Commercial Law Concentrate: Law Revision and Study Guide (6th edn)
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6. Non-existence and perishing of goods

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter examines the effect of the contract of sale of goods in the event that the goods never existed or, if they did exist at one time, are no longer in existence. It first looks at the contract for the sale of specific goods which, without the knowledge of the seller, have perished at the time when the contract is made and then considers an agreement to sell specific goods which, without any fault on the part of either party, subsequently perish before the risk passes to the buyer. The chapter also explains the frustration of a contract for the sale of unascertained goods under s 7 of the Sale of Goods Act 1979 and the question of monies owing or to be repaid under the Law Reform (Frustrated Contracts) Act 1943.

Keywords: contract, sale of goods, specific goods, agreement, buyer, seller, perishing of goods, frustration, unascertained goods, frustrated contracts

Key facts

- A contract for the sale of specific goods which, without the knowledge of the seller, have perished at the time when the contract is made is void.
- An agreement to sell specific goods which, without any fault on the part of either of the parties, subsequently perish before the risk passes to the buyer is avoided.
- The above two points are dealt with by **ss 6** and **7**, respectively, of the **Sale of Goods Act 1979 (SGA)**.
- A contract for the sale of unascertained goods from an identified source which, without the knowledge of the seller, have perished at the time when the contract is made is void at common law.

- A contract for the sale of unascertained goods from an identified source which, without any fault on the part of either of the parties, subsequently perish is frustrated at common law.
- Where the contract is frustrated at common law, the question of monies owing or to be repaid is governed by the **Law Reform (Frustrated Contracts) Act 1943**. The **1943 Act** has no application where the contract is avoided by **s 7 SGA**.

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Introduction

In Chapter 3, 'Passing of property and risk', we looked at the rules for the passing of property and risk. In this chapter, we consider the effect of the contract in the event that the goods never existed or, if they did at one time exist, are no longer in existence. It is important to distinguish the events that caused the goods not to exist from the position before the contract is made to those that arose after the contract is made.

Principally, these problems are dealt with by **ss 6** and **7 SGA**. You will see from these sections that they only apply to contracts of **specific goods**. However, **future goods** that are already in existence are likely to be considered specific goods for the purpose of **ss 6** and **7**.

The **Consumer Rights Act 2015 (CRA)** is silent on this issue so it must be assumed that the position is the same for both consumer and non-consumer transactions.

Revision tip

Section 6 deals with events *before* the contract is made and **s 7** deals with events *after* the contract has been made. Another way of looking at this is to consider **s 6** under the category of 'impossibility' or 'mistake' and **s 7** under the category of '*frustration*'. The key difference between these sections is that where a contract is impossible to perform *at the time it was made*, it might be void for mistake, whereas if the contract *subsequently* becomes impossible to perform, illegal, or radically different from that which was intended, then it might be deemed frustrated.

Events before the contract is made: s 6 SGA

In ***Couturier v Hastie (1856)***, the House of Lords held that as the contract had contemplated the existence of the goods which, unbeknown to the parties, had ceased to exist, the buyer was not liable to pay because they were not in existence at the time the contract was made.

The effect of the decision in ***Couturier v Hastie*** can now be seen in **s 6 SGA**.

Section 6: goods which have perished

s 6 SGA:

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.

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Revision tip

You should note from the wording in **s 6** that the section only applies to goods that have perished. It will not apply in cases where the goods never existed. However, if X agrees to sell to Y **specific goods** which both of them believe to exist but which in fact did not exist, then the contract would be void at common law.

When will the goods be deemed to have perished?

If the goods have been destroyed, then there can be little doubt that they have perished. Beyond total destruction, the courts have also held that goods will be deemed to have perished if they become significantly altered so that, for commercial purposes, they can no longer be said to be the same goods that were the subject of the contract (***Asfar & Co v Blundell (1896)***). However, a different decision was reached by Morris J in ***Horn v Minister of Food (1948)***, where he held that provided the goods were still in existence and remained in a form that could be identified as the goods relating to the contract, then the goods will not have perished even if they are worthless. This view appears to be wrong and is out of line with the other authorities on the matter.

