

The background features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, creating a modern and dynamic visual effect.

LAWS 4210

Commercial Law

Sale of Goods

Formation and Statutory Regimes: General Principles

Preliminary matters: Sale of Goods Act

- Scope
- Can contract out: *Victorian Alps Wine Co Pty Ltd v All Saints Estate Pty Ltd* (2012) 34 VR 397.
- Construed in same way as a Code.

Sale of Goods Act

- ▶ Is there a contract for the sale of goods within the meaning of the Sale of Goods Act?

Contract of sale

- ▶ *Sale of Goods Act 1923 (NSW)* s 5(1)
- ▶ “Contract of sale” includes an agreement to sell as well as a sale
- ▶ *Sale of Goods Act 1923 (NSW)* s 6
- ▶ (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. There may be a contract of sale between one part owner and another.
- ▶ (2) A contract of sale may be absolute or conditional.
- ▶ (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
- ▶ (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled, subject to which the property in the goods is to be transferred.

“sale” and “agreement to sell”.

6 Sale and agreement to sell

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the *price*.

...

(3) When under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a *sale*; but when the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an *agreement to sell*.

(4) An agreement to sell becomes a sale when the time has elapsed or the conditions have been fulfilled subject to which the property in the goods is to be transferred.

Contract of sale = sale OR agreement to sell

Section 6(3):

When under a contract of sale the **property in the goods is transferred** from the seller to the buyer the contract is called a **sale**;

but when the **transfer of the property in the goods is to take place at a future time or subject to some condition** thereafter to be fulfilled the contract is called an ***agreement to sell***.

1.1 A Contract of Sale

So, for a transaction to be within the *Sale of Goods Act* there must be:

- a contract of sale;
- of goods;
- as a result of which property passes;
- for a money consideration.

Distinguishing between a sale and an agreement to sell:

- where under a contract of sale property in the goods is transferred the contract is called a “sale”
- where the transfer of the property to the goods is to take place at some future time or subject to the fulfilment of a condition the contract is called “an agreement to sell”
- when conditions in an agreement to sell have occurred such that the property in the goods is to pass, the agreement to sell becomes a sale
- different rights arise depending on whether the contract is a “sale” or an “agreement to sell”

- The subject matter of a contract of sale can be a part interest in goods
- The contract can be conditional or absolute
- There is no requirement that the contract be in writing

Exclusionary attributes of contracts outside the SOGA

The *Sale of Goods Act* does not cover:

- the sale of *choses in action* (even though they are personal property)
- Contracts for the sale of goods for other than a money consideration, for example gifts or barter.
- What about **contracts for work and materials?** (*and why does it matter???*)

Two different tests to determine whether or not a contract for work and materials comes within the *Sale of Goods Act*:

1. The “substance of the contract”: *Robinson v Graves* [1935] 1 KB 579
2. End result of the transaction: *Lee v Griffin* (1861) 1 B & S 272

Goods or work and materials

- ▶ *Robinson v Graves* [1935] 1 KB 579
- ▶ Is the main substance the transfer of title to a chattel or is the main substance the skill and experience of one of the parties with transfer of title to a chattel being ancillary to that? (substance of the contract test)
- ▶ Held that the substance of an oral contract of the painting of a portrait was the skill and experience of the artist in producing the picture and was not a contract for the sale of goods.

Goods or work and materials

- ▶ *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167 text 408.
- ▶ Deta was a furniture manufacturer which entered into an oral contract with Viscount, a toolmaker, to make a die for a one piece injection moulded plastic drawer. Was it a contract for the sale of goods or for work and materials.

Goods or work and materials

- ▶ Fullagar J preferred Blackburn J's test in *Lee v Griffin* “ *if the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but if the result of the contract is that the party has done work and labour which ends in nothing that become the subject of a sale, the party cannot sue for goods sold and delivered*”
- ▶ (resulting chattel test)

Goods or work and materials

- ▶ Fullagar J felt bound to apply the substance test from *Robinson v Graves* but was nevertheless able to conclude that the contract relating to the tool was one for the sale of goods.

Goods or work and materials

- ▶ *Toby Constructions Products v Computa Bar Sales* [1983] 2 NSWLR 48
- ▶ Sale of a computer system (3 items of hardware and 2 of software). The total price was approx \$14,000 and about \$12,000 of that was for hardware and \$2,000 for software. The seller was also installing the equipment and providing training and post sales service.
- ▶ Rogers J applied the substance test and concluded that the sale of the system *in toto* was a sale of goods. He said it may be debateable whether the sale of software alone would be a sale of goods.

