Better Late than Never: The Reform of the Law on the Sale of Goods Forming Part of a Bulk

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cannot coerce the private sector into offering secure and adequate private provision. There are other perceptions and other policies.[103] Whilst this article has not directly addressed the affordability of pensions, I hope it has increased the reader's awareness of what is at stake.

Better Late than Never: The Reform of the Law on the Sale of Goods Forming Part of a Bulk

Tom Burns*

Until September 1995, contracts worth millions of pounds were being concluded regularly in the commodity markets[1] of the United Kingdom in which the purchasers of goods forming part of bulk cargoes or bulk storage were at grave risk if the seller became insolvent. This was the result of the inadequate statutory protection provided by the Sale of Goods Act 1979. If a purchaser paid for goods while they were still part of an identified bulk,[2] for example 100 tons of wheat from a named ship carrying a cargo of 500 tons of wheat, and received in return what he perceived to be a document of title such as a bill of lading,[3] the buyer would assume he had become the legal owner of the goods. He would probably not be too worried by the seller becoming insolvent before the ship reached the port and would expect that the goods he had paid for would be separated out from the bulk at the docks and transferred to him rather than going to the seller's receiver or liquidator. Section 16 of the Sale of Goods Act 1979,[4] however, stated that

103 See, for example, Townsend and Walker, *New Directions for Pensions: How to Revitalise National Insurance* (1995) European Labour Forum; Field and Owen, *Private Pensions For All: Squaring the Circle* (1993) Fabian Society; Atkinson, *State Pensions for Today and Tomorrow* (London: LSE, 1994) Discussion Paper WSP/104, Suntory-Toyota International Centre for Economics and Related Disciplines; Hill, *The Future of Welfare* (York: Joseph Rowntree Foundation, 1993).

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1 The main commodity exchanges in the UK where actuals and futures are traded are: (i) the Baltic Exchange specialising in the trade of grain, potatoes and meat under the auspices of the Grain and Feed Trade Association; (ii) the London Metal Exchange dealing in non-ferrous metals such as copper, lead, zinc; (iii) the International Petroleum Exchange (London); and (iv) the London Futures and Options Exchange dealing in futures contracts and options in commodities such as cocoa, coffee and sugar.

2 This would be unascertained goods forming part of a larger mass, stored in a specific place such as a ship's hold, a warehouse or a silo, which was identified in the contract. Such unascertained goods have been classed by Roy Goode as 'quasi-specific' goods because they share more features in common with ascertained or specific goods than they do with wholly unascertained goods: Goode, *Commercial Law* (London: Penguin, 1995) ch 6. See further below, ns 5 and 6.
Section 2 of the 1995 Act amends s 61(1) of the 1979 Act by providing a definition of bulk as 'a mass or collection of goods of the same kind, which (a) is contained in a defined space or area; and (b) is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity.'

3 Bills of lading are accepted by traders and by banks as 'documents of title' and many sale and security transactions are undertaken in commercial practice in the belief that the bill of lading gives a real right to the underlying goods. In *Sewell* v *Burdick* (1884) LR 10 App Cas 74, however, the House of Lords held that these bills represent possession of the goods and not ownership, although possession may raise the presumption of ownership. For further discussion of these issues, see Gretton, 'Pledge, Bills of Lading, Trusts and Property Law' (1990) *Juridical Review* Part I, 23–34, and Rodgers, 'Pledge and Bills of Lading in Scots Law' (1971) *Juridical Review* Part III, 193–213.

4 The Sale of Goods Act 1979 replaced the Sale of Goods Act 1893 which codified the law of sale in England and Ireland. Late in its passage through Parliament the application of the 1893 Bill was

'[w]here there is a contract for the sale of unascertained goods,[5] no property in the goods is transferred to the buyer unless and until the goods are ascertained.'[6] The buyer therefore acquired no proprietary interest in the goods he had paid for and was merely an unsecured creditor for the return of the price.

This was the most serious consequence of a mandatory rule which took no account of the intentions or expectations of the parties. But there were other implications of section 16 which defied commercial expectations. Until the goods became ascertained, the buyer could not acquire legal ownership in, or possessory title to, those goods. As a result, he lacked title and interest to sue in tort/delict for damage to the goods.[7] Moreover, the common practice in international trade of the buyer obtaining a loan from the bank to finance his purchase of the bulk goods by offering the bill of lading as security was put in question by sections 16–19. Until there was an appropriation of the goods to the contract, the buyer could not own the goods and therefore could not offer real security.

