

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

# LAWS4210

# Commercial Law

Sale of Goods: Express and Implied Terms

## *Terms as to suitability of goods*

There are four main areas where goods delivered under a contract may not be acceptable:

- No correspondence with the contract description
- The goods are not fit for their purpose
- The goods are not of merchantable quality
- The goods do not correspond to a contractual sample

# Express and Implied Terms

“In examining whether a particular statutory term can be implied and if it has been breached, we should take heed of Lord Buckmaster’s statement in *Manchester Liners Ltd v Rea Ltd* [1922] 2 AC 74:

‘...its determination really depends upon the proper aspect of the facts rather than on an examination of uncertain principles of law.’

This comment applies as much to the identification and interpretation of express terms of a contract as it does to the identification and interpretation of implied terms. In other words, it is the basic rule for **contract construction** generally.

# Express Terms

- ▶ Preliminary questions concerning the identification of express terms:
  - ▶ Is the 'statement' in question in fact a contractual term or merely a representation? (see *Oscar Chess v Williams* [1957] 1 All ER 325)
  - ▶ Can the statement be a contractual term in a *collateral contract*? (see *Wells (Merstham) Ltd v Buckland Sand & Silica Ltd* [1965] 2 QB 170)
  - ▶ Is the contractual term a condition or warranty? This question is answered by examining **the contract itself** (see *Wallis Son & Wells v Pratt v Haynes* [1910] 2 KB 1003)

# Express Terms

- ▶ Preliminary questions concerning the identification of express terms:
  - ▶ What are the implications of ss.16 and 54 *Sale of Goods Act 1923* (NSW) (and equivalent provisions in the other State and Territory Acts) for contractual conditions and warranties? (see *Wallis Son & Wells v Pratt v Haynes* [1910] 2 KB 1003)
  - ▶ What are intermediate terms and how are they dealt with under the *Sale of Goods Act 1923* (NSW) and corresponding legislation in the other States and Territories? (see *Cehave NV v Bremer Handelsgesellschaft (The Hansa Nord)* [1975] 3 All ER 739)



# Conditions and Warranties

- ▶ “Condition” is not defined in the Act and the Common Law tests apply
- ▶ “Warranty” is defined in s5(1): an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated
- ▶ Whether a particular contractual term amounts to a condition or warranty, depends on the construction of the contract

*continued on next page...*



## Conditions and Warranties...

- ▶ The terms which the Act implies into the contract are categorised by the Act as conditions or warranties
- ▶ In certain situations, breaches of condition will be treated as breach of warranty [s16]



# Implied Terms

- ▶ The Act implies certain terms against the seller. The onus is on the seller to prove that it was not the intention of the parties that these terms should form part of the contract
- ▶ Implied terms under the Act
  - ▶ as to title [s17]
  - ▶ to correspond with description [s18]
  - ▶ as to quality or fitness for purpose; merchantable quality [s19]
  - ▶ sale by sample [s20]



# Implied terms under the Sale of Goods Act

- ▶ **17 Implied undertaking as to title etc**
- ▶ In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:
- ▶ (1) an implied condition on the part of the seller that in the case of a sale the seller has a right to sell the goods, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass,
- ▶ (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods,
- ▶ (3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

# Implied terms under the Sale of Goods Act



## ► title s 17

- There is an implied condition that the seller has the right to sell the goods

*Rowland v Divall* [1923] 2 KB 500

R bought a car from D - unknown to D the car had been stolen and was repossessed by police. R successfully sued D - he had not received title.

# Implied terms under the Sale of Goods Act

## ► quiet possession

- There is an implied warranty that the buyer shall have quiet possession

*Microbeads AG v Vinhurst Road Markings Ltd* [1975] 1 WLR 218 - defendants bought 3 road marking machines but didn't get quiet possession because they were sued by another party claiming their patent was being infringed

- **free from encumbrance** There is an implied warranty that the goods are free from encumbrance (such as a mortgage).



