

contract is specific goods,⁴ goods delivered on approval or on sale or return,⁵ or unascertained goods.⁶ The passing of property in undivided shares in goods forming part of a bulk,⁷ and the reservation by the seller of the right of disposal of goods, as permitted by s.19 of the Act,⁸ are also considered here.⁹

5-002 Property, possession and risk¹⁰ The property in the goods is to be distinguished from the possession of them and from a licence to consume them under a sui generis supply contract.¹¹ The property in the goods may be transferred to the buyer before or after the goods have been delivered to him or to his agent, or it may be transferred at the time of delivery. Property plays a “pivotal” role in the Sale of Goods Act,¹² although, in commercial practice, the location of the ownership of the goods may frequently be of less importance than the location of the risk¹³ and the transfer of ownership of less significance than the delivery of the goods or of the documents of title to the goods. The approach of modern commercial instruments¹⁴ has been to allocate the transfer of risk to the buyer without reference to the passing of property, and in c.i.f. and f.o.b. contracts property and risk are often separated.¹⁵ But the passing of property is of considerable importance in English law, even though some of its effects may be negatived where there has been no delivery of possession.¹⁶ It is especially important where the goods are in the possession of an insolvent buyer who has not yet paid, or retained by an insolvent seller who has already been paid.

1. EFFECTS OF THE PASSING OF PROPERTY

5-003 Title of the buyer When the property in the goods passes to the buyer, there will be transferred to him the entirety of the seller’s ownership rights in the goods, amounting to a legal interest in the goods sold.¹⁷ Prima facie he will be entitled to obtain damages or an order for delivery up of the goods if the seller thereafter

⁴ See below, para.5-016.

⁵ See below, para.5-040.

⁶ See below, para.5-059.

⁷ See below, para.5-109.

⁸ See below, para.5-133.

⁹ It is possible that the property in goods will pass at the point of payment under sui generis supply contracts of the sort considered in *PST Energy Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23; [2016] A.C. 1034. Payment might be made at a time when some or all of the goods remain the hands of the recipient. It is submitted that, by analogy with sale of goods contracts, the passing of property rules in the Sale of Goods Act should be applied as a matter of common law. This is preferable to treating the recipient as having a mere immunity when dealing with the goods as it would permit the recipient to deal with the goods outside the terms of the bailment licence.

¹⁰ See Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn.

¹¹ *PST Energy Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23; [2016] A.C. 1034.

¹² See Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn, p.12.

¹³ See below, para.6-002. But see below, para.18-469.

¹⁴ e.g. the American Uniform Commercial Code (UCC), the Uniform Law on International Sales (ULIS) and the Vienna Convention on Contracts for the International Sale of Goods (CISG) (above, para.1-024). See also Incoterms 2020.

¹⁵ See below, paras 19-160 to 19-162, 20-150 to 20-151.

¹⁶ See Lawson, (1949) 65 L.Q.R. 352.

¹⁷ For failure by the seller to confer a good title, superior to the rights of any third party, see above, para.4-002; for transfer of title by non-owners, see below, Ch.7.

wrongfully interferes with the goods.¹⁸ But in an action for wrongful interference¹⁹ the claimant must prove possession or an immediate right to possession of the goods at the time of the interference. An unpaid seller of goods who is in possession of them is entitled to retain possession of the goods until payment or tender of the price.²⁰ Thus, unless the goods have been sold on credit, and the term of credit has not expired,²¹ a buyer who has not paid or tendered the price will not be entitled to delivery of the goods. He will therefore have no immediate right to possession upon which a claim for wrongful interference can be founded even if the property has passed.²²

Title of third parties Before the property has passed to the buyer, the seller can dispose of the goods and pass a good title to a third party, even though this disposition is in breach of the contract of sale.²³ This is consistent with the view that specific performance of the contract is unavailable in such cases, for, if that remedy were available, it would transform the buyer’s right to delivery into a right of a “quasi-proprietary” kind.²⁴ Conversely, after the property in the goods has passed to the buyer, the buyer can dispose of the goods and pass a good title to a third party.²⁵ In such cases, the third party acquires his title by virtue of the title to the goods that was vested in the seller or buyer, as the case may be. But even if the property in the goods has passed to the buyer, a seller who continues or is in possession of the goods, or of the documents of title to the goods, can pass a good title to a third party who receives them in good faith²⁶ and an unpaid seller in possession of the goods can pass a good title by a resale consequent upon the exercise of his lien or stoppage in transit.²⁷ Similarly, even if the property in the goods is still in the seller, a buyer who obtains with his consent possession of the goods or of the documents of title to the goods can in certain circumstances pass a good title to a

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¹⁸ Torts (Interference with Goods) Act 1977 ss.1, 2, 3. See also *Langton v Higgins* (1859) 4 H. & N. 402; *Chinery v Viall* (1860) 5 H. & N. 288; *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex. D. 164; *Denny v Skelton* (1916) 115 L.T. 305; *Healing (Sales) Pty Ltd v Inglis Electrix Ltd* (1968) 121 C.L.R. 584; see also *Redler Grain Silos Ltd v BICC Ltd* [1982] 1 Lloyd’s Rep. 435 (injunction); and below, para.7-002 (measure of damages). Contrast (where no property passed): *Wait v Baker* (1848) 2 Exch. 1; *Ogg v Shuter* (1875) 1 C.P.D. 47; *Laurie & Morewood v Dudin & Sons* [1926] 1 K.B. 223; *Gale v New* [1937] 4 All E.R. 645. cf. *Joseph v Ralph Wood & Co* [1951] W.N. 224; *Jarvis v Williams* [1955] 1 W.L.R. 71; *Northwest Securities v Alexander Breckon* [1981] R.T.R. 518. See below, para.17-102.

¹⁹ Despite the title of the statute, there is no action for wrongful interference as such, but actions for trespass, conversion and damage done to a reversionary interest, as well as for negligence: see Bridge, Gullifer, Low and McMeel, *The Law of Personal Property* 2nd edn, Ch.32.

²⁰ Sale of Goods Act 1979 s.41 (below, para.15-028). In this case, the seller has a lien over the goods if the property has passed; if the property has not passed, the seller has a right of retention. See also stoppage in transit under Sale of Goods Act s.44 (below, para.15-061).

²¹ If the buyer is not insolvent: see below, paras 15-024, 15-037.

²² *Lord v Price* (1874) L.R. 9 Ex. 54.

²³ *Wait v Baker* (1848) 2 Exch. 1; *Re Wait* [1927] 1 Ch. 606, 639.

²⁴ *VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2020] EWHC 72 (Comm); [2020] 1 W.L.R. 1227 at [77], noting at [78] the singular case of specific relief in *Sky Petroleum Ltd v V.I.P. Petroleum Ltd* [1974] 1 W.L.R. 576. See below, paras 17-095 et seq.

²⁵ See, e.g. *Kirkham v Attenborough* [1897] 1 Q.B. 201; *London Jewellers v Attenborough* [1934] 2 K.B. 206; *Dennant v Skinner* [1948] 2 K.B. 164. Contrast (property in seller): *Weiner v Gill* [1906] 2 K.B. 574.

²⁶ Sale of Goods Act 1979 s.24; Factors Act 1889 s.8; see below, para.7-055.

²⁷ Sale of Goods Act 1979 s.48(2); below, para.15-102.

the entering into the contract, although in that sense the completion of the purchase is deferred."¹¹⁷

Of course, the parties may agree that the passing of property is conditional on payment or delivery, or both, and such an agreement may be implied as well as expressed¹¹⁸; and it has been said that:

"... in modern times very little is needed to give rise to the inference that the property in specific goods is to pass only on delivery or payment."¹¹⁹

5-019 Unconditional contract Considerable difficulty attaches to the meaning of the words "unconditional contract" contained in r.1 of s.18.¹²⁰ The more natural interpretation is that "unconditional" means not subject to any condition upon the fulfilment of which the transfer of property depends.¹²¹ It is submitted that this interpretation is the correct one.¹²² An alternative interpretation, however, is that the words connote a contract which contains no condition unfulfilled by the seller, in the sense of an essential stipulation the breach of which may give rise to a right to treat the contract as repudiated.¹²³ In *Varley v Whipp*,¹²⁴ an action was brought by the seller for the price of a particular reaping machine which he had described to the buyer as "new the previous year, and only used to cut fifty or sixty acres". The machine was old, and there was thus a breach of the condition implied by s.13 of the Act.¹²⁵ The buyer rejected the machine when delivered to him and it was held that he was not liable for the price. Channell J. said that s.18 r.1 of the Act did not apply since "this was not an unconditional contract for the sale of specific goods",¹²⁶ although there was no suspensive condition in the contract of sale. This judgment might appear to support the alternative interpretation given above and to establish

¹¹⁷ *Re Anchor Line (Henderson Bros) Ltd* [1937] 1 Ch. 1 at 9.

¹¹⁸ 1979 Act s.17; see above, para.5-016.

¹¹⁹ *Ward (RV) Ltd v Bignall* [1967] 1 Q.B. 534 at 545. See also *Minister of Supply and Development v Servicemen's Co-op Joinery Manufacturers' Ltd* (1951) 82 C.L.R. 621 at 635, 640; *Dobson v General Accident Fire and Life Assurance Corp Plc* [1990] 1 Q.B. 274; *Orix Australia Corp Ltd v Peter Donnelly Automotive Pty Ltd* [2007] NSWSC 977; and below, para.16-028.

¹²⁰ See *Gower* (1950) 13 M.L.R. 362, 364; *Smith* (1951) 14 M.L.R. 173; *Stoljar*, (1953) 16 M.L.R. 174; *Twigg-Flesner*, *Canavan and MacQueen, Atiyah and Adams' Sale of Goods*, 13th edn, pp.248-249; *Bridge, The Sale of Goods*, 4th edn, paras 3.10-3.11. Most of the difficulty has arisen out of the fact that, before 1967, a literal application of s.11(1)(c) of the 1893 Act (amended by the Misrepresentation Act 1967 s.4(1), which was re-enacted by s.11(4) of the 1979 Act) would take away the buyer's right to reject for breach of condition once the property in the goods had passed: see below, para.12-040.

¹²¹ Sale of Goods Act 1979 s.2(3); above, para.1-025; below, para.5-071.

¹²² According to Aldous L.J., with whose judgment the other members of the court concurred, in *Classic Automobiles of London v Aura Holdings Inc* [1997] EWCA Civ 2834: "A condition having no bearing on the transfer of the property could not, in my view, render a contract conditional and thus obviate the presumption of rule 1". The conditions in the present case, that the goods (classic cars) be recovered from France in a "somewhat speculative enterprise" and that they be in good condition, were held to bear directly on the passing of property.

¹²³ See *Taylor v Combined Buyers Ltd* [1924] N.Z.L.R. 627; *Armaghdown Motors Ltd v Gray Motors Ltd* [1963] N.Z.L.R. 5 at 8.

¹²⁴ *Varley v Whipp* [1900] 1 Q.B. 513. See also *Ollett v Jordan* [1918] 2 K.B. 41 at 45 (on s.18 r.5); below, para.5-073.

¹²⁵ See below, para.11-001.

¹²⁶ *Varley v Whipp* [1900] 1 Q.B. 513 at 517.

that, where an essential stipulation is broken by the seller, the property in specific goods passes to the buyer only if and when he accepts the goods.¹²⁷

It is to be noted, however, that *Varley v Whipp* concerned a sale of goods by description. Channell J. appears to have regarded the description as an identification of the goods contracted to be sold, for he says:

"If a man says he will sell the black horse in the last stall in his stable, and the stall is empty, or there is no horse in it, but only a cow, no property could pass. Again, if he says he will sell a four-year-old horse in the last stall, and there is a horse in the stall, but it is not a four-year-old, the property would not pass. But if he says he will sell a four-year-old horse, and there is a four-year-old horse in the stall, and he says the horse is sound, this last statement would only be a collateral warranty."¹²⁸

It is therefore not unreasonable to suppose that he intended to lay down a different proposition, viz. that where goods are sold by description, and the description identifies the goods,¹²⁹ no property will pass in any goods other than those which correspond with the description.¹³⁰ If such is the case, the inapplicability of s.18 r.1 did not result merely from the fact that the contract contained a condition unfulfilled by the seller. It was inapplicable because the goods which the seller delivered in pretended fulfilment of the contract were not those identified by the terms of the contract of sale.

Conditional contract Where a contract for the sale of specific goods is made subject to a condition upon the fulfilment of which the transfer of property depends, the property will not pass to the buyer when the contract is made, but only when the condition is fulfilled.¹³¹ Until this time, the contract takes effect as an agreement to sell, and not as a sale of the goods.¹³² Notwithstanding the presumption contained in s.18 r.1, the contract may be held to be conditional by virtue of the intention of the parties ascertained in accordance with s.17¹³³ or as the result of the reservation by the seller of the right of disposal of the goods.¹³⁴ Circumstances in which a conditional contract for the sale of specific goods will be presumed to have been intended by the parties are further contained in s.18 rr.2 and 3 of the Act, which are discussed below.¹³⁵ If the passing of property is conditional on payment of the price,¹³⁶ it is submitted that property in the goods does not pass by virtue of the seller

¹²⁷ See *Leaf v International Galleries* [1950] 2 K.B. 86 at 89-90.

¹²⁸ *Varley v Whipp* [1900] 1 Q.B. 513 at 517.

¹²⁹ cf. *Parsons v Sexton* (1874) 4 C.B. 899.

¹³⁰ See *Vigers Bros v Sanderson Bros* [1901] 1 Q.B. 608 (below, para.5-086). The difficulty lies in reconciling the concepts of "specific goods" and a "sale of goods by description" (see *Stoljar*, (1953) 16 M.L.R. 174).

¹³¹ Sale of Goods Act 1979 s.2(3), (5); see above, paras 1-025, 1-026, 1-109. In *Nelson v Metway* [2009] NSWSC 146, the passing of property in a car to the buyer was conditional upon the seller obtaining clear and unencumbered title to the trade-in vehicle.

¹³² Sale of Goods Act 1979 s.2(5); see above, para.1-026.

¹³³ See above, para.5-016; below, paras 5-026 to 5-029. See also s.5(1), (3) of the 1979 Act: above, para.1-102.

¹³⁴ Sale of Goods Act 1979 s.19; see below, para.5-133.

¹³⁵ See below, paras 5-030, 5-035.

¹³⁶ Payment by a negotiable instrument which is subsequently dishonoured does not ordinarily pass property: *M'Laren's Trustee v Argylls Ltd* 1915 S.L.T. 241; see below, para.9-030. But a tender of the price wrongfully refused by the seller would appear to do so: see below, para.18-495; cf. *City Motors (1933) Pty Ltd v Southern Aerial Super Service Pty Ltd* (1961) 106 C.L.R. 477 (where

agent.²⁶⁴ All the circumstances of the contract should be looked at. The essence of sale or return is that the person to whom the goods have been delivered has the right for a period to retain them²⁶⁵ and is given the option during that period either himself to purchase the goods or to sell or dispose of them to another on his own account. The distinction between the two types of transaction may be relevant not only to the passing of property between seller and buyer, but also to the acquisition of title by third parties²⁶⁶ and the extent of the seller's claim against the buyer.²⁶⁷

5-046 Fraud by buyer Where the seller has been induced to deliver goods to the buyer on approval or on sale or return by a fraudulent representation by the buyer that he has a customer to whom he can sell the goods, the transaction is voidable but not void.²⁶⁸ It was at one time argued that such a situation constituted the former offence of larceny by a trick; that the buyer was not in possession of the goods with the seller's consent; and that s.18 r.4 did not therefore apply. But in *London Jewellers Ltd v Attenborough*,²⁶⁹ the court rejected this argument and held that the offence committed was one of obtaining by false pretences and not larceny by a trick.²⁷⁰ There is no doubt that the position remains unaltered as a result of the passing of the Theft Act 1968.²⁷¹ If, however, the transaction has been entered into as the result of a false representation which gives rise to an operative mistake on the part of the seller as to the buyer's identity, it will be void ab initio²⁷² and the rule will not apply.

5-047 Approval or acceptance The first situation stipulated in r.4 for the passing of property is when the buyer "signifies his approval or acceptance to the seller or does any other act adopting the transaction". There is no real problem concerning approval or acceptance,²⁷³ but the words "or does any other act adopting the transaction" have occasioned some difficulty. They have been said to be "unfortunately chosen",²⁷⁴ "difficult to construe"²⁷⁵ and "not very happy".²⁷⁶ It is, however, now settled law that, if a buyer who has received goods on sale or return sells²⁷⁷ or

²⁶⁴ *Re Nevill* (1870) L.R. 6 Ch. App. 397 at 405. See also *Re Smith* (1879) 10 Ch. D. 566 at 570.

²⁶⁵ *Janesich v Attenborough* (1910) 102 L.T. 605.

²⁶⁶ See below, paras 5-047, 7-031.

²⁶⁷ *Re Nevill* (1870) L.R. 6 Ch. App. 397; *Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd* (1917) 55 Sc. L.R. 35 HL.

²⁶⁸ *Truman v Attenborough* (1910) 26 T.L.R. 601; *Whitehorn Bros v Davison* [1911] 1 K.B. 463.

²⁶⁹ *London Jewellers Ltd v Attenborough* [1934] 2 K.B. 206. See also *Whitehorn Bros v Davison* [1911] 1 K.B. 463.

²⁷⁰ Even if it had been larceny by a trick, the distinction would probably be irrelevant: see below, paras 7-037, 7-074.

²⁷¹ Theft Act 1968 s.1 (theft) and s.15 (obtaining property by deception): *R. v Lawrence* [1972] A.C. 626. See also *Dobson v General Accident Fire and Life Assurance Corp Plc* [1990] 1 Q.B. 274.

²⁷² *Hardman v Booth* (1863) 1 H. & C. 803; *Cundy v Lindsay* (1878) 3 App. Cas. 459; *Morrisson v Robertson* 1908 S.C. 332; *Lake v Simmons* [1927] A.C. 487 at 500; *London Jewellers Ltd v Attenborough* [1934] 2 K.B. 206 at 217, 223; *Ingram v Little* [1961] 1 Q.B. 31. See also *Shogun Finance Ltd v Hudson* [2003] UKHL 62; [2004] 1 A.C. 919; and above, para.3-012.

²⁷³ But the definition in the Sale of Goods Act 1979 s.35 is not really appropriate to this situation. See below, para.12-046.

²⁷⁴ *Kirkham v Attenborough* [1897] 1 Q.B. 201 at 203.

²⁷⁵ *Kirkham v Attenborough* [1897] 1 Q.B. 201 at 204.

²⁷⁶ *London Jewellers Ltd v Attenborough* [1934] 2 K.B. 206 at 214.

