Commercial Law

Case Summaries

Key

- “C”: Claimant
- “D”: Defendant
- “X”: Third party

Sale of Goods: Contractual

- “S”: Seller
- “B”: Buyer
- “TP”: Third party
- “RoT” Retention of Title

Nemo dat exceptions

- “O”: True owner
- “MA”: Mercantile agent

Agency

- “P”: Principal
- “A”: Agent

Assignment

- “Aor”: Assignor (creditor in original contract)
- “Aee”: Assignee
- “D”: Debtor in original contract
- “BoA”: Ban on Assignment

Security

- “Mor”: Mortgagor
- “Mee”: Mortgagee
- “Chor”: Chargor
- “Chee”: Chargee

Topic 1 – Sale of Goods: Contractual

Subject matter of contract of sale of goods (digital content?)

St Albans City and DC v International Computers (1997)

Case overview

- D supplied computer software to C. The software overestimated the number of community charge payers in the council's area, with the result that there was a shortfall of £484k in revenue from the charge for C. The additional effect was that C also had to pay an increased precept to the county council of £685k. C sued D for breach of contract, relying both on express terms and implied terms under SGA 1979, and for negligent misstatement. D argued that C was not entitled to recover any damages because C's loss had been fully recovered in the following year. D also sought to rely on a limitation clause which limited liability to £100k.
- Court of Appeal
- Held (obiter): A computer disk onto which a program designed and intended to enable a computer to achieve particular functions has been encoded, is a "good" for the purposes of SGA 1979. Software in itself, without a disk, is not a "good".

Judgment – Nourse LJ

- Parties who agree to supply and acquire a system recognising that it is still in course of development cannot be taken, merely by virtue of that recognition, to intend that the supplier shall be at liberty to supply software which cannot perform the function expected of it at the stage of the development at which it is supplied.
- There was an express term in the contract that C could use the software to produce the required return (part of its council duties).

Judgment – Sir Iain Glidewell

- SGA 1979 s61 defines "goods" as including "all personal chattels other than things in action and money…". A computer disk is within this definition. A computer program, of itself, is not.
    - A computer disk onto which a program designed and intended to enable a computer to achieve particular functions has been encoded, is a "good" – if the disk is sold or hire but the program is defective, there would prima facie be a breach of the implied terms under SGA 1979.
- However, where the program is installed by an employee of D on C's computers, the defective program is not sold or hired. Such a transfer does not constitute a transfer of goods, since the program itself is not "goods".
- A court is justified in implying a term into a contract in which it has not been expressed on a strict basis: it is implied if and only if the parties must have intended the term to form part of the contract; that the term would be reasonable is insufficient.
- A contract for the transfer into a computer of a program intended by both parties to enable the computer to achieve specified functions contains an implied term that the program will be reasonably fit for its intended purpose.

Computer Associates v The Software Incubator (2018)

Case overview

- D produced software that it licensed to customers and supplied via a link in an email leading to a download. Key issue is whether such software supplied electronically amounts to a "sale of goods", for the purposes of the Commercial Agents (Council Directive) Regulations 1993 r2.
- Court of Appeal
- Held: The supply of software in the form of a download is not a "sale of goods".

Judgment – Gloster LJ

- It is widely recognised in the case law (both in reference to the regulations and to sale of goods), that there is a distinction between tangible and intangible property: tangible property is "goods"; intangible property is not "goods".
- There are difficulties with maintaining the tangible / intangible distinction, including the following:
    - It is difficult to see any principled basis for making the status of software as "goods" turn on the medium by which they were delivered or installed.
    - The conclusion that "goods" does not include electronically supplied software leads to the odd inference that Parliament wished to protect a commercial agent selling hard copy books, but not one selling electronic books.
    - Gas and electricity constitute "goods", as per *International v Eastern Natural Gas*; it is impossible to coherently explain why they are more tangible property than software.
    - New Zealand and Australia have taken account of the increasing prevalence of intangible and digital products when updating their existing sale of goods legislation.
- Despite these difficulties, the weight of judicial authority supports maintaining the tangible / intangible distinction, and so it is not open for the court here to impute a new meaning of "goods" to the legislators of the 1986 Directive and 1993 Regulations (which implemented the Directive).
    - The fact that the Directive is aimed at commercial parties, rather than consumers, is relevant: commercial parties are not so in need of protection that the judiciary should adopt a completely different approach to interpreting "goods" than that established by precedent.
- This is an area of reform which must come from Parliament, not judicial interpretation.

The Software Incubator v Computer Associates (2021) (CJEU)

Case overview

- C appealed the EWCA decision to the UKSC. The UKSC seeks from the CJEU an interpretation of the Directive.
- Court of Justice of the European Union
- Held: "Goods" includes computer software; and "sale of goods" includes supply of computer software – [contrary to EWCA].

Judgment

- "Goods" is to be understood as meaning products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.
    - It follows that "goods" can cover computer software, since that has a commercial value and is capable of forming the subject of a commercial transaction.
    - Software can be classified as "goods" irrespective of whether it is supplied on a tangible medium or by electronic download.

- According to a commonly accepted definition, a "sale" is an agreement by which a person, in return for payments, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.
- So, the supply of computer software, in return for payment of a fee, to a customer by electronic means where that supply is accompanied by the grant of a perpetual licence to use that software, can be covered by the concept of "sale of goods".

Power to pass title

Niblett v Confectioners' Materials (1921)

Case overview

- C purchased 1000 tins of condensed milk, labelled "Nissly", from D. Nestlé told C that if they attempted to sell these on, they would apply for an injunction to prevent the sale, as the label was very similar to Nestlé's labels. C agreed not to sell them and brought an action against D.
- Court of Appeal
- Held: Claim successful; D did not have the right to sell the goods and therefore C was entitled to repudiate the contract.

Judgment – Bankes LJ

- SGA 1893 s12 (now SGA 1979 s12) is not limited to acts and omissions of the seller and those acting by his authority.

Judgment – Scrutton LJ

- If a vendor can be stopped by process of law from selling he has not the right to sell. This applies unless the circumstances of the contract are such as to show a different intention (such a provision does not exist in SGA 1979 s12).
- The decision in *Monforts v Marsden* that the implied condition that the vendor has a right to sell makes no mention of a condition or warranty that the purchaser shall be able legally to use the thing sold, is erroneous and should be overturned.

Judgment – Atkin LJ

- D gave an undertaking not to sell the goods, and having admitted that they were an infringement of Nestlé's trademark, they were liable to an injunction restraining the sale; D did not have the right to sell the goods.
    - A seller may be able to sell notwithstanding his own inability, but that is not the case here, since Nestlé had the same rights against C as against D.
- There is also a breach of the implied warranty that the buyer shall have and enjoy quiet possession of the goods. C were never allowed to have quiet possession: they had to strip off the labels before they could assume possession of the goods.

Rowland v Divall (1923)

Case overview

- A car dealer (C) bought a car from D. He painted the car, put it in his showroom and sold it to a customer. Two months later, the car was impounded by the police as it had been stolen. It was then returned to its original owner. Both C and D were unaware that the car had been stolen. C returned the purchase price to the customer and brought a claim against D.
- Court of Appeal
- Held: Claim successful; C entitled to the purchase price. D did not have the right to sell the car, as he did not obtain good title from the thief. Ownership remained with the original owner.

Judgment – Bankes LJ

- It cannot be said that C received any portion of what he agreed to buy: D had no right to sell the car to him, so C did not get what he paid for. C is entitled to recover the whole of the purchase money.

Judgment – Scrutton LJ

- Whenever the implied condition of title is broken, the contract can be rescinded. The buyer can demand return of the purchase money, unless he has, with knowledge of the facts, held on to the bargain so as to waive the condition.
- The restitutio in integrum rule holds that rescission is not available where full restitution is impossible. However, it would be absurd for D to raise this defence, since the reason why full restitution is impossible is the fact that D sold a thing he had no title to.

Judgment – Atkin LJ

- There is no obligation on the part of the buyer to return the car, for ex hypothesi the seller had no right to receive it.
- The buyer did not receive any part of that which he contracted to receive, namely, the property and right to possession. So, there was a total failure of consideration.

Butterworth v Kingsway Motors (1954)

Case overview

- Hire purchase finance company (X) let a car to Y on hire purchase. Y mistakenly thought that she had a right to sell the car provided she continued to pay the hire purchase instalments, and she purportedly sold it. The car passed through several hands and finally, D sold it to C. After C had used the car for nearly a year, X claimed the delivery of the car to them. C therefore claimed from D the whole purchase price. Within a week, Y paid the final instalment, so the title passed to her and this fed the defective titles of all the subsequent purchasers.
- High Court
- Held: Claim successful; C was entitled to rescind the contract and recover the purchase price.

Judgment – Pearson J

- C's letter to D to rescind the contract was valid, since there was a fundamental breach of the contract of sale by D. After the point of the letter, C had a right to repayment of the purchase price.
- On the final instalment, Y acquired title to the car, and this fed the previously defective titles of the subsequent buyers and enured to their benefit.

Barber v NWS Bank (1996)

Case overview

- C entered into a conditional sale agreement to purchase a car from D. X acted as the intermediary and took property of the car. Property was to pass upon payment by C of the balance. C did not pay the balance immediately, but paid the instalments until deciding to sell the car. It then transpired that the car was subject to a prior registered finance agreement, having been let on hire-purchase by another finance company to D, who sold the car to X before the property had passed to D. C purported to rescind the agreement and sought to recover the deposit and instalments, commencing proceedings for a declaration that the agreement had been validly rescinded and for the return of all sums paid thereunder.
- Court of Appeal
- Held: Claim successful.

Judgment – Sir Parker

- The term which said that the car was D's sole property free of any incumbrance was a condition. The agreement could only operate on the basis that D had the property in the car at the time of the agreement and would retain it until paid in full the moneys due under the agreement.
- The express term that the seller has and will retain the property in the goods has the same quality as an implied condition under SGA 1979 s12.
- The bank was in breach of the fundamental term, and therefore C was entitled to rescind the agreement.
- It was argued that D had changed its position so that it would be inequitable for C to recover any more than D could recover against X. However, X received the deposit from C as agent for D, and so it would not be inequitable in all the circumstances or C to recover the full amount of the deposit and instalments from the bank.

Heathrow Truck Centre v Motability Operations (2021)

Case overview

- D leased vehicles to those in receipt of benefits, working under a scheme operated by Motability, a charity. X sold vehicles to C, who in turn sold them to Y, who converted them for vehicle users, before selling them to D. Y went into administration. C claimed that title in the vehicles was retain, and that it was entitled to the return of the vehicles or their value.
- County Court
- Held: Claim unsuccessful.

Judgment – HHJ Saunders

- The agreement meant that C was the bailee of the vehicles and had the right to possession of them. It also meant that C could sell those vehicles on to Y. A superior title would have remained with X until it was paid by C but, nevertheless, a possessory and inferior title was capable of being passed down to Y and existed at the time of sale.
- Where there is a chain of sales between A (the original seller), B (the original buyer) and C (the sub-buyer), then if A authorises B to re-sell the goods to C, C is protected against an action in conversion brought by A, so long as he continues to comply with the terms of his contract with B.

    - The rationale behind this is that A has consented to what would otherwise be the act of conversion – a wrongful sale to a third party.
- On payment of the sums owing by C to X, C's superior title would have been fed down the chain to D, in accordance with *Butterworth v Kingsway Motors*.
- Where SGA 1979 s25 applies, the sub-seller is deemed to have been authorised by the original seller to sell the goods to the sub-buyer. That gives the sub-buyer a defence to a claim for wrongful interference with goods, just as if the sub-seller had been expressly authorised by the original seller to sell the goods.
    - The fact that C had an inferior title does not prevent D from relying on the application of s25.
- The burden of proof lies on D to prove, on the balance of probabilities, that they received the vehicles without notice that C had rights of ownership – that test is objective.
    - D has proved this quite easily.

Correspondence with description

Heilbut Symons v Buckleton (1913)

Case overview

- C purchased shares in a company from an underwriter (D) upon D's claim that the company was a rubber company. The company was not a rubber company, and the shares fell in value and C brought an action in damages for breach of contract.
- House of Lords
- Claim unsuccessful. The fact that the seller stated a fact that the buyer is ignorant of does not decisively determine as a rule of law that the statement is a term of the contract.

Judgment – Lord Moulton

- C must show a warranty (i.e. a contract collateral to the main contract to take the shares), whereby D, in consideration of C taking the shares, promised that the company was a rubber company.
- Collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are viewed with suspicion by the law: they must be proved strictly. Not only must the terms of such contracts be clearly shown, but the existence of animus contrahendi (intention to contract) too.
- In the present case, there is an absence of any evidence to support the existence of such a collateral contract.
    - The statement by D was a mere statement of fact. It was a representation as to fact, and there is no suggestion that C regarded it as anything but a representation. There is no evidence to show the existence of any animus contrahendi other than as regards the main contracts.
- If this statement were to become a term of the contract, it would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true.
- The courts should stay true to Holt CJ's words: "an affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended."
- The present case is one of innocent misrepresentation. The law is clear that one can only be liable for damages for fraudulent misrepresentation, not innocent misrepresentation [this was before MA 1967].

T & J Harrison v Knowles & Foster (1918)

Case overview

- D sold two ships to C, giving C particulars in writing of the ships which stated, inter alia, that the dead-weight capacity of each ship was 460 tons. C, relying on the particulars, agreed to buy the ships, although the contract signed did not in terms refer to the particulars. After delivery to C, it was subsequently discovered that the dead-weight capacity of each ship was only 360 tons. C brought an action for damages.
- Court of Appeal
- Held: Claim unsuccessful. On the evidence, the particulars were made bona fide and were not part of the contract.

Judgment – Pickford LJ

- The particulars merely contained a representation made innocently as to the dead-weight capacity of the ships, which may have induced C to enter into the contract, but which afforded no ground for a claim for damages for breach of contract.

Judgment – Scrutton LJ

- It is a question of intention whether a representation amounts to a warranty, as per *Heilbut Symons v Buckleton*

Arcos v Ronaasen (1933)

Case overview

- Buyers (C) concluded a contract for staves of timber wood from the sellers (D), specifying staves of Russian redwood and whitewood to be of 0.5 inches in thickness. A large proportion of the staves delivered were over 0.5 inches and C rejected them on the grounds that they did not conform to the contract's requirement. An arbitrator found that the staves were still within the contract as they remained fit for the purposes of making cement barrels, thus C could not reject them.
- House of Lords
- Held: Claim successful. D committed a breach of condition that gave C the right to terminate the contract, meaning C was entitled to reject the wood.

Judgment – Lord Buckmaster

- If the article a buyer has purchased is not in fact the article that has been delivered, the buyer is entitled to reject it, even though it is the commercial equivalent of that which they have bought.

Judgment – Lord Warrington

- If the deviations from the contractual thickness were so slight as to be negligible, the court would find that the delivered staves answered the description.

Judgment – Lord Atkin

- The staves were required by the buyers for making cement barrels, and this was made known to the sellers in circumstances that implied a condition that they should be fit for that purpose.
- The simple question is whether the goods, when shipped, complied with the implied condition that they should correspond with the description (as per SGA 1893 s13 [now SGA 1979 s13]).
    - If the written contract specifies conditions of weight, measurement etc., those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard.
    - If the seller wants a margin, he must stipulate for it.
- No doubt that in many cases of deviations, the court will consider them negligible. But this aside, the conditions of the contract must be strictly performed. If a condition is not performed, the buyer has a right to reject.
- The result of this case is in no way affected by the arbitrator's finding that the goods were fit for the particular purpose for which they were required. Unless the contract provides otherwise, the implied condition under SGA 1893 s14(1) is additional to the condition under s13.

Reardon Smith Line v Hansen-Tangen (1976)

Case overview

- A charterparty described the ship to be chartered as called "Yard No. 354 at Osaka". Osaka was the name of the yard responsible for building the ship, although the building was subcontracted to another yard, Oshima. The Osaka yard could not handle a tankship of that size, which both parties knew. The buyers (C), wanting to get out of the contract for another reason, argued that the ship did not correspond with the description under SGA 1979 s13.
- House of Lords
- Held: Claim unsuccessful. The words did not fall under s13; they were merely labelling the vessel.

Judgment – Lord Wilberforce

- In a commercial contract, it is certainly right that the court should know the commercial purposes of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
    - When one speaks of aim or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.
    - What the court must do is place itself in thought in the same factual matrix as that in which the parties were.
- The commercial purpose of the charterparties was to make available to C a medium-sized tanker suitable for use as such.
- Since at the time of the charterparty, the vessel was not in existence or under construction, some means had to be agreed upon for identifying the particular vessel which would form the subject matter of the charter. This was intended and done.
- There is a difference between saying that the purpose of words is to identify an essential part of the description of the goods and saying that they provide one party with identification of the goods so that he can find them.
    - Words used to identify an essential part of the description of the goods should be given contractual force (each element of the words).
    - Words used to provide identification of the goods can be construed much more liberally.

- It can be fairly said that, as a means of identification, the vessel was Yard No. 354 at Osaka. For the purposes of the identificatory clause, the words used are quite sufficient to cover the facts: no other vessel could be referred to.

Judgment – Lord Russell

- The key question is one of identity: was the ship, when built, identified by the sub-charter as its future subject matter? The essence of the identification of the vessel in the sub-charter lies in the necessary assumption of a shipbuilding contract to which Osaka was party; on this basis, there is no difficulty in identifying the ship as the vessel subject to the sub-charter.

Harlingdon and Leinster v Christopher Hull (1991)

Case overview

- C purchased a painting from D for £6k. The painting was described in an auction catalogue as being by German artist Munter. Both the buyers and the sellers were London art dealers, although the sellers were not experts on Germany paintings; the buyers were. The buyers sent their experts the painting before agreeing to purchase. After the sale, the buyers discovered that the painting was fake and worth less than £100. C brough an action based on SGA 1979 s13.
- Court of Appeal
- Held: Claim unsuccessful. By sending their experts to inspect the painting, this meant the sale was no longer by description. S13 only applies to goods sold by description and therefore C had no protection.

Judgment – Nourse LJ

- For the purposes of s13, the description must be influential in the sale to become a condition of the contract. The correlative of influence is reliance: reliance by the buyer is the natural index of a sale by description.
    - In practice, there cannot be a contract for sale of goods by description where it is not within the reasonable contemplation of the parties that the buyer is relying on the description.
    - It is an objective test: specific goods may be sold as such where, though they are described, the description is not relied upon, as where the buyer buys the goods such as they are.
- 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 they are sold.
- In the present case, the parties could not reasonably have contemplated that Cs were relying on D's statement that the painting was by Munter. The sale was not made by description.
- In the specific context of paintings, the court ought to be exceedingly wary in giving a seller's attribution any contractual effect. The potential arguability of almost any attribution, being part of the common experience of the contracting parties, is part of the factual background against which the effect of an attribution must be judged.

Judgment – Stuart-Smith LJ (dissenting)

- Every item in a description which constitutes a substantial ingredient in the identity of the thing being sold is a condition.
    - It is beyond question that the identity of the artist who painted a picture can be a substantial ingredient in the identity of the thing sold.

- If it is a term of the contract that the painting is by Munter, the purchaser does not have to prove that he entered into the contract in reliance on this statement – this distinguishes a condition from a mere representation which induces a purchaser to enter into a contract.
- D merely said that he was not an expert in what was being sold: that is not sufficient to exclude the implied condition; the implied condition can only be excluded by clear words.
- As to s14, the question of whether something is genuine or fake is a quality of the goods themselves. The parties knew that the purpose of the sale was resale as dealers, not merely putting the picture on the wall and enjoying its aesthetic qualities.
    - There cannot be a reasonable expectation that a fake which is virtually worthless is fit for the purpose of being sold as a painting by Munter at a price of £6k.

Judgment – Slade LJ

- A contract for the sale of specific goods (goods identified and agreed on at the time a contract of sale is made, as per SGA 1979 s61 is capable of falling within s13(1). However, if it is to do so, it has to be a contract for sale by description.
- The fact that a description has been attributed to the goods, either during the course of negotiations or in the contract itself, does not necessarily and by itself render the contract one for sale by description.
    - In order to be a sale by description, the court must be able to impute to the parties (quite apart from s13) a common intention that it shall be a term of the contract that the goods will correspond with the description.
    - The practical effect of s13(1) is to make it plain that in a case where such a common intention can be imputed, the relevant term of the contract will be a condition as opposed to a mere warranty.
- If a party wishes to claim relief in respect of a breach of a term of the contract (whether it be a condition or warranty), he need prove no actual reliance.
    - However, where a question arises as to whether a sale of goods was one by description, the presence or absence of reliance on the description may be very relevant in so far as it throws light on the intentions of the parties at the time of the contract.
    - If there was no reliance, this may be powerful evidence that the parties did not contemplate that the correctness of the description should constitute a term of the contract.
- The key question is: On an objective assessment of what the parties said and did at and before the meeting, and of all the circumstances of the case, is it right to impute to them the common intention that the authenticity of the attribution to Munter should be a term of the contract?
    - The answer to this is negative. Objectively, the inference is that the auction catalogue proves nothing, since D made it clear that he is not qualified to give any opinion as to its authorship. It was the exercise of C's own judgment as to the quality of the painting, which induced him to enter into the agreement.
- If C fails to establish a breach of contract through the front door of s13(1), they cannot succeed through the back door of s14.

Grant v Australian Knitting Mills (1936)

Case overview

- C bought 2 pairs of long underwear which were manufactured by D. C got dermatitis from the excess sulphite in the underwear and almost died. C sued for negligence.
- Privy Council
- Held: Claim successful. The implied condition in s14 was breached.

Judgment – Lord Wright

- The South Australia Sale of Goods Act 1895 s14 is identical to SGA 1893 s14. S14(2) holds that where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality.
- Whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use.
    - It is not merchantable if it has defects unfitting it for its only proper use but not apparent on ordinary examination.
    - The implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make.
- The goods should be in such an actual state that a buyer, fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms.
- The underwear was not merchantable because their defect rendered them unfit to be worn next to skin.
- There is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description.

Ashington Piggeries v Hill (1972)

Case overview

- C supplied feed to customers; the feed was supplied to C by D. Many of the animals who consumed the food died, as the feed was not processed properly. C sued D for failing to fulfil its contractual obligations by providing poor quality ingredients that did not meet the contract's requirements.
- House of Lords
- Held: Claim successful in part. D breached the implied condition in s14, but did not breach the implied condition in s13.

Judgment – Lord Hodson

- S13 is concerned with identification of the goods.
    - In the present case, the herring meal was contaminated but no poisonous substance was added to it so as to make the description "herring meal" erroneous. So, the claim based on s13 fails.
- For the purposes of s14, the reliance on the seller's skill and judgment need not be total or exclusive. When D made a detailed specification of the ingredients to be included in the good, C acted within the field in which they were capped upon to exercise their discretion, warranted that the herring which they would incorporate in the food would not contain poison.

    - D succeeds in establishing under s14(1) first that a condition of fitness was to be implied between the parties as to the suitability of the herring meal and that this condition was breached, and secondly, that the goods were of a description which it was in the course of C's business to supply.
- Although quality could be used as part of a description, in the present case it is not so used: there is a warranty of quality but no more.

Judgment – Lord Guest

- Herring meal is still herring meal notwithstanding that it may have been contaminated. If there was a substantial addition to the commodity described, then it might be that the goods plus the addition would not correspond with the description. No breach of s13 occurred.

Judgment – Viscount Dilhorne (dissenting)

- The line between a difference in quality and a difference in kind may in many instances be difficult to draw. However, in this case, where the distinction is between poisonous and non-poisonous herring meal, this is more than a difference in quality. There was a difference in kind and so a breach of s13.

Judgment – Lord Wilberforce

- SGA was not designed to provoke metaphysical discussions as to the nature of what is delivered, in comparison with what is sold. The test of description (at least, for commodities) is intended to be a broader, more common sense, test of a mercantile character.
    - The question whether that is what the buyer bargained for has to be answered according to such tests as men in the market would apply, leaving more delicate questions of condition or quality, to be determined under other clauses of the contract or sections of the Act.
- In the present case, buyers and sellers in the market, asked what this was, could only have said that the relevant ingredient was herring meal. Therefore, there was no failure to correspond with description. Cs do not succeed under s13.
- As to s14(1), it is indisputable that a particular purpose was made known by the buyers so as to show that they relied on the sellers' skill and judgment. The particular purpose for which the product was required was as food for mink.
    - It is equally clear that there was reliance on the sellers' skill and judgment.
- For the purposes of s14(1), it is in the course of the seller's business to supply the goods if he agrees to supply the goods when ordered. For the purposes of s14(2), a seller deals in goods of that description if his business is such that he is willing to accept orders for them.

Judgment – Lord Diplock (dissenting)

- The "description" by which unascertained goods are sold is confined to those words in the contract 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 choose.
    - But ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical 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 those he agreed to buy.
    - The key to s13 is identification.

- Unlike s13, s14(1) and s14(2) are not concerned with the identity of the goods which are the subject-matter of the contract, but with their quality or fitness for any particular purpose.
    - The key to the two subsections in s14 is reliance: the reasonable reliance of the buyer upon the seller's ability to make or select goods which are reasonably fit for the buyer's purpose coupled with the seller's acceptance of responsibility to do so.
- To attract the implication of the condition under s14(1), the buyer must make known the purpose for which he requires the goods with sufficient particularity to enable a reasonable seller, engaged in the business of supplying goods of the kind ordered, to identify the characteristics which the goods need to possess to fit them for that purpose.
- For the purposes of s14(2), the only condition to be implied as to the responsibility of the seller is that the goods should be reasonably fit for one of the purposes within the range.

Local Boy'z v Malu (2021)

Case overview

- C agreed contracts with D for two types of face masks. C argued that it was a condition of the contracts that the masks would comply with UK and EU regulations, and that the masks failed to conform with the regulations. C further argued that before the contracts of sale had been agreed, the masks had been described by reference to a report containing a photograph, but the masks in fact supplied were obviously different and inferior. C sought restitution of the sums paid on summary judgment.
- High Court
- Held: Claim successful in part. Claim successful for the first type of mask, since they were patently not the same as the masks in the photograph. Claim sent to full trial for the second type of mask.

Judgment – Edwards QC

- The claim is based upon alleged breach of three SGA implied conditions: that the masks would comply with their description; that they would be of satisfactory quality; and that they would be reasonably fit for purpose.
    - As to the implied condition of complying with description, D has no realistic prospect of defending the claim, for the simple reason that the masks supplied were patently not the same as those shown in the photograph.
- Lord Atkin in *Arcos v Ronaasen* set out the proposition that, in general, compliance with the implied condition of description is strict, although there may be some microscopic deviations which businessmen and therefore lawyers will ignore.

Satisfactory quality

Stevenson v Rogers (1999)

Case overview

- D was a fisherman who sold his fishing boat to C. C brought an action against D based on breach of SGA 1979 s14 as the boat was not of satisfactory quality. S14 only applies to the sale of goods sold in the course of business. D argued that the sale of the boat was not in the course of his business; his business was catching fish and selling them, he was not in the business of buying and selling fishing boats.
- Court of Appeal
- Held: Claim successful; the sale was in the course of D's business, and so D breached the implied term that the boat was of satisfactory quality.

Case overview – Potter LJ

- The implied term of merchantable quality in SGA 1979 s14(2) was replaced by an obligation that the goods supplied be of "satisfactory quality" by SSGA 1994 s1.
- Parliament's purpose was to widen the protection afforded by s14(2) through the 1973 Act, from a situation where the seller was a dealer in the type of goods sold to one where he simply made a sale in the course of a business – the requirement for regularity of dealing in the goods was removed.
    - 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 of goods outside the confines of the business (if any) carried on by the seller.

The Hansa Nord (1976)

Case overview

- D agreed to sell citrus pulp pellets for use in cattle feed to C. A clause in the contract stipulated that the shipment was to be made in good condition. C sought to reject the goods on the ground that not all of the goods were shipped in good condition. However, all of the goods were usable for the same intended purpose.
- Court of Appeal
- Held: Claim unsuccessful. The pellets were brought for use in cattle feed, and the whole cargo was used for that purpose, thus C's only remedy is in damages – the term was an intermediate stipulation, and the breach did not go to the root of the contract.

Judgment – Lord Denning

- Cases in the nineteenth century recognised that breach of a condition, however slight, gives the other party a right to be quit of his obligations and to sue for damages, whereas breach of a warranty, however serious, merely gives the other party a right to sue for damages.
    - In *Hongkong Fir Shipping v Kawasaki*, it became clear that there are many stipulations beside conditions and warranties, whose effect depends on this: the party may discharge himself of the obligations under the contract if the breach goes to the root of the contract.
    - These concepts apply to contracts for the sale of goods.
- The task of the court is to first see whether the stipulation, on its true construction, is a condition strictly so called. Second, if it is not a condition, then look to the extent of the actual breach which

has taken place; if it is such as to go to the root of the contract, the other party is entitled to treat himself as discharged.

- There may be an anticipatory breach where one party, before the day on which he is due to perform, shows by his words or conduct that he will not perform in a vital respect when the day comes. In such a case, the other party is entitled to treat himself as discharged.
- The express term "shipped in good condition" is an intermediate stipulation which gives no right to reject unless the breach goes to the root of the contract.
- The implied term under s14(2) is a condition. Any breach of it gives rise to a right to reject the goods, or to accept them and sue for damages.
- In the present case, the goods were, in a commercial sense, merchantable. Therefore, there was no breach of s14(2). However, the buyers are entitled to damages for the difference in value.

Judgment – Roskill LJ

- It is desirable that the same legal principles should apply to the law of contract: the same principles should apply to sale of goods as to other contractual obligations.
    - The statements of law in *Hongkong Fir Shipping* apply just as much to contracts for the sale of goods as to other contracts.
- Since present clause is not a condition, the buyers can only rely upon the breach if they can show that the breach deprived them of the whole of the benefit of the contract or went to the root of the contract. There is no finding that the breach had this effect.
- "Merchantability" is a question of fact. In the present case, the buyers are entitled to damages.

Wormell v RHM Agriculture (1987)

Case overview

- A farmer (C) bought herbicide from D. On the container, the instructions warned that damage might occur to crops if used after the recommended growth stage. C used the herbicide late and it proved ineffective. C claimed that D was in breach of the implied terms as to merchantable quality and fitness for purpose under SGA 1979 s14.
- Court of Appeal
- Held: Claim unsuccessful. A specific warning as to possible damage does not entitle C to make any assumption as to effectiveness; D need not give reasons for his instructions.

Judgment – Dillon LJ

- D is not required to spell out in greater detail why it is not recommended that the herbicide is used after the growth stages have been reached.
- C chose to take a chance; that is a matter for him. He cannot say that the herbicide was not reasonably fit for purpose under s14(3), when it would have been had weather conditions allowed it to be used within the limits and in the conditions prescribed by the instructions.

Judgment – Nicholls LJ

- The starting point is that unsatisfactory results following from, and caused by, the use of a product otherwise than in accordance with the manufacturers' recommendations are not, without more, results which should surprise a user, or results of which he can reasonably complain.

Aswan v Lupdine (1987)

Case overview

- C purchased liquid waterproofing from D which was contained in some heavy duty plastic pails. The pails were described as being heavy duty and suitable for store outside. C stored the pails outside, but they were in Kuwait and the pails were left out in the sun in 70°C temperatures. Consequently, the pails melted and the liquid waterproofing was ruined.
- Court of Appeal
- Held: Claim unsuccessful. There was no breach of s14 because a reasonable user could have used the goods without incurring damage. There was no implied condition under s14(3) because C did not rely on D's skill or judgment.

Judgment – Lloyd LJ

- Whilst Lord Diplock's judgment in *Ashington Piggeries* was a dissenting judgment, his sentence regarding "reasonably fit for one of the purposes within the range", regarding s14(2), accurately distilled the law as it stood when the 1973 Act was passed.
- At that time, to bring s14(2) into operation, a buyer had to show that the goods had been bought by description from a seller dealing in goods of that description. If they were, then the goods were required to be of merchantable quality. The goods did not have to be suitable for every purpose within a range of purposes for which goods were normally bought under that description: it was sufficient that they were suitable for one or more such purposes without abatement of price since, if they were, they were commercially saleable under that description.
    - S14(6) did not fundamentally change this.
- S14(3) is intended to cover normal as well as abnormal purposes.
- One must assume that the hypothetical buyer knows not only that the goods on offer are defective, but also what the nature of the particular defect is.
- In the present case, the pails were perfectly suitable for export to Europe or the Middle East and were therefore of merchantable quality. Storing the pails in a different method would have allowed the pails to survive despite the temperature.
- S14(3) depends on reliance. Unless the buyer relies on the seller's skill or judgment in selecting the appropriate goods for the stated purpose, there is no implied condition.
    - In many cases, reliance can be inferred.
- In the present case, C never relied on D's skill or judgment in any relevant sense at all. Thus, there can be no question of an implied condition under s14(3).
    - Even if there had been an implied condition, there was no breach. If making known that the pails were wanted for export is a particular purpose under s14(3), then the purpose could hardly be wider. A very wide range of goods must be regarded as reasonably fit for that purpose and on the facts, these pails fell within that range.

Rogers v Parish (1987)

Case overview

- C bought a new Range Rover which contained a number of serious defects on delivery. During a six-month period, C drove 5500 miles while a number of (generally unsuccessful) attempts were made to rectify the defects. C then repudiated the contract and sought repayment of all sums paid under the conditional sale agreement and damages.
- Court of Appeal
- Held: Claim successful. Where goods as delivered are defective, they are not of merchantable quality and do not become so simply because they are capable of being used in some way.

Judgment – Mustill LJ

- The fact that a defect is reparable does not prevent it from making the res vendita unmerchantable if it is of a sufficient degree.
    - The fact that the defect has been repaired at the instance of the purchaser (which is not so in the present case) might have an important bearing on whether the purchaser has by his conduct lost his right to reject. But it is not material to the question of merchantability – this falls to be judged at the moment of delivery.
- In the present case, it cannot be said that the Range Rover as delivered was as fit for the purpose as the buyer could reasonably expect.

Fitness for purpose

Manchester Liners v Rea (1922)

Case overview

- D supplied coal to be used in a ship. The coal delivered by D was unsuitable for the steamer for which the buyer intended it to be used.
- House of Lords
- Held: Claim successful. Since ships differ in their types and requirements, and D knew this, there was a breach of the implied condition.

Judgment – Lord Buckmaster

- The order was expressed for the use of a particular steamship, and it must therefore be assumed that D knew the nature of the ship's furnaces and the character of the coal it used, for it was this coal they contracted to supply.
- If goods are ordered for a special purpose, and that purpose is disclosed to the seller, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment.

Judgment – Lord Atkinson

- The buyer, by expressly stating in the contract of purchase the purpose for which he requires the goods, prima facie shows to a seller whose business is to supply goods of the description required, that he relies upon the seller's skill and judgment.

    - The same result would follow if the seller was (either before or at) the time of purchase by implication made aware by the buyer of the purpose for which the buyer required the goods.
- C was entitled to assume that D would exercise the skill and judgment he had contracted to exercise so as to secure that the coal which they caused to be filled into the ship's bunkers would be fit for the purpose for which they must be taken to have known C required it.

Judgment – Lord Sumner

- The crucial time is the time when the contract is made.
- Communication of the reliance can be inferential: the statutory words are "so as to show", not "and also shows". They are satisfied if the reliance is a matter of reasonable inference to the seller and to the court.

Cammell Laird v Manganese Bronze (1934)

Case overview

- Shipbuilders (D) agreed to build two ships to carry heavy liquids. They were to have propellers of special construction and diameter according to certain specifications. One proved unsatisfactory because it caused too much noise.
- House of Lords
- Held: Claim successful. If the defect in goods sold which renders them unfit for their purpose is due to a characteristic which lay within the sphere of the seller's expertise to detect and avoid, the responsibility for their unfitness lies with the seller.

Judgment – Lord Macmillan

- In the present case, there was sufficient disclosure of the particular purpose to give rise to an implied term.
- Further, the defect lay in the region within which D were free, so far as the specification went, to exercise their skill and judgment. Thus, C relied on D's exercise of skill and judgment.

Judgment – Lord Wright

- In the present case, C expressly and by implication made known to D the purpose which the goods were required.
    - As seen in *Manchester Liners v Rea*, these words have been given a liberal interpretation.
- Reliance by C on the sellers' skill and judgment must be affirmatively shown: the buyer must bring home to the seller's mind that he is relying on him in such a way that the seller can be taken to have contracted on that footing: that reliance is the basis of a contractual obligation.
- In the present case, considering all the relevant matters between the parties, it can be concluded that there was reliance on D's skill or judgment.
- Where a manufacturer or builder undertakes to produce a finished result according to a design or plan, he may still be bound by his bargain even though he can show an unanticipated difficulty, or even impossibility, in achieving the result desired with the plans or specification.
    - The application of this general rule must vary with the terms and circumstances of the contract.

    - Each case must be decided on its own facts, but there is no general rule that in such cases, s14 is excluded.
- The reliance on the sellers' skill or judgment need not be total or exclusive. The buyer can rely on the sellers' skill and judgment only in some respects.

Ashington Piggeries v Hill (1972)

Case overview

- C supplied feed to customers; the feed was supplied to C by D. Many of the animals who consumed the food died, as the feed was not processed properly. C sued D for failing to fulfil its contractual obligations by providing poor quality ingredients that did not meet the contract's requirements.
- House of Lords
- Held: Claim successful in part. D breached the implied condition in s14, but did not breach the implied condition in s13.

Judgment – Lord Hodson

- There is no dispute that D expressly made known to C the particular purpose for which the goods were required, nor is there any dispute but that the goods were unfit for that purpose.
- The present case is close to *Cammell Laird*: when the buyers made a detailed specification of the ingredients to be included in the good, the sellers, acting within the field in which they were called upon to exercise their discretion, warranted that the herring which they would incorporate in the food would not contain poison.
    - The condition of fitness was implied and breached.

Judgment – Lord Guest

- In s14(1) (now s14(3)), the purpose must be a particular, definite purpose. As per *Hardwick Game Farm,* a communicated purpose, if stated with reasonably sufficient precision, will be a particular given purpose.
- If the seller knows the purpose for which the buyer requires the goods, then no express intimation by the buyer is necessary.
- The question becomes: whether in all the circumstances it is proper to draw the inference that there was reliance by the buyer on the seller's skill or judgment.
    - Whether the test is "likely", "not unlikely", or "liable to" is a matter of taste.
    - If the particular purpose is shown, then it is an easy step to draw the inference of reliance.

Judgment – Viscount Dilhorne (dissenting)

- D made known the purpose to C so as to rely on C's skill and judgment in seeing that the ingredients used were of good quality. There was an implied condition that the herring meal would be reasonably fit for use as feeding stuff for animals.

Judgment – Lord Wilberforce

- It was settled in *Cammell Laird* that there may be cases where the buyer relies on his own skill or judgment for some purposes and on that of the seller for others.
- For the purposes of s14(1) (now s14(3)), it is in the course of the seller's business to supply goods if he agrees, either generally or in a particular case, to supply the goods when ordered.

- For the purposes of s14(2), a seller deals in goods of the relevant description if his business is such that he is willing to accept orders for them.

Judgment – Lord Diplock (dissenting)

- There are two requirements: (i) the buyer should make known expressly or by implication to the seller what is the particular purpose for which the goods are required; and (ii) the buyer should do so in such a way as to make the seller reasonably understand that he is relying upon the seller to exercise sufficient skill or judgment to ensure that the goods are fit for that particular purpose.
- It does not matter if the seller does not possess the necessary skill or judgment, nor if no one could by the exercise of skill or judgment detect the particular characteristic of the goods which rendered them unfit for that purpose.
    - This harshness on the seller is mitigated by the requirement that the goods must be of a description which it is in the course of the seller's business to supply.
- To attract the condition, the buyer must make known the purpose for which he requires the goods with sufficient particularity to enable a reasonable seller, engaged in the business of supplying goods of the kind ordered, to identify the characteristics which the goods need to possess to fit them for that purpose.
- Where the seller knows of the range of purposes which the buyer may use the goods for, the seller need not ensure that the goods supplied are reasonably fit for all purposes within the range, if his knowledge of the range is derived in whole or in part from some circumstance other than the description by which the goods are ordered.
- The field of the seller's undertaking as to the fitness of the goods for the purpose correspond with the field of the buyer's reliance upon the skill and judgment of the seller.

Slater v Finning (1996)

Case overview

- D supplied C with a new camshaft and undertook the work of replacement on C's ship. The replacement was not a success, and D supplied and fitted a second camshaft, but problems persisted. D supplied and fitted a third camshaft but problems persisted and C gave up and sold the engine. C claimed damages under s14(3); D counterclaimed for payment of goods and services supplied by them.
- House of Lords (Scotland)
- Held: Claim unsuccessful. The ship's engine suffered from a particular abnormality which was not known to D, and so they were not in a position to exercise skill and judgment for the purpose of dealing with it, nor were they in a position to make up their minds whether or not to accept the burden of the implied condition.

Judgment – Lord Keith

- In the present case, the Lord Ordinary found that the cause of the trouble did not lie in the camshafts themselves, but in some external feature peculiar to the ship.
    - D was not made aware of the abnormal tendency, and so were not in a position to exercise skill and judgment for the purpose of dealing with it. Nor were they in a position to make up their minds whether or not to accept the burden of the implied condition.

- There is no breach where the failure of the goods to meet the intended purpose arises from an abnormal feature or idiosyncrasy, not made known to the seller by the buyer, in the buyer or in the circumstances of the use of the goods by the buyer.
    - This is the case whether or not the buyer is himself aware of the abnormal feature or idiosyncrasy.

Judgment – Lord Steyn

- The old rule of caveat emptor has become the rule of caveat venditor in order to meet the requirements of modern commerce and trade.
    - Despite this, to uphold the present claim would be to allow caveat venditor to run riot.
- Liability under s14(3) is strict in the sense that D's liability does not depend on whether he exercised reasonable care.
- The burden of proof regarding reliance lies on D: the seller can only defeat the implied condition by proving that the buyer did not rely, or that it was unreasonable for him to rely, on the skill or judgment of the seller.
- It is sufficient that the seller was aware of the buyer's purpose, although it must be borne in mind that the law looks at contract objectively: what matters is how a reasonable person, circumstanced as the seller was, would have understood the buyer's purpose at the time of the making of the contract.
    - If the buyer's purpose is insufficiently communicated, the buyer cannot reasonably rely on the seller's skill and judgment.

Jewson v Kelly (2003)

Case overview

- C purchased electric boilers from D, to be installed in flats converted for resale. The boilers' electricity consumption reduced the energy rating of the flats, making them more difficult to market. C claimed for breach under SGA 1979 s14(2) and s14(3).
- Court of Appeal
- Held: Claim unsuccessful; the boilers' impact on the flats' energy rating lay within the expertise of C and his advisers, not within that of D or the manufacturer.

Judgment – Clarke LJ

- The questions under s14(3) are: (i) whether the buyer, expressly or by implication, made known to the seller the purpose for which the goods were being bought; (ii) if so, whether they were reasonably fit for that purpose; (iii) if not whether the seller has shown (a) that the buyer did not rely upon his skill and judgment, or (b) if he did, that it was reasonable for him to do so.
- It is the function of s14(3), not s14(2), to impose a particular obligation tailored to the particular circumstances of the case.
    - What has been held to be unsatisfactory is not the intrinsic qualities of the boilers, but their impact on the energy rating of the flat. It would be startling if D were liable for breach under s14(2) and not under s14(3).
- S14(3) expressly provides that the burden of proof lies on the seller to show that the buyer did not rely upon his skill or judgment, or if he did, that it was unreasonable for him to do so.

- In the present case, C relied upon the skill and judgment of D only as to the intrinsic qualities of the boilers. The question of whether the boilers were suitable for the energy rating was a matter for C and his advisers.
    - It was also not reasonable for C to rely upon the skill and judgment of D in that regard. There was no discussion with D before the boilers were bought as to the particular characteristics of the flat, and no claims were made as to the energy efficiency of the boilers.
- The effect of the boilers on the flats' energy rating was something which lay within the sphere of exercise of C and his advisers, not within the sphere of D's expertise.
    - This was thus a case of partial reliance.
    - Within the sphere which C could reasonably have relied upon D's skill and judgment, the boilers were reasonably fit for their purpose.

Aswan v Lupdine (1987)

Case overview

- C purchased liquid waterproofing from D which was contained in some heavy duty plastic pails. The pails were described as being heavy duty and suitable for store outside. C stored the pails outside, but they were in Kuwait and the pails were left out in the sun in 70°C temperatures. Consequently, the pails melted and the liquid waterproofing was ruined.
- Court of Appeal
- Held: Claim unsuccessful. There was no breach of s14 because a reasonable user could have used the goods without incurring damage. There was no implied condition under s14(3) because C did not rely on D's skill or judgment.

Judgment – Lloyd LJ

- S14(3) is intended to cover normal as well as abnormal purposes.
- S14(3) depends on reliance. Unless the buyer relies on the seller's skill or judgment in selecting the appropriate goods for the stated purpose, there is no implied condition.
    - In many cases, reliance can be inferred.
- In the present case, C never relied on D's skill or judgment in any relevant sense at all. Thus, there can be no question of an implied condition under s14(3).
    - Even if there had been an implied condition, there was no breach. If making known that the pails were wanted for export is a particular purpose under s14(3), then the purpose could hardly be wider. A very wide range of goods must be regarded as reasonably fit for that purpose and on the facts, these pails fell within that range.

BSS Group v Makers (2011)

Case overview

- C was contracted to carry out plumbing work. C ordered various items from D, all for a special type of piping system (Uponor). A month later, C asked D for a quote for more items, some of which were identified as Uponor items. Rather than providing Uponor valves, D quoted for and supplied its own manufactured brand of valves. The system was installed, but the valve failed, resulting in substantial flood and damage. At trial, an expert gave evidence that the supplied valve was incompatible with the Uponor piping system.
- Court of Appeal
- Held: Claim successful; D breached the implied term under s14(3).

Judgment – Rimer LJ

- This judgment will follow the three questions set out by Clarke LJ in *Jewson v Kelly.*
- It is an obvious inference that C made known a particular purpose for which the valves were intended to be used. The valves supplied were not reasonably fit for the requisite purpose because they were incompatible with Uponor piping and would be likely to, and did, fail when used in conjunction with them.
    - This is not an "idiosyncrasy" case: the piping were sound components. D knew all that it needed to know in order to exercise its skill and judgment as to whether the items were compatible. D supplied its own valve without exercising any judgment as to its suitability for use with the Uponor piping.
- Reliance is normally inferred if the purpose is made known. Whilst it is easier to so infer where the buyer has stated his purpose expressly, that is not a necessary precondition of drawing the inference.
- Since the burden of disproving reliance lies on the buyer, the only question is whether D discharged that burden. In the present case, D has not so proved.
    - The fact that on arrival of the goods, there will or may be analysis of them, does not negative a reliance on skill or judgment. Reliance need not be exclusive; partial can suffice.
- In the present case, the reliance was not unreasonable.

Remedies of the seller

Charter v Sullivan (1957)

Case overview

- D refused to accept delivery of a car which he contracted to buy from C, at the retail price fixed by the manufacturers. Within 10 days, C resold the car to another purchaser. C brought an action for breach of contract, claiming damages for the loss of profit on the repudiated sale. D argued that the true measure of damages was the difference between the market value and the contract price, and that C had not suffered any damage since he had subsequently resold the car for the agreed price.
- Court of Appeal
- Held: C entitled to nominal damages only, since he was able to resell the car.

Judgment – Jenkins LJ

- Even if there was an available market and even if the fixed retail price was the market price, the prima facie rule in s50(3) should be rejected in favour of the general rule laid down by s50(2) – just because C sold at the fixed retail price does not mean that he suffered no loss directly and naturally resulting from D's breach of contract.
- S50(3) seems to postulate a market in which there is a market price at which a purchaser can be found. If the only price at which a car can be sold is the fixed retail price and no purchase can be found at that price, it cannot be said that there is a market price or an available market.
    - S50(3) seems to postulate that in the cases to which it applies there will, or may, be a difference between the contract price and the market price, which cannot be so where the goods can only be sold at a fixed retail price.
- In the present case, s50(2) should be applied to the exclusion of s50(3).
- The measure of loss under s50(2) must be the amount, if any, of the profit C has lost by reason of D's failure to take and pay for the car he agreed to buy.
- In the present case, C has not suffered any loss because he was able to sell all of the cars he could get. It was for C to prove that he did in fact sustain the loss of profit claimed, but he failed to do so.

Judgment – Sellers LJ

- A seller's loss of profit on a sale may clearly directly and naturally result in the ordinary course of events from a buyer's wrongful neglect or refusal to accept and pay for the goods bought. But it may be that the seller is so circumstanced that he could sell the goods elsewhere either at the same price as the contract price or at some lesser price which would either extinguish or minimise the loss to the seller and therefore the damages which the defaulting buyer will have to pay.
- For the purposes of s50(3), a market can exist in a variety of circumstances. It must at least be a market in which the seller could, if he wishes, sell the goods left on his hands.
    - In the present case, there was no real market where the rejected car could have been offered for sale and sold.
- Where there has been a resale of the goods, C has the burden of proving a loss of profit beyond that which on the face of it has been recouped in whole or in part by the resale.
    - In the present case, C has failed to prove this.

Thompson v Robinson (1955)

Case overview

- C claimed damages for breach of contract by D when they refused to accept delivery. C were only permitted to sell new cars at a price fixed from time to time by the manufacturers, and their profit on the transaction was also fixed. C mitigated their losses by rescinding the contract with their suppliers. The suppliers took back the car, free of any claim for damages.
- High Court
- Held: Claim successful; C awarded their loss of profit.

Judgment – Upjohn J

- C did what was reasonable, getting out of their bargain with their suppliers. But they still sold one less car and lost their profit on that transaction.
- The word "market" is of no fixed legal significance.
- (Obiter because bound by UKHL decision): "available market" merely means that the situation in the particular trade in the particular area was such that the goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted, the goods in question could readily be disposed of.
- S50(3) is only a prima facie rule: if it would be unjust to apply that rule, then it is not to be applied.
- In the present case, it is plain almost beyond argument that in fact the loss to Cs is the loss of profit.

Lazenby Garages v Wright (1976)

Case overview

- A dealer in luxury cars (C) contracted to sell D a second-hand BMW for £1670. D repudiated the contract and refused to accept delivery. Six weeks later, C sold the car at a higher price of £1770. C sued for breach of contract and sought damages for the difference between the price C had the purchased the car and £1670. C argued that if D had taken the car, they would have been able to sell another second-hand BMW of the same model.
- Court of Appeal
- Held: C entitled to nominal damages only.

Judgment – Lord Denning MR

- If there are a number of new cars, all exactly of the same kind, available for sale, and the dealers can prove that they sold one car less than they otherwise would have done, they would be entitled to damages amounting to their loss of profit on the one car (as per *Thompson v Robinson*).
    - It is entirely different in the case of a second-hand car, since each second-hand car is different from the next
    - There is no "available market" for second-hand cars. So, s50(2) is to apply.
- When applying s50(2), the test is what could reasonably be expect to be in the contemplation of the parties as a natural consequence of the breach.
- In the present case, the buyer could not have contemplated that the seller would sell one car less. At most, the buyer would contemplate that, if the seller resold this very car at a lower price, they

would suffer by reason of that lower price and should recover the difference. However, in selling the car at a higher price, D suffered no loss.

Judgment – Lawton LJ

- When the goods are not unique, but are mass-produced, different considerations may apply from those which apply when an article is unique.
    - In the present case, C's own sales manage said, in effect, that second-hand cars are from their very nature unique. In those circumstances, the *Thompson* case has no application.

Bem Dis v International Agri Trade (1998)

Case overview

- D entered into a contract for the sale of goods to C. D breached the contract, forcing C to compensate the shippers of the goods for cancellation of the charterparty. Arbitrators awarded damages totalling $65k; D appealed on the basis that there was an express standard term in the agreement that damages would be based on the difference between the contract price and either the default price or the actual/estimated value of the goods on the date of default. D argued that this prevented D from claiming damages for the costs of cancelling the charterparty.
- High Court
- Held: D's appeal dismissed. The standard term applied where the damages sought were for the difference between the contract price and the default price or market value, and for loss of profit. It should not be interpreted as precluding damages for wasted expenditure of the type of foreseeable loss which C suffered.

Judgment – Clarke J

- An innocent party has an unfettered right to frame its claim as one for wasted expenditure rather than loss of profits.
- In the present clear, unsure that C's claim is for wasted expenditure, as contended. However, either way, there is no difference between a claim for wasted expenditure and a claim for the expenses incurred here.
    - The expenses incurred by C were caused by the buyer's breach; they arose directly and naturally out of the breach, and are recoverable unless there is anything in the terms of the contract which excludes their recovery.
- While parties to a contract are free to agree that an innocent party should not be entitled to recover damages to which he would otherwise be entitled at common law, they must do so in clear terms.
    - In the present case, the clause is not sufficient clear to exclude claims for wasted expenditure or foreseeable loss. Rather, the clause is concerned with the prima facie measure of damages in SGA 1979 s50(3).

Rejection and acceptance; rights to repair or replacement

Borrowman v Free (1878)

Case overview

- D agreed to purchase a cargo of American maize from sellers (C). C tendered the cargo, but D refused to accept it. C insisted that the tender was valid, and made a second tender, but D rejected the second attempt. C brought an action for damages for not accepting and paying for the cargo.
- Court of Appeal
- Held: Claim successful; D were bound to accept the cargo, and C could sue to recover any loss which they might have sustained through the refusal to accept.

Judgment – Brett LJ

- C offered, and were ready and willing, to deliver the cargo, but D refused to accept it. D argued that C might in fact be ready and willing to offer the cargo, but they could not do so in law because they could not at the time tender the bills of lading.
    - This objection is unsustainable, since the shipping documents might have been delivered within a reasonable time.
- By insisting that they were not bound to accept the tender, D waived the tender.
- The doctrine of election that says that when in pursuance of a contract to sell unspecified goods, the vendor has appropriated certain goods, he has made an election which is irrevocable (as per *Blackburn on Contract of Sale*).
    - It may be that, where goods which fulfil the terms of a contract are appropriated for sale in performance thereof, there is an election by the vendor which is irrevocable. In the present case, however, that doctrine does not apply.

Bernstein v Pamson Motors (1987)

Case overview

- C bought a new car from D. After driving for 140 miles and using it for three weeks, the car broke down and C incurred costs in towing it. Upon complaining to D, the problem was fixed on the warranty of the manufacturer. However, C insisted on rescinding the contract and being paid damages.
- High Court
- Held: C entitled to damages, but not entitled to rescind the contract.

Judgment – Rougier J

- It is not possible to define in positive terms what makes a merchantable car. However, the principal considerations, in the context of a car, can be set out.
- The defect causing the breakdown was there from the moment of assembly, and so on the moment of delivery.
- With regards to merchantable quality, the court must look not only at the nature of the defect itself, considered in isolation, but also its likely effect on the performance of the car.
    - The two basic requirements of any car is that it is capable of being driven, and that it is capable of being driven in safety, as per *Bartlett v Sidney Marcus.*
- Whether the defect is latent or patent is immaterial to the question of merchantable quality.

    - Merchantability is to be tested by reference to the condition of the car at the time of delivery.
    - This means that, in reality, there will always be an element of latency in any particular defect which is the subject of a claim.
- Material considerations include: the intractability of the defect (how easy it is to be remedied); the time taken and the expense of rectification; whether the defect is capable of being satisfactorily repaired so as to produce a result as good as new (this is a question of fact, but if the defect is so fundamental a kind that no amount of repair will ever bring the car properly to its pristine state, then it will not be merchantable); the cumulative effect of a series of relatively minor defects; and cosmetic factors.
- In the present case, the defect was a small blob of sealant, but that had a dramatic effect when it caused the camshaft to seize and the car to grind to a halt. The defect was repairable and was in fact repaired, after which the car was as good as new.
    - A defect of this kind, leading to this result, even though repairable, goes far beyond that which a buyer must accept.
    - At the time of delivery, the car was not of merchantable quality, still less fit for its purpose.
- SGA 1979 s11(4) holds that: "Subject to section 35A below, where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect."
    - In the present case, the contract was clearly not severable, so the question is whether C accepted the car.
- S34(1) only provides an exception to the second set of circumstances in s35(1), namely, those wherein the buyer does not act in relation to the goods inconsistently with the continued ownership of the seller.
- The only possible acceptance in the present case is based on lapse of a reasonable time. "Reasonable time" is simply defined in s59 as a question of fact.
- S35 creates an implied affirmation by saying that once a buyer has had the goods for a reasonable time (not related to the opportunity to discover any particular defect), he is deemed to have accepted them.
    - The nature of the particular defect, discovered ex post factor, and the speed with which it might have been discovered, are irrelevant for "reasonable time" in s35.
- S35 is directed solely to what is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back.
    - From the buyer's point of view, the nature of the goods and their function must be taken into account.
    - From the seller's point of view, the commercial desirability of being able to close his ledger reasonably soon after the transaction is complete must be taken into account.
- The complexity of the intended function of the goods is of prime consideration – what is a reasonable time in relation to a bicycle would hardly suffice for a nuclear submarine.
- "Reasonable" is referable to the individual buyer's situation as well as that of the seller – in the present case, the period of time in which the buyer was ill is to be discounted.
- S53(3) holds that a buyer who has been compelled to treat a breach of condition as to quality as a breach of warranty is entitled to the difference between the value of the goods at the time of delivery and the value they would have had if they fulfilled the warranty.
    - In the present case, there is no evidence that there is a difference in value.

