Commercial Law

Problem Question Guide

Key

- Blue text: Important facts of cases
- Red text: Commentary

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

Statutes

- "FA 1889": Factors Act 1889
- "LPA 1925": Law of Property Act 1925
- "TA 1925": Trustee Act 1925
- "HPA 1964": Hire Purchase Act 1964
- "SGITA 1973": Supply of Goods (Implied Terms) Act 1973
- "CCA 1974": Consumer Credit Act 1974
- "UCTA 1977": Unfair Contract Terms Act 1977
- "SGA 1979": Sale of Goods Act 1979
- "SGSA 1982": Supply of Goods and Services Act 1982
- "IA 1986": Insolvency Act 1986
- "IA 1986 (PP) Order 2003": The Insolvency Act 1986 (Prescribed Part) Order 2003
- "FCA (No2) Regs 2003": The Financial Collateral Arrangements (No.2) Regulations 2003

- “CA 2006”: Companies Act 2006
- “CRA 2015”: Consumer Rights Act 2015
- “BCTAR Regs 2018”: The Business Contract Terms (Assignment of Receivables) Regulations 2018

Topic 1 – Sale of Goods: Contractual

SGA implied terms

Scope of SGA

- These provisions apply to contracts of sale – *SGA 1979 s1(1)*
- **A contract of sale of goods is a contract by which S transfers or agrees to transfer the property in goods to B for a money consideration, called the price – *SGA 1979 s2(1)***
    - There may be a contract of sale between one part owner and another – *SGA 1979 s2(2)*
    - A contract of sale may be absolute or conditional – *SGA 1979 s2(3)*
        - "Conditional sale agreement": An agreement for the sale of goods under which the purchase price (or part of it) is payable by instalments, and the property in the goods is to remain in S (notwithstanding B's possession of the goods) until such conditions as to the payment of instalments (or otherwise, as may be specified in the agreement) are fulfilled – *SGITA 1973 s15(1)*
    - These provisions do not apply to a transaction in the form of a contract of sale, but which is intended to operate by way of mortgage, pledge, charge, or other security – *SGA 1979 s62(4)*
    - **It is unclear whether a contract for the sale and installation of goods is a contract of sale under SGA 1979, or a contract for the transfer of goods under SGSA 1982.** The authorities are conflicting, yet it is clear that the court must have regard to the substance of the transaction (*Robinson v Graves*). In any event, there is little difference between the terms to be implied under SGA 1979 and SGSA 1982, and it was assumed in *Jones v Gallagher* that SGA 1979 s35 applied also to a contract under SGSA 1982, thus showing the overlap between the two legislative provisions.
    - **It is unclear whether a part-exchange contract is a contract of sale under SGA 1979, or a contract for the transfer of goods under SGSA 1982.** A contract of sale requires a money consideration (as per SGA 1979 s2(1)), but the statute does not specify whether the consideration must only be money, or whether it may money in part. Still, there is little difference between the terms implied under SGA 1979 and SGSA 1982, and it was assumed in *Jones v Gallagher* that SGA 1979 s35 applies also to a contract under SGSA 1982, thus showing the overlap between the two legislative provisions.
    - A contract in which bunkers (fuel) is supplied, under which B is permitted to consume the bunkers for the propulsion of the vessel, prior to payment (60 days after supply), and thus property never passes because the bunkers are consumed, is not a contract for sale, but a sui generis contract. This is so even if some of the bunkers are not consumed, in which property passes against payment of the price – *PST Energy v OW Bunker*
        - However, this sui generis contract is closely analogous to a sale, so that the contract contains similar implied terms as to SGA 1979 ss12-15 (with regards to both consumed and non-consumed bunkers) – *PST Energy v OW Bunker*
        - On this basis, it can be argued a sui generis contract such as that in the *Bunker's* case, is to be treated in the same way as a contract of sale, so that the same terms under SGA 1979, as well as other statutes (such as UCTA 1977 s6) can be applied.
- "Agreement to sell": Under a contract of sale, the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled – *SGA 1979 s2(5)*
    - An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled – *SGA 1979 s2(6)*

- Existing goods: Goods owned or possessed by S – *SGA 1979 s5(1)*
- Future goods: Goods to be manufactured or acquired by S after the making of the contract of sale – *SGA 1979 s5(1)*
    - Where a contract purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods – *SGA 1979 s5(3)*
    - A contract for the sale of goods, where the acquisition by S of the goods depends on a contingency which may or may not happen, is valid – *SGA 1979 s5(2)*
- **"Goods" includes all personal chattels other than things in action and money – *SGA 1979 s61(1)***
    - Intangible property are not "goods" – *Computer Associates*
- A computer program, by itself, is not a "good" – *St Albans v International Computers*
    - The supply of software in the form of a download is not a "sale of goods" – *Computer Associates*
    - CJEU (waiting on judgment from UKSC): Computer software can be classified as "goods", irrespective of whether it is supplied on a tangible medium or by electronic download – *Computer Associates*
    - This is a contentious point of law, waiting on judgment by UKSC. Digital content is covered by a separate chapter in CRA 2015, thus arguable that it has thus far been purposefully excluded from SGA 1979. On the flipside, there seems no rational reason for protection not to be given to purchasers of digital content.
    - **Irrespective of the above**, there will, at common law, be an implied term in the contract that the program will be reasonably fit for the intended purpose – *St Albans v International Computers*
- A computer disk, onto which a program has been encoded, is a "good" – *St Albans v International Computers*
    - If the disk is sold or hired, but the program is defective, there is prima facie a breach of the implied terms under SGA 1979 – *St Albans v International Computers*

Implied terms

Power to pass title

- **There is an implied term that S has a right to sell the goods – *SGA 1979 s12(1)***
    - **In the case of an agreement to sell, the implied term is that S will have a right to sell at the time when the property is to pass – *SGA 1979 s12(1)***
    - This term is a condition – *SGA 1979 s12(5A)*
    - S does not have a right to sell when he acquired the goods from a thief – *Rowland v Divall*
    - Where S can be restrained from selling by operation of law (e.g., an injunction), he has no right to sell – *Niblett v Confectioners' Materials*
    - S may not be in breach of s12(1) if B acquires a right to sell, notwithstanding S's inability to sell – *Niblett v Confectioners' Materials*
        - This is an ambiguous point of law without an authoritative answer.
    - Title can be fed down a chain if the original defective title is cured – *Butterworth v Kingsway*
- **There is an implied term that the goods are free (and will remain free until property passes) from any charge or encumbrance not disclosed or known to B before the contract is made – *SGA 1979 s12(2)(a)***
    - This term is a warranty – *SGA 1979 s12(5A)*
- **There is an implied term that B will enjoy quiet possession of the goods (subject to S or any TP's benefit to disturb possession by virtue of any charge or encumbrance disclosed or known to B before the contract is made) – *SGA 1979 s12(2)(b)***
    - This term is a warranty – *SGA 1979 s12(5A)*
    - Where B has no right to legally use the goods (e.g., they are subject to a trademark infringement), B does not enjoy quiet possession – *Niblett v Confectioners' Materials*
- EXCEPTION: A contract of sale in which there appears from the contract (or is to be inferred from its circumstances) an intention that S should transfer only such title as S or a TP may have – *SGA 1979 s12(3)*
    - In such a contract, there is an implied term that all charges or encumbrances known to S and not known to B have been disclosed to B before the contract is made – *SGA 1979 s12(4)*
    - In such a contract, there is an implied term that none of the following will disturb B's quiet possession of the goods:
        - S – *SGA 1979 s12(5)(a)*
        - Where the parties intend that S should transfer only such title as TP may have, TP – *SGA 1979 s12(5)(b)*
        - Anyone claiming through or under S or TP, otherwise than under a charge or encumbrance disclosed or known to B before the contract is made – *SGA 1979 s12(5)(c)*
    - These terms are warranties – *SGA 1979 s12(5A)*
- There may be an express term in the agreement that S has the right to sell the goods – *Barber v NWS Bank*

Correspondence with description

- **There is an implied term that the goods will correspond with the description (in a contract for the sale of goods by description) – *SGA 1979 s13(1)***
    - This term is a condition – *SGA 1979 s13(1A)*
    - This is concerned with identification of the goods – *Ashington Piggeries*
    - Words used to identify an essential part of the description of the goods should be given contractual force; but words used to provide identification of the goods can be construed much more liberally – *Reardon Smith v Hansen-Tangen*
        - The key question is one of identity: was the goods that identified in the contract as the future subject matter? – *Reardon Smith v Hansen-Tangen*
- **Alternatively:** For a statement by S to become a term of the contract, B must show that it was intended to be a warranty – *Heilbut v Buckleton*
    - *[See "Contractual term" section in "Contract – Misrep" notes]*
- A contract for the sale of unascertained or future goods (as being of a certain kind of class) is a sale by description – *Travers v Longel*
- A contract for specific goods is a sale by description if the parties had a common intention that it should be a term of the contract that the goods will correspond with the description – *Harlingdon v Christopher Hull*
    - The goods must be sold as a thing corresponding to a description – *Grant v Australian Knitting Mills*
    - This is an objective test – *Harlingdon v Christopher Hull*
    - Reliance by B on the description is powerful evidence of such a common intention – *Harlingdon v Christopher Hull*
- Subject to the de minimis principle, the contractual condition must be strictly performed – *Arcos v Ronaasen*
    - This is subject to SGA 1979 s15A – *[See "Buyer's remedies" section]*
- If the sale is by sample and description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description – *SGA 1979 s13(2)*
- A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by B – *SGA 1979 s13(3)*
- There is a breach of this term where there is a discrepancy from the contract particulars, such as where the thickness of staves differs from that contracted for – *Arcos v Ronaasen*
- There is a breach of this term where the goods are patently not the same as those depicted in a photograph supplied to B – *Local Boy'z v Malu*

- If B fails to establish a breach of contract through the front door of s13(1), they cannot succeed through the back door of s14 – *Harlingdon v Christopher Hull*

Satisfactory quality

- **There is an implied term that the goods are of satisfactory quality – *SGA 1979 s14(2)***
  - This term is a condition – *SGA 1979 s14(6)*
  - Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant), and all the other relevant circumstances – *SGA 1979 s14(2A)*
  - The quality of goods include their state and condition – *SGA 1979 s14(2B)*
  - The following are, inter alia, aspects of the quality of goods:
    - Fitness for all the purposes for which goods of the kind are commonly supplied – *SGA 1979 s14(2B)(a)*
    - Appearance and finish – *SGA 1979 s14(2B)(b)*
    - Freedom from minor defects – *SGA 1979 s14(2B)(c)*
    - Safety – *SGA 1979 s14(2B)(d)*
    - Durability – *SGA 1979 s14(2B)(e)*
  - **The goods must be reasonably fit for one or more of the purposes within the range of purposes for which goods under that description are normally bought – *Aswan v Lupdine***
  - The court must look not only at the nature of the defect itself, but also its likely effect on the overall condition of the goods – *Bernstein v Pamson Motors*
    - 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 car was not of satisfactory quality – *Bernstein v Pamson Motors*
  - Second-hand goods need not reach the same standard of quality as new goods – *Bartlett v Sidney*
    - This case was decided before the insertion of s14(2)-(2C), and so the result may now simply be achieved by application of the principle that when deciding whether the goods are of satisfactory quality, their description must be taken into account, per s14(2A).
  - If the goods on delivery require modification (even if easily and in minor ways) in order to be of satisfactory quality, they are not of satisfactory quality – *Lowe v Machell*
  - The implied condition does not apply to defects reasonably discoverable to B on such examination as he made or could make – *Grant v Australian Knitting Mills*
  - Unsatisfactory results caused by use of the goods otherwise than in accordance with the manufacturer's recommendations are not, without more, results of which B can reasonably complain – *Wormell v RHM Agriculture*
  - Pellets used for cattle feed whose quality have deteriorated by submergence of the ship, but which are still merchantable as cattle feed, does not breach s14(2). However, B may still sue for damages for the difference in value – *The Hansa Nord*
  - B purchased a staircase from S, and told S that the staircase was for residential use. The staircase did not comply with Building Regulations. The court held that S breached s14(2) and s14(3) – *Lowe v Machell*
  - In the case of a car, the two basic requirements of any car are that it is capable of being driven, and that it is capable of being driven in safety – *Bartlett v Sidney Marcus*
- Satisfactory quality is to be determined at the moment of delivery; the fact that the defect is reparable is immaterial for the question of quality – *Rogers v Parish*
  - Subsequently acquired knowledge can be taken into account (e.g., where goods are initially considered to be poisonous, but then discovered to not be so, or vice versa) – *Kendall v Lillico*

        - Lord Pearce gave a powerful dissent, in which he argued that subsequently acquired knowledge should not be taken into account, since at the date of delivery, the goods were believed to be poisonous and so were not marketable at that date. This approach accords more with the general principle in s14(2), and it is to be hoped that the UKSC will overturn *Kendall v Lillico* on this point soon.
- S14(2) is directed primarily at sub-standard goods – *Jewson v Kelly, Sedley LJ*
    - The mere fact that the operation of a boiler depended on peak-rate electricity, thus making the boilers more expensive to run and reducing the energy rating of the home, did not mean that the boiler was not of satisfactory quality – *Jewson v Kelly*
- Subsequently acquired knowledge can be taken into account
- This only applies where S sells goods in the course of a business – *SGA 1979 s14(2)*
    - There is no requirement for regularity of dealing in the goods – *Stevenson v Rogers*
        - A purely private sale of goods outside the confines of a business (if any) carried on by S is not in the course of a business – *Stevenson v Rogers*
        - A fisherman, whose business was caching fish and selling them, not buying and selling fishing boats, who sold his fishing boat, acted in the course of a business – *Stevenson v Rogers*
    - This also applies where S is, in the course of a business, an agent acting for a principal, except where the principal does not sell in the course of a business and either B knows that fact, or reasonable steps are taken to bring it to B's notice before the contract is made – *SGA 1979 s14(5)*
- The implied term may be annexed to a contract of sale by usage – *SGA 1979 s14(4)*
- EXCEPTION: The term does not extend to any matter making the quality of goods unsatisfactory which:
    - Is specifically drawn to B's attention before the contract is made – *SGA 1979 s14(2C)(a)*
        - This does not apply where the relevant defect is one different to that brought to B's attention – *Stephenson v Cookson*
    - Where B examines the goods before the contract is made, that examination ought to reveal – *SGA 1979 s14(2C)(b)*
        - This relates to the examination actually made; so it is no defence to say that a proper examination would have revealed the defect – *Macdonald v Pollock*
        - Examination of an allegedly identical item is not sufficient – *Garside v Black Horse*
    - In the case of a contract for sale by sample, would have been apparent on a reasonable examination of the sample – *SGA 1979 s14(2C)(c)*

Fitness for purpose

- **There is an implied term that (where B, expressly or by implication, makes known to S any particular purpose for which the goods are being bought) the goods are reasonably fit for that purpose – *SGA 1979 s14(3)***
    - This term is a condition – *SGA 1979 s14(6)*
    - The purpose must be a particular, definite purpose – *Ashington Piggeries*
    - The purpose may be expressly stated in the contract, or its communication may be inferred – *Manchester Liners v Rea*
        - No express intimation by B is necessary if S knows the purpose – *Ashington Piggeries*
        - The test is objective: what matters is how a reasonable person, circumstanced as S was, would have understood B's purpose at the time of the making of the contract – *Slater v Finning*
    - This term is implied whether or not the particular purpose is one for which goods are commonly such goods are commonly supplied – *SGA 1979 s14(3)*
        - S14(3) covers normal as well as abnormal purposes – *Aswan v Lupdine*
    - Second-hand goods need not reach the same standard of quality as new goods (although B must ask for second-hand goods, or know that they will be supplied) – *Bartlett v Sidney*
    - B cannot complain that the goods were not reasonably fit for purpose if they would have been had B used the goods in the conditions prescribed by the manufacturer's instructions – *Wormell v RHM Agriculture*
    - B purchased a staircase from S, and told S that the staircase was for residential use. The staircase did not comply with Building Regulations. The court held that S breached s14(2) and s14(3) – *Lowe v Machell*
- This only applies where S sells goods in the course of a business – *SGA 1979 s14(3)*
    - *[See "Satisfactory quality" section]*
- EXCEPTION: Where the circumstances show that B does not rely, or that it is unreasonable for him to rely, on the skill or judgment of S – *SGA 1979 s14(3)*
    - B's reliance need not be total or exclusive; reliance in some respects only is sufficient – *Cammell Laird*
        - However, where B partially relies on S's skill and judgment, and the defect arises in the sphere within B's expertise, there is no breach of s14(3) – *Jewson v Kelly*
        - In a construction contract, where S is free, according to the specification, to exercise their skill and judgment in a particular area, B is taken to rely on this – *Cammell Laird*
        - Where B, a property developer, ordered boilers for converted flats, but did not indicate any specific requirements as to the energy efficiency of the boilers, B was held to rely on S only to supply boilers of satisfactory quality: the impact on the energy ratings of the flats lay within the sphere of B's expertise – *Jewson v Kelly*
    - ONUS OF PROOF: It is for S to show that B did not rely on his skill and judgment, or that it was unreasonable of him to do so – *Slater v Finning*
        - If the relevant purpose was made known, reliance is normally inferred – *BSS Group v Makers*
            - It raises a presumption of reliance – *Manchester Liners v Rea*
        - An opportunity for B to examine the goods may show a lack of reliance (although there may still be reliance where the goods are to be examined by B on delivery) – *Kendall v Lillico*

- EXCEPTION: There is no breach of s14(3) where the failure of the goods to meet the intended purpose arises from an abnormal feature or idiosyncrasy, not made known to S by B, in B or in the circumstances of the use of the goods by B – *Slater v Finning*
    - This is so whether or not B is himself aware of the abnormal feature or idiosyncrasy – *Slater v Finning*
    - B purchased a tweed jacket, but suffered dermatitis from the jacket because, unbeknownst to B, she had unusually sensitive skin. S was held not in breach of s14(3) because the jacket would not have harmed the ordinary person – *Griffith v Conway*
- The implied term may be annexed to a contract of sale by usage – *SGA 1979 s14(4)*

<u>Match sample</u>

- The following apply in a contract for the sale of goods by sample:
    - A contract is a contract for sale by sample where there is an express or implied term to that effect in the contract – *SGA 1979 s15(1)*
- **There is an implied term that the bulk will correspond with the sample in quality – *SGA 1979 s15(2)(a)***
- **There is an implied term that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample – *SGA 1979 s15(2)(b)***
    - *[For satisfactory quality, see "satisfactory quality" section]*
- These terms are conditions – *SGA 1979 s15(3)*

SGSA / SGITA provisions

Contracts for the supply of services

Scope

- **These provisions apply to contracts under which a person agrees to carry out a service – *SGSA 1982 s12(1)***
    - This does not apply to a contract of service or apprenticeship – *SGSA 1982 s12(2)*
- These provisions apply whether or not goods are also transferred or bailed under the contract, and whatever the nature of the consideration for which the service is to be carried out – *SGSA 1982 s12(3)*
- A contract to provide an all-inclusive holiday in a hotel is both a contract for the supply of services and the supply of goods – *Wood v TUI*

Implied terms

- **There is an implied term that the supplier (acting in the course of a business) will carry out the service with reasonable care and skill – *SGSA 1982 s13***
- **There is an implied term that the supplier (acting in the course of a business) will carry out the service within a reasonable time – *SGSA 1982 s14(1)***
    - This only applies where the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract, or determined by the course of dealing between the parties – *SGSA 1982 s14(1)*
    - "Reasonable time" is a question of fact – *SGSA 1982 s14(2)*
- **There is an implied term that the party contracting with the supplier will pay a reasonable charge – *SGSA 1982 s15(1)***
    - This only applies where the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract, or determined by the course of dealing between the parties – *SGSA 1982 s15(1)*
    - "Reasonable charge" is a question of fact – *SGSA 1982 s15(2)*

Exclusion clauses

- Where a right, duty, or liability would arise under a contract for the supply of a service by virtue of these provisions, it may be negatived or varied by express agreement, by the course of dealing between the parties, or by such usage as binds both parties to the contract – *SGSA 1982 s16(1)*
    - This is subject to UCTA 1977 – *SGSA 1982 s16(1)*
        - *[See "Reasonableness: non-consumer" section in "Contract" notes]*
    - However, an express term does not negative a term implied by these provisions unless inconsistent with it – *SGSA 1982 s16(2)*

Contracts for the transfer of property in goods

Scope

- **These provisions apply to contracts for the transfer of goods, except the following contracts:**
  - **Contracts of sale of goods – *SGSA 1982 s1(2)(a)***
  - **Hire-purchase agreements – *SGSA 1982 s1(2)(b)***
  - **Transfers made by deed for which there is no consideration – *SGSA 1982 s1(2)(d)***
  - **Contracts intended to operate by way of mortgage, pledge, charge, or other security – *SGSA 1982 s1(2)(e)***
- These provisions apply to contracts for the transfer of goods whether or not services are also provided under the contract, and whatever the nature of the consideration for the transfer – *SGSA 1982 s1(3)*
- "Goods" includes all personal chattels, other than things in action and money – *SGSA 1982 s18(1)*
  - *[See "SGA implied terms" section]*
- The provision of food and drink in a hotel restaurant, even in the form of a buffet, amounts to a transfer of goods (in the absence of any express agreement to the contrary) – *Wood v Tui*
- A contract to provide an all-inclusive holiday in a hotel is both a contract for the supply of services and the supply of goods – *Wood v TUI*

Implied terms

- **POWER TO PASS TITLE:**
- **There is an implied term that S has a right to transfer the property – *SGSA 1982 s2(1)***
  - In the case of an agreement to sell, the implied term is that S will have a right to transfer the property in the goods at the time when the property is to pass – *SGSA 1982 s2(1)*
  - This term is a condition – *SGSA 1982 s2(1)*
- **There is an implied term that the goods are free (and will remain free until property passes) from any charge or encumbrance not disclosed or know to B before the contract is made – *SGSA 1982 s2(2)(a)***
  - This term is a warranty – *SGSA 1982 s2(2)*
- **There is an implied term that B will enjoy quiet possession of the goods (subject to S or any TP's benefit to disturb possession by virtue of any charge or encumbrance disclosed or known to B before the contract is made) – *SGSA 1982 s2(2)(b)***
  - This term is a warranty – *SGSA 1982 s2(2)*
- EXCEPTION: A contract for the transfer of goods in which there appears from the contract (or is to be inferred from its circumstances) an intention that S should transfer only such title as S or TP may have – *SGSA 1982 s2(3)*
  - In such a contract, there is an implied term that all charges or encumbrances known to S, and not known to B, have been disclosed to B before the contract is made – *SGSA 1982 s2(4)*
  - In such a contract, there is an implied term that none of the following will disturb B's quiet possession of the goods:
    - S – *SGSA 1982 s2(5)(a)*
    - Where the parties intend that S should transfer only such title as TP may have TP – *SGSA 1982 s2(5)(b)*