²⁷⁷ *Re Florence* (1879) 10 Ch. D. 591 at 593; *Genn v Winkel* (1912) 107 L.T. 434.

pledges²⁷⁸ the goods to a third party, he thereby adopts the transaction and property passes to him. In *Kirkham v Attenborough*,²⁷⁹ a buyer of goods on sale or return pledged them with a pawnbroker in order to secure an advance. The Court of Appeal held that the property in the goods passed to the buyer by this act so that the pawnbroker acquired a good title to the goods. Lord Esher M.R. said:

"There must be some act which shows that he adopts the transaction; but any act which is consistent only with his being the purchaser is sufficient."²⁸⁰

The peculiarity of this situation lies in the fact that a person who is intended to purchase or sell the goods and who pledges them contrary to his "mandate" should be treated as a buyer.²⁸¹ But it was said in this case that a pledge constitutes an act adopting the transaction either because "he ought not to have done this unless he meant to treat himself as purchaser, and by doing it he makes himself a purchaser",²⁸² or because "if he pledges [the goods] he no longer has the free control over them so as to be in a position to return them".²⁸³ The same principle applies to sales on approval.²⁸⁴

It seems that the delivery of possession of the goods to a third party for a special purpose consistent with the terms of the contract is not an act adopting the transaction.²⁸⁵ Also, if a buyer on sale or return²⁸⁶ offers to sell the goods, or delivers them on sale or return to another, this will not in itself pass the property to him. Such was the opinion of Fletcher Moulton and Buckley L.JJ. in *Genn v Winkel*.²⁸⁷ In the same case it was held that, if A delivers goods on sale or return to B, who delivers them on the same terms to C, any act on the part of C which constitutes an adoption of the transaction between himself and B or which passes the property to him from B will constitute an adoption of the first transaction by B.

Where goods are delivered to a buyer on trial, there appears to be no authority whether a use of the goods which is more than necessary for a fair test or trial amounts to an adoption of the transaction by him. It is, however, submitted that an excessive use of the goods is an act from which the court would be entitled to infer an adoption.²⁸⁸ And where a motor-car was delivered to a buyer on sale or return, it was held that the receipt of a vehicle log-book issued to him by the local authority on his application was an act adopting the transaction.²⁸⁹

²⁷⁸ *Kirkham v Attenborough* [1897] 1 Q.B. 201; *Weiner v Gill* [1906] 2 K.B. 574 at 578.

²⁷⁹ *Kirkham v Attenborough* [1897] 1 Q.B. 201.

²⁸⁰ *Kirkham v Attenborough* [1897] 1 Q.B. 201 at 203.

²⁸¹ *London Jewellers Ltd v Attenborough* [1934] 2 K.B. 206 at 214.

²⁸² *Kirkham v Attenborough* [1897] 1 Q.B. 201 at 203. See also *London Jewellers Ltd v Attenborough* [1934] 2 K.B. 206 at 215.

²⁸³ *Kirkham v Attenborough* [1897] 1 Q.B. 201 at 204.

²⁸⁴ *London Jewellers Ltd v Attenborough* [1934] 2 K.B. 206. See also *Blanckensee v Blaiberg* (1885) 2 T.L.R. 36 (on approbation).

²⁸⁵ *Weiner v Gill* [1906] 2 K.B. 574 at 578; *Genn v Winkel* (1912) 107 L.T. 434; *Ellis v Steinberg's Trustee* [1925] 4 D.L.R. 733.

²⁸⁶ Quaere whether this also applies to sales on trial, or even on approval, where it is not intended that the buyer should sell the goods.

²⁸⁷ *Genn v Winkel* (1912) 107 L.T. 434.

²⁸⁸ See, e.g. *Okell v Smith* (1815) 1 Stark. 107. cf. *Elliott v Thomas* (1838) 3 M. & W. 170.

²⁸⁹ *Asitley Industrial Trust Ltd v Miller* [1968] 2 All E.R. 36.

s.18 r.5.³⁹⁶ The first paragraph of this rule sets out the general requirements for the passing of property in unascertained or future³⁹⁷ goods by appropriation, and further provides that appropriation by one party shall not be effective to pass the property without the assent of the other.³⁹⁸ The second paragraph of the rule provides for appropriation by delivery.³⁹⁹ The third and fourth paragraphs of the rule provide for appropriation in situations where goods forming part of an identified bulk have become ascertained by processes of exhaustion and consolidation.⁴⁰⁰

(a) Appropriation with the Assent of the Other Party

5-068 Section 18 r.5(1) By s.18 r.5(1):

"Where there is a contract for the sale of unascertained⁴⁰¹ or future⁴⁰² goods by description,⁴⁰³ and goods of that description⁴⁰⁴ and in a deliverable state⁴⁰⁵ are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made."

This paragraph codifies the common law before the Sale of Goods Act 1893.⁴⁰⁶

5-069 Meaning of appropriation The word "appropriated" has been said to be "a term of legal art [which] has a certain definite meaning".⁴⁰⁷ It is, however, extremely difficult to discover the true meaning of appropriation since the word does not appear to have been used with any consistency in the cases. In *Wait v Baker*⁴⁰⁸ Parke B. pointed out that appropriation may be understood in different senses:

"It may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract. Or the word may mean, that both parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case ... 'Appropriation' may also be

³⁹⁶ Section 18 r.5 contains only a presumptive rule which, even if satisfied on its terms, may be impliedly excluded by the parties: *Kulkarni v Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69; [2012] 2 Lloyd's Rep. 431 at [29] and [45].

³⁹⁷ See below, para.5-068.

³⁹⁸ See below, para.5-074.

³⁹⁹ See below, para.5-096.

⁴⁰⁰ See below, para.5-103.

⁴⁰¹ See above, para.5-060.

⁴⁰² See above, para.5-060 n.334; below, para.5-090.

⁴⁰³ See Sale of Goods Act 1979 s.13 of the Act (below, para.11-001). A sale by description is not necessarily a sale of unascertained or future goods: see *Varley v Whipp* [1900] 1 Q.B. 513 (above, para.5-019), but a sale of unascertained goods appears to be always a sale of goods by description.

⁴⁰⁴ See below, para.5-085.

⁴⁰⁵ Defined in s.61(5) of the Act. See *Pritchett & Gold and Electrical Power Storage Co Ltd v Currie* [1916] 2 Ch. 515; *Philip Head & Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd's Rep. 140; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485 at 495; above, paras 5-023, 5-031, 5-105; below, para.5-034.

⁴⁰⁶ *Rohde v Thwaites* (1872) 6 B. & C. 388 at 392; *Aldridge v Johnson* (1857) 7 E. & B. 885 at 898; *Campbell v Mersey Docks and Harbour Board* (1863) 14 C.B. (N.S.) 412 at 414, 415.

⁴⁰⁷ *Re Blyth Shipbuilding and Dry Docks Co* [1926] Ch. 494 at 518.

⁴⁰⁸ *Wait v Baker* (1848) 2 Exch. 1 at 8. See also the different sense in Sale of Goods Act 1979 s.9(1): above, para.2-049.

used in another sense, viz. where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it."

The first meaning is barely distinguishable at all from ascertainment. For property to pass under a contract for the sale of unascertained or future goods, it is undoubtedly necessary that appropriation in the last sense should have occurred. In essence, however, "appropriation is to be understood as an overt act manifesting an intent to identify specific goods as those to which the bargain of the parties shall apply"⁴⁰⁹; it is the act of one party only, and its purpose is to identify the goods to be sold. But since its relevance in this context is in relation to the transfer of ownership by mutual agreement of the parties, it will only have effect where, by reason of prior or subsequent assent of the other party, it is agreed that such act shall pass the property to the buyer. As a minimum prerequisite, the act of appropriation must therefore so far identify the goods that the passing of property thereby becomes possible.

Appropriation in this sense has to be unconditional and will only be held to have occurred where the contract has become irrevocably attached to the goods in question.⁴¹⁰ This may be illustrated by taking as an example a contract entered into for the sale of a quantity of unascertained goods, e.g. 100 tons of coal. It will be the duty of one or other of the parties to appropriate, i.e. identify, the particular goods to be sold. This duty may be placed upon the buyer, as where the contract provides that he is to separate the goods from bulk and carry them away.⁴¹¹ More usually it will be placed on the seller. The duty to appropriate carries with it the power to select the goods which are to be delivered in fulfilment of the contract. But it is clear that the act of the party appropriating in simply selecting the goods which he intends to be delivered cannot pass the property in them by appropriation⁴¹²; something more is required. Either the selection will have subsequently to be approved by the other party, so that both parties are agreed that those are the goods to be sold, or one party, e.g. the seller, must have been previously authorised to do an act which passes the property to the buyer by appropriation. In the latter case, the act must be one which irrevocably determines the appropriating party's election to specify the goods, and not one by which he may still be at liberty to select other goods. It is here that most difficulty arises, since it may not be easy in any individual case to decide whether the selection made by the seller is a mere revocable manifestation of his intention, or the final determination of a selection conclusively binding on him.⁴¹³ Property, however, will only pass where the identity of the goods has been finally and irrevocably established by the mutual assent of both parties. This is a question of law.⁴¹⁴

Unconditional appropriation An irrevocable appropriation is one that is "unconditional", that is to say, the party appropriating must intend that the property shall pass by the appropriation, if assented to by the other party. Delivery by the seller will, unless the right of disposal is reserved, amount to an unconditional ap-

⁴⁰⁹ Williston, *Sales*, s.273(a). See also below, para.18-472.

⁴¹⁰ See below, para.5-080.

⁴¹¹ See, e.g. *National Coal Board v Gamble* [1959] 1 Q.B. 11.

⁴¹² *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep. 240 at 255; see below, para.5-080.

⁴¹³ See below, paras 5-078 to 5-081, 5-082.

⁴¹⁴ *Blackburn on Sale*, 3rd edn, p.137.

5-111 Sale of a specified quantity of unascertained goods The first requirement of subs.(1) is that there should be "a contract for the sale of a specified quantity of unascertained goods". The quantity may be specified by number, measurement, weight, or in any other way, but cannot be wholly indefinite. The question therefore arises whether a contract for the sale of "80 to 100 tonnes" or "100 tonnes, 5 per cent more or less" at seller's option is a contract for the sale of a specified quantity. Such contracts are very common in commodity transactions and it would defeat the purpose of the section if they were excluded from its ambit. The seller's later election to crystallise the contract amount will then satisfy the specified quantity requirement. But the problem then is to determine what is the precise share of the buyer in the bulk. Since, however, that share depends upon the quantity of goods paid for and due to the buyer out of the bulk,⁶¹² in most cases the margin afforded to the seller will not affect the determination of the buyer's share.

5-112 The goods must also be unascertained. If a buyer purchases "50 cases of Chateau Palmer 1997 from your Park Street cellar" and there are presently in that cellar more than 50 cases of that wine, there is a contract for the sale of unascertained goods.⁶¹³ But if at the time of the contract there are only 50 cases, and it is agreed that those cases alone are to be the subject of the contract of sale, the contract is a contract for the sale of specific goods, since the goods will be "identified and agreed on at the time a contract of sale is made".⁶¹⁴ Also if a buyer purchases an undivided share, specified as a fraction ("one-half") or percentage ("50 per cent"), of a bulk which is identified and agreed on at the time the contract of sale is made, then, by virtue of the extended definition of "specific goods" in s.61(1) of the Act⁶¹⁵ the contract is one for the sale of specific, and not unascertained, goods.⁶¹⁶ Section 20A does not apply. More difficulty, however, surrounds a contract for the sale of an undivided share, specified as a fraction or percentage, of a bulk which is not in existence at the time the contract of sale is made, e.g. "one-half of the cargo to be shipped on the *Parchim* next November" or "50 per cent of the potatoes to be grown on Blackacre". Since it would appear that a contract for the sale of the entire bulk is not a contract for the sale of specific goods,⁶¹⁷ the contract for a share of that future bulk is not a contract for the sale of specific goods. It is a moot point whether, in such a situation, the specified fraction or percentage is a "specified quantity" of unascertained goods for the purposes of subs.(1). If the quantity of goods in the bulk is itself specified ("one-half of the cargo of 800 tonnes to be shipped on the *Parchim* next November"), or even possibly estimated ("50 per cent of the potatoes to be grown on Blackacre, expected to yield 20 tonnes"), there are strong grounds for saying that a specified fraction or percentage of that bulk is a "specified quantity" as the quantity in question can be determined by a simple arithmetical calculation.⁶¹⁸

⁶¹² 1979 Act s.20A(1)(b), (3).

⁶¹³ See above, para.5-060.

⁶¹⁴ See above, para.5-113.

⁶¹⁵ Inserted by the Sale of Goods (Amendment) Act 1995 s.2(d).

⁶¹⁶ See above, para.5-116.

⁶¹⁷ See above, para.1-115.

⁶¹⁸ But the sale of a share of an indivisible thing such as a racehorse (see above, paras 1-081 and 1-116) will be a sale of specific goods (s.61(1) as amended) so that a proprietary interest may pass to the buyer without the payment necessary to acquire an interest in common under s.20A. See further *Swindle v Matakana Estate Ltd* [2011] NZHC 1345; [2012] 1 N.Z.L.R. 806 at [95] ("division and appropriation is neither intended nor possible"), citing *Marston v Short* (1835) 2 Bing. N.C. 118, 132 E.R. 47.

But if the extent of the bulk is unspecified, then it is very doubtful whether a specified fraction or percentage of that bulk can be considered to be a "specified quantity".⁶¹⁹

The same difficulty arises in the case of a contract for the sale of an undivided share, specified as a fraction or percentage, of a bulk which is not identified and agreed on at the time the contract of sale is made, but which is only identified by subsequent agreement between the parties.

Bulk The second requirement is that the goods or some of them form part of a bulk.⁶²⁰ "Bulk" is defined in s.61(1) of the 1979 Act to mean:

"... a mass or collection of goods of the same kind which—(a) is contained in a defined space or area; and (b) is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity."

In addition to the obvious examples of a warehouse, store, compound, silo, hopper, hold or tank, the words "a defined space or area" will include a ship, vehicle or aircraft, and even a discrete stack, heap or pile, but not merely a particular geographical source, e.g. Bordeaux,⁶²¹ or a company's general trading stock.⁶²² The word "contained" should be given the larger meaning of being kept within limits rather than being enclosed or kept within a container. It seems probable that a mass which itself has a defined space or area, e.g. a roll of carpet, is within the definition.

The goods in the bulk must be of the same kind and interchangeable with any other goods therein of the same number or quantity. In other jurisdictions, such goods are known as "fungible" goods.⁶²³ It is submitted that this does not require that each unit or particle of the goods must be identical. Whether they are of the same kind and interchangeable depends upon whether, under the terms of the contract or by trade practice, they are to be regarded as such. Thus, the bulk may consist of a quantity of items of varying colours or sizes, but it may be the intention of the parties to regard them as equivalent to one another despite their differences, and this criterion will then be satisfied.

It is immaterial that the entire quantity of goods in the bulk is unknown (although this will be relevant to determining the extent of the undivided share of the buyer in the bulk), or that the bulk is not in existence at the time of the contract of sale.⁶²⁴ It would also appear to be immaterial that the goods comprised in the bulk are constantly changing, for example, by oil being withdrawn from a tank and the tank being replenished by fresh oil,⁶²⁵ or that they are mixed with goods of a different description, provided that they are easily separable.⁶²⁶

⁶¹⁹ See also below, paras 18-605 et seq.

⁶²⁰ See also below, paras 18-609 et seq.

⁶²¹ *Re Stapylton Fletcher Ltd* [1994] 1 W.L.R. 1181.

⁶²² *Re London Wine Co (Shippers) Ltd* [1986] P.C.C. 121; *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74. In *RBG Resources plc v Banque Cantonale Vaudoise* [2004] 3 S.L.R. (R.) 421, Sing, at [65], the court was of the view that a general trading stock could be an agreed bulk if it otherwise satisfied the statutory requirements of a bulk.

⁶²³ See above, para.1-120.

⁶²⁴ The bulk may be identified by agreement after the contract date: s.20A(1)(a) of the 1979 Act.

⁶²⁵ Quære whether this is also the case where the entire quantity of oil in the bulk is withdrawn and the tank is then subsequently replenished: see *Mercer v Craven Grain Storage Ltd* [1994] C.L.C. 328 HL; Smith, (1995) 111 L.Q.R. 10; and above, para.1-059.

⁶²⁶ e.g. 100 sheep from an identified cargo of sheep and goats.

the undivided share so acquired would be vulnerable to depletion under s.20B(1). For instance, in the example given in para.5-123 above, if the original buyers remove from the bulk the whole or part of their contractual entitlement, leaving less than 200 tonnes in the bulk for the later buyer, could they claim that they were protected against an action in conversion by the later buyer on the ground that he would be deemed to have consented to the removal under s.20B(1)?⁶⁸¹ On one view, they could not do so, since the later buyer would not have become an owner in common of the bulk by virtue of s.20A but by virtue of s.24. On another view, the effect of s.24 is merely that the sale to the later buyer is treated as having been authorised by the original buyers (the then owners of the goods). Section 24 does not explain why this sale results in the later buyer becoming an owner in common of the bulk, which must come about by virtue of s.20A⁶⁸² or at least by a combination of s.20A and s.24. There is stronger textual support for the latter view, but it can give rise to odd consequences. The consent to delivery in s.20B extends to the contractual entitlement of the co-owner taking delivery and does not depend on the presence or absence of good faith, or of notice of the oversale, on the part of that co-owner. If this is correct, it therefore follows that a co-owner whose share is reduced by a dealing in the goods under s.24, and who is aware of that transaction, could restore the position he lost as a result of the oversale by taking physical delivery of his contractual share. Yet that same consequence might not follow for a co-owner whose share has been eliminated as a result of the oversale, since s.20B(1) concerns deliveries out of the bulk to "any other owner in common of the bulk", and someone whose share has been eliminated cannot be an owner in common of the bulk at the time of delivery. This would be the case, for example, where S agrees to sell 250 tonnes out of a 500 tonne bulk to B1 and B2 successively, before entering into an oversale transaction for that 500 tonnes bulk with B3. In addition, by buying the entire bulk, B3 would have acquired from S a good title to the bulk under s.24 and would not be relying upon rights acquired as a s.20A co-owner. But if B3 had bought less than the entire bulk, say 400 tonnes, then B3 would be deemed to have consented to removals from the bulk of B1's and B2's contractual portions. The language of this provision appears not to allow for any other conclusion.

5-129 Other savings Subsection (3) of s.20B states:

"(3) Nothing in this section or section 20A above shall—

- (a) impose an obligation on a buyer of goods out of a bulk to compensate any other buyer of goods out of that bulk for any shortfall in the goods received by that other buyer;
- (b) affect any contractual arrangement between buyers of goods out of a bulk for adjustments between themselves; or
- (c) affect the rights of any buyer under his contract."