But what if there has only been a partial loss of the goods sold? Will they still be deemed to have perished?

Barrow, Lane & Ballard Ltd v Phillip Phillips & Co Ltd [1929] 1 KB 574

The buyer bought a specific 'lot' of 700 bags of ground nuts. Unknown to either party, before the contract had been made, a thief had made off with 109 of these bags, and before collection a total of 400 bags had been stolen. Wright J found that there was no prospect of the goods being recovered and held that **s 6** (of the **1893 SGA**) applied where even part of the goods have perished at the time the contract is made and that the contract was therefore void. This case turned on its facts. The sale was

for a specific indivisible 'lot' of 700 bags of nuts. Had the contract been severable (i.e. for the sale of separate lots, with each lot being invoiced and paid for separately), then it would seem that only the contract(s) representing the missing goods would have been held to be void.

It has been suggested that in a case where only part of the goods have perished, the seller might be required to make the remaining (unperished) goods available to the buyer, although the buyer will not be under any obligation to accept them (***Sainsbury Ltd v Street (1972)***).

Events after the contract is made: s 7 SGA

At common law, after a contract has been made and, through the fault of neither party, something happens to make its performance impossible, the contract is said to be frustrated and the parties are released from future obligations.

Section 7 SGA mirrors this common law position.

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Section 7: goods perishing before sale but after agreement to sell

s 7 SGA:

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 avoided.

In this instance, the word 'avoided' in **s 7** is synonymous with 'frustrated'.

Looking for extra marks?

You should explain your understanding of the application of **s 7** by pointing out that although it is similar to the common law rules on **frustration**, the **Law Reform (Frustrated Contracts) Act 1943** (which applies to common law frustration by setting out the legal consequences of a contract that has been held to have been frustrated) has no application to contracts avoided by **s 7 SGA** (**s 2(5)(c)** of the **1943 Act**).

Frustration, for the purpose of **s 7**, can arise (as the section says) when the goods subsequently perish before the risk passes to the buyer. It can also arise in cases where, after the contract has been made, its performance becomes illegal (***Avery v Bowden (1855)***).

Revision tip

Don't forget that **s 7** (as with **s 6**) only applies in the case of **specific goods**. In all other cases where the contract becomes impossible or illegal to perform, you should consider whether it has been frustrated at common law. Just as goods that have never existed cannot perish, a contract for the sale of **future goods** that do not materialise will not be avoided by **s 7** (as this section only covers specific goods). However, such a contract may be frustrated at common law (***Howell v Coupland (1875–76)***).

The decision in ***Howell v Coupland*** should be contrasted with ***Sainsbury Ltd v Street (1972)***, where MacKenna J held that where a buyer contracts with a seller to purchase a specific portion of a crop, and performance becomes impossible owing to a failure of the crop without any default on the part of the seller, then the seller is not liable to the buyer in damages, although they are obliged to deliver the actual amount that has been harvested.

p. 95 ↵ In the event the contract is held to be avoided (or frustrated), the parties are relieved from further performance. This means that, subject to what was said in ***Sainsbury Ltd v Street*** about partial delivery, the seller is relieved from having to deliver the goods and the buyer from paying for them. This reflects the presumed intention of the parties to the contract had they put their minds to the events that later occurred. Of course, had they put their minds to the problem and reflected this in the contract, then neither **s 6** nor **s 7** would apply, as these only apply in the absence of agreement to the contrary.

It is likely that, had the parties to the contract put their minds to the problem, they would have agreed that in the event the contract became impossible to perform, future performance would be excused. But the courts are unlikely to excuse all further performance of the contract if it appears to be an unreasonable presumption of what the parties will have intended. This can be seen from the decision of MacKenna J in ***Sainsbury Ltd v Street***, where he held that the seller was not liable to the buyer in damages, although he was obliged to deliver the actual amount that had been harvested.