Clearly, reform of the rules on passing of property was required to meet the needs of commerce. Surprisingly, however, reform did not immediately follow from the discovery that the law was defective with regards to goods bought from bulk. Cases from the earlier part of this century in both Scotland[8] and England[9] highlighted the most serious aspect of the problems caused by the mandatory rule on the passing of property in unascertained goods; this was the consequence of this rule for the buyer where the seller becomes insolvent before ascertainment has taken place. But no reform followed. Some eminent Scots lawyers[10] began to express their concern about the effects of these statutory rules which had displaced their own common law rules on sale, but such concerns were largely ignored by the legislature.[11] Later, other common law jurisdictions which had originally based

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extended to Scotland in order to produce one standard code on sale for the United Kingdom. The Act had the effect of replacing the common law on the sale of goods in Scotland which had been based on the principles of Roman law.

5 Surprisingly, the term 'unascertained goods,' which is also used in s 18 of the 1979 Act, is not defined. It may be inferred, however, that they are the goods not identified and agreed upon at the time the contract is made. Thus, future goods (eg a machine yet to be manufactured) and generic goods such as coal and oil sold by description are unascertained goods.

6 'Ascertained goods' is another term used, but not defined in the 1979 Act. It may be inferred that these are unascertained goods which later become identified as the goods to be delivered to the buyer as a result of those goods becoming separated out and irrevocably earmarked for the buyer in accordance with the agreement made after the time the contract was concluded: see *Re Wait* [1927] 1 Ch 606, 630.

7 This was established by *Leigh and Sillivan Ltd* v *Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.

8 *Hayman and Son* v *McLintock* 1907 SC 936 (the claim of McConnell and Reid).

9 *Re Wait* [1927] 1 Ch 606, and *Laurie and Morewood* v *Dudin and Sons* [1926] 1 KB 223.

10 Scottish lawyers who were prominent critics of the Sale of Goods Act 1893 were Professor T.B. Smith and Professor J.J. Gow. In a number of books and articles, these critics pointed out the deficiencies in the Act and asserted the relative merits of a Scots Common Law of Sale based on the principles of Roman law. See 'The Crisis of Scots Law as a Civilian System' in Smith (ed), *Studies: Critical and Comparative* (Edinburgh: W. Green, 1962); Smith, *Property Problems in Sale* (London: Sweet and Maxwell, 1978); and Gow (ed), *The Mercantile v Industrial Law in Scotland* (Edinburgh: W. Green, 1964).

11 Interestingly, many of the problems highlighted in this article concerning the statutory rules on the passing of property (ss 16–19 of the 1979 Act), particularly as they affect the sale of goods forming part of a bulk, would not have caused problems under the old common law of Scotland. Under the old common law of sale, property passed not by mere agreement (contract) but by the intention to sell, coupled with the transfer of possession of the goods. In other words, there had to be a contract and a conveyance. The maxim was *traditionibus et usucapionibus, non nudis pactis, transfuntur rerum dominia.* Actual physical transfer was not, however, always necessary as the Scots common law on the sale of goods allowed constructive transfer by way of documents of title. For a fuller

their commercial law on the Sale of Goods Act 1893, such as the United States of America[12] and Canada,[13] saw the problems created for commerce by general rules on the passing of property and reformed their laws to accommodate the expectations of the commercial world, but again no reform followed in the United Kingdom itself.

This note first traces the reasons why it took until 1995 to reform the law in the United Kingdom, before examining and evaluating the changes brought about by the Sale of Goods (Amendment) Act 1995.

Why was there no substantial demand for reform in the United Kingdom until the late 1980s?

It became apparent from the case law of both Scotland and England that the Sale of Goods Act was not protecting the buyer who paid in advance for goods forming part of an identified bulk. In the Scottish case of *Hayman* v *McLintock*,[14] the buyer paid the seller in advance for 250 sacks of flour stored in an undifferentiated mass in a particular warehouse. In return the buyer received a delivery order to enable him to take possession of the goods. The buyer took delivery of 29 sacks but left the remainder undivided in the bulk. When the seller became insolvent, the remaining 221 sacks had not been separated out and irrevocably earmarked for the buyer; therefore, no property had passed in these goods and the seller's trustee in bankruptcy claimed them. In the English case of *Re Wait*,[15] the buyer paid in advance for 500 tons of wheat out of a ship's cargo of 1,000 tons and received a bill of lading in return. The buyer's goods had not been divided from the bulk at the time of the seller's bankruptcy, and so the buyer lost his payment and could assert no claim to the unascertained goods. In these cases the courts were applying the unambiguous rule of section 16 and the buyers' plight, although unfortunate, was discounted as one of the risks of commerce which the buyer must accept. The rights of the seller's creditors were being protected as a consequence of section 16 and if there was a lesson to be learned from these cases by the buyer it was *caveat emptor*. The buyer should take whatever precautions he could in terms of arranging for insurance cover and bargaining for appropriate protective contractual terms.