Goods or work and materials

- ▶ The argument for the defendants was that the contract was for work and materials and possibly the transfer of intellectual property - that the substance of the contract was the manufacture of and transfer to the plaintiff of the software designed to make the hardware work.
- ▶ Alternatively argued that the sale of hardware and software was divisible.

Goods or work and materials

- ▶ *Friederichs v McLeay & Sons Carpets Pty Ltd* [1999] SASC 472
- ▶ Olsson J: *The first issue to be addressed is as to whether the appellant is correct in seeking to characterise the relevant contract as one for the sale of goods, which attracts the operation of the Sale of Goods Act.*

Goods or work and materials

- ▶ *Friederichs v McLeay & Sons Carpets Pty Ltd* [1999] SASC 472
- ▶ 28. The arrangement was, in practical terms, of a hybrid nature. The respondent was to supply the materials selected for the curtains and blinds, but the contract envisaged that the requisite items were to be made up to agreed measurements and then installed, ie there was a significant amount of work to be done to the materials. The ultimate obligation of the respondent was to install, in the appellants' home, items manufactured to the agreed specification.

Goods or work and materials

- ▶ 29 *In some cases there may well be a difficult line to be drawn between contracts for work done (including materials supplied) on the one hand and a contract for the sale of goods on the other. However, it seems to me that, in the instant case, the work done was, in reality, to fashion the primary materials into a customised form to fit the intended venue, ie it was, primarily, an agreement for the sale and supply of goods. Whilst these were to be "installed", they scarcely became a fixture, so as to lose their character as movable chattels. The work was incidental and peripheral to what was essentially the production and supply of chattels.*

Goods or work and materials

- 30 *The authorities bearing on this topic do not appear to be entirely settled (cf Brooks Robinson Pty Ltd v Rothfield [1951] VLR 405 at 407-8 ("the substance of the contract test") with what fell from Fullagar J in Data Nominees Pty Ltd v Viscount Plastic Products Pty Ltd [1979] VR 167 at 181-6. See also Pacific Film Laboratories v Commissioner of Taxation (1970) 44 ALJR 376 at 377 and Wansborough v Edwards (1941) 36 Tas LR 1 at 3-4). However, it seems to me that the preponderance of authority favours a conclusion that the contract in this case was for the sale of goods and not work done and materials supplied. The essential object of the work done was, as I have indicated, to produce what was clearly a chattel.*

The substance of the contract test:

If the primary purpose of the contract is the transfer of property in something which was not originally the property of the buyer, the contract is one for the sale of goods; but if the main object of the parties is the performance of certain work or the provision of certain services and it is subsidiary to that object that property is to pass from one party to another, it is not a contract for the sale of goods. The substance of the contract in this sense is to be determined from the intention of the parties objectively ascertained.

Goods

- ▶ *Sale of Goods Act 1923 (NSW)* s 5(1)
- ▶ Goods includes all **chattels personal** other than things in action and money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale
- ▶ *Sale of Goods Act 1954 (ACT)*
- ▶ "goods" includes all chattels personal other than things in action and money and also includes emblements, industrial growing crops, and things attached to or forming part of the land, that are to be severed before sale or under the contract of sale.

1.2 Goods

Categories of “goods”

- specific goods
- unascertained goods
- ascertained goods
- future goods

Specific goods

Specific goods:

S5: goods identified and agreed upon at the time a contract of sale is made

- may be presently existing goods
- may be future goods yet to be made

Unascertained goods

Unascertained goods:

- Not defined
- Are goods that are not specific goods
- At the time of contract the goods have not been appropriated
- Cannot have title transferred in them

Re Stapylton Fletcher Ltd & In re Ellis Son & Vidler

- Two wine merchants were placed into receivership.
- Each held wines which had been paid for by the customers.
- Ellis Son & Vidler had a system of segregating the wine of the various customers in a separate warehouse or warehouse area and records which indicated the quantities of wine which belonged to each individual customer. However, it was not possible to tell which wine belonged to which customer.
- Stapylton Fletcher Limited's system was less rigorous. The wine was stored together with the stock-in-trade of the business. It was not marked by markings on the cases or by inventory.

- ▶ The provisions of the *Sale of Goods Act* were relevantly the same being:
- ▶ S 16 Goods must be ascertained.
- ▶ When there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

s.23 (r.5) When there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state 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 thereupon passes to the buyer.

- It was the common intention of the parties that the wine merchants would segregate the wine, it was that segregation from the trading assets of the company (whether physically) or by separation as part of business which caused the goods to be ascertained.
- The wine which had been separated by Ellis Son & Vidler had been ascertained for the purposes of passing title to the buyers who had paid the purchase price.
- In the case of Stapylton the wine had not been allocated to any particular buyer or the buyers generally such that they were not ascertained for the purposes of the Act

Ascertained goods

- Not defined by the *Sale of Goods Act*
- Are not specific goods because they are not identified at the time of the sale
- Are goods which are identified or appropriated to the contract *after* the contract to sell unascertained goods has been entered into.