Paragraphs (a) and (b) are self-explanatory, but the effect of para.(c) is less certain. Clearly ss.20A and 20B do not affect the right of a buyer to claim damages against the seller for non-delivery should he receive less than the quantity of goods due to him under his contract (although such a claim would be as an unsecured creditor in the event of the seller's insolvency). What is less clear is whether para.(c) requires that ss.20A and 20B must be left out of account in deciding when the risk of loss,

⁶⁸¹ See also Bridge, *The Sale of Goods*, 4th edn, para.5.143.

⁶⁸² Assuming that the later buyer has pre-paid.

damage, destruction or deterioration of the goods in the bulk is transferred to the buyer, with the result that such risk would (in a commercial transaction) normally pass to him only upon the transfer to him of the sole property in the contract goods themselves. This matter is discussed in Ch.6 of this work.⁶⁸³

Trading the undivided share A buyer who has contracted to buy a specified quantity of unascertained goods forming part of an identified bulk, and to whom the property in an undivided share in the bulk has been transferred under s.20A, may agree to resell to a sub-purchaser the whole or part of the contract quantity. The provisions of s.20A likewise apply to the sub-sale and, if the conditions set out in subs.(1) of that section are satisfied, property in an undivided share in the bulk is transferred to the sub-purchaser and the sub-purchaser becomes an owner in common of the bulk. The effect of the sub-sale is therefore to pass the whole or part of the buyer's interest in the bulk at the time of the sale from the buyer to the sub-purchaser.⁶⁸⁴ Undivided shares in a bulk can thus be traded, or fragmented and traded, while the goods still remain in bulk.⁶⁸⁵

Situations outside s.20A: specific goods It has already been noted that a contract for the sale of specific goods does not fall within s.20A and that a contract for the sale of an undivided share, specified as a fraction or percentage, of a bulk which is identified and agreed on at the time the contract is made is contract for the sale of specific goods.⁶⁸⁶ The question therefore arises as to what interest (if any) is transferred to the buyer of such an undivided share while the goods still form part of the bulk. The answer would appear to be, at common law, an interest identical with that set out in s.20A(2), namely, property in the undivided share in the bulk and ownership in common of the bulk. This proprietary interest will pass when the parties intend it to pass, which may be before, or at the time, or after the price is paid. The rules set out in subss.(4)–(6) of s.20A are, however, an innovation and do not in their terms apply. In cases of overselling,⁶⁸⁷ if a seller purports to sell 25 per cent of the bulk to five separate buyers, it would seem that a proprietary interest passes to the four whose contracts were first in time, but none to the fifth, rather than each buyer suffering an abatement of his share.⁶⁸⁸ Section 20B also does not apply, so that the position is governed by the Torts (Interference with Goods) Act 1977 s.10(1).⁶⁸⁹

Other situations Where one or more of the other conditions set out in subs.(1) of s.20A are not met, for example, where the buyer has not paid the price for any of the goods which are the subject of the contract and which form part of the bulk,⁶⁹⁰

⁶⁸³ See below, para.6-006.

⁶⁸⁴ See also below, para.7-085 (s.25(1) of the 1979 Act).

⁶⁸⁵ See above, para.1-121.

⁶⁸⁶ See above, paras 1-116, 5-112.

⁶⁸⁷ cf. above, paras 5-123 to 5-125 and s.24 of the 1979 Act.

⁶⁸⁸ But where the seller is in possession of the goods or documents of title, he may be able to pass a good title to the fifth buyer under the Sale of Goods Act 1979 s.24 (below, para.7-055); above, para.5-123. In such a case, it would seem that the title of the fifth buyer overrides and "eats into" the title of the other four, so that his proprietary interest will be 25 per cent of the bulk, the remaining 75 per cent being apportioned between the other four. See also above, paras 5-123 to 5-124.

⁶⁸⁹ See above, para.5-127.

⁶⁹⁰ Sale of Goods Act 1979 s.20A(1)(b).

to the banker, who holds the bill of lading as pledgee.⁷⁵² The property will not pass to the buyer until he has accepted the bill of exchange or paid or tendered the price.⁷⁵³

5-143 Romalpa clauses⁷⁵⁴ Reservation of the right of disposal of the goods greatly increased in importance as the result of the decision of the Court of Appeal in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd.*⁷⁵⁵ In that case, the claimants, a Dutch company, sold to the defendants, an English company, aluminium foil, some of which was then sold by the defendants to sub-purchasers and the sub-purchasers paid the defendants therefor. The claimants' standard conditions of sale provided (inter alia) that: (i) the ownership of the foil was to be transferred to the defendants only when they had met all that was owing to the claimants; (ii) until the date of payment the defendants were, if the claimants so desired, to store the foil in such a way that it was clearly the property of the claimants; (iii) articles manufactured from the foil supplied were to become the property of the claimants as surety for the full payment of the sums owed by the defendants to the claimants; (iv) until such payment, the defendants were to keep the articles for the claimants in their capacity of fiduciary owners and, if required, were to store them in such a way that they could be recognised as such; (v) the defendants were to be entitled to sell the articles to third parties in the ordinary course of business on condition that, if the claimants so required, the defendants would "hand over" to the claimants the claims (concerning the articles, not the foil) they might have against those third parties. The defendants' bankers appointed a receiver under powers contained in a debenture. On the date of his appointment, the defendants were indebted to the claimants for over £122,000. After his appointment, the receiver

Oteric [1920] A.C. 724 at 733; *Comptoir Commercial Anversoys v Power, Son & Co* [1920] 1 K.B. 868 at 877, 893.

⁷⁵² *Banner v Johnston* (1871) L.R. 5 H.L. 157; *Re Howe* (1871) L.R. 6 Ch. App. 338; *Lutscher v Comptoir d'Escompte de Paris* (1876) 1 Q.B.D. 709; *Bristol & West of England Bank v Midland Ry* [1891] 2 Q.B. 653; *The Oteric* [1920] A.C. 724; *Brandt v Liverpool Brazil & River Plate Steam Navigation Co Ltd* [1924] 1 K.B. 575. See below, paras 18-482 to 18-483.

⁷⁵³ *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex. D. 164; *The Charlotte* [1908] P.206; *The Prinz Adalbert* [1917] A.C. 586; *Midland Bank Ltd v Eastcheap Dried Fruit Co* [1962] 1 Lloyd's Rep. 359.

⁷⁵⁴ See McCormack, *Reservation of Title*, 2nd edn; Davies, *Effective Retention of Title* (1991); Wheeler, *Retention of Title Clauses: Impact and Implications* (1991); Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn, Ch.V; Worthington, *Proprietary Interests in Commercial Transactions* (1996); Palmer and McKendrick (eds), *Interests in Goods*, 2nd edn, Ch.28 (McCormack); Bridge, *The Sale of Goods*, 4th edn, paras 3.87 to 3.100. The periodical literature on this subject is so voluminous that little would be achieved by attempting to list all the articles. On the conflict of laws problems involved, see below, paras 26-136 to 26-148. On reform of the law, see the Law Commission's Consultation Paper No.164 (2002); *Consultative Report on Company Security Interests* (Consultation Paper No.176 (2004)); *Company Security Interests Developing a Final Scheme* (April 2005); *Law Commission Final Report on Company Security Interests*, Law Com. No.296 (2005). Under Art.4 of Directive 2000/35 on combating late payment in commercial transactions [2000] O.J. L200/35 the UK is required to provide, in conformity with the applicable national provisions designated by private international law, that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before delivery of the goods. On the meaning of this obscurely worded provision, see below, para.26-148; Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), paras 18-203 to 18-210. See also Regulation (EU) of the European Parliament and of the Council of 20 May 2015 2015/848 on insolvency proceedings (recast), applicable to insolvency proceedings on or after June 26, 2017 [2015] O.J. L141/19; below, para.26-145.

⁷⁵⁵ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676.

certified that he held foil delivered by the claimants to the defendants to the value of some £50,000 and that an amount of £35,000 was held by him in a separate account representing the proceeds of foil supplied and then resold by the defendants to third parties. The claimants claimed an order for delivery up of the foil so held and a declaration that they were entitled to a charge on the money in the account of the receiver. They claimed to be entitled to trace the proceeds of the sub-sales of their property in that account. The defendants conceded that they were bailees of the foil supplied, but contended that, once they had resold the foil, the relationship between them and the claimants was simply that of debtor and creditor so that the claimants had no right to trace. The Court of Appeal held that, by virtue of the relationship of bailor and bailee, and as expressly contemplated in the claimants' conditions, a fiduciary relationship arose and the claimants were entitled to trace and claim the proceeds of the sub-sales in priority to the general body of the defendants' creditors and in priority to the defendant's bankers under their debenture. As a result of this decision, it has become extremely common for sellers to insert in their standard conditions of sale a *Romalpa* clause which, as a minimum, stipulates that the seller is to retain ownership of the goods until payment of the price, but which may contain more extensive provisions.

The existence of *Romalpa* clauses in contracts of sale⁷⁵⁶ is of serious concern to creditors of manufacturing and trading companies and in particular to banks who might otherwise be secured by a floating charge on the assets of the buyer company or a fixed charge⁷⁵⁷ on its book debts and other receivables. It is also of concern to factoring companies to whom the buyer company may have sold or discounted its receivables.⁷⁵⁸ Attacks on the effectiveness of *Romalpa* clauses have been made mainly on two grounds. The first is that the clause gives rise to a charge created by the buyer company within the Companies Act 2006 s.859A⁷⁵⁹ and so requires to be registered within 21 days of its creation.⁷⁶⁰ The second is that the particular clause, in its terms or upon its true construction, does not confer such extended rights as are claimed by the seller in reliance on its provisions. Since *Romalpa* clauses may take many forms, and since the case law on their validity and interpretation has become progressively complex and refined, this area of the law is, in the words of Staughton J.,⁷⁶¹ "presently a maze if not a minefield". It will therefore be necessary to consider separately the various provisions that may be inserted in such clauses.

⁷⁵⁶ As a result of the decision of the Supreme Court in *PST Energy Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23; [2016] A.C. 1034, contracts in which the recipient of goods is at liberty to sell on or use or consume the goods before the property in them is to pass may no longer be considered to be sale of goods contracts but rather sui generis supply contracts. The principles applicable to reservation of title clauses, discussed below, remain the same, except where otherwise stated.

⁷⁵⁷ But see *Re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 A.C. 680.

⁷⁵⁸ *Pfeiffer (E) Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150; *Compaq Computer Ltd v Abercorn Group Ltd* [1991] B.C.C. 484; below, para.5-163.

⁷⁵⁹ Formerly the Companies Act 2006 s.860.

⁷⁶⁰ Companies Act 2006 s.859A(2), (4).

⁷⁶¹ *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485 at 493.

On the other hand, in *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd*,⁸¹⁸ diesel engines were sold to the buyer company subject to a retention of title clause and were incorporated into diesel generating sets. The process of incorporation did not in any way alter or destroy the substance of an engine, and it could be removed from the set, if necessary, within several hours. Staughton J. held that the proprietary rights of the seller were not affected by the incorporation: the engines remained engines, albeit connected to other things. These cases move into very difficult and uncertain⁸¹⁹ areas of law relating to the creation of a new product from materials owned by another⁸²⁰ or the attachment of one person's chattel to that of another.⁸²¹ They appear to establish that, in the absence of an express provision to the contrary,⁸²² the seller's property in the goods will be lost and vest in the buyer if the identity of the goods is destroyed in the manufacturing process or if they are transformed by manufacture into different goods, but may be retained if the goods are in their original state and can easily be removed from the finished product. But other intermediate possibilities exist. The question whether or not goods which are still identifiable, but have to a greater or less extent been worked on by the buyer or incorporated in other articles, remain the property of the seller would seem to depend upon what intention is to be imputed to the parties, having regard to such factors as the nature of the goods, the product, the degree and purpose of incorporation, and the manufacturing or other process applied.⁸²³

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Romalpa clauses not infrequently contain a specific provision whereby ownership of products manufactured with the goods agreed to be sold is to vest in the seller or the seller is to acquire ownership of any articles in which such goods are incorporated. In *Borden (UK) Ltd v Scottish Timber Products Ltd*,⁸²⁴ the opinion was

⁸¹⁸ *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485. Contrast *Specialist Plant Services Ltd v Braithwaite Ltd* (1987) 3 B.C.C. 119 (materials for repair).

⁸¹⁹ See *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111 at 124.

⁸²⁰ The principle of specificatio (Bracton, Lib. II, cap. ii and iii; 2 B.Comm. 405). The ownership of the new product normally vests in the maker (if bona fide), subject to his liability in damages to the owner of the materials converted. See Matthews, (1981) 10 Anglo-American L.R. 121; Whittaker (1984) 100 L.Q.R. 35; Palmer and McKendrick (eds), *Interests in Goods*, 2nd edn, Ch. 10 (Hill and Bowes-Smith), p. 228, Ch. 36 (Palmer and Hudson), p. 934; and, in Scotland, Stair II, 1, 41; Erskine II, 1, 16; Bell, *Prin.* para. 1298; *International Banking Corp v Ferguson Shaw & Sons* 1910 S.C. 182; *Wylie & Lochhead v Mitchell* (1870) 8 M. 552; *McDonald v Provan of Scotland Street Ltd* 1960 S.L.T. 231; *Zahnradfabrik Passau GmbH v Terex Ltd* 1986 S.L.T. 84; *Gretton and Reid*, 1985 S.L.T. 329 at 333. cf. *Jones v De Marchant* (1916) 28 D.L.R. 561; *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep. 283 at 320; and the cases cited in para. 5-150 n. 810.

⁸²¹ The principle of accession (2 B.Comm. 404; 2 Kent's Comm. (10th edn) 300). See *Akron Tyre Co Pty Ltd v Kittson* (1951) 82 C.L.R. 477; *Rendell v Associated Finance Pty Ltd* [1957] V.R. 604; *Thomas v Robinson* [1977] 1 N.Z.L.R. 385; *McKeown v Cavalier Yachts* (1988) 13 N.S.W.L.R. 303; *Crossley Vaines on Personal Property*, 5th edn, p. 430; (1935) Sawyer 9 Aust. L.J. 50; Slater, (1959) 37 Can. Bar Rev. 597; Guest, (1964) 27 M.L.R. 505; Matthews, [1981] *Current Legal Problems* 159; Matthews, [1981] C.L.J. 340; Palmer and McKendrick (eds), *Interests in Goods*, 2nd edn, Ch. 10 (Hill and Bowes-Smith), p. 227, Ch. 36 p. 931; and, in Scotland, Bell, *Prin.*, paras 1297-1298; *Wylie & Lochhead v Mitchell* (1870) 8 M. 552 at 557; *Zahnrad Fabrik Passau GmbH v Terex Ltd* 1986 S.L.T. 84; *Gretton and Reid* 1985 S.L.T. 329 at 333.

⁸²² Such a term will not be implied: *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25 at 42, 44, 46.

⁸²³ The last four sentences were cited with approval in *Saint-Gobain Building Distribution Ltd v HMRC* [2019] UKFTT 314 (TC) at [67]. See the cases cited in para. 5-151 nn. 813, 821, above.

⁸²⁴ *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25. See also *Kruppstaahl v Quitmann Products Ltd* [1982] 1 L.R.M. 551 (joint ownership provision).

expressed⁸²⁵ that if the seller had any interest or share in the chipboard or proceeds of sale of the chipboard, or property representing proceeds of sale of the chipboard, any such interest or share must have been agreed to be granted. It must therefore have been created as security for the payment of the debts incurred, and to have been incurred by the buyer company to the seller in respect of the supply of resin so as to require registration as a company charge.⁸²⁶ In that case, however, the seller's goods had been combined with the buyer's materials to create a new product, and the same reasoning would not necessarily apply where they could be proved to have been manufactured solely from the seller's goods. But in *Re Bond Worth Ltd*,⁸²⁷ where the seller supplied raw acrilan to be spun, dyed and woven into carpets, a provision that the seller was to have "equitable and beneficial ownership of the products" was held void against a receiver of the assets of the buyer company on the ground that it created a charge over carpets in the process of manufacture and finished carpets in stock. Also in *Re Peachdart Ltd*,⁸²⁸ where leather was supplied to be made into handbags, a provision that:

"... the relationship of the buyer to the seller shall be fiduciary in respect of ... other goods in which [the contract goods] are incorporated or used"

was likewise held to create a charge over completed and uncompleted handbags manufactured from the leather supplied. All of these cases assume that the application of the manufacturing process to the goods agreed to be sold vested ownership in the products in the buyer company, so that the buyer company was creating a charge over its property as security for payment of a debt. On the other hand, in *Clough Mill Ltd v Martin*,⁸²⁹ where yarn was supplied to be manufactured into fabric, neither Robert Goff L.J.⁸³⁰ nor Oliver L.J.⁸³¹ saw any objection in principle to an agreement of the parties that property in any new product created by manufacture should vest in the seller: the buyer would not confer upon the seller any interest in property defeasible on payment of a debt, since, when the new product came into existence, the property in it would ipso facto vest in the seller. Nevertheless, both they and Donaldson M.R. were of the opinion⁸³² that the specific provision in that case whereby:

"... if any of the material is incorporated in or used as material for other goods before ... payment the property in the whole of such goods shall be and remain with the seller until such payment has been made"

would give rise to a charge on the new product in favour of the seller. The provision could not be read literally to produce the result of a windfall to the seller of

⁸²⁵ *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, per Templeman L.J. at 44, 45. See also Buckley L.J. at 46, 47.

⁸²⁶ As a charge under s. 95(2)(c) of the 1948 Act (see now the Companies Act 2006 s. 859A(1), (6)).

⁸²⁷ *Re Bond Worth Ltd* [1980] Ch. 228.

⁸²⁸ *Re Peachdart Ltd* [1984] Ch. 131.

⁸²⁹ *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111.

⁸³⁰ *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111 at 119.

⁸³¹ *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111 at 124. See also *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2001] 2 Lloyd's Rep. 62 at [47]; *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep. 284 at [156]-[157]. But see Donaldson M.R. in *Clough Martin* at 125; and *Borden (UK) Ltd v Scottish Timber Products* [1981] Ch. 25 at 46.

⁸³² *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111 at 120, 124, 125. See also *Modelboard Ltd v Outer Box Ltd* [1993] B.C.L.C. 623; *ICI New Zealand v Agnew* [1998] 2 N.Z.L.R. 129.

returned it before the stated time. In the meantime, however, it had been injured by no fault of the claimant while in his possession. In an action by the claimant for the recovery of the price, the defendant pleaded an implied term that the horse, if returned, should be returned in the same state as that in which it was delivered, and without having been injured. The Court of Exchequer held that the injury did not cause the claimant to lose his right to return the horse. This case would appear to establish no more than that the buyer's right to reject goods for failure to correspond with their contractual description is not taken away by the fact that they have in the meantime been damaged without his fault.⁶⁰ But in his judgment Cleasby B. said:

"As a general rule, damage from the depreciation of a chattel ought to fall on the person who is the owner of it. Now here the effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event when it would revert in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is re-vested, and he must therefore bear the loss."⁶¹

It is submitted, however, that this statement should not be taken to extend to a situation where the buyer is permitted, without any breach on the part of the seller, to return the goods sold to him, e.g. where clothing purchased is not of the appropriate size. It would then be the intention of the parties that the contract should be subject to a condition of the type pleaded by the defendant in *Head v Tattersall*, so that the goods would effectively be at the buyer's risk until they are returned to the seller.