The commercial community did develop precautionary measures following these cases. Buyers of goods forming part of a bulk could, for example, contract to acquire the risk of damage to or loss of the unascertained goods.[16] Although at first sight this might seem strange, this could be of advantage to the buyer. He would acquire an insurable interest in the goods and could take out the appropriate

discussion on the points of comparison between the statutory law on the sale of goods and old Scots law, see Gow, *op cit* n 10, ch 2.

12 The model law of the United States, the Uniform Sales Act 1906, was modelled on the Sale of Goods Act 1893. Like the 1893 Act, the American law adopted the concept of passing of property as the way of determining which one of the parties has the real right to the goods. When it came to dealing with the problem of quasi-specific goods or goods forming part of a bulk, however, the passing of property rules were modified by s 6 of the Uniform Sales Act to permit the buyer of goods in bulk to become a part-owner of the bulk.

13 Provincial laws in Canada were modelled on the Sale of Goods Act 1893, as indeed were most of the commercial laws of Commonwealth countries (see Goode, *op cit* n 2, p 35).

14 1907 SC 936.

15 [1927] 1 Ch 606.

16 This happened in the case of *Sterns Ltd* v *Vickers Ltd* [1973] 1 KB 78, where the risk passed to the buyer before the property. It is commonplace for risk to pass before property in cif and fob contracts.

insurance cover so that if the seller did not deliver, the buyer could recover his losses. Buyers could also use the law of trusts to protect their interests. In a leading English case, *Re Kayford Ltd (In Liquidation)*,[17] it was established that money paid in advance for goods not yet appropriated to the contract could be placed in trust for the buyer in a separate bank account (that is, a Customer Trust Deposit Account) if the buyer stipulated for this result in the contract. If the seller then became insolvent, the buyer would appear not as the seller's creditor subject to the competing claims of the other creditors, but as a beneficiary under the trust with a proprietary claim to the trust fund. This result would also be recognised in Scots Law.[18] Performance bonds could offer the buyer another method of protecting his interests when he pays in advance for unascertained goods forming part of a bulk. The buyer could require the seller to arrange for an advance payment bond by which the seller's bank would provide a bond guaranteeing repayment in the event (*inter alia*) of the seller's insolvency.

There are, however, costs in terms of time, money and convenience associated with these measures. They require careful drafting. They make contracts more complex and the process of concluding agreements slower and more cumbersome and they do not meet the commercial needs of the commodity trade for rapid and efficient procedures to conclude bargains in markets where there is fluctuating supply and demand and volatile price movements.[19] As a result, in practice many commercial traders did not take elaborate protective measures, particularly when they saw that most sellers performed their obligation to deliver the goods.[20] Thus, in the absence of significant cases to cause concern among the trading community up until the 1980s, there was no clamour for the reform of sections 16–19.

The practice of the courts in interpreting the statutory rules on the passing of property in a flexible fashion in certain circumstances also helped to minimise the number of calls for reform of the law until the 1980s. Thus, in *Wait and James* v *Midland Bank*,[21] the English High Court held that there could be a transfer of property without unconditional appropriation by a process of ascertainment by exhaustion. In this case, Wait and James, the owners of a consignment of wheat held in bulk in a Bristol warehouse, sold various quantities of this stock to various buyers. One of the contracts was for the sale of 1,250 quarters of wheat to a firm called Redlers. This firm took delivery of 400 quarters and pledged the remaining 850 quarters, still forming part of a bulk, to the Midland Bank. Over time, all the various purchasers of this stock of wheat took delivery of their various shares, which left 850 quarters of the stock in the warehouse. Redlers had not paid Wait and James for the wheat and they claimed to be entitled to keep the 850 quarters lying in the warehouse as those goods were still unascertained goods in which no property had passed to Redlers. However, the Midland Bank also claimed a right to those goods. It was held that the wheat lying in the warehouse had passed to Redler as a result of those goods having become ascertained by exhaustion. The principle

17 [1975] 1 All ER 604.

18 See Wilson, *The Law of Scotland Relating to Debt* (Edinburgh: W. Green, 1982) p 257, where the author cites *Re Kayford* with approval.

19 This point was noted by the Law Commissions in their *Joint Report 1993* (Law Com No 215, Scots Law Com No 145) para 3.7, where they state: 'Sellers in high-volume international trades with rapidly fluctuating prices may well be unwilling to trade on the basis of legally sophisticated terms which attempt to get round section 16 indirectly.'

20 The Law Commission's *Joint Report 1993*, *op cit* n 19, para 1.1, noted that less than ten per cent of contracts were not performed owing to the seller's insolvency.

