

(a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 1. - In General

(a) - Introduction

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Legislative background to the Sale of Goods Act 1979

46-001 The [Sale of Goods Act 1979](#), which came into force on 1 January 1980, consolidates the law relating to sale of goods. It replaced the [Sale of Goods Act 1893](#) (as amended). Prior to the [Consumer Rights Act 2015](#), the [1979 Act](#) had itself been subject to three amending Acts, viz the [Sale of Goods \(Amendment\) Act 1994](#), the [Sale and Supply of Goods Act 1994](#) and the [Sale of Goods \(Amendment\) Act 1995](#), and (in relation to consumers) to the [Sale and Supply of Goods to Consumers Regulations 2002](#)¹ as well as a number of minor statutory amendments. The [Consumer Rights Act 2015](#)² has a major impact on contracts for the sale of goods by businesses to consumers. Many of the rules discussed in this chapter are now limited to business-to-business sales. Consumer contracts are covered in detail in Ch.40. Cases prior to the [1893 Act](#) are of course only relevant in so far as they are consistent with the Act.³ But they are occasionally cited nevertheless. Cases decided on the [1893 Act](#) are usually relevant but should be approached with caution. They may have been based on a form of words no longer contained in the [1979 Act](#), either because the [1979 Act](#) consolidated amendments made to the [1893 Act](#) or because of the subsequent amendments to the [1979 Act](#). But such cases may legitimately be used where the [1979 Act](#), as often, preserves earlier forms of wording (sometimes in a slightly “modernised” form which it appears was not meant to effect practical changes).

Sale of Goods Act rules not exhaustive

46-002

The Act is not exhaustive, and by s.62 it is provided that:

Arrangement of Act

“(1) The rules in bankruptcy relating to contracts of sale apply to those contracts, notwithstanding anything in this Act.⁴

(2) The rules of the common law, including the law merchant,⁵ except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent⁶ and the effect of fraud, is representation,⁷ duress or coercion,⁸ mistake,⁹ or other invalidating cause,¹⁰ apply to contracts for the sale of goods.

(3) Nothing in this Act or the Sale of Goods Act 1893 affects the enactments relating to bills of sale,¹¹ or any enactment relating to the sale of goods which is not expressly repealed or amended by this Act or that.¹²

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

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Rights, etc. enforceable by action

46-003 By s.60:

“Where a right, duty or liability is declared by this Act, it may (unless otherwise provided by this Act) be enforced by action.”¹⁴

Consumer Rights Act 2015

46-004 The Consumer Rights Act 2015 has a major impact on contracts for the sale of goods by businesses (referred to as “traders”) to consumers made on or after 1 October 2015. The provisions of the Act including the implications of Brexit are discussed in detail in Ch.40.¹⁵

Legislative background to the Consumer Rights Act 2015 ¹⁶

- 46-005 Between the enactment of the [Sale of Goods Act 1893](#) and the amendment in 2002 of its successor, the [Sale of Goods Act 1979](#),¹⁷ the legislative frameworks governing contracts for the sale of goods did not themselves apply special rules to govern consumer contracts, that is, broadly speaking, contracts between sellers acting in the course of business and buyers *not* acting in the course of business, though they distinguished between sellers acting or not acting in the course of business. On the other hand, from 1973 legislation controlling the validity of contract terms seeking to exclude or to limit the seller's liability under the statutory implied terms in [ss.12 to 14 of the Sale of Goods Act 1979](#) did distinguish according to the position of the buyer, first by reference to "consumer sales"¹⁸ and then, under the [Unfair Contract Terms Act 1977](#), by reference to a buyer "dealing as consumer".¹⁹

Consumer Sales Directive 1999

- 46-006 However, this established pattern of treatment was changed on implementation of the European Consumer Sales Directive of 1999.²⁰ The main purpose of this directive is to require uniform rules governing certain aspects of contracts of sale of goods by sellers acting in the course of a business to consumer buyers.²¹ The Directive has three main requirements to be given effect in national laws. First, it requires that "the seller must deliver goods to the consumer which are in conformity with the contract of sale", defining "conformity" in terms familiar to the English lawyer from the statutory implied terms of [s.14 and 15 of the Sale of Goods Act 1979](#).²² However, some aspects of the 1999 Directive's requirement of conformity were new to English law, notably, the specified relevance to the quality which a consumer can reasonably expect of goods of "public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative".²³ Secondly, the Directive requires a series of rights for consumer buyers in respect of the "contractual non-conformity" of the goods: at a first level, a right to repair or replacement of the goods²⁴; and, if these remedies are unavailable or fail, a right to "an appropriate reduction in the price"²⁵ and a right to "rescission" of the contract as long as the non-conformity of the goods is not minor.²⁶ Thirdly, the Directive requires that "guarantees" by sellers or producers to consumers²⁷ shall be binding.²⁸

First implementation of 1999 Directive: amendment of existing legislation

- 46-007 The 1999 Directive was first implemented in the UK by the [Sale and Supply of Goods to Consumers Regulations 2002](#) (“the 2002 Regulations”)²⁹ and took effect principally by the amendment of existing UK legislation: the [Sale of Goods Act 1979](#),³⁰ the [Supply of Goods and Services Act 1982](#),³¹ the [Supply of Goods \(Implied Terms\) Act 1973](#)³² and the [Unfair Contract Terms Act 1977](#).³³ In particular, the 2002 Regulations inserted a new Pt 5A into the Sale of Goods Act 1979 providing a bespoke scheme of remedies based on the Directive for those dealing as a consumer. The 2002 Regulations also made provision for “consumer guarantees” as required by the 1999 Directive, which was not inserted into any existing primary legislation.³⁴ In implementing the Directive in this way, the new English law provisions were extended so as to benefit persons “dealing as consumer” within the meaning of the [Unfair Contract Terms Act 1977](#)³⁵ and not merely “consumers” as understood by the 1999 Directive. This law still applies to contracts made before 1 October 2015³⁶ and is discussed in detail in Ch.40.

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The Consumer Rights Act 2015

- 46-008 The [Consumer Rights Act 2015](#) took a radically different approach to implementation of the Consumer Sales Directive 1999 and introduced wider reform to the substantive rights of consumers against traders in respect of the conformity of goods, digital content or services with the contract. The provisions of this Act are described in detail in Ch.40.³⁸
- 46-009 The [2015 Act](#) seeks to set out comprehensively in a single Act all the rules governing the issues arising between the parties to consumer contracts. As a result, the [2015 Act](#) disapplies earlier legislation affecting these categories of contracts (particularly the [1979 Act](#)) so as no longer to apply to them or to apply to them only with qualifications.³⁹ Thus, as special provision is made in the [2015 Act](#)⁴⁰ for the issues formerly (and generally) governed by the [1979 Act](#)’s provisions on statutory implied terms as to title, sale by description, quality or fitness for purpose and sale by sample⁴¹ the [2015 Act](#) disapplies these provisions in the [1979 Act](#) so as no longer apply to “goods contracts” within the meaning of Pt 1 of the [2015 Act](#).⁴² Similarly, the [2015 Act](#) makes special provision for “goods contracts” regarding delivery of goods generally,⁴³ delivery of wrong

quantity,⁴⁴ instalment deliveries⁴⁵ and the passing of risk⁴⁶ and, as a result, it disapplies the equivalent provisions applicable to contracts of sale of goods under the 1979 Act.⁴⁷ Finally, because the 2015 Act also provides a new scheme of remedies for the consumer under “goods contracts” it also deletes Pt 5A of the 1979 Act and disapplies other provisions in the 1979 Act.⁴⁸ The remainder of this chapter accordingly focuses on rules which are either common to consumer contracts for goods and business sales (summarised in para.46-010 below), or which now only apply to non-consumer sales which are not subject to Ch.2 of Pt 1 of the 2015 Act.

Issues still regulated by the Sale of Goods Act 1979

- 46-010 The 2015 Act leaves unaffected a number of provisions of the 1979 Act, which are therefore potentially applicable to the contracts to which the 2015 Act applies. In particular, the 2015 Act leaves unaffected provisions in the 1979 Act governing capacity to buy and sell,⁴⁹ how contracts of sale of goods are made,⁵⁰ existing or future goods,⁵¹ perished goods,⁵² goods perishing before sale but after agreement to sell,⁵³ ascertainment of price,⁵⁴ agreement to sell at a valuation,⁵⁵ stipulations about time,⁵⁶ when property passes (though the 2015 Act refers instead to “ownership” rather than “property”),⁵⁷ sales by a person other than the owner,⁵⁸ duties of sellers and buyers in general,⁵⁹ payment and delivery as concurrent conditions,⁶⁰ the buyer’s liability for not taking delivery of goods,⁶¹ the unpaid seller’s rights against goods,⁶² the seller’s action for the price,⁶³ and damages for non-acceptance against the buyer.⁶⁴

The Uniform Laws on International Sales Act 1967

- 46-011 This Act implemented two international conventions signed at The Hague in 1964. It contains, in Schedules, two uniform laws, the Uniform Law on the International Sale of Goods (“ULIS”) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (“ULFIS”), both of which differ in important respects from the English domestic law. The Laws received the requisite number of ratifications to be brought into effect in 1972.⁶⁵ The Uniform Law on Sales was intended to regulate international sales between parties whose places of business or habitual residence are in the territories of different contracting states,⁶⁶ but by virtue of reservations made by the United Kingdom on ratification, under English law the law applied only where chosen by the parties.⁶⁷ The Uniform Laws had comparatively little effect, and in the United Kingdom virtually none. They have in effect been superseded by the Vienna Convention, below.

Vienna Convention of 1980

- 46-012** A new Convention on Contracts for the International Sale of Goods (CISG), prepared by UNCITRAL and intended to supersede ULIS and ULFIS, was approved in Vienna in April 1980.
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Its scope is similar, and though its rules vary considerably from those of ULIS and ULFIS they are still substantially different from those of English law: they represent, in fact, a compromise between common law and civil law techniques. The Convention came into force on 1 January 1988. It has been ratified or acceded to by over 94 States, including the United States, China, Japan, Australia, New Zealand and most EU countries, but not by the United Kingdom. Should the United Kingdom adopt the Convention, its application would (within its own terms) be automatic and not dependent on the positive choice of the parties; and the same is the case in other countries which become parties to it. The contracting parties, however, may exclude the Convention in whole or in part if they wish. Contracts governed by foreign law may well be governed or affected by the Convention.

Footnotes

- 1 SI 2002/3045.
- 2 The Act has been brought into force so as to apply to contracts made on or after 1 October 2015. See above, para.40-012.
- 3 “The object and intent of the statute of 1893 was, no doubt, simply to codify the written law applicable to the sale of goods, but, in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law”: *Bristol Tramways and Carriage Co v Fiat Motors Ltd [1910] 2 K.B. 831, 836*, per Cozens-Hardy MR. See also *Bank of England v Vagliano Brothers [1891] A.C. 107, 144–145*.
- 4 See Insolvency Act 1986 as amended. See also Vol.I, Ch.23.
- 5 It seems clear that these include the rules of equity, which have in numerous cases been assumed to be applicable: the prime example is that of rescission for misrepresentation, as to which see below, para.46-058. See in general Benjamin’s Sale of Goods, 11th edn (2021), paras 1-008, 1-009.
- 6 See Vol.I, Ch.21.
- 7 See Vol.I, Ch.9; below, para.46-058.
- 8 See Vol.I, Ch.10.
- 9 See Vol.I, Ch.8.

- 10 See Vol.I, Ch.18 (Illegality).
- 11 See the Bills of Sale Acts 1878 and 1882; above, para.41-313.
- 12 e.g. Factors Act 1889.
- 13 See below, paras 46-030, 46-031. New subss.(5) and (6) are added by the Consumer Rights Act 2015 making it clear that certain sections or subsections of the Act no longer apply to consumer sales contracts which are subject to Ch.2 of Pt 1 of the 2015 Act.
- 14 In Chalmers, Sale of Goods, 18th edn (1981), p.261, it is suggested that the purpose of this provision is to exclude the criminal law.
- 15 See above, paras 40-229 et seq. and 40-460 et seq.
- 16 For further detail see above, paras 40-460—40-463.
- 17 These amendments were effected by the Sale and Supply of Goods to Consumers Regulations 2002 SI 2002/3045 implementing the Directive 1999/44/EEC (“the Consumer Sales Directive 1999”).
- 18 Supply of Goods (Implied Terms) Act 1973 s.4 creating new Sale of Goods Act 1893 s.55(4) and (7) (repealed by Unfair Contract Terms Act 1977).
- 19 Unfair Contract Terms Act 1977 s.6(2)(a) (in relation to the terms implied by the Sale of Goods Act 1979 ss.13–15).
- 20 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 (“Consumer Sales Directive” or “1999 Directive”). See above, para.40-461.
- 21 1999 Directive art.1(2)(a) “consumer”; (b) “goods” and (c) “seller”.
- 22 1999 Directive art.3(2). The formulations of these requirements are elaborated further in the Directive.
- 23 1999 Directive art.2(2)(d).
- 24 1999 Directive art.3(3).
- 25 1999 Directive art.3(5).
- 26 1999 Directive art.3(5) and (6).
- 27 Defined in 1999 Directive art.1(2)(e).
- 28 1999 Directive art.6.
- 29 SI 2002/3045.
- 30 2002 Regulations regs 3–6, amending Sale of Goods Act 1979 ss.14, 20 and 61(1) and inserting new Pt 5A.
- 31 2002 Regulations regs 7–12, amending Supply of Goods and Services Act 1982 ss.4, 11D, 11J and 18, and inserting new Pt 1B.
- 32 2002 Regulations reg.13, amending Supply of Goods (Implied Terms) Act 1973 s.10.
- 33 2002 Regulations reg.14, amending Unfair Contract Terms Act 1977 s.12 (for English law).
- 34 2002 Regulations reg.15. The definitions in reg.2 apply only to this provision as the remainder of the substantive provisions of the 2002 Regulations provide for amendments of other legislation (as explained in the text) whose terms fall to be interpreted, therefore, by the legislation which these amendments concern.
- 35 The definition in UCTA was amended to include contracts made by an individual buyer for goods of a kind not normally supplied for private use or consumption.

- 36 For the temporal application of the [Consumer Rights Act 2015](#), see above, para.[40-012](#).
- ③7 A new Directive of 2019 (Directive (EU) 2019/771) governing certain aspects of the law governing consumer contracts for the sale of goods (and repealing the Consumer Sales Directive 1999) had to be implemented by Member States by 1 July 2021, i.e. after IP completion day, as to which see Vol.I, paras [1-016](#) et seq. As the UK has now left the EU it will not be bound to implement the provisions of this new Directive. See the discussion of the “old law” above, paras [40-467—40-592](#).
- 38 See above, paras [40-467—40-592](#).
- 39 [2015 Act s.60](#) and [Sch.1](#).
- 40 [2015 Act ss.9–18](#).
- 41 [1979 Act ss.11–15](#).
- 42 [2015 Act s.60](#); [Sch.1](#), paras [8, 10–14](#).
- 43 [2015 Act s.28](#).
- 44 [2015 Act s.25](#).
- 45 [2015 Act s.26](#).
- 46 [2015 Act s.29](#).
- 47 [1979 Act ss.20, 29–33; 35–36](#); [2015 Act s.60](#), [Sch.1](#) paras [17–22](#).
- 48 [2015 Act s.60](#), [Sch.1](#) paras [24–30, 31–32](#) disapplying [1979 Act s.35](#) (acceptance), [s.35A](#) (right of partial rejection) and [s.36](#) (buyer not bound to return rejected goods) which are inconsistent with the new scheme for consumers. The [2015 Act](#) also disapplies [s.51](#) (damages for non-delivery), [s.52](#) (specific performance), [s.53](#) (remedy for breach of warranty) and [s.54](#) (interest). In consumer contracts for the sale of goods the [2015 Act](#) provides special remedies for buyers. Where there is no direct equivalent to [ss.51, 52](#) and [53](#) the consumer buyer will have to rely on the common law. The [2015 Act s.60, Sch.1](#) also makes other minor amendments to the [1979 Act](#) consequential on its enactment of Pt 1.
- 49 [1979 Act s.3](#), on which see Vol.I, Ch.[11](#) and below, para.[46-033](#).
- 50 Though parallel provision is made for all the types of contract to which Pt 1 of the [2015 Act](#) applies: [2015 Act s.1\(2\)](#).
- 51 [1979 Act s.5](#), on which see below, para.[46-038](#).
- 52 [1979 Act s.6](#), on which see below, para.[46-046](#).
- 53 [1979 Act s.7](#), on which see below, paras [46-047—46-048](#).
- 54 [1979 Act s.8](#), on which see below, paras [46-051—46-052](#).
- 55 [1979 Act s.9](#), on which see below, para.[46-053](#).
- 56 [1979 Act s.10](#), on which see below, para.[46-128](#).
- 57 [2015 Act s.4](#); [1979 Act ss.16–19, 20A–20B](#), below, paras [46-130—46-188](#).
- 58 [1979 Act ss.21–26](#), below, paras [46-193—46-235](#).
- 59 [1979 Act s.27](#), on which see below, para.[46-236](#).
- 60 [1979 Act s.28](#), on which see below, para.[46-237](#).
- 61 [1979 Act s.37](#), on which see below, para.[46-292](#).
- 62 [1979 Act ss.41–48](#), on which see below, paras [46-305](#) et seq.
- 63 [1979 Act s.49](#), on which see below, paras [46-361](#) et seq.

- 64 1979 Act s.50, on which see below, paras 46-370 et seq.
- 65 Uniform Laws on International Sales Order 1972 (SI 1972/973).
- 66 SI 1972/973 art.1.
- 67 Uniform Law on International Sales Act 1967 s.1(3).
- ⑥8 See *Nicholas* (1989) 105 L.Q.R. 201; Honnold, Uniform Law for International Sales, 4th edn (2009); Schlechtriem, Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd edn (2010); Bianca and Bonell (eds), Commentary on the International Sales Law (1987); Bridge, The International Sale of Goods, 4th edn (2017).

(b) - Definitions

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Section 1. - In General

(b) - Definitions

Definitions

46-013 By [s.61\(1\)](#), unless the context or subject matter otherwise requires:



“Action” includes counterclaim and set-off;

‘Bulk’ means a mass or collection of goods of the same kind which—

(a)is contained in a defined space or area; and

(b)is such that any goods in the bulk are interchangeable with other goods therein of the same number or quality⁶⁹;

‘Business’ includes a profession and the activities of any government department (including a Northern Ireland department), or local or public authority;

‘Buyer’ means a person who buys or agrees to buy goods;

‘Contract of sale’ includes an agreement to sell as well as a sale;

‘Delivery’ means voluntary transfer of possession from one person to another⁷⁰ except that in relation to [ss.20A](#) and [20B](#) ... it includes such appropriation of goods to the contract as results in property in the goods being transferred to the buyer⁷¹;

‘Document of title to goods’ has the same meaning as it has in the [Factors Acts](#)⁷²;

‘Factors Acts’ means the [Factors Act 1889](#) and any enactment amending or substituted for the same;

‘Fault’ means wrongful act or default;

‘Future goods’ means goods to be manufactured or acquired by the seller after the making of the contract of sale ⁷³;

‘Goods’ includes all personal chattels other than things in action and money.
⁷⁴

U The term includes emblems, 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 ⁷⁵; and includes an undivided share in goods ⁷⁶;

‘Plaintiff’ includes defendant counterclaiming;

‘Property’ means the general property in goods, and not merely a special property ⁷⁷;

‘Seller’ means a person who sells or agrees to sell goods ⁷⁸;

‘Specific goods’ means goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid ⁷⁹;

‘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.”⁸⁰

- 46-014 By [s.61\(3\)](#), a thing is deemed to be done “in good faith” within the meaning of the Act when it is in fact done honestly, whether it is done negligently or not. ⁸¹
- 46-015 By [s.61\(4\)](#), a person is deemed to be insolvent within the meaning of the Act if he has either ceased to pay his debts in the ordinary course of business or he cannot pay his debts as they become due. ⁸²
- 46-016 By [s.61\(5\)](#), goods are in a “deliverable state” within the meaning of the Act when they are in such a state that the buyer would under the contract be bound to take delivery of them. ⁸³

Reasonable time

46-017 By [s.59](#):

“Where a reference is made in this Act to a reasonable time the question what is a reasonable time is a question of fact.”⁸⁴

Consumer Rights Act 2015

46-018 The [Consumer Rights Act 2015](#) removes from the [Sale of Goods Act](#) those definitions that are relevant only to consumer contracts, and provides its own definitions. The principal change is that the concept of “dealing as a consumer”⁸⁵ is abolished and the Act applies “where there is an agreement between a trader and a consumer for the trader to supply goods, digital content or services, if the agreement is a contract”.⁸⁶ “Trader” is defined as “a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf”.⁸⁷ “Consumer” is defined as “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”.⁸⁸ The principal changes of substance is that only an individual can now count as a consumer and that there is now explicit provision for the case in which goods are bought partly for business and partly for non-business purposes: the question will be which was the main purpose.⁸⁹

Overseas sales

46-019 Special forms of contract have been developed by traders for overseas sales, and in particular for sales which contemplate that the goods will be carried to their destination by ship or by multimodal transport. The most frequently encountered types of contract are CIF (cost, insurance and freight), where the price is inclusive of insurance and freight to the designated port of destination, and FOB (free on board), where the seller is required at his own expense to deliver the goods to and place them on board a ship at the designated port of shipment. But the standard types of such contract also include: C&F or CFR (cost and freight), FAS (free alongside ship), FCA or FRC (free to carrier at a named place), CIP (carriage and insurance paid to a named place of destination), as well as Ex Works, Ex Ship and Ex Quay. Agreed terminology has been formulated

by the International Chamber of Commerce in Incoterms,⁹⁰ but the incidents of the contracts there defined are sometimes at variance with those implied by English law. A detailed discussion of the law applicable to overseas sales can be found in Pt 7 of Benjamin's Sale of Goods.⁹¹

Footnotes

69 Inserted by [s.2 of the Sale of Goods \(Amendment\) Act 1995](#): see [ss.20A, 20B](#), see below, paras [46-160](#) et seq. It is probable that this definition does not apply to [s.15](#): see below, para.[46-114](#).

70 But the delivery may be constructive; see below, para.[46-241](#).

71 Amended by [s.2 of the Sale of Goods \(Amendment\) Act 1995](#). See below, paras [46-160](#) et seq.

72 See [ss.24, 25](#). The expression "document of title" is stated by [s.1 of the Factors Act 1889](#) to include "any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented". This is considerably wider than the common law notion of a document of title, viz a document which is treated as representing the goods, which is effectively confined to bills of lading. See Benjamin's Sale of Goods, 11th edn (2021), para.18-025. A motor vehicle registration document is not in England a document of title under the Act: *Joblin v Watkins and Roseveare (Motors) Ltd (1949) 64 T.L.R. 464*; and see *Beverley Acceptances Ltd v Oakley [1982] R.T.R. 417*.

73 See below, para.[46-037](#).

74 The term "personal chattels" covers any tangible movable property except money: [s.61\(1\)](#) (but see *Moss v Hancock [1899] 2 Q.B. 111*; coin bought as curiosity, and not received as current coin). It includes ships: *Behnke v Bede Shipping Co [1927] 1 K.B. 649, 659*; but these are largely governed by their own special rules: see [Merchant Shipping Act 1995](#). It does not include things in action, such as shares, insurance policies, negotiable instruments, and industrial property; but it does include a part interest in goods (see [s.2\(2\)](#), below, para.[46-020](#); *Nicol v Hennessy (1896) 1 Com. Cas. 410*). It has been held that a sale of a computer system, including both hardware and software, is a sale of goods: quaere as to software alone: *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd [1983] 2 N.S.W.L.R. 48*; *Rubicon Computer Systems Ltd v United Paints Ltd (2000) 2 T.C.L.R. 454*; and see *St. Albans City and DC v International Computers Ltd [1996] 4 All E.R. 481*; but cf. *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd 1996 S.L.T. 604*. In *Southwark LBC v IBM UK Ltd [2011] EWHC 549 (TCC), 135 Con. L.R. 136* it was said that compact discs impressed with software can be considered as "goods". The issue does not easily arise as such because matters of quality and suitability for purpose can be disposed of under express contract terms, the implied terms of the [Supply of Goods and Services Act 1982](#) and the implication

of terms by analogy with that statute and the *Sale of Goods Act*. See also discussions by *Green and Saidov [2007] J.B.L. 161*; *Naranjan [2009] J.B.L. 799*; and below, para.46-109. It was decided, after a careful survey of the authorities, that software is not “goods” in *Gammasonics Institute for Medical Research Pty Ltd v Comrad Medical Systems Ltd [2010] NSWSC 267*. In *Software Incubator Ltd v Computer Associates UK Ltd [2018] EWCA Civ 518* the Court of Appeal held that the concept of a “sale of goods” in the *Commercial Agents (Council Directive) Regulations 1993* was limited to a sale of tangible rather than intangible property. Given the judge’s finding of fact that the licence to use electronically supplied software was intangible property (see [68]) the Regulations accordingly were not engaged. The Court of Appeal accepted that it might seem superficially illogical that the medium on which software was supplied became determinative ([51]) and that the tangible/intangible construction that excludes software seems artificial in the modern age but given the state of the authorities held that it was not open to the Court of Appeal to adopt what might be seen as a common sense meaning. On appeal, the Supreme Court stayed proceedings and referred the meaning of “goods” in this context to the Court of Justice. The Court of Justice (*C-410/19*) held that giving the term goods in the Directive an autonomous Community meaning based on its usual meaning in everyday language, “goods” meant products which could be valued in money and which were capable of forming the subject of commercial transactions. Furthermore, the use of the term “goods” in the various language versions of the Directive did not indicate any distinction according to the tangible or intangible nature of the goods concerned. The term “goods” within the meaning of the Directive could accordingly cover computer software regardless of the medium on which that software was supplied. The *Consumer Rights Act 2015 Ch.3* provides statutory terms for contracts for the supply of digital content to consumers and provide the consumer with remedies for breach. See above, paras 40-539—40-568.

75 Slag, cinder tips or other artificially formed mounds of débris may, in the process of time, so accede to the soil as to become incapable of forming the subject matter of a contract of sale within the *Sale of Goods Act*: *Morgan v Russell [1909] 1 K.B. 357*; *Mills v Stokman (1967) 116 C.L.R. 61* (abandoned slate); cf. *Kursell v Timber Operators and Contractors Ltd [1927] 1 K.B. 298* (growing timber). Mineral oil extracted and removed from the soil is in the category of movables: *Anglo-Iranian Oil Co Ltd v Jaffrate [1953] 1 W.L.R. 246, 260*. It has been held in Australia that the sale of a house to be moved on a trailer was a sale of goods: *Symes v Laurie [1985] 2 Qd.R. 547*.

76 Amended by *s.2 of the Sale of Goods (Amendment) Act 1995*; see below, paras 46-160 et seq.

77 A special property could arise, for example, by way of pledge. For the distinction, see *Sewell v Burdick (1884) 10 App. Cas. 74*; *The Odessa [1916] 1 A.C. 145*.

78 See *s.2*, below, para.46-020.

79 Amended by *s.2 of the Sale of Goods (Amendment) Act 1995*; see below, paras 46-160 et seq.

80 See *s.11*, below, para.46-056; Vol.I, paras 27-013 et seq.

81 See *Jones v Gordon (1877) 2 App. Cas. 616*; *Janesich v Attenborough & Son (1910) 102 L.T. 605*; *Moody v Pall Mall Deposit and Forwarding Co Ltd (1917) 33 T.L.R. 306*; *Heap v Motorist’ Advisory Agency Ltd [1923] 1 K.B. 577, 590, 591*; *Davey v Paine Bros (Motors) Ltd [1954] N.Z.L.R. 1122, 1130*; *Barclays Bank Ltd v TOSG Trust Fund Ltd [1984] B.C.L.C.*

1, 18; GE Capital Bank Ltd v Rushton [2005] EWCA Civ 1556, [2006] 1 W.L.R. 899. cf. Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd [1949] 1 K.B. 322, 338; Pearson v Rose and Young Ltd [1951] 1 K.B. 275, 289; Stadium Finance Ltd v Robbins [1962] 2 Q.B. 664, 672, 675; Astley Industrial Trust Ltd v Miller [1968] 2 All E.R. 36 (whether purchase of vehicle without registration document is evidence of bad faith). See ss.23–25, below, paras 46-208 et seq.

82 See below, para.46-314.

83 See below, paras 46-140—46-141.

84 e.g. s.18 r.4, ss.29(3), 35, 37, 48(3).

85 Previously found in Sale of Goods Act 1979 s.61(5A).

86 s.1(1).

87 s.2(2).

88 s.2(3).

89 See further above, para.40-483.

90 Incoterms 2020 (ICC January 2020).

91 11th edn (2021).

(a) - Contract of Sale

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 2. - Formation of the Contract

(a) - Contract of Sale

Sale and agreement to sell

- 46-020 The terms “sale” and “agreement to sell” are defined as follows by [s.2 of the Sale of Goods Act 1979](#):

[**Arrangement of Act**](#)

(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property ⁹² in goods to the buyer for a money consideration, called the price.

(2) There may be a contract of sale between one part owner and another.

(3) A contract of sale may be absolute or conditional. ⁹³

(4) 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.

(5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

(6) 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.”

Two points here are to be noted. The first is the distinction between a sale and an agreement to sell. The second is the distinction between a contract of sale, which includes both a sale and an agreement to sell, and other similar contracts.

Sales distinguished from agreements to sell

- 46-021 It is necessary to make this distinction because a sale of goods is both a contract and a conveyance⁹⁵; an agreement to sell, on the other hand, is a contract and nothing more. It follows that if one party to an agreement to sell defaults, the other party is limited to a personal remedy. But if there has been a sale the buyer also may have proprietary remedies in respect of the goods themselves, and the seller can sue for the price. Further, the risk of destruction or deterioration of the goods in a business-to-business transaction normally remains with the owner: thus it usually lies on the seller under an agreement to sell, but if there has been a sale the *prima facie* rule is that the buyer assumes the risk.⁹⁶

Contracts of sale distinguished from other contracts

- 46-022 Before the repeal of s.4 of the *Sale of Goods Act 1893*,⁹⁷ the distinction between sale and other similar contracts was important, for until then sales, but not other contracts relating to goods, required written evidence. Since that time the matter is of less significance. But it may still be necessary to draw the distinction. For example, the Act lays down implied terms as to title, quality and description⁹⁸; and the *Unfair Contract Terms Act 1977* contains special provisions regulating the exclusion of these terms,⁹⁹ which are different from those applicable to other contracts for the supply of goods¹⁰⁰ or to contracts in general.¹⁰¹ Although similar terms are laid down for hire-purchase contracts, they did not apply to contracts of barter, for work and materials, or of pure hire. Thus the section of the *Unfair Contract Terms Act 1977*, which applied to these contracts,¹⁰² when first passed had little to bite on. However, the courts applied similar rules by analogy¹⁰³; and subsequently the *Supply of Goods and Services Act 1982* laid down implied terms for these contracts also¹⁰⁴; but they are not identical with those for sale or hire-purchase. Again, the *Sale of Goods Act* contains detailed provisions under which the property in goods passes, in many cases independently of delivery.¹⁰⁵ These rules as such do not apply to contracts which are not contracts of sale.¹⁰⁶ The distinction may also be important in the case of frustration: certain contracts for the sale of goods are governed by s.7 of the Act, but the consequences of frustration when the case falls outside s.7 are governed by the general law and by the *Law Reform (Frustrated Contracts)*

Act 1943.¹⁰⁷ And in general, the other provisions of the Act are intended for contracts of sale and not for other contracts.¹⁰⁸

Transactions outside the Act

46-023 The following transactions are outside the scope of the Act.

(i) Gift:

46-024 The provisions of the Act, e.g. those as to quality and as to the passing of property, do not apply to gifts. This can be important in the case of advertising and promotional offers of goods: if there is a sale, the Act will apply, but if there is merely a gift it will not.¹⁰⁹

(ii) Exchange or barter¹¹⁰:

46-025 A sale presupposes a price, and if the consideration for the transfer of property is goods and not money, the transaction is one of exchange or barter and not one of sale.¹¹¹ For s.61(1) defines goods so as to exclude money.¹¹² But in order to constitute a sale it is not necessary that the entire consideration should be money, and if it consists partly of the delivery of goods and partly of money, the contract is probably one of sale; for such a part-exchange arrangement may be treated as involving reciprocal sales with a set-off of prices,¹¹³ or as a sale where the buyer has the option of satisfying the price in part by delivery of goods.¹¹⁴ On the latter interpretation the traded-in article would not be the subject of a contract of sale. But implied terms are provided for contracts of barter by the Supply of Goods and Services Act 1982.

(iii) Contract for work and materials:

46-026 The distinction between such contracts and contracts of sale has long given rise to controversy. Where the person for whom the work is done supplies all or the principal materials,¹¹⁵ or where the work done involves affixing, or installing materials on the land¹¹⁶ or a chattel¹¹⁷ of that person, the contract is likely (but not certain)¹¹⁸ to be treated as one for work and materials. More difficulty occurs where the work done goes into the actual creation of something produced with materials furnished by the creator. In *Lee v Griffin*¹¹⁹ Blackburn J stated that the test was

whether the contract was intended to pass the property; if so, the contract must be one of sale. But in *Robinson v Graves*¹²⁰ the Court of Appeal held that a contract to paint a portrait was one for work and materials and not for the sale of goods, and Greer LJ stated the law as follows:

“If the substance of the contract ... is that skill and labour have to be exercised for the production of the article and ... it is only ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture.”

The latter dictum, being more recent, presumably carries more weight, but it has been observed that the question is one of choice between two equally arbitrary rules.¹²¹ The tendency in the courts was in any case to construe contracts for work and materials as though terms analogous to the implied terms of the *Sale of Goods Act* were applicable to them.¹²² But implied terms applicable to contracts for work and materials are now provided by the *Supply of Goods and Services Act 1982*.¹²³ The *Consumer Rights Act 2015* introduces a new concept of the “mixed contract”, i.e. one that involves the trader supplying more than one of the three elements (goods, digital content and services) covered by the three chapters of Pt 1. The 2015 Act also provides that a contract is a sales contract if the goods are to be manufactured or produced, the trader agrees to supply them to the consumer, and the goods will then be owned by the consumer.¹²⁴

(iv) Hire-purchase agreements, conditional sale agreements and credit sale agreements¹²⁵:

46-027

A hire-purchase agreement is an agreement for the bailment of goods for hire with an option to purchase.¹²⁶ Such a transaction is not governed by the *Sale of Goods Act*, and indeed this form of contract was in part devised to avoid its provisions, especially that by which a person who has agreed to buy goods and obtained possession of them with the consent of the seller can in some circumstances pass a good title to a bona fide purchaser though he has no property in the goods.¹²⁷ Hire-purchase agreements, however, have since 1938 been controlled by other statutes in the interests of consumer protection. The principal current statute imposing such control¹²⁸ is the *Consumer Credit Act 1974* (which applies when the hirer is an individual).¹²⁹ Terms analogous to those implied by ss.12 to 15 of the *Sale of Goods Act* are implied in all hire-purchase agreements by the *Supply of Goods (Implied Terms) Act 1973*.¹³⁰ Hire-purchase agreements under which a trader supplies goods to a consumer are within the scope of Ch.2 of Pt 1 of the *Consumer Rights Act 2015*.¹³¹

Conditional sale agreements

- 46-028 A conditional sale agreement is an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.¹³² Such a transaction is a contract of sale of goods¹³³ and is governed by the [Sale of Goods Act](#). But it is also subject to the control of the [Consumer Credit Act 1974](#)¹³⁴ if the buyer is an individual. Unlike a hirer under a hire-purchase agreement, who has merely an option to purchase the goods, a buyer under a conditional sale agreement will have agreed to buy them, so that if he is in possession of the goods with the consent of the seller he may be able to pass a good title to a bona fide purchaser.¹³⁵ But a buyer under a conditional sale agreement which is a consumer credit agreement within the meaning of the [Consumer Credit Act 1974](#) is deemed not to be a person who has bought or agreed to buy goods.¹³⁶ Such an agreement is therefore assimilated to a hire-purchase agreement for the purposes of restricting the buyer's ability to pass a good title to the goods. Conditional sale agreements under which a trader supplies goods to a consumer are within the scope of [Ch.2 of Pt 1 of the Consumer Rights Act 2015](#).¹³⁷

Credit-sale agreements

- 46-029 The term "credit-sale agreement" is largely of statutory origin: it refers to "an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, but which is not a conditional sale agreement",¹³⁸ viz the property passes to the buyer in accordance with normal rules and is not reserved to the seller.¹³⁹ Such a transaction is a sale of goods and is therefore governed by the [Sale of Goods Act](#). A credit-sale agreement is a consumer credit agreement if the buyer is an individual¹⁴⁰ and (unless otherwise exempt)¹⁴¹ the agreement will be a regulated agreement¹⁴² and subject to the control of the [Consumer Credit Act 1974](#),¹⁴³ unless the number of payments to be made by the buyer in respect of credit does not exceed four.¹⁴⁴ A buyer under a credit-sale agreement can pass title to a third party by virtue of the fact that he is the owner of the goods.

(v) Mortgages of goods:

- 46-030 A legal mortgage of goods consists in the transfer of property in the goods in order to secure a debt; the mortgagor retains possession of the goods, subject to the mortgagee's power of taking

possession on default in payment. As such, a mortgage of goods bears certain similarities to a contract of sale, since there is a transfer of the property in the goods by the mortgagor to the mortgagee with a proviso for retransfer on redemption. But a transaction in the form of a contract of sale which is intended to operate by way of mortgage, charge or other security is not subject to the provisions of the [Sale of Goods Act](#).¹⁴⁵ If, however, it is reduced to writing, the transaction may fall within the [Bills of Sale Acts 1878 and 1882](#).¹⁴⁶ Considerable difficulty may, however, arise where an owner of goods sells the goods to a purchaser and then immediately enters into a hire-purchase agreement whereby he (the original owner) agrees to hire the goods. The combined effect of the sale and lease back may be that of a loan on security of the goods. A genuine sale and a genuine lease back of the same goods will be upheld as falling outside the [Bills of Sale Acts](#).¹⁴⁷ But circumstances may be present which indicate that such a two-stage transaction is in reality a cloak for a mortgage and so void under the [Bills of Sale Act 1882](#).¹⁴⁸

(vi) Pledges:

46-031

A pledge consists in the bailment of goods to secure payment of a debt.¹⁴⁹ The general property in the goods remains in the pledgor, though the pledgee thereby acquires a special property for securing repayment of the debt. The provisions of the [Sale of Goods Act](#) about contracts of sale do not apply to a transaction in the form of a contract of sale¹⁵⁰ which is intended to operate by way of pledge.¹⁵¹

(vii) Agency:

46-032

A person who agrees to procure goods for another may be an agent, or he may buy them and resell them to that other. Conversely a person who agrees to sell goods for another may be an agent, or he may be a person buying for resale, whether outright or on a “sale or return” basis.¹⁵² An agent’s duties are normally no more than to use his best endeavours and are quite different from those of a seller. The extent to which the person concerned is remunerated by commission is relevant to this distinction: even more relevant is the extent to which he has to account to the other.¹⁵³

Footnotes

92 It is not, of course, essential that any immediate right to possession should be passed by the contract: see *Watts v Seymour [1967] 2 Q.B. 647*. But the title passed must be absolute and not merely possessory: see *Rowland v Divall [1923] 2 K.B. 500*; and the transfer of property

must be the essence of the contract: see *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23. The Supreme Court, upholding the decision of the Court of Appeal ([2015] EWCA Civ 1058; see *L. Shmilovits* [2016] L.M.C.L.Q. 20 and *A. Tettenborn* [2016] L.M.C.L.Q. 24 and, in relation to the decision of the Supreme Court, *L. Gullifer* [2017] L.Q.R 244), held that a contract for the supply of fuel bunkers, which contained a retention of title clause and permitted the purchasing vessel owners to consume the bunkers during the credit period, was not a contract for the sale of goods within the meaning of s.2(1). See below, para.46-174.

- 93 The meaning of the term “conditional” is not clear, but it is submitted that it refers to a contract in which the duties are subject to a suspensive or resolutive condition, of which an example is discussed in connection with future goods: In *Hughes v Pendragon Sabre Ltd (t/a Porsche Centre Bolton)* [2016] EWCA Civ 18 there was a contract to sell if the seller was allocated one of a new model of car by the manufacturer. The contract was construed as an agreement to sell future goods to be acquired by the seller which depended on a contingency: see below, para.46-037. As such it should be distinguished from an option to buy: see *Marten v Whale* [1917] 2 K.B. 480. cf. *Spiro v Glencrown Properties Ltd* [1991] Ch. 537. Difficulties occur because of the use of the term “unconditional” in s.18 r.1 (see below, para.46-028); and because of conditions affecting the passage of property creating a “conditional sale” (see below, para.46-028).
- 94 As to when the property is transferred, see below, paras 46-130 et seq.
- 95 See *Mischeff v Springett* [1942] 2 K.B. 331, 336.
- 96 See below, para.46-189.
- 97 See below, para.46-034.
- 98 1977 Act ss.12–15, see below, paras 46-075 et seq.
- 99 s.6, see below, paras 46-117 et seq.
- 100 See s.7; Vol.I, para.17-098.
- 101 1977 Act ss.2, 3; Vol.I, paras 17-085 et seq.
- 102 s.7.
- 103 See below, para.46-026.
- 104 See ss.1, 2–5, 6–10.
- 105 See below, paras 46-130 et seq.
- 106 See *Flynn v Mackin and Mahon* [1974] I.R. 101, noted (1976) 39 M.L.R. 589 (barter).
- 107 See below, para.46-047 and Vol.I, paras 26-104 et seq.
- 108 See *Widenmeyer v Burn, Stewart & Co Ltd* 1967 S.C. 85 (pre-1893 rules as to risk applied to contract of barter).
- 109 The point arose in connection with purchase tax: see *Esso Petroleum Co Ltd v Customs and Excise Commissioners* [1976] 1 W.L.R. 1. See also *Beecham Foods Ltd v North Supplies (Edmonton) Ltd* [1959] 1 W.L.R. 643; *Chappell & Co Ltd v Nestlé Co Ltd* [1960] A.C. 87. Equally, Pt 1 of the Consumer Rights Act 2015 does not apply to gifts of goods. Nor does it apply to gifts of digital content: it applies only where the consumer is to pay a price or the digital content is available “free” but only with goods, services or other digital content for which the consumer must pay. See above, para.40-545.

- 110 See Law Com. No.95 (1979); *Forte* (1983) 28 J. Law Soc. Scotland 108, 314; *Jacobs* (1986) 15 Anglo-Am.L.R. 234.
- 111 *Harrison v Luke* (1845) 14 M. & W. 139; *Simpson v Connolly* [1953] 1 W.L.R. 911, 915. Contracts of barter or exchange between a consumer and a trader are within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015 as far as the trader's obligations are concerned as they constitute "contracts for the transfer of goods" under s.8. See above, para.40-493.
- 112 See above, para.46-015.
- 113 See *Sheldon v Cox* (1824) 3 B. & C. 420; *Aldridge v Johnson* (1857) 7 E. & B. 885. But cf. *Chappell & Co Ltd v Nestlé Co Ltd* [1960] A.C. 87.
- 114 See *GJ Dawson (Clapham) Ltd v H & G Dutfield* [1936] 2 All E.R. 232.
- 115 See *Dixon v London Small Arms Co* (1876) 1 App. Cas. 632 (manufacture of rifles).
- 116 *Tripp v Armitage* (1839) 4 M. & W. 687 (building); *Appleby v Myers* (1867) L.R. 2 C.P. 651 (machinery); *Reg Glass Pty Ltd v Rivers Locking Systems Ltd* (1968) 120 C.L.R. 516 (burglar-proof door); *Archivent Sales and Development Ltd v Strathclyde RC* (1984) 14 B.L.R. 70 (building).
- 117 *Stewart v Reavell's Garage* [1952] 2 Q.B. 545 (relining car brakes).
- 118 See *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] Q.B. 791, 805, 809 (contract to install bulk food hopper held one of sale: but cf. Lord Denning MR at 800).
- 119 (1861) 1 B. & S. 272.
- 120 [1935] 1 K.B. 579, 587. Transactions held not to be sales include printing (*Clay v Yates* (1856) 1 H. & N. 73); supply of veterinary medicines (*Dodd and Dodd v Wilson and McWilliam* [1946] 2 All E.R. 691); supply of building materials by builder (*Young and Marten Ltd v McManus Childs Ltd* [1969] 1 A.C. 454); a contract to build, launch, equip and complete a ship (*Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129; and *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 W.L.R. 574); and a contract to build and deliver a transportable house (*Hewett v Court* (1983) 149 C.L.R. 639). Transactions treated as sales include supply of medicine on prescription (*R. v Wood Green Profiteering Committee* (1920) 89 L.J. K.B. 55) (but supply under the National Health Service is not a sale at all: *Pfizer Corp v Ministry of Health* [1965] A.C. 512; *Appleby v Sleep* [1968] 1 W.L.R. 948); supply of meal in a restaurant (*Lockett v A & M Charles Ltd* [1938] 4 All E.R. 170; *Gee v White Spot Ltd* (1986) 32 D.L.R. (4th) 238); manufacture of a ship propeller (*Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] A.C. 402); manufacture of jacket to order (*J Marcel (Furriers) Ltd v Tapper* [1953] 1 W.L.R. 49); compounding of mink food to formula specified (*Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] A.C. 441).
- 121 Benjamin's Sale of Goods, 11th edn (2021), para.1-047. The test laid down in *Robinson v Graves* was rejected by the Supreme Court of Victoria in *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] V.R. 167.
- 122 See *Harmer v Cornelius* (1858) 5 C.B.(N.S.) 236 (painter); *Myers & Co v Brent Cross Service Co* [1934] 1 K.B. 46 (car repairs); *Watson v Buckley, Osborne, Garrett & Co Ltd* [1940] 1 All E.R. 174 (hair dye); *Samuels v Davis* [1943] K.B. 526 (dentures); *Dodd and Dodd v Wilson and McWilliam* [1946] 2 All E.R. 691 (veterinary medicines); *Stewart v Reavell's Garage* [1952] 2 Q.B. 545 (car repairs); *Ingham v Emes* [1955] 2 Q.B. 366 (hair dye); *Young and Marten Ltd v McManus Childs Ltd* [1968] 1 A.C. 454; cf. *Gloucestershire CC v Richardson*

- [1969] 1 A.C. 480 (building materials); *Helicopter Sales (Australia) Pty Ltd v Rotor-Work Pty Ltd* (1974) 132 C.L.R. 1 (helicopter replacement part); *Cheeld v Alliott* [2013] EWCA Civ 508 (defective workmanship in metal porch where nothing turned on whether it was a contract for goods or services). See also Vol.I, paras 16-039 et seq.
- 123 See ss.2-5.
- 124 See above, para.40-488.
- 125 See in general above, Ch.41.
- 126 For statutory definition, see *Consumer Credit Act 1974* s.189(1).
- 127 Factors Act 1889 s.9; Sale of Goods Act 1979 s.25; see below, para.46-220; see *Helby v Matthews* [1895] A.C. 471. Such a transaction was not caught by the Bills of Sale Acts: *McEntire v Crossley Bros Ltd* [1895] A.C. 457; nor by the Moneylenders Acts. A limited exception as regards motor vehicles was introduced by the *Hire-Purchase Act 1964* Pt III, which is re-enacted by Sch.4 para.22 to the *Consumer Credit Act 1974*; see above, para.41-406.
- 128 The *Hire-Purchase Act 1964* was entirely repealed by s.192(3)(b) of and Sch.5 to the *Consumer Credit Act 1974* and SI 1983/1551 (c.44), but see art.6(1)(2) of that Order.
- 129 ss.8, 9. The general financial limit in the 1974 Act was removed by s.2 of the *Consumer Credit Act 2006*. For the definition of “individual”, see s.189(1) (as amended by the *Consumer Credit Act 2006*): it includes (a) a partnership consisting of two or three persons not all of whom are bodies corporate; and (b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership. See also above, paras 41-016, 41-017.
- 130 ss.8-11; see above, para.41-320. The 1973 Act is re-enacted by s.192 of and Sch.4 paras 35-36 to the *Consumer Credit Act 1974*, and was amended by the *Sale and Supply of Goods Act 1994* and by the *Sale and Supply of Goods to Consumers Regulations 2002* (SI 2002/3045) reg.13.
- 131 See above, para.40-492.
- 132 Consumer Credit Act 1974 s.189(1); see above, para.41-468.
- 133 Sale of Goods Act 1979 s.2(3). However, if the terms of an agreement mean that property is unlikely ever to pass then the *Sale of Goods Act* does not apply, see *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2016] UKSC 23 in the context of a bunker supply contract.
- 134 ss.8, 9; see above, para.41-465. The general financial limit in the 1974 Act was removed by s.2 of the *Consumer Credit Act 2006*.
- 135 Sale of Goods Act 1979 s.25(1); Factors Act 1889 s.9; *Lee v Butler* [1893] 2 Q.B. 318; *Hull Rope Works Co v Adams* (1895) 73 L.T. 446; *Thompson and Shackell Ltd v Veale* (1896) 74 L.T. 130; *Horton v Gibbins* (1897) 13 T.L.R. 408; *Wylde v Legge* (1901) 84 L.T. 121; *Marten v Whale* [1917] 2 K.B. 480; see below, para.46-220.
- 136 Sale of Goods Act 1979 s.25(2)(4), Sch.1 para.9 and Sch.4 para.2; Consumer Credit Act 1974 s.192 and Sch.4 paras 2, 4; SI 1983/1572. But see Pt III of the *Hire-Purchase Act 1964* (motor vehicles), see above, para.41-406, which is re-enacted by Sch.4 para.22 to the *Consumer Credit Act 1974*.
- 137 See above, para.40-492.
- 138 Consumer Credit Act 1974 s.189(1).

- 139 See above, para.41-446.
- 140 1974 Act s.8(2). The general financial limit in the 1974 Act was removed by s.2 of the Consumer Credit Act 2006.
- 141 Under ss.16, 16A, 16B, 16C of the 1974 Act (as amended); see above, para.41-039.
- 142 s.8(3).
- 143 See above, para.41-469.
- 144 Consumer Credit (Exempt Agreements) Order 1989 (SI 1989/869) art.3(1)(a)(i) (provided the payments are to be made within 12 months from the date of the agreement). As a result of the implementation of the Consumer Credit Directive (see para.41-011, above), art.3(1)(a)(i) has been amended by SI 2010/1010 reg.66 (in force from 1 February 2011) and a further condition for exemption has been added: that the credit must be provided without interest or any other charge.
- 145 s.62(3), (4): see above, para.46-002; nor the Consumer Rights Act 2015.
- 146 Or (in the case of a company) a registrable charge: Companies Act 2006 s.860(7)(b). See also Bills of Sale Act (1878) (Amendment) Act 1882 s.17; *Re Standard Manufacturing Co [1891] 1 Ch. 627*; and see above, para.41-523.
- 147 *Yorkshire Ry Wagon Co v Maclure* (1882) 21 Ch. D. 309; *Victoria Dairy Co of Worthing v West* (1895) 11 T.L.R. 233; *British Ry Traffic and Electric Co v Kahn* [1921] W.N. 52; *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 K.B. 305; *Olds Discount Co Ltd v Krett* [1940] 2 K.B. 117; *Diamond* (1960) 23 M.L.R. 518.
- 148 *Re Watson* (1890) 25 Q.B.D. 27; *Wheatley's Trustee v Wheatley Ltd* (1901) 85 L.T. 491; *Maas v Pepper* [1905] A.C. 102; *Polsky v S and A Services* [1951] 1 All E.R. 185, 1062n.; *North Central Wagon Finance Co Ltd v Brailsford* [1962] 1 W.L.R. 1288. cf. *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 Q.B. 747. See also *Stoneleigh Finance Ltd v Phillips* [1965] 2 Q.B. 537; *Snook v London and West Riding Investments Ltd* [1967] 2 Q.B. 786; *Re Curtain Dream Plc* [1990] B.C.L.C. 925; Benjamin's Sale of Goods, 11th edn (2021), para.1-066.
- 149 See above, para.35-121.
- 150 For pledge and sale contrasted, see *Burdick v Sewell* (1884) 13 Q.B.D. 159, 175; (1884) 10 App. Cas. 74, 93. For a case where a storage arrangement having some appearance of a bailment was held to be a sale, see *Chapman Bros v Verco Bros & Co Ltd* (1933) 49 C.L.R. 306.
- 151 1979 Act s.62(4): see above, para.46-002.
- 152 See below, para.46-146.
- 153 For full discussion, see Benjamin's Sale of Goods, 11th edn (2021), paras 1-048—1-049; Bowstead and Reynolds on Agency, 22nd edn (2021), para.1-036. See also Vol.I, para.21-140.

(b) - Capacity of Parties

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 2. - Formation of the Contract

(b) - Capacity of Parties

Capacity of parties

46-033 By s.3¹⁵⁴:

Arrangement of Act

“(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.

(2) Where necessaries are sold and delivered to a minor or to a person who by reason of drunkenness is incompetent to contract, he must pay a reasonable price for them.

(3) In subs.(2) above, ‘necessaries’ means goods suitable to the condition in life of the minor or other person concerned and to his actual requirements at the time of the sale and delivery.”

155

Section 7 of the Mental Capacity Act 2005, which deals with mental incapacity, is expressed in similar terms. These provisions are considered elsewhere in this work.¹⁵⁶ The liability to pay a reasonable price for necessities appears to be restitutionary: a person who in law is incompetent to make a contract cannot bind himself to pay for necessities supplied, but if it is for his benefit that he should have them, he must pay a reasonable price for goods received, though not necessarily

the contract price.¹⁵⁷ Hence it is usually thought that a minor would not be liable on an executory contract for necessaries.¹⁵⁸

Footnotes

154 As amended by the [Mental Capacity Act 2005 Sch.6 para.24](#).

155 For full discussion, see Benjamin's Sale of Goods, 11th edn (2021), paras 1-048—1-049; Bowstead and Reynolds on Agency, 22nd edn (2021), para.1-036. See also Vol.I, para.[21-140](#).

156 Vol.I, Ch.11. See also Benjamin's Sale of Goods, 11th edn (2021), paras 2-028 et seq.

157 *Re Rhodes (1890) 44 Ch. D. 94, 105*; approved in *Nash v Inman [1908] 2 K.B. 1, 8*.

158 But in *Roberts v Gray [1913] 1 K.B. 520* a minor was held liable on an executory contract for education. cf. also Treitel, The Law of Contract, 15th edn (2020), para.12-004; Goff and Jones, The Law of Unjust Enrichment, 9th edn (2016), para.24-018 (liability is contractual).

(c) - Formalities

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 2. - Formation of the Contract

(c) - Formalities

Formalities

- 46-034 Section 4 of the Sale of Goods Act 1893,¹⁵⁹ which required written evidence or part performance for contracts for the sale of goods of the value of £10 or upwards, was repealed by the Law Reform (Enforcement of Contracts) Act 1954. The result is that contracts for the sale of goods may be made without formalities.¹⁶⁰

Footnotes

159 s.4 re-enacted, with some variations, the Statute of Frauds 1677. See Vol.I, Ch.7.

160 But there are statutory requirements for certain hire-purchase agreements, conditional sale agreements, and credit-sale agreements: see above, paras 41-078 et seq.

(d) - Subject Matter

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 2. - Formation of the Contract

(d) - Subject Matter

Subject matter of contract

46-035 By [s.5\(1\)](#):

“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 him after the making of the contract of sale, in this Act called future goods.”

Existing goods

46-036 These may be specific or unascertained. This distinction, which is important as regards the passing of property and as regards the effects of destruction of the goods, is discussed in what follows.

Future goods

46-037 This expression covers goods which are not yet in existence and existing goods not yet acquired by the seller.¹⁶¹ [Section 5\(3\)](#) provides: “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”. Future goods will usually¹⁶² be unascertained: as such property in them cannot pass.¹⁶³ Even if they

are specific, the passing of property would sometimes be deferred until they were in a deliverable state.¹⁶⁴

Contracts for the sale of future goods

- 46-038 Such contracts are capable of three interpretations. First, the seller may promise that they will come into existence or be acquired, and will be liable if this does not occur.¹⁶⁵ Secondly, there may be a conditional sale on the basis of s.5(2), which provides: "There may be a contract for the sale of goods, the acquisition of which by the seller depends on a contingency which may or may not happen".¹⁶⁶ In such a case (e.g. the sale of a future crop) both seller and buyer may owe subordinate duties to each other not to prevent the occurrence of the condition, and in some cases to facilitate its occurrence¹⁶⁷; but the buyer only pays for such goods as are supplied and cannot sue for non-delivery of goods that never came into existence or were never acquired.¹⁶⁸ When only part of the goods come into existence or are acquired it is a question of interpretation whether he can demand, or must take, such goods as there are, and whether he can reject completely.¹⁶⁹

Sale of a chance

- 46-039 The third interpretation is that the buyer agrees to pay whether or not goods are supplied (though there would here again be subordinate duties as to the prevention of the goods coming into existence or being acquired). The subject matter here would be a mere chance. This possibility is not mentioned in the Act, and indeed it is arguable that such a sale of a chance is not a sale of *goods* at all: but there seems little merit in excluding the Act from such a closely assimilated transaction. There is no clear authority, but it is commonly said that an old decision in *Bagueley v Hawley*¹⁷⁰ could be explained on this basis.

Specific, ascertained and unascertained goods

- 46-040 Although two possibilities are referred to in s.5 as forming the subject matter of a contract of sale, there is another important distinction to be drawn. This is the distinction between specific, ascertained and unascertained goods, which to some extent cuts across the distinction between existing and future goods.

Specific goods; ascertained goods

- 46-041 Specific goods are those “identified and agreed on at the time a contract of sale is made”.¹⁷¹ By an amendment made by the *Sale of Goods (Amendment) Act 1995*, this definition was extended to include “an undivided share, specified as a fraction or percentage of goods identified and agreed on as aforesaid”. Thus a contract for the sale of a quarter-share in a named racehorse, or a contract for the sale of 20 per cent of the existing cargo of a named ship, will be a contract for the sale of specific goods. Ascertained goods are not defined by the Act, although various references are made to such a category.¹⁷² In *Re Wait*¹⁷³ Atkin LJ said that ascertained “probably means identified in accordance with the agreement after the time a contract of sale is made”.

Unascertained goods

- 46-042 Unascertained goods may be said to fall into three categories:
- (i) future goods, except identified goods to be acquired by the seller;
 - (ii) generic goods, e.g. “100 tons of wheat”;
 - (iii) the unascertained portion of an ascertained whole, for instance, “100 tons of wheat from the larger quantity which A has in his warehouse”.

Problem cases

- 46-043 It is clear that existing goods may be either specific or unascertained: if unascertained they may later become ascertained. Future goods will certainly for the most part be unascertained. The clearest example of future goods which seem to be specific is that of identified goods owned by a third party at the time the contract is made.¹⁷⁴ But it can be argued that there is nothing in the Act saying that specific goods must actually be in existence at the time they are identified and agreed upon: on this basis a contract for the entire future crop of a particular piece of land might be argued to be a contract for specific goods.¹⁷⁵ In *Howell v Coupland*¹⁷⁶ it was held before the Act that a contract for the sale of a specified quantity of potatoes to be grown on a designated piece of land was frustrated by failure of the crop, and the contract was said to be one for “what will be and may be called specific things”.¹⁷⁷ But in *Re Wait*¹⁷⁸ it was held that a contract for a specified quantity of goods out of a particular mass was not a contract for specific goods, and though the context was one of the availability of specific performance the reasoning seems of general application. Thus the sale of a particular quantity of future goods from a defined source is

not a sale of specific goods, and it is submitted that even a sale of the whole crop from that source would not be, for the wording of ss.6 and 7 of the Act, which deal with perishing of the goods,¹⁷⁹ seem clearly to envisage “specific goods” as being in existence at the time of contract, and the wording of s.5(3)¹⁸⁰ points to a similar conclusion. In *HR & S Sainsbury Ltd v Street*¹⁸¹ it was held that a contract similar to that in *Howell v Coupland* was governed by s.5(2) of the Act¹⁸² and was not a contract for specific goods covered by s.7. Although the case was also one of sale of a specified quantity to be grown at a particular place, it is submitted that the reasoning is again of general application and that, except in the situation indicated at the beginning of the paragraph, future goods cannot be specific.

Importance of distinction

- 46-044 The distinction between specific, ascertained and unascertained goods is of importance in relation to ss.6 and 7 of the Act, as explained below. It is also of importance in relation to the passing of the property and the risk. This is discussed in detail elsewhere.¹⁸³

Sale of goods already perished

- 46-045 By s.6:

“Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished¹⁸⁴ at the time when the contract is made, the contract is void.”

This section deals with mistake as to the existence of the specific subject matter of the contract.¹⁸⁵ If the terms of the section are satisfied the contract is void, so that no action will lie for breach of contract by either party and the buyer may recover the price if he has already paid it. The section is commonly thought to be intended to represent the effect of the old decision in *Couturier v Hastie*.¹⁸⁶ In that case there was a sale (effectively what is now called CIF) of a specific cargo of corn then believed to be on the high seas but which had in fact, before the sale, become so heated that it had been unloaded and sold at a nominal price by the master of the ship. The sellers had delivered the shipping documents. The House of Lords held that they were not entitled to recover the price from the buyer. The case was regarded as turning on the construction of the contract¹⁸⁷: it was decided that this was a contract for the sale of a specific cargo rather than the adventure represented by the documents, and so in the circumstances the plaintiffs could not recover. The question whether the contract was void can be said not to have been directly in issue, though had it been void the same result would have ensued. Nevertheless, the case was and is taken to stand for

the proposition that such a sale is based on the initial existence of the goods, and hence inoperative if there were none.¹⁸⁸

Operation of s.6

46-046 Three points arising from s.6 require brief comment.