        - Anyone claiming through or under S or TP, otherwise than under a charge or encumbrance disclosed or known to B before the contract is made – *SGSA 1982 s2(5)(c)*
    - These terms are warranties – *SGSA 1982 s2(4) and (5)*
- *[For case law, see "SGA implied terms" section]*

- **<u>CORRESPOND WITH DESCRIPTION:</u>**
- **There is an implied term that the goods will correspond with the description (in a contract for the transfer of goods by description) – *SGSA 1982 s3(2)***
    - This term is a condition – *SGSA 1982 s3(2)*
- If the transfer is by sample and description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description – *SGSA 1982 s3(3)*
- A contract for the transfer of goods is not prevented from being one by description by reason only that, being exposed for supply, the goods are selected by B – *SGSA 1982 s3(4)*
- *[For case law, see "SGA implied terms" section]*

- **<u>SATISFACTORY QUALITY:</u>**
- **There is an implied term that the goods are of satisfactory quality – *SGSA 1982 s4(2)***
    - This term is a condition – *SGSA 1982 s4(2)*
    - Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant), and all the other relevant circumstances – *SGSA 1982 s4(2A)*
    - The quality of goods includes their state and condition – *SGSA 1982 s18(3)*
    - The following are, inter alia, in appropriate cases aspects of the quality of goods:
        - Fitness for all the purposes for which goods of the kind in question are commonly supplied – *SGSA 1982 s18(3)(a)*
        - Appearance and finish – *SGSA 1982 s18(3)(b)*
        - Freedom from minor defects – *SGSA 1982 s18(3)(c)*
        - Safety – *SGSA 1982 s18(3)(d)*
        - Durability – *SGSA 1982 s18(3)(e)*
- This only applies where S transfers the property in the goods in the course of a business – *SGSA 1982 s4(2)*
    - This also applies where S is, in the course of a business, an agent acting for a principal, except where the principal does not transfer the goods in the course of a business and either B knows that fact, or reasonable steps are taken to bring it to B's notice before the contract is made – *SGSA 1982 s4(8)*
- EXCEPTION: The term does not extend to any matter making the quality of goods unsatisfactory which:
    - Is specifically drawn to B's attention before the contract is made – *SGSA 1982 s4(3)(a)*
    - Where B examines the goods before the contract is made, that examination ought to reveal – *SGSA 1982 s4(3)(b)*
    - Where the contract is by sample, would have been apparent on a reasonable examination of the sample – *SGSA 1982 s4(3)(c)*
- The implied term may be annexed to the contract by usage – *SGSA 1982 s4(7)*
- *[For case law, see "SGA implied terms" section]*

- **<u>FITNESS FOR PURPOSE:</u>**
- **There is an implied term that (where B expressly or by implication, makes known to S, or a credit-broker, any particular purpose for which the goods are being acquired) the goods are reasonably fit for that purpose – *SGSA 1982 s4(5)***
    - This term is a condition – *SGSA 1982 s4(5)*
    - This term is implied whether or not the particular purpose is one for which goods are commonly such goods are commonly supplied – *SGSA 1982 s4(5)*
- This only applies where S transfers the property in the goods in the course of a business – *SGSA 1982 s4(5)*
    - This also applies where S is, in the course of a business, an agent acting for a principal, except where the principal does not transfer the goods in the course of a business and either B knows that fact, or reasonable steps are taken to bring it to B's notice before the contract is made – *SGSA 1982 s4(8)*
- EXCEPTION: Where the circumstances show that B does not rely, or that it is unreasonable for him to rely, on the skill or judgment of S (or the credit-broker) – *SGSA 1982 s4(6)*
- The implied term may be annexed to the contract by usage – *SGSA 1982 s4(7)*
- *[For case law, see "SGA implied terms" section]*

- **<u>MATCH SAMPLE:</u>**
- The following apply in a contract for the transfer of goods by reference to a sample:
    - A contract is one by sample where there is an express or implied term to that effect in the contract – *SGSA 1982 s5(4)*
- **There is an implied term that the bulk will correspond with the sample in quality – *SGSA 1982 s5(2)(a)***
- **There is an implied term that B will have a reasonable opportunity to compare the bulk with the sample – *SGSA 1982 s5(2)(b)***
- **There is an implied term that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on a reasonable examination of the sample – *SGSA 1982 s5(2)(c)***
    - *[For satisfactory quality, see "satisfactory quality" section]*
- These terms are conditions – *SGSA 1982 s5(2)*
- *[For case law, see "SGA implied terms" section]*

<u>Slight breach</u>

- Where B has the right to treat the contract as repudiated by reason of a breach by S of an implied term in SGSA 1982 ss3-5, but the breach is so slight that it would be unreasonable for B to do so, the breach is to be treated as a breach of warranty – *SGSA 1982 s5A(1)*
    - This does not apply if a contrary intention appears in, or is to be implied from, the contract – *SGSA 1982 s5A(2)*
    - ONUS OF PROOF: It is for S to prove that the breach is so slight that it would be unreasonable for B to treat the contract as repudiated – *SGSA 1982 s5A(3)*

Exclusion clauses

- Where a right, duty, or liability would arise under a contract for the transfer of goods by implication of law, it may be negatived or varied by express agreement, by the course of dealing between the parties, or by such usage as binds both parties to the contract – *SGSA 1982 s11(1)*
    - This is subject to UCTA 1977 – *SGSA 1982 s11(1)*
        - *[See "Reasonableness: non-consumer" section in "Contract" notes]*
    - However, an express condition or warranty does not negative a condition or warranty implied by these provisions, unless inconsistent with it – *SGSA 1982 s11(2)*

Contracts for the hire of goods

Scope

- **These provisions apply to contracts under which one person bails goods to another by way of hire (other than a hire-purchase agreement) – *SGSA 1982 s6(1)***
    - "S": Bailor
    - "B": Bailee
- These provisions apply to a contract for the hire of goods whether or not services are also provided under the contract, and whatever the nature of the consideration for the bailment by way of hire – *SGSA 1982 s6(3)*
- "Goods" includes all personal chattels, other than things in action and money – *SGSA 1982 s18(1)*
    - *[See "SGA implied terms" section]*

Implied terms

- **POWER TO PASS TITLE:**
- **There is an implied term that S has the right to transfer possession of the goods by way of hire for the period of the bailment – *SGSA 1982 s7(1)***
    - In the case of an agreement to bail, the implied term is that S will have a right to transfer possession at the time of bailment – *SGSA 1982 s7(1)*
    - This term is a condition – *SGSA 1982 s7(1)*
- **There is an implied term that S will enjoy quiet possession of the goods for the period of bailment (subject to S or TP's benefit to disturb possession by virtue of any charge or encumbrance disclosed or known to B before the contract is made) – *SGSA 1982 s7(2)***
    - This term is a warranty – *SGSA 1982 s7(1)*
- This does not affect the right of S to repossess the goods under an express or implied term of the contract – *SGSA 1982 s7(3)*
- *[For case law, see "SGA implied terms" section]*

- **CORRESPOND WITH DESCRIPTION:**
- **There is an implied term that the goods will correspond with the description (in a contract for hire by description) – *SGSA 1982 s8(2)***
    - This term is a condition – *SGSA 1982 s8(2)*
- If the hire is by sample and description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description – *SGSA 1982 s8(3)*
- A contract for hire is not prevented from being one by description by reason only that, being exposed for supply, the goods are selected by B – *SGSA 1982 s8(4)*
- *[For case law, see "SGA implied terms" section]*

- **SATISFACTORY QUALITY:**
- **There is an implied term that the goods are of satisfactory quality – *SGSA 1982 s9(2)***
    - This term is a condition – *SGSA 1982 s9(2)*
    - Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant), and all the other relevant circumstances – *SGSA 1982 s9(2A)*
    - The quality of goods includes their state and condition – *SGSA 1982 s18(3)*
    - The following are, inter alia, in appropriate cases aspects of the quality of goods:

        - Fitness for all the purposes for which goods of the kind in question are commonly supplied – *SGSA 1982 s18(3)(a)*
        - Appearance and finish – *SGSA 1982 s18(3)(b)*
        - Freedom from minor defects – *SGSA 1982 s18(3)(c)*
        - Safety – *SGSA 1982 s18(3)(d)*
        - Durability – *SGSA 1982 s18(3)(e)*
- This only applies where S bails the goods in the course of a business – *SGSA 1982 s9(2)*
    - This also applies where S is, in the course of a business, an agent acting for a principal, except where the principal does not bail in the course of a business and either B knows that fact, or reasonable steps are taken to bring it to B's notice before the contract is made – *SGSA 1982 s9(8)*
- EXCEPTION: The term does not extend to any matter making the quality of goods unsatisfactory which:
    - Is specifically drawn to B's attention before the contract is made – *SGSA 1982 s9(3)(a)*
    - Where B examines the goods before the contract is made, that examination ought to reveal – *SGSA 1982 s9(3)(b)*
    - Where the contract is by sample, would have been apparent on a reasonable examination of the sample – *SGSA 1982 s9(3)(c)*
- The implied term may be annexed to the contract by usage – *SGSA 1982 s9(7)*
- *[For case law, see "SGA implied terms" section]*

- **<u>FITNESS FOR PURPOSE:</u>**
- **There is an implied term that (where B expressly or by implication, makes known to S, or a credit-broker, any particular purpose for which the goods are being bailed) the goods are reasonably fit for that purpose – *SGSA 1982 s9(5)***
    - This term is a condition – *SGSA 1982 s9(5)*
    - This term is implied whether or not the particular purpose is one for which goods are commonly such goods are commonly supplied – *SGSA 1982 s9(5)*
- This only applies where S bails the goods in the course of a business – *SGSA 1982 s9(5)*
    - This also applies where S is, in the course of a business, an agent acting for a principal, except where the principal does not bail the goods in the course of a business and either B knows that fact, or reasonable steps are taken to bring it to B's notice before the contract is made – *SGSA 1982 s9(8)*
- EXCEPTION: Where the circumstances show that B does not rely, or that it is unreasonable for him to rely, on the skill or judgment of S (or the credit-broker) – *SGSA 1982 s9(6)*
- The implied term may be annexed to the contract by usage – *SGSA 1982 s9(7)*
- *[For case law, see "SGA implied terms" section]*

- **<u>MATCH SAMPLE:</u>**
- The following apply in a contract for the hire of goods by reference to a sample:
    - A contract is one by sample where there is an express or implied term to that effect in the contract – *SGSA 1982 s10(4)*
- **There is an implied term that the bulk will correspond with the sample in quality – *SGSA 1982 s10(2)(a)***
- **There is an implied term that B will have a reasonable opportunity to compare the bulk with the sample – *SGSA 1982 s10(2)(b)***

- **There is an implied term that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on a reasonable examination of the sample – *SGSA 1982 s10(2)(c)***
    - *[For satisfactory quality, see "satisfactory quality" section]*
- These terms are conditions – *SGSA 1982 s10(2)*
- *[For case law, see "SGA implied terms" section]*

Slight breach

- Where B has the right to treat the contract as repudiated by reason of a breach by S of an implied term in SGSA 1982 ss8-10, but the breach is so slight that it would be unreasonable for B to do so, the breach is to be treated as a breach of warranty – *SGSA 1982 s10A(1)*
    - This does not apply if a contrary intention appears in, or is to be implied from, the contract – *SGSA 1982 s10A(2)*
    - ONUS OF PROOF: It is for S to prove that the breach is so slight that it would be unreasonable for B to treat the contract as repudiated – *SGSA 1982 s10A(3)*

Exclusion clauses

- Where a right, duty, or liability would arise under a contract for the hire of goods by implication of law, it may be negatived or varied by express agreement, by the course of dealing between the parties, or by such usage as binds both parties to the contract – *SGSA 1982 s11(1)*
    - This is subject to UCTA 1977 – *SGSA 1982 s11(1)*
        - *[See "Reasonableness: non-consumer" section in "Contract" notes]*
    - However, an express condition or warranty does not negative a condition or warranty implied by these provisions, unless inconsistent with it – *SGSA 1982 s11(2)*

Hire-purchase agreements

Scope

- **Hire-purchase agreement *(SGITA 1973 s15(1))*: An agreement, other than conditional sale agreement, under which:**
  - **(a) Goods are bailed in return for periodical payments by the person to whom they are bailed or hired; and**
  - **(b) The property in the goods will pass t that person if the terms of the agreement are complied with, and one or more of the following occurs:**
    - **(i) The exercise of an option to purchase by that person**
    - **(ii) The doing of any other specified act by any party to the agreement**
    - **(iii) The happening of any other specified event**
  - "S": Creditor
  - "B": Hirer
- **"**Conditional sale agreement": An agreement for the sale of goods under which the purchase price (or part of it) is payable by instalments, and the property in the goods is to remain in S (notwithstanding B's possession of the goods) until such conditions as to the payment of instalments (or otherwise, as may be specified in the agreement) are fulfilled – *SGITA 1973 s15(1)*

Implied terms

- **There is an implied term that S has a right to sell the goods at the time when the property is to pass – *SGITA 1973 s8(1)(a)***
  - This term is a condition – *SGITA 1973 s8(3)*
- **There is an implied term that the goods are free (and will remain free until property passes) from any charge or encumbrance not disclosed or known to B before the contract is made – *SGITA 1973 s8(1)(a)***
  - This term is a warranty – *SGITA 1973 s8(3)*
- **There is an implied term that B will enjoy quiet possession of the goods (subject to S or any TP's benefit to disturb possession by virtue of any charge or encumbrance disclosed or known to B before the contract is made) – *SGITA 1973 s8(1)(b)***
  - This term is a warranty – *SGITA 1973 s8(3)*
- EXCEPTION: A contract for hire-purchase in which there appears from the contract (or is to be inferred from its circumstances) an intention that S should transfer only such title as S or TP may have:
  - In such a contract, there is an implied term that all charges or encumbrances known to S, and not known to B, have been disclosed to B before the contract is made – *SGITA 1973 s8(2)(a)*
  - In such a contract, there is an implied term that none of the following will disturb B's quiet possession of the goods:
    - S – *SGITA 1973 s8(2)(b)(i)*
    - Where the parties intend that S should transfer only such title as TP may have TP – *SGITA 1973 s8(2)(b)(ii)*
    - Anyone claiming through or under S or TP, otherwise than under a charge or encumbrance disclosed or known to B before the contract is made – *SGITA 1973 s8(2)(b)(iii)*
  - These terms are warranties – *SGITA 1973 s8(3)*
- *[For case law, see "SGA implied terms" section]*

- **<u>CORRESPOND WITH DESCRIPTION:</u>**
- **There is an implied term that the goods will correspond with the description (in a contract for hire-purchase by description) – *SGITA 1973 s9(1)***
    - This term is a condition – *SGITA 1973 s9(1A)*
- If the hire-purchase is by sample and description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description – *SGITA 1973 s9(1)*
- A contract for hire-purchase is not prevented from being one by description by reason only that, being exposed for supply, the goods are selected by B – *SGITA 1973 s9(2)*
- *[For case law, see "SGA implied terms" section]*

- **<u>SATISFACTORY QUALITY:</u>**
- **There is an implied term that the goods are of satisfactory quality – *SGITA 1973 s10(2)***
    - This term is a condition – *SGITA 1973 s10(7)*
    - Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant), and all the other relevant circumstances – *SGITA 1973 s10(2A)*
    - The quality of goods includes their state and condition – *SGITA 1973 s10(2B)*
    - The following are, inter alia, in appropriate cases aspects of the quality of goods:
        - Fitness for all the purposes for which goods of the kind in question are commonly supplied – *SGITA 1973 s10(2B)(a)*
        - Appearance and finish – *SGITA 1973 s10(2B)(b)*
        - Freedom from minor defects – *SGITA 1973 s10(2B)(c)*
        - Safety – *SGITA 1973 s10(2B)(d)*
        - Durability – *SGITA 1973 s10(2B)(e)*
- This only applies where S bails the goods in the course of a business – *SGITA 1973 s10(2)*
    - This also applies where S is, in the course of a business, an agent acting for a principal, except where the principal does not bail in the course of a business and either B knows that fact, or reasonable steps are taken to bring it to B's notice before the contract is made – *SGITA 1973 s10(5)*
- EXCEPTION: The term does not extend to any matter making the quality of goods unsatisfactory which:
    - Is specifically drawn to B's attention before the contract is made – *SGITA 1973 s10(2C)(a)*
    - Where B examines the goods before the contract is made, that examination ought to reveal – *SGITA 1973 s10(2C)(b)*
    - Where the contract is by sample, would have been apparent on a reasonable examination of the sample – *SGITA 1973 s10(2C)(c)*
- The implied term may be annexed to the contract by usage – *SGITA 1973 s10(4)*
- *[For case law, see "SGA implied terms" section]*

- **<u>FITNESS FOR PURPOSE:</u>**
- **There is an implied term that (where B expressly or by implication, makes known to S, or a credit-broker, any particular purpose for which the goods are being bailed) the goods are reasonably fit for that purpose – *SGITA 1973 s10(3)***
    - This term is a condition – *SGITA 1973 s10(7)*
    - This term is implied whether or not the particular purpose is one for which goods are commonly such goods are commonly supplied – *SGITA 1973 s10(3)*
    - "Credit-broker": A person acting in the course of a business of credit brokerage – *SGITA 1973 s10(6)(a)*
        - "Credit brokerage": The effecting of introductions of individuals desiring to obtain credit to persons carrying on any business so far as it relates to the provision of credit, or to other persons engaged in credit brokerage – *SGITA 1973 s10(6)(b)*
- This only applies where S bails the goods in the course of a business – *SGITA 1973 s10(3)*
    - This also applies where S is, in the course of a business, an agent acting for a principal, except where the principal does not bail the goods in the course of a business and either B knows that fact, or reasonable steps are taken to bring it to B's notice before the contract is made – *SGITA 1973 s10(5)*
- EXCEPTION: Where the circumstances show that B does not rely, or that it is unreasonable for him to rely, on the skill or judgment of S (or the credit-broker) – *SGITA 1973 s10(3)*
- The implied term may be annexed to the contract by usage – *SGITA 1973 s10(4)*
- *[For case law, see "SGA implied terms" section]*

- **<u>MATCH SAMPLE:</u>**
- The following apply in a hire-purchase agreement by reference to a sample:
- **There is an implied term that the bulk will correspond with the sample in quality – *SGITA 1973 s11(1)(a)***
- **There is an implied term that B will have a reasonable opportunity to compare the bulk with the sample – *SGITA 1973 s11(1)(b)***
- **There is an implied term that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on a reasonable examination of the sample – *SGITA 1973 s11(1)(c)***
    - *[For satisfactory quality, see "satisfactory quality" section]*
- These terms are conditions – *SGITA 1973 s11(2)*
- *[For case law, see "SGA implied terms" section]*

<u>Slight breach</u>

- Where B has the right to reject the goods by reason of a breach by S of an implied term in SGITA 1973 ss9-11, but the breach is so slight that it would be unreasonable for B to do so, the breach is to be treated as a breach of warranty – *SGITA 1973 s11A(1)*
    - This does not apply if a contrary intention appears in, or is to be implied from, the contract – *SGITA 1973 s11A(2)*
    - ONUS OF PROOF: It is for S to prove that the breach is so slight; and that the agreement was a relevant hire-purchase agreement – *SGITA 1973 s11A(3)*

<u>Exclusion clauses</u>

- *[See "Reasonableness: non-consumer" section in "Contract" notes]*

Consumer statutes

Goods

Scope

- **These provisions apply to any contract for a trader to supply goods to a consumer – *CRA 2015 s3(1)***
    - Contracts to supply goods include:
        - A sales contract – *CRA 2015 s3(2)(a)*
        - A contract for the hire of goods – *CRA 2015 s3(2)(b)*
        - A hire-purchase agreement – *CRA 2015 s3(2)(c)*
        - A contract for transfer of goods – *CRA 2015 s3(2)(c)*
    - Contracts to supply goods also include:
        - Contracts entered into between one part owner and another – *CRA 2015 s3(5)(a)*
        - Contracts for the transfer of an undivided share in goods – *CRA 2015 s3(5)(b)*
        - Contracts that are absolute or conditional – *CRA 2015 s3(5)(c)*
        - "Conditional sale agreement": An agreement for the sale of goods under which the purchase price (or part of it) is payable by instalments, and the property in the goods is to remain in S (notwithstanding B's possession of the goods) until such conditions as to the payment of instalments (or otherwise, as may be specified in the agreement) are fulfilled – *SGITA 1973 s15(1)*
- **Sales contract:** A contract under which S transfers (or agrees to transfer) ownership of goods to B, and B pays (or agrees to pay) the price – *CRA 2015 s5(1)*
    - A contract is also a sales contract where goods are to be manufactured or produced and S agrees to supply them to B, where on being supplied, the goods will be owned by B, and where B pays (or agrees to pay) the price – *CRA 2015 s5(2)*
    - A sales contract may be conditional – *CRA 2015 s5(3)*
- **Contract for the hire of goods:** A contract under which S gives B possession of the goods with the right to use them, subject to the terms of the contract, for a period determined in accordance with the contract – *CRA 2015 s6(1)*
- **Hire-purchase agreement:** A contract under which the following two conditions are met:
    - Goods are hired by S in return for periodical payments by B – *CRA 2015 s7(2)*
    - Ownership of the goods will transfer to B if the terms of the contract are complied with, and B exercises an option to buy the goods, any party to the contract does an act specified in it, or an event specified in the contract occurs – *CRA 2015 s7(3)*
- **Contract for transfer of goods:** S transfers ownership of the goods to B and B provides consideration otherwise than by paying a price, or the contract is (for any other reason) not a sales contract or hire-purchase agreement – *CRA 2015 s8*

Implied terms

- *[See "Implied terms" section in "Contract – Consumer protections" notes]*

Remedies

- *[See "Remedies" section in "Contract – Consumer protections" notes]*

Exclusion clauses

- *[See "Fairness test" section in "Contract – Consumer protections" notes]*

Services

Scope

- **These provisions apply to a contract for a trader to supply a service to a consumer – *CRA 2015 s48(1)***
    - These provisions do not apply to a contract of employment or apprenticeship – *CRA 2015 s48(2)*

Implied terms

- *[See also "Implied terms" section in "Contract – Consumer protections" notes]*

Remedies

- *[See "Remedies" section in "Contract – Consumer protections" notes]*

Exclusion clauses

- *[See "Fairness test" section in "Contract – Consumer protections" notes]*

Buyer's remedies

Breach of SGA implied term

- **Breach of condition allows B to treat the contract as repudiated and sue for damages – *Photo Production v Securicor***
    - Where B has the right to reject the goods for a breach by S of an implied term in SGA 1979 ss13-15, but the breach is so slight that it would unreasonable for B to reject them, the breach is to be treated as a breach of warranty – *SGA 1979 s15A(1)*
        - This does not apply if a contrary intention appears in, or is to be implied from, the contract – *SGA 1979 s15A(2)*
        - ONUS OF PROOF: It is for S to prove that the breach is so slight that it would be unreasonable for B to reject the goods – *SGA 1979 s15A(3)*
    - B can recover the price paid where the consideration for payment has failed – *SGA 1979 s54(1)*
- **Breach of warranty allows B to sue for damages, but does not entitle him to terminate the contract – *Bunge v Tradax***
    - The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach – *SGA 1979 s53(2)*
        - This is a statutory formulation of *Hadley v Baxendale – Parsons v Uttley*
        - In the case of breach of warranty of quality, the estimated loss is prima facie the difference between the value of the goods at the time of delivery – *SGA 1979 s53(3)*
            - ONUS OF PROOF: It is for the person seeking to depart from the prima facie rule to show it (can be either B or S) – *Bence v Fasson*
        - Loss of profits may be recovered where S knew that B intended to resell the goods, and ought reasonably to have contemplated that his breach would be not unlikely to cause B to lose profits from sub-sales – *Bence v Fasson*
        - If the goods purchased are substantially converted into a new thing by B, and this was contemplated by the parties, then damages must be assessed by reference to the sub-sale – *Bence v Fasson*
    - B may also set up against S the breach in diminution or extinction of the price – *SGA 1979 s53(1)(a)*
        - This does not prevent B from also maintaining an action for the same breach of warranty if he has suffered further damage – *SGA 1979 s53(4)*
    - B cannot bring any damages for loss of amenity, since this is confined to non-commercial cases – *Ruxley v Forsyth*
- **Anticipatory breach:** *[See "Termination" section in "Contract – Remedies" notes]*

Rescission for breach of s12

- When the implied term as to title in s12(1) is breached, B can rescind the contract and demand return of the purchase money – *Rowland v Divall*
- Where B purports to rescind the contract before title is fed down the chain, the rescission is still valid – *Butterworth v Kingsway*
- DEFENCE: S can bring a change of position defence, which bars restitution of the purchase price where it would be inequitable, in all the circumstances, to require S to make restitution – *Lipkin Gorman*

Acceptance

- **Where B accepts the goods or part of them (in a contract of sale which is not severable), S's breach of condition can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated – *SGA 1979 s11(4)***
    - This is subject to an express or implied term in the contract to contrary effect – *SGA 1979 s11(4)*
- **Right of partial rejection:** Where B has the right to reject some or all of the goods, and accepts some of the goods (including where he accepts all the goods unaffected by the breach), he does not lose his right to reject the rest of the goods – *SGA 1979 s35A(1)*
    - This is subject to a contrary intention appearing in, or to be implied from, the contract – *SGA 1979 s35A(4)*
    - This also applies to instalments of goods – *SGA 1979 s35A(2)*
    - This is, presumably, subject to the requirement that, if incorporated into a new product, the goods have not ceased to exist (see Borden, Hendy Lennox etc.).
        - *[See "RoT clauses" section in "Security" topic]*
    - However, where the contract is for the sale of goods making one or more commercial units, B accepting any goods included in a unit is deemed to have accepted all the goods making the unit – *SGA 1979 s35(7)*
        - "Commercial unit": A unit, division of which would materially impair the value of the goods or the character of the unit – SGA 1979 s35(7)
- The contract of sale may contain a clause dictating when B is deemed to have accepted the goods, or when a reasonable time has elapsed, although such a clause is subject to the reasonableness test under UCTA 1977 – *Green v Cade Bros*

When has B accepted?