Future Goods:

- s 5: goods to be manufactured or acquired by the seller after the making of the contract of sale.
- includes goods not yet in existence or not yet acquired by the seller
- future goods cannot be the subject of a sale but only an agreement to sell

Goods

- ▶ Emblements
- ▶ A vegetable chattel or annual crop produced by labour and industry at the expense of the land occupier: *Tynte (1986) Ltd v Cmr of Stamps (SA)* 95 ATC 4571 at 4574;...Emblements are to be contrasted with *fructus naturales*, which are the natural growth of the soil, such as fruit on trees, and are defined as interests in land.
- ▶ Butterworths Australian Legal Dictionary

Goods

- ▶ *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 48 text 391
- ▶ A software fault resulted in an overestimation of numbers of payers and underestimation of the rate of the charge. The contract was for transfer of a computer program without any transfer of a disk or other tangible thing on which the program was encoded.
- ▶ Held the program itself is not goods and the transfer of the program did not constitute a transfer of goods.

Goods

- ▶ *Telstra Corporation Ltd v Hurstville City Council* (2000) 181 ALR 406 text 393
- ▶ In the context of whether local government charges on broadband cables were invalid an issue arose whether electromagnetic signals passing along coaxial cables and content carried by those signals were goods within s 90 of the Constitution.
- ▶ Held not be goods. Compared to a pay TV subscriber who does not receive either tangible property (a DVD) or the intellectual property. The viewer receives a service. Also compared to production of transcripts by shorthand writers (service rather than production of goods).

Goods

- ▶ *E v Australian Red Cross Society* (1991) 105 ALR 53
- ▶ P was infected with HIV as a result of receiving a blood transfusion following hospital surgery.
- ▶ Issue as to whether there was a contract for the supply of goods under s 71 TPA or s 19 SGA
- ▶ Contract with the hospital for “the provision of nursing services and perhaps for medical attention, but there was no contract for the supply of the blood plasma which was intended to be supplied, if necessary, and supplied free of charge.” per Lockhart J

Goods

- ▶ “ It is sometimes difficult to determine whether a particular agreement is for the sale of goods or the performance of services and the distinction between the two is often a fine one. The traditional test is to distinguish between the two is for the Court to have regard to “the substance” of the contract.” per Lockhart J
- ▶ The particular contract was held to be for the provision of services with the supply of goods such as good, tablets, dressings etc being incidental to the contract for the supply of services and the contract was not divisible.
- ▶ Note that in *PQ v Australian Red Cross Society* [1992] 1 VR 19 blood was assumed to be goods.

Contract of sale of goods distinguished:

- ▶ Security agreements
- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ **4 Savings**
- ▶ (4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Contract of sale of goods distinguished:

- ▶ Bailment - bailment assumes that ownership remains with the bailor
- ▶ contract of sale involves a transfer of ownership
- ▶ Both can be involved where a buyer gets possession before title has passed or where the seller retains possession after title has passed.

Contract of sale of goods distinguished: Licence

- ▶ *Definition used in Uniform Information Transactions Act 1923 (US)*
- ▶ S 102 (41) ‘License’ means a contract that authorizes access to, or use, distribution, performance, modification, or reproduction of, information or informational rights, but expressly limits the access or uses authorized or expressly grants fewer than all rights in the information, whether or not the transferee has title to a licensed copy. The term includes an access contract, a lease of a computer program, and a consignment of a copy. The term does not include a reservation or creation of a security interest to the extent the interest is governed by [Article 9 of the Uniform Commercial Code]”.

Contract of sale of goods distinguished:

- ▶ Exchange, gift - s 6
- ▶ Agency -
 - ▶ Agency can facilitate the creation and performance of a sale of goods contract
 - ▶ Agent not usually party to the sale
 - ▶ Agency is inherently fiduciary
- ▶ Trust - if property has passed to the buyer but the seller retains the goods then there is a bailment rather than a trust. If the seller retains property in the goods it is theoretically possible but unlikely that the seller could make an express declaration of trust.

Contract of sale of goods distinguished:

- ▶ Hire purchase - could be covered as an agreement to sell (*Lee v Butler* text 401 - contract for payment by instalments - title passes when full amount paid) but depends on terms of agreement (*Helby v Matthews* text 402 - the right to return the piano precluded the conclusion that there was a sale of goods).
- ▶ Lay-by - sale of goods where price paid by instalment and delivery delayed until the whole of the price is paid.