6-011 Risk in relation to rejected goods The case of *Head v Tattersall*⁶² raises the general issue of the incidence of risk in respect of rejected goods.⁶³ If, after the property in the goods has passed to the buyer, he justifiably rejects the goods, the question arises whether and, if so, in what circumstances the risk of any loss of or damage to or deterioration of the goods in the intervening period reverts in⁶⁴ or is deemed to have remained with the seller.⁶⁵ This matter is discussed in Ch.12 of this work.⁶⁶ If goods are rightfully rejected, but the seller neglects or refuses to collect them,⁶⁷ the buyer would appear thereafter to be an involuntary bailee,⁶⁸ being li-

⁶⁰ *Head v Tattersall* (1871) L.R. 7 Ex. 7, per Bramwell B. (at 13) also considered that the contract could have been rescinded even if the horse had died without the buyer's default. See also *Chapman v Withers* (1888) 20 Q.B.D. 824.

⁶¹ *Head v Tattersall* (1871) L.R. 7 Ex. 7 at 13, 14.

⁶² *Head v Tattersall* (1871) L.R. 7 Ex. 7.

⁶³ See *Law Com. Working Paper No.85* (1983), paras 2.60, 4.76-4.80; *Law Com. Report, Sale and Supply of Goods* (1987), Cmnd.137, para.5.40; *Uniform Commercial Code Art.2-510(1)*.

⁶⁴ See *Head v Tattersall* (1871) L.R. 7 Ex. 7 at 13, 14; *Vitol SA v Esso Australia Ltd* [1989] 1 Lloyd's Rep. 96.

⁶⁵ See (in Scots law) *Kinnear v Brodie (J & D)* (1902) 3 F. 540 at 544, 545; *Boyd & Forrest v Glasgow & SW Ry Co* 1915 S.C. (HL) 21 at 29.

⁶⁶ Below, paras 12-059 to 12-061.

⁶⁷ See the *Sale of Goods Act 1979* s.36; below, para.12-067.

⁶⁸ *Heugh v L & NW Ry Co* (1870) L.R. 5 Ex. 51 (carrier).

able only for deliberate injury to the goods or for gross negligence, but not for ordinary negligence.⁶⁹

Insurable interest The question of the allocation of risk is often of importance where a claim is made on an insurance policy, since the insured must have an insurable interest in the goods at the time of the loss.⁷⁰ It will be sufficient that the goods are at his risk even though he has no property in them.⁷¹ The topic of insurance is, however, outside the scope of this work and reference should be made to specialist treatises on insurance law.

(b) Carriage of Goods to the Buyer

Delivery to carrier In those instances where the property in the goods passes to the buyer on delivery to a carrier,⁷² the risk prima facie passes with the property.⁷³ It has, however, been previously pointed out that, if the contract is one for the sale of unascertained goods, the property will normally not pass to the buyer by delivery to the carrier unless and until the goods become ascertained,⁷⁴ and it seems that the risk will not in principle pass until that time.⁷⁵ Otherwise, the risk in principle passes on delivery to the carrier.

Special rules have nevertheless been developed in relation to overseas sales. The case of *Stock v Inglis*⁷⁶ shows that risk in relation to the unascertained part of a larger bulk may pass under an f.o.b. contract on shipment, even though the goods are not ascertained. Further, where goods are sold on c.i.f. terms, the property will usually pass to the buyer only on unconditional delivery of the bill of lading.⁷⁷ But the risk is then prima facie transferred on shipment or retrospectively as from shipment, and the seller is often entitled to tender the shipping documents to the buyer and claim the price where the goods have been lost in transit.⁷⁸ These and other special rules⁷⁹ are dealt with later in this work.

⁶⁹ *Hiori v Bott* (1874) L.R. 9 Ex. 86 at 90; *Howard v Harris* (1884) Cab. & El. 253. But contrast *Newman v Bourne and Hollingsworth* (1915) 31 T.L.R. 209; *Summer v Challenor* (1926) 70 S.J. 760; *Elvin and Powell Ltd v Plummer Roddis Ltd* (1933) 50 T.L.R. 158; *Houghland v Low (RR) (Luxury Coaches) Ltd* [1962] 1 Q.B. 694 at 698; *Chitty on Contracts*, 33rd edn, Vol.II para.33-036.

⁷⁰ See *Anderson v Morice* (1876) 1 App. Cas. 713; *Marine Insurance Act 1906* ss.4-8; and generally *Chitty on Contracts*, 33rd edn, Vol.II paras 42-005 to 42-017. But see also *Marine Insurance Act 1906* s.4; and above, para.5-012.

⁷¹ See, e.g. *Inglis v Stock* (1885) 10 App. Cas. 263; *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App. Cas. 128. In *Milos Equipment Ltd v Insurance Corp of Ireland* (1990) 47 B.C.L.R. (2d) 296, a dealer with a right to sell a trade-in vehicle, but who had neither possession of nor the property in the vehicle, was held to have an insurable interest in it.

⁷² See above, para.5-096.

⁷³ *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 K.B. 343 (above, para.5-023). cf. *Vienna Convention on Contracts for the International Sale of Goods (CISG) Art.67* (above, para.1-024).

⁷⁴ *Healy v Howlett & Sons* [1917] 1 K.B. 337 (above, para.5-099).

⁷⁵ *Healy v Howlett & Sons* [1917] 1 K.B. 337.

⁷⁶ *Stock v Inglis* (1884) 12 Q.B.D. 564; affirmed (1885) 10 App.Cas. 263. See below, paras 18-627, 20-177. cf. *Vienna Convention on Contracts for the International Sale of Goods (CISG) Art.67(2)* (above, para.1-024); *Incoterms* (2020) (f.o.b.), B.3.

⁷⁷ See above, para.5-102; below, paras 19-167 to 19-170.

⁷⁸ See below, paras 19-120, 19-122 to 19-125. See also *Incoterms* (2020), (c.i.f.), B.3.

⁷⁹ c. & f. contracts (below, paras 21-162 to 21-164); f.a.s. contracts (below, para.21-013); "ex ship" contracts (below, para.21-025); containers (below, para.21-166).

envisaged in s.18 rr.2 and 3 of the Act,¹⁷⁴ and also to cases where the seller has reserved the right of disposal of specific goods in accordance with s.19.¹⁷⁵ It is, however, submitted that s.7 does not lay down an absolute rule, but may be negated 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.¹⁷⁶ A court may thus be at liberty to find that the contract has not been avoided, that the goods were intended to be at the seller's risk until the property therein was transferred to the buyer, and that the seller is liable in damages for failure to deliver the goods.¹⁷⁷

6-032 Howell v Coupland It is generally thought that s.7 of the Act was formulated in reliance on the decision of the Court of Appeal in *Howell v Coupland*,¹⁷⁸ where the defendant agreed to sell to the claimant 200 tons of potatoes to be grown on a particular field.¹⁷⁹ The crop failed, so that the defendant was able to deliver only 80 tons. It was held that he was relieved of liability to deliver the other 120 tons by reason of impossibility of performance.¹⁸⁰ Sir Mackenzie Chalmers was of the opinion that s.7 applied to specifically described goods, whether in existence at the time the contract was made or not.¹⁸¹ But this interpretation does not accord with the definition of "specific goods" in s.61(1) of the Act.¹⁸² It seems better¹⁸³ to regard the situation in *Howell v Coupland* either as an instance of a sale upon a contingency covered by s.5(2) or as a sale subject to a condition implied at common law¹⁸⁴ as preserved by s.62(2) of the Act. It was not decided in *Howell v Coupland* whether the seller might have refused to deliver the 80 tons which he in fact delivered. This will depend on the presumed intention of the parties.¹⁸⁵ A condition may be implied that, in such circumstances, the contract is wholly discharged. Alternatively, a condition may be implied that the buyer shall have the option of accepting part delivery.¹⁸⁶ In this type of case, therefore, one or both parties may be relieved, in whole or in part, from further performance of his obligations under

¹⁷⁴ See above, paras 5-030, 5-035; *Rugg v Minett* (1809) 11 East 210. But it is questionable whether it would apply to s.18 r.4 of the 1979 Act: *Edwards v Vaughan* (1910) 26 T.L.R. 545.

¹⁷⁵ See above, para.5-131.

¹⁷⁶ Sale of Goods Act 1979 s.55(1). However, s.7 is not prefaced by the words "unless otherwise agreed" as is (e.g.) s.20(1), and it is arguable that s.55(1) in its terms does not apply to such a provision.

¹⁷⁷ See, e.g. *Logan v Le Mesurier* (1847) 6 Moo. P.C. 116.

¹⁷⁸ *Howell v Coupland* (1876) 1 Q.B.D. 258.

¹⁷⁹ In *JGL Commodities Ltd v Puddell Farms Ltd* 2018 SKQB 345, the seller of durum wheat was a producer but, not being required to supply wheat from its own land, could not claim the protection of s.7 when adverse growing conditions restricted the availability of durum wheat of the contract quality.

¹⁸⁰ *Howell v Coupland* (1876) 1 Q.B.D. 258 at 262. See also the decision at first instance (1874) L.R. 9 Q.B. 462.

¹⁸¹ Mark (ed), Chalmers' Sale of Goods Act, 18th edn (1893) p.100. See also *PS International Canada Corp v Palimar Farms Inc* 2016 SKQB 232 at [98].

¹⁸² See Treitel, *Frustration and Force Majeure*, 3rd edn, para.4-052, and above, paras 1-113, 5-022.

¹⁸³ *Re Wait* [1927] 1 Ch. 606 at 630-631; *Sainsbury Ltd v Street* [1972] 1 W.L.R. 834.

¹⁸⁴ *PS International Canada Corp v Palimar Farms Inc* 2016 SKQB 232 at [88]; affirmed 2017 SKCA 78 at [30].

¹⁸⁵ But see *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm); [2010] 2 C.L.C. 534 at [125] ("the seller will have an excuse for non-performance of the part of the crop that has failed").

¹⁸⁶ *Sainsbury Ltd v Street* [1972] 1 W.L.R. 834. cf. *Lovatt v Hamilton* (1839) 5 M. & W. 639; *Lipton Ltd v Ford* [1917] 2 K.B. 647.

the contract. But the contract is not avoided by s.7 of the Act; nor is it otherwise discharged automatically by frustration.

Consequences of s.7 The effect of the operation of s.7 is that the agreement is avoided. Both parties are released from all obligations which have not yet accrued at the time at which the goods perish. Prima facie, however, any obligation which has accrued before this time must be performed,¹⁸⁷ and any obligation which has accrued and been performed remains undisturbed. Nevertheless, if the price, or any part of it, has already been paid by the buyer, it is recoverable from the seller, provided there has been a total failure of consideration.¹⁸⁸ But no provision is made under s.7 for apportionment of the loss; nor can the seller retain or recover any sum in respect of expenses incurred by him before the time of discharge in, or for the purpose of, the performance of the agreement.¹⁸⁹ The rights and obligations of the parties are in principle determined as at the time the goods perish.

It has, however, been suggested¹⁹⁰ that, if part of the specific goods agreed to be sold has been delivered to the buyer, but the remainder subsequently perishes before the risk passes to the buyer, the buyer can recover that part of the price due and paid which is attributable to the goods not yet received, even though the consideration has only partially failed.¹⁹¹ This is no doubt so where part of the price can be attributed to a corresponding part of the goods, e.g. where there is a unit price for the goods.¹⁹² But it is argued that the same principle applies even where the payment cannot easily be apportioned, on the ground that the risk in respect of the non-delivered goods is on the seller when they perish. The suggestion has also been made that, where part of the goods has been delivered to the buyer, even though the contract of sale is not severable and the price only payable on delivery of the whole of the goods,¹⁹³ the buyer cannot claim to retain the goods without paying for the part retained. Provided that the buyer has an option to retain or return those goods,¹⁹⁴ it is argued that he should be held liable *quantum valebant* upon a new implied contract which arises from his acceptance of the benefit, and his refusal to disgorge it.¹⁹⁵ The validity of the first suggestion may depend on whether the incidence of

¹⁸⁷ *Chandler v Webster* [1904] 1 K.B. 493 is still good law in this respect.

¹⁸⁸ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32. See also *Rugg v Minett* (1809) 11 East 210; *Logan v Le Mesurier* (1847) 6 Moo. P.C. 116; *McDill v Hilson* (1920) 53 D.L.R. 228.

¹⁸⁹ See below, para.6-052, on the non-applicability of the Law Reform (Frustrated Contracts) Act 1943. Contrast *Cantiare San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd* [1924] A.C. 226 (Scots law).

¹⁹⁰ Twigg-Flesner, Canavan and MacQueen, *Atiyah and Adams' Sale of Goods*, 13th edn, p.292.

¹⁹¹ By the same token, if the price is due but unpaid, the buyer would be relieved from payment in respect of the goods destroyed.

¹⁹² See (in a different context) *Devaux v Connolly* (1849) 8 C.B. 640; *Biggerstaff v Rowatts' Wharf Ltd* [1896] 2 Ch. 93; *Behrend & Co Ltd v Produce Brokers Ltd* [1920] 3 K.B. 530; *Ebrahim Dawood Ltd v Heath Ltd* [1961] 2 Lloyd's Rep. 512; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768 at 779.

¹⁹³ cf. *Cutter v Powell* (1795) 6 T.R. 320; *Appleby v Myers* (1867) L.R. 2 C.P. 651; *Whincup v Hughes* (1871) L.R. 6 C.P. 78; *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [254] et seq.

¹⁹⁴ cf. *Sumpter v Hedges* [1898] 1 Q.B. 673; *Forman & Co Pty Ltd v The Ship "Liddesdale"* [1900] A.C. 190. Quaere whether such an option exists if the buyer has resold the goods: see Twigg-Flesner, Canavan and MacQueen, *Atiyah and Adams' Sale of Goods*, 13th edn, p.293.

¹⁹⁵ cf. s.30(1) of the 1979 Act; and the result in *Barrow, Lane and Ballard v Phillip Phillips & Co* [1929] 1 K.B. 574 (s.6).

6-057

time value of money, that is to say, for the fact that that party had had the use of money obtained by the disposal of the goods (or, presumably, the use of the goods themselves) prior to the date of frustration.³³⁴ If the benefit was obtained partly by reason of performance of the contract by the seller and partly by reason of work done by the buyer, the court had to do its best to apportion the benefit, and to decide what proportion was attributable to the seller's performance.³³⁵ These points were not considered by the Court of Appeal³³⁶ or by the House of Lords.³³⁷

Robert Goff J. further took the view that the circumstances referred to in s.1(3)(a) and (b) should be taken into account in valuing the benefit.³³⁸ For example, under s.1(3)(a), the relevant expenses of the buyer and the amount (if any) retained or recoverable by the seller under s.1(2) in respect of the seller's expenses would fall to be deducted from the value of the benefit.³³⁹ And s.1(3)(b) had also to be applied. This provision, in his opinion, made it clear that the party conferring the benefit was to take the risk of depreciation or destruction by the frustrating event.³⁴⁰ So, for instance, if part of the contract goods were delivered to the buyer, but that part was destroyed by the frustrating event³⁴¹ or was rendered by the frustrating event of no value without delivery of the remainder, then the value of the benefit at the date of frustration³⁴² would be nil.³⁴³ Again, however, these views were not considered by the Court of Appeal or by the House of Lords and it is arguable³⁴⁴ that, on an alternative interpretation of s.1(3), the circumstances referred to in (a) and (b) are to be taken into account, not in valuing the benefit, but in the assessment of the just sum. In that event those circumstances would not go to reduce the value of the benefit (which forms the upper limit of the award), but be circumstances, *inter alia*, relevant to fixing a sum which the court considers it just to award to the seller.

6-058

Section 1(6) further provides that, where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances it is just to do so, treat for the purpose of s.1(3) any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

6-059

The "just sum" The Act gives no indication of the way in which the just sum is to be assessed³⁴⁵ and in *BP Exploration Co (Libya) Ltd v Hunt (No.2)*, the Court of

³³⁴ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783 at 801–802.

³³⁵ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783 at 802.

³³⁶ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1981] 1 W.L.R. 232.

³³⁷ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1983] 2 A.C. 352.

³³⁸ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783 at 801, 803, 804.

³³⁹ Contrast *Chitty on Contracts*, 33rd edn, Vol.1 para.23-090 (just sum).

³⁴⁰ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783 at 803. See also the 1943 Act s.2(3); below, para.6-065.

³⁴¹ See, e.g. *Appleby v Myers* (1867) L.R. 2 C.P. 651 (above, para.6-045); *Parsons Bros Ltd v O'Shea* (1965) 53 D.L.R. (2d) 86.

³⁴² cf. Glanville Williams, *Law Reform (Frustrated Contracts) Act 1943* (1944), pp.48–50; Treitel, *Frustration and Force Majeure*, 3rd edn, para.15-068, who argues that the 1943 Act s.1(3) requires the court to look at the facts as they were before and not after the frustrating event.

³⁴³ Assuming no obligation to insure: the 1943 Act s.1(5); below, para.6-063.

³⁴⁴ Treitel, *Frustration and Force Majeure*, 3rd edn, para.15-068. See also *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1981] 1 W.L.R. 232 at 237–238 CA.

³⁴⁵ In *BP Exploration Co (Libya) Ltd v Hunt (No.2)* at [1979] 1 W.L.R. 783, Robert Goff J. at 799 explained the principle underlying the Act to be "the prevention of unjust enrichment of either party

Appeal recognised that it might be assessed in a number of different ways.³⁴⁶ At first instance, Robert Goff J. had, in the circumstances of that case, assessed the just sum on the basis of reimbursing the claimants the expenditure which they had incurred under the contract before the frustrating event.³⁴⁷ The Court of Appeal refused to upset this assessment and stated that it would not be justified in setting aside the judge's method of assessment merely because it thought there were better ways: the method of assessment would have to be shown to be "palpably wrong".³⁴⁸ Although the assessment will depend upon the particular circumstances of each case, the method adopted by Robert Goff J. could be applied to contracts of sale of goods. On a reimbursement basis, the just sum would then be such amount as would fairly compensate the seller for the expenditure incurred by him in performance of the contract. This could, in appropriate cases, include development costs and machine and tool costs, as well as expenses of manufacture. However, any award would have to be limited to the value of the benefit obtained by the buyer by reason of the seller's performance.³⁴⁹ The terms of the contract between the parties and the circumstances surrounding the making of it might also be relevant to the assessment of the just sum, in particular with respect to their intentions regarding the allocation of risks.³⁵⁰ It has further been suggested³⁵¹ that, in a contract of sale of goods, since the buyer will only have been prepared to contract for the goods on the basis that he paid no more than the contract price, it might be unjust to compel him, by an award under the Act, to pay more than that price, or a rateable part of it in respect of the goods he has received.