- *[See also Bars to Rescission in "Rescission & s2(2)" section in "Contract – Misrep" notes]*
- **B is deemed to have accepted the goods in the following situations:**
- **1. B intimates to S that he has accepted them – *SGA 1979 s35(1)(a)***
    - B is not deemed to have accepted the goods until he has had a reasonable opportunity to examine them for the purpose of ascertaining whether they are in conformity with the contract, or (in a contract for sale by sample) of comparing the bulk with the sample – *SGA 1979 s35(2)*
    - Intimation may be implied, but must be clear – *Varley v Whipp*

- **2. The goods have been delivered to B and he does any act in relation to them which is inconsistent with the ownership of S – *SGA 1979 s35(1)(b)***
    - B must not act inconsistently with the **reversionary interest** of S – *Clegg v Anderson*
        - S's reversionary interest entitles him, immediately upon the operation of the condition subsequent (i.e., as soon as opportunity for examination has been given), to have the goods physically returned to him in the place where the examination has taken place, without the goods being dispatched to a TP – *Kwei Tek v British Traders*
        - Where B is issued with a bill of lading, and thus acquires conditional property in the goods, B's dealing with the property is not inconsistent with S's ownership, unless B deals with something more than the conditional property (i.e., S's reversionary interest) – *Kwei Tek v British Traders*

        - If B deals with the documents by selling or pledging them, he simply sells or pledges the conditional property – *Kwei Tek v British Traders*
        - If B physically deals with the goods by delivering them to a sub-buyer, he acts inconsistent with S's reversionary interest – *Kwei Tek v British Traders*
    - Incorporating the goods into a new product, so that the original goods cease to exist, would presumably be an act inconsistent with S's ownership (see Borden, Hendy Lennox etc.)
        - *[See "RoT clauses" section in "Security" topic]*
    - B is not deemed to have accepted the goods until he has had a reasonable opportunity to examine them for the purpose of ascertaining whether they are in conformity with the contract, or (in a contract for sale by sample) of comparing the bulk with the sample – *SGA 1979 s35(2)*
    - B's requests or agreements for the repair of the defects by S, or B's delivery of the goods to a sub-purchaser, are relevant factors – *Truk v Tokmakidis*

- **3. After a lapse of reasonable time, B retains the goods without intimating to S that he has rejected them – *SGA 1979 s35(4)***
    - "Reasonable time" is a question of fact – *SGA 1979 s59*
    - This is solely a matter of what is a reasonable practical interval in commercial terms between B receiving the goods and his ability to send them back – *Bernstein v Pamson Motors*
        - It is a balancing between the interests of B and S – *Truk v Tokmakidis*
        - To be taken into account: (i) from B's point of view, the nature of the goods and their function; (ii) from S's point of view, the commercial desirability of being able to close his ledger reasonable soon after the transaction is complete – *Bernstein v Pamson Motors*
        - "Reasonable" is referable to both the individual B's situation and the individual S's situation – *Bernstein v Pamson Motors*
            - B was ill for a short period of time before taking the car for its first trips; this period of time was discounted – *Bernstein v Pamson Motors*
            - This appears to be wrong, conflicting with the objective standard in contract law. It also detracts from the main rationale of the balancing exercise.
    - "Reasonable time" will be different for different types of goods – *Bernstein v Pamson Motors*
    - A material factor is whether B has had a reasonable opportunity to examine the goods for the purpose of ascertaining whether they are in conformity with the contract, or (in a contract for sale by sample) of comparing the bulk with the sample – *SGA 1979 s35(5)*
        - This is not a conclusive factor – *Clegg v Anderson*
    - Irrelevant factors: The nature of the particular defect, discovered ex post facto, and the speed with which it might have been discovered – *Bernstein v Pamson Motors*
        - B purchased a car, in which a defect was revealed after driving 140 miles and using the car for 3 weeks. The court held that a reasonable time had lapsed – *Bernstein v Pamson Motors*
        - However, the right to reject a yacht was held not to have been lost after a period of 7 months while inquiries and negotiations about rectification of defects were in progress – *Clegg v Anderson*
        - Further, the right to reject facemasks was held not to have been lost after a period of 5 months, when they were sold on and then rejected by the end-user – *Local Boy'z v Malu*

        - *Bernstein* is viewed by many as a harsh decision, and the trend of the case law following *Bernstein* has been to allow for a longer period of time without losing the right to reject.

- **REPAIR:** B is not deemed to have accepted the goods merely because he asks for, or agrees to, their repair by or under an arrangement with S – *SGA 1979 s35(6)(a)*
    - This may extend the reasonable time – *Truk v Tokmakidis*
        - The period during which repairs were carried out is not time to be taken into account – *Douglas v Glenvarigill (Scotland)*
        - The relevant time only began to run when B received the requested information about the defect – *Clegg v Anderson*
    - Where B requests further information about the defect, before deciding whether to accept the goods, he does not lose the right to reject – *Clegg v Anderson*
        - This is not an absolute rule; it is a factor to be taken into account – *Jones v Gallagher*
    - There is an implied term in a repair agreement that B, equipped with the knowledge of the defect and its required repair, and allowing S to incur the expense of repair, will accept and pay for the goods once the repair has been carried out – *Ritchie v Lloyd*
        - B's right to reject is lost when the repair is completed, in these circumstances – *Ritchie v Lloyd*
    - There is also an implied term in a repair agreement that S, if asked, will tell B what the inspection of the goods had shown and what repairs had been made to cure the defect – *Ritchie v Lloyd*
        - Breach of this implied term allows B to rescind the repair agreement and reject the repaired goods. B can then rescind the original contract of sale – *Ritchie v Lloyd*

- **SUB-SALE:** B is not deemed to have accepted the goods merely because the goods are delivered to a sub-purchaser under a sub-sale or other disposition – *SGA 1979 s35(6)(b)*
    - However, it is right to, at least, take account of the period likely to be required for resale – *Truk v Tokmakidis*
    - Where goods are resold, the reasonable time 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 – *Truk v Tokmakidis*

<u>Consequences of acceptance</u>

- Where B validly refuses to accept the goods, he is not bound to return them to S. It is sufficient if he intimates to S that he refuses to accept them – *SGA 1979 s36(1)*
    - This is subject to any agreement otherwise – *SGA 1979 s36(1)*

Other breaches and rights

B's right to examine the goods

- When S tenders delivery of goods to B, S is bound (on request) to afford B a reasonable opportunity to examine the goods for the purpose of ascertaining whether they are in conformity with the contract – *SGA 1979 s34(1)*
    - In the case of a contract for sale by sample, S must afford B a reasonable opportunity to examine the goods for the purpose of comparing the bulk with the sample – *SGA 1979 s34(1)*
- This is subject to a contrary agreement by the parties – *SGA 1979 s34(1)*

S's right to re-tender

- Where B validly rejects S's tender of delivery, S has a right to retender conforming goods if this is done within the contract time (i.e., before the time for delivery has expired) – *Borrowman v Free*
    - There has been some debate as to whether, strictly speaking, this rule applies to a tender of goods, since *Borrowman v Free* concerned a tender of documents under a c.i.f. contract. It has, however, been argued by many, including Professor Beale, that the rule should apply to both documents and goods. There appears little sound reason to restrict the operation of the rule, and so it can be said that the court would likely hold that the rule in *Borrowman v Free* applies to both goods and documents.
    - S must pay any special expenditure or loss incurred by B in connection with examining and rejecting the first tender – *The Kanchenjunga*
- But where (in a contract to for sale of unascertained goods) S has appropriated certain goods to the contract, he has made an irrevocable election and cannot retender other goods – *Borrowman v Free*

Non-delivery by S

- S has a duty to deliver the goods in accordance with the terms of the contract – *SGA 1979 s27*
- Where S wrongfully neglects or refuses to deliver the goods, B can bring an action for damages for non-delivery – *SGA 1979 s51(1)*
    - The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from S's breach of contract – *SGA 1979 s51(2)*
        - B cannot recover for loss of profits – *Williams v Reynolds*
    - Where there is an available market for the goods, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market (or current) price of the goods – *SGA 1979 s51(3)*
        - The relevant time of assessment is the time when the goods ought to have been delivered, or (if no delivery time was fixed) at the time of the refusal to deliver – *SGA 1979 s51(3)*
        - "Available market" means that the goods could freely be sold, and that there would be sufficient demand to absorb readily all the goods thrust on it – *Thompson v Robinson*
            - If S can prove that they would have sold one car less than they otherwise would have done, they would be entitled to damages amount to their loss of profit on the one car – *Lazenby Garages v Wright*

        - When the goods are unique, such as second-hand cars, there is no available market – *Lazenby Garages v Wright*
    - Where there is no difference between the contract price and the market price (i.e., where the goods can only be sold at a fixed retail price), s50(3) does not apply; s50(2) applies – *Charter v Sullivan*
        - Whilst decided in relation to s50(3), this can be applied to s51(3).
    - In the case of **anticipatory breach** (where the contract fixes a delivery time), the relevant time of assessment is the time fixed for performance – *Tai Hing v Kamsing*
        - If B does not accept the repudiation and waits for actual failure by S, the relevant time of assessment is the date of the actual failure to perform – *Tai Hing v Kamsing*

<u>Delivery of wrong quantity by S</u>

- S has a duty to deliver the goods in accordance with the terms of the contract – *SGA 1979 s27*
- Where S **delivers less** than the contracted-for quantity of goods, B may either accept or reject the goods – *SGA 1979 s30(1)*
    - If B accepts the goods delivered, he must pay for them at the contract rate – *SGA 1979 s30(1)*
    - B may not reject the goods if the shortfall is so slight that it would be unreasonable for him to do so – *SGA 1979 s30(2A)*
        - ONUS OF PROOF: It is for S to show this – *SGA 1979 s30(2B)*
- Where S **delivers more** than the contracted-for quantity of goods, B may either reject the excess or the whole of the goods – *SGA 1979 s30(2)*
    - If B accepts the whole of the goods delivered, he must pay for them at the contract rate – *SGA 1979 s30(3)*
    - B may not reject the goods if the excess is so slight that it would be unreasonable for him to do so – *SGA 1979 s30(2A)*
        - ONUS OF PROOF: It is for S to show this – *SGA 1979 s30(2B)*
- These rules are subject to any usage of trade, special agreement, or course of dealing between the parties – *SGA 1979 s30(5)*

<u>Specific performance</u>

- The court may, **if it thinks fit**, order, on B's application, that the contract should be performed specifically – *SGA 1979 s52(1)*
    - This only applies where the relevant goods are specific or ascertained – *SGA 1979 s52(1)*
        - "Ascertained" means goods which were unascertained at the time the contract was made – *Re Wait*
        - A contract for unascertained goods (e.g., 500 tonnes of wheat out of a ship's cargo of 1000 tonnes) cannot be the subject of an order of specific performance – *Re Wait*
        - A contract of sale does not automatically create any equitable rights in the goods – *Re Wait (obiter)*
        - *[See "Passing of property" section in "Sale of Goods: Proprietary" topic]*
    - This applies whether or not property has passed – *Jones v Tankerville*
- The court's order may be unconditional, or on such terms and conditions as to damages, payment of the price, or otherwise as seem just to the court – *SGA 1979 s52(3)*

Seller's remedies

Action for the price

- **Where B wrongfully neglects or refuses to pay for the goods according to the terms of the contract, S can bring an action for the price – *SGA 1979 s49(1)***
    - **This only applies if property in the goods has passed to B – *SGA 1979 s49(1)***
- Where the price is payable on a day certain irrespective of delivery, and B wrongfully neglects or refuses to pay the price, S can bring an action for the price – *SGA 1979 s49(2)*
    - Property in the goods need not have passed to B; and the goods need not have been appropriated to the contract – *SGA 1979 s49(2)*
- S49 does not represent a complete code of situations in which the price is recoverable under a contract of sale: there is some room (although the court should be cautious) for claims other than those covered by s49 – *PST Energy v OW Bunker (obiter)*
    - The precise limits of such circumstances are to be determined at a future occasion – *PST Energy v OW Bunker (obiter)*
    - The price is recoverable where the goods are undelivered and remain S's property, but are at B's risk, and are then destroyed by perils of the seas or by fire (and, a fortiori, when destroyed by B's express right to do so for commercial benefit) – *PST Energy v OW Bunker (obiter)*
    - Possible examples of such circumstances: (i) where S has reserved title, but B is permitted to take possession under a buy-back contract, and to dispose of some of the goods of which possession was taken back; and (ii) where property has not passed, but the goods are at B's risk and are destroyed by perils of the sea or fire, or are consumed by B for its commercial benefit – *PST Energy v OW Bunker (obiter)*
    - This was obiter dicta by Lord Mance in UKSC. Whether s49 provides a complete code remains a contentious issue and unresolved. However, Lord Mance's view finds support in the early case of *Manbre Saccharine v Corn Products*.
- C can affirm a repudiated contract (so as to perform his side of the contract and thereafter sue for the contract price from D) if: (i) he can perform without the cooperation D; and (ii) he has a legitimate interest in doing so – *White & Carter v McGregor*
    - *[See "Action for the Price" section in "Contract – Remedies" notes]*

Damages for non-acceptance by B

- B has a duty to accept and pay for the goods in accordance with the terms of the contract – *SGA 1979 s27*
- **Where B wrongly neglects or refuses to accept and pay for the goods, S may maintain an action for damages for non-acceptance – *SGA 1979 s50(1)***
    - The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach – *SGA 1979 s50(2)*
        - This is the amount of lost profit by S – *Charter v Sullivan*
            - ONUS OF PROOF: Any loss of profit beyond that recouped by the resale, must be proved by S – *Charter v Sullivan*
        - The test is what could reasonably be expected to be in the contemplation of the parties as a natural consequence of the breach – *Lazenby Garages v Wright*

    - Where there is an available market of the goods, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market (or current) price – *SGA 1979 s50(3)*
        - The relevant time for assessment is the time when the goods ought to have been accepted, or (if no time for acceptance was fixed) at the time of the refusal to accept – *SGA 1979 s50(3)*
        - "Available market" means that the goods could freely be sold, and that there would be sufficient demand to absorb readily all the goods thrust on it – *Thompson v Robinson*
            - If S can prove that they would have sold one car less than they otherwise would have done, they would be entitled to damages amount to their loss of profit on the one car – *Lazenby Garages v Wright*
            - When the goods are unique, such as second-hand cars, there is no available market – *Lazenby Garages v Wright*
        - Where there is no difference between the contract price and the market price (i.e., where the goods can only be sold at a fixed retail price), s50(3) does not apply; s50(2) applies – *Charter v Sullivan*
- EXCLUSION CLAUSES: Parties to a contract are free to agree to exclude liability in damages. However, contra proferentem applies – *Bem Dis v International Agri Trade*
    - *[See "Reasonableness: Non-consumer" section in "Contract" notes]*
    - A clause which states that damages must be recovered on the basis of the difference in value between the contract price and market price, does not exclude possibility of claim for wasted expenditure (reliance loss damages) – *Bem Dis v International Agri Trade*

Damages for failure to take delivery by B (short of repudiation)

- When S is ready and willing to deliver the goods, and requests B to take delivery, and B does not within a reasonable time after such request take delivery of the goods, B is liable to S for any loss occasioned by his neglect or refusal to take delivery, as well as for a reasonable charge for the care and custody of the goods – *SGA 1979 s37(1)*
    - "Reasonable time" is a question of fact – *SGA 1979 s59*

Unpaid seller

Scope

- "Unpaid seller": A seller of goods who has not been paid or tendered the whole of the price – SGA 1979 s38(1)(a)
- The lien, right of stoppage in transit, and the right of re-sale, are available notwithstanding that property may have passed to B – *SGA 1979 s39(1)*
    - Additionally, where property has not passed, the unpaid S has a right of withholding delivery – *SGA 1979 s39(2)*
- Unpaid S's lien, right of retention, or right of stoppage in transit is not affected by any sale or other disposition of the goods which B may have made, unless S has assented to it – *SGA 1979 s47(1)*
    - Where a document of title to goods has been lawfully transferred to B, and B transfers the document to TP who takes it in good faith and for valuable consideration, then if the transfer

to TP was by sale, S's lien, right of retention, or right of stoppage in transit is defeated – *SGA 1979 s47(2)(a)*
    - If the transfer to TP was by way of pledge or other disposition for value, S's lien, right of retention, or right of stoppage in transit can only be exercised subject to TP's rights – *SGA 1979 s47(2)(b)*

Seller's lien

- **An unpaid S, who is in possession of the goods, is entitled to retain possession of them until payment or tender of the price, in the following cases:**
    - **Where the goods have been sold without any stipulation as to credit – *SGA 1979 s41(1)(a)***
    - **Where the goods have been sold on credit, but the credit term has expired – *SGA 1979 s41(1)(b)***
    - **Where B becomes insolvent – *SGA 1979 s41(1)(c)***
- S may exercise his lien or right of retention notwithstanding that he is in possession of the goods as agent / bailee / custodier for B – *SGA 1979 s41(2)*
- Where the unpaid S has made part delivery, he may exercise his lien or right of retention on the remainder of the goods, unless such part delivery has been made under circumstances showing an agreement to waive the lien or right of retention – *SGA 1979 s42*
- Unpaid S loses his lien or right of retention of the goods in the following cases:
    - When he delivers the goods to a carrier (or other bailee / custodier) for the purpose of transmission to B without reserving the right of disposal of the goods – *SGA 1979 s43(1)(a)*
    - When B or his agent lawfully obtains possession of the goods – *SGA 1979 s43(1)(b)*
    - By waiver of the lien or right of retention – *SGA 1979 s43(1)(c)*
- Unpaid S does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods – *SGA 1979 s43(2)*
- Unpaid S's exercise of his lien or right of retention does not by itself rescind the contract for sale – *SGA 1979 s48(1)*

Stoppage in transit

- **Where B becomes insolvent, the unpaid S (who has parted with possession of the goods) has the right of stopping the goods in transit – *SGA 1979 s44***
    - S may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price – *SGA 1979 s44*
- Goods are deemed to be in course of transit from the time when they are delivered to a carrier (or other bailee / custodier) for the purpose of transmission to B, until B (or his agent in that behalf) takes delivery of them – *SGA 1979 s45(1)*
    - The transit is at an end if B obtains delivery of the goods before their arrival at the appointed destination – *SGA 1979 s45(2)*
    - The transit is at an end if, after the arrival of the goods at the appointed destination, the carrier acknowledges to B that he holds the goods on his behalf and continues in possession of them as bailee/custodier for B – *SGA 1979 s45(3)*
        - It is immaterial if a further destination for the goods may have been indicated by B – *SGA 1979 s45(3)*
    - The transit is not at an end if the goods are rejected by B, and the carrier continues in possession of them – *SGA 1979 s45(4)*

        - This is so even if S has refused to receive the goods back – *SGA 1979 s45(3)*
        - When goods are delivered to a ship chartered by B, it is a question depending on the circumstances of the particular case, whether the goods are in the possession of the master as a carrier or as agent to B – *SGA 1979 s34(5)*
    - The transit is at an end where the carrier wrongfully refuses to deliver the goods to B – *SGA 1979 s45(6)*
- Where part delivery of the goods has been made to B, the remainder of the goods may be stopped in transit, unless such part delivery has been made under circumstances showing an agreement to give up possession of the whole of the goods – *SGA 1979 s45(7)*
- **Unpaid S may exercise his right of stoppage in transit either by taking actual possession of the goods or by giving notice of his claim to the carrier in whose possession the goods are – *SGA 1979 s46(1)***
    - The notice may be given either to the person in actual possession of the goods or to his principal – *SGA 1979 s46(2)*
        - If given to the principal, the notice is ineffective unless given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to B – *SGA 1979 s46(3)*
    - When notice of stoppage in transit is given by S to the carrier in possession of the goods, he must re-deliver the goods to, or according to the directions of, S – *SGA 1979 s46(4)*
        - The expenses of re-delivery must be borne by S – *SGA 1979 s46(4)*
- Unpaid S's exercise of right of stoppage in transit does not by itself rescind the contract for sale – *SGA 1979 s48(1)*

