# LECTURE 1

## Course Overview - Topics

1. Personal Property (Underlined in all other three areas)
2. Sale of Goods (transferring of goods)
3. Agency (agents conducting business, selling goods)
4. Credit and Security (borrowing money, raising funds for business)

## Introduction & Personal Property

* + Contract (essential element, core of commercial law)
  + Tort
  + Equity / Trust
  + Restitution
  + Others (e.g. Company)

## Interaction with Other Aspects of Law Historical Development

* **Lex mercatoria**/**mercantile law** (the Middle Ages)
  + The law of merchants; developed in Europe (where trades started) but not the UK (later trade spread to UK as well as the law)
* Incorporation of lex mercatoria into common law (17th – 18th century) – Sir John Holt; Lord Mansfield
  + Separate courts for commercial law
  + Can have conflicts due to the source of law; no coherent system for the conflicts between commercial and contract law
* **Commercial codification** (19th century)
  + Attempt to codify in common law, to correct inconsistency
* **Rise of consumerism** (from end of 19th century)
  + Professional, but not really concerning about consumer, but the rise of need to protect the weaker party (consumer), consumer law later developed

## Nature & Philosophy of Commercial Law

* No clearly defined scope (**based on contract law** between businessman)
* No separate and distinct general commercial code (**rely on common law**)
* **Protect free flow of trade** (party autonomy; predictability & flexibility)
  + Idea that things not in flow is not in its best use, to maximise its use
  + Freedom to promote the free flow
  + **Flexibility**: as commercial world keeps changing, e.g., cypto-currency; law flexible enough to cover new things

## Protect innocent bona fide purchaser/innocent third parties

* + Among the passing of trade there would be multiple parties in competition
  + Protecting innocent third-party, can sometimes cause detriments to the original owner; Question of how to balance the interest
* Business to business (B2B) vs Business to consumer (B2C)

## Sources of Commercial Law

* **Contracts** (express/implied terms)

## Custom and usage

* **Domestic legislation** (SOGO)
* International codes/conventions (governed by international conventions, not covered in this course)

## Consumer –related legislation (for information only)

* Consumer protection, for example:
* the Sale of Goods Ordinance (Cap. 26)
* the Control of Exemption Clauses Ordinance (Cap. 71)
* the Unconscionable Contracts Ordinance (Cap. 458)
* the Supply of Services (Implied Terms) Ordinance (Cap. 457)
* the Consumer Goods Safety Ordinance (Cap. 456)
* the Toys and Children’s Products Safety Ordinance (Cap. 424)
* the Trade Description Ordinance (Cap. 362)
* the Weights and Measures Ordinance (Cap. 68)

**First Principles**

“The greatest difficulty confronting the student lies not in the sophisticated rule but in the **fundamental concept**. Rules may change, concepts are more permanent. Hence it is the theoretical framework of a subject which demands the closest attention, for it is this that

endures when the detailed rule has passed into oblivion.” Professor Goode, Preface to Goode and McKendrick on Commercial Law

**Personal Property**

(Goode Chapter 2, paras.2.15 to 2.27, paras.2.40 to 2.55, and paras.2.59 to 2.60)

## Meaning of “Property” Recognised under Law

* “Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be **definable, identifiable by third parties, capable in its nature of assumption by third parties**, and have **some degree of permanence or stability**.” per Lord Wilberforce, National Provincial Bank v Ainsworth [1965] AC 1175, 1247-1248
  + If a thing is not within definition of law, then not protected by law; law giving legal right of that property
  + identifiable: the exact element or property of such
  + capable in its nature of assumption by third parties: can be passed and can assumed right over it
  + have some degree of permanence or stability: e.g., bottle some water -> a bottle of water can be attainable protected property
* Section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) – “‘property’ includes

1. money, goods, choses in action and land; and
2. obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition.”

## Types of Property

* Real property (outside scope of this course)

## Personal property

* + **Chose in possession** – **tangibles** e.g. goods & money
    - Chose (a thing), Latin word; Anything you can see and touch
  + **Chose in action** – **intangibles** e.g. debts

“all **personal rights of property** which **can only be claimed or enforced by action**, and not by taking physical possession” (Torkington v Magee [1902] 2 KB 427)

* + - Not able to be physically processed
    - E.g., Contractual right (need to carry out legal action to claim the right)

## Pure intangibles

* + Anything that does not fall within documentary intangibles
* **Documentary intangibles** (Not tested in the course)
  + Document that evidences the right of that intangibles; e.g., cheque
  + Rights to money, goods or securities which are locked up in a document to the extent that the document is considered to represent the right, which thus

becomes transferable by transfer of the document itself

* + **Others? Digital assets** e.g. cryptocurrency (see Re Gatecoin Limited (in liq) [2023] 3 HKC 401) – for information only (outside the scope of this course)
    - Resort to the 1st principle, whether digital assets bear all the characteristics
    - Ans yes, cryptocurrency bears the characteristics recognized by law

## Types of Rights & Interests in Personal Property

* + **Personal rights (in personam)** – **claim against the person**
    - Need to take out court proceeding to claim the right against the person, in respect of that thing;
    - not actually getting the thing itself, usually damages (i.e. money), but cannot seek specific performance to get the thing itself
    - E.g., can only pay the price, claim against the seller in respect of not getting delivered but not the goods itself, can get damages in money

## Real rights (in rem)

* + - Main significant: they can be asserted against third parties (other than those acquiring an overriding title) and survive the bankruptcy of the person against whom they are asserted
    - Different aspects/type of real rights:

## Ownership – indivisible

* Cannot have part of the ownership; One true owner for a piece of property, no concept of joint ownership on goods

## A legal interest in a chattel cannot be split

* In case of joint tenants, the ownership is still indivisible: one party cannot transfer half of the ownership, it should be intact and come tgt
  + even if the legal title may be held by persons concurrently, as joint tenants or tenants in common, the property should still be transferred as an entity by their collective action; not possible to split the title in the sense of carving a smaller title out of it
  + co-owners interest is acquired at the same time as a single interest
* the *ingredients* of ownership may be separated and distributed among different persons
  + e.g, goods may be held on trust or subjected to a mortgage or charge; so that legal title is still in one person and beneficial ownership in another

## Possession – actual vs constructive

* + **Real security** (not based on ownership or possession) – security holder being granted certain limited rights over the personal property by the owner (to be discussed in Topic 6)
    - A type of real right; in the last topic

## Real Rights Ownership

* **Owner** - **indefeasible title** to the **absolute (or greatest) interest** in the personal property
  + As a **relative concept,** important when there is competition between ownership claimed by others: need to determine **priority** to claim ownership
  + Ownership as priority, if having higher priority the person would have the ownership
  + **Title:** measure the **strength of your right** over that property e.g., true owner would have the indefeasible title; if have inferior title, could be defeated by the true owner
  + **Interest:** determine what rights you have; true owner has the absolute right, can grant partial right and interest to other person; vs other owners can have the right but not absolute
  + **Residual right:** whatever right left would be left with the owner; as the owner can grant interest and right to others (e.g., the owner lending the computer to others by passing part of the right, but the owner would not loss all its interest but all the residual right would be left with him)
* **Bundle of rights** (attached together with the ownership to the owner) e.g.
* Right to possession (e.g., the owner can call the chattel back from others)
* Right to use or manage
* Right to alienate (e.g., grant interest to others over that property)
* Right to income (e.g., shares; if the property can be used to gain interests, the owner would be entitled to it)

## Legal vs equitable ownership

* + Legal ownership:
    - may be original (does not derive from the title of another)
    - or derivative (it takes the form of succession to another’s title); may came about voluntarily (e.g., by gift or sale) or by operation of law (e.g,. by death or bankruptcy)
  + Equitable ownership:

**Possession (legal):** A aspect of Real right, not physical procession but legal possession

## Exercise of control

* + Can be more than just physical control, as not all the thing could be held physically

##  The Tubantia (No.2) [1924] P78 – shipwreck

|  |  |
| --- | --- |
| Facts | ship underneath the ocean; captain wants to savage the goods on board of that  ship > used voids to marked the ship > not physically holding the ship |
| Issue | whether the marking is the exercise of control of the ship? As other compete with  the captain as to the real right of the goods |
| Held | * Depends on circumstances> **\*degree of control** > the action of marking the ship > successful **possession of the ship and the goods on board** * goods belong to him |

1. **Intention to possess**

*-* Merely physical control is not enough, requires also intention to possess (e.g., university tables)

 **Wilson v Lombank Ltd [1963] 1 WLR 1294**

|  |  |
| --- | --- |
| Facts | * car left at garage for repair by buyer * rouge (the seller) not the true owner sold to Wilson, Wilson bought the car but only has the defective title, took it to garage for repair, someone tried to claim ownership at the garage, the garage gave up possession to Lombank, but   turns out Lombank is not the owner as well |
| Issue | competition of true owner; Wilson requires to show his legal procession at the  time Lombank took the car; who has right over the car |
| Held | * Even though Wilson did not have actual physical possession, but he has **constructive procession** (sb else holding the possession for you); where the garage had the actual possession * **Possession** not dividable (as it is indivisible) but **can be shared**: Wilson sharing possession with the garage; * constructive possession of Wilson & actual possession of the garage, * Wilson has the prior legal possession (intended to possess the property ) and Lombank is the late comer & not the true owner * Wilson has the legal possession, as he intended to possess the things. |

 **Costello v Chief Constable of Derbyshire [2001] EWCA Civ 281**

|  |  |
| --- | --- |
| Facts | P (the thief) knew that this is a stolen car, but the custody is with the police, but the original true owner cannot be found, police refused to give back the car to P  (removed possession of P); P sued the police |
| Held | * protect personal property right; public policy is not the reason to rule otherwise * P **exercise the control** and has **intention of possessing the car** -> two elements fulfilled * P possessed the car. |

**Possession – constructive possession**

* **Bailment** – **transfer of possession** by **owner (bailor)** to **another party (bailee)** for a

**specified purpose** and in accordance **with instructions of bailor**

* + requires **consent** of bailee (contract law)
    - but consideration does not matter in commercial law (conflicts with contract law)
  + bailee owes **duty of care** to bailor (tort law)
    - as an contractual agreement, where the bailor transfer the possession right to bailee, but not transferring the ownership right
    - With instruction of bailor: Once requested to return the possession (instruction of bailor), bailee need to comply with it
    - Under tort law, bailee would own duty of care to the bailor
* **Attornment** – a **process** whereby **constructive** possession is **passed from one person to another**
* Important to sale of good (e.g., once agreeing on holding the possession for someone)
* A process (where the bailee under the bailment agrees to pass constructive possession), not a contractual relationship
* Constructive (bailee still holding the goods), originally the bailee is holding the possession for the bailor, but now holding for another person, once agree so, attornment happens
* Assumption of there is a bailment already

## Significance of real rights vs personal rights

* When someone in the chain of the event is insolvent
* E.g., situation where A passes possession to B (with constructive posession), B not under consent sells to C & C pays B; A claims his possession back & C cannot get the goods;
* C as the innocent 3rd party (who paid for the goods & does not have any real right)still have personal right to sue B for damages; but if B (the person being sued against) is bankrupt,
* question: what would the innocent 3rd party get? C does not have real rights & cannot seek performance to get the goods, but has personal right to sue for damages; where A has real right to seek performance get back the goods but not damages

**Dealings in Chose in Action – Assignment**

(S&H Chapter 22, pages 787-795 (up to and excluding Re Adams case))

## Assignment

* + “**Immediate transfer** of an **existing proprietary right,** vested or contingent, from **assignor** to **assignee**” (Norman v Federal Commissioner of Taxation (1963 109 CLR 9)
    - Vested: already having the right (existing right); Contingent: may have the right later; cover future right
    - Common law: does not recognise assignment; does not recognised right you do not have yet, can only transfer existing right of property (including chose in action)
    - Equity: recognise transfer of future right
  + To be **distinguished from** ‘**novation’** – replacement of old contract with a new one
    - Different form assignment (showing interest alone is enough;
    - Assignment e.g., originally A (lender, creditor), lending money to B (borrower, debtor); loan agreement between A and B;
    - A can assign debt to another party C: transferring the debt from A to C would be assignment; the assignment of benefit or contract is only between A and C; B is not involved in the assignment (2 contract separated, the old contract is not replaced)
    - Vs novation: involve all three parties, entering into a new contract, novate a loan agreement; new loan agreement between A and C, now that C would take over all the debt, old agreement invalid

## What can or cannot be assigned:

* **Bare right to sue**
  + Rationale behind: Maintenance, under HK law cannot fund other to take out litigation (prevent 3rd party funding another to sue) as it would encourages floodgate
  + But the right of getting damages can be assigned after a judgment is handed down as it is not right to sue (the fruit of litigation)
* **Personal agreement** (e.g. employment agreement)
  + Prevent slavery, cannot assign employee to work for somebody else
  + Vs manufactory agreement (merely contract) can be assigned as it is only sale of goods

## Existing vs future chose in action

* + Existing chose yes
  + Future chose that has not arisen yet is not assignable (where this is possible under equity?)

## Benefit vs burden

* + Benefit yes; Burden no
  + E.g., between buyer and seller: to the buyer, the goods as the benefit can be assignable), but the obligation to pay is not assignable
  + Or the benefit of the seller of getting paid is assignable

## Legal/Statutory Assignment

* **S9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap.23) (‘LARCO’)**
  + “Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge (security) only), of any debt or other legal

chose in action, of which express notice in writing has been given to the debtor… shall be and be deemed to have been effectual in law (subject to all equities) … to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…”

* + - Statue changing the common law position of non-assignment of future right (as originally common law prohibits transfer of future rights and does not recognise assignment)
    - Illustration:
      * A (assignor/lender); B (borrower, debtor), C (assignee); Loan agreement between A & B; assignment between A & C
      * **Expressing notice in writing**: Under equity, B needs not to be notified; here under the statue it is a requirement; **Written notice has to give to B** for the assignment from A to C
      * **on date of notice > the effective date** (but not the date of assignment, as they could be different dates); Anyone could give notice (does not need to be
      * **Good discharge** of the loan agreement (the loan is discharged as the loan is paid, to release the loan; but since now B no longer needs to pay A, A no longer has the power to give a good discharge; A cannot release the loan agreement
      * Now that C is the one to get good discharge, B will need to pay C; if B does not pay C, B would run the risk of paying the loan twice, as the loan is not discharged by A and only C could give a good discharge of the loan
* **Absolute assignment** (have to assign the whole thing, cannot assign partially; but if want partial assignment it should go go equitable assignment)
* **In writing** (should be in writing, not orally); under the hand of the assignor (assignor has to assign the written document)

## Express written notice to debtor

* **Consideration not needed** (execute by deed to skip consideration in practice to not involve consideration)
* Note: legal assignment is stronger than the equitable one, but equitable assignment is usually preferred, for the reason that the requirement for legal assignment is too rigid; (1) requires absolute assignment & (2) serving of notice

## Equitable Assignment

* **Intention to assign** (Brandt’s Sons v Dunlop Rubber [1905] AC 454 )
* No particular form of words is required so long as sufficient to establish a clear intention to transfer

*-* Could have oral assignment, as long as intention is expressed

## No need to be absolute assignment

*-* Where people can assign partially to get immediate cash

* **Consideration required** (but usually not a problem)

## No need to give notice but…

* Can assign debt or chose in action without the debtors ever knowing it
* practically impossible to give notice everything in reality, preferably by bank (i.e. customer assigning debt to bank to get money; if following legal assignment then the bank would need to issue notice to all debtors > impossible in reality)

## Legal vs Equitable Assignment

* **Both subject to contractual prohibition** – **non-assignment clause**
* Prohibit the parties to assign benefits to other party, expressly stating the target party to deal with other 3rd party you don’t know

##  Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd case

|  |  |
| --- | --- |
| Facts | leases of certain real property; non-assignment clause in the lease;  counterparty assign the benefit to another 3rd party; 3rd party wanted to claim against the debtor (the original party) under the assignment   * A (assign to) -> B, contract with non-assignment clause * B -> C (B still assign to C), despite the clause |
| Held | * Assignment (between B & C) ineffective against A bc of the clause * but still effective between B & C; assignment not void against C, * C can claim from B under assignment from B, but cannot get it from A |

* **Both subject to (mere) equities** before notice is given (e.g. set off, not tested)
* Equitable interest inferior to legal interest
* Right itself, equitable right as the pure right, mere equity e.g., right to set aside, rescind the contract , not the right to that thing
* **Assignment subject to set off**, example:

A owns 10 to B (B helped A to buy a $10 lunch)

B owns 5 to A (A helped B to buy a $5 lunch) Set off: A now would need to pay B $5 only

If B assigns the whole debt to C, C originally should be getting $10 (the original debt), but bc of the set off, now C would only get $5 from A subject to the set off

* Matters when A is insolvent, B would want set off (as if B pay 5 first he would never get back the 10)

## Recourse to original debtor? Discharge of original debt?

* A (assignor/lender); B (borrower, debtor), C (assignee); Loan agreement between A & B; assignment between A & C
* Equitable: no recourse to original debtor (B) as there is no notice served to the debtor, then cannot sue debtor;
* legal assignment: serve of notice required; when notice is served to the debtor, the assignee can sue the original debtor (as the assignee would know the debtor) in case C does not pay up
* C the assignee has to give a good discharge or the original debt won’t be discharged; discharge could not be done by A

## Claims between rival assignees – issue of priorities

* Normally, **legal assignment** (without notice of prior equitable assignment) will have

## priority

* + Prior equitable assignment, legal (always absolute) assignment would have priorities
* As between two or more assignments - the **Dearle v Hall rule** applies (i.e. **whoever gives notice to debtor first**)
  + Successive assignment: More than 1 assignment > equitable; as legal always has to be absolute
  + Whoever gives notice first, the priority would be given to him (but not accord to the timing of assignment)
  + Usual practice, giving notice when sensing things weird happen

Recap:

* chose in possession: possession here means legal possession; not just the actual possession; the default rule only pass legal possession during transfer

# LECTURE 2: SALE OF GOODS (INTRODUCTION; TRANSFER OF PROPERTY)

1. **Scope and application** of the Sale of Goods Ordinance (Cap.26) (‘SOGO’)

## Long Title

* + - to **codify the law** relating to the **sale of goods**
      * Tells what the ordinance in summary is about; law referring to the common law; to fill the gaps in inconsistency in case law
    - per Lord Herschell in Bank of England v Vagliano Brothers [1891] AC 107:

“The **purpose** of [a codifying] statute surely was that on any point specifically

dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to

discover what the law was, extracting it by a minute critical examination of the prior decisions.”

* + - * In other words, the interpretation of a codifying statute is no different from any other enactment, and the statute must in the first place be construed according to its **natural meaning**, unaided by reference to prior case law
      * Always start with statue, not case law; when facing ambiguity, go to case law for interpretation
      * smaller the no., older the statue; cases could come before the statue that contradict with each other

## Largely based on the UK Sale of Goods Act 1979 (‘SGA’)

*-* SOGO mostly follows UK law, can refer to it

* + **S62(2) SOGO** preserves those **common law** rules that are **not inconsistent with SOGO**

“The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to

contracts for the sale of goods”

* Note the interrelationship between statue SOGO and common law: some areas might left to be dealt by common law, statue cannot cover all law
* As long as there is no inconsistency, if there is anything silent in the SOGO, can refer to and rely on common law

## Structure of SOGO

* + - Part I – formation of the contract
    - Part II – effects of the contract (i.e. term of the contract)
    - Part III – performance of the contract
    - Part IV – rights of unpaid seller against the goods
    - Part V – actions for breach of the contract
    - Part VI – supplementary provisions
  + Concerns with **domestic** sale of goods

*-* Ordinance do not have extraterritorial effect; only governs contracts in HK

## Meaning of ‘goods’ – see s2 SOGO (s61 SGA)

S2(1) “includes **all chattels personal** other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale”

* Always refer to s2 for meaning of goods, check for particular terms, follow what is in SOGO; do not follow common law and IGCO definition
* Goods: **Only cover personal**, does not cover chose in action and money
* Includes/inclusive (not exhaustive): only gives examples: Keep the definition flexible, can be other things fallen in the definition but not mentioned here
* Means (exhaustive): then only the things mentioned would be the only definition

## Existing vs future goods

* + Define goods in diff categories, in terms of passing properties

S2(1) “**future goods** means **goods to be manufactured** or **acquired by the seller** after the making of the contract of sale”

* + Means: exhaustive
  + At time of sell, if the goods is not yet manufactured or acquired by the seller > future goods
  + \*time reference > the making of the contract

S7(1) “The goods which form the subject of a contract of sale may be either **existing goods, owned or possessed by the seller**, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Ordinance called “future

goods”.”

## Specific goods

S2(1) “means goods **identified and agreed upon** at the time a contract of sale is made”

* + Time reference: at time of contract
  + The rest would be unascertained goods
* **Ascertained** vs **unascertained** goods – these terms not defined in SOGO
  + Unascertained: not specifically identified; has not been agreed upon
  + Test to distinguish them: can the seller change the good; if yes, unascertained (e.g., a pink bottle, can be substituted by another pink bottle that fit the description)
  + But once ascertained (once identified, appropriation) could no longer change the goods, as it is agreed upon already
  + Opposite meaning, a good cannot be both

## Contract for sale of goods (s3 SOGO (s2 SGA))

* + S3(1) “**A contract of sale of goods** is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a **money consideration**, called the **price**. There may be a contract of sale between one part owner and another.

*-* Always determine scope of statue: Money is required; otherwise does not fall in to this statue, the statue would be irrelevant & not protected by it (unlike case law that can take analogy)

* + S2(1) “**contract of sale** includes an **agreement to sell** as well as a **sale**”

*-* Sale: immediate sell; Agreement to sell: before the sell, can subject to some condition; if condition not satisfied -> there would be no sale

* + S3(3) “Where under a contract of sale the property in the goods is **transferred** from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a **future time** or **subject to some condition** thereafter **to be fulfilled**, the contract is called an **agreement to sell**.”
  + S7(3) “Where by a contract of sale the seller purports to effect a present sale of **future goods,** the contract operates as an **agreement to sell** the goods.”
* Logically speaking, future goods is yet to be manufactured, cannot be sale
* Sale of future goods > agreement to sell
  + S3(2) “A contract of sale may be **absolute** or **conditional**.”

*-* No condition or conditional

* + S3(4) “An agreement to sell **becomes a sale** when the **time elapses** or **the conditions are fulfilled** subject to which the property in the goods is to be transferred.”
  + S5 “Subject to the provisions of this Ordinance and of any enactment in that behalf, a contract of sale may be made in **writing** (either with or without seal), or **by word of mouth**, or partly in writing and partly by word of mouth, or may be **implied** from the conduct of the parties…”

*-* Formality of a contract: can be in writing, oral, partly writing or oral, or conduct

* S62(4) “The provisions of this Ordinance relating to contracts of sale **do not apply** to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.”

*-* Carved out: anything that relates to creating new security (despite looking like a sale), not governed by this statue > follow common law rule; See last topic

##  Helby v Matthews [1895] AC 471 – hire purchase agreement

|  |  |
| --- | --- |
| Facts | Standard hire purchase agreement:  hire sth (piano); pay monthly fee for hiring that piano for 2 years; end of 2 years given the option (option to buy) under the agreement; the price to be valued by  the hiring charges; the price would already be paid (by paying nominal fee) |
| Issue | Statue cover? Looks like a sale   1. Is it a sale? 2. Agreement to sell, subject to condition? |
| Held | Piano as a good, covered in the statue.   * To (1), not a sale under s3(1)   + in s3(1) **transfer** implied **immediate sale**; as it is not an immediate sale; but hireable in 2 years; * To (2), not an agreement to sell   + Under S3(3): the transfer of the property in the goods is to take place at a   **future time** or **subject to some condition** thereafter **to be fulfilled**  (under the statue; agrees to transfer, is not conditional)   * + But at time of hire purchase agreement there is no obligation to fulfil the condition; it is only an option to buy; buyer hasn’t agreed to buy * Right exercisable on the hirer, can choose to buy or not, no obligation of transfer; SOGO does not apply |

1. **Price (ss3(1), 10 & 11 SOGO (ss2(1), 8 & 9 SGA)) –** money consideration for it to be a sale

## S10 SOGO – ascertainment of price

“(1) The price in a contract of sale may be **fixed by the contract**, or may be left to be **fixed in manner thereby agreed**, or may be determined by the **course of dealing between the parties**.

*-* Fixed in manner: E.g., price subject to weight of the goods, methods of measuring the weight of goods to be fixed in the contract or during the course of dealing

(2) Where the price is not determined in accordance with the foregoing provisions, **the buyer must pay a reasonable price**. What is a **reasonable** price is a question of fact **dependent on the circumstances** of each particular case.”

*-* in case of have not fixed the price but to be fixed (not an ideal situation), might need expert evidence to determine the reasonableness

## S11 SOGO – agreement to sell at valuation

“(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is **avoided**:

* No valuation by the 3rd party at the end > agreement avoided (Voidable): parties can choose to end the contract, but contract continues if parties intend to vs void (no contract at the beginning)

Provided that if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor.

* If parties intend to save the contract > pay reasonable price

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, **the party not in fault may maintain an action** for damages against the party in fault.”

*-* contract not avoided; party not in fault can choose to sue

## Contract for sale of goods vs contract of service

* when there is overlapping (e.g., selling the paint that one painted, service or goods); SOGO only covers goods
* issue of mixing these two: cannot have both definitions; important when suing for damages, have to determine the price for goods or service
* **Look at substance of the contract:** Compare Lee v Griffin [1861] 1 B&S 272 and Robinson v Graves [1935] 1 KB 579–
  + **Lee v Griffin [1861] 1 B&S 272** (contract to make and fit false teeth)

|  |  |
| --- | --- |
| Facts | dentist, patient died before he could make debentures; action taken out of estate  of the patient; |
| Issue | goods or service? If goods, dentist could claim for damages; if service, cannot get  damages as patient did not enjoy the service |
| Held | Court looks at substance of the contract > ruled as goods |
| Note | Note: if put nowadays, might be ruled as service, as putting the braces is mostly about dental service; e.g., paying fee on stages for teeth alignment; Contract of  service not goods |

* + **Robinson v Graves [1935] 1 KB 579** (a contract to paint a portrait)

|  |  |
| --- | --- |
| Facts | Painter case |
| Held | substance of the contract is painting skill & labour (more important in the  painting) > ruled as sales of service |

* + **Mak Ping Kui v Millionice Ltd [2001] HKCU 350** (extract on Moodle):
    - the Court opined that this topic “is not free from controversy”, Halsbury's, Laws of England, 4th edn, Vol.41, at para.603:
    - "Contract of sale distinguished from contract for work and labour. A contract of sale of goods must be distinguished from a contract for work and labour. The

distinction is often a fine one. **A contract of sale** is a contract the main object of which is the transfer of the property in, and the delivery of the possession of, a **chattel** as such to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel as such, the contract is one for **work and labour**. **The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale**. Neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into

consideration in determining in the circumstances of a particular case whether the contract is in substance one for work and labour or one for the sale of a chattel."