# *Niblett v Confectioners' Materials Co [1921]*

- ▶ The buyer agreed to buy condensed milk of the “Freedom”, “Tuscan” or “Nissley” brand.
- ▶ The milk was to be imported to the UK from America.
- ▶ The 1000 cartons of “Nissley” brand infringed Nestle’s trade mark.
- ▶ The buyers could not re-export the goods nor obtain them from the Commissioner of Customs until the infringing labels were removed.
- ▶ The labels were removed and the goods were sold as unmarked tins of sweetened condensed milk.



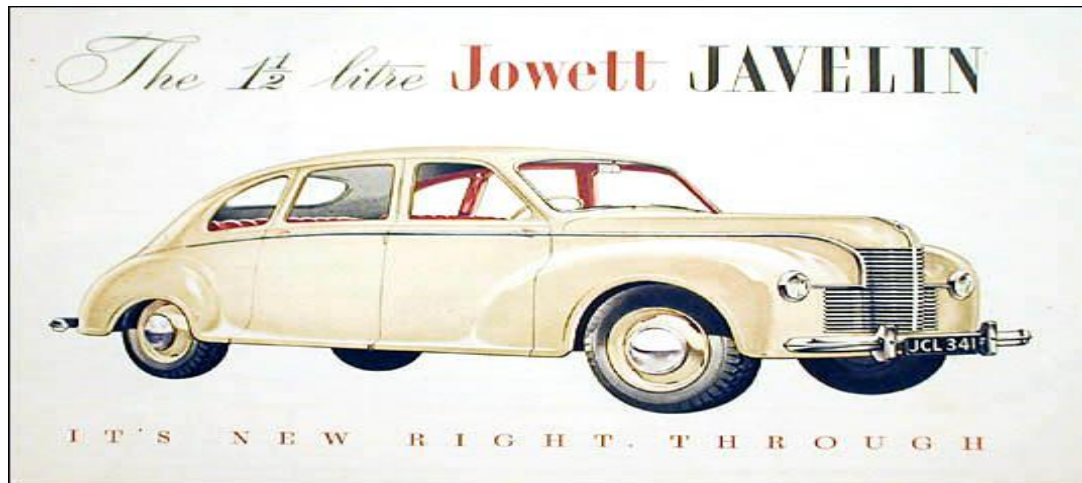
- ▶ It was held that the vendor did not have the right to sell the goods and there was therefore a breach of s.17(1) [s.15 (Qld)].
- ▶ Scrutton LJ held that at the time when title was to pass the sellers could have been restrained by injunction from selling the goods. If a vendor could be restrained by process of law from selling the goods he has not the right to sell them.

## *Niblett v Confectioners' Materials Co*

- ▶ There was also a breach of the implied warranty of quiet possession because the buyers had to strip off the labels before they could assume possession.
- ▶ That was an interference with the entitlement to quiet possession.

## *Butterworth v Kingsway Motors [1954] 1 WLR 1286*

- ▶ Mr Butterworth purchased a Jowett Javelin motor car in 1951.
- ▶ About a year later it was repossessed by the rightful owners.
- ▶ He sued the person who sold it to him and four others in the chain of buyers from the rightful owner to him.