Cross-claims Claims or cross-claims, or both, may be made by either party under both subss.(2) and (3) of s.1 of the Act.³⁵²

Interest The court may award interest under the Senior Courts Act 1981 s.35A³⁵³ on any sum adjudged to be payable under the Act from the date on which the cause of action arose.³⁵⁴ The cause of action arises on the occurrence of the frustrating

to the contract at the other's expense"; but the Court of Appeal at [1981] 1 W.L.R. 232 at 243, stated: "We get no help from the use of words which are not in the statute".

³⁴⁶ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1981] 1 W.L.R. 232 at 242–244. The method of assessment was not considered by the House of Lords.

³⁴⁷ Less the value of the benefits in kind which the claimants had received before that time.

³⁴⁸ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1981] 1 W.L.R. 232 at 243.

³⁴⁹ See above, para.6-056.

³⁵⁰ This appears to have been impliedly accepted by the House of Lords in *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1983] 2 A.C. 352, although held to be inapplicable on the facts of the case. See also the 1943 Act s.2(3).

³⁵¹ By Robert Goff J. in *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783 at 805–806.

³⁵² *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783 at 807–8. But see the 1943 Act s.1(3)(a).

³⁵³ Formerly the Supreme Court Act, the title of the Act was modified by the Constitutional Reform Act 2005 Sch.11(1) para.1(2). See also *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2019] A.C. 929 and County Courts Act 1984 s.69; Arbitration Act 1996 s.49; and below, paras 16-007, 16-012.

³⁵⁴ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1983] 2 A.C. 352. See *Kuwait Airways Corp v Kuwait Insurance Co (No.3)* [2000] 1 All E.R. (Comm) 972; *Manchikalapati v Zurich Insurance Plc* [2019] EWCA Civ 2163; 167 Con. L.R. 62 at [221]: "Generally, where there is uncertainty as to liability and a need to investigate that, that is not a material factor in postponing the running of interest. Where the uncertainty is as to quantum, once the answer is known and it is established, not only that pay-

or other circumstances, he could discharge the burden of proof.¹⁵¹ The same principles apply where the true owner signs documents in blank, entrusting these to the seller to be completed in accordance with an agreement between them.¹⁵² If the seller, in breach of the agreement, completes the blanks and is thereby enabled to represent that he is the owner of the goods to the buyer who purchases them in reliance on that representation, the true owner will be bound, unless the transaction contemplated by the agreement was essentially different in substance or in kind and he proves that he exercised reasonable care.¹⁵³

7-019 Estoppel by judgment Estoppel by judgment, or estoppel *per rem judicatam*, is a rule of evidence¹⁵⁴ whereby a party is debarred from relitigating a cause of action which has been conclusively determined by a judgment of a court of competent jurisdiction in previous proceedings between the same parties or their privies, or an issue raised in such proceedings which it was necessary to determine for the purposes of those proceedings.¹⁵⁵ So far as title to goods is concerned, where ownership of the goods has thus been determined in legal proceedings, the estoppel will operate for, or against, the parties to those proceedings and also their privies, that is to say, persons who claim title through or under a party. However, a person claiming title is "privity" to the interests of those through whom he claims that title for the purposes of the operation of the doctrine of estoppel *per rem judicatam* only if the title he claims was acquired after the date of the judgment.¹⁵⁶ If the title claimed was acquired before the date of the judgment, he will not be estopped.¹⁵⁷

3. SALE IN MARKET OVERT

7-020 Market overt The Sale of Goods Act 1979 s.22(1) formerly provided:

"Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."

This ancient rule applied to sales from shops in the City of London and, outside the City of London, to sales from any open, public and legally constituted market, including fairs. It did not apply in Scotland or in Wales, or to ships, or to goods belonging to the Crown. The rule was highly technical in its application and replete with artificiality.¹⁵⁸ It was abolished by the Sale of Goods (Amendment) Act 1994, which came into force on January 3, 1995, and applies to any contract for sale of

¹⁵¹ *Saunders v Anglia Building Society* [1971] A.C. 1004 at 1025. See also *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242.

¹⁵² *United Dominions Trust Ltd v Western* [1976] Q.B. 513 (disapproving *Campbell Discount Ltd v Gall* [1961] 1 Q.B. 431). See also *British Railway Traffic and Electric Co Ltd v Roper* (1939) 162 L.T. 217; *General and Finance Facilities Ltd v Hughes* (1966) 110 S.J. 147. cf. *Unity Finance Ltd v Hammond* (1965) 109 S.J. 70.

¹⁵³ *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242.

¹⁵⁴ *Vervaeke v Smith* [1983] 1 A.C. 145; *Republic of India v India Steamship Co Ltd* [1993] A.C. 410 at 422.

¹⁵⁵ *Chitty on Contracts*, 33rd edn, Vol.I para.25-011; Halsbury, *Laws of England*, 5th edn, Vol.I2A para.1591.

¹⁵⁶ *Doe d. Foster v Earl of Derby* (1834) 1 A. & E. 783 at 790; *Hodson v Walker* (1872) I.R. 7 Ex. 55.

¹⁵⁷ *Powell v Wiltshire* [2004] EWCA Civ 534; [2005] Q.B. 117.

¹⁵⁸ See the 4th edn of this book, paras 7-016 to 7-022.

goods made after that date.¹⁵⁹

4. SALE UNDER A VOIDABLE TITLE

Seller with a voidable title By s.23 of the Sale of Goods Act 1979:

7-021

"When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

The paradigm case of the operation of this section is where A, the true owner of the goods, is induced by the fraud of B (the seller) to sell goods to B which B then resells to C, an innocent buyer. A fraudulent representation made by B may arise from B's conduct, as where B, paying by cheque, impliedly represents that there are funds in the drawee bank or an available overdraft facility for the cheque to be honoured.¹⁶⁰ The effect of the fraud is not absolutely to avoid the contract of sale between A and B, but to render it voidable at the option of A. Property in the goods passes to B, although B's title is subject to A's right to avoid it. Provided that A has not effectively exercised this right at the time of the sale of the goods by B to C, then C will acquire an indefeasible title to the goods notwithstanding the fact that B had only a voidable title to them.¹⁶¹

Section 23 does not apply to sui generis supply contracts of the sort considered in *PST Energy Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)*,¹⁶² but a rule of the common law should apply to the same effect in such cases where the supplier's reservation of title has been lifted, as might occur where the recipient has paid for the goods before they are consumed. A receiver consuming the goods before payment will never acquire the property in them and so would seem not to acquire the immunity from suit in the tort of conversion available to those acquiring a "good title" under one of the exceptions to the *nemo dat* rule.¹⁶³ It should be the case, nevertheless, that the original seller could not have at the time of consumption, prior to the avoidance of the contract, the right to immediate possession needed to ground an action for the conversion of the goods by consumption.¹⁶⁴

Voidable title The transaction between the true owner and the seller must be such as to transfer to the seller a voidable title to the goods sold. It is therefore neces-

7-022

¹⁵⁹ The market overt rule survives in Hong Kong: Sale of Goods Ordinance Cap 26), s.24 ("a shop or market in Hong Kong"). It also survives in Ireland: Sale of Goods Act 1893 s.22(1).

¹⁶⁰ *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355; [2018] 1 W.L.R. 3529 at [126].

¹⁶¹ *Wright v Lawes* (1801) 4 Esq. 82; *Load v Green* (1846) 15 M. & W. 216 at 219; *White v Garden* (1851) 10 C.B. 919; *Powell v Hoyland* (1851) 6 Ex. Ch. 67 at 72; *Stevenson v Newnham* (1853) 13 C.B. 285 at 302; *Pease v Gloaher* (1866) L.R. 1 P.C. 219; *Cundy v Lindsay* (1878) 3 App. Cas. 459 at 463-464, 466; *King's Norton Metal Co v Edridge, Merrett & Co* (1897) 14 T.L.R. 98; *Phillips v Brooks Ltd* [1919] 2 K.B. 243; *Nanka Bruce v Commonwealth Trust* [1926] A.C. 77; *Terry v Vancouver Motors U-Drive Ltd* [1942] 4 D.L.R. 399; *Dennant v Skinner and Collom* [1948] 2 K.B. 164; *Robin and Rambler Coaches Ltd v Turner* [1947] 2 All E.R. 284; *Hendrickson v Mid-City Motors Ltd* [1951] 3 D.L.R. 276; *MacLeod v Kerr* 1965 S.C. 253; *Lewis v Averay* [1972] 1 Q.B. 198; *Young v Dalglish (DS) & Son (Hawick)* 1994 S.C.L.R. 696 (Sh. Ct.).

¹⁶² *PST Energy Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23; [2016] A.C. 1034.

¹⁶³ Above, para.7-002.

¹⁶⁴ Bridge, Gullifer, Low and McMeel, *The Law of Personal Property*, 2nd edn, paras 32-019, 32-035.

and without notice of the original hire-purchase agreement or conditional-sale agreement) will, as well as the former disposition, have effect as mentioned in s.27(3). Suppose, therefore, that a motor vehicle owned by A is let under a hire-purchase agreement to B. B wrongfully sells the vehicle to a finance company, which lets it under a hire-purchase agreement to C. Provided that C was, at the time of the letting, the first private purchaser of the vehicle in good faith and without notice of the original hire-purchase agreement, the letting under his hire-purchase agreement is a valid letting; and if, in pursuance of this agreement, the finance company transfers the property in the vehicle to C, he acquires a good title even though at the time the property is transferred he has been informed of the original hire-purchase agreement and so has notice thereof.

7-097 Anomalies Certain anomalies are created by this structure of protection. It will be noted that, under s.27(2), a good title is conferred upon *any* private purchaser (provided he is in good faith and without notice) to whom the debtor has himself disposed of the vehicle. But under s.27(3) and (4) only the first private purchaser after the disposition by the debtor to a trade or finance purchaser is protected, and then only if he is in good faith and without notice. Thus, for example, if a debtor under a hire-purchase agreement himself wrongfully lets the vehicle on hire-purchase to A, but subsequently repossesses it and sells it to B, B will acquire a good title. Yet if he sells the vehicle to a finance company which lets the vehicle on hire-purchase to A, but subsequently repossesses it and sells it to B, B will not acquire a good title as he is not the *first* private purchaser. Further, the protection afforded in the circumstances mentioned in s.27(4) (notice acquired of the original agreement between the time of letting and the time the property is transferred to him) will only apply where the vehicle is let to the debtor by a trade or finance purchaser, and not where the vehicle is let to him by the original debtor.

7-098 A problem also arises in the following situation: a motor vehicle owned by A is let under a hire-purchase agreement to B, who wrongfully sells it to C, a trade or finance purchaser. C lets the vehicle to D (a private purchaser) under a hire-purchase agreement. Before the property is transferred to him in pursuance of this second agreement, D wrongfully sells the vehicle to a private purchaser, E. Assuming that D was at the time of the letting to him in good faith and without notice of the original hire-purchase agreement, and that E is likewise innocent, will E acquire a good title? It is submitted that he will not do so.⁶³⁷ He cannot acquire a good title merely by virtue of s.27(3), since he is not the first private purchaser. However, the letting (disposition) to D has, under s.27(3), effect:

"... as if the title of the creditor ... to the vehicle has been vested in the debtor ... immediately before he disposed of it to the original purchaser."

It could therefore be argued that the title of the trade or finance purchaser, C, was notionally "fed", so that E could rely upon s.27(2) and acquire that title. But it is submitted that the title of C is only notionally "fed" for the purpose of establishing the validity of the letting to D. C, in fact, has no title; he was the "creditor" in relation to the second hire-purchase agreement; and E can only acquire such title

⁶³⁷ cf. Goode, *Hire-Purchase Law and Practice*, 2nd edn, p.627. But see above, para.7-095.

of C⁶³⁸ as is deemed to be vested in D immediately before the sale of the vehicle by D to E, i.e. none.

Good faith and notice The expression "in good faith" is not defined in the 1964 Act, but presumably a purchaser is deemed to be in good faith when he acts honestly, whether he acts negligently or not.⁶³⁹ Section 29(3) of the Act further provides that:

"... a person shall be taken to be a purchaser of a motor vehicle without notice of a hire-purchase agreement or conditional sale agreement if, at the time of the disposition made to him, he has no actual notice that the vehicle is or was the subject of any such agreement."

Constructive notice is therefore insufficient. Despite the use of the words "a" and "any" in s.29(3), it has been held by the Court of Appeal in *Barker v Bell*⁶⁴⁰ that there must be actual notice of the relevant, and not of any, hire-purchase agreement or conditional sale agreement. In the same case, Lord Denning M.R. and Fenton Atkinson L.J. expressed the opinion that the words "or was" did not embrace a hire-purchase or conditional-sale agreement which had been supposedly paid off. Thus, if the purchaser is informed that the vehicle has been the subject of a hire-purchase agreement, but (untruthfully) that the debtor has paid off the amount outstanding under the agreement and so acquired a title to the vehicle, the purchaser will still be protected. The burden of proving good faith and absence of notice appears to rest upon the purchaser.⁶⁴¹

Presumptions Once it is proved in any proceedings (whether civil or criminal) relating to a motor vehicle: (i) that the vehicle was bailed under a hire-purchase agreement, or was agreed to be sold under a conditional sale agreement; and (ii) that a person⁶⁴² (whether a party to the proceedings or not) became a private purchaser of the vehicle in good faith and without notice of the hire-purchase or conditional-sale agreement (the "relevant agreement"), certain rebuttable presumptions arise in favour of a claimant who seeks to rely on the protection conferred by Pt III of the 1964 Act.⁶⁴³ These presumptions may enable him to overcome the difficulty of proving the precise chain of dealings between himself and the debtor, or the state of mind of the parties to those transactions; but they do not apply where all the transactions are fully known.⁶⁴⁴

First, it is presumed that the disposition to the private purchaser mentioned above (known as "the relevant purchaser") was made by the debtor.⁶⁴⁵

Secondly, if it is proved that the disposition was not made by the debtor, then it

⁶³⁸ See the 1964 Act s.29(5); below, para.7-107.

⁶³⁹ See Bills of Exchange Act 1882 s.90; Sale of Goods Act 1979 s.61(3); *Dodds v Yorkshire Bank Finance* [1992] C.C.L.R. 92 CA; *GE Capital Bank Ltd v Rushton* [2005] EWCA Civ 1556; [2006] 1 W.L.R. 899; and above, para.7-046.

⁶⁴⁰ *Barker v Bell* [1971] 1 W.L.R. 983.

⁶⁴¹ *Mercantile Credit Co Ltd v Waugh* (1978) 32 (2) Hire Trading 16. But see the 1964 Act s.28, above.

⁶⁴² Such a purchaser must be one in the "chain" between the debtor and the person claiming that he has title under Pt III of the 1964 Act, and not a purchaser from or subsequent to the claimant: *Worcester Works Finance Ltd v Ocean Banking Corp Ltd* unreported March 29, 1972, Cty. Ct (Utttoxeter).

⁶⁴³ 1964 Act s.28(1).

⁶⁴⁴ *Sonoco Ltd v Barcross Finance Ltd* [1978] R.T.R. 444.

⁶⁴⁵ 1964 Act s.28(2). See *Ford Motor Credit Co Ltd v Harmack* [1972] C.L.Y. 1649 CA.

on credit but the term of credit has expired, or where the buyer becomes insolvent.²⁹ The seller may retain possession of the goods indefinitely pending payment of the price.³⁰

8-005 Expenses of delivery Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state³¹ are required by s.29(6) of the Act to be borne by the seller.³² But the Act does not set out any rule as to the expenses of delivery itself. At common law, however, the rule is that the expenses of and incidental to making delivery fall on the seller; those of preparing to receive, or receiving, delivery on the buyer.³³ This rule may be varied by agreement between the parties, and special rules have been elaborated where the sale is on c.i.f.,³⁴ f.o.b.,³⁵ "ex ship"³⁶ or other similar terms.³⁷

8-006 Breach by seller A breach by the seller of an obligation on his part relating to delivery will not necessarily amount to a repudiation by him of the contract of sale.³⁸ But it will do so if the breach is a breach of condition.³⁹ The seller will also be held to have repudiated the contract⁴⁰ if: (i) he makes it plain to the buyer by words or conduct that he is unable or unwilling to carry out such an obligation; or (ii) he is in fact finally and completely disabled from performing the obligation; or (iii) he fails to perform the obligation, provided that, in each case, the resulting or actual breach would or does amount to a fundamental breach of the contract.⁴¹ Acceptance by the buyer of the repudiation brings to an end all primary obligations of the parties which have not yet fallen due for performance, but does not prejudice the buyer's right to claim damages for non-delivery.⁴² Acceptance may be by words or conduct, provided that it clearly and unequivocally conveys to the seller that the buyer is treating the contract as at an end.⁴³ The buyer may alternatively elect to treat

²⁹ Sale of Goods Act 1979 s.41 (below, para.15-024).

³⁰ *Lomas v FJB Firth Rixson Inc* [2012] EWCA Civ 419; [2012] 2 Lloyd's Rep. 548 at [34]–[35].

³¹ Defined in s.61(5) of the 1979 Act as being "in such a state that the buyer would under the contract be bound to take delivery of them": see above, para.5-023.

³² A similar common law provision should apply to sui generis supply contracts of the sort considered in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23; [2016] A.C. 1034.

³³ cf. *Neill v Whitworth* (1865) 18 C.B.(N.S.) 435; affirmed (1866) 1 L.P. 1 C.P. 684 ("to be taken from the quay"); *Playford v Mercer* (1870) 22 L.T. 41 ("from the deck"); *Acmé Wood Flooring Co Ltd v Sutherland Innes & Co Ltd* (1904) 9 Com. Cas. 170 ("c.i.f. to buyer's wharf"); *Re Shell Transport and Trading Co and Consolidated Petroleum Co* (1904) 20 T.L.R. 517 (cost of preparing place of delivery); *White v Williams* [1912] A.C. 814 ("cost of stevedoring"); *Jager v Tolme and Runge* [1916] 1 K.B. 939 ("free of customs formalities"); *Fisher, Reeves & Co v Armour & Co* [1920] 3 K.B. 614 ("ex store, Rotterdam"); *Gregor Fisker Ltd v Carl* [2020] EWHC 1385 (Comm) at [153].

³⁴ See below, paras 19-016 to 19-017, 19-019.

³⁵ See below, paras 20-013, 20-030 to 20-031.

³⁶ See below, para.21-018.

³⁷ See "ex works", below, para.21-003.

³⁸ In particular, in the case of instalment deliveries, by s.31(2) of the 1979 Act: see below, para.8-065.