Looking for extra marks?

You should explain the difference in the decisions in ***Howell v Coupland*** and ***Sainsbury Ltd v Street*** by pointing out that the courts will try to ascertain what the parties would have intended had they put their minds to the problem. It seems reasonable to assume that in the ***Sainsbury*** case the parties are likely to have agreed that, on the facts that arose in that case, the buyer should have had the option of accepting the reduced quantity of barley that was, in fact, harvested.

Key points on ss 6 and 7 SGA

- Both **ss 6** and **7** relate only to **specific goods** and in the absence of any agreement by the parties to the contrary.
- Neither section applies to **unascertained goods** nor to goods that were **ascertained** after the contract was made.
- Section 6 deals with *sales* (of **specific goods**).
- Section 6 applies only where, without the knowledge of the seller, **specific goods** perish before the contract is made. It does not apply where the goods never existed in the first place.
- Section 7 does not cover immediate sales but only *agreements to sell* **specific goods** where property in the goods will pass to the buyer at a future date.
- With **s 7**, the perishing of the goods must arise after the contract was made but before risk in the goods passes to the buyer.

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- If the risk in the goods has already passed to the buyer, then **s 7** will not apply and the buyer will bear the loss and have to pay the contract price.
- Neither party can be at fault for **s 7** to apply.

The difference between the contract being avoided by s 7 and frustrated at common law

Section 7 SGA

Where the contract is avoided under **s 7 SGA**, and the buyer has suffered a total failure of **consideration**, then they can claim the return of monies paid under the contract. They will have suffered a total failure of consideration if they received nothing for what they had bargained for. The failure of consideration must be total and the goods must have perished before any of them were delivered to the buyer. If the failure of consideration was only partial, for example in the unlikely event that the buyer had some use of the goods before they perished, then they will not be entitled to recover any of the money paid under the contract.

Note that this possibility is unlikely to arise because, once the goods have been delivered to the buyer, risk will usually also have passed to them and **s 7** only applies in cases where the goods 'perish before the risk passes to the buyer'.

Frustration at common law

Where the contract is frustrated at common law, the effects of **frustration** and the question of monies is governed by the **Law Reform (Frustrated Contracts) Act 1943**. (You should already have noted that the 1943 Act has no application where the contract is avoided by **s 7 SGA**.)

Although the contract is discharged and automatically terminates upon a court holding it to be frustrated, it is important to appreciate that the contract is not treated as void or as if it never existed. The legal consequences of acts that were performed before the frustrating event will need to be considered.

At one time, the courts adopted the harsh position that the parties' obligations were not discharged by a frustrating event and that a party would be in breach of contract if it failed to carry out its obligations as if the frustrating event had not arisen (***Paradine v Jane (1647)***).

Following a number of cases where justice remained both harsh and unpredictable and where the arbitrary principle of the 'loss lies where it falls' (***Chandler v Webster (1904)***) produced results that were in many cases largely a matter of luck, the House of Lords attempted to improve matters in ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1943)***.

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Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32

An English company contracted with its Polish customer to supply machinery for which it paid £1,000 in advance towards the cost of the equipment. When Germany invaded Poland in 1939, followed two days later by Britain declaring war on Germany, the contract became frustrated. The buyer sought to recover the £1,000 paid. The House of Lords held that as the buyer had received no benefit under the contract, there was a total failure of **consideration** and it could recover the monies paid.

Looking for extra marks?

The decision in ***Fibrosa***, whilst almost certainly an improvement on cases such as ***Chandler v Webster***, still left problems unanswered. First, it only applies to cases of total failure of **consideration**. This means that where one party has received some benefit (no matter how small) under the contract, the failure of consideration will not be total and the recovery of monies already paid will not be possible. Second, and arguably more serious, the party who has received some money under the contract as a part-payment is likely to have expended some money in relation to the performance of the contract and will therefore suffer a loss if the entire sum received has to be repaid. The **Law Reform (Frustrated Contracts) Act 1943** addresses both of these concerns. Don't forget that the Act applies to contracts frustrated at common law but does not apply to contracts avoided by **s 7 SGA**.