**Bowmakers Ltd**  
The original owners.

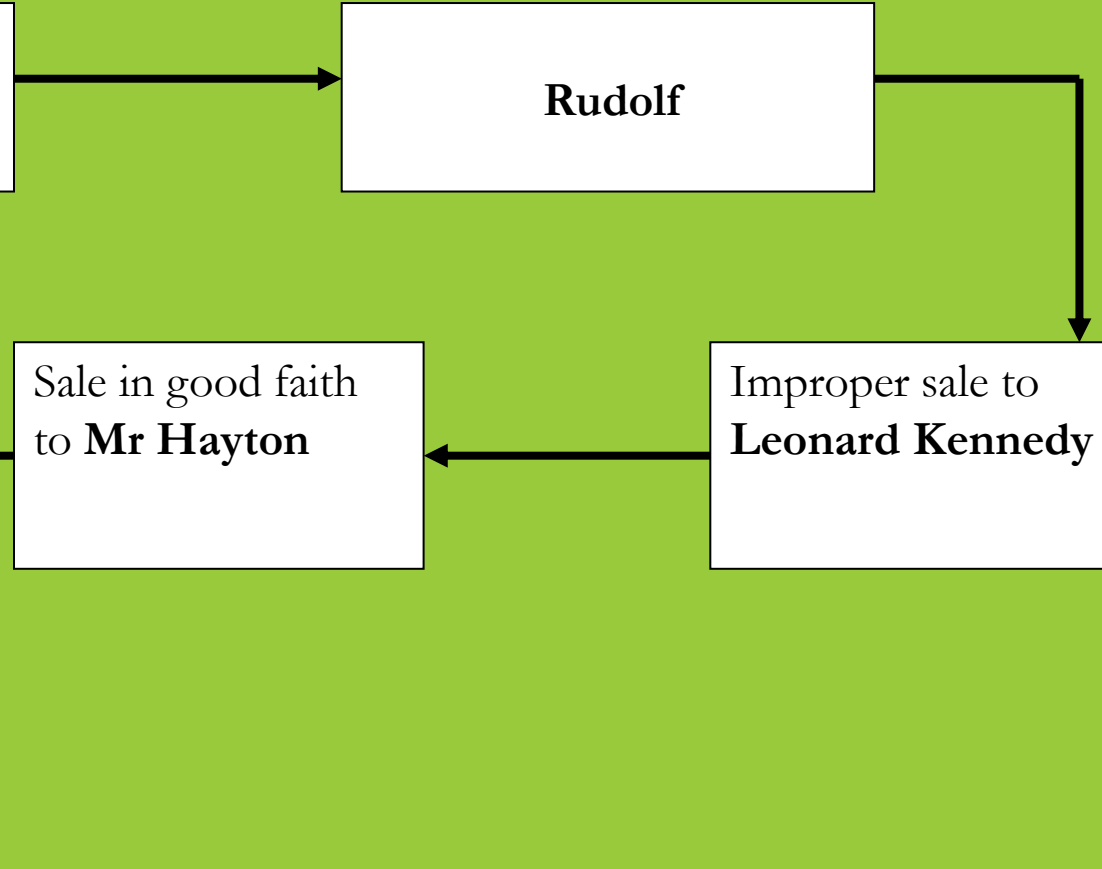
**Rudolf**

Sale in good faith to  
**Kingsway Motors**

Sale in good faith  
to **Mr Hayton**

Improper sale to  
**Leonard Kennedy**

Sale in good faith to  
**Mr Butterworth**





- ▶ Mr Butterworth was entitled to terminate the contract for breach of the agreement which he did on the date when he asked for his money back.
- ▶ It was claimed that there was no total failure of consideration because by the date of the issue of the writ, Ms Rudolf had paid the full purchase price such that there could have been no adverse claim against Mr Butterworth.
- ▶ The answer to that was that Mr Butterworth had terminated the agreement by asking for his money back before Ms Rudolf had paid out the hire purchase agreement. He was therefore entitled to recover the purchase price.

- ▶ Once Ms Rudolf had perfected her title the defective title down the line was also perfected such that Kingsway Motors was then the owner of the vehicle.
- ▶ Kingsway had a claim against Mr Hayton for breach of warranty (not condition) of title to the car. But, Kingsway Motors had to give credit for the value of the car received. The reduction in damages was the value of the car at the date on which title was acquired.
- ▶ Each purchaser was entitled to claim the difference in value back down the chain to Ms Rudolf.