21 (1926) 31 Com Cas 172.

was confirmed in the 1982 case of *Karlshamns Oljefabriker* v *Eastport Navigation Corp (The Elafi)*.[22]

Reform of the passing of property rules in North America

If the British were prepared to accept the nineteenth-century statutory rules on the passing of property as being adequate to cope with the commercial needs of the twentieth century, even though these rules could produce the occasional injustice for the buyer in certain circumstances, the Americans were not. By the 1950s there was strong pressure for the reform of the English rules on the passing of property which had been incorporated by the Americans into their Uniform Sales Act 1906. American businessmen thought that the rules were outdated and inappropriate for the changing patterns of commercial activity in the USA in the immediate postwar period when the country was leading the world in technological and economic terms. The rules could produce results contrary to the commercial expectations of the parties to the contract and this resulted in businesses having to place more reliance on lawyers for advice on what business people had once regarded as straightforward commercial transactions. Another factor in the pressure for reform was the divergent case law on the Uniform Sales Act across the different States producing further uncertainty in the law. As a consequence of these factors, the issue of reform was taken up by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Initially, the Institute agreed to co-sponsor a revision of the old Uniform Sales Act. Lobbying by reformers influenced by the philosophy of Legal Realism, however, led to the project for reform becoming a more radical one. Instead of merely adjusting the existing law, these Legal Realists recommended the abolition of the old law, the abandonment of the concept of the passing of property as the determining factor in the allocation of rights and the creation of a comprehensive Uniform Commercial Code (UCC).[23]

This radicalism stemmed from the Realists' functionalist view of the law. In the words of the main proponent of Realism and the chief architect of the new Uniform Commercial Code, Karl Llewellyn[24]: 'law [is] ... a means to social ends and not an end in itself; so that any part needs constantly to be judged in the light of both and of their relation to each other.'[25] Accordingly, commercial law had to be judged in terms of how effective it was in achieving its purpose of facilitating commercial transactions and trade for the economic well-being of society. For Llewellyn and his colleagues the Uniform Sales Act was failing to meet those requirements. A root cause of this failure was the over-reliance on the concept of property. Like its English counterpart, the Sale of Goods Act, the American Uniform Sales Act had made 'property' or 'title' its central organising concept. It served to determine the rights and obligations of parties in many different kinds of disputes. Thus, if a dispute arose over who should bear the risk of loss or damage to goods, the answer was to be found by locating who had the title to the goods at

22 [1982] 1 All ER 208.

23 The Uniform Commercial Code 1952, revised in 1962 and 1972. This model law has now been adopted in all the states except Louisiana, which uses the Code Napoleon: see Hay, *Introduction to US Law* (London: Butterworths, 2nd ed, 1991).

24 Llewellyn (1893–1962) was the leading exponent of Legal Realism. His principal works are *The Bramble Bush: Our Law and its Study* (1930, New York: Oceania, c. 1960); *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941); and *The Common Law Tradition* (Boston: Little, Brown & Co, 1960).

25 Llewellyn, 'Some Realism about Realism' (1931) 44 Harvard L Rev 1222.

the time of the loss and placing the risk on that party (unless the parties themselves had contracted for a different result). Title was used to determine whether a seller could sue a buyer for the price of the goods supplied. The concept could also be used to decide if a buyer could demand delivery of the goods he had paid for from an insolvent seller. The concept could even be used to determine whether a valid security right had been created where a creditor had advanced money on a pledge of a bill of lading. However, whilst this single concept of property or title had the advantage of flexibility and economy in resolving many problems, the American reformers thought that it was not sophisticated enough. Stretching the one concept to cover so many different issues created anomalies which could defeat even the inventiveness of the judiciary, as well as the purposes of commercial traders, and could produce questionable results. The classic example of this is the rule that property cannot pass to the buyer where he purchases goods in an undivided bulk. The result of this statutory rule in cases where the seller has become insolvent is that the buyer loses both the money he had paid for those goods and the goods themselves to the seller's creditors — hardly a just result.