The Law Reform (Frustrated Contracts) Act 1943

The allocation of loss is decided by the Act, which provides:

- all sums payable under the contract cease to be payable and any money already paid may be recovered. If the party to whom the sums were paid or payable incurred expenses before the time of discharge, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow them to retain or recover the whole or part of the sums paid or payable but not an amount in excess of the expenses that have been incurred (**s 1(2)**);
- where, before the time of discharge, a party to the contract has obtained a valuable benefit as a result of something done by another party (other than a payment of money referred to in **s 1(2)**), the other party will be entitled to recover from them such sum (if any), not exceeding the value of the benefit, as the court considers just, having regard to all the circumstances of the case (**s 1(3)**);
- where the parties make their own provisions for the effects of a frustrating event, then those provisions will apply to the contract rather than those contained in the Act (**s 2(3)**).

The effect of **s 1(3)** on the recovery of a valuable benefit can be seen in ***BP Exploration Co (Libya) Ltd v Hunt (No 2) (1983)***.

BP Exploration Co (Libya) Ltd v Hunt (No 2) [1983] 2 AC 352

p. 98 ↵ H was granted a concession by the Libyan government to explore for and extract oil in a specified part of the desert. H subsequently entered into an agreement with BP for them to drill and extract the oil. In this agreement, H agreed to split the benefit of his concession with BP which, in return, also agreed to assume all risks associated with the extraction of the oil. The Libyan government later nationalised the oil industry and expropriated first BP's interest and then, nearly two years later, H's interest. After BP's interest had been expropriated, but before H's interest had been, H obtained 74 million barrels of oil. BP brought a claim in damages under the 1943 Act in respect of its lost benefit. The House of Lords held that the contract had become frustrated and that by virtue of **s 1(3)** of the Act, BP was entitled to recover a share of H's profits as a valuable benefit received.

Looking for extra marks?

Notwithstanding the provisions in the **Law Reform (Frustrated Contracts) Act 1943**, the parties would be well advised to agree their own contractual provisions for the allocation of risk because there are gaps in the Act that will not always provide a satisfactory solution to the division of losses. An example of this can be seen in ***Appleby and another v Myers (1866–67)***. C contracted to build machinery in D's premises and to keep it in good working order for two years, with the price to be paid upon the completion of the whole works. After part of the work had been finished, and others were in the course of completion, the premises with all the machinery and materials in it were destroyed by fire. It was held that both parties were excused from the further performance of the

contract and that C was not entitled to sue in respect of those portions of the works which had been completed, whether or not the materials used had become the property of D. Even under the 1943 Act, C would not be entitled to payment because there was no valuable benefit to which **s 1(3)** could apply.