(i) Specific goods:

The section does not cover a sale of unascertained goods. Thus if A contracts to sell to B 1,000 tons of grain, it is normally immaterial that A's intended source of supply has already been destroyed. The case is governed by the maxim genus nunquam perit, and A remains liable to procure the grain from another source.¹⁸⁹

(ii) Partial destruction:

It seems that the section applies where there is a contract to sell an indivisible parcel of specific goods part only of which has perished when the contract is made. In *Barrow, Lane and Ballard Ltd v Phillip Phillips & Co*,¹⁹⁰ where, at the date of the contract to sell 700 bags, 109 bags had been stolen, it was held that the whole contract was avoided. Had the contract been severable it could perhaps have been void only as to the perished part.

(iii) Knowledge of the seller:

If at the time of the contract the seller knows that the goods have perished, he is perhaps estopped from pleading that no contract exists.¹⁹¹ But if the seller is ignorant and the buyer aware, or if both parties are ignorant, it seems that the contract is in each case void. There is however nothing to exclude the application of common law doctrines which might render the contract inoperative for any other reason, e.g. some other type of fundamental mistake, even if this would be rare.¹⁹²

Goods perish after contract made

46-047 By s.7:

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

46-048

Section 7 relates to a particular case of frustration. The scope of the section is comparatively narrow. First, it is limited to specific goods and does not apply to sales of unascertained goods. This excludes sales of generic goods, sales of an unascertained quantity of an ascertained whole,¹⁹³ and most sales of future goods from the operation of the section.¹⁹⁴ Secondly, it is limited to goods which have perished.¹⁹⁵ Perishing covers of course physical destruction, and also the case where the goods are so damaged as no longer to answer to the description under which they were sold.¹⁹⁶ But if the goods retain their commercial identity, and have merely deteriorated in quality, the section does not apply.¹⁹⁷ Further, it probably does not apply where the goods have not perished but are simply unavailable, because for example, of requisition¹⁹⁸ or the outbreak of war,¹⁹⁹ though where they are stolen or otherwise lost irretrievably, it may apply.²⁰⁰ Thirdly, it is limited to an agreement to sell, that is, a case where the property in the goods has not passed to the buyer.²⁰¹ Fourthly, the risk must not yet have passed to buyer: so, for example, **s.7** will not apply where the property in the goods remains in the seller; but the goods are nevertheless at the buyer's risk.²⁰² Fifthly, the section is limited to cases where the goods perish without any fault²⁰³ on the part of the seller or the buyer.

Frustration at common law

- 46-049 There is however nothing to exclude the operation of the common law doctrine of frustration in situations other than that where the goods perish, even if it would rarely apply.²⁰⁴

Operation of s.7

- 46-050 The **Law Reform (Frustrated Contracts) Act 1943 s.2(5)(c)**, excepts from the Act's provisions any contract to which **s.7 of the Sale of Goods Act** applies.²⁰⁵ Consequently cases falling under **s.7** are governed by the common law rules as to the consequences of frustration, and not by the apportionment provisions introduced by the **1943 Act**, irrational though this difference may be.²⁰⁶

Footnotes

161 **1893 Act s.61(1)**; see above, para.46-015.

162 See below, para.46-038.

163 See **s.16**, see below, para.46-131. Before the **1893 Act** equity held that a beneficial interest passed to the buyer as soon as the goods became present goods and the contract could be

- implemented by specific performance (see *Holroyd v Marshall* (1862) 10 H.L. Cas. 191). But this doctrine did not survive the Act, at any rate in England and Wales: see *Re Wait* [1927] 1 Ch. 606, 635–636, applied in *Hughes v Pendragon Sabre Ltd (t/a Porsche Centre Bolton)* [2016] EWCA Civ 18 (at [42]).
- 164 See s.18 r.2: below, para.46-141.
- 165 e.g. *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 2 K.B. 467 (sale of generic goods).
- 166 See also s.2(3) of the Act: above, para.46-020. See *Hughes v Pendragon Sabre Ltd (t/a Porsche Centre Bolton)* [2016] EWCA Civ 18.
- 167 e.g. the seller of a future crop must cultivate it. See *Mackay v Dick* (1881) 6 App. Cas. 251 (duty to test machine). See Vol.I, paras 16-026, 16-027.
- 168 e.g. *Lovatt v Hamilton* (1839) 5 M. & W. 639 (sale of goods “to arrive”).
- 169 See *HR & S Sainsbury Ltd v Street* [1972] 1 W.L.R. 834 (barley).
- 170 (1867) L.R. 2 C.P. 625 (resale of goods seized under distress).
- 171 1893 Act s.61(1); see above, para.46-015.
- 172 e.g. ss.16, 17, 52.
- 173 [1927] 1 Ch. 606, 630.
- 174 This was in the case in *Varley v Whipp* [1900] 1 Q.B. 513, and there is no suggestion in the case that the goods were not specific.
- 175 Benjamin’s Sale of Goods, 11th edn (2021), paras 1-114, 1-115. See also *Lister v Munro* [1924] N.Z.L.R. 1137, 1140.
- 176 (1876) 1 Q.B.D. 258.
- 177 At 262.
- 178 [1927] 1 Ch. 606.
- 179 See below, paras 46-045 et seq.
- 180 See above, para.46-037.
- 181 [1972] 1 W.L.R. 834.
- 182 See above, para.46-038.
- 183 See below, paras 46-130 et seq., paras 46-189 et seq.
- 184 On the meaning of “perish”, see note to s.7: below, para.46-048. Section 6 does not apply if the goods have never been in existence at all, for in that case they have not “perished”: *McRae v Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, where sellers were held liable on the basis that they had warranted that the goods (a wrecked oil tanker sold for salvage) existed. The case could also be solved on the basis of a collateral contract or of an action in tort for negligent misrepresentation.
- 185 See Vol.I, paras 8-042 et seq.
- 186 (1856) 5 H.L. Cas. 673; affirming (1853) 9 Ex. 102.
- 187 Twigg-Flessner and Canavan (eds), Atiyah and Adams Sale of Goods, 14th edn (2020), p.76, concludes, citing s.55(1) (see below, para.46-127) and *McRae v Commonwealth Disposals Commission* (1951) 84 C.L.R. 377 that s.6 is not mandatory; that is, it will not apply if, on the construction of the contract, the seller has contracted that the goods are in existence, or if the buyer can genuinely be regarded as having bought a chance. See also Benjamin’s

- Sale of Goods, 11th edn (2021), paras 1-122—1-135; Vol.I, paras 8-021 et seq. Such an interpretation would only be necessary where a claim in tort or upon a collateral contract would yield damages inadequate to the circumstances.
- 188 The question connects with problems of risk in documentary sales. See Benjamin's Sale of Goods, 11th edn (2021), para.19-183.
- 189 *Re Thorne and Fehr and Yuills Ltd [1921] 1 K.B. 219*.
- 190 *[1929] 1 K.B. 574*. See Benjamin's Sale of Goods, 11th edn (2021), para.1-126.
- 191 See *Bell v Lever Bros [1932] A.C. 161, 217*.
- 192 See Vol.I, Ch.8.
- 193 e.g. 200 bottles from a larger quantity in an identified bin. But a contract for the sale of a fraction ("one-fifth") or percentage ("20%") of the wine in an identified bin is a contract for the sale of specific goods: s.61(1); see above, para.46-015.
- 194 See above, para.46-037; *HR & S Sainsbury Ltd v Street [1972] 1 W.L.R. 834*.
- 195 Including part of an indivisible parcel: see above, para.46-046.
- 196 *Barr v Gibson (1838) M. & W. 390; Asfar & Co Ltd v Blundell [1896] 1 Q.B. 123*. For a recent example see *Oldfield Asphalts Ltd v Grovedale Coolstores (1994) Ltd [1998] 3 N.Z.L.R. 479*.
- 197 *Horn v Minister of Food [1948] 2 All E.R. 1036* (rotten potatoes held still to be potatoes). But cf. *Rendell v Turnbull & Co (1908) 27 N.Z.L.R. 1067* (a case on s.6).
- 198 See *Re Shipton, Anderson & Co [1915] 3 K.B. 676*, where, however, the contract was held to be frustrated at common law.
- 199 See *Re Badische Co Ltd [1921] 2 Ch. 331*, where again common law was applied.
- 200 See *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co Ltd [1929] 1 K.B. 574* (theft).
- 201 As in cases falling within s.18 rr.2 and 3 of the Act (below, paras 46-141 et seq.) or where the seller reserves the right of disposal (below, para.46-170).
- 202 See below, para.46-189. Frustration only starts where risk stops.
- 203 Defined in s.61(1); see above, para.46-015.
- 204 See Vol.I, Ch.26; *Blackburn Bobbin Co Ltd v TW Allen & Sons [1918] 2 K.B. 467; Re Shipton, Anderson & Co*, above; *Lewis Emanuel & Son Ltd v Sammut [1955] 2 Lloyd's Rep. 629*. Alternatively, the contract may be subject to a condition precedent as to the goods coming into existence as in *Howell v Coupland (1876) 1 Q.B.D. 258*.
- 205 The second part of s.2(5)(c) excepts from the Law Reform (Frustrated Contracts) Act 1943 "any other contract for the sale or for the sale and delivery of specific goods where the contract is frustrated by reason of the fact that the goods have perished". It is far from clear to what situations this obscure provision applies: see Benjamin's Sale of Goods, 11th edn (2021), para.6-052; Twigg-Flesner and Canavan (eds), Atiyah and Adams' Sale of Goods, 14th edn (2020), p.273.
- 206 See Vol.I, para.26-126; Benjamin's Sale of Goods, 11th edn (2021), para.6-052; Twigg-Flesner and Canavan (eds), Atiyah and Adams' Sale of Goods, 14th edn (2020), p.275.

(e) - The Price

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Section 2. - Formation of the Contract

(e) - The Price

Ascertainment of price

46-051 By s.8:

Arrangement of Act

“(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner agreed by the contract, or may be determined by the course of dealing between the parties.²⁰⁷

(2) Where the price is not determined as mentioned in subs.(1) above the buyer must pay a reasonable price.²⁰⁸

(3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.”

In the latter case the current market price may or may not be a reasonable price.²⁰⁹

Price not fixed

46-052 The fact that the price is not fixed may be an indication that no binding contract has been concluded at all. The authorities are discussed elsewhere.²¹⁰ But briefly it seems that each case must be

decided on the construction of the particular contract.²¹¹ If there is nothing that can be regarded as an agreement about the price, this may be evidence that the parties have not in fact completed the making of their contract²¹²; if on the other hand it appears that the parties have made a contract, the courts may be able to determine what is the price by resort to provisions for arbitration, trade custom, etc., or will apply s.8 in order to establish a reasonable price.²¹³

Agreement to sell at a valuation

46-053 By s.9:

Arrangement of Act

“(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 he cannot or does not make the valuation, the agreement is avoided; but if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them.

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

²¹⁴

Such a valuer is not an arbitrator so that the *Arbitration Act 1996*²¹⁵ will not apply. He cannot be sued for failure to give a valuation, unless he has contracted to do so. But if he does make a valuation, it seems that he may be liable in tort if he does so fraudulently or negligently.²¹⁶ The actual valuation is normally valid unless there is fraud or collusion.²¹⁷

Footnotes

- 207 The contract may provide that one of the parties may fix the price: see *May and Butcher Ltd v The King [1934] 2 K.B. 17, 21*.
- 208 This probably extends to executory contracts and is not restricted to cases where the buyer has taken delivery: see *Acebal v Levy (1834) 10 Bing. 376*; *Haudly v M'Laine (1834) 10 Bing. 482*; *Hall v Busst (1960) 104 C.L.R. 206, 243–244*; cf. at 222, 234.
- 209 *Acebal v Levy (1834) 10 Bing. 383*. As to agreements to sell at “market price”, see *Charrington & Co Ltd v Wooder [1914] A.C. 71*. See also *Davies v Davies (1887) 36 Ch. D. 359, 392–393*.

- 210 Vol.I, paras 4-145 et seq.
- 211 See *Foley v Classique Coaches Ltd* [1934] 2 K.B. 1, 10, 12.
- 212 See, e.g. *May & Butcher Ltd v The King* [1934] 2 K.B. 17.
- 213 See, e.g. *Foley v Classique Coaches Ltd* [1934] 2 K.B. 1; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 L.T. 503. See also *British Bank for Foreign Trade Ltd v Novinex Ltd* [1949] 1 K.B. 623; *R & J Dempster Ltd v Motherwell Bridge and Engineering Co Ltd*, 1964 S.L.T. 353; *F & G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep. 53; *Smith v Morgan* [1971] 1 W.L.R. 803; *Brown v Gould* [1972] Ch. 53; *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 W.L.R. 297; *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 1 W.L.R. 591; *Mallozzi v Carapelli SpA* [1976] 1 All E.R. 407; *Hall v Busst* (1960) 104 C.L.R. 206, 222, 232–235, 241–245; *Att-Gen v Barker Bros* [1976] 2 N.Z.L.R. 445; *Didymi Corp v Atlantic Lines and Navigation Co Inc (The Didymi)* [1988] 2 Lloyd's Rep. 108; *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep. 205; *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery Co* [2001] 2 Lloyd's Rep. 76. See *Berg* (2003) 119 L.Q.R. 357.
- 214 This section applies to a named valuer. Where the valuer is to be appointed, and the machinery for appointing him breaks down, it has been held that, where on its true construction the agreement was one to sell at a reasonable price to be determined by the valuer, the court will substitute its own machinery for ascertaining a fair and reasonable price: *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 A.C. 444 (option to purchase land). See also *Wenning v Robinson* (1964) 64 S.R. (N.S.W.) 157 (no mention of particular valuer).
- 215 See above, Ch.34.
- 216 See *Sutcliffe v Thackrah* [1974] A.C. 727; *Campbell v Edwards* [1976] 1 W.L.R. 403; *Arenson v Arenson* [1977] A.C. 405.
- 217 *Campbell v Edwards* [1976] 1 W.L.R. 403; above; and see *Baber v Kenwood Mfg Co Ltd* [1978] 1 Lloyd's Rep. 175. But it may sometimes be possible to impeach the valuation if it can be shown to be based on a wrong principle: *Baber v Kenwood*, above; *Finnegan v Allen* [1943] K.B. 425; *Dean v Prince* [1954] Ch. 409; *Frank H Wright (Constructions) Ltd v Froodoor* [1967] 1 W.L.R. 506; *Smith v Gale* [1974] 1 W.L.R. 9; *Burgess v Purchase & Sons (Farms) Ltd* [1983] Ch. 216; *Jones v Sherwood Computer Services Plc* [1992] 2 All E.R. 170; *Nikko Hotels (UK) v MEPC* (1991) 28 E.G. 86; *Pontsarn Investments v Kasallis-Osake-Pankki* (1992) 22 E.G. 103. See above, para.34-198.

(a) - Conditions, Warranties, Misrepresentations and Puffs

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Chapter 46 - Sale of Goods

Section 3. - Terms of the Contract

(a) - Conditions, Warranties, Misrepresentations and Puffs

General

- 46-054 Where promises and statements are made in connection with a contract of sale, it may be necessary to determine into what category they should be put, for the consequences of a promise or statement not being made good or being untrue may vary in accordance with the category to which it is attributed.

Puffs and statements of opinion

- 46-055 A puff is a statement extolling the virtues of goods which by virtue of its vagueness or extravagance would not be expected to and does not ground any form of liability.²¹⁸ Simplex commendatio non obligat. Difficulties can arise regarding expressions of opinion.²¹⁹ Although these may similarly give rise to no liability, they may, especially when made by skilled persons, amount to promises, or to representations that the opinion is honestly held or of the facts upon which they purport to be based.²²⁰ In general, liability on statements is more readily imposed than formerly.²²¹

Contractual promises: conditions and warranties

- 46-056 Other statements may be contractual promises, for which the maker must in general answer strictly, i.e. guarantee their truth.²²² The **Sale of Goods Act** refers to two types of such promise

or term, conditions and warranties. A condition is a promise in respect of which the parties have agreed, whether by express words or by implication, that any failure of performance by one party, irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party not only to damages but also to treat the contract as discharged.²²³ A warranty is defined by the Act²²⁴ as “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”. It is thus a minor promise within the contract, for which the promisor still answers strictly, but normally²²⁵ only in damages. It should be distinguished from a genuinely separate or collateral warranty, which is a promise contained in a separate contract with its own consideration, and which may override terms of the main contract or otherwise create liability independently of the main contract.²²⁶ Section 11(3) provides:

“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 to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.”²²⁷

The converse of the last proposition is also true: a stipulation designated a condition may be held not to be so.²²⁸ The [Consumer Rights Act 2105](#) does not refer to terms (whether “terms that are to be treated as included” in the contract, or express terms, which the Act often describes as “requirements stated in the contract”) as being conditions or warranties. [Chapters 2 and 3 of the Act](#) set out the remedies which are available for various breaches of contract by the trader.²²⁹ However, there is nothing in the Act to prevent the parties agreeing that an express term shall be a condition or a warranty, with the normal consequences. [Section 11\(3\) of the 1979 Act](#) is not disapplied from consumer contracts for goods.

Dichotomy not exhaustive

46-057

 It has subsequently become clear, however, that, whatever the words of the Act, this dichotomy is not exhaustive, and that in sale as in other contracts there may be discharge by virtue of the nature and effect of the breach.

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 The operation of these general principles is preserved by [s.62\(2\) of the Act](#).²³¹ The normal approach seems to be to treat this as indicating the existence of a third type of term, the “intermediate” or “innominate” term, breach of which may or may not give rise to (in this context)

the right to reject, depending on the nature and consequences of the breach,²³² though in truth the technique deployed is a different one.²³³

Misrepresentations external to the contract

- 46-058 The law recognises a third category, that of a misrepresentation of fact which does not constitute a contractual promise but which nevertheless forms sufficient part of the inducement to contract to justify the granting of a remedy to the representee. Such representations, not being promises, did not originally ground any relief at common law unless they were made fraudulently, in which case there was liability in deceit. From the late nineteenth century however it was established that equity would grant relief by way of rescission and indemnity,²³⁴ and although it was arguable that since the Act made no reference to this jurisdiction it did not apply to sale of goods,²³⁵ it is now clear that it does so.²³⁶ The jurisdiction was much improved by the *Misrepresentation Act 1967*, which by s.1(b) abolished a possible limit on the right to rescind; by s.2(1) created a statutory action against a party to a contract who made such a misrepresentation negligently²³⁷; and by s.2(2) empowered the court to grant damages in lieu of rescission.²³⁸ It also made provision for the control of terms excluding liability for misrepresentation.²³⁹ Meanwhile the possibility of a tortious action for a negligent statement leading to pure economic loss was established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,²⁴⁰ and the action on a collateral contract, the use of which had earlier been restricted in this context,²⁴¹ also became prominent.²⁴² Thus there has been a movement from a paucity of remedies to almost an excess.²⁴³

Distinction between terms of the contract and external misrepresentations

- 46-059 The distinction between these two notions can be extremely difficult to make in this context. It is easier to classify a statement as a mere representation where there is a considerable time-gap between negotiation and contract, or where the negotiations are oral and the contract written, e.g. in the sale of land.²⁴⁴ These conditions less frequently occur in the sale of goods. The test of a contractual promise traditionally asks whether there is “evidence of an intention by both parties that there should be contractual liability in respect of the accuracy of the statement”.²⁴⁵ But it may be that to some extent one should, to determine this intention, consider the consequences of attributing a statement to either category before doing so.²⁴⁶ There are important differences between those consequences.

Standard of liability

- 46-060 First, if the statement is treated as a contractual promise the seller will *prima facie* answer strictly for it, however carefully or honestly he made it. If (the tort of) negligence is pleaded, he can prove that he was not at fault; and if sued under [s.2\(1\) of the Misrepresentation Act 1967](#) he has the statutory defence contained in it, that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true. If it is treated as a mere representation, deliberate or negligent conduct is not required: he will be liable to have the contract rescinded against him, unless it is too late to do so²⁴⁷ or the court awards damages in lieu of rescission.²⁴⁸

Measure of damages

- 46-061 Secondly, if the statement is treated as a contractual promise; the damages for which the seller will be liable will be such as to put the buyer in the position in which he would have been had the promise been made good.²⁴⁹ These will include the difference between the value of the goods as promised and their value as delivered,²⁵⁰ and the buyer's loss of profit.²⁵¹ If the statement is treated as a mere representation, the measure of damages recoverable is that in tort, which seeks to put the buyer in the position in which he would have been had the representation not been made.²⁵² This will *prima facie* be restricted to his "reliance" or "out-of-pocket" loss,²⁵³ although consequential loss is recoverable.²⁵⁴

Unfair commercial practices

- 46-062 The [Consumer Protection from Unfair Trading Regulations 2008](#),²⁵⁵ which implemented the Unfair Commercial Practices Directive,²⁵⁶ have been amended²⁵⁷ to provide remedies for individual consumers who have been the victim of certain types of unfair commercial practice, namely misleading actions and aggressive practices.²⁵⁸

Contributory negligence

- 46-063

Thirdly, although contributory negligence will normally be no defence in an action by the buyer for breach of a contractual promise,²⁵⁹ it may in certain circumstances be raised as a defence where the buyer's claim is for breach of the common law duty of care or under s.2(1) of the Misrepresentation Act 1967.²⁶⁰

Conditions

- 46-064 Which terms in a contract of sale will be held conditions? The implied terms as to title, description and quality are, as regards England and Wales and Northern Ireland, all designated by the Act as implied conditions.²⁶¹ This classification has the merit of certainty and facilitates rejection by the buyer where a term is sharply formulated.²⁶² It may well be reasonable in consumer transactions to uphold strictly the buyer's right to reject. In commercial transactions, however, the right to reject the goods for minor disparities or defects may be abused by the buyer for market reasons.²⁶³ Accordingly, s.15A of the Act seeks to limit the right of rejection in such cases.²⁶⁴
- 46-065 Express terms are most likely to be held conditions if they are designated as such²⁶⁵; if they have been held to be conditions in other cases²⁶⁶; if they relate to the time of performance in mercantile contracts²⁶⁷; if they relate to duties which must be performed by fixed times in sequence with the duties of the other party²⁶⁸; or if the circumstances of the particular case indicate that it was contemplated that rejection should follow if the term was not complied with.²⁶⁹

Effect of breach of condition

- 46-066 Where the term broken is a condition, upon any breach the buyer may treat the contract as discharged, i.e. refuse to perform his own obligations and refuse to accept the goods or further performance.²⁷⁰ He may also sue for damages²⁷¹; or he may instead elect to recover money he has paid in restitution, if there has been a total failure of consideration.²⁷² If he has already received part performance which he cannot return he therefore may not be able to recover the price paid.²⁷³ But the courts will allow recovery of part of the price despite the fact that part of the goods have been delivered and retained, if the price is readily apportionable.²⁷⁴ It is arguable that the mere tender of defective goods is not itself a repudiatory breach of contract, though where it causes loss (for example, by payment for a survey) it may give rise to liability in damages. A small group of cases, mostly concerned with documentary sales with time limits for performance, hold that if there is still time, the seller can withdraw a rejected tender and submit another.²⁷⁵ But it is

uncertain how far this goes: in many cases a faulty tender would be prejudicial to the buyer and entitle him to treat the contract as repudiated and purchase elsewhere.²⁷⁶

Effect of breach of other terms

46-067 It might seem from the wording of the Act that where the term broken is not a condition it must be a warranty, and hence give rise to a right to damages only. However, as stated above,²⁷⁷ it has been held that the common law principles, whereby a breach which goes to the root of the contract or which deprives the innocent party of the whole benefit of the contract entitles that party to treat the contract as discharged, are not excluded by the Act.²⁷⁸ From the reasoning in the case it follows that if the term broken is held not to be a condition, the next stage should be to examine the extent of the breach to see whether it justifies discharge on common law principles, which consider the nature and consequences of the breach²⁷⁹ and whether there has been a renunciation or repudiation.²⁸⁰ If it does, the consequences are the same as those of breach of condition: if it does not there will be a right to damages. It might seem that only damages are available for breach of what is clearly a warranty, but it may be that if there was an aggregation of breaches of warranty, or if serious consequences resulted there could be repudiatory conduct on general principles.²⁸¹

Loss of right to reject²⁸²

46-068 The right to reject must be exercised clearly.²⁸³ And even though the term broken is a condition, the buyer may lose the right to reject for breach of it. He can do this by waiving the breach completely, or by electing to affirm the contract and sue for damages. Thus s.11(2) of the Sale of Goods Act provides:

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

A waiver in this sense is usually treated by the law as a promise not to sue, and it may be possible to go back on it on giving notice, unless it is supported by consideration or the other party has acted on it in some way making it inequitable to retract.²⁸⁴ An affirmation on the other hand is an act of election and may not normally be retracted regardless of whether it has been acted on.²⁸⁵ It requires in principle a manifestation of choice (“election”), communicated to the other party, by a person who knows that he has the right to reject. But affirmation may in this context also be simply implied by law²⁸⁶ when the goods have been accepted. Section 11(4) of the Act²⁸⁷ provides:

“Subject to s.35A ... where a contract of sale is not severable,²⁸⁸ and the buyer has accepted the goods or part of them, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.”

The notion of acceptance is dealt with below.²⁸⁹ Under this provision the buyer may lose the right to reject before he has discovered a defect in the goods, and without any communication with the seller.

Rejection in severable contract

- 46-069 In principle, as s.11(4) indicates, acceptance of part of the goods bars rejection of the remainder. But the subsection does not apply where the contract of sale is severable (or divisible), for example, where it provides for the delivery of goods by stated instalments, which are to be separately paid for.²⁹⁰ Then the buyer’s right to treat the contract as discharged depends on the relation of the breach to the total contractual obligation and is regulated by s.31(2) of the Act²⁹¹: acceptance of instalments already delivered does not prevent the buyer from treating the rest of the contract as discharged. Moreover, s.11(4) is subject to s.35A which permits the buyer to accept conforming goods and to reject those that do not conform.²⁹²

Limitation of right to reject in non-consumer cases

- 46-070 A further limitation is placed on the right to reject for breach of condition in *non-consumer* cases by s.15A of the 1979 Act:

Arrangement of Act

“(1) Where in the case of a contract of sale—

(a) the buyer would, apart from this section, have the right to reject goods by reason of a breach on the part of the seller of a term implied by s.13, 14 or 15 ... , but

(b) the breach is so slight that it would be unreasonable for him to reject them, [then, if the buyer does not deal as consumer],²⁹³ the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the seller to show that the breach does not fall within subs.(1)(b) above.”

This section was introduced into the 1979 Act by the Sale and Supply of Goods Act 1994.²⁹⁴ Its purpose was to prevent a commercial buyer from abusing the right to reject by taking advantage of a trivial breach, for example, when the real reason for rejecting the goods is a fall in the market. But it only applies to a breach of the *implied* terms as to quality, fitness for purpose and correspondence with description or sample set out in ss.13, 14 and 15 of the 1979 Act and not to the breach of any express term. It may also be excluded expressly or by implication. This may give rise to some uncertainty,²⁹⁵ e.g. as to whether the application of the section is impliedly excluded in the case of the breach of a term as to the date of shipment of goods to be carried by sea (which is treated as part of their description); and there may be other situations where its application is similarly uncertain. No reported decisions on this section have been traced.²⁹⁶

Further remedies in consumer cases

- 46-071 The paragraphs above state the common law position as to the buyer's rights to reject the goods, terminate the contract and/or sue for damages. The Sale and Supply of Goods to Consumers Regulations 2002, which came into effect on 31 March 2003 provided (in a new Pt 5A inserted into the 1979 Act) a further range of remedies for consumers based on an EU Directive of 1999 on certain aspects of the sale of consumer goods and associated guarantees. These exist alongside the common law remedies and interact in a way that is not easy to formulate. The Consumer Rights Act 2015 incorporates these Pt 5A remedies, together with new remedies for consumers, into a new comprehensive scheme. Consumer contracts are dealt with in detail in Ch.40.

Rescission for misrepresentation

- 46-072 Where the statement made by the seller ranks as a misrepresentation inducing the contract, and is not a contractual promise, the basic remedy is rescission (with indemnity where appropriate)

only,²⁹⁷ though if it was subsequently incorporated as a term in the contract the remedies for breach of contract will also apply.²⁹⁸ The buyer may therefore rescind unless his right to do so is barred by affirmation of the contract, the impossibility of restitutio in integrum, the intervention of third-party rights, or lapse of time.²⁹⁹ However, the court may exercise the power to award damages in lieu of rescission under s.2(2) of the Misrepresentation Act 1967,³⁰⁰ and it is possible that this power applies also to misrepresentations subsequently incorporated into the contract as conditions.³⁰¹

Remedies in tort

- 46-073 Where the buyer has suffered loss caused by a wilfully false statement by the seller, he may sue the seller in deceit.³⁰² The damages here will be calculated by the rules applicable to that tort, and hence may include consequential loss even if unforeseeable.³⁰³ So also if loss is caused by a negligent statement made by the seller, the buyer may sue in negligence if he can establish the existence of a duty of care.³⁰⁴ As regards a seller, however, these remedies are of less importance in England than they might be in view of that provided by s.2(1) of the Misrepresentation Act 1967,³⁰⁵ which provides what appears to be a statutory tort action.³⁰⁶ Section 2(1) of that Act gives a party to a contract a statutory action for damages against the other party who makes a false representation, unless that other party shows that he had reasonable grounds to believe and did believe that the facts represented were true.³⁰⁷ Where defective goods cause damage to person or property the seller may be liable in negligence³⁰⁸ or under Pt I of the Consumer Protection Act 1987.³⁰⁹

Footnotes

218 e.g. *Chalmers v Harding* (1868) 17 L.T. 571 (“very good second-hand reaper”); *JJ Savage & Sons Pty Ltd v Blakney* (1970) 119 C.L.R. 435 (speed of boat); *Ross v Allis-Chalmers Australia Pty Ltd* (1981) 55 A.L.J.R. 8 (capacity of harvesting machine).

219 Vol.I, paras 9-009 et seq.

220 e.g. *Jendwine v Slade* (1797) 2 Esp. 572; cf. *Power v Barham* (1836) 4 Ad. & El. 473 (cases on pictures); *Hopkins v Tanqueray* (1854) 15 C.B. 130; cf. *Schawel v Reade* (1912) 46 I.L.T. 281; *Holmes v Burgess* [1975] 2 N.Z.L.R. 311 (assertions of soundness of horses). See also *Andrews v Hopkinson* [1957] 1 Q.B. 229 (“It’s a good little bus”); *Cremdean Properties Ltd v Nash* [1977] E.G.D. 63; *Porter v General Guarantee Corp Ltd* [1982] R.T.R. 384.

221 See Vol.I, paras 9-004 et seq.

222 See below, para.46-060.

- 223 *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 849*, per Lord Diplock; and see Sale of Goods Act 1979 s.11(3), quoted below; unless the right is lost; see below. As to the history of this use of the word “condition” see Vol.I, paras 27-014 et seq.; Benjamin’s Sale of Goods, 11th edn (2021), paras 10-024 et seq.
- 224 s.61(1); see also s.11(3), quoted below.
- 225 But see below, para.46-067.
- 226 *Couchman v Hill [1947] K.B. 554*; see Vol.I, paras 15-002, 15-024.
- 227 There are leading dicta to the same effect in *Bentsen v Taylor, Sons & Co [1893] 2 Q.B. 274, 281*.
- 228 See *Wickman Machine Tool Sales Ltd v L Schuler AG [1974] A.C. 235*.
- 229 See above, paras 40-483 et seq.
- 230 *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] Q.B. 44*, where the words “shipment to be made in good condition” were held not to be a condition, but to be subject to the general principles of repudiatory breach, following *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 Q.B. 26*, in which the test was said to be whether the breach deprived the innocent party of “substantially the whole benefit” of the contract. See also *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (The Diana Prosperity) [1976] 1 W.L.R. 989, 998*. In *RG Grain Trade LLP v Feed Factors International Ltd [2011] EWHC 1889 (Comm)*, [2011] 2 Lloyd’s Rep. 432 it was said that it was not the law that there was a right of rejection for quality matters unless the contract provides otherwise: at [42]. See also for a discussion of contract specifications as intermediate terms *Galtrade Ltd v BP Oil International Ltd [2021] EWHC 1796 (Comm)*. As to the general principles of discharge by breach, see Vol.I, Ch.27.
- 231 *The Hansa Nord [1976] Q.B. 44*.
- 232 e.g. *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 717, 718, 719*. See Vol.I, paras 27-014 et seq.; below, para.46-067.
- 233 See *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 82 A.L.J.R. 345*, per Kirby J.
- 234 *Redgrave v Hurd (1881) 20 Ch. D. 1*. See below, para.46-072; Vol.I, Ch.9.
- 235 *Riddiford v Warren (1901) 20 N.Z.L.R. 572*; followed in *Watt v Westhoven [1933] V.L.R. 458*; see Benjamin’s Sale of Goods, 11th edn (2021), paras 1-008 et seq., 10-008.
- 236 For examples, see *Leaf v International Galleries [1950] 2 K.B. 86* (painter of picture); *Long v Lloyd [1958] 1 W.L.R. 753* (condition of lorry); *Goldsmith v Rodger [1962] 2 Lloyd’s Rep. 249* (misrepresentation by buyer as to condition of boat); *Royscot Trust Ltd v Rogerson [1991] Q.B. 297* (sale by dealer to finance company). See also as to misrepresentation by buyer *Riddiford v Warren (1901) 20 N.Z.L.R. 572*.
- 237 Below, para.46-073.
- 238 See Vol.I, paras 9-112 et seq.
- 239 s.3 (as amended by Unfair Contract Terms Act 1977 s.8): see Vol.I, paras 9-153 et seq.
- 240 [1964] A.C. 465; Vol.I, paras 9-098 et seq.
- 241 *Heilbut, Symons & Co v Buckleton [1913] A.C. 30*. See Vol.I, para.15-018.

- 242 e.g. *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801. But cf. *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574.
- 243 In the case of consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015 certain information provided under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 is also to be treated as included as a term of the contract (ss.11(4) and 12). The consumer will be entitled to rely on the remedies set out in s.19 of the Act; see above, paras 40-495 et seq.
- 244 And, in the nineteenth century, of stocks and shares, on which there are several cases.
- 245 *Heilbut, Symons & Co v Buckleton* [1913] A.C. 30, 51; see Vol.I, para.15-018.
- 246 See *Dick Bentley (Productions) Ltd v Harold Smith (Motors) Ltd* [1965] 1 W.L.R. 623, 627 (though some of this passage should be viewed with caution); Vol.I, para.15-002. In cases decided before the advent of a remedy in damages for negligent misrepresentation, there perhaps was a tendency to hold that, whereas statements by dealers and others with special means of knowledge were contractual promises (the *Dick Bentley* [1965] 1 W.L.R. 623, 627), statements by private persons were misrepresentations only (*Oscar Chess Ltd v Williams* [1957] 1 W.L.R. 370). cf. *Beale v Taylor* [1967] 1 W.L.R. 1193. But this is less important after the enactment of the Misrepresentation Act 1967.
- 247 See below, para.46-073.
- 248 Under s.2(2) of the Misrepresentation Act 1967; see below, para.46-072.
- 249 See below, paras 46-418 et seq.
- 250 Sale of Goods Act 1979 s.53; see below, para.46-418.
- 251 See below, paras 46-430 et seq.
- 252 *Sharneyford Supplies Ltd v Edge* [1986] Ch. 128 (actual decision reversed [1987] Ch. 305); *Rroysco Trust Ltd v Rogerson* [1991] 2 Q.B. 297. But as to this distinction see *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd (The Mamola Challenger)* [2010] EWHC 2026 (Comm), [2010] 2 C.L.C. 194; *McLauchlan* (2011) 127 L.Q.R. 23. See Vol.I, paras 9-087, 9-088.
- 253 *Saunders v Edwards* [1987] 1 W.L.R. 1116. cf. *East v Maurer* [1991] 1 W.L.R. 461.
- 254 *Davis & Co (Wines) Ltd v Afa Minerva Ltd (EMI) Ltd* [1974] 2 Lloyd's Rep. 27; *Rroysco Trust Ltd v Rogerson* [1991] 2 Q.B. 297. In the *Rroysco Trust* case, however, the Court of Appeal held that the measure of damages under s.2(1) of the 1967 Act was the same as that in deceit, and hence that even unforeseeable damage was recoverable. This is, however, arguable. The Singapore Court of Appeal doubted the correctness of *Rroysco* in *RBC Properties v Defu Furniture Pte Ltd* [2014] SGCA 62, [2015] 1 S.L.R. 997; see *Liau* [2015] L.M.C.L.Q. 464. See Vol.I, para.9-087. For the measure of damages in deceit, see *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158, and Vol.I, paras 9-063 et seq.
- 255 SI 2008/1277.
- 256 Directive 2005/29/EC of 11 May 2005.
- 257 By the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). The bulk of the Regulation came into force on 1 October 2014 and apply to contracts made on or after that date: reg.1(3). See generally paras 40-181 et seq.

- 258 See above, paras 40-181 et seq. The *2008 Regulations* are subject to minor amendment by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.6 and, subject to those amendments, form part of retained EU law post Brexit.
- 259 See Vol.I, para.3-061.
- 260 cf. *Gran Gelato Ltd v Richcliff Ltd [1992] Ch. 560*; Vol.I, para.9-091.
- 261 1979 Act ss.12(5A), 13(1A), 14(6), 15(3).
- 262 e.g. *Arcos Ltd v EA Ronaasen & Son [1933] A.C. 470* (description): see below, para.46-089. But a looser term such as “satisfactory quality” (below, para.46-099) facilitates flexibility.
- 263 e.g. *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] Q.B. 44*.
- 264 See below, para.46-070.
- 265 Though this is not conclusive: see above, para.46-056.
- 266 e.g. *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos) [1971] 1 Q.B. 164*.
- 267 *United Scientific Holdings Ltd v Burnley BC [1978] A.C. 904, 924, 937, 944, 950, 958*; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 716*. But see *Compagnie Commerciale Sucres et Denrées v C Czarnikow Ltd [1990] 1 W.L.R. 1337, 1347* (no presumption or rule of law to that effect). See also below, para.46-128.
- 268 *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711, 729*; *Toepfer v Lenersan-Poortman NV [1980] 1 Lloyd's Rep. 143*.
- 269 e.g. *Harling v Eddy [1950] 2 K.B. 739* (promise to take goods back); *Bergerco v Vegoil Ltd [1984] 1 Lloyd's Rep. 440* (“direct ship”); *Kuwait Rocks Co v AMN Bulkcarriers Inc (The Astra) [2013] EWHC 865 (Comm)*, [2013] 2 Lloyd's Rep. 69 (breach of an express obligation to make punctual payment of time charterparty hire). See also Vol.I, para.27-017.
- 270 See Vol.I, Ch.27.
- 271 See below, paras 46-390 et seq.
- 272 *Giles v Edwards (1797) 7 T.R. 181*; *Bragg v Villanova (1923) 40 T.L.R. 154*.
- 273 See *Yeoman Credit Ltd v Apps [1962] 2 Q.B. 508*; cf. *Charterhouse Credit Co Ltd v Tolly [1963] 2 Q.B. 683*.
- 274 See Vol.I, para.32-072.
- 275 Principally *Borrowman, Phillips & Co v Free and Hollis (1878) 4 Q.B.D. 500*; *EE & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd [1939] 2 K.B. 392*. But if loss was thereby caused to the buyer the seller might be liable in damages.
- 276 But cf. *McDougall v Aeromarine of Emsworth Ltd [1958] 1 W.L.R. 1126*. Curing of a faulty tender may be easier in the case of delivery of wrong quantity: see below, paras 46-257 et seq. See in general Benjamin's Sale of Goods, 11th edn (2021), para.12-032.
- 277 See above, para.46-057.
- 278 *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] Q.B. 44*.
- 279 [1976] Q.B. 44 at 60, 72–73, 84. See Vol.I, paras 27-042 et seq.; below, paras 46-265 et seq.
- 280 See *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 82 A.L.J.R. 345* (see per Kirby J at [114], where however for English law the word “substantial” is too weak). In *Gregg & Co (Knottingley) Ltd v Emherst Glass Ltd [2005] EWHC 804 (TCC)* it was held that continuing malfunctions of computerised machines, despite best efforts at remediation

- over two years, were repudiatory of an obligation of sale and service though the right to reject had been lost.
- 281 See *Rubicon Computer Systems Ltd v United Paints Ltd* (2000) 2 T.C.L.R. 453 (Sale of Goods Act 1979 s.12(2)); but cf. *The Ymnos* [1982] 2 Lloyd's Rep. 574, 583. Such an idea is accepted in the context of an elaborately drafted agreement in *GB Gas Holdings Ltd v Accenture (UK) Ltd* [2010] EWCA Civ 912; but different uses of the word “warranty” make it difficult to generalise further.
- 282 The *Consumer Rights Act 2015* makes elaborate provisions as regards the different circumstances which give rise to the remedies (often referred to as “rights to enforce”) which the Act provides for the consumer. Under the *2015 Act*, the buyer will have a so-called “short-term right to reject”, which will normally be lost after 30 days from delivery of the goods, and a final right to reject. See above, paras 40-515 et seq.
- 283 See *Grimoldby v Wells* (1875) L.R. 10 C.P. 391, 396; *Chapman v Morton* (1843) 11 M. & W. 534.
- 284 See *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 K.B. 473; *Charles Rickards Ltd v Oppenheim* [1950] 1 K.B. 616; *Société Italo-Belge, etc. v Palm and Vegetable Oils (Malaysia) Ltd (The Post Chaser)* [1982] 1 All E.R. 19; Vol.I, paras 25-042 et seq.
- 285 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391, 397–399. See also Vol.I, para.27-056; Benjamin's Sale of Goods, 11th edn (2021), para.12-036.
- 286 And there may be situations where a buyer is estopped from alleging that he has affirmed even though he did not know he had a right to reject. See *Panchaud Frères SA v Et. General Grain Ltd* [1970] 1 Lloyd's Rep. 53 (documentary sale); *Peyman v Lanjani* [1985] Ch. 457; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 2 Lloyd's Rep. 386.
- 287 The subsection in the *1893 Act* originally based rejection of specific goods on the passing of property, creating considerable problems which remain in some other common law jurisdictions. This provision does not apply to consumer contracts for the sale of goods which fall within *Ch.2 of Pt 1 of the Consumer Rights Act 2015*. In consumer contracts for the sale of goods the *2015 Act* provides a corresponding right of partial rejection, see above, para.40-517.
- 288 See below, paras 46-263 et seq.
- 289 See below, paras 46-279 et seq.
- 290 See below, paras 46-264 et seq.
- 291 See below, para.46-264.
- 292 See below, para.46-287. But see s.35(7).
- 293 See s.61(5A). The words in brackets are deleted by the *Consumer Rights Act 2015*. Special rules in that Act apply to consumer sales. In particular, the implied terms in ss.13, 14 and 15 of the *1979 Act* no longer apply in consumer sales contracts.
- 294 s.4(2).
- 295 Benjamin's Sale of Goods, 11th edn (2021), paras 12-024 et seq., 18-579 et seq.
- 296 The provision was used in an argument e contrario in *Lowe v W Machell Joinery Ltd* [2011] EWCA Civ 794, below, para.46-089.

- 297 See Vol.I, paras 9-120 et seq.
- 298 Misrepresentation Act 1967 s.1(a); see Vol.I, para.9-122. For practical difficulties of tactics in this connection, see Benjamin's Sale of Goods, 11th edn (2021), para.12-074.
- 299 See Vol.I, paras 9-132 et seq. A fifth possible limitation, that rescission was barred by performance of the contract, was removed by s.1(b) of the Misrepresentation Act 1967.
- 300 See *Atlantic Lines and Navigation Co Inc v Hallam Ltd* [1983] 1 Lloyd's Rep. 188, 202; *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016; *Beale* (1995) 111 L.Q.R. 60; and Vol.I, paras 9-112 et seq.
- 301 See Vol.I, para.9-121.
- 302 *Derry v Peek* (1889) 14 App. Cas. 337; Vol.I, paras 9-055 et seq.
- 303 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158; *Archer v Brown* [1985] Q.B. 401; Vol.I, paras 9-063 et seq.
- 304 See *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; *Capital Motors Ltd v Beecham* [1975] 1 N.Z.L.R. 576; *Sealand of the Pacific Ltd v Ocean Cement Ltd* 33 D.L.R. (3d) 625 (1973); affirmed 51 D.L.R. (3d) 702 (1975); *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 Q.B. 113; Clerk & Lindsell on Torts, 23rd edn (2020), paras 7-125 et seq. See Vol.I, paras 9-098 et seq.
- 305 For an example of possible difference, see *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574. cf. Vol.I, para.9-106.
- 306 See, e.g. *Royscot Trust Ltd v Rogerson* [1991] 2 Q.B. 297; Vol.I, para.9-087.
- 307 See Vol.I, paras 9-084 et seq. The action does not lie against an agent who induces a contract with his principal by misrepresentation: *Resolute Maritime Inc v Nippon Kaiji Kyokai (The Skopas)* [1983] 1 W.L.R. 857.
- 308 *Clarke v Army and Navy Co-operative Society Ltd* [1903] 1 K.B. 155; *Herschthal v Stewart and Ardern Ltd* [1940] 1 K.B. 155; *Andrews v Hopkinson* [1957] 1 Q.B. 229; *Vacwell Engineering Ltd v BDH Chemicals Ltd* [1971] 1 Q.B. 88, 108; *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep. 645; *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379. But the duty can sometimes be discharged by a warning: see *Hurley v Dyke* [1979] R.T.R. 265. Such an action may perhaps lie, on the analogy of building cases, in respect of damage to another part of a complex structure: but not merely because the article is unsatisfactory and involves financial loss to the buyer: see Benjamin's Sale of Goods, 11th edn (2021), paras 12-075 et seq. and in general Clerk & Lindsell on Torts, 23rd edn (2020), Ch.10.
- 309 See also Pt II of the 1987 Act (breach of statutory duty).

(b) - Implied Terms

Chitty on Contracts 34th Ed.

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Chapter 46 - Sale of Goods

Section 3. - Terms of the Contract

(b) - Implied Terms

Overview of implied terms

- 46-074 The Act lays down a number of implied terms as to title, compliance with description and quality or fitness, and these are now discussed. Further new terms were added by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#)³¹⁰; if the trader provides pre-contractual information in compliance with those Regulations, the information “is to be treated as included as a term of the contract” and the contract is to be treated as including a term that the trader has supplied the information required.³¹¹ The [Consumer Rights Act 2015](#) seeks to set out in a comprehensive way all of a consumer buyer’s statutory rights under a consumer sale of goods contract. The consumer will have rights directly equivalent to the existing rights under current law and several new rights.³¹² The corollary of the [2015 Act](#)’s enactment of special and separate provision for consumer contracts in certain respects is that it amends certain provisions of the [Sale of Goods Act 1979](#), including the implied terms in ss.12, 13, 14 and 15, so that the [1979 Act](#) no longer applies to consumer sales contracts or applies to them only with qualifications.

Footnotes

310 SI 2013/3134.

311 See above, paras 40-067 et seq.

312 The new rights granted to consumers by the [2015 Act](#) in the case of consumer sale of goods contracts are described above, paras 40-494 et seq.

(i) - Implied Terms about Title

Chitty on Contracts 34th Ed.

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(b) - Implied Terms

(i) - Implied Terms about Title

Implied terms about title

46-075 By [s.12 of the Sale of Goods Act 1979](#)³¹³:

Arrangement of Act

“(1) In a contract of sale, other than one to which subs.(3) below applies,³¹⁴ there is an implied term on the part of the seller that in the case of sale, he has a right to sell the goods, and in the case of an agreement to sell,³¹⁵ he will have a right to sell the goods at the time when the property is to pass.

(2) In a contract of sale, other than one to which subs.(3) below applies, there is also an implied term that—

(a) 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

(b) 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.”

Breaches of s.12

- 46-076 Section 12(1) is clearly broken if the goods belong to a third party and the seller has at the relevant moment no power to transfer the property in them to the buyer. It requires no knowledge or fault on the part of the seller nor any disturbance of possession, merely absence of the right to sell. Further, in *Niblett v Confectioners' Materials Co Ltd*,³¹⁶ where the goods sold bore a label which infringed the trade mark of a third party, it was held that the sellers had no right to sell them because the third party could have obtained an injunction to restrain the sale. Scrutton LJ said³¹⁷: "If a vendor can be stopped by process of law from selling he has not the right to sell".
- 46-077 The seller need not, however, own the goods at any time: he only promises that he will be able to create the appropriate rights in the buyer.³¹⁸ He can therefore perform by causing transfer direct from a third party. There is no clear decision as to whether the term is broken where a person sells who has no right to sell, but who nevertheless has a power to pass title in a situation where a non-owner can do so by statute.³¹⁹ The above dictum of Scrutton LJ might suggest that it is: but it is submitted that since the goods will not be affected by any third party right after sale, the seller should be regarded as having had the right to sell.³²⁰

Charges and encumbrances: quiet possession

- 46-078 Section 12(2), dealing with charges and encumbrances and quiet possession, is an amalgamation of what were in the original Act two separate provisions.³²¹ There has been little authority on the application of their requirements, and both are more reminiscent of the law of land than of sale of goods.³²² It does not however appear that rules from land law should be imported into this area.³²³ Thus though the warranty against encumbrances in relation to land is not broken until the buyer's possession is disturbed,³²⁴ the wording of the subsection, at any rate in its present form, appears to envisage breach simply because of the presence of an encumbrance at the relevant time, which is not necessarily (as in the case of s.12(1)) the time at which property is to pass. And though there is authority that the warranty of quiet possession in land law only applies to disturbance by the vendor and not those claiming by title paramount,³²⁵ this is not so in the case of sale of goods.³²⁶

Examples of breach of the term requiring quiet possession

46-079

The term as to quiet possession seems in fact to have at least three applications where the condition as to title may fail. First, it may apply to interference not related to title. Thus it was held in *Microbeads AG v Vinhurst Road Markings Ltd*³²⁷ that where goods were sold, and after the sale letters patent were granted which enabled third parties to restrain the use of the goods, there was a breach of s.12(2)(b), though s.12(1) was not infringed; and in *The Playa Larga*³²⁸ it was held broken when subsequent to the sale the seller connived at a governmental decision to withdraw goods from a contract after appropriation. But interference by *wrongful* acts of third parties unconnected with the seller would not be covered.³²⁹ Secondly, the term may allow the buyer a longer period of limitation than that which is available to him under s.12(1); for under s.12(2)(b) time will not begin to run until the disturbance of possession has actually taken place.³³⁰ Thirdly, it may provide the buyer with a remedy in a situation where the seller has a right to sell but the goods are subject to the rights of a third party. If, for instance, a debtor sells goods which have been seized by a sheriff but which remain in the debtor's possession, the buyer may have a remedy for breach of the terms as to quiet possession and freedom from encumbrances if he is compelled to surrender the goods.³³¹

Effect of breach of s.12³³²

46-080 As regards England and Wales and Northern Ireland the term implied by s.12(1) is a condition.³³³ Hence on its breach the buyer can treat the contract as repudiated and claim damages.³³⁴ He can alternatively affirm the contract and claim damages.³³⁵ The obligations laid down in s.12(2) are, in England and Wales and Northern Ireland, warranties only.³³⁶ They will normally give rise to no more than the right to damages.³³⁷ The rules as to damages are discussed elsewhere,³³⁸ but it may be noted that buyers have been held entitled to recover the cost of improvements done to the goods in the ordinary course of events, if evicted,³³⁹ and of discharging the adverse claim³⁴⁰ or defending an action brought by the true owner.³⁴¹

Total failure of consideration despite use of goods

46-081 A well-known problem arises as to whether the buyer, when he treats the contract as repudiated, is entitled to recover the whole purchase price as upon a total failure of consideration in spite of the fact that he has used the thing sold. In *Rowland v Divall*³⁴² the plaintiff bought a car from a person who, unknown to him, did not own it. He and his sub-purchaser used the car for several months before it was seized by the police and restored to the true owner; nevertheless, he was allowed to

recover the purchase price in full on the ground that there had been a total failure of consideration. This case was followed in *Butterworth v Kingsway Motors Ltd*³⁴³ and *Barber v NWS Bank Plc*³⁴⁴ and a similar principle has been applied in relation to hire-purchase agreements.³⁴⁵ As a result, the buyer's use of the goods, their consequent deterioration and any alterations in the conditions of the market are regarded as irrelevant; though where improvements have in good faith been made to the goods, the amount recovered may be reduced to the extent to which the value of the goods is attributable to the improvement.³⁴⁶ It is arguable that the buyer should be obliged to bring into account any benefit that he has received, although as the law now stands he has the right to recover the entire purchase price paid.³⁴⁷ It is, however, possible that if the seller's title is made good, or "fed", before the buyer elects to treat the contract as repudiated, the purchase price cannot be recovered.

³⁴⁸

U And if the buyer satisfies a judgment against him in conversion, the true owner's title is extinguished³⁴⁹ and it is arguable that the buyer cannot then treat the contract as repudiated, though he can sue for damages.³⁵⁰

No acceptance where there has been a breach of s.12

46-082 A further difficulty in this connection is that by virtue of s.11(4) of the Act³⁵¹ acceptance by the buyer will normally deprive him of his right to treat the contract as repudiated, and confine him to his remedy in damages. In cases such as *Rowland v Divall* it is difficult to see that the buyer had not accepted the goods. Atkin LJ however held that s.11(4) had no application to a breach of s.12 in that case.³⁵²

Change of position no defence

46-083 Since a claim by the buyer to recover the purchase price paid on the ground of a total failure of consideration is a restitutionary claim, he could in principle be met by a defence of "change of position",³⁵³ that is to say, that the seller had changed his position as a result of the payment so that it would now be inequitable to require him to make restitution in whole or in part.³⁵⁴ But it is submitted that his defence is not open to a seller since he is, by his breach (even if unwitting) of the contract of sale, a "wrongdoer" to whom the defence is not available.³⁵⁵

Sales of limited title

46-084 Subsections (3) to (5) of s.12 of the 1979 Act deal with sales of limited title:

Arrangement of Act

“(3) This subsection applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.

(4) In a contract to which subs.(3) above applies there is an implied term that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.

(5) In a contract to which subs.(3) above applies there is also an implied term that none of the following will disturb the buyer’s quiet possession of the goods, namely—

(a) the seller;

(b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;

(c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.”

There is at present no authority on the scope of subs.(3).³⁵⁶ Section 12 of the 1893 Act was expressed to apply “unless the circumstances of the contract are such as to show a different intention”. It was accordingly held in connection with that Act that there was no breach of subs. (1) where an auctioneer sold goods known to have been distrained by a bailiff,³⁵⁷ and Atkin LJ suggested that the qualification was introduced to exclude sales by a sheriff under an execution, and “other cases where by implication or by express terms there is no warranty of title”.³⁵⁸ Certain cases prior to the Act of 1893 are also sometimes cited,³⁵⁹ but none of these authorities can be regarded as conclusively indicating the appropriate interpretation of the present wording. In England and Wales and Northern Ireland, these implied terms are warranties.³⁶⁰

Exclusion of s.12

46-085 By [s.6\(1\) of the Unfair Contract Terms Act 1977](#):

“Liability for breach of the obligation arising from s.12 of the Sale of Goods Act 1979
... cannot be excluded or restricted by reference to any contract term.”

It should be noted that this provision, is not limited to sales made in the ordinary course of business.³⁶¹ Thus the section can only be limited by the techniques which it itself provides in [subss. \(3\) to \(5\)](#). Evasion of this provision by means of a “choice of law” clause is prevented by [s.27\(2\) of the 1977 Act](#).³⁶² However, by [s.26](#) the limits on contracting out imposed by the Act do not apply to international supply contracts.³⁶³ In such a contract therefore the common law principles will apply. There was much controversy over the possibility of contracting out of the provisions of [s.12](#) before the introduction of the present [subss.\(3\) to \(5\)](#). It seems that it is in principle possible to do so if the true intention of the parties is that the seller should transfer only such title as he or a third person may have within [subss.\(3\) to \(5\)](#). Otherwise it is submitted that a clause which, in general terms, purported to relieve the seller from his obligation to pass a good title to the buyer would be inconsistent with the notion of sale and would not be upheld,³⁶⁴ although a clause which merely restricted the seller’s liability for breach of that obligation or any right or remedy available to the buyer could well be effective.

Footnotes

- 313 This section does not apply to consumer contracts for the sale of goods which fall within [Ch.2 of Pt 1 of the Consumer Rights Act 2015](#). In consumer contracts for the sale of goods the [2015 Act](#) provides a corresponding term relating to the right to supply which is to be treated as included in the contract, see above, paras [40-494](#) et seq.
- 314 See below, para.[46-084](#).
- 315 See above, paras [46-020](#)—[46-021](#).
- 316 [\[1921\] 3 K.B. 387](#), disapproving *Monforts v Marsden* (1895) 12 R.P.C. 266. See also *Egekvist Bakeries v Tizel & Blinick* [1950] 1 D.L.R. 585; *affirmed* [1950] 2 D.L.R. 592 (goods subject to detention order by pure food administration); *J Barry Winsor & Associates Ltd v Belgo Canadian Mfg Co Ltd* (1976) 76 D.L.R. (3d) 685 (non-compliance with electrical standards). Applied in *Azzurri Communications Ltd v International Telecommunications Equipment Ltd* [2013] EWPCC 17 where it was accepted that there was a breach of [s.12\(1\)](#) and [s.12\(2\)](#) where telephone handsets infringed a registered trademark. The decision of the buyer to

- return the handsets to the owner constituted reasonable mitigation and the buyer was entitled to damages for buying replacement goods.
- 317 At 398.
- 318 *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafit) [1986] 1 All E.R. 208, 215*; in the context of retention of title clauses, see *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd [2015] EWCA Civ 1058* (noted *Tettenborn [2016] L.M.C.L.Q. 24*), affirmed *[2016] UKSC 23* and see *L. Gullifer [2017] L.Q.R 244*.
- 319 See below, paras 46-193 et seq. But see *Reg v Wheeler (1991) 92 Cr. App. R. 279* (sale in market overt).
- 320 Contra, Benjamin's Sale of Goods, 11th edn (2021), para.4-004. See *Kolkarni v Manor Credit (Davenham) Ltd [2010] EWCA Civ 69, [2010] 2 Lloyd's Rep. 431* at [43]. It may, however, be argued that a person who holds title to a vehicle only by virtue of Pt III of the Hire-Purchase Act 1964 (see above, para.41-374) will find the vehicle virtually unsaleable through the motor trade. See also *Barber v NWS Bank Plc [1996] 1 W.L.R. 641* (express term).
- 321 1979 Act ss.12(2) and (3).
- 322 cf. Conveyancing Act 1881 s.7. But encumbrances can certainly be relevant when ships are sold: see *The Barenbels [1985] 1 Lloyd's Rep. 528* (where the debt in respect of which the ship was arrested did not constitute an encumbrance).
- 323 See *Mason v Burningham [1949] 2 K.B. 545, 563*.
- 324 *Nottidge v Dering [1909] 2 Ch. 647, 656; affirmed [1910] 1 Ch. 297*.
- 325 See *Niblett v Confectioners' Materials Co Ltd [1921] 3 K.B. 387, 403; Jones v Lavington [1903] 1 K.B. 253*.
- 326 *Mason v Burningham [1949] 2 K.B. 545, 562–563; Microbeads AG v Vinhurst Road Markings Ltd [1975] 1 W.L.R. 218*.
- 327 See above. See also *Gencab of Canada Ltd v Murray-Jensen Mfg Ltd (1980) 114 D.L.R. (3d) 92* (threat of action by patent holder); *Rubicon Computer Systems Ltd v United Paints Ltd (2000) 2 T.C.L.R. 454* (supplier of computer equipment attached lock to it).
- 328 *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga) [1983] 2 Lloyd's Rep. 171*.
- 329 In *Great Elephant Corp v Trafigura Beheer BV [2012] EWHC 1745 [2013] 1 All E.R. (Comm) 415* a Nigerian Government Department had refused to issue cargo documents which prevented the vessel carrying the oil which was the subject of the contract of sale from sailing. There was a breach of s.12(2)(b) as although the interference occurred after property had passed it arose out of circumstances which existed at the time of the sale. However, when the Government unlawfully demanded a fine, the breach stopped as the guarantee did not extend to unlawful acts. The judge's decision on s.12(2)(b) was upheld by the Court of Appeal (*[2013] EWCA Civ 905*) although the appeal was allowed on different grounds.
- 330 See *Howell v Richards (1809) 11 East 633, 642, 643; Baynes & Co v Lloyd & Sons [1895] 1 Q.B. 820, 824* (cases on land, however).
- 331 See *Lloyds and Scottish Finance Ltd v Modern Cars & Caravans (Kingston) Ltd [1966] 1 Q.B. 764*.
- 332 The Consumer Rights Act 2015 introduces a separate scheme of remedies for breaches of the provisions equivalent to those of s.12, but the effect appears to be much the same: if

the trader had no right to sell the goods, the consumer may reject the goods and treat the contract as at an end; if the goods are subject to an encumbrance, the consumer will have no right to reject or treat the contract as at an end but will be entitled to damages. See above, paras 40-514 et seq.