* + - * **Contract of sale**: the focus is more on the **chattel**
      * **Contract of service**: main object is not the chattel, but of **work and labour**
      * List of factors to considered but not conclusive (e.g., ownership of the materials, value of the skill and labour, value of the materials); look at all circumstances
      * Distinguish and specify each price in the contract is of sale of goods or service: e.g., innovation contract (which part as to the consultation given as service; which part as to the materials used as goods)

**B. TRANSFER OF PROPERTY** Goode Chapter 8 (paras.8.27 to 8.103)

1. **Meaning of ‘property’** - General property, not merely special property (s2(1) SOGO)
   * focus on consequences (that would entail after transferring the property when concept not clear
   * **Property: means property interest**; whatever the seller has of the property interest, all interest would be passed to the other party
   * **Special: partial property interest**, not all of the property
   * E.g., thief selling stolen goods; he would only be able to pass general property; but not able to pass title and complete ownership; but he can pass whatever interest

left behind (still falls within SOGO)

## Ascertained/specific goods vs unascertained goods

* **S18 SOGO (s16 SGA)**

“Where there is a contract for the sale of **unascertained goods** no property in the goods is transferred to the buyer unless and **until the goods are ascertained.**”

* + Cannot be passed until the goods are ascertained
  + **No “subject to contract”:** cannot contract out of this provision (this provision would override any other contract term of “subject to contract”
  + Rationale behind: in dispute, in regard of unascertained goods, court cannot enforce any right if the goods are not ascertained
* **S19 SOGO (s17 SGA)** (Goode p.303)

1. “Where there is a contract for the sale of **specific or ascertained goods**, the property in them is **transferred** to the buyer **at such time** as the parties to the contract **intend** it to be transferred.”

*-* once ascertained, parties at freedom to agree: freedom of contract (\*intend)

1. “For the purpose of **ascertaining the intention** of the parties, regard shall be had to **the terms** of the contract, **the conduct** of the parties, and the **circumstances** of the case.”

**\* Re Anchor Line Ltd [1937] Ch1** – intention of the parties inferred from terms of contract – **specific clause placing risk on buyer**

|  |  |
| --- | --- |
| Facts | buyer buys the crane and had possession of the crane; payment by way of instalment; before final instalment is made, buyer becomes insolvent;  liquidator came in (knowing all the assets of the buyer) and intend to sell the crane as he thought the buyer has the property; but seller has not been paid and tried to take back the crane; as now claiming damages would be  meaningless, as buyer at liquidation |
| Issue | * **\*time of passing of property\***; if not passed, the crane is with the seller; but if has passed, the owner only left with personal right |
| Held | * Court: Risk of the crane as passed to the buyer already; if specify when the risk is passed (meaning that they do not want the risk to pass), as the   general rule would be risk would be passed along with the property   * **Specific clause**: property not passed to the buyer unless full instalment has been paid * specifying the passing of risk, indicates there is no passing of property; seller wants to keep the property but for buyer to bear the risk * Held: no payment is made, goods not passed, seller still owns the property |
| Note | * **General rule: passing of property along with the risk** (e.g., customer/buyer buying the bottle would bear the risk of the damaged bottle) * But **can be overcome by parties intention** by way of terms in contract or conduct |

## Rebuttable presumptive rules for ascertaining intention (s20 SOGO (s18 SGA))

* + If contract silent on passing of property; default rule of presumption applies; Unless intention provide in contract (means that parties can contract out)

“**Unless a different intention appears,** the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—

(Rule 1-3 for sale of specific goods)

## Rule 1

“Where there is an **unconditional contract** for the sale of **specific goods** in a

**deliverable state**, the property in the goods **passes** to the buyer **when the contract is made**, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.”

* + ‘In a **deliverable state’ (s2(4) SOGO** (s61(5) SGA)) – “Goods are in a deliverable state when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.”
  + **Unconditional contract:** no more than a contract of sale under which the passing of the property to the buyer is not made subject to any condition.
    - Specific goods + unconditional contract for goods in deliverable state
    - Property passes when the contract is made

## Rule 2

“Where there is a contract for the sale of **specific goods** and the **seller is bound to do something to the goods**, for the purpose of putting them into a deliverable state, the property does not pass **until such thing be done**, and the buyer has **notice** thereof.”

* Specific goods + not yet in deliverable state
* Property passes only when deliverable state + notice
* Conditional contract, that sth is to be done before the goods’ deliverable state
* E.g., need to decorate the bottle before passing it to others > the decoration done > it would be passed

## Rule 3

“Where there is a contract for the sale of **specific** goods in **a deliverable state**, but the

## seller 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**, the property does not pass until such act or thing be done, and the buyer has **notice** thereof. ”

* Specific goods + deliverable state + price unascertained
* Property would not be passed until an extra step to ascertain the price is done

(Rule 4-5 for unascertained or future goods)

## Rule 5 - Sale of unascertained or future goods by description (not examined)

“Where there is a contract for the sale of **unascertained or future goods by description**, and goods of that description, and in a deliverable state, are

**unconditionally appropriated** to the contract, either by the seller with the **assent** of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be **express or implied**, and may be given **either before or after the appropriation** is made.

* To ascertain the goods, requires act of appropriation
* Process of appropriation; act of appropriation: appropriate means finally

identifying the goods and attached that in the contract; Once gone though that, goods become ascertained goods (then the seller can no longer change good)

* The process can be done by the buyer or the seller, based on that the parties agreed or consented; Can be expressed or implied
* E.g., seller selling apples in a box; letting the buyer to choose one apple, implying consent to the buyer for appropriation; appropriation is done by the buyer by

choosing one particular apple as the ascertained good

Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a **carrier** or **other bailee** (whether named by the buyer or not) **for the purpose of transmission to the buyer**, and does not reserve the right of disposal, he is deemed to have **unconditionally appropriated the goods** to the contract.

* Passing to a carrier or a bailee for purpose of transmission to the buyer: buyer would have **Constructive possession**
* Right of disposal: buyer reserving title of the property
* Carrier holding on the goods for the buyer not the seller: the seller is deemed to have unconditionally appropriated the goods; Once the seller passed the goods for delivery, that pointed onwards the goods becomes ascertained by the seller;
* now that the possession would be with the buyer, along with the risk of the property, despite not having actual possession

## Rule 4 (not examined)

“When goods are delivered to the buyer **on approval** or **“on sale or return”** or other similar terms, **the property therein passes to the buyer**

* 1. When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
  2. If he does not signify his approval or acceptance to the seller **but retains the goods without giving notice of rejection**, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the

expiration of a reasonable time. What is a reasonable time is a question of fact.”

* + - E.g., cold call advertising goods for customers to try out, until the customer finds interested to buy, retain the good and pay the price > if the customer does not return the good then it is passed to the buyer
    - The rule assumes there is a contract > can be challenged that there is no contract in the first place (merely an offer but no acceptance?)

## Appropriation

* the **common intention** to **attach the contract irrevocably to the subject goods** so that those goods and no others become the property of the buyer

## appropriation by act: the default rule

* + both sides cannot change the goods as common intention has been ascertained

 **Healy v Howlett & Sons [1917] 1 KB 337** (at S&H p343 note 4) – earmarking of boxes of mackerel

|  |  |
| --- | --- |
| Facts | * Mackerel transferred by train in boxes, to be located by agent of the buyer; Buyer not sure which box contain the mackerel, but already turned bad when identified * Both sides argue that risk should be borne by the other side * Dispute over non-ascertained goods that has not been appropriated |
| Issue | when the good become ascertained; time of transfer of property; who bear the risk |
| Held | * At time of arrival, agent starts to allocate, but fish already turn bad * Before passing the property, the fish already turned bad > risk on the seller * No appropriation until the boxes of fish had been set aside for the buyers |

* **Appropriation by exhaustion** (in the case of an **identified bulk**/quasi-specific)
* Agreed goods come from that bulk; once agreed the bulk, the content of the bulk cannot be changed
* The bulk has been identified, but the exact items or content in the bulk are not at time of contract
* Additional/Alternative way to appropriate the goods by implication (does not need to be agreed upon)
  + Implied that if the goods for whatever reason is exhausted (exhausted to the quantity which matches exactly the same as the quantity of the goods agreed under the contract)
  + In cases where there is shrinkage of the bulk, the remaining goods must be coming from the bulk, that matches what is agreed in the contract
  + No one has done anything to the bulk, except from change by natural shrinkage

 **Wait & James v Midland Bank (1926) 31 Com Cas 172** (see p213a to h of the judgment in The Elafi [1982] 1 All ER 208 (on Moodle)

|  |  |
| --- | --- |
| Facts | * Sale of wheat; agreed on certain quantity of wheat stored in the warehouse; identified bulk and under contract the wheat must be from the bulk identified stored in the warehouse, where the bulk also contains wheat that is going to be sold to the other party; * one buyer took some for delivery but not all of them; another buyer stared to take delivery of the remaining wheat; buyer got into liquidation(cannot pay for the wheat) * if the wheat is passed to the buyer, then the liquidator can hold on the wheat; if hasn’t passed, the seller would get wheat |
| Issue | Whether the goods have been ascertained and appropriated, and passed |
| Held | * The default rule does not apply, as there is no appropriation by act * Identified bulk situation:   + Remaining quantity of wheat that still sits in the warehouse, which matches as the same quantity stated in the contract;   + by **appropriation by exhaustion**, the wheat that did not attached to the contract, **property has passed** once appropriation has done * Seller only left with personal right to sue, but cannot get the wheat * Property passed to buyer, as there is identified bulk & appropriation by exhaustion |

## The Elafi [1982] 1 All ER 208

* **Re London Wine Co (Shippers) Ltd [1986] PCC 121** (at S&H p308) –

|  |  |
| --- | --- |
| Facts | Wine bought, not delivered but stored in a place, mixed with other wine; wine dealer went into liquidation; quantity of wine cannot satisfy all the purchase; court divide purchases into 3 categories |
| Held | consider each of the following scenarios:   * a single purchaser of a particular wine by **generic description purchased** what was in fact the seller’s total stock of a particular wine at the day of the purchase   + As by generic description > not specifying which exact bottles in the bulk (e.g., not like that the bottles have serial no.) > means that **seller can**   **change the context**, of whatever contained in the bottles, to give whatever 10 bottles that match the description to satisfy the order > goods remain **unascertained** at time of liquidation > buyers loses claim (only left with monetary claim and cannot get the wine)   * + even in mind of buyer and seller thinking that the 10 bottles in the warehouse > if not identified in the contract > mere coincidence   + for which they are to be identified, need to specify in contract * **two or more purchasers** who had bought quantities of a particular wine which **taken together**, exhausted the whole of seller’s stocks of wine of that description, which stocks were held by different warehousemen |

|  |  |
| --- | --- |
|  | * same amount of purchase by two or more purchaser * cannot have tenants in common in property initially (previously not allowed in common law but changed in statue); (vs. tenants-in-common in land law); cannot own the wine tgt; **argued on basis of trust** (that the company is holding the wine on trust for the two or more purchasers tgt) * court: no identified bulk > haven’t identified bulk by exhaustion > no trust > it is unsure which quantity belongs to whom > cannot have appropriation by exhaustion even the quality matches the number; goods remained unascertained * purchaser did not exhaust the seller’s stocks and, although there was no act of appropriation, there was an **acknowledgement** given by the warehouseman that the **appropriate quantity** of the particular wine was being held to the purchaser’s order   + where the quantity the buyer bought is less than the stock   + appropriate quantity: do not specify specific bottle of wine > seller at freedom to change until the buyer come > unascertained goods * Buyers’ claim failed, uncertain subject matter > no trust |
| Note | to rely on the principle, both sides have to identify the bulk |

# LECTURE 3: TOPIC 2 (PART 2) – SALE OF GOODS (TRANSFER OF RISKS & TITLE)

## Transfer of Risk: General

* + **S22 SOGO (s20 SGA)**

“Unless otherwise agreed, the goods remain at the seller’s risk **until** the property therein is **transferred to the buyer**, **but** when the property therein is transferred to the buyer the goods are at the buyer’s risk, whether delivery has been made or not:

provided that where **delivery** has been **delayed** through the fault of either seller or buyer,

## the goods are at the risk of the party in fault …”

* Unless otherwise agreed: Allow to contract out to agree otherwise, but the general rule would be: Before goods is transfer, risk would be with the seller; once

transferred, risk with the buyer

* Delivery does not matter: risk is only linked to the property; Under s2(1), Seller under the law does not have the duty to delivery
* where delivery has been delayed through the fault of either seller or buyer: **Exception:** risk factor about accidental or natural deterioration; but if harm is not caused by the parties’ fault, then not governed by the statue

# S2(1) SOGO

* + - “delivery means voluntary transfer of possession from one person to another”
    - “fault means wrongful act or default”
      * Deliver: not just mean passing the property from A to B; under law, seller does not have the duty to deliver; can charge the delivery fee
      * Only means voluntary transfer of goods
* **Pignataro v Gilroy [1919] 1 KB 459 (at S&H p329)** – risk in unascertained goods – implied appropriation from failure to reply to note of appropriation

|  |  |
| --- | --- |
| Facts | agreed on sale of rice; seller informed buyer rice was ready for collection; but goods still unascertained; buyer collected some of the rice but the remaining got stolen before he could collect it on the other day |
| Issue | Who bear the risk of the stolen goods; depending on whether property has  passed/appropriation as at time of contract the goods is unascertained, requires act of appropriation |
| Held | * **Notify the buyer to collect the goods** (reasonable notice by the seller) ; Act of appropriation is now with the buyer, where the buyer ought to have collected the goods, despite the delay on the buyer’s side; the property was deemed to have passed * Risk with the buyer |

**“Unless otherwise agreed”**

* **Sterns Ltd v Vickers Ltd [1923] 1 KB 78 (at S&H p342)** – contrary intention shown (i.e. risk to pass before property) – buyer accepted delivery warrant

|  |  |
| --- | --- |
| Facts | Buyer contracted to buy 120,000 gallons of white spirit out of an undivided bulk of 200,000 gallons. Sellers gave buyers a **delivery note** giving the buyer the **right to immediate possession**, but buyer chose to leave the spirit in the tanks. Before the buyer’s 120,000 gallons had been separated from the bulk,  the contents of the tank deteriorated. |
| Issue | Goods was unascertained at time of contract; need to determine when the  goods are passed to the buyer |
| Held | **Passing of delivery warrant**:   * once seller tendered warrant, buyer would get the goods * **warrant infers intention**, that the buyer would collect the goods, accept and bear the risk; i.e. “if buyer does not collect it, buyers has to bear the risk” * The risk had passed to the buyer when they accepted the delivery note even though property had not passed. * An agreement that the passing of property and passing of risk will not occur simultaneously can be inferred from the circumstances |
| Note | Risk not linked to actual delivery |

**where delivery has been delayed through the fault of either seller or buyer**

* **Demby Hamilton v Barden [1949] 1 All ER 435** (at S&H p338) – delivery delayed due to fault of buyer

|  |  |
| --- | --- |
| Facts | Sale of apple juice which sits in stock; buyer has to give instruction to the delivery; Buyer failed to give delivery instruction; during the period juice turned bad; |
| Held | delay of delivery; on the fault of the buyer as buyer ought to give timely notice  for the delivery; buyer bear the risk |

## Further proviso to s22

“…Provided, also, that nothing in this section shall affect the duties or liabilities of either

**seller or buyer as a bailee** of the goods of the other party.”

* + In bailment situation
  + If property is passed to the other side but not delivered, held by the bailee (the seller); even if the risk passed along with the property; the seller still has duty of care to take care of the goods (subject to common law liability)
  + In bailment, bailee bears the risk of damaged goods (cannot say the goods are passed to the buyer)

## Perishing of goods

* + **S8 SOGO (s6 SGA)**

“Where there is a **contract for the sale** of **specific goods**, and the goods, without the knowledge of the seller, **have perished at the time when the contract is made**, the contract is **void**.”

* Contact void: Similar to mistake, contract mistakenly made turns out void
* Perish: lost, damaged completely, stolen goods

 **Barrow, Lane & Ballard Ltd v Philip Philips & Co [1929] 1 KB 574 (at S&H p343)**

– **part of the goods being stolen**

|  |  |
| --- | --- |
| Facts | Sale of groundnuts; specific as agreed upon on specific number of bags (identified 700 bags); at time of contract; parties thought that the bags are at stored somewhere in the warehouse; but in fact the bags were  stolen that parties did not know |
| Held | Perish includes stolen good, contract void (as to the specific goods, which is no longer existing) |

* **S9 SOGO (s7 SGA)**

“Where there is **an agreement to sell specific** goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby **avoided**.”

* + Contract for sale; conditional sale, on fulfillment of certain condition; not immediate sale
  + Avoided: If both parties agreed to continue the contact, they can keep the contract
* **S35 SOGO (s33 SGA)** – not significant

“Where the seller of goods agrees to **deliver** them **at his own risk** at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any **risk of deterioration** in the goods necessarily incident to the course of

transit.”

* + Risk of transporting the goods: Delivery from once place to the other involves risk;
  + carving out: buyer might need bear some risk e.g., transferring fragile goods by rail, seller to ensure it is carefully packed; but even if the seller had carefully packed the goods, when there is intrinsic nature of the goods that leads to the deterioration

(such as perishing of fresh veg; then natural deterioration is not of fault of the seller, but the buyer has to also bear the risk; cannot prove it is the seller’s fault, buyer has to bear the risk)

* + As delivery is not mandatory but additional, cannot be said that there is risk originally borne with the seller
  + Normal practice: parties who bear the risk taking out insurance (e.g., online shopping website asking consumer whether to take out insurance)
  + Regarding allocating risk; not unfairness of risk

# B. TRANSFER OF TITLE

Goode Chapter 16 (excluding para. 16.45, and paras.16.72 to 16.101)

* Different facet of ownership (apart form transfer of property)
* Labelling for passing the title;
* E.g., thief selling the stolen goods, cannot pass title as he is not the true owner and has no title himself, but whatever property interest left; whoever get the stolen goods would not be the true owner
* Title as a measurement of right; e.g., strength of a claim; indefeasible title> strongest claim; in a comparative sense when there is more than one person try to claim the good
* Title would not be a problem for original or true owner; but when issue happened in between the transfer, title would be an issue e.g., buyer might not gain the true title

## Nemo dat quod non habet (the nemo dat rule)

* + ‘… in the development of our law, two principles have striven for mastery. The first is for the **protection of property**: **no one can give a better title than he himself**

**possesses**. The second is for the **protection of commercial transactions**: the one who takes in good faith and for value without notice should get a good title. The first

principle has held sway for a long time, but has been modified by the common law and by statute so as to meet the need of our own times’ (per Lord Denning, Bishopgate Motor Finance v Transport Brakes) (at S&H p359)

* + - Rule started in common law, later get codified
    - Protection of property; Cannot give title of which you do not have
    - Protection of commercial transaction: Bona fide purchase without notice; person who buy in good faith without notice should get a good title
    - Striking balance between original seller and third parties (e.g., protecting the seller too much > would harm commercial development)

## S23 SOGO (s21 SGA)

“Subject to the provisions of this Ordinance, where goods are **sold** by a person who is not the owner thereof, and who **does not sell them under the authority** or with the **consent of the owner**, the buyer acquires no better title to the goods than the seller had…”

* + - Common law codified here
    - The sale could be done by an agent (under the authority) with consent of the owner
    - Statue protects interests of seller; Exceptions comes in for looser rule for a better balance to facilitate trade

## Exceptions to the nemo dat rule

* + **Estoppel**
* Proviso in s23 SOGO “… unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell …”
  + E.g., **The owner giving representation** (either by way of words of conduct) to the other side as estoppel
* Enshrining the common law rule
  + **Shaw v Commissioner of Police of the Metropolis [1987] 1 WLR 1352** – estoppel – ‘agreed to buy’

|  |  |
| --- | --- |
| Facts | A rogue car dealer(B) contacted the owner/claimant(A) of a Porsche to express interest to buy the car for C(first plaintiff), who traded in association with the second plaintiff(D). A permitted B to have possession of the car and gave a letter of certification that the car is sold to B after B express this intention to sell the car to C.  B sold to C; banker's draft given by C to B is refused by the bank, and B disappeared without paying to A. A involve police in; C relied on estoppel to claim that the car belongs to him. |
| Held | Despite Shaw(C) has authority to sell, court is in view of protecting the original owner; Counsel **relied on s23 of SOGO: the car is not “sold” to Shaw**, but only an agreement to sell as he has not paid; ownership is still with the original  owner; Shaw **cannot rely on estoppel** |

|  |  |
| --- | --- |
| Note | court’s narrow interpretation (as now “sold” might well interpreted to include “agreement to sell”); case criticized |

* + **Farquharson Brothers & Co v King & Co [1902] AC 325 (at S&H p357 and p363)** – estoppel – apparent ownership

|  |  |
| --- | --- |
| Facts | Clerk gave delivery instruction but no authority to buy and sell timber on behalf of Farquharson; but he forge the document and transfer the goods to himself; appears to have the apparent ownership, he further sold the timber to  King & Co.; parties claimed on the timber, Farquharson discovered and tried to claimed back the timber |
| Issue | Ownership issue, the clerk now appear to be the owner of the timber, having the apparent ownership |
| Held | **estoppel requires representation**, but it only came from the clerk but **not from P** (where P does not even know about the timber & no misrepresentation from principal P)   * Agent is not sufficient enough to make representation; representation ought to be from the original owner * P can get back the timber, King & Co. Lost in case; as representation was not coming from original owner |

* + **Central Newbury Car Auctions v Unity Finance [1957] 1 QB 371** (at S&H p364) – handing over of car and registration document

|  |  |
| --- | --- |
| Facts | Hire-purchase of a car; finance company owned the car; owner ought to pass the document to the middleman (who is arranging the HP agreement (which is rogue, instead sold the car to a third party); 3rd party claimed ownership over  the car as it now obtained **registration document** of the car and think that they are the original owner |
| Issue | dispute between the original owner and the 3rd party |
| Held | possessing the goods does not mean the middleman has right to sell >  handling the registration document and selling the car are not sufficient to amount to representation under the Estoppel rule |

* + **Mercantile Credit v Hamblin [1965] 2 QB 242** – does owner have duty of care to third party buyer?

|  |  |
| --- | --- |
| Facts | Hamblin owns a car and wants to make use of the car to raise money; engage dealer (whom has past dealing with Hamblin) and provides document to sell the car |
| Issue | dispute between finance credit and Hamblin |
| Held | * **Handling over the car and the registration document does not amount to representation or estoppel** * Court rejected the argument on duty of care owned by the owner:   + Argument that the Owner was negligent in itself allowing the middleman to get hold of the registration; Hamblin to take the responsibly; 3rd party having the property * Recognized duty of care but Hamblin did not breach the duty:   + Considering here is pass dealings, reasonable for Hamblin to trust the dealer |

|  |  |
| --- | --- |
| Note | Subject to dispute vs mortgage case (no such duty owned to the 3rd party; the true owner can do whatever to its property)   * No duty of care owned by the original owner to third party in relation to how they deal with the property (can do whatever they like with the   document) |

* + **Moorgate Mercantile Co v Twitchings [1977] AC 890 (at S&H p366)** – non-registration of hire-purchase agreement

|  |  |
| --- | --- |
| Facts | Moorgate Mercantile Co supplied a car to a middleman; of hire-purchase term; middleman get and sold the car to def(who decide to buy after finding that the car is not under HP according to the register); Moorgate then sue Twitchings under nemo dat rule. |
| Issue | Dispute between the finance company and the third party over the car |
| Held | No duty owned by the original owner (the finance company) to the 3rd party in relation to how they deal with their own property (register for the HP agreement); |

**Sale by mercantile agent** (unlike the usual regular agent that can be appointed in an ad hoc basis; here mercantile agent is different)

## S23(2)(a) SOGO

“Provided, also, that nothing in this Ordinance shall affect the provisions of the Factors Ordinance (Cap. 48), or any enactment enabling **the apparent owner of goods** to

dispose of them as if he were the true owner thereof…”

* + - Mercantile agent not defined in SOGO; Cross-referencing: reference to Factors Ordinance only

## S2(1) Factors Ordinance (Cap. 48) (‘FO’)

“**mercantile agent** means a mercantile agent having, in the **customary course of his business** as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods”

* + - Agent has the course of business buying and selling goods for other people; ad hoc agent does not fallen within this definition
    - Satisfy this before going to 3(1)

# S3(1) FO

“Where a **mercantile agent** is, with **the consent of the owner**, in **possession** of goods or of the documents of **title** to goods, any sale, pledge, or other disposition of the goods, made by him when acting **in the ordinary course of business** of a mercantile agent, shall, subject to the provisions of this Ordinance, be as valid as if he were expressly authorized by the owner of the goods to make the same:

* + - As long as consented by the original owner in getting hold of the goods or the title of the goods, the sale if expressing authorized by the owner would be valid

Provided that the person taking under the disposition acts **in good faith**, and has not, at the time of the disposition, **noticed** that the person making the disposition has no authority to make the same.”