## 2.2 Correspondence with description

### Correspondence with description

#### 18 Sale by description

When there is a contract for the **sale of goods by description** there is an implied condition that the goods shall correspond with the description; and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

*Joseph Travers & Sons Ltd v Longel Ltd (1947)*  
*64 TLR 150*

Sellers LJ: meaning of the expression sale by description:

Sales by description may be divided into two sales:

- (1) of unascertained or future goods, as being of a certain kind or class, or to which otherwise a 'description' in the contract is applied.
- (2) of specified goods, bought by the buyer in reliance, at least in part upon the description given or to be tacitly inferred from the circumstances and which identifies the goods.

# *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1990] 3 WLR 13*

- ▶ Christopher Hull Fine Art Ltd sold a painting said on the invoice to be a work of Gabriele Munter to Harlingdon & Leinster Enterprises Ltd.
- ▶ The painting was a forgery.
- ▶ Mr Hull was not an expert in early 20<sup>th</sup> century German impressionists.
- ▶ The agents of the buyers professed expertise in that area.



As to whether or not the sale was a sale by description.

► Norse LJ:

- The section “suggests that the description must be influential in the sale, not necessarily alone but so as to become an essential term; ie a condition of the contract. Without such influence a description cannot be said to be one *by* which the contract for sale of the goods is made.”
- In this sense one must look to the contract as a whole in order to identify what stated characteristics of the goods are intended to form part of the description by which the goods are sold.

“The description must have a sufficient influence in the sale to become an essential term of the contract and the correlative of influence is **reliance**. Indeed, reliance by the buyer is the natural index of a sale by description. It is true that the question must always be judged **objectively** and it may be said that previous judicial references have been to subjective or actual reliance. ... For all practical purposes there cannot be a contract for the sale of goods by description where it is not within the reasonable contemplation of the parties that the buyer is relying on the description.”

- ▶ The question was whether or not there can be deduced a common intention in the parties that a description given by them to the item agreed to be sold will be a condition of the contract.
- ▶ On the objective facts of the case the proper inference was that there was no common intention of the parties that the authenticity of the attribution to Gabriele Munter was a term of the agreement.



## Contrast with approach of Stuart-Smith LJ:

- ▶ If a party wishes to bring a claim on a breach of a term of contract there is no need for there to be reliance on the term.
- ▶ If it is a term that the painting is by Munter the purchaser does not need to prove that he entered into the contract in reliance on the statement.
- ▶ This distinguishes a contractual term from a mere representation.

# Correspondence with description



- ▶ *Ashington Piggeries Ltd v Christopher Hill Ltd* [1971] 1 All ER 847.
- ▶ AP had a mink farm and asked CH to make a compound feed for the mink. CH engaged N to supply herring meal of “fair average quality of the season” for the feed compound. The herring meal contained DMNA (which was produced by a chemical reaction because of the preservative agent) which was toxic for mink (although not necessarily other animals) and the mink died.

# Correspondence with description

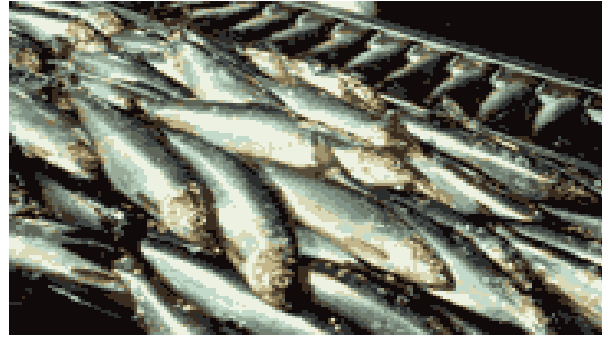
- ▶ Was there a failure to correspond with description when there was nothing added to the meal and where the meal was not necessarily harmful to other animals?
- ▶ Held by the majority that the description was Norwegian herring meal and the goods met that description.