- 333 1979 Act s.12(5A).
- 334 See above, para.46-056.
- 335 e.g. *Mason v Birmingham* [1949] 2 K.B. 545.
- 336 1979 Act s.12(5A).
- 337 But see *Rubicon Computer Systems Ltd v United Paints Ltd* (2000) 2 T.C.L.R. 454 (repudiatory breach rules applied).
- 338 See below, paras 46-390 et seq. See also *Healing (Sales) Pty Ltd v English Electrix Pty Ltd* (1968) 121 C.L.R. 584.
- 339 *Mason v Birmingham* [1949] 2 K.B. 545.
- 340 *Stock v Urey* [1954] N.I. 71; *Ed Learn Ford Sales Ltd v Giavannone* (1990) 74 D.L.R. (4d) 761.
- 341 *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 Q.B. 764. See further Benjamin's Sale of Goods, 11th edn (2021), para.4-028.
- 342 [1923] 2 K.B. 500.
- 343 [1954] 1 W.L.R. 1286.
- 344 [1996] 1 W.L.R. 641.
- 345 *Karflex Ltd v Poole* [1933] 2 K.B. 251; *Mercantile Union Guarantee Corp v Wheatley* [1938] 1 K.B. 490; *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 K.B. 576; see above, para.41-320. See also *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 W.L.R. 912, 925, 938.
- 346 Torts (Interference with Goods) Act 1977 s.6(3). The reason is that the damages recoverable by the true owner are under the Act similarly reducible.
- 347 See the Twelfth Report of the Law Reform Committee (1966) Cmnd.2958, para.36; see also Benjamin's Sale of Goods, 11th edn (2021), para.4-006. cf. Law Commission, Final Report on Sale and Supply of Goods (1987), Law Com. No.160, paras 6.1-6.5.
- 348 Lucas v Smith [1926] V.L.R. 400, 403-404; *Butterworth v Kingsway Motors Ltd* [1954] 1 W.L.R. 1286; *Patten v Thomas Motors Pty Ltd* [1965] N.S.W.R. 1457. But cf. *HW West Ltd v McBlain* [1950] N.I. 144. See also *Whitehorn Bros v Davison* [1911] 1 K.B. 463, 475; *Blundell-Leigh v Attenborough* [1921] 3 K.B. 235, 240, 242; *Robin and Rambler Coaches Ltd v Turner* [1947] 2 All E.R. 284; *Bennett v Griffin Finance Ltd* [1967] 2 Q.B. 46, 50; Benjamin's Sale of Goods, 11th edn (2021), paras 4-010—4-011. In *Heathrow Truck Centre Ltd v Motability Operations Ltd* [2021] 12 WLK 545 goods were sold by a bailee with a right to possession and on payment of sums superior title would have been fed down the chain.
- 349 Torts (Interference with Goods) Act 1977 s.5(1). It is arguable that the title also vests in the buyer. This is the position at common law: *USA v Dollfus Mieg & Cie* [1952] A.C. 582, 622.
- 350 Benjamin's Sale of Goods, 11th edn (2021), at para.4-012. See also *Ed Learn Ford Sales Ltd v Giavannone* (1990) 74 D.L.R. (4d) 761.

- 351 See above, para.46-068.
- 352 At 506–507. The provision was then s.11(1)(c). A possible argument is that the subsection does not apply where the breach is fundamental. See *Reynolds* (1963) 79 *L.Q.R.* 534, 553–555; *Ellinger* (1969) 5 *Victoria U. of Wellington L.R.* 168. But the demise of the notion of fundamental breach makes this now difficult to argue: see Vol.I, paras 17-023 et seq.
- 353 *Lipkin Gorman v Karpnale Ltd* [1991] 2 *A.C.* 548, 558, 562, 567–568, 577. See Vol.I, paras 32-199 et seq.
- 354 cf. *Barber v NWS Bank Plc* [1996] 1 *W.L.R.* 641 (where the defence failed on the facts).
- 355 *Lipkin Gorman v Karpnale Ltd*, above, at 579. Contra, Benjamin's Sale of Goods, 11th edn (2021), para.4-008.
- 356 But see *Reg v Wheeler* (1991) 92 *Cr. App. R.* 279 (sale in market overt, now abolished).
- 357 *Payne v Elsden* (1900) 17 *T.L.R.* 161.
- 358 *Niblett v Confectioners' Materials Co Ltd* [1921] 3 *K.B.* 387, 401.
- 359 See, e.g. *Chapman v Speller* (1850) 14 *Q.B.* 621 (sheriff); *Bagueley v Hawley* (1867) *L.R.* 2 *C.P.* 625 (resale of goods seized under distress); *Wood v Baxter* (1883) 49 *L.T.* 45 (auctioneer); *Morley v Attenborough* (1849) 3 *Exch.* 500 (pawnbroker); *Page v Cowasjee Eduljee* (1866) *L.R.* 1 *P.C.* 127 (shipmaster). See also *Warmings Used Cars Ltd v Tucker* [1956] *S.A.S.R.* 249 (commission agent).
- 360 1979 Act s.12(5A).
- 361 The Consumer Rights Act 2015 Act repeals or disappplies provisions in the Unfair Contract Terms Act 1977 governing the contracts to which Ch.1 applies, and instead makes its own provision controlling the exclusion of liabilities arising under its provisions.
- 362 See Vol.I, para.33-009; *Mann* (1974) 90 *L.Q.R.* 42.
- 363 See below, para.46-125.
- 364 See *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 *A.C.* 361, 398, 432; Benjamin's Sale of Goods, 11th edn (2021), para.4–019.

(ii) - Implied Term as to Correspondence with Description

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(b) - Implied Terms

(ii) - Implied Term as to Correspondence with Description

Sale by description

46-086 Section 13 of the Act provides³⁶⁵:

Arrangement of Act

“(1) Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.

(2) 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.”

The section applies to all sales of unascertained goods,³⁶⁶ and has been interpreted as applying to many sales of specific goods.³⁶⁷ As regards the latter, it may be said that there is a sale by description in two types of cases. The first occurs where the buyer contracts in reliance on the description of the goods in the contract without having seen them. Thus in *Varley v Whipp*³⁶⁸ the defendant agreed to buy a reaping machine which he had never seen, and which the plaintiff described as nearly new. In fact it did not correspond with this description, and the defendant was held to be entitled to reject it. It was said that, although the most usual application of this section is to the case of unascertained goods, it “must apply to all cases where the purchaser has not seen

the goods but is relying on the description alone”, and was therefore applicable to a contract for the sale of specific goods where there was no identification otherwise than by description.³⁶⁹

- 46-087 The second goes further: the buyer has seen the goods, but the stated characteristics of the goods are still intended to form part of the description by which they are sold.³⁷⁰

“It may also be pointed out that 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 undergarments, a hot-water bottle ...”³⁷¹

This is subject to the proviso that the difference between the goods and the description of them was not apparent at the time of the sale.³⁷² This type of case also extends to situations where the buyer, though he has seen the goods, relies, at least in part, on the description given to them,³⁷³ for example, that table linen is “the authentic property of Charles I”³⁷⁴ or that a painting is the work of a particular artist.³⁷⁵ However, if the buyer purchases specific goods, not in reliance on the description, but such as they are,³⁷⁶

then the goods will not have been sold by description. Thus in *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*³⁷⁷ a sale between art dealers of a painting attributed to Gabriele Münter was held not to be by description where the seller had disclaimed any knowledge as to the artist and the buyer had, after inspection, relied on his own judgment in buying the painting, even though the attribution had been made in negotiations, in an old auction catalogue, and in an invoice issued after the sale.

Goods selected by buyer

- 46-088 Though it was probably already the case, it is made clear by s.13(3) of the Act that a sale where the buyer selects the goods, in, e.g. a self-service shop, can be a sale by description. The subsection provides:

“A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.”

Correspondence with description

- 46-089 The time for correspondence with description is the time of delivery, or if the time of passing of property is earlier, at that time.³⁷⁸ Once it is established that a given contract of sale is a sale by description, the test applied by the courts to determine whether or not the goods correspond with the description is a strict one. If the goods do not correspond with the description, it is not enough for the seller to show that they were of satisfactory quality, or fit for the particular purpose for which they were required. Some cases are fairly obvious. Thus a contract for common English sainfoin seed is not performed by the delivery of giant sainfoin,³⁷⁹ a contract for a new car is not performed by delivery of a second-hand car,³⁸⁰ and a contract for a 1961 Triumph Herald is not performed by delivery of a car made up of two portions from different models welded together.³⁸¹ But in commercial cases particularly stringent rules may be applied. In *Arcos Ltd v EA Ronaasen & Son*,³⁸²

- U** a case where timber did not meet specified measurements, Lord Atkin put the point as follows:

“If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard.”

The same reasoning may apply to packaging: thus in *Re Moore & Co and Landauer & Co*³⁸³ a buyer was held entitled to reject a whole consignment of tinned fruit on the grounds that some of the cases contained 24 tins instead of the stipulated 30, though the total number of tins was correct. In such cases also stipulations as to the time and method of shipment are usually held part of the description.³⁸⁴ Nevertheless, it has been said that some of these cases are “excessively technical and due for fresh examination” in the House of Lords.³⁸⁵

Description or quality?

- 46-090 Difficulty may occur in distinguishing between description and quality. In principle the two are clearly different.³⁸⁶ But indications of quality may in appropriate cases be part of the description of the goods,³⁸⁷ as may indications of purpose (e.g. “cough mixture”, “pet food”), and goods may be of such bad quality as not to comply with their description for that reason.³⁸⁸ In commercial cases much may turn on the form of the contract³⁸⁹ and on commercial usage.³⁹⁰ Where goods

contain admixtures of other substances the question is whether the addition is such as to make the basic substance lose its identity, or merely to vary the quality.³⁹¹

“Ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of different kind from those he had agreed to buy.”³⁹²

Identification

- 46-091 Descriptive words may however identify the goods with varying degrees of preciseness. In a charterparty case³⁹³ the ship chartered was described as “Japanese flag ... Newbuilding motor tank vessel called Yard No.354 at Osaka Zosen ... described as per Clause 24 hereof”. The vessel tendered had been built at an associated yard, Oshima, in whose books it was No.004. The words were held not descriptive of the ship but simply to provide an indication or identification of the vessel meant.³⁹⁴

Sale by sample and description

- 46-092 It follows from the wording of s.13(1) that a sale may be by sample as well as by description. In such a case the rule is that the goods must correspond with both sample and description. Thus, in *Nichol v Godts*³⁹⁵ the sale was for “foreign refined rape oil, warranted only equal to sample”. The goods tendered were equal to sample but contained an admixture of hemp oil. It was held that the buyer was entitled to reject because the goods, though corresponding with the sample, did not correspond with the description. But sometimes the sample is given under circumstances making it the only description of the thing to be supplied³⁹⁶; and where quality is part of the description,³⁹⁷ certification as to quality may sometimes be conclusive as to compliance with sample and hence with description.³⁹⁸

Remedies for breach³⁹⁹

- 46-093 As regards England and Wales and Northern Ireland, the term implied by s.13 is a condition.⁴⁰⁰ Breach of the term by the seller will therefore entitle the buyer, if he so chooses, to reject the goods

and normally treat the contract as repudiated⁴⁰¹ and to recover damages for any loss sustained as a result of the breach. But in the case of a very slight breach in a non-consumer case the right to reject is subject to s.15A.⁴⁰²

Footnotes

- 365 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides a corresponding requirement that goods be as described which is to be treated as included in the contract, see above, para.40-501. There will be one additional element. Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, traders are required to give various types of information to consumers before or at the time the contract is made, including information about the main characteristics of the goods. The information about the main characteristics that is given will be included as a term of the contract, so that the consumer will have the same remedies as in other cases in which the goods do not comply with the description. Other information that is given by the trader in compliance with the Regulations is to be treated differently: see above, paras 40-501—40-502. These Regulations, subject to minor amendments introduced by the Consumer Protection (Amendment etc) (EU Exit) Regulations 2018, form part of retained EU law post Brexit.
- 366 *Kidman v Fiskens Bunning & Co* [1907] S.A.L.R. 101, 107; see above, paras 46-040 et seq.
- 367 For the historical background, see Benjamin's Sale of Goods, 11th edn (2021), paras 11-002, 11-003; *Taylor v Combined Buyers Ltd* [1924] N.Z.L.R. 627. Prior to 1973 the condition as to merchantability in s.14(2) of the 1893 Act only applied to sales by description, and many of the authorities on the meaning of the phrase arise in connection with that subsection.
- 368 [1900] 1 Q.B. 513.
- 369 [1900] 1 Q.B. 513, 516.
- 370 *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382, 394; *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564.
- 371 *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85, 100 per Lord Wright.
- 372 See *Beale v Taylor* [1967] 1 W.L.R. 1193, 1196.
- 373 Benjamin's Sale of Personal Property, 7th edn (1931), p.641; *Joseph Travers & Son Ltd v Longel Ltd* (1947) 64 T.L.R. 150. See also *Speedway Safety Products Ltd v Hazell & Moore Industries Pty Ltd* [1982] 1 N.S.W.L.R. 225; *Elder Smith Goldsborough Mort Ltd v McBride* [1976] 2 N.S.W.L.R. 631.
- 374 *Nicholson and Venn v Smith Marriott* (1947) 177 L.T. 189.
- 375 *Leaf v International Galleries* [1950] 2 K.B. 86, 89 (a case of misrepresentation). But see *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564.
- 376 In *Hughes v Hall* [1981] R.T.R. 430, Donaldson LJ said that a clause in a contract "sold as seen and inspected" would prima facie negative a sale by description. The case was, however,

doubted in *Cavendish-Woodhouse Ltd v Manley* (1984) 82 L.G.R. 376. See also *Speedway Safety Products Ltd v Hazell & Moore Industries Pty Ltd* [1982] 1 N.S.W.L.R. 225 (sale by receiver of stock situated at identified premises) and *McGowan (t/a McGowan Tree Services) v McArthur (t/a McArthur Forestry Services)* [2022] NIQB 27, where the Northern Ireland court held that even if a mulching machine had been “sold as seen” that would not have acted as an effective exclusion of warranties.

- 377 [1991] 1 Q.B. 564.
- 378 See *KG Bominfot Bunkergesellschaft etc. & Co v Petroplus Marketing AG (The Mercini Lady)* [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442, holding that it will not normally be appropriate to imply a term that the goods hold their specification for a period: if they cease to conform, that is a matter of quality covered by s.14, below, paras 46-094 et seq.
- 379 *Wallis, Son and Wells v Pratt and Haynes* [1911] A.C. 394.
- 380 *Andrews Bros Ltd v Singer & Co Ltd* [1934] 1 K.B. 17.
- 381 *Beale v Taylor* [1967] 1 W.L.R. 1193 (a case very near the line, however). *Brewer v Mann* [2010] EWHC 2444 (QB) (car sold as “1930 Speed Six Bentley” actually contained 1927 reconstructed standard 6.5 litre engine).
- 382 [1933] A.C. 470, 479. But contracts frequently stipulate for tolerances: and trade custom may be received in this connection: see *Montague L Meyer Ltd v Vigers Bros Ltd* (1939) 63 Ll.L. Rep. 10. See also *Local Boy'z Ltd v Malu NV* [2021] EWHC 2439 (Comm), where the masks supplied were not the same as the masks shown in the photograph when the contract was concluded and the court stressed that compliance with the implied condition of description was strict, save for microscopic deviations which businessmen and therefore lawyers would ignore.
- 383 [1921] 2 K.B. 519, a case on s.30(4) (now repealed).
- 384 *Bowes v Shand* (1877) 2 App. Cas. 455; *Macpherson Train & Co Ltd v Howard Ross & Co Ltd* [1955] 1 W.L.R. 640 (date of due arrival). cf. *J Aron & Co Inc v Comptoir Wegimont* [1921] 3 K.B. 435.
- 385 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (The Diana Prosperity)* [1976] 1 W.L.R. 989, 998, per Lord Wilberforce. *Bowes v Shand*, above, was, however, approved by the House of Lords in *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711; and Lord Wilberforce himself reserved the position as to unascertained future goods (e.g. commodities), as to which the date of shipment is often of commercial importance.
- 386 See, e.g. *Arcos Ltd v EA Ronaasen & Son* [1933] A.C. 470, where the goods were found to be merchantable under the contract specification and suitable for their purpose. See also *Proton Energy Group SA v Orien Letuva* [2013] EWHC 2872 (Comm), [2014] 1 Lloyd's Rep. 100 (oil specification went to quality not description).
- 387 See *Toepfer v Continental Grain Co* [1974] 1 Lloyd's Rep. 11 (“hard amber durum wheat”); *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep. 569 (“fine-ground”); cf. *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] A.C. 441, 470 (“fair average quality” not part of description, though in clause headed “Quantity and Description”); *Tradax International SA v Goldschmidt SA* [1977] 2 Lloyd's Rep. 604 (provision as to impurities); *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382, 393–394; *Total International Ltd v Addax BV* [1996] 2

- Lloyd's Rep.* 333 (“usual Dakar refinery quality” not part of description). And see *Montedison SpA v Icroma SpA (The Caspian Sea)* [1980] 1 W.L.R. 48; *NV Bunge v Cie Noga, etc. SA (The Bow Cedar)* [1980] 2 Lloyd's Rep. 601.
- 388 *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All E.R. 1496, 1516; affirmed on this point [1972] A.C. 441, 470; *Lockhart v Osman* [1981] V.R. 57 (cattle sold at cattle breeders’ sale infected with brucellosis).
- 389 See, e.g. *Montague L Meyer Ltd v Kivistö* (1929) 35 Ll.L. Rep. 265 (timber: “to be properly seasoned” not part of description); cf. *Tradax Export SA v European Grain & Shipping Ltd* [1983] 2 Lloyd's Rep. 100 (“maximum 7.5 per cent fibre” part of description).
- 390 See *Grenfell v EB Meyrowitz Ltd* [1936] 2 All E.R. 1313 (“safety glass”); *Steels & Busks Ltd v Bleeker Bik & Co Ltd* [1956] 1 Lloyd's Rep. 228 (“pale crepe rubber, quality as previously delivered”).
- 391 See *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 K.B. 690 (copra cake containing castor seed poisonous and not copra cake); *Robert A Munro & Co Ltd v Meyer* [1930] 2 K.B. 312 (adulterated bone meal); cf. *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] A.C. 441 (contaminated herring meal, toxic to mink but not to other animals, still herring meal); *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382. But see *Coote* (1976) 50 A.L.J. 17, pointing out that exclusion clause cases have used a more generalised approach than the precise correspondence required in some commodity cases on rejection.
- 392 *Christopher Hill Ltd v Ashington Piggeries Ltd*, above, at 503–504 per Lord Diplock.
- 393 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (The Diana Prosperity)* [1976] 1 W.L.R. 989; see also *Joseph Travers & Sons Ltd v Longel Ltd* (1947) 64 T.L.R. 50 (“waders”).
- 394 As to when descriptive words can constitute warranties or external representations, see *Taylor v Combined Buyers Ltd* [1924] N.Z.L.R. 627; *The Diana Prosperity* [1976] 1 W.L.R. 989 at 998; *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] Q.B. 574; Benjamin’s Sale of Goods, 11th edn (2021), paras 11-012, 11-013.
- 395 (1854) 10 Exch. 191. See also *Azémar v Casella* (1867) L.R. 2 C.P. 677; *Wallis, Son and Wells v Pratt and Haynes* [1911] A.C. 394; *ES Ruben & Co Ltd v Faire Bros & Co Ltd* [1949] 1 K.B. 254.
- 396 *Boshali v Allied Commercial Exporters Ltd* (1961) 105 S.J. 987.
- 397 See above, para.46-090.
- 398 e.g. *Toepfer v Continental Grain Co* [1974] 1 Lloyd's Rep. 11; *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382, 393–394; cf. *NV Bunge v Cie Naga d'Importation et d'Exportation SA (The Bow Cedar)* [1980] 2 Lloyd's Rep. 601; *Cauwenberghe & Fils SA v Tropical Product Sales SA* [1986] 1 Lloyd's Rep. 535; *Septo Trading Inc v Tintrade Ltd* [2020] EWHC 1795 (Comm).
- 399 The Consumer Rights Act 2015 introduces a separate scheme of remedies for breaches of the provisions equivalent to those of s.13; see above, paras 40-501—40-502.
- 400 1979 Act s.13(1A).
- 401 See above, para.46-066.
- 402 See above, para.46-070.

(iii) - Implied Terms about Quality and Fitness for Purpose

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 3. - Terms of the Contract

(b) - Implied Terms

(iii) - Implied Terms about Quality and Fitness for Purpose

Preliminary

46-094 Section 14(1) of the Sale of Goods Act provides:

“Except as provided by this section and s.15 below and subject to any other enactment,⁴⁰³ there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale.”

Subsection (4) however adds that “An implied term about quality or fitness for a particular purpose may be annexed to a contract of sale by usage”.⁴⁰⁴

Implied term as to satisfactory quality⁴⁰⁵

46-095 By subss.(2) to (2F) of s.14 of the 1979 Act:

Arrangement of Act

“(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of the goods—

- (a)** fitness for all the purposes for which goods of the kind in question are commonly supplied,
- (b)** appearance and finish,
- (c)** freedom from minor defects,
- (d)** safety, and
- (e)** durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—

- (a)** which is specifically drawn to the buyer's attention before the contract is made,
- (b)** where the buyer examines the goods before the contract is made, which that examination ought to reveal, or
- (c)** in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample."

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The concept of "satisfactory quality" and the guidelines were introduced into the [1979 Act](#) by the [Sale and Supply of Goods Act 1994](#)⁴⁰⁷ and replace that of "merchantable quality" the [1893 Act](#). As regards England and Wales and Northern Ireland, the term implied by [subs.\(2\)](#) is a condition.⁴⁰⁸

Sale in course of a business

The subsection requires that the seller sells goods “in the course of a business” and the Act provides that “‘business’ includes a profession and the activities of any government department ... or local or public authority”.⁴⁰⁹ It has been held⁴¹⁰ that these words cover, not only sales by business sellers of the type of goods which they are in the business of selling,⁴¹¹ but also sales by business and professional sellers who are in the business of selling one thing and sell something else incidentally (e.g. a commercial fisherman selling his fishing vessel,⁴¹² or a coal merchant selling his truck) and business and professional sellers who are not in the business of selling at all but who make a sale in connection with another business (e.g. a television rental company selling one of its vans or a doctor the computer used by his secretary). This is so despite the fact that cases in other contexts, especially with regard to buyers (more likely to be thought of as needing protection), suggest that the words “in the course of a business” require that the transaction is an integral part of the business carried on or, if it is only incidental thereto, that there is a sufficient degree of regularity about the transaction in question.⁴¹³ It has been held that the final sale of the live and dead stock of a farm was made in the course of a business.⁴¹⁴ Difficult cases may also arise where non-profit-making organisations (schools, hospitals) conduct commercial activities such as bookshops and restaurants: authority as to the meaning of the word “business” in other contexts, though relevant, will not be conclusive.⁴¹⁵

Sale through an agent

46-097 Section 14(5) provides:

“The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.”

This subsection applies to any sale by an agent whether the principal is disclosed or undisclosed.⁴¹⁶ Thus a sale will be in the course of a business if it is effected by an agent in the course of a business on behalf of a principal who would, if selling himself, be selling privately, unless the buyer knows that the principal is selling privately or reasonable steps are taken to make him aware of this. This provision is particularly relevant to sales by auction.

Goods supplied under the contract

46-098

These words take account of case law under the [1893 Act](#), whereby the duty to supply merchantable goods was applied to the containers and other additions in and with which they were supplied.⁴¹⁷

Satisfactory quality

46-099 The duty to supply goods of satisfactory quality is strict: it is no defence to prove that all care was taken.⁴¹⁸ [Section 14\(2A\)](#) defines satisfactory quality: “For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances”. It has been said that the provision is “to establish a general standard of quality which goods are required to reach”⁴¹⁹ and that it is “primarily directed towards substandard goods”.⁴²⁰ There is as yet a modest amount of case law on the application of this new definition⁴²¹ although there are numerous cases on “merchantable quality” in the previous legislation.⁴²² These are, however, unlikely to be of direct assistance in interpreting the current definition. The reference to “a reasonable person” suggests an objective standard, but presumably must take into account the position of the individual buyer and must necessarily presuppose that the reasonable person is fully acquainted with the condition of the goods (including any hidden defects)⁴²³ and would with that knowledge regard them as being of a satisfactory standard. In determining the appropriate standard, it will obviously be relevant to take account of any description given of the goods⁴²⁴: this is particularly the case where the goods are described as having certain characteristics, e.g. “heavy duty” equipment, or are described as second-hand⁴²⁵ or sub-standard goods. The price may also be relevant in that the buyer may reasonably expect a standard of quality that is not grossly out of line with the price that he has paid.⁴²⁶ But all other relevant circumstances may be taken into account.⁴²⁷

Guidelines

46-100 [Section 14\(2B\)](#) further provides a non-exhaustive list of features which, in addition to the state and condition of the goods, are “in appropriate cases” to be regarded as “aspects of the quality of the goods”.

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U The first is “fitness for all the purposes for which the goods in question are commonly supplied”. By including fitness for *all* such purposes this feature appears to go further than the previous law, which held goods to be merchantable if they were fit for a purpose for which goods of

that description would normally be used even if they were unfit for another such purpose intended by the buyer.

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U However, the reference to the purposes for which the goods are *commonly* supplied may, in addition to excluding an abnormal or idiosyncratic use of the goods, enable the courts to avoid the extreme position that the goods must be fit for whatever purpose the buyer happens to require them.

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U Moreover, this feature is only to be applied “in appropriate cases”. The second and third features (“appearance and finish” and “freedom from minor defects”) are especially applicable to consumer sales, where the existence of slight defects may cause a reasonable person to regard the goods as unsatisfactory

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U even if they do not make the goods unfit for their purpose and even if the cost of remedying the defects is small.

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U The fourth feature (“safety”) is important in both consumer and non-consumer sales. Goods may be rendered unsafe by the absence of appropriate instructions for their use.

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U Conversely, goods may be rendered safe if accompanied by clear and adequate instructions as to their use or by warnings as to the risks involved.

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U The fifth feature (“durability”) does not mean that the seller gives a continuing guarantee that the goods will last for any particular period of time. But the inherent durability of the goods at the time of their sale to the buyer is a matter to be taken into account in determining whether the goods are of satisfactory quality.

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U The extent of the durability which it is reasonable to expect will, on the other hand, depend on the nature and description of the goods, their price and the circumstances of the sale.

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Provisos

- 46-101 The first proviso, relating to defects drawn to the buyer’s attention, is particularly relevant to the sale of second-hand and sub-standard goods. ⁴³⁷

- 46-102 The second proviso, on examination, replaced a similar proviso in the original [1893 Act](#) with one difference of wording: there is no liability for defects which *that* (previously “such”) an examination ought to reveal. It seems likely that this change in wording was intended to reverse the effect of the decision in *Thornett and Fehr v Beers & Son*⁴³⁸ where the buyer made a hasty examination though offered further facilities: it was held that the proviso applied to defects which a proper examination would have revealed. The present wording may be taken to refer to the examination actually conducted.⁴³⁹ It is to be noted, however, that the term continues to be implied where the buyer is given the opportunity to examine the goods but fails to do so.
- 46-103 The third proviso applies only in the case of a contract for sale by sample.⁴⁴⁰ Its effect is that the seller is under no liability in respect of defects which could have been detected on reasonable examination of the sample.⁴⁴¹ In this situation it is immaterial whether or not the buyer examines the sample.⁴⁴²

Time for compliance

- 46-104 In principle the goods must be of satisfactory quality at the time of sale,⁴⁴³ though in CIF and FOB contracts the duty normally relates to the time when risk passes, viz the time of shipment,⁴⁴⁴ and this may be so in most cases where property and risk are separated. But the fact that goods deteriorate soon after purchase may be evidence that they were not of the requisite standard (including in respect of durability) when sold⁴⁴⁵; and in contracts involving transportation of the goods, [s.14\(2\)](#) may be held to require that the goods are on shipment in a fit state to endure normal transit and to be satisfactory in quality on arrival.⁴⁴⁶

Implied term as to fitness for purpose⁴⁴⁷

- 46-105 [Section 14\(3\) of the Act](#)⁴⁴⁸ provides:

“Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—

- (a)to the seller, or

(b)where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker, any particular purpose for which the goods are being bought, there is an implied term 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 skill or judgment of the seller or credit-broker.”

The meaning of “sells goods in the course of a business” and the rules as to a sale through an agent have already been discussed⁴⁴⁹ as has also the meaning of the phrase “goods supplied under the contract”.⁴⁵⁰ As regards England and Wales and Northern Ireland, the term implied by s.14(3) is a condition.⁴⁵¹

Credit-broker

46-106 The references to a credit-broker are intended to cover instalment credit transactions where the supplier of the goods, e.g. a retailer, sells the goods to a finance company which then sells them to the buyer on credit terms (under a credit sale⁴⁵² or conditional sale⁴⁵³ agreement). The finance company is not a party to the original negotiations. In this case the purpose for which the goods are being bought is not made known to the seller, the finance company, but to the supplier (the credit-broker) with whom there is no contract of sale. The effect of the amendment is to make the actual seller subject to s.14(3) as well as to s.14(2).⁴⁵⁴ A credit-broker is defined by the subsection as:

“... a person acting in the course of a credit brokerage carried on by him, that is a business of effecting introductions of individuals desiring to obtain credit—(i) to persons carrying on any business so far as it relates to the provision of credit, or (ii) to other persons engaged in credit brokerage.”⁴⁵⁵

Making known purpose for which goods bought

46-107 As the subsequent words “whether or not that is a purpose for which such goods are commonly supplied” make clear, the subsection is not confined to the ordering of goods for specific purposes. The wording at this point is similar to that of s.14(1) of the 1893 Act, case-law on which had established that the purpose need not be made known expressly. Thus where an article can only be used for one purpose, e.g. a hot-water bottle, it is unnecessary for the buyer to make clear that

he wants the article for the purpose of containing hot water without leakage.⁴⁵⁶ Where however the goods may be used for any of several purposes, it may be necessary to specify the purpose: but here again knowledge may readily be inferred, e.g. from extraneous communications,⁴⁵⁷ the purpose of the contract,⁴⁵⁸ or the general background of the particular trade.⁴⁵⁹

Reliance may be rebutted

- 46-108 The 1893 Act required the buyer to allege reliance on the seller's skill or judgment, though the court would readily infer such reliance.⁴⁶⁰ The present wording of s.14(3) dispenses the plaintiff from this requirement, and it is for the seller to prove the absence of reliance or that reliance was not in the circumstances reasonable.⁴⁶¹ This could occur for instance where the seller disclaims any knowledge or expertise in relation to the goods, or if the buyer knows more about the conditions in which the goods are to be used than the seller,⁴⁶² or selects the goods from stock himself,⁴⁶³ or where the buyer makes assumptions as to the product which are not justified⁴⁶⁴ or takes a commodity as it is.⁴⁶⁵ Dealers in established markets may likewise be held to rely on their own judgment when buying, though there is no rule to this effect.⁴⁶⁶ Reliance may be partial: for example, where mink farmers asked a compounder of animal foods to make up mink food to a supplied formula it was held that there was reliance as to the suitability of the ingredients only.⁴⁶⁷

Reasonably fit for purpose

- 46-109 The duty to provide goods reasonably fit for the purpose made known is a strict one: it is no defence that all care was taken.⁴⁶⁸ There are many cases on this subsection,⁴⁶⁹ for s.14(2) of the original 1893 Act applied only to sales "by description": and difficulties over the meaning of that phrase, and over the meaning of "merchantable quality", seem for a period to have discouraged litigants from relying on that provision. As already stated, "reasonably fit" covers fitness for purposes for which the goods are commonly supplied as well as for specific purposes expressly made known to the seller. It does not however require that the goods are absolutely suitable for their purpose,⁴⁷⁰ nor proof against misuse,⁴⁷¹ nor usable for purposes outside the range of purposes foreseeable by the seller,⁴⁷² nor proof against an abnormal peculiarity or sensitivity, not known to the seller,⁴⁷³ in the buyer, or in the circumstances of the use of the goods by the buyer. This is the provision of the Act most likely to be relevant, whether directly or by analogy, to defective consumer software.⁴⁷⁴ The analogy would however (unless a service element can be isolated) create strict liability, which may not always be appropriate to a composite transaction.

Patent or trade name

- 46-110 Under the wording in the [1893 Act](#) the order of an article by its patent or trade name would exclude the condition as to fitness, though the proviso to this effect was restrictively interpreted.⁴⁷⁵ Under the present wording the fact that an article is ordered by a patent or trade name is relevant only as a possible indication that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill or judgment.

Time for compliance

- 46-111 This question has been discussed in connection with [s.14\(2\)](#).⁴⁷⁶ There can, however, be a difference of application, in that if a contract contemplates transportation of the goods and the goods are perishable, they must be shipped in a condition to endure normal transit to their destination.⁴⁷⁷

Relation between ss.14(2) and (3)

- 46-112 There is a considerable overlap between [ss.14\(2\)](#) and [14\(3\)](#) and claims under both subsections are frequently made. But three main differences exist.⁴⁷⁸ First, [s.14\(2\)](#) requires that the goods be of satisfactory quality whereas [s.14\(3\)](#) requires that they be reasonably fit for the purpose made known. The latter standard will normally be higher than the former if a special purpose is made known; and though "satisfactory quality" includes in appropriate cases fitness for purpose, it can be argued to impose a somewhat lower standard than [s.14\(3\)](#).⁴⁷⁹ Secondly, if there is no reliance, or if reliance is unreasonable, [s.14\(3\)](#) is excluded, but [s.14\(2\)](#) may still apply.⁴⁸⁰ Thirdly, [s.14\(2\)](#) is excluded as regards defects drawn to the buyer's attention, and defects which ought to have been revealed by an examination made: in connection with [s.14\(3\)](#) either of these factors may be relevant to show lack of reliance, but the lack of reliance may be partial only and not exclude the provision altogether.

Footnotes

- 403 Various statutes impose warranties upon sales: see, e.g. *Agriculture Act 1970* (as amended Pt IV (fertilisers and feeding stuffs); *Plant Varieties and Seeds Act 1964* (as amended) ss.16, 17.
- 404 As to custom or usage, see Vol.I, paras 16-035 et seq. An example is *Jones v Bowden (1813) 4 Taunt. 847* (warranty against seawater damage).
- 405 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the *Consumer Rights Act 2015*. In consumer contracts for the sale of goods the 2015 Act provides a corresponding requirement of satisfactory quality which is to be treated as included in the contract, see above, para.40-499. Section 14(2) is amended by removing subss.(2D)–(2F).
- 406 subss.(2D) to (2F) are deleted by the *Consumer Rights Act 2015*. See above, para.40-474. The provisions of s.14(2) no longer apply to consumer sales contracts. This chapter from the 33rd edition is also available as a PDF to online subscribers of this edition on Westlaw.
- 407 s.1(1).
- 408 1979 Act s.12(5A). As to conditions, see above, para.46-093.
- 409 1979 Act s.61(1).
- 410 *Stevenson v Rogers [1999] Q.B. 1028; MacDonald v Pollock [2012] CSIH 12, 2012 G.W.D. 8–162* (sale of a cruise ship).
- 411 As to which see *Christopher Hill Ltd v Ashington Piggeries Ltd [1972] A.C. 441, 474, 485, 495*.
- 412 *Stevenson v Rogers [1999] Q.B. 1028*.
- 413 See *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 W.L.R. 321* (buyer); *Feldaroll Foundry Plc v Hermes Leasing (London) Ltd [2004] EWCA Civ 747* (buyer); *Peter Symmons & Co v Cook (1981) 131 L.J. 758* (buyer) (*Unfair Contract Terms Act 1977*); *Davies v Sumner [1984] 1 W.L.R. 1301* (seller, but in context of criminal offence under *Trade Descriptions Act 1968*); below, para.46-121.
- 414 *Buchanan-Jardine v Hamilink, 1983 S.L.T. 149* (displenishing sale to buyer of farm: not actual sale of business). See also *Browning v Brachers [2005] EWHC 16 (QB), [2004] P.N.L.R. 28* at [47] (sale of items as part of the majority of a business).
- 415 See, e.g. *Trade Descriptions Act 1968* s.1; *Moneylenders Act 1900* ss.2, 6 (now repealed) (see *Litchfield v Dreyfus [1906] 1 K.B. 584*); Stroud's Judicial Dictionary, 7th edn (2006), "Business". See also *Stevenson v Beverley Bentinck Ltd [1976] 1 W.L.R. 483*.
- 416 *Boyter v Thomson [1995] 2 A.C. 628*.
- 417 *Gedding v Marsh [1920] 1 K.B. 668* (returnable mineral water bottle); *Morelli v Fitch and Gibbons [1928] 2 K.B. 636* (ginger beer bottle); *Niblett v Confectioners' Materials Ltd [1921] 3 K.B. 387* (tins of condensed milk); *Chaproniere v Mason (1905) 21 T.L.R. 633* (stone in Bath bun); *Wilson v Rickett, Cockerell & Co Ltd [1954] 1 Q.B. 598* (explosive mixed in Coalite).
- 418 *Grant v Australian Knitting Mills Ltd [1936] A.C. 85, 100*.
- 419 *Jewson Ltd v Boyhan [2003] EWCA Civ 1030, [2004] 1 Lloyd's Rep. 505* at [68].
- 420 *Balmoral Group Ltd v Borealis (UK) Ltd [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629* at [140].

- 421 See *Thain v Anniesland Trade Centre*, 1997 S.C.L.R. 991 (second hand car failed after a few weeks: sufficient durability); *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] 1 Lloyd's Rep. 20; affirmed [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379 (carcinogenic additive to CO₂ gas: too little to cause harm but necessitated product recall: quality not satisfactory); contrast *Jewson Ltd v Boyhan* [2003] EWCA Civ 1030, [2004] 1 Lloyd's Rep. 505 (home energy rating of boilers: boilers satisfactory in themselves); *Bramhill v Edwards* [2004] EWCA Civ 403, [2004] 1 Lloyd's Rep. 653 (American mobile home slightly wider than UK regulations permitted: satisfactory quality though use in UK would be illegal: doubted by *Twigg-Flesner* (2005) 121 L.Q.R. 205); *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 (polymer satisfactory for making storage tanks if properly processed); *Darren Egan v Motor Services (Bath Ltd)* [2007] EWCA Civ 1002, [2008] 1 All E.R. 1156n. (car veered with camber of road: satisfactory); *Webster Thompson Ltd v JG Pears (Newark) Ltd* [2009] EWHC 1070 (Comm), [2009] 2 Lloyd's Rep. 339 (Supply of Goods and Services Act 1982 s.4, as amended) (goods liable to be downgraded under EU animal by-products regulations); *Lowe v W Machell Joinery Ltd* [2011] EWCA Civ 794, [2012] 1 All E.R. (Comm) 153 (staircase supplied as specified but did not comply with Building Regulations, though change to specification required would have been very slight: not satisfactory); *Activa DPS Europe SARL v Pressure Seal Solutions Ltd* [2012] EWCA Civ 943, [2012] 3 C.M.L.R. 33 (goods lacked certification of conformity required by EC Directive—satisfactory quality as no evidence that Directive implemented in country of sale and buyer able to resell goods inside and outside EU); *Ward v MGM Marine Ltd* [2012] EWHC 4093 (QB) (luxury yacht caught fire and exploded 15 minutes after delivery: quality not satisfactory); *Cheeld v Alliott* [2013] EWCA Civ 508 (defective workmanship in metal porch); *KG Bominfot Bunkergesellschaft, etc & Co v Petroplus Marketing AG (The Mercini Lady) (No.2)* [2012] EWHC 3009 (Comm), [2013] 1 Lloyd's Rep. 360 (unstable gasoil: discussion of principles). cf. *United Central Bakeries Ltd v Spooner Industries Ltd* 2013 CSOH 150, 2013 G.W.D. 302–608 (baking equipment of satisfactory quality though part of the cause of fire).
- 422 For examples see *Wren v Holt* [1903] 1 K.B. 610 (contaminated beer); *Bristol Tramways, etc. Carriage Co v Fiat Motors Ltd* [1910] 2 K.B. 831 (buses not strong enough for heavy passenger work); *Niblett v Confectioners' Materials Ltd*, above (goods carrying labels infringing trade mark) (cf. *Sumner, Permain & Co v Webb & Co* [1922] 1 K.B. 55 (tonic water unsaleable in Argentina only)); *Buchanan-Jardine v Hamilink*, 1983 S.L.T. 149 (cattle subject to temporary health “stop order” preventing movement); *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep. 645 (boat); *Jackson v Chrysler Acceptances* [1978] R.T.R. 474 (car); *Leaves v Wadham Stringer (Cliftons) Ltd* [1980] R.T.R. 308 (car); *Rogers v Parish (Scarborough) Ltd* [1987] Q.B. 933 (car); *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 W.L.R. 1 (plastic pails). For a recent example see *Russo v Belcar Pty Ltd* [2011] SASCFC 151 (car merchantable despite many alleged defects).
- 423 *Bristol Tramways, etc. Carriage Co v Fiat Motors Ltd* [1910] 2 K.B. 831 at 841; *Australian Knitting Mills Ltd v Grant* (1933) 50 C.L.R. 387, 418; *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31, 79, 108, 118.

- 424 *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1991] 1 Q.B. 564*. This passage from the 31st edition of this work (para.43-086) is cited in *Saint Gobain Building Distribution Ltd (t/a International Decorative Surfaces) v Hillmead Joinery (Swindon) Ltd [2015] B.L.R. 555, QBD*, [60].
- 425 As to second-hand goods, see *Bartlett v Sydney Marcus Ltd [1965] 1 W.L.R. 1013* (car); *McDonald v Empire Garage (Blackburn) [1975] 10 C.L. 388* (car); *Feast Contractors Ltd v Ray Vincent Ltd [1974] 1 N.Z.L.R. 212* (engine); *Lee v York Coach and Marine [1977] R.T.R. 35* (car); *Kealey v Guy McDonald Ltd* (1984) 134 N.L.J. 706 (car); *Shine v General Guarantee Corp Ltd [1988] 1 All E.R. 911* (car); *Business Application Specialists Ltd v Nationwide Credit Corp Ltd [1988] R.T.R. 332* (car); *Brewer v Mann [2010] EWHC 2444 (QB)* (car).
- 426 See *BS Brown & Son v Craiks Ltd [1970] 1 W.L.R. 752*. It has been held that the existence of a warranty is not relevant to the issue of satisfactory quality: *Lamarra v Capital Bank Plc, 2007 S.C. 95*, Sh Ct (Range Rover). On the construction of contractual warranties and specifications which apparently contradict see *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd [2017] UKSC 59, [2017] Bus. L.R. 1610*.
- 427 Where the seller makes up the goods to the buyer's instructions, the requirement may attach to the ingredients only: *Christopher Hill Ltd v Ashington Piggeries Ltd [1972] A.C. 441, 494* (mink food); *Bowen v RB Young Products Pty Ltd [1967] W.A.R. 97, 105* (poultry food).
- ④28 In the case of consumer contracts for the sale of goods which fall within **Ch.2 of Pt 1 of the Consumer Rights Act 2015** the satisfactory quality of goods also depends on other relevant circumstances including public statements made about the goods. See **Consumer Rights Act s.9**, above para.40-499.
- ④29 *Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 A.C. 31*; *M/S Aswan Engineering Establishment Co v Lupdine Ltd [1987] 1 W.L.R. 1*. See also *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] Q.B. 44* (part of consignment damaged, still usable for same purpose in lesser concentration).
- ④30 This is supported by *Jewson Ltd v Boyhan [2003] EWCA Civ 1030, [2004] 1 Lloyd's Rep. 505* (boilers yielding low home energy ratings and reducing attractiveness of newly converted flats: satisfactory—see at [67] et seq.), cited in *Balmoral Group Ltd v Borealis (UK) Ltd [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629* at [140] and followed in *Provimi France SAS v Stour Bay Co Ltd [2022] EWHC 218 (Comm)*. Compare *Bajaj Healthcare Ltd v Fine Organics Ltd [2019] EWHC 2316 (Ch)*, where there was an express term that goods had to be of similar quality to earlier instalments, the presence of a contaminant meant that they were not of satisfactory quality even though the contaminant would not have been detected by the tests specified in the contract.
- ④31 *Rogers v Parish (Scarborough) Ltd [1987] Q.B. 933, 944* (car); *Jackson v Rotax Motor and Cycle Co Ltd [1910] 2 K.B. 937* (motor horns).
- ④32

- cf. *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All E.R. 220, 227.
- ④33 *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31 at 119.
- ④34 *Wormell v RHM Agricultural (East) Ltd* [1987] 1 W.L.R. 1091 (herbicide). See in general *McLeod* (1981) 97 L.Q.R. 550; *Brown* [1988] L.M.C.L.Q. 502.
- ④35 See *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep. 216 at [45] (subsequent deterioration evidence of original quality, not part of a continuing breach); see also *Peebles v Rembrand Builders Merchants Ltd* Unreported 18 April 2017, *Sherriff Court* (Tayside, Central and Fife) (Dundee) (roof tiles which became patchy and discoloured were not of satisfactory quality) and *Dana UK Axle Ltd v Freudenberg FST GMBH* [2021] EWHC 1751 (TCC) (automotive seals whose failure rates far exceeded the rate that was acceptable in the industry were of unsatisfactory quality and fell short of the durability requirement).
- ④36 *Preist v Last* [1903] 2 K.B. 148 (hot-water bottle); *MP Evangelinos v Leslie & Anderson* (1920) 4 Ll.L. Rep. 17 (tinned salmon); *AB Kemp v Tolland* [1956] 2 Lloyd's Rep. 681 (peaches); *Shillingford v Baron* [1959] 2 Lloyd's Rep. 453 (sugar syrup); *Godley v Perry* [1960] 1 W.L.R. 9 (catapult); *Oleificio Zucchi SpA v Northern Sales Ltd* [1965] 2 Lloyd's Rep. 496, 517 (rapeseed screenings); *Crowther v Shannon Motor Co* [1975] 1 W.L.R. 30.
- 437 See above, para.46-100. See also *Stephenson v Cookson* [2009] EWCA Civ 1270 (horse: different defect from that to which attention drawn).
- 438 [1919] 1 K.B. 486 (barrels of glue); cf. *Frank v Grosvenor Auctions Pty Ltd* [1960] V.R. 607 (car). It may be that the proviso is not applicable where the buyer has reason to believe that the defect will be rectified: see *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321, 326, 333.
- 439 But this point was ignored by the Court of Appeal in *Bramhill v Edwards* [2004] EWCA Civ 403, [2004] 1 Lloyd's Rep. 653 (mobile home inspected but not measured for conformity with width regulations): see *Twigg-Flesner* (2005) 121 L.Q.R. 125. It was, however, so decided in *MacDonald v Pollock* [2012] CSIH 12, [2012] 1 Lloyd's Rep. 425. See further *Garside v Black Horse Ltd* [2010] EWHC 190 (QB) (Supply of Goods (Implied Terms) Act 1973) (new car: examination of an allegedly identical item not sufficient).
- 440 See below, paras 46-113, 46-114.
- 441 See *Joseph Travers & Sons Ltd v Longel Ltd* (1948) 64 T.L.R. 50 ("waders" not waterproof—apparent on examination). cf. *Godley v Perry* [1960] 1 W.L.R. 9 (catapult dangerous—not apparent).
- 442 But, if the buyer fails to examine the sample, this might be an indication that the sale is not one by sample. See also *Murdoch* (1981) 44 M.L.R. 388, 396–399.
- 443 For the meaning of "sale", see s.2 above, para.46-020. See *AB Kemp Ltd v Tolland* [1956] 2 Lloyd's Rep. 681, 685, 691 (peaches); *Crowther v Shannon Motor Co* [1975] 1 W.L.R. 30, 33 (car). But in *Lambert v Lewis* [1982] A.C. 225, 276; *Viskase Ltd v Paul Kiefel GmbH* [1999] 1 W.L.R. 1305 and *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ

- 429, [2008] 2 *Lloyd's Rep.* 216 at [45] it is said that the duty relates to the time of delivery. See *Hudson* (1978) 94 *L.Q.R.* 566.
- 444 *Oleificio Zucchi SpA v Northern Sales Ltd* [1965] 2 *Lloyd's Rep.* 496, 518. But see *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] *Q.B.* 44, where the discussion concentrates entirely on the condition of the goods on arrival.
- 445 See above, para.46-100.
- 446 *Mash and Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 *W.L.R.* 862, 867–868 (potatoes); reversed on other grounds [1961] 2 *Lloyd's Rep.* 326. See also *Cordova Land Co Ltd v Victor Bros Inc* [1966] 1 *W.L.R.* 793, 796 (skins); discussion in *KG Bominflot Bunkergesellschaft etc. & Co v Petroplus Marketing AG (The Mercini Lady)* [2010] *EWCA Civ* 1145, [2011] 1 *Lloyd's Rep.* 442, especially at [18] (rejecting an argument that the goods must hold their specification for such a period); and below, para.46-274. But where any goods of the type would deteriorate in transit, the seller may not be liable: see *Broome v Pardess Co-operative Society of Orange Growers* [1940] 1 *All E.R.* 603.
- 447 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides a corresponding requirement of fitness for purpose which is to be treated as included in the contract, see above, para.40-500.
- 448 Formerly s.14(1) of the 1893 Act.
- 449 See above, paras 46-096, 46-097.
- 450 See above, para.46-098.
- 451 1979 Act s.14(5A). As to conditions, see para.46-093.
- 452 See above, para.46-029.
- 453 See above, para.46-028.
- 454 Provisions as to the agency of the supplier in respect of express statements in negotiations are contained in s.56 of the Consumer Credit Act 1974: see above, para.41-077.
- 455 Problems may arise where the buyer is a corporation and so not an “individual”: see *Dobson* [1983] *J.B.L.* 313.
- 456 *Preist v Last* [1903] 2 *K.B.* 148.
- 457 *Bristol Tramways, etc. Carriage Co v Fiat Motors Ltd* [1910] 2 *K.B.* 831 (buses required for heavy passenger work in Bristol).
- 458 *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd* [1934] *A.C.* 402 (ship propeller).
- 459 e.g. *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 *A.C.* 31 (Cattle Food Trade Association: foreseeable that pig and poultry food might be fed to pheasants); *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] *A.C.* 441 (claim against third parties: foreseeable that herring meal might be fed to mink).
- 460 See *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 *A.C.* 31 at 81–84; *Godley v Perry* [1960] 1 *W.L.R.* 9 (child buying catapult).
- 461 *Central Regional Council v Uponor*, 1996 *S.L.T.* 645 (water pipes). For a case on the old wording in which reliance was not proved, see *Hamilton v Papakura DC* [2002] 3 *N.Z.L.R.* 308, *PC* (water supply to tomato grower).

- 462 *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 Q.B. 545 (air compressors for resale in Iran); *Sumner, Permain & Co v Webb & Co* [1922] 1 K.B. 55 (tonic water for resale in Argentina); *Phoenix Distributors Ltd v LB Clarke (London) Ltd* [1966] 2 Lloyd's Rep. 285, [1967] 1 Lloyd's Rep. 518 (potatoes for export to Poland); *Nikka Traders Ltd v Gizella Pastry Ltd* [2012] BCSC 1412 (cookies for importation into Japan needing to pass customs). As to reliance by an agent, see *Ashford Shire Council v Dependable Motors Pty Ltd* [1961] A.C. 336. See also *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] 1 Lloyd's Rep. 20 at [93]; affirmed [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368 (sufficient that buyer relies on seller or any person from whom seller acquired the goods). Sed quaere: see *Jewson Ltd v Kelly Unreported 2 August 2002 Q.B.D.* at [88]; reversed without reference to this point [2003] EWCA Civ 1030, [2004] 1 Lloyd's Rep. 505. See *Sealy* [2003] C.L.J. 260.
- 463 *H Beecham & Co Pty Ltd v Francis Howard & Co Pty Ltd* [1921] V.L.R. 428 (timber).
- 464 *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 (polymer: different process required).
- 465 See *Turner v Mucklow* (1862) 6 L.T. 690; *Ipswich Gaslight Co v WB King & Co* (1886) 3 T.L.R. 100—cases on sale of industrial waste.
- 466 See *CEB Draper & Son Ltd v Edward Turner & Son Ltd* [1965] 1 Q.B. 424, 433, 434; but cf. *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31, 84, 95, 107, 124 (London Cattle Foods Trading Association). See also *Feast Contractors Ltd v Ray Vincent Ltd* [1974] 1 N.Z.L.R. 212 (cartage contractor buying engine from garage); *South Coast Basalt Pty Ltd v RW Miller & Co Pty Ltd* [1981] 1 N.S.W.L.R. 356, PC (reliance though buyer and seller associated companies).
- 467 *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] A.C. 441; see also *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] A.C. 402; cf. *Central Regional Council v Uponor*, 1996 S.L.T. 645. See also *Jewson Ltd v Kelly* [2003] EWCA Civ 1030, [2004] 1 Lloyd's Rep. 505 (boilers for flats); *Medivance Instruments Ltd v Gaslane Pipework Services Ltd* [2002] EWCA Civ 500 (heater: BS compliance relevant to s.14(2) not s.14(3)); *BSS Group Plc v Makers (UK) Ltd* [2011] EWCA Civ 809 (plumbing equipment: made known to seller that parts to be used with Uponor piping: reliance reasonable). On the construction of contractual warranties and specifications which apparently contradict see *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59, [2017] Bus. L.R. 1610.
- 468 *Bigge v Parkinson* (1862) 7 Hurl. & N. 955, 959 (tinned goods); *Frost v Aylesbury Dairy Co* [1905] 1 K.B. 608 (typhoid germs in milk); *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31, 84.
- 469 e.g. *Wallis v Russell* [1902] 2 I.R. 585 (infected boiled crab); *Bristol Tramways, etc. Carriage Co v Fiat Motors Ltd* [1910] 2 K.B. 831 (buses unsuitable for heavy passenger work); *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31, 84 (groundnut extractions unsuitable for compounding into poultry food); *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 Q.B. 88 (dangerous chemical without warning label); *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] A.C. 441 (herring meal toxic to mink); *Jackson v Chrysler Acceptances Ltd* [1978] R.T.R. 474; but cf. *Millar's of Falkirk Ltd v Turpie*, 1976 S.L.T. (Notes) 66; *Leaves v Wadham Stringer (Cliftons) Ltd* [1980] R.T.R.

- 308 (cases on new cars); *Farnworth Finance Facilities Ltd v Attryde [1970] 1 W.L.R. 1053* (motorcycle); *Finch Motors Ltd v Oris (No.2) [1980] 2 N.Z.L.R. 519* (car unsuitable for towing boat); *Milne Construction Ltd v Expandite Ltd [1984] 2 N.Z.L.R. 163* (epoxy resin accompanied by inadequate instructions); *Hazlewood Grocery Ltd v Lion Foods Ltd [2007] EWHC 1887 (QB)* (dye in food: danger of intervention by Food Standards Agency); *Fluor Ltd v Shanghai Zhenhua Heavy Industries Ltd [2016] EWHC 2062 (TCC)* (if a buyer knows of goods' true condition but is unable to discover without lengthy investigation whether or not that condition affects use of the goods, they are not fit for purpose).
- 470 e.g. *Bartlett v Sidney Marcus Ltd [1965] 1 W.L.R. 1013* (second-hand car); cf. *Crowther v Shannon Motor Co [1975] 1 W.L.R. 30*; *Lee v Coach and Marine [1977] R.T.R. 35*.
- 471 *Heil v Hedges [1951] 1 T.L.R. 512* (pork insufficiently cooked). As to the legal significance of instructions see *McLeod (1981) 97 L.Q.R. 550*.
- 472 See *Christopher Hill Ltd v Ashington Piggeries Ltd [1972] A.C. 441* at 477, 498–499 (applying the test of remoteness laid down in *Koufos v C Czarnikow Ltd (The Heron II) [1969] 1 A.C. 350*).
- 473 *Slater v Fanning Ltd [1997] A.C. 473* (engine for boat). See also *Griffiths v Peter Conway Ltd [1939] 1 All E.R. 685* (skin sensitive to tweed); *Ingham v Emes [1955] 2 Q.B. 366* (hair dye); *Crozier v A & P Canada Inc (2010) 329 D.L.R. (4th) 565* (peanut butter: claimant had long history of Crohn's disease). cf. *BSS Group Plc v Makers (UK) Ltd [2011] EWCA Civ 809* (the fact that the plumbing equipment supplied was not compatible was not due to some unknown idiosyncrasy of the buyer). In *DBE Energy Ltd v Biogas Products Ltd [2020] EWHC 1232 (TCC)* a plant was not fit for purpose where the seller had also been found to be responsible for the design of the facility.
- 474 See above, para.46-015. For examples see *Salvage Association v CAP Financial Services Ltd [1995] F.S.R. 654*; *St Albans City and DC v International Computers Ltd [1996] 4 All E.R. 481*; *Jonathan Wren & Co Ltd v Microdec Plc (1999) 65 Con. L.R. 157*; *Pegler Ltd v Wang UK Ltd [2000] B.L.R. 218*; *Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] 1 All E.R. (Comm) 696*; *Rubicon Computer Systems Ltd v United Paints Ltd (2000) 2 T.C.L.R. 454*; *SAM Business Systems Ltd v Hadley & Co [2002] EWHC 2733 (TCC), [2003] 1 All E.R. (Comm) 465*; *Brocket v DGS Retail Ltd [2004] C.L.Y. 3269* (seller should warn about incompatibility of packages). A recent example in the context of defective software (though for commercial use) is *Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd [2010] EWHC 965 (TCC)* (reservation system for hotel). See also *Southwark LBC v IBM UK Ltd [2011] EWHC 549 (TCC), 135 Con. L.R. 136* (no sale involved in supply of third party software and associated services). The *Consumer Rights Act 2015* provides new statutory rights in relation to digital content: see above, paras 40-539 et seq.
- 475 See *Baldry v Marshall [1925] 1 K.B. 260, 267*.
- 476 See above, para.46-104. See *Lambert v Lewis [1982] A.C. 225, 276–277*; *Viskase Ltd v Paul Kiefel GmbH [1999] 1 W.L.R. 1305*.
- 477 See *Mash and Murrell Ltd v Joseph I Emanuel Ltd [1961] 1 W.L.R. 862, 867–868*; reversed on other grounds *[1961] 2 Lloyd's Rep. 326* (potatoes), below, para.46-274; cf. *AB Kemp Ltd v Tolland [1956] 2 Lloyd's Rep. 681, 684–685* (peaches). But this is a matter of quality on

- shipment: see *KG Bominfot Bunkergesellschaft etc. & Co v Petroplus Marketing AG (The Mercini Lady)* [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442, especially at [18].
- 478 See also (under the 1893 Act), e.g. *Bristol Tramways, etc. Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 K.B. 831; *Lee v York Coach and Marine* [1977] R.T.R. 35. See *Franzi* (1977) 51 A.L.J. 298; and *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 Q.B. 545, 562–563.
- 479 See above, para.46-099.
- 480 But see *Harlington and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564, where this was not so.

(iv) - Sale by Sample

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Sale by sample ⁴⁸¹

46-113 By [s.15\(1\)](#):

“A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.”

It seems that there is a sale by sample only if the parties intended this and made it a term of their contract that “the goods should answer the description of a small parcel exhibited at the time of sale”.⁴⁸² Thus the fact that a sample was exhibited during the negotiations for the contract does not of itself render it a sale by sample.⁴⁸³ But evidence of usage is admissible to show that a sale is by sample even where the written contract is silent on this point.⁴⁸⁴ In view of the fact that the term as to satisfactory quality does not apply to defects apparent on reasonable examination of the sample,⁴⁸⁵ it may be suggested that private buyers, who usually lack expertise for such examination, will not readily be held to buy by sample, nor private sellers to sell by sample.

Bulk to correspond with sample

46-114

By s.15(2) certain terms are implied in the case of a contract for sale by sample.⁴⁸⁶ In England and Wales and Northern Ireland these terms are conditions.⁴⁸⁷ Unlike the requirements of s.14, they are not restricted to business sellers, though, as stated above, it may be that private sales by sample are rare. The first is “(a) that the bulk will correspond with the sample in quality”.⁴⁸⁸ The fact that the bulk, though not in accordance with the sample, could be made to conform by a simple process is irrelevant: correspondence must be precise.⁴⁸⁹ It has been held that an exclusion of any implied term as to quality does not exclude the duty of securing that the bulk correspond with the sample.⁴⁹⁰ The extent to which there must be conformity—whether it need be visual only, or whether the two must correspond on analysis—depends on the contemplation of the parties and the usage of trade.⁴⁹¹ The word “bulk” is defined in s.61(1) of the Act,⁴⁹² but in a way that appears to be inappropriate in the context of the present section,⁴⁹³ since specific goods,⁴⁹⁴ goods manufactured after contract,⁴⁹⁵ and further articles supplied on the pattern of that shown as a sample, may all count as “bulk” under it.

Freedom from latent defect

46-115 The second term implied by s.15(2) is:

“(c)that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.”

The effect of this provision is that the seller is liable for latent defects which make the quality of the goods unsatisfactory.⁴⁹⁶ Where, however, the defect could have been detected on reasonable examination of the sample there is no liability.⁴⁹⁷ It follows from this provision that, if there is a latent defect of this kind in the goods, the buyer may reject them even though bulk and sample correspond.⁴⁹⁸

Footnotes

481 See *Murdoch (1981)* 44 M.L.R. 388. This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides corresponding terms requiring goods to match any sample which are to be treated as included in the contract; see above, para.40-503. The 2015 Act also introduces a new requirement that goods must match a model seen or examined; see above, para.40-504.

482 *Parker v Palmer (1821)* 4 B. & Ald. 387, 391.