* + - Requirement: bona fide purchaser in good faith

## Requirements for s3(1)FO to apply

* Transaction **initiated by a mercantile agent** (‘MA’) – not by the 3rd party
* MA must be **in possession of the goods**, or **the document of title** to the goods **at the time of the transaction**
* **Beverley Acceptance Ltd v Oakley [1982] RTR 417** – not previously has been in possession

|  |  |
| --- | --- |
| Facts | a person has entered into hire purchaser agreement; pledge the car to another guy creating security interest; putting the car with the finance  company (the pledgee); he asked the finance company to take out the car for a short period of time to sell the car with the intention to sell the car to others; but did not tell the pledgee; at time of transaction (time of signing of  contract), the car has been return back to the pledgee  take out the car show to 3rd party > return the car > contract with 3rd party |
| Issue | third party tried to get the car but pledgee held the car |
| Held | The middle man is a mercantile agent, with possession of the car, with  consent of the owner; but at time of transaction (time of contract) he did not own the car (as he returned the car to the finance company at that time)   * Not in possession of the goods at time of transaction > 3rd party lose, pledgee gets the car |

* + MA must
    - obtain possession with **consent of owner**(may not be actually for sale); and

## receive goods in the capacity as MA –

* **Pearson v Rose & Young [1951] 1KB 275** (at S&H p373) – MA instructed to obtain offers but with no authority to sell – consent obtained by deception

|  |  |
| --- | --- |
| Facts | obtained the registration book by deception (selling the car to someone else without noticing the company) |
| Held | *“The owner must consent to the agent having them for a purpose which is in*  *some way or other* ***connected with his business as a mercantile agent****. It may not actually be for sale. It may be for display, or to get offers, or merely to put in his showroom; but there must be a* ***consent*** *to something of that kind before the owner can be deprived of his goods.”* per Lord Denning  *-* The only requirement is the hold of goods must have connection with the business as a mercantile agent |
| Note | Consent obtained by deception is no consent |

## Sale must take place in the ordinary course of business

* + **Oppenheimer v Attenborough & Son [1908] 1 KB 221at pp230-231**

“…‘acting in such a way as a mercantile agent acting **in the ordinary course of business** of a mercantile agent would act’; that is to say, **within business hours**, **at a proper place of business**, and in other respects the in the ordinary way in which a mercantile agent would act so that there is nothing to lead the [buyer] to suppose that anything wrong is being done, or to **give him notice** that the disposition is one which the mercantile agent had no authority to make.”

* + - Meaning of ordinary course of business: within business hours, at a proper place
    - Exception? E.g., transaction at a doggy place > requires notice to the buyer to protect the buyer
    - Without notice, buyer can presume the dealing is in the ordinary course of business
* Buyer must take goods in bona fide and without notice that the sale was made without the owner’s authority

**Sale under voidable title (s25 SOGO (s23 SGA))**

# S25

“When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them **in good faith** and **without notice** of the seller’s defect of title.”

* + E.g., Goods stolen by the thief; no title obtained
  + voidable: can be potentially avoided; certain grounds of which the seller could avoid the contract (e.g., mistake);
  + if buyer has voidable title, his title is not void at time of sale (the narrow window for him to have a valid title); if the seller does not succeed in holding the title, the third party would get the title
  + the 3rd party buyer must be bona fide purchaser

##  Car & Universal Finance Co Ltd v Caldwell [1965] 1 QB 525 (at S&H p381)

– Does the avoidance need to be communicated to the buyer?

|  |  |
| --- | --- |
| Facts | 3rd party buyer; Stolen car; seller reported to the police, first buyer could not be found; fraudulent buyer sold to a 3rd party; but before the second sale (from  the middleman to 2nd party), seller reported to the police |
| Held | * reporting to the police is sufficient; deemed to be successfully avoid the first contract; **Do not have to communicate to the buyer** * Avoidance takes place before the 2nd contract is entered into |
| Note | property cannot be shared, only one party that can take the property |

Exceptions by statue:

* to mitigate the issue brought by neno dat rule (no one can acquire title better than the true owner), hard rule
* (2nd) buyer does not need to get involve in the title dispute between the seller and the person selling to the seller
* Third party buyer would defeat the title of the original title of the true owner
* 3 exceptions, can rely on all of them to argue the case
  + - 1. Estoppel s23.SOGO
    - 2. Sale by mercantile agent s23(2)(a).SOGO; s3(1).FO
    - 3. Sale under voidable title s25.SOGO

**Sale by seller in possession after sale (s27(1) SOGO (s24 SGA))**

# S27(1) SOGO

“Where a person having sold goods **continues or is in possession** of the goods, or of the documents of title to the goods, **the delivery or transfer** by that person (the seller), or by a mercantile agent acting for him (can be himself or the mercantile agent), of the goods or documents of title, under any sale, pledge (security interest, not tested), or other disposition thereof, to [any person receiving the same **in good faith**] and [**without notice** of the previous sale] (the 2nd buyer, with honestly and not knowing the previous sale), shall have the same effect as if the person making the delivery or transfer were expressly authorized by [the owner of the goods to make the same] (the 1st buyer).”

* + - Situation where: Seller has sold the goods, goods paid, Property has passed to buyer, but buyer has not collected the goods yet; seller still in procession of the goods, in breach of the agreement transferred the good to a 2nd buyer;
    - As if the seller is making delivery authorized by the 1st buyer to the 2nd buyer
    - 2nd buyer can rely on this statue: if 2nd buyer is the bona fide purchaser w/o notice and in good faith, he could get the good title & defeat the first buyer
    - Competition between the 1st buyer and 2nd buyer
    - Buyer in possession of the goods, buyer sold the goods to the 3rd party; 3rd party get good title?
  + S9 FO

“Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale,

pledge, or other disposition thereof, or under any agreement for sale, pledge, or other

disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or

transfer were expressly authorized by the owner of the goods to make the same.”

*-* Factor ordinance, the origin of SOGO, need not to look at FO, can just focus on SOGO

## Seller must remain continuously in possession of the goods

* *Pacific Motor Auctions Pty Ltd v Motor Credits* (Hire Finance) Ltd [1965] AC 867 (at S&H p382)
  + Possession here: physical possession; where the seller still holds the goods despite the goods have transferred (e.g., when the seller after sale has not deliver the good to the buyer)
  + Continuous: cannot be a break of possession (e.g., seller delivering the good to buyer, but buyer at some point return the goods to the seller > a break in

continuous possession)

* + the seller needs to be continuously possessing the goods (e.g., goods still with the seller despite paid by the 1st buyer)

## The third party must also have taken delivery of the goods

* + - Delivery or transfer: physical delivery (2nd buyer must have the good)
    - If delivery has not been done, but entered into a 2nd contract; 2nd buyer has not obtained the possession of goods yet, 2nd buyer would not have good title > 2nd must have got the goods to confer good title
  + The third party must be a **bona fide purchaser without notice S27(2) SOGO:**

**Sale by buyer in possession after sale (s27(2) SOGO (s25 SGA))**

# S27(2) SOGO

“Where a person **having bought** or **agreed to buy goods** obtains, with the **consent of the seller**, possession of the goods or the documents of title to the goods, the delivery or transfer by that person (1st buyer), or by a [mercantile agent] acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any

person receiving the same (2nd buyer) [in good faith and without notice] of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with **the consent of the owner** (the seller).”

* + - Situation where: Buyer now has possession of the good (property might not have been transfered), now sold the good to a 3rd party
    - 1st buyer deemed to be a mercantile agent, having the authority to sale the good on behalf of the seller; 2nd buyer defeat title of the seller
    - Seller can only claim against the first buyer, but cannot go after the 2nd buyer
  + S10 FO

“Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or

documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.’

 *Helby v Matthews [1895] AC 471 – does not apply to hire purchase agreement*

|  |  |
| --- | --- |
| Facts | HP agreement of a piano; ‘agree to buy’, hirer has not exercise option r to buy, but sold the piano to 3rd party |
| Issue | 3rd party can get good title? By relying on this statue? |
| Held | There is no obligation to buy; Does not fall within the ‘agreed to buy; in the statue; statue does not apply 3rd party would not get good title |

 *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560 (at S&H p388 and p392) – inter- relationship between s25 (voidable title) and s27(2) (buyer in possession)

|  |  |
| --- | --- |
| Facts | Newtons (seller) tried to sell a car, buyer is a fraudster, payment by cheque; seller did not get money and buyer sold the car to a 3rd party; 3rd party tried  to claim good title |
| Held | 1. Reliance on s25 (voidable title) –successful    * Fraud case, contract voidable by the seller under s25    * But contract not void as the report to police took place after the 2nd contract; 2nd contract stands, 3rd party gets the title 2. Reliance on s27 (2) – successful    * 3rd party is a bona fide purchaser w/o notice; all elements satisfy in s27(2) |
| Note | Both sections relevant, can rely either of them (if voidable title does not work, rely on another) |

 *National Employers’ Mutual General Insurance Association Ltd v Jones* [1990] 1 AC 24 (at S&H p388 and p392) – meaning of ‘consent of the seller’

|  |  |
| --- | --- |
| Facts | Sale of car by Miss H > but stolen by a thief (no sales here as the car is stolen) > thief sold the car to L > L sold the car to T > T sold the car to a  dealer > The dealer sold the car to M. Motors, from whom, the defendant, Mr Jones, bought it in good faith. National Employers Miss H’s insurers claimed the car against Jones.   * chain sales * Assuming that: thief cannot pass title as that is not a sale to 1st buyer; 2nd buyer can rely on s27(2) buyer in possession exception; as 1st buyer is a buyer & is in possession where the buyer got consent from the seller (the thief); the 2nd buyer deemed to have obtained   possession with consent of the seller(thief)   * Bizarre situation: 1st buyer cannot get title, but 2nd buyer can * If this works, it would be like the thief is creating a sale, cleaning his   title (money laundering); Statue should not be interpreted in this way |
| Issue | whether the owner’s rights to stolen goods prevail over all others |
| Held | inconsistency in wording; s27 (2) said seller instead of owner: could create a bizarre situation   * Means the same thing, **seller here means the last owner;** * the 2rd buyer cannot get good title as the thief has broken the chain |

**Sale in market overt** (s24 SOGO (abolished in UK))

# S24(1)

“Where goods are **openly sold** in a shop or market in Hong Kong, **in the ordinary course of the business** of such shop or market, the buyer acquires a good title to the

goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.”

* Open shop or market: all public members having free access; Cannot be a private sale
* Buyer would acquire good in ordinary course of the business
  + *Au Muk Shun v Cho Chuen Yau* [1988] 1 HKLR 413 -

|  |  |
| --- | --- |
| Held | Four conditions must be fulfilled:   1. goods must be openly sold 2. the sale must take place in shop or market in HK 3. the sale must be in the ordinary course of business of that shop or market; and 4. the buyer must act in good faith without notice of any defect or want of title of seller    * section interpreted strictly; need to fulfill every elements in the section |

# LECTURE 4: TOPIC 2 (PART 3) – SALE OF GOODS (IMPLIED TERMS)

1. **IMPLIED TERMS**

## Introduction

* + - Certain terms implied by SOGO – to protect the buyer
    - Implied condition vs implied warranty
    - Remedies of seller and buyer under SOGO to be covered in the topic ‘Duties and Remedies of Seller and Buyer’
* Breach of condition > can rescind the contract vs Breach of warranty > can only seek damages
* Statutory implied terms, can still argue under common law implied terms
* If fulling all the requirement in the statue, rely on the statue; if not, look for common law contract principle
* Mainly to protect the buyer, only cover limited quality of good

# IMPLIED UNDERTAKINGS AS TO TITLE (S14 SOGO (S12 SGA))

* 1. **Implied condition that seller has the right to sell the goods: s14(1)(a) SOGO**

# S14(1)

“In every contract of sale…there is—

(a) an **implied condition** on the part of the seller that in the case of the **sale**, he has a **right to sell** the goods, and in the case of **an agreement to sell**, he will have a right to sell the goods at the time **when the property is to pass**; and …”

* Seller has right to sell, diff from title; cover title but wider than title
* Conditional: when the property is to pass

 Rowland v Divall [1923] 2 KB 500 (at S&H p432) – seller had no title to goods

|  |  |
| --- | --- |
| Facts | Seller got the car but later found no title to the car, to pass the title to the buyer; buyer has been using the car for some time; buyer sued the seller can try to claim the price |
| Held | Condition: in breach of **condition (that the seller has right to sell)**   * Here the seller does not have right to sell > breach of the implied condition (just as Total failure of consideration in common law) * Buyer can claim for full price |

 Niblett v Confectioners’ Materials Co Ltd [1921] 3 KB 387 (at S&H p434) – power vs

**right to sell** - infringement of trademark of a third party

|  |  |
| --- | --- |
| Facts | * Milk packed in cans owned by the seller (no problem with title, seller did own the milk and the can), but labels inflicts an infringement of Nestlé's trade market; Nestle’s asked C not to sell, C agreed and brought a claim against D(seller). * Buyer claimed against the seller for breach of implied condition that the goods ought to be of merchantable quality and **seller having right to sale.** |
| Held | Seller in breach of implied condition, can reject the goods & claim remedies |
| Note | Wider than title, not have right to sale of the agreed goods |

## Implied warranty that the goods are free from charge and encumbrance not disclosed or known to the buyer before the contract is made: s14(1)(b) SOGO

* + - “(b) an implied warranty that the goods are **free**, and will **remain free** until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.”
* Free from charge on a continuous basis: At time of contract being free, and after sale continuously being free, until property being passed
* Goods the seller sell is subject to security: charge or encumbrance are security interest; security holder can go after the buyer, then the buyer cannot enjoy quiet possession, but can go after the seller for breach of warranty
  1. **According to the Control of Exemption Clauses Ordinance (Cap.71) (‘CECO’), the implied condition as to title cannot be contracted out**

# S11(1) CECO

“Liability for breach of the obligations arising from section 14 of the Sale of Goods

Ordinance (Cap. 26) (seller’s implied undertakings as to title, etc.) cannot be excluded or restricted by reference to any contract term.”

* Cannot contract out of s14, not subject to reasonableness

# SALE BY DESCRIPTION (S15 SOGO (S13 SGA))

* About quality of goods

## Implied condition that goods shall correspond with the description in a contract of sale of goods by description: s15 SOGO

* + - “(1) Where there is a contract for the sale of goods **by description**, there is an **implied condition** that **the goods shall correspond with the description**…

(2) A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.”

* e.g., label describing the goods, customer selecting good based on the label, can reply on what the section says; the quality ought to match the description;
* In *Joseph Travers & Son Ltd v Longel Ltd* (1948) 64 TLR 150, Sellers J accepted the following passage from Benjamin’s Sale of Personal Property (7th edn, p641):

“Sales by description may ... be divided into sales **(1) of unascertained or future goods**, as being of a certain kind or class, or to which otherwise a ‘description’ in the contract is applied; **(2) of specific goods**, bought by the buyer in reliance, at least in part, upon the description given, or to be tacitly inferred from the circumstances, and which identifies the goods.”

* Sale of unascertained good with description > assumed to be sale by description
* If Specific goods with description > can also rely on this section (if provided with

description, e.g., telling what the quality the good has, if the description does not match the specific good, can also rely on this section)

* *Grant v Australian Knitting Mills* [1936] AC 85 at 100:

“.. there is a **sale by description** even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but **as a thing corresponding to a**

**description**, e.g. woollen under-garments, a hot-water bottle, a second-hand reaping machine…” per Lord Wright

* If with description, the good ought to fulfill all the description
* Vs showing buyer the specific good w/o description > would not fall within ‘sale by description’
* Q: not all descriptions are describing the goods (might be only quality of the goods)
* By description: buyer relying on the description to identify the good that is being sold under the contract
* But **if only on attributes/quality** of the goods (would be only warranty, sued under common law)> this section does not apply

## Distinction between the goods’ identity and attributes/quality

 ***Ashington Piggeries v Christopher Hill Ltd [1972] 441*** (at S&H p405)

“The ‘**description’** by which an **ascertained goods** are sold is, in my view, confined to those words in the contract which were intended by the parties to **identify** the kind of goods which were to be supplied. It is open to the parties to use a description as broad or as narrow as they choose but ultimately the **test is whether the buyer could fairly and reasonably refused to accept the physical goods proffered to him** on the ground that their failure to correspond with what was said about them makes them good of a different kind from those he had agreed to buy. The key… is **identification**.” per Lord Diplock

|  |  |
| --- | --- |
| Facts | Animal feed for mink, the feed turns out to be poisonous (but won’t be poisonous if for other animals) |
| Held | **No breach of implied condition**, still animal feed, **fits the description**, only  issue is the quality (being poisonous) but does not go to the identify of the feed, which does not breach the condition |

 ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989** (at S&H p402) – vessel being constructed in another yard with a different yard number

|  |  |
| --- | --- |
| Facts | Buyer commissioning the seller to build a vessel; contact identified the vessel by yard no.; vessel fulfilled all requirement except for the yard no., but build in  another yard with another yard; seller tried to get out of the contract, argued breach of implied condition (that the vessel does not fit the description) |

|  |  |
| --- | --- |
| Held | The yard no does not go to identify the ship > immaterial; section does not apply, not even sale by description; prerequisite is not found, no sale of  description |

## Intention of parties

 ***Lee Yuk Shing v Dianoor International Ltd (in liq)* [2016] 4 HKC 535** (Read paras. 13- 30 and paras. 88-93 only) (on Moodle) - a common intention that that the **description is a term of the contract** and that the goods will correspond with the description

|  |  |
| --- | --- |
| Facts | Sale of diamonds, brochure describing the diamond, but diamond turns out to  be fake, buyer sued for breach of condition, does not match the description |
| Issue | Description goes to nature?   * Do the parties intend these words to be part of the contract? * A term of contract? Party expect that the diamond would fit the description? * Party relied on the description? or merely buying the good based on his own judgment?   (if no intention, then the statue does not apply, otherwise it would be misrepresentation) |

 ***Harlingdon & Leinster Enterprise Ltd v Christopher Hull Fine Art* [1991]** (at S&H p404) – no reliance on description by the buyer

|  |  |
| --- | --- |
| Facts | Both buyer and seller are in art field; Buyer has more expertise (made decision on his own on evaluation of the painting; during the sale, description about the painting; turns out fake, buyer sued |
| Held | * If parties do not care about the description, falls out of the section * **No reliance on the seller’s word**, as the buyer relied on his own assessment as an expert > **cannot sue on sale by description** |

## Applies to goods not sold ‘in the course of business’

 **Varley v Whipp [1900] 1 QB 513** (at S&H p406) – sale of second hand reaping machine by a person not dealer in the agricultural industry

|  |  |
| --- | --- |
| Facts | Seller described the machine as a new one; does not correspond to the  machine as it is a 2nd hand one; seller argued not selling the machine in an ad hoc basis but not in the course of business |
| Issue | In some sections there is this phrase, but no such words under s16(1); |
| Held | Not a requirement, not words in the section, cannot be fallen within the section   * Any kind of sale would fall within this section * Applied to goods not sold in course of business |

## Correspondence with description must be exact

 **Arcos Ltd v EA Ronaasen & Son [1933] AC 47** (at S&H p401) – thickness of wood

|  |  |
| --- | --- |
| Facts | Supply of timber; width of timber; contract said provided with certain width, but turns out timber with minor difference in its thickness |
| Held | Minor deviation would result in breach; **Must be exactly the same as the**  **description** |

* **Re Moore & Co Ltd and Landauer & Co’s Arbitration Ltd [1921] 2 KB 519** (at S&H p403) – packaging of canned fruits

|  |  |
| --- | --- |
| Facts | Canned fruits, packaging; seller supplied with a different no. of can in one packaging. |
| Held | **Packaging goes to identification of the goods > minor deviation would still be breach**   * Reason: commercial decision why one require 30 boxes, if not following the description buyer would need to re-pack it * Look at the agreement to determine whether it goes to the identity; does not mean that packaging would always be identification of the goods |

# IMPLIED UNDERTAKINGS AS TO QUALITY AND FITNESS (S16 SOGO (S14 SGA))

## Implied condition that the goods supplied under contract are of merchantable quality (s16(2) SOGO)

(Note that the term ‘merchantable quality’ has been changed to ‘satisfactory quality’ in UK)

* Once changing the term, interpretation would be different

# S16(2)

“Where the seller sells goods **in the course of a business**, there is an **implied condition** that the goods supplied under the contract are of **merchantable quality**…”

* + - “The **effect** this subsection is to displace the rule of caveat emptor (buyer beware) and to **place the burden** of finding out and communicating the existence of the defect on

**the seller**. This expression has a long history in the law of sale of goods and there are many decisions on its meaning. A … definition of ‘merchantable quality’ was introduced in the UK in the Supply of Goods (Implied Terms) Act 1973 and copied in Hong Kong in 1977, as the then section 2(5) of [the Sale of Goods] Ordinance.” Annotated Guide to

SOGO

* Not defined in statue; Must guarantee the quality, which is merchantable quality
* **Stevenson v Rogers [1999] 1 All ER 613** – ‘in the course of business’ includes one-off sale in the course of business and habitual dealings in the goods sold is not required

|  |  |
| --- | --- |
| Facts | Seller (a fisherman) one would expect that the fishermen would sell fish; but it is sale of boat |
| Issue | Sale of boat is the fisherman’s course of business for the statue to apply? |
| Held | **As long as associated with the business** > would still be ‘in the course of a business; **EXCEPTION: Does not cover private sale** |
| Note | Interpret the words liberally and loosely |

## Meaning of ‘merchantable quality’

* Not a definition but mere factors to weight balance on, do not need to fit into all the factors (only consider relevant ones)
* Rationale behind: can have multi-purpose good; consider the common purposes of which people buy for (no need to satisfy every purpose)

# S2(5)

Goods of any kind are of ***merchantable quality*** within the meaning of this Ordinance if they are—

* 1. as fit for the **purpose or purposes** for which goods of that kind are **commonly bought**

 *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1 – stacking of pails containing waterproofing compound in intense heat);

|  |  |
| --- | --- |
| Facts | buyer received the goods, stack the bucket (weight added up) in intense heat;  buyer sue seller that the buckets do not meet the requirement of quality of holding things |
| Held | only need to satisfy common purposes (hold things but not to be stacked up); seller not in breach of condition |

* 1. of such standard of **appearance** and **finish**;
  2. as **free from defects** (including minor defects);
  3. as **safe**; and
  4. as **durable**,

as it is **reasonable** to expect having regard to any description applied to them, **the price** (if relevant) and all the other relevant circumstances; and any reference in this Ordinance to unmerchantable goods shall be construed accordingly.

## Test is an objective one

### Cehave v Bremer [1976] QB 44 at 80:

‘Merchantable…. is a composite quality comprising elements of **description, purpose, condition and price.** The relative significance of each of these elements will vary from case to case according to the nature of the goods in question and the characteristics of the market which exists for them.’

* Particular requirement from the buyer is not material, assess objectively
* Taken into account all the factors and relevant facts
* ***Rogers v Parish [1987] QB 933*** – sale of new car with minor defects

|  |  |
| --- | --- |
| Facts | Sale of a new range rover, with defects, not minor defects but buyer requires repair; sue for breach; seller argue it is useable as a car despite minor defects |
| Held | Take into account the price; if sold as 2nd hand car, could expect there is defect But sold as the new car, of a famous brand, would expect certain quality; seller in  breach of condition (that the quality is not reasonably merchantable) |

* 1. **Exceptions [**Feb 22 lecture]

# S16(2)

“… except that there is no such condition—

* + - 1. as regards **defects specifically drawn to the buyer’s attention** before the contract is made; or
         * if the seller beforehand tells the buyers about the defect; then the buyer cannot say that the defect is in breach of implied condition of merchantable quality (**disclosure of defect**)
      2. if the **buyer examines** the goods **before the contract is made**, as regards defects which that examination **ought to reveal**;
         * **actual examination** by the buyer: that the buyer did examine the goods (usually it’s specific good), if there is no examination, s16 (2) does not apply
         * “ought to reveal”: simply physical touching and observing; if buyer does not notice the defect, where the defect ought to be revealed, this implied condition does not apply
      3. if the contract is a contract for **sale by sample**, as regards defects which would have been **apparent** on a **reasonable examination** of the sample.”
         * Sale by sample, under s17 > what is reasonable examination
  1. **Implied condition that the goods supplied under contract are reasonably fit for a particular purpose (s16(3) SOGO)**

# S16(3)

“Where the seller sells goods **in the course of a business** (does not cover private sale) and the buyer, **expressly** or **by implication**, **makes known to the seller** any **particular**

**purpose** (has to be told by the buyer beforehand) for which the goods are being bought, there is an **implied condition** that the goods supplied under the contract are **reasonably fit for that purpose**, whether or not that is a purpose for which such goods are commonly supplied, **except** where the circumstances show that the **buyer does not rely**, or that it is **unreasonable for him to rely**, on the seller’s skill or judgment. (exception where there is no reliance or it is unreasonable not rely on the seller)”

* If before the contract, buyer has expressed the purpose for which the good is to be used; if there is a particular purpose (not a common purpose), if the good fails to reach the purpose; the particular purpose has to be told by the seller beforehand
* Exception: even has told the seller why they buy the good, but if they does not rely on the seller’s judgment, this does not apply

## Requirements:

### Seller sells in the course of business

* ***Buyer makes known to seller (a) particular purpose(s)(implied or express)***

 **Henry Kendall v William Lilico [1969] 2 AC 31** – groundnut extracts poisonous for feeding pheasants

|  |  |
| --- | --- |
| Facts | Sale of groundnut, buyer told the seller about the purpose of feeding poultry (made known to seller); but seller sent good that is poisonous |
| Held | Seller does not comply with the implied condition > breach |

* **Ashington Piggeries v Christopher Hill Ltd [1972] AC 441** – sale of herring meal which was suitable for inclusion in foodstuffs in small quantities for most animals but seriously poisonous to mink

|  |  |
| --- | --- |
| Facts | Animal feed for mink, did not argued in breach of implied condition of mercantile quality (as it is still animal feed); **But buyer claimed Not reasonably fit for purpose**; |
| Held | as the seller knew the industry which the buyer is in & the feed is for minks,  made known to the seller already > condition breach |
| Note | Case does not touch on mercantile quality (not argued on the case, but still relevant), but claim succeeded on not fit for the purpose  Can use more than one grounds, as long as relevant; but no double recovery, damages would be the same even if relied on both grounds |

### Buyer’s (reasonable) reliance on seller’s skill or judgment

* **Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd [1934] AC 402** (at S&H p416) – construction of propellers

|  |  |
| --- | --- |
| Facts | Buyer buys propellers, for ship building, provided basic drawing e.g., shape, design to the seller, but does not show the specifics, leave the seller to decide some substantial part (e.g.,. thickness of the propeller), propeller turns out  break down at the end; Buyer relied on fit for purpose; seller argued buyer not relying on their judgment as drawing is provided |
| Held | **Even partial reliance is reliance**, as the other remaining part not contained in the drawing remains on seller’s assessment and skill; buyer relies on the seller’s skill to have the appropriate propellers for the vessel > breach of  condition |

## Does not apply where damage caused by goods due to sensitivity or particular unusual characteristics of the buyer that was unknown to the seller

* Sensitivity of the buyer: Normally would fit that purpose, but due to unusual characteristic of the buyer unknown to the seller, there would be no breach
* If the buyer is particularly sensitive > ought to make known to the seller

 **Griffiths v Peter Conway Ltd [1939] 1 All ER 685 (at S&H p418)** – buyer contracted dermatitis after wearing a bought tweed coat

|  |  |
| --- | --- |
| Facts | Tweed coat, buyer sensitive to the material > skin problem; but not make known to the seller |
| Held | No breach |

 **Slater v Finning Ltd [1997] AC 473 (at S&H p418)** – failure of camshafts on a vessel

|  |  |
| --- | --- |
| Facts | Seller commissioned camshafts (parts in vessel) > broke down due to engine (the resonance) of the vessel, which is unusual and unknown even to the buyer until they start using it; |
| Held | As long as the seller does not know, there would be no breach |

## Relationship between s16(2) and s16(3) SOGO

* **Jewson Ltd v Boyhan [2003] EWCA Civ 1030**

“The function of section [16(2)] (merchantable quality), by contrast with section [16(3)] (fitness for purpose), is to establish a **general standard of quality** which **goods are required to reach**. (objective standard to reach) It is not designed to ensure that goods are fit for a particular purpose made known to the seller. That is the function of section [16(3)]…” per Clarke LJ

* + Overlap in the purposes when there is one single purpose of the good: If in breach of mercantile condition, almost naturally would breach the fit for the particular purpose (e.g., water bottle only to obtain liquid)

# SALE BY SAMPLE (S17 SOGO (S15 SGA))

## Implied conditions in s17

“(1) A contract of sale is a **contract for sale by sample** where there is **a term** in the contract, **express or implied**, to that effect.