<u>S's right to re-sell</u>

- Where unpaid S exercises his lien right of retention, or right of stoppage in transit, and re-sells the goods to TP, TP acquires a good title to them as against B – *SGA 1979 s48(2)*
    - *[See also "Exception: Seller in possession" section in "Nemo dat exceptions" topic]*
- Where the goods are of a perishable nature, or where unpaid S gives notice to B of his intention to re-sell, and B does not within a reasonable time pay or tender the price, unpaid S may re-sell the goods – *SGA 1979 s48(3)*
    - S may then recover from B damages for any loss occasioned by his breach of contract – *SGA 1979 s48(3)*
- Where S expressly reserves the right of re-sale in case B should make default, and on B making default S re-sells the goods, the original contract of sale is rescinded, but without prejudice to any claim S may have for damages – *SGA 1979 s48(4)*

Topic 2 – Sale of Goods: Proprietary

Passing of property

- The passing of property in consumer cases is governed by SGA 1979 ss16-20B – *CRA 2015 s4(2)*

Specific goods

- "Specific goods": Goods identified and agreed on at the time the contract of sale is made, including an undivided share, specified as a fraction or percentage, of the goods identified – *SGA 1979 s61(1)*
    - Where the contract is for the whole of the bulk, it is a contract for the sale of specific goods. But the bulk must be identified, and it must be clear that it is for the whole of that bulk.
- **Property in specific goods is transferred to B at the time when the parties intend it to – *SGA 1979 s17(1)***
    - For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case – *SGA 1979 s17(2)*
    - *[See "RoT clauses" section in "Security" topic]*
- In a contact for the sale of specific goods (or goods subsequently appropriated to the contract), S may reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, the property in the goods does not pass to B until the conditions are fulfilled – *SGA 1979 s19(1)*

Rules for ascertaining intention

- These rules are subject to a contrary intention of the parties – *SGA 1979 s18*
- In an **unconditional contract for sale of specific goods in a deliverable state**, property in the goods passes to B when the contract is made – *SGA 1979 s18 r1*
    - The property in the goods passes to B when the contract is made, unless a different intention appears – *Dennant v Skinner*
    - It is immaterial whether the time of payment or the time of delivery, or both, is postponed – *SGA 1979 s18 r1*
    - Goods are in a "deliverable state" when they are in such a state that B would, under the contract, be bound to take delivery of them – *SGA 1979 s62(5)*
        - "Deliverable state" refers to a state in which the thing will be the article contracted for by B; it does not mean deliverable in the sense that it is properly packed etc. – *Underwood v Burgh*
        - Where there is work to be done in relation to the article sold before S's contractual obligations are complete, the relevant importance of that work in relation to the contract must be considered, when deciding whether property has passed – *Philip Head v Showfronts (in relation to r5(1), but applicable here)*
        - B contracted to purchase a carpet and have it laid. S had delivered the carpet in bales, and it was not yet laid when it was stolen. The court held that it was not in a "deliverable state" – *Philip Heads v Showfronts (in relation to r5(1), but applicable here)*
    - Where the contract is conditional, it is an agreement to sell – *SGA 1979 s2(5)*
        - Property will then pass upon satisfaction of the condition. This is also how reservation of the right of disposal under s19 works.

- In a **contract for sale of specific goods where S is bound to do something to the goods for the purpose of putting them into a deliverable state**, property does not pass until the thing is done and B has notice that it has been done – *SGA 1979 s18 r2*
    - *"Deliverable state": See above*

- In a **contract for sale of specific goods in a deliverable state where S is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price**, property does not pass until the act or thing is done and B has notice that it has been done – *SGA 1979 s18 r3*
    - This only applies where the relevant act is to be performed by S – *Nanka-Bruce v Commonwealth Trust (simply emphasising point in r3)*
    - *"Deliverable state": See above*

- When goods are delivered to B on approval, or on sale or return or other similar terms, property in the goods passes to B when he signifies his approval or acceptance to S, or does any other act adopting the transaction – *SGA 1979 s18 r4(a)*
    - If B does not signify his approval or acceptance to S but retains the goods without giving notice of rejection, then, property passes to B on expiration of the fixed time for return of the goods (if one is fixed), or on the expiration of a reasonable time (if no time is fixed) – *SGA 1979 s18 r4(b)*

<u>Unascertained goods – Generic</u>

- Property in unascertained goods does not transfer to B unless and until the goods are ascertained – *SGA 1979 s16*
- Property in ascertained goods is transferred to B at the time when the parties intend it to – *SGA 1979 s17(1)*
    - For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case – *SGA 1979 s17(2)*
- A contract for the sale of goods takes effect at law; it gives rise to no equitable interest in favour of B – *Re Wait*
    - No legal or equitable interest in favour of B can pass when the goods are yet to be ascertained (e.g., because the goods never existed) – *Re Goldcorp*
- Goods in a homogenous mass must be segregated and identified as belonging to B – *Re London Wine*
    - 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; as they are identified as fulfilling the contract – *Re Stapylton Fletcher*
    - The goods are ascertained on the basis of the common intention of the parties (as per s17), not by virtue of s18 r5 – *Re Stapylton Fletcher*
- B purchased 500 tonnes of wheat out of ship's cargo of 1000 tonnes from D. No 500 tonnes of wheat had ever been ear-marked, identified, or appropriated as the wheat to be delivered to C. No property had passed – *Re Wait*
    - Query whether a different result may now be reached under s20A

Rules for ascertaining intention

- These rules are subject to a contrary intention of the parties – *SGA 1979 s18*
- In a **contract for sale of unascertained goods (or future goods) by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract** (either by S with the assent of B, or by B with the assent of S), property in the goods passes to B in that moment – *SGA 1979 s18 r5(1)*
    - The assent may be express or implied, and may be given either before or after the appropriation is made – *SGA 1979 s18 r5(1)*
        - "Assent" simply means that the appropriation has been made in the manner contemplated by the parties – *Nippon v Ramjiban*
    - A notice of appropriation appropriates the goods to the contract, but does no more: it does not necessarily ascertain the goods. It merely binds S to deliver the relevant goods (which may still form part of a bulk) to B – *Smyth v Bailey*
    - *"Deliverable state": See above in relation to r1*

    - **To constitute an appropriation of the goods to the contract, the parties must 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 B – *Carlos Federspiel***
        - A mere setting apart or selection by S of the goods which he expects to use in performance of the contract is insufficient, since S could change his mind and use those goods to perform a different contract – *Carlos Federspiel*
        - **Usually, the appropriating act is the last act to be performed by S – *Carlos Federspiel***
            - If there remains a further, important, and decisive act to be done by S, then there is prima facie evidence that the property does not pass until the final act is done – *Carlos Federspiel*
        - Where construction of the documents suggests that the goods were, at all material times, still at S's risk, that is prima facie an indication that property had not passed – *Carlos Federspiel*
    - Where S does not have title to the goods (and a fortiori if he knows this), his appropriation to the contract is no more reliable as an indication of his intention than the appropriation of goods which are not in a deliverable state, or which are not of the contract description – *Kulkarni v Manor Credit*

- In a sale of unascertained goods, property may not pass after the goods have become ascertained, if it was still not the intention of the parties for property to pass – *Cheetham v Thornham*
    - Where goods were delivered and placed in B's warehouse, but S retained the bills of lading as security until payment by B, and both parties knew and intended this, property had not passed – *Cheetham v Thornham*

- Where **S delivers the goods**, in pursuance of the contract, to B, or to a carrier, bailee, or custodier (whether named by B or not) **for the purpose of transmission to B**, and does not reserve the right of disposal, he is taken to have unconditionally appropriated the goods to the contract – *SGA 1979 s18 r5(2)*
    - The goods must be identified as belonging to B; if the goods are not marked, no appropriation takes place – *Healy v Howlett*

- Where the goods at the time of sale are in the possession of TP, delivery will take place when TP attorns to B (i.e., acknowledges to B that he holds goods on his behalf) – *Wardar's v Norwood*
- This rule may allow S who lacks ownership to pass full title, as he may transfer such property as he has (e.g., a possessory title) – *Kulkarni v Manor Credit*
- If S takes bills of lading out to his own order (and not on behalf of, or as agent for, B), he thereby reserves to himself the right of disposal – *Mirabita v Imperial Ottoman Bank*
- *[See "RoT clauses" section in "Security" topic]*

- Where, in pursuance of the contract, S is authorised/required to send the goods to B, delivery of the goods to a carrier (whether named by B or not) for the purpose of transmission to B, is prima facie deemed to be a delivery of the goods to B – *SGA 1979 s32(1)*

<u>Unascertained goods – Identified bulk</u>

- **SCOPE:** A contract for the sale of a specified quantity of unascertained goods, in which (a) the goods form part of a bulk identified either in the contract or by subsequent agreement between the parties; and (b) B has paid the price for some or all of the goods – *SGA 1979 s20A(1)*
  - "Bulk": A mass or collection of goods of the same kind, which is contained in a defined space/area and which is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity – *SGA 1979 s61(1)*
  - "Subsequent agreement" includes a notice of appropriation.
    - There may be some doubt about this, since the notice appears to be a unilateral action. However, it is argued in *Benjamin's Sale of Goods* that if the notice is given in line with the contract, then B has agreed to the notice. Further, it is unlikely that the court would disrupt this common commercial practice.
  - "Paid the price": It is argued in Benjamin's Sale of Goods that any recognised form of payment will suffice, thus including a credit, draft, or bill of exchange.

- **EFFECT:** As soon as the conditions in s20A(1) are met, or at such later time as the parties may agree, property in an undivided share in the bulk is transferred to B, and B becomes an owner in common of the bulk – *SGA 1979 s20A(2)*
  - B only becomes the sole owner of the goods when his relevant share is ascertained. Once the goods are ascertained, property passes when intended to pass, having regard to s18 r5.
  - This is subject to a contrary agreement between the parties – *SGA 1979 s20A(2)*
    - In a c.i.f. contract, property only passes on full payment (*The Ciudad de Pasto*); this would appear to suggest that s20A does not apply to a c.i.f. contract unless the whole price is paid for. However, it is likely that the court would hold that it was not the intention of the parties to displace s20A in the absence of an express agreement.
  - The undivided share of B, at any time, shall be such share as the quantity of goods paid for and due to B out of the bulk bears to the quantity of goods in the bulk at that time – *SGA 1979 s20A(3)*
    - However, where the aggregate of the undivided shares at any time exceeds the whole of the bulk, each B's undivided share shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk – *SGA 1979 s20A(4)*
      - Some academics, including Professor Goode, have taken the reference to "buyer" to mean that the seller drops out in this situation; his share is

extinguished. There is no authority on this point, so it is unclear whether S drops out.

- Where B has paid the price for only some of the goods, any delivery to him out of the bulk shall be ascribed in the first place to the goods in respect of which payment has been made – *SGA 1979 s20A(5)*
  - Payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods – *SGA 1979 s20A(6)*

- **DEALINGS:** An owner in common of a bulk (by virtue of s20A) is deemed to consent to the following:
  - Any delivery of goods out of the bulk to any other owner in common (goods that are due to him under his contract) – *SGA 1979 s20B(1)(a)*
  - Any dealing with, or removal, delivery, or disposal of, goods in the bulk by any other owner in common of the bulk, in so far as the goods fall within his undivided share in the bulk at the time of the dealing, removal, delivery, or disposal – *SGA 1979 s20B(1)(b)*
- No cause of action shall accrue against a person who acts in accordance with s20B(1) – *SGA 1979 s20B(2)*
  - The dealing B is under no obligation to compensate any other B for any shortfall in the goods received by that other B – *SGA 1979 s20B(3)(a)*
- These provisions do not affect any contractual arrangement between Bs for adjustments between themselves, nor any rights of B under his contract – *SGA 1979 s20B(3)(b),(c)*

<u>Ascertainment by exhaustion</u>

- These rules are subject to a contrary intention of the parties – *SGA 1979 s18*
- In a **contract for sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement** between the parties, and **the bulk is reduced** to (or to less than) that quantity, then, if B is the only B to whom goods are then due out of the bulk, the remaining goods are to be taken as appropriated to that contract at the time when the bulk is reduced, and the property in the goods then passes to B – *SGA 1979 s18 r5(3)*
  - *"Deliverable state": See above*
  - Property in goods passes when the quantity of goods covered by B's contract are the only goods left in the bulk. The remaining goods need not be weighed; it is sufficient if the weight of the bulk and the weight of the other contracts is known – *Wait and James*
- This also applies where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single B under separate contracts relating to that bulk, and if B is the only B to whom goods are then due out of that bulk – *SGA 1979 s18 r5(4)*
  - This also applies where B has contracts with different Ss, but his contractual rights in gross account for all that is left of the remaining bulk – *The Elafi*

Passing of risk

- **Default rule: Risk passes with property (subject to contrary agreement between parties) – *SGA 1979 s20(1)***
    - **This is so irrespective of delivery – *SGA 1979 s20(1)***
- **Application to s20A:** There appears to be some doubt as to whether risk passes with the passing of property under s20A. This doubt stems from s20B(3)(c), which states that s20A does not affect any rights of B under the contract. However, this is best interpreted as preserving B's rights to sue under the contract, not to detach s20A from the passing of risk since this would, in many cases, render s20A pointless.
- Where delivery has been delayed through the fault of either B or S, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault – *SGA 1979 s20(2)*
- Where S agrees to deliver the goods at his own risk at a place other than that where they are when sold, B must nevertheless take any risk of deterioration in the goods necessarily incident to the course of transit – *SGA 1979 s33(1)*
    - This is subject to a contrary agreement – *SGA 1979 s33(1)*
- Where B validly rejects the goods, the goods are deemed to be at S's risk – *Demby v Barden*
- When goods in transit are marked as belonging to B, they are appropriated to the contract and risk passes to B – *Healy v Howlett*
- Where S transfers the undivided interest in the goods to TP, who is to appropriate the goods, (and S has given B a delivery order, which TP has assented to), risk passes at that moment, notwithstanding the fact that property has not yet passed (because the goods have not yet been ascertained) – *Sterns v Vickers*
    - Here, TP was a warehouseman – *Sterns v Vickers*

Effect of risk

- **If risk lies on S:** If the goods are lost/damaged so that he is no longer able to deliver the goods in accordance with the contract (or at all), S will not be entitled to recover the price from B. S must refund any part of the price paid in advance.
    - However, the contract is not discharged and so if S cannot replace the goods with other goods which comply with the contract, he may be liable in damages for non-delivery, since he is only released from his obligation to deliver if the contract is frustrated.
    - *[See "Frustration" section in "Contract – Common mistake & frustration" notes, as well as "Perishing Goods" section, below]*
- **If risk lies on B:** If the goods are lost/damaged, B must pay the price – *Castle v Playford*
    - S will be released from his obligation to deliver the goods – *McPherson v Dench*
        - However, S will not necessarily be released from his other obligations, such as to deliver the shipping documents.
    - If the goods have been damaged, B is not entitled to reject the goods if they are otherwise conforming.
    - If the goods have been partly lost, B is not entitled to reject the partly delivered goods if they are otherwise conforming.

Delivery to a carrier

- Where, in pursuance of the contract, S is authorised/required to send the goods to B, delivery of the goods to a carrier (whether named by B or not) for the purpose of transmission to B, is prima facie deemed to be a delivery of the goods to B – *SGA 1979 s32(1)*
    - Unless otherwise authorised by B, S must make a reasonable (having regard to the nature of the goods and other circumstances of the case) contract with the carrier on behalf of B – *SGA 1979 s32(2)*
        - If S omits to do so, and the goods are lost or damaged in course of transit, B may decline to treat the delivery to the carrier as a delivery to himself, or may hold S responsible in damages – *SGA 1979 s32(2)*
    - Where goods are sent by S to B by a route involving sea transit, under circumstances in which it is usual to insure, S must give such notice to B as may enable B to insure the goods during their sea transit – *SGA 1979 s32(3)*
        - This is subject to a contrary agreement – *SGA 1979 s32(3)*
        - If S fails to do so, the goods are at his risk during such sea transit – *SGA 1979 s32(3)*

Perishing goods

- In a sale of *specific* goods, where the goods (without the knowledge of S) have perished at the time when the contract is made, the contract is void – *SGA 1979 s6*
    - However, this does not apply where S ought to have known that the goods had perished at that time (and so S is in breach) – *McRae v CDC (Australian case)*
- In an agreement to sell *specific* goods, where the goods subsequently (without any fault by S or B) perish before risk passes to B, the agreement is avoided – *SGA 1979 s7*

Consumer cases

- **A contract of sale is to be treated as including a term that the goods are to remain at S's risk until they come into the physical possession of B (or a person identified by B to take possession) – *CRA 2015 s29(2)***
    - This does not apply if the goods are delivered to a carrier who is commissioned by B to deliver the goods, and who is not a carrier that S named as an option for B – *CRA 2015 s29(3)*
        - In such a case, the goods are at B's risk on and after delivery to the carrier – *CRA 2015 s29(3)*
        - This does not affect any liability of the carrier to B in respect of the goods – *CRA 2015 s29(4)*

Topic 3 – Nemo dat exceptions

Nemo dat – General rule

General principles

- **Nemo dat quod non habet – One cannot give what he does not have**
    - The recipient of a title to goods takes that title subject to what may turn out to be certain infirmities in it – *Cundy v Lindsay*
- Relativity of title: A person who wrongfully acquires possession of goods (even a thief) acquires a title which is good against all but a person who can prove a better of title – *Parker v British Airways Board*

General rule under SGA s21

- **Where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of O, B acquires no better title to the goods than S had – *SGA 1979 s21(1)***
    - O is protected where goods are stolen from him – *Farquharson v King*
        - This is so even where B purchases from a mercantile agent – *Pearson v Rose*
- S was a clerk working for O. S fraudulently sold O's timber to B, who had acted in good faith and had no notice of S's fraud. The court held that the nemo dat rule applied; the thief could give no better title than he himself had, which was none – *Farquharson v King*

Nemo dat exceptions – Owner's consent

- **Where S sells to B with O's consent, O cannot assert his right against B.**

Nemo dat exceptions – Estoppel

- **REQUIREMENTS: O is by his conduct precluded from denying S's authority to sell – *SGA 1979 s21(1)***
    - The representation made may be by words or conduct, but it must be clear and unequivocal – *Moorgate v Twitchings*
    - B must have relied on O's representation – *Cole v North Western Bank*
    - S need not have possession of the goods. Further, O giving possession to S does not constitute a representation to B that S has authority to sell; something more is required – *Jerome v Bentley*
        - There must be some ostensible ownership (e.g., when O gives S a document of title or invests him with the indicia of ownership) – *Central Newbury v Unity Finance*
    - O is only precluded from denying S's authority if it can be said that, by parting with his car and its registration book, O endowed S with an apparent authority to sell – *Central Newbury v Unity Finance*
        - No apparent authority to sell can be assumed from mere possession of a car or its registration book; further, possession of both does not remove all occasion for inquiry – *Central Newbury v Unity Finance*

- A duty of care on O (or an agent acting on O's behalf) may give rise to an estoppel – *Moorgate v Twitchings*
  - There must exist a legal duty not to be careless – *Moorgate v Twitchings*
    - *[See "Duty of Care" section in "Tort – Negligence" notes]*
  - The mere fact that O could reasonably foresee that his carelessness would lead B to believe that S was the owner of the goods, or that O had no interest in the goods, does not in itself impose such a duty – *Moorgate v Twitchings*
- Good faith:
  - Sale at an undervalue may be a factor indicating notice – *Heap v Motorists*
  - *[For constructive notice, see discussion in "Apparent authority" section in "Agency" topic]*

- **EFFECT: B acquires a real title (better than that of S) to the goods – *Eastern Distributors v Goldring***

- S was armed by O with documents which enabled him to represent to B that he was the owner of the van and had the right to sell it. O consented and was privy to S's representation to B. The court held that O was precluded from denying S's authority to sell, and B acquired the title to the goods which S had – *Eastern Distributors v Goldring*
- The registration book of a car does not prove legal ownership, and it proclaimed a clear warning and intimation that it did not do so, its possession with car does not preclude O from denying S's authority to sell – *Central Newbury v Unity Finance*
- A representation by a third party record keeper that it had no record of a prior hire-purchase agreement does not amount to a representation by the record keeper as agent of the finance company, that no prior agreement existed – *Moorgate v Twitchings*

Nemo dat exceptions – FA s2 (Mercantile agent)

- **SITUATION:** Mercantile agent (MA) is in possession of goods (or documents of title) belonging to the owner (O), and transfers them to buyer (B).
  - Mercantile agent:
    - A mercantile agent having in the customary course of his business as such agent, authority to sell, consign for the purposes of sale, buy, or raise money on the security of, goods *[belonging to another] – FA 1889 s1(1)*
    - MA need not be an agent as a general occupation; it is sufficient if he acts for one principal only, and only has limited discretionary authority – *Lowther v Harris*
      - MA operating his own business and earning commission is indicative of being an MA – *Lowther v Harris*
    - B need not be aware that MA is a mercantile agent (e.g., it is sufficient if MA pretends to B to own the goods in order to pledge them to him) – *Oppenheimer v Attenborough*
  - Goods:
    - In the context of a car, this means the car together with the registration book – *Pearson v Rose*
  - Document of title (see FA 1889 s1(4)):
    - A car registration book is not a "document of title" – *Central Newbury v Unity Finance*

- **<u>REQUIREMENTS:</u> (i) MA is, with the consent of O, in possession of goods (or documents of title); (ii) MA makes *any sale, pledge, or other disposition;* (iii) acting in the ordinary course of business of a mercantile agent; (iv) B acts in good faith, and does not have (at the time of the disposition) notice that MA does not have authority to make the disposition – *FA 1889 s2(1)***
    - Where MA has obtained possession of documents of title by reason of being/have been in possession of the goods with O's consent, MA's possession of the documents of title is deemed to be with O's consent – *FA 1889 s2(3)*
    - <u>Possession:</u>
        - MA must have possession of the goods in his capacity as a mercantile agent, and O must have consented to that possession in that capacity – *Astley v Miller*
        - Possession can be actual or constructive – *FA 1889 s1(2)*
    - <u>O's consent:</u>
        - O's consent is presumed in the absence of evidence to the contrary – *FA 1889 s2(4)*
        - Where MA was once in possession of the goods/docs with O's consent, but that consent has been determined, *any sale, pledge, or other disposition* which would have been valid if O's consent continued, is valid – *FA 1889 s2(2)*
            - B must not have had notice, at the time of the disposition, that the consent has been determined – *FA 1889 s2(2)*
        - The relevant consent must be a consent to the possession of the goods by a mercantile agent as mercantile agent; although the possession need not be for sale, it can be for display or to get offers, or to merely put in showroom – *Pearson v Rose*
        - Where MA fraudulently obtained consent, there is still consent (until avoided) – *Pearson v Rose*
            - Where MA obtained the goods by theft, there is no consent – *Pearson v Rose*
    - <u>"Owner":</u>
        - S2(1) still applies even if the rights of ownership have been divided, or if MA has an interest in the goods (e.g., is a trustee, and O is the beneficiary) – *Lloyd's Bank v Bank of America*
    - <u>Ordinary course of business:</u>
        - "Ordinary course of business" envisages a transaction by a MA, 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 – *Newtons v Williams*
        - MA must act as a mercantile agent would act if he were carrying out a transaction which he was authorised by his master to carry out – *Newtons v Williams*
            - MA must act within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act – *Oppenheimer v Attenborough*
        - Query whether a transaction at an undervalue would be in the ordinary course of business.
        - This does not depend on the circumstances in which MA obtained possession; it is simply concerned with how a MA would act in the ordinary course of business – *Astley v Miller*
        - A second-hand car was sold on Warren Street, which was home to an established second-hand car market. The court held that the sale was in the ordinary course of business – *Newtons v Williams*
    - <u>Good faith:</u>
        - There is nothing special about the definition of good faith in s2 – *Summers v Havard*

        - Where B knows that some of the goods in MA's possession do not belong to MA, and that MA was up to skulduggery, a refusal to make enquiries means that B does not act in good faith – *Summers v Havard*
        - Sale at an undervalue may be a factor indicating notice – *Heap v Motorists*
        - It is commonly said that constructive notice does not operate in commercial transactions, yet Bridge, Gullifer et al. have argued that it may apply in certain contexts, such as where there is a recognised practice of making inquiries. The operation of constructive notice has been the subject of discussion in many areas of commercial law, with the courts more reluctant in some areas than others. Thus, it is unclear whether the court would accept that TP had constructive notice here.