- 483 *Gardiner v Gray* (1815) 4 Camp. 144; *Ginner v King* (1894) 7 T.L.R. 140. And in commercial contracts for commodities samples may perform quite different functions: see *John Bowron & Sons Ltd v Rodema Canned Foods Ltd* [1967] 1 Lloyd's Rep. 183 (preliminary shipment); cf. *Wood Components of London v James Webster & Bros Ltd* [1959] 2 Lloyd's Rep. 200.
- 484 See *Syers v Jonas* (1848) 2 Exch. 111.
- 485 See above, para.46-102.
- 486 1979 Act s.15 should be read in conjunction with s.13, see above, paras 46-086 et seq.; a sale is frequently both by sample and by description.
- 487 1979 Act s.15(3).
- 488 “Quality” of goods includes their state or condition and, in appropriate cases, certain other features: s.14(2B); see above, para.46-095.
- 489 *ES Ruben Ltd v Faire Bros & Co Ltd* [1949] 1 K.B. 254, 260; *Aitken, Campbell & Co v Boullen and Gatenby*, 1908 S.C. 490. Unless the de minimis principle applies.
- 490 *Champanhac & Co Ltd v Waller & Co Ltd* [1948] 2 All E.R. 724.
- 491 See *FE Hookway & Co Ltd v Alfred Isaacs & Son* [1954] 1 Lloyd's Rep. 491; *Steels and Busks Ltd v Bleecker Bik & Co Ltd* [1956] 1 Lloyd's Rep. 228. Sometimes there are provisions making certain types of certification or testing conclusive: e.g. *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382.
- 492 See above, para.46-015. The definition is plainly directed at ss.20A and 20B, below, paras 46-160 et seq.
- 493 Benjamin's Sale of Goods, 11th edn (2021), para.11-073.
- 494 e.g. *Azémar v Casella* (1867) L.R. 2 C.P. 677.
- 495 e.g. *Drummond & Sons v Van Ingen & Co* (1887) 12 App. Cas. 284; *Jones v Padgett* (1890) 24 Q.B.D. 650.
- 496 *Godley v Perry* [1960] 1 W.L.R. 9 (catapult dangerous—not apparent): “satisfactory quality” is defined in s.14(2A); see above, para.46-099.
- 497 *Joseph Travers & Sons Ltd v Longel Ltd* (1948) 64 T.L.R. 150 (“waders” not waterproof—apparent on examination). This is expressly covered for in a proviso to s.14(2) contained in s.14(2C); see above, para.46-103.
- 498 *Mody v Gregson* (1868) L.R. 4 Ex. 49; *Drummond & Sons v Van Ingen & Co* (1887) 12 App. Cas. 284, 297.

(v) - Pre-contractual Information to Consumers

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Pre-contractual information to be included as term of consumer contract

⁴⁶⁻¹¹⁶ The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013⁴⁹⁹ implement the Consumer Rights Directive 2011.
⁵⁰⁰

U They replace the Consumer Protection (Distance Selling) Regulations 2000 and the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 with effect from 13 June 2014, and apply to contracts made on or after that date. The 2013 Regulations impose duties on traders making distance contracts, off-premises contracts and some other ("on-premises") contracts with consumers to give or make available a wide range of information to the consumer before the contract is concluded.⁵⁰¹ The Consumer Rights Act 2015, refers to the information requirements and provides that information provided in accordance with the Regulations becomes a term of the contract. Information about the main characteristics of the goods will be treated as part of the description, and the consumer will have the normal remedies for non-conformity⁵⁰²; whereas for other information that is given the trader is in effect, treated as giving a contractual warranty that the information was correct at the time.⁵⁰³

Footnotes

499 SI 2013/3134.

500 2011/83/EU of 15 October 2011. The Regulations are subject to minor amendments introduced by the [Consumer Protection \(Amendment etc\) \(EU Exit\) Regulations 2018](#) and, as amended, form part of retained EU law post-Brexit. The 2011 Directive is subject to considerable amendment by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.4, including requiring new definitions of “sales contract” and “service contract”, additional specific information requirements for contracts concluded on online marketplaces and making more elaborate provision on penalties. However, as the 2019 Directive was to be implemented by Member States on 28 November 2021 (i.e. after IP completion day), the UK was not required to implement these changes: see Vol.I, paras [1-016](#) et seq.

501 See above, paras [40-062](#) et seq.

502 See above, para.[40-501](#).

503 See above, para.[40-502](#).

(vi) - Exclusion of Terms Implied by ss.13, 14, and 15

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(vi) - Exclusion of Terms Implied by ss.13, 14, and 15

Unfair Contract Terms Act 1977

46-117 The [Unfair Contract Terms Act 1977](#) controls, for the contracts to which it applies, attempts to exclude the seller's duties laid down in [ss.13, 14 and 15 of the Sale of Goods Act](#).⁵⁰⁴ In addition to the general provisions of the Act, which are dealt with elsewhere in this work,⁵⁰⁵ s.6(2) (which in substance re-enacts earlier controls imposed by the [Supply of Goods \(Implied Terms\) Act 1973](#)) provided an absolute bar on exclusions in consumer cases:

“As against a person dealing as consumer, liability for breach of the obligations arising from—(a) [sections 13, 14 or 15 of the 1979 Act](#) ... cannot be excluded or restricted by reference to any contract term.”⁵⁰⁶

In the case of non-consumer sales, [s.6\(3\) of the 1977 Act](#) provided:

“As against a person dealing otherwise than as consumer, the liability specified in subs. (2) above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.”⁵⁰⁷

Unfair terms in consumer cases

- 46-118 However, for contracts entered into after 1 October 2015, the [Consumer Rights Act 2015](#) repeals or disapplies provisions in the [Unfair Contract Terms Act 1977](#) in relation to consumer contracts. In relation to contracts to which Ch.1 applies, the Act makes its own provision controlling the exclusion of liabilities arising under its provisions,⁵⁰⁸ though this follows the pattern of the relevant provisions in the [1977 Act](#) to a considerable extent. As a result, [s.31 of the 2015 Act](#) provides that a term of a goods contract⁵⁰⁹ is not binding on the consumer to the extent that it would exclude or restrict the trader's liability under the statutory terms which the Act treats as included,⁵¹⁰ in respect of its special provisions governing non-conformity of the goods,⁵¹¹ delivery of goods and the passing of risk.⁵¹² [Section 6 of the Unfair Contract Terms Act 1977](#) no longer applies to consumer contracts. It should be noted that the new provisions have a different scope of application from that of the [1977 Act](#), because the test whether the party was "dealing as a consumer"⁵¹³ is to be replaced by one of whether the contract for goods was one under which a trader was to supply goods to a consumer, and only a natural person who is buying goods wholly or mainly for purposes outside that individual's trade, business craft or profession as a consumer.⁵¹⁴

Thus, control of unfair terms is now divided sharply between terms found in consumer contracts (regulated by the [2015 Act](#), principally in Pt 2) and terms (principally exemption clauses⁵¹⁵) in other contracts (regulated by the [Unfair Contract Terms Act 1977](#)).

Exclusion of terms in non-consumer sales

- 46-119 In non-consumer sales, a new s.6(1A) (replacing the previous [s.6\(2\)](#) and [\(3\)](#)) provides that:

"Liability for breach of the obligations arising from—

- (a)[Section 13, 14 or 15 of the 1979 Act](#) (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);
- (b)[Section 9, 10 or 11 of the 1973 Act](#) (the corresponding things in relation to hire purchase),

Cannot be excluded or restricted by reference to a contract term except in so far as the term satisfies the requirement of reasonableness."

46-120

The provisions are not confined, as is the rest of the [1977 Act](#),⁵¹⁶ to business liability, but of course the duties created by [s.14](#) are already limited to business sellers.⁵¹⁷ As elsewhere explained, there are possibilities of reducing the operation of the Act by reducing the contractual description, as by providing for tolerances. If the seller points out defects these will not be covered by the provisions as to merchantable quality of [s.14\(2\)](#). And where the seller indicates to the buyer that the buyer should not rely on the seller's skill or judgment, this may make it unreasonable for the buyer to do so under [s.14\(3\)](#). It has however been held that a clause "sold as seen and inspected" was an actual exclusion of [s.13](#).⁵¹⁹

Businesses dealing as consumer⁵²⁰

46-121 For contracts entered into before 1 October 2015, [s.12\(1\)](#) of the Unfair Contract Terms Act 1977 provided that:

Arrangement of Act

- "(1)** A party to a contract 'deals as consumer' in relation to another party if—
- (a)** he neither makes the contract in the course of a business nor holds himself out as doing so; and
 - (b)** the other party does make the contract in the course of a business; and
 - (c)** in the case of a contract governed by the law of sale of goods ... the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.⁵²¹
- (2)** But on a sale by auction or competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.⁵²²
- (3)** Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not."

This definition, which is deleted by the [Consumer Rights Act 2015](#), also applied to the same words as used in the [Sale of Goods Act 1979](#),⁵²³ and was amended (for both) by the [Sale and Supply of Goods to Consumers Regulations 2002](#).⁵²⁴ Under this definition, except in certain situations a corporation can in appropriate cases deal as consumer.⁵²⁵ The phrase "in the course of a business" is the same as that used in [s.14 of the Sale of Goods Act 1979](#),⁵²⁶ where it has been held that these words cover, not only a seller selling goods of a type which he is in the business of selling, but a

seller in the business of selling one type of goods who incidentally in his business sells another type of goods or even one who sells goods in the course of a business which does not consist of selling goods at all, for example, the sale by a plumber of his van.⁵²⁷ But it has been held that, in the context of the 1977 Act, for a *buyer*⁵²⁸ to make the contract in the course of a business the transaction must be an integral part of the business carried on, or, if only incidental thereto, be of a type regularly entered into. Thus the purchase of a second-hand motor car by a firm of surveyors⁵²⁹ or by a company which carried on the business of freight forwarders and shipping agents⁵³⁰ was held not to be a contract made in the course of a business. The overall result favours buyers, which seems appropriate, albeit there is some loss of consistency. Problems may also arise (when it applies) as to the phrase “goods ordinarily supplied for private use or consumption”. Does this mean that the *majority* of such goods are supplied for private use, or that such goods are *commonly* supplied for such use? The second interpretation is much wider, and it is submitted that it should be adopted: the effect would be that only goods which are not supplied, or only exceptionally supplied, for such use would be excluded (e.g. beer pumps, furniture vans).⁵³¹

Non-consumer sales

- 46-122 In non-consumer sales, exclusions are enforceable if clearly expressed, but only insofar as the term satisfies the requirement of reasonableness. Schedule 2 lays down guidelines⁵³² for the exercise of the court’s discretion stating that:

“The matters to which regard is to be had in particular ... are any of the following which appear to be relevant—

- (a)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;
- (b)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 term⁵³³;
- (c)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);
- (d)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 practicable⁵³⁴;
- (e)whether the goods were manufactured, processed or adapted to the special order of the customer.”

Reasonableness ⁵³⁵

- 46-123 The Act's more general provision, applicable to non-consumer sales, is that the clause must have been a:

“... fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.”⁵³⁶

It has been held that the term must be taken as a whole: if the term as a whole is unreasonable, it is not open to a party to say that the part of the term on which he relies is reasonable, or that a particular application of it is reasonable, or vice versa.⁵³⁷ The question of reasonableness is obviously a general one and is considered in Vol.I.⁵³⁸ The same is true of the question to which types of clause the Act applies.⁵³⁹ As regards sale of goods and closely related transactions, some of the reported authority relates to [s.3 of the Misrepresentation Act 1967](#) and the amendments to the [Sale of Goods Act 1893](#) inserted by the [Supply of Goods \(Implied Terms\) Act 1973](#), under both of which the test was whether the *reliance* on the term was reasonable in the particular case. In the leading case of [George Mitchell \(Chesterhall\) Ltd v Finney Lock Seeds Ltd](#)⁵⁴⁰ reliance on a term in a contract for the supply of cabbage seed limiting liability to the price of the seed was held unreasonable where the term was contained in a standard contract which had not been negotiated between interested parties or trade associations, insurance against liability for supply of the wrong seed was easily obtainable at low cost and the evidence showed that the proponent did not in fact usually rely on the term but sought to negotiate against its background. In cases decided under the [1977 Act](#), where the test is one of reasonableness of *inclusion*, the following terms have been held to be unreasonable: a term in a contract for the supply of piping which excluded all liability unless the seller was notified of defects in the piping within three months of delivery⁵⁴¹; a term in a contract for the supply of a drilling rig which limited liability to replacement parts⁵⁴²; a term in a contract for the supply of computer software limiting liability to £100,000⁵⁴³; a term in a contract for the supply of radar equipment excluding the terms implied by the Sale of Goods Act save for a warranty that the equipment was free of defects caused by faulty materials or bad workmanship⁵⁴⁴; an exclusion and time-bar in a computer software contract inserted by a party who had so misrepresented what was being supplied that breaches of contract were not unlikely⁵⁴⁵; exclusion of all liability for the typical consequences of delivery of impure CO₂ gas, subject to a derisory recovery if complaint was made within an impossibly short period⁵⁴⁶; a term in a contract for the supply of a polymer for making storage tanks limiting liability to replacement or refund of the price was unreasonable as a blanket exclusion of liability⁵⁴⁷; a term in a contract for the supply of O-rings purporting to exclude liability, subject to certain exceptions, unless defects were

reported within a very short period⁵⁴⁸; terms in a contract for supply of laminated sheets excluding implied terms, damages for consequential loss and excluding liability where there had been no inspection⁵⁴⁹ and a term excluding liability if the total price of the goods had not been paid.⁵⁵⁰ On the other hand, it has been stated that it would not be unreasonable for a finance company to exclude its liability with respect to goods sold on credit where it had never had possession of or inspected the goods⁵⁵¹; and a commercially acceptable warranty in place of the normal implied terms has been held to make an accompanying exclusion reasonable.⁵⁵²

Burden of proof

46-124 The burden of proof is on the party contending that the clause is reasonable.⁵⁵³

International sales

46-125 Section 26 excludes from the scope of the 1977 Act international supply contracts. An “international supply contract” (a term which of course also covers transactions other than sale) is defined by subs.(3) as having the following characteristics:

“(a)either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes⁵⁵⁴; and

(b)it is made by parties⁵⁵⁵ whose places of business (or, if they have none, habitual residences) are in the territories of different States (the Channel Islands and the Isle of Man being treated for this purpose as different States from the United Kingdom).”

This definition is amplified by subs.(4) which reads:

“A contract falls within subsection (3) above only if either—

(a)the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried,⁵⁵⁶ from the territory of one State to the territory of another; or

(b)the acts constituting the offer and acceptance have been done in the territories of different States; or

(c)the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.”⁵⁵⁷

It should be noted first that the definition is not restricted to commercial transactions, and thus applies to consumer transactions if made before 1 October 2015.⁵⁵⁸ It covers liability under [s.3 of the Misrepresentation Act 1967](#).⁵⁵⁹ It also causes certain difficulties. It does not indicate how to treat parties who have places of business in more than one State: presumably the place of business from which the transaction is conducted is intended. The reference to “the acts constituting the offer and acceptance” being “done” leaves it in doubt whether it is the physical acts which are referred to or the place where these legally take effect (which under English law may differ, for example, in the case of letters of acceptance). It has been held that these words refer to “the totality of the acts which constitute the offer and acceptance including both the making and receiving of each” without recourse to technicalities of communication. What is excluded is the situation where all elements occur in the same state.⁵⁶⁰ For other situations, [s.27](#) provides that the [1977 Act](#)’s controls of exclusion or restriction of liability do not apply where the law applicable to the contract is the law of any part of the United Kingdom only by choice of the parties.⁵⁶¹ It also seeks to preserve the effect of the Act despite an evasive choice of a foreign law and in certain consumer situations.⁵⁶²

Unfair Terms in Consumer Contracts Regulations 1999⁵⁶³

46-126 These Regulations are replaced by [Pt 2 of the Consumer Rights Act 2015](#) for contracts made on or after 1 October 2015.⁵⁶⁴ The Regulations and the provisions of [Pt 2 of the 2015 Act](#) are considered in detail in Ch.40.

Common law

46-127 The common law technique of holding that a clause is not part of the contract at all⁵⁶⁵ is expressly preserved by [s.11\(2\) of the Unfair Contract Terms Act](#), and though there is no express reference to other ways of attacking exemption clauses it may be assumed that the cases on collateral warranties,⁵⁶⁶ misrepresentation,⁵⁶⁷ privity⁵⁶⁸ and restrictive interpretation⁵⁶⁹ are still valid. Although the scope for the operation of these rules is obviously much cut down by the controls provided by the Act,⁵⁷⁰ there are occasions where they will be of use. The common law will still be relevant in the case of international supply contracts⁵⁷¹ and contracts where English law is applicable only by choice of the parties,⁵⁷² and in certain other cases of lesser importance.⁵⁷³ The common law rules as to exemption clauses are dealt with earlier in this work.⁵⁷⁴ In brief,

though s.55(1) of the 1979 Act permits exclusion or variation of the Act's provisions, clauses purporting to exclude the central duties of the contract of sale are restrictively construed. Exclusion of warranties does not exclude conditions⁵⁷⁵; exclusion of implied conditions may not cover express conditions⁵⁷⁶; sale "with all faults" may only cover "faults which [the article] may have consistently with being the thing described"⁵⁷⁷; clauses forbidding absolutely or after a period rejection of "the goods herein specified" and the like may not prevent rejection of goods not conforming with the specification⁵⁷⁸; clauses stating that "no warranty is given" need not exclude collateral warranties.⁵⁷⁹ Cases of this sort make it difficult to exclude the provisions of s.13, and frequently those of ss.14 and 15 also. There are a few cases appearing to go further, and holding that clauses which on the face might seem to exclude one or more of these provisions were inoperative on the basis of the doctrine of fundamental breach of contract.⁵⁸⁰ In view of dicta in the *George Mitchell*⁵⁸¹ case that it is not admissible to reintroduce that doctrine by the back door, these decisions cannot now be justified on that basis; but they have not been overruled and most can probably be regarded as still valid as examples of strict interpretation.⁵⁸² It has been said that the principles of interpretation are not applicable in their full rigour to clauses which merely limit liability in monetary terms⁵⁸³; but though this may be useful as a commonsense guide, it is difficult to accept it as a clear principle of law, for some monetary limits are so low as to be equivalent to non-liability.⁵⁸⁴

Footnotes

504 As to s.12, see above, para.46-085.

505 Vol.I, paras 17-075 et seq.

506 The use of terms purporting to exclude such liability was an offence under the Consumer Protection (Restriction on Statements Order) 1976 (SI 1976/1813) as amended by SI 1978/127 (now repealed); as was the supply of statements about consumer rights relating to quality, fitness or description without at the same time notifying the consumer that his statutory rights are unaffected. See *Hughes v Hall* [1981] R.T.R. 430; but cf. *Cavendish-Woodhouse Ltd v Manley* (1984) 82 L.G.R. 376.

507 The subsection also refers to hire-purchase (see above, para.41-386); and s.7 makes similar, but not identical, provision for other contracts where possession or ownership of goods passes (see Vol.I, para.17-098).

508 See above, paras 40-229 et seq. On the general strategy of the 2015 Act in relation to the control of unfair contract terms, see above, paras 40-229 et seq.

509 On s.31 see above, para.40-535.

510 i.e. 2015 Act s.9 (goods to be of satisfactory quality), s.10 (goods to be fit for particular purpose), s.11 (goods to be as described), s.12 (other pre-contract information included in contract); s.13 (goods to match a sample); s.14 (goods to match a model seen or examined)

- and [s.17](#) (trader to have right to supply the goods etc): [2015 Act s.31\(1\)\(a\)–\(f\), \(i\)](#). On these provisions see above, paras [40-494](#) et seq.
- 511 i.e. [2015 Act s.15](#) (installation as part of conformity of the goods with the contract) and [s.16](#) (goods not conforming to contract if digital content does not conform): [2015 Act s.31\(1\)\(g\)](#) and [\(h\)](#). On these provisions see above, paras [40-505](#) and [40-506](#) respectively.
- 512 [2015 Act ss.28](#) and [29](#) respectively: [2015 Act s.31\(1\)\(j\)](#) and [\(k\)](#), on which see above, para.[40-530](#).
- 513 See below, para.[46-121](#).
- 514 See above, para.[40-483](#).
- 515 The [Unfair Contract Terms Act 1977](#) as amended by the [2015 Act](#) applies only to exemption clauses (as defined in [s.13](#)) and other clauses falling within [s.3\(2\)\(b\)](#) of the [1977 Act](#): see Vol.I, paras [17-090](#) et seq.
- 516 [s.1\(3\)](#); Vol.I, para.[17-083](#).
- 517 See above, paras [46-096](#), [46-105](#).
- 518 Vol.I, para.[17-081](#).
- 519 *Hughes v Hall [1981] R.T.R. 430* (a prosecution under the [Consumer Transactions \(Restriction on Statements\) Order 1976](#) (now repealed)). The decision was however doubted in *Cavendish-Woodhouse Ltd v Manley (1984) 82 L.G.R. 376*. If such a clause is not an exclusion it seems that the operation of the [1977 Act](#) can be fairly easily avoided. But in *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep. 92* several clauses in a sale of derivatives were said merely to define “the basis on which [the contractor] was providing its services”. See also *Avrora Fine Arts Investment Ltd v Christie Manson & Woods Ltd [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35* (clause purporting to negative reliance on statements at fine art auction “parts company with reality” because it attempted retrospectively to alter the character of what had gone before, so subject to Act: but also held reasonable); *Dalmare SpA v Union Maritime Ltd (The Union Power) [2012] EWHC 3537 (Comm), [2013] 1 Lloyd's Rep. 509* (sale of ship “as she was” at time of inspection wording held not clear enough to exclude the conditions stated in [ss.13](#) and [14](#)—even if the words “as is where is” could exclude statutory implied terms). On the other hand a “certificate of acceptance” and associated terms in an aircraft lease were assumed valid in principle in *Olympic Airlines SA v ACG Acquisition XX LLC [2013] EWCA Civ 369, [2013] 1 Lloyd's Rep. 658*. This problem links to that of entire agreement clauses and “no-reliance” clauses: see Vol.I, paras [17-064](#) and [9-154](#) respectively.
- 520 [1977 Act s.5](#) deals with guarantees of consumer goods: see above, paras [40-531](#) et seq.
- 521 By virtue of the [Sale and Supply of Goods to Consumers Regulations 2002](#) (SI 2002/3045) reg.[14 subs.\(c\)](#) does not apply where the buyer is an individual.
- 522 By virtue of the above Regulations, where the buyer is an individual this exception is limited to second-hand goods sold by public auction at which individuals have the opportunity of attending in person.
- 523 [Sale of Goods Act 1979 s.61\(5A\)](#), added by [Sale and Supply of Goods Act 1994](#): for application see [ss.14\(2D\), 14\(2F\), 15A, 20\(4\), 30\(2A\), 32\(4\), 35\(3\), 48A–48F](#).
- 524 [2002 Regulations reg.14](#).

- 525 See *Peter Symmons & Co v Cook* (1981) 131 N.L.J. 758; *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [108], though in the case itself the corporation did not do so.
- 526 See above, para.46-096.
- 527 *Stevenson v Rogers* [1999] Q.B. 1028; *MacDonald v Pollock* [2012] CSIH 12, [2012] 1 Lloyd's Rep. 425.
- 528 i.e. the party referred to in s.12(1)(a): *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321 (buyer); following *Davies v Sumner* [1984] 1 W.L.R. 1301 (Trade Descriptions Act 1968: seller); and cf. *Corfield v Sevenways Garage Ltd* [1985] R.T.R. 109.
- 529 *Peter Symmons & Co v Cook* (1981) 131 N.L.J. 758.
- 530 *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321. This case contains a suggestion (at 331) that the corporate veil might sometimes be pierced in such a case. See also *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep. 645.
- 531 An expensive power boat was held to come within the similar terminology laid down by the Supply of Goods (Implied Terms) Act 1973 in *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep. 645. In *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [122], a Challenger 605 jet aircraft (sold to a corporation) was held to be such an item.
- 532 See Vol.I, para.17-101, for cases in which these guidelines were considered.
- 533 See *Denham Fish Selling Ltd v Anderson*, 1991 S.L.T. (Sh Ct) 24.
- 534 See *Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1984) 134 New L.J. 706.
- 535 See in general Vol.I, paras 17-108 et seq.
- 536 1977 Act s.11(1). See Vol.I, para.17-099.
- 537 *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] Q.B. 600; Vol.I, para.17-116; but see doubts expressed in *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379 at [26].
- 538 Vol.I, paras 17-108 et seq.
- 539 See Vol.I, paras 17-079.
- 540 [1983] 2 A.C. 803; contrast *RW Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep. 602.
- 541 *Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1984) 134 N.L.J. 706 (piping); cf. *Knight Machinery (Holdings) Ltd v Rennie*, 1995 S.L.T. 166 (meaning of similar clause not clear).
- 542 *Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 Con. L.R. 1; cf. *British Fermentation Products Ltd v Compair Reavell Ltd* (1999) 66 Con. L.R. 1 (air compressor).
- 543 *St Albans City and DC v International Computers Ltd* [1995] F.S.R. 686; affirmed [1996] 4 All E.R. 481; but cf. *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] 1 Lloyd's Rep. 62; affirmed [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379 (CO2 gas for drinks: £500,000 reasonable).
- 544 *AEG (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 265 (noted [1996] L.M.C.L.Q. 334).
- 545 *Pegler Ltd v Wang UK Ltd* [2000] B.L.R. 218. cf. *Southwark LBC v IBM UK Ltd* [2011] EWHC 549 (TCC), 135 Con. L.R. 136, where a clause in a software contract excluding

- implied conditions or warranties of fitness for purpose would have been reasonable had the Act applied.
- 546 *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379; see also *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 Lloyd's Rep. 368; and *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep. 645. For a recent example in connection with hotel computer software see *Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd* [2010] EWHC 965 (TCC).
- 547 *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 (some reliance on insurance position and fact that buyer had sometimes settled claims).
- 548 *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep. 8.
- 549 *Saint Gobain Building Distribution Ltd (t/a International Decorative Surfaces) v Hillmead Joinery (Swindon) Ltd* [2015] B.L.R. 555, QBD.
- 550 *Phoenix Interior Design Ltd v Henley Homes Plc* [2021] EWHC 1573 (QB).
- 551 *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321, 332. But contrast *Purnell Secretarial Services v Lease Management Services* [1994] C.C.L.R. 127; *Sovereign Finance Ltd v Silver Crest Furniture Ltd* [1997] C.C.L.R. 76.
- 552 *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [122] et seq.; cf. *KG Bominflot Bunkergesellschaft etc. & Co v Petroplus Marketing AG (The Mercini Lady)* [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442 at [62]. See also *Aurora Fine Arts Investment Ltd v Christie Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] P.N.L.R. 35 (limited rejection rights at fine art auction reasonable. Important considerations were that there was a remedy to cancel the sale under an express warranty and that this was a rich claimant with no imperative to deal with the defendant); *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) (commercial sale of parts of rigid steel platform: limits of liability for personal injuries reasonable. Both parties were substantial commercial entities, there was insurance in place and such terms were common in the industry).
- 553 1977 Act s.11(5).
- 554 The term covers related services which are part of the contract: *Amiri Flight Authority v BAE Systems Plc* [2002] EWHC 2481 (Comm), [2003] 1 Lloyd's Rep. 50; reversed on other grounds [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767.
- 555 Not their agents: *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446, 453. See further *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [437]–[439].
- 556 There is no requirement under s.26(4)(a) that the carriage of the goods be in the fulfilment of a contractual obligation, though there is under s.26(4)(c). See *Amiri Flight Authority v BAE Systems Plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767 at [32]; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290, [2009] 1 Lloyd's Rep. 702 at [32] (indicating also that carriage includes self-propulsion); *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm) at [87] et seq.; see also *Yuanda (UK) Ltd v WW Gear Construction Ltd* [2010] EWHC 720 (TCC), [2010] 1 C.L.C. 491 (goods to be brought in from third country).

- 557 See *Amiri Flight Authority v BAE Systems Plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767 (goods must be delivered to a different country); *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [442], [443].
- 558 But see below, para.46-126.
- 559 *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290, [2009] 1 Lloyd's Rep. 702.
- 560 *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [81].
- 561 This was so in the *Transworld* case, above. See Vol.I, para.33-009.
- 562 See Vol.I, para.33-009.
- 563 SI 1999/2083 (with several subsequent amending instruments none involving substance).
- 564 See above, paras 40-229 et seq.
- 565 See Vol.I, paras 15-008 et seq.; Benjamin's Sale of Goods, 11th edn (2021), paras 13-011 et seq. For recent examples of such arguments see *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629; *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep. 8; *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSIH 95, 2010 S.C.L.R. 192.
- 566 See Vol.I, para.17-065; *Couchman v Hill* [1947] K.B. 554.
- 567 See Vol.I, para.17-063; *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 K.B. 805. But as to this case see *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep. 1 at [99]–[105].
- 568 See Vol.I, paras 17-042 et seq.
- 569 See Vol.I, paras 17-008 et seq.; Benjamin's Sale of Goods, 11th edn (2021), paras 13-018 et seq.
- 570 See *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 843.
- 571 See above, para.46-125.
- 572 See above, para.46-125.
- 573 e.g. certain transactions not caught by s.7.
- 574 See Vol.I, Ch.17. As to clauses purporting to exclude reliance under s.14(3) see Vol.I, para.17-064.
- 575 *Baldry v Marshall* [1925] 1 K.B. 260; *Wallis, Son and Wells v Pratt and Haynes* [1911] A.C. 394; *Henry Kendall & Sons v William Lillico & Sons* [1969] 2 A.C. 31, 84, 95–96, 107, 109, 114, 126; *KG Bominflot Bunkergesellschaft etc. & Co v Petroplus Marketing AG (The Mercini Lady)* [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442 at [61]–[66]; *Dalmare SpA v Union Maritime Ltd (The Union Power)* [2012] EWHC 3537 (Comm), [2013] 1 Lloyd's Rep. 509 (sale of ship “as she was” at time of inspection: wording held not clear enough to exclude the conditions stated in ss.13 and 14 and, in any event, would only have excluded the right to reject whilst leaving the right to claim damages); but cf. *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [10] et seq., especially at [30]. See also *Aston FFI (Suisse) SA v Dreyfus* [2015] EWHC 80 (right to reject goods in an FOB contract not excluded by requirement as to certification).
- 576 *Andrews Bros Ltd v Singer & Co Ltd* [1934] 1 K.B. 17.

- 577 *Shepherd v Kain* (1821) 5 B. & A. 240, 241; see *Robert A Munro & Co Ltd v Meyer* [1930] 2 K.B. 312; *Champanhac & Co Ltd v Waller & Co Ltd* [1948] 2 All E.R. 724.
- 578 *Vigers Bros v Sanderson Bros* [1901] 1 K.B. 608; *Beck & Co v Szymonowski & Co* [1924] A.C. 43; cf. *Smeaton, Hanscomb & Co Ltd v Sassoon I Setty, Son & Co* [1953] 1 W.L.R. 1468.
- 579 *Webster v Higgin* [1948] 2 All E.R. 127; *Harling v Eddy* [1951] 2 K.B. 739.
- 580 *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; following *Pollock & Co v Macrae*, 1922 S.C. 192, HL. See also *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 W.L.R. 1053. As to this doctrine see in general Vol.I, paras 17-023 et seq.
- 581 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, 813. See above, para.46-123; Vol.I, para.17-026.
- 582 cf. Vol.I, para.17-027. The proposition that an exclusion clause should be interpreted so as not to cover a deliberate breach is rejected in *Astrazeneca UK Ltd v Albemarle International Corp* [2011] EWHC 1574 (Comm), [2011] 2 C.L.C. 252.
- 583 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 970, per Lord Fraser of Tullybelton, HL; followed in the *George Mitchell case* [1983] 2 A.C. 803, 813.
- 584 It was rejected by the High Court of Australia in *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 C.L.R. 500.

(c) - Stipulations as to Time

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 3. - Terms of the Contract

(c) - Stipulations as to Time

Stipulations as to time

46-128 Section 10 provides that:



Arrangement of Act

“(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.

(2) Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.”

A contract may always by its terms make prompt or punctual payment a condition,⁵⁸⁵ and such an implication may fairly readily be read into a commercial contract.

⁵⁸⁶

Otherwise, however, the question whether late payment entitles the seller to treat the contract as discharged will be regulated by the rules as to repudiatory breach,⁵⁸⁷ though it should be borne in mind that there may sometimes be a right of resale in such a situation.⁵⁸⁸ It was long said that an action for damages does not lie for late payment⁵⁸⁹; but it is now the law that a claimant can plead and prove actual interest losses (including compound interest) as well as other loss in the contemplation of the parties incurred by reason of the late payment.⁵⁹⁰ Interest on commercial debts may, by statute, also be awarded in certain circumstances.⁵⁹¹ As to delivery,⁵⁹² it has been

said that “in ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery”,⁵⁹³ although there is no presumption or rule of law to that effect and the question ultimately depends on the terms of the contract and the nature of the goods. Late delivery gives rise to a claim for damages in the usual way.⁵⁹⁴

Late delivery in consumer contracts for goods

46-129 The Consumer Rights Directive 2011

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U requires Member States to provide that in a consumer sales contract the trader must deliver within certain periods unless the parties have agreed otherwise, and to provide the buyer with rights to terminate the contract in the event of late delivery.⁵⁹⁶ This provision was initially implemented in the United Kingdom by the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013*,⁵⁹⁷ which apply to consumer contracts made after 13 June 2014. These provisions are now contained in the *Consumer Rights Act 2015*.⁵⁹⁸

Footnotes

585 See, e.g. *Ebbw Vale Steel, Iron and Coal Co v Blaina, etc. Co* (1901) 6 Com. Cas. 33; *MacLaine Galty* [1921] 1 A.C. 376, 389 (loan: “punctual payment”); *The Brimnes* [1975] Q.B. 929 (time charter: “punctual payment”); *Lombard North Central Plc v Butterworth* [1987] Q.B. 527 (hire: “punctual payment to be of essence”).

586 See, e.g. *Ryan v Ridley & Co* (1902) 8 Com. Cas. 105 (CIF contract); *Pavia & Co SpA v Thurmann-Nielsen* [1952] 2 Q.B. 84; *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 Q.B. 130 (opening of credit in international sale). In *DD Classics Ltd v Chen* [2022] EWHC 1357 (Comm) there was no reason to infer from the inclusion of a provision giving a right to cancel if the buyer failed to pay within a specified period that failure to pay within that period was to be treated as a repudiatory breach.

587 See Vol.I, Ch.27; *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 App. Cas. 434; *Payzu Ltd v Saunders* [1919] 2 K.B. 581; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361.

588 Sale of Goods Act 1979 s.48; see below, paras 46-346 et seq.

589 See Vol.I, paras 29-199—29-200.

590 *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 A.C. 561; see Vol.I, paras 29-199—29-200.

- 591 Late Payment of Commercial Debts (Interest) Act 1998 (as amended); Vol.I, para.[29-291](#); see below, para.[46-301](#).
- 592 See below, paras [46-241](#) et seq.
- 593 *Hartley v Hymans [1920] 3 K.B. 475, 483–484*. See also *Toepfer v Lenersan-Poortman NV [1980] 1 Lloyd's Rep. 143*; *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711*; as to a non-commercial contract *McDougall v Aeromarine of Emsworth Ltd [1958] 1 W.L.R. 1126*; and see below, para.[46-241](#). The date of shipment is usually part of the description of the goods: *Bowes v Shand (1877) 2 App. Cas. 455*; see above, para.[46-089](#).
- 594 See below, para.[46-413](#).
- ⑤95 Directive 2011/83/EU of 25 October 2011. The 2011 Directive is subject to considerable amendment by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019. However, as the 2019 Directive had to be implemented by Member States on 28 November 2021 (i.e. after IP completion day) the UK was not required to implement these changes: see Vol.I, paras [1-016](#) et seq.
- 596 art.18.
- 597 SI 2013/3134.
- 598 See above, paras [40-529](#) et seq.

(a) - Transfer of Property as between Seller and Buyer

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 4. - Effects of the Contract

(a) - Transfer of Property as between Seller and Buyer ⁵⁹⁹

Rules governing transfer of property

- 46-130 Sections 16–19 and s.20A of the Act contain the rules which govern the transfer of the property in goods sold from the seller to the buyer.

Unascertained goods

- 46-131 By s.16:

“Subject to s.20A ... where there is a contract for the sale of unascertained goods no property⁶⁰⁰ in the goods is transferred to the buyer unless and until the goods are ascertained.”

This section states in the clearest terms that, except where s.20A applies,⁶⁰¹ the property in unascertained goods cannot pass.⁶⁰² It must be noted that the rule is stated negatively. It does not say that when the goods are ascertained the property will pass, although in very many instances this is what will in fact happen; the intention of the parties is of primary importance in determining when the property is to pass.⁶⁰³

- 46-132 The Act does not define unascertained goods, but for the purpose of the passing of the property they seem to fall into three categories⁶⁰⁴: generic goods,⁶⁰⁵ for instance, “100 tons of wheat”; a

specified quantity of goods forming part of an identified bulk,⁶⁰⁶ for instance, “100 tons of wheat from the larger quantity which A has in his warehouse”; and certain types of future goods.⁶⁰⁷

Separation of goods from bulk

46-133 Where there is a contract for the sale of a quantity of unascertained goods forming part of an identified bulk, the goods may become ascertained by “exhaustion”, that is to say, if sufficient goods are removed from the bulk that the remaining goods are reduced to (or to less than) the contract quantity and there is only one buyer to whom goods are due out of the bulk.⁶⁰⁸ The goods may also become ascertained by “consolidation”, if all the contracts for the goods which remain in the bulk become vested in a single buyer so that he is then the only buyer to whom goods are due out of the bulk.⁶⁰⁹ Otherwise as a general rule⁶¹⁰ the goods must be physically separated from the bulk before they can become ascertained.⁶¹¹ Previously, since s.16 precluded the passing of property in unascertained goods, a buyer would have no claim at law or in equity⁶¹² to or to a share in unascertained goods while still in bulk, even if he had paid the whole or part of the purchase price, unless the seller was estopped from contending that the buyer was entitled to delivery of the goods.⁶¹³ So, for example, if after the buyer had paid for the goods the seller became insolvent or the bulk was seized in execution by a creditor of the seller, the buyer would have no claim to the goods but only a claim as an unsecured creditor for return of the price. However, s.16 was amended by the [Sale of Goods \(Amendment\) Act 1995](#)⁶¹⁴ so as to make the section subject to s.20A (which was also introduced by the 1995 Act). Under s.20A, in certain circumstances property in an undivided share in the bulk will be transferred to the buyer and he will become an owner in common of the bulk.⁶¹⁵

Intention of the parties

46-134 By s.17:

Arrangement of Act

“(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.

(2) 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.”

It will be noted that this section, which makes the passing of property dependent upon the intention of the parties, applies both to specific goods, viz goods identified and agreed on at the time a contract of sale is made, and also to goods which, though not so identified and agreed on, later become ascertained.

Ascertaining intention

46-135 By s.18 it is provided that:

“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.”

It must be emphasised that these rules are presumptions and nothing more. They are not applied if the parties have agreed when and on what conditions the property is to pass.⁶¹⁶

Specific goods in a deliverable state

46-136 By r.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.”⁶¹⁷

(i) Rule 1 applied:

46-137

In *Dennant v Skinner*⁶¹⁸ an auctioneer knocked down several motor cars to a bidder who later tendered payment by cheque, representing himself as the son of a well-known car dealer. Before allowing him to drive away a car, the auctioneer made him sign a statement that the ownership in the cars would not pass to him until the proceeds of the cheque were credited to the auctioneer. The bidder was a fraudulent person whose cheque was dishonoured and who sold the car to the defendant. Hallett J held that the contract was completed on the fall of the hammer and at that time the property passed to the bidder, as the document which purported to delay the passing of the property was signed after the property had in fact passed it was of no effect. The defendant therefore had a good title.

(ii) Unconditional:

- 46-138 It would seem that this word distinguishes cases where the passing of property is subject to a condition later to be fulfilled,⁶¹⁹ e.g. where it is agreed that property is not to pass until the price has been paid.

(iii) Specific goods⁶²⁰:

- 46-139 The meaning of the requirement that the goods must be specific is illustrated in relation to r.1 by *Kursell v Timber Operators and Contractors Ltd.*⁶²¹ In that case the contract was for the sale of all the timber in a Latvian forest which conformed with certain measurements at a specified date. Shortly afterwards all private rights in relation to the forest were annulled. It was held that the property in the timber had not passed to the buyers because this was not a contract for the sale of specific goods. Scrutton LJ said: "Specific goods are defined as goods identified and agreed upon at the time a contract of sale is made. It appears to me these goods were neither identified nor agreed upon. Not every tree in the forest passed, but only those complying with a certain measurement not then made".⁶²² Specific goods also include an undivided share, specified as a fraction or percentage of goods identified and agreed on at the time a contract of sale is made, e.g. a quarter share in a named racehorse.

(iv) Deliverable state:

- 46-140 The goods must also be in a deliverable state at the time the contract is made, that is, "in such a state that the buyer would under the contract be bound to take delivery of them".⁶²³ In *Underwood v Burgh Castle Brick and Cement Syndicate*⁶²⁴ a fixed condensing engine was sold by the claimants to the defendants; it was to be severed, dismantled and delivered free on rail at a specified price. The main body of the engine was damaged by accident while being loaded

on a railway truck and the defendants refused to accept it. It was held that the property had not passed to the defendants under r.1 because the engine was not in a deliverable state at the time the contract was made.

Specific goods to be put into a deliverable state

46-141 By r.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 into a deliverable state,⁶²⁵ the property does not pass until the thing is done, and the buyer has notice that it has been done.”⁶²⁶

This rule only applies where the obligation to put the goods in a deliverable state rests on the seller. But where a similar obligation is placed on the buyer, the result may be the same: s.18 r.1, will not apply, and the situation will be governed by s.17 of the Act.⁶²⁷

- 46-142 It is a question of interpretation in each case whether the thing to be done for the purpose of putting the goods into a deliverable state is a condition of the contract of sale so as to suspend the passing of property, or whether the seller’s obligation is a supplemental obligation only.⁶²⁸
- 46-143 The buyer must have notice that the obligation has been performed.

Specific goods to be weighed, etc.

46-144 By r.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 the act or thing is done⁶²⁹ and the buyer has notice that it has been done.”

Rule 3 suspends the transfer of property only where the act or thing is to be done by the seller, and not by the buyer or a third party. A mere right on the part of the buyer or a third party to weigh the goods will not suspend the passing of property.⁶³⁰ Thus in *Nanka-Bruce v Commonwealth Trust*

*Ltd*⁶³¹ the appellant sold cocoa to A, who was to resell it to the respondents. The latter were then to weigh the cocoa at their premises and the weight was to be tested there. It was held that the property had passed to A and that accordingly the respondents had a good title. The weighing of the goods was said to be “simply a means to satisfy the purchaser that he had what he had bargained for and that the full price claimed per the contract was therefore due”. ⁶³² As in r.2, the buyer must have notice that the seller has done what he is required to do.

Different intention

- 46-145 As already indicated, the rules for ascertaining the intention of the parties are of presumptive force only and are open to rebuttal. Thus in a given case the parties may intend the property to pass at once, even though the price has not yet been precisely calculated. The fixing of a provisional estimate of the price is evidence of an intention that the passing of the property is not to depend upon the final weighing. ⁶³³

Sale or return

- 46-146 By r.4:

“When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:

- (a)when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b)if he does not signify his approval or acceptance to the seller but retains ⁶³⁴ the goods without giving notice of rejection ⁶³⁵ then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time.” ⁶³⁶

What is a reasonable time is a question of fact. ⁶³⁷

- 46-147 This states the general rule that where goods are delivered on approval or on sale or return the property in them remains with the seller until the buyer adopts the transaction. It is however possible to enter into a transaction which is similar in purpose but under which the property passes immediately subject to the buyer’s right to return the goods, as where garments can be exchanged if they are not of the right size: such transactions are not affected by this rule. ⁶³⁸

Displacement of r.4 by contrary intention

- 46-148 Two situations must be contrasted. The first is where the buyer has an option to acquire the property in the goods on the terms set out in r.4; the second is where r.4 is displaced because the contract states that some other event is essential to the passing of the property. With regard to the first situation it is clear that approval of the goods may be signified expressly or it may be implied from the buyer's actions. So in *Kirkham v Attenborough*,⁶³⁹ where the person to whom the goods were delivered "on sale or return" pledged them with a pawnbroker, it was held that the act of pledging was an act adopting the transaction and operated to transfer the property therein to the buyer. With regard to the second situation, it is established that if the contract states for instance that the property is not to pass until the price is paid, an act of the buyer which purports to adopt the transaction is not, without more, sufficient to pass the property to him. For r.4, like all five rules in s.18, does not operate if a different intention appears. Consequently, third parties are not protected.⁶⁴⁰ Thus, where the goods, though delivered "on sale for cash only or return", were to remain the property of the seller till settled for or charged, it was held that, though pawned, they were recoverable by the seller, as the special term took the case out of r.4.⁶⁴¹

Appropriation of unascertained or future goods

- 46-149 By r.5:

"(1)Where there is a contract for the sale of unascertained or future goods⁶⁴² by description,⁶⁴³ and goods of that description⁶⁴⁴ and in a deliverable state⁶⁴⁵ are unconditionally⁶⁴⁶ 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 then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

(2)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 to be taken to have unconditionally appropriated the goods to the contract.⁶⁴⁷

(3)Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state⁶⁴⁸ forming part of a bulk⁶⁴⁹ which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then, if the buyer under that contract is the only buyer to whom goods are then due out of the bulk—

- (a)the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced; and
- (b)the property in those goods then passes to that buyer.

(4)Paragraph (3) above applies also (with the necessary modifications) where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk.”

Appropriation by one party with assent of other

46-150 Once unascertained goods have become ascertained, the property in them may pass if they are unconditionally appropriated to the contract by one party with the assent of the other party. “Appropriation” will occur only where the contract has become irrevocably attached to the goods in question. Rule 5(1) states that the appropriation may be made either by the buyer or by the seller. In a case where the buyer is to select the goods and take them away, there is normally little difficulty.⁶⁵⁰ There is also normally little difficulty if the seller selects the goods, and the buyer subsequently assents to the seller’s choice.⁶⁵¹ But when it is the seller who is to select by virtue of the previous assent (express or implied) of the buyer,⁶⁵² it may be difficult to point to the act of the seller by which the goods are appropriated so as to pass the property in them to the buyer. This is because it may not be clear whether the seller is exercising irrevocably his right to make an election, or whether, though he intends to appropriate these goods to the contract, he may still change his mind and appropriate others.⁶⁵³ This is a question of law, and the answer to it is important, not only to the question of risk, but also because if appropriation has taken place the buyer is protected against the insolvency of the seller. Property has been held to pass where goods were placed by the seller in containers provided by the buyer.⁶⁵⁴ But in the absence of any such constructive or quasi-delivery, the position is less certain.⁶⁵⁵ The principle was thus stated in *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd*⁶⁵⁶ by Pearson J:

“A mere setting apart or selection of the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract, the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer.”

Express or implied assent

- 46-151 Assent to the appropriation may be express or implied. So in *Pignataro v Gilroy*⁶⁵⁷ the defendants sold bags of rice to the claimant who paid for them and received a delivery order identifying the rice agreed to be sold; he delayed for a month before sending for some of the rice. It was held that his subsequent assent to the appropriation must be implied from his conduct. The property had therefore passed to him and the rice was at his risk. If it is alleged that one party assented to an appropriation by the other before it was made, then it must be shown that the latter was authorised, expressly or impliedly, to pass the property in the goods by appropriation⁶⁵⁸ and that the appropriation effected was in accordance with the terms of that authority.

Appropriation unconditional

- 46-152 The appropriation must be unconditional, that is to say, the party appropriating must intend that the property shall pass by the appropriation, if assented to by the other party, and not upon the occurrence of some further event, e.g. payment of the price.⁶⁵⁹

Goods “of that description”

- 46-153 Rule 5(1) also requires that the appropriation be of goods “of that description”, i.e. the description by which the goods are sold. If the goods which are the subject matter of the appropriation are other than those described in the contract of sale, then the property will not pass under the rule.⁶⁶⁰ But it may be the intention of the parties that property in such goods shall pass to the buyer, subject to right of the buyer (if he so chooses) to reject them as not being in conformity with the contract.⁶⁶¹ In such a case, property will pass to the buyer under s.17, since r.5(1) establishes only a *prima facie* rule.

Appropriation by delivery

- 46-154 Appropriation by delivery is dealt with by r.5(2), and it is probably the commonest example of unconditional appropriation.⁶⁶² Four points must be made. The first is that the rule, like all others in s.18, only applies if no different intention appears. Thus if the seller reserves the right of disposal until certain conditions are fulfilled, the appropriation is not unconditional and s.19 provides

that the property is not to pass until those conditions are fulfilled.⁶⁶³ Secondly, where goods are delivered to a carrier, the rule only applies if the carrier is or is deemed to be the buyer's agent (and not the agent of the seller) to take delivery.⁶⁶⁴ The third point is that if goods are delivered to a carrier, unmarked with other goods of like kind, the property will not pass. In other words, unless the goods become ascertained goods by virtue of their delivery to a carrier, they are not deemed to be unconditionally appropriated. Thus if the contract is for the sale of 20 boxes of mackerel, the delivery to a carrier of 20 boxes amounts to unconditional appropriation; but the delivery of 190 boxes from which 20 are to be taken does not, unless the 20 are marked with the name of the consignee.⁶⁶⁵ Fourthly, the delivery to the carrier must be "in pursuance of the contract", that is to say, the contract must provide, expressly or impliedly, for delivery to a carrier and the delivery must be in accordance with its terms.⁶⁶⁶

Appropriation of goods to be manufactured by the seller

- 46-155 In cases where goods are to be manufactured by the seller, the general rule is that the property does not pass until the work is completed and the goods are appropriated to the contract with the assent of the buyer.⁶⁶⁷ However, the parties may agree that the property is to pass before completion. Whether or not they have done so is a question of construction of the contract.

Shipbuilding contracts

- 46-156 This problem has come up for decision on a number of occasions in shipbuilding contracts. In *Re Blyth Shipbuilding and Dry Docks Co*⁶⁶⁸ the Blyth Shipbuilding Co contracted to build a ship for an Italian company; the purchase price was to be paid by instalments, and a clause in the contract provided that "from and after payment by the purchasers to the builder of the first instalment ... the vessel and all materials and things appropriated for her should thenceforth ... become and remain the absolute property of the purchasers". After two instalments had been paid, the Blyth Shipbuilding Co went into liquidation. It was held that on the true construction of the contract, the property in the uncompleted ship had passed to the purchasers. In *Sir James Laing & Sons v Barclay, Curle & Co*,⁶⁶⁹ on the other hand, it was held that the property in the ship as she lay had not passed because, although the purchase price was to be paid by instalments, the contract showed no intention that the property was to pass before the vessel was completed and tried.

Materials not yet incorporated

- 46-157

It again appears to be a question of construction whether the property passes in materials provided by the seller and intended to be used by him in manufacture but not yet incorporated in the product. If, for instance, there was “some definite agreement between the parties which amounts to an assent to the property in the materials passing from the builders to the purchasers”,⁶⁷⁰ it seems that the materials would be regarded as appropriated to the contract and that the property in them would pass. The courts, however, are disinclined to hold that the property in the material passes before they become part of the structure of the product.⁶⁷¹ The point was put as follows by Lord Watson in *Seath & Co v Moore*⁶⁷²:

“... materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract or as ‘sold’ unless they have been affixed to or in a reasonable sense made part of the *corpus*.”

And in *Re Blyth Shipbuilding and Dry Docks Co*,⁶⁷³ where the clause regulating the passing of the property referred specifically to the materials, it was held by the Court of Appeal that the materials had not been effectively appropriated to the contract. Warrington LJ said⁶⁷⁴:

“... the real way of dealing with this question is to read the word ‘appropriated’, in its proper technical sense and as limited to goods which have been so dealt with that the builder could not use them except for the purposes of the ship, and that the purchasers could not refuse to accept them as part of the ship, ... the mere intention on the part of the builder to use them is not enough to transfer the property to the purchasers.”

Appropriation by exhaustion of goods forming part of an identified bulk

- 46-158 Rule 5(3) and r.5(4) deal with the appropriation of goods forming part of an identified bulk.⁶⁷⁵ The effect of r.5(3) may be illustrated as follows: a buyer contracts to purchase, and pays for,⁶⁷⁶ 100 tons of wheat part of a larger bulk of 1000 tons lying in a specified warehouse. Under **s.20A of the Act**⁶⁷⁷ property in an undivided share in the bulk is transferred to the buyer and the buyer becomes an owner in common of the bulk. If, because of deliveries to other buyers or other removal of wheat from the warehouse, the quantity of wheat in the warehouse is reduced to 100 tons or less and the buyer is the only buyer to whom wheat is due out of the 1000 tons, the quantity of wheat remaining becomes ascertained goods by process of “exhaustion”.⁶⁷⁸ Further, under r.5(3), if that quantity of wheat is in a deliverable state,⁶⁷⁹ it is taken as appropriated to the buyer’s contract and the property in the wheat itself (as opposed to an undivided share in the bulk) passes to the buyer.

Appropriation by consolidation

- 46-159 The effect of r.5(4) may be illustrated as follows: if in the above example the seller has agreed to sell the 100 tons to the buyer under two or more separate contracts, the remaining wheat becomes ascertained by “consolidation”⁶⁸⁰ and the property can pass under r.5(4) even though no portion of it has been appropriated to any particular contract. The same result ensues even if the contracts have been made with different sellers, or different buyers, but have become vested in a single buyer.

Undivided shares in goods forming part of a bulk

- 46-160 Subsections (1) and (2) of s.20A provide:

Arrangement of Act

“(1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met—

(a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and

(b) the buyer has paid the price for some or all the goods which are the subject of the contract and which form part of the bulk.

“(2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subs.(1) above are met or at such later time as the parties may agree—

(a) property in an undivided share in the bulk is transferred to the buyer, and

(b) the buyer becomes an owner in common of the bulk.”

Section 20A was inserted into the Act by the Sale of Goods (Amendment) Act 1995.⁶⁸¹ It qualifies s.16 of the Act⁶⁸² which provides that property cannot pass in the case of a contract for the sale of unascertained goods unless and until the goods are ascertained. Previously, if there was a contract for the sale of a quantity of unascertained goods forming part of an identified bulk, no property or interest in the goods would pass to the buyer unless and until the goods were ascertained either by being separated from the bulk or by process of “exhaustion” or “consolidation”.⁶⁸³ In the event of the insolvency of the seller the buyer could assert no proprietary claim to the goods while still in

bulk even though the purchase price had been paid. The object of s.20A is (inter alia)⁶⁸⁴ to enable a pre-paying buyer to assert such a claim by transferring to him the property in an undivided share of the bulk. The conditions set out in subs.(1) must, however, be satisfied.

Requirements for passing of property in undivided share: specified quantity

- 46-161 The first requirement of subs.(1) is that there should be “a contract for the sale of a specified quantity of unascertained goods”. The quantity may be specified by number, weight, measurement or any other means but cannot be wholly indefinite.⁶⁸⁵ The goods must be unascertained goods, for example, 100 tons of wheat part of a larger quantity currently lying in a designated warehouse, and not specific goods⁶⁸⁶ (as defined in s.61(1) of the Act).

Goods forming part of a bulk

- 46-162 The second requirement is that the goods or some of them form part of a bulk. “Bulk” is defined by s.61(1) to mean “a mass or collection of goods of the same kind which—(a) is contained in a defined space or area, and (b) is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity”. In addition to the obvious examples of a warehouse, store, hopper, hold or tank, the words “in a defined space or area” will include a ship, vehicle or aircraft, or even a discrete stack or pile.⁶⁸⁷ It does not seem necessary that the goods in the bulk are interchangeable in the sense of being identical provided that they are regarded as equivalent to each other under the contract or by trade practice.⁶⁸⁸ It would appear to be immaterial that the extent of the bulk is unknown⁶⁸⁹ or that it is not in existence at the time of the sale or that the goods comprised in the bulk are constantly changing.⁶⁹⁰ But, since the goods agreed to be sold, or some of them, must form part of the bulk it is clear that there must be attribution of those goods to the bulk.

Identification of the bulk

- 46-163 The third requirement is that the bulk must be identified either in the contract or by agreement of the parties. It must be certain from which bulk the goods are to come and this must be established by agreement: a unilateral designation by one party will not suffice unless it is agreed or assented to by the other.⁶⁹¹

Payment in advance

- 46-164 The fourth requirement is that the buyer must have paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk. Presumably any recognised form of payment, e.g. by bill of exchange or cheque, will suffice.⁶⁹²

Exclusion by contrary intention

- 46-165 It is open to the parties to agree that no undivided share is to be transferred to the buyer, and it may be assumed that they can do so expressly or by implication, for example, by reserving the right of disposal against payment in full of the price.⁶⁹³ They may also agree that an undivided share is to be transferred to the buyer at some time later than that specified in subs.(2). But, in the absence of any such agreement, the buyer acquires an undivided share in the bulk and becomes an owner in common of the bulk as soon as these conditions are satisfied. It is important, however, to note that what is transferred to the buyer by s.20A is the property in an undivided share in the bulk. The buyer does not become the sole owner of the goods themselves. The goods, while in bulk, remain unascertained and s.16 still governs the transfer of the property in those goods. They must therefore become ascertained (normally by being physically separated from the bulk)⁶⁹⁴ before the property can pass. Once they have become ascertained, the sole property in the goods themselves will pass to the buyer at such time as the parties intend it to be transferred⁶⁹⁵ having regard, in appropriate cases, to s.18 r.5.

Extent of the undivided share

- 46-166 Subsections (3) to (6) of s.20A deal with the extent of the buyer's undivided share:

Arrangement of Act

“(3) Subject to subs.(4) below, for the purposes of this section, the undivided share of a buyer in a bulk at any time shall be such share as the quantity of goods paid for and due to buyer out of the bulk bears to the quantity of goods in the bulk at that time.

(4) Where the aggregate of the undivided shares of buyers in a bulk determined under subs.(3) above would at any time exceed the whole of the bulk at that time,

the undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk.

(5) Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery⁶⁹⁶ to the buyer out of the bulk shall, for the purposes of this section, be ascribed in the first place to the goods in respect of which payment has been made.

(6) For the purposes of this section payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods."

Although the buyer becomes owner in common with others of the entire bulk, only a proportionate share of the bulk is attributed to him. The basic rule (set out in subs.(3)) is that the extent of his undivided share in the bulk at any time is such share as the quantity of goods paid for and due to him out of the bulk bears to quantity of goods in the bulk at that time, e.g. if he has agreed to buy and has paid for 100 tons out of a bulk consisting of 1000 tons, there is transferred to him the property in an undivided share of one-tenth of the 1000 tons. Subsection (4) deals with the question of what happens if the aggregate of the undivided shares of buyers in the bulk exceeds the bulk at that time, for example, if 100 tons have been sold to each of ten buyers from a bulk believed to contain 1000 tons, but the bulk is subsequently reduced by theft or wastage to 800 tons or the seller or another person wrongfully removes 200 tons from that bulk. In that case, the undivided share of each buyer in the remaining 800 tons is reduced proportionately to one-tenth of 800 tons. Reduction also occurs where a co-owning buyer has taken delivery of the goods due to him under his contract but in excess of his undivided share.⁶⁹⁷ It is, however, doubtful whether subs.(4) applies where the seller purports to sell more than the quantity of goods in the bulk, for example, where he sells to each of three buyers consecutively 500 tons from a bulk which consists only of 1000 tons.⁶⁹⁸ In such a case, it is probable that the last buyer will get nothing as the seller will by then have nothing left to sell.⁶⁹⁹ The section does not deal with the converse case where the aggregate of the undivided shares is less than the whole of the bulk at that time, for instance, where the seller sells 100 tons to each of ten buyers from a bulk believed to consist of 1000 tons but which actually consists of 1100 tons, or where 100 tons are added by the seller to the bulk. In such a case each buyer becomes (together with the seller) a co-owner of the entire 1100 tons and there is transferred to him an undivided share of one-eleventh of the bulk of 1100 tons. The section also does not deal with the case where the quantity of goods in the bulk is unknown: presumably the calculation must then be done on the basis of an estimate.

Deemed consent by owner to dealings in bulk goods

Section 20B supplements s.20A and provides that each co-owner of the bulk is deemed to have consented to deliveries to any other co-owner of the quantity due to the latter under his contract⁷⁰⁰ and is deemed to have consented to any dealing with or removal, delivery or disposal of the goods in the bulk by another co-owner (including the seller) falling within the latter's undivided share at the time.⁷⁰¹ This is a useful provision⁷⁰² having regard to the fact that the relationship between a buyer's undivided share and his contractual entitlement may be uncertain and may vary from time to time. Section 20B may therefore protect third parties who purchase goods from co-owning buyers, and liquidators and receivers who release goods to co-owning buyers in reliance on the deemed consent.⁷⁰³ The section also contains other savings,⁷⁰⁴ and in particular preserves the rights of any buyer under his contract.⁷⁰⁵

Situations outside s.20A

- 46-168 A contract for the sale of specific goods falls outside s.20A and by s.61(1) "specific goods" includes an undivided share, specified as a fraction or percentage, of a bulk which is identified and agreed on at the time a contract of sale is made. Thus a contract for the sale of a quarter share in a named racehorse, or a contract for the sale of a fraction ("one-half") or percentage ("50 per cent")—as opposed to a specified quantity ("100 tons")—of a larger quantity of wheat currently lying in a designated warehouse, will be not be a contract for the sale of a specified quantity of *unascertained* goods falling within s.20A but one for the sale of specific goods. Nevertheless, while the goods still form part of the bulk, the result at common law is probably the same: property in an undivided share in the bulk is transferred to the buyer and he becomes an owner in common of the bulk.⁷⁰⁶ This proprietary interest will pass when the parties intend it to pass,⁷⁰⁷ which may be before or at the time or after the price is paid.
- 46-169 Where one or more of the other conditions specified in subs.(1) of s.20A is not satisfied, for example, where the buyer had not paid the price for any of the goods comprised in the contract,⁷⁰⁸ or where the buyer has paid the price for only some of the goods, then as regards those goods for which no payment has been made, s.20A will not apply. It is also open to the parties to exclude by agreement the application of s.20A.⁷⁰⁹ In those cases, there may be exceptional situations where property in an undivided share will pass to the buyer while the goods are still in bulk.⁷¹⁰ But, as a normal rule, this will not be so and the seller will remain the sole owner of the goods unless and until they have become ascertained by being separated from the bulk⁷¹¹ and have been appropriated to the contract in accordance with s.18 r.5.