Price

- ▶ Note that the definition of contract of sale requires that there be a money consideration called the price.
- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ **13 Ascertainment of price**
- ▶ (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.
- ▶ (2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Price

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ **14 Agreement to sell at valuation**
- ▶ (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and the third party cannot or does not make the valuation, the agreement is avoided:
Provided that if the goods or any part thereof have been delivered to and appropriated by the buyer, the buyer must pay a reasonable price therefor.
- ▶ (2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Price

- ▶ S 13(2) provides that where the price is not determined in accordance with s 13(1) the buyer must pay a reasonable price
- ▶ Issue: Will the law infer a reasonable price in the case of a contract not executed by the acceptance of goods as opposed to a contract where there has been such acceptance.

SOGA Section 13(2) a “reasonable price”

- A reasonable price is a matter of fact to be determined by reference to all of the circumstances of the case
- Usually ascertained by reference to the current market price at the time and place of delivery
- If the current market price is an aberration for whatever reason the Court may choose another price
- The price might also reflect the cost of production together with a profit margin and taxes

Price

- ▶ *Hall v Busst* (1960) 104 CLR
- ▶ Fullagar J expressed doubts as to whether a reasonable price would be inferred in the case of an executory contract.
- ▶ Menzies J regarded s 13 as but a “recognition of the clearly-established rule that a man who, without any agreement as to price, accepts goods that he has ordered, is bound to pay a reasonable price for them” - price only payable after property had passed - s 13 wouldn’t cover breaches of an executory contract.
- ▶ Windeyer J took the view that as the definition of contract of sale covered sale and agreements to sell then implied that a reasonable price could be fixed in the case of executed and executory contracts.

Price

- ▶ *Wenning v Robinson* (1964) 64 SR (NSW) 157.
- ▶ Contract for the sale of business (dress shop) at a specified price plus stock at valuation but with no indication as to how or by whom the valuation would be made
- ▶ The purchaser failed to complete the contract.
- ▶ The plaintiff (seller) claimed damages and the defendant (buyer) claimed that the contract was unenforceable due to uncertainty and because an essential term had not been agreed.

Price

- ▶ Walsh J s 14 did not apply because it was not the case of a named third party refusing or being unable to make a valuation.
- ▶ Walsh J interpreted stock at valuation to mean that “the stock would pass from the seller to the buyer at its ‘value’, that is to say at its reasonable value, or (which is the same thing), at its reasonable price.”

Price

- ▶ The price was sufficiently fixed by the contract without having resort to s 13.
- ▶ In relation to executory contracts,
- ▶ *“Notwithstanding some of the observations made in Hall v Busst ... I cannot really doubt that an agreement in express terms, that the stock was to go at a reasonable price or at a reasonable value, would have constituted a binding executory contract.”*

Contract of sale

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ 8 Contract of sale how made
- ▶ Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties:

Provided that nothing in this section shall affect the law relating to corporations.

Contract of sale

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ **7 Capacity to buy and sell**
- ▶ Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property:

Provided that where necessaries are sold and delivered to a person who, by reason of mental incapacity or drunkenness, is incompetent to contract, the person must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such person, and to the person's actual requirements at the time of the sale and delivery.

Contract for sale of goods which no longer exist

- ▶ Goods never existed
- ▶ Goods once existed but unknown to the seller had ceased to exist prior to entry into the contract
- ▶ That at the time of contract the goods were in existence but perished before the risk passed to the buyer
- ▶ The goods existed but perished after the contract and after the buyer had assumed the risk.

Goods never existed

- ▶ *McCrae v Commonwealth Disposals Commission* (1951) 84 CLR 377.
- ▶ Commonwealth invited tenders for the purchase of an oil tanker lying on the Jourmaund Reef - no tanker ever existed.
- ▶ Was the contract void for mistake?
- ▶ The Commonwealth contracted that they had a tanker to sell in the location specified. Any mistake on the part of the purchasers was due to the “culpable conduct” of the Commonwealth.

Goods once existed but unknown to the seller had ceased to exist prior to entry into the contract

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ **11 Goods which have perished**
- ▶ Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.
- ▶ Why did this not apply to McCrae?

That at the time of contract the goods were in existence but perished before the risk passed to the buyer

- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ 12 Goods perishing before sale but after agreement to sell
- ▶ Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided.

The goods existed but perished after the contract and after the buyer had assumed the risk.

- ▶ The loss is the buyer's.
- ▶ *Sale of Goods Act 1923 (NSW)*
- ▶ 25 Risk prima facie passes with property
- ▶ Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not:
Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:
Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.