- **EFFECT: The disposition shall be as valid as if MA were expressly authorised by O to make it – *FA 1889 s2(1)***
    - "Authorised by the owner" refers only to O *(in the scenario)*; if O stole the goods from the true owner, B only acquires O's title to the goods: he does not acquire the true owner's title, and so the true owner still has a better title than B – *National Employers v Jones*

Nemo dat exceptions – SGA s24 (Seller in possession)

- **SITUATION:** Seller (S) sells goods to buyer (B/O), and property has passed, but S keeps hold of the goods. S transfers the goods to TP.

- **REQUIREMENTS: (i) S continues, or is, in possession of the goods (or documents of title); (ii) S (or a mercantile agent acting for him) delivers/transfers the goods/docs; (iii) under any *sale, pledge, or other disposition thereof;* (iv) to TP receiving in good faith and without notice of the previous sale – *SGA 1979 s24***
    - "Mercantile agent": A mercantile agent having in the customary course of his business as such agent, authority to sell, consign for the purposes of sale, buy, or raise money on the security of, goods – *SGA 1979 s26(1)*
    - Possession:
        - "Possession" refers to physical possession; not legal title. There may be a change in legal title (e.g., S's attornment to B as bailee), but a break in physical possession ousts the operation of s24 – *Pacific Motor v Motor Credits*
            - This was a decision of UKPC, which purported to overturn this aspect of *Eastern Distributors v Goldring.* However, the decision was followed by EWCA in *Worcester v Cooden,* and so can be considered authoritative.
        - S need not be in possession with B's consent – *Worcester v Cooden*
            - But, an unlawful repossession of the goods sold by S would not enable him to pass a good title, as he would not then be in possession as S – *Benjamin's Sale of Goods*
        - The capacity in which S retains possession is not crucial – *Pacific Motor v Motor Credits*
        - Where there was no sale between S and O (or the sale is void), s24 does not apply
    - Delivery:
        - "Delivery": Voluntary transfer of possession from one person to another – *SGA 1979 s62(1)*

        - Delivery includes constructive delivery; it is not confined to physical delivery. Constructive delivery occurs where there is a change in the character of possession – *Gerson v Wilkinson*
            - This was expressly stated to be obiter dictum by Clarke LJ in EWCA since no argument was heard on the issue. However, there appears to be academic consensus that the dictum is correct in principle, which is supported by the fact that constructive delivery is sufficient under s25, per *Forsythe v Silver Shipping*
        - On the basis that delivery can be constructive, the change of character of S's possession from seller to bailee, amounts to delivery; the making of the agreement for sale and then the entering into of the lease is sufficient – *Gerson v Wilkinson*
    - <u>The disposition:</u>
        - "Disposition": Extends to all acts by which a new interest (legal or equitable) is effectually created – *Worcester v Cooden*
        - The disposition to TP may be merely an agreement to sell etc. – *FA 1889 s8*
        - The disposition need not be in the ordinary course of business – *Pacific Motors v Motor Credits*
        - It is unclear whether the grant of a charge amounts to a "disposition". A charge creates a proprietary interest, yet applying the ejusdem generis rule, it can be said that a charge is not of the same kind as a sale or pledge, and so would not likely be held by the court to be a "disposition". This conclusion can be supported by the fact that a mortgage is not a "disposition", per *Kitto v Bilbie*.
    - <u>Good faith:</u>
        - Sale at an undervalue may be a factor indicating notice – *Heap v Motorists*
        - It is commonly said that constructive notice does not operate in commercial transactions, yet Bridge, Gullifer et al. have argued that it may apply in certain contexts, such as where there is a recognised practice of making inquiries. The operation of constructive notice has been the subject of discussion in many areas of commercial law, with the courts more reluctant in some areas than others. Thus, it is unclear whether the court would accept that TP had constructive notice here.

- **<u>EFFECT:</u> The delivery/transfer of the goods/docs has the same effect as if S was expressly authorised by O to make the delivery/transfer – *SGA 1979 s24***
    - "Authorised by the owner" refers only to B; if B's title is defective (because S stole the goods from the true owner), TP only acquires B's title to the goods: he does not acquire the true owner's title, and so the true owner still has a better title than TP – *National Employers v Jones*

Nemo dat exceptions – SGA s25 (Buyer in possession)

- **SITUATION:** Seller (S/O) sells goods to buyer (B), but property has not yet passed. B transfers the goods to TP.
    - This does not apply where B is a buyer under a conditional sale agreement – *SGA 1979 s25(2)(a)*
        - "Conditional sale agreement": An agreement for the sale of goods which is a consumer credit agreement within the meaning of CCA 1974, under which the purchase price (or part of it) is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding the buyer's possession) until such conditions as specified in the agreement are fulfilled – *SGA 1979 s25(2)(b)*
            - "Consumer credit agreement": An agreement between an individual (the debtor) and any other person (the creditor) by which the creditor provides the debtor with credit of any amount – *CCA 1974 s8(1)*
    - ROT Clauses: Where B purchased the goods from S on RoT terms, he is a buyer in possession, and so TP may acquire good title by virtue of s25(1) – *Hendy Lennox v Grahame Puttick*
        - However, where TP purchases the goods from B also on RoT terms, and in neither case is the price paid so as to pass property in the goods under the RoT clause, TP does not acquire good title under s25(1) – *Re Highway Foods*

- **REQUIREMENTS: (i) B (having bought, or agreed to buy, goods) obtains, with the consent of S, possession of the goods (or documents of title); (ii) B (or a mercantile agent acting for him) delivers/transfers the goods/docs; (iii) under any *sale, pledge, or other disposition thereof;* (iv) to TP receiving in good faith and without notice of any lien or other right of S in respect of the goods – *SGA 1979 s25(1)***
    - Possession
        - Where there was no sale between O and B (or the sale is void), s25 does not apply
    - Mercantile agent:
        - A mercantile agent having in the customary course of his business as such agent, authority to sell, consign for the purposes of sale, buy, or raise money on the security of, goods – *SGA 1979 s26(1)*
    - Delivery:
        - "Delivery": Voluntary transfer of possession from one person to another – *SGA 1979 s62(1)*
        - Delivery can be constructive – *Forsythe v Silver Shipping*
    - The disposition:
        - The disposition to TP may be merely an agreement to sell etc. – *FA 1889 s9*
        - The disposition to TP must be done in the ordinary course of business – *Newtons v Williams*
        - The possession of an option to buy in a contract for hire is not an agreement to buy, and an obligation to give the option is not an agreement to sell – *Helby v Matthews*
            - Where there is an option to pay a final instalment and then buy the goods, that is a hire-purchase agreement; but if there are simply instalments of payment, that is a conditional sale agreement – *Helby v Matthews*
    - Good faith:
        - Sale at an undervalue may be a factor indicating notice – *Heap v Motorists*

        - It is commonly said that constructive notice does not operate in commercial transactions, yet Bridge, Gullifer et al. have argued that it may apply in certain contexts, such as where there is a recognised practice of making inquiries. The operation of constructive notice has been the subject of discussion in many areas of commercial law, with the courts more reluctant in some areas than others. Thus, it is unclear whether the court would accept that TP had constructive notice here.

- **<u>EFFECT:</u> The delivery/transfer of the goods/docs has the same effect as if B were a mercantile agent in possession of the goods/docs with the consent of O – *SGA 1979 s25(1)***
    - *[I.e., requirement (i) in FA 1889 s2 is satisfied: see "Exception – Mercantile agent" section]*
        - **S25 does no more than clothe S with the fictitious position of a mercantile agent – *Newtons v Williams***
    - *"With the consent of owner"* refers only to S; if S stole the goods from the true owner, TP only acquires S's title to the goods: he does not acquire the true owner's title, and so the true owner still has a better title than TP – *National Employers v Jones*
    - In a chain of sales, TP will only get as good a title as S, not the true owner. However, where S's title is fed, the title is fed down the chain, so as to give TP full title – *Heathrow v Motability Operations*
- B was in possession of furniture under a hire-purchase agreement made with S. B sold and delivered the goods to TP, before the last payment had been paid to S. TP received the furniture in good faith and without notice of S's right. The court held that this was the very kind of transaction which s25(1) was designed to cover – *Lee v Butler*

<u>Nemo dat exceptions – SGA s23 (Voidable title)</u>

- **<u>REQUIREMENTS:</u> (i) S has a voidable title to the goods; (ii) but his title has not been avoided at the time of the sale; (iii) B buys the goods in good faith and without notice of S's defect of title – *SGA 1979 s23***
    - Where O discovers the fraud and rescinds the contract before S's sale to B, S has no title to sell to B and s23 does not apply – *Car & Universal Finance v Caldwell*
        - O notified the police and the AA; this was held to be sufficient evidence of recission of the contract; the fraudster (S) could not be traced – *Car & Universal v Caldwell*
        - Where S sold the car onto B before O discovered the fraud, O had not rescinded the contract in time, and title passed to B at the moment of sale – *Lewis v Avery*
    - <u>Good faith:</u>
        - Sale at an undervalue may be a factor indicating notice – *Heap v Motorists*

- **<u>EFFECT:</u> B acquires a good title to the goods – *SGA 1979 s23***

<u>Voidable vs void</u>

- S's title may be voidable at the option of O, on the ground of (e.g.):
    - Fraud – *Pearson v Rose*
    - Misrepresentation – *Clough v L&NW*
    - Non-disclosure
    - Duress – *Atlas v Kafco*
    - Undue influence

    - Unconscionable bargain
- S's title may be void, on the ground of (e.g.):
    - Mistake as to identity – *Shogun v Hudson*
        - *[See "Agreement" section in "Contract – Forming a contract" notes]*
    - Lack of coincidence between the terms of the offer and of the acceptance – *Morrison v Robertson*
    - The goods were stolen (whether by S or other)
    - Application of nemo dat – no title was ever passed, so void

Nemo dat and hire-purchase agreements

- "O": Creditor in the HP/conditional sale agreement
- "S": Debtor in the HP/conditional sale agreement
- "B": Third party purchaser from S
- "The agreement:" The hire-purchase / conditional sale agreement
- "Title of O": Such title (if any) to the vehicle as, immediately before the disposition to S, was vested in O – *HPA 1964 s29(5)*

- **REQUIREMENTS:** (i) A motor vehicle has been bailed under a hire-purchase (HP) agreement, or has been agreed to be sold under a conditional sale agreement; and (ii) before property in the vehicle has become vested in the debtor (S), S disposes of the vehicle to another person (B) – *HPA 1964 s27(1)*
    - "Hire-purchase agreement":
        - An agreement, other than a conditional sale agreement, under which goods are bailed in return for periodical payments, and the property in the goods will pass to the bailor/hirer if the terms of the agreement are complied with, and one or more of the following occurs: – *HPA 1964 s29(1)*
            - The exercise of an option to purchase by that person
            - The doing of any other specified act by any party to the agreement
            - The happening of any other specified events
        - The agreement may be voidable, but not void – *Shogun v Hudson*
            - *[See "Agreement" section in "Contract – Forming a contract" notes]*
    - "Conditional sale agreement":
        - An agreement for the sale of goods under which the purchase price (or part of it) is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding the buyer's possession) until such conditions as specified in the agreement are fulfilled – *HPA 1964 s29(1)*
        - The agreement may be voidable, but not void – *Shogun v Hudson*
            - *[See "Agreement" section in "Contract – Forming a contract" notes]*
    - "Disposition":
        - Any sale or contract of sale (including a conditional sale agreement), any bailment under a HP agreement, and any transfer of the property in goods in pursuance of a provision in that behalf contained in the HP agreement. It also includes any transaction purporting to be a disposition – *HPA 1964 s29(1)*

        - Where the disposition to B takes place before the agreement between O and S has been concluded, s27(1) does not apply – *Kulkarni v Manor Credit*

- **EFFECT 1:** (i) B is a private purchaser; and (ii) B purchases in good faith without notice of the agreement…. -> The disposition shall have effect as if O's title to the vehicle had been vested in S immediately before the disposition – *HPA 1964 s27(2)*
    - "Private purchaser": A purchaser who, at the time of the disposition, does not carry on any such business – *HPA 1964 s29(2)*

- **EFFECT 2:** (i) B is a trade or finance purchaser; (ii) B sells the vehicle on to a private purchaser (B2); and (iii) B2 purchases in good faith without notice of the agreement… -> The disposition to B2 shall have effect as if O's title had been vested in S immediately before the disposition to B – *HPA 1964 s27(3)*
    - Where the disposition by B to B2 is one of bailment or hire-purchase, and B transfers the property in the vehicle to B2, then (whether or not B2 takes in good faith without notice), the same effect shall take place – *HPA 1964 s27(4)*
    - "Trade or finance purchaser": A purchaser who, at the time of the disposition, carried on a business which consists, wholly or partly of purchasing motor vehicles for the purpose of offering/exposing them for sale; or of providing finance by purchasing motor vehicles for the purpose of bailing them under HP agreements, or agreeing to sell them under conditional sale agreements – *HPA 1964 s29(2)*

- A trade or finance purchaser receives no protection under HPA 1964 – *Moorgate v Twitching*
    - Under s27(3), B2 must be a private purchaser also

Presumptions

- **REQUIREMENTS:** Where it is proved that: (i) the vehicle was bailed under a HP agreement, or was agreed to be sold under a conditional sale agreement; and (ii) B was a private purchaser of the vehicle in good faith without notice of the relevant agreement – *HPA 1964 s28(1)*
- **EFFECT:** It shall be presumed (unless the contrary is proved) that the disposition of the vehicle to B was made by S – *HPA 1964 s28(2)*
    - If it is proved that the disposition was not made by S, then it shall be presumed (unless the contrary is proved) that: S disposed of the vehicle to a private purchaser (TP) purchasing in good faith without notice of the relevant agreement; and that B is claiming under TP – *HPA 1964 s28(3)*
    - If it is proved that the disposition was not made by S, and that TP was a trade or finance purchaser, then it shall be presumed (unless the contrary is proved) that: the person who, after TP, became the first private purchaser of the vehicle, was a purchaser in good faith without notice of the relevant agreement; and that B is a person claiming under TP.

Topic 4 – Agency

Actual authority

Creation

- **Actual authority is a legal relationship between P and A created by a consensual agreement to which they alone are parties – *Freeman v Buckhurst***
    - TP is a stranger to the agreement conferring actual authority between P and A – *Freeman v Buckhurst*
- To confer actual authority requires not merely the silent acquiescence of the purported P, but the communication by words or conduct of P's consent to A – *Freeman v Buckhurst*

Implied actual authority

- **Implied actual authority may be inferred from the conduct of the parties and the circumstances of the case – *Hely-Hutchinson v Brayhead***
- A relationship of agency is created when P signs a blank instrument and hands it to A as agent for the purpose of it being used as a negotiable instrument, with the intention that it should be issued as such – *Smith v Prosser*
    - Where a person handed promissory notes to another as custodian only, with the intention that the notes should not be issued until he sent instructions to that effect later, this did not create an agency relationship – *Smith v Prosser*

Scope of authority

- **The scope of the actual authority 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 – *Freeman v Buckhurst***
    - *[See "Interpretation" section in "Contract – Contract terms" notes]*
    - If P gives an order with an ambiguous meaning, and A adopts a possible interpretation bona fide, P cannot repudiate the act as unauthorised because he meant the other possible interpretation; P should give his order in clear and unambiguous terms – *Ireland v Livingston*
        - A key factor in *Ireland v Livingston* was that A had no way of communicating to P (the case was in 1872); it is unclear how this situation would apply in the modern world where communication is easy and instant. It may still be relevant in a rare case where communication to P would be difficult / impossible.
    - Where A has authority to purchase goods, A undertakes to use reasonable skill and diligence to fulfil P's order, to be followed up by a transfer of the property at the actual cost, with the addition of the commission – *Ireland v Livingston*
- A does not have actual authority to bind P when he acts fraudulently or in the furtherance of his own interests – *Hopkins v TL Dallas*
    - P is still bound if A acted within the written terms of his authority, notwithstanding that he so acted in furtherance of his own aims, rather than those of P – *Hambro v Burnand*
    - *Hopkins* and *Hambro* appear to conflict. *Hambro* was a judgment of EWCA, which was not expressly overruled, or referred to directly, by Lightman J in *Hopkins.* However, *Hopkins* would appear to be the favoured case amongst academics and judges, and also accords with the well-established Australian case of *Lysaght v Folk,* which held that A's authority is subject to a condition precedent that it is exercised honestly and in P's interests. Therefore, if the

issue ever reached UKSC, the court would likely expressly overrule *Hambro* and follow the *Hopkins* line of cases.

- Every authority conferred upon A, whether express or implied, must be taken to be subject to a condition precedent that the authority is to be exercised honestly and on behalf of P – *Lysaght v Falk (High Court of Australia)*
  - If this condition is not fulfilled, then there is no authority, and any act purporting to have been done is void – *Lysaght v Folk (High Court of Australia)*
  - A does not have authority to enter into a contract which is not in P's interest – *Lysaght v Falk (High Court of Australia)*
- But, A may still have apparent authority, unless TP knows (or has reason to believe) that A is not acting in P's interests.

- Delegatus non potest delegare: An agent cannot sub-delegate (unless given authority to do so)

Usual authority

- When a board of directors appoints one of their number to be managing director, they thereby invest him with implied actual authority (as well as apparent authority) to do all such things as fall within the usual scope of that office – *Hely-Hutchinson v Brayhead*
- A has implied actual authority to perform acts necessarily incidental to the performance of the agency – *First Energy v HIB*
  - A had the usual authority of a person described as a senior manager in charge of a branch office, subject only to the express limitation which P communicated to TP. Crucial to this case was that it was an "on-premises contract" – *First Energy v HIB*
- The signature of a duly authorised agent of the company, acting in the course of the company's business, is the signature of the company – *UBAF v EAB*
- A solicitor has implied authority as between himself and P to settle a dispute; and has apparent authority as between himself and TP to settle a dispute – *Waugh v Clifford*

Effect as against TP

- **If A enters into a contract pursuant to the actual authority, it creates contractual rights and liabilities between P and TP – *Freeman v Buckhurst***
- If TP has knowledge that A has fraudulently exercised his authority, TP cannot assert the contract between him and P – *Lysaght v Falk*

Apparent authority

Basis

- Apparent/ostensible authority is a legal relationship between P and TP created by a representation by P to TP, intended to be and in fact acted upon by TP, 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 by him by such contract – *Freeman v Buckhurst*
    - A is a stranger to the relationship between P and TP. He need not be aware of the representation, although he must not purport to make the agreement as principal himself – *Freeman v Buckhurst*
- **Apparent authority can only be used as a shield, not a sword**
    - It is based on estoppel by representation – *Freeman v Buckhurst*

Creation

- **Apparent authority comes about where P, by words or conduct, represents that A has the requisite actual authority, and TP enters into a contract with A in reliance on that representation. P is then estopped from denying that actual authority existed – *Armagas v Mundogas***
    - The representation may be by words or conduct – *Armagas v Mundogas*
    - It is unclear whether detrimental reliance is required. Cases such as *Freeman v Buckhurst* suggest that alteration of position is sufficient, whilst cases such as *Farquharson v King* call for detrimental reliance. In *The Tatra,* it was held that entering into the contract with P is sufficient detriment by TP, and this is likely to cover the vast majority of situations. Where TP does not enter into the contract, it may be that some other form of detrimental reliance is required.
- Where TP knows that A does not have actual authority, he cannot rely on apparent authority; lack of belief that A had actual authority is fatal – *Criterion v Stratford*
    - If TP knows, or has reason to believe, that the transaction is contrary to P's interests, he will likely have great difficulty in asserting that he believed that A had actual authority – *Criterion v Stratford*
    - It is unclear whether constructive notice is sufficient to preclude TP from relying on apparent authority. In *Overbrooke v Glencombe,* EWHC held that TP knew, or ought to have known, that A had no authority, and so could not rely on apparent authority. Further, UKPC held in *East Asia v PT Satria* that TP cannot rely on apparent authority if he failed to make reasonable inquiries. However, neither case is binding. In *Quinn v CC Automotive,* EWCA endorsed Lord Neuberger's approach, set out in the Hong Kong Final Court of Appeal in *Thanakhran*, which does not make room for constructive notice. It is to be hoped that UKSC will bring clarity to this area of the law, yet until such time, EWCA ought to be followed as a matter of precedent, so that constructive notice is not sufficient.