* 1. In the case of a contract for sale by sample—
     1. there is an implied condition that **the bulk** shall **correspond with the sample in quality**;
        + in situation of buying in bulk, where the buyer cannot check each content in the bulk, and difficult to describe each content in the bulk
        + mutual expectation that the bulk delivered would match the quality of that of the sample
     2. there is an implied condition that the buyer shall have a **reasonable opportunity** of

## comparing the bulk with the sample;

* + - * Note this implied condition (b) has been repealed in UK): useful but overlap with other section; as buyer always have the right to do so; redundant
      * reasonable = objective: matter of fact, depends on the goods supplied on contract and the industry; can be just by simple observation
    1. there is an implied condition that the goods shall be **free from any defect**,

**rendering them unmerchantable**, which **would not be apparent** on **reasonable examination** of the sample.”

* + - * overlaps with the s16 exception (c) under mercantile quality
      * What reasonable examination is, depends on the industry (objective analysis for reasonableness)
      * the examination would be able to discover the defect which is substantive enough to render it unmerchantable
      * **only covers latent (hidden) defect**, that one could not discover under reasonable examination (defects that could discover defects by reasonable examination is not covered here)
      * different from mercantile examination (which only applied to actual examination, that if there is no examination done by the buyer, s16 (2), the section does not apply)
      * but here, even if the buyer chose not to do the examination, it is still applicable

i.e. buyer chose not to do examination, but had he done so, the defect would have not discovered, buyer would not be able to claim under this section, as buyer waive the right for examination.

## Function of ‘sample’

* **Drummond v Van Ingen (1887) 12 App Cas 284** (at S&H p421)

“The office of a sample is to present to the eye the **real meaning and intention** of the parties with regard to the subject matter of the contract which, owing to the imperfections of language, it may be **difficult or impossible to express in words**.” per Lord Macnaghten

* + Function of the sample, hard to describe all the qualities of unascertained good (unlike a specific good where one can know the qualities of it)
  + By sample, requires mutual intention, that the bulk would correspond to the sample, so that the buyer can compare the sample for quality purposes
* ‘Sale by sample’ – the bulk to be delivered will correspond to the sample

## Free from latent defect

 **Steels & Busks Ltd v Bleecker Bik & Co [1956] 1 Lloyd’s Rep 228** (at S&H p422)

“The extent to which a sample may be held to ‘speak’ must depend on the contract and what was contemplated by the parties in regard to it. A sample may be analysed, X-rayed- tested to destruction. In the present case the parties were content, in accordance with the normal practice of the trade, to rely on a visual examination.” per Sellers J

*-* What reasonable examination is, depends on the industry

1. **Relationship of s17 with s15 and s16 SOGO**

# S15(1)

“… and if the sale is **by sample**, as well as **by description**, it is **not sufficient** that the bulk of the goods corresponds with the sample **if the goods do not also correspond with the description**.”

* + Additional to s17
  + If the good (the bulk) complies with the sample, but not fully complying with the description, it would breach s15 (sale by description) but not s17 (sale by sample)

## S16(2)(c)

“…if the contract is a contract for sale by sample, as regards **defects** which **would have been apparent** on a **reasonable examination** of the sample.” – one of the exclusions

* + Cannot argued that they are not of merchantable quality, if have examination already to detect the defect

# EXCLUSION/RESTRICTION ON LIABILITY

* **S57 SOGO**

“Where any right, duty or liability would arise under a contract of sale of goods by

implication of law, it may (subject to the Control of Exemption Clauses Ordinance (Cap. 71)) be **negatived or varied** by **express agreement**, or by **the course of dealing** between the parties, or by **usage** if the usage is such as to bind both parties to the

contract.”

*-* Can be contract out, can be varied by agreement, or usage of trade

BELOW ARE NOT THE FOCUS:

# S11 CECO

1. As against a person **dealing as consumer**, liability for breach of the obligations arising from section 15, 16 or 17 of the Sale of Goods Ordinance (Cap. 26) (seller’s implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose) **cannot be excluded or restricted by reference to any contract term**.
   * consumer products enjoy all the protection under 15, 16, 17, cannot be

contracted out; excluded in B2B contract, but subject to the requirement of reasonableness (not focus in this course)

1. As against a person dealing **otherwise than as consumer**, the liability specified in subsection (2) **can be excluded or restricted** by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.
   * in exam, stop at exemption clause, not focus in this course

# S3(2) CECO

“In determining for the purposes of section 11 or 12 whether a contract term satisfies the requirement of reasonableness, the court or arbitrator shall have regard in particular to the matters specified in Schedule 2; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.”

## Schedule 2 of CECO

“The matters to which the court or arbitrator shall have regard in particular for the purposes of sections 11(3) and 12(3) and 4 are any of the following which appear to be relevant—

1. the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer’s requirements could have been met;
2. whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
3. whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
4. where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that

compliance with that condition would be practicable;

1. whether the goods were manufactured, processed or adapted to the special order of the customer.”

# TOPIC 2 (PART 4) – SALE OF GOODS (DUTIES OF SELLER AND BUYER)

1. **INTRODUCTION**
   1. **Part III of SOGO – Performance of the contract**

# S29

It is the **duty** of the seller to **deliver** the goods, and of the buyer to accept and pay for goods, in accordance with the terms of the contract of sale.

# S30

Unless otherwise agreed, delivery of goods and payment of price are concurrent

conditions, **the seller must be ready and willing to give possession of goods to buyer** in exchange for price, and buyer must be ready and willing to pay price for possession of goods

# DUTIES OF SELLER

## Duty to deliver

* + - s29 SOGO (s27 SGA):

“It is the **duty of the seller to deliver the goods** … in accordance with the terms of the contract of sale.”

* + - (s2(1) SOGO): **Meaning of ‘delivery’**

## “means voluntary transfer of possession from one person to another”

* + - * Not physical delivery, but voluntary transfer of possession

# S31(1)

“Whether it is for the **buyer to take possession** of the goods or for **the seller to send them to the buyer** is a **question depending in each case on the contract**, express or implied, between the parties…”

* + - * Up to the agreement between buyer and seller, entitled to charge the buyer for fee, as they do not have the legal duty
      * In practice, free delivery as commercial concern (subject to private agreement) or agreement but not legal duty
    - **Rules as to delivery** set out in s31 SOGO (s29 SGA)

**S31(3)** “Where the goods at the time of sale are **in the possession of a third person**, there is no delivery by seller to buyer **unless** and until such **third person** acknowledges to the buyer that he holds the goods on his behalf (attornment) ”

* **Actual delivery** - by passing the whole thing physically across
* **Constructive delivery** - **Bailment** initially (between the seller and the 3rd party, 3rd party holding the good for the seller), but once the 3rd party acknowledges holding good for the buyer (now that the 3rd party is not holding the good for the seller but to the buyer > **attornment** (when the 3rd party hold the good for the buyer) > under law, delivery had been made > buyer has constructive possession
  1. **Place of delivery**

# S31(1)

“Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question **depending** in each case **on the contract**, express or implied, between the parties. Apart from any such contract, express or implied, **the place of delivery is the seller’s place of business**, if he has one, and **if not, his residence**:

* + - * Meaning of ‘delivery’: same as above, not physical delivery but voluntary transfer of possession from one person to another

Provided that, if the contract is for the sale of **specific goods**, which, to the knowledge of the parties when the contract is made, **are in some other place**, then **that place is the place of delivery**.”

* + - * Only for specific goods; if located at certain other location, known by both parties > the place of delivery
      * Unless contract out, subject to contract, can be somewhere else

# S31(5)

**“Unless otherwise agreed**, the **expenses of** and incidental to **putting the goods into a deliverable state** must be **borne by the seller**.”

* S2(4) “**Goods are in a deliverable state** when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.”

## To be distinguished from expenses of delivery itself

* + Put the good in deliverable state, not actual delivery
  + E.g., buyer requesting packaging of the goods (to put the goods in state of delivery), the expenses borne by the seller (subject to their agreement)
  + But for actual delivery, expenses will be borne by the whoever the contract stipulated

## Time of delivery

* + - **Time of the essence?**
* S12(1) SOGO (s10(1) SGA)) “Unless a different intention appears from the terms of the contract (subject to contract), **stipulations as to time of payment** are **not**

deemed to be of **the essence of a contract of sale**. Whether any other stipulation as to time is of the essence of the contract or not **depends on the terms of the contract**.”

* + Time of payment not of essence: e.g., in contract law time/payment is not of

essence normally; damages would be sufficient for the payment (damages could be easily decided, ultimately money)

* + Vs **time of performance of obligation**; under commercial contract, assumption being they are of essence
  + Why general assumption? Buyer not for self-consumption, but to have material to produce further things, or to re-sale (back-to-back contract); would have the effect on the second contract, could render the buyer in breach of the 2nd contract
  + Commercially important, but only a presumption of essence; can be proven not important, a matter of adducing evidence
* ‘... the enormous practical advantages in **certainty**, not least in regard to **string contracts** where today’s buyer may be tomorrow’s seller. Most members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions’ (per Lord Lowry, Bunge Corp v Tradax Export SA)

 Charles Rickards Ltd v Oppenheim [1950] 1 KB 616 – **giving reasonable notice to make time of the essence**

|  |  |
| --- | --- |
| Facts | Delivery at March, seller failed to deliver the car in time, buyer did not press for termination of contract but allowed the delivery to be done later; If the buyer did not press for termination, as a waiver of time as of essence > now time is no longer as essence, seller can deliver later; Seller delayed again, final  ddl given; seller thinks that they have waived the requirement already |
| Held | Giving reasonable notice can make time of the essence   * buyer was entitled to give a reasonable notice making time of the essence of the matter * Even he have waived the requirement before (or time is originally not of essence), but can still change it by reasonable notice * what is reasonable depends on facts of each case |

# S31(2)

“Where under the contract of sale the seller is bound to send the goods to the buyer, but **no time for sending them is fixed**, the **seller is bound** to send them within **a reasonable time**.” (see s58 for “reasonable time”)

* + - * Question of fact; apply industry standard; refer to s58

# S31(4)

“Demand or tender of delivery may be treated as ineffectual unless made at a

**reasonable hour**. What is a reasonable hour is a question of fact.”

* + - * E.g., within office hour

## Rules as to delivery to carrier (s34 SOGO (s32 SGA))

* + - **S34(1)** SOGO

“Where, in pursuance of a contract of sale, the **seller is authorized** or **required** to send the goods to the buyer, **delivery of the goods to a carrier**, whether named by the buyer or not, for the **purpose of transmission to the buyer** is prima facie **deemed to be a**

**delivery of the goods to the buyer**.”

* + - * Delivery to a carrier is prima facie deemed to be delivery to the buyer
      * Physical delivery here for the purpose of transmission to the buyer (holding the good on behalf of the buyer, as a carrier); deemed delivery (voluntary transfer of possession)
      * Duty to deliver the goods to the buyer

# S34(2)

“Unless otherwise authorized by the buyer, **the seller** must make such contract with the carrier on behalf of the buyer as may **be reasonable** having regard to **the nature of the goods** and **the other circumstances** of the case. **If the seller omits to do so**, and the goods are **lost or damaged** in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.”

* + - * In making that delivery contract with the carrier, seller to make sure the contract is reasonable with regard of the good (e.g., if perishable, would expect that the carrier that has refrigerator, so that food won’t perished)
      * if seller failed to make the contract reasonable, if goods are damaged during the transit, can be seen as seller been in breach, the buyer can hold seller responsible.

 *Thomas Young & Sons v Hobson & Partners* (1949) 65 TLR 365 – sale of electric engines

|  |  |
| --- | --- |
| Facts | Electric engine, through carrier by rail, seller failed to make it clear to the carrier to tie the engines, ends up not tied properly and damaged |
| Held | Buyer is entitled not to treat them as complete fulfilling the contract  requirement, Can claim seller for damages |

# DUTIES OF BUYER

* + - **S29**

“It is the duty …. of the buyer to **accept** and **pay for [the goods],** in accordance with the terms of the contract of sale.”

1. **Acceptance (**If buyer does not accept = rejecting the good)

**Delivery of wrong quantity (s32 SOGO (s30 SGA))**

# S32(1)

“Where the seller delivers to the buyer a **quantity** of goods **less than he contracted** to sell, **the buyer may reject** them, **but if the buyer accepts** the goods so delivered, **he must pay** for them at the **contract rate**.”

* + - Buyer can either reject the whole amount, or accept, then has to pay at contract rate; but has right to reject
    - Relates to S33(1): if seller deliver the rest of the amount it would be delivery by instalment, as the quantity is less than the amount contract; but the buyer can reject the whole amount, as well as instalment
    - Rationale: string contract; the buyer might well have another contract; if by

instalment the buyer did not agree (that he might get the good in once), the buyer might still incur cost e.g., to pick up the good in mid-point; entirely choice of the buyer, having the option to reject or accept

* + - But if choosing to accept the amount already delivered, and treat it as delivery by instalment > waived right to accept already? [check]

# S32(2)

“Where the seller delivers to the buyer a quantity of goods **larger than he contracted** to sell, **the buyer may accept the goods** included in the contract and **reject the rest**, **or he may reject the whole**. **If the buyer accepts the whole** of the goods so delivered he must **pay for them** at the contract rate.”

* + - Rationale: certainty of contract
    - Technical breach: Suddenly give the buyer the right to get out of the contract

(possible reason being changed market price, when there is a lower price to get the same good)

 *Shipton, Anderson & Co v Weil Bros & Co* [1912] 1 KB 574 (at S&H p431 and p437) – **de minimis exception**

*- Minimal, minute deviation, can be accepted, depends on the facts*

|  |  |
| --- | --- |
| Facts | Delivery of wheat, measured in tons, large quantities(4950 tons), slightly more than contracted in weight, but only slight difference(55 pounds = 0.024 ton), buyer tried to get out of the contract |
| Held | Cannot reject, only minute deviation, a question of fact |

# S32(3)

“Where the seller delivers to the buyer the goods he contracted to sell **mixed with goods** of a different description not included in the contract the **buyer may accept the goods which are in accordance with the contract** and **reject the rest**, or **he may reject the whole**.”

# S32(4)

“The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.”

* + - Can contract out

**Delivery by instalments (s33 SOGO (s31 SGA))**

# S33(1)

“Unless otherwise agreed, **the buyer** of goods is **not bound** to accept delivery thereof

## by instalments.”

 *Behrend & Co v Produce Brokers Co* [1920] 3 KB 530 (at S&H p437) – discharged cargoes by instalments

|  |  |
| --- | --- |
| Facts | Not important; delivery by instalment by ship, but actually contained the whole amount of goods, but only released part of them first, before passing of the whole part, ship departed > now becomes instalment; buyer rejected rest  of the good |
| Held | buyer entitled to reject the instalment |
| Note | If buyer rejects the rest, but accepted the first bulk > breach of duty on part of  the seller, **buyer can still claim damages after rejection for failing the duty to deliver** |

# S33(2)

“Where there is a contract for the sale of goods to be **delivered by stated instalments**, which are to be separately paid for, and the **seller makes defective deliveries** in

respect of one or more instalments, or the **buyer neglects or refuses to take delivery** of or **pay** for one or more instalments, it is a question in each case **depending on the terms** of the contract and the **circumstances** of the case, whether the breach of

contract is a **repudiation** of the whole contract or whether it is a **severable breach** giving rise to a claim for compensation **but not to a right to treat the whole contract as repudiated**.”

* Delivery by instalment, agreed upon; some instalment defective (some okay); can the buyer repudiate the whole contract?
* Contact law, where agreed delivery by instalment, but some instalment might be defective
* *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148 (at S&H p440)
  + **the quantitative ratio** which the breach bears to the contract as a whole

## the degree of probability that such a breach will be repeated

|  |  |
| --- | --- |
| Facts | Bulk fabrics of large volume, delivered by instalment; until the 16th instalment, sth wrong with the instalment that does not meet the requirement of certain  regulation; Buyer tried to get out of the contract, alleged having the right to reject the entirety |
| Issue | Can buyer repudiate the contact? or can just claim damages for the defective part? |
| Held | In favor of the seller,   * look at the quantitative ratio, the extent of the damages in terms of the whole installment, low ratio of incidence, only minor * degree of recurrence of the breach, degree of probability (not likely to be in breach again) > buyer not entitled to repudiate the contract |
| Note | Matter of adducing evidence (e.g., to prove that is only a one-off accident, but not of intrinsic fault) |

**Deemed acceptance (s37 SOGO (s35 SGA))**

* in practice, normally the buyer would not contact the seller; concept important as to the seller be ascertained there is no further dispute of the goods for the sake of certainty

# S37(1)

“Subject to subsection (2), the buyer is deemed to have accepted the goods—

1. when he **intimates to the seller** that **he has accepted them**; or
   * inform the seller that they have accept the goods
2. when the **goods have been delivered** to him and **he does any act in relation to them** which is **inconsistent with the ownership of the seller**.
   * Deemed to have accepted the goods, even no informing the seller
   * E.g., in a resale, an act inconsistent with the ownership of the seller (that the seller cannot further have the ownership, and cannot reject the goods)

* *Clegg v Anderson* [2003] 1 All ER (Comm) 721 (at S&H p445) – asking for further information

|  |  |
| --- | --- |
| Facts | Goods delivered, buyer asking for further information; seller thought that the buyer has accepted the goods, but later buyer wanted to reject |
| Issue | Whether asking further info is acceptance |
| Held | **Asking for clarification does not amount to acceptance**; as further info is to decide whether to accept the good |

o **S37(6)**

“The buyer is **not** by virtue of this section deemed to have accepted the goods **merely because the goods are delivered to another under a sub-sale** or other disposition.”

* + Sub-sale (when entering into 1st sale of agreement, already lined up with the 2nd buyer, or another customer – subcontract), buyer takes no risk
  + diff from resale (buy the good first, then decide to resell to 3rd party), buyer still taking the risk
  + carving out (not deemed): bc of examination, as normally during sub-sale would request the seller directly deliver to 3rd party?; but never have the chance to check the good, cannot be acceptance; mere delivery does not amount to acceptance

**Subject to right to examine before accepting**

# S36(2)

“Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a **reasonable opportunity of examining** the goods for the purpose of ascertaining whether they are in conformity with the contract.”

# S37(2)

“Where goods are delivered to the buyer, and he has **not previously examined** them, **he is not deemed to have accepted them** under subsection (1) **until** he has had a **reasonable opportunity of examining** them for the purpose—

1. of ascertaining whether they are in **conformity with the contract**; and
2. in the case of a contract for **sale by sample**, of **comparing the bulk with the sample**.
   * Buyer always has the right to reasonable examination in any kind of contract
   * In sub-sale: buyer cannot be deemed to accept the good, as examination is not done by the buyer but the; allowing certain time for sub-buyer to examine the good (e.g., keep the box for 7 days, as a reasonable time, passing the date would be deemed

acceptance)

# S37(3)

“The buyer who deals **as consumer cannot lose his right** to rely on subsection (2) by agreement, waiver or otherwise.”

* + - Right protected, cannot be waived

# S37(4)

“The buyer is also deemed to have accepted the goods when **after the lapse of a reasonable time he retains the goods without intimating to the seller** that he has rejected them.”

* + - If buyer retain the goods after some reasonable time, and does not do anything afterwards > deemed acceptance

# S37(5)

“The questions that are material in determining for the purposes of subsection (4) whether a **reasonable time** has elapsed include whether the buyer has had a **reasonable opportunity of examining the goods** for the purpose mentioned in subsection (2).”

## Liability for neglecting or refusing to take delivery (s39 SOGO (s37 SGA))

* + “When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the **buyer does not within a reasonable time after such request take**

**delivery of the goods,** he is **liable to the seller for any loss occasioned** by his **neglect or refusal** to take delivery, and also for a **reasonable charge** for the **care and custody** of the goods,

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a **repudiation** of the

contract.”

*-* Buyer fails to take delivery; not within reasonable time to take the goods, can take the responsibility as the seller would incur charges (e.g., storage charges)

[lecture Feb 29]

## Right of cure / Request for repair

* + **No general right of cure** but if the time of delivery has not yet expired, **seller is entitled to make a fresh tender** (common law rule)
* *The Kanchenjunga* [1990] 1 Lloyd’s Rep 391) – facts not important – a HL case which endorsed that principle
  + Case: Buyer not bound to accept the good, as not obliged to take goods by instalment
  + If the delivery is not in conformity with the contract term, it would be up to the buyer to **give seller the opportunity to cure the goods**; assuming time as passed already, **buyer may choose to accept seller’s offer to repair the goods**
* *J&H Ritchie Ltd v Lloyd Ltd* [2007] 1 WLR 670 (at S&H p445) – case which concerns the question of **whether requesting for repair amounts to acceptance of the goods**.

|  |  |
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| Facts | sale of certain machine which developed serious vibrations and buyer allowed seller to take back the machine for inspection and if necessary repair. After repair, the seller retendered the machine to the buyer but refused to explain what was the problem causing the vibrations and buyer wanted to reject the goods (buyer uncomfortable as the rationale behind, seller refused to explain  the problem, buyer wanted to reject as afraid that there is intrinsic problem). |
| Issue | whether requesting for repair amounts to acceptance of the goods  (under general rule, no right of cure; agree to repair = accept the goods?) |
| Held | HL did not rule on the point whether request for repair amounted to acceptance but ruled that   * buyer could reject the repaired machine for breach of an implied term of the **repair service agreement**. |

|  |  |
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|  | (When the buyer and seller agree to repair = agreement of service; Seller refusing to provide reason under this agreement of service, buyer can reject the goods) |
| Note | * The SGA has since been amended – a new section **(s35(6)(a) SGA**) which expressly provides that **request for repair will not amount to acceptance of the goods.** * HK does not have the equivalent provision. (leave for the court to decide case by case, currently unclear situation; One way to do it: in contract stated “Subject to repair of the goods”) |

## Effect of rejection

* if buyer has **rightly rejected** the goods, he is **not bound to return** them to the seller. It is sufficient that he **informs** the seller that he refuses to accept them. It is up to the **seller** to make arrangements for, and **bear the expenses** of, collection or disposal.
  + Buyer needs to rightly reject the goods: **rejecting with good grounds**
  + If buyer rejecting goods without good grounds > refusal to accept the delivery (fail to accept > breach of implied condition)
  + If lawfully rejecting the goods: buyer not bound to return the goods, can **still hold onto the goods** (e.g., asking the seller come and get the good, seller bear the cost of recollecting the goods)
  + Need to make it clear the ground for which he reject the goods (otherwise there would be breach

1. **Payment s12 SOGO (s10 SGA)**

# S30

“Unless otherwise agreed, **delivery** of the goods and **payment** of the price are

**concurrent conditions**, that is to say, the seller must be ready and willing to give

possession of the goods to the buyer in exchange for the price, and the **buyer must be ready and willing to pay the price** in exchange for possession of the goods.”

# S12(1)

“Unless a different intention appears from the terms of the contract, stipulations as to

**time of payment** are **not** deemed to be of the **essence** of a contract of sale….”

* + - Buyer has duty to pay
    - Time not of essence, but can be provided otherwise

# TOPIC 2 (PART 5) – SALE OF GOODS (REMEDIES OF SELLER AND BUYER)

*[Feb 29 Lecture 6]*

1. **REMEDIES OF SELLER**
   1. **Real remedies** (Real rights: important in insolvency case)

## “Unpaid seller” and its rights

* + - **Definition: S40(1) SOGO** (s38 SGA)

“The seller of goods is deemed to be an **unpaid seller** within the meaning of this Ordinance —

* + - 1. when the **whole of the price has not been paid** or **tendered**;
         * not about breach, no breach here, only price not paid)
      2. when a bill of exchange or other negotiable instrument has been received as

conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.”