Karl Llewellyn's alternative to a revised Uniform Sales Act was a comprehensive Commercial Code cast in non-technical language which would modernise, clarify and simplify the law.[26] Although sale would still have as its aim the transfer of ownership of the goods from seller to buyer for the price (section 2-106(1) of the Code), the rights of the parties at any given time during the performance of the contract would be governed by the Code where the parties' own contract was silent on the issue.[27] As Llewellyn notes in his comment on the Short Title to Article 2 of the Code (section 2-101):

> The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

This step-by-step approach allows the Code to deal with various issues such as the allocation of risk, reservation of title, sales on approval and sale or return agreements etc in a more coherent and comprehensive way than the blunt instrument of the passing of property could permit.[28]

With regard to the particular issue of the sale of goods in an undivided bulk, section 2-105(4) of the Code deals with the issue in the following way:

> An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold, although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

This avoids the need for ascertainment to establish the buyers' title as owners in common and gives the buyers protection they could not enjoy under the mandatory rules of section 16 of the United Kingdom Sale of Goods Act 1893. This reform

26 This aim is expressly stated in Article 1, s 1-102 (2) of the Code.
27 The intention of the parties is the paramount rule, subject to obligations of good faith, diligence and due care imposed on the parties by the Code irrespective of their intentions.
28 See Article 2, ss 2-509 and 2-510; ss 2-326 and 2-327; and Article 9 on Secured Transactions.

Items that are interchangeable because they are identical to each other for practical purposes.

encouraged Canada to review its own sales law which, like the 1906 American Act, was based on the Sale of Goods Act 1893. The Canadian law reformers found the United Kingdom rules on the passing of property of goods from a bulk source 'anomalous.'[29] In the early 1980s the Canadians adopted a version of the American section 2-105(4) UCC into their Uniform Sale of Goods Act.

The 1980s and the first significant move for the reform of the United Kingdom rules

Although the Americans provided a model in the 1950s of how the law on the passing of property could be transformed by codification, or could at least be modified with regard to the transfer of ownership of goods forming part of an identified bulk by the selective adoption of section 2-105(4) of the UCC, it was not until the 1980s that serious pressure began to mount for a change in the law. The reasons for the change of attitude stem in part from the changes in transportation and commercial practices starting in the 1970s and continuing through the 1980s. Ships became larger, cargoes became bigger and more buyers bought more (but proportionately smaller quantities) of the bulk goods. Speculative buying and selling of goods in bulk in the commodity markets increased in the 1980s, with the result that the undivided shares in the goods may have changed hands many times before the cargo ship reached its port of destination.[30] These factors which combined to increase the sale of goods in undivided bulk also increased the likelihood that more buyers would suffer loss as a result of the unreformed law than was the case in the past.

By the mid-1980s the number of cases concerning the sale of goods forming part of a bulk began to increase. This highlighted for previously unconcerned and complacent buyers the fact that the statutory provisions of the Sale of Goods Act offered them inadequate protection. It also strengthened the case for reform which had been made by influential academic lawyers, like Professor Roy Goode in England and Professor T.B. Smith in Scotland, in their various academic writings.[31]

The *Gosforth* case[32] was the first of a line of cases to cause concern to buyers. Although it was a Dutch case, the judges had to apply the provisions of the Sale of Goods Act 1979 because the choice of law clause in the contract specified English Law as the law of contract governing the sale to the sub-buyers and, as a result, it received a degree of publicity in Britain, especially among commodity traders. The facts of the case were as follows. The merchant ship 'The Gosforth' was carrying a bulk cargo of citrus pellets to Rotterdam. The first buyer (B1) agreed to buy the cargo from the seller in order to re-sell the goods to a number of sub-buyers in Rotterdam. B1 received a bill of lading in respect of the unascertained goods but he did not pay for the goods in advance. The sub-buyers paid B1 for their shares in the yet undivided cargo and each was given a delivery order in respect of their share.

29 Ontario Law Reform Commission, *Report on the Sale of Goods* (1979) vol 1, pp 44–45.

30 This was noted in the Law Commissions' *Joint Report*, *op cit* n 19, para 3.2. In para 1.3, it was reported that 85 per cent of traders in grain, animal feedstuffs, vegetable oils, sugar, coffee, tea, oil, metals and ores purchased goods while they were still part of a larger bulk.

31 See eg Goode, *Commercial Law*, *op cit* n 2, and *Proprietary Rights and Insolvency in Sales Transactions* (London: Sweet & Maxwell, 2nd ed, 1989); Smith, *Property Problems in Sale* (London: Sweet & Maxwell, 1978).

32 *The Gosforth* (1985) S en S 91.

When the ship docked at Rotterdam, however, the unpaid seller arrested the cargo to put pressure on Bl to make payment for the goods. The sub-buyers objected, claiming to be the owners of the cargo, but their claim failed because, applying section 16 of the Sale of Goods Act, they could not acquire property in goods that were unascertained. The merchants' faith in bills of lading and other 'documents of title' was proved to be ill-founded under English law,[33] although if the buyers had chosen German law or the laws of the States of America, or the Provinces of Canada as the law governing the contract, they would have acquired ownership in common.