# Correspondence with description

- ▶ The dissenting judges said that herring meal does not normally contain poison and the contaminated meal was therefore different in kind from the description.

# *Ashington Piggeries Ltd v Christopher Hill Ltd [1972]*

## *AC 441*



- ▶ Christopher Hill was the seller of mink food to Ashington Piggeries, which owned a mink farm.
- ▶ AP had asked CH to make a compound food in accordance with a formula supplied by AP (who knew the nutritional requirements of mink) called “King Size”.
- ▶ Christopher Hill agreed to and did supply a formula for food for the minks known as “Kingsize”. CH was to provide the ingredients and mix the compound.
- ▶ CH was in the business of compounding foodstuffs for animals but knew nothing about mink.

- ▶ CH entered into a contract with Norsildmel for it to supply Norwegian herring meal of 'fair average quality of the season'. The herring meal had become contaminated due to a chemical reaction and was toxic to mink.
- ▶ CH (the seller) sued AP for the price of the goods.
- ▶ AP counter-claimed for damages for breach of contract, alleging King Size did not correspond to with its description and was not reasonably fit for purpose or of merchantable quality.
- ▶ CH in turn sued Norsildmel, the supplier of the herring meal, for indemnity.

The House of Lords held no breach of the implied condition as to correspondence with description between CH and AP because the herring meal supplied was herring meal.

The fact it was contaminated and poisonous to mink was a difference in quality or condition rather than description.

Re contract between CH and N, the third party supplier - description of the goods was limited to 'Norwegian Herring Meal' and did not include phrase of 'fair average quality of the season'. Held no breach of the term.

- ▶ In the case of unascertained goods the description is confined to those words which were intended by the parties to identify the kind of goods which were to be supplied.
- ▶ “It is open to the parties to use a description as broad or narrow as they like. But ultimately the test is whether the buyer could fairly and reasonably refuse to accept the goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from that he had agreed to buy. The key to [s.18] is identification.”



- ▶ The product supplied to the mink farm met the description of “Kingsize” because it contained the expected ingredients in the expected amounts and these were the contractual descriptions.
- ▶ In the herring meal contract (between the suppliers and the importers) the identification of the minimum percentage of ingredients did not amount to an identification of the goods but merely the quality as did the statement of “fair average quality of the season”.

# Correspondence with description

- specific goods not seen by the buyer

*Varley v Whipp* [1900] 1 QB 513

Reaping machine described as new last year and had cut only 50 - 60 acres. Machine was older and in worse condition - breach - as goods did not correspond with description



# Correspondence with description

- specific goods which the buyer has seen but which are sold by description

*Beale v Taylor* [1967] 1 WLR 1193

Described as 1961  
Herald convertible -  
breach - back half was  
1961 - welded to the  
front half of an earlier  
model



# Fitness for purpose

- ▶ **19 Implied condition as to quality or fitness**
- ▶ Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
- ▶ (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether the seller be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:  
Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

The elements of s19(a) & (b) are:

1. The buyer must have made known the particular purpose for which the goods are required.
2. The purpose must have been disclosed in such a way as to make it clear that the purchaser was relying on the seller's skill and judgment;
3. The seller is in the business of supplying goods of that description.
4. The goods were not acquired under their trade or patent name.

- Purpose must be made known at or before time of contract.
- Where goods only suitable for one purpose, it will be inferred that buyer has made known purpose: *Priest v Last* [1903] 2 KB 148
- If no specific purpose made known, it will be inferred that buyer has made known that goods are bought for their normal purpose: *Priest*
- Where goods capable of more than one purpose, the buyer must make known the purpose for which they require them; if so, the suitability must be for that purpose.