* + - * + payment by cheque, not important here
    - **Unpaid seller’s right: S41 SOGO** (s39(1) SGA)

“Subject to the provisions of this Ordinance and of any enactment in that behalf,

notwithstanding that **the property in the goods may have passed to the buyer**, (does not matter the buyer has the property yet or not) the unpaid seller of goods as such, has by implication of law—

* + - 1. a **lien** on the goods or right to retain them for the price while he is in possession of them;
         * Unpaid seller enjoy all these real rights over the goods itself, not to claim damages
         * **Lien**: **gives seller right to retain goods/security interests** (Security interest of a 3rd party: Someone owes the seller some obligations e.g., payment obligation/debt, lien would create a right over the good to satisfy or discharge that debt)
         * Logically would not create security interest over one’s own property, when lien happens, **property must have passed already**.
      2. in case of the **insolvency** of the buyer, a right of **stopping the goods in transitu** after he has parted with the possession of them; **a right of re-sale as limited** by this Ordinance.”
         * Seller lost actual possession of the goods, as the goods are in transitu (in transit, on its way of delivery to the buyer); seller can stop the goods, and get back the good
    - **Withholding delivery: S42 SOGO** (s39(2) SGA)

“Where the property in goods has not passed to the buyer (goods still sitting with the seller), the unpaid seller has, in addition to his other remedies, **a right of withholding delivery** similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.”

* Property still sitting with the seller (the actual owner), can withhold delivery
* Comparing to s41 (a) rights of lien & (b) stoppage in transitu; physically the same as seller holding the goods, but legally different concepts

1. **Unpaid seller’s lien** (ss43-45 SOGO (ss41-43 SGA))
   * + **S43 (Unpaid seller’s lien) -** situations where right of lien arises

“(1) Subject to the provisions of this Ordinance, the **unpaid seller** of goods who is **in possession** of them is **entitled to retain possession** of them **until payment** or tender of the price in the following cases, namely—

* + - 1. where the goods have been sold **without any stipulation as to credit**;
* price has due already, no credit period has been given
  + - 1. where the goods have been **sold on credit**, but the **term of credit** has **expired**;
* having credit period e.g., seller giving 30 days for the buyer to pay, if passed & buyer still has not paid, unpaid seller can exercise this right
  + - 1. where the **buyer** becomes **insolvent**.
* Insolvent: see s2(3) for definition
* Unpaid seller has pure right to retain (cannot sell/deal with the goods), until payment is made (can hold the goods forever)

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.”

* Override the right of the buyer as bailor to get back the goods (as buyer might argue that he has better right as a bailor to get the goods)

o **S2(3)**

“A person is deemed to be ***insolvent*** who either has **ceased to pay his debts in the ordinary course of business** or **cannot pay his debts as they become due**, whether he has been adjudged bankrupt or not.”

* Either one of the two situations, only need to show buyer is not able to pay
* Buyer unable to discharge his debts in his ordinary course of business, can be any of the buyer’s debt (does not need to be the debt under this particular contract)
* **Seller** need not to go through all the court procedure to get a court order (which it takes time); make it easier for the seller, **no need to wait for the Bankruptcy**

**order** (individual vs winding up order for company) **to exercise his right**

## Part delivery: S44

“Where an **unpaid seller** has made part delivery of the goods, he may exercise his **right of lien or retention on the remainder**, unless such part delivery has been made in such circumstances as to show an agreement to waive the lien or right of retention.”

* Delivery by instalment, e.g., delivered part, payment due, fail to make payment, seller can retain remaining part of the goods
* Exception: unless there is an agreement to waive this right (waiver of right)
  + - **Termination of lien: S45 (**Unpaid seller has but then lose the right of lien) “The unpaid seller of goods **loses his lien or right of retention** thereon—
      1. when he **delivers** the goods to a **carrier** or other bailee for the purpose of

transmission to the buyer, **without reserving the right of disposal** of the goods;

* seller hasn’t got paid, still continues to pass the goods to the carrier for the purpose for transmitting to the buyer;
* without retaining his title of property > lose the possession and right to lien
* further see s46: if seller resume his possession, he can then get back right of lien, only when the buyer is insolvent
  + - 1. when the **buyer or his agent** lawfully obtains **possession** of the goods;
* seller naturally lost possession and thus right of lien
  + - 1. by waiver thereof.

The unpaid seller of goods, having a lien or right of retention thereon, **does not lose his lien or right of retention** by reason only that he has **obtained judgment** for the price of the goods.”

* Even if he has obtained court judgment, does not mean seller has lost his right of lien
* judgment debt (a separate debt, not the original debt under the contract)
* give extra protection for the seller, that even if the buyer has paid the judgment debt, seller can still hold onto the goods

1. **Unpaid seller’s right of stoppage in transit** (ss46-48 SOGO (ss44-46 SGA))

*-* Seller lost possession > lost lien (having right of lien only when having possession of the goods); but still has second chance to stop the goods

## S46 (Right of stoppage in transit)

“Subject to the provisions of this Ordinance, when the **buyer** of goods becomes **insolvent**, the unpaid seller who **has parted with the possession** of the goods has the **right of stopping them in transit**, that is to say, he 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.”

* Only when buyer becomes insolvent
* Once resume possession, can exercise right again (regaining possession)
* Goods already delivered? But buyer not willing to pay
* Vs s45? Different scenarios covered: s46 confer extra right when buyer is insolvent & when goods are delivered to carrier, buyer can resume possession vs. s45: seller loses the right when goods delivered to the carrier
* Go to s47 to consider whether goods are in course of transit

## S47 (Duration of transit)

1. Goods are deemed to be in course of transit from the time when they are delivered to a **carrier** by land or water, or other bailee for the purpose of transmission to the buyer, **until the buyer**, or his agent in that behalf, **takes delivery of them** from such carrier or other bailee.
   * seller can stop anytime during the transit (e.g., during the train trip before the train reaches the final destination)
2. If the buyer or his agent in that behalf obtains delivery of the goods before their

## arrival at the appointed destination, the transit is at an end.

* + Competition between buyer and seller, e.g., buyer intercepting the goods, would stop the transit

1. If, after the arrival of the goods at the appointed destination, **the carrier or other bailee acknowledges to the buyer**, or his agent, that he holds the goods on his behalf and **continues in possession of them** as bailee for the buyer or his agent, **the transit is at an end**, and it is immaterial that a further destination for the goods may have been indicated by the buyer.
   * Attornment (when the carrier acknowledges(constructive notice) he is holding the goods for the buyer), transit at an end
2. If the goods are **rejected** by the buyer, and the **carrier** or other bailee **continues in possession** of them, **the transit is not deemed to be at an end**, even if the seller has refused to receive them back. [When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier, or as agent to the buyer].
   * goods did arrive but rejected by the buyer, goods go back to the seller, carrier

continue in possession, transit not deemed to be at the end; in favour of the seller (can stop the goods, for him to get back the goods)

* + exclude carriage by sea (not focus in this course)

1. Where **the carrier or other bailee wrongfully refuses to deliver** the goods to the buyer or his agent in that behalf, **the transit is deemed to be at an end**.
   * Wrongfully refuses: where the buyer should have obtained the goods (transit deemed to be at an end)
2. Where **part delivery** of the goods has been made to the buyer or his agent in that behalf, the **remainder** of the goods may be **stopped in transitu**, **unless** such part

delivery has been made in such circumstances as to show **an agreement to give up possession of the whole of the goods**.

* + s44, same idea: if only part of the goods delivered, seller can stop the remaining good, as long as the part delivery does not constitute waiver (agreement to give to possession)

## How stoppage in transitu is effected: S48

* 1. The unpaid seller may exercise his right of stopping in transitu either **by taking actual possession** of the goods or **by giving notice** of his claim **to the carrier or other**

**bailee** in whose possession the goods are. Such **notice** may be given either to **the**

**person in actual possession** of the goods or to **his principal**. In the latter case the notice, to be effectual, must be given at such time and in 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 the buyer.

* actual possession: go back to the carrier to get back the good
* if goods in transit > **serve notice** to whom is in actual possession or the person’s principal
* e.g., delivery by truck (seller can go to the driver), only needs to notify the principal, to further tell his delivery man to stop and give back the good to the seller
* exercise of reasonable diligence: to protect the carrier, for agents to be notified in reasonable time
  1. When notice of stoppage in transitu is given by the seller to the carrier or other bailee in possession of the goods, he must **re-deliver** the goods to, or according to the

directions of, the seller. The **expenses** of such **re-delivery** must be borne by the seller.”

* + - If carrier received notice, can charge the seller for re-delivery

## Right of resale

* **s50 SOGO** (s48 SGA)
  1. Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.
     + Common law: withholding/stopping the goods may amount to restitution
     + But here the statue tries to save the contract, contract still valid, even when unpaid seller exercise right of lien
  2. Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu **re-sells** the goods, **the buyer acquires a good title** thereto as against the original buyer.
     + Give power to sell to the seller; (as right to lien only gives seller the right to hold on to the goods forever, which does not mean much in making profits),
     + Here provides **extra power to re-sell** to the seller to get back the damages, after right of lien
     + Protect the 3rd party (2nd buyer): exception to nemo dat rule: 3rd party does not need to get involved in the first contract; Gives good title to 3rd party
  3. Where the goods are of a **perishable** nature, or where the unpaid seller gives **notice** to the buyer of **his intention to re- sell**, and the buyer does not within a reasonable time pay or tender the price, the **unpaid seller may re-sell** the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.
     + Either one of the two scenarios: perishable nature (which needs to be sold in time) or gives notice of intention to re -sell
     + When the buyer still does not pay in reasonable time, seller can re-sell the good as he has statutory right to resell, and would not be in breach of contract
     + Follow (3) strictly to avoid breach of contract
     + Does not affect (2) (protecting 3rd party), as merely give 3rd party good title.
  4. Where **the seller expressly reserves a right of re-sale** in case the buyer should make default, and on the buyer making default, re-sells the goods, **the original contract** of sale is thereby **rescinded**, but without prejudice to any claim the seller may have for damages.
     + After re-selling, seller be able to claim damages for any further loss
     + if in the re-sale proceed the seller cannot cover loss from previous sale, he can claim further damages from the buyer

## Personal remedies

1. **Action for price**
   * + **S51**(s49 SGA)

“(1) Where, under a contract of sale, the **property** in the goods has **passed to the buyer**, and the **buyer wrongfully neglects or refuses to pay** for the goods according to the terms of the contract, the **seller may maintain an action** against him for the

price of the goods.

*-* Prerequisite: property has passed

(2) Where, under a contract of sale, the **price is payable on a day certain** irrespective of delivery, and the **buyer wrongfully neglects or refuses to pay** such price, **the**

**seller may maintain an action for the price,** although the property in the goods has not passed, and the goods have not been appropriated to the contract.”

* if seller relies on (2), have to show agreement that there is a **fixed date** of payment irrespective of delivery; if the date has passed, even property has not passed, seller still be able to sue for price
* important as: seller does not need to mitigate for claiming his loss by statue here (can sue for the exact amount stated in the contract, overriding common law rule) vs. under common law need to mitigate the loss (check again)
* The rule of mitigation: requires a claimant to take steps to minimise its loss and to avoid taking unreasonable steps that increase its loss. An injured party cannot

recover damages for any loss (whether caused by a breach of contract or breach of duty) which could have been avoided by taking reasonable steps.

## Damages for non-acceptance

*-* Mitigation needed

* + - **s52 SOGO** (s50 SGA)

“(1) Where the **buyer** wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

1. The **measure of damages** is the **estimated loss** directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract.
   * Mirrors common law rule
2. Where there is an **available market** for the goods in question, the measure of damages is prima facie to be ascertained by the **difference** between the **contract price** and the **market or current price** at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then **at the time of the neglect or refusal to accept**.”
   * Help the seller, seller does not need to really sell the goods to claim for damages
   * A test: without selling the good, can calculate the amount he can claim
   * If market price is above contract price: get nominal damages (as there is no actual consequential loss suffered by the seller)
   * If contract price is higher than market price: can claim substantive damages
   * **Prima facie: Presumption only**, buyer can produce evidence that the test should not apply (see case law)
     + Thompson v Robinson [1955] Ch 117 – loss of one sale – presumptive ‘market price’ rule in s52(3) not applied

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| --- | --- |
| Facts | Sale of car, manufacturer set a retail price, seller is one of the  distributors, cannot sell lower or higher than the fixed price; buyer refused payment, seller claim for damages |
| Issue | **market price = contract price;** if apply the test, seller gets nothing (as there is no loss suffered by the seller)  Seller argued that should not apply the test: loss here is loss of one sale, cannot sell at any other price |
| Held | Presumptive rule should not apply, can **claim loss of that one sale (profit of that one particular sale)** |
| Note | Unlikely to happen again, now with competition ordinance, this won’t  happen; manufacturer cannot fix price |

* + - Campbell Mostyn v Barnett [1954] 1 Lloyd’s Rep 65 – the ‘market price’ rule applied – no need to account for the actual greater price at which the seller sold the goods

|  |  |
| --- | --- |
| Facts | Sale of ham, seller held onto the goods, re-sell them at much higher  price; (re-sale making extra profit) under rule, cannot claim substantive damages as he can already make extra profit |
| Held | Can still apply the prima facie test (override contract law principle)  **seller able to keep the profit and still claim damages**, **seller takes risks, as market price might have dropped** |

1. **REMEDIES OF BUYER**

## Right to reject goods

* + - **Breach of condition: S13(2)**

“Whether a stipulation in a contract of sale is a **condition**, the breach of which may give rise to a right to treat the contract as **repudiated**, or a **warranty**, the breach of which may give rise to a claim for **damages** but **not a right to reject the goods** and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.”

* Breach of condition (e.g., implied conditions under s15-17) > can repudiate contract > can reject the goods
* Breach of warranty > claim for damages > but cannot reject the goods
  + - S32 Delivery of wrong quantity – see previous lecture
    - S33 Delivery by instalments – see previous lecture

## Buyer not bound to return rejected goods: S38

“Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to

accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if **he intimates to the seller** that **he refuses** to accept them.”

* Seller’s duty to collect the goods back
* If buyer wants to keep the goods > can treat it as breach of warranty > claim for damages

## Damages for non-delivery

* + - **s53 SOGO** (s51 SGA))

1. Where **the seller wrongfully neglects or refuses** to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
2. The **measure of damages** is the **estimated loss** directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.
3. Where there is an **available market** for the goods in question, 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 at the time or times when they ought to have been delivered, or, if no time was fixed for delivery, then at the time of the neglect or refusal to deliver.

 *Hughes v Pendragon Sabre Ltd (t/a Porsche Centre Bolton)* [2016] EWCA Civ 18

|  |  |
| --- | --- |
| Facts | sale of a super rare limited edition car |
| Issue | Calculation of the market price (as the car is super rare, hard to have the same type of car to decide the market price) |
| Held | As long as there is **a market to absorb the product**, there is a market, sufficient enough (does not need to be a market specifically for this car)   * Adduce evidence of **similar type of product** (can be of another brand), to ascertain the market price |
| Note | **Meaning of available market** |

## Specific performance

* + - **s54 SOGO** (s52 SGA)

“In any action for breach of contract to deliver **specific or ascertained** goods, the court may, if it thinks fit, on the application of the plaintiff, by its judgment **direct that the contract shall be performed specifically**, without giving the defendant the option of retaining the goods on payment of damages. The judgment may be **unconditional**, or on such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just. The application by the plaintiff may be made at any time before judgment.”

*-* Common law rule: court having power to grant specific performance (only in rare cases can get so, as normally in commercial world damages is often enough)

* 1. **Remedies for breach of warranty** (s55 SOGO (s53 SGA))

# S2

“***warranty*** means an agreement with reference to goods which are the subject of a

contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the

contract as repudiated.”

# S13(1)

“Where a contract of sale is subject to any ***condition* (implied condition)** to be fulfilled by the seller, **the buyer may waive the condition**, or may elect to treat the breach of such condition as a **breach of warranty**, and not as a ground for treating the contract as repudiated.”

*-* Buyer can choose to waive the condition, treat the condition as warranty to keep the goods & claim for damages

# S55

“(1) Where there is a breach of warranty by the seller, or where the buyer **elects**, or is **compelled**, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not, by reason only of such breach of warranty, entitled to reject the goods; but he may—

* Elect: by choice, having the choice to do so, to waive the condition > treat it as warranty > claim for loss/damages
* Compelled: where he has lost the right to reject; (as condition gives right to reject); if lose the right, can only treat it as warranty
* Check again? What kind of situation would the buyer lose its right to reject??
  1. **set up** against the seller the breach of warranty in diminution or extinction of the **price**; or
  2. maintain an action against the seller for damages for the breach of warranty.

1. The **measure of damages** for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
2. In the case of breach of warranty of quality, such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
3. The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered **further damage**.”
4. **RETENTION OF TITLE CLAUSE**

## Introduction

* + - **Retention of title clause** (‘**ROT clause’**) is also known as reservation of title clause or the Romalpa clause - **Seller retains title until full payment is received**.
* Relates to s19, 20 (unless different intention appears); ROT clause can ascertain the intention of parties that property would not pass until full payment;
* linking the property with payment here when contrary intention shown
* Goods sold, until full payment
  + - **Simple** ROT clause vs **extended** ROT clause
* Simple: seller retains title until full payment is received
* Extended: covers more scenarios, induce problems
  1. **Law**

# S21(1)

“Where there is a contract for the sale of **specific** goods, or where goods are subsequently **appropriated** to the contract, the **seller** may, by the terms of the contract or appropriation, **reserve the right of disposal** of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the **property** in the goods does not pass to the buyer **until** the **conditions** imposed by the seller are

fulfilled.”

* Seller may reserve the right of **disposal** > narrow concept, includes retention of ownership and the right to sell the goods;
* in reality contract always says retains title (which includes property)
* by the terms of the contract: Can have ROT clause in contract under law
* Can be any condition (but usually payment), allowed under law

# S3(1)

“A contract of sale of goods is a contract whereby the **seller transfers** or **agrees to transfer the property** in goods to the buyer for a money consideration, called the **price**. There may be a contract of sale between one part owner and another.”

* If the contract does not allow the transfer of property, SOGO does not apply
* To be reviewed

# S51(1)

“Where, under a **contract of sale**, the property in the **goods has passed** to the buyer, and the **buyer wrongfully neglects or refuses to pay** for the goods according to the terms of the contract, the seller may maintain an action against him for the **price** of the goods.”

* Only when property has passed, to be able to claim for price
* If property has not passed (if retaining the title), cannot claim for the price, (but can sue for damages)
* If there is **ROT clause** (showing intention to retain the title & property), **property would not pass** > **cannot rely on s51(1) to claim for price** (see FG Wilson below)
* Need to let the property pass (to avoid the need of mitigation), to claim for price, otherwise can only sue for damages(which requires mitigation)

## Effect of ROT clause

* + - *FG Wilson v John Holt & Co* [2014] 1 WLR 2365 – could not claim price independently of s51 of SOGO
* If have the clause, retain the title, meaning that never intend to transfer the title, then cannot claim for price; can only sue for damages
* Still good law
  + - *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (the “Res Cogitans”)* [2016] AC 1034 (at S&H p280)

|  |  |
| --- | --- |
| Facts | ROT in contract, sale of oil bunkers, series of sale of the same set of oil bunkers, contract stated delivery by ship that use fuel; allowed to use oil in the bunkers before reaching the destination; buyer would be buying whatever is  left in the bunker on arrival; later buyer went insolvent & cannot pay; seller seeks claim for the price; (Oil was consumed before payment > buyer never received the oil > property has not passed to buyer) |
| Issue | buyer would be paying the whole thing; **only one lump sum**, covers the usage of the oil during the voyage + final bunkers arrived (did not separate the two)   * But due to the ROT clause: property never passed to the buyer * Can seller claim for price when property has never passed? |
| Held | Cannot claim for price   * ROT clause: seller retains title; property has never passed to the buyer, cannot rely on s51(1) to claim for price * One lump sum:   + 1st part: use of oil during the voyage: **Licence to use the oil**   + 2nd part: **the property (the final bunkers arrived)**, but property   **never passed** due to ROT clause   * **Not sale of goods of contract**, only **a licence to use oil contract**   + s3: A contract of sale of goods is a contract whereby the **seller transfers** or **agrees to transfer the property** in goods to the buyer for a money consideration, called the **price**.   + only when there is transfer of property can it be a contract of sale |

|  |  |
| --- | --- |
|  | * until the oil is used up, no property of oil has been passed * Does not know the exact amount of goods at final arrival > the whole contract is not a sale of good contract * cannot sue for price under s51 * can only sue for damages |
| Note | Controversial: ROT takes the whole contract out of SOGO   * ROT clause may cause an entire transaction to fall outside scope of s51; or is this a sui generis contract? (One of a type contract, due to the peculiarity of that industry) * Court cast doubt as to whether seller can sue for price outside scope of s51 * **provide a clause** to allow you to **sue for price even the property has not passed**, but need to specify so in contract, otherwise ROT would take the whole contract out of S51 |

## ROT clause – characterisation

* + - *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 (at S&H p469) (the Romalpa case) - Extended version here

“The **ownership** of the material to be delivered (goods sold, separate the storage of goods) by A.I.V. [i e the plaintiffs] will **only be transferred** to purchaser when he has met all that is owing to A.I.V., no matter on what grounds. **Until the date of payment**, purchaser, if A.I.V. so desires, is required to store this material in such a way that it is clearly the property of A.I.V. (separate the storage of goods)

A.I.V. and purchaser agree that, if purchaser should make (a) new object(s) from the material, **mixes this material** with (an) other object(s) or if this material in any way whatsoever becomes a constituent of (an) other object(s) A.I.V. will be **given the ownership of this (these) new object(s)** as surety of the full payment of what

purchaser owes A.I.V. To this end A.I.V. and purchaser now agree that the ownership of the article(s) in question, whether finished or not, are to be transferred to A.I.V. and that this transfer of ownership will be considered to have taken place through and at the moment of the single operation or event by which the material is converted into (a) new object(s), or is mixed with or becomes a constituent of (an) other object(s).

* if mixed with other goods, to produce new goods, then give ownership of the new goods to the seller as well (extending the clause)
* vs simple ROT: retaining the goods being sold

Until the moment of full payment of what purchaser owes A.I.V. purchaser shall keep the object(s) in question for A.I.V. in his capacity of fiduciary owner and, if required, shall store this (these) object(s) in such a way that it (they) can be recognized as such (new goods/product). Nevertheless, purchaser will be entitled to sell these objects to a third party within the framework of the normal carrying on of his business and to

deliver them on condition that—if A.I.V. so requires—purchaser, as long as he has not fully discharged his debt to A.I.V. shall hand over to AIV the claims he has against his buyer emanating from this transaction.' (proceeds of new products)

* dilemma: seller wants to retain the title? But allowing buyer to use the product
* the new goods have to be sold, profit from the proceeds
* Who own the new goods? manufacturer would own the new product, but creating

**security interest** (seller would not retain the property, but mere interest in the product, but here this is not retention at all)

* Works for proceeds: cannot trade for proceeds unless there is trust, no action following the proceeds
* cannot transfer proceeds unless there is trust; but here there is no trust created under the clause: creates interest in property (money) > creating another security interest
* case: only claim for unused aluminium (still with the buyer, stored separated by the buyer), only relying on simple ROT
* held valid, only simple retention of title
  + - *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339 (at S&H p926) – an **all liabilities clause** (ROT – payment obligation price; cover all other payment obligation including debts
* Lord Keith: “Such a [retention of title] provision does in a sense **give the seller**

**security for the unpaid debts of the buyer**. But it does so by way of a **legitimate retention of title**, not by virtue of any right over his own property conferred by the buyer.”