Seller's right of disposal

46-170 Section 19(1) provides as follows:

“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; and in such a 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.”

Section 19(1) states the general rule that it is open to the seller to reserve to himself the right of disposal, i.e. retain property in the goods, until a specified condition is fulfilled—usually payment of the price.⁷¹² If he does this, the property does not pass until that condition is fulfilled, even though the goods are delivered to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer; in other words, delivery to a carrier does not, in this instance, amount to an unconditional appropriation so as to pass the property under s.18 r.5. This point may be illustrated by reference to what is the normal rule in CIF contracts.⁷¹³ There the property in the goods does not usually pass upon shipment, nor even upon notice of appropriation, but only when the seller transfers the documents against payment or securing of the price.

Particular applications of s.19(1)

46-171 The remaining subsections consist of particular applications of the general rule stated in s.19(1) and are as follows:

Arrangement of Act

“(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.⁷¹⁴

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.”

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Section 19(2) states that there is a presumption in favour of the reservation of the right of disposal where by the bill of lading the goods are deliverable to the order of the seller or his agent.⁷¹⁶ It must be added that if the bill of lading is made out to the order of the buyer or his agent it does not necessarily follow that the property in the goods is transferred when they are shipped. If, for instance, the seller retains the bill of lading this may be “inconsistent with an intention to pass the property”⁷¹⁷ so as to prevent the property from passing even though the bill of lading is taken in the buyer’s name. The result of s.19(2) seems to be that where goods are shipped under a bill of lading the presumption is that the property does not pass until the bill is transferred unconditionally to the buyer.

- 46-172 Section 19(3) in the circumstances to which it applies makes the passing of the property by the transfer of the bill of lading conditional on the bill of exchange being honoured by the buyer. As in s.19(1), the protection given to the seller is limited: so that if the buyer, without honouring the bill of exchange, transfers the bill of lading to a bona fide third party, the latter may by statute acquire a good title.⁷¹⁸

“Romalpa” clauses: retention of title⁷¹⁹

- 46-173 Reservation of the right of disposal of goods greatly increased in importance as the result of the decision in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*⁷²⁰ where the Court of Appeal upheld, as against a receiver of the buyer company, a clause by which (inter alia) the seller retained title to the goods sold until all sums owing from the buyer were paid. This case was distinguished in *Re Bond Worth Ltd*,⁷²¹ where the clause in question retained merely “equitable and beneficial” (and not legal) ownership; it was held to create a charge on the assets of the buyer company within s.95(2) of the Companies Act 1948⁷²² and to require registration. However, if the seller retains legal ownership of the goods agreed to be sold until their price is paid, no question of any charge by the buyer company requiring registration under s.860 of the Companies Act 2006 can arise, because a company can create a charge only on its own property, and if it never acquired property in the goods it cannot charge them.⁷²³ The fact that the buyer is expressly or impliedly⁷²⁴ entitled to consume the goods in manufacture or to resell them in the ordinary course of business will not invalidate the seller’s retention of ownership until such time as the goods are so consumed or sold.⁷²⁵ Nor will the addition of words which entitle the seller to retake possession of the goods in which he retains title upon certain contingencies, e.g. the insolvency of the buyer company, create a registrable charge,⁷²⁶ since the seller retains property in the goods and his right to recover the seller’s right to possession is a right against his own goods.⁷²⁷ In the *Romalpa* case, it was

conceded that, on the wording of the clause, the buyer held the goods until payment as bailee for the seller.⁷²⁸ But in subsequent cases, the courts have found it unnecessary to decide whether the relationship between seller and buyer in relation to the goods is one of bailor or bailee⁷²⁹ or whether, if the buyer resells the goods, he does so as agent of the seller.⁷³⁰ Such considerations are not relevant to the efficacy of the seller's retention of title to the goods, but only (if at all) to the question of accountability of the buyer for the proceeds of sale.⁷³¹

Right to consume before property has passed

- 46-174 If the contract provides for possession of goods to be given, coupled with a legal entitlement to consume them before the property in them is transferred upon payment, then, according to the Supreme Court in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*⁷³² the contract is not one of sale but is sui generis as a bailment coupled with a licence to consume the goods. Since almost all retention of title clauses allow the buyer to use or resell the goods before property in them has passed, this means that a very large number of contracts with reservation of title clauses will no longer be contracts of sale within the meaning of the *Sale of Goods Act*.

Sui generis supply contracts analogous to contracts for the sale of goods

- 46-175 A consequence of the conclusion in *PST Energy 7 Shipping LLC* is that a body of common law parallel to the *Sale of Goods Act* will have to be elaborated to deal with sui generis supply contracts. Although the Court of Appeal was clear that the incidents of the sui generis contract should track those of a sale of goods contract,⁷³³ it cannot be assumed that the entire *Sale of Goods Act* can be applied by analogy to sui generis contracts.⁷³⁴ The Supreme Court gave consideration to an obligation comparable to the right to sell goods that is the equivalent of s.12 of the *Act*. However, the judge at first instance saw no need for a warranty of quiet possession akin to the one that exists for sale of goods contracts in s.12(2)(b).⁷³⁵ The first reason given was that the recipient of the goods obtained sufficient protection from the implied term of lawful permission to use or consume. The second reason was that the warranty of quiet possession in sale of goods contracts was concerned with events after the passing of property. However, neither reason seems compelling and there may be a practical need for such a warranty. It is likely that equivalent common law rules should apply to such sui generis contracts in relation to matters such as delivery (including time and quantity of delivery and delivery by instalments) payment and quality (although, on a strict view, the statutory provisions which modify the common law rules on merchantable quality, etc. would not apply). The potential applicability of the statutory exceptions to the nemo dat rule is complex. The supplier of goods under a sui generis contract is not a "seller" for the purposes of s.24, nor is the recipient a "buyer" of goods for the purpose of s.25. However, it is likely that

the receipt of goods with a licence to use or consume them should be regarded as a disposition for the purposes of these sections. The definition of a mercantile agent in s.1(1) of the Factors Act 1889 may be broad enough to capture a person who buys and resells under a *sui generis* supply contract, given that such contracts are “in commercial terms” regarded as contracts for the sale of goods⁷³⁶ and that the **Factors Act** is not confined to sale of goods contracts as these are defined in the **Sale of Goods Act**. Thus the provisions of s.2(1) of the **Factors Act** may apply. By contrast, certain provisions of the **Sale of Goods Act** are statutory inventions and did not codify existing common law. Such sections cannot apply by analogy at common law. For example, it is possible, though perhaps unlikely, that a bulk may consist of goods supplied to two or more recipients under *sui generis* supply contracts and that the bulk has not been exhausted by the time that one or more recipients has paid in full. **Section 20A**, which is not declaratory of the common law, cannot apply to such contracts by analogy. Similarly, ss.15A and 30(2A) cannot apply.

All monies clauses

- 46-176 Although certain retention of title clauses retain ownership only in such goods as have not been paid for by the buyer, others go further and retain ownership until all goods comprised in the same invoice⁷³⁷ or in the same contract⁷³⁸ have been paid for, or until all accounts owing by the buyer have been settled.⁷³⁹ There is no reason, under s.19(1) of the 1979 Act, why the seller should not reserve the right of disposal of the goods on any terms that he thinks fit,⁷⁴⁰ although in the case of an “all accounts” clause this may in practice mean that property will never pass between seller and buyer. In *Clough Mill Ltd v Martin*⁷⁴¹ the Court of Appeal upheld the retention of title in a clause which retained ownership until all goods comprised in the same contract were paid for, but the court discussed⁷⁴² the problems that would arise if goods that had already been paid for (but in which the property had not yet passed) were repossessed and sold by the seller: whether account must be taken of the part payment already received, and whether the seller would be accountable to the buyer for the proceeds of sale once full payment was achieved. In *Armour v Thyssen Edelstahlwerke AG*⁷⁴³ (where an “all accounts” clause was upheld) the House of Lords did not find it necessary to form a concluded view as to the solution of these problems.⁷⁴⁴

Products

- 46-177 If goods which are the subject of a retention of title provision are used by the buyer in his manufacturing process to make other products or are incorporated in other goods owned by the buyer, the seller may lose his title to the goods. In *Borden (UK) Ltd v Scottish Timber Products Ltd*⁷⁴⁵ resin supplied by the seller was used by the buyer company in the manufacture of chipboard. The Court of Appeal held that, once the resin had lost its identity in the chipboard, it ceased to

exist and with it the seller's title thereto; the resin could not be traced into the chipboard or the proceeds of its sale, nor could the seller claim any interest in or charge over the chipboard. In *Re Peachdart Ltd*,⁷⁴⁶ where leather supplied by the seller was used by the buyer company to manufacture handbags, Vinelott J held that, once a piece of leather had been appropriated to be manufactured into a handbag and work had started on it, it ceased to be the exclusive property of the seller.⁷⁴⁷ And in *Clough Mill Ltd v Martin*,⁷⁴⁸ Robert Goff LJ stated⁷⁴⁹ that: "where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B, at least where the goods are not reducible to the original materials". On the other hand, in *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttik Ltd*⁷⁵⁰ diesel engines supplied by the seller were incorporated by the buyer company into diesel generating sets. The incorporation did not alter or destroy the substance or an engine, and it could be removed from the set within several hours, Staughton J held that the proprietary rights of the seller were not affected by the incorporation. These cases move into very difficult and uncertain areas of law,⁷⁵¹ in particular where the goods remain identifiable but have, to a greater or less extent, been worked upon by the buyer.⁷⁵²

Products clauses

- 46-178 "Romalpa" clauses sometimes expressly provide that ownership of products manufactured from goods supplied subject to the seller's retention of title are to vest in the seller, or that the seller is to acquire ownership of any articles in which such goods are incorporated. But there is considerable doubt as to the efficacy of such provisions. In the *Borden* case (see above) it was stated⁷⁵³ that, had any interest been granted to the seller in the chipboard or the proceeds of its sale, such interest would have been agreed to be granted and must have been created by the buyer company as security for debts owed to the seller and be registrable as a charge.⁷⁵⁴ In *Re Peachdart Ltd* (see above),⁷⁵⁵ a provision that "the relationship of the buyer to the seller shall be fiduciary in respect ... of other goods in which [the contract goods] are incorporated or used" was held to create a charge over completed and uncompleted handbags manufactured by the buyer company from the leather supplied. In *Clough Mill Ltd v Martin*,⁷⁵⁶ however, where yarn was supplied to be manufactured by the buyer company into fabric, Robert Goff and Oliver LJJ⁷⁵⁷ saw no objection in principle to a provision whereby property in any new product created by manufacture should ipso facto vest in the seller,⁷⁵⁸ but the Court of Appeal was unanimous in holding⁷⁵⁹ that the clause in that case (which vested property in the products in the seller until payment had been made) could not be read literally so as to produce the result of a "windfall" to the seller of the full value of the new product, and so gave rise to a charge in favour of the seller.

Proceeds of sale

- 46-179 A mere reservation of title provision would not appear to impose any duty on the buyer to account for the proceeds of sale of the goods in which title is reserved.⁷⁶⁰ Even if the clause further provides that the buyer holds the goods until payment as bailee or sells the goods as agent of the seller,⁷⁶¹ he does not necessarily hold or sell them in a fiduciary capacity,⁷⁶² since not all bailees or agents are fiduciaries for their bailors or principals.⁷⁶³ But provision is commonly found in “Romalpa” clauses that the buyer is to hold the proceeds of sale on trust or in a fiduciary capacity for the seller. The object is to enable the seller to trace the proceeds of sale in accordance with the principles in *Re Hallett’s Estate*⁷⁶⁴ to the exclusion of other creditors of the buyer. In *Re Bond Worth Ltd*,⁷⁶⁵ however, it was pointed out that there is high authority⁷⁶⁶ for the view that, if the buyer is not bound to keep the proceeds of sale separately, but is entitled to mix them with his own money and deal with them as he pleases, and when called upon to hand over an equivalent sum of money, then he is not a trustee of the proceeds but merely a debtor. A “Romalpa” clause should therefore provide that the proceeds of sale are to be placed in a separate account so as to be identifiable as being in the beneficial ownership of the seller. Nevertheless, even in such a case, it is arguable that if the parties never intended that the entire proceeds of sale (including the buyer’s profit)⁷⁶⁷ could be claimed by the seller, but that the true intention was that the proceeds were to be appropriated by the buyer to satisfy pro tanto and to be security for his debt to the seller this is inconsistent with an intention that the buyer sells as agent for the seller.⁷⁶⁸ If the intention was that a charge over the proceeds would thus be created⁷⁶⁹ by the buyer company,⁷⁷⁰ it would fall within s.860(7) of the Companies Act 2006.⁷⁷¹ On the other hand, in *Associated Alloys Pty Ltd v CAN001 452 106 Pty Ltd (In Liquidation)*⁷⁷² the High Court of Australia upheld⁷⁷³ a clause which required the buyer company to hold on trust for the seller such part of the proceeds of sale as were equal to the amount owing by the buyer at the time of receipt of the proceeds. The High Court held that there was an implied term in the contract that, upon receipt of the relevant proceeds, the obligation in debt of the buyer to the seller was discharged. The clause did not therefore, create any “charge” over the proceeds to secure a debt: it was simply an agreement to constitute a trust of after-acquired property, which did not require registration.

Claims against sub-purchasers

- 46-180 A seller may be able to claim title to goods in the possession of a sub-purchaser if the sale and sub-sale are both made subject to a retention of title provision.⁷⁷⁴ Otherwise title of bona fide purchasers from the buyer of goods subject to a “Romalpa” clause is not ordinarily⁷⁷⁵ affected by the existence of the clause.⁷⁷⁶ However, “Romalpa” clauses sometimes contain a provision (which

may take various forms) whereby any claim to the purchase price of the goods resold by the buyer to sub-purchasers is to vest in⁷⁷⁷ or to be transferred to the seller. Again, however, it is arguable that the parties never intended that the entire resale price should pass to the seller, but that the right is granted as security and so creates a charge on the book debts of the buyer company.⁷⁷⁸ In the *Romalpa* case⁷⁷⁹ itself, a provision that the buyer company was, if the seller so required, to “hand over” to the seller claims that it had against sub-purchasers was held not to be a present equitable assignment of those claims. But if the clause is construed as an agreement by the buyer company to assign future choses in action, namely, future debts owed by sub-purchasers to the buyer up to the amount of outstanding indebtedness of the buyer to the seller, then (depending on its wording) it may likewise be held to be a charge created by the buyer company on its book debts.⁷⁸⁰ In the event that it is to be construed as an absolute assignment,⁷⁸¹ vesting the buyer’s claim to the sub-sale price unconditionally in the seller, then it will not create a charge, but problems of priority⁷⁸² may arise as between the seller and other assignees, e.g. where the buyer has factored the debts.⁷⁸³

Building contracts⁷⁸⁴

- 46-181 Goods may be supplied by a sub-contractor to the main contractor subject to a “Romalpa” clause, and delivered to the building site. Before the goods are affixed to the building,⁷⁸⁵ the main contractor becomes insolvent and the sub-contractor seeks to recover the unfixed goods from the employer. In some cases the sub-contractor’s claim may fail because the main contractor is a “buyer in possession” and can therefore pass a good title to the employer under s.25 of the 1979 Act.⁷⁸⁶ But in other cases it will succeed, either because the contract between the sub-contractor and the main contractor is not one of sale but for work and materials,⁷⁸⁷ or because there is no sufficient “sale, pledge or other disposition of the goods” by the main contractor to the employer to enable the latter to rely on s.25,⁷⁸⁸ or because the employer had notice of the terms of the sub-contract including the “Romalpa” clause.⁷⁸⁹

Fixtures

- 46-182 Where goods sold subject to “Romalpa” clause are so attached to land as to become fixtures, the seller’s retention of title to the goods will normally⁷⁹⁰ be ineffective, for example, against a mortgagee⁷⁹¹ or landlord⁷⁹² of the buyer. The goods, having become part of the realty, are irrecoverable by the seller.⁷⁹³

Non-corporate buyers

- 46-183 Where the buyer is not a company, a “Romalpa” clause cannot be attacked on the ground that it creates a charge which requires to be registered under [s.860 of the Companies Act 2006](#),⁷⁹⁴ since that provision applies only to companies. But problems relating to the scope and interpretation of the clause will nevertheless remain. The “reputed ownership” provision of the [Bankruptcy Act 1914](#) has now been repealed.⁷⁹⁵ However, there are certain further statutes that have to be taken into account where the buyer is unincorporated. First there are the [Bills of Sales Acts 1878](#) and [1882](#).⁷⁹⁶ A mere reservation of title clause will not be affected by these Acts,⁷⁹⁷ although an extension of the clause to products manufactured with the goods supplied may come within their scope.⁷⁹⁸ Secondly, a general assignment by the buyer to the seller of debts due to the buyer from sub-purchasers of the goods may be invalidated by [s.344 of the Insolvency Act 1986](#)⁷⁹⁹ unless the assignment has been registered⁸⁰⁰ under the [Bills of Sale Act 1878](#).

Disadvantages of “Romalpa” clauses

- 46-184 The presence of a “Romalpa” clause takes away entitlement to bad debt relief in respect of value added tax⁸⁰¹ and, by reason of the fact that the property in the goods has not passed to the buyer, unless it is expressly stipulated to the contrary, the goods will continue to be at the seller’s risk in the hands of the buyer.⁸⁰² It had been held⁸⁰³ that an action for the price would not be available unless either [s.49\(1\)](#) or [s.49\(2\)](#) were satisfied and that accordingly the presence of a “Romalpa” clause, which prevented property from passing to the buyer, would ordinarily mean that the seller could not maintain an action for the price. In *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*⁸⁰⁴ the Supreme Court held that the bunker supply contract fell outside the [Sale of Goods Act](#) and accordingly it was not necessary to decide whether an action for the price under the Act would have been maintainable in the circumstances. However, the Supreme Court indicated, obiter, that the price would have been recoverable on the date stated by virtue of the contract’s express terms providing the goods had been delivered, indicating that they would have overruled the decision of the Court of Appeal in *Caterpillar* on this point.⁸⁰⁵
- 46-185 A careful assessment of the advantages and disadvantages of such a clause should therefore be made, in particular since the practical difficulties of identifying the goods sold and not paid for—even if still in the possession of the buyer, and of tracing into a mixed fund in the hands of a liquidator or receiver (possibly in competition with other suppliers under “Romalpa” clauses), may be considerable.

Administration ⁸⁰⁶

- 46-186 The ability of the seller to enforce a “Romalpa” clause, or indeed any other agreement for the sale of goods to a company by which the right of disposal is reserved until payment of the price,⁸⁰⁷ will be affected once an administration application has been made⁸⁰⁸ or during the period in which a company is in administration.⁸⁰⁹ No step may be taken to repossess the goods except with the consent of the administrator or permission of the court.⁸¹⁰ Moreover, the administrator is empowered, if he obtains an order of the court, to overreach the rights of the seller by disposing of the goods as if ownership were vested in the company⁸¹¹ and applying the net proceeds of the disposal towards the sums payable under the agreement.⁸¹²

Voluntary arrangements

- 46-187 A similar temporary moratorium is available to a company against repossession of the goods by the seller where the directors propose a voluntary arrangement under **Pt I of the Insolvency Act 1986.**⁸¹³ This facility is, however, restricted to small companies, and certain companies are excluded.⁸¹⁴

Receivership

- 46-188 Where goods are supplied on credit to a company subject to a retention of title clause, and the company goes into receivership, the court will not grant an injunction to restrain the receivers from dealing with the goods if they give an undertaking to pay for such of the goods as are used or sold.⁸¹⁵ But the power of a floating charge holder to appoint a receiver has been largely taken away by **s.72A of the Insolvency Act 1986.**⁸¹⁶

Footnotes

- 599 *Lawson* (1949) 65 L.Q.R. 352; *Battersby and Preston* (1972) 35 M.L.R. 268; *Ho* [1997] C.L.J. 571; *Battersby* [2001] J.B.L. 1.
- 600 Defined **s.61(1)**, see above, para.46-015.
- 601 See below, para.46-160.

- 602 *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 2 Lloyd's Rep. 679, 683.
- 603 See s.17, see below, para.46-134.
- 604 See above, para.46-042.
- 605 See *Austin v Craven* (1812) 4 Taunt. 644; *Hayward Bros v Daniel* (1904) 91 L.T. 319.
- 606 See *Hayman v M'Lintock*, 1907 S.C. 936; *Healy v Howlett & Sons* [1917] 1 K.B. 337; *Laurie & Morewood v Dudin & Sons* [1926] 1 K.B. 223; *Kursell v Timber Operators and Contractors Ltd* [1927] 1 K.B. 298; *National Coal Board v Gamble* [1959] 1 Q.B. 11; *Preston v Albuery* [1964] 2 Q.B. 796; *Re Stapylton Fletcher Ltd* [1994] 1 W.L.R. 1181; see below, para.46-160.
- 607 See above, para.46-042. See also s.18 r.5(1), below, para.46-149.
- 608 *Wait and James v Midland Bank* (1926) 31 Com. Cas. 172; *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 2 Lloyd's Rep. 679; s.18 r.5(3); see below, para.46-158.
- 609 *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)*, see above. See also, para. 46-159, below.
- 610 cf. *Re Stapylton Fletcher Ltd* [1994] 1 W.L.R. 1181.
- 611 *Gillett v Hill* (1834) 2 C. & M. 530, 535; *R. v Tideswell* [1905] 2 K.B. 273; *Healy v Howlett & Sons* [1917] 1 K.B. 336; *Laurie & Morewood v Dudin & Sons* [1926] 1 K.B. 223; *National Coal Board v Gamble* [1959] 1 Q.B. 11; *Preston v Albuery* [1964] 2 Q.B. 796; *Re London Wine Shippers Ltd* [1986] P.C.C. 121.
- 612 *Re Wait* [1927] 1 Ch. 606, 623, 634, 636; *Re London Wine Shippers Ltd*, above; *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74. Contrast *International Finance Corp v DSNL Offshore Ltd* [2005] EWHC 1844 (Comm), [2007] 2 All E.R. (Comm) 305 at [60] (equitable lien).
- 613 *Stonard v Dunkin* (1810) 2 Camp. 344; *Hawes v Watson* (1824) 2 B. & C. 540; *Gillett v Hill* (1834) 2 C. & M. 530, 535; *Woodley v Coventry* (1863) 2 H. & C. 164; *Knights v Wiffen* (1870) L.R. 5 Q.B. 660; *Simm v Anglo-American Telegraph Co* (1879) 5 Q.B.D. 188, 215; Contrast *Re London Wine Shippers Ltd* (1886) P.C.C. 121; *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74.
- 614 s.1(1).
- 615 See below, para.46-160.
- 616 See *McEntire v Crossley Bros Ltd* [1895] A.C. 457; *Omstein v Alexandra Furnishing Co* (1895) 12 T.L.R. 128; *Re Shipton, Anderson & Co* [1915] 3 K.B. 676; *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch.1; *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)* [1981] 2 Lloyd's Rep. 679 (property passed though no appropriation to specific contracts). Special rules apply where the sale is on CIF, FOB, "ex ship", f.o.r., etc. terms: see Benjamin's Sale of Goods, 11th edn (2021), paras 18-469, 19-160, 20-150, 21-004, 21-013, 21-017, 21-025, 21-050, 21-162.
- 617 *Tarling v Baxter* (1827) 6 B. & C. 360; *Gilmour v Supple* (1858) 11 Moo. P.C. 551, 556; *Seath v Moore* (1886) 11 App. Cas. 350, 370. But see *RV Ward Ltd v Bignall* [1967] 1 Q.B. 534, 545; "in modern times very little is needed to give rise to the inference that the property in specific goods is to pass only on delivery or payment". For such a case, see *Michael*

- Gerson (Leasing) Ltd v Williamson [2001] Q.B. 514. See also Orix Australia Corp Ltd v Peter Donnelly Automotive Pty Ltd [2007] NSWSC 977.
- 618 [1948] 2 K.B. 164.
- 619 Sale of Goods Act 1979 s.2(3), (5), 19. The alternative view (based on Varley v Whipp [1900] 1 Q.B. 513, 517; Ollett v Jordan [1918] 2 K.B. 41, 45; and Leaf v International Galleries [1950] 2 K.B. 86, 89–90) that “unconditional” means “subject to no essential undertaking” cannot be supported: see Benjamin’s Sale of Goods, 11th edn (2021), paras 5-019—5-020. See also Classic Automobiles of London v Aura Holdings Inc [1997] EWCA Civ 2834.
- 620 Defined in s.61(1); see above, para.46-015.
- 621 [1927] 1 K.B. 298.
- 622 [1927] 1 K.B. 298 at 311. See also at 314.
- 623 1979 Act s.61(5). See Underwood Ltd v Burgh Castle Brick and Cement Syndicate [1922] 1 K.B. 343, 345; Pritchett & Gold and Electric Power Storage Co Ltd v Currie [1916] 1 Ch. 515; Philip Head & Sons Ltd v Showfronts Ltd [1970] 1 Lloyd’s Rep. 140; Kulkarni v Manor Credit (Davenham) Ltd [2010] EWCA Civ 69, [2010] 2 Lloyd’s Rep. 431 at [24].
- 624 [1922] 1 K.B. 343.
- 625 See above, para.46-140.
- 626 See (before the 1893 Act) Rugg v Minett (1809) 11 East 210; Acraman v Morice (1849) 8 C.B. 449. See also Underwood v Burgh Castle Brick and Cement Syndicate [1922] 1 K.B. 343.
- 627 Kursell v Timber Operators and Contractors Ltd [1927] 1 K.B. 298; see above, para.46-134.
- 628 Pritchett and Gold and Electrical Power Storage Co Ltd v Currie [1916] 2 Ch. 515; Jerome v Clements Motor Sales Ltd, 15 D.L.R. (2d) 689 (1958); Hartley v Saunders 33 D.L.R. (2d) 638 (1962); Anderson v Ryan [1967] 1 I.R. 34, 37.
- 629 See Zagury v Furnell (1809) 2 Camp. 239, 240: goods to be counted; Hanson v Meyer (1805) 6 East 614: goods to be weighed; Logan v Le Mesurier (1847) 6 Moo. P.C. 116: goods to be measured.
- 630 In limiting the rule to acts to be done by the seller, the Act adopted the view taken in Turley v Bates (1863) 2 H. & C. 200. There weighing was to be done by the buyer, and it was held that the passing of the property was not suspended. But see s.17.
- 631 [1926] A.C. 77 (though not a case of specific goods).
- 632 At 79.
- 633 See Martineau v Kitching (1872) L.R. 7 Q.B. 436, 449; Anderson v Morice (1874) L.R. 10 C.P. 58. See also Howes v Watson (1842) 2 B. & C. 243; Kershaw v Ogden (1865) 3 H. & C. 717; R. v Tideswell [1905] 2 K.B. 273, 277.
- 634 This rule applies only if it is the buyer who retains. See Re Ferrier [1944] Ch. 295 (property did not pass because goods retained by buyer’s execution creditors). But cf. Genn v Winkel (1912) 107 L.T. 434.
- 635 See Berry v Star Brush Co (1915) 31 T.L.R. 603. On the contents of the notice, see Atari Corp (UK) Ltd v Electronic Boutiques Stores (UK) Ltd [1998] Q.B. 539.
- 636 See Moss v Sweet (1851) 16 Q.B. 493; Poole v Smith’s Car Sales (Balham) Ltd [1962] 1 W.L.R. 744. But the transaction does not become a sale if the goods perish in the bailee’s possession without his fault: Elphick v Barnes (1880) 5 C.P.D. 321. cf. Poole v Smith’s

- Car Sales (Balham) Ltd*, above. On return of the goods in a damaged condition, see below, para.46-291; cf. Benjamin's Sale of Goods, 11th edn (2021), paras 5–055, 5–056.
- 637 1979 Act s.59.
- 638 See *Head v Tattersall (1871) L.R. 7 Ex. 7*.
- 639 [1897] 1 Q.B. 291. Followed in *London Jewellers Ltd v Attenborough [1934] 2 K.B. 206*, where an agent to sell was treated as a buyer; see per Scrutton LJ at 214: the section “appears to contemplate that the person who has goods delivered to him on approval becomes a buyer to whom the property passes”. cf. *Genn v Winkel (1912) 107 L.T. 434*.
- 640 Further, a person who takes goods on sale or return is not in possession under an agreement to buy for the purposes of s.25: see *Edwards v Vaughan (1910) 26 T.L.R. 545, 546*. Therefore he cannot pass a good title to a third party. But a third party is protected if the contract is one of mercantile agency within the Factors Act 1889: see *Weiner v Harris [1910] 1 K.B. 285*; *Janesich v Attenborough (1910) 102 L.T. 605*. Contrast *Re Nevill (1860) L.R. 6 Ch. App. 397*; affirmed sub nom. *Towle & Co v White (1873) 29 L.T. 78, HL*. See below, paras 46-204, 46-222.
- 641 *Weiner v Gill [1906] 2 K.B. 574*; see also *Edwards v Vaughan (1910) 26 T.L.R. 545*; *Kempler v Bravingtons Ltd (1925) 133 L.T. 680* (previous cases reviewed); *R. v Eaton (1966) 50 Cr. App. R. 189*.
- 642 Defined s.61(1), see above, para.46-015, and see s.5(1), see above, paras 46-035 et seq.
- 643 See s.13, see above, paras 46-086 et seq.
- 644 See below, para.46-153.
- 645 Defined, s.61(5), see above, para.46-136.
- 646 See below, para.46-152. Notice of appropriation under a CIF contract does not pass the property because, as the seller retains the documents against the payment of the price, the appropriation is not unconditional: see *Ross T Smyth & Co Ltd v Bailey, Son & Co [1940] 3 All E.R. 60, 65–66*; *Ginzberg v Barrow Haematite Steel Co and McKellar [1966] 1 Lloyd's Rep. 343*; Benjamin's Sale of Goods, 11th edn (2021), para.19-165.
- 647 cf. s.32, see below, para.46-270.
- 648 Defined in s.61(5); see above, para.46-140.
- 649 Defined in s.61(1); see above, para.46-015.
- 650 But cf. *R. v Tideswell [1905] 2 K.B. 273*; *National Coal Board v Gamble [1959] 1 Q.B. 11*.
- 651 *Rohde v Thwaites (1927) 6 B. & C. 388*; *Pignataro v Gilroy [1919] 1 K.B. 459*; *Wardar's (Import and Export) Ltd v W Norwood & Sons Ltd [1968] 2 Q.B. 663*.
- 652 See below, para.46-151.
- 653 See Blackburn on Sale, 1st edn, p.128, citing *Heyward's Case (1595) 2 Co. Rep. 35a*. See also *Mucklow v Mangles (1808) 1 Taunt. 318*; *Ridgway v Ward (1884) 14 Q.B.D. 110, 116*; *Cocker v McMullen (1900) 81 L.T. 784*; *Noblett v Hopkinson [1905] 2 K.B. 214*. cf. *Pletts v Beattie [1896] 1 Q.B. 519*; *Furbey v Hoey [1947] 1 All E.R. 736*.
- 654 *Aldridge v Johnson (1857) 7 E. & B. 885*; *Langton v Higgins (1859) 4 Hurl. & N. 402*.
- 655 But see *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd [1984] 1 W.L.R. 485, 495* (goods invoiced to buyer). See also *Pullman Trailmobile Canada Ltd v Hamilton Refrigeration Ltd 96 D.L.R. (3d) 322 (1979)*. Contrast *Carlos Federspiel & Co SA v Charles*

- Twigg & Co Ltd, below; *Kulkarni v Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69, [2010] 2 Lloyd's Rep. 431.
- 656 [1957] 1 Lloyd's Rep. 240, 255; *Kulkarni v Manor Credit (Davenham) Ltd*, above, at [35].
- 657 [1919] 1 K.B. 459.
- 658 *Jenner v Smith* (1869) L.R. 4 C.P. 270, 277, 278.
- 659 *Godts v Rose* (1854) 17 C.B. 229; *Stein Forbes & Co Ltd v County Tailoring Co Ltd* (1916) 86 L.J. K.B. 448, 449. Notice of appropriation under a CIF contract does not pass the property because, as the seller retains the documents against payment or securing of the price, the appropriation is not unconditional: see *Ross T Smyth & Co Ltd v Bailey Son & Co* [1940] 3 All E.R. 60, 65–66; *Ginzberg v Barrow Haematite Steel Co and McKellar* [1966] 1 Lloyd's Rep. 343; Benjamin's Sale of Goods, 11th edn (2021), para.19-165. See also s.19, below, para.46-170.
- 660 *Wait v Baker* (1848) 2 Exch. 1, 7; *Vigers v Sanderson* [1901] 1 Q.B. 608; *Hammer & Barrow v Coca-Cola* [1962] N.Z.L.R. 723; *Thornley v Tuckwell Butchers Ltd* [1964] Crim. L.R. 127.
- 661 *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459; *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 W.L.R. 1126.
- 662 *Ogle v Atkinson* (1814) 5 Taunt. 759; *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1887) 12 App. Cas. 128; *Denny v Skelton* (1916) 115 L.T. 305; *Edwards v Dolin* [1976] 1 W.L.R. 942. See also s.29(4) (delivery by attorney of third party) and *Wardar's (Export and Import) Co Ltd v Norwood & Sons Ltd* [1968] 2 Q.B. 663.
- 663 See below, para.46-170.
- 664 *Wait v Baker* (1849) 2 Exch. 1, 7. See also *Badische Anilin und Soda Fabrik v Basle Chemical Works* [1898] A.C. 200 (despatch by post); *Scottish and Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462 at [15]–[37] (C&F contract), and s.32(1) below, para.46-270. It is submitted that r.5(2) is not affected by s.32(4) which affects only risk.
- 665 *Healy v Howlett & Sons* [1917] 1 K.B. 337.
- 666 *Cooke v Ludlow* (1806) 2 B. & P.N.R. 119; *Ullock v Reddelein* (1828) 5 L.J. (O.S.) K.B. 208; *Aron & Co v Comptoir Wegimont* [1921] 3 K.B. 435.
- 667 See *Mucklow v Mangles* (1808) 1 Taunt. 318; *Clarke v Spence* (1836) 4 A. & E. 448, 466; *Laidler v Burlinson* (1837) 2 M. & W. 602; *Reid v Macbeth* [1904] A.C. 223.
- 668 [1926] Ch. 494; see also *Wood v Bell* (1856) 6 El. & Bl. 355; *Seath v Moore* (1887) 11 App. Cas. 350, 380; Benjamin's Sale of Goods, 11th edn (2021), paras 5-090—5-092.
- 669 [1908] A.C. 35.
- 670 *Re Blyth Shipbuilding and Dry Docks Co* [1926] Ch. 494, 518. See also *Sauter Automation Ltd v Goodman Mechanical Services Ltd* (1986) 34 B.L.R. 81 (building contract). cf. *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 W.L.R. 1126, 1129 (contra); *Re Cosslett (Contractors) Ltd* [1998] Ch. 495; *Smith v Bridgend CBC* [2001] UKHL 58, [2002] 1 A.C. 336 (charge).
- 671 See *Wood v Bell* (1856) 6 El. & Bl. 355, 263 (overruling *Woods v Russell* (1822) 5 B. & Ald. 942); *Reid v Macbeth* [1904] A.C. 223. But see *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2004] EWHC 1180 (Comm), [2005] 1 Lloyd's Rep. 219 at [36].
- 672 (1887) 11 App. Cas. 350, 381.

673 [1926] Ch. 494, 518.

674 At 517–518.

675 “Bulk” is defined in s.61(1); see above, para.46-015. See below, para.46-163.

676 If the goods are not paid for, in whole or in part, no property in an undivided share passes to the buyer under s.20A, but r.5(3) can nevertheless still apply to transfer the property in the goods themselves to the buyer.

677 See below, para.46-160.

678 See above, para.46-133.

679 Despite the position of the words “in a deliverable state” in r.5(3), it is submitted that the goods need only be in a deliverable state at the time the bulk is reduced and not at the time of the contract of sale. For the meaning of “deliverable state”, see s.61(5), see above, para.46-016, and see above, para.46-140.

680 See above, para.46-133.

681 s.1(3).

682 See above, para.46-131.

683 See above, para.46-133.

684 See also the other reasons set out in the Report of the English and Scottish Law Commission Sale of Goods Forming Part of a Bulk (Law Com. No.215 and Scot. Law Com. No.145) (1993). See generally M. Bridge [2019] L.M.C.L.Q. 57.

685 For a discussion as to whether, e.g. “80 to 100 tons” or “100 tons 5% more or less” are covered, see Benjamin’s Sale of Goods, 11th edn (2021), para.5-111.

686 See below, para.46-168.

687 The word “contained” should be given its larger meaning of being kept within limits rather than enclosed or kept within a container: Benjamin’s Sale of Goods, 11th edn (2021), at para.5-113.

688 Benjamin’s Sale of Goods, 11th edn (2021), at paras 1-120, 5-113.

689 But see below, para.46-171.

690 cf. *Mercer v Craven Grain Storage Ltd* [1994] C.L.C. 328, HL.

691 For the particular problems to which this may give rise, see Benjamin’s Sale of Goods, 11th edn (2021), at para.5-114.

692 See Vol.I, paras 24-037—24-081.

693 See below, para.46-170. For the position in relation to CIF and C&F contracts, see Benjamin’s Sale of Goods, 11th edn (2021), paras 5-116, 18-620.

694 But see above, para.46-133 (exhaustion and consolidation).

695 1979 Act s.17.

696 Defined in s.61(1); see above, para.46-015.

697 1979 Act s.20B(1)(a); see below, para.46-167.

698 See Benjamin’s Sale of Goods, 11th edn (2021), paras 5-123–5-125.

699 1979 Act s.21(1); see below, para.46-193 (unless the last purchaser can establish a good title under s.24 of the 1979 Act, see below, para.46-214). See Benjamin’s Sale of Goods, 11th edn (2021), at paras 5-123–5-125, 7-067.

700 1979 Act s.20B(1)(a).

- 701 1979 Act s.20B(1)(b).
- 702 For the position at common law and under s.10(1) of the Torts (Interference with Goods) Act 1977, see Benjamin's Sale of Goods, 11th edn (2021), para.5-127.
- 703 1979 Act s.20B(2).
- 704 1979 Act s.20B(3).
- 705 For the position in respect of risk, see below, para.46-189.
- 706 Benjamin's Sale of Goods, 11th edn (2021) at para.5-131. But the rules in subss.(4) to (6) of s.20A are peculiar to that section and cannot therefore apply.
- 707 1979 Act s.17.
- 708 1979 Act s.20A(1)(b).
- 709 See above, para.46-165.
- 710 *Re Stapylton Fletcher Ltd* [1974] 1 W.L.R. 1181. Contrast *Re London Wine Co (Shippers) Ltd* [1986] P.C.C. 121; *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74.
- 711 See above, para.46-133 (but note also ascertainment by exhaustion and consolidation).
- 712 See, e.g. *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785. If a seller makes a unilateral reservation of property in breach of contract, and/or refuses to transfer the property on tender of the price, it is not clear whether the buyer's tender vests the property in him. See Benjamin's Sale of Goods, 11th edn (2021), paras 5-134, 18-473; *City Motors (1933) Pty Ltd v Southern Aerial Super Service Pty Ltd* (1961) 106 C.L.R. 477, 485-486, 487-490.
- 713 See *Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All E.R. 60, 67-68; see also *Wait v Baker* (1848) 2 Exch. 1, 7-8 and Benjamin's Sale of Goods, 11th edn (2021), paras 19-160 et seq.
- 714 See *Ogg v Shuter* (1875) 1 C.P.D. 47; *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex. D. 164, 172; Benjamin's Sale of Goods, 11th edn (2021), paras 18-474, 20-0160.
- 715 The reference is probably to dishonour by non-acceptance rather than by non-payment. See *Shepherd v Harrison* (1871) L.R. 5 H.L. 116; *The Prinz Adalbert* [1917] A.C. 586; *The Orteric* [1920] A.C. 724. See also *Barton, Thompson & Co v Vigers Bros* (1906) 19 Com. Cas. 175; *Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd* [1973] 2 Lloyd's Rep. 101; Benjamin's Sale of Goods, 11th edn (2021), paras 5-140, 18-489.
- 716 *Mitsui & Co Ltd v Flota Mercante Grancolombiana SA* [1988] 1 W.L.R. 1145. cf. *The Parchim* [1918] A.C. 157: presumption rebutted in a Prize case.
- 717 *The Kronprinsessan Margareta* [1921] 1 A.C. 486, 517. Although property usually passes on transfer of the bill of lading this is not necessarily so: *Carlos Soto SAU v AP Moller-Maersk AS (The SFL Hawk)* [2015] EWHC 458 (Comm), [2015] 1 Lloyd's Rep. 537, [19].
- 718 *Cahn v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 Q.B. 643. See below, para.46-220.
- 719 See Parris, Retention of Title on Sale of Goods (1982); Parris, Effective Reservation of Title Clauses (1986); Dickson, Retention of Title Clauses (1987); McCormack, Reservation of Title, 2nd edn (1995); Davies, Effective Retention of Title (1991); Wheeler, Retention of Title Clauses: Impact and Implications (1991); Benjamin's Sale of Goods, 11th edn (2021), paras 5-143 et seq.; Palmer and McKendrick, Interests in Goods, 2nd edn (1998), Ch.28. The periodical literature is voluminous. For the problems involved regarding conflict of laws see Benjamin's Sale of Goods, 11th edn (2021), at para.26-136 et seq.

- 720 [1976] 1 W.L.R. 676; noted (1976) 39 M.L.R. 585, [1977] C.L.J. 27.
- 721 [1980] Ch. 228. See also *Stroud Architectural Systems Ltd v John Laing Construction Ltd* [1994] 2 B.C.L.C. 276.
- 722 See now Companies Act 2006 s.860, replacing Companies Act 1985 ss.395, 396, from October 2009. The amendments provided for in ss.92–107 of the Companies Act 1989, were not brought into force and are repealed by s.1295 of and Sch.16 of the 2006 Act. On proposals of the Law Commission for reform: see Law Com. Consultation Paper No.264 (2002); Law Com. Consultation Paper No.176 (2004); Law Com. Report No.296 (2005).
- 723 *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111, 116, 122, 125. See also *Re Peachdart Ltd* [1984] Ch. 131, 141; *Hendy Lennox (Industrial Engines Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485, 491; *Re Andrabel Ltd* [1984] 3 All E.R. 407, 410. But see *Re Curtain Dream Plc* [1990] B.C.L.C. 925 (sale and repurchase of goods).
- 724 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676, 680, 687, 689, 692, 694; *Re Bond Worth Ltd* [1980] Ch. 228, 246; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, 34, 44, 46; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485, 491; *Re Andrabel Ltd* [1984] 3 All E.R. 407 at 411; *Four Point Garage Ltd v Carter* [1985] 3 All E.R. 12. *Fairfax Gerrard Holdings Ltd v Capital Bank Plc* [2007] EWCA Civ 1226, [2008] 1 Lloyd's Rep. 297 at [34].
- 725 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676, 680, 687, 689, 692, 694; *Re Peachdart Ltd* [1984] Ch. 131, 141; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485, 491; cf. *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, 34, 44, 46; *Re Bond Worth Ltd* [1980] Ch. 228, 246. However, where the buyer is at liberty to consume the goods before the price becomes due, such that the transfer of the property in the goods may never happen, the contract may not be a contract of sale at all: see *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2016] UKSC 23 where the Supreme Court characterised a bunker contract with these characteristics as a sui generis supply contract. See below, para.46-174.
- 726 Under s.860(7)(b) of the Companies Act 2006.
- 727 *McEntire v Crossley Brothers Ltd* [1895] A.C. 457, 462; *Smart Brothers Ltd v Holt* [1929] 2 K.B. 303, 308.
- 728 [1976] 1 W.L.R. 676, 680. Contrast *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, 35, 45; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150, 159.
- 729 *Re Peachdart Ltd* [1984] Ch. 131, 141, 142; *Hendy Lennox (Industrial Engines) Ltd v Graham Puttick Ltd* [1984] 1 W.L.R. 485, 499–500; *Re Andrabel Ltd* [1984] 3 All E.R. 407, 414. But see *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111 at 116.
- 730 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676, 690, 693, 694. But see *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 All E.R. (Comm) 393 at [60], [61], [75]–[76] (buyer sells as agent). For a critical analysis of this decision see *Gullifer* [2014] L.M.C.L.Q. 564.
- 731 See below, para.46-179. In *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 All E.R. (Comm) 393,

the question of whether the buyer resold as agent was relevant to the question of whether property had ever passed to the buyer, or passed directly to the sub-buyer, which, in turn, was relevant to whether there could be an action for the price under [s.49 of the Sale of Goods Act 1979](#) for the purposes of a non-set-off clause.

- 732 [2016] UKSC 23, [2016] 2 W.L.R. 1193, [2016] 1 Lloyd's Rep. 589. For a critical review of this decision see *L. Gullifer* [2017] L.Q.R. 244. The Court of Appeal in *Wood v TUI Travel Plc (t/a First Choice)* [2017] EWCA Civ 11, [2017] 1 Lloyd's Rep 322 held that *PST Energy 7 Shipping LLC* was not authority for the proposition that there was no intention that property in any food or drink served by a hotel to guests would pass to them. The conclusion in *PST Energy 7 Shipping LLC* depended upon the relationship between a retention of title clause and the liberty to consume fuel in which property had not already passed and was accordingly distinguishable. See also *Gregor Fiskin v Carl* [2020] EWHC 1385 (Comm), rejecting an argument based on *PST Energy* and holding that the contract in question was a contract for the sale of goods. The Court of Appeal upheld the decision that the Sale of Goods Act applied, without referring to the argument based on *PST Energy* ([2021] EWCA Civ 792, [71]).
- 733 “There is no reason why the incidents of a contract of sale of goods for which the Act provides should not apply equally to such a contract at common law”: Moore-Bick LJ, [2015] EWCA Civ 1058 at [33].
- 734 See *L. Gullifer* [2017] L.Q.R. 244, 258 and Benjamin’s Sale of Goods, 11th edn (2021) at 4-001.
- 735 [2015] EWHC 2022 (Comm) at [63].
- 736 [2015] EWCA Civ 1058 at [33].
- 737 *Re Peachdart Ltd* [1984] Ch. 131.
- 738 *Re Bond Worth Ltd* [1980] Ch. 228, 246; *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111.
- 739 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676; *Borden (UK) Ltd v Scottish Timber Products Ltd*, above; *John Snow & Co Ltd v DGB Woodcraft Co Ltd* [1985] B.C.L.C. 54; *Armour v Thyssen Edelstahlwerke AG* [1991] 2 A.C. 339; *Peerless Carpets Ltd v Moorhouse Carpet Market Ltd* (1992) 4 N.Z.B.L.C. 102, 747.
- 740 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676; *Re Peachdart Ltd* [1984] Ch. 131; *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111; *John Snow & Co Ltd v DGB Woodcraft Co Ltd* [1985] B.C.L.C. 541; *Armour v Thyssen Edelstahlwerke AG* [1991] 2 A.C. 339 at 353. Contrast *Goodhart and Jones* (1980) 43 M.L.R. 489, 508; *Goodhart* (1986) 49 M.L.R. 86. In Scotland, “all accounts” clauses were once struck down as an attempt to obtain security without possession, and, by virtue of s.62(4), to fall outside the [Sale of Goods Act 1979](#), but they have since been upheld in *Armour v Thyssen Edelstahlwerke AG* [1991] 2 A.C. 339.
- 741 [1985] 1 W.L.R. 111.
- 742 At 117–118, 124, 125–126.
- 743 [1991] 2 A.C. 339.
- 744 At 353. See Benjamin’s Sale of Goods, 11th edn (2021), para.5-148.
- 745 [1981] Ch. 25.
- 746 [1984] Ch. 131. See also *Modelboard Ltd v Outer Box Ltd* [1993] B.C.L.C. 623 (cardboard made into boxes); *Ian Chisholm Textiles v Griffiths* [1994] B.C.C. 96 (cloth cut and worked

- on); *Chaigley Farms Ltd v Crawford, Kay & Grayshire Ltd* [1996] *B.C.C.* 957 (slaughtered cattle); *Re Highway Foods International* [1995] *B.C.L.C.* 209 (processed meat); *ICI New Zealand v Agnew* [1998] 2 *N.Z.L.R.* 129 (plastic pellets made into containers). Contrast *Armour v Thyssen Edelstahlwerke AG* [1991] 2 *A.C.* 339 (cut steel); *New Zealand Forest Products Ltd v Pongakawa Sawmill Ltd* [1992] 3 *N.Z.L.R.* 304 (sawn timber); *Coleman v Harvey* [1989] 1 *N.Z.L.R.* 723 (refined silver).
- 747 In this case there was an express “products” provision (see below) and it was held that the intention was to create a charge on the handbags in the course of manufacture and on the end products.
- 748 [1985] 1 *W.L.R.* 111.
- 749 At 119. See also at 125.
- 750 [1984] 1 *W.L.R.* 485. Contrast *Specialist Plant Services Ltd v Braithwaite Ltd* (1987) 3 *B.C.C.* 119 (materials for repair).
- 751 *Clough Mill Ltd v Martin* [1985] 1 *W.L.R.* 111, 124; *Coleman v Harvey* [1989] 1 *N.Z.L.R.* 723. See Benjamin’s Sale of Goods, 11th edn (2021), paras 1-058—1-059, 5-150—5-151.
- 752 As in *Re Peachdart Ltd* [1984] Ch. 131. See also *Re Bond Worth Ltd* [1980] Ch. 228; *Clough Mill Ltd v Martin* [1985] 1 *W.L.R.* 111 (where the manufacturing process went further).
- 753 [1981] Ch. 25, at 44, 45. See also at 46, 47; *Re Bond Worth Ltd* [1980] Ch. 228, 246.
- 754 Under what is now s.860(7)(b) of the Companies Act 2006. cf. *ICI New Zealand v Agnew* [1998] 2 *N.Z.L.R.* 129 (floating charge).
- 755 [1984] Ch. 131.
- 756 [1985] 1 *W.L.R.* 111.
- 757 At 119, 124. But see Donaldson MR at 125. See also *Glencore International AG v Metro Trading International Inc* [2001] 1 *Lloyd’s Rep.* 284, 322; *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] 1 *Lloyd’s Rep.* 62, 75; affirmed [2002] EWCA Civ 549, [2002] 2 *Lloyd’s Rep.* 379.
- 758 So that the buyer company would not be creating a charge over its own goods.
- 759 At 120, 124, 125. See also *Modelboard Ltd v Outer Box Ltd* [1993] *B.C.L.C.* 623.
- 760 *Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd* (1917) 55 *S.C.L.R.* 35, HL; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 *W.L.R.* 485; *Re Andrabell Ltd* [1984] 3 All E.R. 407; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 *W.L.R.* 150, 159. Contrast *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies* (1982) Ltd [1986] *N.Z.L.R.* 349. See also *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 All E.R. (Comm) 393 at [60], [61], [75]–[76] (buyer sells as agent). For a critical analysis of this decision see *Gullifer* [2014] L.M.C.L.Q. 564.
- 761 See above, para.46-173.
- 762 Contrast *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 *W.L.R.* 676, 690, 692, 694. See also *Re Hallett’s Estate* (1880) 13 Ch. D. 696, 708–711.
- 763 *Kirkham v Peel* (1880) 43 L.T. 171; *Re Coomber* [1911] 1 Ch. 723, 728; *Henry v Hammond* [1913] 2 K.B. 515; *Boardman v Phipps* [1967] 2 A.C. 46, 126; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick*, above, at 497–499; *Re Andrabell Ltd*, above, at 411–416; *Compaq Computer Ltd v Abercorn Group Ltd* [1991] *B.C.C.* 484, 496.

- 764 (1880) 13 Ch. D. 696 (as in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Industrie Ltd* [1976] 1 W.L.R. 676, 690, 692, 694).
- 765 [1980] Ch. 228.
- 766 *Re Nevill* (1870) L.R. 6 Ch. App. 397; affirmed sub nom. *Towle & Co v White* (1873) 29 L.T. 78, HL; *Foley v Hill* (1848) 2 H.L. Cas. 28; *South Australian Insurance Co v Randall* (1869) L.R. 3 P.C. 101. See also *Henry v Hammond* [1913] 2 K.B. 515 at 521; *Neste Oy v Lloyd's Bank Plc* [1983] 2 Lloyd's Rep. 658.
- 767 For this reason, some clauses provide for the buyer to hold as trustee for the seller only such part of the proceeds as represent or are equivalent to the price at which the goods resold were invoiced to the buyer. The trust of such a part would appear to be effective even though not separated. See *Hunter v Moss* [1994] 1 W.L.R. 452; *Associated Alloys Pty Ltd v CAN001 452 106 Pty Ltd (In Liquidation)*, below.
- 768 cf. *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 All E.R. (Comm) 393 where the majority of the Court of Appeal found that on the terms of the particular clause there was a duty to account for the whole proceeds of sale which was consistent with an agency relationship (per Patten LJ at [60] and Floyd LJ (at [76]). For a critical analysis of this decision see *Gullifer* [2014] L.M.C.L.Q. 564.
- 769 *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, 45; *Re Bond Worth Ltd* [1980] Ch. 228, 248, 259; *Tatung (UK) Ltd v Galex Telesure Ltd* [1989] 5 B.C.C. 325; *Re Weldtech Equipment Ltd* [1991] B.C.C. 16; *Compaq Computer Ltd v Abercorn Group Ltd* [1991] B.C.C. 484; *Modelboard Ltd v OuterBox Ltd* [1993] B.C.L.C. 623.
- 770 cf. *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676, 682–683 (at first instance); *Peerless Carpets Ltd v Moorhouse Carpet Market Ltd* (1992) 4 N.Z.B.L.C. 102, 747.
- 771 See above, para.46-173. Such an argument would be even stronger in the case of a trust in respect of the proceeds of sale of products manufactured from the goods supplied: see Benjamin's Sale of Goods, 11th edn (2021), para.5-156; and see above, para.46-178.
- 772 (2000) A.L.J.R. 862 (Kirby J dissenting).
- 773 But the seller's claim failed, on the facts, since it could not sufficiently relate the proceeds of sale to the goods that it had supplied.
- 774 *W Hanson (Harrow) v Rapid Civil and Engineering and Usborne Developments* (1987) 38 B.L.R. 106; *Re Highway Foods International Ltd* [1995] B.C.L.C. 209. cf. *P4 Ltd v Unite Integrated Solutions Plc* [2006] Build. L.R. 150.
- 775 But see *Re Interview Ltd* [1975] I.R. 182; *Dawber Williamson Roofing Ltd v Humberside CC* (1979) 14 Build. L.R. 70; *Feuer Leather Corp v Frank Johnstone & Sons* [1981] Com. L.R. 251; *W Hanson (Harrow) v Rapid Civil Engineering and Usborne Developments* (1987) 38 B.L.R. 106; *Forsyth International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268.
- 776 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676, 681; *Re Peachdart Ltd* [1984] Ch. 131, 141; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485, 495; *Archivent Sales and Developments Ltd v Strathclyde RC* (1984) 27 B.L.R. 98; *Four Point Garage Ltd v Carter* [1985] 3 All E.R. 12; *Fairfax*

- 133 *Gerrard Holdings Ltd v Capital Bank Plc* [2007] EWCA Civ 1226, [2008] 1 Lloyd's Rep. 297 at [16].
- 777 See *Goode* [1964] J.B.L. 523, 525.
- 778 Companies Act 2006 s.860(7)(f); see above, para.46-173. Alternatively see *Re Bond Worth Ltd* [1980] Ch. 228 (floating charge).
- 779 [1976] 1 W.L.R. 676, 688, 692.
- 780 *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150; *Re Weldtech Equipment Ltd* [1991] B.C.C. 16; *Compaq Computer Ltd v Abercorn Group Ltd* [1991] B.C.C. 484.
- 781 *Hughes v Pump House Hotel Co* [1902] 2 K.B. 190.
- 782 See Vol.I, para.22-070.
- 783 *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150. See also *Re Interview Ltd* [1975] I.R. 182; *Re Peachdart Ltd* [1984] Ch. 131 at 143; Benjamin's Sale of Goods, 11th edn (2021), para.5-163.
- 784 See *Newman* (1999) 10 Construction Law 25.
- 785 cf. *Aircool Installations v British Telecommunications* [1995] C.L.Y. 821, Cty Ct (goods affixed).
- 786 *Archivent Sales and Developments Ltd v Strathclyde RC* (1984) 27 B.L.R. 98; see below, para.46-220.
- 787 *Dawber Williamson Roofing Ltd v Humberside CC* (1979) 14 Build. L.R. 70; see below, para.46-222.
- 788 *W. Hanson (Harrow) Ltd v Rapid Civil Engineering Ltd* (1987) 38 B.L.R. 106; see below, para.46-229.
- 789 *W. Hanson (Harrow) Ltd v Rapid Civil Engineering Ltd* (1987) 38 B.L.R. 106; see below, para.46-231.
- 790 But see above, para.41-423 (goods let on hire-purchase). The same principles apply.
- 791 *Trust Bank Central Ltd v Southdown Properties Ltd* [1991] 1 N.Z. Conv. C. 190, 870. But see *Guest and Lever* (1963) 27 Conv.(N.S.) 30, and see above, para.41-423.
- 792 See above, para.41-423.
- 793 *Melluish v BMI (No.3) Ltd* [1996] A.C. 454; *Aircool Installations v British Telecommunications* [1995] C.L.Y. 821, Cty Ct; *Bennett and Davis* (1994) 110 L.Q.R. 448.
- 794 See above, para.46-173.
- 795 s.38(c). See s.235 and Sch.10 Pts III and IV, of the Insolvency Act 1985. The **Insolvency Act 1986** contains no "reputed ownership" provision.
- 796 Bills of Sale Act 1878; Bills of Sale Act (Amendment) Act 1882.
- 797 *McEntire v Crossley Brothers Ltd* [1895] A.C. 457, 462. See above, para.46-173.
- 798 Bills of Sale Act 1878 s.3. The clause must be contained in a document.
- 799 See Vol.I, para.22-064.
- 800 s.344(4).
- 801 Value Added Tax Act 1994 s.36(4)(b). But Customs and Excise have conceded entitlement to such relief if title has passed to the insolvent debtor by the time relief is claimed: see

- C.C.A.B. TR 388 (7 May 1980); VAT Leaflet 700/18/86 (1 April 1986). See also s.11 of the Finance Act 1990.*
- 802 See below, para.46-189. cf. (consumer sales) para.40-530.
- 803 *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd [2013] EWCA Civ 1232, [2014] 1 All E.R. (Comm) 393* at [60], [61] and [75]–[76].
- 804 *[2016] UKSC 23.*
- 805 See further below, para.46-403.
- 806 See Sch.B1 to the Insolvency Act 1986, substituted by s.248 of and Sch.16 to the Enterprise Act 2002.
- 807 i.e. a “retention of title agreement”, as defined in s.251 of the Insolvency Act 1986, which is included in the definition of “hire purchase” agreement in Sch.B1 para.111(1).
- 808 Insolvency Act 1986 Sch.B1 para.44.
- 809 Insolvency Act 1986 Sch.B1 para.43.
- 810 Insolvency Act 1986 Sch.B1 paras 43, 44.
- 811 Insolvency Act 1986 Sch.B1 para.72.
- 812 Insolvency Act 1986 Sch.B1 para.72(3).
- 813 Insolvency Act 1986 s.1A and Sch.A1, inserted by the Insolvency Act 2000 s.1.
- 814 i.e. banks, insurance companies and companies involved in the performance of market contracts: Insolvency Act 1986 Sch.A1 para.2.
- 815 *Lipe Ltd v Leyland DAF Ltd [1993] B.C.C. 385.*
- 816 Inserted by s.250 of the Enterprise Act 2002.

(b) - When the Risk Passes

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(b) - When the Risk Passes

Passing of the risk

46-189 By s.20(1)



U :

“Unless otherwise agreed, the goods remain at the seller’s risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer, the goods are at the buyer’s risk whether delivery has been made or not.”⁸¹⁸

Thus the presumption is that the risk and the property pass together. This means that as a general rule the risk of loss, damage or deterioration falls on the owner of the goods. But the property and the risk may be separated by agreement⁸¹⁹ or by usage.⁸²⁰ Where the buyer deals as consumer this section does not apply and under the **Consumer Rights Act 2015**, risk passes only on delivery of the goods.⁸²¹

Goods to which risk relates

46-190 The goods must be sufficiently identifiable as those to which the risk relates. But in some cases, especially of overseas sales, the risk in goods not yet separated from bulk may pass to the buyer

even though the property in the goods is still in the seller.⁸²² And in *Sterns Ltd v Vickers Ltd*⁸²³ the buyers purchased 120,000 gallons of spirit, part of a larger quantity contained in a 200,000-gallon tank belonging to the storage company. They accepted a delivery warrant whereby the company undertook to deliver to them the quantity which had been sold. They indorsed the warrant to a sub-purchaser, who left the spirit in storage and paid the storage company rent. The bulk of the spirit deteriorated in quality before delivery took place, and it was held that upon acceptance of the delivery warrant the risk passed to the buyers. Bankes LJ left open the question whether the property had passed. Scrutton LJ held that it had not because there had been no appropriation; but he regarded the acceptance of the delivery warrant as crucial in that it transferred to the buyers an undivided interest in the bulk which carried with it the risk of loss from deterioration.⁸²⁴ Under s.20A of the Act⁸²⁵ where there is a contract for the sale of a specified quantity of ascertained goods forming part of an identified bulk and the buyer has paid the price for some or all of the goods, property in an undivided share in the bulk will be transferred to the buyer and he will become an owner in common of the bulk. In such a case, it is probable that risk passes to the buyer at the same time as the undivided share⁸²⁶ although it is by no means clear from ss.20, 20A and 20B that this is the result.⁸²⁷

Overseas trade

- 46-191 The fact that the goods are to be shipped under a CIF or FOB or similar contract is a strong indication that the property and the risk may pass at separate times.⁸²⁸ Thus in a CIF contract the risk is transferred on shipment or as from shipment, but the presumption is that the property does not pass until the shipping documents are handed over. In a FOB contract, on the other hand, the property and the risk may pass together on shipment. But if the seller reserves the right of disposal of the goods, the risk passes on shipment or as from shipment, but the property remains with the seller until the buyer effects payment or secures the price against tender of the bill of lading; and, further, if the goods are unascertained, the risk again passes on shipment but the property in the goods themselves⁸²⁹ does not pass until they become ascertained and are unconditionally appropriated.⁸³⁰

Qualifications

- 46-192 The main rule stated in s.20(1) does not apply where the loss is caused by the fault of either party. It is therefore qualified as follows:

Arrangement of Act

(2) Where delivery has been delayed through the fault⁸³¹ of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.⁸³²

(3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee ... of the goods of the other party.”