Key cases

CASE	FACTS	HELD/PRINCIPLE
Asfar & Co v Blundell [1896] 1 QB 123	A vessel carrying a shipment of dates sank during the course of the voyage and was subsequently salvaged. On arrival at the port, it was found that although the dates still retained the appearance of dates, and although they were of value for the purpose of distillation into spirit, they were so impregnated with sewage and in such a condition of fermentation as to be no longer merchantable as dates in accordance with the contract of sale.	The Court of Appeal held that the dates had perished because, for commercial purposes, they were so altered that they were no longer the same goods that were the subject of the contract.
p. 99 ↵ ***Avery v Bowden (1855) 26 LJ QB 3***	The parties entered into an agreement to bring goods from Russia. Before the ship had been loaded, war broke out and it became illegal to trade with the enemy.	It was held that the subsequent illegality of the contract had frustrated the contract and that no claim could succeed against D for failing to load the ship.
Couturier v Hastie (1856) 5 HL Cas 673	A contract was entered into for the sale of a cargo of corn. At the time of making the contract, both seller and buyer believed that the cargo existed. However, the previous month, the ship's captain had sold the cargo to a third party as a result of its deterioration during the early part of the voyage so as to render impossible its intended transmission to England. When the English buyer discovered the facts, he repudiated the contract. The seller brought an action against the buyer for the price.	The House of Lords held that as the contract had contemplated the existence of the corn, which unbeknown to the parties had ceased to exist because of the earlier sale, the buyer was not liable to pay for the goods because they were not in existence at the time the contract was made. The effect of the decision in ***Couturier v Hastie*** can now be seen in **s 6 SGA**.
Horn v Minister of Food [1948] 2 All ER 1036	H entered into a contract with the Minister of Food under which the minister purchased 33 tons of Majestic ware potatoes in a certain clamp. When the clamp was opened, the potatoes were found to be rotten. The delivery was cancelled.	Morris J held that as the potatoes had not ceased to exist and were still in a form that would permit their being called potatoes, the potatoes had not 'perished' within the meaning of **s 7** (of the **1893 Act**). This view was *obiter* because the judge held that as the risk in the goods had already passed to the buyer, the section had no application.

CASE	FACTS	HELD/PRINCIPLE
Howell v Coupland (1875–76) LR 1 QBD 258	Coupland agreed to sell to Howell 200 tons of Regent potatoes to be grown on a specific piece of land. The land in question ought not to have had any problems in producing this quantity, although, due to the fault of neither party, the crop failed and only 80 tons were harvested, which Howell accepted; it then sued Coupland for non-delivery of the remaining 120 tons.	The Court of Appeal held that Coupland was not liable to Howell for non-delivery because the unforeseen potato blight made further delivery impossible, the effect of which frustrated the contract and released Coupland from his obligation to deliver any more than could reasonably have been harvested. The court implied a term into the contract to the effect that each party should be free of further performance if the crop perished. The position would, of course, have been otherwise had the contract not specified a particular crop because the seller could then have supplied Regent potatoes from another source.
Sainsbury Ltd v Street [1972] 1 WLR 834	A farmer entered into a contract with a corn merchant to sell 275 tons of barley which was to be grown on the farmer's farm. Due to a poor harvest and without any fault of the farmer, the crop only came to 140 tons. As a result, the farmer acted on the basis that the contract was frustrated and he sold the available crop to a third party.	MacKenna J held that where a buyer contracts with a seller to purchase a specific portion of a crop and performance becomes impossible owing to a failure of the crop without any default on the part of the seller, then the seller is not liable to the buyer in damages, although they are obliged to deliver the actual amount that has been harvested. The judge confirmed the rule in ***Howell v Coupland*** but held that that did not affect the farmer's obligation to deliver the quantity of barley actually produced.

Key debates

TOPIC	ON THE PERISHING OF GOODS
Viewpoint	Discusses the meaning of 'perished' and '**specific goods**' in the provisions of the **1979 Act** making contracts void where specific goods have perished.
Source	(1997) 19(10) *Buyer* 7
TOPIC	**FRUSTRATION: A LIMITED FUTURE**
Author/ academic	Celia Battersby

TOPIC	ON THE PERISHING OF GOODS
Viewpoint	Discusses the strict limits of the application of the doctrine of **frustration**.
Source	(1990) 134(13) *Solicitors Journal* 354

Exam question

It is important to distinguish the events that caused the goods subject to the contract of sale not to exist both from the position before the contract was made and to those that arose after the contract was made.

Critically evaluate this statement.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- multiple-choice questions *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-6-multiple-choice-questions?options=showName>*;
- key facts checklists *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-6-key-facts-checklists?options=showName>*;
- interactive flashcards of key cases *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-6-interactive-flashcards-of-key-cases?options=showName>*;
- outline answers to essay questions *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-6-outline-answers-to-essay-questions?options=showName>*.

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