* + Vs in simple ROT: only retain title against the payment obligation under the same contract (price)
  + **All liabilities**, covers any other payment obligations or debts that owed by the same buyer to the same seller under **multiple contracts**
  + E.g., 4 transactions, between the same seller and buyer, seller retains property until all transactions have been paid (all liabilities)
  + Q: creating security interest, or genuine retention of title?
  + If ROT has this all liabilities clause: Still regard as **valid, legitimate retention of title**, but not creating security interest
    - Re Peachdart Ltd [1984] Ch 131 (at S&H p473) – supply of leather to make handbags

|  |  |
| --- | --- |
| Facts | **Simple** ROT, claim for leather, **Leather has been used** (unlike the previous case); |
| Issue | does it give u right to the handbags? Or leather in the handbag? |
| Held | **Leather has lost its identity** once been made into a new product; handbags made from leathers from different source **(mixed source),** no retention of title, no property over the handbag |

* + - Clough Mill Ltd v Martin [1985] 1 WLR 111 (at S&H p480) – sale of yarn to make fabrics

|  |  |
| --- | --- |
| Facts | Yarn, ROT gives right to fabrics (the new extended, new product), fabrics to make new product; would be creating security interest on the new product; seller goes after unused yarn |
| Held | Unused yarn, **Still retain the identity, clause works**  (obiter: if yarn weed into fabric > lose identify > clause does not work) |
| Note | If creating security interest, could be as charge? (one type of security interest, see later)   * But if creates charges > need to be registered under companies act in UK; * legal effect of non- registration, charge will be void * parties not realizing they have created a charge here; in this case they did not register, the whole thing is void (But here does not matter, they only rely on sold goods**, unused part, not the new products**) |

* + - Modelboard Ltd v Outer Box Ltd [1993] BCLC 623 (at S&H p475) – sale of cardboard sheets to make cardboard boxes

|  |  |
| --- | --- |
| Facts | **extended** version ROT, covers new product; **claims cardboard boxes (new product)** that made from the carboard sheets |
| Held | creates new security interest > charge > requires registration (but they did not  register > void clause > cannot have the title |

* + - Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch 25 (at S&H p478) – sale of resin in manufacturing process

|  |  |
| --- | --- |
| Facts | All resin melted (disappeared), clause ineffective, all resin has been used claim new product |
| Held | * Property disappeared (melted) once used in manufacturing process & once allowed use of them; even have the clause it is not effective, cannot rely on **extended part of ROT** * Over the new problem > Charge > not registered > void |

* + - Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd [1984] 1 WLR 485 (at S&H p479) – sale of engines

|  |  |
| --- | --- |
| Facts | Engines for insulation in car, rely on **simple ROT**, want to get back the engine (not the car) |
| Held | * engines (1) **retain identity** (with identification marks) * can be (2) **dismantled with relative ease without damaging the finished product**; * Clause works, seller can get back the engine (can tells which part is yours) |
| Note | A matter of proving the part belongs to you (e.g., with serial no., certificates) |

# TOPIC 3 – AGENCY (PART 1)

[Lecture 7 March 14]

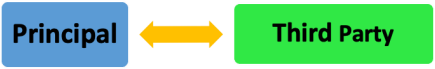
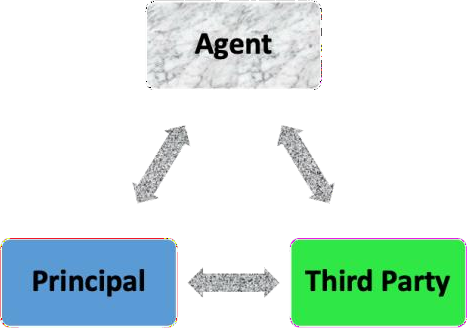
# CONCEPT OF AGENCY

Goode Chapter 5 (excluding those paragraphs on European Directives); S&H, pp 101-104

## Definition

* + - a relationship that arises when a **principal authorises an agent** to act on his behalf in regard to a third party, and **the agent agrees** to do so
      * requires agreement from the agent too: as the agent acting on behalf of the principal gives rise to personal liability

## Triangular relationship

****

* 3rd party dealing with the agent (authorised by the agent)
* final contract between principal and third party (w/o the agent)

## Theories underlying agency law

* **Consent theory -> conferral of authority**
* Is it **consensual** in all cases?
  + In theory: all parties agree that principal confer authority to the agent & agent’s act will bind to the principal

## Apparent authority?

* + Defect of using consent theory: when agent not acting in accordance with the authority > principal did not actually consent
  + Issue when agent not property appointed, but action still bind principal; When the principal actually did not consent, or exceeding the authority

## Operation of law?

* + the law imposes the relationship, even the principal did not consent to it

## ‘Power-liability’ analysis

* + Power of agent to create legal liability for the principal
  + Criticized not as a theory but merely a consequence
  + Under contract law: not enforceable without consideration vs Under commercial law, no need of consideration; explained by consent theory
  + Did not sit well with contractual concept, but still adopt it in the commercial world

## Excluded agents

*-* Particular types of ‘agents’ outside scope of this course (they are not the real agent)

* Brokers (sale of stock or investment product, subject to regulation > change the law of agency)
* Distributors (sometimes may act as principal: buy the goods from supplier first, then sell it, not as sell on behalf of the supplier)
* Travel agents
* Real estate agents

1. **CREATION OF AGENCY** (S&H, pp 118 – 119)

## By express or implied agreement

* + - **consensual** but need not be contractual
      * both sides have to consent on the agreement, but can be gratuitous agency without consideration (not contractual)
    - **no particular formality** except those created under the Power of Attorney Ordinance (Cap.31)
      * Exclude PAO (not focus in this course): appoint power of attorney to execute some acts/signing documents; also an agent, also need to read this ordinance in real life > requires formality
  1. **By estoppel** under the doctrine of **apparent /ostensible authority** – see below
* Principal estopped from denying the authority from binding the principal
* agent will have ostensible/apparent authority

## By ratification (of unauthorised acts) by the principal

* If the agent exceeds authority which purported has authority
* principal can choose not to recognised the transaction or adopt it by ratification
* ratification is always post-transaction (done afterwards) (vs authority is always pre-transaction)
  1. **By operation of law** (agency of necessity)

*-* Law imposing agency relationship, allow the act of the agent bind to the principal without his consent

**Authority of Agent**

1. **ACTUAL AUTHORITY** (S&H, pp 120 – 124)

* Actual: Subject to Scope of authority;
* first step: to determine the scope; Look at what is actually been agreed

## Implied actual authority always subject to express actual authority: Agent

could not exceed the limits or the restriction of express actual authority & cannot contradict with it

## Express actual authority

*-* principal expressly tells you what to do

## Implied actual authority

* e.g., authority of “selling not below $1000”
* issue of whether it involves negotiation, looking for other buyers; not expressly authorised but implied
* **Incidental** authority
  + things that are necessary for the agent to carry out the act e.g., necessary to sign documents for the sale
* **Usual** authority
  + Authority comes with the **position & profession of the agent**; authority that is usual to that position (As a matter of fact)
  + e.g., in a company, with directors, clerks with narrower usual authority, will be included in the implied authority)
* **Customary** authority
  + in that particular market/industry; make sure the customary is clear, notorious (that everyone knows about it), reasonable
* **Other situations** where the facts of the case require an **implication of authority**
  + **Course of dealing between principal & the agent**, where the principal has knowledge (e.g., always allow the agent to give discount) > as implied authority

1. **APPARENT / OSTENSIBLE AUTHORITY** (S&H, pp 125 – 138)

## Elements/conditions of apparent authority

(see Freeman & Lockyer v Buckhurst Park Properties Ltd [1964] 2 QB 480)

“An "apparent" or "ostensible" authority ... is a **legal relationship between the principal and the contractor (TP) created by a representation**, made by the principal to the

contractor, intended to be and in fact acted upon by the contractor, that **the agent has authority to enter on behalf of the principal** into a contract of a kind **within the scope of the "apparent" authority**, so as to render the principal liable to perform any

obligations imposed upon him by such contract... The representation, when acted upon by the contractor by entering into a contract with the agent, **operates as an estoppel**,

preventing the principal from asserting that he is not bound by the contract.”

* Representation that the agent has authority to act on behalf of the principal > principal estopped from denying the authority
* Issue when the agent in fact did not have authority
* Need to determine what is the scope

|  |  |
| --- | --- |
| Facts | * ***De facto*** (not properly appointed, not actual authority) **managing director**   of company being ‘allowed’ to act as one   * Engaged, on behalf of company, architects to develop land owned by company **without being authorised to do so** |
| Issue | Company wanted to get out of the contract, claimed the managing director did not have actual authority |
| Held | **Elements:**   * **Representation** made to **third party** that the agent had authority * Representation made by someone with **actual authority** * Contractor **(TP) induced** by and **relied** on such representation (reliance) * Form of estoppel by representation * For the protection of third party (apparent authority not to protect the   company but 3rd party; company cannot argue on estoppel, used as a shied only) |
| Note | No actual but apparent authority |

## Relationship with actual authority

* + - “Generally they **co-exist and coincide**, but either may **exist without the other** and their

**respective scope may be different**.” (per Lord Diplock in Freeman case)

* + - * Different in scope: apparent authority can expand actual authority

 Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549 (at S&H p122)

|  |  |
| --- | --- |
| Facts | * *De facto* managing director had final authority to make decisions concerning the company’s finances * In the past, he entered into agreements on behalf of a company without consulting the board of directors of the company (but in fact he has no authority to do it) * **Board was aware** of the practice and **acquiesced** to it (company silently approved it) * He gave guarantee and undertakings on behalf of the company |
| Issue | Acted on behalf the company while the company has no intention to; company argue that he did not have actual authority; vs 3rd party argued that the  director has both actual & apparent authority, relied on that representation |
| Held | Lower court: 3rd party won, on apparent authority argument  Higher court here: does not need apparent authority   * As he has both **implied actual authority** and apparent authority * Transaction covered by implied actual authority to bind the company * Does not need to argue on apparent authority to win the case |
| Note | \*always start with actual authority, but there can be overlap to argue both |

## Apparent Authority – Representation

* Statement (oral or written)
* Conduct
* Passive allowance of an agent to assume position (e.g., allowing sb to occupy a position)

## Representation made by principal

* **Representation by someone with actual authority** (i.e. agent cannot clothe himself with authority)

*-* someone can be principal himself or someone has actual authority within the principal; agent cannot make representation of his own authority, but from the principal

 Armagas Ltd v Mundogas SA [1986] AC 717

|  |  |
| --- | --- |
| Facts | * Fraud committed by ‘purported’ agent * Agent appointed as chartering manager and vice president (transportation) with **limited authority** to enter into charter contract of 1 year only (3rd party dealing with him knows this limitation by market practice) * Agent, being bribed by brokers, entered into chartering contract of 3 years on behalf of company but had no authority to do so **(no actual authority)** * Counterparty of contract **argued apparent authority** to communicate authority (i.e., agent told that he has the authority to enter into the 3-yr contract) |
| Held | Counterparty loses, the principal not coming from the agent, but not from whom has actual authority |
| Note | Agent cannot clothe himself with authority |

 First Energy v Hungarian Intl Bank [1993] 2 Lloyd’s Rep 194

|  |  |
| --- | --- |
| Facts | * First Energy obtained loan from bank, and **approached senior manager** at   **branch** of the bank   * Branch senior manager had **no authority to approve loan** which could **only be approved by headquarters** and **First Energy was aware** of this fact (loan can only get approved by headquarters but not the branch) * Branch manager communicated approval to First Energy due to internal mis-information but in fact loan was not approved. |
| Issue | Bank later wanted to get out of the loan, 3rd party relied on apparent authority, (as they knew in fact the manager has no authority, cannot rely on actual  authority) |
| Held | * Manager has no actual and apparent authority to approve the loan * But has **authority to communicate approval**: **has both actual or apparent authority to enter into this contract bind the principal** * communication alone suffice; **branch manager is senior enough** to make communication |
| Note | Case **extending the scope of apparent authority**: to authority to communication of approval; in favour for 3rd party/customers Complexity in larger company:   * **Ranking/tiers in bank**, not known by customers * law to protect customers regarding the identity of the person they are dealing with |

 British Bank of the Middle East v Sun Life Assurance Co of Canada [1983] 2 Lloyd’s Rep 9

|  |  |
| --- | --- |
| Facts | * Bank alleged insurance company had given them certain undertakings and brought action to recovery money under them * Form of undertakings required more than one signatory but was only signed by unit manager (bank noticed so & make enquiry) * **Bank made written enquiry** with **general manager** (the most senior manager in the bank) and written reply was issued by **branch manager** (2nd tier) confirming authority of **unit manager** (lower tier) * Neither unit or branch manager had actual authority to approve and sign undertaking |
| Held | **No authority to communicate approval** as they are **too low ranked** |
| Note | Vs First energy, similar idea: Consider the ranking/hierarchy of the person who make communication (as a market practice) |

 Kelly v Fraser [2013] 1 AC 450

|  |  |
| --- | --- |
| Facts | * Mr Fraser was an employee of a company and a member of the company’s staff pension plan (commission out a trusty company managing the funds) * Overall management and administration of the pension plan vested in trustees (outside scope of the company, done by 3rd party trusty) * but day-to-day administration delegated to employee benefits division (“EBD”) of employer (2nd party within the scope of the company) * Mr Fraser applied to employer to transfer his benefits from one plan to another; transfer approved by EBD and approval was **communicated by senior person at EBD** (EBD approved the transfer, but the plan requires also approval from the trustee) * Trustees did not, in fact, approve the transfer but transfer was actually made and funds shown in benefits statements received by Mr Fraser   (funds transferred, without approval from the trustee; trustee argued that there is no actual authority to do the transfer) |
| Held | * EBD has the **apparent authority of communicate approval**, even he does not have the actual authority to approve the transfer > bind the trustee   company   * Internal mistake between him and the company; 3rd party prejudice, court with sympathetic to Mr Fraser (3rd party) |

## Reliance

* **Rational reliance**
* *Thanakhorn Kasikorn v Akai Holdings Ltd* (2013)13 HKCFAR 279 (see next slide)
* **No actual or constructive knowledge** of no authority or authority being exceeded
  + Having knowledge would affect the quality of reliance
  + if the party knows but turns blind eyes > by law deemed to have known the truth (constructive) > reliance is not rational

## Constructive knowledge – whether put on notice

* + See if there are suspicious circumstances > if party is put on notice > they should have made enquires
  + If party might have turned a blind eye on the situation & does not make enquires > the law deemed that the person would have known the truth

 HK Chinese Bank v Onlink Investments Ltd [2003] 3 HKLRD 491

|  |  |
| --- | --- |
| Facts | * Mortgage in favour of bank executed by donee (the daughter) of a power of attorney (given by his mother) * Donee exercised her power improperly for her own purpose > suspicious circumstances * Mother (P) > Daughter (A) > bank (TP) |
| Held | The mortgage is to secure the loan of the daughter herself but not her mother,  naturally it would put the bank (TP) on notice, as it does not benefit the donor, suspicious circumstances > Mortgage does not bind the principal (the mother) |

 Thanakharn Kasikorn Thai Chamkat (Mahachon) v **Akai Holdings Ltd** (2010) 13 HKCFAR 479 (on Moodle) (read only paras.5-10, 24, 41-52, 63-92 and 94)

|  |  |
| --- | --- |
| Facts | * **Switch transaction** (intend to cancel the loan in place of it with another one to cover the loan)   A diagram of a company  Description automatically generated   * Ting, acts as director of both companies, negotiate with the bank  1. Bank > Singer NV (old loan)    * Create security interest from the company, but not sufficient to cover the loan > bank in breach of certain regulation 2. Bank > Akai new loan    * Bank engage with Akai (another company),    * Give the exact same amount of loan to Akai    * Akai in return give back some security, sufficient to cover the loan    * Akai went into liquidation   **Suspicions circumstances:**   1. dealing with Ting only (who represent both sides) 2. The bank is the only one who benefits; Akai is not benefiting & is not in need of a loan in the first place   Liquidator challenged that:   * 1. Ting director has limited authority: no apparent authority   2. No enquires made & no rational reliance   Akai (P) > Ting (A) > Bank (3rd party) |

|  |  |
| --- | --- |
| Held | **Suspicious circumstances > the bank should have made enquiries > no rational reliance** on Ting (A) > no binding on Akai (P) > Liquidator can  disclaim the loan & get back the security |

## Effects of Apparent Authority

* Apparent authority can operate to **create authority**
  + where there was none before;
  + to **enlarge** an agent’s **actual** authority;
  + to **clothe an agent with authority** where he usually would have actual authority but for the existence of a restriction unknown to third party; or
    - e.g., authorise sb to buy goods for $10, not to exceed such amount; if exceeding the amount, agent has no actual authority; but if proven apparent authority, can clothe the agent with such authority
  + to **extend an agent authorities beyond termination** of the agency relationship
    - even if agency has stopped; 3rd party might still rely on apparent authority to extend authorities, as 3rd party might not aware of the situation > protect 3rd party

1. **RATIFICATION** (S&H, pp 148 – 157)

## Doctrine of ratification

“*That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act…. and with all the consequences which follow from, the same act done by his previous authority*”: *Wilson v. Tumman* (1843) 134 ER 879

*-* An exceeding P’s authority > If contract is beneficial to the principal > P can either choose to ratify the contract (to adopt it) > then P would be bound to act of the agent

## Agent must have purported to act on behalf of the principal

* TP knowing that there is a P behind, but does not know the identity of P
* If known: disclosed P

 Keighley Maxsted v Durant [1901] AC 240

|  |  |
| --- | --- |
| Facts | * Agent did not tell Durant whether he acted for anyone when ordering wheat from Durant (3rd party thought that he is dealing with P) * Keighley Maxsted (P) prepared to ratify but changed its mind * Durant sued for price (as TP later found out there is P behind) |
| Held | * A did not purported that he acted on behalf of P > TP does not know existence of P > cannot ratify * contract does not bind P > TP cannot sue P for price |

## The act must be something that the principal could have authorised

 Kelner v Baxter (1866-67) L.R.2 C.P. 174

|  |  |
| --- | --- |
| Facts | At time of contract, company ‘principal’ not yet formed > P would not be able to enter into contract |
| Held | P cannot ratify contract  **Test: can P enter into the contract** |

## The principal must have full knowledge of the material facts at the time of ratification

*-* Need to obtain informed consent from P for it to be valid

## Clear manifestation that the principal ratifies

* sth to show P has ratified, need not to have communication; mere facts/evidence to show manifestation is enough e.g., document, acts to prove so
* does not matter if TP knows or not

## Ratification validates the act retrospectively

 Bolton Partners v. Lambert (1889) 41 Ch D 295

|  |  |
| --- | --- |
| Facts | * Offer of lease accepted by BP’s managing director who had no authority (to accept the offer) * Lambert (the landlord) withdrew offer before BP ratified contract |
| Held | * before the principal is bound, he should be able to withdraw, but he **cannot withdraw contract in this case**; once ratification, the effect can go back * can only withdraw when BP did not ratify |
| Note | Contradict to strict contract law: where the offeror can always withdraw the contract before acceptance |

## Ratification ineffective where the retrospective effect would be unfairly prejudicial to third party

* Smith v Henniker-Major & Co [2003] Ch 182
  + If it causes unfair prejudice to other 3rd party (who is outside the contract), there may not be retrospective effect
  + not tested, fact-sensitive
  + ratification to be happened in a reasonable time; otherwise other party’s interest would be have unfairly impacted

# AGENCY OF NECESSITY

## By Operation of Law

* It is impossible for agent to communicate with the principal or to obtain adequate or in time response (or to get instruction from P)
* The action is necessary for the benefit of principal
* Agent acts bona fide in the interest of principal
* Action taken by agent is **reasonable** and **prudent**
* Principal has not given agent express instructions to the contrary

**AGENCY (PART 2)** [March 21]

# UNDISCLOSED PRINCIPAL

S&H, pp 188 – 190; Tan Cheng-Han, “Undisclosed principals and contract” LQR 2004, 120(Jul), 480-509 (on Moodle)

## Siu Yin Kwan v Eastern Insurance Co Ltd [1994] 2 AC 199

“For present purposes the law can be summarised shortly.

1. An **undisclosed principal** may **sue** and **be sued** on a **contract made by an agent** on his behalf, acting within the scope of his **actual authority**.
2. In entering into the contract**, the agent must intend to act on the principal's behalf**.
3. **The agent** of an undisclosed principal may also **sue** and **be sued** on the contract.
   * Agent not dropped out of the scene here
4. Any defence which the third party may have **against the agent** is available **against his principal**. (subject to exceptions)
5. The **terms** of the contract may, expressly or by implication, **exclude the principal's right to sue**, and **his liability to be sued**. The contract itself, or the circumstances surrounding the contract, may show that **the agent is the true and only principal**.”
   * Contract between TP & A (1st contract), TP thinks that A is the true P
   * the contract can state the only this P can enter into the contract > Preventing the true P to enter the adopted contract
   * TP can argue that he is entering the contract only to that particular person and no one else > P would not be able to intervene

# ELEMENTS/RULES

## Agent must have intended to act for the principal

* + - * Purely on part of the agent, as TP would not know there is a true P behind
      * A matter of prove (of intend to act for P)

## Agent must have had actual authority

* **Apparent authority not relevant** (No representation > no reliance > apparent authority cannot apply in undisclosed P)
* **Ratification not applicable** (rationale behind: preventing P from having too much power or autonomy)
* Keighley Maxsted & Co v Durant [1901] AC 240 – no ratification by undisclosed principal

|  |  |
| --- | --- |
| Facts | A has no intention to act for P, TP does not know there is P behind, thinking  that A is the P, that he is dealing with P |
| Held | * No representation made by P (in the mind of TP) > no reliance > apparent authority cannot apply in undisclosed P * No actual authority (or exceeding authority) > P cannot subsequently   ratify contract |

## Third party can only sue either the principal or the agent

* + - * **act of intervention of P** (inform TP that he is the true P) **required for TP be able to sue**; vs if P did not intervene, there would be nothing wrong, TP need not to

know the true P behind for the transaction to complete

* + - * TP can claim against A or P
      * but once choice of target to sue is made, cannot change to sue another person (on principle of estoppel, estopped from pursuing that right)
* Priestly v Fernie (1865) 3 H&C 977 – election to sue either agent or undisclosed principal

|  |  |
| --- | --- |
| Facts | * agent signed bill of lading (of goods) * goods not delivered and plaintiff successfully sued agent * agent became bankrupt before judgment satisfied * now that TP wanted to sue P instead |
| Held | Once choice made to sue A, cannot go back to sue P |

## Third party cannot be deprived of the agent’s liability should he desire it

* i.e. **third party** may **raise defences** he had **against the agent prior** to knowing about the principal
  + Before P intervenes, TP can raise defence against A
  + E.g., TP setting off of debt (TP owes A a debt, A owes TP debts as well), if P intervenes & states that he does not want set-off, then TP cannot set off; vs but can set off debt prior to knowing about P
* **Subject to exception** (depends on fault of the parties)

 Cooke & Sons v Eshelby (1887) 12 App Cas 271 (at S&H p203) – right of set-off by third party

|  |  |
| --- | --- |
| Facts | * sale of cotton by broker for undisclosed principal * third party buyer wanted to set off a debt owed to him by the broker (debt occurred before he knew P) |
| Held | * Buyer not allowed to set off, as buyer in fault (has course of dealing, past transaction, broker sometimes act as P, sometime P) * **buyer should have made enquires**. * **TP buyer at fault that he did not ask** > no set off available |

## Contract not intended to be confined to original parties

* + - * **When identity not important** (when TP does not mind as to whom he is contracting with) > then P cannot intervene
* **Assumption** in ordinary commercial contracts - **willingness to contract with a duly authorised agent** (Assumed that TP is willing to deal with A, unless proven otherwise)

|  |  |  |
| --- | --- | --- |
|  | **Siu Yin Kwan v Eastern Insurance Co** | |
| Facts | * Crew of the ship (A) acting under UP (insurance company), taking out insurance policy * Insurance company (UP) wanted to enforce the policy, argued on non- assignment clause; argue that there is no assignment & they are the UP >   intervene in the policy and be party of the insurance contract |
| Issue | * UP able enforce the policy * As all elements satisfied, only assumption of willing to deal with A |
| * **Except where identity of counterparty is important** (Contracting with only that | | |

particular person)

|  |  |
| --- | --- |
| **Said v Butt [1920] 3 KB 497** (at S&H p 194) – where identity of counterparty is  important | |
| Facts | * a tort case – wrongful inducement of breach of contract (economic tort) P dispute with theatre manager, knowing that theatre manager would not allow him to enter the theatre > find A to buy tickets for him (Contract   between A & theatre); attended the event & blocked by the manager |
| Issue | Can Said enforce the ticket? |
| Held | * **identity of attendee important** (P knew that identity is important in this context > **general presumption rebutted)** * no wrongful inducement of breach of contract |
| Note | **To rebut presumption:**   * **Either circumstances/market practice show that identity important** (e.g., dealing with bank, finance company, taking out loan, presumption rebutted, as creditworthiness of a person is important) * **Or expressly stated in contract** |

* + - **Principal liable for unauthorised act?**

|  |  |
| --- | --- |
| **Watteau v Fenwick [1893] 1 QB 346** (at S&H p 138) – undisclosed principal liable  for agent’s unauthorised act? | |
| Facts | * Original owner of a hotel who is also the manager (A), later sold to P but remains as manager * Order of cigar between A and TP, A actually has no authority to do so (but customers has been dealing with him) * customers tried to get out of contract after knowing the actual owner (UP) |
| Issue | A without authorisation sold cigar to TP, is UP liable?   * Argued usual authority of the manager (putting this person as manager, authority that comes with the position); **claimed usual authority under apparent authority** |
| Held | * UP liable for damages |

|  |  |
| --- | --- |
|  | * Held in favour of customers, reasonable that they would not know the change in position in the hote * But issue being usual authority is the concept of actual authority; **no such**   **term of “usual authority” under apparent authority** |
| Note | * Not overruled in UK; overruled in Canada * The situation is analogous to a partnership wherein one partner is silent but is still liable for actions of the partnership as a whole. |

# EFFECTS OF AGENCY

* + - **Principal vs Third party** (Main contract between P and TP)
* **Unidentified/unnamed principal** (where TP knowing that he is contracting with A & there is P behind, merely but does not know who is the P)

|  |  |
| --- | --- |
| Lai Wo Heung v Cheung Kong Fur Fty Co Ltd [2004] 1 HKLRD 959 | |
| Facts | * contract between TP (employee) & P (employer, a company); * company requires an A (a person) to deal with the employment contract * however there are two companies, with the same A * Employee (TP) unsure which company he is dealing with; TP claimed against company A, but A alleges is the contract is with company B |
| Issue | A acts for 2 hirers, who is P? |
| Held | * **On establishing the agency relationship, the court looks at subjective intention of A and P, but it needs to be verified in combination with objective evidence.** * **Look at A’s and P’s subjective mind of whether there is agency relationship**; What TP think is not relevant |

## Disclosed/Unidentified principal vs Undisclosed principal

* + For the former, contract between **principal and third party** – **agent drops out**
    - * A acted **within his authority** to enter into a **contract with a TP** > **A would drop out of the picture** > the contract treated as between the **P and TP**
  + For the latter **(UP)** – **principal needs to intervene; agent personally liable**
    - * If P not to intervene, A would be liable under contract > TP can sue A only
    - **Principal vs Agent** (agency contract; while A drops out in the main contract)

## Gratuitous agency

* + For this kind of agency, the liability of one to another only lies in TORT, as there is no contract in between the two (E.g. Agent acts negligently to enter into a contract and causes loss (the Standard of a Reasonable person in that circumstances))

## Contractual agency

* + **Agent’s** entitlement to **remuneration** and **indemnification**
  + If incurred any expense during the contract, on behalf of P, can claim form P of those expenses
  + **Right of lien over goods** held for principal if not paid
  + hold on to the goods if unpaid, but cannot sell the goods)

## In either case, agent owes certain duties to principal

* A has responsibility, to control A and protects P
* Law imposes duty to A (see below)

1. **DUTIES OF AGENTS** (S&H, pp 209-214)
   * Agent has duty to perform his undertakings and obey instructions under contract

## Duties in common law – Duty of care and skill under gratuitous agency

|  |  |
| --- | --- |
| Chaudhry v Prabhakar [1989] 1 WLR 29 – gratuitous agency | |
| Facts | * Frds, one wanted to buy car & asked frd B for advice, no contract between them,   frd B recommended frd A to buy problematic car; sue frd B under duty of care |
| Held | * **Duty of care applied to gratuitous agency** * Frd B still owns duty of care under tort > frd B liable for tortious duty * Obiter: counsel should argue negligence advice under tort |

1. **Duties in equity – Fiduciary duties**
   * Bristol & West Building Society v Mothew [1988] Ch 1 at 18

“A fiduciary is someone who has undertaken to act **for or on behalf of another** in a particular matter in circumstances which give rise to **a relationship of trust and confidence**. The distinguishing obligation of a fiduciary is the **obligation of loyalty**. The principal is entitled to the **single-minded loyalty** of the fiduciary. This core liability has several facets.”