- In the present case, C had the car for a reasonable time, and so accepted the goods under s35. He is compelled to treat his claim under s14 as a claim for breach of warranty rather than condition, and is thereby limited in his remedy to damages rather than rescission of the entire contract.

Truk v Tokmakidis (2000)

Case overview

- C agreed to supply and fit modified parts for D's vehicles. Upon delivery of the vehicle, C provided a written statement confirming that the parts fitted had been installed in accordance with Iveco's (the vehicle manufacturer) recommendation. This statement was incorrect and therefore the installation was not covered by the Iveco warranty. D was informed of this fact by a potential buyer, and D raised the issue with C, refusing to pay. C claimed for the purchase price.
- High Court
- Held: Claim unsuccessful; a reasonable time had not elapsed, and so C was entitled to reject the goods.

Judgment – Jack QC

- This was a contract for the sale of goods, rather than for the supply of services: the essence of the contract was the delivery and sale by C to D of the underlift fitted to the chassis supplied by D.
- The time period can be usefully divided into two periods. In the first period, no relevant events occurred; in the second period, the parties were in frequent communication about the defects. The issues are when D first purported to exercise a right or rejection and whether the right survived until then.
- The relevant "reasonable time" is the time in which it is reasonable for the buyer to intimate his rejection – this is taken from s35(4). This is not to be assessed by looking only at the buyer's position: a balancing exercise is required, balancing the opposing interests of the buyer and seller.
    - The buyer's interest is to be able to reject non-compliant goods whenever the defect appears. The seller's interest is that, if goods are to be rejected, they should be rejected quickly.
- The reasonable time to exercise a right of rejection will be not less than the time required to give the buyer a reasonable opportunity to examine the goods to see if they conform to the contract. The reasonable time may well be longer than such time required, as per s35(5).
- The reasonable time to exercise a right of rejection may be extended by dealings between the parties, in particular dealings relating to the repair of the goods, as per s35(6)(a).
- There is one reasonable time: there are not different times for different defects.
- *Bernstein v Pamson Motors* has been criticised as a harsh decision on its facts.
    - However, Rougier J was correct in stating that the emergence of a defect after what would otherwise have been judged a reasonable time cannot extend the time and revive a right to reject which had been lost.
    - For goods such as vehicles, where the defects may be latent, it may be appropriate to allow within the reasonable time a period beyond that required simply for inspection to permit a period of use in which such defects may appear.
- S35(6)(b) holds that acceptance is not deemed to have occurred merely by reason of delivery under a sub-sale. So, where goods are sold for resale, a reasonable time in which to intimate rejection

should usually be the time actually taken to resell the goods together with an additional period in which they can be inspected and tried out by the sub-purchaser.
    - It is right to, at least, take account of the period likely to be required for resale.
- In the present case, the period should last at least until the date for payment, which is the earlier of the date of resale or six months from delivery. This reflects the reasonable interests of both the buyers and the sellers, and takes account of the terms of the contract itself.
    - So, a reasonable time had not passed when D questioned compliance with the Iveco guidelines and refused to pay.
    - D's conduct at this time, in particular his refusal to pay, reserved the company's position pending investigations as to what, if anything, was wrong. D was entitled to a reasonable time for that.
    - The period of time taken was not excessive, and D acted reasonably promptly.
- S35(6) is also relevant for the point of acts taken to be deemed inconsistent with the seller's ownership.
    - In the present case, no such inconsistent act took place: the continuing attempts to sell the vehicle does not amount to such an act.
- D validly rejected the underlift. They are under no obligation to pay the price, and are in fact entitled to damages.
    - D are entitled to damages on the basis of whatever profit they would probably have made on the resale of the vehicle.

Clegg v Andersson (2003)

Case overview

- D bought a yacht from C. Upon delivery, C informed D that the keel was substantially heavier than the manufacturer's specification. Negotiations ensued as to how the defect might be remedied, and D requested further information in order to enable him to make a decision on the best way to proceed. That information was not forthcoming and seven months after delivery, D rejected the yacht. C disagreed and sued for the purchase price and damages for breach of contract.
- Court of Appeal
- Held: Claim unsuccessful; D was entitled to reject the yacht for a breach of condition under s14(2). A reasonable time had not elapsed, so D validly rejected the yacht.

Judgment – Sir Morritt VC

- In the present case, a reasonable person would consider that the yacht as delivered was not of satisfactory quality because of the overweight keel, the adverse effect it had on rig safety and the need for more than minimal remedial work.
    - So, D has established a breach of condition under s14(2).
- The terms of s35 pose three questions: (i) did D intimate to C that they accepted the yacht?; (ii) did D do any act in relation to the yacht which was inconsistent with C's ownership?; and (iii) had a reasonable time elapsed in which D retained the yacht without intimating to C that they had rejected it?
- In the present case, D's asking for information about the yacht was so that he could determine whether or not to accept the yacht: this was not an intimation of acceptance.

- Under s35(6)(a), a buyer is not deemed to have accepted goods if he asks for or agrees to their repair by the seller.
    - In the present case, D's indication that he did not agree to any remedial works unless and until he had been provided with the information he sought is incapable of amounting to acceptance of the yacht.
- In cases such as this, where property in the goods has passed to the buyer, the ownership of the seller with which the buyer must not act inconsistently, is the seller's reversionary interest (which arises from the contingency that the buyer may reject the goods), as per *Kwei Tek v British Traders*.
    - In the present case, the act of insuring the yacht and registering it in D's name was not inconsistent with C's ownership.
- The case of *Bernstein v Pamson Motors* does not reflect the law as it is now, following the amendment to s35 by the SSGA 1994. The law is now such that s35(5) provides that whether or not the buyer has had a reasonable time to inspect the goods is only one of the questions to be answered in ascertaining whether there has been acceptance in accordance with s35(4).
    - In the present case, the three weeks which elapsed between the time when D received the information and the time when he rejected the yacht, did not exceed a reasonable time.

<u>Judgment – Hale LJ</u>

- If the buyer establishes that the seller is in breach of a condition, whether the parties acted reasonably is immaterial.
- D only thought the boat acceptable because they could put it right. That is not the point. Seller and buyer often agree to try and put defects right, but neither is obliged to do so. The fact that the remedy supplied by English law may be thought disproportionate by some is irrelevant to a consideration of whether the implied term has been broken.
- The test is whether a reasonable person would think the goods satisfactory, taking into account their description, the price (if relevant) and all other relevant circumstances, as per s14(2A).
    - The question is not whether the reasonable person would find the goods acceptable; rather, it is an objective comparison of the state of the goods with the standard which a reasonable person would find acceptable.
- Fitness for purpose and satisfactory quality are two quite different concepts.
- A reasonable person is not an expert.
- C knew that the yacht was unsatisfactory, hence his commendable attempts to get it put right as quickly as possible.
- The buyer has a right to reject goods which are not of satisfactory quality. He does not have to act reasonably in choosing rejection rather than damages or cure; he can reject for whatever reason he chooses. The only question is whether he has lost that right by accepting the goods, as per s11(4).
- The buyer loses the right to reject if he informs the seller that he has accepted the goods, or if he acts inconsistently with the seller's reversionary interest in the goods, or if he leaves it too long before telling the seller that he rejects them (s35(1), (4)).
    - The first two of these are subject to the buyer having a reasonable opportunity of examining the goods to ascertain whether they conform to the contract, including the implied terms in s14. Whether he has had such an opportunity is also relevant to the third (s35(2), (5)).
    - A buyer does not accept the goods simply because he asks for or agrees to their repair (s35(6)). It follows that if a buyer is seeking information which the seller has agreed to supply which will enable the buyer to make a properly informed choice between acceptance, rejection or cure, and if cure in what way, he cannot have lost his right to reject.

- In the present case, the relevant time only began to run when D received the requested information. The three weeks it took him to inform C that he was rejecting the yacht were not more than a reasonable time.

Jones v Gallagher (2005)

Case overview

- C had a kitchen designed and installed by D. The colour of the kitchen units was different to those contracted. At first instance, the judge held that there was a breach of contract, but C had lost the right to reject the kitchen units.
- Court of Appeal
- Held: C's appeal dismissed; a reasonable time had elapsed.

Judgment – Thomas LJ

- When considering under s35(4) what is a reasonable time, regard must be had to the time taken to effect medications and repairs. What constitutes a reasonable time is a question of fact, and must be decided in the circumstances of each particular case.
- In the present case, the judge directed himself properly on the law, and there was ample evidence upon which he could have reached the conclusion that a reasonable time had elapsed.

Judgment – Buxton LJ

- The effect of the amending Act to SGA 1979 is that the right to reject is now not lost automatically if the buyer engages in discussion or activity about repair. Such delay is simply a factor to be taken into account in the factual assessment that is placed on the court.
    - This is what Hale LJ was referring to in *Clegg v Andersson*.
- Sure that Hale LJ did not intend to go so far as to say that it was generally impossible to lose the right to reject while a buyer was still seeking information. There is no absolute rule that a situation in which information was sought cannot involve the loss of a right to reject.
    - Such an absolute rule would be inconsistent with the guiding principle that assessment of loss of right to reject is a matter of fact to be considered in all the circumstances.

Ritchie v Lloyd (2007)

Case overview

- C purchased agricultural machinery from D, which proved to be defective. The parties agreed that D would take the equipment back with a view to investigation and possible repair. D repaired the equipment but refused to tell C what the problem had been, despite repeated requests. C discovered informally what the problem was and was concerned that it might have affected other parts in the machinery. C was also concerned about the possible effects of the events on the manufacturer's guarantee period, and so rejected the machinery.
- House of Lords (Scotland)
- Held: Claim successful; C was entitled to reject the machinery.

Judgment – Lord Hope

- The buyer is not deemed to have accepted the defective goods merely because he asked for, or agreed to, their repair. This gives rise to the question, is he deemed to have accepted the goods if they are so repaired?
    - This question must be answered on the basis of what terms, if any, are to be implied into the contract, bearing in mind that the seller was in breach at the time of delivery and that the buyer retains the right to resile because the goods were not in conformity with the contract.
- In the present case, it would be not at all out of place to resort to an implied term to fill the gap in the statutory code and govern the relationship between the parties when it was arranged that the machinery would be taken back for repair.
    - What term, if any, would be right to imply into the contract of sale at that stage will depend on the circumstances.
- A buyer who, having been equipped with the knowledge of the defect and its required repair, allows the seller to incur the expense of repair is under an implied obligation to accept and pay for the goods once the repair has been carried out. His right to resile is lost when the repair has been completed.
    - The buyer's protection is the reasonable opportunity to examine the goods after delivery under s35(2).
- In the present case, however, the nature of the defect was not immediately obvious and it was not known what, if anything, could be done to correct it.
- The right to reject is a right of election which the buyer cannot be expected to exercise until he has the information that he needs to make an informed choice. The seller cannot refuse to give him the information that he needs to exercise it.
- A condition that the seller would provide the information, if asked for, is one which every buyer would seek for his own protection in circumstances such as the present. It is one which no reasonable seller, who was already in breach of contract, could refuse as a condition of being given the opportunity to cure the defect and preserve the contract.
    - In the present case, D was under an implied obligation to provide C with the information asked for. As they refused to give that information, they were in breach.
    - C was deprived of the information needed to make a properly informed choice, and so were entitled to reject the equipment even although, as it turned out, D was able to prove afterwards that the machinery had been repaired to factory gate standard.

Judgment – Lord Rodger

- It must have been an implied term of the inspection and repair agreement that, so long as the sellers were duly performing their obligations under it, the buyers were not to exercise their right to rescind the contract of sale.
    - A term to this effect would have been necessary to give the inspection and repair agreement business efficacy.
- There is also an implied term that, if asked, the sellers would tell the buyers what their inspection had shown to be wrong with the machinery and what they had done to put it right. D's outright refusal to supply that information constituted a material breach of the inspection and repair agreement, entitling C to rescind it and refused to collect the machinery.
    - So, with the inspection and repair agreement (including the implied term preventing C from exercising their right to rescind the sale contract) rescinded, C was entitled to rescind the sales contract.

Lowe v Machell (2011)

Case overview

- Cs were converting a barn for residential use and ordered a staircase from D. They paid for the goods but when delivered, took the view that the staircase did not comply with D's obligations under the contract. C rejected the goods and claimed for recovery of the purchase price.
- Court of Appeal
- Held: Claim successful; C entitled to reject the goods.

Judgment – Lloyd LJ

- Installation of the staircase would have resulted in failure to comply with the Building Regulations.
- S14(3) applies, since C made clear to D that the goods to be supplied were to be installed and used as the staircase in the barn as converted to residential use – that was the purpose for which the goods were being bought. Unless C did not, or unreasonably did, rely on D's skill and judgment, then s14(3) is to be implied.
    - D should have at the very least warned C of the need to ensure that the building control officer would accept the particular design, and so C did rely, and were reasonable in relying, on D. S14(3), in addition to s14(2), is implied.
- If the goods on delivery require modification (even if easily and in minor ways), in order that they are of satisfactory quality, then as delivered they are not of satisfactory quality.
    - The possibility of modification so as to comply is irrelevant to the consideration of whether there was a breach.
- Fitness of the goods for their purpose includes the compliance of the goods, when installed and used, with the Building Regulations.
- In the present case, D was in breach of contract because the staircase as designed and supplied would not have complied with the Building Regulations when installed. This entitled C to reject the goods, as they did (albeit for the other and bad reasons). C are entitled to be repaid the price which they had already paid.

Other remedies of the buyer

Tai Hing v Kamsing (1979)

Case overview

- D contracted to sell and deliver cotton yarn in instalments as demanded by C on reasonable notice. D failed to make supplies on one occasion and wrote to C saying that they were treating the contract as cancelled. C continued to press them for deliveries, but the later accepted the repudiation. C claimed the difference between the contract price and the market price at the date D wrote to terminate the contract. By the time C accepted the repudiation, the market price had dropped substantially.
- Privy Council (Hong Kong)
- Held: The measure of damages was the difference between the selling price and the market price at the time of acceptance of the repudiation. Therefore, C entitled to the lesser damages.

Judgment – Lord Keith

- In cases of rescission of a contract providing a fixed time for performance by acceptance of a repudiation, damages are to be assessed at the time fixed for performance (subject to considerations of mitigation of loss) and not as at the date of repudiation.
    - The second limb of SGA 1893 s51(3) (now SGA 1979 s51(3)) does not apply in cases of anticipatory breach where the contract stipulated a fixed time for delivery.
- In cases of anticipatory breach, C is not required to accept the repudiation, and if he does not do so the repudiation has no effect. He may wait until there has been an actual failure by D to perform the contract.
    - In this event, the damages would be assessed at the date of the actual failure to perform, not at the date of the unaccepted repudiation.
- The applicable rule for ascertaining the measure of damages is that in s51(2).

Williams v Reynolds (1865)

Case overview

- D contracted to sell cotton to C. C then contracted to sell that cotton to a sub-buyer. D failed to fulfil the contract, at which point the market price of the cotton was higher than the contract price between D and C, but lower than the contract price between C and the sub-buyer.
- High Court
- Held: C not entitled to recover damages for the loss of profit from the sub-sale contract. The measure of damages was the difference between the contract price and the market price on the last day for delivery.

Judgment – Crompton J

- The rule for the measure of damages must be made to reduce the damages to the difference between the contract price and the market price on the last day of delivery. C cannot properly claim for extra damages.
- The ordinary rule is that the damages are the difference between the contract price and the market price at the time of the breach of contract. Lost profit is not a damage naturally arising from the breach of contract, nor such as was within the contemplation of the parties at the time of the contract in case of a breach of it.
    - Since the contract was to deliver at a particular time, and since the price was continually fluctuating, there would be great difficulty in saying that D contemplated as part of his liability in case of default the loss of any more advantageous contract that C might have the opportunity of making during the interval.
    - Such loss is not the natural consequence of the breach, or contemplated by the parties at the time of the contract.

Judgment – Blackburn J

- In the ordinary course of business at Liverpool, such contracts for sale are, to a certain extent, the subject of sale. However, loss of profit from a contract subsequently made by the purchaser (which is not properly a sub-contract) does not follow as a natural consequence from the original seller's breach of contract.
- C had reason to rely on D, but that does not entitle him to throw upon them the loss of the profit he would have made.

Judgment – Shee J

- The selling at a profit is not the natural result of his buying with an intention to resell. Further, the parties could not have formed an opinion whether the purchaser would be able to realise a profit. Therefore, the extra damages do not fall within either alternative of the rule in *Hadley v Baxendale*.

Bence Graphics v Fasson (1998)

Case overview

- D sold vinyl film to C for decals to identify sea-borne bulk containers. A term in the contract required the film to be in legible condition for at least five years. C sold-on the film to container manufactures who supplied the containers marked with the decals to shipping lines. Some of the films became illegible, and C brought an action for breach of warranty.
- Court of Appeal
- Held: The prima facie measure of damages for breach of warranty of quality under s53(3) is displaced where it was in the contemplation of the parties that the goods would be sold on. In such a case, the measure of damages is based on the buyer's liability to the subsequent or ultimate users of the product arising from the defects constituting a breach of the seller's warranty.

Judgment – Otton LJ

- SGA 1979 s53(2) lays down the basic rule in terms of *Hadley v Baxendale*. The second rule under *Hadley v Baxendale* is impliedly accepted by the wording of s54.
- S53(3) lays down only a prima facie rule, from which the court may depart in appropriate circumstances. The burden of proof lies upon the person who seeks such a departure; the seller can, equally to the buyer, discharge this burden and displace the presumption.
- Where a seller knows that the buyer intended to resell the goods, and ought reasonably to have contemplated that a breach of his undertaking would be not unlikely to cause the buyer to lose the profit he hoped to make on the resale/sub-sale, the buyer may recover damages in respect of such loss of profits.
    - In the present case, there were no string contracts: the same goods were not sold on.
- If the buyer uses the goods to make some product out of them, the value of the goods is not to be taken.
- In the present case, the goods were substantially converted/processed by the buyer, and the sellers were aware of the precise use to which the film was to be put at the time the contract was made.
    - Once the goods had been converted in a manner which was contemplated by the parties, the damages must be assessed by reference to the sub-sale; C does not have the option to choose the measure of damages most favourable to him.
- D knew that the chain of C's sub-sales, and knew that the sub-buyer would make claims for damages against C which C would be not unlikely obliged to meet. D would expect to be liable for the value of unmerchantable film processed by C and of unsaleable raw material supplied by D.
    - The correct measure of damages is on the basis of C's liability to the subsequent or ultimate users of Cs' product, rather than on a loss of value basis.
    - At the time of making their contract, the parties were aware of facts which indicated to both that the loss would not be the difference between the value of the goods delivered and the market value, and accordingly, the prima facie measure ceases to be appropriate.

- The prima facie measure of damages for breach of warranty of quality provided for by s53(3) is displaced.

Judgment – Auld LJ

- The starting point in a claim for breach of warranty of quality is the *Hadley v Baxendale* principle reproduced in s53(2) – the starting point is not whether one of the parties has displaced the prima facie rule in s53(3).
- The present case is one in which the parties would have contemplated that, in the event of a breach by the seller discovered only after the decals had been in use, the buyer might wish to pass on to it claims for damages from dissatisfied customers.
- In chain contracts, the point is essentially one of causation: is there sufficient similarity between the sale contract and the subsequent contracts to enable a finding that breach by the seller of the sale contract has in fact caused the breach of the subsequent contracts?
    - A substantial change to goods sold as a result of the buyer subjecting them to a manufacturing process may break the chain of causation between the breach of contract sued upon and any claim arising under a subsequent contract.
- This is plainly a case in which the parties must be taken as having contemplated that any latent defect in the vinyl film at the time of delivery, or at the time of conversion by the buyer into the decals, might when later discovered render the buyer vulnerable to claims for damages which it would wish to pass back to the seller.

Judgment – Thorpe LJ (dissenting)

- Where a manufacturer supplies a defective product to his customers as a consequence of the use within the process of a raw material that did not possess the qualities warranted by the supplier, the manufacturer is fairly compensated by recovering from the supplier the cost of settling claims made by his customers, together with the profit lost on those sales and perhaps prospective sales.
    - Compensation so calculated would in the vast majority of cases considerably exceed the price that the manufacturer paid for the raw materials.
- In the present case, the parties must be taken to have contemplated the consequences of possible future breach within the terms of the contract.
- There is a distinction between cases involving a string of contracts, and cases involving the supply of a raw material to a manufacturer or processor who converts the material to, or incorporates it within, some other product for supply to his customer.
    - In the former class of cases, the exclusive contemplation of the parties is very different in the event of breach of a quality warranty.
    - In the latter class of cases, the contemplation of the supplier and the manufacturer is less confined and will depend upon all the circumstances of the case.
- In the present case, the judge's conclusion was justified on the evidence and no sufficiently substantial misdirection in law has been demonstrated.

Parsons v Uttley (1978)

Case overview

- C bought a container for storing pig feed from D. When installing the container, D neglected to open the ventilator at the top. Due to a lack of ventilation, the pig feed grew mouldy and as a result, over 200 pigs died. C sued for breach of contract, seeking damages for the loss of profits. D argued that the loss of profits was too remote.
- Court of Appeal
- Held: Claim successful; the loss of profits was not too remote.

Judgment – Lord Denning MR (dissenting in reasoning)

- In loss of profit cases, the defaulting party is only liable for the consequences if they are such as, at the time of the contract, he ought reasonably to have contemplated as a serious possibility or real danger – one must assume that, at the time of the contract, he had the very kind of breach in mind.
    - This is *Hadley v Baxendale*
- In physical injury or expense cases, the defaulting party is liable for any loss or expense which he ought reasonably to have foreseen at the time of the breach as a possible consequence, even if it was only a slight possibility – one must assume that he was aware of his breach
    - This is *The Wagon Mound*, and is typically confined to tort, although has extended to contract in cases of product liability and occupiers' liability.
- In the present case, C could sue in either contract or tort. So, the test of remoteness should be the same, namely the test in tort. On a tortious test of remoteness, D is liable for all such loss or expense as could reasonably have been foreseen, at the time of the breach, as a possible consequence of it.
    - D is liable for the death of the pigs.

Judgment – Orr LJ

- Agree with Lord Denning MR and Scarman LJ as to the result of the case.
- Disagree with Lord Denning MR that there is a distinction between loss of profits and physical damage cases.

Judgment – Scarman LJ

- Contrary to Lord Denning MR's reasoning, the cases do not support a distinction in law between loss of profit and physical damage; neither is it necessary to develop the law by drawing such a distinction.
- In concurrent claims in tort and contract, which C decides to bring his claim in does not affect the amount of damages recoverable.
- "Serious possibility", in the *Hadley v Baxendale* test, is a question of fact.
- SGA 1893 s43(2) is clearly a statutory formulation of the first rule in *Hadley v Baxendale,* but is not ousted by the second rule in *Hadley v Baxendale*.
- The breach does not have to be foreseen or contemplated; it does not matter if the defect is latent. For the purposes of remoteness, the court must assume (though perhaps contrary to the fact) that the parties had in mind the relevant breach.
    - The court's task is to decide what loss to Cs it is reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind the breach when they made their contract.

- In the present case, this was a contract for the sale of goods by description made in circumstances in which C made clear to D that they relied on D's skill and judgment to supply a container reasonably fit for storing pig feed.
    - There was only one contract for the sale and delivery of the container, not two separate contracts for sale and delivery. However, this is immaterial since either way, D knew that an unventilated container was not suitable for C's requirements.
- It does not matter if the parties thought that the chance of physical injury, loss of profit, or other loss was slight, provided they contemplated as a serious possibility the type of consequence (not necessarily the specific consequence) that ensued upon breach.
    - In the present case, making the assumption as to breach, no more than common sense was needed for the parties to appreciate that food affected by bad store conditions might well cause illness in the pigs fed upon it.

Other legislation

Wood v TUI Travel (2017)

Case overview

- D contracted to provide C with an all-inclusive holiday in a hotel. D had suffered from acute gastroenteritis as a result of eating contaminated food provided by the hotel. Trial judge found that the food had been contaminated without any fault on the part of the hotel, although the food and drink provided by the hotel was not of "satisfactory quality" for the purposes of SGSA 1982 s4(2).
- Court of Appeal
- Held: Claim successful. The provision of contaminated food or drink is capable of amounting to a breach of the implied condition in SGSA 1982 s4(2).

Judgment – Burnett LJ

- In the absence of any express agreement to the contrary, when customers order a meal / drink, property in the meal / drink transfers to them when it is served.
    - That is so whether the transaction has no other components (e.g. in a restaurant of café), or whether it does provide other services (the most usual being accommodation).
    - The fact that the food and drink may be laid out in a buffet to which customers help themselves can make no difference – when the customer helps himself to the meal / pours himself a drink, property in the fare becomes that of the customer.
- In the present case, the contract between the hotel and Cs was a contract both for the supply of services and the supply of goods. The food and drink supplied were goods in which it was agreed that property would be transferred; and those goods were not of satisfactory quality because the food was contaminated.

Topic 2 – Sale of Goods: Proprietary

The transfer of title to goods under a contract of sale

General

Healy v Howlett (1917)

Case overview

- C contracted to sell 20 boxes of fish to D. C consigned by railway 190 boxes of fish, instructing the railway company to deliver 20 boxes to D, and the remaining to other consignees. After the fish was placed on the train, C sent an invoice to D which stated that the fish was at the sole risk of D after being put on the train. The train was delayed, and the fish became unmerchantable. 20 boxes were picked out for D, but D refused to accept them. C claimed for recovery of the price.
- High Court
- Held: Claim successful. The invoice was sent by C after the contract of sale was complete and the fish were put on rail, and so it was not part of the contract. Further, since there had been no appropriation of the 20 boxes at the time they were put on the train, property did not pass then, and so were not bound by the selection and earmarking made after the delay had occurred.
- The damage was done before property passed, so the seller was on risk.

Judgment – Ridley J

- The contract was complete and the fish were put on rail before the invoice was sent, and so those words cannot be treated as part of the contract.
- Goods become the property of the consignee and are at his risk as soon as they are marked off by some distinct act as his, and not the seller's, and are delivered to the carrier as the agent to complete delivery to the purchaser.
- Each box ought to have been marked with the name of its consignee; from that moment, the boxes would have been at the consignees' risk – this is the principle laid down in SGA 1893.
- If it were said that property has passed in the present case, it would be impossible to say which consignee is to bear the loss caused by the deterioration of any particular boxes of the fish.

Judgment – Avory J

- Whether the 20 boxes of fish became the property of the buyer (or, in other words, whether they were at the buyer's risk when they were put on rail) depends on whether there was an appropriation of the 20 boxes at that time to the buyer.
    - If there was an appropriation of the particular 20 boxes to them, then if they were at Holyhead when the fish in fact arrived, the buyer would have been entitled to say as against the other purchasers that those boxes belonged to them.
- If it is impossible to determine which of the purchasers was bound to take the 20 bad boxes, it follows that no particular 20 boxes were the property of any particular purchaser at that time.
- The invoice containing the words, "at sole risk of purchaser after putting fish on rail" cannot be construed as part of the contract. There is no evidence of the buyer's assent to those words, and they undoubtedly were placed on the invoice after the contract was made and so formed no part of it.

Rowland v Divall (1923)

Case overview

- A car dealer (C) bought a car from D. He painted the car, put it in his showroom and sold it to a customer. Two months later, the car was impounded by the police as it had been stolen. It was then returned to its original owner. Both C and D were unaware that the car had been stolen. C returned the purchase price to the customer and brought a claim against D.
- Court of Appeal
- Held: Claim successful; C entitled to the purchase price. D did not have the right to sell the car, as he did not obtain good title from the thief. Ownership remained with the original owner.

Judgment – Atkin LJ

- Although the seller delivered de facto possession to the buyer, since the seller did not have the right to possession, he could, therefore, not give it to the buyer. Therefore, the buyer was at all times liable to the true owner for its conversion, since he was in actual possession but had no right to it.
- The buyer had a right to receive the property in the car, as a result of the implied term regarding the seller's title in SGA.
    - There can be no sale at all of goods which the seller has no right to sell: the whole object of a sale is to transfer property from one person to another.
- The buyer did not receive any part of that which he contracted to receive, namely, the property and right to possession. Therefore, there was a total failure of consideration.
    - The buyer has a right to reject, and a right to sue for the price paid as money had and received on failure of the consideration.
- The buyer has no obligation to return the car, for ex hypothesi the seller had no right to receive it.

Philip Head v Showfronts (1970)

Case overview

- D bought carpet from C. The carpet was delivered to the showrooms where it was to be laid, but then sent away by C's sub-contractor for stitching. It was returned the next day in heavy bales, but was subsequently stolen. C brought an action for the price.
- High Court
- Held: Claim unsuccessful. The carpet was not in a deliverable state (within SGA 1893 s18 r5(1)). Thus, property remained in C, and D was not liable for the price.

Judgment – Mocatta J

- Despite the fact that the planning and laying of the carpeting were of great importance, this was not a contract for work and labour and the supply of materials; it was a contract of sale, to which SGA 1893 applies.
- "Deliverable state", for the purposes of SGA 1893 s18 r5(1), is defined in s62(4): the goods must be in such a state that the buyer would under the contract be bound to take delivery of them.
- In *Seath v Moore,* Lord Blackburn stated: in general, if there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, the contract will not be construed to be one to pass the property until those things are done.

- In the present case, whilst this was a contract for sale, the laying of the carpeting following on the planning was undoubtedly an important feature of the case.
    - Where there is work to be done in relation to the article sold before the contractual obligations of the sellers are completed, one has to consider the relevant importance of that work in relation to the contract when deciding whether the property has passed.
- One is entitled to apply everyday common sense to the matter.
    - A householder purchasing carpeting under a contract providing that it should be delivered and laid in his house would be very surprised to be told that carpeting, which was in bales which he could hardly move deposited by his contractor in his garage, was then in a deliverable state and his property.
- In the present case, because of the condition of the carpeting at the time it was stolen, and the importance of the last stage in the obligations to be performed by C under the contract, the carpet had not been unconditionally appropriated to the contract in a deliverable state at the time it was stolen.
    - The property had not passed at the moment that the carpeting was stolen.

Carlos Federspiel v Charles Twigg (1957)

Case overview

- C, based in Costa Rica, contracted to buy bicycles from D, based in Birmingham. C paid in advance. D had made preparations for shipment. Whilst the bicycles were being transported to Liverpool dock, D went into insolvency. C claimed that the goods had been appropriated to the contract and that the property in them had thus passed to C.
- High Court
- Held: Claim unsuccessful; it was to be inferred from the contract that the intention was for the property in the goods to pass upon shipment. So, on D's insolvency, property had not yet passed.

Judgment – Pearson J

- The main issue is whether or not the goods were appropriated to the contract by the sellers with the consent of the buyers.
- This is a case in which the contract is for the sale of unascertained goods by description, for the sale of future goods probably still to be manufactured. The question is whether there was an appropriation of those goods to the contract by the sellers with the assent of the buyers within the meaning of SGA 1893 s18 r5.
- The intention of the contract is that the sellers are to arrange the insurance and the contract of affreightment and are to pay the freight and insurance and charge them as extras to the buyers. Also, the intention seems to be that they should charge the cost price to the buyers, so that any rise or fall in rates of freight or insurance would be for the account of the buyers, not the sellers.
    - It is an f.o.b. contract.
- Normally, in an f.o.b. contract, property passes on shipment. In a c.i.f. contract, the property would pass not earlier than shipment, but perhaps later than shipment.
    - In the present case, under the contract, it was to be expected that the ownership of the goods would pass to the buyers on shipment of the goods, or possibly at some later time, when the bill of lading, insurance policy and final definitive invoice would be handed over to the buyers.

- The goods were not in fact shipped, and they were not even dispatched from the sellers' works to the port of shipment. Goods to the quantity and proper description required had been manufactured, they were packed, and they were marked with shipping marks – however, these steps were preparation for the shipment; they cannot be regarded as intended appropriation.
- One of the letters sent from the buyers to the sellers places emphasis on shipment as constituting the performance of the contract.
- From the case law, the following principles emerge:
- 1. S18 s5 is one of the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer unless a different intention appears. It follows that the element of common intention always has to be borne in mind.
    - A mere setting apart / selection of the seller of the goods which he expects to use in performance of the contract is not enough, since he could change his mind and use those goods to perform a different contract.
    - To constitute an appropriation of the goods to the contract, the parties must have had (or be reasonably supposed to have had) an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer.
- 2. It is by agreement of the parties that the appropriation, involving a change of ownership, is made.
    - However, in some cases, the buyer's assent to an appropriation by the seller is conferred in advance by the contract itself or otherwise.
- 3. An appropriation by the seller, with the assent of the buyer, may be said always to involve an actual or constructive delivery.
    - If the seller retains possession, he does so as bailee for the buyer.
    - There may after constructive delivery be an actual delivery made by the seller under the contract. That is possible because delivery is the transfer of possession, whereas appropriation is the transfer of ownership.
- 4. One has to remember SGA 1893 s20, whereby the ownership and the risk are normally associated.
    - Where construction of the relevant documents suggests that the goods were, at all material times, still at the seller's risk, that is prima facie an indication that the property had not passed to the buyer – that is so in the present case.
- 5. Usually, but not necessarily, the appropriating act is the last act to be performed by the seller. If there remains a further, important and decisive act to be done by the seller, then there is prima facie evidence that probably the property does not pass until the final act is done.
    - Where the parties agree that the buyer will collect from the seller's premises, and the seller has identified and placed the goods ready for the buyer, and so informed the buyer, who in turn agrees to come and take them, that is the assent to the appropriation.
- In the present case, the intention was that the ownership should pass on shipment (or possibly at some later date) because the emphasis throughout is on shipment as the decisive act to be done by the seller in performance of the contract. Further, no agreement can be found in the correspondence to a change of ownership before the time of shipment. There is no actual or constructive delivery, and no suggestion of the goods being at the buyer's risk at any time before shipment. Finally, the last two acts to be performed by the seller, namely, sending the goods to Liverpool and having the goods shipped on board, were not performed.
    - The prima facie inference to be draw from the contract is that the property was not to pass at any time before shipment. This view is not displaced by the subsequent correspondence.
    - It follows that there was no appropriation of the goods, and so C's action fails.

Wait and James v Midland Bank (1926)

Case overview

- Ship of wheat cargo arrived at dock. C were entitled to deal with the whole of the cargo, and sold some of it to X, in three separate purchasing agreements. Some of the wheat was delivered, and some transferred to the bank (D) in the form of a pledge; and only some was paid for. The result was that there remained some of the wheat undelivered. X became insolvent, and so C instructed the dock authority not to deliver any to X. The wheat was claimed by both C and D.
- High Court
- Held: The property passed to D; what remains in the warehouse has been ascertained to be the quantity of goods sold by C to X and to be the goods transferred by X to the D.

Judgment – Roche J

- D claims that there was ascertainment on the basis that all the rest of the cargo had been delivered to all the other buyers, so that all that was left was the quantity sold to X and by them transferred to the bank, except that part or quantity which X themselves had got possession of.
- The wheat that was left was not weighed: rather, the total wheat was weighed at the start, then each delivery out of wheat was weighed. Thus, the property in the wheat had passed when the quantity of goods covered by those contracts were the only goods left in the warehouse.
    - This is ascertainment by exhaustion.
- Whilst the most usual and natural way of ascertainment is by weighing, that is not the only way. Ascertainment can take place by any method which is satisfactory to the parties concerned: if the Dock Committee and D chose to ascertain through measuring rather than weighing, that would be fine.
- Where there are contracts for the sale of unascertained goods to one buyer, it is sufficient if it is ascertained what the goods are which are covered by those contracts – this is a permissible and proper construction of s16.
- If this conclusion was wrong, then C's claim would succeed. They are unpaid sellers within the second branch of s38, and if the property were theirs, they would have rights of withholding delivery under s39(2).

Re Wait (1927)

Case overview

- C contracted to buy 500 tonnes of wheat out of ship's cargo of 1000 tonnes from D, whilst the ship was at sea; C paid in advance. D became bankrupt as the ship was at sea, but nothing had been done on the ship to identify which wheat was to be used to fulfil the contract with C. C claimed a proprietary interest in 500 tonnes of wheat.
- Court of Appeal
- Held: Claim unsuccessful; C did not own the 500 tonnes of wheat. A contract for the sale of good does not of itself create equitable rights.

Judgment – Atkin LJ

- No 500 tonnes of wheat have ever been ear-marked, identified or appropriated as the wheat to be delivered to C under the contract. C never received any bill of lading, warrant, delivery order or any document of title representing the goods.

    - Nor can 500 tonnes or any less quantity be ascertained by subtracting from the bulk in D's possession known quantities the property of C.
- C argued for specific performance under SGA 1893 s52. The section gives the remedy in any action for breach of contract to deliver specific or ascertained goods.
    - "Ascertained" probably means identified in accordance with the agreement after the time a contract of sale is made.
- In the present case, the goods were neither specific nor ascertained, and so the remedy of specific performance is not open to C.
- (OBITER, and DISSENTING): Without deciding the point, there is much to be said for the proposition that: an agreement for the sale of goods does not import any agreement to transfer property other than in accordance with the terms of the SGA (i.e. the intention of the parties to be derived from the terms of the contract, the conduct of the parties and the circumstances of the case, and, unless a different intention appears, from the rules set out in s18).
    - It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the SGA.
- A seller or purchase may create an equity by way of charge, equitable assignment, or any other dealing with or disposition of goods, the subject-matter of sale. He may create such an equity as one of the terms expressed in the contract of sale.
    - However, the mere sale or agreement to sell or the acts in pursuance of such a contract mention in the SGA will only produce the legal effects which the SGA states.
- An unpaid seller has a lien which is a possessory lien and has a right of stoppage in transitu. He does not, however, have a right to a lien over the goods in the possession of the buyer – such liens would be inconsistent with the SGA and do not exist.
- The advance payment makes no difference.
- If a seller delivers goods to the buyer before payment, trusting to receive payment in due course, and the buyer becomes bankrupt, the seller is restricted to a proof, and cannot assert a beneficial interest in the goods.
    - There is no reason why a different principle should prevail where a buyer hands the price to the seller before delivery of the goods, trusting to receive delivery in due course.
    - In both cases, credit is given to the debtor, and the buyer and seller respectively take the risk of the insolvency of their customer.
    - So, the buyer of goods in these circumstances is in no better position in bankruptcy than a seller.

<u>Judgment – Sargant LJ (dissenting)</u>

- Had C contracted to purchase the whole 1000 tonnes of wheat, they would have an equitable interest in the specific cargo, and would be entitled to have the 1000 tonnes delivered to them upon payment of the balance.
    - There is no real difference in the equitable position of C because they agreed to buy only 500 tonnes rather than 1000. C was entitled to enforce an equitable lien on the 1000 tonnes for the purpose of protecting their right to receive out of the 1000 tonnes the amount of their purchase, namely 500 tonnes.

- The fact that the property in question is future and unascertainable at the date of the contract is immaterial so long as it is described so clearly as to be ascertainable when the contract comes to be enforced.
- The sale of the 500 tonnes of wheat, which was to be (and was) identified as shipped within a definite period by definite shippers and on a definite vessel, was an agreement for the sale of specific goods. It amounted to an equitable assignment, enforceable against the particular parcel of goods in the bankrupt's hands.
- C is also entitled to succeed on the basis of SGA 1893 s52, since the sale was for specific goods.

The Aliakmon (1986)

Case overview

- Steel coils purchased by C were damaged by bad stowage on ship. At the time the damage occurred, C only had a contractual right to the goods; the title had yet to pass from the seller. Key issue is whether C had a right to sue the shipowners (D) in negligence.
- House of Lords
- Held: Claim in negligence unsuccessful. A claim in negligence for loss or damage to property can be made only when C has legal ownership or a possessory title to the property at the time the damage occurred. Contractual rights that are adversely affected due to the damage do not suffice.

Judgment – Lord Brandon

- There is a long line of authority that in order for C to claim in negligence for loss caused to him by reason of loss of, or damage to, property, he must have had either the legal ownership of, or a possessory title to, the property concerned at the time when the loss or damage occurred. It is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of, or damage to, it.
- A mere equitable ownership right is insufficient; he must join the legal owner as a party to the action. If an equitable owner also has possession, he can sue based on his possessory title.
- (OBITER): SGA ss 16-19 draw no distinction between the legal and equitable property in goods, but appear to have been framed on the basis that the expression "property" is intended to comprise both the legal and equitable title.
    - Not necessary to decide the point, but provisionally agree with Atkin LJ's view in *Re Wait*.
- To establish a duty of care in the present case, in a c.i.f. contract, would open the floodgates to many such claims for transport at sea, but also for transport in land.

The Filiatra Legacy (1991)

Case overview

- D owned a tanker, which loaded a cargo of oil in Turkey and discharged it in Italy. The oil had been sold c.i.f. by the sellers (C1) to the buyers (C2) and the bill of lading recorded 104.5k tonnes as loaded. According to C2, the quantity actually discharged was 100k tonnes, leaving a shortage of 4.5k tonnes that they alleged had been deliberately retained on board and stolen by D. C2 had no contractual claim under the bill of lading as it did not come into their hands until after discharge. So, C2 claimed in tort.
- Court of Appeal
- Held: Claim unsuccessful. Property passed to the buyers, and so they had title to sue. However, their claim failed on the facts of proving that the missing oil was not discharge din Italy, but remained on board the ship.

Judgment – Mustill LJ

- The buyers' claim must be in tort, and so they must establish that they were owners of the oil at the time of discharge.
- The relevant provisions are to be found in SGA 1979 ss16-19.
- S18 and s19 make plain that the inference that a seller is reserving the right of disposal, if he obtains a bill of lading which makes the goods deliverable to his own order, can be rebutted by the circumstances of a particular case.
    - A requirement in the sale contract for a letter of credit to secure payment of the price does not necessarily rebut that inference.
- The buyers must show that the whole cargo became their property no later than the date when discharge came to an end and any substantial quantity of oil remaining on board was wrongfully converted by the shipowners.
- In the present case, the whole of the oil had by then become the property of the buyers.
    - The voyage was a short one, and so it was contemplated that the oil might be delivered, mixed, and even refined and distributed, before payment of the price became due. It was also contemplated that the bill of lading might not reach the buyers before discharge of the cargo.
    - So, the parties could not have intended that the passing of the property should depend either on payment of the price or on transfer of the bill of lading, unless they expressly said so.
- The sellers taking a bill of lading to their own order gives rise to the presumption in s19(2) that they were reserving the right of disposal. This gives rise to the question, subject to what condition was it reserved? It is unclear upon what condition it was reserved.
    - Plainly not a condition which would be fulfilled by the payment of the price, or tender of the bill of lading to the buyers.
    - It may well be that some unconditional act of appropriation was still necessary before property passed. If so, there was an appropriation either when the sellers sent their invoice to the buyers, or when they ordered the shipowners to proceed to Italy and deliver the cargo to the buyers, or when the master on their instructions tendered notice of readiness and started to discharge the cargo.
        - No decision between these possible conclusions is necessary.
    - The property in all the oil passed to the buyers when discharge commenced, if not before.
- So, the buyers have title to sue.

Re London Wine Co (1986)

Case overview

- D sold wine to C. After contracts of sale were executed, the wine was kept in D's warehouses. D gave C certificates of title to the wine and Cs were charged for storage and insurance, but specific cases were not segregated or identified for each customer. D later went into liquidation. Cs sought to establish that the wines were held on trust and thus unavailable to creditors.
- High Court
- Held: Claim unsuccessful; no trust was created because the subject matter was uncertain.
- Segregation of the chattels from the bulk is required in order to form the subject matter of a trust. There must be identification of: (i) the bulk; (ii) the number of items in the bulk; and (iii) the specific items.

Judgment – Oliver J

- There was no representation made by D that the C's specific cases were segregated and identified as earmarked for his purchase, and this was not done in fact. There was never, in general, any segregation or appropriation of the wine in the warehouse until delivery to the purchaser.
- To create a trust, it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property is to attach.
    - This is so despite the fact that the subject-matter is part of a homogenous mass so that specific identity is of as little importance as it is, for instance, in the case of money.
- A farmer who declares himself to be a trustee of two sheep without identifying them cannot be said to have created a perfect and complete trust whatever rights he may confer by such declaration as a matter of contract.
    - The mere declaration that a given number of animals would be held upon a trust could not, without very clear words pointing to such an intention, result in the creation of an interest in common in the proportion which that number bears to the number of the whole at the time of the declaration.
    - Where the mass from which the numerical interest is to take effect is not itself ascertainable at the date of the declaration, such a conclusion becomes impossible.
- The carrying out of the order would bring about ascertainment of the goods, but there would not necessarily be any pre-existing equitable right. C's claims must, therefore, fail.

Re Stapylton Fletcher (1994)

Case overview

- Wine merchant sold wine to customers, who left the wine within him for storage purposes, and drew it out at will. The wine merchant separated the stock from his general trading stock. On the wine merchant's receivership, the receiver applied to the court for directions as to who owner the wine. Customers argued that under SGA 1979 s16, the goods had been ascertained by being set aside from the trading stock, and so belonged to them.
- High Court
- Held: The wine stocks were the property of the customers who had paid for them. The customers were tenants in common of the entire stack in the proportion of their ownerships.

Judgment – Baker QC

- The prohibition in s16 has proved too restrictive in the case of sales of goods forming part of a bulk.
- The decision in *Re London Wine* does not inevitably govern the present case; one obvious difference is the segregation of the wine purchased in a separate part of the warehouse and the careful maintenance of records within the company in the present case.
    - Further, there was no ascertainable bulk in *Re London Wine* because the company was free to sell its stock and satisfy the customers from any other available source.
- *Re Wait* demonstrates that normally a contract for the sale of goods takes effect at law, and gives rise to no equitable interest in favour of the buyer.
    - A contract for the sale of good does not of itself create equitable rights.
- English law does not reject the possibility of a tenancy in common in relation to goods in all circumstances.
- Since these bottles of wine were stored as a commodity of investment, it is of secondary importance that the customer's name should be attached to any particular case. Further, the customer's assent to any appropriation of specific cases without consultation can be safely inferred.
- We are here dealing with two separate, if related, contracts: one contract for the sale of goods, the other a contract to store wines indefinitely.
    - The buyer agreed to become a tenant in common of the entire stack in the proportion that his cases bear to the total number of the cases in the stack for the time being. There is no doubt that such a tenancy in common goods can exist.
- It can be inferred that the parties intended the property in the goods to pass when they were set aside for storage.
- In the case of goods forming part of a bulk, ascertainment does not occur until they are separated from the bulk, usually immediately prior to delivery. There is no compelling reason why ascertainment should mean the same in situations where there is to be no delivery.
- The segregation of the stock from the company's trading assets, whether done physically or by giving instructions to a bonded warehouse keeper, causes the goods to be ascertained for the purposes of s16. The goods are then identified as those to be handed over for storage in performance of the contract for sale.
    - Here, property passes by common intention, not by s18 r5.
- The availability of the remedy of specific performance does not of itself import the existence of some equitable interest. All it imports is the inadequacy of the common law remedy of damages in the particular circumstances.

Re Goldcorp (1995)

Case overview

- Cs invited to buy gold from a company (D) which said it would then store on the purchasers' behalf. Each buyer who paid for a certain amount of gold received a certificate which purported to verify the fact that they were the owner of that amount of gold – this was not a case involving a purported sale out of a bulk. It turned out to be a fraudulent scheme, with D's directors taking the money and not buying any gold with it. D did own some bars of gold used for show, but not nearly enough to cover its liabilities. No gold whatsoever was ever appropriated to any particular purchaser. Cs claimed a beneficial interest in the small number of gold bars which D did own.
- House of Lords
- Held: Claim unsuccessful; Cs could not assert any beneficial interest in the gold.

Judgment – Lord Mustill

- Cs did not obtain any form of proprietary interest, legal or equitable, simply by virtue of the contract of sale, independently of the collateral promises. This is clear from SGA 1893 s16.
- The contracts in question were for the sale of unascertained goods. There are two species of unascertained goods:
    - (i) Generic goods: Sold on terms which preserve the seller's freedom to decide for himself how and from what source he will obtain goods answering the contractual description.
    - (ii) Goods sold ex-bulk: Goods which are by express stipulation to be supplied from a fixed and pre-determined source, from within which the seller may make his own choice (unless the contract requires it to be made in some other way), but outside which he may not go.
- Common sense dictates that the buyer cannot acquire title until it is known to what goods the title relates.
- Whether the property then passes will depend upon the intention of the parties and in particular on whether there has been a consensual appropriation of particular goods to the contract – the law is not straightforward on this question.
- In the present case, however, the case turns not on appropriation. Rather, it turns on ascertainment, on which the law has never been in doubt. It makes no difference what the parties intended if what they intended is impossible – as is the case with an immediate transfer of title to goods whose identity is not yet known.
- Any attempt by Cs to assert that a legal title passed by virtue of the sale would have been defeated, not by some arid legal technicality, but by what Lord Blackburn called "the very nature of things".
    - The same conclusion applies, and for the same reason, to any argument that a title in equity was created by the sale.
- The facts in *Re Wait* were crucially different. There, the contract was for a sale ex-bulk, and so the buyer could point to the bulk and say that his goods were definitely there, although he could not tell which part they were.
    - No such feature exists here. However, the reasoning contained in Atkin LJ's judgment, which is irresistible, points unequivocally to the conclusion that under a simple contract for the sale of unascertained goods, no equitable title can pass merely by virtue of the sale.

Kulkarni v Manor Credit (2010)

Case overview

- C ordered a car from X, knowing that X had no such car but intended to source one. X bought the car from D under a hire-purchase agreement and delivered it to C that day. However, three days earlier, it had given C the car's registration number so that he could insure it. D discovered X's fraud and repossessed the car. C claimed against D in conversion, relying on a title derived under the Hire-Purchase Act 1964 s27.
- Court of Appeal
- Held: Claim successful; C was a purchaser under a disposition which first took place upon delivery, and so the exception in HPA 1964 s27 applied.

Judgment – Rix LJ

- HPA 1964 s27 provides a rare exception to the general principle of English law that no one can transfer a better title than he possesses (the nemo dat rule).

    - HPA 1964 s27(2): Where a motor vehicle has been bailed under a hire-purchase agreement, and this disposition is to a private purchaser, and he is a purchase in good faith without notice of the hire-purchase, that disposition shall have effect as if the creditor's title to the vehicle has been vested in the debtor immediately before that disposition.
- It is important to identify the latest moment when a mere agreement to sell fructified into a (purported) sale under which transfer of the property in the car was intended to be transferred.
    - If that was before X became D's debtor under their hire purchase agreement, then the disposition in question fell outside of the protection under s27 and C received no aid from it to establish a better title than D's.
    - In the circumstances, the question becomes when X and C intended property in the car to be transferred to C.
- This is a contract for the sale of unascertained or future goods. No property is transferred unless and until the goods are ascertained, as per s16.
    - S17 holds that in a contract for the sale of specific or ascertained goods, property in them is transferred when the parties intend it to be transferred. This has been applied to contracts for the sale of unascertained goods, once they have become ascertained.
- Rule 5(2) represents a form of long stop prima facie rule that where the seller reserves a right of disposal, delivery to the buyer amounts to an unconditional appropriation of the goods.
- "Deliverable state" is defined in s61(5) as "such a state that the buyer would under the contract be bound to take delivery of them".
    - Without the registration plates attached, the car was not in a deliverable state, and so C would not have been bound to take delivery of the car. So, rule 5(1) was not fulfilled before X became D's debtor under the hire purchase agreement.
    - This means that C can establish that he became a purchaser of the car under a disposition which first took place at the time of delivery, and thus when X was in a position to transfer the property in the car under the nemo dat exception in s27. Thus, C's claim succeeds.
- Rule 5(1) assumes that the relevant goods are those which the seller has title in under s12(1). If a seller lacks property in the goods (and a fortiori knows this), his appropriation to the contract is unlikely to be any more reliable as an indication of his (or the parties') intentions than his appropriation of goods which are not in a deliverable state, or of goods which are not goods of the contract description.
    - In the present case, X knew that it had no property. So, for his part, C could not be thougth of as intending to assent to an appropriation which X knew could not transfer to him the property which, if rule 5(1) were to be applied, would be required to be transferred.
- Thus, the agreement to sell would only mature into a (purported) sale with actual delivery of the goods itself – that would reflect the presumption in rule 5(2), which focuses on delivery, which deems an unconditional appropriation then to occur, and has no requirement for the buyer's assent.
    - Thus, it is not the case that a seller cannot complete a sale if he lacks full rights of ownership in the goods. Where he lacks full title, he may well transfer such property as he has, such as a possessory title.
    - However, in the present case, there is no finding even as to whether X had possession of the car when the registration plates were given.
- Applying Pearson J's principles in *Federspiel v Twigg,* it can be said that: (i) delivery was looked to as the decisive act which would transfer both possession and property; (ii) there was nothing in the parties' communications which indicated an intention otherwise; (iii) there was no actual or constructive delivery, in which X became the bailee of C's car; (iv) the car was not at C's risk before

delivery; and (v) in the circumstances of X's fraud, the parties should not be taken to intend anything prior to actual delivery of the car to turn their agreement into a sale.
    - In the circumstances of the case, the relevant appropriation should not be regarded, under a merely presumptive rule, as intended to transfer the property in the car to C.
- Property did not pass to C before the hire-purchase agreement between X and D, and so C is entitled to the protection under HPA 1964 s27.

Wood v TUI Travel (2017)

Case overview

- D contracted to provide C with an all-inclusive holiday in a hotel. D had suffered from acute gastroenteritis as a result of eating contaminated food provided by the hotel. Trial judge found that the food had been contaminated without any fault on the part of the hotel, although the food and drink provided by the hotel was not of "satisfactory quality" for the purposes of SGSA 1982 s4(2).
- Court of Appeal
- Held: Claim successful. The provision of contaminated food or drink is capable of amounting to a breach of the implied condition in SGSA 1982 s4(2).

Judgment – Burnett LJ

- In the absence of any express agreement to the contrary, when customers order a meal / drink, property in the meal / drink transfers to them when it is served.
    - That is so whether the transaction has no other components (e.g. in a restaurant of café), or whether it does provide other services (the most usual being accommodation).
    - The fact that the food and drink may be laid out in a buffet to which customers help themselves can make no difference – when the customer helps himself to the meal / pours himself a drink, property in the fare becomes that of the customer.
- In the present case, the contract between the hotel and Cs was a contract both for the supply of services and the supply of goods. The food and drink supplied were goods in which it was agreed that property would be transferred; and those goods were not of satisfactory quality because the food was contaminated.

The passing of risk

Sterns v Vickers (1923)

Case overview

- D sold 120,000 gallons of white spirit to C. This was part of a larger quantity then lying in a certain tank belonging to a storage company (X). D handed a delivery warrant to C, whereby X undertook to deliver the quantity of the spirit to C's order. Subsequently to C's acceptance of that warrant and before the quantity purchased had been severed from the bulk, the spirit in the tank deteriorated in quality.
- Court of Appeal
- Held: The risk must be borne by C; whether the property in the undivided portion of the larger bulk had passed or not, upon the acceptance of the delivery warrant the risk passed to the buyers.

Judgment – Bankes LJ

- It is plain that, upon the facts quite apart from the question of whether property in the spirit passed, the risk of deterioration rested upon the buyers, and they must bear the loss.

Judgment – Scrutton LJ

- The acquisition of an undivided interest in a larger bulk clearly will not suffice to pass the property when the appropriation to the contract has to be made by the seller himself. Nor will property pass where the power of appropriation is in a third party.
- Where a third party has the power of appropriation, the transfer of the undivided interest carries with it the risk of loss from something happening to the goods (such as a deterioration in their quality), at all events after the seller has given the buyer a delivery order upon the party in possession of them, and that third party has assented to it.
    - This is so whether the property passes or not.
    - The seller of a specified quantity out of bulk in the possession of a third party discharges his obligations to the buyer as soon as the third party undertakes to the buyer to deliver him that quantity out of the bulk.
- In the present case, as between C and D, the risk was on C. D had done all that they undertook to do. After the acceptance of the warrant, D would had no right to go to X and request them to refuse delivery to the purchaser.
    - So, treating the matter as a question of the transfer of risk, risk did transfer to C. It is not a question of passing of property (although property did not pass).

Healy v Howlett (1917)

Case overview

- C contracted to sell 20 boxes of fish to D. C consigned by railway 190 boxes of fish, instructing the railway company to deliver 20 boxes to D, and the remaining to other consignees. After the fish was placed on the train, C sent an invoice to D which stated that the fish was at the sole risk of D after being put on the train. The train was delayed, and the fish became unmerchantable. 20 boxes were picked out for D, but D refused to accept them. C claimed for recovery of the price.
- High Court
- Held: Claim successful. The invoice was sent by C after the contract of sale was complete and the fish were put on rail, and so it was not part of the contract. Further, since there had been no appropriation of the 20 boxes at the time they were put on the train, property did not pass then, and so were not bound by the selection and earmarking made after the delay had occurred.
- The damage was done before property passed, so the seller was on risk.