- ▶ Reliance will, in general, be inferred from the fact the buyer goes to the shop with the confidence that the tradesman has selected his stock with skill and judgment, that is, the seller has bought the right goods or a good make: *Grant v Australian Knitting Mills Ltd* [1936] AC 85.
- ▶ Relevance of parties circumstance in establishing reliance illustrated by *Dowdell v Knipsel Fruit Juices Pty Ltd* [2003] FCA 851
- ▶ Reliance on seller need not be total or exclusive: *Hardwick Game Farm*

# Fitness for purpose

- *Grant v Australian Knitting Mills Ltd (1935) 54 CLR 49* - Dr Grant bought some woollen underwear and contracted dermatitis due to a chemical residue in the underpants. He successfully sued the retailer for breach of implied conditions, correspondence with description, merchantable quality and fitness for purpose. He was also successful in an action against the manufacturer in negligence.





# Fitness for purpose

*Griffiths v Peter Conway Ltd* [1939] 1 All ER 685

Griffiths had a Harris tweed coat made by a tailor for her. She developed dermatitis from wearing the coat but it would not have affected a normal person. Griffiths had abnormally sensitive skin - coat was of merchantable quality - no breach of fitness for purpose - she didn't make her particular requirements known.



## *Hardwick Game Farm v SAPPA [1969] 2 AC 31*

The case concerned feed supplied to Hardwick Game Farm by Suffolk Agricultural Poultry Producers Association (SAPPA) for feeding pheasant chicks.

The chicks died.



- ▶ The meal contained Brazilian groundnut extract which contained a toxic substance which produced mould or fungal growth.
- ▶ The plaintiff, Hardwick Game Farm, recovered damages from SAPPA for breach of the implied term as to fitness and merchantable quality. SAPPA sought to recover from the third party suppliers to it.
- ▶ It was held that the sale from the suppliers to SAPPA breached the implied term of fitness for purpose.

## Lord Reid:

- ▶ Identified that the object of disclosure of the particular purpose is to give the seller the opportunity to exercise his skill or judgment in the making or selecting of the appropriate goods.
- ▶ Therefore, it is difficult to see how a stated purpose can be a particular purpose if it is stated so widely that it could cover differing qualities of goods.
- ▶ The purpose for which the goods are required must be made known in such a way that a reasonable man in the shoes of the seller would know that his skill and judgment is being relied upon.
- ▶ SAPPA had made known to the suppliers that it wanted the meal for inclusion in compounded meal to be sold to pig and poultry farmers and that was a sufficient particular purpose to enliven the section

# Fitness for purpose



- ▶ *Henry Kendall & Sons v William Lillico & Sons Ltd* [1968] 2 All ER 444

Importers (including Kendall) imported Brazilian groundnut. They then sold it to suppliers (including Lillico). They were all members of a cattle food association. Lillico in turn sold it to manufacturers of poultry foods (SAPPA). The groundnut was suitable for cattle and older poultry but not young poultry. SAPPA sold compounded meal (made with the groundnut) to the purchasers (Hardwick Game Farm) who lost young poultry and others grew up stunted and unfit for breeding. The groundnuts were contaminated by a poison caused by a fungus.

- ▶ Had Lillico made a particular purpose known to the seller (Kendall) and if so what was that purpose?

# Fitness for purpose

- ▶ The majority said that the purpose made known (either expressly or impliedly) was to re-sell in smaller quantities to be compounded into food for cattle and poultry and there was a breach because it was not reasonably fit for that purpose.
- ▶ Lord Pearce took the view that there was a presumption of reliance on the seller's skill and judgment where a particular purpose was made known. While that may be the case in relation to retail sales the majority did not draw the same inference where dealings between traders in the same market were involved. Did the seller as a reasonable person realise that the buyer was relying on his skill and judgment?