It must be noted that subs.(2), in speaking of delivery, deals with the transfer of possession, not of property; also that the party in fault does not bear the entire risk, but only the risk of loss “which might not have occurred but for such fault”. Subsection (3) means that neither subs.(1) nor subs.(2) alters the common law rule that the party in possession of another person’s goods remains liable for them qua bailee for negligence.⁸³³

Footnotes

①817 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the [Consumer Rights Act 2015](#). In consumer contracts for the sale of goods the [2015 Act](#) provides special rules for the passing of risk, see above para.[40-530](#). Special rules concerning the passing of risk were required by the Consumer Rights Directive 2011. These rules were initially implemented in [reg.43 of the Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#). These rules are now repeated in the [Consumer Rights Act 2015](#). See above, para.[40-530](#). The 2011 Directive is subject to considerable amendment by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019. However, as the 2019 Directive had to be implemented by Member States on 28 November 2021 (i.e. after IP completion day) the UK was not required to implement these changes: see Vol.I, paras [1-016](#) et seq.

818 *Healy v Howlett & Sons* [1917] 1 K.B. 337; *Pignataro v Gilroy* [1919] 1 K.B. 459; *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 K.B. 343; *Wardars (Export and Import) Co Ltd v W Norwood & Sons Ltd* [1968] 2 Q.B. 663; *Stora Enso Oyj v Port of Dundee* [2006] 1 C.L.C. 453.

819 *Castle v Playford* (1872) L.R. 7 Ex. 98, *Martineau v Kitching* (1872) L.R. 7 Q.B. 436; *Anderson v Morice* (1876) 1 App. Cas. 713; *Horn v Minister of Food*, 65 T.L.R. 1906.

820 *Bevington v Dale* (1902) 7 Com. Cas. 112.

821 See above, para.[40-530](#).

822 *Stock v Inglis* (1884) 12 Q.B.D. 564; affirmed sub nom. *Inglis v Stock* (1885) 10 App. Cas. 263. See Benjamin’s Sale of Goods, 11th edn (2021), paras 18-625, 19-181, 20-179, 21-004, 21-013, 21-07, 21-025, 21-050, 21-162.

823 [1923] 1 K.B. 78.

- 824 At 84, 95. But contrast also *Comptoir d'Achat v Luis de Ridder* [1949] A.C. 293, 312, 319 (emphasising the restricted application of the decision in *Sterns Ltd v Vickers Ltd* [1923] 1 K.B. 78). See Benjamin's Sale of Goods, 11th edn (2021), paras 6-005, 18-625.
- 825 See above, para.46-160.
- 826 Benjamin's Sale of Goods, 11th edn (2021), at paras 6-006—6-008. The definition of "goods" in s.61(1), see above, para.46-015, includes an undivided share in goods.
- 827 In particular, it is arguable that s.20B(3)(c) means that the passing of property under s.20A is to be disregarded in determining risk: Benjamin's Sale of Goods, 11th edn (2021), at para.6-006.
- 828 See Benjamin's Sale of Goods, 11th edn (2021), at paras 6-005, 18-625.
- 829 As opposed to property in an undivided share under s.20A; see above, para.46-160.
- 830 *Inglis v Stock* (1885) 10 App. Cas. 263.
- 831 Defined, s.61(1), see above, para.46-015.
- 832 *Demby Hamilton & Co Ltd v Barden* [1949] 1 All E.R. 435. See *Gatoil International Inc v Tradax Petroleum Ltd* [1985] 1 Lloyd's Rep. 350, 351, 362.
- 833 See Benjamin's Sale of Goods, 11th edn (2021), paras 6-021—6-026. For the duties and liabilities of a bailee, see above, Ch.35.

(i) - Sale by Person not the Owner

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Nemo dat quod non habet ⁸³⁴

- 46-193 The first part of s.21(1) states the general rule that “no one can transfer a better title than he himself possesses”. ⁸³⁵ It provides that:

“Subject to this Act,⁸³⁶ where goods are sold by a person who is not their owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.”

An owner of goods who has an immediate right to possession ⁸³⁷ of them may either retake them without action ⁸³⁸ or bring an action for delivery up of the goods ⁸³⁹ or for damages. ⁸⁴⁰ Further, any person who has wrongfully converted the goods either to his own use or to the use of another will be liable to an action for wrongful interference at the suit of the owner provided that, at the time of the conversion, the owner had a right to immediate possession of the goods. ⁸⁴¹ The liability of a person who has converted goods is a strict liability and is not dependent upon proof of knowledge or fault on his part. ⁸⁴²

- 46-194 An allowance may be made for the extent to which, at the time as at which the goods fall to be valued in assessing the damages recoverable, the value of the goods is attributable to an improvement effected by the defendant or by a person from whom the defendant has derived (whether immediately or not) his supposed “title” to the goods. ⁸⁴³

Exceptions

- 46-195 Commercial convenience has, however, called for the recognition of certain exceptions to the general rule.

Footnotes

- 834 On this see generally the Twelfth Report of the Law Reform Committee on the Transfer of Title to Chattels, Cmnd.2958 (1966).
- 835 *Whistler v Forster (1863)* 14 C.B.(N.S.) 248, 257.
- 836 ss.21, 23–25, see below.
- 837 *Iran v Barakat Galleries Ltd [2007] EWCA Civ 1374*. cf. *North West Securities v Alexander Breckon [1981] R.T.R. 518* (action by non-owner who had entered into binding contract to purchase).
- 838 See Clerk & Lindsell on Torts, 23rd edn (2020), para.29-14. On improvements, see *Torts (Interference with Goods) Act 1977* ss.3(7), 6(1), (2); *Greenwood v Bennett [1973] 1 Q.B. 195*; *Thomas v Robinson [1977] 1 N.Z.L.R. 385*.
- 839 *Torts (Interference with Goods) Act 1977* s.3(2)(a), (b). The remedy of specific delivery is, however, discretionary: see s.3(3)(b) of the 1977 Act.
- 840 1977 Act s.3(2)(c).
- 841 *Union Transport Finance Ltd v British Car Auctions Ltd [1978] 2 All E.R. 385*; *RH Willis & Son v British Car Auctions Ltd [1978] 1 W.L.R. 438*; *J Sargent (Garages) Ltd v Motor Auctions (West Bromwich) Ltd [1977] R.T.R. 121*; *Chubb Cash Ltd v John Crilley & Son [1983] 1 W.L.R. 599*; *Hillesden Securities Ltd v Ryjack Ltd [1983] 1 W.L.R. 959*. For the measure of damages in conversion, see *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 A.C. 883*. But see above, para.41-420 (measure of damages where goods let under hire-purchase agreement) and *Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep. 456* (duty to mitigate). Contrast *OBG v Allan [2007] UKHL 21, [2008] 1 A.C. 1* (conversion does not extend to choses in action).
- 842 *Hollins v Fowler (1875) L.R. 7 H.L. 757*.
- 843 *Torts (Interference with Goods) Act 1977* s.6; *Reid v Fairbanks (1853) 13 C.B. 692, 797*; *Munro v Willmott [1949] 1 K.B. 295*. See also s.3(7) of the 1977 Act (allowance to be made on order for delivery up of the goods).

(aa) - Estoppel

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(aa) - Estoppel ⁸⁴⁴

Estoppel

46-196 By s.21(1) the owner of the goods may by his conduct be “precluded” from denying the seller’s authority to sell. It would appear that this provision was intended to give statutory recognition to a particular principle of estoppel in English law in relation to the sale of goods and that the word “precluded” was used to render the principle intelligible in Scots law where the specific term “estoppel” is unknown. ⁸⁴⁵ Briefly, in order to raise such an estoppel it must be shown either that there was a representation by the owner that the seller was entitled to sell the goods or that the owner was negligent in allowing the seller to appear to be entitled to sell the goods. Each of these categories, that is estoppel by representation and estoppel by negligence, are relatively narrow in scope. Their extent is discussed below.

Estoppel by representation

46-197 There must have been a voluntary ⁸⁴⁶ representation by the owner that the seller was entitled to sell the goods. It is clear that the mere parting with possession of goods, or of documents of title to goods, does not without more raise an estoppel. ⁸⁴⁷ The owner must have so acted as to mislead the buyer into the belief that the seller was entitled to sell the goods. Thus in *Central Newbury*

*Car Auctions Ltd v Unity Finance Ltd*⁸⁴⁸ the claimants, owners of a second-hand car, allowed X, who wished to buy it, to take away the car and the registration book before a finance company had accepted their proposal to buy the car and let it to X on hire-purchase terms; X sold the car to a garage, who sold it to the defendants; it was held that the defence of estoppel failed because a motor-car registration book was not proof of ownership, and the claimants had not represented X to be the owner of the car, or to have their authority to sell the car, by allowing him to take possession of it.

Representation by owner or agent of the owner

- 46-198 The representation that the seller has a right to sell the goods must be made by the owner or his agent.⁸⁴⁹ He will not be estopped by a representation of ownership made by the seller himself,⁸⁵⁰ unless he authorised the representation or consented to its being made.⁸⁵¹ The representation must also be clear and unambiguous,⁸⁵² and be addressed to the particular buyer who alleges that he relied on it, or be made under such circumstances of publicity as to justify the inference that the buyer knew of and relied on it.⁸⁵³

Examples of estoppel by representation

- 46-199 It is important to appreciate that the broad principle stated in *Lickbarrow v Mason*⁸⁵⁴ by Ashurst J that “wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it” cannot be regarded as a reliable guide to the solution of problems in this area. This dictum has been heavily criticised,⁸⁵⁵ and although it was relied on in *Commonwealth Trust v Akotey*,⁸⁵⁶ that case cannot be regarded as good law in view of the decision in *Mercantile Bank of India Ltd v Central Bank of India Ltd*.⁸⁵⁷ There are very few reported cases in which a plea of estoppel by representation has in fact succeeded. But in *Henderson v Williams*⁸⁵⁸ an estoppel arose where the owner instructed that goods in the possession of a warehouseman be transferred to the order of another, who sold them as owner. And in *Eastern Distributors Ltd v Goldring*⁸⁵⁹ it was held that there was an estoppel since, in the words of Devlin J, the owner of a van had armed a dealer “with documents which enabled him to represent to the plaintiffs [a finance company] that he was the owner of the van and had the right to sell it”.

Estoppel by negligent conduct

- 46-200

In order to establish estoppel by negligence it is necessary for the buyer to show, first, the existence of a duty of care owed to him by the owner; secondly, a breach of that duty by negligence on the part of the owner; thirdly, that this negligence was proximate or real cause of the buyer entering into the transaction with the seller which occasioned the loss.⁸⁶⁰ It is the first of these requirements that gives rise to the greatest difficulty. Mere carelessness in relation to the goods, or to documents of title to goods, such as failing to take proper precautions to prevent them from being stolen⁸⁶¹ or to report their theft to the police,⁸⁶² a culpable credulity in entrusting them to another,⁸⁶³ or a careless failure to register in a central register the owner's interest in a vehicle let on hire-purchase⁸⁶⁴ will be insufficient. The situation or relationship must be such as to bring into being a duty of care, and on this point decided cases give no firm guidance. The fact that the owner could reasonably foresee that his carelessness would lead the buyer to believe that the seller was the owner of the goods, or that the owner had no interest in the goods, does not in itself impose such a duty.⁸⁶⁵ But in *Mercantile Credit Co Ltd v Hamblin*,⁸⁶⁶ A delivered possession of a car to B and at the same time delivered to B hire-purchase documents signed in blank. A contemplated and contingently intended that the documents should be used to obtain a loan from any person who might be prepared to advance money on the security of the vehicle. B fraudulently completed the documents in a manner not authorised by A and then represented to C that he (B) had a good title to the car. C purchased the car in reliance on the representation. The Court of Appeal held that A owed to C a duty of care,⁸⁶⁷ but further held on the facts that A had not been negligent. The Court of Appeal also took the view that the effective cause of C's loss was the fraud of B, and not any negligence on the part of A. In most cases, however, where a duty of care and breach of that duty has been shown to exist, the negligence of the owner should be regarded as an effective cause of the buyer's loss, albeit concurrent with the fraud of the seller.⁸⁶⁸

Non est factum

- 46-201 Where the owner of goods has signed a document which transfers title to the goods to another, he will not be permitted—vis-à-vis an innocent purchaser of the goods from that other—to disown his signature simply by asserting that he did not understand that which he signed.⁸⁶⁹ But where, by reason of fraud, he is induced to sign a document which purports to be a transaction essentially different in substance or in kind from the transaction intended, he may be able to rely on the defence of non est factum,⁸⁷⁰ but only if he proves that he exercised reasonable care.⁸⁷¹

Estoppel by judgment

- 46-202 Where, in an action between two parties brought to determine the ownership of goods, title to the goods is established by judgment, the unsuccessful party will be estopped per rem judicatam

from claiming the goods and that estoppel will bind also his privies, i.e. those claiming title from or through him, but only if the title claimed was acquired after (and not before) the date of the judgment.⁸⁷²

Nature of title

- 46-203 The effect of an estoppel is to transfer a real title to the buyer.⁸⁷³

Footnotes

- 844 On this generally see *Pickering* (1939) 55 *L.Q.R.* 400; Benjamin's Sale of Goods, 11th edn (2021), para.7-008.
- 845 See Vol.I, para.21-085.
- 846 *Debs v Sibec Developments Ltd* [1990] *R.T.R.* 91.
- 847 *Cole v North Western Bank* (1875) *L.R.* 10 *C.P.* 354, 363; *Johnson v Crédit Lyonnais Co* (1877) 3 *C.P.D.* 32, 36; *Farquharson Bros & Co v King & Co* [1902] *A.C.* 325, 330; *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] *A.C.* 287; *Jerome v Bentley & Co* [1952] 2 *All E.R.* 114, 118; *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 *Q.B.* 371, 394, 396; *Moorgate Mercantile Co Ltd v Twitchings* [1977] *A.C.* 890; *Beverley Acceptances Ltd v Oakley* [1982] *R.T.R.* 417.
- 848 [1957] 1 *Q.B.* 371.
- 849 *Central Newbury Car Auctions Ltd v Unity Finance Ltd*, above, *J Sargent (Garages) Ltd v Motor Auctions (West Bromwich) Ltd* [1977] *R.T.R.* 121.
- 850 *Farquharson Bros & Co v King & Co* [1902] *A.C.* 325; *Weiner v Gill* [1905] 2 *K.B.* 172; affirmed at 719.
- 851 *Pickard v Sears* (1837) 6 *A. & E.* 469; *Rimmer v Webster* [1902] 2 *Ch.* 163, 173; *Abigail v Lapin* [1934] *A.C.* 491; *Eastern Distributors Ltd v Goldring* [1957] 2 *Q.B.* 600.
- 852 *Moorgate Mercantile Co Ltd v Twitchings* [1977] *A.C.* 890.
- 853 *Dickinson v Valpy* (1829) 10 *B. & C.* 128, 140; *Farquharson Bros v King & Co* [1902] *A.C.* 325 at 341.
- 854 (1787) 2 *T.R.* 63, 70.
- 855 See *Farquharson Bros v King & Co*, above, at 342; *London Joint Stock Bank v MacMillan* [1918] *A.C.* 777, 836; *Jones Ltd v Waring & Gillow Ltd* [1926] *A.C.* 670, 693; *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 *Q.B.* 371 at 389, 396.
- 856 [1926] *A.C.* 72.
- 857 [1938] *A.C.* 287.
- 858 [1895] 1 *Q.B.* 521 (in this case, the warehouseman also acknowledged to the buyer that he held the goods to the buyer's order subsequent to the contract of sale). See also *Pickering*

- v Busk* (1812) 5 East 38 (agency); *Colonial Bank v Cady* (1890) 15 App. Cas. 267, 278, 283; *Weiner v Gill* [1906] 2 K.B. 574, 582; *Fry v Smellie* [1912] 3 K.B. 282; *Fuller v Glyn, Mills Currie & Co* [1914] 2 K.B. 168 (documents of title); *Chatfields-Martin Walter Ltd v Lombard North Central Plc* [2014] EWHC 1222 (QB) (representation via the Hire Purchase Register that the owner had no legitimate interest in a vehicle).
- 859 [1957] 2 Q.B. 600, 614. See also *Spencer v North Country Finance Co Ltd* [1963] C.L.Y. 212, CA; *Stoneleigh Finance Ltd v Phillips* [1965] 2 Q.B. 537; *Snook v London and West Riding Investments Ltd* [1967] 2 Q.B. 786.
- 860 *Johnson v Crédit Lyonnais Co* (1877) 3 C.P.D. 32, 42; *Farquharson Bros & Co v King & Co* [1902] A.C. 325, 335–336; *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] A.C. 287, 299; *Central Newbury Car Auctions v Unity Finance Ltd* [1957] 1 Q.B. 371, 381, 389, 395; *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242, 271; *Moorgate Mercantile Co Ltd v Twitchings* [1977] A.C. 890, 903, 906, 912, 920, 921, 924, 927, 928; *Beverley Acceptances Ltd v Oakley* [1982] R.T.R. 434, 439.
- 861 *Farquharson Bros & Co v King & Co*, above, at 335; *Central Newbury Car Auctions v Unity Finance Ltd* [1957] 1 Q.B. 371, 381, 394.
- 862 *Debs v Sibec Developments Ltd* [1990] R.T.R. 91.
- 863 *Johnson v Crédit Lyonnais Co* (1877) 3 C.P.D. 32; *Farquharson Bros & Co v King & Co* [1902] A.C. 325; *Central Newbury Car Auctions v Unity Finance Ltd* [1957] 1 Q.B. 371; *Beverley Acceptances Ltd v Oakley* [1982] R.T.R. 434.
- 864 *Moorgate Mercantile Co Ltd v Twitchings* [1977] A.C. 890: See also *Cadogan Finance Ltd v Lavery and Fox* [1982] Com. L.R. 248 (aircraft) and *Industrial and Corporate Finance Ltd v Wyder Group* (2008) 152 S.J.L.B. 31 (motorcycle). However, if the owner of a vehicle changes the register to represent that it no longer has an interest it will be estopped from going back on that representation (*Chatfields-Martin Walter Ltd v Lombard North Central Plc* [2014] EWHC 1222 (QB)).
- 865 *Moorgate Mercantile Co Ltd v Twitchings* [1977] A.C. 890: See also *Cadogan Finance Ltd v Lavery and Fox* [1982] Com. L.R. 248 (aircraft).
- 866 [1965] 2 Q.B. 242. See also *British Railway Traffic and Electric Co Ltd v Roper* (1939) 162 L.T. 217; *General and Finance Facilities Ltd v Hughes* (1966) 110 S.J. 847; *United Dominions Trust Ltd v Western* [1976] Q.B. 513; *Allcock* (1982) 45 M.L.R. 18.
- 867 [1965] 2 Q.B. 242, 275, 275, 278.
- 868 *United Dominions Trust Ltd v Western* [1976] Q.B. 513; *Moorgate Mercantile Co Ltd v Twitchings* [1977] A.C. 890 at 912, 928. cf. at 921; *Gator Shipping Corp v Trans-Atlantic Oil Ltd* [1978] 2 Lloyd's Rep. 357, 378; *Cadogan Finance Ltd v Lavery and Fox* [1982] Com. L.R. 248.
- 869 *Blay v Pollard & Morris* [1930] 1 K.B. 628; *Muskham Finance Ltd v Howard* [1963] 1 Q.B. 904, 914.
- 870 See Vol.I, paras 1-107 et seq.
- 871 *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242; *Saunders v Anglia Building Society* [1971] A.C. 1004, 1016, 1019, 1027, 1028.
- 872 *Powell v Wiltshire* [2004] EWCA Civ 534, [2005] Q.B. 117.

873 *Eastern Distributors Ltd v Goldring [1957] 2 Q.B. 600, 611.*

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(bb) - Sales under the Factors Acts

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Sales under the Factors Acts

46-204 The [Factors Act 1889 s.2\(1\)](#) provides that:

“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 Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.”

46-205 Section 21(2)(a) of the [Sale of Goods Act](#) states that:

“... nothing in this Act affects ... the provisions of the [Factors Acts](#) ... enabling the apparent owner of goods to dispose of them as if he were their true owner.”

The provision quoted above is therefore an important qualification of the general rule in [s.21\(1\)](#) safeguarding the title of the owner. In order that a bona fide donee of the goods without notice

should be able to claim the benefit of it, five conditions must be satisfied; first, the person disposing of the goods must be a mercantile agent as defined by the [Factors Act 1889 s.1\(1\)](#); secondly, he must be in possession of the goods or of the documents of title to goods; thirdly, he must be in possession with the consent of the owner; fourthly, there must be a sale, pledge or other disposition of the goods by him; fifthly, he must dispose of the goods when acting in the ordinary course of business of a mercantile agent. These conditions are discussed elsewhere.⁸⁷⁴

Footnotes

874 See Vol.I, paras 21-088 et seq.

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Sales under special powers or court orders

46-206 Section 21(2)(b) states that:

“... nothing in this Act affects ... the validity of any contract on sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.”

(i) Special common law powers:

These may be exercised by pledgees, for a pledge carries with it an implied power of sale. ⁸⁷⁶
They may also be exercised by agents of necessity. ⁸⁷⁷

(ii) Special statutory powers:

There are numerous examples of these. Amongst the most important are those given to pawnees by the Consumer Credit Act 1974 ⁸⁷⁸; to innkeepers by the Innkeepers Act 1878 ⁸⁷⁹ s.1; to an enforcement officer charged with the enforcement of a warrant of control against goods ⁸⁸⁰; to trustees in bankruptcy by the Insolvency Act 1986 s.134 and Sch.5; to liquidators of companies by the Insolvency Act 1986 ss.165–167 and Sch.4; to a criminal court ⁸⁸¹; to the police ⁸⁸²; to a local authority in respect of abandoned vehicles ⁸⁸³; to bailees of uncollected

goods under the Torts (Interference with Goods) Act 1977 ss.12, 13⁸⁸⁴; to an unpaid seller of goods under the Sale of Goods Act 1979 s.48⁸⁸⁵; to enforcement authorities⁸⁸⁶ and to administrators of companies.⁸⁸⁷

(iii) Court orders:

Under the Civil Procedure Rules r.25.1⁸⁸⁸ the court has power to order the sale of goods which are of a perishable nature, or which for any other good reason it is desirable to sell quickly.

Footnotes

875 See Benjamin's Sale of Goods, 11th edn (2021), paras 7-109—7-114.

876 See above, para.35-121.

877 See Vol.I, para.21-038; Bowstead and Reynolds on Agency, 22nd edn (2021), paras 4-001 et seq.

878 ss.120, 121; see above, para.35-144.

879 See above, para.35-118.

880 See para.46-233.

881 Powers of the Criminal Courts (Sentencing) Act 2000 s.143; Proceeds of Crime Act 2002 Pts 2, 5; Police Reform Act 2002 Sch.4 para.10; Serious Organised Crime and Police Act 2005 s.97.

882 Police (Property) Act 1897 ss.2 (as amended), 2A; Police Reform Act 2002 Sch.4 para.10.

883 Road Traffic Regulation Act 1984 s.101 (as amended); Removal and Disposal of Vehicles Regulations 1986 (SI 1986/183) reg.15; *Bulbruin Ltd v Romanyszyn [1994] R.T.R. 273*.

884 See above, para.35-095.

885 See below, para.46-347.

886 Proceeds of Crime Act 2002 s.267 and Sch.7; Serious Crime Act 2007 Sch.8.

887 Insolvency Act 1986 Sch.B1 paras 59, 70–72, inserted by s.248 of and Sch.16 to the Enterprise Act 2002.

888 See also CPR r.61.10, 2D–61 (sale of a ship), County Courts Act 1984 ss.38, 100.

(dd) - Sale in Market Overt

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Market overt

⁴⁶⁻²⁰⁷ Section 22(1) of the Sale of Goods Act 1979 gave effect in England⁸⁸⁹ to the ancient market overt rule which protected the bona fide purchaser of goods from shops in the City of London and more generally from any open, public and legally constituted market. The rule was replete with artificiality and s.22(1) was repealed as from 3 January 1995, by the [Sale of Goods \(Amendment\) Act 1994](#).

Footnotes

⁸⁸⁹ The rule did not apply in Scotland or in Wales.

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Sale under a voidable title

46-208 By [s.23](#):

“When the seller of goods has a voidable title to them, 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.”

Thus if A, the true owner of goods, is induced by the fraud of B (the seller) to sell goods to B which B resells to C, an innocent buyer, C will acquire a good title to the goods, provided that A had not exercised his right to avoid B’s voidable title before the time of the sale by B to C.⁸⁹⁰

46-209 However, the transaction between the true owner and the seller must confer upon the seller a voidable title to the goods; so if that transaction is not a sale, but merely an agreement to sell, or a bailment of the goods,⁸⁹¹ then the seller will not have a voidable title to, but merely possession of, the goods, and cannot pass a good title under this section.⁸⁹²

Voidable distinguished from void title

- 46-210 A voidable title must be distinguished from a void title. The latter is a nullity, the former may be set aside, but unless and until it has been set aside, is valid.⁸⁹³ If the fraud practised by the seller is of such a kind as to make the contract between himself and the true owner void for mistake, he will have no title to the goods and can pass none to the bona fide purchaser. A mistake to identity, induced by fraud, may sometimes have this effect.⁸⁹⁴ There may be a mistake of identity, induced by fraud, sufficient to render the contract void and thus prevent the property passing, even if the negotiations take place when the parties are in each other's presence.⁸⁹⁵

The meaning of avoidance

- 46-211 The general rule is that in order to avoid the contract the true owner's intention to rescind must be communicated to the seller who has obtained the goods by fraud. But in *Car and Universal Finance Co Ltd v Caldwell*⁸⁹⁶ the Court of Appeal held that a contract induced by fraud could be rescinded without communication to the fraudulent party where that party had deliberately absconded but the true owner had nevertheless taken steps to trace him, for instance, by notifying the police and the Automobile Association. This exception to the general rule was justified by Upjohn LJ as follows⁸⁹⁷:

“If one party, by absconding, deliberately puts it out of the power of the other to communicate his intention to rescind which he knows the other will almost certain want to do, I do not think he can any longer insist on his right to be made aware of the election to determine the contract. In these circumstances communication is a useless formality.”

The effect of this decision has, however, been considerably curtailed by the subsequent decision of the Court of Appeal in *Newtons of Wembley Ltd v Williams*.⁸⁹⁸ From this later case it would appear⁸⁹⁹ that, notwithstanding that the true owner has avoided the seller's voidable title, the seller may be able to pass a good title under s.25, even if he cannot do so under s.23.

Sale to buyer

- 46-212 Although s.23 applies in its terms only to the situation where the person with a voidable title is a “seller” and the person seeking to establish a good title is a “buyer” of the goods, at common

law a similar rule applies to a person with a voidable title who pledges the goods with an innocent pledgee.⁹⁰⁰

Good faith and notice

- 46-213 The burden of proving that the buyer bought with notice⁹⁰¹ or otherwise than in good faith⁹⁰² appears to rest upon the true owner.⁹⁰³

Footnotes

890 See, e.g. *Lewis v Averay* [1972] 1 Q.B. 198; Vol.I, paras 5-036 et seq., 8-001.

891 *Truman v Attenborough* (1910) 26 T.L.R. 601. But cf. *Whitehorn Bros v Davidson* [1911] 1 K.B. 463.

892 But see below, para.46-220 (s.25).

893 *Whitehorn Bros v Davidson* [1911] 1 K.B. 463 at 481; and see *Robin and Rambler Coaches v Turner* [1947] 2 All E.R. 284.

894 *Cundy v Lindsay* (1878) 3 App. Cas. 459; Vol.I, para.5-042. The Law Reform Committee, Cmnd.2958 (1966), para.15, recommended that contracts of sale that are void for mistake as to identity should be voidable as against a third party.

895 *Ingram v Little* [1961] 1 Q.B. 31 (Vol.I, para.5-041). See also *Lake v Simmons* [1927] A.C. 487; *Rigby (Haulage) Ltd v Reliance Marine Insurance Co* [1956] 2 Q.B. 468, where *Lake v Simmons* was distinguished; *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 A.C. 919. But cf. *Lewis v Averay* [1972] 1 Q.B. 198.

896 [1965] 1 Q.B. 525. See also *Thomas v Heelas*, 27 November 1986 (C.A.T. No.1065); *Colwyn Bay Motorcycles v Poole* [2000] C.L.Y. 4675, Cty Ct. Contrast (Scotland) *Macleod v Kerr*, 1965 S.C. 253; *Young v DS Dalgleish & Son (Hawick)* 1994 S.C.L.R. 696, Sh Ct.

897 At 555.

898 [1965] 1 Q.B. 560. See below, paras 46-220, 46-227.

899 In *Newton's* case, there appears to have been an agreement to sell, and not a sale of the goods. But see below, para.46-221.

900 *Babcock v Lawson* (1880) 5 Q.B.D. 284; *Whitehorn Bros v Davidson* [1911] 1 K.B. 463; *Phillips v Brooks* [1919] 2 K.B. 243.

901 See below, para.46-231.

902 Defined in s.61(3); see above, para.46-016.

903 *Whitehorn Bros v Davidson* [1911] 1 K.B. 463. But see *Thomas v Heelas*, 27 November 1986 (C.A.T. No.1065).

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Seller in possession

46-214 By s.24 of the Act⁹⁰⁵:

“Where a person having sold goods continues or is in possession of the goods, or of the documents of title⁹⁰⁶ to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him,⁹⁰⁷ of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.”

The effect of this section is that where a seller in possession wrongfully disposes of the goods, contrary to the terms of the contract, to a person receiving them in good faith,⁹⁰⁸ the title acquired by the latter prevails over that of the buyer.

Possession of seller

46-215

The seller must be or continue in possession⁹⁰⁹ of the goods sold or of the documents of title to the goods. It was at one time regarded as settled law that s.24 would only apply if the seller was in possession or continued in possession as seller, and that the subsection would not apply if, for example, he continued in possession in some other capacity, e.g. as bailee under a separate agreement.⁹¹⁰ But this was not the view taken by the Privy Council in *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd.*⁹¹¹ In that case, dealers sold cars to the claimants, remaining in possession for display purposes and being authorised to sell as agents for the claimants. This authority was later revoked but the dealers sold to the defendants, who were bona fide purchasers. It was held that the defendants had obtained a good title by virtue of a provision identical to s.24.⁹¹² The Privy Council decided that “continues … in possession” in s.24 refers to the continuity of physical possession regardless of any private transaction between seller and buyer which might alter the legal title under which possession was held. In order to defeat the operation of s.24, there would have to be a break in the continuity of physical possession of the goods, for instance, by delivery of the goods to the buyer or to some third party.⁹¹³ But the subsection would not cease to apply where the seller simply attorned to the buyer as bailee. This decision was followed by the Court of Appeal in *Worcester Works Finance Ltd v Cooden Engineering Co Ltd.*⁹¹⁴

Consent of buyer

- 46-216 Section 24 does not require that the seller should continue or be in possession of the goods or documents of title with the consent of the buyer.⁹¹⁵

Delivery or transfer

- 46-217 The delivery⁹¹⁶ or transfer⁹¹⁷ of the goods or documents of title⁹¹⁸ must be effected “under”, i.e. in consequence of, a sale, pledge or other disposition thereof. So in *Nicholson v Harper*⁹¹⁹ where a merchant sold wine stored in a warehouse and later pledged it to the warehouse-keeper to secure an advance made in good faith and without notice of the sale, the pledge was held by North J to confer no title to the wine as there had been no delivery or transfer to the warehouseman after the sale. It was, however, subsequently held in the context of s.25(1) of the Act⁹²⁰ that a constructive delivery would suffice⁹²¹ and it is now clear that this also applies in the case of s.24.⁹²²

Disposition

- 46-218 It has been said that “disposition” extends to all acts by which a new interest (legal or equitable) in the property is effectually created,⁹²³ although there is some doubt whether a purely gratuitous disposition, e.g. a gift, would suffice.⁹²⁴

Good faith and notice

- 46-219 The burden of proving good faith⁹²⁵ and absence of notice⁹²⁶ appears to rest upon the person receiving the goods.⁹²⁷

Footnotes

904 See Benjamin’s Sale of Goods, 11th edn (2021), para.7-055; *Merrett [2008] C.L.J. 376*.

905 1979 Act s.24 reproduces, with slight modifications, s.8 of the Factors Act 1889.

906 Defined, s.61(1), see above, para.46-016. See also below, para.46-220.

907 As to mercantile agents, see Vol.I, para.21-088.

908 See *Rutherford and Todd [1979] C.L.J. 346*.

909 See s.1(2) of the Factors Act 1889 and *City Fur Manufacturing Co Ltd v Fureenbond (Brokers) London Ltd [1937] 1 All E.R. 799*.

910 *Staffs Motor Guarantee Ltd v British Wagon Co Ltd [1934] 2 K.B. 305*; *Ahrens Ltd v Cohen & Co Ltd (1934) 50 T.L.R. 411*; *Dore v Dore, The Times, 18 March 1953*; *Eastern Distributors Ltd v Goldring [1957] 2 Q.B. 600*; *Halfway Garage (Nottingham) Ltd v Lepley, Guardian, 8 February 1964*. cf. *Union Transport Finance Ltd v Ballardie [1937] 1 K.B. 510*.

911 [1965] A.C. 867. For a discussion of this decision, see *Thornely [1965] C.L.J. 181*.

912 New South Wales Sale of Goods Act 1923–1953 s.28(1).

913 *Mitchell v Jones (1905) 24 N.Z.L.R. 932*; *Olds Discount Co Ltd v Krett [1940] 2 K.B. 117*; *Worcester Works Finance Ltd v Cooden Engineering Co Ltd [1972] 1 Q.B. 210, 217–218*.

914 [1972] 1 Q.B. 210. See also *Astley Industrial Trust Ltd v Miller [1968] 2 All E.R. 36*.

915 *Worcester Works Finance Ltd v Cooden Engineering Co Ltd [1972] 1 Q.B. 210, 217–218*.

916 As to whether physical delivery is required, see para.46-229, below (s.25).

917 In Benjamin’s Sale of Goods, 11th edn (2021), para.7-062, it is suggested that these words should be read distributively in relation to “goods” and “documents of title to goods”. See *Nicholson v Harper [1895] 2 Ch. 415*; *Kitto v Bilbie, Hobson & Co (1895) 72 L.T. 266, 267*;

Ahrens Ltd v Cohen, Sons & Co Ltd (1934) 30 T.L.R. 411, 412; cf. *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 Q.B. 210.

918 cf. *Mount Ltd v Jay and Jay (Provisions) Ltd* [1960] 1 Q.B. 159, 168; see below, para.46-343.

919 [1895] 2 Ch. 415.

920 See below, para.46-229.

921 *Gamers Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 63 C.L.R. 236; *Forsyth International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268. See also *Four Point Garage Ltd v Carter* [1985] 2 All E.R. 12, and see below, para.46-229.

922 *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] Q.B. 514; see below, para.46-229.

923 *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 Q.B. 210, 218. cf. *P4 Ltd v Unite Integrated Systems Plc* [2006] B.L.R. 150 at [18].

924 cf. *Kitto v Bilbie Hobson & Co* (1895) 72 O.T. 266; *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 Q.B. 210, *Preston* (1972) 88 L.Q.R. 239.

925 Defined, s.61(3); see above, para.46-016.

926 See below, para.46-231.

927 *Heap v Motorists' Advisory Agency Ltd* [1923] 1 K.B. 577 (Factors Act 1889 s.2).

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Buyer in possession

46-220 By subs.(1) of s.25⁹²⁹:

“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 title⁹³⁰ to the goods, the delivery or transfer by that person, or by a mercantile agent⁹³¹ acting for him, of the goods or documents of title,⁹³² under any 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, has 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 effect of this subsection is, for example, that a seller who agrees to sell goods to a buyer and retains title to them until the price is paid, but who nevertheless allows the buyer to have possession of the goods, may lose his title if the buyer wrongfully sells the goods to an innocent purchaser.

“Having bought”

- 46-221 The inclusion of the words “having bought” has been criticised as superfluous in that it is unnecessary to protect a third party who has bought from a buyer in possession and to whom the property has already passed. But if the buyer has a voidable title (for instance, where he has obtained the goods by fraud) and this has been avoided by the seller, the buyer may yet be a person who has bought within the meaning of s.25(1): in consequence, although the property has reverted to the seller, he may be able to pass a good title to a third party buyer in good faith. In *Newtons of Wembley Ltd v Williams*⁹³³ a buyer obtained goods by fraud. The seller, having attempted to trace him, rescinded the contract and thus avoided the buyer’s title. But it was held that, as the buyer had agreed to buy the goods and obtained possession of them with the seller’s consent, such consent was deemed to continue⁹³⁴ and he could pass a good title under s.25(1) to a third party buyer in good faith.⁹³⁵ The same reasoning, it is submitted, would apply where the buyer bought and not merely agreed to buy the goods.⁹³⁶

“Having ... agreed to buy”

- 46-222 With regard to the phrase “agreed to buy”, it is necessary to distinguish between those situations where the buyer is contractually bound to purchase the goods and those situations where he is not under any such binding obligation. Under a hire-purchase agreement, for example, the hirer is not bound to purchase the goods, but has merely an option to do so: thus until he exercises the option he is not a person who has bought or agreed to buy goods. In consequence he cannot pass a good title to a buyer in good faith by virtue of s.25(1).⁹³⁷ The same is true where goods are delivered “on sale or return”.⁹³⁸ or under a contract for work and materials.⁹³⁹ In a conditional sale agreement, on the other hand, the buyer is bound to purchase the goods and, accordingly, at common law, he is a person who has agreed to buy the goods; thus he can pass a good title by s.25(1).⁹⁴⁰ However, where the agreement is one which is a consumer credit agreement within the meaning of the *Consumer Credit Act 1974*,⁹⁴¹ the buyer is to be deemed not to be a person who has bought or agreed to buy goods, and so cannot pass title by virtue of the subsection.⁹⁴²

Possession of buyer

- 46-223 Having bought or agreed to buy goods the buyer must obtain possession of the goods or the documents of title to the goods.⁹⁴³ By s.1(2) of the *Factors Act 1889*, a buyer will be deemed to

be in possession of goods or of the documents of title to goods, where the goods or documents of title are in his actual custody or are held by any other person subject to his control or for him or on his behalf.⁹⁴⁴

Meaning of “consent of seller”

- 46-224 The meaning of “consent” in this context was at one time somewhat controversial. But it is now settled that the crucial question is whether the seller *in fact* consented to the buyer’s possession. It is immaterial that the goods have been obtained by fraud or in circumstances amounting to theft if the de facto consent of the seller has been given.⁹⁴⁵

Consent withdrawn

- 46-225 Where possession of goods is in fact obtained with the consent of the seller, s.2(2) of the Factors Act provides that such consent is deemed to continue notwithstanding that it has been withdrawn, provided that the third party had no notice of the withdrawal. Thus in *Newtons of Wembley Ltd v Williams*⁹⁴⁶ the fact that the contract had been rescinded by the seller did not mean that he had withdrawn his consent to the buyer continuing in possession; and accordingly the latter was able to pass a good title under s.25(1).

Burden of proof

- 46-226 The consent of the seller is to be presumed in the absence of evidence to the contrary,⁹⁴⁷ so that the burden is on him to prove the lack of consent.

Mercantile agent

- 46-227 Section 25(1) provides that a delivery or transfer of the goods or documents of title by a buyer in possession is to 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.”

This necessitates a reference to [s.2 of the Factors Act](#) which applies to the case of a disposition by a mercantile agent, and validates the disposition only where it is made by a mercantile agent when acting in the ordinary course of business as a mercantile agent. Where the buyer is in fact a mercantile agent acting in the course of his business, clearly there is no difficulty and the transaction is validated. And where he is not so acting it seems equally clear that the transaction is not validated.⁹⁴⁸ The difficulty arises where the buyer is not a mercantile agent at all, for it is not easy to see how such a person could be said to be acting in the ordinary course of business of a mercantile agent. This problem arose for consideration in *Newtons of Wembley Ltd v Williams*.⁹⁴⁹ Pearson LJ said⁹⁵⁰:

“It follows that, when applying the hypothesis in [s.2](#), one assumes that he is a mercantile agent: if he has a business it is assumed to be the business of a mercantile agent; or the other way of putting it is that the transaction will be validated if this buyer is doing something which would constitute acting in the ordinary course of business if he were a mercantile agent.”

Thus, as the original buyer was not a mercantile agent, it was said that he must act in the way he would have been expected to act if he had been a mercantile agent; and that here he had done so as the sale had taken place in a recognised street market.⁹⁵¹

Sale in the ordinary course of business

- 46-228 A sale of a second-hand vehicle without its registration document is ordinarily not in the ordinary course of business.⁹⁵²

Delivery or transfer

- 46-229 As in the case of [s.24 of the Act](#),⁹⁵³ there must be a “delivery or transfer” of the goods or documents of title under any sale, pledge or other disposition thereof.⁹⁵⁴ The question, however, arises under both sections whether an actual, as opposed to constructive, delivery of the goods is required.⁹⁵⁵ In *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd*⁹⁵⁶ the defendant sellers delivered to car dealers possession of certain vehicles under an agreement for a sale by which they reserved property in the vehicles until the price was paid. The dealers immediately sold the vehicles to the claimants, who bought them in good faith, but allowed the dealers to retain possession of them for the purposes of display though reserving the right to take possession of the vehicles at any time without notice. The High Court of Australia, by

a bare majority, held that “delivery” in s.25(1) did not require a physical delivery of the goods to the donee. There was a sufficient delivery of the vehicles by the dealers to the claimants when the character of the dealers’ possession changed and they became bailees of the vehicles for the claimants.⁹⁵⁷ The conclusion that a constructive delivery of the goods will suffice was endorsed in relation to s.25(1) by Clarke J in *Forsyth International (UK) Ltd v Silver Shipping Co Ltd*⁹⁵⁸ and adopted in relation to s.24 by the Court of Appeal in *Michael Gerson (Leasing) Ltd v Wilkinson*.⁹⁵⁹ It must therefore now be taken to represent English law.⁹⁶⁰ A physical delivery of the goods by the seller to the donee at the request of the buyer will in any event be a sufficient delivery, since such delivery will be considered to have been effected by him as agent for the buyer.⁹⁶¹ The delivery (whether actual or constructive) must be voluntary.⁹⁶²

Effect of delivery or transfer

- 46-230 Despite the fact that the subsection states that the delivery or transfer shall have the same effect as if the buyer were a mercantile agent in possession of the goods or documents of title with the consent of the *owner*, a buyer whose possession of the goods derives ultimately from a thief cannot pass title to an innocent purchaser.⁹⁶³

Good faith and notice

- 46-231 The burden of proving good faith and absence of notice rests upon the person receiving the goods.⁹⁶⁴ “Good faith” is defined in s.61(3).⁹⁶⁵ “Notice” in this subsection and other similar provisions⁹⁶⁶ *prima facie* means actual notice.⁹⁶⁷ The doctrine of constructive notice does not normally apply to commercial transactions, and there is no general duty on a buyer of goods in an ordinary commercial transaction to make inquiries as to the right of the seller to dispose of the goods.⁹⁶⁸ However, means of knowledge in his power wilfully disregarded will amount to notice, i.e. “deliberately turning a blind eye”.⁹⁶⁹ Moreover, the test to be applied is an objective one, that is to say, would the circumstances known to the buyer lead him to conclude, as a reasonable man, that the relevant fact existed.⁹⁷⁰ And it has been said that “if by an objective test clear notice was given liability cannot be avoided by proof merely of the absence of actual knowledge”.⁹⁷¹

Footnotes

928 See Benjamin’s Sale of Goods, 11th edn (2021), para.7-069; *Merrett [2008] C.L.J. 376.*

- 929 Re-enacting, with slight modifications, [s.9 of the Factors Act 1889](#).
- 930 Defined, [s.61\(1\)](#), see above, para.[46-015](#). A vehicle registration document is not a document of title: *Pearson v Rose and Young Ltd [1951] 1 K.B. 275*; *Central Newbury Car Auctions Ltd v Unity Finance Ltd [1957] 1 Q.B. 371*; *J Sargent (Garages) Ltd v Motor Auctions (West Bromwich) Ltd [1977] R.T.R. 121*; *Beverley Acceptances Ltd v Oakley [1982] R.T.R. 417*; *Shaw v Commissioner of Metropolitan Police [1987] 1 W.L.R. 1322, 1335–1336*.
- 931 As to mercantile agents, see Vol.I, para.[21-088](#).
- 932 See *Mount Ltd v Jay and Jay (Provisions) Co Ltd [1960] 1 Q.B. 159*, see below, para.[46-343](#), where Salmon J said obiter that the document which is transferred to the sub-purchaser need not be the same document as that which was given to the buyer; and therefore that the requirements of [s.25\(1\)](#) are less rigorous than those of what is now [s.47\(2\)](#).
- 933 *[1965] 1 Q.B. 560*; see also below, para.[46-227](#).
- 934 Within [s.2\(2\)](#) of the Factors Act 1889; see below, para.[46-225](#).
- 935 *Car and Universal Finance Co Ltd v Caldwell [1965] 1 Q.B. 525* was distinguished on the ground that there the buyer from the seller with a voidable title had notice of the defect and so could not be protected by [s.25\(1\)](#).
- 936 Thus the donee could acquire a good title under [s.25\(1\)](#), even though he could not do so under [s.23](#).
- 937 *Helby v Matthews [1895] A.C. 471*; *Payne v Wilson [1895] 2 Q.B. 537*; *Belsize Motor Supply Co v Cox [1914] 1 K.B. 244*; *Modern Light Cars Ltd v Seals [1934] 1 K.B. 32*; *Close Asset Finance Ltd v Care Graphics Machinery Ltd [2000] E.C.L.R. 43*. Contrast *Forthright Finance Ltd v Carlyle Finance Ltd [1997] 4 All E.R. 90*. See above, para.[41-311](#). But see the exception for motor vehicles established by the *Hire-Purchase Act 1964*; see above, para.[41-406](#).
- 938 *Edwards v Vaughan (1910) 26 T.L.R. 545*. But see *London Jewellers Ltd v Attenborough [1934] 2 K.B. 206*, and [s.18 r.4 of the Act](#); see above, para.[46-146](#).
- 939 *Dawber Williamson Roofing Ltd v Humberside CC (1979) 14 Build. L.R. 70*.
- 940 *Lee v Butler [1893] 2 Q.B. 318*. See above, para.[41-468](#).
- 941 ss.[8\(1\)](#), [189\(1\)](#).
- 942 See above, para.[41-468](#). A “conditional sale agreement” means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the *Consumer Credit Act 1974* ([s.8\(2\)](#)) under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such condition as to payment of instalments or otherwise as may be specified in the agreement are fulfilled: see *Sale of Goods Act 1979* [s.25\(2\)\(4\)](#), Sch.1 para.[9](#) and Sch.4 para.[1](#); *Consumer Credit Act 1974* [s.192](#) and Sch.4 paras 2, 4 (SI 1983/1572). A conditional sale agreement is a consumer credit agreement if the buyer is an “individual”, as defined in [s.189\(1\)](#) of the *1974 Act*, as amended by the *Consumer Credit Act 2006*: see above, para.[41-447](#). See also for the removal of the general financial limit by the *2006 Act*, above, para.[41-010](#).
- 943 cf. *Four Point Garage Ltd v Carter [1985] 3 All E.R. 12* (buyer requests seller to deliver goods direct to a sub-purchaser). See for example *Carlos Soto SAV v AP Moller-Maersk AS*

- [2015] EWHC 458 (Comm), where the buyer had obtained a bill of lading in good faith and without notice.
- 944 *Capital and Counties Bank Ltd v Warriner* (1896) 12 T.L.R. 216; *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268. cf. *Fairfax Gerrard Holdings Ltd v Capital Bank Plc* [2006] EWHC 3439, [2007] 1 Lloyd's Rep. 170 (reversed on other grounds, [2007] EWCA Civ 1226, [2008] 1 Lloyd's Rep. 297).
- 945 *Du Jardin v Beadman Bros Ltd* [1952] 2 Q.B. 712.
- 946 [1965] 1 Q.B. 560; see above, para.46-221.
- 947 Factors Act 1889 s.2(4).
- 948 See *Newtons of Wembley Ltd v Williams* [1965] 1 Q.B. 560, 579; *Colwyn Bay Motorcycles v Poole* [2000] C.L.Y. 4675, Cty Ct.
- 949 [1965] 1 Q.B. 560; see also above, paras 46-221, 46-225. A similar problem was considered in *Lambert v G&C Finance Corp* (1963) 107 S.J. 666. See also *Angara Maritime Ltd v OceanConnect UK Ltd* [2010] EWHC 619 (QB), [2011] 1 Lloyd's Rep. 61.
- 950 At 579.
- 951 The general implications of this decision have been much criticised. See Benjamin's Sale of Goods, 11th edn (2021), para.7-081; *Cornish* (1964) 27 M.L.R. 472; *Thornely* [1965] C.L.J. 24; *Langmead v Thyer Rubber Co Ltd* [1947] S.A.S.R. 29, 39; *Jeffcott v Andrew Motors Ltd* [1960] N.Z.L.R. 721, 729; *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 C.L.R. 236, 243, 252; *Forsyth International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268, 280. The Law Reform Committee, Cmnd.2958 (1966), para.23, recommended an amendment to s.25(1) so as to make it unnecessary for the buyer in possession of goods to have acted in disposing of them, as if he were a mercantile agent.
- 952 *Stadium Finance Ltd v Robbins* [1962] 2 Q.B. 664; *Lambert v G&C Finance Corp* (1963) 107 S.J. 666. *Dreverton v Regal Garage Ltd* [1998] C.L.Y. 4382. See also *Pearson v Rose and Young Ltd* [1951] 1 K.B. 275; *George v Revis* (1966) 111 S.J. 51 (stolen registration book).
- 953 See above, para.46-217.
- 954 Or (by virtue of s.9 of the Factors Act 1889) under any agreement for the sale, pledge or other disposition thereof: see *Shenstone & Co v Hilton* [1894] 2 Q.B. 452. For the meaning of "disposition", see para.46-218 above. cf. *W. Hanson (Harrow) Ltd v Rapid Civil Engineering Ltd* (1987) 38 B.L.R. 106; *Re Highway Foods International* [1995] B.C.L.C. 209.
- 955 See Benjamin's Sale of Goods, 11th edn (2021), para.7-077.
- 956 (1987) 63 C.L.R. 236.
- 957 *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] A.C. 867; see above, para.46-215.
- 958 [1993] 2 Lloyd's Rep. 268.
- 959 [2001] Q.B. 514.
- 960 Even though it does not appear to accord with the decision of North J in *Nicholson v Harper* [1895] 2 Ch. 415; see above, para.46-217.
- 961 *Four Point Garage Ltd v Carter* [1985] 3 All E.R. 12.
- 962 *Forsyth International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268; *Angara Maritime Ltd v OceanConnect UK Ltd* [2010] EWHC 619 (QB), [2011] 1 Lloyd's Rep. 61.

- cf. *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 Q.B. 210 (voluntary surrender of goods).
- 963 *National Mutual General Insurance Ltd v Jones* [1990] 1 A.C. 24.
- 964 *Heap v Motorists' Advisory Agency Ltd* [1923] 1 K.B. 577; *Lambert v G&C Finance Corp* (1963) 107 S.J. 666; *Feuer Leather Corp v Frank Johnstone & Sons* [1981] Com. L.R. 251, 253; *Forsyth International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268, 279.
- 965 See above, para.46-016.
- 966 Sale of Goods Act 1979 ss.22, 23, 24; s.2(1) of the Factors Act 1889; and see s.138(2) of the Senior Courts Act 1981 (now replaced: see para.46-233).
- 967 *Feuer Leather Corp v Frank Johnstone & Sons* [1981] Com. L.R. 251, 253; *Forsyth International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268, 279; *P4 Ltd v Unite Integrated Solutions Plc* [2006] B.L.R. 150.
- 968 *Hambro v Burnand* [1904] 2 K.B. 10, 20; *Dobell, Beckett & Co v Neilson* (1904) 7F. 281, 288; *Reckitt v Barnet and Slater Ltd* [1928] 2 K.B. 244, 258, 266; reversed [1929] A.C. 176; *Feuer Leather Corp v Frank Johnstone & Sons*, above, at 253; *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 279; *Carlos Soto SAU v AP Moller-Maersk AS (The SFL Hawk)* [2015] EWHC 458 (Comm), [2015] 1 Lloyd's Rep. 537.
- 969 *Heap v Motorists' Advisory Agency Ltd* [1923] 1 K.B. 577, 591; *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 Q.B. 210, 218; *Feuer Leather Corp v Frank Johnstone & Sons*, above, at 253; *Forsyth International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268, 279; *Summers v Havard* [2011] EWCA Civ 764, [2011] 2 Lloyd's Rep. 283 at [16].
- 970 *Evans v Trueman* (1830) 1 Moody & R. 10, 12; *Navulshaw v Brownrigg* (1852) 2 De G.M. & G. 441, 451; *Feuer Leather Corp v Frank Johnstone & Sons* [1981] Com. L.R. 251, 253; *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 279; *Ceres Orchard Partnership v Fiatagari Australia Pty Ltd* [1995] N.Z.L.R. 112, 117.
- 971 *Feuer Leather Corp v Frank Johnstone & Sons* [1981] Com. L.R. 251 at 253; *Forsyth International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd's Rep. 268 at 279; *Fairfax Gerrard Holdings Ltd v Capital Bank Plc* [2006] EWHC 3439, [2007] 1 Lloyd's Rep. 170 at [31(e)] (reversed on the grounds [2007] EWCA Civ 1226, [2008] 1 Lloyd's Rep. 297).

(hh) - Sale of a Motor Vehicle Under the Hire-Purchase Act 1964

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Section 4. - Effects of the Contract

(c) - Transfer of Title

(i) - Sale by Person not the Owner

(hh) - Sale of a Motor Vehicle Under the Hire-Purchase Act 1964

Sale of a motor vehicle under the Hire-Purchase Act 1964

46-232 The [Hire-Purchase Act 1964](#)⁹⁷² creates an important further exception to the general rule set out in [s.21\(1\) of the 1979 Act](#). This is discussed in detail elsewhere.⁹⁷³ Briefly, it is provided that the disposition of a motor vehicle by a hirer under a hire-purchase agreement or by a buyer under a conditional sale agreement to a private purchaser in good faith and without notice is effective to vest a good title in such a purchaser. The operation of this Act is not confined to agreements within the statutory control of the [Consumer Credit Act 1974](#).

Footnotes

972 ss.27–29 (as re-enacted from 19 May 1985 (see [SI 1983/1551 \(C. 44\)](#)) by [s.192](#) of and [Sch.4 para.22](#) to the [Consumer Credit Act 1974](#)).

973 See above, paras 41-406 et seq.

(ii) - Effect on Title of Warrants of Control

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(ii) - Effect on Title of Warrants of Control

Effect on title of writs or warrants of execution

46-233 From 6 April 2014⁹⁷⁴ the provisions previously contained in para.8(1) of Sch.7 to the Courts Act 2003⁹⁷⁵ were replaced by Pt 3 of Sch.23 to the Tribunals, Courts and Enforcement Act 2007 and the old “writs of execution” were renamed warrants of control. The property in the goods of the debtor becomes bound from the time when a writ issued by the High Court is received.⁹⁷⁶ However, Sch.12 para.5(2) provides that the provisions are not to prejudice the title to any goods of the execution debtor acquired by a person in good faith and for valuable consideration⁹⁷⁷ without notice.⁹⁷⁸ Thus, a warrant of control does not prevent the property passing on a sale of them by the execution debtor, although the buyer, if he has notice or is not in good faith, takes the goods subject to the rights of the execution creditor.⁹⁷⁹ If he has no notice and is in good faith, the buyer acquires an unencumbered title provided that the warrant has not been executed. Once, however, the warrant has been executed by seizure of the goods then the execution debtor cannot pass an unencumbered title to a buyer, even though the goods have been seized under arrangements which leave the debtor in possession of the goods.⁹⁸⁰

Footnotes

974 Tribunals, Courts and Enforcement Act 2007 (Commencement No.11) Order 2014 (SI 2014/768).

- 975 Replacing s.138 of the Senior Courts Act 1981.
- 976 Sch.12 para.4(2). Where the power is conferred by a warrant to which s.99 of the County Courts Act 1984 (c.28) or s.125ZA of the Magistrates' Courts Act 1980 (c.43) applies, the warrant binds the property in the goods from the time when it is received by the person who is under a duty to endorse it under that section (Sch.12 para.5(1)).
- 977 *Beeber & Co v Turner's Successors* (1931) 48 T.L.R. 61 cf. *Re Cooper* [1958] Ch. 922, 928.
See also *Ellis & Co v Cross* [1915] 2 K.B. 654.
- 978 See *Ehlers v Kauffman* (1883) 49 L.T. 806.
- 979 *Samuel v Duke* (1838) 3 M. & W. 622; *Woodland v Fuller* (1840) 11 A. & E. 859, 867;
McPherson Temiskaming Lumber Co Ltd [1913] A.C. 145, 156.
- 980 *Lloyds & Scottish Finance Ltd v Modern Cars & Caravans (Kingston) Ltd* [1966] 1 Q.B. 764.

(iii) - Effect of Limitation

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(iii) - Effect of Limitation

Limitation

46-234 Where goods have been converted, the owner of the goods has six years thereafter⁹⁸¹ in which to bring an action in respect of that and all subsequent acts of conversion whether or not committed by the same person.⁹⁸² After the expiration of that period, unless he has previously recovered possession, s.3(2) of the **Limitation Act 1980** provides that his title to the goods is extinguished. However, these rules are qualified where the goods have been stolen.⁹⁸³ As against a purchaser in good faith of stolen goods or a person who has converted the goods following such a purchase, the owner's title is extinguished and his right to claim damages barred, after six years from the date of purchase.⁹⁸⁴ But otherwise the right of a person from whom goods are stolen to bring an action in respect of the theft or of any conversion following the theft is not barred by limitation, nor is his title to the goods extinguished.⁹⁸⁵ And the same applies to cases where the goods are obtained by deception⁹⁸⁶ or blackmail.⁹⁸⁷ Theft and these allied offences are therefore "imprescriptible" as against the person from whom the goods are stolen, and no subsequent converter (other than a bona fide purchaser or person claiming through such a purchaser) can claim the benefit of limitation.⁹⁸⁸

Actions for the recovery of property obtained through unlawful conduct etc.

By s.27A of the Limitation Act 1980⁹⁸⁹ (inserted by s.288 of the Proceeds of Crime Act 2002) none of the limits given in the preceding provisions of the 1980 Act apply to any proceedings under Ch.2 of Pt 5 of the 2002 Act (civil recovery of proceeds of unlawful conduct) brought by a “relevant person”, that is to say, by the Serious Organised Crime Agency, the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions or the Director of the Serious Fraud Office.⁹⁹⁰ A relevant person has 12 years in which to bring proceedings⁹⁹¹ for a recovery order from the date on which his cause of action accrued.⁹⁹² Moreover, if proceedings are started by a relevant person for a recovery order in respect of a chattel, s.3(2) of the 1980 Act does not prevent a claimant from asserting on an application under s.281 of the 2002 Act (victims of theft, etc.) that the property belongs to him, or the court making a declaration in his favour under that section. If the court makes such a declaration, his title to the chattel is to be treated as not having been extinguished by s.3(2) of the 1980 Act.

Footnotes

981 Unless he has recovered possession in the meantime.

982 Limitation Act 1980 ss.2, 3(1). But see s.32 of the 1980 Act.

983 See the Twenty-first Report of the Law Reform Committee, Cmnd.6923 (1977), paras 3.1 et seq.

984 Limitation Act 1980 s.4(1), (2).

985 Limitation Act 1980 s.4(1), (2), (3).

986 Limitation Act 1980 s.4(5)(b); Theft Act 1968 s.15(1).

987 Limitation Act 1980 s.4(5)(b); Theft Act 1968 s.21.

988 By s.4(4) of the 1980 Act, the claimant bears the burden of proving that the goods were stolen from him or anyone through whom he claims, but the defendant bears the burden of proving that he is or claims through a bona fide purchaser. See *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 A.C. 883* at [103].

989 As amended by the Serious Organised Crime and Police Act 2005 Sch.6 para.2; Serious Crime Act 2007 Sch.8 para.147.

990 1980 Act s.27A(8).

991 Defined in s.27A(3).

992 Defined in s.27A(4).

(a) - Duties of Seller and Buyer

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Section 5. - Performance of the Contract

(a) - Duties of Seller and Buyer

Duties of seller and buyer

46-236 By [s.27](#):

“It is the duty of the seller to deliver⁹⁹³ the goods, and of the buyer to accept⁹⁹⁴ and pay for them, in accordance with the terms of the contract of sale.”