Judgment – Ridley J

- The contract was complete and the fish were put on rail before the invoice was sent, and so those words cannot be treated as part of the contract.
- Goods become the property of the consignee and are at his risk as soon as they are marked off by some distinct act as his, and not the seller's, and are delivered to the carrier as the agent to complete delivery to the purchaser.
- Each box ought to have been marked with the name of its consignee; from that moment, the boxes would have been at the consignees' risk – this is the principle laid down in SGA 1893.

- If it were said that property has passed in the present case, it would be impossible to say which consignee is to bear the loss caused by the deterioration of any particular boxes of the fish.

Judgment – Avory J

- Whether the 20 boxes of fish became the property of the buyer (or, in other words, whether they were at the buyer's risk when they were put on rail) depends on whether there was an appropriation of the 20 boxes at that time to the buyer.
    - If there was an appropriation of the particular 20 boxes to them, then if they were at Holyhead when the fish in fact arrived, the buyer would have been entitled to say as against the other purchasers that those boxes belonged to them.
- If it is impossible to determine which of the purchasers was bound to take the 20 bad boxes, it follows that no particular 20 boxes were the property of any particular purchaser at that time.
- The invoice containing the words, "at sole risk of purchaser after putting fish on rail" cannot be construed as part of the contract. There is no evidence of the buyer's assent to those words, and they undoubtedly were placed on the invoice after the contract was made and so formed no part of it.

McRae v CDC (1951)

Case overview

- D invited tenders for purchase of a wrecked tanker on Jourmaund Reef. C won the tender. It was later found that no such tanker existed at the location provided by D. C brought an action for breach of contract; D claimed that there was no contract due to common mistake.
- High Court of Australia
- Held: Claim successful. The contract was not void since D had no reasonable grounds for the mistake; therefore, C entitled to sue for damages for breach of contract.

Judgment – Dixon & Fullagar JJ

- D sold an "oil tanker", and so it was a condition of the contract that what was supplied should conform to the description of an oil tanker. There was not at any material time any oil tanker lying at, or anywhere near, the location specified.
- SGA 1893 s7 is generally regarded as expressing the effect of the common mistake case of *Couturier v Hastie*.
- A party cannot rely on mutual mistake where the mistake consists of a belief which is entertained by him without any reasonable ground, and deliberately induced by him in the mind of the other party.
    - In such a case, as in the present, D cannot say that no contract was concluded.
    - This was not a case where the parties proceeded on the basis of a common assumption of fact; rather, the buyers relied upon, and acted upon, the assertion of the seller that there was a tanker in existence.
- The only proper construction of the contract is that it included a promise by D that there was a tanker in the position specified. Since there was no such tanker, there has been a breach of contract, and C is entitled to damages for that breach.
- SGA 1893 s6 has no application to the present case: the goods never existed, and the seller ought to have known that they did not exist.

Supplying Goods on Credit: Sales and Related Transactions

Simple "Retention of Title" clauses

Clough Mill v Martin (1985)

Case overview

- C agreed to supply yarn to X on credit terms. Under the contract, ownership of the yarn was to remain with C until payment in full had been received, and payment was to become immediately due if there was any proceeding involving X's solvency. X became insolvent before the completion of payment, and a receiver (D) was appointed by the debenture holders. C notified D of its intention to repossess the yarn. D refused on the grounds that the effect of the agreement was to create a charge as security for payment, which should have been registered under the Companies Act 1948 s95.
- Court of Appeal
- Held: C was entitled to retain title after delivery under SGA 1979 s19(1). X had never acquired title and therefore were not in a position to create a charge over it, and no question of registration arose.

Judgment – Goff LJ

- This case is concerned with a retention of title clause, which is more frequently known as a Romalpa clause.
- There is nothing objectionable in an agreement between parties under which the owner of goods (A) gives possession of those goods to B, at the same time conferring on B a power of sale and a power to consume the goods in manufacture, though A will remain the owner of the goods until they are either sold or consumed.
    - There is no reason why the law should not give effect to the parties' intention.
    - The relationship is one of bailor and bailee.
- In the present case, the retention of title applies to material, delivered and retained by the buyer, until payment in full for all the material delivered under the contract has been received by the seller.
    - The effect is that the seller may retain his title in material still held by the buyer, even if part of that material had been paid for.
- The court must give effect to the condition in accordance with its terms. In the present case, there is no intention to create a trust: the condition provides that C retains his ownership in the material. Thus, he remains owner, but during the subsistence of the contract, can only exercise his powers as owner consistently with the terms, express and implied, of the contract.
    - Once the contract has been determined, the seller will have his rights as owner uninhibited by any contractual restrictions, though any part of the purchase price received by him and attributable to the material so resold will be recoverable by the buyer on the ground of failure of consideration.
- There is no reason why the retention of title clause should be construed as giving rise to a charge on the unused material in favour of C.
    - X does not, by way of security, confer on C an interest in property defeasible upon the payment of the debt so secured. Rather, C retains the legal property in the material.

- Where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B, at least where the goods are not reducible to the original materials.
    - However, where the parties agree that the property in the goods shall vest in A, that agreement should be given effect to.
- The concept of retention of title (or reservation of the right of disposal) pending payment of the price is well known in commerce, as SGA 1979 s19(1) clearly demonstrates.

Judgment – Oliver LJ

- No question of any charge by X requiring registration under CA 1948 s95 can arise, because a company can create a charge only on its own property; if it never acquires property in the goods the subject of an agreement for sale, it cannot charge them.
- While not deciding the issue, there is no reason in principle why the original legal title in a newly manufactured article composed of materials belonging to A and B should not lie where A and B have agreed that it shall lie.

Armour v Thyssen (1991)

Case overview

- D sold steel to C for use in its manufacturing process. The contract of sale contained a condition that the steel remained in the property of the sellers after delivery until all debts were paid. Receivers were appointed after C became insolvent, and a dispute arose as to the ownership of the steel.
- House of Lords (Scotland)
- Held: Property remained with D until the condition was complied with, by virtue of SGA 1979 s17 and s19(1).

Judgment – Lord Keith

- It is well settled in the law of Scotland that a condition in a contract for the sale of corporeal movables which provides that, notwithstanding delivery, ownership of the goods shall not pass to the buyer until the price has been paid is valid and effective.
- In order to create a security over the goods, C would have had to have both the ownership and the possession (actual or constructive) of the goods. The essence of a right in security is that the debtor retains the ultimate right to the goods. In the present case, since C had no interest of any kind in any particular goods, he was never in a position to confer upon D a security right over the steel.
    - The parties clearly expressed their intention that the property in the steel should not pass to C until all debts due by it to D had been paid; so, on the basis of s17, there is no reason to refuse to give effect to this intention.
    - D have, by the terms of the contract, in effect reserved the right of disposal of the steel until fulfilment of the condition that all debts due to them by C have been paid. By virtue of s19(1), this has the effect that the property in the goods did not pass to C until that condition had been fulfilled.
- A provision reserving title to the seller until payment of all debts due to him by the buyer does not amount to the creation by the buyer of a right of security in favour of the seller.

    - The provision, in a sense, gives the seller security for the unpaid debts of the buyer, but it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer.
- Where the seller of goods retains title until some condition has been satisfied, and on failure of such satisfaction repossesses the goods, he is not obliged to account to the buyer for any part of the value of the goods.
    - Where the condition is to the effect that the price of the goods shall have been paid and it has not been paid, then in the situation where the market price of the goods has risen, so that they are worth more than the contract price, the extra value belongs to the unpaid seller.
    - The same is true where the provision covers not only the price of the goods, but debts due to the seller under other contracts.
- In *Clough Mill v Martin*, the EWCA did not find it necessary to form a concluded view as to the solution of problems which might arise where the goods have been partially paid for before being repossessed by the seller. It is not necessary to form a concluded view in this case either.

Wilson v Holt (2013)

Case overview

- C sold goods to D on standard terms set by C. The standard terms included a RoT clause stating that title to the purchased goods did not pass until C had been paid in full. When D failed to pay a number of invoices, C brought proceedings for the purchase price.
- Court of Appeal
- Held: Claim unsuccessful; property in the goods had not passed because of the RoT clause, and so C could not bring an action for the price under SGA 1979 s49(1).

Judgment – Longmore LJ (dissenting as to construction of the clause)

- In order to succeed in an action for the price under s49, C must show that property in the goods passed to the buyer.
- If a RoT clause is to be construed as intended to give a seller security for the payment of the price, any trust of the proceeds only applies to the amount which the buyer owes the seller, and does not extend to any balance over and above that amount.
    - If the buyer is beneficially entitled to proceeds over and above the amount of the debt, he cannot be regarded as selling as agent for the seller.
- In the present case, the RoT clause is intended to operate by way of security rather than to confer a potential windfall on the seller; that must militate against the buyer acting as the seller's agent on the resale.
- Claim unsuccessful on the basis of no-set off clause. However, will consider effect of s49 (obiter).
- S49 spells out two circumstances where an action for the price can be maintained: s49(1) when property has passed; and s49(2) if the price is payable on a day certain.
- If an action for the price could be maintained whenever the obligation to pay had arisen, s49 would be largely otiose. This strongly suggests that s49 intends to specify the only circumstances in which the seller may maintain an action for the price.

- If a seller is happy to allow a buyer use of the goods without paying for them but wishes to ensure that he retains property in the goods and that he can sue for the price, he simply has to provide for payment to be due on a day certain.
- If there is a potential claim for damages for non-acceptance, and if property has not passed to the buyer, the seller should be confined to that claim rather than a claim for the price.
- If property never passed to D, C will have no claim for the price, nor a claim to damages – that is the inherent result of a retention of title clause and shows that it has dangers as well as benefits.
    - There is a logical difficulty in saying that C are in breach of contract in failing to pay the price if the price is itself not due because property in the goods never passed to them.
- In the present case, property in the goods has passed, and so C are entitled to the price they claim.

Judgment – Patten LJ

- Title did not pass under the RoT clause until payment of the price. The RoT clause created an agency relationship between the buyer and seller, so that the buyer sub-sold the goods as agent of the seller. This meant that property in the goods never passed to the buyer, and the seller cannot bring an action for the price.
- Agree with Longmore LJ that to bring a claim for the price, C must comply with the conditions set out in SGA 1979 s49(1). S49 defines the only situations in which an action for the price can be brought. Therefore, C's claim fails.

PST Energy v OW Bunker (2016)

Case overview

- D contracted to supply bunkers to C with payment to be made within 60 days of the presentation of an invoice. It was subject to D's general terms, which provided that until full payment was made, title remained with D, and that C was in possession of the bunkers solely as C's bailee and would not be entitled to use the bunkers other than for the propulsion of the vessel. C and received and consumed the bunkers but did not make payment; D did not make payment to its own suppliers. D became insolvent. C were concerned that they could be exposed to paying both D and its suppliers (who themselves could have claimed rights under a reservation of title). C commenced arbitration proceedings for a declaration that they had no liability to pay the seller for the bunkers.
- Supreme Court
- Held: Claim unsuccessful; the contract was not one of sale under SGA 1979 s2, meaning that D could have no possible defence under s49 to the claim for the price.

Judgment – Lord Mance

Analysis of the nature of the contract

- An agreement may be in substance a contract of sale, even though it has ancillary aspects (e.g. for after-sales services) which do not involve the passing of property and are not by themselves sale, as per *Stoneleigh v Phillips*.
- SGA 1979 s(3) and s(6) can be applied where there is a condition regarding the passing of property to which all the goods covered by an agreement were subject, but that was not the case here.
- The liberty to use the bunkers for propulsion prior to payment is a vital and essential feature of the bunker supply business. So, the contract cannot be regarded as a straightforward agreement to transfer the property in the bunkers to C for a price.

    - It was in substance an agreement with two aspects: (i) to permit consumption prior to any payment and without any property ever passing in the bunkers consumed (once the theory of a nanosecond transfer of property is rejected); and (ii) if and so far as bunkers remained unconsumed, to transfer the property in the bunkers so remaining to C in return for C paying the price (this refers to the price payable for all the bunkers).
- The contract is not one for sale, but is closely analogous to a sale. Thus, in respect of both bunkers consumed and any bunkers remaining at the time of payment, the contract would contain similar implied terms as to description, quality etc. to those implied in a conventional sale.
- The obligation on D's part to be able to pass the property in respect of any bunkers not so consumed against payment of the price for all the bunkers cannot make the agreement as a whole a contract for sale.
    - The essential nature of the contract offers a feature quite different from a contract of sale of goods, namely the liberty to consume all or any part of the bunkers supplied without acquiring property in them or having paid for them. It is a contract sui generis.
- Even if the contract was a sale, this would not assist C. This is because D could not owe any obligation to transfer property in bunkers consumed before payment. The contract would be subject to a resolutive condition subsequent whereby it would cease to be a contract of sale as and to the extent that C exercised their contractual right to consumer the bunker in the vessel's propulsion, and would cease entirely to be a contract of sale if and when all such bunkers were consumed before payment.

<u>Implied term as to D's obligations</u>

- C's alternative ground of appeal is that there must, as a matter of obviousness and necessity, have been an implied term of the contract relating to performance of obligations in the contractual chain above D, by virtue of which D obtained the bunkers it supplied to C.
    - It is argued that there was an implied duty on D to perform its obligations by making timeous payment to its supplier.
- The only implied undertaking was that D had the legal entitlement to give permission to C to use the bunkers in propulsion prior to payment. In order to be so entitled, D need not have or acquire title to the bunkers; it merely needed to have acquired the right to authorise such use.
- C simply continued to use the bunkers under the contractual liberty until they were all consumed. There is no basis for treating the contractual liberty as ending with the 60-day period for payment; so long as the contract remains in force, the liberty continues on its face until payment or complete consumption of the bunkers.
- No claim was made in the present case that D had no right to permit such use of the bunkers. So, on the presently assumed facts, C are simply liable for the price under a contract sui generis.

<u>The position if the contract had been one of sale (obiter)</u>

- S49(1) enables an action for the price where the seller has transferred property, with or without delivery, and the buyer had failed to pay the price due.
    - S49(2) reflects a common law exceptions that where the price is payable on a day certain, the seller may enforce its payment, provided he is ready and able at the same time to deliver to the buyer the goods and property in them.
- The question of principle is whether s49 excludes any claim to recovery of a price outside its express terms.

- Non-performance could just as well be described in terms of failure to accept a transfer of title to property, as failure to pay its price. If described as a claim for failure to pay the price, a claim for damages for non-payment of money could readily be accommodated in the modern law.
    - The damages may have to be reduced to take account of the prospect of recovery of the property.
- In the present case, bearing in mind the complete consumption of the bunkers, there would be no difference between the agreed price and the damages for non-payment of the price. However, there is artificiality about treating the seller's claim as being for damages.
- S49(2) relaxes only partially the strictness of s49(1), and it depends on the price being payable on a day certain – these words can be construed liberally but are not of indefinite expansion.
    - The main focus of s49(2) may well have been on cases where delivery has not been made.
    - S49 does not focus on the position existing where delivery is made, title is reserved, but the price is agreed to be paid, albeit not on a particular "day certain". It focuses even less on the position where all these features are present, and the buyer is permitted to dispose of or consume the goods or they are at the buyer's risk and are destroyed or damaged.
    - The question is whether in all these cases an action for the price is excluded, and the seller is forced to look around for other means of redress.
- The court should be cautious about recognising claims to the price of goods in cases not falling within s49. However, there is at least some room for claims for the price in other circumstances than those covered by s49.
    - The court could not recognise a claim for the price in a case falling squarely within s50.
- The price may be recovered in respect of goods undelivered which remain the seller's property but are at the buyer's risk and are destroyed by perils of the seas or by fire.
    - The present case is a fortiori. The price of bunkers, which remain the seller's property, but which are both (i) at the buyer's risk as regards damage or destruction, and (ii) also permitted by the express terms of the contract to be destroyed by use for C's commercial benefit, must be equally recoverable.
    - This is not the limit of the circumstances outside s49 in which the price may be recoverable.
- The precise limits of allowed circumstances outside s49, and the significance which may in particular attach to the sue of RoT clauses in combination with physical delivery of the goods and the transfer of risk, must be left for determination on some future occasion.
- So, s49 is not a complete code of situations in which the price may be recoverable under a contract of sale.
    - In the present case, the price was recoverable by virtue of its express terms in the event which has occurred, namely the complete consumption of the bunkers supplied.

Topic 3 – Nemo dat exceptions

Farquharson v King (1902)

Case overview

- Cs were timber merchants. They warehoused the timber they imported with a dock company, and instructed the dock company to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk under an assumed name fraudulently sold C's timber to Ds, who knew nothing of Cs nor of the clerk under his real name, and who bought and paid the clerk for the timber in good faith.
- House of Lords
- Held: Claim successful; the clerk had no title or apparent authority, and so could not give Ds any title to the timber.

Judgment – Earl of Halsbury LC

- This is a plain case in which no difficulty whatever arises. A servant has stolen his master's goods, and the question arises whether the persons who have received those goods innocently can set up a title against the master.
    - Puzzled at the notion that anybody could entertain the smallest doubt in the world that this was not stealing.
- There has been no property changed. The thief could give no better title than he himself had, which was none.

Judgment – Lord Lindley

- The mere fact that Ds acted honestly does not confer upon them a good title as against Cs (the real owners of the timber).
- Cs are entitled to recover the timber or its value, unless they are precluded by their conduct from denying the clerk's authority to sell (estoppel).
- In one sense, Cs by employing the clerk and trusting him enabled him to transfer the timber to anyone – Cs in one sense enabled him to cheat both themselves and others. However, if this would mean that Cs bare the loss, such a doctrine would be far too wide.
- On the issue of estoppel, the key question is what have Cs done to preclude them from denying, as against D, the clerk's right to sell to them?
    - Cs have done nothing to mislead Ds and to induce them to trust the clerk.
    - Ds were not misled by what Cs did or by what Cs authorised the dock company to do, but by the clerk's frauds.
- When the second part of SGA s21 is to be applied, the inquiry which has to be made is not a general inquiry as to the authority to sell, apart from all reference to the particular case, but an inquiry into the real or apparent authority of the seller to do that which Ds say induced them to buy.
- The clerk simply stole Cs' goods and sold them to Ds. Ds' title is not improved by the circumstance and the theft was the result of a fraud against both Cs and Ds. Ds were not in any way misled by any act by Cs on which they placed reliance, and therefore, Cs are not precluded from denying the clerk's authority to sell.

Lowther v Harris (1927)

Case overview

- C kept furniture and antiques, including two valuable tapestries, in a house in Chelsea. X had a shop nearby from which he sold mainly glass and china. C engaged X to seek buyers for the stored articles, but X was not authorised to sell anything without obtaining C's approval. Customers were brought to the house to see the tapestries, and after one such visit X obtained C's consent to remove one of the tapestries by falsely telling C that he had sold it to Y for £525. In fact, he had not sold the tapestry to anyone, but later sold it to D for £250. C sued in conversion.
- High Court
- Held: Claim unsuccessful; X had been entrusted with possession of the tapestry as a mercantile agent, so D obtained good title under the Factors Act 1889.

Judgment – Wright J

- D is liable in damages for conversion unless he has a defence under the Factors Act 1889.
- The first question is whether X was a mercantile agent – that is, an agent doing a business in buying or selling, or both, having in the customary course of his business such authority to sell goods.
    - The agent must not be a mere servant or shopman.
- X was a mercantile agent – whilst X's discretionary authority was limited, he was an agent, not a mere servant. He had his own shops, gave receipts and took cheques in his own registered business name, and earned commissions.
- FA 1889 does not require a general occupation as agent. It is not problematic if the agent acts for one principal only, as in the present case.

Pearson v Rose (1951)

Case overview

- C drove his car to X's showroom with a view to having it sold. X asked for C's registration book in order to find out whether or not there was a covenant against reselling. Whilst X was holding the registration book, he induced X by a trick to accompany X's wife to a hospital. Whilst C was away, having forgotten about the registration book, X sold C's car to D, and handed him the registration book. X was prosecuted and convicted of fraud. C sued D in conversion.
- Court of Appeal
- Held: Claim successful; C had no more consented to X having possession of the logbook than if X had stolen it from his pocket. Therefore, FA 1889 did not operate to give a good title to D.

Judgment – Denning LJ

- The needs of commerce have led to a progressive modification of the nemo dat principle so as to protect innocent purchasers. There is a balance to be struck between the claims of true owners and the claims of innocent purchasers. Parliament has struck the balance in the following way:
    - The true owner is protected where the goods are taken from him without his consent.
        - In such a case, he can claim the goods back from any person into whose hands they came, even from an innocent purchaser who has bought from a mercantile agent.

    - The true owner is not protected where he has himself consented to a mercantile agent having possession of the goods, because by leaving them in the agent's possession, he has clothed the agent with apparent authority to sell them.
        - In such a case, he cannot claim the goods back from the innocent purchaser.
- So, the critical question is whether the true owner consented to the mercantile agent having possession of the goods. This gives rise to three points of principle:
- 1. The fact that the agent is guilty of theft by a trick does not prevent the operation of FA 1889 any more than the fact that he has been guilty of theft as a bailee.
- 2. Where the consent of the true owner has been obtained by some fraud on the part of the agent, it is nevertheless, until avoided, a consent which enables FA 1889 to operate.
    - This is because fraud negatives consent, but only makes the transaction voidable. Therefore, if an innocent purchaser has bought the goods before the transaction is avoided, the true owner cannot claim them back.
- 3. For FA 1889 to operate, the relevant consent must be a consent to the possession of the goods by a mercantile agent as mercantile agent.
    - This means that the owner must consent to the agent having the goods for a purpose which is in some way or other connected with his business as a mercantile agent. It may not actually be for sale. It may be for display or to get offers, or merely to put in his showroom; but there must be a consent to something of that kind before the owner can be deprived of his goods.
- C consented to X having possession of the car as mercantile agent. However, the consent necessary for FA 1889 to operate is a consent to the possession by the agent of both the car and the registration book that goes with it.
    - So long as the owner retains the registration book, the mercantile agent cannot dispose of the car in the ordinary course of his business.
    - So, "goods" for the purposes of FA 1889 means the car together with the registration book.
- C no more consented to X having possession of the registration book than if X had stolen it from his pocket. FA 1889, therefore, does not operate to give a good title to D.
- Some reluctance in coming to this conclusion, because the legislature intended the courts to make every reasonable presumption in favour of the innocent purchaser. But this reluctance is tempered by the consideration that D was himself a car dealer whose business enabled him to make quick and large profits – he must not be surprised if he occasionally gets his fingers burnt.

Jerome v Bentley (1952)

Case overview

- C entrusted a stranger (X) with a diamond ring on terms that if he could sell it for more than £550, he could keep any surplus for himself, and that if he had not sold it within seven days he was to return it. Twelve days later, X sold the ring for £175 to D, who bought in good faith thinking that X was the owner. D resold the ring, and C sued D in conversion.
- High Court
- Held: Claim successful; X had no authority to sell the ring to D.

Judgment – Donovan J

- X was simply a private individual belonging to no well-known class of agent. When he sold the ring, he was not C's agent at all, except perhaps for the purpose of safe custody of the ting. X usurped is authority to sell.
    - After the seven days, X's sole duty was to hand the ring back to X. X entered the shop intending to convert the ring to his own use. He accomplished that purpose, and became a thief of the ring.
- As to the issue of C enabling X to commit the fraud, "enable" means the doing of something by one of the innocent parties which in fact misled the other – this is to be deduced from *Farquharson v King*.
    - In the present case, C did nothing which misled D.
- No property in the ring passed to D; C can set up his title as against D. C's claim successful.

Eastern Distributors v Goldring (1957)

Case overview

- X wished to purchase a car from a car dealer (Y) but was unable to pay the deposit required. Y suggested, and X agreed, that Y should sell X's van to a hire-purchase company (C), together with the car in return for their agreement to sell both vehicles to X on hire-purchase terms. X signed hire-purchase documents in blank and Y completed them and forwarded them to C, who rejected the proposal in respect of the car but accepted it on the van. Y had no authority to deal with the van unless both transactions went through together, but he nevertheless purported to sell the van, which at all times remained in X's possession, to C. C sent a copy of the agreement to X, who made no payments under the agreement, having been told by Y that the transaction was cancelled. X sold the van to D. C sued D in conversion.
- Court of Appeal
- Held: Claim successful.

Judgment – Devlin J

- X placed limits on Y's authority, and so Y had no authority to deal with the van separately from the car. So, C cannot claim that they bought the van from the owner or from one who had his actual authority to sell.
- As against X, C acquired a good title to the van. Y represented that the car was his, and X was privy to that representation being made, so neither can be heard to say that Y had not a good title to transfer to C.
- D argues that although estoppel will prevent both X and Y from asserting that the property in the van did not pass to C, it does not prevent anyone else from doing so.
- The courts began with the principle that no one could pass a better title than that which he had (nemo dat quod non habet). To this general principle, the courts admitted a number of exceptions on the ground of mercantile convenience: e.g., transfers of currency, negotiable instruments, and sales in market overt.
- The courts historically held that, although a factor must be taken to have general authority to sell, it could not be assumed that he had the same authority to pledge. This rule gave rise to the Factors Acts.

    - The principle of the Factors Acts has been extended to sellers who are left in possession of goods after the property in them has passed, and buyers who have obtained possession before the property has passed – these situations are covered by FA 1889 ss 8, 9, and SGA s25. FA s2 now governs the position of factors (or "mercantile agents").
    - These sections are based on and supplement the common law. The language which they employ is not the language of estoppel.
- The Factors Acts apply to an agent who is entrusted with goods. No doubt that cases in which the only evidence of apparent authority is the possession of goods will be governed by the Factors Acts, but there are other ways besides the possession of the goods in which a man can be clothed with apparent ownership or apparent authority to sell. The common law principle is wide enough to govern this.
- SGA s21(1) expresses the old principle that apparent authority to sell is an exception to nemo dat. It is plain from the wording that if the owner of the goods is precluded from denying authority, the buyer will in fact acquire a better title than the seller.
    - It is doubtful whether this principle ought to be regarded as part of the law of estoppel.
- Whatever the limits of the doctrine, it clearly applies to the facts of the present case. Y was armed by X with documents which enabled him to represent to C that he was the owner of the van and had the right to sell it. The result is that X is (in the words of s21) precluded from denying Y's authority to sell, and consequently C acquired the title to the goods which X himself had. So, X had no title to pass to D.
- Re another argument: On the basis of the above conclusion, Y can properly be called a "seller" for the purposes of SGA s25. S25 does not apply unless the seller remains in possession as seller; in particular, s25 does not apply to a person who, having sold a vehicle to a hire-purchase company, buys it back under a hire-purchase agreement.
    - This is because the character of the possession has changed.
    - In the present case, that rule covers the present case. Although the possession never passed physically away from X, its character was changed from that of seller to bailee when he sold the van to C and then entered into a hire-purchase agreement with then. So, s25 does not apply.
- The Act says merely that the hire-purchase agreement is unenforceable, not that it is void. This must mean that it is effective to alter the rights of the parties but that the altered rights cannot be enforced. So, the case under s25 fails.

Central Newbury v Unity Finance (1957)

Case overview

- A distinguished looking trickster (X) obtained a car and its registration book by fraud of C, who believed that a finance company would by the car and sell it to X on hire-purchase. X left in part-exchange another car which was not his to sell but was itself on hire-purchase. A distinguished looking trickster (probably X) later purported to sell C's car to D, calling himself Y; Y's signature then appearing in the registration book. C sued D in conversion
- Court of Appeal
- Held: Claim successful; C did not, by permitting X to take possession of the car and its registration book (which is not a document of title), represent that X was authorised to sell, or enable him to sell, so as to raise an estoppel against C.

Judgment – Denning LJ (dissenting)

- The present deals with estoppel by conduct. The basis of the doctrine is that you start with an innocent person who has been led to believe in a state of affairs which he takes to be correct and has acted on it. Then you ask yourself how has this innocent person been led into this belief. If it has been brought about by the conduct of another who, though not solely responsible, nevertheless has contributed so large a part to it that it would be unfair or unjust to allow him to depart from it, then he is not allowed to go back on it so as to prejudice the innocent person who has acted on it.
    - In the present case, we are concerned with the conduct of a true owner in letting a chattel out of his possession. The question is what conduct on his part is regarded by the law as so serious that it would be unfair or unjust to allow him afterwards to claim it from an innocent purchaser.
- On the authorities, the mere fact that the true owner is careless in the custody of his goods or in the indicia of title to his goods is not sufficient to prevent him from asserting his title to them.
    - If the true owner carelessly leaves his logbook in his car and a thief steals both car and logbook, or if he entrusts both car and logbook to his servant for some purpose and the servant turns thief and sells them, then the true owner can recover them from anyone into whose hands they come.
- At common law, the mere fact that the true owner consents to someone else being in possession of his goods or of the indicia of title to the goods is not sufficient to prevent him afterwards asserting his title to them, unless he deposits them with an agent or broker so as to clothe him with apparent authority to dispose of them.
    - This rule was thought by Parliament to be too favourable to the true owner, and so has been modified by FA 1889 and SGA s25.
- There is a distinction between parting with possession of the goods, and parting with property in the goods.
    - If a man is induced to part with the property in his goods or with the power of disposing of them, then even though he is induced thereto by fraud of a rogue, he cannot afterwards avoid the transaction as against an innocent person who takes in good faith and for value.
    - The technical reason sometime given is because fraud makes a transaction voidable and not void.
    - The real reason is because the owner intended to part with the property in the goods or has behaved as if he so intended. It would be unjust to allow him to recover the goods from the innocent purchaser. He has behaved as if he intended to pass the property and must take the consequences.
- This reflects the distinction between obtaining goods by false pretences, and larceny by a trick.
- In the present case, when C handed the car to X, they intended to part with all their property in it. They did not intend to part with property to X, but only to a finance company, but that makes no difference – C intended to part with the property just as much as if they agreed to sell to X.
    - The point is brought home by the fact that X handed over the logbook to X. Everyone knows that the logbook is good evidence of title (see *Pearson v Rose*); the wise owner keeps it at home or in a place separate from the car. C must have been aware of the importance of the logbook, and must have known that they were arming X with complete dominion over the car, subject only to the rights of the finance company (so they believed). C clearly intended to reserve no dominion over the car.
- An innocent purchaser, who buys both car and logbook, acts on the assumption that the seller is the owner of them. This is a very reasonable assumption to make. It would be unfair and unjust to allow

the original owner to go behind that assumption when he intended to part with the property in the car, and armed the rogue with both car and logbook, thus enabling him to dispose of them.
- D was affected, not by any representation by C, but by his conduct. That is sufficient to work an estoppel, and C's claim fails.

Judgment – Hodson LJ

- The mere handing over of a chattel to another does not create an estoppel, and there will be no estoppel unless the doctrine of ostensible ownership applies, e.g., when the owner gives the recipient a document of title or invests him with the indicia of ownership.
- The registration book is not a document of tile defined by FA s1(4). Its terms negative ownership, and it contains no representation by C or anyone else that X was entitled to deal with the car as his own.
    - A person in possession of a chattel may reasonably be thought to be the owner when he offers it for sale. But the case of a person in possession of a car does not differ in kind (although the absence of the registration book detracts from the signification of possession).
- In the present case, C did not arm X with the power to go into the world as the absolute owner of the car – the handing over of the registration book had no such effect. X did not give X the means to represent himself as the owner of the car by handing him a document which stated the precise opposite.
    - There is no rule on the authorities that a car registration book, if produced to a third person, is calculated to convey to that person that authority exists to deal with the car as owner.
- C's claim succeeds.

Judgment – Morris LJ

- The idea that C giving X the logbook leads to the conclusion that X cannot be heard to say that he has not given X an authority to sell is a far-reaching proposition and involves giving to a registration book a significance which it does not possess.
- C should only lose their ownership, or be precluded from asserting it, if it can be said that by parting with their car and its registration book, they endowed the possessor (X) with an apparent authority to sell.
    - The proposition must be that though no apparent authority to sell can be assumed from mere possession of a car or its registration book, possession of the two together does carry an apparent authority to sell.
- It cannot be that ownership is lost on the basis of enduring punishment for carelessness.
- Criticism can certainly be levelled against C, but not from D. It is not fitting to weigh in the balance the respective criticisms of the actions of the parties and to see in which direction the scales are tipped.
    - Doubtful whether either C or D ought to be judged too harshly because they were equally deceived by a man who seemed distinguished.
- It cannot be assumed that the person in possession of a car and its registration book is the owner of the car. The absence of a registration book when a car is being sold will naturally give rise to much inquiry; the existence of one in the hands of a seller does not remove all occasion for inquiry and does not prove legal ownership.
- D cannot acquire more than X was able to pass to them. D took a risk. If C had merely given X the car, it is not suggested that there would have been a representation to all the world that the possessor of the car was its legal owner – nor can such a representation be established because

possession was also given of a book which does not prove legal ownership and which proclaims a clear warning and intimation that it does not.

- C is not estopped from proving their ownership. C's claim succeeds.

Pacific Motors v Motor Credits (1965)

Case overview

- Under a stocking agreement, a motor dealing company (X) sold cars held as stock to a finance company (C), but continued in physical possession with authority to sell in its own name. After this authority was revoked, D bought some of cars from X. C sued D in detinue (conversion).
- Privy Council (Australia)
- Held: Claim unsuccessful; X passed a good title to D under (the Australian version of) SGA 1893 s25(1) (now SGA 1979 s24 – *this will be referred to*).

Judgment – Lord Pearce

- S24 does not limit its effect to a sale made in the ordinary course of business as FA 1889 s2 does. S24 is not limited to any particular class of seller; it applies to a purchase from any kind of seller made in good faith and without notice of the previous sale.
    - S24 was intended as a protection to innocent purchasers in cases where estoppel gave insufficient protection.
- S24 is to be read as inapplicable to cases where there has been a break in the continuity of the physical possession. Further, the fact that a person having sold goods is described as continuing in possession would seem to indicate that the section is not contemplating as relevant a change in the legal title under which he possesses.
    - This is because the seller's legal title cannot continue: on sale, it changes from owner to bailee.
    - The words "continues in possession" refer to physical possession and do not cease to be satisfied when the seller merely attorns bailee to the original buyer, or when there is some other alteration in the legal title under which the original buyer possesses.
- Possession under s24 must have the same meaning as under s25(1).
- There is the strongest reason for supposing that the words "continues in possession" in s24 were intended to refer to the continuity of physical possession regardless of any private transactions between the seller and purchaser which might alter the legal title under which the possession was held.
    - This view means that when a person sells to a car to a finance house in order to take it back on hire-purchase, the finance house must take physical delivery if it is to avoid the risk of an innocent purchaser acquiring title to it.
    - I.e., the title of a finance company which buys a car and lets it back on hire-purchase terms can be defeated by a sale by the hirer unless the car has been delivered to the finance company.
- *Eastern Distributors v Goldring,* in so far as it followed *Staffs Motor v British Wagon*, was wrongly decided. Even if it were rightly decided, it would not cover the facts of the present case, because there was no separate bailment in the present case (if even assuming that a separate bailment, without any break in the seller's physical possession, were sufficient to break the seller's continuity of possession for the purposes of s24).

- X's continued physical possession was solely attributable to the arrangement which constituted the sale. The transaction by which X sold the cars to D was inextricably missed with X's right to keep the cars for display at its premises: X continued in possession of the cars.
- So, s24 applies; X passed a good title to D. C's claim fails.

Newtons of Wembley v Williams (1964)

Case overview

- C sold a car to X, whilst C registered as the owner. X's cheque was dishonoured, and as soon as that happened, C took all available steps to disaffirm the contract, but could not find X to communicate this to him. Later, X sold the car in Warren Street (an established street market) to D for cash. C found out that D had the car and sued in conversion.
- Court of Appeal
- Held: Claim unsuccessful; whilst at common law, the car had revested in C on disaffirming the contract, X was within FA 1889 s9 and so C's consent to his remaining in possession must be deemed to continue. Therefore, since D bought in good faith, he had a good title to the car.

Judgment – Sellers LJ

- At common law, X had no title to give, and D obtained no title. The question in the present case is whether the transaction between X and D can be brought within the provisions of FA 1889.
    - FA 1889 s8 deals with the disposition by a seller remaining in possession (replicated in SGA 1979 s24.)
    - FA 1889 s9 deals with the disposition by a buyer obtaining possession (replicated in SGA 1979 s25).
- Notwithstanding that which C had done to terminate the contract between C and X and withdraw their consent, they had in fact (although through inability to do otherwise) left the possession of the car with X.
- There is little help, in constructing s9, from looking at s8, except for the fact that the sections use different words and so they are intended to have a different effect.
- S9 takes away the right which would have existed at common law, and so it should not be enlarged more than the words clearly permit and require. All that s9 can be said clearly to do is to place the buyer in possession in the position of a mercantile agent when he has in fact in his possession the goods of somebody else; it does no more than clothe him with the fictitious or notional position on any disposition for those goods.
    - S2(1) makes clear that the sub-buyer from a mercantile agent must establish that the mercantile agent was acting in the ordinary course of business.
    - On the face of it, "the ordinary course of business" seems to envisage a transaction by a mercantile agent and is to be derived from such evidence as is either known to the court or established by evidence as to what would be the ordinary course of business.
        - It may be that in some cases, its meaning may call for some special investigation.
- In the present case, there has been an established market in second-hand cars in Warren Street for a long time. When one looks at what took place in that area and finds the prospective buyer coming up and getting into contact with the prospective seller with regards to a car – there is nothing to indicate that it was not in the ordinary course of business of a mercantile agent.

- D acted in good faith. Therefore, the requirements of FA 1889 s9 are complete. D obtained a good title, as if the car had been sold to him with the consent of C. C's claim fails.

Judgment – Pearson LJ

- The intention of the difference in language between FA 1889 s8 and s9 is that there should be some difference in effect.
- It is plainly contemplated that in s9, there may be a buyer who is not a mercantile agent. When s2 is applied to s9, the prima facie result is that: if the transaction is made by the person concerned when acting in the ordinary course of business of a mercantile agent, the transaction is validated.
- The problem arises: if a person is not in fact a mercantile agent, how can be he acting in the ordinary course of business of a mercantile agent?
    - Initially, it seems to be an impossible position. But the problem arises from the absence of a sufficient definition of how wide the hypothesis is to be.
- Without defining the effect of s2 too precisely, there is help to be gathered from *Oppenheimer v Attenborough*, in which Lord Alverstone CJ and Buckley LJ said that the words "acting in the ordinary course of business of a mercantile agent" mean that the person must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorised by his master to carry out.
    - These words are helpful to give a meaning to those words in relation to a buyer where the primary, governing section is s9.
- In the present case, the trial judge held that X was acting in the way in which a mercantile agent would normally be expected to act. That decision should be accepted. C's claim fails.

Astley v Miller (1968)

Case overview

- X purchased a new car from the makers and registered it in his name as owner. On the same day, X released the car to Y, who had asked for the car and who carried on a car-hire business and, to a lesser extent, a business as dealers in second-hand cars. X released the car to Y as an addition to Y's hire fleet. On the same day, Y sold the car to D, and D accepted delivery and paid for the car a day later. X did not know of the sale to D. Hire-purchase arrangements between a finance company (C), X and Y were later concluded by which X agreed to purchase the car by hire-purchase. C claimed a title to the car a month later. X defaulted on the hire-purchase agreement, and C sought to recover the car, which was in the possession of D.
- High Court
- Held: Claim successful. X had not consented to Y having possession of the car as mercantile agents, and so Y could not pass a good title to D under FA 1889 s2(1).

Judgment – Chapman J

- FA 1889 is founded on three express, but basic, primary conditions: (a) the goods must be in the possession of someone who is not the true owner; (b) that possession must be with the consent of the true owner; and (c) the person who has this possession must be a person who fulfils the requirements of being a "mercantile agent".

- It is well settled and unchallenged law that the statutory power to pass title which is vested in a mercantile agent depends on his having possession in his capacity as mercantile agent, and on the true owner having consent to his having possession in that capacity.
    - In the present case, Y did not have possession of the car in their capacity as mercantile agents, nor did X consent to their having possession in that capacity. X therefore, had no power to pass title to anybody.
- C's claim succeeds.
- The following is obiter:
- In *Pearson v Rose,* the foundation of EWCA's decision was that the mercantile agent's possession of the registration book was without the consent of the true owner. However, this indicates some confusion between the nature of the possession originally acquired, and the nature of the sale which has been effected – the two do not necessarily correspond.
    - Whilst a person's authority depends on the circumstances in which he obtained possession, the ordinary course of business of a vendor does not depend on that.
- In the present case, it is likely that the car was released prematurely but willingly by X to Y, and the registration book was later (when received back from the county council) voluntarily handed over by X to Y so as to join the car to which it belonged.
    - In these course of events, the question is whether, so far as the acquisition of the car and registration book by Y was concerned, the disposal of the car and registration book by Y was vitiated as being outside the ordinary course of business because a few days intervened between the handing over of the two.
- There is a world of difference between a case where the logbook is not given to the dealer so that no one will suppose that the dealer has authority to sell, and the case in the present where the registration book was handed a few days later because it was with the county council for tax purposes.
    - This latter case is within the ordinary course of business of a motor dealer who holds a car on sale or return terms.

Moorgate v Twitchings (1976)

Case overview

- A finance company (C) and a dealer (D) were both members of HPI, a company which kept a central register of almost all hire-purchase agreements relating to cars. D purchased a car from X, having first been informed by HPI that there was no recorded hire-purchase agreement relating thereto in their files. D subsequently resold the car. The car was in fact the subject of a hire-purchase agreement between X and C. After X defaulted, C discovered what happened, and sued D in conversion. Although it was Cs' invariable practice to register all hire-purchase agreements with HPI, it seemed that inadvertently this particular agreement had not been so registered. D argued that C were estopped from relying upon the hire-purchase agreement, and that they were negligent.
- House of Lords
- Held: Claim successful. (1) Even if HPI could be said to be an agent of its members, the representation made by them to D was correct, so no estoppel arose. (2) The simple fact that both parties were members of HPI did not bring them within sufficient propinquity for a duty of care to be owed by C to D.

Judgment – Lord Wilberforce (dissenting on conclusion (2))

- To constitute an estoppel, a representation must be clear, and must unequivocally state the fact which the maker is to be prevented from denying. In the present case, HPI conveyed nothing more than information as to the state of its records: it did not profess to, and did not say anything as to, ownership or lack of ownership of any finance house member of HPI.
    - So, no estoppel can be raised on this basis.
- The second argument is that C is estopped from asserting their ownership of the car by their conduct (their negligent omission to register their agreement). A man who owns property is not under any general duty to safeguard it: he is not estopped from asserting his title by mere inaction or silence, because that cannot influence a person to act to his detriment unless it acquires a positive content such that that person is entitled to rely on it.
    - For silence or inaction to acquire a positive content, there must be a duty to speak or act in particular way, owed to the person prejudiced or to the public or to a class of the public of which he, in the event, turns out to be one.
- With regards to a test, the question is whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man in the position of the acquirer of the property, would expect the owner, acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known to and discoverable by the acquirer, and whether, in the face of an omission to do so, the acquirer could reasonably assume that no such title was claimed.
    - The duty of care should not be stretched so widely as to make it a universal duty on the part of property owners to safeguard others against loss.
- A man who knows that others rely on a particular source of information, which derives that information from him, may surely be under a duty to supply that information if he has it, even though the transmission of the information makes the seeker of it less than 100% secure. D may know that a residual risk remains in every case, but still be entitled to assume that all steps necessary to reduce his risk down to that residue have been taken.
    - D is entitled to assume, as if he had been told so in terms, from the absence of any entry with HPI that none of the major finance companies has any interest in the car he is buying.
    - So, a finance company belonging to HPI is under a duty towards dealers, members of HPI, to take reasonable care to register any hire purchase agreement to which it is a party so that if in reliance on the absence of any such registration a dealer acts to his prejudice, the finance company is estopped from asserting his title against that dealer.
    - It does not follow that the finance company is under a similar duty to any other persons, e.g., non-member dealers or members of the public.
- So, in the present case, C was under a duty to take reasonable care to register the agreement. Thus, C was in breach of that duty, and C's claim in conversion fails.

Judgment – Lord Salmon (dissenting on both conclusions (1) and (2)).

- A private person who buys in good faith without notice of the hire purchase agreement obtains complete protection under HPA 1964 s27.
- All the members of HPI are in such close business propinquity with each other that they are clearly "neighbours" within the meaning of the word used by Lord Atkin in *Donoghue v Stevenson*. The finance house members would have realised that unless they took reasonable care to send on to HPI for registration particulars of all the hire purchase agreements into which they entered, there was a strong probability that the dealer members of HPI would suffer serious financial loss.

- So, C was under a duty to the other members of the HPI, including D, to take reasonable care to furnish particulars to HPI of the hire purchase agreements into which it entered, and they were in breach of that duty.
    - D has established his claim of negligence against C.
- Further, on the basis of estoppel, C's negligence is the real cause of D innocently buying C's car and thereby converting it, and C is therefore precluded from claiming damages from D for the conversion which in reality was caused by their own negligence in failing to register the hire purchase agreement with HPI, who would then have warned D of this agreement and thereby saved him from being defrauded.
- For these reasons, C's claim fails.

Judgment – Lord Edmund-Davies

- Since D was a "trade or finance purchaser", he fell outside HPA 1964 s27. So, ordinarily, there would be no defence to C's claim in conversion.
- As to the argument of estoppel by representation, D must have realised that in all the circumstances there was good reason why HPI were not guaranteeing that no hire purchase agreement existed, for a member could slip up in the registering, or there might be an error by HPI. There was no representation, and so the argument of estoppel by representation fails.
    - Further, even if it is right to regard HPI as acting as C's agents, their known authority fell far short of enabling them to make on C's behalf the sort of representation which is essential for D's to succeed on this basis.
- As to the arguments of estoppel by negligence and negligence as constituting a set-off, the first question is whether C was under any duty of care towards D to take reasonable care to register the hire-purchase agreement.
    - It would be odd if a finance company which, without obligation, takes the precaution of joining HPI is thereby placed under a higher duty than those companies who refrain from joining.
    - In most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort: liability has to be based on a legal duty not to be careless. No such legal duty can be found in the present case.
- C was under no duty to register, or to take due care in registering. However, if C were under a legal duty to take reasonable care, then the proper conclusion was that they breached their duty.
- Perhaps the time has come for fresh attention to be paid to the need to equally protect bona fide "trade or finance purchasers", as defined in HPA 1964 s29(2).
- C's claim succeeds.

Judgment – Lord Fraser

- There was no express representation on behalf of C: HPI made no express representation, and were not acting as agents for C.
- The primary purpose of the HPI scheme is to provide protection to finance houses. But finance houses which are members of the scheme are under no obligation to anyone else to protect their own property by using the facilities of HPI. The owner of property is entitled to be careless with it if he likes – even extreme carelessness with his own property will not preclude him from recovering it from a person who has bought it from someone who dishonestly purported to sell it.
    - So, C was not in breach of any duty owed to D.
    - However, if C did owe a duty towards D, then it would be in breach of that duty.

- C's claim succeeds.

Judgment – Lord Russell

- It would be an unwarrantable extension of the principles of estoppel or the tort of negligence to deduce from a system such as this, the equivalent of a guarantee by all finance house members to all inquiries that the system is proof against any slip-up in their offices in the operation of their methods of sending information to HPI, albeit that the slip-up involves negligence on the part of a posting clerk or messenger.
- C's claim succeeds.

National Employers v Jones (1990)

Case overview

- A car was stolen and eventually, after passing through a number of dealers, bought in good faith by D. An insurer (C) had bought out the original owner's interest after the theft and claimed the car from D. D resisted the claim on the ground that he had acquired a good title.
- House of Lords
- Held: Claim successful; neither FA 1889 nor SGA 1979 operated so as to divest title from a person from whom goods had been stolen. The bona fide purchaser is not able to override the true owner's title when the true owner has ceased to have possession of the goods because they have been stolen.

Judgment – Lord Goff

- The Factors Act 1823 was directed to giving protection to those who dealt in good faith with factors or agents, to whom goods or documents of title had been entrusted, to the extent that the rights of such persons should override those of the owner who had so entrusted the goods or documents to the factor or agent.
    - The statute was not intended to take so radical a step as to depart, except in limited circumstances, from the cardinal principle of nemo dat, so as to enable a factor or agent, entrusted with goods by a thief or a purchase from a thief, to give a good title to a bona fide purchaser from him, overriding the title of the true owner.
- FA 1889 is entitled "an Act to amend and consolidate the Factors Acts". There is no hint of any change of fundamental policy.
- FA 1889 s2 cannot be read as having the effect of adversely affecting the title of any person, other than the person who had entrusted the goods or documents of title to the mercantile agents – it cannot adversely affect the title of one from whom the goods have been stolen, whose goods have come into possession of the mercantile agent from the thief, or from a person deriving title from the thief.
- FA 1889 s8 and s9 go further than FA 1877 s3 and s4, since they take effect not only when the relevant person (the seller in s8; and the buyer in s9) is allowed to be in possession of the documents of title to the goods, but also when he is allowed to be in possession of the goods themselves.
- For s9 to have any effect in a case where the goods were stolen, would constitute a change in policy of a fundamental kind, of which there is no evidence whatsoever in the remainder of the Act.

- The legislature never intended, either in FA 1889 s9 nor in SGA 1979 s25(1), to achieve the result contended for by D. This is clear from the statutory context. There is also internal evidence in the Act of this.
- FA 1889 s8 proceeds upon the assumption that the relevant owner of the goods, who is deemed to have authorised their delivery and transfer, is the person to whom the goods have been sold, and who has allowed the seller to remain in possession of them.
    - The exact same point can be made in relation to s9. There is no good reason why the innocent buyer should get a good title, where the original buyer in s9 cannot.
- S2 goes no further than to divest the title of a person who has entrusted the mercantile agent with the possession of the relevant goods or documents of title; if s8 and s9 were to have the effect of divesting title of a person from whom the goods have been stolen, and who has not entrusted them to the person who has purported to sell them to the purchaser, it is difficult to see why s2 should have been so limited in its effect.
- FA 1889 s9 must be read as providing that the delivery or transfer given by the intermediate transferor shall have the same effect as if he was a mercantile agent in possession of the goods or documents of title with the consent of the owner who entrusted them to him.
    - This construction is to be derived from the terms of s2(1), to which s9 evidently refers, and also from the legislative context which has been discussed.
    - The same construction must be placed upon SGA 1979 s25(1).
- C's claim successful.

Michael Gerson v Wilkinson (2001)

Case overview

- X sold equipment to a finance company (C) under a sale and leaseback arrangement whereby X would hire and retain physical possession of the equipment. X subsequently sold part of the same equipment to another finance company (D) under a similar arrangement, without C's knowledge. C claimed damages for conversion from D.
- Court of Appeal
- Held: Claim unsuccessful; D acquired good title SGA 1979 s24.

Judgment – Clarke LJ

- D's argument on the basis of SGA 1979 s24 is that X was a person who sold goods and continued in possession of goods because it sold goods to C and retained possession of them, and that X later delivered the goods to D under a contract of sale with D, who received them in good faith without notice of the sale to C.
    - The issue between the parties is whether X delivered the goods to D under a sale. If it was a sale, then D obtained good title to them.
- Obiter: Delivery in s24 includes constructive delivery and is not confined to physical delivery.
    - For the purposes of this appeal, it will be assumed that delivery does include constructive delivery. But no argument was heard on the issue, so that ruling is obiter.
- Delivery under SGA 1979 s61(1) means "voluntary transfer of possession from one person to another".

- D had a right to transfer possession to X under the lease, and through SGSA 1982 s7(1). The question is whether there was constructive delivery by X to D so that D could deliver the goods to X under the lease.
- Where a seller in possession of the goods sold acknowledges that he is holding the goods on account of the buyer in circumstances where he recognises the purchaser's right to possess as owner and his continuing to hold the goods thereafter as the bailee with a possession derived from that right, then the transaction amounts to delivery to the buyer immediately followed by redelivery to the seller as bailee.
    - That is so whether the seller's custody is "in the character of a bailee for reward or of a borrower".
    - There is a change of character of the seller's possession when he holds the goods for the buyer, and when he subsequently becomes the bailee from the buyer for reward.
- It is not necessary to identify a moment at which the goods were delivered to D by X: the effect of the sale and leaseback arrangement was that the goods must be taken to have been delivered to D because D could not otherwise have leased them back to X.
    - The making of the agreement for sale and the entering into of the lease was a sufficient voluntary act by X to satisfy the requirement in s61(1) that in order to amount to delivery, there must be a voluntary transfer of possession from one person to another.
- It makes commercial sense to hold that arrangements such as the present involve a transfer of constructive possession to the finance company who buys the goods and leases them back, such that the innocent finance company can take advantage of SGA 1979 s24.
- So, D acquired good title to eth goods under s24; it is not liable in conversion.

Shogun Finance Ltd v Hudson (2003)

Case overview

- A car dealer (C) sold a car to a fraudster, who produced a stolen licence as his own. The dealer wrote out the hire-purchase contract in the name written on the licence (Mr Patel). The fraudster took physical possession of the car, then sold it to D who acted in good faith. Upon discovery of the dishonoured payment by the fraudster and failure to make payments under the hire-purchase agreement, C brought an action for conversion. D counterclaimed, claiming to have obtained the right title of the vehicle. This is an in-writing case, because the only correspondence between Shogun and the rogue is in writing. The face to face with the car dealer is not relevant
- House of Lords
- Held: Claim successful (3-2 majority). The hire-purchase agreement only mentioned Mr Patel, so the agreement was with Mr Patel, not the rogue. On the basis that Mr Patel did not authorise such an agreement, the contract is a nullity. Furthermore, the fraudster never had the honest belief or contractual intent, and the finance company believed it was accepting an offer from Mr Patel, so there was no meeting of minds and thus no offer and acceptance, so no contract was formed.

Judgment – Lord Nicholls (dissenting)

- The effect of fraud is to negative legal rights or obligations otherwise flowing from an intention to enter into a contract.
- Fraud does not vitiate consent. Rather, fraud negatives legal rights or obligations otherwise flowing from a person having given his consent to a particular happening. Fraud can destroy legal rights; it

cannot destroy facts. This reasoning explains why the law treats a contract induced by fraud as voidable, not void. His belief means there was a contract, but the fraudulent inducement of his belief means the contract is voidable.

- In general, the Sale of Goods Act 1979 s21(1) means that proprietary rights of an owner of goods endure against a third party who buys them in good faith from a thief. There are exceptions to this in some cases where the owner of goods parted with his goods consensually. In these exceptions, the third party may acquire a good title if:
    - The crook, who purported to sell the goods to him, had a voidable title (SGA 1979 s23).
    - The crook agreed to buy the goods from the owner and was in possession of the goods with the owner's consent (SGA 1979 s25). The present case concerns this exception.
- The crook's identity fraud entitles the owner to avoid the contract, but does not negative the formation of a contract.
- It can make no difference that the transaction is evidenced in writing or not, when it was negotiated face-to-face, such as invoice or receipt. Furthermore, it is immaterial if the two parties met face-to-face and later arranged the deal in a written agreement.
- It makes no difference if the contract is purely in writing, for the existence of physical immediacy in one case, and the absence of it in the other, is immaterial. In each case, whatever the mode of communication, what matters is whether the party agreed to sell his goods to the person with whom he was dealing, not why he did so or under what name.
- The court must choose between *Cundy v Linday* or *Phillips v Brooks Ltd* and *Lewis v Averary*. *Cundy v Lindsay* is the right case to uphold.
    - Under SGA 1979 s23, the innocent buyer is protected from a seller with a voidable title.
    - It is little short of absurd that a subsequent purchaser's rights depend on the precise manner in which the crook seeks to persuade the owner of his creditworthiness and permit him to take the goods away with him. The purchaser's rights should not depend upon the precise form the crook's misrepresentation takes.
- Devlin LJ's starting point presumption in *Cundy* that a person is presumed to intend to contract with the person with whom he is actually dealing, whatever be the mode of communication, should apply in all cases. Although expressed by Devlin LJ as a presumption, it is difficult to see how this presumption could be displaced.
- C proceeded in the fraud-induced belief that D was who he said he was, and who's credit rating had been checked and approved. However, that mistaken belief did not negative the finance company's intention to let the car on hire to the person in the showroom on the terms set out in the hire-purchase agreement.
- Appeal allowed; claim dismissed.

<u>Judgment – Lord Hobhouse</u>

- Under SGA 1979 s29(4), the question becomes: Was the rogue a debtor under a hire-purchase agreement relating to the car?
- The rogue presented an accurate identity and details of Mr Patel, but he was not Mr Patel. The written contract makes clear that the hirer is only the person named on the front of the document. The agreement makes clear that Mr Patel, not the rogue, is the sole hirer. No one else acquires any rights under the agreement, and no one else can become the debtor of the car.
- The rogue was not, and never purported to be, anybody's agent. It is a well-established and fundamental rule of English law that other evidence may not be adduced to contradict the provisions of a contract contained in a written document.