³⁹ See, e.g. below, para.8-025 (time of delivery), para.8-042 (insufficient delivery), para.8-043 (excessive delivery). But, in the case of instalment deliveries, a breach in relation to an instalment will not necessarily amount to a repudiation: the 1979 Act s.31(2), below, para.8-065.

⁴⁰ See *Chitty on Contracts*, 33rd edn, Vol.I Ch.24; and below, paras 8-025, 8-066, 8-068.

⁴¹ *Afivos Shipping Co SA v Pagnan (R) & Fratelli* [1984] 1 W.L.R. 195 at 203.

⁴² *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 849; *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382 at 390. For the measure of damages, see below, para.17-001.

⁴³ *Vitol SA v Norelf Ltd* [1996] A.C. 800.

the contract as still continuing. In such a case, the contract is kept alive for the benefit of both parties, and the seller may normally⁴⁴ take advantage of any supervening circumstances which would justify him in declining to complete it.⁴⁵

2. METHODS OF DELIVERY

How delivery effected Delivery of the goods to the buyer may be made by a variety of methods as agreed by the parties. It may be agreed that the goods shall be delivered, not to the buyer himself, but to a third party nominated by the buyer.⁴⁶ Delivery may instead take place when the seller sends the goods to the buyer or the buyer collects the goods from the seller's place of business or residence.⁴⁷ In the latter case,⁴⁸ the seller's duty to deliver is performed by making the goods available to the buyer in a deliverable state at the place⁴⁹ and time⁵⁰ designated in the contract of sale so as to enable the buyer to obtain custody of or control over the goods.⁵¹

Symbolic delivery Delivery may be effected by handing to the buyer the key of a warehouse or other place where the goods are stored, provided that a licence to enter and take the goods can be implied therefrom.⁵² Delivery of a bill of lading has also been said to be a symbolic or constructive delivery of the goods.⁵³ But it is doubtful whether a token delivery such as, for example, might support a *donatio mortis causa* or a gift inter vivos⁵⁴ could be considered a delivery for the purpose

⁴⁴ But see the exceptions referred to in para.9-019, below.

⁴⁵ *Avery v Bowden* (1855) 5 E. & B. 714; (1856) 6 E. & B. 953; *Johnstone v Milling* (1886) 16 Q.B.D. 460 at 470; *Ferrometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788; *Segap Garages Ltd v Gulf Oil (Great Britain) Ltd*, *The Times* October 24, 1988 CA. See below, para.9-018.

⁴⁶ *Bull v Sibbs* (1799) 8 T.R. 327 at 328; *Ruben (E & S) Ltd v Faire Bros & Co Ltd* [1949] 1 K.B. 254; *Four Point Garage Ltd v Carter* [1985] 3 All E.R. 12.

⁴⁷ Sale of Goods Act 1979 s.29(1).

⁴⁸ This is the presumptive rule: Sale of Goods Act 1979 s.29(2); and below, para.8-019.

⁴⁹ See below, para.8-018.

⁵⁰ See below, para.8-025.

⁵¹ *Smith v Chance* (1819) 2 B. & Ald. 753 at 755; *Wood v Tassell* (1844) 6 Q.B. 234; *Wilkinson v Lloyd* (1845) 7 Q.B. 27 at 44. See also *European Grain & Shipping Ltd v David Geddes (Proteins) Ltd* [1977] 2 Lloyd's Rep. 591 ("available for delivery"). Where a seller under a work and materials contract is to install goods on the buyer's premises, delivery might not occur prior to the installation of the goods: *Wincanton Group Ltd v Garbe Logistics UK 1 SARL* [2011] EWHC 905 (Ch).

⁵² *Ellis v Hunt* (1789) 3 T.R. 464 at 468; *Chaplin v Rogers* (1800) 1 East 192 at 195; *Elmore v Stone* (1809) 1 Taunt. 458 at 460; *Gough v Everard* (1864) 2 H. & C. 1 at 10; *Ancona v Rogers* (1876) 1 Ex. D. 285 at 290; *Hilton v Tucker* (1888) 39 Ch. D. 669 at 676; *Lloyds Bank Ltd v Swiss Bankverein* (1913) 108 L.T. 143 at 146; *Dublin City Distillery Ltd v Doherty* [1914] A.C. 823 at 843; *Wrightson v McArthur and Hutchinsons* (1919) Ltd [1921] 2 K.B. 807 at 816. cf. *Milgate v Kebble* (1841) 3 M. & G. 100. See also Pollock and Wright, *Possession in the Common Law* (1888), pp.60-70.

⁵³ See below, para.18-161. For the purpose of a contract of carriage, it has been held that the provision of a pin code to afford access to goods is not a delivery of the goods where the parties contemplate that a later document, such as a bill of lading or delivery order, will be transferred to the cargo receiver: *MSC Mediterranean Shipping Co SA v Glencore International AG* [2017] EWCA Civ 365; [2017] 2 Lloyd's Rep. 186 at [31] ("Delivery usually means actual delivery, not delivery of a means of access ..."). If however no such later document is contemplated, the provision of a pin code should suffice notwithstanding the carrier's ability to frustrate the cargo receiver by altering the pin code: at [41].

⁵⁴ See Bridge, Gullifer, Low and McMeel, *The Law of Personal Property*, 2nd edn, paras 17-010 et seq.

8-021 Tender of documents The place of tender of documents in overseas transactions is considered later in this work.¹³¹

8-022 Licence to enter and remove goods If the terms of the contract of sale provide that the goods sold or to be sold are to be taken away from the land or premises of the seller, a licence is impliedly granted to the buyer to enter and remove the goods.¹³² No special formalities are normally required for the grant of such a licence, but a licence to enter and remove growing crops,¹³³ minerals,¹³⁴ etc. may require to be made by signed writing as a "contract for the disposition of an interest in land" within the Law of Property (Miscellaneous Provisions) Act 1989 s.2.¹³⁵ A licence to enter and remove goods, whether express or implied, is irrevocable by the seller, at any rate if the property in the goods has passed to the buyer.¹³⁶ But, as a normal rule, such a licence will not be binding on third parties, e.g. upon purchasers or assignees of the land.¹³⁷

8-023 Delivery at buyer's premises Where the seller is required by the terms of the contract of sale to deliver the goods at the premises of the buyer, he discharges his obligation if he delivers them there without negligence to a person apparently having authority to receive them.¹³⁸ The authority in question is an authority to receive the goods at the address where the goods are delivered. Furthermore, the person receiving the goods may be unknown to the buyer and have no actual or apparent authority from the buyer to receive the goods, yet be someone whom the person effecting delivery would expect to have authority to receive the goods.¹³⁹ The risk of some "apparently respectable person" gaining access to the buyer's premises, signing for the goods and making off with them therefore falls on the buyer.¹⁴⁰

8-024 Delivery at wrong place Where the seller delivers or tenders delivery of the goods at a place other than that stipulated, a question is whether the remedies of the buyer depend on whether the stipulation is a condition, the breach of which entitles the buyer to refuse delivery at that place and to treat the contract as repudiated, or is merely an intermediate term.¹⁴¹ In the case of a c.i.f.¹⁴² or f.o.b.¹⁴³ contract, the

¹³¹ See below, paras 19-106, 20-051.

¹³² *Liford's Case* (1614) 11 Co. Rep. 46b at 52a; *Jones (James) & Sons Ltd v Earl of Tankerville* [1909] 2 Ch. 440 at 442; *Mohanlal Hargovind of Jubbulpore v Commissioner of Income Tax* [1949] A.C. 521. For the remedy of injunction in these circumstances, see below, para. 17-102.

¹³³ See above, para. 1-093.

¹³⁴ See above, para. 1-097.

¹³⁵ See above, paras 1-092, 1-097.

¹³⁶ *Thomas v Sorrell* (1673) Vaughan 330 at 351; *Wood v Manley* (1839) 11 A. & E. 34; *Wood v Leadbitter* (1845) 13 M. & W. 838 at 845; *Marshall v Green* (1875) 1 C.P.D. 35; *Jones (James) & Sons Ltd v Earl of Tankerville* [1909] 2 Ch. 440 at 443.

¹³⁷ *Ashburn Anstalt v Arnold* [1989] Ch. 1. cf. Megarry and Wade, *The Law of Real Property*, 8th edn, paras 34-014 to 34-020.

¹³⁸ *Galbraith and Grant Ltd v Block* [1922] 2 K.B. 155; *Computer 2000 Distribution Ltd v ICM Computer Solutions Plc* [2004] EWCA Civ 1634; [2005] Info. I.L.R. 147. See the explanation of this rule in *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep. 341 at [36] (Rix L.J.). cf. *Thomas (E&D) v Alper (HS) & Sons* [1953] C.L.Y. 3277 CA. Contrast *Linden Tricotagefabrik v White and Meacham* [1975] 1 Lloyd's Rep. 384.

¹³⁹ *Computer 2000 Distribution Ltd v ICM Computer Solutions Plc* [2004] EWCA Civ 1634; [2005] Info. T.L.R. 147 (security guard at delivery address where the buyer had no place of business).

¹⁴⁰ *Galbraith and Grant Ltd v Block* [1922] 2 K.B. 155 at 157.

¹⁴¹ See below, para. 10-033.

port of shipment is a condition. But in other cases, the place of delivery might well be considered to be an intermediate term, breach of which would entitle the buyer to treat the contract as repudiated only if delivery at the wrong place deprived him substantially of the whole benefit of the contract. From the buyer's inability to terminate where the consequences of the seller's breach are insufficiently severe, it does not necessarily follow that the buyer is compelled to accept delivery in the wrong place and thus perform in a way that the contract does not require him to perform. It may be that the seller retains the right to deliver or tender delivery of the goods in the right place. The seller in such a case might then be unable to deliver the goods at the agreed place, either timeously or at all, in which event the buyer would be able to terminate the contract. If the buyer chooses or is compelled to accept the delivery, he may recover the costs and expenses incurred in forwarding the goods to the agreed place of delivery.¹⁴⁴ However, he may be held to have waived or to be estopped from insisting on strict compliance with the terms of the contract as to the place of delivery by taking or agreeing to take delivery at some other place.¹⁴⁵

4. TIME OF DELIVERY

Express stipulations According to the Sale of Goods Act 1979 s.10(2), whether a stipulation as to time (other than as to time of payment) is or is not of the essence of the contract depends on the terms of the contract.¹⁴⁶ The parties are therefore at liberty to stipulate in the contract that time is to be of the essence in relation to the seller's obligation to deliver within an agreed time. If no such stipulation is inserted, but the parties have nevertheless fixed a time for the delivery of the goods, s.10(2) would still require that the nature of this term be determined by reference to the terms of the contract. It was, however, pointed out by McCardie J. in *Hartley v Hymans*¹⁴⁷ that the common law and law merchant did not make the question whether time was of the essence depend upon the terms of the contract, unless those terms were express on the point. It looked rather to the nature of the contract and the character of the goods dealt with. There is no presumption or rule of law that stipulations as to time of delivery are of the essence of a contract of sale of goods.¹⁴⁸ But, in commercial contracts, they are frequently so construed, even

8-025

¹⁴² *Bowes v Shand* (1877) 2 App. Cas. 455 at 467, 480; *Aruna Mills Ltd v Dhanrajmal Gobindram* [1968] 1 Q.B. 655 at 665.

¹⁴³ *Petrograde Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep. 142.

¹⁴⁴ *Peter Cremer v Brinkers' Groudstoffen BV* [1980] 2 Lloyd's Rep. 605.

¹⁴⁵ *Peter Turnbull & Co Pty Ltd v Mundas Trading Co (Australasia) Ltd* [1954] 2 Lloyd's Rep. 198.

¹⁴⁶ By analogy at common law, this section, along with the case law qualifying it, should apply to sui generis supply contracts of the sort considered in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23; [2016] A.C. 1034.

¹⁴⁷ *Hartley v Hymans* [1920] 3 K.B. 475 at 483. Contrast *Bramwell B in Tarrabochia v Hickie* (1856) 1 H. & N. 183 at 188. See also *PT Surya Citra Multimedia v Brightpoint Singapore Pte Ltd* [2018] SGHC 245 at [63]–[64] and [74].

¹⁴⁸ *Compagnie Commerciale Sucres et Denrées v Czarnikow (C) Ltd (The Naxos)* [1990] 1 W.L.R. 1337 at 1347; *Thunderbird Industries LLC v Simoco Digital UK Ltd* [2004] EWHC 209 (Ch); [2004] 1 B.C.L.C. 541 at [14]; *PT Surya Citra Multimedia v Brightpoint Singapore Pte Ltd* [2018] SGHC 245 at [71] (citing with approval this work). The question was left open in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd (The Spar Capella, Star Vega and Spar Draco)* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep. 447 at [56].

tion,²²⁶ such as any estimate given for the time taken to perform, the participation of the party receiving performance or of a third party, and the cause of any delay in performance.²²⁷ A failure to deliver the goods within a reasonable time may amount to a breach which entitles the buyer to treat himself as discharged from further liability under the contract of sale.²²⁸ If the delivery term is not a condition, significant difficulties are presented by having to determine, first, when a reasonable time has elapsed, and then, secondly, whether subsequent delay amounts to a breach going to the root of the contract.²²⁹

8-035 Delivery on request If the seller is under an obligation²³⁰ to deliver the goods to the buyer "on request" or "as required" or on similar terms, he is not bound to deliver the goods unless and until the buyer has requested him to do so.²³¹ Once the buyer has made his request, he is then under a duty to deliver the goods as soon as the buyer is ready to receive them,²³² subject to any contractual requirement that delivery be made within a reasonable time.²³³ Where the time for the buyer's request is not limited or fixed, the general rule is that the seller is not discharged by the fact that the buyer has not made any request within a reasonable time after the contract.²³⁴ But the seller may, after the expiration of a reasonable time, give the buyer notice that he should make known his requirements; and, if the buyer does not then request delivery of the goods within a reasonable time, after notice, the seller may treat himself as discharged from further liability.²³⁵

8-036 Delivery conditional on buyer's act If delivery by the seller is to take place upon the performance of some act by the buyer, e.g. giving delivery instructions,²³⁶ supplying containers, or providing a means of carriage,²³⁷ the seller is not in default for

²²⁶ *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239; [2005] Info. T.L.R. 294 at [15]; *Ostfriesische Volksbank EG v Fortis Bank* [2010] EWHC 361 (Comm); *Urban I (Blom Street) Ltd v Ayres* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 at [49].

²²⁷ *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC) at [144]; applied in *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ; [2005] Info. T.L.R. 294 at [15].

²²⁸ *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep. 17 at 28. But see s.31(2) of the Act (delivery by instalments); below, para.8-065. For the measure of damages where no time is fixed for delivery, see below, para.17-010.

²²⁹ See *Urban I (Blom Street) Ltd v Ayres* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756.

²³⁰ See below, para.8-051.

²³¹ *Birks v Trippet* (1666) 1 Wms. Saund. 32; *Bowdell v Parsons* (1808) 10 East 359; *GN Ry v Harrison* (1852) 12 C.B. 576; *Jones v Gibbons* (1853) 8 Ex. Ch. 920 at 922. But even if no request is received, the seller may be in breach of contract if he disposes of the goods or if he declares his unwillingness to deliver: *Bowdell v Parsons* (1808) 10 East 359; *Leeson v North British Oil and Candle Co* (1874) Ir. R. 8 C.L. 309; *Wingold v William Looser & Co* [1951] 1 D.L.R. 429.

²³² *European Grain & Shipping Ltd v David Geddes (Proteins) Ltd* [1977] 2 Lloyd's Rep. 591; *Tradax Export SA v Italgrani di Francesco Ambrosio* [1986] 1 Lloyd's Rep. 112; *Compagnie Commerciale Sucres et Denrées v Czarnikow (C) Ltd (The Naxos)* [1990] 1 W.L.R. 1337; *Becher (Kurt A) GmbH v Roplak Enterprises* [1991] 1 Lloyd's Rep. 277 at 283.

²³³ *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91, 105.

²³⁴ *Jones v Gibbons* (1853) 8 Ex. Ch. 920; *Pearl Mill Ltd v Ivy Tannery Co Ltd* [1919] 1 K.B. 78 at 81-83.

²³⁵ *Jones v Gibbons* (1853) 8 Ex. Ch. 920; *Pearl Mill Ltd v Ivy Tannery Co Ltd* [1919] 1 K.B. 78 at 81. cf. *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA* [1985] 1 W.L.R. 925 at 938-939. But see s.31(2) of the Act (delivery by instalments); below, para.8-065.

²³⁶ See *Horn v Ministry of Food* [1948] 2 All E.R. 1036. See also *Miguel Mico (London) Ltd v Widdop (H) & Co* [1955] 1 Lloyd's Rep. 491.

²³⁷ See below, para.20-095 (f.o.b. contracts).

non-delivery until the stipulated act has been performed.²³⁸ Where each party is bound²³⁹ to co-operate with the other²⁴⁰ to secure delivery of the goods to the buyer, the implication is that each will use due diligence in performing his part.²⁴¹

Hour of delivery By s.29(5) of the 1979 Act, demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour.²⁴² What is a reasonable hour is a question of fact.²⁴³

Delayed delivery The buyer is entitled to claim damages for late delivery of the goods.²⁴⁴ Further, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.²⁴⁵

Early delivery If a time has been fixed for delivery, it would appear that delivery before that date could be refused by the buyer.²⁴⁶ If, however, the buyer accepted the early delivery, he would probably be held to have waived his right to object that the delivery had been made before the due date.²⁴⁷

Time in overseas sales The nature and effect of stipulations as to the time of shipment in c.i.f.²⁴⁸ and f.o.b.²⁴⁹ contracts, and the time allowed for tender of documents,²⁵⁰ are discussed later in this book.

²³⁸ *Travers v Richardson* (1920) 20 S.R.N.S.W. 367; *Norman v Ackland* [1915] S.A.L.R. 177; *Tradax Export SA v Italgrani di Francesco Ambrosio* [1986] 1 Lloyd's Rep. 112; *Compagnie Commerciale Sucres et Denrées v Czarnikow (C) Ltd (The Naxos)* [1990] 1 W.L.R. 1337. See also below, para.20-101.

²³⁹ See *Bateson*, [1960] J.B.L. 187; *Burrows*, (1968) 31 M.L.R. 390.