* + - Duties under equity and trust
    - **Establish trust and confidence relationship** (P placing trust on A) > if established > **A (the fiduciary) owes obligation of loyalty** (only to serve one master/single-minded loyalty) & cannot act for more than one P > **A can have discretionary power** in course of business (e.g., to negotiation of contract)
    - \*trust and confidence\*: important; decide the relationship first
    - Vs. there may be agency relationship that does not involve trust and confidence > no fiduciary duties (e.g., asking a frd to take a stuff from one point to the other > no fiduciary duties owned to P > no discretion power for him to do other things)
  + **Fiduciary Duties Examples** (non-exhaustive):
* Must act **in good faith**
* Must not, without **full disclosure** to and **obtaining full consent from, the principal**:

## Place himself in a position where his duty and his interest may conflict

|  |  |
| --- | --- |
| **Armstrong v Jackson [1917] 2 KB 822** - agent sold own shares to principal | |
| Facts | * P instructing A (broker) to buy shares > Creating legal obligation for P, placing trust and confidence on A (A is fiduciary) * A managed to buy shares, but did not tell P that he is selling his own   shares to P > place himself in position of conflict |
| Held | * Remedies: breach of fiduciary duty > P can set aside/avoid the contract * If A gained anything from the contract, he could account for profit |
| Note | Can only act for one master, if acting for two > conflicts of interests |

* + **Make secret profits**

|  |  |
| --- | --- |
| Boardman v Phipps [1967] 2 AC 346 (S&H p223) | |
| Facts | * Fiduciaries acting in good faith, holding shares in company but company not doing well > Fiduciaries tried to save the company by increasing shares without the consent of the beneficiaries * Fiduciaries buys shares himself instead; but did not tell the trust company about this act (not the sense he is dishonest but merely in secret) * Later company did turn around, Fiduciaries made his own profits, trust   company sued, claimed the act is without p’s consent |
| Held | For the trustee authorised to do the act: need to **seek P’s informed (tell P**  **the full fact) consent** to keep his own profits |

* **Remedies for breach** (e.g. setting aside of contracts; account for profits)

## Third party vs Agent

* + In general, **agent not liable** under the contract between principal and third party where: (as agent normally would drop out of the picture)
* agent acts **within authority**
* unauthorised act has been **ratified** (A could be liable if unauthorised act not ratified)
* **principal being bound under doctrine of apparent authority** (P liable under main contract)

## However, depending on the circumstances, an agent may be personally liable

* + - Usually arise in written contract (does not work in oral contract)

## Agent being personally liable

“The following rules have… appeared in previous editions and still seem valid starting points:

1. If the contract is signed by the agent personally without qualification, the agent is deemed to have contracted personally unless a contrary intention plainly appears from other portions of the document.
2. The mere fact that the agent is described as an agent, director, secretary, manager, broker, etc. whether by words connected with or forming part of the signature, or in the body of the contract, and whether or not the principal is named, raises no

presumption that the agent did not intend to contract personally; but here again an intention to contract as agent only may be gathered from the whole document and surrounding circumstances.

1. But if the agent adds to a signature words indicating that he or she signs as agent, or for or on behalf or on account of a principal, the agent is deemed not to have

contracted personally, unless it is plain from other portions of the document that, notwithstanding such qualified signature, the agent intended to be bound.” (Bowstead & Reynolds on Agency, para.9-037)

|  |  |
| --- | --- |
| Bridges & Salmon Ltd v The Swan (Owner), The Swan [1968] 1 Lloyd’s Rep 5 (at S&H  p173) – repair of a vessel | |
| Facts | Vessel owned by person X, X leased the vessel to his own company (the hirer hiring the vessel); X took vessel to the shop (TP) to repair, company failed to pay repair charges, TP claimed after X as X is the ultimate owner of the  company **(contract signed as Director [Name of Company])** |
| Held | X signed as Director in the name of company, but this is just a title, **does not**  **mean he is acting as an agent** > **personally liable** under the contract |
| Note | In practice: to avoid being personally liable, add “for and on behalf of” [name  of company] |

* + **Agent liable for breach of warranty of authority** where the agent was not authorised
    - **\*under disclosed agency only\*:** If A exceeds authority, and TP did not or failed to rely on apparent authority > there is **no main contract between P and TP at all** > **TP cannot rely on actual or apparent authority** > but can **sue A for breach of warranty of authority**
    - A liable to TP for breach of warranty > warranty that he was authorities but in fact it is not
    - Q: there is no contract at all > where does the warranty come from (see case law)
    - **Vs when P is undisclosed**: If UP does not show up, UP does not intervene > TP can just sue A under the main contract (as UP never is a party within it)
* **Breach of warranty of authority** (at S&H pp181-185)

|  |  |
| --- | --- |
| **Collen v Wright (1857) 8 E&B 647** | |
| Facts | * agent signed agreement of lease in favour of third party without authority   (acting for disclosed P), later P does not want to honour this lease |
| Held | **No contract between P and TP, but A liable for breaching warranty**   * inducing TP to enter into the main contract, along there is a **collateral contract (about the deed authority:** warranty that A has the authority) > TP relied on this to enter into the contract * turns out untrue that he has such authority **> can sue A for the breach of**   **warranty under the collateral contract** |

|  |  |
| --- | --- |
| **Yonge v Toynbee [1910] 1 KB 215** | |
| Facts | Unknown to the agent (a solicitor who acted for P in a case), P later became  mentally incapacitated > but did not tell the other side (accrued cost in court proceedings); counterparty sued |
| Held | * When p became mentally incapacitated > end of agency > no authority to continue the proceeding > breach of warranty of authority if continue * counterparty able to sue the firm |

* + What if unauthorised act is being subsequently ratified by principal?

## Termination of Agency

* + Agent’s authority may be terminated by:
* **Mutual agreement** (between P and A)
* **Revocation by principal** (P unilaterally revoke the agency)
* **Expiry** of fixed period of appointment (agency automatically ends upon expiry)
* **Destruction of subject matter** of agency (in sale of good, goods destroyed)
* **Frustration** of agency rendering its performance illegal, impossible, or radically different from what the parties originally contemplated
* **Death**, **insanity** or (for an individual) **bankruptcy**, or (for a company) **winding-up** or

**dissolution**, of principal or agent (Yonge v Toynbee – see above)

## Effects on liability

* **Liability of principal to third party** – actual authority vs apparent authority
  + Agency terminated > no actual authority > TP cannot rely on this to sue P
  + But TP can still hold P liable under apparent authority
* **Liability of agent to third party** (TP can still sue A for breach of warranty)
  + **Termination** of agent’s authority is **prospective** – **accrued rights/liabilities not affected**

## General Principal of Estoppel

* + Outside agency law

## Principal estopped from denying existence of an agency relationship

|  |  |
| --- | --- |
| Spiro v Lintern [1973] 1 WLR 1002 (at S&H p137) | |
| Facts | * sale of property by wife; property owned by husband; wife found buyer and sold property to the buyer; buyer visited the house with husband’s presence * husband did not disclose the fact that his wife had no authority to sell to the   plaintiff |
| Issue | * No agency relationship between the couples (in terms of selling the property   > no representation made to P) > P cannot rely one agency law   * P argued on general rule of estoppel: husband must have known that the house is sold, but he did not disclose facts; |
| Held | Husband estopped from denying the authority of the wife |
| Note | Principal creates agency when there is none |

**TOPIC 6 – CREDIT AND SECURITY** [March 28]

# NATURE OF CREDIT AND SECURITY

Goode Chapter 22 (paras.22.05, 22.11 – 22.14)

## Meaning of “Credit”

* + Can mean a **person’s financial standing** which affects his/her/its **ability to borrow money**
  + **Legal meaning of ‘credit’** – **financial accommodation of some kind** i.e. provision of a benefit for which payment is allowed to be made at a later date

## Loan

* **Sale credit** (sell a piece of goods, and allow payment to be made later)
* **Finance leasing** (diff from HP: original owner allow the user to hire that goods, with option to buy; but here, achieving the same purpose to allow hire but **w/o option to buy** at the end of the lease)
  + **Parties to a loan** – lender (who provide credits, **creditor**) vs borrower (**debtor**)
    - in a sale credit situation, there is no lender or borrower > the technical term should be creditor and debtor legally

**Types of loans** (not exhaustive; terms can mix & match e.g., fixed term revolving loan)

## Fixed sum loan vs Revolving loan

* + fixed: borrowing a fixed sum of money, e.g., $1M once draw down, won’t go up again
  + revolving: only a ceiling, provided with a loan up to a certain amount, once draw

down the loan > start to borrow; once you repay the loan, the amount that you are able to borrow will go up again; e.g., credit card, with credit limit, can borrow and pay within that period

* **Fixed term loan** vs **‘On-demand’ loan** (Term loan vs Demand loan)
  + fixed term: term is fixed e.g., 2-year loan
  + Demand: no fixed period; loan is repayable any time, on-demand of the lender or creditor > Lender has right to ask borrower to pay the loan anytime; need to serve written demand to the borrower to recall the loan

## Secured loan vs Unsecured loan

* (Money Lenders Ordinance (Cap. 163)) (for information) (not focus here)
  + secured: loan backed by security
  + unsecured: not backed by anything
  + Ordinance: in real world, if conducting money business, need to apply license for it; with cap of amount; can't lend money on exorbitant interest rate; can have mixed matching of types of loan

## Loans and Security

* **Loan agreements/debentures/loan notes/bonds** - documents creating or evidencing a debt (documents to create loan, all just loans providing credits)
* **Form of security** - **financial collateral** that the creditor could have recourse to
  + the security that could be taken to back a loan
  + otherwise w/o security, creditors would only have personal claim against the borrower > less protection, not strong enough
  + creditors often seek security to have a higher ranking in getting back their money > creditor can have recourse if borrower does not pay up
* **Real security** – creditor has **proprietary claim** (over that property)
  + **Security creates real right** (if the security is created over personal property)
* **Personal or quasi security** (technically not regarded as ‘security’ but a **contractual right**, and lender is still an unsecured creditor)
  + borrower can ask a TP to be the guarantor > **guarantee/indemnity** (see next)
  + only have personal claims against that person (not much better than the loan, does not have more protection, only has recourse to another person), not the real security > still **unsecured loan**
* Retention of title clause?
  + not security interest but like security
  + retaining title of the goods > effect is the same, raise protection to the seller in case of insolvency of the buyer:
  + seller can get back the goods & has better priority or preference over all the other creditors

# REAL SECURITY

Goode Chapter 22 (paras.22.15 – 22.25 (except the sample Debenture), 22.45), Chapter 23

(paras.23.30 – 23.39, 23.41), Chapter 24 (paras.24.02 – 24.06, 24.08, 24.14-24.15 and

paras.24.17 – 24.19), Chapter 25 (paras.25.01 – 25.13, 25.19 – 21, 25.23 – 25.31 and 25.33)

## personal property: security grant over property owned by Hong Kong companies (focus here)

* if individual: if you create security interest over property owned by an individual > need to look at Bill of Sale Ordinance (not focus here)

## Types of real security

* + - Pledges
    - Liens
    - Mortgages
    - Charges
      * court has the power to re-categories them, by look at the substance, to determine so, irrespective of how they are labelled by parties
      * look at the following three aspects

For each type of real security, it involves (a) creation, (b) enforcement and (c) perfection

## Creation

* + Type and nature of security interests created

## Perfection

* + Making known to the outside world of the existence of the security interests
    - diff types of security interest > diff methods of perfection

## Enforcement

* + Method of enforcing security (diff ways for diff types)
    - Note: “security” always singular in this context (vs. securities: shares/bonds/derivative products, i.e. any that’s tradable)

## Pledges

* + - A pledge is a bailment that **conveys possessory title to property owned by a debtor (the pledgor) to a creditor (the pledgee)** to secure repayment for some debt or obligation and to the mutual benefit of both parties
    - **Bailment** for the purpose of security
      * bailment in its nature (bailee to hold a good for a specified purpose)
      * pledge: The specified purpose would be for the purpose of security
    - A form of **possessory security**
      * The personal property that is used must be capable of possession
      * only applies to **chose in possession**
    - Created by **contract** (oral or written)- subject to **pledgor’s right of redemption** and **no right of foreclosure**
      * **pledgor’s right of redemption**: **upon payment** (condition) the bailor can redeem the goods
      * Pledgee have no right of foreclosure: **foreclosure: owning the goods permanently** > bailor/pledgor will lose the ability or right to redeem the goods, even they are able to pay after foreclosure.
      * but here **the pledgee cannot foreclose**: pledgee only with **right to hold on to the goods** permanently and with **right to sell** it if bailor does not pay; but cannot remove the goods and claim to be their own goods

## Types of property that can be pledged

* + **Chose in possession**? **Yes**
  + **Intangible property? No** (not capable of being processed but **stored in physical form?)**

|  |  |
| --- | --- |
| *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41 | |
| Facts | Lien; publishing company has commission to a company to **hold data, can be stored in electric form** (e.g., disk); wanted to terminate the agreement >  company storing the data refused to give back the data, as there is **no**  **payment** (exercise right of lien) |
| Issue | Can create lien (which is also a possessory type of security) over electric form  of data? |
| Held | * Even stored in physical form, just having security over the physical disk,   **but not the information inside**   * only treated over possession of the physical disks but not the data, however they are stored |

## Chose in action? No

|  |  |
| --- | --- |
| *Keller v Ying Wah Tak Holdings Ltd* [1997] 3 HKC 301 | |
| Facts | Credit sitting in bank account; Bank claimed they have a pledge over the credit  in the bank account |
| Held | Credit sitting in bank account > **chose in action > incapable of being**  **possessed** |
| Note | have to sue the bank if you want to get back your deposit if bank doesn’t pay up |

* + **Documentary intangibles? Yes**

|  |  |
| --- | --- |
| *The Odessa* [1916] 1 AC 145 | |
| Facts | * Goods concern was purchased by a German purchaser, holding bill of   lading of the goods but creating a pledge over the bill of lading granted to a bank   * when he has the good, supposed to take delivery of the good; the Crown ceased the good due to war * London bank claimed they have right over the good |
| Issue | whether a valid pledge has been created > Whether the ceasing is unlawful |
| Held | * A pledge can be created over a bill of lading * **Title documents entitle the goods** (an exception); can pledge the document > **amount to a pledge over the underlying goods** |
| Note | * **Bill of lading** 提單(a legal document issued by a carrier to a shipper that details the type, quantity, and destination of the goods being carried) * **give title to the underlining goods** (a physical good): whoever have the lading, can have the possession of the good, e.g., tender this bill and the   carrier will have the given possession of the goods |

* + - Classic example of operation of pledge – **pawnbroking** (governed by the Pawnbroking Ordinance (Cap 166))
* **Perfection** – by delivery of possession of pledged goods

## Enforcement

* + **Sale of pledged property** (with right to sell)
    - **pledgor has power of sale** if goods not paid up > sell the goods at the loss or for profit
    - if sale not enough to cover the loss > still has personal claim to claim for the rest/the shortfall for balance under original loan contract (as the security is only able to satisfy part of the loan)
  + **No right of foreclosure** - need to account to pledgor for surplus
    - if earn extra > return the surplus to the borrower (as the property does not belong to the pledgee)

## Liens

* A right of a person to **retain property** which **is in his possession but belonging to another**, until certain demands of the person in possession are satisfied
  + **offers no rights in the property itself**; **no right to sell** (merely retaining it)

## lien is lost once possession is returned to the owner

* + - **vs pledge**: created by contract > perfection done by delivery > even if the pledgee accidentally returns goods to the pledgor > pledgor to give them back under the

contract

## diff between pledge: diff timeline of creation of security interest

* + - both bailment but here not for purpose of creating security(but to secure a payment?) (before the lien was created, the person was **already in possession of the goods** > not to create security interest > when payment not made > lien then created subsequent to formation of bailment > now have right to retain of goods)

## Types of lien

* + **Common law or contractual lien**
    - contractual lien: create the lien by contract (contract already provided agreement of lien)
    - if in some conflicts, **contractual lien override common law lien** (e.g., common law lien doesn't allow the lien holder to sell the property, but can do this by

contractual lien)

## Statutory lien (e.g. unpaid seller’s lien under SOGO)

* + - if there's a conflict between statute and common law, statute rule over I the common law
  + Equitable lien
  + Maritime lien
* Lien can be **specific** or **general**
* **specific: specific to that particular property** to which the cost incurred (e.g.,. garage can hold on to the car when repairment fee is not paid)
* **general: Any liability or by that person** not just under one contract but multiple contracts (e.g., lawyer deals with series of transactions for one client; if one part of the lawyer fee not paid > can hold on to all the documents)
* **Perfection – by possession** (obtained by creditor under a contract for purposes other than the creation of security interest)

*-* when exercise lien > already has perfection (as there is bailment, right of possession already)

## Enforcement

* + Right of retention only
  + No power of sale unless otherwise agreed in contract or provided for in statute

**Shortcomings of Possessory Security**

* + **Cannot be created over intangible assets**
  + **Owner needs to part with possession of the relevant assets**
* cannot use the assets in their ordinary course of business
* such locking-up of assets is economically inefficient
  + - both parties cannot use the goods subject to security > wastage
    - but advantage: **does not create false wealth**, as all the properties are removed from the owner; vs other security interest can create the picture of false wealth

 **pledge and lien are the two strongest type of security**: as security holder actually physically on hold of the property

* 1. **Mortgages** (non-possessory security)
* **A transfer of ownership/title to a creditor** (mortgagee) by way of security subject to

## equity of redemption

* + mortgagor can exercise right to redeem the property if paid up

## S62(4) of SOGO

“The provisions of this Ordinance relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.”

* + transfer amount to sale of good > the carving out security interest from SOGO; does not need to look at SOGO > just look at common law

## Creation

* By **contract** (usually written, as hard to form oral contract)
* A type of security which involves **transfer of ownership/title** of the relevant

**property/asset** to **creditor** subject to **the equity of redemption**

* + depend on the type of property that is transferred: e.g., piece of land, need to follow land law; shares, need to follow the same rule

## Until redemption of mortgagor, mortgagor is entitled to possession of property

* + merely an entitlement of quiet enjoyment of the flat; but if mortgagor not paid up the whole loan, mortgagee could come up can take possession
  + Usually mortgagee will leave you have quiet enjoyment of your flat unless you default in payment
* **Legal** or **equitable** mortgage
  + legal: if transfer the legal title of the property & follow the right legal procedure
  + equitable: but if not following the exact all legal procedure, but **intention is clear**

to create a mortgage

* + **cannot create legal mortgage of future property** (property that does not exist, or have not been acquired yet), but can create equitable interest > important as it would **affect priority in getting paid**
* **Perfection** – **registration under Companies Ordinance** (Cap.622) (“CO”) (to be explained in next lecture)
  + Security created over property by company Hong Kong companies
  + once registered (mortgage or charges) > open to public inspection (can do company search at CR) > make the public know the existence

## Enforcement

* **Taking possession**
* **Sale** (including right to **appoint a receiver to sell**)
  + to avoid liability, appoint a TP > receiver (stated in term of the agreement), responsible for selling the property
  + if there is surplus they will give it back to the mortgage or and give the rest to the mortgagee
* **Right of foreclosure** (**court order** required to foreclose the property)
  + Normally mortgagee (bank) won't exercise the final right of foreclosure because money is preferrable instead of property
  + not automatic, need to go to court to foreclose the property > once court order granted> can do so > now belongs to the lender (the bank) > borrower cannot redeem it
  + substantive hearing; usually when the company is falling so low in insolvency, no hope of repaying the lender > court would grant the order (as **effect** of foreclosure is borrower can never redeem the property again)

## Charges

* Right of creditor/chargee, created either **by trust** or **by contract**, to have a designated asset of the debtor/chargor **appropriated** to the discharge of the indebtedness of the debtor/charger
  + physical possession with the borrower, but **no right to take possession of the goods** (unlike mortgage); just as encumbrance of the goods, sth attached to the good, does not belong to the pledgee
  + **appropriated**: **set that charge aside**, in case the borrower does not pay up these charged assets, can sell it to satisfy the debts, would never go to the lender
* Confers a **right to realization** of the charged assets under **agreement** or by **court order**

## Creation

* + By **contract**

## An encumbrance on asset(s) which does not involve transfer of title or ownership

* + - as it is setting aside only; does not mean the charge has ownership or title over the goods)

## An equitable interest

* + - could be created over **future property**/basically anything; **doesn't involve transfer of title & ownership > the most popular security**

## Charge or equitable mortgage

“An **equitable mortgage** is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, (legal transfer has not been done) **nevertheless demonstrate a binding intention to create a**

**security** in favor of the mortgagee, or in other words evidence is a contract to do so ….

An **equitable charge** which is not equitable mortgage is said to be created when

property is **expressly or constructively made liable,** or **specially appropriated**, to

**the discharge of a debt** or some other obligation and confers on the chargee a right of realization by judicial process, that is to say, by the appointment of a receiver or an

order for sale” (no transfer of title)

* similar effect (both equitable interest, both confer power of sale); but **difference being foreclosure in equitable mortgage** > superior to charge
* ultimately depends on what the bank want to have

|  |  |
| --- | --- |
| *Swiss Bank v Lloyds Bank* [1982] AC 584 | |
| Facts | * At the material time, **Bank of England’s consent required** for transactions involving foreign currencies * Swiss Bank agreed to lend certain amount of Swiss franc to a company to buy shares (Company borrow from Swiss Bank) * One of the BOE’s conditions was that the **loan could only be used to**   **purchase such shares**, and if shares were sold, **the proceeds would be held in a segregated (separated) account for repayment of the loan** (funds not to be mixed with any other money of the account)   * Swiss Bank alleged that it had a charge over the proceeds of the shares * **The account was opened with Lloyd’s Bank** which was granted a **charge**   over the **shares** (also under security – shares) |
| Issue | competition between Swiss Bank & Lloyd’s Bank as to who has the better security over the monies sitting in that bank account  (Q: **whether Swiss bank has created a charge on the account** opened with  Lloyd’s Bank) |
| Held | * Prima facie: Condition that **segregated account** > assets in the bank account is **appropriated** to secure the liability owed by the debtor to the Swiss Bank (to repay the loan) > charged has created over that account * However, condition was imposed by Bank of England but not required by Swiss Bank; the only person who can waive that condition is BOE * **not created for the purpose of creating security > no charge created** (only   created to satisfy the conditions imposed by Bank of England) |
| Note | * **Intention to create security is important** * Swiss Bank also relied on equitable mortgage > but also failed (difference between **equitable mortgage vs charge**) |

## Fixed Charges

* + Specific charge over **identified and definite property** or property capable of being

ascertained or defined

* + **Borrower cannot dispose of charged assets** without lender’s consent (always insert this clause to prevent court re-construing it as floating charge, important as to the

enforcement of the fixed charge to the bank for better protection)

* + - can create fixed charge on any assets, so long they can be identified
    - possession lies with borrower, but cannot dispose the charged assets
    - e.g., use of machinery, can make use of them in course of business but cannot sell it without consent of the lender
    - **control** in context of fixed charge: The lender can exercise control over the charged property. i.e. the borrower cannot dispose of them without consent

## Characteristics of Floating Charges

* *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 - Classic description of floating charges
  + description not a legal definition (some scholars proposed to abolish this)
  + a wide and intangible term, covers all assets, that potentially all the creditors will be ranked behind floating charge and can get nothing from the borrower
  + A charge on **a class of assets** (present and future)
    - a class: e.g., all the inventories of the company; does not have to be definite
    - present & future: as future assets can come in > subject to floating charge
  + The class of assets charged **would change from time to time** in the ordinary course of business of the company
    - change from time to time: in the course of business, company will sell & replenish the inventories
  + **Until crystallisation**, the company may carry on its business in the ordinary way as far as it concerns the particular class of assets
    - gives freedom to the company to deal in course of business (e.g., to sell the goods while creating security over it)> economic efficient until crystallisation

## Floating Charge – Crystallisation

* The process of the floating charge being **converted into a fixed charge**

*-* cannot enforce floating charge but only when enforcing a fixed charge

* **Common law events** (even if not creating any documents) that trigger crystallization
  + Cessation of business
  + Winding-up
  + Appointment of a receiver (trigger floating charge on floating doc)
    - usually when company fails to pay one debt > triggers all the cross default clauses in all the other documentation

## By agreement

* + **Intervention by debenture holder**, e.g. by notice
  + **Automatic crystallisation** (upon occurrence of specified events)
    - events can be anything, that automatically trigger floating charge e.g., appointment of a receiver under any loans of the company
    - careful when drafting automatic crystallization agreement, if too broad, can trigger this easily

## Floating Charge – Effects of Crystallisation

* As between chargor and chargee
  + chargee has all the rights of a holder of fixed charge (as converted now)
* As between chargee and third parties/other creditors
  + question of priorities (to be discussed in next lecture)

*-* normally a fixed charge (higher priority) will prevail over floating charge; but when floating charged is converted into fixed charge > Q of whether they are of equal

priority > depending on date of creation

## Charges – Perfection and Enforcement

* **Perfection – registration under CO**

*-* same as mortgage, to be explained in next lecture

## Enforcement

* + (For floating charges only) - **Process of crystallisation**

*-* need of crystallization: freezing the charge > converted into fixed charge > so that borrower will no longer be able to dispose of the assets > lender can be sure of what assets are subject to the charge

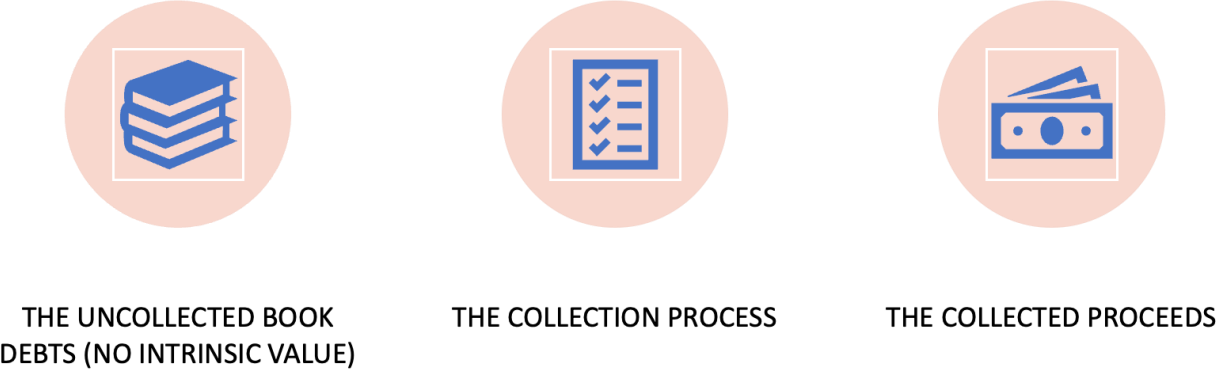
## Sale

* + **No right of foreclosure** (never had ownership in the first place)