- Furthermore, the rogue had no honest belief or contractual intent, and the finance company believed that it was accepting an offer by Mr Patel. There cannot have been a contract formed.
- A forged signature is neither the signature of the purposed signatory nor of the forger.
- Appeal dismissed; claim stands.

Judgment – Lord Millett (dissenting)

- In *Lewis v Averay*, Lord Denning MR rejected the theory that if a party is mistaken as to the identity of the person with whom he is contracting, there is no contract, or that if there is a contract, it is null and void so that no property can pass under it. The question remains whether a contract is initially made.
- It is not possible in law for a person to accept an offer made to someone else; or to intercept an acceptance of someone else's offer and treat it as an acceptance of his own.
- In a case where A, posing as C, makes an offer to B which B purports to accept, B directs his acceptance to A, but intends it for C. The outcome depends on B's intention objectively ascertained.
- The courts have introduced a rebuttable presumption that, where parties deal with each other face-to-face, each of them intends to contract with the physical person to whom he addresses the words of contract.
    - It is insufficient to rebut this presumption by piling up evidence that B would never have accepted the offer if he had not thought that it had been made by C. Such evidence merely shows that the deception was material; it does not establish the identity of B's counterparty.
    - The real objection to the present state of the law is that the distinction between face-to-face contract and other contracts is unrealistic. There is no difference in principle between the two situations when it comes to identifying B's counterparty; in both cases, B's acceptance is directed to the impostor but intended for the person whose identity he has assumed.
- There are only two principled solutions: The law must give preference either to the person for whom the offer or acceptance is intended, or to the person to whom it is directed. The law must do so in all cases.
- The first solution, which gives preference to the person for whom the offer or acceptance is intended, accords more closely to the existing authorities, which treat the face-to-face transaction as an exception to the general rule, and with the decision in *Cundy*. It also accords more closely with the parties' subjective intentions, for B intends to deal with C and not with A, of whom he has never heard, while A has no intention of being bound by contract at all.
    - The strongest argument in favour of this is that it is based on the parties' own assessment of what they mean by the counterparty's identity. This identifies people by their attributes, mostly by their name. However, a person may validly contract using an alias; even if a person assumes a false name for the sole purpose of deceiving the counterparty, there is a contract so long, at least, as there is no real person of that name (as per *King's Norton*).
    - Identifiers such as names and dates of birth are not material in causing a party to accept the offer, as the finance company would have accepted the offer whatever Mr Patel's name or date of birth.
- The second solution, which gives preference to the person to whom the offer or acceptance is directed, should be adopted.
    - The considerations just mentioned go to the mechanics of the deception and its materiality rather than to the identity of the offeror. They ought to come into play when consideration is given to the second question (whether the contract is voidable) rather than to the first (whether there is sufficient consensus ad idem (correlation between offer and acceptance) to bring a contract into existence).

    - Until the fraud is exposed, and it is discovered that A is not C, the existence of the contract is not in doubt. The fraud is relevant to the question of whether the contract is enforceable against B rather than its existence.
- The typical fraudulent credit card transaction is illuminating; there is clearly a transaction with the impostor who produces the card and who receives cash or goods in exchange.
- Once one accepts that there are two questions involved, namely (i) did a contract come into existence at all? and (ii) if so, was the contract vitiated by fraud or mistake?, there is only one principled conclusion. Whatever the medium of communication, a contract comes into existence if, on an objective appraisal of the facts, there is sufficient correlation between offer and acceptance to make it possible to say that the impostor's offer has been accepted by the person to whom it was addressed.
    - Provided that the offer is made to him, then whether his acceptance of the offer is obtained by deception or mistake, and whether his mistake is as to the identity of the offeror or some material attribute of his, the transaction should result in a contract, albeit it one which is voidable.
- Most of the authorities which are concerned with face-to-face transactions can stand with the exception of the decision in *Ingram v Little*. This is inconsistent with *Lewis v Averay* and that case should be overruled. *Phillips v Brooks Ltd* should be confirmed.
- In *Cundy,* there was no contract between the plaintiffs and the cheat. No agreement was contracted, and this is the basis for the decision in that case; it was not reasoned that the contract is void for unilateral mistake. The proper conclusion is that the plaintiffs contracted with Blenkarn in the mistaken belief, induced by his fraud, that they were dealing with Blenkiron & Co, and therefore, the resulting contract was voidable for fraud.
- The identification of the parties to a written instrument is only partly a question of construction. Where the person whose name is stated in the contract and the person who stated it and signed the contract are not the same, the question arises, which should be treated as the counterparty? This is not simply a question of construction; is partly a question of fact, and a question of law.
- If there was a contract with the rogue, it was voidable for fraud.
- The customer was not Mr Patel, it was the impostor. Any other conclusion would mean that the dealer parted with the vehicle to the impostor without authority and would, presumably, be liable in conversion if the vehicle proved to be irrecoverable. This is far removed from reality. Both the finance company and the dealer thought from beginning to end that Mr Patel was the customer.
    - C not only took a credit risk, but also took the risk that the customer who was hiring the car was not Mr Patel and that its credit inquiries had been fraudulently misdirected. There was hiring, and the impostor was the hirer.
- This conclusion involves a departure from *Cundy*, but the reasoning in that case is unsound. It is vitiated by its subjective approach to the formation of contract and the necessary correlation between offer and acceptance. It was treated as an example of unilateral mistake even though this was not the basis on which it was decided; the authority should be discarded.
- *Cundy* should no longer be followed. *Ingram* and *Hector* should be overruled.
- Appeal allowed; claim dismissed

<u>Judgment – Lord Phillips</u>

- A contract will not be concluded unless the parties are agreed as to its material terms. There must be "consensus ad idem". Whether the parties have reached agreement on the terms is not determined by evidence of the subjective intention of each party; it is, largely, determined by making an objective appraisal of the exchanges between the parties.

- The contract stands according to the natural meaning of the words used.
    - There is one exception to this principle: If the offeree knows that the offeror does not intend the terms of the offer to be those that the natural meaning of the words would suggest, he cannot, by purporting to accept the offer, bind the offer to a contract (*Hartog v Colin & Shields*).
- The object of the exercise is to determine what each party intended, or must be deemed to have intended.
- The task of ascertaining whether the parties have reached agreement as to the terms of a contract largely overlap with the task of ascertaining what it is t that the parties have agreed. The approach is the same; it requires construction of the words used by the parties in order to deduce the intention of the parties. This is true whether the contract is oral or in writing.
    - The words used are construed having regard to the relevant background facts, and extrinsic evidence may be admitted to explain or interpret the words used. Equally, extrinsic evidence may be necessary to identify the subject matter of the contract to which the words refer.
- The parties must also be shown to have agreed the one with the other.
    - If A makes an offer to B, but C purports to accept it, there is no contract.
    - If A makes an offer to B, and B addressed his acceptance to C, there is no contract.
    - Where there is an issue as to whether two persons have reached an agreement, the courts have tended to ask the question whether each intended, or must be deemed to have intended, to contract with the other.
- *King's Norton* demonstrates that if a person described himself by a false name in contractual dealings, this will not, of itself, prevent the conclusion of a contract by a person who deals with him in that name.
- The difficulty in applying a test of intention to the identification of the parties to a contract arises only where the parties conduct their dealings in some form of inter-personal contact, and where one purports to have the identity of a third party. When considering with whom he is contracting, the innocent party will have in mind both person with whom he is in contact and the third party whom he imagines that person to be.
    - The same problem will not normally arise where the dealings are carried out exclusively in writing. There is a substantial body of authority that demonstrates that the identity of a party to a contract in writing falls to be determined by a process of construction of the contract itself.
    - The effect of the authorities is that a person carrying on negotiations in writing can, by describing as one of the parties to the agreement an individual who is unequivocally identifiable from that description, preclude any finding that the party to the agreement is other than the person so described. The process of construction will lead inexorably to the conclusion that the person with whom the other party intended to contract was the person thus described (*Hector v Lyons*).
- Lord Hobhouse and Lord Walker have concluded that, as the contract was a written document, the identity of the hirer falls to be ascertained by construing that document. Adopting that approach, the hirer purported to be Mr Patel. As he had not authorised the conclusion of the contract, it was void.
- Lord Nicholls and Lord Millett have adopted a different approach. They point out the illogicality of applying a special approach to face-to-face dealings. They propose an elegant solution to this, namely where two individuals deal with each other, by whatever medium, and agree terms of a contract, then a contract will be concluded between them, notwithstanding that one has deceived

the other into thinking that he has the identity of a third party. In such a situation, the contract will be voidable but not void.

- Where there is some form of personal contact between individuals who are conducting negotiations, a strong presumption should be applied that each intends to contract with the other, with whom he is dealing. Where, however, the dealings are exclusively conducted in writing, there is no scope or need for such a presumption.
    - If the rogue had himself filled in the application and had been authorised to do so by Mr Patel, there would be a contract between the Shogun and Mr Patel.
    - If the rogue wrongfully understood that he had authority to fill in the form on Mr Patel's behalf, but in fact had no authority, the contract would be a nullity. Shogun might have a claim against the rogue for breach of warranty of authority, but could not have demonstrated that a contract had been concluded with the rogue.
    - In the present case, the rogue knew that he had no authority to conclude a contract in the name of Mr Patel, but fraudulently wished to induce Shogun to believe that they were entering into such a contract. There is no legal principle resulting in this change in the mental attitude of the rogue resulting in a binding contract being concluded with him.
- However, the position is not so simple, because there were face-to-face dealings here; it was not merely a written agreement. However, the considerations of Shogun's regulations leads to the conclusion that the correct approach here is to treat the agreement as one concluded in writing, and thus to approach the identification of the parties to that agreement as turning upon its construction.
- Mr Patel was the hirer under the agreement. As the agreement was concluded without his authority, it was a nullity. The rogue took no title under it and was in no position to convey any title to D.
- Appeal dismissed; claim stands.

<u>Judgment – Lord Walker</u>

- Agrees with Lord Hobhouse.
- This issue is essentially a problem about offer and acceptance. In determining whether or not a contract has been formed by offer and acceptance, the court adopts an objective approach, and does not inquire into what either party actually intended, but into the effect, objectively assessed, of what they said or wrote.
- *Ingram* was wrongly decided; Devlin LJ's powerful dissenting judgment is unanswerable.
- The face-to-face principle should not be an inflexible rule (apart from cases of agency) because the notion of one individual impersonating another covers a wide range of factual situations.
- The form of contract made quite clear that Shogun's intention was to accept an offer made by Mr Patel, and no one else. D's attempt to analyse the matter as a face-to-face contract (effected through the agency of the car salesman) must fail, for the reasons stated by Lord Hobhouse.
- *Hector* confirms that the principle as to face-to-face negotiations does not apply to a written contract identifying the parties.
- Appeal dismissed; claim stands.

Lee v Butler (1893)

Case overview

- X was in possession of furniture under a hire and purchase agreement made with C. X sold and delivered the furniture to D before the last payment had been paid by C. D received the furniture in good faith and without notice that C had any right in respect of it. C sued in conversion.
- Court of Appeal
- Held: Claim unsuccessful; the sale and delivery to D was within FA 1889 s9, and so valid.

Judgment – Lord Esher MR

- The present case is clearly within FA 1889 s9. X agreed by the hire and purchase agreement to buy the goods, and they were put into her possession with the consent of the owner (C). X sold the goods to D without notice that they were not hers, and D, acting in good faith and with no notice of C's right, received them.
    - S9 was passed to meet this very kind of case.

Judgment – Kay LJ

- The agreement between X and D is plainly an agreement for purchase. The case is clearly within s9, which seems to have been intended to cover this very kind of transaction.

Helby v Matthews (1895)

Case overview

- The owner of a piano (C) agreed to let it on hire to X, the hirer to pay a rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire. Another term of the contract was that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment, the piano should continue to be the sole property of C. X received the piano, paid a few of the instalments, and pledged it with a pawnbroker (D) as security for an advance.
- House of Lords
- Held: Claim successful. Upon the true construction of the agreement, X was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full. By putting it out of his power to return the piano, X had not become bound to buy, and therefore had not "agreed to buy goods" within the meaning of FA 1889 s9.

Judgment – Lord Herschell LC

- It is the substance of the transaction evidence by the agreement which must be looked at, not its mere words. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement.
- An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot properly be said to have been an agreement to buy.
    - In the present case, the agreement gave X the option to buy, and nothing happened after the contract was made to impose an obligation. So, X did not buy, or agree to buy, the piano.

- An agreement to sell is in truth merely an offer which cannot be withdrawn. It does not connote an agreement to buy.
- There is a broad distinction between the present case and *Lee v Butler.* In *Lee v Butler,* there was an agreement to buy, since there was an absolute obligation to pay both the instalments.

Judgment – Lord Watson

- The agreement in the present case is no more or less than a contract of hiring, terminable at the will of the hirer, coupled with the condition in his favour that if he elects to retain the piano until he has made 36 monthly payments, the piano is then to become his property.
    - The only obligation on X is to pay the stipulated monthly hire so long as he chooses to keep the piano. He is under no obligation to purchase the thing, or to pay a price for it.
    - There is no purchase and no agreement for purchase, until the hirer actually exercises the option given him.
- The possession of an option to buy is not an agreement to buy, and an obligation to give the option is not an agreement to sell. In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it.
    - C was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until there is acceptance by the person to whom the offer is made, there can be no contract to buy.
- In pledging the piano. X breached his contract, and forfeited his right to exercise the option.

Judgment – Lord Macnaghten

- On the part of C, the contract was a contract of hiring coupled with a conditional contract or undertaking to sell. On the part of C, it was a contract of hiring only until the time came for making the last payment.
    - It may be that at the inception of the transaction, both parties expected that the agreement would run its full course, and that the piano would change hands in the end. But an expectation does not amount to an agreement.
    - Even an agreement between two parties operative only during the pleasure of one is no agreement on his part at law.

Judgment – Lord Shand

- D's defence to C's claim under FA 1889 s9 depends on him being able to show that X, in whose possession the piano was, either bought it or agreed to buy it from C. The answer to this question depends entirely on the true construction of the agreement between C and X, under which the latter got possession of the piano.
    - The agreement is clear that there was no purchase and no agreement to purchase.
- An agreement to purchase would infer an obligation to pay a price, the payment of which could be enforced by action. In the present case, no action for any balance of the alleged price could be maintained if X thought fit at any time to return the piano to C.
- Whilst there was an obligation to sell if the hirer should avail himself of the right of option to purchase, there was no obligation or agreement to purchase.

Summers v Havard (2011)

Case overview

- C and D were used car dealers who provided cars to X on the basis that they would share any profits from the sale with X. X was in serious financial difficulties and D removed all of his cars and a number of other cards, including cars belonging to C, from X's premises. C identified 36 cars belonging to him that D claimed he had bought in good faith from X. C sued D.
- Court of Appeal
- Held: Claim successful. The

Judgment – Arden LJ

- The trial judge found that X, in an effort to remain solvent, had sold the cars to D at prices lower than would normally have been achieved, and had exceeded its authority as C's agent. He further found that D was on notice that the sales had not been made in the ordinary course of business, had not made further enquiries, and had not acted in good faith in the purchase of 33 of the cars.
- In determining whether or not the conditions of FA 1889 s2 are satisfied, the court must look at all the circumstances of the case, including the condition of good faith.
- D knew that X was in trouble financially and that X was up to skulduggery. D knew that there was a risk that X might go insolvent. In these circumstances, it is not impossible to conclude that there are circumstances in which, from X's point of view, there would be a risk of X misusing property belonging to other principals.
    - D knew that some of the cars in X's possession did not belong to X. Further, D was on notice and deliberately refrained from making enquiries.
- If a person deliberately refrains from making enquiries, he is not acting in good faith for the purposes of s2.
- On the evidence in front of him, including the judge's reliance on his finding that the cars had not been sold in the ordinary course of business, the judge was entitled to conclude that there had been a lack of good faith for the purposes of s2.
- Appeal dismissed.

Judgment – Carnwath LJ

- There is nothing special about the definition of good faith under the Factors Act.

Heathrow Truck Centre v Motability Operations (2021)

Case overview

- D leased vehicles to those in receipt of benefits, working under a scheme operated by Motability, a charity. X sold vehicles to C, who in turn sold them to Y, who converted them for vehicle users, before selling them to D. Y went into administration. C claimed that title in the vehicles was retain, and that it was entitled to the return of the vehicles or their value.
- County Court
- Held: Claim unsuccessful.

Judgment – HHJ Saunders

- The agreement meant that C was the bailee of the vehicles and had the right to possession of them. It also meant that C could sell those vehicles on to Y. A superior title would have remained with X until it was paid by C but, nevertheless, a possessory and inferior title was capable of being passed down to Y and existed at the time of sale.
- Where there is a chain of sales between A (the original seller), B (the original buyer) and C (the sub-buyer), then if A authorises B to re-sell the goods to C, C is protected against an action in conversion brought by A, so long as he continues to comply with the terms of his contract with B.
    - The rationale behind this is that A has consented to what would otherwise be the act of conversion – a wrongful sale to a third party.
- On payment of the sums owing by C to X, C's superior title would have been fed down the chain to D, in accordance with *Butterworth v Kingsway Motors*.
- Where SGA 1979 s25 applies, the sub-seller is deemed to have been authorised by the original seller to sell the goods to the sub-buyer. That gives the sub-buyer a defence to a claim for wrongful interference with goods, just as if the sub-seller had been expressly authorised by the original seller to sell the goods.
    - The fact that C had an inferior title does not prevent D from relying on the application of s25.
- The burden of proof lies on D to prove, on the balance of probabilities, that they received the vehicles without notice that C had rights of ownership – that test is objective.
    - D has proved this quite easily.

Topic 4 – Agency

The agent's authority

Actual authority

Ireland v Livingston (1872)

Case overview

- Buyer and principal (D) in Liverpool wrote to commission agent (C) in Mauritius, asking for C to ship him 500 tons of sugar at X price to cover cost, freight, and insurance. Principal preferred shipment to London, Liverpool or the Clyde, but wrote that if that was not possible, shipment to Liverpool or London was permissible. Agents could only procure, at the X price, 400 tons of sugar, which they purchased from several different persons, and shipped it on one vessel to Liverpool. D refused the cargo, and wrote to cancel the order so as to prevent any further shipment.
- House of Lords
- Held: Claim successful; D was bound to accept the cargo.

Judgment – Baron Cleasby

- The answer to the present question depends upon the proper construction of the letters between D and C. In the letter, two events are contemplated: (i) the disposal of the vessel at D's preferred destination, which necessarily involves that the whole cargo should belong to D; or (ii) shipment to one of two designated ports (London or Liverpool), which can be as well done whether what is shipped is part of a cargo or a full cargo.
    - Since the first alternative of engaging a vessel to call for orders could not be had, only the other alternative remains, namely to procure and ship 500 tons (50 tons more or less) to London or Liverpool. This raises the question of whether, although D's cargo need not occupy the whole ship, it is essential that it should form one shipment on board one ship?
- When a customary order is given to be executed, it would be unreasonable, in dealing with the conduct of the agent, to exclude from consideration the usual and customary mode of executing such orders. It is found as a fact that, supposing the instructions not to be limited to the engagement of an entire ship to call for orders, C, in shipping the 400 tons, acted in conformity with the usage, as it was their duty to do.
- C's claim succeeds.

Judgment – Blackburn J

- The question in the present case depends almost entirely on the true construction of the letter from D to C.
- The terms "to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents" are very usual and are perfectly well understood in practice. If a consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the amount insert in the invoice is the agreed price, and no commission is charged.
    - In such a case, there is no contract of agency or trust between the parties, and so no commission is charged.
- It is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In such a case, he is bound to get the goods as cheap as he reasonable can, and the sum inserted in the invoice represents the actual cost and charges at which the goods are procured

by the consignor, with the addition of a commission – the naming of a maximum limit shows that the order is of that nature.
    - It would be a positive fraud if, having bought the goods at a price including all charges below the maximum limit fixed in the order, the commission merchant, instead of debiting his correspondent with that actual cost and commission, debited him with the maximum limit.
        - Further, an action brought against the agent for not accounting properly, this extra sum would be disallowed.
- The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering them, the freight not being an element in the limit.
    - But when, as in the present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order – if it does, the principal is not bound to take the goods.
    - If by due exertions the agent can execute the order within those limits, he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness.
- The agent does not take upon himself any part of the risk or profit which may arose from the rise and fall of prices, and is entitled to charge commission because there is a contract of agency.
- There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house, and the owner of that house.
    - The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall. On this basis, the property in the goods passes from the country producer to the commission merchant and then, when the goods are shipped, from the commission merchant to his consignee.
    - The legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other, and consequently, the commission merchant is a vendor and has the right of one as to stoppage in transitu.
- The present case is a contract between vendor and vendee, but it is also a contract as between principal and agent: when the order was accepted by C, there was a contract of agency by which C undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission.
    - The super-added sale is not inconsistent with the contract of agency.
- In the present case, the evidence shows that C pursued a reasonable course. As per *Story on Agency*, where an agent has authority to buy 100 bales, it may ordinarily be implied that the purchase might be made at different times of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed.
- C's claim succeeds.

<u>Judgment – Lord Chelmsford</u>

- If a principal gives an order to an agent in uncertain terms so that there are two different meanings, and the agent bona fide adopts one of the interpretations and acts upon it, the principal cannot repudiate the act as unauthorised because he meant the order to be interpreted in the other way which is equally capable.

    - The departure from the principal's intention was occasioned by his own fault, and he should have given his order in clear and unambiguous terms.
- It would be hard and unjust to make C bear the loss, since they were innocent agents who followed what they honestly considered to be the directions of the principal. It ought, in justice, to be borne by D, who has brought it upon himself by his want of precision and certainty in the language used by him in communication his order to C.
- C's claim succeeds

Freeman v Buckhurst (1964)

Case overview

- X and Y formed a company (D), and were, alongside two nominees, directors of D. The articles of association contained a power to appoint a managing director, but none was appointed: X agreed personally to pay the running expenses and to be reimbursed by the company at a later date. X ordered services from a company (C) who executed the work. C claimed their fees from D.
- Court of Appeal
- Held: Claim successful; since the articles of association contained a power to appoint X managing director, it was not for C to inquire whether he was properly appointed; D was liable for C's fees.

Judgment – Willmer LJ

- The key question is whether X had ostensible authority to engage C. This is partly a question of fact and partly one of law.
- On the evidence, X was throughout, to the knowledge of the board, acting as managing director of D.
- The doctrine of ostensible authority in relation to a limited company necessarily gives rise to difficult legal problems, since a company can act only through its officers, and the powers of its officers are limited by its articles of association.
    - It is well established that all persons dealing with a company are affected with notice of its memorandum and articles of association, which are public documents open to inspection by all.
- In the present case, X, in engaging C, clearly acted within the ordinary ambit of the authority of a managing director. Accordingly, C do not have to inquire whether X was properly appointed – it is sufficient for them that under the articles of association, there was in fact power to appoint X as such.
- C's claim succeeds.

Judgment – Pearson LJ

- The basis of ostensible authority is an estoppel by representation: the agent professes to act on behalf of the company, and he thereby impliedly represents and warrants that he has authority from the company to do so.
    - The company has known and acquiesced in the agent professing to act on its behalf, and thereby impliedly representing that he has the company's authority to do so. The company is considered to have made the representation, or caused it to be made, or at any rate to be responsible for it. Accordingly, as against the other contracting party, who has altered his position in reliance on the representation, the company is estopped from denying the truth.

- The identification of the persons whose knowledge and acquiescence constitute such by the company depends upon the facts of the particular case. The relevant persons are usually directors, but may be others such as shareholders or secretaries.
- In the present case, C did not look at D's articles of association: it would have been surprising if they had done so. They took the very slight risk that D's articles might be such as to make it impossible for X to be acting intra vires on behalf of the company in giving his instructions to C.
- In *Rama v Proved Tin,* it was recognised that it is possible to have ostensible or apparent authority apart from the articles of association, though not where it is inconsistent with or beyond the articles of association.
    - This is not authority for the position that a person dealing with a director of a company in a normal transaction within the ordinary scope of the company's business is not protected by the director's ostensible authority unless that person obtained and studied the company's articles of association and made sure that the directors had power to delegate to a single director – such a requirement would be absurd.
    - There is no difficulty in applying the principle of *Rama v Proved Tin* to any case where there is an unusual transaction outside the scope of the ordinary business which the single director is held out by the company as authorised to conduct on its behalf.

<u>Judgment – Diplock LJ</u>

- To confer actual authority would have required not merely the silent acquiescence of the individual members of the board, but the communication by words or conduct of their respective consents to one another and to X.
    - There is insufficient evidence to conclude that actual authority to employ agents had been conferred by the board on X.
- The law surrounding the authority of an agent has developed pragmatically rather than logically, but it is possible to restate it upon a rational basis.
- Actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties.
- To this agreement, the third parties is a stranger: he may be totally ignorance of the existence of any authority on the part of the agent.
    - If the agent does enter into a contract pursuant to the actual authority, it does create contractual rights and liabilities between the principal and the third party.
    - It may be that this rule relating to undisclosed principals can be rationalised as avoiding circuity of action, for the principal could in equity compel the agent to lend his name in an action to enforce the contract against the third party, and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract.
- On the other hand, "apparent" or "ostensible" authority is a legal relationship between P and T created by a representation by P to T, intended to be and in fact acted upon by T, that A has authority to enter on behalf of P into a contract of a kind within the scope of the "apparent" authority, so as to render P liable to perform any obligations imposed upon him by such contract.
    - A is a stranger to their relationship. He need not be aware of the representation, but he must not purport to make the agreement as principal himself.

    - The representation, when acted upon by T by entering into a contract with A, operates as an estoppel – it prevents P from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.
- In ordinary business dealings, T can in the nature of things hardly ever rely on the "actual" authority of the agent – all he can know is what A or P tell him, which may or may not be true.
- The representation which creates "apparent" authority may take a variety of forms, of which the most common is representation by conduct (by permitting A to act in some way in the conduct of P's business with other persons).
    - By doing so, P represents to anyone who becomes aware that A is so acting that A has authority to enter on behalf of P into contracts with other persons of the kind which A, so acting in the conduct of P's business, has usually "actual" authority to enter into.
- Where P is not a natural person but a corporation, there are two further factors: (i) the capacity of the corporation is limited by its constitution (i.e. for a company incorporated under the Companies Act, by its memorandum and articles of association; and (ii) a corporation cannot do any act, and that includes making a representation, except through its agent.
- Under the doctrine of ultra vires, the limitation of the capacity of a corporation by its constitution to do any acts is absolute. This has two results for "apparent" authority:
    - (i) No representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself.
    - (ii) Since the conferring of actual authority upon an agent is itself an act of the corporation, the capacity to do which is regulated by its constitution, the corporation cannot be estopped from denying that it has conferred upon a particular agent authority to do acts which by its constitution it is incapable of delegating to that particular agent.
        - In order to create an estoppel between the corporation and the third party, the representation as to the authority of the agent which creates his apparent authority must be made by some person with actual authority from the corporation to make the representation.
- This operates to prevent T from saying that he did not know that the constitution of the corporation rendered a particular act or a particular delegation of authority ultra vires the corporation.

Lysaght v Falk (1905)

Case overview

- C contracted to purchase the whole of D's output of spelter dross at £11 per ton, for twelve months from 2nd September 1903, to be delivered by D from time to time as the dross was produced at D's works. C alleged that D refused to deliver the dross as agreed and sued for breach of contract. D later entered a plea, stating that the contract between C and D was made by D's agent (X), acting ostensibly on D's behalf, although he acted fraudulently and in his own interest.
- High Court of Australia
- Held: New trial granted.

Judgment – Griffith CJ

- T (the claimant) must prove that the person with whom he dealt was the agent of P (the defendant), and that, in making the contract, A was acting as agent for P.

- An agent who is not acting for his principal but for his own benefit is acting beyond the scope of his authority. In the present case, the contract was made not for P's benefit, but for the joint benefit of A and T – such a contract is not within the authority of the agent.
    - It is unimportant whether A tells T that he has no authority to make the contract, or whether the circumstances under which he makes it are, to the knowledge of the other party, such as to show that he had no such authority – in either case, A is acting beyond the scope of his authority and T knows it.
- An exception to this is where T deals bona fide with A, without knowledge of the limitation of his authority – this is based upon the principle of estoppel.

Judgment – O'Connor J

- Every authority conferred upon an agent, whether express or implied, must be taken to be subject to a condition that the authority is to be exercised honestly and on behalf of P – that is a condition precedent to the right of exercising it.
    - If that condition is not fulfilled, then there is no authority, and any act purporting to have been done under it (unless in a dealing with innocent parties) is void.
- If a person dealing with an agent has knowledge that there has been a fraudulent exercise of the authority, then he is not allowed to say that the authority exists.

Apparent authority

Freeman v Buckhurst (1964)

- *[See above, under "Actual authority"]*

British Bank v Sun Life (1983)

Case overview

- C brought an action to recover £120k on three dishonoured undertakings in the name of an insurance company (D). C had sent a letter to D asking whether X was empowered to issue undertakings on behalf of D under his sole signature. A branch manager (Y) of D confirmed X's authority. In fact, X was not authorised by D to grant such an undertaking. C argued that X had actual or ostensible authority to execute undertakings on D's behalf.
- House of Lords
- Held: Claim unsuccessful. Neither X nor D's branch manager had actual or ostensible authority to execute the undertaking. In stating erroneously that X had authority, the branch manager did not thereby become clothed with actual or ostensible authority to answer as he did. Further, there was no evidence that D had ever represented that their branch managers had authority to sign contracts, and thus no ostensible authority existed.

Judgment – Lord Brandon

- It is clear from Y's contract of employment that as a branch manager, he did not have actual authority, express or implied, to execute the forms. So, Y never could have had, and never did have, the actual authority, express or implied, of D to represent, to C or anyone else, that X had the actual authority of the company to execute the undertakings on the company's behalf.

- It cannot be properly said that the branch manager, simply by answering a letter clearly addressed to someone in the top management of D, thereby became clothed with the actual authority, express or implied, of D to send the answer to the letter.
    - This was not a case of D holding out Y as having its authority; rather, it was a case of Y, without the knowledge or permission of D, holding himself out as having such authority.
    - Therefore, Y did not have ostensible authority to send out the letter.
- So, Y had neither the implied actual authority, nor the ostensible authority, of D to make the representation to C about X's actual authority. So, C's claim fails.

Armagas v Mundogas (1986)

Case overview

- C contracted to purchase a ship from D on the basis that the ship was to be chartered back to D. D's chartering manager (X) told C that he had authority to agree to the sale of the ship with a three-year charter back to D. Documents purporting to be a 12 month and three-year charterparty came into existence, but D, knowing only of the 12-month charterparty, redelivered the vessel. C sued for breach of the three-year agreement; X admitted that he had signed the charterparty without the knowledge or authority of D.
- House of Lords
- Held: Claim unsuccessful; X could not, in the absence of a representation by D as to his authority, reasonably be believed to have authority to complete the agreement.

Judgment – Lord Keith

- Counsel for C accepted that X did not have actual or ostensible general authority to enter into contracts of such an onerous character but argued that he had ostensible specific authority to enter into this particular contract.
- Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal is then estopped from denying that actual authority existed.
- Commonly, ostensible authority is general. General ostensible authority arises when P has placed A in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. It may also arise where A has had a course of dealing with a particular T and P has acquiesced in this and honoured transactions arising out of it.
    - It can never arise where T knows that A's authority is limited so as to exclude entering into transactions of the type in question, and so T cannot have relied on any contrary representation by P.
- It is possible, although very rare and unusual, for circumstances to give rise to ostensible specific authority to enter into a particular transaction.
    - E.g., T may know that A has no general authority to enter into the transaction, but P may inform T that, in relation to a transaction which to T's knowledge required P's specific approval, he could rely on A to enter into the transaction only if such approval had been given – in such a situation, if A entered into the transaction without approval, P might be estopped from denying that it had been given.

- It is very difficult to envisage circumstances in which the estoppel could arise from conduct only in relation to a one-off transaction.
- It must be a most unusual and peculiar case where an agent who is known to have no general authority to enter into transactions of a certain type can, by reason of circumstances created by P, reasonably be believed to have specific authority to enter into a particular transaction of that type.
    - In the present case, the facts fall far short of establishing such a situation. X did not have ostensible authority, and so C's claim fails.

First Energy v Hungarian International Bank (1993)

Case overview

- Heating engineers (C) were about to undertake major works and entered negotiations with a trading bank (D) for D to provide credit facilities to C's customers. An office manager of D (X) told C that he had no authority to sanction a facility letter. Negotiations continued and D sent a letter indicating that it would the facility would be granted when D returned to C a countersigned letter. This was never sent, and no binding agreement was then achieved, but an ad hoc agreement was reached for the first major contract, on the basis of the earlier negotiations. X later wrote to C offering a further interim solution, stating that the funds would be released on C returning D's hire-purchase agreements – those agreements contained a clause which required an authorised signature. C relied on the apparent authority of X, signing and returning the documents requested. D changed its mind and refused to accept that a binding contract had been made and denied that X had ostensible authority to sanction the transaction.
- Court of Appeal
- Held: Claim successful. Taking into account the surrounding circumstances which reasonable parties would have had in mind, there was an unconditional offer of ad hoc financing for the three projects which involved more than a mere step in continuing negotiations. X's position as senior manager of a major branch was such that he was clothed with the authority to communicate that head office approval had been given, and C was not obliged to check X's authority with the head office.

Judgment – Steyn LJ

- A reasonable businessman, placed in the same objective setting as C, would have read the letter as communicating an unconditional and firm offer. The letter contained all the essentials for the conclusion of a binding contract, and the offer was accepted.
- In the context of apparent authority, the law does not recognise the idea of a self-authorising agent.
- A principal may clothe an agent with apparent authority in more than one way. The present case is often described as the usual authority of an agent, although the idea of usual authority is used in two senses: (i) it sometimes means that the agent had implied actual authority to perform acts necessarily incidental to the performance of the agency; and (ii) it sometimes means that the principal's conduct in clothing the agent with the trappings of authority was such as to induce a third party to rely on the existence of the agency.
    - The issue in the present case is one of usual authority in the second sense.
- Lord Keith's observations in *Armagas v Mundogas* about specific, as opposed to general, authority are not relevant to the present case: the issue here relates to the existence of a general apparent authority arising from the position in which D had placed X.

- Lord Keith in *Armagas* was careful not to say that as a matter of law an apparent authority to communicate approval can never arise where there is no authority in the agent on his own to enter into the transaction.
    - His Lordship's observation was a prediction that it will necessarily be somewhat rare for a principal to be regarded as having authorised his agent to communicate whether or not he has authority – this is valuable guidance, but not a rule or principle of law.
- The law recognises that in modern commerce, an agent who has no apparent authority to conclude a particular transaction may sometimes be clothed with apparent authority to make representations of fact – the level at which such apparent authority could be found to exist may vary and generalisation will be unhelpful.
    - In accordance with the general understanding in commerce, the managing director and general manager of a bank is clothed with a general actual or apparent authority to convey information as to the approval of a transaction.
- In the present case, X's position as senior manager was such that he was clothed with ostensible authority to communicate that head office approval had been given for the facility. The idea that C should have checked with the managing director whether D had approved the transaction seems unreal – this factor is not decisive but is relevant to the ultimate decision.

<u>Judgment – Evans LJ</u>

- D cannot deny that X enjoyed the usual authority of a person described as a senior manager in charge of a branch office, subject only to the express limitation with regard to signing facility letter which he himself communicated to C.
- An agent who has no authority to enter into a transaction on behalf of his principal cannot create the appearance of such authority by making a representation to that effect, as per *Armagas v Mundogas*.
- There is no conceptual difference between ostensible authority to enter into a transaction or to communicate agreement by the principal to a particular transaction.
- It is clear that cases may exist in which the agent does have apparent authority by virtue of his position to communicate decisions made by his seniors. The third party cannot always insist, if ever, on attending the board or management meeting, or on speaking to the senior manage himself.
    - Further, there is clearly no requirement that the authority to communicate decisions should be commensurate with the authority to enter into a transaction of the kind in question on behalf of the principal.
- In the present case, X, by virtue of his position, necessarily had some authority to communicate with third parties dealing with the bank. The fact that C knew that X's actual authority to enter into transactions on behalf of D was limited does not necessarily mean that his authority to communicate decisions on their behalf was limited also.

<u>Judgment – Nourse LJ</u>

- A question of ostensible authority is primarily one of fact: did the principal hold out the agent as having his authority to make the representation or to do the act on which the other party relies?

Lovett v Carson (2009)

Case overview

- Bank (D2) sought to exercise a guarantee and a debenture in its favour over the company (D1)'s assets. The company's directors (C and X) divided the administration of the company. The bank drafted the debenture and guarantee, which were then sent to the company's office; they were returned to the bank carrying both C and X's signatures in their capacity of directors. At the time, C and X had been contemplating liquidising the company and dividing the assets between them. Their professional relationship broke down and the bank exercised its right under the debenture to appoint administrators. X had forged C's signature on the debenture documents, but maintained that he had properly explained the documents and their effects to C. C challenged the validity of D's appointment on the basis that he had not signed the debenture document; question was whether X had authority to sign on C's behalf.
- High Court
- Held: Claim unsuccessful; debenture valid. X did not have express or implied authority to sign C's name on the documents but did have ostensible authority to do so.

Judgment – Davis J

- Whilst C left all the financial and administrative side of things to X and frequently left it to him to handle the signature processes, this particular transaction needed C's consent. So, the making of this debenture and guarantee did not have the actual authority, whether express or implied, of C.
- Under general agency law, forgeries are not treated differently from other fraudulent acts which may be binding on the principal if the agent acts within his ostensible authority. So, a principal may in appropriate circumstances be bound by the fraudulent acts of his agent in circumstances where there is ostensible authority.
    - There may well be cases where an officer or employee of a company can in any event be authorised actually or ostensibly by the company to warrant that procedures have been properly complied with and that documents are genuine. This is sometimes required by the realities of modern commerce – an example of this is *First Energy v Hungarian International Bank*
- In the present case, C left all the bank details and documentation to X, and was happy for him to look after it all. On numerous other occasions, C had been content to leave it to X to communicate the appropriate signed formal documents to the bank when C must have known that two signatories were required and that he himself had not signed and when he knew that X had signed the documents using C's purported signature.
    - So, X had been clothed by the company (D1) with ostensible authority to warrant to the bank (D2) that all formalities relating to approval and execution of the debenture and guarantee had been duly complied with, and that the signatures could be relied upon as genuine.
- Conclusion: The debenture is valid on the basis of CA 2006 s44.
- OBITER (issue of estoppel by acquiescence): For there to be an estoppel, the bank (D2) must show that it acted to its detriment in reliance on C's conduct or silence. There is no evidence of any such detriment.
    - So, D2's argument based on estoppel and acquiescence would fail.

Usual

UBAF v EAB (1984)

Case overview

- English bank (C) was invited by an American bank (D) to participate in a syndicated loan to a shipping company. Certain financial information about the company was passed by D to C under cover of a letter signed by D's assistant secretary (X). The shipping company defaulted and C sued D alleging, inter alia, deceit, misrepresentation, and negligence in the preparation of the financial information.
- Court of Appeal
- Held: Claim successful; X had signed the letter in the ordinary course of his duties, and it was the sort of letter which was within his authority. A company makes a written representation if it produces a document signed by an authorised agent acting within the scope of his authority.

Judgment – Ackner LJ

- Since a company, not being a physical entity, can only act in relation to the outside world by its agents, the signature of the duly authorised agent of the company, acting in the course of the company's business, is the signature of the company – no one nowadays would question this.
    - So, the signature on behalf of a company of its duly authorised agent acting within the scope of his authority is the signature of the company.

Watteau v Fenwick (1893)

Case overview

- C supplied cigars to a beer house operated by X. Prior to 1888, X had operated the business on his own account, but in that year, he assigned his interest to D. However, X remained the manager and continued to operate the business as before; the sign bore his name, and the licence was held in his name. C supplied cigars and Bovril to X and was at all times unaware of D's involvement. However, D had never given X any authority to act on their behalf. When C was not paid the price owed him, he sued D.
- High Court
- Held: Claim successful; D, as the real principals, were liable for all acts of their agent (X) which were within the authority usually conferred upon an agent of his particular character, although he had never been held out by D as their agent, and although the authority actually given to him by them had been exceeded.

Judgment – Wills J

- Once it is established that D was the real principal, the ordinary doctrine as to principal and agent applies, namely the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority.
    - It is not the case that this is only so where there has been a holding out of authority – otherwise, in every case of undisclosed principal, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.

- In the case of a dormant partner, it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner.
    - The law of partnership, on such a question, is nothing but a branch of the general law of principal and agent.
- C's claim successful.

Sign-o-Lite v Metropolitan Life Insurance (1990)

Case overview

- C entered into an agreement with one of several companies controlled by the owner of a shopping mall (X) for the rental of an outdoor sign at the shopping mall. Later, a company acquired the mall owner's interest in the shopping mall, but one of the original owner's companies continued to manage the mall as agent. Later, C (unaware of the new owner's ownership of the mall) entered into a replacement agreement with X which was beyond the actual authority of X to enter. C sued D on the contract.
- British Columbia Court of Appeal (Canada)
- Held: Claim unsuccessful; an undisclosed principal is not liable for unauthorised acts of an agent, even if within the scope of such an agent's usual authority. So, D was not liable on the contract.

Judgment – Wood J.A.

- *Watteau v Fenwick* has been met with a flurry of criticism, which is summarised well in *Bowstead on Agency*:
    - "It was supported by two arguments: an analogy with the law of partnership, and the earlier case of *Edmunds v Bushell*. The analogy with the law of partnership has long since been shown to be wrong. *Edmunds v Bushell* is a case where the facts are not clear and there may have been an apparent authority: in any case, the dicta in the short judgments cast doubt on the reasoning employed.
- It is astonishing that an authority of such doubtful origin and of such unanimously unfavourable reputation, should still be exhibiting signs of life. It is surely time to end an uncertainty which may linger as to its proper place in the law of agency.
    - The case is not part of the law of British Columbia.
- C's claim fails.

Smith v Prosser (1907)

Case overview

- D, before leaving from South Africa to England, gave two persons a power of attorney to act for him in his absence, and signed his name on two blank promissory, handing them to his two agents with instructions that they should be retained in the custody of his attorney (X) until he gave instructions for their issue upon arriving in England. After D left, X filled in the promissory notes, in fraud of D, and sold them C. C took them honestly and in good faith, without notice of the fraud, and gave full value for them. C sued D for payment of the sums on the promissory notes.
- Court of Appeal
- Held: Claim unsuccessful; since D handed the notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and C.

Judgment – Williams LJ

- It is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such.
    - In the present case, this did not happen. What D did was leave South Africa while uncertain that any money would be required for his powers of attorney to work. The promissory notes were handed to X as custodian only, with the intention that the notes should not be issued until he sent instructions to that effect from England.
- The authorities show that in the absence of a delivery of promissory notes to an agent with the intention that they shall be negotiated, the signer is not responsible even to a bona fide holder for value.
- The mere fact that the signer of a negotiable instrument has been negligent as regards the care taken by him in regard to a signed paper never renders him liable to be estopped from showing the conditions under which he parted with its possession, unless he has so dealt with the instrument or given such instructions with regard to it as raised a duty between himself and the commercial public.
- Mere negotiation by itself, unless it raises such a duty, cannot raise an estoppel. However, it may be true to say that where the fraud of a third party has caused injury to one of two innocent parties, that one must be held liable whose negligence rendered the fraud possible.
    - In that sense, negligence is not equivalent to mere carelessness which may cause harm, but it is negligence in the performance of a duty to the person who sets up the estoppel.
- In the present case, at the moment when the promissory notes were handed over, no purpose or intention existed in D's mind that X should negotiate the notes. D only proposed that X should keep them so that he should be ready in case D should at some future time make up his mind that he needed money which should be raised by negotiation.
- C's claim fails.

Judgment – Moulton LJ

- If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands for the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument. Notice of such limitation may be given in various ways by the instrument itself.

    - In the absence of notice appearing on the face of the instrument, as soon as there is an intention by the signer that the piece of paper shall form the basis of a negotiable instrument, no limitation of the agent's authority can be allowed to affect third parties taking it without notice.
- In the present case, there was no such intention; D delivered the documents to X for safe custody only. The forms were not in X's hands as D's agent with an intention by D that he should issue them as promissory notes, and so D is not estopped from saying that he was not the maker of the notes sued upon.
- C's claim fails.

Judgment – Buckley LJ

- The present claim fails on the ground that the promissory notes never became negotiable instruments, since D never issued them, nor authorised anyone else to issue them, as negotiable instruments. X never had authority to issue the documents as promissory notes, but merely held them for safe custody.

Jerome v Bentley (1952)

Case overview

- C entrusted a stranger (X) with a diamond ring on terms that if he could sell it for more than £550, he could keep any surplus for himself, and that if he had not sold it within seven days he was to return it. Twelve days later, X sold the ring for £175 to D, who bought in good faith thinking that X was the owner. D resold the ring, and C sued D in conversion.
- High Court
- Held: Claim successful; X had no authority to sell the ring to D.

Judgment – Donovan J

- X was simply a private individual belonging to no well-known class of agent. When he sold the ring, he was not C's agent at all, except perhaps for the purpose of safe custody of the ting. X usurped is authority to sell.
    - After the seven days, X's sole duty was to hand the ring back to X. X entered the shop intending to convert the ring to his own use. He accomplished that purpose, and became a thief of the ring.
- As to the issue of C enabling X to commit the fraud, "enable" means the doing of something by one of the innocent parties which in fact misled the other – this is to be deduced from *Farquharson v King*.
    - In the present case, C did nothing which misled D.
- No property in the ring passed to D; C can set up his title as against D. C's claim successful.

Ratification

Keighley v Durant (1901)

Case overview

- Principal (D) authorised his agent (X) to purchase some wheat at a certain price in their joint names. X failed to buy the wheat at a price which was directed by D, and subsequently bought it at a higher price. Therefore, at this point, this meant that D was undisclosed because X went against his instructions and omitted to disclose the identity of D to the seller (C). D initially ratified the contract, but later changed his mind and refused to accept delivery of the wheat. C sued for damages, arguing that the contract had been ratified.
- House of Lords
- Held: Claim unsuccessful; an undisclosed principal cannot ratify his agent's contract.

Judgment – Lord Macnaghten

- The doctrine of ratification is an exception to the rule that only persons who are parties to a contract, acting either by themselves or by an authorised agent, can sue or be sued on the contract. By a wholesome or convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract.
    - In principle, this fiction should not be extended to cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else.
- It is a well-established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed intentions. This is a sound maxim and ought not be put aside merely because it may be that, in a case like the present, no injustice might be done to the actual parties to the contract by giving effect to the undisclosed intentions of a would-be agent.

Judgment – Lord Shand

- Allowing ratification by an undisclosed principal would be to give X an option, merely from what was passing in his own mind and not disclosed to C, the power of saying the contract was his alone, or a contract in which others were bound with him.
    - In a case where the agent has no authority on making the contract, he has no power to bind anyone but himself.

Judgment – Lord Lindley

- The reasons upon which a real principal not disclosed can sue or be sued on a contract made on his behalf by an agent acting with this authority have no application to contracts made by one person for another, but without any authority from him.
- Ratification rests on a fiction: where a man acts with an authority conferred upon him, no fiction is introduced; but where a man acts without authority and an authority is imputed to him a fiction is introduced, and care must be taken not to treat this fiction as fact.
    - The doctrine of ratification as hitherto always in fact given effect in substance to the real intentions of both contracting parties at the time of the contract, as shown by their language or conduct.
    - Counsel for C's contention extends the doctrine materially, for which there is no warrant or necessity.

- It may be that if one of several co-owners of a chattel sells it, without the authority of his co-owners, to a person who believes he is dealing with the sole owner of the property sold, the transaction can be ratified by the undisclosed co-owners, and that they can then sue or be sued on the contract as undisclosed principals – their interest in the property may justify this.
    - The co-ownership shows that the seller, if acting honestly, must in fact have been acting for his co-owners as well as for himself. His intention is supplemented by a fact which completes the proof of what is necessary.
    - The present case, however, is not one of co-ownership, and so *Soames v Spencer* is not authority for Cs case.
- Ratification, when it exists, is equivalent to a previous authority (subject to some exceptions that need not be referred to). Yet care must be taken that ratification is established.
- To allow ratification by an undisclosed principal in the present case would be to enable one person to make a contract between two others by creating a principal and saying what his own undisclosed intentions were, and these could not be tested. This would introduce a very dangerous doctrine.
- In the present case, what X intended was never disclosed to D, and cannot be inferred from the nature of the transaction itself. Therefore, his intention cannot be allowed to affect the rights of the parties. What he did afterwards, unknown to D, cannot in any way affect D's position.
    - C's claim fails.

Braymist v Wise (2002)

Case overview

- D entered into an agreement with a company to buy a piece of land. The company's solicitors (C) signed the agreements as agents for the company. D did not know, however, that the company had not been formed at the time of the agreement. When D refused to complete the agreement, C rescinded the agreement and brought an action for breach of contract.
- Court of Appeal
- Claim successful; C, as agent for an unformed company, could enforce the contract through CA 1985 s36C(1).

Judgment – Arden LJ (dissenting in part on reasoning)

- The only consequence of CA 1985 s36C(1) is that the agents of an unformed company should be personally liable. The function of the tailpiece in the statute is to establish liability only, and to leave the question whether the agent can enforce the contract to the general law.
    - So, the common law applies to determine whether such a person can enforce the contract.
- The position in the general law is not that an agent can in all circumstances come in and claim to be principal on a contract which he made as agent – the circumstances in which he can do so have yet to be fully defined by the courts.
    - Parliament intended to preserve the process of common law adjudication in this respect, and to leave it to the courts to complete the exercise of defining the relevant circumstances.
- In determining the rules, as stated in *Bowstead & Reynolds on Agency*, the law should have regard, inter alia, to the position of third parties who claim that they would not have entered into a contract if they had known the other party was not the principal.
    - It may be that the party relies on the skill or solvency of the other party.

- As to what the rules should be, that matter awaits another case. In the present case, it is of no moment to D whether the party selling the property is C or the company. Therefore, C are entitled to enforce the agreement.

Judgment – Latham LJ

- A contract can only have effect if both parties are entitled to give it effect.
- There is proper justification for extending the protection to the unformed company by validating pre-incorporation contracts, and also to others who might have relied on the existence of an apparent contract in their dealings with that company.
- The ordinary common law rules as to the enforceability of contracts are both sufficient and satisfactory to deal with any difficulties which the consequence of CA 1985 s36C(1), construed as it should be construed, could give rise to.
    - Therefore, the section itself provides the answer as to whether or not the person purporting to act as an agent for the company should be entitle to enforce the contract, subject to the proviso of the use of the common law.
- C is entitled to rely on s36C(1) in order to enforce the contract.
    - This produces a just result in that there is no good reason why D should be entitled to resile from their obligations under the contract as a result of a pure technicality when in truth they wish to do so because it proved a bad bargain.

Judgment – Judge LJ

- S36C(1) abrogates the principle in *Newborne v Sensolid* that if the company was not in existence when the contract was signed, there was never a contract. Under the section, there is deemed to be a contract, and the purported contract has effect as one made with the purported agent, who is personally liable on the contract.
- In principle, the identity of the other party to a contract often matters. There are well understood exceptions to the principle that an individual is free to decide whether and with whom to enter or not to enter a contract (e.g., legislation on discrimination), but in the case of unformed companies, s36C(1) applies to all contracts.
- The broad construction of s36C(1) is to be preferred, so that C is both liable on the contract and can enforce the contract.

Bolton v Lambert (1889)

Case overview

- D made an offer to purchase to X, who was the agent of C, but was not authorised to make any contract for sale. The offer was accepted by X, on behalf of C. D then withdrew his offer, and after the withdrawal, C ratified the acceptance of the offer by X. C sued for specific performance of the contract.
- Court of Appeal
- Held: Claim successful. C's ratification related to the acceptance by X, and so D's withdrawal was inoperative, and C were entitled to specific performance.

Judgment – Cotton LJ

- The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had had authority to do the act at the time the act was done by him.
    - In *Hagedorn v Oliverson,* it was pointed out how favourable the rule is to the principal, because until ratification he is not bound, and has an option to adopt or not adopt what has been done.
- The rule is subject to some exceptions: an estate once vested cannot be divested, and an act lawful at the time of its performance cannot be rendered unlawful by ratification.
- In the present case, the proper view is that acceptance by X constituted a contract, subject to it being shown that X had authority to bind C. If that were not shown, there would be no contract on C's part. But, as soon as authority was given to X to bind C, the authority was thrown back to the time when the act was done by X, and prevented D withdrawing his offer, because it was then no longer an offer, but a binding contract.
    - Therefore, C's claim succeeds.

Judgment – Lindley LJ

- The question is whether, when there has been in fact an acceptance which is in form an acceptance by a principal through his agent, though the person assuming to act as agent has not then been so authorised, there can or cannot be a withdrawal of the offer be a withdrawal of the offer before the ratification of the acceptance?
    - The true view is that the doctrine as to the retrospective action of ratification is applicable.
    - There is no authority to warrant the contention that an offer made, and in fact accepted by a principal through an agent or otherwise, can be withdrawn.

Judgment – Lopes LJ

- The doctrine of ratification applies and so gives the same effect to the contract made by X as it would have had if X had been clothed with a precedent authority to make it.
- If X had acted under a precedent authority, the withdrawal of the offer by D would have been inoperative, and it is equally inoperative where C have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect.

By operation of law: Agency of necessity

The Winson (1982)

Case overview

- Cargo owner (D) chartered a ship to carry wheat. During the voyage, the ship stranded on a reef. The ship's managing agents entered into a standard form salvage agreement with professional salvors (C). To assist the salvage operation, C unloaded several parcels of wheat and shipped them. To protect the wheat from deterioration, C contracted with various depositaries to warehouse it at C's expense. C then looked to D for reimbursement of these storage charges.
- House of Lords
- Held: Claim successful; D liable to reimburse C (but on basis of bailment, not agency of necessity)

Judgment – Lord Diplock

- The term "agent of necessity" should be confined to context in which the question to be determined is whether circumstances exist which in law have the effect of conferring on a person authority to create contractual rights and obligations between the other person and a third party that are directly enforceable by each against the other.
    - The term should not be extended to cover cases where the only relevant question is whether a person who without obtaining instructions from the owner of goods incurs expense in taking steps that are reasonably necessary for their preservation is in law entitled to recover from the owner of the goods the reasonable expenses incurred by him in doing so.
- In the present case, it is not disputed that when the agreement was signed, the circumstances that existed at that time were such as entitled the master to enter into the agreement on the cargo owner's behalf as its agent of necessity.
- The rendering of salvage services under the agreement does not usually involve the salvor's taking possession of the vessel or its cargo form the shipowner, although such services may so involve.
    - When, in the course of salvage operations, cargo is off-loaded from the vessel and conveyed to a place of safety by means provided by the salvor, the direct relationship of bailor and bailee is created between cargo owner and salvor. All the mutual rights and duties attaching to that relationship at common law apply, save any inconsistent with the express terms of the agreement.
- EWCA held that not only must the measures taken by C have been objectively necessary to preserve the wheat from rapid deterioration, it must also have been impossible for C to communicate with D to obtain from him such instructions as he might want to give.
    - It may be that this would be so if the question had been whether the depositaries could have sued D directly for their contractual storage charges on the ground that D was party as principal to the contracts of storage made on its behalf by C as agent of necessity, since English law is economical in recognising situations that give rise to agency of necessity.
- In an issue such as the present, inability to communicate with the owner of the goods is not a condition precedent to the bailee's own right to reimbursement of his expenses – the bailor's failure to give any instructions when apprised of the situation is sufficient.

Judgment – Lord Simon

- One of the ways in which an agency of necessity can arise is where A is in possession of B's goods, and an emergency arises which places those goods in imminent jeopardy. If A cannot obtain instructions from B as to how he should act, A is bound to take without authority such action in relation to the goods as B, as a prudent owner, would himself have taken in the circumstances. The relationship between A and B is then known as an "agency of necessity", with A being the agent and B the principal.
- Issues of agency of necessity generally arise forensically when A enters into a contract with C in relation to the goods, the question being whether B is bound by that contract.
    - To confine agency of necessity to such contractual situations is justified by the fact that the law of bailment will often resolve any issue between alleged principal and agent of necessity, as in the present case (although sometimes it may be more useful).
    - This does not mean that other relevant general incidents of agency are excluded from the relationship between A and B.
- There are factual difficulties with treating the present case as one of agency of necessity:

    - As EWCA said, the relevant time for the purposes of considering whether there was a necessity is the tie when the existence of the supposed emergency became apparent – i.e., the emergency would be the arrival of salved cargo at the port, with no arrangements for its off-loading or for its preservation in proper storage. In the present case, there never was such an emergency.
- There are also legal difficulties with treating the present case as one of agency of necessity:
    - For an agency of necessity to arise, the action taken must be necessary for the protection of the interests of the alleged principal, not of the agent. Further, the alleged agent must have acted bona fide in the interests of the alleged principal. In the present case, EWCA held that C's purpose in storing the cargo was to maintain its lien on it.
    - The law does not seem to have determined what ensues where motives are mixed – it may be that the court will look to the dominant motive, but it is unnecessary to reach a conclusion on this point.