²⁴⁰ On the duty to co-operate, see *Mackay v Dick* (1881) 6 App. Cas. 251 at 263; *Sprague v Booth* [1909] A.C. 576 at 580; *Kleinert v Abosso Gold Mining Co* (1913) 58 S.J. (P.C.) 45; *Terry v Moss's Empires Ltd* (1915) 32 T.L.R. 92; *Colley v Overseas Exporters Ltd* [1921] 3 K.B. 302 at 309; *Pound (AV) & Co Ltd v Hardy (MW) & Co Inc* [1956] A.C. 588 at 608, 611; *Kyprianou v Cyprus Textiles Ltd* [1958] 2 Lloyd's Rep. 60. cf. *Mona Oil Equipment and Supply Co Ltd v Rhodesia Ry* [1949] 2 All E.R. 1014; *Hargreaves Transport Ltd v Lynch* [1969] 1 W.L.R. 215; *Becher (Kurt A) GmbH v Roplak Enterprises* [1991] 1 Lloyd's Rep. 277 at 282-284; *Hudson Bay Apparels Brand LLC v Umbro International Ltd* [2009] EWHC 2861 (Ch); [2010] E.T.M.R. 15 at [117] et seq.; *Swallowfalls Ltd v Monaco Yachting & Technologies SAM* [2014] EWCA Civ 186; [2014] 2 Lloyd's Rep. 50. See also *Chitty on Contracts*, 33rd edn, Vol.I para.14-025 (export and import licences).

²⁴¹ *Ford v Cotesworth* (1868) L.R. 4 Q.B. 127; (1870) L.R. 5 Q.B. 544.

²⁴² A similar common law provision should apply to sui generis supply contracts of the sort considered in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23; [2016] A.C. 1034.

²⁴³ This replaces the technical rules of law laid down in *Startup v Macdonald* (1843) 6 M. & G. 593.

²⁴⁴ See below, para.17-038.

²⁴⁵ Sale of Goods Act 1979 s.20(2); above, para.6-019.

²⁴⁶ But it is doubtful whether he could treat the contract as repudiated. cf. *Bowes v Shand* (1877) 2 App. Cas. 455 (c.i.f. contract); Vienna Convention on Contracts for the International Sale of Goods (CISG) Art.52(1) (above, para.1-024).

²⁴⁷ See above, para.8-030.

²⁴⁸ See below, paras 19-022 to 19-024.

²⁴⁹ See below, paras 20-063 to 20-065.

²⁵⁰ See below, para.19-097.

smaller quantities separately (up to 2,000 tons at a time) spread over a period.⁴⁸ Similarly, with some types or quantities of goods, negotiations with potential sellers might take several days: in these circumstances, the market price should be fixed on the assumption that the hypothetical purchaser had begun to negotiate sufficiently far ahead to enable a purchase to be made on the day in question.⁴⁹ In another case, where the sellers failed to deliver goods of merchantable quality⁵⁰ at a UK port, the Court of Appeal held⁵¹ that the fact that there was a market for the purchase of similar goods in India did not impose on the buyers a "duty" to mitigate by ordering substitute goods from India. The reasons given for this ruling were that the substitute goods would reach England too late, viz. about eight months after the delivery date in the contract, and that the buyers could not be under a duty to buy from "some unknown seller in India".⁵²

17-006 If the goods were to be manufactured specially to suit the particular requirements or specifications of the buyer it is most unlikely that there would be an available market in which he could buy suitable substitute goods.⁵³ Where goods are in short supply, so that retail sellers have agreed to a fixed price for selling the goods, a "black market" operating in defiance of contractual obligations has been treated as relevant to fix the market price when that is the only source of substitute goods available to the disappointed buyer.⁵⁴

17-007 Where the "prima facie" rule should not apply Section 51(3) is only a "prima facie" rule, and will not apply when the parties ought, at the time of making the contract, to have contemplated as reasonable men⁵⁵ that the rule would not compensate the buyer for his loss, should the seller fail to deliver.⁵⁶ In a case dealing with the assessment of the buyer's damages for breach of warranty (s.53) the Court of Appeal said⁵⁷ that the basic rule is s.53(2), the provision enacting the basic rule in *Hadley v Baxendale*, which corresponds to s.51(2); and that the "market value" rule in s.53(3), which corresponds to s.51(3), should not apply if it would give the buyer "more than his true loss". If the analogy of this decision is followed it may lead to courts being more willing than in the past not to apply the other "prima facie" rules in ss.50(3) and 51(3) which are based on the market price at the time of the breach. Section 51(3) will not apply if it is inappropriate in special circumstances, as where, following negotiations with the seller after his breach, the

⁴⁸ It is submitted that the period must be reasonable from the buyer's point of view (see above, para.16-071).

⁴⁹ The *Shearson Lehman* case [1990] 3 All E.R. 723 at 731 (seller's claim: breach by buyer). This assumption is consistent with the *Garnac Grain* case [1968] A.C. 1130.

⁵⁰ The buyers justifiably rejected the goods which the sellers tendered.

⁵¹ *Lesters Leather and Skin Co Ltd v Home and Overseas Brokers Ltd* (1948) 64 T.L.R. 569 (snake-skins). See below, para.19-314.

⁵² *Lesters Leather and Skin Co v Home and Overseas Brokers Ltd* (1948) 64 T.L.R. 569 at 569.

⁵³ See the authorities cited above, para.16-069 n.571.

⁵⁴ *Mouatt v Betts Motors Ltd* [1959] A.C. 71; *British Motor Trade Assoc v Gilbert* [1951] 2 All E.R. 641. See above, para.16-071.

⁵⁵ See above, paras 16-045 to 16-047.

⁵⁶ cf. on the analogous s.50(3) of the 1979 Act: *Thompson (W L) Ltd v Robinson (Gunmakers) Ltd* [1955] Ch. 177 (above, para.16-066).

⁵⁷ *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87. (See below, paras 17-057, 17-082.)

buyer finally accepted the same goods from the seller at a price lower than the market price either at the date of the breach or at the date of the final agreement.⁵⁸

(ii) The Time for taking the Market Price

Relevant time for the market price Section 51(3) specifies the time at which the market price is to be taken in assessing damages as: **17-008**

"... the time or times when [the goods] ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver."

The provisions of the contract must be looked at to determine whether a time has been fixed for delivery of the goods, and, if so, the exact time for delivery.⁵⁹ When the contract specifies that delivery is to be made by separate instalments at different times, the market price for each instalment is taken separately at the date when the particular instalment should have been delivered.⁶⁰ Where the contract fixes a period within which the seller is to make delivery of the goods, the time for fixing the market price in the event of non-delivery is the last possible time within that period: the seller is entitled to tender delivery to the buyer up till that moment.⁶¹ If negotiations for purchase of the goods in question might take several days, the market price should be fixed on the assumption that negotiations had begun earlier so as to enable the purchase to be completed on the day in question.⁶² It has also been held that a time is "fixed" for the purposes of s.51(3) if it is fixed by reference to the happening of a future event, e.g. the arrival of a ship at a certain destination.⁶³

If the obligation imposed on the seller is to deliver the goods on a fixed date, it may be assumed that he has the whole of the usual business hours of that day in which to make delivery.⁶⁴ In the absence of the seller's repudiation of his obligation to deliver, the buyer may not know until the close of the day's usual business hours whether the seller has neglected to deliver, and it will then be impracticable for the buyer to buy substitute goods in the market on that day. It is submitted that in these circumstances the relevant time for taking the market price under s.51(3)

⁵⁸ *Pagnan (R) & Fratelli v Corbisa Industrial Agropacuaria* [1970] 1 W.L.R. 1306 (below, para.17-020). And see *Carbopego-Abastecimento de Combustiveis SA v AMCI Export Corp* [2006] EWHC 72 (Comm); [2006] 1 Lloyd's Rep. 736; and *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) in each of which the court following *Johnson v Agnew* [1980] A.C. 367 assessed damages by reference to a later valuation date where it was reasonable for the buyer to press for performance and delay exercising its right to terminate the contract. And see *Hooper v Oates* [2013] EWCA Civ 91; [2014] Ch. 287 (a sale of land case) at [38] where Lloyd L.J. said: "The breach date is the right date for assessment of damages only where there is an immediately available market for the sale of the relevant asset, or in the converse case, for the purchase of an equivalent asset ...".

⁵⁹ Above, paras 8-025 to 8-040. The contract itself may also specify the time by reference to which the damages are to be assessed: see below, para.19-301.

⁶⁰ *Brown v Muller* (1872) L.R. 7 Ex. 319; *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Re Voss* (1873) L.R. 16 Eq. 155.

⁶¹ *Leigh v Paterson* (1818) 8 Taunt. 540 at 541. See above, para.16-073. cf. above, para.17-002.

⁶² *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* (No.2) [1990] 3 All E.R. 723.

⁶³ *Melachrino v Nickoll and Knight* [1920] 1 K.B. 693 at 696.

⁶⁴ *Roper v Johnson* (1873) L.R. 8 C.P. 167 at 179 ("... there is no breach until that day has passed"). cf. *Leigh v Paterson* (1818) 8 Taunt. 540. cf. also s.29(5) (above, para.8-037).

L.J. said²¹³:

"The normal measure of damages for a failure to deliver goods is the estimated loss directly and naturally resulting, in the ordinary course of events from the seller's breach of contract, see s. 51(2). Where there is an available market for the goods, the measure of damages is prima facie the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver, see s. 51(3). However the application of s.51(2) may mean that the prima facie rule in s. 51(3) is not applied, or may be 'displaced' in the particular circumstances of the case... The issue in each case depends on the particular circumstances... In the present case, the sale contracts formed part of a series of what were effectively financing transactions... [T]here was a proper factual foundation... for the Judge's conclusion that 'it was always contemplated' that Euro-Asian would nominate the same cargo to perform the Real Oil contracts that Euro-Asian nominated to perform the sale contracts, so that he was entitled to his view that the damages he awarded was the measure of loss contemplated by the parties."

- 17-029 Loss on a resale where there is an available market** The buyer may have contracted to sell to his sub-buyer the very same goods as he bought from the seller, or he may have fixed the same delivery date in the contract of resale as in the original contract.²¹⁴ In these two situations, when the seller fails to deliver on the due date, the buyer cannot, despite the presence of an available market, avoid loss under the contract of resale: but the buyer can recover damages for that loss only where the seller should have contemplated, at the time the original contract was made, both that the buyer was, or was probably,²¹⁵ buying for resale,²¹⁶ and that the buyer could perform his obligations under a contract of resale only by delivering the same goods²¹⁷:

"If ... the sub-sale is of the selfsame thing ... then ex hypothesi the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller."²¹⁸

The mere fact that sub-sales may be within the reasonable contemplation of the parties at the time the contract is made does not oust the market price rule.²¹⁹ Normally,

²¹³ *Euro-Asian Oil SA v Credit Suisse* [2018] EWCA Civ 1720; [2019] 1 Lloyd's Rep. 444 at [72]. King L.J. and Dame Elizabeth Gloster DBE agreed.

²¹⁴ *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 K.B. 535 at 541; *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 489–490.

²¹⁵ See below, para.17-030.

²¹⁶ Or that the buyer has already entered into an existing sub-contract and was buying in order to fulfil that particular contract: *Aryeh v Lawrence Kostoris & Son Ltd* [1967] 1 Lloyd's Rep. 63 at 68.

²¹⁷ *Re R and H Hall Ltd and WH Pim (Junior) & Co's Arbitration* [1928] All E.R. Rep. 763 (see below, paras 17-030 et seq.); *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 489–490; *Aryeh v Lawrence Kostoris & Son Ltd* [1967] 1 Lloyd's Rep. 63 at 67–68, 72; and see above, para.16-048. cf. *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422 at 436 (below, para.17-082).

²¹⁸ *Williams Bros v Ed T Agius Ltd* [1914] A.C. 510 at 523 (below, para.17-032). See also *The Arpad* [1934] P. 189 at 215 ("If the court is dealing with a case in which the sub-sale is a sale of the selfsame thing, that involves the fact that there is no market in which the thing sold can be bought, but only a market in which it can be sold").

²¹⁹ Where the buyer is a trader, most sellers would be able to contemplate that possibility: *The Arpad* [1934] P. 189 at 230; *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 489. But cf. the willingness of the CA not to apply the prima facie "market value" rule in s.53(3) of the 1979 Act: *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87. (See below, paras 17-057, 17-082.)

when the seller knows²²⁰ that the buyer is a trader buying for the purposes of resale, the seller will be able to contemplate that, if he fails to deliver, the buyer will be able to buy substitute goods in the market in order to fulfil his contracts of resale.²²¹

Hall v Pim For loss of profits under a sub-sale to be recoverable, the first part of the test requires proof of the seller's actual or imputed knowledge of the sub-sale. The buyer may be able to prove that the seller knew, at the time of contracting, that the buyer definitely intended to resell.²²² But actual knowledge of a definite intention is not essential: the buyer may also recover loss of profits under a resale where the seller should have known that it was "probable" that the buyer would resell.²²³ In *Re R and H Hall Ltd and WH Pim (Junior) & Co's Arbitration*,²²⁴ the buyers bought (at 51s. 9d. a quarter) an unascertained²²⁵ cargo of 7,000 tons of Australian wheat under a c.i.f. contract,²²⁶ which contained clauses expressly recognising that the buyer might resell during the voyage.²²⁷ The market price rose after the contract was made, and the buyers resold to a sub-buyer at a higher price (56s. 9d.); later the sub-buyer resold, at a yet higher price (59s. 3d.), back to the buyers.²²⁸ When the ship²²⁹ arrived, the sellers failed to deliver (having previously sold the cargo to a different buyer) and the market price had fallen to 53s. 9d. a quarter. The sellers were prepared to pay as damages the difference between the contract price and the market price on the date of the ship's arrival, but the buyers claimed²³⁰ the 5s. a quarter difference between the contract price and the price at which they had resold.²³¹ The House of Lords held that the terms of contract showed:

²²⁰ Or ought reasonably to have contemplated.

²²¹ *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 489 ("what is contemplated is that the merchant buys for resale but if the goods are not delivered to him he will go out into the market and buy similar goods and honour his contract in that way"); *Aryeh v Lawrence Kostoris & Son Ltd* [1967] 1 Lloyd's Rep. 63 at 67–68. See also *Williams v Reynolds* (1865) 6 B. & S. 495; and *Goknur Gida Maddeleri Enerji v Organic Village Ltd* [2019] EWHC 2201 (QB) at [43].

²²² e.g. *Frank Mott & Co Ltd v Muller & Co (London) Ltd* (1922) 13 Ll. L.R. 492; *Household Machines Ltd v Cosmos Exporters Ltd* [1947] K.B. 217 at 219.

²²³ *Re R and H Hall Ltd and WH Pim (Junior) & Co's Arbitration* [1928] All E.R. Rep. 763; *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 K.B. 535 at 540 ("... it is enough if both parties contemplate that the buyer will probably resell and the seller is content to take the risk"). cf. above, para.16-046. And see *Seven Seas Properties Ltd v Al-Essa (No.2)* [1993] 1 W.L.R. 1083, 1087–1088 (sale of land case) for an exposition and application of the relevant principles.

²²⁴ In *Re R and H Hall Ltd and WH Pim (Junior) & Co's Arbitration* [1928] All E.R. Rep. 763.

²²⁵ The particular cargo was, according to the terms of the contract, to be identified by the seller's nomination before a certain date: thus, the House of Lords was able to treat it as a "specific cargo": *Re R and H Hall* [1928] All E.R. Rep. 763 at 765, 768, 769, 771, 772, 774.

²²⁶ See below, paras 19-001 et seq., for the nature of such a contract.

²²⁷ This type of contract might, depending on the circumstances, be one where the sub-buyers are "identified" as third parties intended to have an enforceable claim against the seller under the Contracts (Rights of Third Parties) Act 1999: see, above, para.2-026; below, paras 17-080, 18-009.

²²⁸ The buyers were actually agents and were acting for different principals in the third contract: *Re R and H Hall* [1928] All E.R. Rep. 763 at 773.

²²⁹ Whose cargo the sellers had appropriated to the original contract.

²³⁰ The buyers also claimed a declaration that they were entitled to recover all damages payable by them to their sub-buyers as a result of their inability to deliver to the sub-buyers (see below, para.17-036).

²³¹ The sellers contended that the damages should be only 2s. a quarter (the difference between the contract price and the market price on the ship's arrival).

17-053 The relevant time for ascertaining values Section 53(3) speaks of the value of the goods "at the time of delivery to the buyer". In *Jones v Just*,⁴¹³ a case before the 1893 Act, the buyers bought "fair current Manilla hemp", but the sellers, in breach of their contract,⁴¹⁴ delivered damaged hemp. After the date of the contract the market price rose, so that the buyers were able to resell the damaged hemp at a price nearly equal to the contract price. But it was held that the buyers were entitled to damages assessed as the difference between the value of the damaged hemp when it arrived, and the value at the same date of hemp up to the contractual standard. The buyer was entitled to the rise in the market price between the contract and the delivery, and the court treated as irrelevant the price at which the buyer had actually resold the goods at a date later than the date of delivery.⁴¹⁵ Section 53(3) clearly accepts this position. If there were separate deliveries, the measure of damages in s.53(3) should be applied separately to each delivery.⁴¹⁶

Section 53(3) lays down only a "prima facie" rule, from which the court may depart in appropriate circumstances.⁴¹⁷ For instance, the time when the actual value of the goods in their defective state is assessed may be postponed until the defect is discovered.⁴¹⁸ Similarly, when the seller knows that the buyer intends to resell the goods to a sub-buyer at another place, and that the goods will not be examined until they reach the sub-buyer (e.g. because they are packaged), the date at which the latter examines the goods may be the date at which the market price should be taken to assess the buyer's damages for the defective condition of the goods.⁴¹⁹ A war-

⁴¹³ *Jones v Just* (1868) L.R. 3 Q.B. 197.

⁴¹⁴ The case was mainly concerned with the terms to be implied in the contract.

⁴¹⁵ cf. *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep. 65 (above, paras 16-058, 16-078). cf. also *Pagnan (R) & Fratelli v Corbisa Industrial Agropacuaria* [1970] 1 W.L.R. 1306 (above, para.17-020).

⁴¹⁶ *Slater v Hoyle and Smith Ltd* [1920] 2 K.B. 11 at 19 (the judge at first instance had used "a general average", and Scrutton L.J. agreed that the precise measure would have been "an almost impossible task": at 19).

⁴¹⁷ *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 CA (see below, paras 17-057, 17-082). And see *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) at [116]–[118] and [131] where the court held that the damages should be assessed not at the time of delivery to the buyer (August 13) but at the time that the goods were rejected after tests carried out on board the vessel revealed that the goods were contaminated (August 28). The goods had been delivered to the buyer on August 13 but the test results had become available on August 27 and the rejection occurred on August 28. In *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) at [165]–[166], the court observed that the question whether some other date than the date of delivery should be chosen was closely associated with the question of mitigation of damage and considered that in that case the date at which damages should be assessed should reflect the fact that the buyer, on discovering the defect in the property delivered, gave the seller an opportunity to cure the breach and set a deadline for the cure. The court took the first working day after the passing of the deadline as the appropriate date for the calculation of damages and calculated damages as at that date.