# Fitness for purpose

- ▶ See also
- ▶ *Ashington Piggeries Ltd v Christopher Hill Ltd* [1971] 1 All ER 847.
- ▶ The seller made it clear that he knew nothing about the nutritional requirements of mink and simply agreed to manufacture a feed stuff in accordance with the formula which the buyer supplied. The purpose of the purchase of herring meal was compounding into animal feedstuff but the seller knew that may include mink.
- ▶ Seller was in breach because although the buyer had relied on his own judgment as to the suitability of the compound for mink, he relied on the seller to select and acquire good quality ingredients and to combine them satisfactorily. The seller warranted the fitness of the ingredients.
- ▶ Lord Wilberforce “a man can hardly claim that the product he sells is suitable, especially if that is a foodstuff, merely because it fails to kill more than one species to which it is fed.”

# Fitness for purpose

- *Expo Aluminium (NSW) Pty Ltd v WR Pateman Pty Ltd* (1990) ASC ¶55-978.
- Per Kirby P “all that is required is that the particular purpose should be specified. The circumstances may then, as here, indicate the reliance. What was sought were windows for a domestic residence with exposure to the wind and rain from the south. Instead of then clarifying , with its knowledge as manufacturer, the terrain category which would be appropriate, the respondent simply went ahead and manufactured windows which events were to prove were quite unsuitable for the purpose for which they were required.”



## *Stevenson v Rogers [1999] 2 WLR 1064*

### Course of seller's business to supply

- ▶ The section offers protection to the buyer where the goods were sold in the course of a business and not merely when the seller was a dealer in the type of goods sold.
- ▶ The expression “in the course of business” does not have any requirement for any regularity of dealing or any dealing in the goods.
- ▶ The purpose of the words is to distinguish between a sale made in the course of a seller's business and a purely private sale made outside the confines of the business carried on if any.

Trade name exception: *Baldry v Marshall* [1925] 1 KB 260.

- ▶ The trade name proviso only applies where buyer orders goods by use of a trade name in such a way as to show that the buyer does not rely on the seller's skill or judgment.
- ▶ If the elements of the fitness for purpose condition are made out then irrelevant that goods supplied bear a trade name.

# Merchantable quality

## 19 Implied condition as to quality or fitness

- ▶ (2) Where goods are bought by description from a seller who deals in goods of that description (whether the seller be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

- ▶ (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- ▶ (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

## Elements of s 19(2)

1. Goods must be bought by description
  2. The seller must deal in goods of that description
  3. No implied term if goods have been examined in respect of defects that examination ought to have revealed.
- Are the goods merchantable?

## Hardwick Game Farm

- ▶ “merchantable quality” meant that the goods were “commercially saleable”
- ▶ If the goods in question have many uses at different levels of quality, the use to which the goods can be put at the lowest level is its “merchantable quality” because it is commercially saleable under that description.
- ▶ The Brazilian groundnut extractions were contaminated by a poison which made it inappropriate for inclusion in feed for poultry. However, the extraction was still able to be used in feed for cattle provided that the proportion did not exceed 5%. For that reason, and because Brazilian groundnut extraction of the same type was being sold on the market, it could not be said that it was not of merchantable quality.

# Merchantable quality

- ▶ *BS Brown & Son Ltd v Craiks Ltd* [1970] 1 WLR 752.
- ▶ Buyer bought cloth that was normally used for making dresses but was saleable as cloth for industrial purposes. The buyer wanted it to make dresses but this purpose was not communicated. The price was low for dress fabric but higher than usual for industrial fabric.
- ▶ Held more than one purpose, goods are of merchantable quality if suitable for secondary purpose unless price so low as to indicate unmerchantability.