Who can sue and be sued?

Disclosed principal

The Swan (1968)

Case overview

- Owner of the fishing vessel (D) hired the vessel to his own company (X), who was to be responsible for maintenance and repair. D instructed C to do repairs to the vessel, partly orally and partly written on X notepaper, and signed by "D director". When X could not pay C's accounts, C claimed against D personally, arguing that D acted as principal, not agent.
- High Court
- Held: Claim successful; D contracted as agent of X. When D discussed repairs with C, it was natural for C to assume that D would accept personal liability unless he made the contrary clear beyond doubt. D had not made it clear beyond doubt that he was disowning personal liability, and so he is personally liable.

Judgment – Brandon J

- D contracted as an agent for X. There was a long course of dealing, which is understandable on the basis that orders for work on the vessel were being placed on X's behalf. Thus, it was X's name which was entered in the customers' book etc. It is clear that D contracted as agent for X, and this was known to C.
- Where A contracts with B on behalf of a disclosed principal C, the question of whether both A and C are liable on the contract, or only C, depends on the intention of the parties. That intention is to be gathered from (i) the nature of the contract, (ii) its terms, and (iii) the surrounding circumstances.
    - The intention for which the court looks is not the subjective intention of A or B, but the objective intention of both parties, based on what two reasonable businessmen making a contract of that nature, in those terms and in those surrounding circumstances, must be taken to have intended.
- Where a contract is wholly in writing, the intention depends on the true constructing, having regard to the nature of the contract and the surrounding circumstances of the document in which the contract is contained.

- Where, as in the present case, the contract is partly oral and partly in writing, the intention depends on the true effect, having regard to the nature of the contract and the surrounding circumstances of the oral and written terms taken together.
- A distinction has been drawn between cases in which a person contracts expressly as agent, and those in which, although he described himself as an agent, he does not contract expressly as such.
    - Where it is stated in the contract that a person makes it "as agent for" (or similar) a principal, or where words of that kind are added after such person's signature, he is not personally liable.
    - Where such words are not used but the person is merely stated to be an agent, or the word "agent" is just added after his signature, the result is uncertain, because it is not clear whether the word is used as a description – generally, in such a case, the person does not avoid personal liability (although there may be exceptions depending on the other terms of the contract or the surrounding circumstances).
    - Where a person contracts as agent for a company and does nothing more than add the word "director" or "secretary" after his signature, it seems that he does not avoid personal liability.
- When a person who is known or correctly assumed to be the owner of a boat, has discussions with a repairing company's manager about repairs to the boat, it is natural for the manager to assume that, if an order for the repairs is placed, that person will accept personal liability for them as such owner unless he makes the contrary clear beyond doubt.
    - In the present case, D did not make it clear beyond doubt that although he was the owner of the vessel, he was disowning personal liability for the cost of the repairs he was ordering.
    - On this basis, C's claim succeeds.

Harper v Vigers (1909)

Case overview

- Shipbrokers (C) entered into charterparty with timber merchants (D), in which C were described as agents for the owners of a ship to be named later, and D as charterers. The contract was signed by C "by authority of and as agents for owners". In fact, C were not acting for principals, nor had they made a contract for a ship to carry the cargo, but were themselves principals in the transaction; this was not known to D. Later, C entered into a charterparty with shipowners (X) for the charter of a ship to carry the cargo, in which C were described as agents for charterers (D), at a rate of freight less than that specified in the earlier charterparty, and signed by C "as agents for merchants". In fact, C were not acting as agents for D, but were themselves principals. The cargo was shipped under bills of lading reserving freight at the rate specified in the second charter. C brought a claim to recover the different between the freight paid and that reserved by the first contract. D contended that, since C had made the contract as agents, they were not entitled to sue upon it as principals.
- High Court
- Held: Claim successful; as C, in making the first contract, had no principals, but were themselves the principals, they were entitled to sue upon it and thereby recover the freight reserved.

Judgment – Pickford J

- C had no principal and were in fact contracting for themselves. The authorities (specifically, *Schmaltz v Avery*) show that in such a case, C can themselves sue upon the contract.

Davies v Barnes (2011)

Case overview

- C contracted to carry out works for a rugby club, of which D was a trustee, a member of the management committee, and the president. The contract standard form and provided for payment of an agreed sum plus, under a standard condition, such other sums as might become payable under the contract. The club treasurer (X) signed the contract, witnessed by D. the work was completed and the agreed sum paid, but an additional sum for agreed variations was not paid. C claimed for the price; D argued that he was not personally liable for the debt.
- High Court
- Held: Claim successful; X acted on the authority of the committee, and so D, as a committee member, was liable.

Judgment – Mann J

- The basic position is that prima facie members of an unincorporated association are not personally made liable for the acts of those who enter into contracts in the course of the affairs of the club. Exactly who is liable depends on the constitution of the club and what acts of authority and ratification have occurred.
    - It is possible for all members to be liable if they give appropriate authority, but the general starting point is that that is not their intention. A member of a club is prima facie not liable for more than his subscriptions or other regular dues.
- The general principles of agency apply. It is necessary to look to see who had authority to do what under the club's constitution.
- In the present case, the constitution of the club shows that the management of the club is in the hands of the management committee. So, the management committee was entrusted with the development of the club, and one would expect them to be liable for debts incurred by officers of the club and those dealing with it.
    - Prima facie and without more, one would expect to find that the management committee had authorised X to sign the contract.
    - The proper inference of the evidence is that X was, as one would naturally expect, acting on the authority of the committee. That makes the committee liable on the contract, and so makes D personally liable on the contract, since he was a member of the committee.
- D's liability is not a liability which he is expected to satisfy out of his own funds, although if he has to, he has to. Rather, it is a liability in respect of which he is likely to be entitled to an indemnity from the club.
- C's claim succeeds.

Undisclosed principal

Siu Yin Kwan v Eastern Insurance (1994)

Case overview

- Two crewmen drowned off Hong Kong, and their personal representative (C) brought actions for compensation and damages from the shipowner. C was awarded sums, but before they were paid, the shipowner went into insolvency. The shipowner had been insured against such claims, and C pursued their claim under a Hong Kong law whereby a company which is insured against liabilities to third parties becomes insolvent while owing a liability to a third party covered by the insurance, the company's right to be indemnified by the insurer in respect of that liability is transferred to the third party. C brought their claim against the insurers (D). D argued that as the employer had not arranged the contract of insurance, but instead instructed agents (X) who had procured insurance in their own name, there was no liability.
- Privy Council (Hong Kong)
- Held: Claim successful. X was an undisclosed principal in the insurance contract, and therefore its rights could be passed to third parties under the legislation.

Judgment – Lord Lloyd

- The law on undisclosed principals can be summarised as follows:
    - An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority.
    - In entering into the contract, the agent must intend to act on the principal's behalf.
    - The agent of an undisclosed principal may also sue and be sued on the contract.
    - Any defence which the third party may have against the agent is available against his principal.
    - The terms of the contract may, expressly or impliedly, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the surrounding circumstances, may show that the agent is the true and only principal.
- The origin of, and theoretical justification for, the doctrine of the undisclosed principal has been the subject of much discussion by academic writers. It seems to be generally accepted that, while the development of this branch of the law may have been anomalous (since it runs counter to fundamental principles of privity of contract), it is justified on grounds of commercial convenience.
- In the present case, whilst the proposal form is directed to X as proposer, nowhere does it state or imply that X might not propose insurance on behalf of others. Nor, having regard to X's answers, were D entitled to assume that X were the employers. This can be taken further: even if X had been named as employer, expressly or impliedly, it would not necessary have prevented C intervening to show that they were the true principals.
    - So, it can be concluded that there is nothing in the terms of the proposal form or policy which expressly or impliedly excludes C's right to sue as undisclosed principal.
    - If courts are too ready to construe written contracts as contradicting the right of an undisclosed principal to intervene, it would go far to destroy the beneficial assumption in commercial cases.
- The present contract is not a personal contract, since D stated that it would have been happy to insure the employer of the ship, whoever it was. So, this cannot be a personal contract so as to exclude the rights of an undisclosed principal.

- There is a class of personal contract where the burden cannot be performed vicariously. The example often given is a contract to paint a picture: such a contract cannot be enforced by an undisclosed principal, since his intervention would be a breach of the very contract in which he seeks to intervene.
    - However, a contract of indemnity insurance is not a personal contract in that sense.
- There are certain similarities between the law of assignment and the law of agency, but there are also many differences. In particular, a contract which provides that it shall not be assignable cannot be assigned – but such a provision does not preclude intervention by an undisclosed principal.
- C's claim succeeds.

Watteau v Fenwick (1893)

- *[See above, under "Usual?"]*

Humble v Hunter (1848)

Case overview

- Charterparty between C and D, but executed by X (on behalf of C) who, in the contract, described himself as owner of the ship. C sued for breach of the charterparty.
- Court of Queen's Bench
- Held: Claim unsuccessful; evidence was not admissible to show that X contracted merely as C's agent.

Judgment – Lord Denman CJ

- The doctrine that a principal may come in and take the benefit of a contract made by his agent cannot be applied where the agent contracts as principal.
    - In the present case, X contracted as principal by describing himself as the owner of the ship.

Judgment – Patteson J

- The question in this case turns on the form of the contract. If the contract had been made simply in X's name, then without more, it might have been shown that he was only an agent, and that C was the principal. But since the document itself represents that X contracted as "owner", it cannot be so.
    - C must be taken to have allowed X to contract in this form, and must be bound by that act.

Said v Butt (1920)

Case overview

- C wanted to be at the first performance of a play at a theatre but knew that an application for a ticket in his own name would be denied. He therefore obtained a ticket through the agency of a friend (X) who bought the ticket at the theatre without disclosing that it was for C. By order of the managing director of the theatre (D), C was refused admission to the theatre on the night. C sued D, claiming damages for maliciously procuring the proprietors of the theatre to break a contract for the admission of C to the theatre, arguing that a contract was made between the proprietors and C.

- High Court
- Held: Claim unsuccessful; the identity of C was, in the circumstances, a material element in the formation of the contract, and so non-disclose of the fact that the ticket was bought for C prevented the sale of the ticket from constituting a contract with C.

Judgment – McCardie J

- A theatre may sell or refuse to sell tickets at its own option. The public cannot compel a theatre to grant admission. The personal element is strikingly present in this case: C knew that the theatre would not contract with him. So, by using the name and services of X, C could not constitute himself a contractor with the theatre against their knowledge, and contrary to their express refusal.
    - D can rightly say, upon the special circumstances of this case, that no contract existed between the theatre and C. C is disabled from asserting that he was the undisclosed principal of X.
- Therefore, C has not shown a breach of contract between the theatre and himself.

Warranty of authority

Collen v Wright (1857)

Case overview

- D professed to act as agent for X and made an agreement with C for the lease of a farm belonging to X, and signed it "D, agent to X, lessor". In fact, D did not have authority from X.
- Court of Exchequer Chamber
- Held: Claim successful; an agent who contracts with a third party impliedly warrants that he has authority to contract on behalf of his principal.

Judgment – Willes J (other judges agree)

- A person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue.
    - This is not a case of a bare misstatement by a person not bound by any duty to give information.
- The obligation arising in this case is well expressed by saying that a person, profession to contract as agent for another, expressly or impliedly promises to the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist.
    - The fact of entering into the transaction with the professed agent is good consideration for the promise – indeed, the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter.
- In the present case, all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by D and bona fide acted upon by C.

Judgment – Cockburn CJ (dissenting)

- The idea that an agent impliedly warrants that he has authority is an altogether new doctrine, and allowing this would be creating a new law rather than expounding an existing law.

- It is a very strong argument against the existence of any such implied contract that no trance of this doctrine is to be found in our law books until within the last few years. We are not justified in introducing such a remedy by the mere fiat of a judicial decree.
- As to the policy of the proposed rule, there are two sides to the case. It is doubtful whether there is any sufficient ground why erroneous representation, in the absence of falsehood or fraud, should create a greater responsibility in the case of a contract than in the case of any transaction, especially as the other contracting party might always protect himself by insisting on communicating with the alleged principal, or by requiring a warranty of authority from the agent.
- If asked to expressly give a warranty as to authority, the agent would likely refuse. The law is now implying such a warranty of authority. If it is desirable to establish such a rule, it must be done by legislative enactment.
    - To establish this rule by judicial decision is to make the law, whilst it is only our province to expound.

Yonge v Toynbee (1910)

Case overview

- X instructed solicitors (D) to conduct his defence to an action threatened against him by C. Before the commencement of the action, X became certified as unsound mind. In ignorance of this, D entered an appearance for him in the action, and delivered a defence, to which C replied. Interlocutory proceedings took place, and so the action did not come to trial. D was informed that X had been certified as being of unsound mind, and C brought an action to strike out the previous proceedings and made an application that D, who had assumed to act for X, should be ordered to pay C's costs of the action up to date, on the ground that they had so acted without authority.
- Court of Appeal
- Held: Claim successful; D had taken on themselves to act for X in the action, and thereby impliedly warranted that they had authority to do so. Thus, they were liable personally to pay C's costs of the action.

Judgment – Buckley LJ

- There is no distinction in principle between the case where the agent never had authority and the case where the agent originally had authority, but that authority has ceased without his knowledge or means of knowledge.
    - In both cases, it is true that without any mala fides, the agent has at the moment of acting represented that he had an authority which in fact he had not. He is then liable on an implied contract that he had authority, whether there was fraud or not.
- The result of the authorities is that the liability of the person who professes to act as agent arises (a) if he has been fraudulent; (b) if he has without fraud untruly represented that he had authority when he had not; and (c) where he innocently misrepresents that he has authority where the fact is either (i) that he never had authority or (ii) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge.
    - This last-mentioned liability arises from the fat that by profession to act as agent, he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not.

- The implied contract may be excluded by the facts of the particular case. E.g., if A told T that he did not know whether the warrant of authority under which he was acting was genuine or not, and would not warrant its validity, there will have been no representation upon which the implied contract will arise.
- The true principles do not rest upon wrong or omission of right by A, but upon implied contract.
- In the present case, D proved no facts to show that an implied contract was excluded. So, D are liable upon an implied warranty or contract that they had an authority which they had not.
    - C's claim succeeds; C are entitled to recover from D the costs thrown away in the action against X.

Judgment – Eady J

- Where the authority upon which an agent is professing to act is a continuing authority, there is a continuing representation by him that he has authority to do the series of acts, and an implied contract or warranty that he possesses such authority.
- This principle is equally applicable whether the authority which the agent assumes extends to one act only, or to a series of acts. In the latter case, if only some of the acts are unauthorised by reason of an authority having determined, there is no reason why the principle should not extend to those.

Judgment – Williams J

- The authority was determined by lunacy, and so D, however innocent of knowledge, must be held liable to all subsequent costs.
- It is an extension of the law to hold that a solicitor is responsible where he had authority originally, but the authority is determined by lunacy or death without the solicitor's knowledge.

Topic 5 – Assignment

The validity of assignments

Tailby v Official Receiver (1888)

Case overview

- Assignor (C) held a debt from debtor (X). Through a bill of sale, C assigned to assignee (D), inter alia, all the book debts due and owing or which might during the continuance of the security become due and owing. C went into insolvency, and C's official receiver sued D for the amount of the debt as money had and received.
- House of Lords
- Held: Claim unsuccessful; the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined, and so passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor (D) at the time of the assignment, or in any other business.

Judgment – Lord Herschell

- The key issue here is whether an assignment by way of security of certain book debts not existing at the time of the assignment was valid, so as to give the assignee (D) a good title to them when they came into existence.
- An assignment may be so indefinite and uncertain in its terms that the Court will not give effect to it because of the impossibility of ascertaining to what it is applicable.
    - But the present assignment is not so indefinite and uncertain.
- There is no sound distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him, and one assigning future bequests and devises to which he may under any will become entitled.
    - The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification when the subject has come into existence, and it is sought to enforce the security.

Judgment – Lord Watson

- The rule of equity which applies to the assignment of future choses in action is simple. Choses in action may be the subject of present assignment – as soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made.
- There is only one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action: on its coming into existence, the chose of action must answer the description in the assignment (or, in other words, be capable of being identified as thing assigned).
    - When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee.
    - Mere difficulty in ascertaining all the things which are included in a general assignment, whether in esse (in existence) or in posse (not in existence), will not affect the assignee's right to those things which are capable of ascertainment or are identified.
- In the case of book debts, as in the case of choses in action generally, intimation of the assignee's right must be made to the debtor or oblige in order to make it complete. That is the only possession

which he can attain, so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor.
    - In the present case, D's right was duly perfected by his notice to X before C's insolvency.

Judgment – Lord Macnaghten

- Future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is immaterial, provided the intention of the parties is clear.
    - To effectuate the intention, an assignment for value, in terms present and immediate, is regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.
- If future book debts are assigned, the subject-matter of assignment is capable of being identified as and when the book debts come into existence, whether the description is restricted to a particular business or not.
- *Holroyd v Marshall* laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before that case, it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done.
- As to Lord Westbury LC's reference in *Holroyd v Marshall* to the subject of specific performance, great confusion would be caused by transferring considerations applicable to suits for specific performance to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract.
    - Cases of equitable assignment, where the consideration has passed, depend on the real meaning of the agreement between the parties. Once the meaning is ascertained, one only has to apply the principle that equity considers that done which ought to be done.

Linden Gardens v Lenesta Sludge (1994)

Case overview

- The original lessee of a building (X) used a standard form contract to hire D to remove asbestos from the premises. The contract contained a clause that X was not to assign the contract without D's written consent. X assigned the building lease and its right of action against D, without D's consent, to C. Later, more asbestos was found in the premises. C sued D for breach of contract.
- House of Lords
- Held: Claim successful; substantial damages awarded to C.

Judgment – Lord Browne-Wilkinson

- The following discussion is only related to the validity of a restriction which prohibits assignments which have the effect of bringing the assignee into direct relations with the other party to the contract.
    - As to attempts by contractual terms to prevent one party making over the fruits of the contract to a third party, no view is expressed.

- The authorities indicate a long-term acceptance of the validity of prohibitions on assignment, which is accepted as part of the law.
- There is no good reason for holding that a prohibition on assignment is void as contrary to public policy. There was nothing put forward in argument to show that such a prohibition was contrary to the public interest beyond the fact that such prohibition renders the chose in action inalienable.
    - Certainly in the context of rights over land, the law does not favour restrictions on alienability. But even in relation to land law, a prohibition against the assignment of a lease is valid.
- In the case of real property, there is a defined and limited supply of the commodity, and it has been held contrary to public policy to restrict the free market. But no such reason can apply to contractual rights: there is no public need for a market in choses in action.
    - A party to a building contract can have a genuine commercial interest in seeking to ensure that he is in contractual relations only with a person whom he has selected as the other party to the contract.
- In the circumstances, there is no policy reason why a contractual prohibition on assignment of contractual rights should be held contrary to public policy.
- A prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent the transfer of the chose in action: in the absence of clearest words, it cannot operate to invalidate the contract between the assignor and assignee, and even then it may be ineffective on the grounds of public policy.
- An assignment of contractual rights in breach of a prohibition against such assignment is ineffective to vest the contractual rights in the assignee.

Don King v Warren (1998)

Case overview

- C brought an action against D arising out of partnership agreements to which C and D were parties. One of the preliminary issues to be decided was whether D's purported assignment for valuable consideration to the partnership of the benefit and burden of existing boxing promotion and management agreements to which he was a party (being contracts for personal services which were expressly non-assignable) was capable of operating as a declaration of trust of the benefit and burden of the contracts, or as imposing fiduciary duties on D.
- High Court
- Held: Claim successful; the entire benefit of the contracts was held by the parties on trust for the partnership.

Judgment – Lightman J

- In the present case, the intentions of the parties were that all promotion and managements agreements should be assigned to, or be held for the benefit of, the partnership absolutely. The business of the partnership included the exploitation of the rights under such agreements.
- There can be a trust where the subject matter is a chose in action, as per *Lord Strathcona v Dominion Coal*.
- Only if and so long as the exceptional circumstances exist where separation of the legal and equitable ownership does not give rise to or co-exist with an obligation binding the conscience of

the person vested with the legal ownership, will a trust relationship not come into being, as per *Westdeutsche*.
    - In the present case, if and so long as legal ownership of the agreements remained in one or other partner and the beneficial ownership was in the partnership, the necessary fiduciary obligation co-existed and so did a trust.
- A trust may exist of a contract, and this may extend, not merely to the benefit of the rights conferred, but also the benefit of being a contracting party.
    - A trust of the benefit of the contract may be more beneficial to the beneficiaries than the mere assignment to them of the benefit of the covenants contained in it. This is because according to established principles, the trustee will hold any benefit arising from his trusteeship, such as renewals of the contract, on trust for the beneficiaries, whether or not the renewal would have been granted to anyone other than the trustee or was assignable.
- In the present case, the partnership could have validly entered into management and promotion contracts with boxers, and the partners would hold the contract as a partnership asset. The issue raised is whether one of the partners who has entered into such an agreement in his own name alone can subsequently hold such a contract as a partnership asset.
- A purported assignment of a contract, or the rights arising under a contract, may be ineffective as such because the contract involves the rendering of personal services or prohibits their assignment.
    - The question arises whether a purported assignment for valuable consideration, ineffective as an assignment for the above reasons, may be effective as a declaration of trust or as imposing fiduciary duties on the assignor.
- The applicable principles, emerging from the authorities, are:
    - 1. It is not possible (save pursuant to statutory authority) to transfer the burden of a contract to a third party without novation.
    - 2. As regard a contractual obligation in which the obligation is such that the identity of the person who performs it is a matter of indifference to the contracting party for whose benefit the obligation is imposed (the obligee), then the other contracting party (the obligor) may delegate to a third party the performance of the obligation.
        - Otherwise, no such delegation is possible.
    - 3. Only the benefit of a contract, or some benefit derived by the assignor from the contract, may legally be assigned.
        - A provision for the assignment of a contract is to be construed as the assignment of the benefit of the contract, as per *Linden Gardens*.
        - The assignment may expressly or by implication require the assignor to perform outstanding obligations on his part under the agreement so as to enable the assignee to obtain the full benefit intended, and to hold the benefit of being the contracting party as trustee for the assignee.
    - 4. Whether or not the benefit can be assigned depends primarily upon the terms of the contract and secondarily, upon the character of the obligations. The benefit of some obligations of a party under one contract may be assignable while at the same time others under the same contract may not – assignability is not a matter of all obligations arising under a contract or none at all.
    - 5. The contract may expressly or impliedly permit assignment of rights not otherwise so assignable, or prohibit assignment of rights otherwise prima facie assignable.
        - The purpose of the non-assignment clause is the genuine commercial interest of a party of ensuring that contractual relations are only with the person he has selected as the other party to the contract and no-one else. The clause avoids the possibility

of a third party being enabled to raise issues of set-off not available to the other contracting party.
        - Unless specially drafted to draw such a distinction, the prohibition attaches equally to the assignment of the right to future performance of the contract and the rights to receive benefits accrued under the contract, as per *Linden Gardens*. It also preserves the parties' rights of set-off against each other and saves them having any concern whether there has or has not been, or preserving any record of, any assignment of the benefit of the contract by the other party.
    - 6. Unless the contract expressly or impliedly otherwise provides, the character of an obligation precludes assignment of the benefit of the obligation if the identity of the obligee is material to the obligor. Any purported assignment or contract to assign will have no effect at law or in equity.
    - 7. A declaration of trust in favour of a third party of the benefit of obligations or the profits obtained from a contract is different in character from an assignment of the benefit of the contract to that third party.
        - Whether the contract contains a provision prohibiting such a declaration of trust must be determined as a matter of construction of the contract. Such a limitation upon the freedom of the party is not lightly to be inferred, and a clause prohibiting assignments is prima facie restricted to assignments of the benefit of the obligation and does not extend to declarations of trust of the benefit.
- In the present case, the agreements could not be effectively vested in, or the benefit assigned to, the partnership. However, the agreements contained no provision purporting to prohibit, or having the effect of prohibiting, the partners declaring themselves trustees of the agreements entered into in their own names for the partnership.
    - So, it is necessary to turn to the question of whether the nature of the agreements was nonetheless such as to preclude such a declaration of trust.
- In neither the case where the other parties to the contract deliberately contract with trustees, nor the case of a subsequent declaration of trust by the other party to the contract, is there any objectionable conflict of duty.
    - A party to a contract involving fiduciary duties who declares himself a trustee of the contract has the paramount duty to perform his obligations under the contract and to fulfil his duty of undivided loyalty to the other contracting party – this accords with the recognition by equity that the first duty of a trustee is to preserve the trust property (in this case, the contract itself).
    - So, there is no conflict of duty between the duties owed to the other party to the contract and the duties owed to the beneficiaries under the trust.
- If one party wishes to protect himself against the other party declaring himself a trustee, and not merely against an assignment, he should expressly so provide.
    - In the present case, that has not been done.
- The courts will be astute to disallow use of the procedural short-cut sanctioned in *Vandepitte* in a commercial context where it has no proper place. A beneficiary cannot be allowed to abrogate the fullest protection that the parties to the contract have secured for themselves under the terms of the contract from intrusion into their contractual relations by third parties.
- A declaration of trust cannot prejudice the rights of the obligor. If the contract requires any judgment to be exercised, whether by the obligor or the obligee, an assignment cannot alter who is to exercise it or how that judgment is to be exercised or vest the right to make that judgment in the court.

- In a case where the subject matter of the trust is a non-assignable contract, and there are still outstanding obligations to be performed by the trustee, the beneficiary under the trust cannot interfere.
- There is no objection, in principle, to a party to contracts involving skill and confidence, or containing non-assignment provisions, from becoming trustee of the benefit of being contracting party, as well as the benefit of the rights conferred.
    - There is no reason why the law should limit the parties' freedom of contract to creating trusts of the fruits of such contracts received by the assignor or to creating an accounting relationship between the parties in respect of the fruits.

Barbados Trust v Bank of Zambia (2007)

Case overview

- The debt due from BoZ (D) had been traded in the distressed debt market. According to its terms, the debt could only be assigned to another bank or financial institution with the prior written consent of C, such consent being deemed to have been given if D failed to reply within 15 days to a request for such consent. The debt was assigned to BoA (X), and under the terms of the Market, the assignment was effective before the 15-day period for obtaining D's consent expired. X then declared a trust in respect of the debt in favour of BT (C). C claimed on the debt.
- Court of Appeal
- Held: Claim unsuccessful; the non-assignment clause applied to establish debts, and on the true construction of the clause, and in the circumstances prior, written / deemed consent to the assignment had not been given. Therefore, the assignment to X was invalid and C had no title to sue.

Judgment – Waller LJ

- The *Vandepitte* short cut is a matter of procedure to enable a beneficiary under a trust to obtain what he is beneficially entitled to in a situation in which the trustee will not sue (for what he is legally entitled to but which if he succeeds, he must hold for the beneficiary).
    - If the beneficiary has an unanswerable right under a trust and the trustee has an unanswerable claim, there is no reason why the court's procedure should not be available to enable the rights to be established or brought to fruition.
- A declaration of trust is not an equitable assignment. An equitable assignment, if in writing, can be converted into a legal assignment under LPA 1925 s136; that is not the case for a declaration of a trust.
    - In the present case, the language of the relevant clause does not include prohibition of a declaration of trust. The court should be slow to contemplate that the parties ever intended such to be within the prohibition.
    - So, the clause does not prevent the use of the *Vandepitte* procedure.
- There is no reason why the court should hold that D should be entitled to a defence which it would not have had if some longer and more tortuous form of procedure, compelling X to sue, were used. The court has to recognise that it is concerned here both with the enforcement of the trust declared as between X and C, as well as with the contract as between X and D.
    - There is no reason for the court not to assist C or any reason why it should provide D with a defence which D does not have against X.

Judgment – Rix LJ

- Where an assignment precedes written consent, then, subject to waive in circumstances where the debtor knows that the assignment has jumped the gun, it will always be open to the debtor to argue that the assignment is ineffective.
    - Despite possible unfortunate consequences, the rule polices the process, and this is a commercially sound reason.
- In the present case, prior written consent was neither obtained nor deemed to have been obtained.
- There is no doubt that debt can be assigned and that it is traded. It is also well established that, even in the case of personal contracts, rights to the performance of which cannot be assigned even in the absence of an express prohibition on assignment, a distinction has been drawn between performance and the fruits of performance.
    - In the present case, against this background, the clause is to be construed as prohibiting the assignment of established debt, save within the restricted limits there allowed. It follows that X lacks legal title to the debt in question.
- Whether the prohibition on assignment embraces a prohibition on a declaration of trust is a question of construction.
- There is good authority for the proposition that a failed assignment may take effect as a declaration of trust between its immediate parties. This is certainly true so far as a declaration of trust which is limited to the proceeds of a claim (or the fruits of contract) when received, as per *Linden Gardens*.
- The fact that a prohibition on assignment between A and B cannot allow a third party (C), as A's purported assignee, to bring a direct contractual claim against B is not in dispute – this was held in *Linden Gardens* to be the consequence of the contractual prohibition.
    - In the present case, there is nothing in the clause to suggest that the limitations on assignment go as far as preventing the contract between would-be assignor and assignee taking effect as between those two as a declaration of trust, and a fortiori nothing to prevent a personal contract between them.
- There is nothing special about the declaration of trust, or the immediate circumstances in which it was made, which would have prevented X from claiming the debt itself or would have entitled it to say that C was acting, so far as X itself as title holder of the debt was concerned, in an illegitimate way.
- One of the purposes of the *Vandepitte* procedure is to protect the obligor from the possibility of any further claim from, or through, the legal owner (the trustee or equitable assignor). If the trustee does not come to court himself as a claimant to protect the equitable rights of the beneficiary, he can be compelled to do so by means of the practice as a procedural short-cut of making him a second defendant.
    - Thus, the effect of the Vandepitte procedure is that, although the trustee is nominally a defendant, his real role as a party is to ensure that, through his presence, his legal right can be properly brought before the court for adjudication, just as though he was a claimant himself.
- The question is whether, in circumstances where there has been a prohibition on assignment, and the legal owner declines himself to claim, the law will permit the beneficiary of a trust to make use of the Vandepitte procedure in order to reduce a debt into possession.
    - This is a question of legal principle, not construction.
- The passages in *Don King* say that the law would not permit rules and procedures, such as the Vandepitte procedure, to be misused in the commercial context where inappropriate.

    - Is the Vandepitte procedure inappropriate here? On the one hand, there is a limited prohibition of assignment under a commercial facility which has resulted in an acknowledged debt; on the other hand, save for that limited prohibition, there is nothing about the underlying contract of a personal nature.
    - Therefore, save for the express and technical terms of the limited prohibition of assignment, recovery of the debt owed to X would not constitute intrusion into the personal mutual dealings of contractual parties under an ongoing relationship.
- There is no prohibition of a declaration of trust here. A declaration of trust (not only of the fruits of a contract) when received but also of rights of suit under a contract, is akin to an equitable assignment of those rights. There is a tension here between:
    - (a) The interests of those whose contracts, either because they are of an inherently personal nature or because of agreed restrictions on alienability, should not readily be intruded upon by strangers to them;
    - (b) The interests of those who seek to arrange their affairs on the basis of holding property in trust for others; and
    - (c) The public interest, which is concerned to see that contracts are performed, that the beneficiaries of trusts are protected, and that financial assets are not too readily made inalienable.
- If a prohibition on assignment carried all before it, destroying all alienability whatever the circumstances, the public interest in freedom of contract and the freedom of markets could be severely prejudiced.
- Thus, had X had a good legal title to the debt, then the Vandepitte procedure could be used to recover into X's possession, for the benefit of C, a debt which on that hypothesis would have been an acknowledge debt owned by X.

First Abu Dhabi Bank v BP Oil (2018)

Case overview

- D entered into an agreement with a debtor (X) for the sale and purchase of crude oil. The agreement incorporated the company's general terms and conditions, which contained a close prohibiting either party from assigning any of their rights or obligations under the agreement without the consent of the other. A bank (C) bought 95% of the receivable evidenced by D's invoice to X. The purchase letter contained a clause obliging D to assign its rights, title, interest, and claims against X to C, as well as a clause warranting that D was not prohibited from assigning the rights. D did not obtain X's consent to any assignment. X became insolvent and C received no payment. C brought for breach of warranty against D.
- Court of Appeal
- Held: Claim unsuccessful; on the proper construction, D was not prohibited from disposing of the receivable in the manner contemplated in the purchase letter.

Judgment – Gloster LJ

- Section 34 of D's terms and conditions prohibited either party from assigning any of their rights or obligations under the agreement without the consent of the other.
    - It is settled law that such a restriction, as a matter of construction, imposed a contractual obligation upon D, in favour of X, not to assign (whether at law or in equity), D's existing or

future rights under the agreement, whether to performance or to the fruits of the contract, even after X had performed its obligations thereunder, without prior consent.

- So, D was contractually prohibited, vis-à-vis X, from effecting a legal or equitable assignment of the receivable without prior consent. However, the wording of the clause did not impose any contractual restriction on D, vis-à-vis X, from agreeing with C that it would pass onto C any payments received from X, or hold the payments on trust for X.
- As a matter of construction, the prohibition on assignment in section 34 could not be construed as:
    - (i) Preventing the disposal to C of any amounts actually received by D from X, since they would not be "rights under" the agreement;
    - (ii) Preventing the creation of any trust over the proceeds of the receivable, or indeed over the receivable itself (as per *Barbados Trust v Bank of Zambia*);
    - (iii) Preventing the creation of any rights of subrogation or sub-participation, as per *Barbados Trust v Bank of Zambia*. Any claim brought pursuant to the subrogation right would have to be brought by and in the name of D. A funded sub-participation would not constitute any breach of an assignment provision, since it would result in a debtor-creditor relationship as between D and C without giving C any interest in the underlying debt owed by X.
- If this Court wasn't constrained by authority, then there would be strong arguments in favour of Professor Goode's proposition: it is necessary to keep in mind the central principle: bars to assignment are relevant only to the relationship with the debtor, not to the relationship between the parties to the dealing in question.
    - Accordingly, he says, it is not competent for the debtor to exclude by contract the proprietary effects of an assignment as between assignor and assignee, or the creation of a trust as between trustee and beneficiary, and that all he can do is to insist that he will not recognise the title of the beneficiary or the ability of the beneficiary to bring proceedings in his own right.
- The question of whether *Linden Gardens* can be characterised in the way Professor Goode suggests, as a case where the issue was whether the assignment was effective against the debtor and whether it was under any obligation to recognise the title of the assignee, was not discussed by counsel.
    - This is so with a considerable degree of intellectual disappointment.
- In the present case, on the construction of the clause, D was not prohibited from disposing of the receivable in the manner contemplated in the purchase letter. Therefore, there was no breach of warranty.

Assignment subject to equities

Biggerstaff v Rowatt's Wharf (1896)

Case overview

- A limited company (D) agreed to sell barrels to C. C paid for the barrels, but D fell into difficulties, and its stock of barrels was exhausted; D failed to deliver over half the contracted-for barrels to C. D had, to the knowledge of C, issued debentures in the usual form of floating securities on all its property. The debenture-holders (X) obtained the appointment of a receiver, at which time C owed D a liquidated sum for rent, but had a claim against D in respect of the barrels.
- Court of Appeal

- Held: Claim successful; C could recover back the purchase-price of each barrel not delivered, since there was a total failure of consideration Further, C could set off this demand against what they owed to D. C's knowledge of the existence of the debentures as a floating security at the time when the debt due to them was contracted was not such notice of an assignment as to prevent a set-off binding X.

Judgment – Lindley LJ

- No doubt the debentures (in the form of floating securities on the property of the company) created an equitable charge; but they are in the usual form, namely, the company has the power to carry on its business as if the debentures did not exist, until some default has been made which entitles the debenture-holders to take possession.
    - It would be monstrous if a company which had issued debentures could not before default receive debts and make arrangements with creditors.
    - If the issuing debentures had such an effect, it would be impossible for a company which had issued them to obtain credit, or indeed carry on its business at all.
- There is no right of set-off against an assignee of whose assignment the person claiming to set off had notice at the time when the debt due to him was contracted.
    - If the debt due from C had been assigned before the debt due to them had been contracted, and C had notice of the assignment, the cross demands could not be set-off.
- There is a difference between an ordinary assignment and an assignment made by debentures such as in the present case. It would be impossible for companies to get credit or carry on business at all if arrangements between them and their creditors could not be made without the assent of the debenture-holders.
    - Such a proposition would be contrary to the principle that a company can, until the debenture-holders interfere, carry on its business as if the debentures did not exist.
    - In the present case, C are entitled to the set-off which they claim.

Judgment – Lopes LJ

- It is true, in ordinary cases, that there is no right of set-off against an assignee of a chose in action where the person claiming the set-off had notice of the assignment when the debt due to him was contracted.
    - However, a debenture differs from an ordinary assignment. If the doctrine were applied to debentures, no creditor of a company could ever get the benefit of a set-off where debentures had been issued.
- It is the essence of a floating security that it allows the company to carry on business in its ordinary way until a receiver is appointed, and it would paralyse the business of companies to give to the issuing of debentures the effect contended for.
    - Thus, the set-off must be allowed.

Judgment – Kay LJ

- If at the time of the assignment there was an inchoate right to set-off, it can be asserted after the assignment. This is because the assignment is subject to the rights then in existence.
- A conclusion that set-off could not arise during the period before taking possession under the debentures would be injurious to debenture-holders, for it would hamper the company in carrying on its business, and so injure the debenture-holders, whose interest is that the company should carry on a prosperous business.

- In the present case, there was an inchoate right of set-off at the time when the receiver was appointed, and that is the time to be looked to (not the time of issuing the debentures).
    - The debentures must be regarded as incompletely assignments which do not become complete until the time when the receiver is appointed.

Business Computers v Anglo-African Leasing (1977)

Case overview

- C made computers, and were owed money by D, who bought two computers from C and sold them on hire-purchase to third parties (Y). By a third transaction, C made a computer for their own use which they sold to D, then leased back on hire-purchase terms. C stopped paying the instalments, then became insolvent. The debenture holders (X) appointed a receiver and took an assignment of all of C's assets after payment of preferential creditors. D received notice of the receiver's appointment, by which time they had the right to sue for one of the instalments, and set it off against the figure owed to them. D were entitled to determine the hire-purchase agreement, but they did not do so. The receiver then repudiated the agreement, which D accepted. D sold the computer and claimed damages; the receiver claimed the amount owing.
- High Court
- Held: There was no right of set-off as between D and the debenture holders (X) as assignees. This is because the right under which D claimed did not arise until after notice of the assignment of their debt. Further, although the alleged right arose form a contract made before the assignment, it was not connected with the same contract as gave rise to the assigned debt.

Judgment – Templeman J

- In the present case, D's claim under the hire-purchase agreement arose subsequently to notice of the assignment of the debt, and the transactions out of which the claim and the debt arose respectively were separate and not connected in any way.
    - Therefore, set off is not available to D against the assignees (the debenture holders (X)).
- The result of the authorities is that a debt which accrues due before notice of an assignment is received, whether or not it is payable before that date, or a debt which arises out of the same contract as that which gives rise to the assigned debt, or is closely connected with that contract, may be set off against the assignee.
    - But a debt which is neither accrued nor connected may not be set off, even though it arises from a contract made before the assignment.
- In the present case, the claim did not accrue before D received notice of the appointment of the receiver and thus notice of the completed assignment of the debt to X, and there was no relevant connection between the transactions which gave rise to the claim and to the debt respectively.

Stoddard v Union Trust (1912)

Case overview

- D entered into a contract for the purchase of a newspaper, with a majority of the price paid in instalments. D were induced to enter into the contract by fraudulent misrepresentations made by the seller (X), and X assigned, for valuable consideration, the balance of the purchase-money by deed absolutely to C, and notice in writing of that assignment was given to D. C at the time had no notice of X's fraud. D did not rescind the purchase contract with X. C claimed for the recovery of the outstanding purchase price (£800). D pleaded, by way of defence, that they sustained damage exceeding £800 as a result of X's fraud, and that therefore no money was due from them at the date of the assignment to C.
- Court of Appeal
- Held: D could not set up a claim to £800 damages for X's fraud by way of defence against C's claim. C entitled to judgment against D for £800.

Judgment – Williams LJ

- Judicature Act 1873 s25(6) (now LPA 1925 s136) does away with the difficulty which formerly existed, namely that a chose in action was not assignable at law, and therefore the assignee of a chose in action could not sue at law in respect of it in his own name, but only in the name of his assignor.
    - In equity, the assignee was allowed to sue in his own name, and the defendant was allowed to set up some of the defences which would have been available to him as against the assignor. However, the defendant would not be allowed to set up any defence or set-off arising as between him and the assignor subsequently to the notice of the assignment out of matters not connected with the chose in action assigned.
- The result of the words "subject to all equities" is that an assignee of a debt could not, under the circumstances of this case, have been restrained in equity from proceedings to enforce the debt, if he were an assignee of it for value and without notice of any fraud.
    - This is the result of the authorities, although effect is given to them with some reluctance.
- A debtor sued by the assignee of a debt (in equity) might set up the defence that the contract under which the debt arose ought to be set aside and cancelled on the ground of fraud.
    - In the present case, however, whether that could have been done is immaterial, for it was not pleaded by D, since they have so acted with regard to the subject-matter, the sale of which was the consideration for the debt that they could not repudiate the contract.
- In the circumstances of the present case, D are in such a position that they cannot rely on the fraud of the assignor. Thus, judgment must be entered for C against D for £800.
    - It is doubtful whether it is entirely consistent with justice that an assignee of a chose in action, even if innocent, should be allowed under such circumstances as these to recover without regard to the fraud of the assignor. But the authorities constrain.

Judgment – Kennedy LJ

- Where there is a claim arising out of the contract itself under which the debt arises, and the claim affects the value or amount of that which one of the parties to that contract has purported to assign for value, then, if the assignee subsequently sues, the other party to the contract may set up that claim by way of defence as cancelling or diminishing the amount of that to which the assignee asserts his right under the assignment.

- The present claim is not a claim arising out of the contract in question, but is a claim for damages in respect of fraud which induced D to enter into that contract. That is a strictly personal claim against X: it is not a claim which comes within the category of claims arising out of the contract sued upon which the person sued by the assignee of a chose in action may set up for his protection, either complete or partial, against the assignee's claim.
- Both upon authority and in principle, it is just that D should look for a remedy for the wrong done to them by X, against X, and that the innocent assignee of the contract (C), which D asserts to be still subsisting, should have the benefit which they stipulated by the contract to give to the assignor.
    - If the case had been one in which D were entitled to elect, and did elect, to cancel and rescind the contract on the ground of fraud and treat it as void, then a different position might have arisen. However, D have not claimed to do any such thing.

Bibby Factors v HFD (2015)

Case overview

- A supplier (X) supplied goods to the customers (D), and agreed to sell all its existing debts to a factor (C), together with any debts which subsequently came into existence. 13 years later, C brought a claim against D, alleging that they had failed to pay £381k which was due in respect of supplies they received. D served a defence and counterclaim for similar amount, alleging that they were entitled to a 10% rebate for every supply made in a given calendar year. D also claimed that they were entitled to a discount of 2.5% if every payment was made in accordance with X's terms, and that they had raised debit notes for faulty goods for which they were entitled to credit. At the time of the factoring agreement, C had sent a "take-on-letter" to the customers, indicating that "any right of set-off in respect of any sale you make to our client is not permitted". It also indicated that customers should advise immediately of any dispute likely to defer payment beyond terms of the sale.
- Court of Appeal
- Held: D's claim to a rebate was a claim which, in equity, fell to be set off against C's claim for the debt. The closeness of the relationship between claim and counterclaim could not be severed by the fact that D had been in communication with C about the outstanding debt for 13 years but had never mentioned the rebate.

Judgment – Clarke LJ

- An assignment of future debts is effective in equity, as per *Tailby v Official Receiver*. It is not necessary to decide whether such an assignment is a good assignment for the purposes of LPA 1925 s136.
    - The classic view is that only an existing chose can be assigned, but equity will enforce a promise for consideration to assign a future chose, and there will be an assignment in equity so soon as the property comes into the hands of the assignor, but not before.
- An assignee of debts, such as a factor, will seek to recover the whole of the debt assigned. He may fail to do so for at least four reasons:
    - 1. The debtor may show that the money claimed is not due, in whole or in part, either because of some substantive defence or some right of abatement.
    - 2. The debtor may have a contractual right of set off.
    - 3. The debtor may have a cross claim which equity will regard him as entitled to set off against the debt such that only the balance may be claimed.

        - If so, and subject to any question of estoppel, the assignee can be in no better position than his assignor, whether the assignment takes effect as a statutory assignment or in equity.
        - It is no matter that the cross claim had not accrued due before the debtor had notice of the assignment.
    - 4. The debtor may have a cross claim which is independent of the claim against him in the sense that it does not fall into the category of a claim which forms the subject of an equitable set off.
        - In such a case, the assignee cannot successfully be met by a cross claim which arose after the debtor had notice of the assignment.
- The present case is concerned with claims in the third and, possibility, the fourth categories.
- There is a single test for equitable set off, although it has two elements: whether the cross-claim is so closely connected with C's demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim, as per *Geldof v Simon Carves*.
- In the present case, the composite test is satisfied. The rebate is due in respect, and as a percentage, of the several amounts which constitute the debts assigned. It is manifest that X could not demand payment without giving creditor for the rebate that it had promised (if that rebate had accrued due).
    - C stands in X's shoes, and thus could not so demand either.
    - It is unclear whether the rebate arose under the same contract or under an overarching contract. However, it is not necessary to determine that question: if it is the latter, then the link between the two contracts was close to umbilical.
- The relevant exercise is not a general decision as to the justice of the case. The question is whether the connection between the claim by X and the cross claim by D is so close that it would be unjust to allow X (and hence C) to maintain the one without giving credit to D for the other.
    - The putative victim of such injustice is the debtor.
- In the present case, the answer is in the affirmative; the action or inaction of D towards C cannot, in the present case, sever the link.
    - If C had wished to be told of the rebates, it could have contracted on terms that required X to provide that information and it could have asked D. C had no contract with D and D were under no duty to inform it of the rebate arrangements.
    - Whether any right of set-off arose depended on the operation of equity in the relationship between X and D. C was a stranger to that contract. It is not possible (for the purposes of estoppel) to construct from the communications between the parties, or the manner in which D conducted themselves, a clear representation as to the absence of any rebate.
    - D were not under any legal duty to tell C of the rebate arrangements such that there was a duty to speak and an estoppel arising from their silence.

The rule in *Dearle v Hall*

Dearle v Hall (1828)

Case overview

- The beneficial owner (X) of a trust fund assigned it first by way of security to A (defendant), and then outright to B (claimant), in each case for valuable consideration. A had not given notice of his assignment to the trustees of the fund and, accordingly, when B made enquiries of them, B did not discover the existence of the assignment to A because the trustees were not aware of it. B did give notice of the assignment to the trustees, and then A subsequently also gave notice to them.
- High Court
- Held: Claim successful; B took priority over A.

Judgment – Lyndhurst LC

- The transaction with A, at the time when it happened, was nothing more than an equitable contract for a collateral security, to be issuing out of a chose in action, not followed by equitable possession, nor by anything tantamount thereto. It was not possible for X to transfer the legal interest.
    - But, wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a court of equity considers tantamount to possession: notice given to the legal depositary of the fund.
- Where a contract, respecting property in the hands of other persons who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of: that is, by giving notice of the contract to those in whom the legal interest is.
    - By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the beneficiary is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him.
- That precaution is always taken by diligent purchasers and incumbrancers; if it is not taken, there is neglect. The consequence of such neglect is that the trustee remains ignorant of any alteration having taken place in the equitable rights affecting it, and the original beneficiary appears to the world to be the complete equitable owner, and the trustees will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor.
- Whenever persons do not give notice to the trustee, they do not perfect their title, and they become responsible (in some respects) for the easily foreseen consequences of their negligence.
- The equitable maxim “qui prior est in tempore, potior est in jure” means that if, by the first contract, all the thing is given, there remains nothing to be the subject of the second contract, and priority must decide. But it cannot be contended that priority in time must decide, where the legal estate is outstanding.
    - If there appease to be a better title in the second purchaser to call for the legal estate than in the first purchaser, there ceases to be a balance of equal equities, and the preference based on priority of date is done away.
- If you mean to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice: unless notice is given, you do not do that which is essential in all cases of transfer of personal property.

    - This is based upon the law of England that personal property passes by delivery of possession, and it is possession which determines the apparent ownership.
- So, in the case of a chose in action, you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property.
    - For this purpose, you must give notice to the legal holder of the fund.
- A man may also lose priority by actual fraud or constructive fraud, by being silent when he ought to speak, or by standing by and keeping his own security concealed. By such conduct, even the advantage of possessing the legal estate may be lost.
- The authorities show that, in assignments of choses in action, notice to the legal holder has always been deemed necessary.
- It would be against good sense, reason, authority and equity if a party conceals his obtaining of an equitable conveyance, and can then at any time come forward with his secret deed, and say to a subsequent purchaser who purchased the interest in ignorance of the existence of such a claim, that his deed is in date prior, and so takes priority.
- B's interest takes priority.

Pfeiffer Weinkellerei v Arbuthnot (1988)

Case overview

- C sold wines to X on terms including a RoT clause that property (both equitable and legal) was to remain with C until X fully paid for it. But X was entitled to sell the wine so long as there was no delay in payment, and all claims that X had in respect of the sale to sub-purchasers amounting to his obligations to C were to be passed to C. On demand, X was to notify C of an assignment of any such claim. X sold the wine to sub-purchasers (Y) on credit terms. C then entered into a factoring agreement with D, under which it assigned to D all debts owed to it by Y. C claimed title to the wine and called on D to hand over to it moneys it had received from Y.
- High Court
- Held: The agreement between X and C amounted to a charge, and so C should have registered it under CA 1948 s95(e). Thus, D was first to give notice of its rights to Y, meaning D had priority over C.

Judgment – Phillips J

- Where the seller retains title by way of security prior to sub-sale, but the contract expressly or impliedly authorises the buyer to effect sub-sales, no prima facie implication arises that sub-sales are to be effected by the buyer as agent for, and for the account of, the seller.
    - On the contrary, the normal implication that arises from the relationship of buyer and seller is that if the buyer is permitted to sub-sell in the normal course of his business, he will do so for his own account.
    - The conclusions of EWCA in *Romalpa* as to the fiduciary relationship of Cs and Ds turned on the particular wording of the clause, and on the concession that the relationship of the parties was that of bailor/bailee.
- In the present case, the clause constitutes an agreement by X to assign to C future choses in action, namely future debts owed by Y to X up to the amount of any outstanding indebtedness on the part of X to C. In so far as debts came into existence falling within that agreement, the agreement

created an equitable assignment of the debts. The agreement was plainly by way of security, and the assignments under it were capable of being redeemed by payment by X of the outstanding indebtedness.
    - It follows that by agreeing to the provisions of the clause, X created a charge by way of security over X's property (namely, book debts), which being unregistered, was rendered void as against X's creditors by CA 1948 s95(1) and s95(2)(e).
- In the present case, the equitable rights which C enjoyed in the proceeds of sale of wine sub-sold by X were acquired prior to the rights that D acquired under the factoring agreement and the assignments pursuant thereto.
- It is not easy to glean a common ratio decidendi from the judgments in *Stoddart v Union Trust*, but the case appears to have turned essentially upon a finding that a claim for damages for fraud by the assignor of a chose in action is not an equity which can be set up against an assignee.
- LPA 1925 s136(1) enables the assignee to acquire a title that has all the procedural advantages of legal title, but so far as priorities are concerned his position is no better than if the assignment had been effected prior to the Act.
    - It follows that, even if the assignment is effected for value without notice of a prior equity, proprieties fall to be determined as if the assignment had been effected in equity, not in law.
    - Accordingly, it is necessary to consider proprieties as if the assignments of the debts to D were no more than equitable assignments.
- The rule in *Dearle v Hall* is an exception to the general principle that equitable interests take priority in the order in which they are created. The rule applies to dealings with equitable interests in any property and, in particular, to equitable assignments of legal choses in action.
    - Under the rule, priority depends upon the order in which notice of the interest created by the dealing is given to the person affected by it (i.e., in the case of assignments of a debt, the debtor).
- In the present case, since the security rights conferred upon C by the clause were conferred by equitable assignment, the rule in *Dearle v Hall* governs. D was the first to give notice of its rights to Y, and so enjoys priority over C.

Compaq Computer v Abercorn (1991)

Case overview

- C supplied computer products to D under an agreement which contained a RoT clause so that title in the products stayed vested in C until payment for the products and any other sums owing were complete. D entered into a written invoice discounting agreement with X, under which D agreed to assign its interest in invoices owing to it to X. D then executed debentures in favour of X, containing a fixed charge on C's book and other debts and a floating charge over its undertaking, property and assets. The debentures were registered. D went into receivership, and C's products in D's possession which were unsold were returned to C or sold by them on terms that they would account to C for the invoiced price. X then gave notice to D's debtors that under the invoice discounting agreement, their debts to D had been assigned to X. D then went into creditors' voluntary liquidation.
- High Court
- Held: Claim unsuccessful; C's charge over the proceeds of sale was a charge which required registration; failure to register meant that it was void as against X and D. On this basis, applying the rule in *Dearle v Hall*, X had priority to C because it gave notice to the sub-purchasers.

Judgment – Mummery J

- The question of whether a charge was constituted in respect of the proceeds of sale is determined by the construction of the express or implied contractual terms.
- The authorities give rise to the following general points of law:
    - 1. The broad purpose of a RoT clause is to protect the seller from the insolvency of the buyer in circumstances where the price and other moneys remain unpaid.
    - 2. It does not follow that this purpose predetermines the legal form of protection agreed upon or its legal consequences. The question is how the position of the seller has been secured.
        - On the one hand, it may be held that, on the true construction of the agreement, the seller has retained full legal and beneficial title in physical good – in those circumstances, it is impossible for the buyer to have created a charge on the goods in favour of the seller.
        - On the other hand, if, on the true construction of the agreement, the legal title to the goods has passed from the seller to the buyer, the court may conclude that the legal consequence of the agreement is that the position of the seller is in facts secured by a charge created in favour over the goods by the buyer.
    - 3. In determining whether any given agreement creates a charge, equity looks to the substance and reality of the transaction.
        - What on the face of it may appear to be an out-and-out disposition of a legal or equitable interest in property by way of assignment or conveyance or an out-and-out disposition of a beneficial interest in property by way of trust, may in fact be by way of security only, with a right of redemption and therefore, in the nature of a charge.
    - 4. An unpaid seller, who contends for a direct claim (other than by way of charge) to the proceeds of sale of goods sub-sold by the original buyer, cannot establish an equitable right to, or to trace, the proceeds simply by relying on the RoT to the physical goods sub-sold.
        - There is no equity to trace into a mixed fund in the absence of a fiduciary relationship: the unpaid seller must establish that there was a fiduciary relationship between himself and the original buyer affecting the proceeds of sale.
    - 5. The existence of a fiduciary relationship in this context depends on whether the parties have agreed terms, either expressly or impliedly, which, when construed in the context of the whole agreement and the surrounding circumstances of the individual case, are appropriate to create such a relationship.
    - 6. The relationships of bailor and bailee, and principal and agent, are normally fiduciary, but not necessarily so – contractual or judicial labels are not conclusive of the nature of the relationship.
- In the present case, once it is accepted that the beneficial interest in the proceeds of sale was determinable on the payment of debts, C is faced with the difficulty that the rights and obligations of the parties were in reality and in substance characteristic of those of the parties to a charge, and not of those in a trustee/beneficiary or other fiduciary relationship.
    - The agreement between C and D created a charge over the proceeds of sale in favour of C. The charge required registration, since it was a charge created by D to which CA 1985 s395 and s396 applied; and the consequence of failure to register such charge is that the charge is void as against X, a creditor of D, as well as against the liquidators of D.
    - X had priority over the rights of C created by virtue of the debenture, because X's debenture was registered, whereas C's charge was not registered.

- OBITER:
- It is established that the rule in *Dearle v Hall* applies to equitable assignments of legal choses in action, as per *Pfeiffer*.
- An equitable assignment may be effected by an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor.
    - In the present case, there was such an agreement.
- If the above conclusions are wrong, and the assignment was not by way of charge, then it was nevertheless an equitable assignment to which the rule in *Dearle v Hall* can apply.
    - On this basis, X had, by virtue of the discounting agreement and assignments made pursuant to it, priority over C in respect of the proceeds of sale of the C products supplied.
- LPA 1925 s136(1) provides that the assignment is "subject to equities having priority over the right of the assignee". The effect of those words is to create, in the case of a statutory assignment of a chose in action, an exception to the general rule that an equity will not prevail against a bona fide purchaser of a legal estate for value without notice of the prior equity.
    - If that is so, in the hands of D, the assignor to X, the rights of action against the sub-purchasers which it assigned to X were subject to an earlier equitable assignment of those same rights to C and X, and therefore took subject to that prior equity.
- Unless the rule in *Dearle v Hall* were applicable, the result would be determined by the ordinary rule as to priorities, i.e., the basic rule of the order of creation where the merits are equal.
- The rule in *Dearle v Hall* apart, X could not put itself in a stronger position than D as against C by giving notice of the assignment from D to the sub-purchasers and by then seeking to rely on the statutory assignment thereby completed to take in priority to the equity of C.
- Would follow the decision in *Pfeiffer*.