Following *The Gosforth*, other cases arose which further underlined the risk to buyers of goods from a bulk source as well as the vagaries of case law as judges tried to adapt the restrictive property rules to do justice to the parties. In *Re London Wine Co (Shippers) Ltd*[34] and *Leigh & Sillivan Ltd* v *Aliakmon Shipping Co Ltd (The Aliakmon)*,[35] the buyers suffered loss as a result of the strict rules on property. However, in *Re Stapylton Fletcher*[36] and *Indian Oil Corporation Ltd* v *Greenstone Shipping Co*,[37] the buyers benefitted when the courts, now sensitive to the needs of buyers, were able to use the special facts of these cases to find that the buyers owned the goods in common.

Given the uncertainty of the law, some traders considered changing the applicable law of their contracts to avoid the problems caused by the Sale of Goods Act. This clearly posed a threat to the insurance and shipping businesses in Britain, as well as jeopardising the valuable legal business generated by arbitration and litigation. Some traders, however, preferred to operate under British law if it could be reformed. The Grain and Feed Trade Association, whose members regularly bought and sold goods in bulk in the Baltic Exchange in London, approached the Law Commission to ask it to investigate the case for reform. The Law Commissions of both Scotland (Discussion Paper No 83: *Bulk Goods*, 1989) and England (Working Paper No 112, 1989) carried out an investigation into the problem. In 1993 the Commissions issued a Joint Report (see n 19 above) recommending changes to the law on the passing of property in undivided bulk for many of the reasons previously highlighted in this article. The Commissions' Draft Bill was introduced as a Private Member's Bill in the House of Lords by Lord Mustill and in the House of Commons by Mr Gary Streeter, and it finally received Royal Assent on 19 July 1995, becoming law on 19 September 1995.

The reforms enacted by the Sale of Goods (Amendment) Act 1995

Unlike America, where dissatisfaction with the problems caused by the concept of 'property' contributed to the fundamental reform of commercial law, the problems

33 *The Gosforth* highlighted another problem with the statutory regime governing commodity sales in Britian. Section 1 of the Bills of Lading Act 1855 prevented a person to whom goods were to be delivered under a contract for the carriage of goods by sea from suing the carrier under a bill of lading because property in the goods forming part of a bulk could not pass to the buyer. The Carriage of Goods by Sea Act 1992 remedied this deficiency by granting a holder of a bill of lading the right to sue the carrier for breach of contract, whether or not property in the goods had passed. For an excellent critique of this legislation, see Bradgate and White, 'Carriage of Goods by Sea Act 1992' (1993) 56 MLR 188.

34 (1986) PCC 121.

35 [1988] 1 Lloyds Rep 128.

36 [1994] 1 WLR 1181. The court recognised ownership in common where wine was stored separately for a group of customers.

37 [1988] QB 345, where tenancy in common was used as a means of remedying the unforeseen mixing of the buyer's and seller's oil.

caused by the passing of property in Britain led to the short and modest Sale of Goods (Amendment) Act 1995, which strengthens the concept of 'property' in sales law by adapting it to meet the modern requirements of trade and commerce. Section 1 of the new Act has made a number of important amendments to sections 16, 18 and 20 of the Sale of Goods Act 1979. Section 16 is no longer an impediment to buyers acquiring property in goods forming part of an identified bulk. Now such buyers can obtain title to the goods as owners in common. Section 18 has been expanded by the addition of two new sub-rules (section 18, rule 5, sub-rules (3) and (4)) which govern the passing of property in goods from a bulk source from a seller to a single buyer. The main conditions for the passing of property laid down by these new sub-rules are that the buyer must have paid for the goods in advance and the source of the goods themselves must have been identified either at the time of the contract (for example, 100 crates of fish out of the cargo of 500 crates in the hold of the merchant ship 'The Maxwell'), or subsequently by agreement between the parties. Subsequent identification could occur where, for example, the seller contracts to sell 100 crates of fish fob Aberdeen and later loads a ship in Aberdeen with 500 crates of fish and gives notice to the buyer that this cargo includes the 100 crates ordered by the buyer. The new sub-rules give statutory recognition to the principle of ascertainment by exhaustion as developed by the courts in cases like *Wait and James* and *The Elafi* (see above).

The only difficulty for the buyer under the new section 18 rules would be if the seller, having sold an undivided share of 50 tons of wheat to one buyer from the warehouse stock of 100 tons, then proceeded to sell and deliver to a second buyer 60 tons of wheat from the warehouse stock before the first buyer had received his share. This act would reduce the first buyer's share to 40 tons. The further 10 tons that the first buyer should be entitled to may not be recoverable from the second buyer if that second buyer bought the goods in good faith and had no notice of the first buyer's legal right to the goods as an owner in common. Section 24 of the Sale of Goods Act 1979 may come into operation as the statutory exception to the rule *nemo dat quod non habet*, which would defeat the first buyer's claim to the goods. The first buyer would, however, still have a right to sue the seller for non-delivery.