# Merchantable quality

- ▶ 64 Conditions and warranties in contracts for consumer sales
- ▶ (3) Without limiting the meaning of the expression "merchantable quality", goods of any kind which are the subject of a contract for a consumer sale are not of merchantable quality if they are not as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable to expect having regard to their price, to any description applied to them by the seller and to all other circumstances.
- ▶ 62 Definition
- ▶ In this Part, "consumer sale" means a sale of goods (other than a sale by auction) by a seller in the course of a business where the goods:
  - ▶ (a) are of a kind commonly bought for private use or consumption, and
  - ▶ (b) are sold to a person who does not buy or hold himself or herself out as buying them in the course of a business.
- ▶ See *Cavalier Marketing v Rasell* (1990) 96 ALR 375

# Sutton, Sales and Consumer Law

Goods have been said to be of merchantable quality if:

- ▶ they were saleable in the market under the description or denomination mentioned in the contract;
- ▶ they were bought for *any* purpose for which the goods would normally be used and hence were saleable under the description;
- ▶ they were reasonably suitable for the ordinary uses they were manufactured to meet;
- ▶ they were such that a buyer fully acquainted with the facts and therefore knowing what hidden defects existed would buy them without abatement in price;
- ▶ they were such that a reasonable person acting reasonably would, after a full examination, accept them under the circumstances of the case in the performance of his or her offer to buy;
- ▶ they were saleable under the description to a buyer who has full and accurate quality of their quality and who buys them for ordinary and normal purposes.



# Sale by sample

## ○ 20 Sale by sample

- (1) A contract of sale is a contract for sale by sample where there is a term in the contract express or implied to that effect.
- (2) In the case of a contract for sale by sample:
  - (a) there is an implied condition that the bulk shall correspond with the sample in quality,
  - (b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample,
  - (c) there is an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample

# International Sale of Goods:

Obligation of the Buyer and Seller and the nature of  
'implied terms' under the CISG regime

# Performance of the seller's obligations

- ▶ The seller has 2 basic obligations:
  - ▶ Deliver the goods and documents in conformity with the contract of sale
  - ▶ Guarantee conformity of the goods with the contract

# Performance of the seller's obligations

- ▶ Delivery of the goods and documents is dealt with in arts. 30 - 34.
- ▶ The guarantee of conformity of the goods with the contract is dealt with in arts. 35 - 44.
- ▶ Art. 30: The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

# Performance of the seller's obligations

- ▶ Seller's obligation that there is conformity of goods with terms of the contract and with the terms of Art 35
- ▶ **Article 35**
  - ▶ (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
  - ▶ (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
    - ▶ (a) are fit for the purposes for which goods of the same description would ordinarily be used;
    - ▶ (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
    - ▶ (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
    - ▶ (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
  - ▶ (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

# Performance of the seller's obligations

- ▶ The seller's obligation in relation to conformity of goods incorporates the following elements:
  - ▶ Fitness for purpose - similar obligation as under domestic SGA
  - ▶ Merchantability of goods - similar to merchantable quality under domestic SGA but term "merchantable quality" not used - fit for the purposes for which goods of the same description would ordinarily be used (this may vary between the buyer's and seller's countries)
  - ▶ Conformity of goods with sample - similar to domestic SGA
  - ▶ Reasonable manner of packaging - no direct domestic equivalent but note that Convention has no obligation in relation to correspondence with description

# Performance of the seller's obligations

- ▶ Seller's obligation and provisos relating to implied terms - see Art 35(3).
- ▶ Seller's obligations and latent defect
- ▶ **Article 36**
- ▶ (1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

# Performance of the seller's obligations

- ▶ Seller's obligation to ensure conformity after delivery
- ▶ **Article 36**
- ▶ (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.



# Performance of the seller's obligations

- ▶ Seller's obligations and buyer's right of examination
- ▶ **Article 38**
- ▶ (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- ▶ (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
- ▶ (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

# Performance of the seller's obligations

- ▶ Seller's obligations and notice of non-conformity
- ▶ **Article 39**
- ▶ (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- ▶ Similar issues in relation to interpretation of “reasonable time” arise as with “as soon as practicable” in art 38.

# Performance of the seller's obligations

- ▶ Seller's obligations and limitation period under the Convention
- ▶ **Article 39**
- ▶ (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

# Performance of the seller's obligations

- ▶ Seller's obligations and the self-cure remedy before date for delivery
- ▶ **Article 37**
- ▶ If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.