Topic 6 – Security

Fixed and Floating charges

Charges on future property

Holroyd v Marshall (1862)

Case overview

- X sold machinery to C. C sold the machinery back to X, but since X could not pay for it, the purchase price was left outstanding and a security interest was granted over the machinery. The indenture granting the security interest referred not only to the existing machinery, but also to all machinery which, during the continuance of the security, is fixed in or about the mill. As time passed, X sold and replaced some of the machinery, and bought some new machinery. D sued X, and the court ordered the machinery to be seized in appropriation of D's claims. C claimed they had superior title to D.
- House of Lords
- Held: Claim successful; C's title was preferable to that of D, both as to the new machinery as well as the old.

Judgment – Lord Westbury LC

- In equity, it is not necessary for the alienation of property that there should be a formal deed of conveyance: a contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest (provided the contract is one of which a Court of Equity will decree specific performance).
    - The vendor becomes a trustee for the vendee, subject to the contract being one to be specifically performed.
    - This applies to both real and personal property.
- A deed which professes to convey property which is not in existence at the time is as a conveyance void at law, since there is nothing to convey. So, in equity, a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation simply because there is nothing to transfer.
- But, if a vendor or mortgagor agrees to sell or mortgage property (real or personal) of which he is not possessed at the time, and he receives consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of Equity would compel him to perform the contract,
    - The contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired (assuming that the contract is one of a class of which a Court of Equity would decree the specific performance).
    - So, immediately on the acquisition of the property described, the vendor or mortgagor would hold it on trust for the purchaser or mortgagee, according to the terms of the contract.
- Mere incapacity to perform a contract at the time of its execution will be no answer when the means of doing so are afterwards obtained.
- In the present case, applying these principles, immediately on the new machinery being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to C.

- If afterwards D attempted to remove any part of the machinery, except for the purpose of substitution, C would have been entitled to an injunction to restrain such removal. Therefore, C's title is to be preferred to that of D.

Judgment – Lord Chelmsford

- Property non-existing but to be acquired at a future time, is not assignable at law, but is in equity.
  - At law, although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken.
  - In equity, the moment the property comes into existence, the agreement operates upon it.
- It is firmly established that an equitable mortgagee (C) has the right of priority over a judgment creditor (D).
  - The equitable title still prevails even if D had no notice of it.
- In the present case, the issue of notice is met by the fact that the deed between C and X was registered.

Tailby v Official Receiver (1888)

Case overview

- Assignor (C) held a debt from debtor (X). Through a bill of sale, C assigned to assignee (D), inter alia, all the book debts due and owing or which might during the continuance of the security become due and owing. C went into insolvency, and C's official receiver sued D for the amount of the debt as money had and received.
- House of Lords
- Held: Claim unsuccessful; the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined, and so passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor (D) at the time of the assignment, or in any other business.

Judgment – Lord Herschell

- The key issue here is whether an assignment by way of security of certain book debts not existing at the time of the assignment was valid, so as to give the assignee (D) a good title to them when they came into existence.
- An assignment may be so indefinite and uncertain in its terms that the Court will not give effect to it because of the impossibility of ascertaining to what it is applicable.
  - But the present assignment is not so indefinite and uncertain.
- There is no sound distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him, and one assigning future bequests and devises to which he may under any will become entitled.
  - The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification when the subject has come into existence, and it is sought to enforce the security.

Judgment – Lord Watson

- The rule of equity which applies to the assignment of future choses in action is simple. Choses in action may be the subject of present assignment – as soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made.
- There is only one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action: on its coming into existence, the chose of action must answer the description in the assignment (or, in other words, be capable of being identified as thing assigned).
    - When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee.
    - Mere difficulty in ascertaining all the things which are included in a general assignment, whether in esse (in existence) or in posse (not in existence), will not affect the assignee's right to those things which are capable of ascertainment or are identified.
- In the case of book debts, as in the case of choses in action generally, intimation of the assignee's right must be made to the debtor or oblige in order to make it complete. That is the only possession which he can attain, so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor.
    - In the present case, D's right was duly perfected by his notice to X before C's insolvency.

Judgment – Lord Macnaghten

- Future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is immaterial, provided the intention of the parties is clear.
    - To effectuate the intention, an assignment for value, in terms present and immediate, is regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.
- If future book debts are assigned, the subject-matter of assignment is capable of being identified as and when the book debts come into existence, whether the description is restricted to a particular business or not.
- *Holroyd v Marshall* laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before that case, it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done.
- As to Lord Westbury LC's reference in *Holroyd v Marshall* to the subject of specific performance, great confusion would be caused by transferring considerations applicable to suits for specific performance to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract.
    - Cases of equitable assignment, where the consideration has passed, depend on the real meaning of the agreement between the parties. Once the meaning is ascertained, one only has to apply the principle that equity considers that done which ought to be done.

Re Lind (1915)

Case overview

- X was presumptively entitled to a share of his mother's personal estate, and assigned his expectant share to C1 by way of mortgage. Later, he assigned the same share to C2 by way of mortgage, subject to the mortgage to C1. X then went bankrupt, but neither C1 nor C2 proved in the bankruptcy. X then assigned his expectant share to D. X's mother then died, and the share fell into possession.
- Court of Appeal
- Held: Cs' claims had priority to D's claim. Notwithstanding X's bankruptcy, the assignments to C1 and C2 remained in force and operated so as to transfer X's share on the death of his mother, and did not merely impose upon X a personal liability which could be affected by his bankruptcy.

Judgment – Phillimore LJ

- An assignment of something not yet in existence can operate as a contract to assign if and when the property comes into existence. This is intelligible and workable if nothing happens between the date of the assignment (construed as a contract to assign) and the date when the property comes into existence. The question is what if in the intervening period something happens which may affect the contract?
    - If the assurance rest in contract and if by consequence the only way in which equity fastens upon the property be by the operation of the doctrine of specific performance, then the liability under the contract would be discharged by bankruptcy.
- In order for the assignment to survive bankruptcy and have its effect, it must give to the assignee something more than a mere right in contract, something in the nature of an estate or interest.
- If the right has to be enforced by a suit for specific performance of a contract, involving as it does "some of the nicest distinctions and most difficult questions that come before the Court", then the right is in contract only and the statutory discharge in bankruptcy should operate.
- The right of the assignee is a higher right than the right to have specific performance of a contract – the assignment creates an equitable charge which arises immediately upon the property coming into existence.
    - Either then no further act of assurance from the assignor is required, or if there be something necessary to be done by him to pass the legal estate or complete the title, he has to do it not by reason of a covenant for further assurance the persistence of which through bankruptcy it is unnecessary to discuss, but because it is due from him as trustee for his assignee.
- An assignment which at the time only operates as a contract does not, when the property comes into possession, without more operate as an actual assurance. Whilst it is still a contract, it is still discharged by a discharge of contracts.
    - OBITER: It would be better as matter of public policy that all assignments of bare futurities were made impossible. But the law is settled by the highest authority.

Judgment – Bankes LJ

- As soon as the property comes into existence, the assignment fastens on it and without any actus interveniens, the property is regarded in equity as the property of the assignee.

- Equity regarded an assignment for value of future acquired property as containing an enforceable security as against the property assigned, quite independent of the personal obligations of the assignor arising out of his imported covenant to assign.
    - It is true that the security was not enforceable until the property came into existence, but nevertheless the security was there, and the assignor was the bare trustee of the assignee to receive and hold the property for him when it came into existence.

The nature of a floating charge

Re Yorkshire Woolcombers (1903) (EWCA)

Case overview

- A company (X), having to give security to certain guarantors, assigned by deed all its present and future book and other debts, with the benefit of all securities for the same, to a trustee (C), subject to redemption, in trust for the guarantors. The deed contained no express provision against possession being taken by C, but contained a declaration that C should at any time, if required by the guarantors, give notice of this assignment to the debtors of the company, with a proviso that it should not be incumbent on C to give notice. There were also provisions that C might at any time give notice, appoint a receiver, and exercise the statutory power of sale, but meantime he was not to be answerable for allowing the company to receive the book debts. A receiver (D) was subsequently appointed in a debenture-holder's action, and C brought an action to enforce his security.
- Court of Appeal
- Held: Claim unsuccessful; on a true construction of the deed, it was not intended by the assignment to stop X, but it was intended to allow X to go on receiving the book debts for the purpose of carrying on its business. Accordingly, the deed contained the true elements of a floating charge. The charge was not registered, and so was void under CA 1900 s14(1) – the charge therefore had no validity against D.

Judgment – Williams LJ

- "Floating charge" was unfortunately not defined in CA 1900 and has never been defined with any great degree of accuracy in the courts.
    - Lord Macnaghten gave a definition in *Government Stock v Manila*, but even this failed to define a floating security without using some terms which are really applicable to the subject-matter, and without resorting to analogy.
- When you start with your floating security given to the debenture-holders, the whole basis of the arrangement is that business is going on, and should go on, until the debenture-holders, according to the terms of the deed, intervene – that is prima facie the object of the floating charge.
    - Everything that will facilitate the carrying on of the business in question without interfering with the floating charge ought to be treated as a transaction which may properly be entered into by the company.
- In the present case, the deed contains clauses and arrangements which are wholly consistent with it having been the intention of both parties that X should be licensed to deal with the book debts as

they come into existence, just as if there had been no mortgage at all, unless and until the mortgagee thought fit to intervene.
    - There is a licence intended to be given to X to employ the book debts for any purpose it likes unless and until C intervenes, and when C has so intervened, nobody is to be held responsible for any appropriation of the book debts to purposes other than those contemplated by the deed, which has taken place prior to intervention.
- For a specific security, it is not necessary to have a security of a subject matter which is then in existence; what is needed is that the security, whenever it has once come into existence and been identified or appropriated as a security, shall never thereafter at the will of the mortgagor cease to be a security.
    - If at the will of the mortgagor, he can dispose of it and prevent it being a security for any longer, although something else may be substituted more or less for it, that is not a specific security.
- In the present case, at the moment when the debts were paid in, the mortgagors got the advantage, since it discharged the debtor which they were guarantors, but it was competent for the mortgagors the next day not only to draw out an equivalent sum to that which had been paid in, but even to draw out a larger sum.

Judgment – Romer LJ

- For a charge to be floating, it is not essential that the charge must be on the whole undertaking, or on the whole property, of the company.
    - "Floating" is not a legal term, and so one must deal with the question of substance to be answered according to the circumstance of each particular case.
- An exact definition of a "floating charge" is not given here, but if a floating charge has the following three characteristics, it is a floating charge:
    - (i) It is charge on a class of assets of a company present and future;
    - (ii) That class is one which, in the ordinary course of the business of the company, would be changing from time to time; and
    - (iii) By the charge, it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets dealt with.
- In the present case, those three characteristics distinguish the charge: (i) it is upon all debts of the company present and future; (ii) it obviously contemplates a class of assets which, in the ordinary course of the life of the company, must continually change; and (iii) the deed clearly contemplated that until some step is taken by or on behalf of those who are to have the benefit of the charge, the company would be able to receive the debts due in its ordinary course of business, and to deal with them for the ordinary purposes of the business.

Judgment – Cozens-Hardly LJ

- In the present case, the security must be read as containing a licence or permission by C to X to deal with the mortgage property for a certain time as though a mortgage had not been executed. That being so, without attempting to define accurately the meaning of "floating charge", there is at least enough to show that there is a good floating charge.
- A floating charge need not be on the whole undertaking nor on the whole property of the company. It must embrace both present and future property, and property of a particular class. It must contain, expressly or impliedly, a right to the company to deal with it for a certain time as though the charge had never been executed – when these conditions are found, there is a floating charge.

Re Yorkshire Woolcombers (1903) (UKHL)

Case overview

- Facts: *[see above]*
- House of Lords
- Held: EWCA decision affirmed.

Judgment – Halsbury LC

- Something that must be an element in the definition of a floating security is that it is something which is to float, not to be put into immediate operation, but such that the company is to be allowed to carry on its business. It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of those book debts being extinguished by payment to the company, and that other book debts should come in and take the place of those that had disappeared.
    - That is an essential characteristic of a floating security.
- The deed shows an intention on the part of both parties that the business of the company shall continue to be carried on in the ordinary way, that the book debts shall be at the command of, and for the purpose of being used by, the company.
- The moment after the execution of a fixes assignment, the company would have no more interest in the debts and would not be allowed to touch them. However, the whole purport of the deed is to enable the company to carry on its business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if the deed had not been executed at all.
    - That is what is meant by a floating security.
- Entirely agree with EWCA.

Judgment – Lord Macnaghten

- What was said in *Manila* was intended as a description, not a definition, of a floating security. There is not much difficulty in defining a floating charge in contrast to a specific charge.
- A specific charge is one that without more, fastens on ascertained and definite property or property capable of being ascertained and defined.
- A floating charge is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs, or some act is done, which causes it to settle and fasten on the subject of the charge within its reach and grasp.

Evans v Rival Granite (1910)

Case overview

- C brought an action against D to recover the rent of a cottage leased by him to D. C became the transferee and holder of a debenture and demanded payment from D of the money secured by the debenture, but took no further step to enforce his security. The debenture-holder (X) opposed C's claim on the ground that as holder of the debenture, he had priority over C as judgment creditor.
- Court of Appeal
- Held: Claim successful; X did not have priority over C.

Judgment – Moulton LJ

- In *Re Yorkshire Woolcombers*, Lord Macnaghten was keeping in view the two characteristic features of floating charges: (i) the non-permanence of the property which is the subject of the charge, and its constant change from time to time; and (ii) that a floating charge does not of itself fasten and settle even on the property existing at the moment.
- A floating charge is an existing charge, but care must be taken to remember that it has not settled down and fastened on the property which is the subject of the charge.
- The freedom of the company to carry on its business is not based on special words creating that freedom, but on the nature of the charge itself. This leads to the conclusion that the right of the company to carry on its business as it wills pending the enforcement of the security must mean that it may carry it on in accordance with law, including a liability to the processes of the law if it does not pay its debts.
    - It is impossible for a Court of law to draw the inference that Parliament intended to confer upon companies complete commercial freedom without commercial responsibilities.
- A security must be either floating or fixed. While it is a floating security, the company has a right, not a mere licence, to carry on its business until the debenture-holder intervenes, and when the debenture-holder does intervene, he must do so with the intention of making his security a fixed security.
    - It is a breach of contract by the debenture-holder to interfere in the conduct of the business so long as his security is only a floating security.
- So, in the present case, the giving of the notice to the bank by X did not amount to a change from a floating to a fixed charge. It gave the debenture-holder (X) no more right than he would have had if it had not been given.

Judgment – Buckley LJ

- As between an execution creditor and a debenture-holder who possesses a floating charge, the execution creditor takes subject to the equity of the debenture-holder. Specifically, the execution creditor takes subject to such equitable rights as an equitable charge of this kind confers.
- The outcome of the authorities can be summarised in the following way:
    - A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him.
        - The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee.
    - A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business. Rather, it is a floating mortgage applying to

every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security.
    - Crystallisation may be brought about in various ways: a receiver may be appointed, or the company may go into liquidation and a liquidator be appointed, or any event may happen which is defined as bringing to an end the licence to the company to carry on business.
        - The real bargain between the parties is that the mortgagee gives authority to the company to use all its property until the licence to carry on business comes to an end.
- The law laid down in *Re Standard Manufacturing* and *Re Opera* is that the execution creditor takes subject to the equity of the debenture-holders.
    - Notwithstanding that, no equity arises in a debenture-holder whose security is a floating charge, from his merely giving notice to seize a particular asset of the company – he must do something to turn his security from a floating into a fixed charge.

Re Bond Worth (1979)

Case overview

- X purchased fibre from Y to make carpets. The fibre was sold with a RoT clause. X was placed in receivership by a debenture holder. £530k was owing to Y under numerous contracts which incorporated the RoT clause. Y notified the receiver of their claim under the conditions of sale to ownership of the fibre supplied and not paid for, and the proceeds of sale of the fibre. X's business (including all its stocks) was then transferred to Z under a hiving down agreement. Joint receivers were appointed by a different debenture holder, and they applied to the court for summons for the determination of the validity and priority of Y's claim.
- High Court
- Held: Under the terms of the contracts and RoT Clauses, property in the fibre passed to X on delivery, and they were free to sell or deal with the fibre in the ordinary course of their business. Whilst the RoT clause referred to "equitable and beneficial ownership", it did not create a bare trust for the benefit of Y but, on its true construction, granted Y a floating equitable charge as security for the purchase price on the raw fibre or the proceeds of its resale, and on the products of which any part of the fibre might become constituent or into which it might be converted or the proceeds of sale of such products.

Judgment – Slade J

- The floating charge is the only type of charge which, by its very nature, leaves a company at liberty to deal with the assets charged in the ordinary course of its business, without regard to the charge, until stopped by a winding up or by the appointment of a receiver or the happening of some other agreed event.
    - Such a charge remains unattached to any particular property and leaves the company with a licence to deal with, and even sell, the assets falling within its ambit in the ordinary course of business, as if the charge had not been given, until it is stopped by one or other of the events referred to above, at which point it is said to crystallise. It then becomes effectively fixed to the assets within its scope.
- Romer LJ's description in *Re Yorkshire Woolcombers* shows that it need not extend to all the assets of the company; it may cover assets merely of a specified category or categories.

- In the present case, there are four categories of charged assets.
    - As to Romer LJ's first characteristic, the charge on the first category of assets is exclusively a charge on present assets of the company, while the charges on the other three categories are exclusively charges on future assets of the company.
        - If the charges are looked at separately, they do not comprise classes of mixed and future assets.
    - Romer LJ's second characteristic is clearly present in the second, third and fourth categories of charged assets, since these are ex hypothesis classes of assets which in the ordinary course of business will be changing from time to time.
        - The second characteristic is only present in relation the first category of assets (the raw fibre) in the sense that the assets may dimmish by being used for the purposes of manufacture or sale; they cannot be increased.
    - Romer LJ's third characteristic is present in relation to each of the four categories of assets: it was clearly contemplated that until some future step was taken by or on behalf of Y, X might carry on its business in the ordinary way in relation to each of the four categories.
- These points of possible distinction do not prevent all or any of the four relevant charges from being floating charges within the ordinary meaning of legal terminology.
    - Romer LJ disclaimed any intention of saying that there could not be a floating charge within the meaning of the Companies Acts which did not contain all the three characteristics.
- The critical distinction is that between a specific charge and a floating charge.
- In the present case, the respective charges on each of the four categories of charged assets were ambulatory and shifting in their nature, and were intended to hover over them until the happening of an event which caused them to crystallise.
    - The assets were of a fluctuating class, and until a crystallising event occurred, it was not intended that any restriction should be placed on X to deal with them in the ordinary course of its business.
- The effect of the RoT clause was to create floating equitable charges over the four categories of charged assets, for the purpose of securing payment of the purchase prices due under the relevant orders, and to constitute X a trustee of such assets for the purpose of such security, but for no other purpose.

Characterisation: fixed or floating?

Re Cosslett (1998)

Case overview

- Company (X) was employed by D under a contract to undertake various engineering works in a land reclamation project. To carry out the work, X placed a coal washing plant on the site. X suffered financial problems and abandoned the site and the plant. X's administrator (C) sought to reclaim the plant or obtain payment from D for its use. D refused on the basis that the contract, which incorporated ICE standard terms, provided that all plant owned by X would, when on site, be deemed to be the property of D and that if X left the site, D was entitled to use the plant to complete the works or sell the plant and to apply the proceeds towards whatever sums might be due from X. C argued that if the contract created a charge over the plant, it was a floating charge which was void for want of registration under CA 1985 s395.
- Court of Appeal

- Claim unsuccessful; the contract did not pass legal title in the plan to D, and D's right to retain the plant did not create an equitable charge because it had no proprietary interest therein. D's contractual power of sale was a floating charge over X's property, and so was void against C for want of registration.

Judgment – Millett LJ

- On the true construction of the contract, legal ownership in the plant did not pass to D.
- D's right to retain possession of the plant and use it to complete the works does not constitute an equitable charge because: (i) it does not give D a proprietary interest in the plant but only rights of possession and use; and (ii) it is not by way of security.
- It is of the essence of charge that a particular asset, or class of assets, is appropriated to the satisfaction of a debt or other obligation of the chargor or a third party, so that the chargee is entitled to look to the asset and its proceeds for the discharge of the liability.
    - This creates a transmissible interest in the asset.
    - A mere right to retain possession of an asset and to make use of it for a particular purpose does not create such an interest and does not constitute charge.
- Further, D's right does not constitute charge since it does not constitute any kind of security interest as it was not given to D by way of security. It does not secure the performance of the contract by X, but merely enables D to perform the contract in its place.
    - It does not, therefore, secure the discharge of any debt or other legal obligation of X or of any third party, whether to complete the works or to pay damages for its failure to do so.
    - Completion of the works by the council does not discharge either of these obligations.
- By contrast, D's power to sell the plant and apply the proceeds in or towards discharge of whatever sums might be or become due from X by reason of its failure to complete the works is a security interest in favour of X.
- There are only four kinds of consensual security known to English law: (i) pledge; (ii) contractual lien; (iii) equitable charge; and (iv) mortgage.
    - A pledge and a contractual lien both depend on the delivery of possession to the creditor. the difference between them is that in the case of a pledge, the owner delivers possession to the creditor as security, whereas in the case of a lien, the creditor retains possession of goods previously delivered to him for some other purpose.
    - Neither a mortgage nor a charge depends on the delivery of possession. The difference between them is that a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an equitable charge does not.
- In the present case, D's rights in relation to the plant and materials are exclusively contractual, and are not attributable to any delivery of possession by X. When X brings plant and materials onto the site, they remain in X's possession to enable it to use them in the completion of the works – this is not X delivering possession at this stage (either by way of security or otherwise). D comes into possession of the plant and materials when it expels X from the site, leaving the plant and materials behind – but this is not a voluntary delivery of possession by X to D; rather, it is the exercise by D of a contractual right to take possession of the plant and materials against the will of X.
    - Therefore, D's rights are derived from contract not possession, and constitute and equitable charge.
- The next question is whether the charge is fixed or floating.
- In the present case, Romer LJ's three characteristics of a floating charge are present.
    - There is no difficulty in regard to the first two characteristics: plant and materials become subject to the charge as they are brought onto the site and cease to be subject to it as they

are removed from the site. Accordingly, the charge is a charge on present and future assets of the company which, in the ordinary course of the business of X, would be changing from time to time. Rather, the dispute centres on Romer LJ's third characteristic.

- The chargor's unfettered freedom to deal with the assets in the ordinary course of his business free from the charge is obviously inconsistent with the nature of a fixed charge; but it does not follow that his unfettered freedom to deal with the charged assets is essential to the existence of a floating charge.
    - Any well drawn floating charge prohibits the chargor from creating further charges having priority to the floating charge, and a prohibition against factoring debts is not sufficient to convert what would otherwise be a floating charge on book debts into a fixed charge, as per *Re Brightlife*.
- The essence of a floating charge is that it is a charge, not on any particular asset, but on a fluctuating body of assets which remain under the management and control of the chargor, and which the chargor has the right to withdraw from the security despite the existence of the charge.
- The essence of a fixed charge is that the charge is on a particular asset or class of assets which the chargor cannot deal with free from the charge without the consent of the chargee.
    - The question is not whether the chargor has complete freedom to carry on his business as he chooses, but whether the chargee is in control of the charged assets.
- In the present case, X's business was not confined to the performance of its contract with D and so if it wished to remove plant or materials from the site and deploy them elsewhere, this too would be in the ordinary course of its business.
    - In forbidding X from removing from the site plant or materials required, whether immediately or not, for the completion of the works, D was placing a restriction on the way in which X carried on business.
    - However, this restriction does not have any relation to D's security: D's purpose was not to protect its security, but to ensure that X would give proper priority to the completion of the works.
- Therefore, the charge is a floating charge.
- So, the power of sale constitutes a charge of a kind registrable under CA 1985 s395. Thus, the failure to register the charge renders the security void as against C, but does not affect any other right of D which is not a security and which does not require registration.

Re Brightlife (1987)

Case overview

- X created a "first specific charge" over "all book debts and other debts" and a "first floating charge" over all assets. The debenture-holder (C) had the "right by a notice" to convert the floating charge into a specific charge over the assets specified in the notice. X went into liquidation with assets including a credit balance at the bank. Shortly before the passing of a winding-up resolution, C served a notice demanding payment, converting the floating charge into a specific charge over all assets and demanding a legal assignment on all book debts and other debts.
- High Court
- Held: Claim successful in part; the "specific charge" operated to create a floating charge crystallising on the service of the notice. The bank balance did not come within "all book debts and other debts", but the debts which were secured, ranked in priority to the preferential debts.

Judgment – Hoffmann J

- The relationship between banker and customer is one of debtor and creditor. Therefore, it would not be legally inaccurate to describe a credit balance with a banker as a debt. However, this would not be a natural usage of a businessman or accountant, who would ordinarily describe it as "cash at bank".
    - If "book or other debts" includes the bank balance, then X could not have dealt with its bank account without the written consent of X; it would have had to obtain such consent every time it issued a cheque. The extreme commercial improbability of such an arrangement satisfies the conclusion that the parties used "book debts and other debts" in a sense which excludes the credit balance at the bank.
    - So, the bank balance does not fall within the term "book debts or other debts" as used in the debenture.
- The dispute in the present case surrounds Romer LJ's third characteristic.
- A floating charge is consistent with some restriction upon the company's freedom to deal with its assets. E.g., floating charges commonly contain a prohibition upon the creation of other charges ranking prior to, or pari passu with, the floating charge. Such dealings would otherwise be open to a company in the ordinary course of its business.
    - In the present case, the significant feature is that X was free to collect its debts and pay the proceeds into its bank account. Once in the account, they would be outside the charge over debts and at the free disposal of X.
    - A right to deal in this way with the charged assets for its own account is a badge of a floating charge and is inconsistent with a fixed charge.
- The existence of general rules of law which imply terms in a floating charge is not inconsistent with the transaction being wholly consensual and the implied terms liable to exclusion by contrary agreement.
- Lord Macnaghten in *Re Yorkshire Woolcombers* had in mind that a floating charge is not susceptible of being defined by the enumeration of an exhaustive set of necessary and sufficient conditions. All that can be done is to enumerate its standard characteristic; it does not follow that the absence of one or more of those features, or the presence of others, will prevent the charge from being categorised as floating.
    - The rights and duties which the law may or may not categorise as a floating charge are wholly derived from the agreement of the parties, supplemented by the terms implied by law.
    - It is fallacious to argue that once the parties have agreed on some terms which are thought sufficient to identify the transaction as a floating charge, they are then precluded from agreeing to any other terms which are not present in the standard case.
- It is not open to the courts to restrict the contractual freedom of parties to a floating charge on grounds of public policy. The public interest requires a balancing of the advantages to the economy of facilitating the borrowing of money against the possibility of injustice to unsecured creditors.
    - These arguments for and against the floating charge are matters for Parliament rather than the courts. It is certainly not for a judge of first instance to proclaim a new head of public policy which no appellate court has even hinted at before.
    - The decision of the New Zealand Supreme Court in *Re Manuwera Transport*, which recognises the validity of a provision for automatic crystallisation, is to be preferred.
    - However, it is not necessary for present purposes to decide any questions about automatic crystallisation.

- The notice stating "all the assets of X, the subject of the said floating charge" is sufficient specification for "specified in notice" and thus to crystallise the charge. This led to X's obligation to execute an assignment, which removed its freedom to deal with the debts that made the charge float.
- Conclusion: The debt secured by the debenture ranks in priority to the preferential debts in respect of all assets in the hands of the liquidator.

Agnew v Commissioner of Inland Revenue (2001)

Case overview

- X gave a debenture to a bank (Y), which was expressed to create a fixed charge over the book debts of the company and their proceeds, but did not extend to proceeds which Y had not specific should be paid into an account with itself, nor to proceeds received by X before the charge crystallised or was otherwise enforced. Subject to these terms, the charge was expressed as a floating charge. The debenture precluded X from disposing of its uncollected book debts, but permitted it to deal freely in the ordinary course of business with assets subject to the floating charge, to include the proceeds of book debts as and when collected. X subsequently went into receivership. The receivers (D) maintained that the proceeds of collected debts were subject to the fixed charge. The preferential creditors (Cs) argued that they were entitled to the proceeds despite the terms of the debenture because ethe charge over such proceeds was a floating charge, given that X had been free to collect the debts and utilise the proceeds free from security prior to crystallisation.
- Privy Council (New Zealand)
- Held: Claim successful; X, as opposed to the chargee (Y), was in control of the process whereby the charged assets, namely the uncollected book debts, were extinguished and replaced by different assets, not subject to a fixed charge, and available for use as the company saw fit. Such an arrangement is inconsistent with the existence of a fixed charge.

Judgment – Lord Millett

- The key issue is whether a charge over the uncollected book debts of a company which leaves the company free to collect them and use the proceeds in the ordinary course of its business is a fixed charge or a floating charge.
- A fixed charge gives the chargee an immediate proprietary interest in the assets subject to the charge which binds all those into whose hands the assets may come with notice of the charge. So, unless it obtained the consent of the chargee, the company would be unable to deal with its assets without committing a breach of the terms of the charge.
    - A fixed charge would deprive the company of access to its cash flow, which is the life blood of a business.
    - So, where the parties contemplated that the company would continue to carry on business despite the existence of the charge, they must be taken to have agreed on a form of charge which did not possess the ordinary incidents of a fixed charge.
- The floating charge is capable of affording the creditor, by a single instrument, an effective and comprehensive security upon the entire undertaking of the debtor company and its assets from time to time, while at the same time leaving the company free to deal with its assets and pay its trade creditors in the ordinary course of business without reference to the holder of the charge.
- There were two main criticisms of the floating charge:

    - (i) It enabled the chargee to withdraw all the assets of an insolvent company from the scope of a liquidation and leave the liquidator with little more than an empty shell and unable to pay preferential creditors.
        - Answer: PPBAA 1897 s107 made the preferential debts payable out of the proceeds of a floating charge in priority to the debt secured by the charge.
    - (ii) it put ordinary trade creditors of the company at risk without them normally knowing of the existence of the charge, since the chargee could step in at any time without warning and obtain priority over the ordinary creditors.
        - Answer: CA 1900 s14 required floating charges to be registered, so that those proposing to extend credit to a company could discover their existence.
- In *Re Brightlife,* Hoffmann J held that, although the charge was expressed to be a fixed charge, it should be characterised in law as a floating charge.
- *New Bullas* was the first case in which the draftsman of the charge deliberately distinguished between book debts and their proceeds – this distinction is also present in the instant case. The intended effect in that case and the present case was that until the chargee intervened, the company could continue to collect the debts, though not to assignor or factor them, and the debts once collected would cease to exist. The proceeds which took their place would be a different asset which had never been subject to the fixed charge, and would from the outset be subject to the floating charge.
    - The question both in *New Bullas* and the present case, is whether the book debts which were uncollected when the receivers were appointed were subject to a fixed charge or a floating charge.
- In deciding whether a charge is fixed or floating, the court is engaged in a two-stage process:
    - (i) The court must construe the instrument of charge and seek to gather the intentions of the parties from the language used.
        - The object at this stage is not to discover whether the parties intended to create a fixed or floating charge; it is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets.
    - (ii) This is a process of categorisation, and is a matter of law; it does not depend on the intention of the parties.
        - If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it.
- It is a similar process to that of construing a document to see whether it creates a licence or tenancy.
- The only relevant intention is the intention that the company should be free to deal with the charged assets and withdraw them from the security without the consent of the chargee (i.e., whether the charged assets were intended to be under the control of the company or the chargee).
- Every charge, whether fixed or floating, derives from contract. The company's freedom to deal with the charged assets without the consent of the chargee, which is what makes it a floating charge, is of necessity a contractual freedom derived from the agreement of the parties when they entered into the debenture.
    - To find the consent in the original agreement would turn every floating charge into a fixed charge.

- Fisher J in *New Bullas* suggested that there is nothing inconsistent with a fixed charge in prohibiting the company from disposing of the charged asset to others but allowing it to exploit the characteristics inherent in the nature of the asset itself.
    - This is correct, so long as the destruction of the security is due to a characteristic of the subject matter of the charge, and not merely to the way in which the charge is drafted.
    - A fixed charge may be granted over a wasting asset.
- An equitable charge confers a proprietary interest by way of security. It is of the essence of a proprietary right that it is capable of binding third parties into whose hands the property may come.
- Property and its proceeds are different assets.
    - The only difference between realising a debt by assignment and collection is that, on collection, the debt is wholly extinguished – (as in the case of alienation) it is replaced in the hands of the creditor by a different asset, namely its proceeds.
- If the company is free to collect the debts, the nature of the charge on the uncollected debts cannot differ according to whether the proceeds are subject to a floating charge or are not subject to any charge.
    - In each case, the commercial effect is the same: the chargee cannot prevent the company from collection the debts and having the free use of the proceeds.
- It does not follow, however, that the nature of the charge on the uncollected book debts may not differ according to whether the proceeds are subject to a fixed or floating charge. The question is not whether the company is free to collect the uncollected debts, but whether it is free to do so for its own benefit – for this purpose, it is necessary to consider what it may do with the proceeds.
    - Any attempt to separate the ownership of the debts from the ownership of their proceeds (even if conceptually possible) makes no commercial sense, since a debt is a receivable, and it cannot be enjoyed in specie – its value can be exploited only by exercising the right.
    - In the present case, the draftsman of the debenture recognised this; he purported to separate the book debts and their proceeds, but he did not attempt to separate their ownership – they were charged by the same chargor to the same chargee.
    - The critical factor which is determinative of the nature of the charge in respect of the uncollected book debts is that the event which is said to convert the charge from a fixed to a floating charge (if there is only one charge) or to replace the one charge by the other (if there are two charges), is the act of the company.
- To constitute a charge on book debts a fixed charge, it is sufficient to prohibit the company from realising the debts itself, whether by assignment or collection. However, it is not enough to provide in the debenture that the account is a blocked account if it is not operated as one in fact.
- In the present case, the debenture was drafted so that X was at liberty to turn the uncollected book debts to account by its own act. Taking the relevant assets to be the uncollected book debts, X was left in control of the process by which the charged assets were extinguished and replaced by different assets which were not the subject of a fixed charge and were at the free disposal of X.
    - This is inconsistent with the nature of a fixed charge.

Queen's Moat v Capita (2004)

Case overview

- A hotel was vested in C2, which was a subsidiary of C. D was a trustee of a trust deed which had been entered into by C and its subsidiaries to secure the issue of debenture stock by C. The debenture granted a fixed charge over property, which included a leasehold property (the hotel). The terms of the trust deed was subject to the proviso that no value was to be attributed to short leaseholds. C applied to withdraw the short leasehold as security and enter the value as nil; the valuation clause in the deed was subject to anything inconsistent in the deed. Key issue was whether the right to withdraw the short leasehold was inconsistent with a fixed charge, so that the proviso (regarding nil value) did not apply.
- High Court
- Held: Claim successful; on the true construction of the trust deed, Cs were entitled, on payment of the expenses of the transaction, to require the withdrawal of the hotel from the charge to D. There was no inconsistency between the existence of a fixed charge and a contractual right on the part of the chargor to require the chargee to release property from the charge.

Judgment – Lightman J

- The crux of the dispute is the status of the hotel as security. On the one hand, the hotel was made the subject of a fixed charge. On the other hand, it was a short leasehold and so for the purposes of valuation, it was to have a nil value attributed to it.
    - The dilemma raised is how at the same time the grant of the fixed charge over the property could add value for the stockholders and could have been available on request by C to be realised from the charge for no consideration.
- The existence of a right unilaterally to require chargee to release property from a charge does not render what is otherwise a fixed charge a floating charge.
    - The right of a corporate chargor in the course of its business to deal with or dispose of charged property without reference to the chargee is inconsistent with the existence of a fixed charge.
    - But there is no inconsistency between the existence of a fixed charge and a contractual right on the part of the chargor to require the chargee to release property from the charge. This is a fortiori the case where the right to require the release (as in the present case) ceases on the security becoming enforceable and the chargee determining or becoming bound to enforce it.
- Even if the effect of the conferment of the right to withdraw the property from the charge had the legal effect of transforming what would otherwise have been a fixed charge into a floating charge, there would be no question of this transformation rendering what the parties intended to agree into something which was legally ineffective.
    - The intentions of the parties as expressed in the trust deed are relevant only to establishing their mutual rights and obligations. They are relevant in establishing the right of Cs to withdraw security from the specifically mortgaged property and the obligation of D to give effect to that right.
    - But the question of whether the charge conferring such right and imposing such obligation is by reason of such conferral characterised as a fixed or floating charge is a question of law.
- On the true construction of the trust deed, Cs were entitled, on payment of the expenses of the transaction, to require the withdrawal of the hotel from the charge to D. the trust deed was clear and unequivocal as to C's entitlement to withdraw from the charge.

Re Spectrum Plus (2005)

Case overview

- X opened an account with a bank (D), obtained an overdraft facility, and executed a debenture to secure its indebtedness to D. The debenture was expressed to create a specific charge of all book debts owing to X, and required X to pay into its account with D all monies which it received in respect of such debts, and not without the prior consent in writing of D to sell, factor, discount, or otherwise charge or assign the same in favour of any other person or purport to do so. It also required X, if called upon to do so by D, to execute legal assignments of such book debts and other debts to D. X went into creditors' voluntary liquidation. X's preferential creditors (C) claimed that D's charge over book debts was only a floating charge and that accordingly, C were entitled to be paid out of the proceeds in priority to D under IA 1986 s175.
- House of Lords
- Held: Claim successful; the debenture did not create a fixed charge. It placed no restriction on the use of the balance in the account with D.

Judgment – Lord Hope

- IA 1986 s175(2)(b), which holds that preferential creditors take priority over floating charge holders, deprives the floating charge of much of its utility from the creditor's point of view.
- *Tailby* showed that an equitable charge can be created over book debts which may accrue in the future. But if this is to be effective as a fixed security, everything depends on the agreement – it is not easy to reconcile the company's need to continue to collect and use the sums for its own business purposes, with the lender's wish to create a fixed charge.
- Agree with Lord Scott that the charge in the present case is floating.
- There are a limited number of ways to create a fixed charge over book debts. One way is to prevent all dealings with the book debts; another is to prevent all dealings with the book debts other than their collection, and to require the proceeds when collected to be paid to the chargee in reduction of the chargor's outstanding debt.
    - These methods are likely to be unacceptable to a company which wishes to carry on its business as normally as possible by maintaining its cash flow and working capital.
- A third way is to prevent all dealings with the debts other than their collection, and to require the collected proceeds to be paid into an account with the chargee bank, and to block that account. A fourth way is to prevent all dealings with the debts other than their collection and to require the collected proceeds to be paid into a separate account with a third party, with the chargee then taking a fixed charge over that account.
    - In the present case, the method selected is closest to the third method.
- The critical question is whether the restrictions imposed went far enough. One must look, not at the declared intention of the parties alone, but to the effect of the instruments whereby they purported to carry out that intention.
    - Was the account one which allowed the company to continue to use the proceeds of the book debts as a source of its cash flow, or was it one which, on the contrary, preserved the proceeds intact for the benefit of the bank's security?
    - In short, was it a blocked account?
- The question can only be answered by examining the contractual relationship in regard to the account between the bank and the customer. An account from which the customer is entitled to withdraw funds whenever it wishes within the agreed limits of any overdraft is not a blocked account.

Judgment – Lord Scott

- The expression "specific charge" is potentially ambiguous – it may mean a charge over specific ascertained property, or it may mean a fixed charge in contrast to a floating charge, depending on the context.
    - In the present case, the expression is intended to bear the latter meaning.
- The question as to how a particular charge should be categorised depends upon the nature of the rights over the charge asset that have been granted to the chargee or reserved to the chargor. The label that the parties have attributed to the charge may be some indication of the rights intended, but is not conclusive.
- In the present case, the charge is over present and future book debts. The chargor cannot dispose of or charge the uncollected book debts, but can deal with its debtors and collect the debts. It is obliged to place the payments made to it by its debtors in a designated account with the chargee bank, but can freely draw on the account for its business purposes provided the overdraft limit is not exceeded.
    - The question is whether this is capable of being a fixed charge.
- If a security has Romer LJ's third characteristic, inclined to think that it qualifies as a floating charge (and cannot be a fixed charge) whatever may be its other characteristics.
- There cannot be a difference in categorisation between the grant of a fixed charge expressed to come into existence on a future event in relation to a specified class owner by the chargor at that time, and the grant of a floating charge over the specified class of assets with crystallisation taking place on the occurrence of that event.
    - Nor, in principle, can there be any difference in categorisation between those grants, and the grant of a charge over the specified assets expressed to be a fixed charge but where the chargor is permitted until the occurrence of the specified event to remove the charged assets from the security.
    - In all these cases, and in any other case in which the chargor remains free to remove the charged assets from the security, the charge should, in principle, be categorised as a floating charge – the assets would have the circulating, ambulatory character distinctive of a floating charge.
- The essential characteristic of a floating charge that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime, the chargor is left free to use the charged asset and to remove it from the security.
    - This recognition reflects the mischief that the statutory intervention was intended to meet, and should ensure that preferential creditors continue to enjoy the priority that IA 1986 s175 intended them to have.
- In the present case, restrictions on X's right to deal with its uncollected book debts go very little way in supporting the characterisation of the charge as fixed. It is restrictions on the use that X could make of the payments made by its debtors that are important.
    - Further, the restrictions on X's right to deal with its uncollected book debts did not enable D to realise its security over the uncollected book debts; their value as a security lay in the money that could be obtained from the debtors.
- The expression "floating charge" has never been a term of art, but is an expression invented by equity lawyers to describe the nature of a particular type of security arrangement between lenders and borrowers. Categorisation depends upon the commercial nature and substance of the arrangement, not upon a formalistic analysis of how the bank clearing system works.

    - If part of the arrangement is that the chargor is free to collect the book debts but must pay the collected money into a specified bank account, the categorisation must depend on what, if any, restrictions there are on the use the chargor can make of the credit to the account that reflects each payment in.
- In the present case, the debenture placed no restriction on the use that X could make of the balance on the account available to be drawn by X.
- The critical question is whether the chargor can draw on the account.
    - If the chargor's bank account were in debit and the chargor had no right to draw on it, the account would have become (and would remain until the drawing rights were restored) a blocked account.
    - But so long as the chargor can draw on the account, and whether the account is in credit or debit, the money paid in is not being appropriated to the repayment of the debt owing to the debenture holder but is being made available for drawings on the account by the chargor.
- The nature of the charge depends on the rights of the chargor and chargee respectively over the assets subject to the charge. If the account had been treated as a blocked account, so long as it remained overdrawn, it would be easy to infer from a combination of that treatment and the description of the charge as a fixed charge that X had no right to draw on the account until the debit on the account had been discharged.
    - But the account was never so treated; the overdraft facility was there to be drawn out by X at will.
    - D could, by notice, terminate the overdraft facility and require immediate payment of the indebtedness and turn the account into a blocked account. Pending such notice, however, X was free to draw on the account.
    - X's right to do so is inconsistent with the charge being a fixed charge, and the label placed on the charge by the debenture cannot be prayed in aid to detract from that right.
- Conclusion: The debenture, although expressed to grant D a fixed charge over X's book debts, in law granted only a floating charge.

<u>Judgment – Lord Walker</u>

- Under a fixed charge, the assets charged as security are permanently appropriated to the payment of the sum charged, in such a way as to give the chargee a proprietary interest in the assets. So long as the charge remains unredeemed, the assets can be released from the charge only with the active concurrence of the chargee.
    - The chargee may have good commercial reasons for agreeing to a partial release. But it will be a matter for the chargee to decide for itself.
- Under a floating charge, the chargee does not have the same power to control the security for its own benefit. The chargee has a proprietary interest, but its interest is in a fund of circulating capital, and unless and until the chargee intervenes (on crystallisation of the charge), it is for the trader, not the bank, to decide how to run its business.
- So long as the company trades in the ordinary way (a requirement emphasised by Romer LJ in *Re Yorkshire Woolcombers*), the constituents of the charged fund are in a state of flux / circulation. Trading stock is sold and becomes represented by book debts; these are collected and paid into the bank; the trader's overdraft facility enables it to draw cheques in favour of its suppliers to pay for new stock; and so the trading cycle continues.
- Not every restriction on a trader's freedom of action is a badge of a fixed charge (see *Re Brightlife*)

    - A prohibition on factoring or otherwise dealing with uncollected debts does not prevent the trader from collecting the debts itself. But if the terms of the debenture were such as to require the trader to pay all its collected debts into the bank and to prohibit the trader from drawing on the account (so that the account is blocked), a charge on debts (described as a fixed or specific charge) would indeed take effect as such.
    - In those circumstances, the chargee would be in control (prior to crystallisation), and the trader would be unable to trade in the ordinary way without the chargee's positive concurrence.
- The label of "fixed" or "specific" (which are taken here to be synonymous) cannot be decisive if the rights created by the debenture, properly construed, are inconsistent with that label.
    - There is a fairly close parallel, first drawn by Hoffmann J in *Re Brightlife*, with the important distinction in land law between a lease and a licence.
    - It is the court's duty to characterise the document according to the true legal effect of its terms.
- There is a public interest which overrides unrestrained freedom of contract: it is ensuring that preferential creditors obtain the measure of protection which Parliament intended them to have.

Re Beam Tube Products (2006)

Case overview

- D advanced money to X to enable X to acquire the assets of another company, with X executing a debenture in D's favour. The debenture purported fixed charges over certain assets, book and other debts, and monies standing to X's credit in bank accounts. X entered into an invoice discount agreement with another company (Y) and executed a debenture over its assets in Y's favour. D2 opened a bank account in X's name to give good effect to the charge over the book debts, and monies from Y were paid into that account. If X wanted to use the funds in the account, it had to ask D2 to make transfers. D2 then directed the transfer of the monies in that account to a solicitors' suspense account. C were appointed as administrative receivers and X's business and assets were bought by another company (Z). C sought directions, and argued that the charges created by D were floating.
- High Court
- Held: The charge was floating; the parties to the debenture contemplated that X would be free to deal with its assets as it wished without having to obtain D's consent. The monies in the suspense account were X's notwithstanding that the account could only be operated by D2. D2's intention was to set up the account to give effect to the terms of the debenture; that X did not have free use of the monies did not have the effect of converting a floating charge into a fixed charge.

Judgment – Blackburne J

- The question is whether, notwithstanding the description of the charge as fixed, the parties contemplated that X would be free to carry on its business in the ordinary way, and particularly whether the parties contemplated that X should have the freedom to buy in and sell, exchange, or otherwise deal with all or any of its equipment without having to obtain the prior consent of D.
    - The parties to the debenture contemplated that X would have this freedom. The facility was expressed to be for the purpose of the acquisition of another company, which was to enable X to carry on business with those assets. The agreement contemplated that X would continue to carry on the business and other activities carried on by it.

    - So, although expressed to be fixed, the charge is floating in nature.
- The answer is all or nothing: either the clause creates a fixed charge over all of the assets to which it refers, or it creates a fixed charge over none of them. The clause is not to be construed as a fixed charge over some of the assets but only a floating charge over the others.
- As to the charge over book and other debts, the agreement stipulated that all such moneys received by X and paid into the collection account were upon payment into that account subject to the floating charge earlier created.
- Where the security documentation envisages, whether as a result of express provision or as a result of proper interpretation, a fixed charge over book debts and a floating charge over the proceeds of those debts, the fixed charge will be treated as a floating charge.
    - This is because the right of the borrower until notice is given to the contrary freely to use the proceeds, is inconsistent with a fixed charge over book debts.
    - This follows from the proposition that a charge over a receivable which does not carry with it the right to receive the proceeds has no value as a security – see *Agnew* and *Re Spectrum Plus*.
- In the present case, the security created by the debenture over X's book and other debts is floating in nature. Free use of the proceeds is inconsistent with the chargee having the degree of control that is requisite for a fixed charge.
    - It is irrelevant that four months after execution of the debenture, the company found itself restricted from freely using the proceeds of the book debts then and thereafter becoming available as a result of the setting up of the blocked account. This is because IA 1986 s40 requires payment to preferential creditors out of the charge which "as created was a floating charge". As created, the debenture did not provide for the blocked account; its scheme was that the proceeds of all book and other debts should be subject to a floating charge.
- In setting up the subsequent account, the parties were endeavouring to give effect to the terms of the debenture. The arrangement for the operation of the blocked account was the parties' attempt, mistakenly as it turned out, to give effect to the security arrangements including the mechanism of a collection account for which the debenture provided.
    - The debenture stipulated that unless and until at some later date the security created by the debenture should become enforceable, or a declared default should occur and the security agent should have issued the company with a written direction to the contrary, all of X's book and other debts on collection were to be paid into the collection account and be freely available to X subject only to a floating charge – that is how the moneys in the suspense account should have been dealt with.
    - The fact that the monies were not so dealt with cannot put D in a better position as against the rights of the preferential creditors than if the terms of the debenture had been duly observed.
- Conclusion: The fact that four months after execution of the debenture, X and D set up and operated an account into which the proceeds of X's book and other debts were to be paid which restricted X from having the free use of those proceeds cannot have the effect of converting a charge over them which, as created, was a floating charge into a fixed charge.

Re Harmony Care Homes (2009)

Case overview

- X operated nursing homes in premises leased from D. X executed a series of debentures in D's favour in respect of the homes, each creating charges over X's book debts. The debentures were expressed to create fixed charges on all uncollected debts and, in the absence of any directions from X, floating charges on the proceeds of the debts upon their receipt. Under the terms of the debentures, X was to pay all book debt realisations into a designated bank account, at which point, absent any directions from D, they would be released from the fixed charge and would stand subject to a floating charge. D argued that the book debt proceeds collected by X were subject a fixed charge, and on that basis that they should receive the proceeds held by the receivers (C) in preference to the preferential creditors. D provided documents to C evidencing that they imposed controls over X's handling of the proceeds of the book debts in relation to one of the debentures (Hygrove House), but no evidence was provided in relation to the debentures of the other homes.
- High Court
- Held: The security granted in respect of the book debt realisations of Hygrove House was intended to be, and was in fact, a fixed charge. However, the evidence provided by D was not sufficient to enable a similar conclusion to be drawn in respect of the other debentures, and so it was not open to the court to conclude that those book debt realisations were also fixed charges in favour of D.

Judgment – Prevezer QC

- On the plain wording of the debentures, the security granted to X is expressed to be a fixed charge on the uncollected debts and a floating charge on the proceeds of the debts on their receipt.
- The court is bound to consider the true nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets at the inception of the debentures, and not simply the way the parties have categorised their relationship.
- The company's ability to deal with its book debt realisations has to be considered at the time the debentures were granted.
    - The legislative purpose of the words "as created" in IA 1986 s40 is to ensure that a charge that is originally created as a floating charge, but which becomes a fixed charge by reason of crystallisation or by notice of conversion does not have the effect of changing a pre-existing floating charge to a fixed charge to the detriment of preferential creditors, as per *Re Brightlife*.
- Where the chargor is permitted until the occurrence of a specified event to remove the charged assets from the security, the charge should, in principle, be categorised as a floating charge.
    - It is irrelevant that some months after the execution of the debenture, the company finds itself restricted from freely using the proceeds of the book debts then and thereafter becoming available, as a result of the setting up of a blocked account, as per *Re Beam Tue Products*.
    - S40 requires the payment of preferential creditors out of the charge which "as created, was a floating charge". If the scheme is in fact that the proceeds of all book and other debts should be subject to a floating charge, then the charge, as created, is a floating charge.
- In the present case, it appears that all book debts collected by X in respect of Hygrove House form the inception of the debenture were subject to D's control and that, unlike the position in *Re Spectrum*, from the outset, the status of D's security over the book debts was specific and ascertained.

    - There was never a moment when X was entitled to remove the charged assets from the security. The effect of the debenture and the arrangements the parties put in place pursuant thereto, was to disentitle X from using the proceeds of the book debts as a source of its cash flow or for any other purpose.
- Accordingly, applying the guidelines laid down in *Agnew* and *Re Spectrum*, the security granted to X in respect of the book debt realisations from Hygrove House was intended to be, and was in fact, a fixed charge; D had the degree of control over the book debts collected in by the company that is requisite for a fixed charge – the charged assets were intended to be, and were in fact, under D's control.
    - However, D has provided insufficient evidence to enable the court to draw a similar conclusion in respect of the security granted over the book debt realisations collected by X from the other homes. The parties may have intended to operate a similar system, but the evidence provided does not go far enough to establish that this in fact occurred.

Gray v G-T-P Group (2010)

Case overview

- D supplied store debit card services to a retailer (X). Sums paid by X's customers using debit cards would be paid into a designated bank account. By a declaration of trust, made between D as trustee and X as the beneficiary, the way in which the monies in the account were to be dealt with was provided for. The declaration stated that the monies would be managed by D on X's behalf and that D would hold the balances from time to time on trust for X. Clause 3 of the agreement allowed D to withdraw from the account sums due to it from X, having deducted any sums properly due from it to X in certain circumstances, such as X's insolvency and a breach by X of the agreement between it and D. X's liquidators (C) applied to the court to resolve a number of issues, including whether the correct legal categorisation of the rights and obligations of the parties.
- High Court
- Held: Clause 3 constituted a floating charge over the account; X could at any stage require D to transfer monies from the account and until one of the events stated in the clause occurred, the monies in the account could be used freely by X.

Judgment – Vos J

- The nature of the rights and obligations that the parties intended to grant to each other in respect of the account is that the account should be used as the conduit through which moneys recovered from the sales will pass from the customers to D and on to X, together with a charge over those moneys in the event that the events in clause 3 come to pass.
    - This is precisely the kind of relationship that their Lordships in *Agnew* and *Re Spectrum* described as constituting as a matter of law a floating charge.
- Whilst no money could be moved out of the account without D taking an administrative step to transfer the money to X, until crystallisation occurred under clause 3 of the declaration of trust, D had no right whatsoever to use the money for any purpose other than in accordance with the declaration of trust.
- The position between the parties was indistinguishable from the position as between a chargor and a bank, where the bank has a floating charge over the bank account. In such a case, the money in the account is (in formal legal terms) a debt owed by the bank to the customer, namely the chargor.

When the chargor presents a cheque for payment out of that account to a third party, the bank has (in theory) a decision to take as to whether to pay the cheque or not to pay the cheque.
    - That is precisely the same as the position in which D found itself when X presented a request for payments to be made pursuant to the declaration of trust agreement. Neither the bank in the example, nor D, had no legal right whatsoever to prevent the payment being made.
- It would be a corruption of the words to suggest that the chargor did not have the ability without the chargee's consent to control and manage the charged assets.
- The key question, as Lord Scott said in *Re Spectrum*, was that the asset, subject to the charge, is not finally appropriated as a security for the payment of the debt until the occurrence of some future event.
    - That is precisely the position under the declaration of trust – until one of the events under clause 3 occurs, then the moneys in the bank account can be used freely by X.
- X could at any stage require D to transfer moneys from the account – in the language used by Lord Scott in *Re Spectrum,* X could draw on the account.
- *Queen's Moat* concerned a proper fixed charge over particular properties and the question of whether, on a proper construction of the terms of the charge, it was possible for the chargor to replace one property with another, with or without paying its value to the chargee.
    - What Lightman J said in that case has no bearing on the present situation, and in any event, the dicta in *Re Spectrum* takes precedence over it.
- Until there was an event of default within clause 3 of the declaration of trust, there was nothing blocked about the account; D had no right to prevent X exhausting and emptying the account by requiring payment to it of the entirety of it.
    - In those circumstances, it is clear that clause 3 constituted a floating charge over the account.

Re Avanti Communications (2023)

Case overview

- An application was brought by the joint administrators (C) of a company (X) for directions, and for a determination of whether certain assets which had been sold by X were secured by fixed or floating charges.
- High Court
- Held: The relevant assets were the subject of a fixed charge since they were income generating assets, which were not themselves part of the circulating capital or fluctuating assets or circulating stock in trade of the company. X had no ability to deal with the assets in the ordinary course of business.

Judgment – Johnson J

- If the chargor is left free to deal with circulating capital, the result is a floating charge. In the case of a charge over a company's circulating capital, one would normally expect that charge to be a floating charge, since otherwise control over the circulating capital given to the chargee by a fixed charge might create commercial problems for the business of the company.
- Lord Scott in *Re Spectrum* does not say that a charge is a fixed charge if and only if the chargor is required to preserve the charged assets, or their permitted substitutes for the benefit of the chargee.