The changes to section 20 of the Sale of Goods Act by the addition of new sections 20A and 20B may be the most significant changes introduced by the 1995 Act. Section 20A provides the basic rule for the passing of property in undivided bulk where there is more than one buyer involved. As in the new section 18, for property rights to accrue to the buyers they must have made payment in advance for the goods and the contract must have identified the bulk source either at the time of the contract or subsequently. Thus, under section 20A (3), if the seller of a cargo of 1,000 tons of oil in a specified ship sold 500 tons to A, 400 tons to B and 100 tons to C while the cargo was en route to its port of destination, the buyers would own the whole cargo in common, with each having a share in proportion to the quantity he ordered. Accordingly, A would be the owner of 50 per cent of the cargo, B the owner of 40 per cent and C 10 per cent. If the total quantity of the oil in the ship turns out to be less than the parties had expected and only 800 tons was delivered at the port, by operation of section 20A(3) the shares of the buyers would be reduced proportionately, so that A could only claim 400 tons, B 320 tons and C 80 tons from the total quantity delivered. The buyers could then sue the seller for the shortfall in the delivery under existing rules (as contained in sections 29 to 32 of the Sale of Goods Act 1979).

In the event of some of the goods in the undivided bulk being partially destroyed, the formula in section 20A(3) would indicate that the loss should be

borne by the seller (unless there was an agreement to the contrary). Thus, if the ship contained 1,000 tons of oil, with A having a claim to 500 tons of it and B 100 tons of it as owners in common, then if 300 tons were destroyed this loss would be deemed to fall on the seller. If, however, the loss extended to 600 tons, the seller would bear the loss of the first 400 tons and the buyers in common ownership would share the remainder of the loss in proportion to their shares: A would bear the loss of 167 tons and B 33 tons.

Section 20B modifies the legal consequences of owning goods in common so as to enable trading in bulk goods to continue in the normal way. Subsection (1) establishes that ownership in common is merely an interim measure until each buyer's share can be finally ascertained. The normal rules of ownership in common as found in the general law of property do not apply here and each buyer is deemed to have consented to deliveries to the other co-owners of the quantities due to them. Those co-owners who take delivery out of the bulk are not liable under the new law to account to the other co-owning buyers who may receive short delivery (section 20B(3)). Delivery is deemed to be made on a 'first come, first served' basis. As a consequence, it is likely to be the person who receives his goods last who is most likely to suffer any shortfall. However, his contractual rights against the seller remain unaltered and undiminished by the new Act.

These new rules do not, however, alter the basic premise of the old Sale of Goods Act, namely that property should pass when the parties intend it to pass (section 17 of the Sale of Goods Act 1979). Therefore, it is possible under the new rules for the parties to agree that property in the identified source shall not pass on payment (section 20A(2)). The parties may also disapply the new rules on ownership in common and regulate their obligations as co-owners *inter se* in the event of a shortfall. This may be done by the creation of a mutual adjustment scheme (section 20B(3)(b)), such as that noted by the Law Commissions in their Joint Report[38] as operating within certain commodity associations such as the Grain and Feed Trade Association. The new law may also have consequences for the scope of the buyers' statutory remedies under the Sale of Goods Act 1979. Although it is fairly rare for the courts in England and Scotland to allow a buyer of specific or ascertained goods the remedy of specific performance under section 52, or, additionally, in Scotland the remedy of specific implement under section 52(4), the purchaser of goods from an identified bulk may also be able to claim this remedy, although it may not be a significant new right in practice.[39]

Do the reforms go far enough?

The reforms do not resolve all of the difficulties that may arise under statutory ownership in common. The Act does not provide any specific rules on the insolvency implications for the buyer of undivided goods. Where there is a

38 *op cit* n 19, pp 23–24.

39 Despite s 52 of the Sale of Goods Act providing for the remedy of specific performance (and, additionally, the remedy of specific implement in Scotland), the courts have taken the view that these remedies are not really appropriate where the goods sold are 'ordinary articles of commerce and of no special value or interest': *Cohen* v *Roche* [1927] 1 KB 169. This is because the buyer can readily obtain substitute goods on the market and can be adequately compensated by the award of damages. In England and Scotland the courts have tended to restrict the availability of the s 52 remedies to cases where the goods in question are either unique or 'commercially unique,' ie goods which cannot be readily obtained elsewhere: see *The Oro Chef* [1983] 1 Lloyd's Rep 509.