46-237 By [s.28](#):

“Unless otherwise agreed,⁹⁹⁵ 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.”⁹⁹⁶

In cases to which the section does apply, the rule is that the seller can claim the price only when ready and willing to deliver the goods, and the buyer can claim the goods only when ready and willing to pay the price. The section is, however, satisfied if the party making the claim is in a position to perform his side of the contract; he need not tender.⁹⁹⁷

Express terms as to payment

46-238

The effect of s.28 may be adopted by express terms. Thus if, for instance, it is provided that payment is to be made against documents, tender of the documents and payment are concurrent conditions.⁹⁹⁸ Section 28 prima facie applies to CIF contracts. It must be noted that here of course documents represent the goods,⁹⁹⁹ so that the duty of the seller is to tender the shipping documents, and the buyer must pay the price on tender of the documents even though the goods are still afloat.¹⁰⁰⁰

Export or import licences ¹⁰⁰¹

46-239 It seems that there is no general rule as to whether, in the absence of an express provision in the contract, it is the duty of the seller or of the buyer to obtain any necessary export or import licence. The question is one of construction. This was the approach favoured by the House of Lords in *Pound & Co Ltd v Hardy & Co Inc.*¹⁰⁰² In that case a buyer agreed to buy turpentine from the seller, f.a.s. the buyer's ship at Lisbon; the destination of the turpentine was East Germany, as the seller knew. Turpentine could not be exported from Portugal without a licence, and this was not granted. It was held that on the construction of the contract and in the light of the surrounding circumstances, the obligation to obtain the licence lay on the seller; but the House of Lords was clearly of the opinion that each case must depend on its own facts. Once it has been determined upon whom the duty lies, it is then necessary to consider whether that duty is an absolute one,¹⁰⁰³ or whether it is merely a duty to use best endeavours and reasonable diligence to obtain a licence.¹⁰⁰⁴

Letters of credit ¹⁰⁰⁵

46-240 In *Ian Stach Ltd v Baker, Bosley Ltd*¹⁰⁰⁶ Diplock J said:

“The commercial purpose of a banker’s confirmed credit is more than a mere method of payment: it creates a direct liability on the banker independent of the contract of sale, and is an undertaking by the banker that if the seller presents the required documents in the required time he will receive payment of the contract price.”

Where the parties to an export sale arrange for payment under a letter of credit without arranging when the credit shall be opened, the credit has to be opened sufficiently early to enable the seller to be assured of payment during the whole agreed shipment period. This now seems to be the rule with regard both to CIF and FOB contracts. For CIF contracts, it was decided in *Pavia & Co SpA v Thurmann-Nielson*¹⁰⁰⁷ that the letter of credit must be opened at the latest by the beginning of the shipment period. But a different view was expressed in *Sinason-Teicher Inter-American Grain*

Corp v Oilcakes and Oilseeds Trading Co Ltd,¹⁰⁰⁸ which concerned a bank guarantee for payment to be given to the sellers. Lord Denning stated¹⁰⁰⁹: “The correct view is that, if nothing is said about time in the contract, the buyer must provide the letter of credit within a reasonable time before the first date for shipment. The same applies to a bank guarantee”. With regard to FOB contracts, it was decided in *Ian Stach Ltd v Baker, Bosley Ltd*¹⁰¹⁰ that it was the buyer’s duty to open the credit at the latest by the first day of the shipping period, and not a reasonable time before the date nominated by the buyer in the shipping instructions. If a date for opening of the credit is stipulated, the buyer must furnish it by that date.¹⁰¹¹

Footnotes

993 “Delivery” is defined in s.61(1), see above, para.46-015. But usually it is the duty of the buyer to collect the goods: s.29(2), see below, para.46-244.

994 See also ss.20, 37.

995 For an example of a contrary implication, see *Amos & Wood Ltd v Kaprow (1948) 64 T.L.R. 110*.

996 But payment of price in exchange for possession does not of itself preclude the buyer from subsequently rejecting the goods. See ss.34 and 35, see below, paras 46-278—46-290.

997 *Levey & Co Ltd v Goldberg [1922] 1 K.B. 688, 692*.

998 *Polenghi Bros v Dried Milk Co Ltd (1904) 92 L.T. 64*.

999 By “documents” is meant the bill of lading, the insurance policy and the invoice (unless otherwise agreed).

1000 See *E Clemens Horst & Co v Biddell Brothers [1912] A.C. 18*: but payment does not deprive the buyer of the right to reject the goods; see s.35, see below, para.46-279.

1001 See Vol.I, para.16-028, and Benjamin’s Sale of Goods, 11th edn (2021), paras 18-635.

1002 [1956] A.C. 588; distinguishing *Brandt & Co v Morris & Co Ltd [1917] 2 K.B. 784*; observations of Scrutton LJ (which might be read as placing duty primarily on buyer) limited to facts of that case.

1003 e.g. *KC Sethia Ltd v Partabmul Rameshwar [1950] 1 All E.R. 51; affirmed [1951] 2 All E.R. 352n.; Peter Cassidy Seed Co v Osuustukkukauppa Ltd [1957] 1 W.L.R. 273*. cf. *Pagnan SpA v Tradax Ocean Transportation SA [1987] 3 All E.R. 565*.

1004 e.g. *Re Anglo-Russian Merchant Traders and John Batt & Co (London) Ltd [1917] 2 K.B. 679*.

1005 See Benjamin’s Sale of Goods, 11th edn (2021), Ch.23; see above, Ch.36.

1006 [1958] 2 Q.B. 130, 139.

1007 [1952] 2 Q.B. 84.

1008 [1954] 1 W.L.R. 1394. See also above, para.36-499.

1009 At 1400.

1010 [1958] 2 Q.B. 130; see also *Heisler v Anglo-Dal Ltd [1954] 1 W.L.R. 1273; Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce [1997] 2 Lloyd’s Rep.*

386; *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep. 653.

- 1011 *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep. 47; *Vitol SA v Conoil Plc* [2009] EWHC 1144 (Comm), [2009] 2 Lloyd's Rep. 466. But the seller may agree to extend the time or be held to have waived the failure: see Vol.I, paras 25-042—25-049.
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(b) - Rules Governing Delivery

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(b) - Rules Governing Delivery

Delivery

46-241 Delivery is defined ¹⁰¹² to mean “voluntary transfer of possession from one person to another”. Delivery may be actual or constructive. ¹⁰¹³ There will be actual delivery where possession of goods is transferred from the seller to the buyer, or to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer. ¹⁰¹⁴ Delivery is constructive when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment (i.e. acknowledgement) or symbolic delivery. ¹⁰¹⁵ Delivery by attornment may take place in three classes of cases. ¹⁰¹⁶ First, the seller may be in possession of the goods, but after the sale he may attorn to the buyer, and continue to hold the goods as his bailee. ¹⁰¹⁷ Secondly, the goods may be in the possession of the buyer before sale, but after the sale he may hold them on his own account. ¹⁰¹⁸ Thirdly, the goods may be in the possession of a third person, as bailee for the seller. After the sale such third person may attorn to the buyer and continue to hold them as bailee. ¹⁰¹⁹

Voluntary transfer of possession

46-242 The transfer of possession must in all cases be voluntary. ¹⁰²⁰ Section 29 contains rules relating to the place, time, expense and other details of the delivery; they will be considered in the following paragraphs. It must be emphasised that the rules apply only if the parties have not expressly or impliedly made other arrangements.

Delivery in consumer contracts

- 46-243 The Consumer Rights Directive 2011 required there to be special rules governing delivery in consumer contracts. This Directive was initially implemented in [reg.42 of the Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#)¹⁰²¹ which contained provisions relating to the time for delivery of the goods where the contract of sale is made between a buyer who is a “consumer” and a seller who is a “trader” (as defined in [reg.4](#)) and is entered into on or after 13 June 2014. [Regulation 42](#) is now subsumed by the special rules relating to delivery in consumer sales contracts contained in the [Consumer Rights Act 2015](#).¹⁰²²

Footnotes

- 1012 [1979 Act s.61\(1\)](#); see above, para.[46-015](#).
- 1013 But delivery for the purpose of one rule in the Act need not necessarily be delivery for the purpose of another separate rule: see Benjamin’s Sale of Goods, 11th edn (2021), para.8-002.
- 1014 See [s.32\(1\)](#); see below, para.[46-270](#).
- 1015 *Ellis v Hunt* (1789) 3 T.R. 464, 468; *Chaplin v Rogers* (1800) 1 East 192, 195; *Elmore v Stone* (1809) 1 Taunt. 458, 460; *Ancona v Rogers* (1876) 1 Ex. D. 285, 290; *Hilton v Tucker* (1888) 39 Ch. D. 669, 676; *Lloyd’s Bank Ltd v Swiss Bankverein* (1913) 108 L.T. 143, 146; *Wrightson v McArthur and Hutchinson* (1919) Ltd [1921] 2 K.B. 807, 816.
- 1016 Chalmers Sale of Goods Act 1893, 5th edn, p.118.
- 1017 *Dublin City Distillery Ltd v Doherty* [1914] A.C. 823, 843; *Gamers’ Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 C.L.R. 236; *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] Q.B. 514.
- 1018 *Manton v Moore* (1796) 7 Term Rep. 67; *Eden v Dudfield* (1841) 1 Q.B. 302; *Lillywhite v Devereux* (1846) 15 M. & W. 285; *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1993] 2 Lloyd’s Rep. 268, 276. cf. *Nicholson v Harper* [1895] 2 Ch. 415; see above, para.[46-217](#).
- 1019 See [s.29\(4\)](#); see below, para.[46-254](#).
- 1020 *Forsythe International (UK) Ltd v Silver Shipping Co Ltd*, above: cf. *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 Q.B. 210.
- 1021 SI 2013/3134, amended by SI 2014/870. The Regulations are subject to the exceptions set out in [reg.6](#).
- 1022 See above, para.[40-529](#).

(i) - Place of Delivery

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(i) - Place of Delivery

Place of delivery

46-244 By [s.29\(1\)](#):

“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 of depending in each case on the contract, express or implied, between the parties.”

And by [s.29\(2\)](#):

“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; except 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.”¹⁰²³

It follows from this rule that it is basically the duty of the buyer to collect the goods rather than that of the seller to send them. But the rule is frequently displaced, especially in overseas sales.¹⁰²⁴

Delivery at buyer’s premises to unauthorised person

46-245

Under a contract to deliver at the buyer's premises, the seller discharges his obligation if he makes delivery there without negligence to a person "apparently having authority to receive them", although in fact the person to whom the goods were delivered had no authority to receive them and misappropriated them.¹⁰²⁵

Footnotes

- 1023 See also Benjamin's Sale of Goods, 11th edn (2021), paras 8-018—8-024. In *Gregor Fisken Ltd v Carl [2020] EWHC 1385 (Comm)* the Court of Appeal found that the natural meaning of the contact provided for a place of delivery so that it was unnecessary to consider what the position would have been under s.29(2).
- 1024 See Benjamin's Sale of Goods, 11th edn (2021) at Chs 18–21; *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462*. Different rules apply to contracts which are subject to *Ch.2 of Pt 1 of the Consumer Rights Act 2015*. In consumer sales, unless the trader and consumer have agreed otherwise, the contract is to be treated as including a term that the trader must deliver the goods to the consumer. See above, para.40-529.
- 1025 *Galbraith & Grant Ltd v Block [1922] 2 K.B. 155*; *Computer 2000 Distribution Ltd v ICM Computer Solutions Plc [2004] EWCA Civ 16345, [2005] Info. T.L.R. 147*. cf. *E & D Thomas v HS Alper & Sons [1953] C.L.Y. 3277, CA*. Contrast *Linden Tricotagefabrik v White and Meacham [1975] 1 Lloyd's Rep. 384*.

(ii) - Time for Delivery

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(ii) - Time for Delivery ¹⁰²⁶

Express stipulation

- 46-246 The parties are at liberty to stipulate in their contract that time is to be of the essence in relation to the seller's obligation to deliver within an agreed time. If no such stipulation is inserted, but a time for delivery is nevertheless fixed, the question whether time is of the essence depends on the terms of the contract.¹⁰²⁷ There is no presumption or rule of law that stipulations as to time of delivery are of the essence of the contract¹⁰²⁸ but, in commercial contracts, they are frequently so construed.¹⁰²⁹

No time fixed

- 46-247 By s.29(3)¹⁰³⁰:

“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.”

This is but one aspect of a more general rule that, if the contract is silent as to the time of delivery, the seller is bound to deliver the goods within a reasonable time.¹⁰³¹ What is a reasonable time is a question of fact,¹⁰³² but may be affected by the usage of trade.¹⁰³³

Goods to be delivered “as required”

- 46-248 Where the goods are to be delivered as required, the rule is as follows: the seller is not bound to deliver any goods until the buyer requires him to do so; once the buyer has made his request, the seller must deliver within a reasonable time; if the buyer fails to make known his requirements within a reasonable time, the seller may not rescind the contract for delay without giving notice to the buyer,¹⁰³⁴ but extreme delay in requiring delivery may support the inference that there is a mutual intention to abandon the contract.¹⁰³⁵

“Reasonable hour”

- 46-249 By s.29(5):

“Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact.”

Variation of delivery time

- 46-250 The buyer may agree to an extension of the time fixed for delivery and such an agreement will constitute an effective variation of the contract of sale provided that sufficient consideration to support the variation moves from the promisee.¹⁰³⁶

Waiver of delivery time

- 46-251 Although the contract fixes a time for delivery, the buyer’s right to require delivery within that period may be waived even after the expiry of that period. So in *Hartley v Hymans*,¹⁰³⁷ where the buyer continued to demand and accept deliveries long after the fixed date and then alleged that

the contract had been broken by failure to deliver punctually, the court held that the buyer, by his demands after the fixed date, had waived his right to insist that the period of delivery terminated on that date. He was also by his conduct estopped from alleging that the period for delivery terminated on the date originally fixed by the contract.

Affirmation

- 46-252 The parties may be found to have mutually affirmed the contract on the same terms, after the contractual date for delivery has passed. ¹⁰³⁸

Force majeure

- 46-253 By a clause in the contract the seller may be entitled to suspend delivery or extend the time for delivery or even cancel the contract on the happening of a specified event or events beyond his control. ¹⁰³⁹ Such clauses are very common in commercial contracts of sale; but force majeure clauses may assume a variety of forms and must be construed in the light of their precise wording, and with regard to the nature and general terms of the contract.

Footnotes

- 1026 As to damages for delayed delivery, see below, para.46-413.
- 1027 1979 Act s.10(1); see above, para.46-128. cf. *Hartley v Hymans* [1920] 3 K.B. 475, 483. See also *ERG Raffinerie Mediterranee SpA v Chevron USA Inc* [2007] EWCA Civ 494, [2007] 2 Lloyd's Rep. 542 (lay can shipment term in FOB contract).
- 1028 *Compagnie Commerciale Sucres et Denrées v C Czarnikow Ltd* [1990] 1 W.L.R. 1337, 1347.
- 1029 *Wimshurst v Deeley* (1845) 2 C.B. 253; *Bowes v Shand* (1877) 2 App. Cas. 455, 463; *Reuter v Sala* (1879) 4 C.P.D. 239, 246, 249; *Hartley v Hymans* [1920] 3 K.B. 475, 484; *Brooke Tool Manufacturing Ltd v Hydraulic Gears Co Ltd* (1920) 89 L.J. K.B. 263; *Finagrain SA v P Kruse Hamburg* [1976] 2 Lloyd's Rep. 508; *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 924, 937, 944, 950, 958; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711; *Scandinavian Trading Co A/B v Zodiac Petroleum SA* [1981] 1 Lloyd's Rep. 81; *Cerealmangimi SpA v Toepfer* [1981] 1 Lloyd's Rep. 337; *Tradax Export SA v Italgrani Francesco Ambrosio* [1986] 1 Lloyd's Rep. 112; *Gill & Duffus SA v Société pour l'Exportation des Sucres SA* [1986] 1 Lloyd's Rep.

- 322; *Compagnie Commerciale Sucres et Denrées v C Czarnikow Ltd* [1990] 1 W.L.R. 1337, 1347.
- 1030 This provision does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special rules in relation to delivery in consumer sales contracts, see above, para.40-529.
- 1031 *Ellis v Thompson* (1838) 3 M. & W. 445, 456; *Jones v Gibbons* (1853) 8 Ex. 920, 923; *Hick v Raymond and Reid* [1893] A.C. 22, 29; *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep. 17, 28; *SHV Gas Supply and Trading SAS v Naftomar Shipping & Trading Co Ltd Inc* [2005] EWHC 2528 (Comm), [2006] 1 Lloyd's Rep. 163. Contrast *ERG Raffinerie Mediterranee SpA v Chevron USA Inc* [2006] EWHC 1322 (Comm), [2006] 2 Lloyd's Rep. 543 at [56] (affirmed [2007] EWCA Civ 494, [2007] 2 Lloyd's Rep. 542) (FOB contract: ship provided by buyer).
- 1032 1979 Act s.59.
- 1033 *Bradley & Sons v Colonial Continental Trading* (1964) 108 S.J. 599.
- 1034 *Jones v Gibbons* (1853) 8 Ex. 920, 923.
- 1035 *Pearl Mill Co v Ivy Tannery Co* [1919] 1 K.B. 78. See also *Honck v Muller* (1881) 7 Q.B.D. 92. But see Vol.I, para.25-029.
- 1036 *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128; see Vol.I, para.6-086.
- 1037 [1920] 3 K.B. 475. See also *Ogle v Earl Vane* (1868) L.R. 3 Q.B. 272; *Besseler Waechter Glover & Co v South Derwent Coal Co* [1938] 1 K.B. 408; *Charles Rickards Ltd v Oppenheim* [1950] 1 K.B. 616; *Woodhouse v Nigerian Produce Marketing Co Ltd* [1972] A.C. 741, 755; *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep. 508; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 116, 120, 126, 130, 131; *Cerealmangimi SpA v Toepfer* [1981] 1 Lloyd's Rep. 337; *Cook Industries v Meunerie Liegeois* [1981] 1 Lloyd's Rep. 359; *Cremer v Granaria BV* [1981] 2 Lloyd's Rep. 583; *Société Italo Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All E.R. 19; *Bremer Handelsgesellschaft mbH v Raiffeisen* [1985] 1 Lloyd's Rep. 355; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep. 45; *Motor Oil (Hellas) (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 399; *Fleming & Wendeln GmbH & Co v Sanofi SA/AG* [2003] EWHC 561 (QB), [2003] 2 Lloyd's Rep. 473; *Westbrook Resources Ltd v Metallurgical Inc* [2009] EWCA Civ 310, [2009] 2 Lloyd's Rep. 224. See also Vol.I, paras 25-042 et seq. Contrast *South Caribbean Trading Ltd v Trafigura Beheer BV*, above (estoppel cannot be invoked where unconscionable to do so): see Vol.I, para.6-103.
- 1038 *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm), [2010] 1 C.L.C. 284.
- 1039 See Benjamin's Sale of Goods, 11th edn (2021), para.8-074.

(iii) - Goods in Possession of Third Person

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(iii) - Goods in Possession of Third Person

Goods in possession of third person

46-254 By [s.29\(4\)](#):

“Where the goods at the time of sale are in possession of a third person, there is no delivery by seller or buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf; but nothing in this section affects the operation of the issue or transfer of any document of title ¹⁰⁴⁰ to goods.” ¹⁰⁴¹

This subsection states that where goods are possessed by a third person, there is no delivery to the buyer unless there is an attornment. ¹⁰⁴² The qualification of the rule is merely negative in nature. The issue or transfer of a document of title ¹⁰⁴³ does not necessarily dispense with an attornment. ¹⁰⁴⁴ As between seller and buyer ¹⁰⁴⁵ a bill of lading would appear to be the only document of title which will have this effect. ¹⁰⁴⁶ The issue or transfer of other documents, for example, a delivery order, does not constitute delivery without an attornment by the bailee.

Third party refusing to acknowledge buyer's right

46-255

The seller and buyer must do what is necessary to obtain the attornment. If the third person then refuses to acknowledge the buyer's right, the latter is entitled to treat the contract as discharged.¹⁰⁴⁷

Footnotes

- 1040 Defined, [s.61\(1\)](#), see above, para.[46-015](#).
- 1041 See also [ss.24, 25](#) and [47](#), see above, paras 46-214 et seq., see below, paras 46-342 et seq.
- 1042 *Farina v Home* (1846) 16 M. & W. 119; *Dublin City Distillery Ltd v Doherty* [1914] A.C. 823, 847–848, 864–865; *Laurie and Morewood v Dudin & Sons* [1926] 1 K.B. 223, 237; *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 1 W.L.R. 815; *Wardar's (Import and Export) Co Ltd v Norwood and Sons Ltd* [1968] 2 Q.B. 663; *Mercuria Energy Trading PTE Ltd v Citibank NA* [2015] EWHC 1481 (Comm); see also above, para.[46-133](#).
- 1043 As defined in s.61(1) of the Sale of Goods Act (see above, para.[46-015](#)) and s.1(4) of the Factors Act 1889.
- 1044 *Mordaunt Bros v British Oil and Cake Mills Ltd* [1910] 2 K.B. 502; *Comptoir d'Achat et de Vente du Baerenbond Belge SA v Luis de Ridder Ltd* [1949] A.C. 293; *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 Q.B. 219.
- 1045 Contrast [ss.9, 10](#) of the Factors Act 1889 and [ss.25\(1\), 47](#) of the Sale of Goods Act 1979.
- 1046 See Benjamin's Sale of Goods, 11th edn (2021), paras 8-013, 18-161, 18-434.
- 1047 *Pattison v Robinson* (1816) 5 M. & S. 105, 110; cf. *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 1 W.L.R. 815.

(iv) - Expenses in Connection with Delivery

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(iv) - Expenses in Connection with Delivery

Expenses of delivery

46-256 By s.29(6): “Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state ¹⁰⁴⁸ must be borne by the seller”. This subsection does not deal with the expenses of the actual delivery. Here the rule is that, unless otherwise agreed, the expenses of and incidental to making delivery of the goods must be borne by the seller, but those of and incidental to receiving delivery must be borne by the buyer.¹⁰⁴⁹ So where buyers of oil undertook to receive it from the sellers’ ship through the buyers’ pipe-lines at the discharging berth, it was held that on the construction of the contract the buyers had undertaken to procure for the sellers the right to have the steamer at the berth for the purpose of discharging there, and that the buyers must bear the cost of the dredging operations, which proved necessary.¹⁰⁵⁰ Special rules have, however, been elaborated where the sale is on CIF or FOB, etc. terms.¹⁰⁵¹

Footnotes

1048 Defined, s.61(5), see above, para.46-016.

1049 cf. *Neill v Whitworth (1866) L.R. 1 CP 684*; *Playford v Mercer (1870) 22 L.T. 41*; *Acme Wood Flooring Co v Sutherland Innes Co (1904) 9 Com. Cas. 170*; *White v Williams [1912] A.C. 814*.

1050 *Re Shell Transport Co & Consolidated Petroleum Co (1904) 20 T.L.R. 517*.

- 1051 See Benjamin's Sale of Goods, 11th edn (2021), paras 19-016, 19-019, 20-013, 20-025,
21-003, 21-012, 21-016, 21-018.

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(v) - Delivery of the Wrong Quantity

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(v) - Delivery of the Wrong Quantity

Defective delivery

46-257 Section 30 deals with the delivery of the wrong quantity.¹⁰⁵²

It is submitted that a delivery which is defective under the section does not ipso facto entitle the buyer to treat the contract as repudiated, but it is open to the seller to withdraw the rejected tender, and substitute a tender of goods in conformity with the contract, provided he does so within the time limited for delivery.¹⁰⁵³

Insufficient delivery

46-258 By s.30(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.”

Two alternatives are therefore open to the buyer: (i) to reject the insufficient quantity delivered, recover the price (if paid) and sue for any loss occasioned by the seller’s breach¹⁰⁵⁴; or (ii) to accept the quantity delivered, paying for this at the contract rate, and recovering such part of the

price as has been paid for the undelivered balance¹⁰⁵⁵; he can also claim damages for breach.¹⁰⁵⁶ In *Behrend & Co v Produce Brokers Co*¹⁰⁵⁷ the claimants had sold certain seed to the defendants to be delivered in London, and the claimants' ship, after discharging part only of the seed, left with the remainder to discharge other cargo elsewhere. She returned a fortnight later to complete the delivery to the defendants, who rejected it. It was held that once the delivery had begun the buyers were entitled to receive the whole quantity before the ship left port, and that in the circumstances they were entitled to keep the part actually delivered and to reject the balance.

- 46-259 Unless the seller consents, the subsection does not allow the buyer to accept part only of the goods tendered in attempted performance of the contract and to reject the rest.¹⁰⁵⁸

The seller cannot protect himself from the consequences of a short delivery by promising a completed delivery in due course, because s.31(1) provides that "Unless otherwise agreed, the buyer of goods is not bound to accept delivery by instalments".¹⁰⁵⁹

Excessive delivery

- 46-260 By s.30(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."

And by s.30(3):

"Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate."

The buyer therefore has three options: first, to reject the whole of the goods delivered¹⁰⁶⁰; secondly, to select the correct quantity and to reject the rest¹⁰⁶¹; thirdly, to accept the whole delivery, paying for the excess at the contract rate.¹⁰⁶²

Limitation of right to reject

- 46-261

The right to reject the goods for failure to deliver the exact quantity of goods contracted for is nevertheless alleviated in non-consumer cases by subs.(2A) of s.30:

“A buyer¹⁰⁶³ may not—

(a)where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under subs.(1) above, or

(b)where the seller delivers a quantity of goods larger than he contracted to sell, reject the goods under subs.(2) above.

if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to do so.”

It is for the seller to show that a shortfall or excess falls within this subsection. At common law, whether or not the buyer deals as consumer, the right to reject is subject to the principle de minimis non curat lex: a trifling or minute departure from the exact quantity stipulated does not entitle the buyer to reject the goods.¹⁰⁶⁴ But it would appear that subs.(2A), despite its reference to the shortfall or excess being “slight”, goes further than this and that a departure which is more than de minimis could fall within its scope. It might be unreasonable for the buyer to reject if, for example, a shortfall could be adequately compensated for by damages or, in the case of an excessive delivery, if it was commercially practical for the buyer to separate out the correct quantity and return the excess or if he did not have to pay for the excess.

Derogation from s.30

- 46-262 The whole of s.30 (including subs.(2A)) is subject to any usage of trade, special agreement, or course of dealing between the parties.¹⁰⁶⁵ The most common way for the parties to derogate from its provisions is to stipulate for a margin by using terms such as “about” or “more or less”, but then the seller must not deliver a quantity outside the margin.¹⁰⁶⁶ The parties may also include in their contract a “non-rejection” clause which limits the remedy of the buyer to damages only.

Footnotes

- 1052 The section is subject to s.31(2), where the contract is one for the sale of goods by instalments: *Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street Ltd [1981] 3 All E.R. 327*. This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer

- contracts for the sale of goods the [2015 Act](#) provides special rules in relation to delivery of the wrong quantity in consumer sales contracts, see above, para.[40-529](#).
- 1053 *Borrowman, Phillips & Co v Free & Hollis (1878) 4 Q.B.D. 500*; see Benjamin's Sale of Goods, 11th edn (2021), paras 8-045, 12-032.
- 1054 *Harland & Wolff Ltd v Burstall & Co (1901) 84 L.T. 324*.
- 1055 *Oxendale v Wetherell (1829) 9 B. & C. 386*; *Biggerstaff v Rowatt's Wharf Ltd [1896] 2 Ch.93*; *Behrend & Co v Produce Brokers Co [1920] 3 K.B. 530*.
- 1056 *Household Machines Ltd v Cosmos Exporters Ltd [1947] K.B. 217*.
- 1057 *[1920] 3 K.B. 530*.
- 1058 *Champion v Short (1807) 1 Camp. 53*; *Tarling v O'Riordan (1878) 2 L.R.Ir. 82*. cf. *Hudson (1976) 92 L.Q.R. 506*.
- 1059 See *Reuter v Sala (1879) 4 C.P.D. 239*; *Cobec Brazilian Trading and Warehousing Corp v Toepfer [1983] 2 Lloyd's Rep. 386* and see below, para.[46-263](#).
- 1060 *Cunliffe v Harrison (1851) 6 Exch. 903, 906*. But there is some doubt whether the buyer is so entitled if the seller does not seek to charge the buyer with the excess and the excess quantity is not otherwise a burden to the buyer: *Levy v Green (1857) 8 E. & B. 575, 587; (1859) 1 E. & E. 969, 975*; *Rylands v Kreitman (1865) 19 C.B.(N.S.) 351*; *Shipton Anderson & Co v Weil Bros & Co [1912] 1 K.B. 574, 577*.
- 1061 But not part of the correct quantity or part of the excess. cf. *Hudson (1976) 92 L.Q.R. 506*.
- 1062 *Hart v Mills (1846) 15 M. & W. 85*; *Cunliffe v Harrison*, above; *Gabriel Wade and English Ltd v Arcos Ltd (1929) 34 Ll. L. Rep. 306*.
- 1063 The former reference to consumers is deleted by the [Consumer Rights Act 2015](#). Contracts for the sale of goods which fall within [Ch.2 of Pt 1](#) of the [2015 Act](#) are subject to special rules in relation to delivery, see above, para.[40-529](#).
- 1064 See *Harland and Wolff Ltd v Burstall & Co (1901) 6 Com. Cas. 113, 116*; *Shipton Anderson & Co v Weil Brothers [1912] 1 K.B. 574*; *EA Ronaasen & Son v Arcos Ltd (1932) 48 T.L.R. 356*; affirmed sub nom. *Arcos Ltd v EA Ronaasen & Son [1933] A.C. 470*; *Margaronis Navigation Agency Ltd v Peabody & Co Ltd [1965] 1 Q.B. 300*. cf. *Jackson v Rotax Motor and Cycle Co [1910] 2 K.B. 937, 948*; *Payne & Routh v Lillico & Sons (1920) 36 T.L.R. 569*; *Wilensko Slaski v Fenwick & Co Ltd [1938] 3 All E.R. 429*; *Rapalli v KL Take Ltd [1958] 2 Lloyd's Rep. 469*.
- 1065 1979 Act s.30(5).
- 1066 *Payne & Routh v Lillico & Sons (1920) 36 T.L.R. 569*. See also *Cross v Eglin (1831) 2 B. & Ad. 106*; *Reuter v Sala (1974) 4 C.P.D. 239*; *Harland and Wolff Ltd v Burstall & Co (1901) 6 Com. Cas. 113* (reasonable latitude exceeded).

(vi) - Instalment Deliveries

Chitty on Contracts 34th Ed.

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(b) - Rules Governing Delivery

(vi) - Instalment Deliveries

Instalment deliveries

46-263 By s.31(1)¹⁰⁶⁷ : “Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments”.¹⁰⁶⁸ Nor can he demand delivery by instalments.¹⁰⁶⁹ But the parties may provide, expressly or impliedly,¹⁰⁷⁰ for delivery by instalments, and in *Howell v Evans*¹⁰⁷¹ a contract for the sale of 13 engravings “to be sent to me as published” was held, by its very terms, to be an instalments contract.

Stated instalments

46-264 By s.31(2):

“Where there is a contract for the sale of goods to be delivered by stated instalments,¹⁰⁷² 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.”

By its express terms s.31(2) applies only if the goods are to be delivered by stated instalments and if the instalments are to be separately paid for, but the common law applies the same principle to other severable contracts for the delivery of goods by instalments.¹⁰⁷³ However, the rule set out in the subsection does not apply to entire contracts, that is, where full and complete delivery of the entire quantity is a condition precedent to the liability of the buyer to pay any part of the price, though the delivery may be made by instalments. In these cases a partial breach is treated as a total breach.¹⁰⁷⁴

Repudiation of whole contract

- 46-265 Failure of performance by one party may entitle the other party to treat an instalment contract as repudiated, but only if the breach goes “to the root or essence of the contract”¹⁰⁷⁵ or deprives the other party of substantially the whole benefit which it was intended that he should receive from the contract.¹⁰⁷⁶ In *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd*¹⁰⁷⁷ the test to be considered in applying the subsection was stated by Lord Hewart CJ to be: “First, the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability or improbability that such a breach will be repeated”. In that case the contract was for the sale of 100 tons of rag flock, the flock to conform to government standards and to be delivered in separate loads. The sixteenth load was found not to conform to government standards, and the buyers refused to accept further deliveries. The Court of Appeal held that the seller’s breach of contract with regard to one delivery was not a repudiation of the whole contract, for the character of the breach was said to be isolated and limited and there was also an “extreme improbability of the breach being repeated”.¹⁰⁷⁸ By contrast in *Robert A Munro & Co Ltd v Meyer*¹⁰⁷⁹ the contract was for the sale of 1,500 tons of meat and bone meal of a specified quality, to be shipped in equal weekly quantities. After more than half of the whole had been delivered it was found that the meal was adulterated, and the buyer claimed to treat the contract as repudiated. Wright J came to the following conclusion: “Where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated”.¹⁰⁸⁰

Renunciation of obligations

- 46-266 One party may also be entitled to treat an instalment contract as repudiated if the other party renounces his obligations under it in some fundamental respect.¹⁰⁸¹ In *Freeth v Burr*¹⁰⁸² Lord Coleridge CJ stated the test to be “whether the acts and conduct of the party evince an intention no longer to be bound by the contract”. So in *Mersey Steel and Iron Co v Naylor*,¹⁰⁸³ where the buyer’s failure to pay was due to his thinking in error that there was no one to whom payment

could safely be made, the vendor company having gone into liquidation, it was held that this was not to be treated as a repudiation of the whole contract.

Disablement from performing

- 46-267 Where one party has, by his own act or default, finally and completely disabled himself from performing an obligation undertaken by him, the other party will be entitled to treat an instalment contract as repudiated, provided that the resulting non-performance would amount to a fundamental breach.¹⁰⁸⁴

Anticipatory breach: repudiation accepted ¹⁰⁸⁵

- 46-268 If one party commits a repudiatory breach of the contract of sale, and the repudiation is accepted by the other party, this brings to an end all primary obligations of both parties which have not yet been performed.¹⁰⁸⁶ The seller is not bound to deliver, nor is the buyer bound to accept and pay for, any further instalments of the goods.¹⁰⁸⁷ Further, the repudiating party cannot raise as a defence to liability any plea that, had he not repudiated the contract, there would have been no performance by the other party at the time fixed for performance or that the performance would have been defective.¹⁰⁸⁸ However, when assessing damages for breach, the compensatory principle requires the court to undertake a hypothetical assessment of what would have occurred if there had been no repudiatory breach. The burden would accordingly fall on the innocent party to prove that, had there been no breach, it would have been in a position to fulfil its own obligations under the contract, thereby entitling it to earn whatever consideration was due to it under the contract.¹⁰⁸⁹ Exceptionally, if, at the time of the repudiation, the other party has (unknown to the repudiating party) committed a breach which would have justified the repudiation¹⁰⁹⁰ or (semble) if it is clear that the other party was at that time finally and completely disabled from performing,¹⁰⁹¹ then he may raise this as a defence to any action for damages brought against him by the other party based on the repudiation. Although he repudiated the contract for the wrong reason or for no reason at all, he may yet justify his action if there were at the time facts in existence which would have provided a good reason.¹⁰⁹²

Repudiation not accepted

- 46-269

On the other hand, if one party commits a repudiatory breach of the contract of sale, but the repudiation is not accepted by the other party who continues to require performance, then the contract remains alive for the benefit of both parties.¹⁰⁹³ It might therefore be expected that each party would continue to be bound to carry out those of his obligations under the contract which remain unperformed and that it would be a defence for the repudiating party to show that, notwithstanding his repudiation, the other party had failed to perform the contract in accordance with its terms. In *Braithwaite v Foreign Hardwood Co Ltd*,¹⁰⁹⁴ however, where buyers under a CIF contract wrongfully repudiated the contract by refusing to accept any goods under it, the Court of Appeal held that they thereby waived the performance by the seller of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract and that the buyers could not raise as a defence to liability the fact that two instalments of the goods subsequently tendered¹⁰⁹⁵ by the seller were not of the quality required by the contract. The facts of *Braithwaite*'s case are, however, open to interpretation and the case has been explained as one in which the buyer's repudiation was in fact accepted by the seller and at a time at which he had committed no breach of contract which would have justified the repudiation.¹⁰⁹⁶ In any event, the House of Lords has now held¹⁰⁹⁷ that, if a repudiation is not accepted, the repudiating party can rely upon a term of the contract which entitles him to terminate the contract upon the other party's subsequent breach. Since the contract remains alive for the benefit of both parties, it would seem that the repudiating party could also take advantage of any subsequent non-performance by the other party which would entitle him to be discharged,¹⁰⁹⁸ unless he is estopped from so doing by representing to the other party that he will no longer require performance of that obligation¹⁰⁹⁹ or unless the other party can prove that his breach was caused by or due to the repudiation.¹¹⁰⁰

Footnotes

- 1067 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special rules in relation to instalment deliveries in consumer sales contracts, see above, para.40-528.
- 1068 *Reuter v Sala* (1879) 4 C.P.D. 239; *Behrend & Co v Produce Brokers Co* [1920] 3 K.B. 530, 534–535; *Cobec Brazilian Trading and Warehousing Corp v Toepfer* [1983] 2 Lloyd's Rep. 386.
- 1069 *Reuter v Sala* (1879) 4 C.P.D. 239, 247.
- 1070 *Brandt v Lawrence* (1876) 1 Q.B.D. 344; *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App. Cas. 128, 138; *Jackson v Rotax Motor and Cycle Co* [1910] 2 K.B. 937.
- 1071 (1926) 134 L.T. 570.
- 1072 Semblé the same principle applies if the instalments are not stated: *Calaminus v Dowlais Iron Co* (1878) 47 L.J. Q.B. 5757 and Benjamin's Sale of Goods, 11th edn (2021), para.8-065.

- 1073 See below, para.[46-265](#), and Benjamin's Sale of Goods, 11th edn (2021), para.8-065.
- 1074 *Longbottom & Co Ltd v Bass, Walker & Co [1922] W.N. 245.*
- 1075 *Mersey Steel and Iron Co v Naylor Benzon & Co (1884) 9 App. Cas. 434, 443–444.*
- See also *Foxholes Nursing Home Ltd v Accora Ltd [2013] EWHC 3712 (Ch).*
- 1076 See Vol.I, para.[27-012](#).
- 1077 *[1934] 1 K.B. 148, 157.* See also *Cornwall v Henson [1900] 2 Ch. 298, 304; Millar's Karri & Jarrah Co v Weddel, Turner & Co (1909) 100 L.T. 128, 129.*
- 1078 See also *Simpson v Crippin (1872) L.R. 8 Q.B. 14; Payzu Ltd v Saunders [1919] 2 K.B. 581; Taylor v Oakes Roncoroni & Co (1922) 127 L.T. 267; Ross T Smyth & Co Ltd v TD Bailey Son & Co [1940] 3 All E.R. 60; Amos & Wood Ltd v Kaprow (1948) 64 T.L.R. 110; Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street Ltd [1981] 3 All E.R. 327.*
- 1079 *[1930] 2 K.B. 312.* See also *Hoare v Rennie (1859) 5 H. & N. 19; Honck v Muller (1881) 7 Q.B.D. 92; Millar's Karri & Jarrah Co v Weddel, Turner & Co (1909) 100 L.T. 128, 129.*
- 1080 At 331.
- 1081 See Vol.I, paras [27-048](#) et seq.
- 1082 *(1874) L.R. 9 C.P. 208, 213.*
- 1083 *(1884) 9 App. Cas. 434.* See also *Kent v Godts (1855) 26 L.T.(O.S.) 88; Freeth v Burr (1874) L.R. 9 C.P. 208, 213; Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd [1909] A.C. 293; Household Machines v Cosmos Exports [1947] K.B. 217; Shaffer Ltd v Findlay Durham & Brodie [1953] 1 W.L.R. 106; Peter Dumenil & Co Ltd v James Ruddin Ltd [1953] 1 W.L.R. 815; Bunge GmbH v CCV Landbouwbelang GA [1980] 1 Lloyd's Rep. 458.* Contrast (renunciation); *Withers v Reynolds (1831) 2 B. & Ad. 882; Morgan v Bain (1874) L.R. 10 C.P. 15; Bloomer v Bernstein (1874) L.R. 9 C.P. 588; Berk & Co Ltd v Day and White (1897) 13 T.L.R. 475; Warinco AG v Samor SpA [1979] 1 Lloyd's Rep. 450; Metro Meat Ltd v Fares Rural Co Pty Ltd [1985] 2 Lloyd's Rep. 13. Afovos Shipping Co SA v R Pagnan & Filli [1984] 1 W.L.R. 195, 203.*
- 1084 See Benjamin's Sale of Goods, 11th edn (2021), paras 9-010—9-017.
- 1085 See Vol.I, para.[27-078](#).
- 1086 *Cort v Ambergate Ry (1851) 17 Q.B. 127; Bank of China, Japan and the Straits v American Trading Co [1894] A.C. 266, 274; Braithwaite v Foreign Hardwood Co Ltd [1905] 2 K.B. 543, 552; Cooper Ewing & Co v Hamel & Horley Ltd (1922) 13 Ll.L. Rep. 590, 592; British and Beningtons Ltd v North Western Cachar Tea Co Ltd [1923] A.C. 48, 63–66; Gill & Duffus SA v Berger & Co Inc [1984] A.C. 382, 395–396.*
- 1087 *Cooper Ewing & Co v Hamel & Horley Ltd (1922) 13 Ll.L. Rep. 590, 593; Taylor v Oakes Roncoroni & Co (1922) 38 T.L.R. 349, 517; British and Beningtons Ltd v North Western Cachar Tea Co Ltd [1923] A.C. 48, 72; Gill & Duffus SA v Berger & Co Inc [1984] A.C. 382, 392, 396.*
- 1088 *Braithwaite v Foreign Hardwood Co Ltd (1905) 92 L.T. 637 (cf. at [1905] 2 K.B. 543); British and Beningtons Ltd v North Western Cachar Tea Co Ltd [1923] A.C. 48, 71, 72; Esmail v Rosenthal & Sons [1964] 2 Lloyd's Rep. 447, 466; Gill & Duffus SA v Berger & Co Inc [1984] A.C. 382, 392, 396; Golden Strait Corp v Nippon Yusen*

- Kubishika Kaisha (*The Golden Victory*) [2007] UKHL 12, [2007] 2 A.C. 253; *Flame SA v Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153, [2014] 1 All E.R. (Comm) 1043. Contrast *Taylor v Oakes Roncoroni & Co* (1922) 38 T.L.R. 349, 517. On whether damages should be assessed in a different way in commodity sales see *P. Todd* [2017] L.M.C.L.Q 122.
- 1090 *Taylor v Oakes Roncoroni & Co* (1922) 38 T.L.R. 349, 351; affirmed at 517; *Esmail v Rosenthal & Sons Ltd* [1964] 2 Lloyd's Rep. 447, 466.
- 1091 *Cooper Ewing & Co v Hamel & Horley Ltd* (1922) 13 L.L. Rep. 590; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48 at 72.
- 1092 See Vol.I, para.27-067.
- 1093 See Vol.I, paras 27-056, 27-064—27-065.
- 1094 [1905] 2 K.B. 543. See also *Cereal mangimi SpA v Toepfer* [1981] 1 Lloyd's Rep. 337; *Bunge Corp v Vegetable Vitamin Foods (Private) Ltd* [1985] 1 Lloyd's Rep. 613.
- 1095 Or offered to be tendered.
- 1096 *Taylor v Oakes Roncoroni & Co* (1922) 38 T.L.R. 349, 351; affirmed at 517; *Esmail v J Rosenthal & Sons Ltd* [1964] 2 Lloyd's Rep. 447, 466 (not discussed on appeal to the House of Lords [1965] 1 W.L.R. 1117).
- 1097 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788 (Vol.I, paras 27-064, 27-074). See also *Segap Garages Ltd v Gulf Oil (Great Britain) Ltd*, *The Times*, 24 October 1988. (Vol.I, para.27-074.) But see *Foran v Wight* (1989) 168 C.L.R. 385, 421–422.
- 1098 See Vol.I, para.27-073.
- 1099 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788, 805.
- 1100 *Segap Garages Ltd v Gulf Oil (Great Britain) Ltd*, *The Times*, 24 October 1988.

(vii) - Delivery to a Carrier

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(vii) - Delivery to a Carrier

Delivery to a carrier

46-270 By [s.32\(1\)](#)¹¹⁰¹:

“Where, in pursuance of a contract of sale, the seller is authorised 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.”¹¹⁰²

The effect of delivery to a carrier for the purpose of transmission to the buyer is prima facie to pass possession to the buyer. It must also be noted that although delivery to a carrier normally terminates the unpaid seller’s lien,¹¹⁰³ the goods may still be stopped in transit¹¹⁰⁴; further, delivery to a carrier does not amount to acceptance by the buyer within the meaning of [s.35](#).¹¹⁰⁵

Reasonable contract with carrier

46-271 By [s.32\(2\)](#):

“Unless otherwise authorised 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; and 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.”

The question which arises here is whether the contract made by the seller with the carrier on the buyer’s behalf is a reasonable one. It was considered in *Thomas Young & Sons v Hobson & Partners*.¹¹⁰⁶ In that case engines sold and sent to the buyers by railway “at owner’s risk” were damaged in the course of transit because they were improperly secured. If the sellers had arranged for the goods to be sent “at company’s risk” the railway would have made an inspection to see that the goods were suitably secured. There was no difference in rates at owner’s risk and at company’s risk. It was held that the sellers had failed to make a reasonable contract with the carrier and the buyers were therefore entitled to refuse to treat the delivery to the carrier as delivery to themselves.

Notice to enable insurance

46-272 By s.32(3):

“Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit; and, if the seller fails to do so, the goods are at his risk during such sea transit.”

This provision does not normally apply to CIF contracts because in such contracts it is the seller’s duty to insure¹¹⁰⁷; but it does apply to FOB contracts unless the buyer has sufficient information to enable him to insure or has waived notice.¹¹⁰⁸ Thus in *Wimble Sons & Co v Rosenberg & Sons*¹¹⁰⁹ goods were sold FOB Antwerp to be shipped as required, payment by cash against bills of lading; the sellers were left to select the ship. The sellers shipped the goods, without having insured them, and both goods and ship were lost at sea. When the bills were presented for payment, the buyers refused to pay on the ground that the sellers had not given them such notice as was required by s.32(3) and they had consequently not insured the goods. It was held that, before the goods were shipped, the buyers had all the information necessary to enable them to make a particular insurance, and that therefore there was no obligation upon the sellers to give notice of the shipment on a particular ship. It is a moot point whether this rule could be extended by analogy to other forms of transport.

Deterioration

46-273

By s.33¹¹¹⁰:

“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.”

The rule only applies where the seller has agreed (expressly or impliedly) to assume the risk during transit. The buyer is bound to accept the goods if only deteriorated to the extent that they are necessarily subject to in the course of transit from one place to another.¹¹¹¹ The rule is excludable by contrary agreement and it is quite possible for the seller to agree to bear the whole risk.

Seller's responsibilities at point of delivery

- 46-274 In *Mash & Murrell Ltd v Emanuel Ltd*,¹¹¹² Diplock J said that, where goods are sold under a contract which involves transit before use, there is an implied term in the contract of sale that the goods should be dispatched in such a condition that they can endure the normal journey and upon arrival at their destination be suitable for the ordinary purpose for which such goods are intended to be used and be of merchantable quality. This dictum appears to be good law,¹¹¹³ at least so far as perishable goods are concerned.¹¹¹⁴ In the case itself, Cyprus potatoes were sold C&F Liverpool. They were in good condition when shipped but were rotten on arrival. If the cause of the rotting had been, for example, a fungus infection, or wetting before or at the time of shipment, the seller would have been liable for breach of the implied term stated by Diplock J. But the cause of the rotting was found by the Court of Appeal¹¹¹⁵ to be poor ventilation occurring after shipment, so that the seller was not liable for the deterioration. As a result, where the warranty applies “an extraordinary deterioration of the goods due to abnormal conditions experienced during transit [is one] for which the buyer takes the risk. A necessary and inevitable deterioration during transit which will render them unmerchantable on arrival is normally one for which the seller is liable”.¹¹¹⁶ On the other hand the terms of the contract may be such as to show that the goods are to meet their specification at the time they are delivered on board the vessel but that thereafter the buyer should assume the risk of any deterioration of or changes in the goods.¹¹¹⁷

Relationship between durability and s.33

- 46-275 At first sight, this rule appears to be the precise opposite to that stated in s.33. However, it must be noted that s.33 applies only where the seller agrees to deliver the goods at his own risk at a place other than that where they are when sold, and does not apply to a case where (as under a C&F, CIF or FOB contract) the goods are effectively at the buyer's risk after shipment. But in situations

to which s.33 applies, it would seem that the words “necessarily incident to the course of transit” should not be taken to extend to cases where perishable goods are dispatched by the seller in such a state as to be unable to withstand normal transit, but only to cover deterioration which all goods of that kind would necessarily suffer during transit.¹¹¹⁸

Footnotes

- 1101 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special rules in relation to delivery in consumer sales contracts, see above, para.40-529.
- 1102 *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462*; see Benjamin's Sale of Goods, 11th edn (2021), paras 8-014, 19-019, 20-028, 21-099. Contrast *Dunlop v Lambert (1839) 6 Cl. & F. 600, 620*; *Badische Anilin und Soda Fabrik v Basle Chemical Works [1898] A.C. 200, 207*; *Galbraith and Grant Ltd v Block [1922] 2 K.B. 155, 156*; *Scottish & Newcastle International Ltd v Othon Galanos Ltd [2008] UKHL 11, 39* (carrier employee or agent of seller).
- 1103 1979 Act s.43(1), see below, para.46-322.
- 1104 1979 Act s.45(1), see below, para.46-327.
- 1105 See below, paras 46-279—46-290. The presumption is that the carrier is the buyer's agent to take delivery, but is not his agent to accept the goods in performance of the contract.
- 1106 (*1949*) 65 T.L.R. 365. See also *Wimble, Sons & Co Ltd v Rosenberg & Sons [1913] 3 K.B. 743*; *Gatoil International Inc v Tradax Petroleum Ltd [1985] 1 Lloyd's Rep. 350*; Benjamin's Sale of Goods, 11th edn (2021), paras 8-015, 18-515.
- 1107 *Law and Bonar Ltd v British American Tobacco Co Ltd [1916] 2 K.B. 605*. See Benjamin's Sale of Goods, 11th edn (2021), paras 18-516, 19-190, 20-091, 21-167.
- 1108 It does not apply to FOB contracts if the seller has undertaken to arrange for shipment and insurance. For a discussion of this point, see *Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 Q.B. 402, 424*; Benjamin's Sale of Goods, 11th edn (2021), paras 18-509, 20-089. See also (C&F) Benjamin's Sale of Goods, 11th edn (2021), para.21-017. cf. *ERG Raffinerie Mediterranee SpA v Chevron USA Inc [2006] EWHC 1322 (Comm), [2006] 2 Lloyd's Rep. 543 at [56] (affirmed [2007] EWCA Civ 494, [2007] 2 Lloyd's Rep. 542)*.
- 1109 [*1913*] 3 K.B. 743. Buckley LJ, however, pointed out at 754 that the fact that the buyer could protect himself by a general covering policy would not prevent the application of s.32(3): if this were so, the subsection would be meaningless.
- 1110 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of

goods the 2015 Act provides special rules in relation to delivery and risk in consumer sales contracts, see above paras 40-529 and 40-492.

1111 *Bull v Robison (1854) 10 Exch. 342, 346*. See Benjamin's Sale of Goods, 11th edn (2021), paras 6-018, 18-514, 19-191, 20-184.

1112 [1961] 1 W.L.R. 862.

1113 *Beer & Walker (1877) 46 L.J. Q.B. 677*; *Ollett v Jordan [1918] 2 K.B. 41*; *Broome v Pardess Co-operative Society [1939] 3 All E.R. 978*; reversed on other grounds [1940] 1 All E.R. 603; *AB Kemp Ltd v Tolland [1956] 2 Lloyd's Rep. 681, 685*; *H Glynn (Covent Garden) Ltd v Wittleder [1959] 2 Lloyd's Rep. 409*; *Gardano and Giampieri v Greek Petroleum, etc. Co [1962] 1 W.L.R. 40, 53*; *Gatoil International Inc v Tradax Petroleum Ltd [1985] 1 Lloyd's Rep. 350, 358*; Benjamin's Sale of Goods, 11th edn (2021), paras 6-020, 11-067, 18-561, 20-088. Contrast *KG Bominflot Bunkersgesellschaft etc. & Co v Petroplus Marketing AG [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442* at [45], where Rix LJ suggested that the implied term was precluded by s.14(1) of the 1979 Act.

1114 On non-perishable goods, see *Oleificio Zucchi SpA v Northern Sales Ltd [1965] 2 Lloyd's Rep. 496*; *Cordova Land Co Ltd v Victor Brothers Inc [1966] 1 W.L.R. 793*.

1115 [1962] 1 W.L.R. 16.

1116 *Mash & Murrell Ltd v Joseph I Emanuel Ltd [1961] 1 W.L.R. 862, 871*.

1117 *KG Bominflot Bunkersgesellschaft etc. & Co v Petroplus Marketing AG [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442*; see para.46-111, above.

1118 See *Sassoon (1965) 28 M.L.R. 189*.

(c) - Examination and Acceptance

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Buyer's right of examining the goods

46-276 By s.34¹¹¹⁹:

“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 and, in the case of a contract for sale by sample, of comparing the bulk with the sample.”

Thus where the buyer has not been given an opportunity to examine the goods, he is not in breach of contract by not accepting them: though conversely if he refuses to examine, the seller may not be in breach if he does not deliver.¹¹²⁰

Place for examination

46-277 The *prima facie* rule is that the place of delivery is the place for examination.¹¹²¹ This presumption is, however, displaced if the terms of the contract¹¹²² or the circumstances of the case (e.g. that the place is inconvenient¹¹²³ or the goods are packed in such a way that examination before final destination would be difficult¹¹²⁴) indicate a different intention. Such will frequently be the case in overseas sales.¹¹²⁵

Waiver

- 46-278 On general principle the buyer may waive his right to examine the goods, for instance, where he expressly accepts them without troubling to examine them. This is, however, not so if the buyer deals as consumer and has had no opportunity to examine.¹¹²⁶ Subject to this, the right may also be excluded by the terms of the contract express or implied: thus in a CIF sale the buyer must pay against the documents without having examined the goods,¹¹²⁷ and in auctions examination after sale is only relevant for the purpose of ascertaining that the goods received are those bought.¹¹²⁸

Acceptance

- 46-279 Section 35 of the 1979 Act¹¹²⁹ provides:

Arrangement of Act

(1) The buyer is deemed to have accepted the goods subject to subs.(2) below—
(a) when he intimates to the seller that he has accepted them, or

(b) 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.

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

(a) of ascertaining whether they are in conformity with the contract, and

(b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

(3) Where the buyer deals as consumer ... the buyer cannot lose his right to rely on subs.(2) above by agreement, waiver or otherwise.”

1130

This section relates to the loss of the right to reject the goods by acceptance under s.11(4).¹¹³¹ It should be noted that as a matter of principle the party entitled to insist that goods have been accepted may waive his rights in this respect and take them back.¹¹³²

Intimation of acceptance

- 46-280 The intimation may presumably be express or implied. Signature by or on behalf of the buyer of a delivery note acknowledging that he had taken delivery of the goods would not of itself amount to an intimation of acceptance unless it could reasonably be inferred from the wording of the note and the surrounding circumstances that the buyer had accepted the goods. An acknowledgment that the buyer had inspected goods when he had not would only be effective in favour of a seller who relied on it.¹¹³³ And by virtue of subs.(3), none of these would affect a buyer dealing as consumer and seeking to reject at common law who had not had the opportunity to examine. Asking for information or discussing remedial measures, so keeping the matter open, need not be an intimation of acceptance.¹¹³⁴

Act inconsistent with the ownership of the seller

- 46-281 The second instance of acceptance listed in subs.(1) gives rise to some problems of interpretation. In many situations where the goods have been delivered to the buyer, the property in the goods will have passed to the buyer, so that the seller has no ownership of the goods with which the buyer can inconsistently deal. It is, however, said that the fact that the buyer has a right to reject makes the property conditional only and leaves a reversionary interest in the seller, and it is with that reversionary interest that the buyer must not act inconsistently.¹¹³⁵

Policy of the provision

- 46-282 The policy which lies behind this provision is also not clear. Some, perhaps the majority, of cases concern situations where the goods cannot in fact be returned, because, for example, they have been incorporated into a structure¹¹³⁶ or consumed, or more of them used than is necessary for testing or fitting.¹¹³⁷ In such cases it is not difficult to see why the goods should be held to have been accepted, and the right to reject consequently lost, because restitutio in integrum is no longer possible. The wording of the provision is, however, in wider terms and a second group of cases brings within the concept of "any act in relation to [the goods] which is inconsistent with the ownership of the seller" acts done in relation to the goods, most clearly resale and forwarding to a sub-buyer.¹¹³⁸ This line of reasoning has been extended still further, on an uncertain basis, to cover putting goods up for sale in one's own name and buying them in,¹¹³⁹ mortgaging them¹¹⁴⁰ and reselling them¹¹⁴¹ (but not unloading them,¹¹⁴² rebagging them,¹¹⁴³ insuring them,¹¹⁴⁴ claiming

on insurance relating to them ¹¹⁴⁵ or making inquiries about resale ¹¹⁴⁶). It may be argued that the reason why, in these cases, the buyer is deemed to have accepted the goods and so lost his right of rejection is because the acts in question show that he has thereby elected to affirm the contract, and he should not be permitted to rescind from that election. But, if this is so, then it is difficult to see how there is any true election to “affirm” the contract in situations where the buyer has no knowledge that the goods are defective or of his right to reject; yet rejection in such a situation may be barred. It would be preferable if s.35(1)(b) were confined to cases where the goods simply cannot be returned. Hence if the buyer has resold the goods but can recover the goods from the sub-buyer (i.e. because the sub-buyer has himself rejected them) he should be able to reject them. ¹¹⁴⁷ He should also be able to reject them if he delivers the goods to a third party for repair. ¹¹⁴⁸ This approach is to some extent supported by s.35(6)(b) which provides that the buyer is not by virtue of s.35 deemed to have accepted the goods “merely because the goods are delivered to another under a sub-sale or other disposition”.

Opportunity to examine

- 46-283 The acts which are stated in s.35(1)(a) and (b) to constitute acceptance are both subject to s.35(2). The effect of this subsection is that, where goods are delivered to the buyer, he will not be deemed to have accepted them unless he has previously examined the goods or has had a reasonable opportunity of examining them. A commercial buyer could nevertheless agree to forego or waive his right of examination. ¹¹⁴⁹ But if the buyer deals as consumer he cannot so lose his right to rely on s.35(2).

Lapse of reasonable time

- 46-284 Section 35 provides yet a third way in which acceptance will take place and the right to reject become barred:

Arrangement of Act

(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.

(5) The questions that are material in determining for the purposes of subs.(4) above whether a reasonable time has elapsed include whether the buyer has had a

reasonable opportunity of examining the goods for the purpose mentioned in subs. (2) above.”

- 46-285 What is a “reasonable time” for rejection is a question of fact.¹¹⁵⁰ In general the buyer is entitled to a reasonable time in which to assess the defects and decide what to do¹¹⁵¹; but if his delay is unnecessarily prejudicial to the seller, it may be held unreasonable.¹¹⁵² There was a tendency to assume that in the interests of finality the time should not be long: and there is certainly no requirement that the time be sufficiently long to enable a defect of the type concerned to manifest itself, for this may in the case of some products not be for several years. In 1987 an approach was adopted at first instance that the time should not be related to special circumstances of the buyer, but should be more generally “a reasonable practical interval in commercial terms”.¹¹⁵³ It has more recently, however, been held in the Court of Appeal that, since the amendments of 1994, this no longer represents the law, and time taken to ascertain what repairs or changes are needed and implement them is not necessarily to be counted.¹¹⁵⁴ The question whether the buyer has had a reasonable opportunity for examination is relevant to the determination whether a reasonable time has elapsed.¹¹⁵⁵ Where goods are sold for resale, a reasonable time to intimate rejection will usually be the time actually taken to resell the goods together with an additional period in which they can be inspected and tried out by the sub-purchaser.¹¹⁵⁶ In determining what is a reasonable time the seller’s conduct also may be relevant; as where he has acquiesced in an extension of time,¹¹⁵⁷ or by means of a misrepresentation has caused the buyer to prolong the trial of the goods.¹¹⁵⁸ Custom may also be considered, and in one old case a custom that only one day should be allowed for rejection was upheld.¹¹⁵⁹

Attempts at repair

- 46-286 Where the buyer allows the seller to attempt to repair defects in the goods, there might be a risk that the buyer would in consequence lose his right to reject, whether because this was an implied indication of acceptance or because the attempts cause a reasonable time to elapse. **Section 35(6)** seeks to meet this problem by providing that the buyer is not deemed to have accepted the goods “merely because he asks for, or agrees to, their repair by or under an arrangement with the seller”. The House of Lords has considered the question whether a buyer must accept goods which have been repaired to the appropriate standard, but where no information is given as to what was or had been wrong with them. It was held that he need not; and it would seem that even if an explanation is given, sometimes (as in this case) the indication of the nature of the repair would be enough to justify continued rejection. The basis of the reasoning cannot be that there is a *right* to retender, nor that the retender of goods so repaired of itself puts the seller in compliance under the main contract,

for either of these (unless perhaps the view is taken that the returned goods would not have been of satisfactory quality unless accompanied by an explanation) would have led to a different result. It is rather that the arrangement for repair was a separate transaction suspending the right to reject. It seems that this may have been by way of a separate contract, unilateral or even bilateral, or by way of a conditional waiver; and the implied terms of that arrangement in the situation in issue (though not necessarily always) required the seller to state what had been wrong, or even sometimes to specify this before commencing on repair.¹¹⁶⁰

Acceptance of part severable contracts

- 46-287 In principle acceptance of part of the goods is acceptance of the whole and thus bars the right to reject.¹¹⁶¹ But this rule is subject to two exceptions. In the first place it does not apply where the contract is severable. One example of a severable (or divisible) contract is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for,¹¹⁶² though there can be other cases.¹¹⁶³ Where the contract is severable, a buyer may treat it as discharged if there is a renunciation or repudiatory failure of performance by the seller, despite the fact that he has accepted instalments of the goods previously delivered to him.¹¹⁶⁴ He must of course pay for any deliveries accepted.¹¹⁶⁵

Statutory right of partial acceptance

- 46-288 The second exception is set out in s.35A(1) of the Act¹¹⁶⁶:



“If the buyer—

- (a)has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but
- (b)accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods,

he does not by accepting them lose his right to reject the rest.”