## Fixed Charge vs Floating Charge

|  |  |
| --- | --- |
| **Fixed Charge** | **Floating Charge** |
| Equitable in nature | Equitable in nature |
| Attaches to the charged asset | Hovers over a designated class of assets |
| Debtor not free to dispose of charged asset (fixed charge holder has control over the asset) | Debtor free to utilise the charged assets in its ordinary course of business until  crystallisation |
| - | Converts into a fixed charge on crystallisation |

* 1. **Charge over book debts (i.e. receivables)**
     + **Book debts = receivables** (chose in action)
       - receivables 應收帳款: money due to a firm for goods or services delivered or used but not yet paid for by customers; listed on the balance sheet as a current asset
       - fixed charged (higher priority, ppl normally prefer this) > floating charge; either would have priority over unsecured creditors
       - bank would prefer floating charge (more flexibility for the lender to use the money to generate more profit);
       - but under company law, **floating charge can rank behind certain and secured creditor** (e.g., employees which are called preferred creditors > all are unsecured creditors but they will rank in front of floating charge) > bank would mind this as they do not want to lose priority



## 3 Stages:

1. **Uncollected book debts**:
   * sitting on the books of the company, only entry with no value (value only when getting the value)
   * cannot assign/alienate them (no assignment without the lender's consent)
     + fixed charge > can do assignment

## The collection process:

* + how you collect the books (get back the money being owed) >
  + normally required to deposit the money into a segregated account > not allowed to be mixed with other money
    - fixed charge > can collect book debts

1. **The collector proceeds** (money)
   * not allowed to withdraw money without consent
     + fixed charge > can use the proceeds

## Fixed charge vs floating charge –

* + **Fixed charge if** having control over the book debts:
    - the ability to **alienate uncollected book debts** and to **collect book debts**
    - the ability to **use the proceeds** of collected book debts
* fixed charge if control over all 3 stages
  + Previously (since 1970s), courts held that it was possible to create:

## a fixed charge over uncollected book debts and

* bank prefer fixed charge over 1st stage (uncollected book debts) > Not allowing assignment of the uncollected form; and 2nd stage (the collection process) > control the collection process

## a floating charge over the proceeds of collected book debts

* 3rd stage: prefer to create floating charge over this > allow company to withdraw the money to generate more business
* two charges created over the different aspects of the book debts > later created

problems (see cases, where liquidator challenged the charges created are invalid)

|  |  |
| --- | --- |
| *Agnew v CIR* (or *Re Brumark Investments Ltd* case) [2001] 2 AC 710 (PC) | |
| Facts | Liquidator challenged the creation of charges invalid > so that they can get  back the money |
| Held | * Fixed charge over uncollected book debts + floating charge over proceeds   1. **Construe the instruments creating the charge** to ascertain the **nature** of rights and obligations intended to be granted by the parties (look at **substance** over form, a matter of fact)   2. **Categorise the charge as a matter of law** (irrespective of how the   charge is labelled > can be re-categorized) |

|  |  |
| --- | --- |
| *Re Spectrum Plus* [2005] 2 AC 680 (HL) | |
| Facts | * Specific charge over company’s book debts which company was not allowed to sell, factor, discount or otherwise charge to other person without bank’s consent (Fixed charge over uncollected book debts) * Company was obliged to **pay proceeds of collected book debts** to an   **account held with the bank** (Fixed charge over collection process)   * **Company was free to draw on the account** (floating charge over proceeds) * Company went into liquidation and the Liquidator collected certain book   debts |
| Held | * **Cannot create mixed charges over the same book debt** * Overruling all previous judgements |

|  |  |
| --- | --- |
|  | * Court interpreted it as floating charge over the (all 3 stages of) book debts (no fixed charge at all) > company would lose priority * Reason being: artificial & does not make sense to treat 3 stages separately   + as **book debts** does not have any intrinsic value (its value lies in the proceeds) > **cannot separate** uncollected proceeds and collected book debts > **viewed as one and only one thing** (not true assets)   + taking the assets out of the proceeds > **contradict to rule of exercise & control**, when no consent needed to withdraw money   + no control over the 3rd stage > floating charge * but does not mean it cannot create charge, way to do it being:   + either does **not let the borrower to withdraw money without consent** > fixed charge over the whole thing   + or adopt **two-accounts structure**     - blocked account that cannot withdraw money without consent     - another normal account > transfer the money to normal account so that it can be used     - suggestion: transfer money from blocked to normal account by getting one-off consent to withdraw money (but issue in   hard implementation) |
| Note | * **Retrospective effect** of this law |

## Security over Book Debts

* Bank’s commercial objectives
  + **Enable debtor company to use proceeds** sitting in its bank account in its ordinary course of business until occurrence of specified events (when company cannot repay

the loan, e.g. default in repayment of loan) - so that company can generate more income to repay the loan; until bank wants to have more control

* + **Minimise administrative costs** or procedures (no need to seek consent every time when company wants to use proceeds)
  + Obtain a security interest of **higher priority** (e.g. fixed charge)
* Possible ways to overcome problems associated with floating charge

## “Two accounts” arrangement

* + - **blocked account** (fixed charge no withdrawal allowed without consent) +
    - **regular account** (can withdraw money w/consent of the bank, not subject to the charge)

*-* rationale of block account: once you allow the company to freely withdraw funds from that account > effectively allowing the borrower to remove the assets from the charge > no longer fixed charge (but still not practical > as consent is required every time to withdraw from block account)

## Account receivables financing involving sale of receivables and creation of trust

(for information only)

* make the arrangement similar of practical event as if there is a security.
* sale of the receivables to the bank or to a SPV- special purpose vehicle (do it off the book), SPV then holds the receivables on trust for the creditors > now SPV controls the whole process (receivables no longer belong to the company)
* sale of receivables by assignment at a discount; an outright sale
* achieving the same result as security, but not itself security

## Perfection of Company Charges

* **Registration** (make known to the outside world to be transparent, prevent false picture of false wealth > ppl dealing with a company will know the situation)
  + ss.333(1), 334, 335, 344, 351 & 352 Companies Ordinance (“CO”) (Cap.622)
    - **Registrable charges** (=mortgages in this context) – **positive listing approach** (to find out what type of mortgages are to be registered > if not

listed > not charges) vs negative (changed in UK, assuming that it is registered unless stated otherwise)

## Filing / registration requirements

* + - * **Statement of particulars of the charge** + **certified copy of the charge instrument** (2 doc, with CR- companies registry)
      * **Time limit**: one month; time between creation and registration - ‘invisibility period’
    - **Certificate of registration** (issued by registry to the company if registration done)
      * priority of a security interest **determined by date of creation**, not date of registration so long as registration is done within time
  + ss.333(1), 334, 335, 344, 351 & 352 CO (administrative)

## Keeping of register of charges and copies of charges by company

(the company ought to keep them)

* + s.2A Land Registration Ordinance (Cap.128) (for information only)
    - Floating charges on interests in **land** are registrable at the Land Registry **only after crystallization** (floating charge: 2 steps (1) register with CO (2) once crystallized > register again at LR)
* **Consequences of non-registration** (S.337 CO)
  + **Criminal offence** (for company and its responsible persons)
  + **Charge void** against the liquidator and other creditors
  + **Loan still valid** but lender has option to terminate loan

## Debenture – Main Provisions

*-* just a name of the document, document creating the charge, no substantive meaning; the name can be changed to anything,

* **Covenant to pay** – the loan amount being secured
* the main clause: but the name can be changed (the name to be determined by the needs of the transaction)
* the company covenants (formal agreement) to pay the amount under the loan
* needed because the content contemplates **two documents**; Otherwise you don't have covenant to pay because the loan is actually within the same document.
* emphasize there are two documents > need to make sure there is consideration of the company paying > the company will enter into this clause

## Charging clause

* + Type of charge: e.g. **fixed charge over certain assets** + **floating charge over rest of assets**
* if it is fixed charge > need to ascertain assets (as not all assets are situatable for fixed charge)
* can't create two different charges in respect of the same liability; cannot create diff charges over the same loan (e.g., fixed & floating charge for loan A)
* but **can create two different types of charges over the same property in respect of different liabilities** (e.g., loan A for fixed charge, loan B for floating charge > fixed charge and floating charge over the same assets)
  + **Order of the charge** e.g. first, second (subordination, telling priority)

*-* e.g., fixed charge generally has priority over floating charge, but can change the

priority by contract by subordination: subordinate certain security to another one)

## Restrictive covenants

* + **Negative pledge clause** – not to further encumber the security
* an optional clause when there is floating charge
* **to require the company not to create further security over the same assets** (as this is the nature of floating charge)
* negative in the sense tht: company can still at freedom to use the assets in its ordinary cause of business, but only **in restriction of creating security**
  + **Non-alienation clause** – not to sell or dispose of the assets subject to the security

*-* not suitable to floating charge; **consistent with fixed charge**

## Events of default

*-* triggering crystallization

## Automatic crystallisation clause

* only relevant to floating charge; **automatic**: does not need to give notice
* other than common law events triggering crystallization, can also state some specific event in contract that can automatically trigger crystallisation
* risk being one may inadvertently trigger crystallization because it hinges on the event (whether or not one has knowledge of the event) > careful when drafting this

## Appointment of receiver to deal with charged assets

* in charge, does not transfer ownership of the underlying assets > chargor cannot transfer the assets to the creditor > **only right of sale** > **appoint an agent** > so that no need to do it by themselves > does not need to take on liability
* the agreement will provide for appointment of a third party receiver.
* **Receiver’s power** (what can the receivers do)
* **Enforcement of debenture** (sale of charged assets)

## Priorities of Security Interests General/Default Rules

* **Legal interests prevail over equitable interests** unless with notice of prior equitable interests
* legal interests prevail, even if the legal interest is created after or subsequent
* notice: can be actual or constructive
* As between **competing equitable interests**, **the first in time prevails** (subject to

exception – see next slide) – date of creation (not first being registered, with exception)

* As between **successive assignees of debts** (chose in action), **the first assignee**

(without notice of earlier assignment) **to give notice to debtor** has priority over earlier assignee (*Dearle v Hall*) – exception; subject to additional rules

* creating security interest over debts
* first assignee who gives notice to the debtor first > have priority; provided that he does not have notice of early assignment

## Priorities between Fixed and Floating Charges

* **Fixed charge prevails over prior floating charge** (exception to the second rule that first-in-time may not the one that is prevailing)

|  |  |
| --- | --- |
| *Wheatley v Silkstone and Haigh Moor Coal Co* (1885) 29 Ch D 715)) | |
| Facts | Competition between fixed and floating charge (created earlier) |
| Held | Explanation that fixed charge (stronger) prevails   * due to nature of floating charge * **without the negative pledge clause**, the company is allowed not only to dispose of the assets in this ordinary course of business, but also to create security interest (as company can do anything with the assets) |

|  |  |
| --- | --- |
|  | * **if assets created with security interest(fixed)** (even created subsequently) >   will be **stronger than floating charge** > higher priority |

* **Fixed charge postponed to earlier floating charge if** (exception of exception)
  + created with (actual or constructive) **notice of negative pledge clause** (NPC) (not to further encumber the security) in the earlier floating charge or

## created after crystallisation of earlier floating charge

* as after crystallisation > now become fixed charge > competition between two fixed charges > first-in-time prevails (first fixed charge has higher priority)

|  |  |
| --- | --- |
| *ABN Amro* case; s335(1)&(3) of CO) | |
| Facts | * two banks created security interest over the same assets, competition between them   + 1st bank: NPC in the floating charge   + 2nd bank: fixed charge over the same assets * Rule:   + general rule: first-in-time prevails   + exception: fixed charge prevails over prior floating charge if without NPC or without notice of the NPC * **P argued that D has constructive notice of the NPC clause**   + if there is notice > fixed charge should not prevail over the floating charge > P would have priority   + argued registration shown constructive knowledge (expect the 2nd bank would do company search   + but at that time, where the law is not developed to require two   documents, only need to file one doc: statement of particulars which  contains the summary of particulars, a filling of form that the lawyer can tick what goes into the summary   * + but **no requirement as to the exact content of the summary,** which   **could include the NPC clause** but it is **not a must**   * + even the 2nd man has done the search, can only see if the charge is registered but he may not know there is NPC clause * P argued that it is usual practice > they should have included NPC |
| Issue | Whether there is constructive knowledge |
| Held | * No constructive notice: **usual practice does not mean the bank has seen**   **it >** first in time prevail |
| Note | Obiter: **Now deemed to have constructive knowledge, as one would**  **already see the NPC clause** (due to requirement of whole charge instrument) |

## First floating charge prevails over second floating charge

(*Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800)

|  |  |
| --- | --- |
| Held | If created **something of equal status**, apply **general approach** > first in time  prevails |
| Note | **Commercial expectation** that it would create better security if the general  approach applies |

* Combination of common law rules and CO (Examples – not exhaustive)

|  |  |
| --- | --- |
| **First in time Second in time** |  |
| * equal status: 1st prevails * exception: fixed charge prevails * not registered > void against competing creditors |
| Fixed charge (registered) Fixed charge (registered) |
| Floating charge (registered) Fixed charge (registered)  Floating charge (registered) Fixed charge (not registered) Floating charge (not registered) Floating charge (registered) |

* if of equal status > first-in-time prevails
* look at registration (if not registered > void > lose priority no matter first or second); registered always prevails over unregistered one
* then look at nature of the charge > whether floating of fixed > fixed charge prevails (exception to the general rule of first-in-time prevails)

## Broader Picture in Context of Personal Property Law

* ***Nemo dat* rule**

*-* if no title but try to create security interest > no ownership > invalidate security interest)

## Retention of title

*-* effectively self-help remedy > will have priority over subsequent security interest as subject property never belongs to the buyer but still sits with the seller)

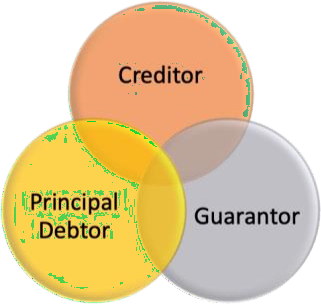
## Purchaser for value without notice

* exception to nemo dat rule, if purchasers can reply on common law or SOGO to get a good title > then can create valid security interest > can defeat the title to the original owner
* Set-off (outside scope of this course)

**Guarantee & Indemnity** (personal security is not strictly speaking security, as loan is still unsecured)

## Guarantee

* **Three-way relationship** – guarantor (TP) promises to be responsible to the creditor for the due performance by the principal debtor of his obligations if the principal debtor fails to perform those obligations.



loan agreement between creditor and principal debtor

* can create guarantee within the same document of loan agreement (TP as one party to sign)
* or can create a separate document (executed by a deed), only the guarantor has to sign; the creditor doesn't have obligations under the guarantee

## Secondary liability

* + depends on **default by principal debtor**
* secondary: if default under > cannot go to guarantor directly, have to resort to debtor first; only when debtor does not pay up > can then claim after guarantor
* distinguished from indemnity
  + **guarantee invalidated** if underlying loan invalid or set aside or varied without consent of guarantor
* if loan agreement is invalidated for whatever reason > guarantee goes away
* if there is change in the loan agreement > need to get consent of the guarantor
* **No specific formality** (usually in writing by way of deed)

## Indemnity

* “A **contract** by one party to keep the other harmless against loss” (*Yeoman Credit v Latter* [1961] 2 All ER 294) – definition
* very useful to keep beneficiary of indemnity harmless against any type of loss
* can be in relation to anything, any type of loan
* **Primary liability** in indemnity, totally **independent**, and **regardless, of any third party default**
* creditor does not need to go to the debtor first (does not matter if debtor is able to pay up) > can go directly to the indemnifier & does not require mitigation for loss (can claim whatever stated in the contract)
* totally independent: even if the underlying loan is void or invalidated, creditor can still go after the indemnifier
* No specific formality (usually in writing by way of deed)

*-* can include indemnity in the same agreement or separate it in another document

**Guarantee vs Indemnity**

Primary liability

Secondary liability

**Indemnity**

**Guarantee**

Liability extinguished/discharged if guaranteed loan invalid/set aside/varied

Liability discharged on usual rules of contract (e.g. illegality) but not affected by validity/variation of underlying loan

*-* indemnity: apply general contract rule

## A matter of construction/characterisation

|  |  |
| --- | --- |
| *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2005] EWCA Civ 395 | |
| “(Mongolian govt) Unconditionally pledges to pay to you (the creditor) upon your simple demand (indemnity? as if it is guarantee, need to resort to debtor first) all amounts payable under the contract if not paid when the same become due (guarantee? call upon the guarantor here)… further **pledges** the full and timely performance and observance by the buyer (about observance or performance of obligations by the principal debtor) of all the terms and conditions of the agreement.”   * govt argued that it is guarantee & the agreement was varied without guarantor’s consent > guarantor then does not need to pay (vs. if it is indemnity > indemnifier   will need to pay no matter under what circumstances) | |
| Held | Court has power to reconstrue the meaning, look into substance to decide if it is guarantee or indemnity   * look at the identity of person entering into the undertaking   + **presumption** that if the **bank** is giving such undertaking > likely to be   **indemnity**   * + but **if given by other person > presumption as guarantee** (unless strong facts suggest otherwise) * however, still need to look into the clause: **ambiguity** > on balance & presumption applies > as guarantee |
| Note | Normally court would not re-construe the meaning, as long as there is consistency  in the agreement; unless there is ambiguity and one party challenged it |

* Weakness of guarantee/indemnity
  + if guarantee/indemnifier is bankrupt > guarantee/indemnity would be useless
  + not really a security, but debtor having personal claims only
* Advantage
  + but does not lock up any assets of the debtor, does not need to pay anything until there is default, even weaker than the other security

(focus only on the brown ones)

## Perfection of mortgages/charges - Registration under the Companies Ordinance (Cap.622) (‘CO’)

* + - **s333(1) CO: “charge includes mortgage”** (mortgage also follow this ordinance)

## s334(1) CO – types of registrable charges

“In this Division, a reference to a specified charge is a reference to any of the following charges created on or after the commencement date of this section—

(see whether registrable)

1. a charge on uncalled share capital of the company;
2. a charge created or evidenced by an instrument that, if executed by **a natural person**, would require **registration as a bill of sale**;
   * instrument: charge for mortgage instruments
   * executed by natural person > ask whether that charge instrument is registrable under Bill of sale > if yes > registrable
   * Bill of Sale ordinance: **all any personal property that created a charge over/subject to charge created by a company**, is **registerable** if created by a natural person, **except/excluding shares or money**
3. a charge on land (wherever situate) or any interest in land, except a charge for any rent or other periodical sum issuing out of land;

## a charge on book debts of the company;

1. a charge on calls made but not paid;
2. a charge on instalments due, but not paid, on the issue price of shares;
3. a charge on a ship or any share in a ship;
4. a charge on an aircraft or any share in an aircraft;
5. a charge on— (about IP, covered by IP law)
6. goodwill;
7. a patent or a licence under a patent;
8. a trademark; or
9. a copyright or a licence under a copyright;
10. **a floating charge** on the company’s undertaking or property.”
    * floating charge would cover almost anything not-specific

## s335 CO – registration

1. A company must deliver (1) **a statement of the particulars of every specified**

**charge** created by the company, together with (2) **a certified copy of the instrument (if any) creating or evidencing the charge**, to the Registrar for registration within the registration period specified in subsection (5)(a).

* + legal obligation to file on the company (later see consequences of failure to do so)
  + (1) a statement of the particulars: a prescribed form, summarize main feature of the charge & (2) certified copy: that create the evidence
  + if commercially sensitive loan, **separate the loan and the charge** instrument into **two documents**: (1) One agreement creating the loan only; (2) second agreement creating the charge > only this will be registered under s335
  + vs. can just create the loan and the charge in one single document;
  + once filled, open to public for inspection

1. Where—
2. a specified charge created by a company—
   1. is given in a debenture forming part of a series by reference to any other instrument containing the charge (whether or not also contained in the debenture); or
   2. is contained in a debenture forming part of a series (but not given in the debenture by reference to any other instrument); and
3. every holder of the debentures of the series is entitled equally to the benefit of the charge,

the company is to be regarded as having complied with subsection (1) in relation to the specified charge if the company delivers a statement of the particulars of the

charge, together with a certified copy of an instrument specified in subsection (4), to the Registrar for registration within the registration period specified in subsection (5)(b).

1. A person interested in a specified charge— (who can actually deliver)

(a) **may** deliver a statement of the particulars of the charge, together with a certified copy of the instrument (if any) creating or evidencing the charge, to the Registrar for registration within the registration period specified in subsection (5)(a); or

* important as there will be consequences for non-filling > Q: from the bank’s point of view, can the bank file it if the company forgot to do so?
* may: option only, not an obligation (e.g., if the company does not do it, the bank/charge holder can do it)

(b)may, in the case of subsection (2), deliver a statement of the particulars of the

charge, together with a certified copy of an instrument specified in subsection (4), to the Registrar for registration within the registration period specified in subsection (5)(b).

1. The instrument is—
2. for the purposes of subsection (2)(a)(i), the instrument by reference to which the specified charge is given; or
3. for the purposes of subsection (2)(a)(ii), any one debenture of the series.
4. The registration period is—
5. for the purposes of subsection (1) or (3)(a)—
   1. **one month** after the date on which the specified charge is created; or

* the **time period is one month** counting from the day on which the charge is created > if miss the ddl > lose priority
* if registered, won’t have undesirable consequences
* but registration does not determine priority, **priority depends on only the date creation of charge**
* **invisibility period:** if registered at the last date of the month, the charge (already created despite not registered is not visible to the outside world during that month
  1. where the specified charge is created outside Hong Kong and comprising property situate outside Hong Kong, one month after the date on which a

certified copy of the instrument creating or evidencing that charge could, if despatched with due diligence, have been received in Hong Kong in due

course of post; and

1. for the purposes of subsection (2) or (3)(b)—
   1. one month after the execution of the instrument by reference to which the specified charge is given or if there is no such instrument, one month after the execution of the first debenture of the series; or
   2. where the specified charge is created outside Hong Kong and comprising property situate outside Hong Kong, one month after the date on which a certified copy of the specified instrument could, if despatched with due

diligence, have been received in Hong Kong in due course of post.

1. A statement of the particulars of a specified charge—
2. must be in the specified form; and
3. must be accompanied by the prescribed fee.
4. If a person interested in a specified charge pays to the Registrar any prescribed fee for the registration of a statement of the particulars of the charge, the fee is recoverable from the company creating the charge.

## S337CO – consequences for failure to register

* 1. This section applies if—
     1. a company **contravenes section 335(1)** in relation to a specified charge, and a person interested in the charge has **not registered the charge under section 335(3)**; or ….
  2. Subject to section 346, the company …, and every responsible person of the company …,

**commit an offence**.

* 1. A person who commits an offence under subsection (2) is liable to a **fine** at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.
  2. Subject to section 346, **the specified charge is void** against any liquidator and creditor of the company …. so far as any security on its undertaking or property is conferred by the charge.
     1. not void against the company (only void against liquidator and creditor, if any other competing creditor come within the picture > now the creditor lose priority and cannot complete)
     2. in current circumstances: it's always against the liquidator and other predators
     3. in liquidation, effectively the charge is void > security owner (the lender) would become unsecured creditor
  3. Subsection (4) **does not prejudice any contract or obligation for repayment** of the money secured by the specified charge.
     1. the loan is a separate contractual obligation > not void, but unsecured
  4. At the lender’s option, **the money** secured by a specified charge becomes **immediately payable when the charge becomes void** under subsection (4).”
     1. charge void > money immediately payable); lender can demand repayment of the loan immediately
     2. used to be automatic change, but now change to at the lender’s option
     3. reason: bank does not want the loan to be void, as if you suddenly call accelerate repayment of the loan, it could trigger the crosswalk clauses of all the other loan agreements that the company may have (but the company may be solvent)
     4. if lender is given the option to make payment immediate payable > could remedy the situation (by e.g., e-execute the security document and register again if there is no competing secured creditor)

## s344 CO – certificate of registration

* 1. This section applies if a statement of the particulars of a charge, and the requisite

accompanying instrument, are delivered by a company or registered non-Hong Kong

company, or by a person interested in the charge, to the Registrar for registration under Division 2 or 3.

* 1. After registering the statement and the requisite accompanying instrument, the **Registrar must issue a certificate** to the company or registered non-Hong Kong company, or to the interested person, certifying registration of the charge under Division 2 or 3.
  2. A certificate of registration must be **signed by the Registrar**.
  3. A certificate of registration is conclusive **evidence that the requirements of this Part as to registration have been satisfied**.

## s351(1) CO – company to keep copies of charges

* 1. A company must keep at its registered office, or at a place prescribed by regulations made under section 657—
     1. a copy of every instrument creating a charge required to be registered by the company under this Part…

## s352 CO – company to keep a register

* 1. A company must keep a register of charges—
     1. at the company’s registered office; or
     2. at a place prescribed by regulations made under section 657.
  2. A company—
     1. must enter in its register of charges—
        1. every charge specifically affecting property of the company; and
        2. every floating charge on the whole or part of the company’s property or undertaking; and
     2. must enter in its register of charges the following particulars in respect of every charge specified in paragraph (a)(i) and (ii)—
        1. the amount secured by the charge;
        2. a description of the property charged;
        3. except in the case of securities to bearer, the names of the persons entitled to the charge.
  3. If a company contravenes subsection (1) or (2), the company, and every responsible

person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

* 1. If an officer of the company knowingly and wilfully authorizes or permits the omission of an entry required to be made under subsection (2), the officer commits an offence and is liable to a fine at level 5.”