General or specific

- Apparent authority is usually general:
    - General apparent 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 can also arise from a course of dealing between A and TP, where P has acquiesced to this and honoured the transactions – *Armagas v Mundogas*

        - However, a previous course of dealing is not, without more, sufficient to establish apparent authority – *Armagas v Mundogas*
    - General apparent authority cannot arise where TP knows that A's authority is limited so as to exclude entering into the transactions of the type in question – *Armagas v Mundogas*
    - A may have a general apparent authority to communicate information and make representations of fact, but not to enter into contracts himself – *First Energy v HIB*
        - The branch manager did not have authority to enter into the contract with the client, which the client had knowledge of. However, the branch manager represented that he had authority to communicate Head Office's approval of the transaction, which was not true. EWCA held that the branch manager was clothed with apparent authority. Crucial to this case was that it was an "on-premises contract", and that A was a senior manager in the corporate structure – *First Energy v HIB*
        - This decision appears to be difficult to reconcile with the principle that an agent cannot hold himself out to have authority. However, the tendency of the courts, such as Potter LJ in *Sun Life v CX Reinsurance*, has been to view *First Energy* as a case in which the bank clothed the branch manager, by virtue of his position, with apparent authority to communicate decisions of Head Office. Brown, amongst others, has argued that *First Energy* may pave the way for a change in the law, elevating the protection afforded to TPs. Yet, such a change must come from UKSC or Parliament, and until then, it may be best to confine *First Energy* to its specific facts, reaffirming the general rule against self-authorising agents.
- Apparent authority may be specific (in rare cases):
    - P may inform T that A, notwithstanding his usual lack of authority, has authority to enter into the particular transaction. It is difficult to envisage circumstances in which this representation could be made by conduct – *Armagas v Mundogas*

<u>Chain of authority</u>

- There can be apparent authority where: P represents to TP that A1 has authority to represent to TP that A2 has authority to act on P's behalf; P is then bound by A2's acts – *Ing v Versicherung*
    - The critical requirement is that A2's authority must be able to be traced back to P by a representation, or a chain of representations, upon which TP acted and whose authenticity P is estopped from denying by his representation – *Ing v Versicherung*

<u>Self-authorisation</u>

- A cannot hold himself out to have authority, where he has no actual authority – *British Bank v Sun Life*
    - The law does not recognise the idea of a self-authorising agent – *First Energy v HIB*
    - A bank manager stated erroneously that a bank employee had authority. This did not thereby clothe the branch manager with actual or apparent authority to state this. The bank never represented that their branch managers had authority (they did not have usual authority for this) and so no apparent authority existed – *British Bank v Sun Life*
- A may hold himself out to have authority to communicate information, but not to enter into contracts himself – *First Energy v HIB [see above]*

Scope of authority

- Apparent authority can operate to:
  - (i) Create authority where there was none before – *Barrett v Deere*
  - (ii) Enlarge A's actual authority – *First Energy v HIB*
  - (iii) Clothe A with authority where he would usually have actual authority, but for the existence of a restriction unknown to TP – *Manchester Trust v Furness*
  - (iv) Extend A's authority beyond termination of the agency relationship – *Generali v Trygg*
- Where apparent authority is established, secret limitations on A's authority will not bind TP – *The Unique Mariner*
- Forgery of P's signature by A can bind P where A was clothed with apparent authority – *Lovett v Carson*
  - P frequently left all bank details and documentation to A, and was on numerous occasions content to leave it to A to communicate the appropriate signed formal documents to the bank, even though P knew that P's signature was required, so A forged it. In doing so, P clothed A with apparent authority – *Lovett v Carson*

Usual authority

- **P is liable for all the acts of A which are within the authority usually confided to an agent of that character, notwithstanding limitations put upon that authority (as between P and A) – *Watteau v Fenwick***
  - This is so even in the case of an undisclosed P – *Watteau v Fenwick*
  - This is not based on apparent authority, but on its own principle of usual authority.
  - *[See "Undisclosed principal" section]*
- When a board of directors appoints one of their number to be managing director, they thereby invest him with apparent authority (as well as implied actual authority) to do all such things as fall within the usual scope of that office – *Hely-Hutchinson v Brayhead*
  - Where P has placed a secret restriction on A's authority, but A's usual authority extends beyond the restriction, then P is liable for the full extent of usual authority, if established that there is apparent authority – *Hely-Hutchinson v Brayhead*
- A solicitor has implied authority as between himself and P to settle a dispute; and has apparent authority as between himself and TP to settle a dispute – *Waugh v Clifford*

Effects as against TP

- It is irrelevant whether A had actual authority to enter into a contract with TP; the representation acts as an estoppel: P is precluded from denying A's authority to enter into the contract with TP – *Freeman v Buckhurst*

Agency of necessity

- **Agency of necessity: Where circumstances exist which (in law) have the effect of conferring on A authority to create contractual rights and obligations between P and TP, that are directly enforce by each against the other – *The Winson, Lord Diplock***
    - Questions of agency of necessity arise in relation to whether P is bound by the contract between A and TP. Issues between P and A will be resolved by the law of bailment – *The Winson, Lord Simon*
- Agency of necessity can arise where A is in possession of P's goods, and an emergency arises which places those goods in imminent jeopardy. If A cannot obtain instructions from P as to how he should act, A is bound to take without authority such action in relation to the goods as P, a prudent owner, would himself have taken in the circumstances – *The Winson, Lord Simon*
    - This is not confined to carriage of goods by sea, but also extends to the carriage or storage of perishable goods or livestock on land – *Great Northern Rly v Swaffield*

- **Agency of necessity will only arise if the following five conditions are met:**
    - (i) It is impossible/impracticable for A to communicate with P – *Springer v Great Western Rly*
    - (ii) The action is necessary for the benefit of P – *Prager v Blatspiel*
    - (iii) A acts bona fide in the interests of P – *Prager v Blatspiel*
    - (iv) The action taken by A is reasonable and prudent – *F v West Berkshire HA*
    - (v) P must have been competent at the time that the agent acted – *Jebara v Ottoman Bank*

Disclosed principal

- **In the case of a disclosed principal, the question of whether A is also liable on the contract alongside P depends on the intention of the parties – *The Swan***
- This intention is to be gathered from: (i) the nature of the contract; (ii) its terms; and (iii) the surrounding circumstances – *The Swan*
    - The court must look for the objective intention of A and TP, 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 – *The Swan*
        - *[See "Interpretation" section in "Contract – Contract terms" notes]*
        - Where the contract is wholly in writing, the intention depends on the true construction of the contract – *The Swan*
        - Where the contract is partly oral and partly in writing, the court must look at the true effect of the oral and written terms taken together – *The Swan*
- Where A is described in the contract as an agent acting for P, but in fact A only acts for himself and not for P, A may then himself sue upon the contract – *Harper v Vigers*
- Members of an unincorporated association are prima facie not liable for the acts of those who enter into contracts in the course of the affairs of the club. Who is liable depends on the constitution of the club and what acts of authority and ratification have occurred – *Davies v Barnes*
- When A (acting on behalf of his personal company) is known or correctly assumed to be the owner of a boat, and has discussion with a repairing company's manager (TP) about repairs to the boat, it is natural for TP to assume that, if an order for the repairs is placed, A will accept personal liability for them as the owner, unless he makes the contrary clear beyond doubt – *The Swan*

Undisclosed principal

Creation

- Where A contracts as principal (e.g., by calling describing himself as "owner" of the ship); an undisclosed P is not permitted to step in – *Humble v Hunter*
    - An undisclosed P may exist even where there exists a memorandum in writing containing the name or description of the parties – *Higgins v Senior*
- The terms of the contract may, expressly or impliedly, exclude P's right to sue, and his liability to be sued. The contract itself, or the surrounding circumstances, may show that A is the true and only principal – *Siu Yin v Eastern Insurance (UKPC)*
    - Certain personal contracts cannot be performed vicariously – *Siu Yin v Eastern Insurance (UKPC)*
        - E.g., a contract to paint a picture cannot be enforced by an undisclosed P, since his intervention would be a breach of the very contract in which he seeks to intervene – *Siu Yin v Eastern Insurance (UKPC)*
        - A contract of indemnity insurance is not a personal contract in this sense – *Siu Yin v Eastern Insurance (UKPC)*
    - Where P knew that the theatre (TP) would not contract with him, and so sent A to contract with TP instead, P could not assert that he was the undisclosed principal of A. "The personal element is strikingly present in this case" – *Said v Butt*
- In entering into the contract, A must intend to act on P's behalf – *Siu Yin v Eastern Insurance (UKPC)*
- A contract containing a non-assignability clause does not preclude intervention by an undisclosed P – *Siu Yin v Eastern Insurance (UKPC)*
- P is not an undisclosed principal if TP has actual knowledge that A is acting for another; nothing short of actual knowledge will suffice for this – *Greer v Downs*
    - P is not an undisclosed principal if he is merely unnamed, but his existence is known – *Cumbria v Athersmith*
- Where P encourages and fosters a mistake in TP that she is contracting with P (through providing misleading contractual documents), but she is in fact contracting with A, P can be sued as an undisclosed principal – *Lease Management v Purnell*
    - This is so unless P discharges its burden of proving that TP would have entered into the contract even if it did not contain the misleading features (thus if TP would have knowingly contracted with A) – *Lease Management v Purnell*
    - This is an application of a wider, general principle of estoppel by representation, of which the doctrine of apparent authority is a particular application – *Lease Management v Purnell*

Who can sue or be sued

- **An undisclosed P may sue and be sued on a contract made by A on his behalf, acting within the scope of his actual authority – *Siu Yin v Eastern Insurance (UKPC)***
- **An undisclosed P may sue and be sued on the contract even where A only had apparent or usual authority, rather than actual authority – *Watteau v Fenwick***
    - This case has been widely criticised for a number of reasons. The British Columbia Court of Appeal in *Sign-o-Lite* refused to follow the case on the basis that it was reasoned on doubtful grounds of analogy with the law of partnership and precedence. Fridman has argued compellingly that there is a logical difficulty with *Watteau v Fenwick,* namely, how can an agent have apparent authority if it is not known that he acts for a principal? It is difficult to

see how the rule can overcome this logical difficulty. As a result, were the rule ever challenged in the Supreme Court, it would likely be overturned. However, for now, it remains the law and must be followed here.

- Where an undisclosed A enters into a contract with TP without actual or apparent authority (e.g., because TP believed A to be a principal), and P finds out, P is under a duty to disclose A's lack of authority to TP; if P does not do so, he is estopped from denying A's authority – *Spiro v Lintern*
- A may also sue and be sued on the contract – *Siu Yin v Eastern Insurance (UKPC)*
    - A's right to sue is lost once P intervenes on the contract – per Munday
- Any defence which TP may have against A is also available against P – *Siu Yin v Eastern Insurance (UKPC)*

The contract terms and notice of P

- Notice of P operates to fix the contract between A and TP. After this point, they cannot, by agreement together, alter or rescind the contract – *Dyster v Randall*
    - A and TP may vary the terms of the contract before TP has notice of P. P will be bound by these variations – *Blackburn v Scholes*
    - Payment by TP to A, before TP has notice of P, is good discharge of TP's obligation – *Coates v Lewes*
- P has a duty to see that A discharges his obligation of payment towards TP; payment by P to A is not sufficient until TP actually receives the money from A – *Heald v Kenworthy*

Ratification

- **An undisclosed P cannot ratify A's contract – *Keighley v Durant***

Ratification

Rule

- **Ratification: By a fiction, P can ratify the act of A who, without authority, made a contract openly and avowedly on P's behalf. P is then deemed to be (though in fact he was not) a party to the contract between A and TP – *Keighley v Durant***

Requirements for applicability

- **Three requirements:**
- **1. A must have purported to act for P – *Firth v Staines***
    - An undisclosed P cannot ratify A's contract – *Keighley v Durant*
- **2. P must have been in existence when the act was done – *Firth v Staines***
    - Where a contract is purported to be made with a company which has not yet formed, the contract has effect as being made with the person (A) acting for the company or as agent for it (subject to any contrary agreement) – *CA 2006 s51(1)*
        - In such a case, A is personally liable on the contract – *CA 2006 s51(1)*
        - A can also sue to enforce the contract – *Braymist v Wise*

- **3. P must be legally capable of doing in the act in question himself, at the time of ratification – *Firth v Staines***
- P cannot ratify transactions in which A acted for himself rather than for P – *Keighley v Durant*

Requirements for valid ratification

- **Ratification may be express or implied by P's unequivocal conduct – *Hogan v London Irish***
    - If ratification is to be implied from P's conduct, he must be shown to have had full knowledge of A's acts, and to have enjoyed a real choice as to whether or not he wished to adopt them – *The Bonita*
        - However, a P with incomplete knowledge may be held to have ratified the unauthorised acts of A if it can be shown that he took a risk as to how matters might turn out – *Marsh v Joseph*
    - Silence or inactivity alone will not amount to ratification – *Cramspey v Deveney*
        - However, it may be sufficient if coupled with other factors that provide clear and unequivocal evidence of P's approval and adoption of A's actions – *Suncorp v Milano*
- Ratification is a unilateral act of will, and need not be communicated to TP – *Harrison v London & NW Rly*
- P must ratify the transaction in its entirety; although, adoption of part of a transaction may amount to ratification of the whole – *Smith v Henniker-Major*
- P may ratify a contract even though he initially declined to do so, as long as it is still within a reasonable time and TP is unaware of P's initial refusal to ratify – *Simpson v Eggington*
    - But P may not resile from his ratification – *Trygg v Manches*
- A may have authority (actual or apparent) to ratify on behalf of P – *Trygg v Manches*

Effect

- **Ratification has retrospective effect.** Ratification is thrown back to the date of the contract, and so puts A in the same position as if he had authority at the time – *Bolton v Lambert*
    - This rule has been subject to extensive criticism. One compelling argument is that the rule allows P to speculate at TP's expense: he can see whether the contract made by A turns out to be a good or a bad bargain, and then choose whether or not to ratify the contract. Were the rule ever challenged in the Supreme Court, it would likely be overturned. However, for now, it remains the law and must be followed here.
- **Ratification is not effective where to permit it would unfairly prejudice TP – *The Borvigilant***
    - Ratification must take place within a reasonable time after acceptance of the offer by A – *Met. Asylums Board v Kingham*
    - The rule in *Bolton v Lambert* will not apply if the contract was made subject to ratification by P – *Met. Asylums Board v Kingham*
    - P cannot ratify a contract which has already been avoided – *Walter v James*

Warranty of authority

The warranty

- **Where A warrants to TP that he has authority to enter into the contract on behalf of P, TP can bring a claim for breach of warranty against A – *Collen v Wright***
    - This is based on an implied contract between A and TP; A's liability is strict – *Yonge v Toynbee*
        - The consideration for the implied contract is TP entering into the contract – *Collen v Wright*
    - This applies equally where A originally had authority, but that authority has ceased (even if without his knowledge) – *Yonge v Toynbee*
- A can make the false warranty fraudulently, negligently, or innocently – *Yonge v Toynbee*
- A third party may be liable for representing that A has warranty from P – *Chapleo v Brunswick*
- *Alternatively, A may be liable for the tort of deceit, or for negligent misstatement*
    - *[See "Deceit" section in "Tort – Economic torts" notes and "Duty of care" section in "Tort – Negligence" notes]*

Scope of warranty

- A's warranty only extends to a warranty that he has authority to make the contract / enter into the transaction – *Generali v Trygg*
    - The warranty does not extend to a warranty that the contract / transaction will be performed by P, or that P is solvent – *Generali v Trygg*
- A may be liable if he warrants the authority of someone else – *Chapleo v Brunswick*
- A may be liable to a TP unknown to him but who nevertheless relied upon his representation (e.g., the indorsee of a bill of lading) – *Rasnoimport v Guthrie*
    - TP need not be induced to transact with the purported P as a result of A's warranty (although this is the paradigm case); it is sufficient if TP provides consideration for A's warranty, by entering into a transaction with someone else – *Penn v Bristol & West BS*

Measure of damages

- The measure of damages is the usual contractual measure; TP is placed in the same position as if A's warranty had been true – *Firbank v Humphreys*

Defences

- A will not be liable where TP knew, or ought to have known, that A was not warranting his authority – *Lilly v Smales*
    - Trade custom ought to have put TP on notice that A was not warranting his authority – *Lilly v Smales*

Topic 5 – Assignment

Equitable assignment

Scope

- **Future property, possibilities, and expectancies (including choses in action) are assignable in equity *for value* – *Tailby v Official Receiver***
    - The assignment is regarded in equity as a contract binding on the conscience of Aor – *Tailby v Official Receiver*
- **Only the benefit of a contract may be assigned; novation is required to transfer the burden of a contract – *Don King v Warren***
    - A provision for the assignment of a contract is to be construed as the assignment of the benefit of a contract – *Linden Gardens*
- The benefits of the contract are severable; it is possible for only some to be assigned – *Don King v Warren*
- Unless the contract expressly or impliedly provides otherwise, there can be no assignment of the benefit of an obligation under which the identity of the obligee is material to the obligor: any such purported assignment will have no effect at law or in equity – *Don King v Warren*

Requirements

- The mode or form of an equitable assignment is immaterial, provided that the intentions of the parties are clear – *Tailby v Official Receiver*
    - The only condition is that on its coming into existence, the chose in action must answer the description in the assignment – *Tailby v Official Receiver*
- **NOTE:** If the equitable interest is subsisting, the assignment must be in writing signed by Aor (or his agent lawfully authorised in writing, or by will) – *LPA 1925 s53(1)(c)*

Effects

- Where D is sued by an equitable Aee, D may set up the defence that the contract giving rise to the debt out to be set aside and cancelled on the ground of fraud – *Stoddard v Union Trust*
- Aee can sue D, so long as Aor is joined in the action (either as a co-claimant or compelled as a co-defendant) – *Weddell v Pearce*
    - This is a purely procedural requirement, and can be dispensed with by the court – *Kapoor v National Westminster*
- Aor cannot sue D in his own name for his own account; he must be joined by Aee – *Three Rivers v Bank of England*
    - This is not a purely procedural requirement, but is a matter of substantive law given Aor's insufficient title – *Kapoor v National Westminster*
    - But, Aor can sue D as trustee for Aee, if Aee agrees and if Aor's representative capacity is disclosed – *Kapoor v National Westminster*
    - Professor Gullifer has argued that in the case where no notice has been given to D, the joinder of Aee is not necessary. She has argued compellingly that the caselaw does not strictly deal with the situation where D has no notice, and that dispensing with the requirement of Aee's joinder would be beneficial for financed businesses operating its customer relations. Dispensing with the joinder requirement would result in Aor holding the

funds on trust for Aee, and so Aee's interest is protected. There are thus strong arguments in favour of dispensing with the joinder requirement in these situations, and it is to be hoped that the Supreme Court will rule on this issue soon.

Factoring v invoice discounting

- Factoring: Aor sells its receivables to Aee. Aee collects the debts from D. Notice is given to D, and so the assignment may be statutory.
    - D gives good discharge of his debt by paying Aee; paying Aor is insufficient – *Brice v Bannister*
- Invoice discounting: Aor sells its receivables to Aee. Aor collects the debts from D, and holds them on trust for Aee. No notice is given to D, so the assignment must be equitable.
    - D gives good discharge of his debt by paying Aor – *Stocks v Dobson*

Statutory assignment

Scope

- FUTURE PROPERTY: The orthodox view is that only an existing chose in action can be assigned in law, and that a purported statutory assignment of a future chose in action will instead take effect as an equitable assignment. However, no decision is made on this point – *Bibby Factors v HFD, EWCA*
    - Future property is not assignable at law; the contract may give a power to take possession of the property, but no interest is transferred – *Holroyd v Marshall*

Requirements

- **Any (i) absolute assignment (ii) by writing under the hand of Aor ((iii) not purporting to be by way of charge only) of (iv) any debt or other legal thing in action, (v) of which express notice in writing has been given to D, the trustee, or other person from whom Aor would have been entitled to claim such debt or thing in action – *LPA 1925 s136(1)***
    - **(i):** The assignment must not be by way of conditions
        - An assignment by way of mortgage (with an equity to redeem) is valid, so long as it is absolute – *Durham Bros v Robertson*
        - An assignment by security, with an obligation to reassign on redemption, can be absolute – *Bovis v Circle*
        - Partial assignments (i.e., assignment of part of a debt) are not absolute, and can only take effect in equity – *Durham Bros v Robertson*
    - **(iii):** A document given by way of charge does not absolutely transfer the property with a condition for re-conveyance; rather, it is a document which only gives a right to payment out of a particular fund/property, without transferring that fund/property – *Trancred v Delagoa*
    - **(iv):** "Other legal thing in action": Any debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a court of equity deals with as being assignable – *Torkington v Magee*
        - This includes a debt not yet due, but accruing due – *Brice v Bannister*
        - This does NOT include choses in action which can be transferred only by complying with some other statute, such as shares in a company – *CA 2006 s544(1)*
        - This includes equitable choses in action – *Re Pain*

- **(v):** Notice must be given to D in writing
  - If no notice is given, the assignment may still be effective in equity – *Holt v Heatherfield*

- An equitable assignment, if in writing, can be converted into a legal assignment under LPA 1925 s136 – *Barbados Trust v Bank of Zambia*
  - This can be done through giving notice to D – *Mailbox v Galliford*

Effects

- **The assignment is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice:**
  - **The legal right to such debt or thing in action – *LPA 1925 s136(1)(a)***
  - **All legal and other remedies for the same – *LPA 1925 s136(1)(b)***
  - **The power to give a good discharge for the same without the concurrence of the assignor – *LPA 1925 s136(1)(c)***
- If the D (or other) has notice that the assignment is disputed by the Aor (or any person claiming under him) or of any other opposing/conflicting claims to the debt or thing in action, D (if he thinks fit) may either call upon the person making the claim to interplead concerning the thing, or may pay the debt into court under the provisions of TA 1925 – *LPA 1925 s136(1)*

- Aee, not Aor, may sue D [without the need for joinder by Aor] – *Hughes v Pump House*
  - D ceases to be liable to Aor as soon as notice is given – *Cottage Club v Woodside*

Subject to equities

- Where Aor's title is defective (e.g., because he failed to perform the contract), Aee takes no greater rights than Aor had – *Tooth v Hallett*
  - Defences under the contractor available by D against Aor can also be raised against Aee – *The League*
- However, Aee cannot be restrained from enforcing his debt against D by any equity (such as fraud), so long as Aee took the debt for value and without notice of any fraud – *Stoddart v Union Trust*
  - This decision by EWCA can be criticised on the basis that it gives Aee a greater right than Aor had, which defeats the purpose of the subject to equities rule, as argued by Professor Peel. The case was viewed with scepticism by EWCA in *Banco Santander v Banque Paribas,* and so would likely be overturned by UKSC, if it ever reached the court.
- Aee is only liable to equities available against the original Aor, not to those available against an intermediate Aee – *The Raven*
  - However, Professor Peel has argued that where the claim or defence against the intermediate Aee arose after the first assignment, it should be available in a claim by a subsequent Aee.
- *[For right of set-off in relation to "subject to equities rule", see "right of set-off" section]*

Priority

Rule

- **Where there are competing equitable assignments, an Aee *for value* who is first to give notice to D takes priority, unless Aee had notice of the other assignment, when taking his assignment – *Dearle v Hall***
    - If neither Aee has given notice, the first in time rule applies (i.e., the first Aee takes priority) – *Dearle v Hall*
    - Aee may be fixed with constructive notice by being put on inquiry of the previous assignment – *Spencer v Clarke*
        - It is unclear whether registration of an assignment amounts to constructive notice against the later Aee. Professor Gullifer has argued that, in relation to negative pledge clauses, registration operates as constructive notice against those who could reasonably be expected to check the register.
- **Rationale:** Notice is required to perfect the equitable title. Where an Aee does not perfect his title, he is responsible for the easily foreseen consequences of his negligence (namely, that Aor may assign the debt to another Aee, who takes without notice) – *Dearle v Hall*

Scope

- The same rules also apply to statutory assignments (or if one assignment is equitable and the other statutory): these are, for the purposes of priority, considered in the same way as equitable assignments – *Pfeiffer v Arbuthnot*
    - This is a product of the "subject to equities" rule – *Compaq v Abercorn*
    - This proposition has been doubted by Oditah, who argues that as a point of legal principle, LPA 1925 s136(1) was not a priority provision, and that as a point of policy, the law is in need of reform on a wider scope than merely extending *Dearle v Hall*. There is much to be said for Oditah's criticisms, yet his claim of the true position that subsequent legal assignment will take priority over earlier perfected equitable assignment, can be questioned. His claim is based on dicta in *Ward v Duncombe,* yet the extension of the rule in *Dearle v Hall* formed part of the ratio of the High Court in *Pfeiffer* and so, whilst not strictly binding, it may be argued that this ratio should be followed until such time as an appellate court may rule on the matter.
- The rule also applies to equitable assignments of legal choses in action (such as a charge) – *Pfeiffer v Arbuthnot*
- The rule only applies to assignments that have occurred; notice of agreements to assign future choses in action are ineffective – *Re Dallas*
- The rule only applies where Aee takes for his own benefit, rather than as an agent or trustee for another – *Compaq Computers*

Notice to D

- Registration of the assignment cannot operate as constructive notice to D. Registration may, although it is uncertain, operate as constructive notice to those who could reasonably be expected to check the register, as Professor Gullifer has argued. However, it cannot be said that D is expected to check the register, because his debt arose before any assignment, and so D would otherwise be expected to regularly check the register.