⁴¹⁸ *Naughton v O'Callaghan* [1990] 3 All E.R. 191. In *Bominflot Bunkergesellschaft für Mineralöle mbH v Petroplus Marketing AG* [2012] EWHC 3009; [2013] 1 Lloyd's Rep. 360 (Comm) it was held that since the defect in the goods had been latent and had only been discovered after arrival of the goods at the port of destination, the appropriate time for measuring the loss was the time at which the buyer had been able to resell the goods after discovering the defect, and not the date of the original delivery to the buyer.

⁴¹⁹ *Van den Hurk v Martens (R) & Co Ltd* [1920] 1 K.B. 850. See above, para.12-045. cf. the similar ruling in *Kwei Tek Chao v British Traders Ltd* [1954] 2 Q.B. 459 (below, paras 19-324, 19-339). Normally, the place of delivery is the place for examination of the goods under s.34(2) of the 1979 Act: see above, para.12-045; below, paras 19-382, 20-204 et seq., 20-215. On the question of the "time of delivery" in a c.i.f. contract, see below, paras 19-265, 19-339.

ranty as to quality may relate to the future⁴²⁰ (e.g. that seed will produce a certain crop) so that there can be no question of the buyer's opportunity to resell the defective goods until the defect becomes apparent at a later date. The market value test should not be applied until the future event is known,⁴²¹ since s.53(3) assumes that the buyer could immediately resell the defective goods in the market. Where, however, the seller, by his negotiations with the buyer, delayed the resale of the defective goods for a period after delivery to the buyer and discovery of the defect, the price at the date of the resale was taken as the value of the goods which were delivered by the seller.⁴²²

Cost of remedying the defect⁴²³ Where the market value of the defective goods cannot be ascertained, because there was no market in which they could be disposed of, damages may be awarded on the basis of the cost of bringing the goods up to the contractual standard which would make them saleable.⁴²⁴ This is similar to the position where the seller fails to deliver the goods, and there is no available market in which to buy substitute goods: the buyer may buy the nearest equivalent goods which are available, and recover as damages both the cost of procuring them and the cost of adapting them to meet the contractual standards.⁴²⁵

Cost of buying substitute goods⁴²⁶ In some circumstances the buyer may be entitled to claim, as damages for defective quality, the cost of buying substitute goods to perform the function intended to be performed by the contractual goods.⁴²⁷ The House of Lords, in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*,⁴²⁸ accepted that the cost of substitute machines could be awarded, but held that the damages should take account of any extra profit to the buyer resulting from the replacement of the defective machines. The seller agreed to deliver and erect steam turbines of a specified kilowatt capacity. The turbines were delivered but the buyers complained that they failed to comply with the contractual provisions with respect to economy and steam consumption. Several years later, after experience of the defective supply of power from the seller's turbines, the buyers decided that they would replace the seller's turbines with eight new turbines of a different manufacturer, which were an improved type and of a greater kilowatt capacity than the seller's. The arbitrator found that the superiority of the newer machines was so great in efficiency and in

⁴²⁰ See above, para.10-021.

⁴²¹ *Ashworth v Wells* (1898) 14 T.L.R. 227 (below, para.17-065).

⁴²² *Loder v Kekule* (1857) 3 C.B.(N.S.) 128 at 140.

⁴²³ A consumer will have the remedies provided in the Consumer Rights Act 2015 on which see Ch.14.

⁴²⁴ *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All E.R. 136 at 156. (The judge also allowed damages for the consequent loss of profits during the period when the machines were being overhauled.) The cost of repairs to the goods was also accepted as a basis for damages in *Mondel v Steel* (1841) 8 M. & W. 858 at 872 (above, para.17-048). cf. above, para.17-023. And see also *Zuvela v Geiger* [2007] WASCA 138 where the court awarded damages based substantially on repairs carried out to the goods which were defective on delivery. In *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm) at [116]–[122], it was said that s.53(3) rests on an assumption that there is an available market. In the absence of a market it was unrealistic to assess damages on a difference in value basis rather than the reasonable cost of repairing to warranted condition.

⁴²⁵ Above, paras 17-023 to 17-025.

⁴²⁶ See above, para.17-054 n.423

⁴²⁷ cf. above, paras 17-023 to 17-025.

⁴²⁸ *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] A.C. 673.

resulting from the seller's breach of warranty, since public policy is not in question.⁵⁰⁷

(iii) Loss of Profit

17-065 The buyer's loss of profit⁵⁰⁸ Where, at the time of making the contract, the seller knew, or ought reasonably to have contemplated, that the buyer intended to use the goods to produce a profit,⁵⁰⁹ and that a breach of the seller's undertaking as to description or quality of the goods would impede that profit-making, the buyer may recover damages for his loss of profits caused by the breach.⁵¹⁰ In one case,⁵¹¹ brewers bought sugar for making beer, but the sugar was poisoned with arsenic. The brewers were able to recover the market value of the beer in their stock which had to be destroyed, and the court expressly recognised that this market value would include the brewers' profits in making the beer, as well as their costs of production. In another case, a farmer bought seed potatoes of a specified type, but those delivered were mixed with an inferior type. When a crop of mixed potatoes resulted, the farmer's damages were assessed as the difference between: (a) the market value of the normal crop which would have resulted if the seed potatoes had complied with the contractual description; and (b) the value of the mixed crop actually grown.⁵¹²

Where there are several different uses to which the buyer might put the goods, the seller will be liable for the buyer's loss of profits in respect of a particular category of use only when the seller knew, or ought reasonably to have contemplated, that the buyer intended that category of use.⁵¹³ In one case⁵¹⁴ a bull was sold at an auction to a farmer who hoped to improve his butterfat production and who relied on a warranty in the auction catalogue that tests of the milk of the bull's dam had averaged a certain percentage of butterfat content. The farmer discovered three years later that this statement was incorrect and he sued to recover the resulting loss in value of every calf sired by the bull during these years. The court, however, refused to award damages beyond those specified in s.53(3),⁵¹⁵ because the seller had not known that the buyer intended to use the bull for breeding, and there were other purposes for which the buyer may have bought it, viz. for resale at a profit. However, it was found to be "likely" that the buyer was "buying it for breeding

⁵⁰⁷ *Proops v Chaplin (WH) & Co* (1920) 37 T.L.R. 112.

⁵⁰⁸ For loss of profits under a sub-sale see below, para.17-067. For a general loss of custom, see below, para.17-068.

⁵⁰⁹ The seller must have actual or imputed knowledge of the category of use intended by the buyer: *Bunting v Tory* (1948) 64 T.L.R. 353.

⁵¹⁰ See, in addition to the cases cited below: *Ashworth v Wells* (1898) 14 T.L.R. 227 (orchid sold warranted to flower white but 2 years later it flowered an ordinary purple, which was commercially worth little).

⁵¹¹ *Richard Holden Ltd v Bostock & Co Ltd* (1902) 18 T.L.R. 317.

⁵¹² *Wagstaff v Shorthorn Dairy Co* (1884) Cab. & Ell. 324. See also *Randall v Raper* (1858) E.B. & E. 84; and the facts of *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 K.B. 1003 (on appeal [1911] A.C. 394) where the sub-buyer had grown inferior seeds, and his damages appear to have been assessed on the above basis).

⁵¹³ On the parties' reasonable contemplation of the type or kind of loss in question, see above, para.16-045.

⁵¹⁴ *Bunting v Tory* (1948) 64 T.L.R. 353.

⁵¹⁵ The difference between the actual value of the bull at the time of delivery, and its value if it had complied with the warranty—the auction price would be prima facie evidence of the latter (see above, para.17-051).

purposes",⁵¹⁶ and the decision is therefore hard to reconcile with cases where the buyer was claiming damages for physical loss caused by a particular use of the defective goods. In these cases, the buyer may recover if the category of use to which the buyer put the goods was one of the possible uses within the reasonable contemplation of the seller.⁵¹⁷ It is submitted that the same should apply when the buyer claims loss of profits caused by defective goods.

Warranty as to profit-earning capacity Where the goods sold were a profit-earning machine,⁵¹⁸ which the seller undertook would perform in a specified manner or at a specified rate, the buyer may claim (subject to his "duty" to take reasonable steps to mitigate his loss) his loss of profits caused by the failure of the machine to perform as warranted.⁵¹⁹ Thus in the *Cullinane* case,⁵²⁰ where the seller warranted that a clay-pulverising machine had a certain productive capacity, but the machine failed to achieve this, the Court of Appeal held that the buyer was entitled to recover his net⁵²¹ loss of profits during the normal commercial life⁵²² of the machine⁵²³:

"The plant having been supplied in contemplation by both parties that it should be used by the plaintiff in the commercial production of pulverised clay, the case is one in which the plaintiff can claim as damages for the breach of warranty the loss of the profit he can show that he would have made if the plant had been as warranted."⁵²⁴

This means that the buyer is not limited to the amount of damages specified by the "prima facie" rule in s.53(3), viz. the difference between the market value (at the

⁵¹⁶ *Bunting v Tory* (1948) 64 T.L.R. 353 at 354. In the light of the reasoning in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48; [2009] 1 A.C. 61 (para.16-045, above) the decision in *Bunting v Tory* appears more defensible. It cannot be reasonable to think that the seller was assuming responsibility for these losses. In cases which result in physical loss to person or property, the presumed intention to bear loss may be more readily inferred: see *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48; [2009] 1 A.C. 61, per Lord Walker.

⁵¹⁷ e.g. *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 K.B. 725 at 736-739 ("sulphuric acid is used for a great variety of purposes; ... the use of the acid for food products cannot be said to be other than a well-recognised and ordinary use": at 736); *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31 (feeding stuffs sold as fit for all farm stock, which might be used for cattle, for poultry, or (as the ultimate buyer intended to use it) for pheasants and partridges). See further below, para.17-077. cf. on a range of purposes for the goods, *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] A.C. 441 (claim against the third party under s.14 of the 1979 Act: see above, para.11-050).

⁵¹⁸ Or part thereof: cf. above, para.17-041 for authority in an analogous situation.

⁵¹⁹ cf. the buyer's claim for loss of profits when the seller delays delivery of a profit-earning chattel (above, paras 17-040 to 17-042).

⁵²⁰ *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 Q.B. 292. (The case is discussed in more detail below, para.17-069, since the main issue was whether the buyer could claim both his wasted expenditure and his loss of profits.)

⁵²¹ viz. after deducting from his expected gross profits (or gross receipts) the necessary expenditure in earning it.

⁵²² The expected useful life of the machine was 10 years, but the buyer limited his claim to only three years (*Cullinane v British "Rema" Manufacturing Co Ltd* [1954] Q.B. 292 at 306-307) because he was also claiming his wasted expenditure (see below, para.17-069); in *New York Laser Clinic Ltd v Naturastudios Ltd* [2019] EWHC 2892 (QB), a claim on a collateral warranty in respect of defective goods where there was no evidence of mitigation to avoid loss, the court awarded damages for loss of expected profits on the basis of an working life of 10 years.

⁵²³ *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 Q.B. 292 at 303, 308 (at 315 Morris L.J., dissenting, accepted this proposition).

⁵²⁴ *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 Q.B. 292 at 308.

By subs.(3) of s.52, the court when making an order for specific performance also has a wide discretion to impose conditions:

"The judgment ... may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court."

Thus, the buyer may be ordered to pay the price into court as a condition of the order being made against the seller.⁸⁰² Another illustration of the terms on which an order may be made is *Re Wait*,⁸⁰³ where the court of first instance made an order in favour of sub-buyers upon payment of their share in the freight of the consignment. In ordering the specific performance of a contract to sell shares, the House of Lords required the buyer to pay interest on the purchase price which he had been entitled to retain pending the order.⁸⁰⁴

(d) Injunctions and Declarations⁸⁰⁵

17-100 Injunction Whereas specific performance is a remedy for the positive promise of the seller to deliver the goods, the remedy of an injunction is usually the order of the court restraining the breach of a purely negative promise by the seller.⁸⁰⁶ Like specific performance,⁸⁰⁷ an injunction is an equitable remedy,⁸⁰⁸ but, unlike specific performance, it is not expressly referred to in the Act.⁸⁰⁹ Section 62(2) preserves "the rules of common law" except where inconsistent with the express provisions of the Act, and it has been suggested earlier⁸¹⁰ that the rules of equity are included in this phrase. The court may use an injunction in support of an order for specific performance. In *Behnke v Bede Shipping Co Ltd*,⁸¹¹ in addition to making the order for specific performance against the sellers, as set out in an earlier paragraph,⁸¹² the court also granted an injunction restraining the sellers from parting with the ship

⁸⁰² *Hart v Herwig* (1873) L.R. 8 Ch. App. 860 at 864 (a similar injunction case: see below, para.17-100). cf. *Langen and Wind Ltd v Bell* [1972] Ch. 685 (specific performance of agreement to transfer shares granted subject to a lien to protect the transferor against non-payment of the price of the shares).

⁸⁰³ *Re Wait* [1926] Ch. 962 at 972. The CA, however, did not consider this, as it held that no order should have been made: [1927] 1 Ch. 606 (see above, para.17-096).

⁸⁰⁴ *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] A.C. 207.

⁸⁰⁵ If a third party is entitled to enforce a term of the contract under the Contracts (Rights of Third Parties) Act 1999, he may claim any remedy which would be available to him as if he were a party: see above, para.17-080; below, 18-009.

⁸⁰⁶ The order of the court must define clearly what should or should not be done by the seller. In *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC); [2011] B.L.R. 340 at [33], the court granted an interim injunction to restrain payment being made under an on-demand performance bond on the ground that there was an express negative covenant in the underlying contract restricting the circumstances in which the grantee of the performance bond could seek payment.

⁸⁰⁷ Above, paras 17-095 to 17-099.

⁸⁰⁸ *Kerr on Injunctions*, 6th edn, pp.409 et seq.; Sharpe, *Injunctions and Specific Performance*, 3rd edn, Pt I; Spry, *The Principles of Equitable Remedies*, 9th edn, Chs 4 and 5; *Ashburner's Principles of Equity*, 2nd edn, pp.384-387; *Snell's Equity*, 33rd edn, Ch.16; *Doherty v Allman* (1878) 3 App. Cas. 709 at 719-721.

⁸⁰⁹ cf. s.60 of the 1979 Act (above, para.16-096).

⁸¹⁰ Above, paras 1-007 to 1-011.

⁸¹¹ *Behnke v Bede Shipping Co Ltd* [1927] 1 K.B. 649.

⁸¹² Above, para.17-098.

to anyone but the buyer.⁸¹³ Similarly, the court has power by injunction to prevent a specific chattel from being removed out of the jurisdiction until a question relating to the chattel has been decided by the court.⁸¹⁴ So where the buyer sought specific performance of the sale to him of a German ship, which was in an English port, the court restrained the seller and the master of the ship from removing her, so that she could be delivered under the contract if the court later so ordered.⁸¹⁵ In some circumstances, an injunction may be granted which has much the same effect as an order of specific performance.⁸¹⁶ Thus, where the goods sold to the buyer are on the land of the seller, and the contract gives the buyer a right to enter the land to remove the goods, the court may grant an injunction to restrain the seller from preventing the due execution of the contract.⁸¹⁷

Normally, the court has a discretion whether or not to grant an injunction.⁸¹⁸ However, it is said that the court has no option but to grant an injunction to restrain the breach of a negative contractual undertaking.⁸¹⁹ In one case of a contract to sell all the seller's output over a two-year period, the court granted an injunction to enforce the seller's express undertaking not to sell similar goods during the period to any other manufacturer than the buyer.⁸²⁰

In another case, where the buyer agreed to take from the seller at a fixed price per unit all the electricity required for his premises for not less than five years, the buyer was restrained by injunction from taking it from any other supplier.⁸²¹ The

⁸¹³ *Behnke v Bede Shipping Co Ltd* [1927] 1 K.B. 649 at 662. The Privy Council in *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* [1909] A.C. 293 at 310 (above, para.17-096) envisaged the granting of an injunction to prevent the sellers from discriminating against the buyers in the selection of the quality of the coal to be supplied to the buyers.

⁸¹⁴ *Hart v Herwig* (1873) L.R. 8 Ch. App. 860.

⁸¹⁵ *Hart v Herwig* (1873) L.R. 8 Ch. App. 860. cf. *North v Great Northern Railway* (1860) 2 Giff. 64 (claimant hired coal wagons of special value to him; railway company could be restrained from selling them).

⁸¹⁶ Above para.17-098 n 784 and cf. *Astro Exito Navegacion SA v Southland Enterprises (No.2)* [1983] 2 A.C. 787 (injunction to buyers to sign document needed by sellers to comply with letter of credit; Master of Supreme Court to sign if buyers failed to do so). And see *Lauritzen Cool AB v Lady Navigation Inc* [2005] EWCA 579; [2006] 1 All E.R. 866 (injunction granted to restrain shipowner from employing vessel inconsistently with terms of time charter contract and restraining owner from fixing vessel with third party during term of charter).

⁸¹⁷ *James Jones & Sons Ltd v Tankerville* [1909] 2 Ch. 440 (timber growing on the seller's land: by s.61(1) of the 1979 Act "goods" are defined as including industrial growing crops which are to be severed under the contract of sale: see above, paras 1-090 to 1-094).

⁸¹⁸ *Snell's Equity*, 33rd edn, para.18-036; *James Jones & Sons Ltd v Tankerville* [1909] 2 Ch. 440 at 445-446 (a sale of goods case). On the question of Lord Cairns' Act, see above, para.17-099 n.801.

⁸¹⁹ *Snell's Equity*, 33rd edn, para.18-035(2) (quoting *Doherty v Allman* (1878) 3 App. Cas. 709 at 720). In *Priyanka Shipping Ltd v Glory Bulk Carriers Ltd* [2019] EWHC 2804 (Comm); [2019] 1 W.L.R. 6677 at [64] the court reviews the authorities and states that, whilst the thrust of Lord Cairns's dictum in *Doherty v Allman* has been accepted, the cases make plain that his remark that a court has no discretion to exercise goes too far. See the discussion of this point in *Thomas Borthwick & Sons (Australia) Ltd v South Ottago Freezing Co Ltd* [1978] 1 N.Z.L.R. 538 at 545-548 (no magic importance in express negative covenant).

⁸²⁰ *Donnell v Benner* (1883) 22 Ch. D. 835. (The restraint of trade doctrine will apply to such contracts: see above, paras 3-033 to 3-038.) In *Priyanka Shipping Ltd v Glory Bulk Carriers Ltd* [2019] EWHC 2804 (Comm); [2019] 1 W.L.R. 6677 the court restrained a buyer of a vessel (who had agreed as a term of a purchase of a vessel that the vessel would not be traded or resold for trading) from trading or reselling the vessel for trading.

⁸²¹ *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch. 799. See also *Foley v Classique Coaches Ltd* [1934] 2 K.B. 1; *Servais Bouchard v Prince's Hall Restaurant* (1904) 20 T.L.R. 574. cf. an injunction to enforce a "tied-house" covenant under which the publican agrees to take all his beer