shortfall and the seller is insolvent, leaving the last co-owner with the burden of absorbing the losses, there is no statutory provision to spread that burden more evenly among the co-owners. The Law Commissions did consider three options to provide for this situation.[40] The first was a statutory regime to provide for a pro rata apportionment of goods to be administered by the office-holder in insolvency of the seller. They considered, second, a statutory monetary adjustment scheme between co-owning buyers and, third, giving the courts wide discretionary powers to make equitable adjustments among the co-owning buyers. Following consultation with insolvency practitioners and traders, however, it was concluded that statutory schemes might be difficult to administer, expensive to operate and could cause uncertainty among the trading community. It was also felt that there would be practical difficulties for the courts and uncertainty for the traders if the courts were left to decide the complex issues of equitable apportionment of losses. The Commission therefore abandoned its proposals on involvency provision, concluding 'that the attempt to achieve perfect justice among co-owning buyers in cases of shortfall on insolvency would be likely to do more harm than good and indeed [could] imperil the whole reform.'[41]

The new Act may protect buyers from a seller's insolvency before the apportionment of bulk goods, but it is silent on the issue of what is to happen if one of the co-owning buyers becomes insolvent or is otherwise unable to pay a debt. It would seem that the existing rules on the enforcement of judgments (English law) and diligence (in Scotland) are to apply. Consequently, if the co-owned bulk goods are in the hands of the debtor, they may be seized under the writ of *fieri facias* (in England) or by the diligence of poinding (in Scotland, under the provisions of section 4 of the Debtors (Scotland) Act 1987). Where the goods are in the hands of a third party (for example, the carrier where the goods are on a ship), under English law[42] the goods may be seized under a *fieri facias*, but in Scotland the position is less clear. In *Malcolm* v *Cook*,[43] it was held that a ship could be arrested, that is, seized in order to secure payment of the debt and, if necessary, the goods could be sold to settle the debt by another court order. In *Lucas's Trustees* v *Campbell and Scott*,[44] however, the Scottish court held that co-owned plant and machinery could not be arrested for the debt of one co-owner. What is clear is that if co-owned goods in bulk can be seized by a creditor, then the remaining co-owners are bound to suffer. The time for delivery of goods for commerce is almost always 'of the essence' and the delay caused by seizure of the bulk will inevitably be costly to the other co-owning buyers. In addition, the other buyers may have to become involved in court proceedings to assert their claim to the goods by actions such as multipoinding (in Scotland) or interpleader (in England), which again may be costly in time and money. Thus, the buyer of an undivided share in bulk goods may still face risks even as a co-owner until the goods are finally apportioned and he receives his share in full.

Conclusions

British statutory rules on the passing of property which were created in the nineteenth century proved to be inadequate to meet the demands of modern

40 *op cit* n 19, pp 14–17, the Supplementary Consultation.
41 *op cit* n 19, para 4.30.
42 *The James W. Elwell* [1921] P 351.
43 (1853) 16 D 262.
44 (1894) 21 R 1096.

commerce. Judicial ingenuity went some way towards ameliorating the worst effects of these statutory rules, for example, when the courts developed the principle of ascertainment by exhaustion, but the strict nature of some of the old statutory rules set a limit on what judges were able to do to modernise the law. The Americans, faced with similar difficulties forty years ago, opted to carry out a fundamental revision of their commercial law by codification. In the process they largely abandoned the concept of property as the chief determinant of rights in the sale of goods. The approach taken in the Sale of Goods (Amendment) Act 1995 has been much more cautious. The concept of property remains, but its effects have been modified to accommodate, amongst other things, the purchase of goods in an undivided, identified bulk. This change was largely modelled on Article 2, section 2-105(4) of the UCC, and this is to be welcomed. In a wider context, however, the changes introduced by the Sale of Goods (Amendment) Act 1995 represent yet another set of piecemeal amendments to the Sale of Goods Act 1979.[45] Although piecemeal change is better than no change at all when the statutory law is not as effective as it should be, such piecemeal changes can lack coherence. It can also make the law difficult for users to access. Perhaps nothing less than codification would solve these issues, but such a prospect seems remote. Consequently, commercial traders have to be satisfied with the fact that the Sale of Goods (Amendment) Act 1995 has modernised United Kingdom law and brought it into line with other jurisdictions. This change may have happened more than forty years after the Americans made their changes to the law to help buyers of goods in bulk but, considering the significant impact this new law will have on large numbers of high value commodity contracts, it is a reform that was better made late than never at all.

45 Other recent amendments to the Sale of Goods Act 1979 have been the Sale of Goods (Amendment) Act 1994, abolishing the rule of law relating to sale of goods in market overt and the Sale and Supply of Goods Act 1994 amending, *inter alia*, the provisions on quality, acceptance of goods by the buyer and the right of partial rejection.