Ban on Assignments

Validity

- **Clauses prohibiting assignments which have the effect of bringing Aee into direct relations with D, are valid – *Linden Gardens***
    - There is no reason for a contractual prohibition on assignment of contractual rights to be held contrary to public policy – *Linden Gardens*
- A BoA normally only invalidates the assignment as against D, so as to prevent the transfer of the chose in action – *Linden Gardens*
    - The clearest of words are required to invalidate the contract between Aor and Aee. Even if so, such a clause may be ineffective on grounds of public policy – *Linden Gardens*
- **A BoA (or any term that imposes a condition or other restriction on assignment) has no effect if any of the following are satisfied: – *BCTAR Regs 2018 s2(1)***
    - **The supplier is an individual, a partnership (other than an LLP or limited partnership), or an unincorporated association – *BCTAR Regs 2018 s3(3)(a)***
    - **The supplier is a small company within the meaning of CA 2006 – *BCTAR Regs 2018 s3(3)(b)***
        - A small company is a company which satisfies two or more of the following in a year: (i) turnover of no more than £10.2m; (ii) balance sheet total of no more than £5.1m; and (iii) number of employees no more than 50 – *CA 2006 s382(3)*
        - A public company is not a small company – *CA 2006 s384(1)(a)*
    - **The supplier is a medium-sized company within the meaning of CA 2006 – *BCTAR Regs 2018 s3(3)(c)***
        - A medium-sized company is a company which satisfied two or more of the following in a year: (i) turnover of no more than £36m; (ii) balance sheet total of no more than £18m; and (iii) number of employees of no more than 250 – *CA 2006 s465(3)*
        - A public company is not a medium-sized company – *CA 2006 s467(1)(a)*

Scope

- Unless specially drafted to draw a distinction, a BoA attaches equally to the assignment of the right to future performance, as the right to receive benefits already accrued under the contract – *Linden Gardens*
    - The BoA also preserves the parties' rights of set-off against each other – *Don King v Warren*
- BoAs cover both assignments in equity and assignments at law – *First Abu Dhabi v BP Oil*
- **A BoA does not, prima facie, extend to prohibition of declarations of trust of the benefit of the contract;** such a prohibition is not to be inferred lightly – *Don King v Warren*
    - The purported declaration of trust is based on the separation of legal and equitable ownership, which results in a trust coming into being – *Don King v Warren*
    - Whether the contract contains a clause prohibition of such a declaration of trust is a matter of construction of the contract – *Don King v Warren*
- BoAs do not prima facie prohibit the creation of a trust over neither the proceeds of the receivable, nor over the receivable itself – *Barbados Trust v Bank of Zambia*
- BoAs do not prima facie prohibit Aor passing onto Aee payments received from D – *First Abu Dhabi v BP Oil*
- An agreement to assign the proceeds of an unassignable chose in action is valid in equity as a contract to assign future proceeds – *Raiffeisen v Five Star*

Effect

- An assignment of contractual rights in breach of a BoA is ineffective to vest the contractual rights in Aee – *Linden Gardens*
    - Aee has no rights of suit against D – *Linden Gardens*
- A failed assignment may take effect as a declaration of trust (esp. where the trust is limited to the proceeds of the claim) – *Barbados Trust v Bank of Zambia*
    - Aee can then bring a claim against D through the Vandepitte procedure: If Aor refuses to bring a claim in his name for the benefit of Aee, Aee can compel Aor to court as a co-defendant – *Barbados Trust v Bank of Zambia*
    - *[For Vandepitte procedure, see "B's claims in tort & contract" section in "Trusts – Duties & claims" notes]*

Reasons for BoAs

- Some creditors are more reasonable than others (especially in building contracts which are pregnant with disputes) – *Linden Gardens, Lord Browne-Wilkinson*
- The identity of the counterparty (a boxing promoter) was crucial – *Don King v Warren*
- Sealy & Hooley: D may wish to retain rights of set-off; or D may wish to avoid the risk of paying twice over due to an oversight of a notice of assignment.

Right of set-off

Debt due to D from Aor

- **Where the debt due to D from Aor accrues before notice of an assignment is received by D, then (whether or not the debt is payable before the date of notice) D may set-off the debt against Aee – *Business Computers***
    - This is a consequence of the "subject to equities" rule: Aee takes the assignment subject to D's right of set-off – *Biggerstaff v Rowatt's*
    - However, where D had notice of the assignment when the debt due to D from Aor accrued, there is no right of set-off – *Biggerstaff v Rowatt's*
        - This does not apply to an assignment by debenture (such as a floating charge) – *Biggerstaff v Rowatt's*
- **Where the debt due to D from Aor arises out of the same contract as the contract which gives rise to the assigned debt (i.e., the debt due to Aee from D), or is closely connected with that contract, then D may set-off the debt against Aee – *Business Computers***
    - Where the debt due to D from Aor is neither accrued nor connected, then (even if it arises form a contract made before the assignment), D has no right of set-off against Aee – *Business Computers*

Cross-claim by D

- Where D has a cross-claim under which equity regards D as entitled to set-off against the debt (aside from a contractual right of set-off), then Aee can be in no better position than Aor (subject to any question of estoppel) – *Bibby Factors v HFD*
    - This is so whether the assignment is statutory or equitable – *Bibby Factors v HFD*

    - This is so whether or not the cross-claim had accrued due before D had notice of the assignment – *Bibby Factors v HFD*
- Where D has a cross-claim which is independent of the claim against him (in the sense that it does not fall into the category of claim which forms the subject of an equitable set-off), D cannot bring a set-off against Aee for the cross-claim if it arose after D had notice of the assignment – *Bibby Factors v HFD*

<u>Equitable set-off</u>

- For an equitable set-off, there is a single test with two elements**: Is the cross-claim so closely connected with Aee's demands that it would be manifestly unjust to allow Aee to enforce payment without taking into account of the cross-claim?** – *Geldof v Simon Carvees*
    - This is not a general decision of the justice of the case – *Bibby Factors v HFD*
    - The putative victim of the injustice is D – *Bibby Factors v HFD*

Topic 6 – Security

Charges over future property

- **Where a S/Mor agrees to sell/mortgage property (either real or personal) of which he is not yet in possession, for value, equity will compel him to perform the contract when he is later in possession of property answering the description of the contract – *Holroyd v Marshall***
    - On acquiring the property, the S/Mor immediately holds it on trust for the B/Mee, according to the terms of the contract – *Holroyd v Marshall*
    - Attachment of the security interest onto the property when it comes into existence, takes effect retrospectively: it is treated as relating back to the time of the security agreement (subject to a contrary agreement between the parties) – *Re Lind*
    - Future property is not assignable at law; the contract may give a power to take possession of the property, but no interest is transferred – *Holroyd v Marshall*
- **Future property, possibilities, and expectancies (including choses in action) are assignable in equity *for value* – *Tailby v Official Receiver***
    - The assignment is regarded in equity as a contract binding on the conscience of Aor – *Tailby v Official Receiver*
    - *[See "Equitable assignment" section in "Assignment" topic]*

Characterisation

- **There are 4 kinds of consensual security in English law: – *Re Cosslett, Millet LJ***
    - **(i) The pledge:** Requires delivery of possession to the creditor. The owner delivers possession to the creditor as security. Any surplus after sale must be accounted to the pledgor – *CCA 1974 s121(3)*
    - **(ii) The contractual lien:** Requires delivery of possession to the creditor. The creditor retains possession of goods previously delivered to him for some other purpose.
    - **(iii) The equitable charge:** Does not require delivery of possession. Does not involve a transfer of ownership to the creditor.
    - **(iv) The mortgage:** Does not require delivery of possession. Involves a transfer of legal or equitable ownership to the creditor.

General approach

- **The court must look at the provisions in the agreement as a whole to decide, in substance, what kind of transaction the agreement amounts to – *Welsh Development v Export Finance***
    - The court must look at the operative parts of the agreement. If some parts appear to be inconsistent with others, a decision must be made between the two – *Welsh Development v Export Finance*
    - The transaction which the documents embody should be categorised in conformity with the intention of the parties – *Orion Finance v Crown Financial*
    - The court must look at the nature of the agreement, not its object – *Olds Discount v John Playfair*

Shams

- **The court must consider whether the documents mask the true transaction (i.e., if the transaction is a sham). If that is the case, the court must have regard to the true position, in substance and in fact – *Re George Inglefield***
    - However, where the documents and oral evidence are so clear of the contractual intention, the courts should not go so far in looking for the substance so as to contradict the clear evidence of the intention of the parties – *Lloyds v Cyril*
    - There is a very strong presumption that parties intend to be bound by the agreement into which they entered and intended to take effect. A finding of a sham carries with it a finding of dishonesty – *National Westminster v Jones, Neuberger J (case affirmed on appeal by EWCA)*
- If the transaction is a sham, the task of the court is to discover, by extrinsic evidence, what the true agreement was and to disregard, if inconsistent with the true agreement, the written words of the sham agreement – *Welsh Development v Export Finance*
- The post-contractual behaviour of the parties is not relevant when construing an instrument, but is relevant for deciding whether the instrument is a sham – *Re Avanti Communications*

Charge vs mortgage

- The technical difference between a mortgage and charge is that a mortgage involves a conveyance of property subject to a right of redemption, whereas a charge conveys nothing and merely gives the chargee certain rights over the property as security for the loan – *Re Bond Worth*
    - In practice, "charge" and "mortgage" are often used interchangeably – *Re Bond Worth*
- When a floating charge crystallises, Chee has a proprietary interest in the fund of assets, for the purpose of paying off the secured debt. Chor has an equity of redemption: the right to retransfer of the assets when the debt secured by the floating charge has been paid off – *Buchler v Talbot*
    - The method by which the holder of an equitable charge will resort to the property will ordinary involve the sale of the asset or, more rarely, the extinction of the equity of redemption by foreclosure – *Re BCCI (No8)*
    - *[See "Land – Mortgages" notes]*

Sale vs loan and charge

- If a transaction constitutes a sale, the mere fact that its purpose is an advance of money will not convert the transaction into a loan – *Lloyds v Cyril*
- There are three essential differences between a transaction of sale, and a transaction of loan and charge: – *Re George Inglefield, Romer LJ*
    - (i) In a sale, S is not entitled to get back the subject-matter by returning the money to B. In a loan and charge, Chor is entitled to get back the subject-matter of the charge by returning to Chee the money that passed under the loan.
        - This equity of redemption is the critical indication in favour of a mortgage – *Re Curtain Dream*
    - (ii) If a Chee realises the subject-matter of the loan for a sum more than sufficient to pay him (with interest and costs), he must account to Chor for the surplus of the money that passed under the loan. If B sells the subject-matter of the sale and realises a profit, he need not account for the profit to S.

    - (iii) If Chor realises the charge property for a sum insufficient to pay off the debt to Chee (together with interest and costs), then Chee is entitled to receive from Chor the balance of the money. If B were to resell the purchased property at a price insufficient to recoup the money paid to S, B would not be entitled to recover the balance from S.
- None of Romer LJ's features may be determinative on its own – *Orion Finance v Crown Financial*

- Block discounting: The trader sells his interest in the agreements he has with his customers, to a finance house at a discount, in return for an immediate advance. The trader gives the finance house his guarantee of due performance by his customers of their obligations – *Lloyds v Cyril*
    - This is a sale, not a loan – *Lloyds v Cyril*
    - The discount is deduction from the price fixed once and for all the time of payment (although it may be fluctuating); this is different to interest on a secured loan which is earned day to day – *Welsh Development Agency v Export Finance*
- Factoring of book debts amounts to a sale of book debts – *Welsh Development v Export Finance*
- A sale of book debts may still be a sale, notwithstanding that B has recourse against S to receive the shortfall if the debtor fails to pay the debt in full, and notwithstanding that B may have to make adjustments and payments to S after the full amounts of the debts have been received from the debtors – *Welsh Development v Export Finance*
    - A right of redemption is not inconsistent with a transaction of sale: a contract of sale can lawfully provide that in certain circumstances, and for an ascertained sum, S may repurchase the property sold from B – *Welsh Development v Export Finance*
    - An obligation to repurchase the factored/discounted receivable if it cannot be recovered from the debtor is not an equity of redemption and does not turn a sale into a secured loan – *Olds Discount v John Playfair*
- A sale of book debts may still be a sale, notwithstanding that the operative reason for the transaction was that S desired to raise money as a temporary matter in the same way as in a transaction of loan – *Olds Discount v John Playfair*
- A sale with an option to repurchase is not to be equated with a right of redemption merely because the repurchase price is calculated by reference to the original sale price plus interest – *Orion Finance v Crown v Financial*
    - Equally, the presence of a right of recourse by transferee against transferor to recover a shortfall may, although not necessarily, be inconsistent with a sale – *Orion Finance v Crown v Financial*

<u>Secured loan vs sale and lease-back</u>

- A lessor's interest in the rolling-stock of the lessee does not make the transaction less a sale and lease-back. It is possible to buy an equity of redemption, and the only question is whether the transaction was a sale or not – *Yorkshire Wagon v Maclure*
- Both parties intended for a lump sum to be advanced a repaid in instalments. The mode of carrying this out was indifferent to the lessor, so long as they were safe, and so they acceded to the terms suggested by the lessee, namely that of a sale and lease-back. The parties intended for the transaction to operate in this way; it was not intended as a mere cloak for something behind – *Yorkshire Wagon v Maclure*
- A transaction purporting to be one of sale followed by hire-purchase agreements was, in fact, a loan accompanied by a security upon the goods. The transaction was a sham – *Re Watson*

RoT: Security?

- It is open to the parties to express their intention as to when property passes; a contract of sale in which property is not to pass until the payment of all instalments may have the effect of giving S a security, but it is a valid contract of sale – *McEntire v Crossley*
    - The court must regard the agreement as a whole, looking at its substance. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as it appears from the whole agreement – *McEntire v Crossley*

Fixed v Floating charges

- **A charge can only arise in equity**

Floating charge – Nature

- **A floating charge has the following three characteristics: – *Re Yorkshire Woolcombers, Romer LJ***
    - **(i) It is a charge on a class of assets of a company present and future**
        - I.e., the charge may cover assets merely of a specified category; it need not extend to all the assets of the company – *Re Bond Worth*
    - **(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 interest 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.**
        - Chor is at liberty to deal with the assets *in the ordinary course of business – Re Bond Worth*
    - This was endorsed by UKHL in *Re Yorkshire Woolcombers*
- Other key characteristics:
    - It is ambulatory and shifting in its nature, hovering over and floating with the property until some event occurs, or some act is done, which causes it to settle and fasten on the subject of charge – *Re Yorkshire Woolcombers (UKHL)*
        - The asset is not finally appropriated as a security for the payment of the debt until the occurrence of some future event – *Re Spectrum Plus*
    - It contemplates the possibility of book debts being extinguished, and new book debts being created – *Re Yorkshire Woolcombers (UKHL)*
- It is possible for a bank to take a charge over a customer's credit balance with the bank – *Re BCCI (No8)*
    - There was, for some time, doubt as to whether it is conceptually possible for a charge to be created by a bank over a debtor's credit balance with the bank, with Professor Goode arguing strongly that it is not so possible. However, this debate was addressed by Lord Hoffmann in *Re BCCI* who said, albeit merely in obiter dicta, that notwithstanding any possible conceptual problems, the practice is well-established in the commercial world, and the court should not disturb it.

Effects

- Chor has a right (not a mere licence) to carry on its business until Chee intervenes. When Chee does intervene, he must do so with the intention of making his charge fixed – *Evans v Rival Granite*

    - It is a breach of contract by Chee to interfere in the conduct of the business so long as his charge is only a floating charge – *Evans v Rival Granite*
- Chee has a proprietary interest in a fund of circulating capital – *Re Spectrum Plus*
- A floating Chee may not appoint an administrative receiver, save in narrow cases – *IA 1986 s72A(1)*

Fixed charge – Nature

- A fixed charge is one that without more, fastens on ascertained and definite property (or property capable of being ascertained and defined) – *Re Yorkshire Woolcombers (UKHL)*
    - Chor cannot deal with the assets free from the charge without the consent of Chee – *Re Cosslett*

Effects

- A fixed charge gives Chee an immediate proprietary interest in the assets, binding all those into whose hands the assets may come with notice of the charge – *Agnew v Commissioner*
- If Chor deals with the assets without Chee's consent, he commits a breach of the terms of the charge – *Agnew v Commissioner*

Characterisation

- **Characterising a charge as fixed or floating is a two-stage process:**
- **1. The court must construe the instrument of charge and seek to gather the intention of the parties from the language used – *Agnew v Commissioner***
    - The object is not to discover whether the parties intended a fixed or floating charge, but is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the assets – *Agnew v Commissioner*
    - The relevant intention is when creating the charge (so, any subsequent agreement is immaterial) – *Agnew v Commissioner*
        - Post-contractual behaviour is not relevant – *Avanti Communications*
- **2. It is a process of categorisation and is a matter of law; it does not depend on the intention of the parties – *Agnew v Commissioner***
    - If the intention of the parties, properly gather from the language of the instrument, is to grant Chor rights in respect of the assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge (however the parties may have chosen to describe it) – *Agnew v Commissioner*
    - The only relevant intention is the intention that Chor should be free to deal with the assets and withdraw them from the security without the consent of Chee – *Agnew v Commissioner*
        - Whether the charged assets were intended to be under the control of Chor or Chee – *Agnew v Commissioner*
        - Chee must have total control to be fixed
    - A charge expressed as a fixed charge may be characterised in law as a floating charge – *Re Brightlife*
        - The label attributed to the charge by the parties may be some indication of the rights intended, but it is not conclusive – *Re Spectrum Plus*
    - *Re Avanti* appears to support a different approach to the orthodox view of fixed charges. The orthodox view requires Chee to have total control of the assets, yet Johnson J's approach focuses on maintaining merely the value of the assets. This new approach presupposes that

assets subject to a floating charge fluctuate in value, yet this is not necessarily the case; trading stock may maintain a regular, steady value. By contrast, it is difficult to see how the precise value of fixed equipment can be maintained given their depreciating value. As a result, Johnson J's approach blurs the distinction between floating and fixed charges, and ought to be rejected in favour of the orthodox requirement of total control.