    - Rather, the point he makes is that in a case involving a charge over book debts, where the chargor remains free to remove the charged assets from the security, the charge should, in principle, be categorised as a floating charge.
- The speeches in *Re Spectrum* do not support an absolute approach to the question of what degree of restriction is required for the charge to be fixed. In particular, they do not support the statements of the authors in *Goode & Gullifer* and in *Beale, Bridge & Gullifer* that a total prohibition on disposals is required before a charge can be fixed.
    - The same point emerges equally clearly from Lord Millett's speech in *Agnew*.
- It is helpful (as *Goode & Gullifer* suggests) to look at the range of possibilities as a spectrum, with total freedom of management at one end, and a total prohibition on dealings of any kind at the other end.
    - But it is not the case (contrary to *Goode & Gullifer*) that a charge will only be fixed if it is located at the total prohibition end of the spectrum. The case law supports a more nuanced approach, which depends upon a combination of factors – this was the essential pointed being made by Lord Millett in *Agnew*.
    - It is not sensible or feasible to try to identify the location of the point on the spectrum where a floating charge gives way to a fixed charge, or vice versa.
- In the present case, the charge over the relevant assets was not necessarily floating simply because X had some ability to deal with the assets or some of them. In order to determine whether the charge was fixed or floating, it is necessary to consider all the circumstances of the case.
    - The scheme of restrictions on disposals of the assets gave to the chargees very significant control over the assets. The essential point is that X was not fere to deal with the assets; its freedom to deal with them was materially and significantly limited. X had no ability to deal with the assets in the ordinary course of its business.
    - The assets were income generating assets of X, which were not themselves part of the circulating capital or fluctuating assets or circulating stock in trade of X – they could perfectly well have bene the subject of a fixed charge.
- Conclusion: The charges over the assets were fixed.

The distinction between a charge and a mortgage

Buchler v Talbot (2004)

Case overview

- Joint administrative receivers (C) of a company (X), which had been the subject of a creditors' voluntary liquidation after the receivers were appointed, appealed against a decision that the expenses incurred by X's liquidators (D) in winding up X were payable out of the assets comprised in the debenture holder's crystallised floating charge in priority to the claims of the debenture holder.
- House of Lords
- Held: Appeal allowed; the debenture holder had no interest in the winding up, and the unsecured creditors had no interest in the administrative receivership. Therefore, there was no reason why either group should contribute to the expenses of other.

Judgment – Lord Hoffmann

- EWCA's reasoning: the expenses of winding up are payable out of an insolvent company's funds in priority to the claims of unsecured creditors, whether preferential or otherwise. The claims of

preferential creditors, so far as unpaid out the company's funds, are payable out of the debenture holder's funds. It therefore follows that the expenses of winding up are payable out of the debenture holder's funds.
    - This is hard to follow. If A has priority over B in respect of payment out of the proceeds of Blackacre and B has priority over C in respect of payment out of the proceeds of Whiteacre, why does it follow that A has any right to payment out of Whiteacre?
- The winding up of a company is a form of collective execution by all its creditors against all its available assets. The resolution or order for winding up divests the company of the beneficial interest in its assets; they become a fund which the company thereafter holds in trust to discharge its liabilities.
    - It is a special kind of trust because neither the creditors nor anyone else have a proprietary beneficial interest in the fund. The creditors have only a right to have the assets administered by the liquidator in accordance with the provisions of IA 1986. But the trust applies only to the company's property; it does not affect the proprietary interests of others.
- When a floating charge crystallises, it becomes a fixed charge attaching to all the assets of the company which fall within its terms. Thereafter, the assets subject to the floating charge form a separate fund in which the debenture holder has a proprietary interest – for the purposes of paying off the secured debt, it is his fund.
    - The company has only an equity of redemption; the right to retransfer of the assets when the debt secured by the floating charge has been paid off. It is this equity of redemption which forms part of the fund held on trust for the company's creditors which arises upon a winding up.
- Putting aside any fixed charges if a company is in both administrative receivership and liquidation, its former assets are comprised in two separate funds.
    - Assets which were subject to the floating charge belong beneficially to the debenture holder; the company has only an equity of redemption.
    - Assets which are not subject to the floating charge are held in trust for unsecured creditors.
- In the usual case in which the whole of the company's assets are subject to the floating charge, the company's fund will consist only of the equity of redemption in the debenture holder's fund.

Re BCCI (No8) (1998)

Case overview

- *[See below]*

Judgment – Lord Hoffmann

- EWCA accepted the submission that, by reason of conceptual impossibility, the letter could not operate as a charge over the deposit. But they said it could provide perfectly good security by virtue of the later contractual provisions which limited the right to repayment of the deposit and made what is sometimes called a "flawed asset".
    - His Lordship agrees, and could stop without commenting on the question of whether a charge is conceptually impossible or not. But the issue will be fully explored.
- The doctrine of conceptual impossibility was first propounded by Millett J in *Re Charge Card Services*. Documents purporting to create such charges have been used by banks for many years.
- The reason given by EWCA was that a man cannot have a proprietary interest in a debt or other obligation which he owes another.

    - In order to test this proposition, one needs to identify the normal characteristics of an equitable charge, and then ask to what extent they would be inconsistent with a situation in which the property charged consisted of a debt owed by the beneficiary of a charge.
- The following does not purport to be an exhaustive description of an equitable charge:
- An equitable charge is a species of charge, which is a proprietary interest granted by way of security. Proprietary interests confer rights in rem which, subject to questions of registration and the equitable doctrine of purchaser for value without notice, will be binding upon third parties and unaffected by the insolvency of the owner of the property charged.
- A proprietary interest provided by way of security entitles the holder to resort to the property only for the purpose of satisfying some liability due to him (whether from the person providing the security or a third party) and, whatever the form of the transaction, the owner of the property retains an equity of redemption to have the property restored to him when the liability has been discharged.
    - The method by which the holder of the security will resort to the property will ordinarily involve its sale or, more rarely, the extinction of the equity of redemption by foreclosure.
- A charge is a security interest created without any transfer of title or possession to the beneficiary.
    - An equitable charge can be created by an informal transaction for value (legal charges may require a deed or registration, or both) and over any kind of property (equitable as well as legal) but is subject to the doctrine of purchaser for value without notice applicable to all equitable interests.
- The depositors' right to claim payment of his deposit is a chose in action which the law has always recognised as property. There is no dispute that a charge over such a chose in action can validly be granted to a third party.
- The fact that the beneficiary of a charge was the debtor himself would only be inconsistent with the transaction having some of all of the various features enumerated in the following way: the method by which the property would be realised would differ slightly; instead of the beneficiary of the charge having to claim payment from the debtor, the realisation would take the form of a book entry.
    - In no other respect would the transaction have any consequences different from those which would attach to a charge given to a third party.
    - It would be a proprietary interest in the sense that, subject to questions of registration and purchaser for value without notice, it would be binding upon assignees and a liquidator or trustee in bankruptcy. The depositor would retain an equity of redemption and all the rights which that implies. There would be no merger of interests because the depositor would retain title to the deposit subject only to the bank's charge. The creation of the charge would be consensual and not require any formal assignment or vesting of title in the bank.
    - If all these features can exist despite the fact that the beneficiary of the charge is the debtor, there is no reason why it cannot properly be said that the debtor has a proprietary interest by way of charge over the debt.
- EWCA: The bank could obtain effective security in other ways. If the deposit was made by the principal debtor, it could rely upon contractual rights of set-off or combining accounts or rules of bankruptcy set-off. if the deposit was made by a third party, it could enter into contractual arrangements such as the limitation on the right to withdraw the deposit in this case, thereby making the deposit a "flawed asset".
    - This is all true: it may well be that the security provided in these ways will in most cases be just as good as that provided by a proprietary interest.

- But that is no reason for preventing banks and their customers from creating charges over deposits if, for reasons of their own, they want to do so.
- If such charges are granted by companies over their book debts, they will be registrable under CA 1985 s395 and s396(1)(e).

Crystallisation

Re Manurewa Transport (1971) (New Zealand)

Case overview

- A debenture was executed and registered, and contained a condition whereby the money secured should become immediately due and payable and the charge thereby created should attach and become affixed if, inter alia, the company mortgaged, charged, or encumbered any of its assets contrary to the provisions of the debenture without the prior written consent of the debenture holder. The debenture was a floating charge, and so contained a condition permitting the company (X) to deal with its property and assets in the ordinary course of business, but X was not at liberty to create a mortgage or other charge upon any part thereof in priority to the charge created by the debenture, except with the prior written consent of the debenture holder. A had a mortgage debenture by way of a floating charge over all of X's assets, and B had an instrument by way of security over a specific chattel, namely a truck.
- High Court of New Zealand
- Held: A takes priority; the floating charge had crystalised prior to the registration of the instrument by the company mortgaging or attempting to mortgage the asset by executing the instrument by way of security.

Judgment – Speight J

- It is of the essence of a floating charge that usually there is power for that asset to be dealt with in the ordinary course of business, for this is the purpose of the operation. But that does not mean that the charge does not "relate" in some way to the asset, for it if it did not, the asset would not be charged at all.
    - The freedom to deal in the ordinary course of business is not because there is no charge upon the asset, but because it is a type of charge which permits such dealing notwithstanding the charge.
- Doubtless most floating charges permit dealing in the ordinary course of business, but freedom to do so varies in accordance with the terms. It would defeat the ordinary purpose of the floating charge to hold otherwise.
    - All that Chattels Transfer Act 1924 s4(2) says is that once registered upon a chattel, one is bound by notice of what the security does or does not provide.
- In the present case, if there were no restriction on charging, then B would obtain priority, not because they had no notice, but because although a general charge it had not yet attached to the particular asset so that it was no longer available to be further charged.
- This does not mean to say the debenture was not upon the asset in the first place. A security cannot be in vacuo, it must relate to something; it is not merely an unsupported promise by the company to pay. It is a promise backed up by making the assets subject to powers of the debenture holder.

    - In consideration of money advanced, the grantor surrenders some of his property rights to deal with his assets, and the grantee acquires certain property rights (albeit limited to a greater or lesser extent) over the asset.
- Although the security does not attach specifically (for to do so would be to defeat its purpose), it covers the assets but with power of automatic relinquishment, provided they are dealt with in a way authorised by the debenture (i.e., in the ordinary course of business).
- In the present case, B had constructive notice off the contents of the security and its prohibition against charging the assets, including the truck, and so A takes priority.
    - However, there is another ground which defeats B's security, namely the fact that the floating charge had in fact crystallised prior to the completion, and certainly prior to the registration, of B's instrument by way of security.
- *Evans v Rival Granite* is usually cited for the proposition that crystallisation does not take place until the debenture holders intervene.
    - This proposition is erroneous.
    - The debenture in *Evans* was a much simpler document than the one in the present case. Further, the question of crystallisation only arose in *Evans* in relation to a demand by the debenture holder for payment which was not an act under which the terms of the debenture there crystallised it.
- Crystallisation may, in certain circumstances, be self-generated or at least debtor generated. Authority for this point can be found in Buckley LJ's judgment in *Evans*.
- A floating charge is not a word of art; it is a description for a type of security contained in a document which may provide a variety of circumstances whereupon crystallisation takes place.
    - In the present case, to mortgage or attempt to mortgage an asset was one such event. So, when X executed the document to mortgage the asset to B, within the terms of the prohibition of X's agreement with A, A's security thereupon crystallised.
    - Priority must be given to the holder of what was now a specific charge earlier in time and duly registered, namely A.

Re Woodroffes (1986)

Case overview

- X created a debenture in favour of a bank (A), secured by a fixed and first floating charge, whereby no further charge was to be created without A's consent. A was empowered by notice to convert the floating charge into a specific charge in relation to specified assets, and the debenture was registered without A's consent. X created a second debenture, secured by a second floating charge in favour of B, to rank immediately after the first charge. B was empowered to convert the charge into a specific charge in relation to all the company's undertakings and asstes, and the debenture was registered. Later, B gave notice to convert the charge; a few days later, A served a formal demand for repayment and appointed receivers. There were insufficient assets to repay all of X's creditors.
- High Court
- Held: A had priority to the extent of B's charge. There was no ground for implying that A's charge crystallised automatically when B's charge crystallised. The cessation of X's business caused the automatic crystallisation of any floating charge, but there was insufficient evidence that X had ceased to carry on business prior to A's demand.

Judgment – Nourse J

- The basic question in dispute is whether, although it did not itself give notice of conversion, A's floating charge crystallised when B gave notice, or whether it did not crystallise until A served its demand.
- It is not clear how the determination of B's licence can in some way work a determination of A's, or produce the effect that A had had its charge crystallised over its head and possibly contrary to its own wishes.
    - The debenture agreement between A and X contained a prohibition against creating any subsequent charge without consent, yet it did not provide for A's floating charge to crystallise either on the creation or crystallisation of a subsequent charge.
    - Neither is there any ground for an implication of such a term into the agreement.
- This case does not concern express automatic crystallisation. In any event, cases on crystallisation on the appointment of a receiver would not necessarily be conclusive in regard to crystallisation on the happening of some other event.
- There is a question of whether the cessation of the company's business causes an automatic crystallisation of a floating charge. There is no decision directly in point, yet the authorities disclose a uniform assumption in favour of crystallisation.
    - The most authoritative assumption that crystallisation takes place on a cessation of business is that of Moulton LJ in *Evans v Rival Granite*.
    - This assumption correctly represents the law.
- The material event is cessation of business, not (if it is even something different) cessation of being a going concern.
- Crystallisation on cessation of business is in accordance with the essential nature of a floating charge. The thinking behind the creation of a floating charge has always been a recognition that a fixed charge on the whole undertaking and assets of the company would paralyse it and prevent it from carrying on its business.
    - On the other hand, it is a mistake to think that the chargee has no remedy while the charge is still floating: he can always intervene and obtain an injunction to prevent the company from dealing with its assets otherwise then in the ordinary course of its business.
- A cessation of business necessarily puts an end to the company's dealings with its assets. That which kept the charge hovering has then been released, and the force of gravity causes it to settle and fasten on the subject of the charge within its reach and grasp. The paralysis, while it may still be unwelcome, can no longer be resisted.
- In the present case, on the balance of probabilities, X ceased business before A served its demand. Therefore, A's charge crystallised on the day it served its demand.

Re Brightlife (1987)

- *[See above]*

Can a security be taken over the debtor's credit balance with the creditor?

Re BCCI (No8) (1998)

Case overview

- X made loans to A and B, secured by deposits made with the bank. The security document purported to grant X a proprietary interest over the deposits by way of a charge, and provided that the deposits would only be repayable if all the liabilities of the principal debtors had been met, although there was no promise by the depositor to pay sums due from the debtor to the bank. The debtors and depositors appealed against a decision that X's liquidators were entitled to recover the full amount due under the loans to A and B, without being required to set off the loans against the deposits.
- House of Lords
- Held: Appeal dismissed; the security document simply gave rise to a charge over the deposit and a contractual restriction against withdrawal of the deposit, and could not be interpreted as creating a personal and several obligation. No cross claim for the purposes of set-off arose. In any case, the transaction created effective security in the form of the contractual limitation on the right to repayment of the deposit, which rendered it a flawed asset.
    - EWCA was wrong to find that the security document did not create a charge over the deposit in favour of X, as the fact that the beneficiary of the charge was a debtor was immaterial.

Judgment – Lord Hoffmann

- The general rule is that a secured creditor is not obliged to resort to his security; he can claim repayment by the debtor personally and leave the security alone. If the creditor recovers judgment against the debtor and the debt is paid, the security is realised – this will be the consequence of payment. The security created by the letter of charge will be discharged and the deposit left unencumbered.
- In bankruptcy set-off, under IA 1986 r4.90, when its conditions are satisfied, a set-off is treated as having taken place automatically on the bankruptcy date. The original claims are extinguished and only the net balance remains owing one way or the other (*Stein v Blake*).
    - The effect is to allow the debt which the insolvent company owes to the creditor to be used as security for its debt to him. The creditor is exposed to insolvency risk only for the net balance.
- Set-off is strictly limited to mutual claims existing at the bankruptcy date. There can be no set-off of claims by third parties, even with their consent – to do so would be to allow parties by agreement to subvert the fundamental principle of pari passu distribution of the insolvent company's assets.
- In the present case, the depositor is a separate personality to the borrower, and this was an essential element in the structure which the parties chose to adopt for the borrowing.
- EWCA accepted the submission that, by reason of conceptual impossibility, the letter could not operate as a charge over the deposit. But they said it could provide perfectly good security by virtue of the later contractual provisions which limited the right to repayment of the deposit and made what is sometimes called a "flawed asset".
    - His Lordship agrees, and could stop without commenting on the question of whether a charge is conceptually impossible or not. But the issue will be fully explored.
- OBITER:

- The doctrine of conceptual impossibility was first propounded by Millett J in *Re Charge Card Services*. Documents purporting to create such charges have been used by banks for many years.
- The reason given by EWCA was that a man cannot have a proprietary interest in a debt or other obligation which he owes another.
    - In order to test this proposition, one needs to identify the normal characteristics of an equitable charge, and then ask to what extent they would be inconsistent with a situation in which the property charged consisted of a debt owed by the beneficiary of a charge.
- The following does not purport to be an exhaustive description of an equitable charge:
- An equitable charge is a species of charge, which is a proprietary interest granted by way of security. Proprietary interests confer rights in rem which, subject to questions of registration and the equitable doctrine of purchaser for value without notice, will be binding upon third parties and unaffected by the insolvency of the owner of the property charged.
- A proprietary interest provided by way of security entitles the holder to resort to the property only for the purpose of satisfying some liability due to him (whether from the person providing the security or a third party) and, whatever the form of the transaction, the owner of the property retains an equity of redemption to have the property restored to him when the liability has been discharged.
    - The method by which the holder of the security will resort to the property will ordinarily involve its sale or, more rarely, the extinction of the equity of redemption by foreclosure.
- A charge is a security interest created without any transfer of title or possession to the beneficiary.
    - An equitable charge can be created by an informal transaction for value (legal charges may require a deed or registration, or both) and over any kind of property (equitable as well as legal) but is subject to the doctrine of purchaser for value without notice applicable to all equitable interests.
- The depositors' right to claim payment of his deposit is a chose in action which the law has always recognised as property. There is no dispute that a charge over such a chose in action can validly be granted to a third party.
- The fact that the beneficiary of a charge was the debtor himself would only be inconsistent with the transaction having some of all of the various features enumerated in the following way: the method by which the property would be realised would differ slightly; instead of the beneficiary of the charge having to claim payment from the debtor, the realisation would take the form of a book entry.
    - In no other respect would the transaction have any consequences different from those which would attach to a charge given to a third party.
    - It would be a proprietary interest in the sense that, subject to questions of registration and purchaser for value without notice, it would be binding upon assignees and a liquidator or trustee in bankruptcy. The depositor would retain an equity of redemption and all the rights which that implies. There would be no merger of interests because the depositor would retain title to the deposit subject only to the bank's charge. The creation of the charge would be consensual and not require any formal assignment or vesting of title in the bank.
    - If all these features can exist despite the fact that the beneficiary of the charge is the debtor, there is no reason why it cannot properly be said that the debtor has a proprietary interest by way of charge over the debt.
- EWCA: The bank could obtain effective security in other ways. If the deposit was made by the principal debtor, it could rely upon contractual rights of set-off or combining accounts or rules of bankruptcy set-off. if the deposit was made by a third party, it could enter into contractual

arrangements such as the limitation on the right to withdraw the deposit in this case, thereby making the deposit a "flawed asset".
    - This is all true: it may well be that the security provided in these ways will in most cases be just as good as that provided by a proprietary interest.
    - But that is no reason for preventing banks and their customers from creating charges over deposits if, for reasons of their own, they want to do so.
    - If such charges are granted by companies over their book debts, they will be registrable under CA 1985 s395 and s396(1)(e).
- Since *Re Charge Card,* statutes have been passed in several offshore banking jurisdictions to reverse its effect. Those statutes say that the relevant charge can be granted – if the trick can be done as easily as this, it is hard to see where the conceptual impossibility is to be found.
- Where there is no threat to the consistency of the law or objection of public policy, the courts should be very slow to declare a practice of the commercial community to be conceptually impossible.
    - Legal concepts like "proprietary interest" and "charge" are no more than labels given to clusters of related and self-consistent rules of law. Such concepts do not have a life of their own from which the rules are inexorably derived.
- In the present case, the letter was effective to do what it purported to do, namely, to create charge over the deposit in favour of X.

Registration and priority of security interests

Charges subsequent to a floating charge

Wheatley v Haigh Moor (1885)

Case overview

- Directors of a company (D) with power to borrow or create mortgages or issue debentures, issued debentures purporting to charge the undertaking and the hereditaments and effects of the company (D) with the payment of sums, to the intent that the debentures might rank equally as a first charge on the undertaking, hereditaments, and effects of the company. Afterwards, in consideration of £4000, they advanced and applied to the purposes of the company, deposited with C the title deeds of the colliery the property of the company, and by a written agreement charged the property comprised in the deeds with the payment to C of £4000 and interest.
- High Court
- Held: The mortgage to C had priority over the debentures.

Judgment – North J

- The parties intended that the parties holding the debentures should have the right of coming forward when the money was payable to them, and that they had a first charge upon the property belonging to the company at that time, prior to any other charge to be set up in the same way against it – i.e., if the money became payable, not only by the period of the loan elapsing but (for instance) by winding-up, it was to be a first charge as against the general creditors of the company.
    - The words "first charge" cannot mean a charge which shall prevent any person whatever, under any circumstances, from receiving any part of the assets of the company, even if his

claim arose in the proper and bona fide exercise of the power of carrying on the undertaking.

- The debenture is intended to be a general floating security over all the property of the company, as it exists at the time when it is to be put in force. It is not intended to prevent and has not the effect of in any way preventing, the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course.
    - Inasmuch as that in the ordinary course of business and for the purpose of the business this mortgage was made, it is a good mortgage and charge upon the property comprised in it and is not subject to the claim created by the debentures.
- The first charge referred to in the debentures is fully satisfied by being the first charge against the general property of the company at the time when the claim under the debentures arises and can have effect given to it.
- C's charge takes priority to the debentures.

English & Scottish Mercantile Investments v Brunton (1892)

Case overview

- X issued debentures charging all its property both present and future, and containing a condition that the company (X) should not be at liberty to create any mortgage or charge in priority to the debentures, to D. Subsequently, X obtained a loan from C on the security of an assignment to them of its interest in moneys due from an insurance company. When the loan and assignment were effected, C's solicitor (who negotiated the matter for C) knew that debentures had been issued, but did not know in what form they were issued, and having been misled by the managing director of X into believing there was nothing in the debentures to affect C's security, he did not require to see the form. C gave notice of the assignment to the insurance company, and subsequently D gave notice to the insurance company of the prior charge created by the debentures.
- Court of Appeal
- Held: Claim successful; C was not affected with constructive notice of the restrictive clause in the debentures and therefore, the assignment gave them a charge upon the insurance moneys in priority to D.

Judgment – Lord Esher MR

- The doctrine of constructive notice is wholly equitable; it is not known to the common law. However, there is an inference of fact known to common law which comes somewhat near it: when a man has statements made to him, or has knowledge of facts, which do not expressly tell him of something which is against him, and he abstains from making further inquiry because he knows what the result would be (i.e., he wilfully shuts his eyes), then judges are in the habit of telling juries that they may infer that he did not know what was against him.
    - There is no question of constructive notice or knowledge involved in that inference; it is actual knowledge which is inferred.
- What C's solicitor wanted to know, and what he was really asking, was whether there was anything in the debentures which had been issued to interfere with the validity of the mortgage he proposed to take from X. X gave an answer which put C's solicitor off further inquiry and led him to believe that there was nothing in the debentures which would affect the mortgage.
- The doctrine of constructive notice should not be extended.

- There is a distinction, drawn by Sir Jessel MR in *Patman v Harland*, between deeds which obviously must affect the property, and deeds which may or may not affect it.
    - If the case is brought within the first category, and a person is told that the deed does not affect the property, he must look at the deed. If he does not look at it, he will be taken to have had constructive notice of its contents.
    - If the case is brought within the second category, and the person is told that the deed does not affect the property, he may take that statement and cannot be held to have had constructive notice of its contents.
- So, the question is, were the debentures such as would necessarily affect C's title the mortgage, or were they such as might or might not affect it? There are certainly a class of debentures issued by companies which would not affect the mortgage at all.
    - Therefore, the only notice which C had was notice of documents which might or might not affect their title to the mortgage. C's solicitor asked if they did so affect and was told they did not. Therefore, constructive notice of the contents of the debentures cannot be imposed in equity upon C.

<u>Judgment – Bowen LJ</u>

- There are three usual forms of debentures: (i) a simple acknowledgment, under seal, of the debt; (ii) an instrument acknowledging the debt, and charging the property of the company with repayment; and (iii) an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving any prior charge.
    - In class (i), there is nothing to charge the property of the company at all.
    - Class (ii) is a very common form of debenture.
    - Class (iii) is the form which the debentures took in the present case.
- In the present case, C's solicitor did not know which form the debentures took. He must be taken to have known that there were debentures which might charge the property of the company, because he must have known that class (ii) was commonly used. However, he did not know that there was anything in the debentures, in the form of class (iii), which could prejudice his clients' security – classes (i) and (ii) would not prejudice C's security.
    - C's solicitor did not know of the existence of the class (iii) debenture, and so he couched his inquiry, according to his limited knowledge and according to his experience, in a manner which, taken by the card, asked the wrong question, and he was answered by the card. He was answered in a way which, treating the question as asked form that point of view, gave him to understand that there was nothing outstanding which could affect the security.
- Agree with Lord Esher MR that the doctrine of constructive notice should not be extended.
- There are two questions: (i) whether C's solicitor had notice of documents which might or might not affect the property of the company; and (ii) whether he was told that in fact they did not affected it, and acted fairly in the transaction, and believed the representation to be true.
    - C's solicitor did not know that the debentures affected his clients' security, or necessarily or probably would do so. The answer given to him reasonably convinced him that there was no charge upon X's property which could affect C's security.
    - In any event, it is certain that C's solicitor was misled as to whether the right created by X's debentures was one which would affect the property mortgaged to C.
- The equitable doctrine of constructive notice does not apply. C's mortgage takes priority.

Re Benjamin Cope (1914)

Case overview

- A company (X) created a series of debentures over the company's undertaking and all its property both present and future, subject to any mortgages affecting at the time or which may thereafter affect the same or any part thereof. The debentures were also stated to rank pari passu without regard to the date of issue, but notwithstanding the charge, X was permitted, in the course of its business and for the purpose of carrying on the same, to deal with its property as it may think fit, and in particular may mortgage and sell the same or any part thereof. Years later, X created a second series of debentures, in the same form as the first series, stating that the debentures of both the first and second series, shall rank pari passu without regard to the date thereof.
- High Court
- Held: The second debentures did not rank pari passu with the first debentures, but after them.

Judgment – Sargant J

- Whether the first and second series of debentures rank pari passu depends on the answer to two questions: (i) whether, in general, a company has power to create a second floating charge ranking pari passu with a first floating charge; and (ii) whether in this particular case, the words of the first debentures are sufficient to alter the general rule.
- It would not have been incompatible with the floating charge if X, while left at liberty to sell and deal with their assets in most ways, would have been precluded from making specific mortgages or charges of parts of their property in priority to, or competition with, the floating charge.
    - However, the law was definitely settled to the contrary in *Wheatley v Haigh Moor*.
- Since *Wheatley v Haigh Moor*, it has been recognised that a floating security can be displaced by a specific legal or equitable mortgage.
    - The question is whether it follows that the floating security can be displaced by a subsequent floating charge in the absence of words in the first charge authorising such a displacement?
    - Laying down the law in this way would be acting contrary to all professional and commercial views on the subject, and it must be remembered that these debentures are commercial instruments.
- It would be as incompatible with X's bargain with the first debenture holders to put their debentures behind, or on the same footing as, subsequent debentures giving a charge of the same character, as if the debentures had constituted a specific charge and it were then attempted to create a subsequent specific charge ranking pari passu with them or in priority to them.
- The first debentures have priority over the second debentures.

Re Automatic Bottle Makers (1926)

Case overview

- A debenture trust deed created a general floating charge over all of X's undertaking and assets both present and future, but reserved to X the power to create in priority to that charge, such mortgages or charges as it should think proper in specific circumstances. In pursuance of the power, and in the course and for the purposes of its business, X raised additional funds and secured payment thereof by charging all the before-mentioned documents, material and stock, both present and future, by way of a floating security to rank in priority to the floating charge created by the trust deed.
- Court of Appeal
- Held: The second charge was valid and took priority to the first charge; the power reserved to X in the first charge, except as to subject matter and purpose, was unlimited and enabled X to choose the form a floating charge, if required.

Judgment – Pollock MR

- The first debenture gave X liberty to make such mortgages, charges, or incumbrances as it deems proper. These words cannot be read as restricting X's discretion to specific charges only, as opposed to floating charges. The whole purpose of the clause is to give latitude to X to carry on its business.
    - Restricting the exception to specific charges on specific goods lays down a narrow course of X to follow which would deprive it surely and increasingly of any means to raise finance for its source of power and primary needs.
- The present case is to be differentiated from *Re Benjamin Cope o*n the basis that there was not in that case an exception in respect of particular securities, but the charge was upon the same securities as those already subject to the earlier debenture.
    - In the present case, the clause in the trust deed appears to have been carefully drawn to meet the necessities of the company within limits allowed by law.

Judgment – Warrington LJ

- "In the ordinary course of the business of the company" is assumed to be construed in a commercial sense, namely in the ordinary course of carrying on the manufacturing and commercial transactions the object of its incorporation.
- It is well settled that by creating a charge upon its assets generally by way of floating security, the company is not (in the absence of any stipulation to the contrary) prohibited from creating specific charges on specific portions of its assets in the ordinary course of business, since otherwise it would be prevented from effectually carrying on that business the carrying on of which was contemplated by the parties to the security.
    - The clauses in the first debenture trust deed have the effect of excluding this rule of law, so far as mortgages or charges are concerned, except as provided in the clause, and thus to allow (and allow only) in priority to or pari passu with the debentures, created in accordance with such provisions.
- In the present case, the second charge granted is within the clause. Within the clause, the authority given to X is unlimited, and there is no good reason (in the absence of express words to that effect) to limit the authority.
    - It is true that the commercial documents cannot be made the subject of a floating security because they have to be actually deposited, but there is no reason why, by construction, the same disability should extend to the other subject matters which are in themselves exempt from it.

    - There is no reason to be found in the clause for any limitation authorising only securities as would have been allowed under the general rules relating to floating securities. The parties excluded the general rule so far as charges are concerned, and were making a special bargain.
- There is no authority for the proposition that no floating charge, though upon a part only of the assets, would be allowed under the general law.
    - In *Re Benjamin Cope,* it was the fact that the charge in question covered the whole of the property included in the original charge which prevented it from ranking pari passu with the latter charge.

Judgment – Sargant LJ

- The case of *Re Benjamin Cope* was rightly decided. But the facts there were very different: there, the original charge was on the whole undertaking and property for the time being of the company, and the reservation of a power to mortgage was in quite general terms. It was held there that such a power could not have been intended to authorise a competing charge upon the entirety of the property comprised in the earlier charge.
    - In the present case, the reservation of the power to mortgage is precise and specific in its terms and extends only to certain particular classes of the property of the company.

Re Household Products (1981)

Case overview

- The case concerned a motion to determine the priority of two floating charge debentures. D's floating charge was created, through the execution of the debenture, prior to C's floating charge, but C's charge crystallised by the appointment of a receiver, whilst D's charge was still floating.
- Ontario High Court of Justice (Canada)
- Held: Claim unsuccessful; D's floating charge took priority, as it was created first in time, notwithstanding that it was still a floating charge.
- Where two floating charge debentures are executed by a corporation, both duly registered, the debenture earlier in execution and registration takes priority notwithstanding that the later debenture is first crystallised by the appointment of a receiver. Although, by the presumed intention of the parties to the earlier debenture, a charge on specific property would take priority over the debenture, it would be contrary to that intention to contemplate its subordination to a subsequent floating charge.

Judgment – Hughes J

- C argued that their debenture, though later in execution and registration than the D's debenture, enjoys priority because its floating charge was crystallised by the appointment of a receiver, whereas that of the bank is still floating. On the other hand, D relies on the equitable first in time rule.
- Qui prior est tempore potior est jure must prevail in this case over the contention that anyone who appoints a receiver can turn a floating charge into something crystallised which gives it priority over another floating charge earlier created.
- The act of crystallisation does not alter the nature of the interest held by a subsequent debenture holder so as to give priority over a predecessor, where the interest in both cases is bestowed by a floating charge. The ordinary rule of equity must prevail, and the first debenture takes priority.

Circularity problems

Re Woodroffes (1986)

Case overview

- X created a debenture in favour of a bank (A), secured by a fixed and first floating charge, whereby no further charge was to be created without A's consent. A was empowered by notice to convert the floating charge into a specific charge in relation to specified assets, and the debenture was registered without A's consent. X created a second debenture, secured by a second floating charge in favour of B, to rank immediately after the first charge. B was empowered to convert the charge into a specific charge in relation to all the company's undertakings and assets, and the debenture was registered. Later, B gave notice to convert the charge; a few days later, A served a formal demand for repayment and appointed receivers. There were insufficient assets to repay all of X's creditors.
- High Court
- Held: A had priority to the extent of B's charge. There was no ground for implying that A's charge crystallised automatically when B's charge crystallised. The cessation of X's business caused the automatic crystallisation of any floating charge, but there was insufficient evidence that X had ceased to carry on business prior to A's demand.

Judgment – Nourse J

- The basic question in dispute is whether, although it did not itself give notice of conversion, A's floating charge crystallised when B gave notice, or whether it did not crystallise until A served its demand.
- It is not clear how the determination of B's licence can in some way work a determination of A's, or produce the effect that A had had its charge crystallised over its head and possibly contrary to its own wishes.
    - The debenture agreement between A and X contained a prohibition against creating any subsequent charge without consent, yet it did not provide for A's floating charge to crystallise either on the creation or crystallisation of a subsequent charge.
    - Neither is there any ground for an implication of such a term into the agreement.
- This case does not concern express automatic crystallisation. In any event, cases on crystallisation on the appointment of a receiver would not necessarily be conclusive in regard to crystallisation on the happening of some other event.
- There is a question of whether the cessation of the company's business causes an automatic crystallisation of a floating charge. There is no decision directly in point, yet the authorities disclose a uniform assumption in favour of crystallisation.
    - The most authoritative assumption that crystallisation takes place on a cessation of business is that of Moulton LJ in *Evans v Rival Granite*.
    - This assumption correctly represents the law.
- The material event is cessation of business, not (if it is even something different) cessation of being a going concern.
- Crystallisation on cessation of business is in accordance with the essential nature of a floating charge. The thinking behind the creation of a floating charge has always been a recognition that a fixed charge on the whole undertaking and assets of the company would paralyse it and prevent it from carrying on its business.

    - On the other hand, it is a mistake to think that the chargee has no remedy while the charge is still floating: he can always intervene and obtain an injunction to prevent the company from dealing with its assets otherwise then in the ordinary course of its business.
- A cessation of business necessarily puts an end to the company's dealings with its assets. That which kept the charge hovering has then been released, and the force of gravity causes it to settle and fasten on the subject of the charge within its reach and grasp. The paralysis, while it may still be unwelcome, can no longer be resisted.
- In the present case, on the balance of probabilities, X ceased business before A served its demand. Therefore, A's charge crystallised on the day it served its demand.

Re Portbase Clothing (1993)

Case overview

- X granted a first debenture to a bank (A), creating fixed and floating charges over all its property, as security for all moneys and liabilities then or at any time thereafter owing by it to the bank; a second debenture to two directors (B), secured by a floating charge, in respect of a loan by them; and a third debenture, creating fixed and floating charges similar to those in the first, to the trustees of its parent company's pension fund (C), in respect of a loan for the purpose of reducing its indebtedness to the bank. Simultaneously with the third debenture, a deed of priority was executed with all the parties which provided for the postponement of the first and second debentures to the third. X was wound up voluntarily by creditors, and its liabilities included sums due to HMRC as preferential creditors. The liquidator sought the determination of the court on numerous issues of priority.
- High Court
- Held: The deed of priority made A's debenture subject to C's floating charge and consequently, on crystallisation of C's floating charge, the book and other debts of X fell to be applied in satisfaction of the debt secured by C's charge before they could be applied in satisfaction of the debt to A. However, the claims of the preferential creditors had priority over those of C.

Judgment – Chadwick J

- C's debenture contains no provision restricting the use which X might make of any balance which might from time to time stand to the credit of its account with the bank. The purpose of the loan was to enable the company to continue trading; it could not sensibly have been contemplated that C's consent would be required to the operation of X's bank account in the ordinary course of business.
    - To hold that C's debenture succeeded in creating a fixed security over the book and other debts, would require accepting that the reasoning set out by Hoffmann J in *Re Brightlife* was wrong.
    - C's debenture created a floating charge on the company's book and other debts.
- A's debenture created a fixed charge over book and other debts.
- X's assets available for payment of general creditors are insufficient to meet the preferential debts; there are no assets available for payment of unsecured creditors. On the basis that C's debenture created a floating charge over the company's book and other debts, C are holders of a debenture secured by a floating charge; it is irrelevant that C's floating charge crystallised prior to liquidation.

    - In these circumstances, IA 1986 s175(2)(b) requires that the preferential debts have priority over the claims of C, and shall be paid accordingly out of any property comprised in or subject to that charge.
- Nevertheless, but for the deed of priority, the book and other debts of X would not be available to satisfy the preferential debts. That property would be taken out of s175(2)(b) by the prior fixed charge in favour of A, since the property out of which the preferential debts are to be paid does not include property or assets which are never payable to the chargee (or any receiver for the chargee) as holder of the floating charge, as per *Re Lewis Merthyr*.
    - The basis for this rule is that, where property is comprised in a prior fixed charge, it is not that property, but only the equity of redemption in that property, that can be said to be comprised in or subject to the subsequent floating charge.
- The position immediately before the execution of the deed of priority was that, in relation to any asset subject to the fixed charges, A's charge had priority over C's charge.
- A and C were entitled, by agreement between them, to alter the priorities of their respective charges, as per *Cheah v Equiticorp.* This was the effect of the deed of priority.
    - The parties agreed that, instead of the proceeds of realisation of any charged asset being applied to the satisfaction of their respective secured debts in the order which would otherwise be determined by the terms of their charges and the dates upon which they were created, those proceeds should be applied first in payment of the moneys secured by C.
    - The effect is that A's debenture has been made subject to C's debenture.
- It follows that a fixed charge in A's debenture became subject to a floating charge in C's debenture. So, upon crystallisation of the floating charge in C's debenture, the book and other debts of X must be applied in satisfaction of the debt secured by that charge before they can be applied in satisfaction of A's debt.
- The principle to be derived from the authorities is that a holder of a subsequent fixed charge which has been made subject to a prior floating charge, either by express provisions in the fixed charge itself or by a restriction in the floating charge of which the holder of the fixed charge had notice, takes his security upon terms that, if before the charge property has been realised under the fixed charge events occur which cause the floating charge to crystallise, then the proceeds of realisation must be paid to the holder of the floating charge. The holder of the fixed charge can have no claim upon those proceeds until the claims under the floating charge have bene paid out.
    - In those circumstances, if the floating charge has crystallised prior to liquidation, the position at the time when IA 1986 s175(2)(b) comes to be applied will be that the property in relation to which the successive charges have been created will be property comprised in, or subject to, the floating charge for the purpose of that subsection.
- The property will not be taken out of s175(2)(b) by the rule in *Re Lewis Merthyr*, because: (i) the charged property, or the proceeds of realisation, are payable to the floating chargee and not to the fixed chargee; (ii) additionally or alternatively, the property subject to the floating charge is the charged property itself and not an equity of redemption associated with the fixed charge.
- If, upon a true analysis, the property in relation to which the successive charges have been created is not taken out of s175(2)(b) by the rule in *Re Lewis Merthyr,* then it must be applied in payment of the preferential debts. The existence of the subsequent fixed charge is immaterial.
- In *Re Woodroffes,* Nourse J was not asked to decide the point considered in the present case, and the judge simply recorded, as a consequence which would follow from findings which he was about to make on issues, a result which he thought was not in issue.
- The issue of circularity, addressed by Professor Goode in academic writing and in argument before Nourse J in *Re Woodroffes,* can be described in the following way.

    - The elements which give rise to the problem are: (i) that a floating chargee (F) has priority over a fixed chargee (C) by virtue of the agreement between them; (ii) that C has priority over preferential creditors (P); and (iii) that the preferential claims have priority over F under the statute.
    - Professor Goode's view is that the problem can be solved through the principle of subrogation: F is treated as subrogated to C to the extent necessary to give effect to the subordination agreement. That is to say, F will collect from the liquidator in right of C the amount due to C, or such part of that amount as is necessary to satisfy F's claim. As regards any balance due to F, this is postponed to the claims of P under s172(2)(b).
- In circumstances where F has priority over C independently of any agreement between them (so that element (i) is not present), the solution put forward by Goode is not apposite. The holder of a fixed charge is entitled to be paid in priority to unsecured creditors (including preferential creditors) out of the assets which are subject to, and are available to satisfy, his fixed charge. But if the assets subject to the fixed charge are also subject to a prior floating charge, so that they are not taken out of s175(2)(b) by the rule in *Re Lewis Merthyr,* then the assets available to satisfy the fixed charge will be those assets remaining after, inter alia, the preferential creditors have been paid.
- The assets subject to the fixed charge will not be taken out of s175(2)(b) in circumstances in which the fixed charge, as created, is necessarily subject to the floating charge.
    - In these circumstances, it would be wrong to regard the holder of the fixed charge as having a priority over the preferential creditors in relation to the assets which are subject to the floating charge.
    - Accordingly, element (ii) in Goode's circle is missing.
- Element (i) was not present in *Re Woodroffes*; A's floating charge had priority over B's charge since it was first in time, and because it contained an express prohibition (of which B had notice) against the creation of any subsequent charge without A's consent, which was never obtained. There was no agreement between A and B.
    - In those circumstances, B, as the holder of a fixed charge, could not claim to be paid out of the assets over which the bank's floating charge subsequently crystallised until the claims under the floating charge had been satisfied.
    - It follows that B's fixed charge could not properly be said, in the circumstances which existed at the relevant time, to have priority over the preferential creditors.
- In the present case, C have priority over A by virtue of an agreement between them. But, if the effect of the deed of priority is that, as between A and C, A's debenture must be treated as if it had been expressed to be subject to C's debenture, then element (ii) of Goode's problem is not present.
    - This is because, if the deed of priority does have that effect, A does not become entitled to payment out of the proceeds of realisation of any asset until after the debt secured by C's floating charge has been satisfied, and the assets available to satisfy that debt are assets to which the provisions of s175(2)(b) apply.
- It is possible for two secured creditors to enter into an arrangement by which they exchanged the rights under their respective securities. In particular, it would be open to a creditor secured by a prior fixed charge to assign to the holder of a subsequent floating charge some or all of his rights to receive payment under the fixed charge.
    - It may be that this was an arrangement of the kind Goode had in mind, but it is not the arrangement made in the present case. The deed of priority does not purport to effect any assignment or exchange of proprietary rights; it merely provides (by way of contract) for the order in which the proceeds of realisation of the charged assets shall be applied in satisfaction of the secured debts.

    - C do not collect from the liquidator the proceeds of assets subject to their floating charge in right of A; they collect those proceeds because the assets were subject to their floating charge. They collect those proceeds in priority to A because they have agreed with A that A's claim to those assets will be subject to C's claim.
- The claims of the preferential creditors to be paid out of the proceeds of the realised book and other debts have priority over the claims thereto of C and of the receiver who C appointed.

Characterisation

General approach

Re George Inglefield (1933)

Case overview

- X went into voluntary liquidation, and its assets were insufficient for the payment of its creditors in full. A large proportion of its business consisted in letting out furniture on hire-purchase agreements, and for financing these agreements, the company entered into agreements with a discount company. The issue was whether the assignments of goods and hire-purchase agreements were mortgages / charges of book debts.
- Court of Appeal
- Held: The agreements entered into between the dealer and the discount company were for an out-and-out sale, and so the assignments made thereunder did not require registration.

Judgment – Lord Hanworth MR

- The argument presented by the liquidator was that, by whatever method or documents the transaction purported to be carried out, it really was a transaction of charge to the discount company and of a loan to X, upon a security which X placed under the dominion of the discount company, while retaining what amounts to an equity of redemption. It is therefore argued that it was not an absolute assignment to the discount company, but in truth and in effect, a charge.
- It is old and plain law that in transactions of this sort, the court must consider whether or not the documents really mask the true transaction. If they do merely mask the transaction, the court must have regard to the true position, in substance and in fact, and for this purpose tear away the mask or cloak that has been put upon the real transaction.
- In the present case, there is no clause in the agreement between X and the discount company (D) which appears to reserve to X, any reversion or equity of redemption. On a careful examination of the clauses of the agreement, they seem consistent only with an out-and-out assignment to D.
    - One of the clauses amounts to stating that when D have been paid more than they are entitled to receive under the assignment to them of the benefit of the hire-purchase agreements, they will pay the excess to X. Nothing in this clause provides sufficient ground for treating the assignment as a charge.
- The documents must be considered as they stand, treated fairly, and approached without a sinister desire to impute to them something which they do not contain.
- In the present case, the documents provide for a hiring in the *Helby v Matthews* form to the hirer, with the consequence that there are recurrent payments to be made to the dealer, and under which the dealer obtains from D by way of purchase money a more immediate payment than he would

obtain from the hirer of a sum amounting to 75% of the sum to be received under the hiring agreement.
    - There is nothing improper in this way of obtaining money. A transaction is either within or without the law, and malice is not to be attributed to a person who so carries out a transaction that it remains outside the law.
    - This transaction was one of assignment to D, and not merely one of charge.

Judgment – Lawrence LJ

- The question to be considered is whether the substance of the transaction is one of sale and purchase or loan and charge.
- There is nothing in the law to prevent a limited company from selling its assets without giving notice of that sale to the public or to anyone else, remaining in possession of the assets so sold, with the consent of the buyer, and obtaining credit on the faith of that possession.
    - If such a state of things ought to be remedied, it is for Parliament to supply the remedy.
- Agree with Lord Hanworth MR that this agreement is not a charge.

Judgment – Romer LJ

- If a man so conducts his affairs that he places himself outside the operation of an Act of Parliament, he cannot be said to be either evading or defeating it. He has done nothing unlawful, and nothing that calls for adverse comment form the court.
- Financing can be done either by means of a transaction of mortgage and charge, or by means of a transaction of sale.
- First essential difference:
    - In a transaction of sale, the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them.
    - In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them.
- Second essential difference:
    - If the mortgagee realises the subject-matter of the mortgage for a sum more than sufficient to repay him, with interest and costs, he must account to the mortgagor for the surplus of the money that has passed between him and the mortgagor.
    - If the purchaser sells the subject-matter of the purchase, and realises a profit, he need not account to the vendor for the profit.
- Third essential difference:
    - If the mortgagee realises the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to receive from the mortgagor the balance of the money.
        - This is either because there is a covenant by the mortgagor to repay the money advance by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made.
    - If the purchaser were to resell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, he would not be entitled to recover the balance from the vendor.
- In the present case, the subject-matter of the transaction is certain furniture subject to, and with the benefit of, the hiring agreements. If one considers the documents in relation to the three

matters mentioned above, it will be found that every one of those three matters, the documents bear the attributes of a sale and purchase, not the attributes of a mortgage and charge.

- This is a sale and purchase.

Lloyds v Cyril (1979)

Case overview

- C and D set up a trading agreement to govern the purchase and sale between them of debts. After some time of trading, C argued that the agreement was commercially unworkable and was departed form in practice, and therefore, they were not bound by it. D argued that, although on occasions the trading agreement had been varied, it still represented the true intentions of the parties and was both workable and binding.
- House of Lords
- Held: Claim unsuccessful; there was a flexibility within the trading agreement which allowed certain departures from it to be made, without this being used as evidence that it was commercially unworkable. The contract was real, intended to govern the transactions between the parties, and was generally followed in practice: the occasions when it was ignored were neither substantial nor numerous enough to justify the claim that it had been repudiated.

Judgment – Lord Wilberforce

- In the present case, the total dependence of the assignment of the debts upon the trading agreement, the importance attached to the completion of the trading agreement before any money was advanced, show beyond doubt that the trading agreement was an essential element of the parties' contractual intentions, and that the assignments were made under it.
  - To suppose, in the face of this, that the assignments were made not by way of sale but by way of security, would be to impose upon the parties a form of transaction totally different form that which they had selected, namely one of sale and which there is no evidence whatever that either of them desired.
  - Uncontradicted oral evidence showed that D had no intention of creating any charge over book debts or merely making a series of loans. It would be a strange doctrine of "looking for the substance" which would produce a contractual intention so clearly negated by the documents and by oral evidence.
- All of the block assignments were made in pursuance of the trading agreement (an agreement providing for the sale and purchase of debts), and they themselves on their face were assignments on sale.
  - That is the end of the case, but other arguments will be dealt with.
- OBITER:
- Legally, discounting is not treated as the lending of money, and the asset discounted is not considered as the subject of a charge. Further, a discount charge is a different thing from a payment of interest: it is fixed and paid once for all, whereas interest accrues from day to day.
  - In spite of these distinctions, parties to discounting arrangements often confuse the terminology appropriate to such arrangements with that which describes loan transactions. It is regrettable that the artificial character of the substantive law should lead to these inaccuracies, but the courts have to look to the nature of the transaction which they profess to describe.

- In block discounting, the purchaser naturally requires a certain security to ensure, so far as possible, that he will get what he has bargained for. But it is a fallacy to argue from this towards a conclusion that the transaction as a whole is one of security or charge.
    - There are many contracts of sale or otherwise where some security is required by one party that the other will fulfil his promise. But this does not alter the nature of the contract itself or turn it into a contract by way of charge.
    - In the present case, the fact that the purchasers wanted security to ensure that they received the whole of what they had bought cannot convert a transaction of purchase into one of charge.
- In the present case, in some respects there were rough edges in the way that business was done; commercial practicality may have taken precedence over legal exactitude. But over the whole field, given the flexibility of the trading agreement and the great number of transactions handled, it cannot be said that the parties were not, in substance, carrying out the trading agreement.
- Parties to a contract may often for practical reasons, instead of carrying it out to the letter, by agreement substitute other arrangements having equivalent effect without justifying the conclusion that they have substituted a different contract.
    - They should all the less be held to have done so when there is not the slightest evidence that this was their intention.

Judgment – Lord Scarman

- The essential feature of block discounting is that in return for an immediate advance, the trader sells to the finance house at a discount his interest in the agreements he has with his customers, and the trader gives the house his guarantee of due performance by his customers of their obligations.
    - The finance house looks only to the discount for its profit. Once the trader has met his commitment for the advance and the discount charge, the finance house is content that the trader should keep for himself whatever else is collected from the customers.
- The courts have held (including in *Re George Inglefield*) that if this transaction is genuine and not a sham to cover something different, then it is a sale, not a loan. This is sound law.
    - If the method employed constitutes a sale, the mere fact that its purpose is an advance of money will not convert the transaction into a loan.
- Agree with Lord Wilberforce.

Welsh Development Agency v Export Finance (1992)

Case overview

- C acted as a guarantor of X's financial obligations, with X agreeing to indemnify C in respect of any liabilities arising under its guarantee, an indemnity which was secured by a debenture in favour of C. X sold products overseas and entered into a master agreement with D in order to provide trade financing. The master agreement for X to sell disks as an agent for D where the disks complied with stipulated warranties and provided for a standing offer by D to purchase disks from X. C appointed receivers pursuant to its debenture. The receivers took the view that the arrangements with D were a charge over X's assets, which was void for want of registration, and wrote to all of X's customers directing them to pay the receivers rather than the account controlled by D.
- Court of Appeal

- Held: D's appeal successful; having regard to all the provisions of the master agreement between X and D, the agreement was one of sale and not one of charge.

Judgment – Dillon LJ

- Two well-tried routes, by which a company can raise finance which do not involve charging its assets, are: (i) the factoring of book dets; and (ii) the block discounting of hire-purchase or credit sale agreements.
    - It is well-established that factoring of block discounting amounts to a sale of book debts, rather than a charge on book debts, even though under the relevant agreement, the purchaser of the debts is given recourse against the vendor in the event of default in payment of the debt by the debtor.
- The task of looking for the substance of the parties' agreement and disregarding the labels used may arise in a case where the written agreement is a sham intended to mask the true agreement.
    - The task of the courts there is to discover by extrinsic evidence what their true agreement was and to disregard, if inconsistent with the true agreement, the written words of the sham agreement.
    - The question can also arise where, without any question of sham, there is some objective criterion in law by which the court can test whether the agreement the parties made does or does not fall into the legal category in which the parties have sought to place their agreement.
- It is clear from *Re George Inglefield* and *Lloyds v Cyril* that:
    - (i) There may be a sale of book debts, and not a charge, even though the purchaser ha recourse against the vendor to receive the shortfall if the debtor fails to pay the debt in full;
    - (ii) There may be a sale of book debts, even though the purchaser may have to make adjustments and payments to the vendor after the full amounts of the debts have been got in from the debtors.
- There is no one clear touchstone by which it can necessarily and inevitably be said that a document which is not a sham, and which is expressed as an agreement for sale must necessarily, as a matter of law, amount to no more than the creation of a mortgage or charge on the property expressed to be sold.
    - Romer LJ's three essential differences in *Re George Inglefield* are merely indicia.
    - It is necessary to look at the provisions in the agreement as a whole to decide whether, in substance, it amounts to an agreement for the sale of goods or only to a mortgage or charge on goods and their proceeds.
- The right of redemption is not inconsistent with the transaction being one of sale.
- In the present case, taking all factors into account, the agreement is what it purports to be, namely, an agreement for the sale by X to D, by acceptance of a standing offer, of goods about to be sold by X to overseas buyers.

Judgment – Staughton LJ

- The starting point is that statute law, when it enacts rules to be applied to particular transactions, is in general referring to the legal nature of a transaction and not to its economic effect, as per *Chow Yoong v Choong* (Lord Diplock in a Malayan case).
- The two routes by which this principle can be overcome are: (i) the external route, showing that the written document does not represent the agreement of the parties and is a sham; and (ii) the internal route, looking at only the written agreement, in order to ascertain from its terms whether it amounts to a transaction of the legal nature which the parties ascribe to it.

    - The present case concerns route (ii).
    - As to route (i), one can show that the written document does not reflect the agreement of the parties by proving a collateral agreement, or at least a common intention, to that effect. Or there may be proof of a subsequent variation, as was argued in *Lloyds v Cyril*.
- As to route (ii), the correct process is to look at the operative parts of the document, in order to discover what legal transaction they provide for. If some parts appear to be inconsistent with others in this respect, a decision must be made between the two – this is what is to be understood by ascertaining the substance of the transaction.
- The discount in the present agreement is a provision which one might expect to find in a contract of loan, but it is not inconsistent with a contract of sale. Further, as to the right of redemption, a contract of sale can lawfully provide that in certain circumstances, and for a sum which is ascertained or ascertainable, the seller may repurchase the property sold from the buyer.
    - These features are more commonly found in contracts to lend money, but they are not inconsistent with a contract of sale.
    - The agreement provided, in terms, for a sale by X to D, and by X as agent for D to overseas buyers. It was plainly the intention that D should become entitled, as against the overseas buyers, to the rights and remedies of a seller of goods.
- The present agreement provided for D to buy the goods from X. The agreement was effective with its terms and did not create a charge on goods or on book debts.

Orion Finance v Crown Financial Management (1996)

Case overview

- A lease agreement between X and D was assigned to C. Following the assignment, X and D agreed that D could terminate the lease before expiry of its full term without incurring any penalty. C sued D for rent payable under the lease. The key question was whether the assignment was by way of security or as a sale with an option to repurchase.
- Court of Appeal
- Held: Claim unsuccessful; the language of the lease and the structure of the financial arrangements led to the assignment being construed as security. The hire purchase agreement funded the acquisition of the equipment; it was not financed by the sale of rents to fall due under the lease.

Judgment – Millett LJ

- This appeal raises a familiar question which has caused problems before, and no doubt will cause problems again. It is whether an assignment of book debts forming part of complex financing arrangements is by way of security or should be characterised as an outright sale with an option to repurchase.
- The proper approach which the court adopts in order to determine the legal category into which a transaction falls is well established. The most recent case on the subject is *Welsh Development Agency v Export Finance.*
- Unhappily, there is no single objective criterion by which it is possible to determine whether a transaction is one of sale and repurchase, or security. Romer LJ explained the essential differences between a transaction of sale and a transaction of mortgage or charge in *Re George Inglefield*.
    - The difficulty is that no single one of Romer LJ's features may be determinative.