- **Not a rigid categorisation:**
    - The floating charge cannot be defined by an exhaustive set of necessary and sufficient conditions; all that can be done is enumerate its standard characteristics. The absence of one or more features, or the presence of others, does not in itself prevent the charge from being categorised as floating – *Re Brightlife, Hoffmann J*
    - A charge with Romer LJ's third characteristic is likely to be a floating charge, notwithstanding its other characteristics – *Re Spectrum Plus, Lord Scott*
    - The question is not whether Chor has complete freedom to carry on his business as he chooses, but whether Chee is in control of the charged assets – *Re Cosslett*
    - A floating charge is consistent with some restriction upon Chor's freedom to deal with its assets (e.g., a prohibition upon the creation of other charges ranking prior to, or pari passu with, the floating charge (i.e., a negative pledge clause)) – *Re Brightlife*
- Chor's contractual right to require Chee to release property from the charge is not inconsistent with the existence of a fixed charge – *Queen's Moat v Capita*
- Chor's unfettered freedom to deal with the assets in the ordinary course of business is inconsistent with a fixed charge, but not essential for a floating charge – *Re Cosslett*
    - Chee restricted Chor's use of site plant and materials, by forbidding Chor to remove them from the site and use for a different job (which would have been in the ordinary course of Chor's business); Chee's purpose was not to protect its security, but to ensure that Chor would give proper priority to the completion of the works. Therefore, the charge was floating – *Re Cosslett*
- **All or nothing:** The answer is all or nothing: either the clause creates a fixed charge over all of the assets to which it refers, or none of them. The clause is not to be construed as a fixed charge over some assets but a floating charge over others – *Fanshawe v Amav*
    - Where the clause envisages a fixed charge over book debts and a floating charge over the proceeds of those debts, the fixed charge will be treated as floating – *Fanshaw v Amav*

<u>Book debts</u>

- Whether the charge is fixed or floating, Chor has the right to collect the debts. However, the question is whether Chor is free to collect the debts for its own benefit – *Agnew v Commissioner*
    - It makes no commercial sense to separate the ownership of the debts from the ownership of their proceeds, since the value of the debts can only be exploited through their proceeds – *Agnew v Commissioner*
- For a charge on book debts to be fixed, it is sufficient to prohibit Chor from realising the debts itself (whether by assignment or collection). However, the account must not only be blocked in law, but must also operate so in fact – *Agnew v Commissioner*
    - The fact that an administrative step must be taken by Chee to allow Chor to draw on the account does not necessarily categorise the charge as fixed – *Gray v G-T-P Group*
    - Where Chor remains free to remove the charged assets from the security, the charge should (in principle) be categorised as a floating charge – *Re Spectrum Plus*

- **Four methods to create a fixed charge over book debts:**
    - 1. Prevent all dealings with the book debts – *Re Spectrum Plus*
    - 2. Prevent all dealings with the book debts other than their collection, and require the proceeds, when collected, to be paid to Chee in reduction of Chor's outstanding debt – *Re Spectrum Plus*
    - 3. Prevent all dealings with the debts other than their collection, and require the collected proceeds to be paid into an account with Chee bank, and to block that account – *Re Spectrum Plus*
        - **The critical question is whether Chor can draw on the account – *Re Spectrum Plus***
            - If Chor has no right to draw on the account when it is in debit, the account is blocked. If Chor can draw on the account, and the money paid in is not being appropriated to the repayment of the debt but is made available for the drawings by Chor, the account is not blocked – *Re Spectrum Plus*
    - 4. Prevent all dealings with the book debts other than their collection, and require the collected proceeds to be paid into a separate account with a third party (X), with Chee then taking a fixed charge over that amount – *Re Spectrum Plus*
- Unless there is a total prohibition on use of the proceeds without the consent of the creditor, it is likely that the charge will be regarded as floating, per Goode & McKendrick on Commercial Law

- The fact that some time after the execution of the charge, the parties set up and operate a blocked account into which the proceeds of the book debts are to be paid, cannot have the effect of converting a what was, as created, a floating charge, into a fixed charge – *Fanshawe v Amav*
- All book debts collected by Chor from the inception of the charge were subject to Chee's control. So, from the outset, the status of Chee's security over the book debts was specific and ascertained. The charge was fixed – *Re Harmony Care Homes*
- Chor was free to collect its debts and pay the proceeds into its bank account. Once in the account, they were outside the charge over debts, and at the free disposal of Chor. The right to deal with the charged assets in this way is a badge of a floating charge, and inconsistent with a fixed charge – *Re Brightlife*

Crystallisation

Occurrence

- **Crystallisation may be brought about in various ways:**
    - **Upon the appointment of a receiver – *Evans v Rival Granite***
    - **Upon the liquidation of the company (Chor) and the appointment of a liquidator – *Evans v Rival Granite***
    - **Upon any event bringing to an end Chor's licence to carry on business – *Evans v Rival Granite***
- **Crystallisation occurs on cessation of business – *Re Woodroffes***
- The charge instrument may empower Chee to convert the floating charge into a fixed charge by giving Chor notice of crystallisation; the charge will crystallise when such notice is given – *Re Woodroffes*
- Crystallisation may be automatic (i.e. arise by itself or by virtue of Chor); it does not always require intervention by Chee – *Re Manurewa Transport (High Court of New Zealand)*

    - Approved, although without expressing a concluded view, by Hoffmann J in *Re Brightlife (EWHC)*
- An automatic crystallisation provision (i.e., on occurrence of a specified event) is valid – *Re Manurewa Transport (High Court of New Zealand)*
    - Approved, although without expressing a concluded view, by Hoffmann J in *Re Brightlife (EWHC)*

Effects

- Upon crystallisation, the charge fastens on the assets – *Re Woodroffes*
- Crystallisation has no impact on the insolvency waterfall, since preferential creditors have priority over charges which, *as created,* were floating charges (*IA 1986 s40(1)*) – *Re Harmony Care Homes*

Registration

Creation

- **Where a company creates a charge (or a series of debentures containing a charge – *s859B(1)*), and delivers to the registrar a statement of particulars within 21 days of the creation of the charge, the registrar must register the charge – *CA 2006 s859A(1)***
    - "Charge" includes a mortgage, but does not include a pledge – *CA 2006 s859A(7)*
    - "Charge" does not include a security financial collateral arrangement, or any charge thereunder – *FCA (No2) Regs 2003 r4(4)*
        - "Financial collateral": Cash or financial instruments (shares in companies, bonds, any other securities) – *FCA (No2) Regs 2003 r3(1)*
    - The statement of particulars must include, inter alia:
        - Whether there is a floating charge and, if so, whether it covers all the property and undertaking of the company – *CA 2006 s859D(2)(b)*
        - Whether any terms of the charge prohibit or restrict the company from creating further security that will rank equally with, or ahead of, the charge (a negative pledge clause) – *CA 2006 s859D(2)(c)*
        - Whether there is a fixed charge over any tangible or intangible property – *CA 2006 s859D(2)(e)*

Effect

- Where a company creates a charge (or a series of debentures containing a charge), and does not deliver a statement of particulars to the registrar within 21 days, the charge is void (so far as any security on the company's property or undertaking is conferred by it), against:
    - A liquidator of the company – *CA 2006 s859H(3)(a)*
    - An administrator of the company – *CA 2006 s859H(3)(b)*
    - A creditor of the company – *CA 2006 s859H(3)(c)*
        - This means "secured creditor" not just any "creditor"
- When the charge becomes void, the money secured by it immediately becomes payable – *CA 2006 s859H(4)*
- Following registration, the registrar must give a certificate of registration to the company – *CA 2006 s859I(3)*
    - This certificate is conclusive evidence that the documents required by s859A or s859B were delivered to the registrar before the end of the delivery period – *CA 2006 s859I(6)*

- **Registration does not affect priority (if both interests registered on time) – priority comes from date of creation, not date of registration**

Late registration

- The court may, on the application of the company, and on such terms and conditions as it thinks just and expedient, order that the period allowed for delivery be extended, in the following circumstances: – *CA 2006 s859F(3)*
    - (i) Neither the company, nor any other person interested, has delivered to the registrar the documents required before the end of the period allowed for delivery – *CA 2006 s859F(1)(a)*
    - And (ii) The failure to deliver the documents was accidental, due to inadvertence, or due to some other sufficient cause; or was not of a nature to prejudice the position of company creditors and shareholders; or, on other grounds, it is just and equitable to grant relief – *CA 2006 s859F(2)*

Priorities

- **In order to be validly constituted (and so to have priority), a charge must be registered**
    - *[See "Registration" section]*
- **Registration does not affect priority (if both interests registered on time) – priority comes from date of creation, not date of registration**

Priorities of charges

- **A subsequent fixed charge (legal or equitable) takes priority over an earlier floating charge – *Wheatley v Haigh Moor***
    - This rule of law can be excluded (or allowed only by specific provisions) by a negative pledge clause in the earlier floating charge – *Re Automatic Bottlemakers*
    - Where two floating charges are executed and duly registered, the floating charge first executed and registered takes priority
- **A subsequent floating charge ranks second to the earlier floating charge over the same assets (due to first in time rule), unless the earlier floating charge authorises the company to create a subsequent floating charge which displaces the first – *Re Benjamin Cope***
    - This is so notwithstanding the earlier crystallisation of the subsequent charge – *Re Household Products (Ontario High Court of Justice – Canada)*
    - A subsequent floating charge can rank in priority to the earlier floating charge in relation to part of the assets *in the ordinary course of business*, if the earlier floating charge contains a provision authorising such – *Re Automatic Bottlemakers*
- A bona fide purchaser for value without notice of an asset subject to an equitable charge will take free of the charge – *Foskett v McKeown (in relation to an equitable interest)*
    - Constructive notice can be said to apply on the basis of *English & Scottish Mercantile v Brunton*. As to whether registration constitutes constructive notice, *see above*.
- A fixed Chee and a floating Chee are entitled, by agreement between them, to alter the priorities of their respective charges – *Cheah v Equiticorp*
    - *[See "Priorities in insolvency" section for circularity problem]*

Negative pledge clause

- A negative pledge clause (i.e. a clause in a charge that restricts the company's right to create charges that have priority to, or rank equally with, the floating charge) is only effective to retain priority where the subsequent chargee has notice of it – *English & Scottish Mercantile v Brunton*
    - The subsequent chargee must have notice of the negative pledge clause, not merely notice of the charge – *English & Scottish Mercantile v Brunton*
    - "Constructive notice" only applies in equity; it does not extend to legal charges – *English & Scottish Mercantile v Brunton*
        - At law, however, there may be an inference of actual knowledge where facts are represented to a person, and he abstains from making further inquiry because he knows what the result would be (i.e., he wilfully shuts his eyes) – *English & Scottish Mercantile v Brunton*
        - The subsequent chargee knew that there was an earlier charge, but he did not know whether or not it contained a negative pledge clause. Upon asking, he was assured that there was no negative pledge clause, and so acted upon that. This does not constitute wilful blindness, and the subsequent chargee did not have notice – *English & Scottish Mercantile v Brunton*
    - It has been argued by some, including Professor Gullifer, that those who could reasonably be expected to search the register (e.g., most secured lenders), will be taken to have constructive notice of, or wilful blindness towards, negative pledge clauses registered under CA 2006 s859D(2)(c)). Whilst this point remains open, it may be argued that it is likely to be adopted by the courts, since it is consistent with the idea that the subsequent chargee must not unreasonably abstain from making further inquiries, as per *English & Scottish Mercantile v Brunton*.

Tacking

- **Tacking:** A prior mortgagee has the right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable) if:
    - An arrangement has been made to that effect with the subsequent mortgagees – *LPA 1925 s94(1)(a)*
    - He had no notice of the subsequent mortgages when the further advance was made – *LPA 1925 s94(1)(b)*
    - Or, whether or not he had notice, the mortgage imposes an obligation on him to make further advances – *LPA 1925 s94(1)(c)*

Priorities in insolvency

Insolvency Waterfall

- **1. Fixed charge holders (and other proprietary interest holders)**
    - Assets subject to a charge belong to Chee to the extent of the amounts secured by them; Chor retains an equity of redemption which falls within the scope of Chor's bankruptcy or winding up – *Buchler v Talbot*
- **2. Winding up expenses**
    - "Winding up expenses": All expenses properly incurred in the winding up, including the remuneration of the liquidator – *IA 1986 s176ZA(4)*

    - The winding up expenses have priority over floating charge holders – *IA 1986 s176ZA(1)*
    - The winding up expenses also have priority over preferential creditors – *IA 1986 s176ZA(2)(b)(ii)*
- **3. Preferential creditors**
    - Preferential creditors shall be paid in priority to all debts after the expenses of the winding up – *IA 1986 s175(1)*
    - Preferential creditors have priority over floating charge holders – *IA 1986 s175(2)*
    - Ordinary preferential creditors rank equally among themselves and shall be paid in full. If the assets are insufficient to meet them, the creditors abate in equal proportions – *IA 1986 s175(1A)*
        - The same applies to secondary preferential creditors.
    - Preferential debts include:
        - Remuneration of employees – *IA 1986 Sch6(9)*
        - Certain HMRC debts – *IA 1986 Sch9(15D)*
- **4. The prescribed part**
    - The liquidator shall make a prescribed part of the company's net property available for the satisfaction of unsecured debts, and shall not distribute that part to floating charge holders, except in so far as it exceeds the amount required for the satisfaction of the unsecured creditors – *IA 1986 s176A(2)*
        - "Company's net property": The amount of its property which would, but for this section, be available for satisfaction of claims by floating charge holders – *IA 1986 s176A(6)*
        - "Floating charge": A charge which was, on its creation, a floating charge – *IA 1986 s176A(9)*
        - This does not apply if the company's net property is less than the prescribed minimum, and the liquidator thinks that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits – *IA 1986 s176A(3)*
            - The minimum value of the company's net profit is £10k – *IA 1986 (PP) Order 2003 Art2*
    - The prescribed part of the company's net property shall be calculated as follows:
        - Where the company's net property does not exceed £10k, 50% of that property – *IA 1986 (PP) Order 2003 Art3(1)(a)*
        - Where the company's net property exceeds £10k, the sum of: (i) 50% of the first £10k; and (ii) 20% of the part which exceeds £10k – *IA 1986 (PP) Order 2003 Art3(1)(b)*
        - The value of the prescribed part of the company's net property shall not exceed £600k.
- **5. Floating charge holders**
    - Preferential creditors shall be paid out of the assets under a charge which was, as created, a floating charge – *IA 1986 s40(1)*
    - A floating charge holder may not appoint an administrative receiver, save in narrow cases – *IA 1986 s72A(1)*
    - "Winding up expenses" and "The prescribed part" do not have priority over claims to any charge or property arising under a financial collateral arrangement – *FCA (No2) Regs 2003 r20(2B, 3)*

    - Assets subject to a charge belong to Chee to the extent of the amounts secured by them; Chor retains an equity of redemption which falls within the scope of Chor's bankruptcy or winding up – *Buchler v Talbot*
- **6. Unsecured creditors**

Circularity problem

- Where fixed Chee and floating Chee agree that the fixed charge is subordinated to the floating charge, there is a circularity problem – *Re Portbase*
    - This is because the floating Chee now has priority over the fixed Chee; but in the insolvency waterfall, the fixed Chee has priority over preferential creditors, and preferential creditors have priority over the floating Chee (as per *IA 1986 s175(2)*).
- There are two possible solutions to this problem, each propounded by judges in the High Court:
    - 1. The floating charge has priority, but may collect only up to the value that the fixed charge was entitled to (or to the value of its claim). The preferential creditors then take priority, followed by the floating Chee to the extent that its claim is outstanding, and finally the fixed Chee – *Re Woodroffes, Nourse J*
    - 2. The fixed Chee also subordinates his priority to the preferential creditors. As a result, the preferential creditors take priority, followed by the floating Chee, and finally the fixed Chee – *Re Portbase, Chadwick J*
- An issue with the *Re Portbase* solution is that preferential creditors are given a windfall for which they did not bargain, by taking priority over both the floating and fixed Chees. This issue does not arise in the *Re Woodroffes* solution, since the floating Chee is entitled to claim up to the value of the fixed charge in priority to the preferential creditors, so the value of the preferential creditors' claim is not changed.

Retention of Title clauses

General

- In a contract for the sale of specific or ascertained goods, property in the goods transfers to B at such time as the parties intend it to – *SGA 1979 s17(1)*
    - An agreement under which S gives possession of the goods to B, and confers on B a power to sell and consume the goods in manufacture, although S will remain owner of the goods until the price is paid or until the goods are sold/consumed, is valid – *Clough Mill v Martin*
- Where S retains title to the goods under some condition, and B totally fails to satisfy that condition, S may repossess the goods, and is not obliged to account to B for any part of the value of the goods – *Armour v Thyssen*
    - This is so even if the goods have risen in market value, so that they are worth more than the contract price; the extra value belongs to S – *Armour v Thyssen*
    - Whether the same solution applies where the goods have been partially paid for by B, but are repossessed by S, no concluded view is formed – *Armour v Thyssen*
        - It can be argued that in such a situation, S still has no obligation to account to B for the surplus (whether by virtue of the rise in market price, or as a surplus as to what B has paid). This is because an effective RoT clause is based on the transaction being a sale, not a loan and charge. In *Re George Inglefield,* Romer LJ's second hallmark of a

sale was that B need not account to S for any profits made on sub-sale; it is arguable that the same principle can apply in the reverse, so S need not account to B.

Right of disposal

- In a contact for the sale of specific goods (or goods subsequently appropriated to the contract), S may reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, the property in the goods does not pass to B until the conditions are fulfilled – *SGA 1979 s19(1)*

Registration

- The registration provisions in CA 2006 Pt25 apply "where a company *creates* a charge" – *CA 2006 s859A(1)*
    - Any contract which (by way of security for the payment of a debt) *confers* an interest in property defeasible upon payment of such debt, must necessarily be regarded as creating a mortgage or charge – *Re Bond Worth*
    - For these provisions to apply, the company must *create* a charge conferring security over its property – *Clough Mill v Martin*
- The reservation of the entire **legal** property in the goods does not create a charge – *Clough Mill v Martin*
- The reservation of only the **equitable** interest in the goods does create a charge; it is construed as a transfer of the entire property followed by a regrant of the equitable interest – *Re Bond Worth*

All monies clause

- A RoT clause which reserves title in the goods to S until all debts (not just under that contract) to S have been satisfied by B, is valid – *Armour v Thyssen*

Characterisation: Sale vs security

- The agreement must be regarded as a whole, looking at its substance; 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 entered – *McEntire v Crossley*
    - *[See "Characterisation" section]*
- When the agreement, looked at a whole, shows a clear intention that S should not part with his property in the goods until the price is paid by B, this is a valid agreement and is to be upheld, notwithstanding its effect, to some extent, of giving S a security – *McEntire v Crossley*

Proceeds

Rule

- English law has been reluctant to allow an interest under a RoT clause to extend into the proceeds of sale. This is because the grant of an equitable interest in the proceeds of sale, which is defeasible upon repayment of the debt, amounts to a security interest (*Re Bond Worth*), which is void as against the liquidator for want of registration under CA 2006 s859H(3). However, the grant of an absolute interest, which would not create a charge, flouts business common sense, because it would require the buyer to account for the whole of the proceeds of sale to the seller, and would

disallow the buyer from using the proceeds of sale for any other purpose. Since no buyer would willingly accept such terms, the courts have interpreted RoT clauses extending to proceeds as security interests, rather than absolute interests.

- Overcoming this thus requires a perfect balance of drafting, which shows expressly that B held the goods as S's trustee or fiduciary, as this would allow S to trace into the proceeds under Re Hallett. Examples of such terms may include (as per Sealy & Hooley):
  - (i) Terms requiring B to keep the goods separate from other goods, perhaps also stipulating that he shall hold the goods as bailee for S
  - (ii) Terms seeking to confer upon S proprietary rights in relation to the proceeds, including terms requiring B to sell the goods as S's agent, to keep proceeds separate from other monies, to hold them on a fiduciary basis, or to pay them into a special account etc.
  - (iii) Similar provisions with relation to goods which may be manufactured by B and which incorporate the goods which S has sold.

- The reservation of only the **equitable** interest in the goods creates a charge; it is construed as a transfer of the entire property followed by a regrant of the equitable interest – *Re Bond Worth*

- Where the RoT clause authorises B to effect sub-sales, this does not give rise to an implication that the sub-sales are to be effected for the account of S – *Pfeiffer v Arbuthnot*
  - B will normally do so for its own account – *Pfeiffer v Arbuthnot*
  - A clause in which B's receivables from sub-sales were to be passed onto S to satisfy the debt, amounted to an equitable assignment of future debts, which was by way of security and with an equity of redemption, and so created a charge over B's book debts – *Pfeiffer v Arbuthnot*

<u>Attempts at extending RoT clause to proceeds</u>

- A fiduciary relationship was created, under which S sold as agent for B, so that the RoT covered the proceeds of sale and was not interpreted as a charge – *Aluminium Industrie v Romalpa*
  - This decision has been criticised extensively, on the basis outlined above regarding the courts' reluctance towards such clauses. Further, the case turned on a concession made by counsel for B that there existed a bailor-bailee relationship which amounted to a fiduciary relationship. This concession would appear to have been mistaken; not every bailor-bailee relationship is a fiduciary relationship, as per *Hendy Lennox.* Finally, *Romalpa* has largely been ignored and confined to its facts by subsequent courts, and it would be appropriate to do so here.
  - Where property passes to B, there can be no bailor-bailee relationship, since the essence of a bailment is that the general property remains in the bailor, while only a special property passes to the bailee – *Re Bond Worth*

- Where the contract included an obligation for B to account for the proceeds of sale to S as "fiduciary agent", this is only consistent with B remaining a fiduciary agent throughout the whole process of the sub-sale. It does not have the effect of converting the RoT clause into a charge; the more natural construction of the clause is that the RoT clause covers the proceeds of sale – *Wilson v Holt*

- This decision has been criticised extensively, including by Professor Gullifer who has argued compellingly that the interpretation of the clause flouts business common sense and threatens to upset the balance of interests in financing. This issue was not considered by the Supreme Court in *PST Energy v OW Bunker,* yet Lord Mance appeared to support Professor Gullifer's criticisms. It can also be argued that *Wilson v Holt* flew in the face of a vast array of previous authorities on this issue, without directly addressing them, and so cannot be said to have overruled the authorities. It may be best, therefore, to set *Wilson v Holt* aside in much the same way as the courts have done to *Romalpa*.

- A clause which stated that B should hold the proceeds of the manufacturing process on trust for S, in an amount equal to the amount owing by B to S, was said to validly constitute a trust of future-acquired property, and not amount to a charge – *Associated Alloys (High Court of Australia)*
  - In *Associated Alloys,* Kirby J produced a powerful dissenting opinion, in which he said that the court should look to the substance and reality of the clause, which was here a defeasible security interest, designed to allow S to rank above other creditors without registering the interest. This threatens to upset the balance of interests in insolvency, and given the reluctance of the English courts to allow RoT clauses to extend to proceeds of sale, it is unlikely that *Associated Alloys* would be followed in this jurisdiction.
  - A clause which purports to declare a trust of an unquantified share of the proceeds will fail for uncertainty – *Sprange v Barnard*
  - There cannot be a bare trust in favour of S (which would not be a charge), if:
    - B has an equity of redemption – *Re Bond Worth*
    - B is entitled to mix the proceeds of sale with his own assets, and when called upon hand over an equivalent sum, rather than the proceeds themselves – *Henry v Hammond*

Substitutes

- **Where S'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 – *Clough Mill v Martin***
  - **The main factor is commercial character: Do the goods have a new purpose?**
  - The question of whether or not goods (which are still identifiable, but have to a greater or less extent been worked on by B or incorporated in other articles) remain the property of S, depends upon the intention to be imputed to the parties – *Saint-Gobain v HMRC*
    - Regard must be had to such factors as the nature of the goods, the product, the degree and purpose of incorporation, and the manufacturing or other process applied – *Saint-Gobain v HMRC*

- Where the goods sold cease to exist, it is impossible for S to reserve any property in the newly manufactured goods, since they never had any property in those goods. S's title under the RoT clause vanishes – *Borden v Scottish Timber*
  - The contract of sale between S and B concerned the supply of resin. B's manufacturing process incorporated the resin into chipboard, and so the resin ceased to exist, as did S's title to it – *Borden v Scottish Timber*

- Where the goods sold continue to exist, but are incorporated into a new product, S's title under the RoT clause continues in the goods sold – *Hendy Lennox v Grahame Puttick*
    - The contract of sale between S and B concerned the supply of engines. B incorporated the engines into wider generator sets, and unlike the resin in *Borden v Scottish Timber,* S's rights in the engines were not affected by their incorporation. The engines remained engines, albeit connected to other things – *Hendy Lennox v Grahame Puttick*

- Where the goods sold are material in their raw state, S's title under the RoT clause does not cover any partly or completely manufactured article deriving from the raw material – *Re Peachdart*
    - The contract of sale between S and B concerned the supply of leather; B used the leather to make handbags. The court held that the parties must have intended that at least after a piece of leather had been appropriated to be manufactured into a handbag and work had started on it, the leather would cease to be covered by the RoT clause, and S would merely have a charge on the handbags – *Re Peachdart*
    - Cardboard which had been made into cardboard boxes had ceased to be the goods which had been subject of the original sale – *Modelboard v Outer Box*
    - Tree logs which had been sawn into timber had not ceased to exist – *Pongakawa v New Zealand Forest Products (New Zealand case)*

- Where the contract is silent as to substitutions, the courts will not imply any term for the furnishing of such additional security, and the claim will fail. The implication of a term must satisfy the "business efficacy" test – *Borden v Scottish Timber*

- **NOTE:** Additional difficulty when S attempting to claim proceeds from substitute goods
    - Any interest in the proceeds from the onward sale of new goods will be considered a charge, if S has a charge over the new goods – *Tatung v Galex Telesure*