- The legal classification of a transaction is not approached by the court in vacuo. The question is not what the transaction is, but whether it is in truth what it purports to be.
    - Unless the documents, taken as a whole, compel a different conclusion, the transaction which they embody should be categorised in conformity with the intention which the parties have expressed in them.
- In the present case, the assignment is by way of security: the structure of the financing arrangements and the language in which they are expressed compel this conclusion. The acquisition of the equipment by X is financed by hire-purchase, not by the sale of the rents to fall due under the lease.
    - The principal document is the hire-purchase agreement of which X's obligation to assign the lease rentals forms an integral part. The purpose of the assignment is not to finance the purchase of the equipment, but to provide the mechanism by which C's right to receive the instalments of hire is without recourse to X.
    - If X is regarded as financing the acquisition of the equipment by means of the outright sale of the rents, it is difficult to see what function is performed by the hire-purchase agreement.
- Significant factors in the present case:
    - The amount of the cost of the equipment is stated in the hire-purchase agreement and not in the assignment;
    - The assignment is not expressed to be made in consideration of a purchase price;
    - The hire-purchase agreement gives X a right to terminate the hiring, not to repurchase the lease rentals;
    - The purchase price payable by X in the event of the termination of the hire-purchase agreement is calculated by reference to the discounted value of future instalments of hire under the hire-purchase agreement and not of future rents under the lease;
    - In the event of the termination of the hire-purchase agreement by reason of the default of X, X is required to assign absolutely to C the very same rights which have previously been assigned to it. This appears to envisage X retaining an interest in the lease rents after the assignment, and it is difficult to identify any interest other than a right of redemption.
- Conclusion: The structure of the transaction is that of a hire-purchase agreement coupled with a non-recourse charge of the lease rentals to secure the payment of the instalments of hire. There is nothing in the documentation which is inconsistent with the intention of the parties being to create a charge, and the documentation is to be construed in conformity with that intention.

Secured loan or sale and lease-back?

Yorkshire Wagon v Maclure (1882)

Case overview

- Railway Company (D) sold part of their rolling-stock to Wagon Company (C) for £30k, and at the same time made a contract with C for the hire of the same rolling-stock at a rent which would repay the £30k with interest in five years, and then for its re-purchase at a nominal pace. At the same time, three of D's directors guaranteed to C the payment of the rent. C brought an action against D and the sureties for non-payment of rent due.
- Court of Appeal
- Held: Claim successful; the transaction was not a borrowing of money, but a bona fide sale and hiring of the rolling-stock, and so was valid both against D and the sureties.

Judgment – Jessel MR

- D intended clearly for this to be a sale and lease-back agreement. D intended throughout to carry out one object, namely, obtaining £30k by repaying it in five years. That was D's object, and they carried that out. On the other hand, the object of C was undoubtedly to get back that £30k with interest by instalments over a period of five years. The mode of carrying it out was indifferent to C so long as they were safe, and so they acceded to the terms suggested to them originally by D to make it a sale and lease.
- Any interest of a debenture holder in the rolling-stock [appears to refer to a floating charge] does not make the transaction from D to C less a purchase (although it may give C a bad title). One may buy an equity of redemption if one is foolish enough to do so, and the only question is whether the transaction was a sale or not.

Judgment – Lindley LJ

- The purchase and hire transaction was the real transaction; the parties meant it to operate according to its tenor as comprised in the deeds. It was not intended by them as a mere blind or cloak for something behind; it was a transaction substituted for another, but bona fide substituted, and intended to be acted upon according to its purport and apparent effect.

Re Watson (1890)

Case overview

- The case concerned a transaction which purported to be a sale of personal chattels, followed by a hiring and purchase agreement, whereby the vendor agreed to hire the chattels from the purchaser and to pay quarterly sums as for such hire, until a certain amount was paid. On that point, when the chattels were to become again the property of the vendor, and power was given to the purchaser to take possession of the chattels on default in payment. However, no sale or hiring of the chattels was really intended; the object, in truth, was merely to create a security for a loan of money to the supposed vendor from the supposed purchaser.
- Court of Appeal
- Held: The true nature of the transaction must be regarded, not its form. The supposed hiring and purchase agreement was a bill of sale within the Bills of Sale Acts.

Judgment – Lord Esher MR

- What Lindley LJ was saying in *Yorkshire Wagon v Maclure* is that the court will inquire into the real facts; but, having done so, they find that the document correctly represents the truth, and is a hiring agreement both in form and substance.
- It is quite right in one sense to have regard to the form – the form of the document is no doubt one of the facts to be looked at, and the fact that it is not in the form of a bill of sale is the first fact that has to be considered, but when, on looking to the other facts, it appears that the form is a mere cloak, it may be thrown aside.
- People may evade an Act of Parliament if they can, but if they attempt to do so by putting forward documents which affect to be one thing when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the court will go through the documents in order to arrive at the truth.

    - So, when the transaction is in truth merely a loan, and the lender is to be repaid his loan and to have a security upon the goods, it will be unavailing to cloak the reality of the transaction by a sham purchase and hiring.
    - It will be a question of fact in each case whether there is a real purchase and sale complete before the hiring agreement. If there be such a purchase and sale in fact and afterwards the goods are hired, the case is not within the Bills of Sale Act.
    - The document itself must be looked at as part of the evidence, but it is only part; the Court must look at the other facts and ascertain the actual truth of the case.
- In the present case, it was found as a fact that there was no real transaction of sale; there was nothing but a loan accompanied by a security given upon the goods, the terms of which are contained in the document in question.
    - That being so, the form of the document does not prevent our looking at the real truth of the case, which is that the document is not really a hiring agreement, but in substance contains the terms of a loan and the security given for it upon personal chattels.
    - The document so regarded is at least a licence to take possession of personal chattels within the Act and is therefore a bill of sale.

Judgment – Cotton LJ

- Lindley LJ clearly expressed in *Yorkshire Railway v Maclure* that when documents are mere shams or cloaks to hide the real nature of the transaction, the court will not allow them to prevent it from going into the real transaction.

Re Curtain Dream (1990)

Case overview

- D accepted a credit facility from C and signed a contract of trading, under which C was the seller. D then invoiced C for a sum of money for fabric stock which was paid by C. C then invoiced D for the stock in a sum reflecting its outlay and an administration fee. The contracts of trading and the invoice contained retention of title clauses in favour of C. The fabric stock never left D's warehouse. Receivers were appointed, and argued that the transaction created an unregistered charge. C sought a declaration that it retained title to the stock.
- High Court
- Held: Claim unsuccessful; there was a charge unprotected by registration. The sale and resale were the machinery of a loan transaction, not a true sale and resale transaction with retention of title – that was not the intention of the parties. The critical indication in favour of mortgage is the compulsory redemption provision (the first, and most important, of Romer LJ's indications in *Re George Inglefield*).

Judgment – Knox J

- It is not possible to arrive at a correct overall appreciation of the effect of the transaction without looking at the whole of the transaction, and in particular, it is not possible to arrive at that correct appreciation by just looking at the second limb (the transfer back by C to D).
- One effect of the transaction is that C, when it set about implementing the second half of the transaction by its invoice back to D, subject to the general contract of trading, was not the sole absolute beneficial owner of the fabric.

    - It was the legal owner of the fabric at that stage, subject to the rights which the transaction as a whole conferred upon D, notably the entitlement of D to recover the fabric back, which itself was subject to the obligation on D to honour the bill of exchange, which it accepted.
- The question is whether the transaction, taken as a whole is one by way of mortgage or charge, with money being lent and the relationship between the parties being one of creditor and debtor, or whether, on the other hand, the transaction was one which consisted of a sale and a resale with a retention of title on the latter.
- On balance, this was intended to be a transaction of loan, and the technique of adopting a sale and resale was mere machinery. This conclusion is reached for the following reasons:
    - The reference to a credit line suggests the relationship of debtor and creditor rather than of vendor and purchaser.
    - There is interest, which is an indication of a mortgage.
    - There was an exact degree of mutuality in both directions with regard to the passing of the title to the property in question. Just as D was bound, once it had embarked upon this transaction, to transfer the property to C, so C was bound to reconvey it. It was a provision for redemption by being one which was the subject-matter of contractual obligation.
        - This fulfils the first, and probably the most important, test of the three identified by Romer LJ in *Re George Inglefield* (namely, the redemption requirement).
        - This is by far and away the most important indication in the present case.

Loan secured on receivables or sale of receivables?

Olds Discount v John Playfair (1938)

Case overview

- D, in consideration of the payment of a sum of money, assigned to C certain debts, on terms that the price should be paid in instalments. D undertook to collect the debts at their own expense as agents for C, and to remit to C all money so collected. D also gave a series of monthly bills for further securing the book debts. It was then provided that, when all the instalments and other moneys payable in respect of the book debts were paid, then C should pay a further sum in respect of the purchase price of the book debts. C argued that this transaction was in effect a money-lending transaction and was unenforceable since C were not registered money lenders.
- High Court
- Held: Claim unsuccessful; the transaction was a sale of book debts, and not a money-lending transaction. It was thus enforceable.

Judgment – Branson J

- Upon the face of the documents, it is perfectly clear that the transaction entered into between the parties was not a moneylending transaction, but a transaction under which C purchased from D certain book debts for certain payments, with the arrangement that, when C had been repaid, the rest of the book debts should be collected by D, and should be retained by them in discharge of a further sum of purchase money which, in those events, would become payable from C to D.
- It is the nature of the agreement entered into, not its object, at which the court has to look in order to decide whether in any particular case the agreement is a moneylending agreement or otherwise.
    - If it be the fact that the agreement was one for the purchase of book debts, then it is perfectly good and lawful, notwithstanding that the operative reason in the mind of D for

entering into it was that they desired to raise money as a temporary matter in the same way as they would have raised it if they had merely entered into a transaction of loan.

- Conclusion: The form of a sale of the book the book debts was deliberately adopted by the parties in order to avoid having to take a loan or make a loan, and so in order to avoid any danger of it being held that they were indulging in a moneylending transaction, and therefore that they ought to have been registered as moneylenders.

Retention of title: Security or quasi-security?

McEntire v Crossley (1895)

Case overview

- D hired an engine from C, at a rent to be paid by instalments. The agreement stipulated that upon payment in full, the engine was to become the property of D, but until payment in full, the engine was to remain the sole and absolute property of C. It was also agreed that in case of failure to pay or if D should become bankrupt, C might elect either to recover the full balance remaining due or instead to resume possession of the engine and sell it, and after retaining all expenses and balance remaining due, pay the surplus to D. D paid the first instalment and the engine was placed on his premises, but then he became bankrupt.
- House of Lords (UK – Ireland)
- Held: Claim successful; upon the true construction of the agreement, the property in the engine never passed to the lessee but remained in the lessors, and so the transaction was not within the Bills of Sale Acts. C entitled to an order of the Bankruptcy Court for delivery of the engine to them.

Judgment – Lord Herschell LC

- In order to make out that D have a title to the engine under the Bills of Sale Act, it is essential to prove that the property in the engine, at some time or other, passed to D. The Bills of Sale Act relates to assurances or assignments or right to seize given or conferred by the person who owns the property.
- The agreement must be regarded as a whole, with its substance looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered.
- In the present case, the parties have in terms expressed the intention that the property in the engine should not pass until all the instalments have been paid. Upon an agreement to sell, it depends upon the intention of the parties whether the property passes or does not pass.
    - There is no reason to prevent this from being a perfectly lawful agreement if it was the true intentions of the parties.
- When the agreement is looked at as a whole, there is nothing to prevent effect being given to the expressed intention of the parties that the property in the engine should not pass. No doubt it would, to some extent, have the effect of giving to C a security such as they would have as mortgagees, but there is nothing to prevent such a contract being made and having full effect.

Judgment – Lord Watson

- The duty of a Court is to examine every part of the agreement and every stipulation which it contains, and to consider their mutual bearing upon each other. But it is entirely beyond the function of a Court to discard the plain meaning of any term in the agreement unless there can be

found within its four concerns other language and other stipulations which necessarily deprive such term of its primary significance.

- In the present case, although the words “lessors” and “hirer” are used, it is perfectly plain that the agreement is one of sale and purchase, and nothing else. But it must be decided whether property in the subject-matter of the contract passed to D.
    - That is a question which entirely depends upon the intention of the parties: the law permits them to settle the point for themselves by any intelligible expression of their intention.
- The point clear on the face of the contract is that the intention of the parties was that C should not part with his dominium over the engine, and that its property should not become vested in C, until the last farthing of the price was paid.
    - The whole stipulations of the agreement are in entire conformity with the expressed intention of the parties.

Aluminium Industrie v Romalpa (1976)

Case overview

- C agreed to sell quantities of aluminium foil to D on conditions which included a provision that ownership of the goods would not be transferred to D until D paid the price to C. The condition also provided that ownership of items made by D out of material would also remain in C as surety for D’s indebtedness, but that D should have power to sell such items to third parties in the normal course of their business. D went into liquidation, owing money to C. Some money (although not enough to match the debt to C) was held in a bank account in the receiver’s name, such sum representing the proceeds of sales by D of items made from C’s materials. C claimed that they were entitled to trace the proceeds of the sub-sales into the bank account.
- Court of Appeal
- Held: Claim successful; in light of the fiduciary relationship created by the conditions of sale, there was to be implied into the agreement an obligation upon D to account for the proceeds of any such sub-sales.

Judgment – Roskill LJ

- The foil physically held by the receiver was C’s foil, to which they are now entitled.
- As to whether C is entitled to the money held by the receivers, the critical question is whether there was a fiduciary relationship between C and D which entitles C successfully to claim the money on the basis of the principles laid down in *Re Hallett*.
- The agreement is clear that C were to retain the property in the goods until all that was owing to them had been paid. The business purpose of the clause was to secure C, so far as possible, against the risks of non-payment after they had parted with possession of the goods delivered, whether or not those goods retained their identity after delivery.
    - Further, the clause clearly contemplates the creation of a fiduciary relationship in relation to mixed goods, and the assignment provisions are clearly designed to give C, if they so require, an additional security to recover debts otherwise payable to D but not paid to them by the sub-purchasers, if D have failed to discharge all or any of their current indebtedness to C.
- There is no difficulty in the contractual concept that, as between D and their sub-purchasers, D sold as principals, but that as between themselves and C, those goods which they were selling as

principals within their implied authority from C were C's goods which they were selling as agents for C to whom they remained fully accountable.
    - If an agent lawfully sells his principal's goods, he stands in a fiduciary relationship to his principal and remains accountable to his principal for those goods and their proceeds.
- In order to give effect to the obvious purpose of the present clause, one must imply not only the power to sell but also the obligation to account in accordance with the normal fiduciary relationship of principal and agent, bailor and bailee.
    - So, the principles in *Re Hallett* apply; C is entitled to trace and recover the proceeds of sale.

Re Bond Worth (1979)

Case overview

- X purchased fibre from Y to make carpets. The fibre was sold with a RoT clause. X was placed in receivership by a debenture holder. £530k was owing to Y under numerous contracts which incorporated the RoT clause. Y notified the receiver of their claim under the conditions of sale to ownership of the fibre supplied and not paid for, and the proceeds of sale of the fibre. X's business (including all its stocks) was then transferred to Z under a hiving down agreement. Joint receivers were appointed by a different debenture holder, and they applied to the court for summons for the determination of the validity and priority of Y's claim.
- High Court
- Held: Under the terms of the contracts and RoT Clauses, property in the fibre passed to X on delivery, and they were free to sell or deal with the fibre in the ordinary course of their business. Whilst the RoT clause referred to "equitable and beneficial ownership", it did not create a bare trust for the benefit of Y but, on its true construction, granted Y a floating equitable charge as security for the purchase price on the raw fibre or the proceeds of its resale, and on the products of which any part of the fibre might become constituent or into which it might be converted or the proceeds of sale of such products.

Judgment – Slade J

- This case differs from *Romalpa* on the basis that in that case, the clause reserved legal and beneficial ownership to the vendor, whereas in the present case, the clause reserved only beneficial ownership.
    - This, inter alia, means that the *Romalpa* case has little bearing on the present case.
- Whilst the RoT clause provided that "equitable and beneficial ownership" in the goods would remain with Y until full payment for the whole amount of the relevant order had been received or until prior resale, it was not the intention to confer on, or to reserve to Y, all the rights which would normally be enjoyed by a sui juris person, having the sole beneficial title to property, as against the trustee holding the legal title.
- Unlike in *Romalpa,* in the present case, there is no question of a bailor-bailee relationship, since it is common ground that the property in the fibre passed to X at latest when it was delivered, while it is of the essence of a bailment that the general property in goods remains in the bailor, while only a special property passes to the bailee, which entitles him to exercise certain possessory remedies.
    - Neither can the relationship be one of agency, since the documents contain no suggestion that X is to be regarded as an agent and the rights which by necessary implication are given to it deal with the goods on its own behalf are quite inconsistent with a principal-agent relationship.

- The only two possibilities of the rights created in favour of X are: (i) by way of a trust under which X was the sole beneficiary; or (ii) by way of trust under which X had a charge in equity over the relevant assets to secure payment of the unpaid purchase price.
- Any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt, must necessarily be regarded as creating a mortgage or charge, as the case may be.
    - The existence of the equity of redemption is quite inconsistent with the existence of a bare trustee-beneficiary relationship.
- Romer LJ's three features of a charge (set out in *Re George Inglefield*) are present in this case.
- In the present case, the clause, property construed, purported to create equitable charges in favour of X over four categories of asset: (i) the raw fibre which was the original subject matter of the original sale; (ii) the proceeds of any sale of the raw fibre; (iii) any products of which any part of the raw fibre might become a constituent or into which it might be converted; and (iv) the proceeds of sale of any such products.
- Subject to the provisions of the Bills of Sale Acts (which generally do not apply to instruments charging the property of a company), a person may create an effective equitable charge over chattels by declaring that he holds them in trust for a creditor by way of security for the payment of a specified debt.
- In order to create a mortgage or charge, an express or implied grant back in favour of the original grantor is required. The court will be prepared to imply this grant back if the parties have contracted that the vendor shall have defined rights by way of mortgage or charge.
- The proper manner of construing the RoT clause, together with all the other relevant provisions of the contracts of sale read as a whole, is to regard them as effecting a sale in which the entire property in the fibre passes to X followed by a security given back by X to Y. It is, therefore, X, rather than Y, who must be regarded as creator of the relevant charge.
- The floating charge is the only type of charge which, by its very nature, leaves a company at liberty to deal with the assets charged in the ordinary course of its business, without regard to the charge, until stopped by a winding up or by the appointment of a receiver or the happening of some other agreed event.
    - Such a charge remains unattached to any particular property and leaves the company with a licence to deal with, and even sell, the assets falling within its ambit in the ordinary course of business, as if the charge had not been given, until it is stopped by one or other of the events referred to above, at which point it is said to crystallise. It then becomes effectively fixed to the assets within its scope.
- Romer LJ's description in *Re Yorkshire Woolcombers* shows that it need not extend to all the assets of the company; it may cover assets merely of a specified category or categories.
- In the present case, there are four categories of charged assets.
    - As to Romer LJ's first characteristic, the charge on the first category of assets is exclusively a charge on present assets of the company, while the charges on the other three categories are exclusively charges on future assets of the company.
        - If the charges are looked at separately, they do not comprise classes of mixed and future assets.
    - Romer LJ's second characteristic is clearly present in the second, third and fourth categories of charged assets, since these are ex hypothesis classes of assets which in the ordinary course of business will be changing from time to time.

        - The second characteristic is only present in relation the first category of assets (the raw fibre) in the sense that the assets may dimmish by being used for the purposes of manufacture or sale; they cannot be increased.
    - Romer LJ's third characteristic is present in relation to each of the four categories of assets: it was clearly contemplated that until some future step was taken by or on behalf of Y, X might carry on its business in the ordinary way in relation to each of the four categories.
- These points of possible distinction do not prevent all or any of the four relevant charges from being floating charges within the ordinary meaning of legal terminology.
    - Romer LJ disclaimed any intention of saying that there could not be a floating charge within the meaning of the Companies Acts which did not contain all the three characteristics.
- The critical distinction is that between a specific charge and a floating charge.
- In the present case, the respective charges on each of the four categories of charged assets were ambulatory and shifting in their nature, and were intended to hover over them until the happening of an event which caused them to crystallise.
    - The assets were of a fluctuating class, and until a crystallising event occurred, it was not intended that any restriction should be placed on X to deal with them in the ordinary course of its business.
- The effect of the RoT clause was to create floating equitable charges over the four categories of charged assets, for the purpose of securing payment of the purchase prices due under the relevant orders, and to constitute X a trustee of such assets for the purpose of such security, but for no other purpose.
    - The floating charges are all within the statutory definition in CA 1948. They were also "created" by X, since the charges arose by way of grant back by X in favour of Y.
- Since the charges were not registered in accordance with CA 1948 s95(1), they are void against any creditor of X, but without prejudice to the contractual obligation of X for repayment of the money thereby secured.

Borden v Scottish Timber (1981)

Case overview

- C supplied resin to D, pursuant to a contract under which property in the resin was to pass when all goods supplied to D had been paid in full. It was clearly contemplated that the resin would be used in the manufacturing process, in which it would be irreversibly mixed with other substances, before it had been paid for. D went into receivership, and C brought an action for the sum outstanding in respect of unpaid-for resin, and argued that any chipboard manufactured with the resin, and its proceeds of sale, were charged with the outstanding sum.
- Court of Appeal
- Held: Claim unsuccessful; once used in the manufacture of the chipboard, the resin ceased to exist and with it C's title thereto. C acquired no interest of any kind in the chipboard.

Judgment – Bridge LJ

- The effect of the agreement was that the beneficial interest in the resin passed to D, who were to be entirely free to use it for their own purposes in the manufacture of chipboard, and that all that was retained by C was the bare legal title to the resin so long as the resin existed, held as security for the unpaid price of the resin.

- The essence of the decision in *Romalpa* was that D were selling C's material as agents for C. In the present case, it is impossible to say that in using C's resin in their own manufacturing process to manufacture their own chipboard, D could be described as acting in any sense as agents for C.
    - *Romalpa* does not throw any significant light on the issues in the present case.
- C is not entitled to the tracing remedy which they claim.
- If a seller of goods to a manufacturer, who knows that his goods are to be used in the manufacturing process before they are paid for, wishes to reserve to himself an effective security for the payment of the price, he cannot rely on a simple reservation of title clause such as that relied upon by the plaintiffs.
    - If he wishes to acquire rights over the finished product, he can only do so by express contractual stipulation.

Judgment – Templeman LJ

- When the resin was incorporated in the chipboard, it ceased to exist, and C's title to the resin became meaningless and their security vanished. There was no provision in the contract for D to provide substituted or additional security; the chipboard belonged to D.
- In a commercial contract of this nature, no agreement should be implied for the furnishing of additional security. In the absence of any implied or express agreement to provide substitutional security, equity has nothing to trace: the resin and the title and the security disappeared without trace.
    - In any event, no term should be implied, nor should the aid of equity be invoked to produce a result which other creditors of D might justifiably regard as a fraudulent preference.
- For good measure, if C have any interest or share in chipboard or proceeds of sale thereof, they fall foul of CA 1948 s95.

Hendy Lennox v Grahame Puttick (1984)

Case overview

- Sellers (C) supplied diesel engines to the buyers (D) under contracts which preserved the C's title to the engines until full payment of the price, under an RoT clause. It was contemplated that D would incorporate the engines into generating sets which would be sold to sub-buyers with the engines unaltered in substance. D went into receivership. C had not yet been paid, and obtained an interim injunction restraining D from purporting to sell or parting with possession of the engines. Of three generating sets on D's premises, two were in a deliverable state and their serial numbers were communicated to the sub-buyers; the third was not in a deliverable state. The injunction was discharged when D undertook to pay the proceeds of sale of the sets into an account held by C's solicitors. C claimed for the proceeds of sale by D of the three engines and other engines, in respect of which the property had passed at the inception of the receivership.
- High Court
- Held: Claim successful in part; C had a valid proprietary claim to retake the engines, the property of which had not passed before D went into receivership. These engines had been subsequently delivered to the sub-buyers, and so the proprietary claim was transformed into a claim against the proceeds of sale. However, since it could not be implied from the terms of the agreement that D occupied a fiduciary position in relation to the proceeds of sale, C did not have a direct claim for the proceeds of sale of the engines.

Judgment – Staughton J

- For the time being, before the engines were sold to the sub-buyers, C retained some rights of a proprietary nature. These were full rights of ownership, subject to certain personal or contracted restrictions.
    - D did not confer any proprietary rights in the goods on C; it was C who retained proprietary rights.
- There are passages in *Borden v Scottish Timber* which, if taken out of context, might suggest that an unpaid seller cannot lawfully retain proprietary rights in goods delivered to a buyer, whether or not those goods have been used or altered in a manufacturing process.
    - But there, the dispute was about chipboard; it was not about the resin which was sold and which the buyers used to make chipboard. The passages must be understood in that context.
- *Re Bond Worth* is readily distinguishable on the basis that there, "equitable and beneficial ownership" was to remain with the sellers, whereas in the present case, the contract provided that the goods should "be and remain the property of the company".
- This area of the law is presently a maze, if not a minefield.
- One of the questions is whether C did or did not retain any proprietary rights once the engines had been wholly, or in part, incorporated into generator sets.
    - An engine which was the property of A would not become the property of B merely because B incorporated it in a generator set otherwise composed of his own materials.
- So, in the present case, the proprietary rights of C in the engines were not affected when the engines were wholly or partially incorporated into generator sets.
    - They were not like the fibre which became the yar and then carpet in *Re Bond Worth*, or like the resin which became chipboard in *Borden*.
- C had a valid proprietary claim in respect of one of the engine sets, the property of which had not yet passed before D went into receivership. The next question is whether C's proprietary claim has been transformed into a claim against the proceeds of sale.
    - It was an implied term of the contract that C should have a derivative claim against the proceeds of sale in substitution for any direct claim they might have to retake the goods.
- C's entitlement is not a charge. A chose in action was created when the sum was paid into C's solicitors' joint deposit account, and C are the beneficial owner, absolutely and not by way of charge, to the extent of the value of the proceeds of sale for the engine set.
- The next question is whether C has a direct claim for the proceeds of sale of the other engines, to which they do not have a direct claim to retake the goods.
- It is implicit in the court's reasoning in *Romalpa* that some bailees and some agents do not occupy a fiduciary position, although there may well be a presumption that they do. One has to examine the relationship in each individual case, to see whether it is of a fiduciary nature.
    - In the present case, there a three grounds of differentiation from *Romalpa*: (i) the express terms here referred only to the actual goods supplied; (ii) there was here no express obligation on D if required to store the goods in such a way that they were clearly the property of C; (iii) the implied term contended for here would relate to the proceeds of sale of the generator sets, whereas the implied term in *Romalpa* related only to the proceeds of sale of the actual goods supplied.
- In the present case, the presumption of a fiduciary relationship is neutralised by the agreement that D should have credit for at least one month, and possibly two months. It is not easy to reconcile that with an obligation to keep the proceeds of re-sale in a separate account.

    - By the business efficacy test, as propounded in *Borden*, there is no implied term in the contracts that the proceeds of sale must be kept separate and would belong wholly or in part to C. The express terms in the contract concerned only the property in the goods, and they provided expressly for a remedy in respect of the goods: the power to retake possession and retain them permanently.
    - Viewing the transactions as a whole, it was not implied that D were to occupy a fiduciary position in respect of the proceeds of sale.
- Conclusion: C do not have a direct claim for the proceeds of sale of the engines of the other type (to which they had no direct claim to retake the goods, because property had passed before receivership).

Clough Mill v Martin (1985)

Case overview

- C agreed to supply yarn to X on credit terms. Under the contract, ownership of the yarn was to remain with C until payment in full had been received, and payment was to become immediately due if there was any proceeding involving X's solvency. X became insolvent before the completion of payment, and a receiver (D) was appointed by the debenture holders. C notified D of its intention to repossess the yarn. D refused on the grounds that the effect of the agreement was to create a charge as security for payment, which should have been registered under the Companies Act 1948 s95.
- Court of Appeal
- Held: C was entitled to retain title after delivery under SGA 1979 s19(1). X had never acquired title and therefore were not in a position to create a charge over it, and no question of registration arose.

Judgment – Goff LJ

- This case is concerned with a retention of title clause, which is more frequently known as a Romalpa clause.
- There is nothing objectionable in an agreement between parties under which the owner of goods (A) gives possession of those goods to B, at the same time conferring on B a power of sale and a power to consume the goods in manufacture, though A will remain the owner of the goods until they are either sold or consumed.
    - There is no reason why the law should not give effect to the parties' intention.
    - The relationship is one of bailor and bailee.
- In the present case, the retention of title applies to material, delivered and retained by the buyer, until payment in full for all the material delivered under the contract has been received by the seller.
    - The effect is that the seller may retain his title in material still held by the buyer, even if part of that material had been paid for.
- The court must give effect to the condition in accordance with its terms. In the present case, there is no intention to create a trust: the condition provides that C retains his ownership in the material. Thus, he remains owner, but during the subsistence of the contract, can only exercise his powers as owner consistently with the terms, express and implied, of the contract.
    - Once the contract has been determined, the seller will have his rights as owner uninhibited by any contractual restrictions, though any part of the purchase price received by him and

attributable to the material so resold will be recoverable by the buyer on the ground of failure of consideration.

- There is no reason why the retention of title clause should be construed as giving rise to a charge on the unused material in favour of C.
    - X does not, by way of security, confer on C an interest in property defeasible upon the payment of the debt so secured. Rather, C retains the legal property in the material.
- Where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B, at least where the goods are not reducible to the original materials.
    - However, where the parties agree that the property in the goods shall vest in A, that agreement should be given effect to.
- The concept of retention of title (or reservation of the right of disposal) pending payment of the price is well known in commerce, as SGA 1979 s19(1) clearly demonstrates.

Judgment – Oliver LJ

- No question of any charge by X requiring registration under CA 1948 s95 can arise, because a company can create a charge only on its own property; if it never acquires property in the goods the subject of an agreement for sale, it cannot charge them.
- While not deciding the issue, there is no reason in principle why the original legal title in a newly manufactured article composed of materials belonging to A and B should not lie where A and B have agreed that it shall lie.

Pfeiffer Weinkellerei v Arbuthnot (1988)

Case overview

- C sold wines to X on terms including a RoT clause that property (both equitable and legal) was to remain with C until X fully paid for it. But X was entitled to sell the wine so long as there was no delay in payment, and all claims that X had in respect of the sale to sub-purchasers amounting to his obligations to C were to be passed to C. On demand, X was to notify C of an assignment of any such claim. X sold the wine to sub-purchasers (Y) on credit terms. C then entered into a factoring agreement with D, under which it assigned to D all debts owed to it by Y. C claimed title to the wine and called on D to hand over to it moneys it had received from Y.
- High Court
- Held: The agreement between X and C amounted to a charge, and so C should have registered it under CA 1948 s95(e). Thus, D was first to give notice of its rights to Y, meaning D had priority over C.

Judgment – Phillips J

- Where the seller retains title by way of security prior to sub-sale, but the contract expressly or impliedly authorises the buyer to effect sub-sales, no prima facie implication arises that sub-sales are to be effected by the buyer as agent for, and for the account of, the seller.
    - On the contrary, the normal implication that arises from the relationship of buyer and seller is that if the buyer is permitted to sub-sell in the normal course of his business, he will do so for his own account.

    - The conclusions of EWCA in *Romalpa* as to the fiduciary relationship of Cs and Ds turned on the particular wording of the clause, and on the concession that the relationship of the parties was that of bailor/bailee.
- In the present case, the clause constitutes an agreement by X to assign to C future choses in action, namely future debts owed by Y to X up to the amount of any outstanding indebtedness on the part of X to C. In so far as debts came into existence falling within that agreement, the agreement created an equitable assignment of the debts. The agreement was plainly by way of security, and the assignments under it were capable of being redeemed by payment by X of the outstanding indebtedness.
    - It follows that by agreeing to the provisions of the clause, X created a charge by way of security over X's property (namely, book debts), which being unregistered, was rendered void as against X's creditors by CA 1948 s95(1) and s95(2)(e).
- In the present case, the equitable rights which C enjoyed in the proceeds of sale of wine sub-sold by X were acquired prior to the rights that D acquired under the factoring agreement and the assignments pursuant thereto.
- It is not easy to glean a common ratio decidendi from the judgments in *Stoddart v Union Trust*, but the case appears to have turned essentially upon a finding that a claim for damages for fraud by the assignor of a chose in action is not an equity which can be set up against an assignee.
- LPA 1925 s136(1) enables the assignee to acquire a title that has all the procedural advantages of legal title, but so far as priorities are concerned his position is no better than if the assignment had been effected prior to the Act.
    - It follows that, even if the assignment is effected for value without notice of a prior equity, proprieties fall to be determined as if the assignment had been effected in equity, not in law.
    - Accordingly, it is necessary to consider proprieties as if the assignments of the debts to D were no more than equitable assignments.
- The rule in *Dearle v Hall* is an exception to the general principle that equitable interests take priority in the order in which they are created. The rule applies to dealings with equitable interests in any property and, in particular, to equitable assignments of legal choses in action.
    - Under the rule, priority depends upon the order in which notice of the interest created by the dealing is given to the person affected by it (i.e., in the case of assignments of a debt, the debtor).
- In the present case, since the security rights conferred upon C by the clause were conferred by equitable assignment, the rule in *Dearle v Hall* governs. D was the first to give notice of its rights to Y, and so enjoys priority over C.

Armour v Thyssen (1991)

Case overview

- D sold steel to C for use in its manufacturing process. The contract of sale contained a condition that the steel remained in the property of the sellers after delivery until all debts were paid. Receivers were appointed after C became insolvent, and a dispute arose as to the ownership of the steel.
- House of Lords (Scotland)
- Held: Property remained with D until the condition was complied with, by virtue of SGA 1979 s17 and s19(1).

Judgment – Lord Keith

- It is well settled in the law of Scotland that a condition in a contract for the sale of corporeal movables which provides that, notwithstanding delivery, ownership of the goods shall not pass to the buyer until the price has been paid is valid and effective.
- In order to create a security over the goods, C would have had to have both the ownership and the possession (actual or constructive) of the goods. The essence of a right in security is that the debtor retains the ultimate right to the goods. In the present case, since C had no interest of any kind in any particular goods, he was never in a position to confer upon D a security right over the steel.
    - The parties clearly expressed their intention that the property in the steel should not pass to C until all debts due by it to D had been paid; so, on the basis of s17, there is no reason to refuse to give effect to this intention.
    - D have, by the terms of the contract, in effect reserved the right of disposal of the steel until fulfilment of the condition that all debts due to them by C have been paid. By virtue of s19(1), this has the effect that the property in the goods did not pass to C until that condition had been fulfilled.
- A provision reserving title to the seller until payment of all debts due to him by the buyer does not amount to the creation by the buyer of a right of security in favour of the seller.
    - The provision, in a sense, gives the seller security for the unpaid debts of the buyer, but it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer.
- Where the seller of goods retains title until some condition has been satisfied, and on failure of such satisfaction repossesses the goods, he is not obliged to account to the buyer for any part of the value of the goods.
    - Where the condition is to the effect that the price of the goods shall have been paid and it has not been paid, then in the situation where the market price of the goods has risen, so that they are worth more than the contract price, the extra value belongs to the unpaid seller.
    - The same is true where the provision covers not only the price of the goods, but debts due to the seller under other contracts.
- In *Clough Mill v Martin*, the EWCA did not find it necessary to form a concluded view as to the solution of problems which might arise where the goods have been partially paid for before being repossessed by the seller. It is not necessary to form a concluded view in this case either.

Compaq Computer v Abercorn (1991)

Case overview

- C supplied computer products to D under an agreement which contained a RoT clause so that title in the products stayed vested in C until payment for the products and any other sums owing were complete. D entered into a written invoice discounting agreement with X, under which D agreed to assign its interest in invoices owing to it to X. D then executed debentures in favour of X, containing a fixed charge on C's book and other debts and a floating charge over its undertaking, property and assets. The debentures were registered. D went into receivership, and C's products in D's possession which were unsold were returned to C or sold by them on terms that they would account to C for the invoiced price. X then gave notice to D's debtors that under the invoice discounting agreement, their debts to D had been assigned to X. D then went into creditors' voluntary liquidation.

- High Court
- Held: Claim unsuccessful; C's charge over the proceeds of sale was a charge which required registration; failure to register meant that it was void as against X and D. On this basis, applying the rule in *Dearle v Hall*, X had priority to C because it gave notice to the sub-purchasers.

Judgment – Mummery J

- The question of whether a charge was constituted in respect of the proceeds of sale is determined by the construction of the express or implied contractual terms.
- The authorities give rise to the following general points of law:
    - 1. The broad purpose of a RoT clause is to protect the seller from the insolvency of the buyer in circumstances where the price and other moneys remain unpaid.
    - 2. It does not follow that this purpose predetermines the legal form of protection agreed upon or its legal consequences. The question is how the position of the seller has been secured.
        - On the one hand, it may be held that, on the true construction of the agreement, the seller has retained full legal and beneficial title in physical good – in those circumstances, it is impossible for the buyer to have created a charge on the goods in favour of the seller.
        - On the other hand, if, on the true construction of the agreement, the legal title to the goods has passed from the seller to the buyer, the court may conclude that the legal consequence of the agreement is that the position of the seller is in facts secured by a charge created in favour over the goods by the buyer.
    - 3. In determining whether any given agreement creates a charge, equity looks to the substance and reality of the transaction.
        - What on the face of it may appear to be an out-and-out disposition of a legal or equitable interest in property by way of assignment or conveyance or an out-and-out disposition of a beneficial interest in property by way of trust, may in fact be by way of security only, with a right of redemption and therefore, in the nature of a charge.
    - 4. An unpaid seller, who contends for a direct claim (other than by way of charge) to the proceeds of sale of goods sub-sold by the original buyer, cannot establish an equitable right to, or to trace, the proceeds simply by relying on the RoT to the physical goods sub-sold.
        - There is no equity to trace into a mixed fund in the absence of a fiduciary relationship: the unpaid seller must establish that there was a fiduciary relationship between himself and the original buyer affecting the proceeds of sale.
    - 5. The existence of a fiduciary relationship in this context depends on whether the parties have agreed terms, either expressly or impliedly, which, when construed in the context of the whole agreement and the surrounding circumstances of the individual case, are appropriate to create such a relationship.
    - 6. The relationships of bailor and bailee, and principal and agent, are normally fiduciary, but not necessarily so – contractual or judicial labels are not conclusive of the nature of the relationship.
- In the present case, once it is accepted that the beneficial interest in the proceeds of sale was determinable on the payment of debts, C is faced with the difficulty that the rights and obligations of the parties were in reality and in substance characteristic of those of the parties to a charge, and not of those in a trustee/beneficiary or other fiduciary relationship.
    - The agreement between C and D created a charge over the proceeds of sale in favour of C. The charge required registration, since it was a charge created by D to which CA 1985 s395

and s396 applied; and the consequence of failure to register such charge is that the charge is void as against X, a creditor of D, as well as against the liquidators of D.
    - X had priority over the rights of C created by virtue of the debenture, because X's debenture was registered, whereas C's charge was not registered.
- OBITER:
- It is established that the rule in *Dearle v Hall* applies to equitable assignments of legal choses in action, as per *Pfeiffer*.
- An equitable assignment may be effected by an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor.
    - In the present case, there was such an agreement.
- If the above conclusions are wrong, and the assignment was not by way of charge, then it was nevertheless an equitable assignment to which the rule in *Dearle v Hall* can apply.
    - On this basis, X had, by virtue of the discounting agreement and assignments made pursuant to it, priority over C in respect of the proceeds of sale of the C products supplied.
- LPA 1925 s136(1) provides that the assignment is "subject to equities having priority over the right of the assignee". The effect of those words is to create, in the case of a statutory assignment of a chose in action, an exception to the general rule that an equity will not prevail against a bona fide purchaser of a legal estate for value without notice of the prior equity.
    - If that is so, in the hands of D, the assignor to X, the rights of action against the sub-purchasers which it assigned to X were subject to an earlier equitable assignment of those same rights to C and X, and therefore took subject to that prior equity.
- Unless the rule in *Dearle v Hall* were applicable, the result would be determined by the ordinary rule as to priorities, i.e., the basic rule of the order of creation where the merits are equal.
- The rule in *Dearle v Hall* apart, X could not put itself in a stronger position than D as against C by giving notice of the assignment from D to the sub-purchasers and by then seeking to rely on the statutory assignment thereby completed to take in priority to the equity of C.
- Would follow the decision in *Pfeiffer*.

Re Highway Foods (1995)

Case overview

- C sold a quantity of meat to X on terms that included a RoT clause which provided C with a right to repossess the meat in the event of non-payment by X. The meat was delivered to X, and then sold on by X to D on terms which also included a RoT clause. The meat was then delivered to D. Shortly thereafter, C and D agreed that C would re-possess the meat pursuant to its contract with X, and sell it to D for the same price it had agreed to sell it to X. C purported to carry that agreement into effect, although the meat never left D's premises. By that time, part of the meat had been incorporated by D into products it manufactured. X went into receivership, and the receivers contended that D was liable to pay C for the meat, and sought directions as to whether C or X was entitled to receive the purchase price for the meat.
- High Court
- Held: C was entitled to receive the purchase price of the unincorporated meat; there was no effective sale of the meat to D under FA 1889 s9. Since the meat remained the property of C, C was entitled to repossess the meat and sell it directly to D. So far as the incorporated meat was

concerned, C was only entitled to receive from X the purchase price payable to it by D; C's interest in that sum as a security interest which was void for want of registration under CA 1985 s395.

Judgment – Nugee QC

- FA 1889 s9 is identical with SGA 1979 s25, with the exception that s25 does not contain the words "or under any agreement for sale, pledge, or other disposition thereof". This is significant and may be taken advantage of.
- To hold that a simple RoT clause gave the seller no more than a security interest, on the ground that his title to the goods could be defeated by the buyer paying the purchase price in full, would render reservation of title clauses useless in call cases unless registered.
    - The effectiveness of a RoT clause, notwithstanding that the underlying purpose is clearly to provide a form of security for the purchase price, has been well established since *Clough Mill v Martin*.
    - So, as to the unprocessed meat, there is no doubt that C retained the title at the date it repossessed it. Therefore, C is entitled to the purchase price of that meat.
- C's claim that it is entitled to the purchase price of the meat which had already been processed and which accordingly it did not repossess depends on different considerations. D paid money into a joint account, but it cannot be said that this money constitutes a larger fund over which C has a charge for the smaller amount claimed by it, as would have been the case had D paid to X the whole amount for which it had agreed to buy the meat.
    - To the extent that C is entitled to be paid by D, the payment into the joint account is to be treated in the same way as if it were a payment to C. To the extent that X is entitled, it should be treated as if it were a payment to X.
- As between C and X, X never acquired title to the meat which was processed by D; but by the time it had bene processed by D it had lost its identity, and C did not assert a claim to ownership of it. D acquired title to the resulting product, at the latest when it paid for the meat which it contained.
    - As between X and D, the agreement envisaged that, if X initially had title to the meat, the title would pass to D when the meat had been incorporated with other goods not the property of X whereby it had lost its identity and could not be extracted.
- X delivered possession of the meat to D under an agreement for sale within the meaning of FA 1889 s9; under s2(1), this disposition was as valid as if it had been expressly authorised by C. therefore, the terms of the disposition are binding on C: when title to the meat which had been processed passed to D, the price paid for it to the receivers must be treated as paid to X.
    - Once in X's hands, it became subject to the RoT Clause in the contract between C and X, but that clause gave C only a security interest in the proceeds of the sale by X to D. Since that security interest was unregistered, it is void against the receivers.
- Therefore, the receivers, not C, are entitled to the purchase price of the processed meat.

Associated Alloys v Metropolitan Engineering (2000)

Case overview

- C sold steel to D on terms which included a RoT clause. The clause stated that in the event that D uses the steel in some manufacturing process, then D shall hold such part of the proceeds of the manufacturing process on trust for C, in an amount equal to the amount owing by D to C. D went into liquidation. The purported continuing interest of C in the title to the steel was not registered.
- High Court of Australia
- Held: Claim unsuccessful; C's interest was not a charge and so not void for want of registration, however, C had failed to prove whether any payments made a by sub-buyers from D had been made for the steel that was supplied by C: C had not demonstrated by the receipt of future acquired property by D.

Judgment – Gaudron, McHugh, Gummow, Hayne JJ

- The proceeds sub-clause is an agreement to constitute a trust of future-acquired property. It is therefore not a "charge" within the meaning of the Corporations Law (equivalent of Companies Act). Therefore, the sub-clause is not void as against the liquidator.
- This is of commercial significance since, for third parties such as financial institutions seeking to assess the credit-worthiness of the buyer, the non-registration of the proceeds sub-clause on a public register, may create practical difficulties.
    - These difficulties are capable of remedy by legislation.
- The lack of any statutory obligation to register the proceeds sub-clause creates commercial incentives for entities, in the position of both the buyer and the seller, to incorporate such clauses into their purchase agreements. These clauses reduce the risk of non-payment by the buyer.
    - To the extent that this credit risk is reduced, the commercial viability of the transaction for both parties may be increased. For example, the availability of this means of reducing credit risk for the seller may result in the seller accepting a lower cost price per unit of steel.
    - Competitive pressures may thus operate upon the parties to incorporate such clauses in their transactions.

Judgment – Kirby J (dissenting)

- Initially, *Romalpa* was seen with admiration for the perceived ingenuity of the device. However, as more cases were decided about RoT clauses, the fundamental flaw of such clauses in the context of statutory priorities governing insolvency came to be recognised.
- The Canadian courts have been resistant to RoT clauses which endeavour to defeat or postpone other creditors in cases of insolvency. Similarly in the US Uniform Commercial Code, any attempt by a seller to reserve title or a proprietary interest in goods will only have the effect of creating a security interest in those actual goods.
- In England, judges have been willing to give RoT clauses effect only in circumstances where: (i) they are clearly accepted as part of the agreement between the parties; and (ii) they can be applied to the original goods that were sold where such goods may be readily identified, retrieved intact, reconstituted, separated and returned to the seller; or (iii) a separate financial account or fund has been established, as proper to a fiduciary relationship between the parties, in order to receive the proceeds of the sale of the goods possessed by one but still purportedly owned by another, as per *Borden v Scottish Timber*.

- (i) Where there is doubt that the clause ever truly became part of the agreement between the parties; (ii) where the goods bought have been converted by manufacture into some other product so as to lose their original identity (as in *Hendy Lennox*); (iii) where the goods have been on-sold to others who have no notice of the clause; and (iv) where the receipts in payment for the derived goods have been mixed in the financial records of the buyer, it is hardly surprising that judges have been reluctant to give effect to legal form over commercial substance.
    - It is natural that creditors should attempt to protect their own particular positions in case of insolvency, but it is imperative that the rules laid down by the legislature should still be obeyed.
    - In the present case, the last three of the four features noted, which serve to deny the effectiveness to RoT clauses in other jurisdictions, are present. The Court should not be diverted from the duty to give effect to the Corporations Law by the RoT clause adopted in the present case.
- Once a RoT is purportedly expressed to cover debts, goods manufactured from the goods supplied, or the proceeds of on-sales, the approach to be taken is one that looks beyond legal technique and form to the substance and reality, as per *Compaq v Abercorn*.
    - In *Compaq,* Mummery J was not asserting that trusts are, of their nature, securities. But he was cautioning against exclusive concentration on the terms of an instrument purporting to create a trust, to the neglect of an examination of the purpose and effect of that instrument when considered for its substance and not merely its form.
- The goods sold by C to D had ceased to exist, and so the sub-clause is either void for uncertainty, or if it is to have an operation, it can only operate as creating a security interest over the undifferentiated book debts of D. It then attracts the registration requirements of the Corporations Law.
- In the absence of the possibility of identifying specific goods, or of payments being made to a particular identifiable fund, the parties must be taken to have agreed by the sub-clause to create a form of security for the payment of the moneys owing by D to C.
- The most that the sub-clause can amount to for C is an unregistered charge on a book debt.
    - Any other construction would permit the easy defeat of the clear purpose of the Corporations Law, namely that creditors of companies which become insolvent must, unless they are secured creditors that are afforded priority, participate pari passu in the available assets of the company.
    - It would be contrary to principle to adopt a restrictive or confined construction of the provisions of the Corporations Law.
- In effect, C seeks, notwithstanding the provisions of the Corporations Law regarding unsecured creditors, to have a priority by virtue of its own undisclosed contractual stipulation. In the present case, that attempt fails.
- If, for the purposes of the Corporations Law, C's interest is classified as constitution a "charge on a book debt", then the requirement of registration arises and the consequence of a failure to register is that the charge is void as against the liquidator. This follows as a matter of law.
    - However, the lower court was correct to hold that any charge applicable in this case did not arise by operation of law, but by virtue of the agreement between C and D.

Wilson v Holt (2013)

Case overview

- C sold goods to D on standard terms set by C. The standard terms included a RoT clause stating that title to the purchased goods did not pass until C had been paid in full. When D failed to pay a number of invoices, C brought proceedings for the purchase price.
- Court of Appeal
- Held: Claim unsuccessful; property in the goods had not passed because of the RoT clause, and so C could not bring an action for the price under SGA 1979 s49(1).

Judgment – Longmore LJ (dissenting as to construction of the clause)

- In order to succeed in an action for the price under s49, C must show that property in the goods passed to the buyer.
- If a RoT clause is to be construed as intended to give a seller security for the payment of the price, any trust of the proceeds only applies to the amount which the buyer owes the seller, and does not extend to any balance over and above that amount.
    - If the buyer is beneficially entitled to proceeds over and above the amount of the debt, he cannot be regarded as selling as agent for the seller.
- In the present case, the RoT clause is intended to operate by way of security rather than to confer a potential windfall on the seller; that must militate against the buyer acting as the seller's agent on the resale.
- Claim unsuccessful on the basis of no-set off clause. However, will consider effect of s49 (obiter).
- S49 spells out two circumstances where an action for the price can be maintained: s49(1) when property has passed; and s49(2) if the price is payable on a day certain.
- If an action for the price could be maintained whenever the obligation to pay had arisen, s49 would be largely otiose. This strongly suggests that s49 intends to specify the only circumstances in which the seller may maintain an action for the price.
- If a seller is happy to allow a buyer use of the goods without paying for them but wishes to ensure that he retains property in the goods and that he can sue for the price, he simply has to provide for payment to be due on a day certain.
- If there is a potential claim for damages for non-acceptance, and if property has not passed to the buyer, the seller should be confined to that claim rather than a claim for the price.
- If property never passed to D, C will have no claim for the price, nor a claim to damages – that is the inherent result of a retention of title clause and shows that it has dangers as well as benefits.
    - There is a logical difficulty in saying that C are in breach of contract in failing to pay the price if the price is itself not due because property in the goods never passed to them.
- In the present case, property in the goods has passed, and so C are entitled to the price they claim.

Judgment – Patten LJ

- Title did not pass under the RoT clause until payment of the price. The RoT clause created an agency relationship between the buyer and seller, so that the buyer sub-sold the goods as agent of the seller. This meant that property in the goods never passed to the buyer, and the seller cannot bring an action for the price.
- Agree with Longmore LJ that to bring a claim for the price, C must comply with the conditions set out in SGA 1979 s49(1). S49 defines the only situations in which an action for the price can be brought. Therefore, C's claim fails.

PST Energy v OW Bunker (2016)

Case overview

- D contracted to supply bunkers to C with payment to be made within 60 days of the presentation of an invoice. It was subject to D's general terms, which provided that until full payment was made, title remained with D, and that C was in possession of the bunkers solely as C's bailee and would not be entitled to use the bunkers other than for the propulsion of the vessel. C and received and consumed the bunkers but did not make payment; D did not make payment to its own suppliers. D became insolvent. C were concerned that they could be exposed to paying both D and its suppliers (who themselves could have claimed rights under a reservation of title). C commenced arbitration proceedings for a declaration that they had no liability to pay the seller for the bunkers.
- Supreme Court
- Held: Claim unsuccessful; the contract was not one of sale under SGA 1979 s2, meaning that D could have no possible defence under s49 to the claim for the price.

Judgment – Lord Mance

Analysis of the nature of the contract

- An agreement may be in substance a contract of sale, even though it has ancillary aspects (e.g. for after-sales services) which do not involve the passing of property and are not by themselves sale, as per *Stoneleigh v Phillips*.
- SGA 1979 s(3) and s(6) can be applied where there is a condition regarding the passing of property to which all the goods covered by an agreement were subject, but that was not the case here.
- The liberty to use the bunkers for propulsion prior to payment is a vital and essential feature of the bunker supply business. So, the contract cannot be regarded as a straightforward agreement to transfer the property in the bunkers to C for a price.
    - It was in substance an agreement with two aspects: (i) to permit consumption prior to any payment and without any property ever passing in the bunkers consumed (once the theory of a nanosecond transfer of property is rejected); and (ii) if and so far as bunkers remained unconsumed, to transfer the property in the bunkers so remaining to C in return for C paying the price (this refers to the price payable for all the bunkers).
- The contract is not one for sale, but is closely analogous to a sale. Thus, in respect of both bunkers consumed and any bunkers remaining at the time of payment, the contract would contain similar implied terms as to description, quality etc. to those implied in a conventional sale.
- The obligation on D's part to be able to pass the property in respect of any bunkers not so consumed against payment of the price for all the bunkers cannot make the agreement as a whole a contract for sale.
    - The essential nature of the contract offers a feature quite different from a contract of sale of goods, namely the liberty to consume all or any part of the bunkers supplied without acquiring property in them or having paid for them. It is a contract sui generis.
- Even if the contract was a sale, this would not assist C. This is because D could not owe any obligation to transfer property in bunkers consumed before payment. The contract would be subject to a resolutive condition subsequent whereby it would cease to be a contract of sale as and to the extent that C exercised their contractual right to consumer the bunker in the vessel's propulsion, and would cease entirely to be a contract of sale if and when all such bunkers were consumed before payment.

Implied term as to D's obligations

- C's alternative ground of appeal is that there must, as a matter of obviousness and necessity, have been an implied term of the contract relating to performance of obligations in the contractual chain above D, by virtue of which D obtained the bunkers it supplied to C.
    - It is argued that there was an implied duty on D to perform its obligations by making timeous payment to its supplier.
- The only implied undertaking was that D had the legal entitlement to give permission to C to use the bunkers in propulsion prior to payment. In order to be so entitled, D need not have or acquire title to the bunkers; it merely needed to have acquired the right to authorise such use.
- C simply continued to use the bunkers under the contractual liberty until they were all consumed. There is no basis for treating the contractual liberty as ending with the 60-day period for payment; so long as the contract remains in force, the liberty continues on its face until payment or complete consumption of the bunkers.
- No claim was made in the present case that D had no right to permit such use of the bunkers. So, on the presently assumed facts, C are simply liable for the price under a contract sui generis.

The position if the contract had been one of sale (obiter)

- S49(1) enables an action for the price where the seller has transferred property, with or without delivery, and the buyer had failed to pay the price due.
    - S49(2) reflects a common law exceptions that where the price is payable on a day certain, the seller may enforce its payment, provided he is ready and able at the same time to deliver to the buyer the goods and property in them.
- The question of principle is whether s49 excludes any claim to recovery of a price outside its express terms.
- Non-performance could just as well be described in terms of failure to accept a transfer of title to property, as failure to pay its price. If described as a claim for failure to pay the price, a claim for damages for non-payment of money could readily be accommodated in the modern law.
    - The damages may have to be reduced to take account of the prospect of recovery of the property.
- In the present case, bearing in mind the complete consumption of the bunkers, there would be no difference between the agreed price and the damages for non-payment of the price. However, there is artificiality about treating the seller's claim as being for damages.
- S49(2) relaxes only partially the strictness of s49(1), and it depends on the price being payable on a day certain – these words can be construed liberally but are not of indefinite expansion.
    - The main focus of s49(2) may well have been on cases where delivery has not been made.
    - S49 does not focus on the position existing where delivery is made, title is reserved, but the price is agreed to be paid, albeit not on a particular "day certain". It focuses even less on the position where all these features are present, and the buyer is permitted to dispose of or consume the goods or they are at the buyer's risk and are destroyed or damaged.
    - The question is whether in all these cases an action for the price is excluded, and the seller is forced to look around for other means of redress.
- The court should be cautious about recognising claims to the price of goods in cases not falling within s49. However, there is at least some room for claims for the price in other circumstances than those covered by s49.
    - The court could not recognise a claim for the price in a case falling squarely within s50.

- The price may be recovered in respect of goods undelivered which remain the seller's property but are at the buyer's risk and are destroyed by perils of the seas or by fire.
    - The present case is a fortiori. The price of bunkers, which remain the seller's property, but which are both (i) at the buyer's risk as regards damage or destruction, and (ii) also permitted by the express terms of the contract to be destroyed by use for C's commercial benefit, must be equally recoverable.
    - This is not the limit of the circumstances outside s49 in which the price may be recoverable.
- The precise limits of allowed circumstances outside s49, and the significance which may in particular attach to the sue of RoT clauses in combination with physical delivery of the goods and the transfer of risk, must be left for determination on some future occasion.
- So, s49 is not a complete code of situations in which the price may be recoverable under a contract of sale.
    - In the present case, the price was recoverable by virtue of its express terms in the event which has occurred, namely the complete consumption of the bunkers supplied.