Goods are “affected by a breach” if by reason of a breach they are not in conformity with the contract.¹¹⁶⁷ Where the sale is by instalments, the provision applies to each instalment.¹¹⁶⁸

U The section applies unless a contrary intention appears in, or is to be implied, from the contract.¹¹⁶⁹

- 46-289 It will be noted that, in order to take advantage of s.35A(1), the buyer must accept *all* the conforming goods; he cannot accept part of them only. But he is permitted to choose how much of the *non-conforming* goods he will accept or reject. The subsection does not, however, impose on the buyer any obligation to accept those goods which are in conformity with the contract: he can always reject the whole. Presumably the buyer must pay for the goods accepted at the contract rate or, if the price has been paid, can recover the price of the goods rejected.

No partial acceptance in the case of “commercial units”

- 46-290 Section 35A(1) is nevertheless qualified where the goods sold can be divided into “commercial units”. Section 35(7) provides:

“Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit; and in this subsection ‘commercial unit’ means a unit division of which would materially impair the value of the goods or the character of the unit.”

Standard examples are one of a pair of shoes or a volume of a multi-volume encyclopedia. Although part acceptance of goods within a unit amounts to total acceptance of that unit, a buyer could nevertheless accept a unit or units which conform with the contract while rejecting those that do not conform.

Return to seller

- 46-291 By s.36¹¹⁷⁰:

“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.”

The property in the goods is by rejection revested in the seller and they become at his risk¹¹⁷¹ if they were not so already. If they have been damaged or destroyed without the buyer’s fault it is

not clear whether they may still be rejected. Cases suggest that they may¹¹⁷²; but it is arguable that unless the damage or destruction arises from the very defect complained of, the risk should be on the buyer.¹¹⁷³ It is certainly true that the fact that goods have deteriorated has been taken into account in the assessment of what is a “reasonable time” under what is now s.35(4).¹¹⁷⁴ A buyer who rejects cannot exercise a lien over the goods against repayment of the price.¹¹⁷⁵

Refusal to take delivery

46-292 By s.37:

Arrangement of Act

“(1) When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery,¹¹⁷⁶ and the buyer does not within a reasonable time¹¹⁷⁷ 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,¹¹⁷⁸ and also for a reasonable charge for the care and custody of the goods.¹¹⁷⁹

(2) Nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.”

46-293 Where the property has passed but the buyer does not take delivery, the seller’s principal remedy is an action for the price under s.49.¹¹⁸⁰ He may also claim damages under s.37. Where the property has not passed his remedy normally lies in damages.¹¹⁸¹ In such a case failure to take delivery would normally indicate wrongful repudiation and would often be difficult to distinguish from non-acceptance; but cases could arise where the two were distinguishable.¹¹⁸²

Footnotes

- 1119 Nothing in this section affects the operation of the time limit for the consumer’s short-term right to reject under the *Consumer Rights Act 2015*. On the consumer buyer’s right to reject under the 2015 Act see above, paras 40-515—40-524.
- 1120 *Walter W Potts & Co Ltd v Brown, Macfarlane & Co Ltd* (1924) 30 Com. Cas. 64.
- 1121 *Perkins v Bell* [1893] 1 Q.B. 193. In *Gregor Fisken Ltd v Carl* [2021] EWCA Civ 792 there was no obligation to allow a gearbox to be sent to specialists in Italy for

- examination, although the position might have been different if Italy had been the agreed place of delivery.
- 1122 See *Heilbutt v Hickson* (1872) *L.R. 7 C.P. 438*.
- 1123 See *Grimoldby v Wells* (1875) *L.R. 10 C.P. 391* (transfer from one vehicle to another).
- 1124 See *Molling & Co v Dean & Son Ltd* (1901) *18 T.L.R. 217* (books); *Van den Hurk v R Martens & Co Ltd* [1920] *1 K.B. 850* (sodium sulphate); cf. *Saunt v Belcher and Gibbons Ltd* (1920) *90 L.J. K.B. 541* (coke).
- 1125 See Benjamin's Sale of Goods, 11th edn (2021), paras 12-045, 19-261, 20-204, 20-205, 21-168.
- 1126 On the consumer buyer's right to reject under the **2015 Act** see above, paras 40-515—40-524.
- 1127 *E Clemens Horst & Co v Biddell Bros* [1912] *A.C. 18* (though he may reject later). See also *Polenghi Bros v Dried Milk Co Ltd* (1904) *92 L.T. 64* (sale by sample).
- 1128 *Pettitt v Mitchell* (1842) *4 Man. & G. 819*; *Isherwood v Whitmore* (1843) *11 M. & W. 347*.
- 1129 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the **Consumer Rights Act 2015**. In consumer contracts for the sale of goods the **2015 Act** provides special rules in relation to the right to reject in consumer sales contracts, see above paras 40-515—40-524.
- 1130 subs.(3) only applies to acceptance under subs.(2). General principles of waiver are however presumably relevant. This subsection is deleted by the **Consumer Rights Act 2015**. In consumer contracts for the sale of goods the **2015 Act** provides special rules in relation to the right to reject in consumer sales contracts, see above, paras 40-515—40-524. In consumer sales contracts the buyer has a so-called “early right to reject”, which is normally lost after 30 days from delivery of the goods.
- 1131 See above, para.46-068.
- 1132 *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] *EWCA Civ 429*, [2008] *2 Lloyd's Rep. 216*.
- 1133 cf. “acknowledgment” clauses: see Vol.I, para.17-064.
- 1134 *Clegg v Anderson* [2003] *EWCA Civ 320*, [2003] *2 Lloyd's Rep. 32*; as explained in *Jones v Gallagher* [2004] *EWCA Civ 10*, [2005] *1 Lloyd's Rep. 377*.
- 1135 *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] *2 Q.B. 459, 487*; *J Rosenthal & Sons Ltd v Esmail* [1965] *1 W.L.R. 1117, 1131*.
- 1136 *Mechan & Sons v Bow, M'Lachlan & Co Ltd*, 1910 *S.C. 758* (ship).
- 1137 See a case before the Act, *Harnor v Groves* (1855) *15 C.B. 667*.
- 1138 *Hardy & Co v Hillerns & Fowler* [1923] *2 K.B. 490*; *E & S Ruben Ltd v Faire Bros & Co Ltd* [1949] *1 K.B. 254*; *Pelhams (Materials) Ltd v Mercantile Commodities Syndicate* [1953] *2 Lloyd's Rep. 281*. But contrast (dealings with documents) *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] *2 Q.B. 459, 485–488*.
- 1139 *Parker v Palmer* (1821) *4 B. & A. 387*, also before the Act.
- 1140 *Metals Ltd v Diamond* [1930] *4 D.L.R. 886*.

- 1141 *Chapman v Morton* (1843) 11 M. & W. 534; *Vargas Pena Apezteguia y Cia SAIC v Peter Cremer GmbH* [1987] 1 Lloyd's Rep. 394; cf. *J & J Cunningham Ltd v Robert A Munro & Co Ltd* (1922) 28 Com. Cas. 42.
- 1142 *Libar Wood Co v H Smith & Sons Ltd* (1930) 37 Ll.L. Rep. 296.
- 1143 *Dower & Co v Corrie, MacColl & Son Ltd* (1925) 23 Ll. L. Rep. 100.
- 1144 *Clegg v Anderson* [2003] EWCA Civ 320, [2003] 2 Lloyd's Rep. 32.
- 1145 *JS Robertson (Aust) Pty Ltd v Martin* (1956) 94 C.L.R. 30.
- 1146 *Fisher Reeves & Co Ltd v Armour & Co Ltd* [1920] 3 K.B. 614.
- 1147 But see *Jordeson & Co v Stora Kopparbergs Bergslags Aktiebolag* (1931) 41 Ll.L. Rep. 201.
- 1148 cf. s.35(6) (repair by or under an arrangement with the seller).
- 1149 See above, para.46-278.
- 1150 1979 Act s.59. See *Fisher, Reeves & Co Ltd v Armour & Co Ltd* [1920] 3 K.B. 614, 624; *Leaf v International Galleries* [1950] 2 K.B. 86; *Long v Lloyd* [1958] 1 W.L.R. 753.
- 1151 *Fisher, Reeves & Co Ltd v Armour & Co Ltd*, above; *Manifatture Tessile Laniera Wooltex v JB Ashley Ltd* [1979] 2 Lloyd's Rep. 28; *Patient* (1980) 43 M.L.R. 463.
- 1152 *Morrison and Mason Ltd v Clarkson Bros* (1898) 25 R. 427 (goods subjected to rough usage).
- 1153 *Bernstein v Pamsons Motors (Golders Green) Ltd* [1987] 2 All E.R. 220 (decided before s.35 was amended and replaced by the Sale and Supply of Goods Act 1994 s.2(1)): the right to reject a defective new car was held to have been lost after 21 days, though the buyer had been ill for part of the time and had only driven 120 miles. cf. *M & J Hurst Consultants Ltd v Grange Motors (Brentwood) Ltd* (Russell J), Manchester, October 1981 (about four months): see (1988) 104 L.Q.R. 16; *Fiat Auto Financial Services v Connelly*, 2007 S.L.T. (Sh Ct) 111 (attempts to rectify: car used as taxi over 40,000 miles over more than eight months: rejectable); *Kingsway Hall Hotel Ltd v Red Sky IT (Hounslow) Ltd* [2010] EWHC 965 (TCC) (computer program: five months).
- 1154 *Clegg v Andersson* [2003] EWCA Civ 320, [2003] 2 Lloyd's Rep. 32 (yacht: eight months); as explained in *Jones v Gallagher* [2004] EWCA Civ 10, [2005] 1 Lloyd's Rep. 377 (fitted kitchen: too late to reject after four month's negotiation). See also *Douglas v Genvarigill Co Ltd* [2010] CSOH 14 (car not rejectable after 15 months); *Russo v Belcar Pty Ltd* [2011] SASFC 151 (acceptance by acquiescence in performance of warranty work and lack of unequivocal rejection).
- 1155 1979 Act s.35(5).
- 1156 *Truk (UK) Ltd v Tokmakidis GmbH* [2000] 1 Lloyd's Rep. 543, 551.
- 1157 *Lucy v Mouflet* (1860) 5 H. & N. 229 (failure to answer letter of complaint). And see *Farnworth Finance Facilities Ltd v Attride* [1970] 1 W.L.R. 1053.
- 1158 *Munro & Co v Bennet & Son*, 1911 S.C. 337; *Cork v Greavette Boats Ltd* [1940] 4 D.L.R. 202; but cf. *Long v Lloyd* [1958] 1 W.L.R. 753, 760. And if the buyer negotiates for a reduction in price this may indicate acceptance: see *Canterbury Seed Co Ltd v J G Ward Farmers' Association Ltd* (1895) 13 N.Z.L.R. 96.
- 1159 *Sanders v Jameson* (1848) 2 Car. & K. 557.

- 1160 *J & H Ritchie Ltd v Lloyd Ltd* [2007] UKHL 9, [2007] 1 W.L.R. 670. See *Bridge* [2007] J.B.L. 814; *Loi* [2007] J.B.L. 807; *Low* (2007) 123 L.Q.R. 536. In *Gregg & Co (Knottingley) Ltd v Emherst Glass Ltd* [2005] EWHC 804 (TCC) it was held that continuing malfunctions of computerised machines, despite best efforts at remediation over two years, were repudiatory of “the contract for sale and after sales services” though the right to reject had been lost.
- 1161 1979 Act s.11(4); see above, para.46-068.
- 1162 1979 Act s.31(2); see above, para.46-264.
- 1163 See *Longbottom & Co Ltd v Bass, Walker & Co* [1927] W.N. 245 (delivery in instalments, price payable by monthly account); *Jackson v Rotax Motor & Cycle Co* [1910] 2 K.B. 937 (deliveries “as required”); *Molling & Co v Dean & Son Ltd* (1901) 18 T.L.R. 217; *Regent OHG Aisenstadt und Barig v Francesco of Jermyn St Ltd* [1981] 3 All E.R. 327.
- 1164 1979 Act s.31(2); see above, paras 46-264 et seq.
- 1165 *Jackson v Rotax Motor & Cycle Co*, above; *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1974] 2 Lloyd's Rep. 216, 226; decision reversed [1976] Q.B. 44. See also *Tarling v O'Riordan* (1878) 2 L.R. Ir. 82.
- 1166 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special rules in relation to partial rejection in consumer sales contracts, see above, para.40-517.
- 1167 1979 Act s.35A(3).
- 1168 1979 Act s.35A(2). See *Local Boy'z Ltd v Malu NV* [2021] EWHC 2439 (Comm).
- 1169 1979 Act s.35A(4).
- 1170 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special rules in relation to the right to reject in consumer sales contracts, see above, paras 40-515—40-524.
- 1171 See *Grimoldby v Wells* (1875) L.R. 10 C.P. 391; *Lucy v Mouslet* (1860) 5 H. & N. 229. A buyer was awarded damages for storing rejected goods in *Kolfor Plant Ltd v Tilbury Plant Ltd* (1977) 121 S.J. 390. As to the effect of acts by a buyer after rejection see *Tradax Export SA v European Grain and Shipping Ltd* [1983] 2 Lloyd's Rep. 100; *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] 2 Lloyd's Rep. 216.
- 1172 *Head v Tattersall* (1871) L.R. 7 Ex. 7; *Chapman v Withers* (1888) 20 Q.B.D. 824; *Kinnear v Brodie* (1902) 3 F. 540, 544, 545; *Boyd & Forrest v Glasgow and South-Western Ry Co*, 1915 S.C. (H.L.) 20, 29; *Vitol SA v Esso Australia Ltd* [1989] 1 Lloyd's Rep. 96.
- 1173 See Benjamin's Sale of Goods, 11th edn (2021), paras 12-059—12-061.
- 1174 *Morrison and Mason Ltd v Clarkson Bros* (1898) 25 R. 427.
- 1175 *JL Lyons & Co Ltd v May and Baker Ltd* [1923] 1 K.B. 685.
- 1176 Defined, s.61(1), see above, para.46-015.

- 1177 This is a question of fact: [s.59](#).
- 1178 But the seller may claim only if he himself is ready and willing to deliver: see *Forrest & Son Ltd v Aramayo* (1900) 83 L.T. 335.
- 1179 See *Greaves v Ashlin* (1813) 3 Camp. 426. See also *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd's Rep. 359 (benefit of free storage given as damages for trespass).
- 1180 See below, para.[46-361](#).
- 1181 Unless the price is payable on a day certain irrespective of delivery: [s.49\(2\)](#): see below, para.[46-366](#).
- 1182 e.g. where in an overseas sale the buyer accepts documents but not goods; or accepts goods after delay. See Benjamin's Sale of Goods, 11th edn (2021), paras 19-371, 20-243.

(d) - Payment

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 5. - Performance of the Contract

(d) - Payment

Payment by buyer

- 46-294 It is the duty of the buyer to pay for the goods in accordance with the terms of the contract of sale.¹¹⁸³ The method, place and time of payment are, therefore, in the first instance to be determined by reference to the terms of the contract of sale.¹¹⁸⁴ The duty of the buyer to pay the price does not, however, necessarily connote a right on the part of the seller to sue for the price¹¹⁸⁵ and a wrongful neglect or refusal by the buyer to pay the price may give rise only to an action for damages for non-acceptance.¹¹⁸⁶

Amount of payment

- 46-295 The buyer is bound to pay to the seller the full price of the goods unless by their contract the parties have agreed that a discount shall be allowed. If a discount is stipulated for a particular period, the full price is payable should the reduced price not be paid before the end of the period.¹¹⁸⁷

Payment in cash

- 46-296 Unless otherwise agreed the seller is entitled to payment in cash and in legal currency.¹¹⁸⁸ But the parties may expressly or impliedly agree that payment may be made in some other manner, e.g. by

cheque or by credit or charge card or by credit transfer,¹¹⁸⁹ and such an implication may be made by course of dealing between the parties or by trade custom.

Conditional and absolute payment

- 46-297 Payment by negotiable instrument¹¹⁹⁰ or by letter of credit¹¹⁹¹ is normally regarded as conditional payment only: the seller's remedy to sue for the price is suspended, but revives if the instrument is dishonoured on presentation¹¹⁹² or if payment of the letter of credit is wrongfully refused. However, payment by means of a credit or charge card¹¹⁹³ and probably by cheque supported by a cheque guarantee card¹¹⁹⁴ is absolute payment and a discharge of the buyer's obligation to pay.

Place of payment

- 46-298 Where a place of payment is specified in the contract of sale, payment must be made at that place. Otherwise payment is to be made at the seller's place of business, if he has one, or if not, his residence.¹¹⁹⁵ The place of payment may be a condition of the contract and not merely an intermediate term.¹¹⁹⁶

Time of payment

- 46-299 The time of payment may be stipulated in the contract, or, if not expressly so stipulated, be determined by reference to the course of dealing between the parties or by trade custom. Where no time of payment can thus be implied, payment will *prima facie* be due when the seller informs the buyer that he is ready and willing to deliver the goods, since by virtue of s.28 of the 1979 Act delivery of the goods and payment of the price are, unless otherwise agreed, concurrent conditions.¹¹⁹⁷

Whether time for payment of essence

- 46-300 Unless a different intention appears from the terms of the contract,¹¹⁹⁸ stipulations as to time of payment are not deemed to be of the essence of a contract of sale.¹¹⁹⁹ But the seller may expressly

reserve the right of re-sale in the event of default¹²⁰⁰ and by s.48(3) of the Act the seller has in certain circumstances a statutory right of resale.¹²⁰¹

Late payment of commercial debts

- 46-301 Statutory interest may be payable under the Late Payment of Commercial Debts (Interest) Act 1998 on a debt created by virtue of an obligation to pay the whole or part of the contract price.¹²⁰² Such interest starts to run on the day after the relevant day for the debt determined in accordance with s.4 of the 1998 Act. This will not necessarily be the same as the time of payment referred to above.¹²⁰³

Advance payment

- 46-302 The question whether the time for payment of a deposit or other advance payment is of the essence depends on the intention of the parties to be ascertained by construing the contract.¹²⁰⁴ A term which stipulates for payment of a deposit is not usually a condition precedent to the formation of the contract,¹²⁰⁵ but it may be construed as a fundamental term of the contract entitling the seller to treat the contract as repudiated if the deposit is not duly paid.¹²⁰⁶ The Late Payment of Commercial Debts (Interest) Act 1998 contains specific provisions for the calculation of the date from which statutory interest starts to run in a case where the debt relates to an obligation to make an advance payment.¹²⁰⁷

Credit

- 46-303 Where goods are sold on credit, payment is not due until the period of credit has expired.¹²⁰⁸ Before that time the seller is not entitled to withhold delivery until payment or tender of the price, unless the buyer becomes insolvent,¹²⁰⁹ in the absence of an express stipulation in the contract to the contrary.¹²¹⁰

Sales regulated by the Consumer Credit Act 1974

- 46-304

A contract for the sale of goods on credit, where the buyer is to pay the price of the goods by instalments, may be regulated by the [Consumer Credit Act 1974](#) if the buyer is an individual.¹²¹¹

Footnotes

- 1183 [Sale of Goods Act 1979 s.29](#).
- 1184 Otherwise, see [s.28 of the Act](#); see above, para.[46-237](#).
- 1185 See below, para.[46-361](#).
- 1186 See below, para.[46-370](#).
- 1187 *Amos and Wood Ltd v Kaprow (1948) 64 T.L.R. 110*. Aliter if the discount is a “trade” discount.
- 1188 See Vol.I, para.[24-037](#).
- 1189 See Vol.I, paras [24-043](#), [24-073](#), [24-081](#).
- 1190 See Vol.I, paras [24-072](#)—[24-080](#).
- 1191 See above, para.[36-452](#).
- 1192 See also below, para.[46-312](#) (when seller is “unpaid”).
- 1193 *Re Charge Card Services Ltd [1989] Ch. 497*; see Vol.I, para.[24-081](#).
- 1194 *[1987] Ch. 150, 166* (Millett J). This question was left open by the Court of Appeal *[1989] Ch. 497, 517*.
- 1195 See Vol.I, para.[24-053](#).
- 1196 *PT Berlian Laju Tanker TBK v Nuse Shipping Ltd [2008] EWHC 1330 (Comm), [2008] 2 Lloyd's Rep. 246*.
- 1197 See above, para.[46-236](#).
- 1198 See above, para.[46-128](#).
- 1199 Sale of Goods Act 1979 s.10(1); see above, para.[46-128](#) and generally Vol.I, paras [24-012](#), [24-052](#).
- 1200 Sale of Goods Act 1979 s.48(4); see below, para.[46-357](#).
- 1201 See below, para.[46-348](#).
- 1202 See Vol.I, para.[29-303](#). The [Late Payment of Commercial Debts Regulations 2013](#) implement Directive 2011/7/EU on combating later payment in commercial transactions and make amendments to the 1998 Act.
- 1203 See, e.g. [s.4\(5\)](#).
- 1204 *Portaria Shipping Co v Gulf Pacific Navigation Co Ltd [1981] 2 Lloyd's Rep. 180*.
- 1205 *Damon Compañía Naviera SA v Hapag-Lloyd International SA [1985] 1 W.L.R. 435*. See also *Millichamp v Jones [1982] 1 W.L.R. 1422*. cf. *Myton Ltd v Schwab-Morris [1974] 1 W.L.R. 331*.
- 1206 *Myton Ltd v Schwab-Morris*, above, at 337; *Millichamp v Jones*, above, at 1430; *Portaria Shipping Co v Gulf Pacific Navigation Co Ltd*, above; *Damon Compañía Naviera SA v Hapag-Lloyd International SA [1985] 1 W.L.R. 435*.
- 1207 ss.[4\(4\)](#), 11; see Vol.I, para.[29-303](#). In *Gripon Shipping LLC v Firodi Shipping Ltd (The Griffon) [2013] EWCA Civ 1567, [2014] 1 All E.R. (Comm) 593*, there was an express

contractual right to cancel in the event that a deposit was not paid. If the right to receive the deposit had accrued it could survive termination of the agreement.

1208 *Price v Nixon (1813) 5 Taunt. 338.*

1209 Sale of Goods Act 1979 ss.39(1)(2), 41(1); see below, paras 46-305, 46-315.

1210 cf. *BV Oliehandel Jongland v Coastal International Ltd [1983] 2 Lloyd's Rep. 463.*

1211 Consumer Credit Act 1974 s.8; see above, paras 41-016 et seq. But credit sale agreements of four instalments or less are not regulated agreements provided that the payments are to be made within a period not exceeding 12 months beginning with the date of the agreement: *Consumer Credit (Exempt Agreements) Order 1989 (SI 1989/869) art.3(1)(a)(i)*. This exemption does not apply to conditional sale agreements where the seller retains the property in the goods.

(a) - Rights of Unpaid Seller against the Goods

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 6. - Remedies of the Seller

(a) - Rights of Unpaid Seller against the Goods

Summary of remedies against the goods

46-305 It is provided by s.39(1) of the Act that:

“Subject to this ¹²¹² and any other ¹²¹³ Act, notwithstanding that the property ¹²¹⁴ in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law ¹²¹⁵ —

- (a)a lien on the goods or right to retain ¹²¹⁶ them for the price while he is in possession of them;
- (b)in case of the insolvency ¹²¹⁷ of the buyer, a right ¹²¹⁸ of stopping the goods in transit after he has parted with the possession of them;
- (c)a right of re-sale as limited by this Act.”¹²¹⁹

Although the unpaid seller's normal remedy is to sue the buyer for the price ¹²²⁰ or for damages for non-acceptance, the law gives him certain remedies in respect of the goods themselves, analogous to a form of “security” for payment of the price. ¹²²¹ By exercising these remedies, the unpaid seller in effect secures a form of preference over the general creditors of a bankrupt buyer. ¹²²² They are known as “real” remedies, since they depend on, and are directed against, the res, the goods themselves. ¹²²³ The remedies of lien and stoppage in transit are designed to give protection to an unpaid seller so long as the goods have not reached the actual possession of the buyer or his agent. Until then, the buyer's right to possession is defeasible upon certain conditions: the main one ¹²²⁴ is where the buyer becomes insolvent while the goods are still subject to the control of

the unpaid seller or his agent; the seller¹²²⁵ is then, by virtue of his right of lien, entitled to retain possession of them until the price is paid. If the buyer becomes insolvent while the goods are still in the control of a carrier and before the buyer or his agent obtains delivery of them, the seller may, by giving notice to the carrier, prevent delivery to the buyer and direct redelivery to himself or his agent: this is the right of stoppage in transit, which enables the unpaid seller to resume possession of the goods and to retain them until the price is paid.¹²²⁶ The unpaid seller who has exercised either of the rights of lien or of stoppage is given the power to pass to a new buyer a good title to the goods, so that the resale will divest the original buyer of the title which he may have had.¹²²⁷ In practice, the unpaid seller will need to be in possession of the goods before he can effectively exercise his right to resell them.¹²²⁸

Effect on third parties

- 46-306 The real remedies exercisable by the unpaid seller normally prevail over the rights of a sub-buyer or pledgee,¹²²⁹ and may affect third parties in that remedies for wrongful interference with the goods (e.g. trespass or conversion) will depend on who is in possession of them or entitled to possession of them.¹²³⁰

Remedies of seller who retains the property in the goods

- 46-307 Section 39(2) provides:

“Where the property in goods has not passed to the buyer, the unpaid seller has (in addition to his other remedies)¹²³¹ a right¹²³² of withholding delivery similar to and co-extensive with his rights of lien or retention and stoppage in transit where the property has passed to the buyer.”¹²³³

The purpose of this subsection is to bring into line the law on the seller’s right to retain the goods pending payment of the price in the two possible situations which could arise in respect of the property in the goods. A lien is a right to retain possession of goods owned by another person, and the unpaid seller’s “lien” is therefore an appropriate term when the property in the goods has already passed to the buyer before the seller claims to retain possession of the goods.¹²³⁴ When, however, the property in the goods is not to pass until a future event¹²³⁵ (e.g. upon payment¹²³⁶), the seller is claiming to retain, pending payment of the price, goods in which he still has the property.¹²³⁷ One result of s.39(2) is that in an instalment contract¹²³⁸ the seller may usually¹²³⁹

“withhold delivery” of future instalments until he is paid for instalments already delivered to the buyer.¹²⁴⁰

Retention of title

- 46-308 A special contractual clause (a *Romalpa* or retention of title clause) may reserve to the seller the property in the goods supplied to the buyer, until the full price has been paid; such a clause may also purport to entitle the unpaid seller to claim any product manufactured by the buyer from the goods, or the proceeds of resale of the goods, or of the manufactured product.¹²⁴¹

Future and unascertained goods

- 46-309 If, under an agreement to sell¹²⁴² “future goods”¹²⁴³ or “unascertained goods”¹²⁴⁴ the seller has not yet obliged himself to deliver any particular goods to the buyer (e.g. by a notice of appropriation), he is obviously under no contractual obligation towards the buyer in regard to any goods subject to his control which happen to fit the contractual description, or which he has in mind to use in order to perform his obligations to the buyer.¹²⁴⁵ Since such goods have not been attached to the particular contract, the seller’s right and power over them are in no way restricted by the contract, and his rights over them are therefore wider than rights arising under s.39(2), see above (which should not be interpreted so as to *restrict* any of his rights arising under common law rules).¹²⁴⁶

Extended meaning of “seller”

- 46-310 Section 38(2) extends¹²⁴⁷ the meaning of “seller” as follows:

“In this part of this Act ‘seller’ includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed,¹²⁴⁸ or a consignor or agent who has himself paid (or is directly responsible for) the price.”

Thus, a wider group of persons are given the opportunity of protecting their interests when they have not been paid. The main illustration is that of the agent who has himself paid the price to the seller,¹²⁴⁹ as in the decisions before the Act on the position of a commission agent who accepted an order to obtain goods for his principal on the understanding that the agent would buy the goods in

his own name and then consign them to the principal. By buying in his own name, the commission agent pledged his own credit when buying the goods, and not the credit of his principal¹²⁵⁰: he was thus treated (for this purpose) as a seller of the goods to his principal and was held to be entitled to exercise the right of stoppage in transit when his principal became insolvent during the course of transit of the goods.¹²⁵¹ It is submitted that a surety for the buyer is, when he has paid the seller, a “person who is in the position of a seller” within the meaning of subs.(2) above.¹²⁵² Before the buyer has defaulted in paying the price, the surety has only a contingent liability to pay the price,¹²⁵³ but after payment by him he is subrogated to the rights of the seller against the defaulting buyer.¹²⁵⁴

Claim for repayment

- 46-311 The term “seller” in s.38(2) does not extend to a buyer who has a claim against the seller for repayment of the price.¹²⁵⁵ So where the buyer paid the price to the seller, but later, and justifiably, rejected the goods, he could not claim a lien to retain the goods until the seller repaid him the price.¹²⁵⁶ If the buyer who has paid the price wishes to reject the goods on the ground that they are not in accordance with the contractual description, he is dependent on the solvency of the seller for his recovery of the price¹²⁵⁷: the buyer’s rejection of the goods revests the property in the seller and leaves the buyer with only a personal claim against the seller.

Definition of unpaid seller

- 46-312 Section 38(1) provides:

“The seller of goods is an unpaid seller within the meaning of this Act—

- (a)when the whole¹²⁵⁸ of the price has not been paid or tendered;
- (b)when a bill of exchange or other negotiable instrument has been received as conditional¹²⁵⁹ payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.”¹²⁶⁰

The buyer’s obligation to pay the price depends on construction of the contract.¹²⁶¹ The meaning of s.38(1)(a) is that the whole of the price has not in fact been paid or tendered to the seller, whether or not payment is due according to the contract.¹²⁶² During a period of credit, or during the currency of a negotiable instrument taken for the price, the seller is taken to have waived his right to a lien, but he is nevertheless an unpaid seller, whose right to exercise the real remedies

revives¹²⁶³ if the buyer becomes insolvent.¹²⁶⁴ The same position obtains where by the contract the buyer is obliged to pay the price by arranging for a banker's commercial credit to be opened in favour of the seller: the opening of the credit is normally only conditional payment,¹²⁶⁵ and if the banker defaults in honouring the credit, the seller may claim payment of the price directly from the buyer,¹²⁶⁶ and the seller's remedies against the goods revive.

Tender of price

- 46-313 For entitlement to exercise the real remedies, tender of the price is equated with payment.¹²⁶⁷ The general principles of the law on tender of money to pay a debt are discussed in Vol.I.¹²⁶⁸ If the seller waives¹²⁶⁹ tender of the price by the buyer, he will be estopped from claiming subsequently that he is an "unpaid seller" for the purpose of exercising the real remedies.¹²⁷⁰

Definition of insolvency¹²⁷¹

- 46-314 Section 61(4) provides a definition of insolvency¹²⁷²:

"A person is deemed to be insolvent within the meaning of this Act if he has either ceased to pay his debts in the ordinary course of business¹²⁷³ or he cannot pay his debts as they become due."¹²⁷⁴

This definition is of crucial importance for two of the remedies against the goods: the right of stoppage in transit arises only upon the buyer's insolvency,¹²⁷⁵ while in the case of the unpaid seller's lien, it is one of the three alternative situations which justify the seller's retention of the goods.¹²⁷⁶ The word "insolvent" has been interpreted in other contexts, from which analogies may cautiously be sought.¹²⁷⁷ Thus, the word has often been construed:

"... both in private instruments and upon the construction of a statute, to apply to a person labouring under a general disability to pay his just debts in the ordinary course of trade and business."¹²⁷⁸

When a clause in a contract is to take effect upon the "insolvency" of a party, the ordinary meaning of the word has been held to be "an incapability of paying the party's just debts",¹²⁷⁹ or "a general inability to pay debts".¹²⁸⁰ The buyer's own statements in documents or correspondence may be

strong evidence against him.¹²⁸¹ Some cases have dealt with the effect of the buyer's alleged insolvency upon the contract of sale. If the buyer declares that he is insolvent this does not of itself terminate the contract¹²⁸²: but he may make the declaration in such circumstances as to show that he cannot, or does not intend to, perform his side of the contract, in which case the seller may treat the declaration as a repudiation and terminate the contract.¹²⁸³ In this context, the mere fact that a debtor calls a meeting of his creditors, or some of them, need not necessarily imply that he is insolvent: the debtor may merely be discussing his need for more capital or for more credit, or the possibility that he may have to wind up an unprofitable business.¹²⁸⁴

Effect of bankruptcy

46-315 The rules on bankruptcy apply notwithstanding the Act.¹²⁸⁵ The fact that the buyer has become bankrupt does not of itself terminate the contract, but the buyer's trustee in bankruptcy may exercise his power to disclaim onerous property, including any unprofitable contract.¹²⁸⁶ The buyer's trustee in bankruptcy (and, probably, a sub-buyer of the same goods bought from the buyer) is entitled to choose to fulfil the original contract by paying the price in cash to the seller within a reasonable time of the buyer's default in payment.¹²⁸⁷ If, however, the goods are still in transit because a bankrupt or insolvent buyer refused to take delivery of the goods from the seller or the carrier, the seller may still have the opportunity of exercising his rights of lien or of stoppage in transit, and thus of gaining priority over the general creditors of the buyer.¹²⁸⁸

Footnotes

- 1212 The provisions of the Act which are directly relevant are ss.24, 25 and 41–48.
- 1213 e.g. *Factors Act 1889* ss.8, 9, 10 (cf. ss.24, 25, 47(2) of the *Sale of Goods Act 1979*); *Carriage of Goods by Sea Act 1992*; *Bills of Sale Act 1878*.
- 1214 Defined, s.61(1): see above, para.46-015.
- 1215 These remedies may therefore be excluded or varied by the parties: s.55.
- 1216 The “right to retain” is a term of Scots law.
- 1217 On the definition of “insolvent”, see s.61(4); see below, para.46-314.
- 1218 It is a right not only against the buyer, but also against the carrier: see below, para.46-338. In the *1893 Act*, and in most of the common law cases on the topic, the Latin phrase “stoppage in transitu” is used. The *1979 Act* uses the English version “in transit”.
- 1219 The provision referred to is s.48(3): *RV Ward Ltd v Bignall [1967] 1 Q.B. 534, 549*. The “right” of resale includes the “power” to confer a good title on the new buyer (as against the original buyer).

- 1220 The right of the seller to sue for the price is independent of his remedies against the goods: see e.g. [s.43\(2\)](#).
- 1221 The creation of a *security* recognised at law requires the debtor to have both ownership and possession (actual or constructive) of the goods: *Armour v Thyssen Edelstahlwerke AG [1991] 2 A.C. 339, 353*.
- 1222 cf. the use of retention of title clauses under which the seller retains the property in the goods until he has been fully paid: see above, paras [46-173](#)—[46-188](#).
- 1223 These remedies are historically derived from the law merchant.
- 1224 For other conditions in the case of liens, see [s.41\(1\)](#) (see below, para. [46-316](#)).
- 1225 An agent who has actual or apparent authority from the unpaid seller may exercise on his behalf the seller's remedies against the goods: *Whitehead v Anderson (1842) 9 M. & W. 518* (stoppage in transit). Similarly, the doctrine of ratification may apply: *Hutchings v Nunes (1863) 1 Moo. P.C. N.S. 243; Bird v Brown (1850) 4 Ex. 786* (see Vol.I, paras [21-030](#) et seq.; below, para. [46-328](#)).
- 1226 See below, paras [46-327](#)—[46-350](#).
- 1227 See below, para. [46-347](#).
- 1228 See below, paras [46-346](#)—[46-360](#).
- 1229 [1979 Act s.47](#) (see below, paras [46-340](#)—[46-345](#)).
- 1230 Clerk & Lindsell on Torts, 23rd edn (2020), paras 16-43, 16-060 et seq.
- 1231 e.g. [s.49](#) (see below, para. [46-361](#)); [s.50](#) (see below, para. [46-370](#)).
- 1232 A “right” as against the buyer: as owner of the goods, the seller has the legal “power” to withhold delivery.
- 1233 The omission of a reference in [s.39\(2\)](#) to a *right* of resale (as against the original buyer) does not mean that the unpaid seller in these circumstances lacks the right to resell, since [s.48\(3\)](#) (see below, para. [46-353](#)) can be interpreted as applicable to cases where the property has not passed to the buyer as well as to those where it has: *RV Ward Ltd v Bignall [1967] 1 Q.B. 534, 545*. See also Benjamin's Sale of Goods, 11th edn (2021), para.15-011.
- 1234 *Lickbarrow v Mason (1793) 6 East 21, 24n.* (“... it is a contradiction in terms to say a man has a lien upon his own goods ...”).
- 1235 See above, paras [46-170](#) et seq.
- 1236 Or in a contract to deliver unascertained goods by instalments, when the goods are “unconditionally appropriated” to that instalment: [s.18 r.5\(1\)](#) (see above, paras [46-149](#) et seq.).
- 1237 This was the position before the Act: e.g. *Bellamy v Davey [1891] 3 Ch. 540; Ex p. Chalmers (1873) L.R. 8 Ch. App. 289, 293* (following *Griffiths v Perry (1859) 1 E. E. 680, 688*).
- 1238 See above, para. [46-307](#) (note).
- 1239 The contract may, however, be “severable” into separate contracts: see below, para. [46-321](#).
- 1240 *Longbottom Co Ltd v Bass, Walker Co [1922] W.N. 245, 246* (see below, para. [46-321](#)).
- 1241 On these clauses, see above, paras [46-173](#)—[46-188](#).
- 1242 [s.2\(5\)](#) (see above, paras [46-020](#)—[46-022](#)).

- 1243 s.61(1) (see above, paras 46-015, 46-037, 46-042).
- 1244 s.16 (see above, paras 46-040 et seq., para.46-131). cf. s.18 r.5(1) (see above, para.46-149).
- 1245 cf. *Carlos Federspiel Co SA v Charles Twigg Co Ltd [1957] 1 Lloyd's Rep. 240*.
- 1246 See the saving provisions of s.62(2) (see above, para.46-002).
- 1247 The main definition of “seller” is in s.61(1): it includes a person who “agrees to sell”, e.g. a buyer who resells the goods before the property in the goods has passed to him: *Jenkyns v Usborne (1844) 7 M. & G. 678, 698–699* (buyer who resold is entitled, as against the insolvent sub-buyer, to stop the goods in transit).
- 1248 See the early decision of *Morison v Gray (1824) 2 Bing. 260*. (This was an action of trover, on which point reference should now be made to *Burgos v Nascimento (1908) 100 L.T. 71* and to the **Torts (Interference with Goods) Act 1977** (see below, paras 46-455—46-456)); see above, paras 35-010 et seq.
- 1249 *Imperial Bank v London and St. Katharine Docks Co (1877) 5 Ch. D. 195*.
- 1250 *Feise v Wray (1802) 3 East 93; Ex p. Miles (1885) 15 Q.B.D. 39, 42*.
- 1251 *Ireland v Livingston (1872) L.R. 5 H.L. 395, 408–409; Cassaboglou v Gibb (1883) 11 Q.B.D. 797, 804, 806–807* (following *Feise v Wray (1802) 3 East 93*). (By s.38(2), such an agent could exercise any of the real remedies.) See also Vol.I, para.21-181.
- 1252 The **Mercantile Law Amendment Act 1856** s.5, may also lead to the same result: *Imperial Bank v London and St Katharine Docks Co (1877) 5 Ch. D. 195*. (See below, para.47-152.)
- 1253 See below, paras 47-001 et seq.
- 1254 See below, para.47-149.
- 1255 *JL Lyons Co Ltd v May and Baker Ltd [1923] 1 K.B. 685*.
- 1256 *JL Lyons Co Ltd v May and Baker Ltd [1923] 1 K.B. 685*.
- 1257 This is the reason given in *Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2 Q.B. 459, 483*, for the buyer not rejecting the goods after he had paid the price.
- 1258 Before the Act, payment of part of the price did not prevent exercise of the right of stoppage in transit: this rule now applies to all the real remedies (even the right of resale). The price may, however, be apportioned where separate deliveries are to be paid for separately: see above, para.46-263.
- 1259 For the circumstances in which a negotiable instrument is taken as absolute payment, see Vol.I, para.24-076. In this situation, the seller’s only remedy is to sue on the instrument.
- 1260 *Gunn v Bolckow, Vaughan Co (1875) L.R. 10 Ch. App. 491, 501* (dishonour by non-payment: a fortiori in the case of non-acceptance of the draft). See also above, paras 36-103—36-108 (“or otherwise” at the end of s.38(1)(b) refers to the buyer’s insolvency).
- 1261 See Vol.I, paras 15-047 et seq.; see above, paras 46-051—46-053.
- 1262 This is implied by ss.41(1)(b) and 43(2).
- 1263 If the other conditions of entitlement are satisfied, e.g. s.44 (see below, para.46-327); *Gunn v Bolckow, Vaughan Co (1875) L.R. 10 Ch. App. 491* at 501.

- 1264 The fact that the seller, who has taken a bill of exchange as conditional payment, has negotiated the bill to a third person, does not alter the rule that there has been only a conditional payment of the price, because the seller may have to take up the bill: if such a bill is dishonoured while it is in the hands of a third person, the seller's remedies revive: *Gunn v Bolckow, Vaughan Co* (1875) *L.R. 10 Ch. App.* 503. cf. *Bunney v Poyntz* (1833) 2 *L.J. K.B.* 55.
- 1265 *WJ Alan Co Ltd v El Nasr Export and Import Co* [1972] 2 *Q.B.* 189, 209–212, 221; *Maran Road Saw Mill v Austin Taylor Co Ltd* [1975] 1 *Lloyd's Rep.* 156; *ED F Man Ltd v Nigerian Sweets and Confectionery Co Ltd* [1977] 2 *Lloyd's Rep.* 50.
- 1266 *Newman Industries Ltd v Indo-British Industries Ltd* [1956] 2 *Lloyd's Rep.* 219, 236; reversed on another ground: [1957] 1 *Lloyd's Rep.* 211; *Soproma SpA v Marine and Animal By-products Corp* [1966] 1 *Lloyd's Rep.* 367, 386. See also above, para.36-502. s.38(1)(a) above; ss.41(1) (see below, para.46-316), 44 (see below, para.46-327), and 48(3) (see below, para.46-353). A valid tender does not discharge the buyer's obligation to pay the price.
- 1268 Vol.I, paras 24-082et seq.
- 1269 Vol.I, paras 25-042—25-049.
- 1270 *Cohen v Roche* [1927] 1 *K.B.* 169 (“waiver of tender will produce the same result as actual tender in divesting a [seller] of his right to assert a vendor's lien”: at 180).
- 1271 On bankruptcy, see Vol.I, paras 23-015 et seq.
- 1272 This definition is required by ss.41 and 44 (in addition to s.39).
- 1273 A special reason for a failure to pay debts may prevent the debtor being held to be “insolvent” within the definition, e.g. if an alien enemy failed to meet an acceptance because of the outbreak of war: *The Feliciana* (1915) 59 *S.J.* 546, 547 (obiter: the goods were seized as prize before the seller purported to give notice of stoppage).
- 1274 The words omitted from subs.(4) were repealed by the *Insolvency Act 1985* s.235(3), Sch.10 Pt III (and by corresponding legislation for Scotland).
- 1275 *Sales Goods Act 1979* s.44 (see below, para.46-327). The time when the buyer became insolvent may be important for this remedy: at common law, the stoppage was held to be valid if the buyer became insolvent before the expected termination of the transit, even where it later appeared that he was not insolvent at the time of the stoppage: *The Constantia* (1807) 6 *C.Rob.Adm.R.* 321, 326. (Section 44 could possibly be interpreted so as to enable such a retroactive justification of a premature stoppage.)
- 1276 s.41(1) (see below, para.46-316).
- 1277 cf. the grounds on which a bankruptcy order may be made: *Insolvency Act 1986* ss.267(2), 271(1); also s.268.
- 1278 *R. v Saddlers' Co* (1863) 10 *H.L. Cas.* 404, 425.
- 1279 *Parker v Gossage* (1835) 2 *C.M.R.* 617, 620.
- 1280 *Biddlecombe v Bond* (1835) 4 *Ad. & El.* 332, 337. (It is not restricted to a person who actually becomes “bankrupt” within the meaning of the *Insolvency Act 1986* (referring to the Insolvent Debtors' Act 1820).)
- 1281 *Billson v Crofts* (1873) *L.R. 15 Eq.* 314.

- 1282 *Ex p. Chalmers* (1873) L.R. 8 Ch. App. 289, 293–294; *Mess v Duffus* (1901) 6 Com. Cas. 165, 167.
- 1283 *Mess v Duffus* (1901) 6 Com. Cas. 165, 167. On this point, see Vol.I, paras 27-048—27-049.
- 1284 *Re Phoenix Bessemer Steel Co* (1876) 4 Ch. D. 108, 120. (Nor is mere suspicion of the buyer's insolvency sufficient.)
- 1285 1979 Act s.62(1).
- 1286 Insolvency Act 1986 s.315.
- 1287 *Ex p. Stapleton* (1879) 10 Ch. D. 586, 590. cf. *Insolvency Act 1986 ss.311(5), 314; Kemp v Falk* (1882) L.R. 7 App. Cas. 573, 578.
- 1288 *Ex p. Cooper* (1879) 11 Ch. D. 68, 73. See below, paras 46-331, 46-336.

(i) - Unpaid Seller's Lien

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 6. - Remedies of the Seller

(a) - Rights of Unpaid Seller against the Goods

(i) - Unpaid Seller's Lien ¹²⁸⁹

Seller's right to retain possession

46-316 Section 41(1) provides:

“Subject to this Act, the unpaid seller ¹²⁹⁰ 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—

- (a)where the goods have been sold without any stipulation as to credit ¹²⁹¹;
- (b)where the goods have been sold on credit but the term of credit has expired;
- (c)where the buyer becomes insolvent.”

Apart from an express term in the contract of sale, ¹²⁹² the seller's only right of lien arises under the Act and the seller cannot rely on the equitable principle of a vendor's lien. ¹²⁹³ The gist of the unpaid seller's lien is his entitlement to retain the goods until the buyer has paid or tendered ¹²⁹⁴ the whole ¹²⁹⁵ of the price ¹²⁹⁶; his lien is therefore a qualification on his duty to deliver the goods to the buyer, ¹²⁹⁷ and the seller will in practice exercise his right of lien as a first step towards exercising a right of resale. ¹²⁹⁸ The lien arises whether the contract is a sale of specific goods or an executory contract to supply unascertained goods, e.g. by instalments over a future period ¹²⁹⁹; in the case of unascertained goods, the lien will arise when the goods have been ascertained. ¹³⁰⁰

The extent of the lien is limited to the price: it does not cover the expenses of keeping the goods, since the seller is detaining them for his own benefit.¹³⁰¹

Effect of grant of credit

- 46-317 Where the seller grants credit to the buyer, he waives his lien for the agreed period of credit,¹³⁰² but the lien will revive after that period has expired,¹³⁰³ whether or not the buyer is then insolvent. Where the buyer is given credit for the period of a negotiable instrument given by him to the seller in payment of the price, the seller's lien is waived for that period, since acceptance of a negotiable instrument is normally treated as conditional¹³⁰⁴ payment.¹³⁰⁵ But if, before the goods are delivered to the buyer, the negotiable instrument is dishonoured, or the buyer becomes insolvent,¹³⁰⁶ the seller's lien¹³⁰⁷ will revive, so that he may retain the goods until he is paid.¹³⁰⁸ The lien revives upon dishonour despite the fact that the dishonour occurred after the seller had, during the period of the buyer's solvency, committed a breach of his obligations under the contract (e.g. by failure to deliver part of the goods¹³⁰⁹). In these circumstances, the buyer has a cause of action, but the seller has his lien for payment of the whole of the price, which will be taken into account in assessing the buyer's damages for the seller's breach.¹³¹⁰

Buyer insolvent

- 46-318 Where the buyer becomes insolvent,¹³¹¹ the seller may retain the goods¹³¹² until the buyer, or his trustee in bankruptcy,¹³¹³ pays the whole price. Thus, unless full payment is made, the seller's power of retention enables him to avoid the alternative of proving in the bankruptcy for the price.¹³¹⁴ The buyer's trustee in bankruptcy may elect to fulfil the contract by paying the price in cash within a reasonable time¹³¹⁵; dicta also suggest that a sub-buyer might have the same election.¹³¹⁶

The seller's possession

- 46-319 The unpaid seller must be in "possession" of the goods in order to exercise his right of lien,¹³¹⁷ and what amounts to possession for this purpose may be different from that required for other types of lien¹³¹⁸ or for other rules of law.¹³¹⁹ Provided he retains general control over the goods,¹³²⁰ the seller's possession for the purpose of maintaining his lien may continue despite the fact that the buyer has been given a measure of control over them or temporary possession of them for a

limited and specific purpose,¹³²¹ e.g. to allow the buyer to mark them¹³²² or to pack them in his (the buyer's) own containers.¹³²³ The seller may act in the dual role of seller and warehouseman for the buyer, but he retains his lien¹³²⁴: s.41(2) of the Act provides that: "The seller may exercise his lien or right of retention notwithstanding that he is in possession of the goods as agent or bailee ... for the buyer".¹³²⁵ Thus, the seller does not lose his lien by attorney¹³²⁶ to the buyer, viz by acknowledging to the buyer that he holds the goods on the buyer's account.¹³²⁷

Wrongful refusal to deliver on credit

- 46-320 If the buyer is entitled to delivery of the goods without paying the price, because the goods are sold on credit terms,¹³²⁸ a wrongful refusal by the unpaid seller to deliver the goods to the buyer should, it is submitted, debar the seller from exercising his lien if the buyer should later become insolvent.¹³²⁹

Part delivery and instalment contracts

- 46-321 By s.42:

"Where an unpaid seller has made part delivery of the goods, he may exercise his lien or right of retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive¹³³⁰ the lien or right of retention."¹³³¹

The onus is on the buyer, who claims that the seller has lost his lien, to show that it was the intention of the parties that the part delivery should constitute a delivery of the whole.¹³³² Where there is a contract for the sale of a specified quantity of goods by instalments, the presumption is that it is an indivisible or entire contract, so that the seller may exercise his lien over any part of the goods not yet delivered, if any part¹³³³ of the total price is unpaid.¹³³⁴ But if the contract is severable, in the sense that there are to be separate deliveries of specified instalments, with a separate payment to be made for each delivery, each delivery will be treated for the purposes of the seller's lien as if it were a separate contract¹³³⁵; in these circumstances, no lien can be exercised by the seller in regard to a particular instalment of the goods for which payment has been made,¹³³⁶ and the lien can be exercised only over goods forming part of an instalment which has not been paid for.¹³³⁷

Termination of the lien

46-322 By s.43 of the Act it is provided that:

Arrangement of Act

“(1) The unpaid seller of goods loses his lien or right of retention in respect of them—

- (a) when he delivers the goods to a carrier or other bailee ... for the purpose of transmission to the buyer without reserving the right of disposal¹³³⁸ of the goods;
- (b) when the buyer or his agent lawfully obtains possession of the goods;
- (c) by waiver of the lien or right of retention.”

The lien may also be lost in other circumstances, e.g. the seller will lose his lien if the whole of the price is paid or tendered to him, since he then ceases to be an “unpaid” seller within the meaning of s.38(1).¹³³⁹

Delivery to carrier ends lien

46-323 The delivery of the goods to a carrier¹³⁴⁰ will terminate the lien¹³⁴¹ unless there are special circumstances; e.g. where the seller contracts to deliver the goods to the buyer at a particular destination, the carrier may be treated as the seller’s agent.¹³⁴² Where the goods are shipped under a bill of lading, possession of the goods is treated as having been transferred to the buyer or his agent when the bill has been indorsed and delivered to him.¹³⁴³ But while the goods are in transit, the unpaid seller may exercise the separate right of stoppage in transit.¹³⁴⁴

Delivery to buyer ends lien

46-324 Possession¹³⁴⁵ of the goods passes to the buyer or his agent (s.43(1)(b) above) only¹³⁴⁶ upon delivery,¹³⁴⁷ whereupon the seller loses his lien.¹³⁴⁸ Analogies relevant to the buyer’s obtaining

possession may be found in the decisions on the termination of transit for the purpose of the right of stoppage in transit,¹³⁴⁹ and in the decisions on what constituted an actual receipt by the buyer within the (now repealed) provision of the Statute of Frauds.¹³⁵⁰ The seller's lien is not lost by the buyer's wrongful taking of the goods,¹³⁵¹ but once the lien is lost by delivery to the buyer or his agent, it does not revive when the goods are handed back to the seller for a different purpose (e.g. repacking).¹³⁵² The seller will lose possession, and thus his lien as unpaid seller, whenever a third person (such as a warehouseman) who is in possession of the goods as the seller's bailee, attorns to the buyer,¹³⁵³ or sub-buyer.¹³⁵⁴ But the fact that a delivery note or order for goods stored in a warehouse is handed to the buyer does not normally give the buyer possession until the warehouseman attorns to the buyer¹³⁵⁵: until then the seller's lien continues. The delivery of part only of the goods sold does not normally preclude the unpaid seller from exercising his right of lien over the remainder of the goods which continue in his possession.¹³⁵⁶

Waiver of lien

⁴⁶⁻³²⁵ The seller may waive his lien by assenting to a sub-sale,¹³⁵⁷ or by dealing with the goods in a manner inconsistent with the lien,¹³⁵⁸ or by making a new arrangement with the buyer which is inconsistent with the continuance of his lien.¹³⁵⁹ A lien may be lost if the seller refuses to deliver the goods on some ground other than the buyer's failure to pay or tender the price, or on some ground other than his right of lien.¹³⁶⁰ Where the seller obtains judgment for the price he does not waive his lien: by s.43(2) of the Act, "An unpaid seller of goods who has a lien or right of retention in respect of them does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods".¹³⁶¹ Only full satisfaction¹³⁶² of a judgment¹³⁶³ for the price can amount to payment so as to defeat the seller's lien.¹³⁶⁴

Effect of sub-sales and other dispositions

⁴⁶⁻³²⁶ The fact that the buyer has resold the goods to a sub-buyer, or agreed to pledge them or disposed of them in some other way, will not deprive the unpaid seller of his lien,¹³⁶⁵ even where he knows of the sub-sale or other disposition, or knows that the sub-buyer has paid the buyer.¹³⁶⁶ There are, however, a number of special circumstances in which the unpaid seller's right of lien will be lost or adversely affected by a sub-sale or other disposition of the goods.¹³⁶⁷

Footnotes

- 1289 On the general law of lien, see Silvertown, *The Law of Lien* (1988). The seller's lien should be distinguished from the equitable lien that a party may have over goods in the possession of another if he has paid for them: see *International Finance Corp v DSNL Offshore Ltd [2005] EWHC 1844 (Comm), [2007] 2 All E.R. (Comm) 305*.
- 1290 s.38 (see above, para.46-312). The unpaid seller who retains the property in the goods has a similar right of withholding delivery: s.39(2) (see above, para.46-307). But a right to a lien, stricto sensu, can arise only when the property held belongs to another: *Nippon Yusen Kaisha v Ramjiban Serowgee [1938] A.C. 429, 444*.
- 1291 s.28 (see above, para.46-237) applies. This was the common law position: *Bloxam v Sanders (1825) 4 B. & C. 941, 948; Miles v Gorton (1834) 2 Cr. & M. 504, 511*.
- 1292 s.55. Express terms creating a lien or security for the price will prevail over the statutory implication of a lien: *Re Leith's Estate (1866) L.R. 1 P.C. 296*. See also above, paras 46-173—46-188 (on retention of title clauses).
- 1293 *Transport and General Credit Corp Ltd v Morgan [1939] 2 All E.R. 17, 25*.
- 1294 See above, para.46-312.
- 1295 s.38(1)(a) (see above, para.46-312).
- 1296 The contract of sale is not rescinded (terminated) by exercise of the lien: s.48(1) (see below, para.46-346). The right to be paid is independent of the existence of the lien: *The Eider [1893] P. 119, 131*. For a discussion of the nature of a lien, see Fletcher Moulton LJ's dissenting judgment in *Lord's Trustee v GE Ry [1908] 2 K.B. 54, 61–73*. (The House of Lords allowed the appeal: *GE Ry v Lord's Trustee [1909] A.C. 109*.)
- 1297 s.27 (see above, para.46-236).
- 1298 For the seller's power to resell, see below, para.46-347. If the unpaid seller resells while exercising his right of lien, the second buyer acquires a good title to the goods as against the original buyer: s.48(2). During the exercise of the lien the seller's possession of the goods will support an action for wrongful interference with the goods: *Nippon Yusen Kaisha v Ramjiban Serowgee [1938] A.C. 429, 445*.
- 1299 *Griffiths v Perry (1859) 1 E. & E. 680; Ex p. Chalmers (1873) L.R. 8 Ch. App. 289*. See also s.39(2) (see above, para.46-307).
- 1300 See above, paras 46-149 et seq.
- 1301 *Somes v British Empire Shipping Co (1860) 8 H.L. Cas. 338* (a case on a repairer's lien: see above, para.35-093). A claim for damages may lie for such expenses: *Bloxam v Sanders (1825) 4 B. & C. 941, 950* (cf. s.37).
- 1302 *Spartali v Benecke (1850) 10 C.B. 212, 223; Poulton and Son v Anglo-American Oil Co Ltd (1910) 27 T.L.R. 38, 39; on appeal (1911) 27 T.L.R. 216*. The normal implication of granting credit is that the buyer is immediately entitled to delivery without making payment: (1910) 27 T.L.R. 38, 39. But the parties may agree that, despite the granting of credit, delivery is to take place concurrently with payment: *Bloxam v Sanders*, above,

- at 948; *Miles v Gorton* (1834) 2 Cr. & M. 504, 511; Benjamin's Sale of Goods, 11th edn (2021), para.15-034. cf. *Field v Lelean* (1861) 6 H. & N. 617.
- 1303 *Poulton and Son v Anglo-American Oil Co Ltd* (1910) 27 T.L.R. 38, 39.
- 1304 The seller may convert it into an absolute payment by negotiating the instrument without recourse: *Bunney v Poyntz* (1833) 2 L.J. K.B. 55. (See all the reports: 1 N. & M. 229; 4 B. & Ad. 568.) cf. *Re J Defries Sons Ltd* [1909] 2 Ch. 423, 429.
- 1305 s.38(1)(b). cf. *Horncastle v Farran* (1820) 3 B. & Ald. 497 (carrier's lien); *Hewison v Guthrie* (1836) 2 Bing. N.C. 755, 759 (broker's lien).
- 1306 *Miles v Gorton* (1834) 2 Cr. & M. 504 at 512, 514; *Gunn v Bolckow Vaughan Co* (1875) L.R. 10 Ch. App. 491, 501.
- 1307 It may be that it is not a right to a lien stricto sensu because the lien had been waived by the granting of credit; but it is a right of withholding delivery analogous to a lien: *Griffiths v Perry* (1859) 1 E. & E. 680, 688.
- 1308 *Valpy v Oakeley* (1851) 20 L.J. Q.B. 380; *Griffiths v Perry* (1859) 1 E. & E. 680, 688.
- 1309 *Valpy v Oakeley* (1851) 20 L.J. Q.B. 380; *Griffiths v Perry* (1859) 1 E. & E. 680, 688.
- 1310 *Valpy v Oakeley* (1851) 20 L.J. Q.B. 380; *Griffiths v Perry* (1859) 1 E. & E. 680, 688.
- 1311 On insolvency, see above, para.46-314.
- 1312 *Grice v Richardson* (1877) L.R. 3 App. Cas. 319.
- 1313 *Ex p. Stapleton* (1879) 10 Ch. D. 586, 590; *Ex p. Chalmers* (1873) L.R. 8 Ch. App. 289, 294.
- 1314 *Gunn v Bolckow Vaughan Co* (1875) L.R. 10 Ch. App. 491 at 501.
- 1315 *Ex p. Stapleton* (1879) 10 Ch. D. 586, 590.
- 1316 *Ex p. Stapleton* (1879) 10 Ch. D. 586, 590. cf. *Kemp v Falk* (1882) L.R. 7 App. Cas. 573, 578.
- 1317 Benjamin's Sale of Goods, 11th edn (2021), paras 15-038—15-039. The seller's lien does not entitle him to regain possession of the goods after he has given it up: *Jeffcott v Andrew Motors Ltd* [1960] N.Z.L.R. 721, CA. cf. stoppage in transit (see below, paras 46-327 et seq.).
- 1318 *GE Ry v Lord's Trustee* [1909] A.C. 109, 115 (carrier's lien: see also the dissenting judgment of Fletcher Moulton LJ in the court below: *Lord's Trustee v GE Ry* [1908] 2 K.B. 54, 71).
- 1319 See Harris in Guest (ed.), Oxford Essays in Jurisprudence (1961), p.69.
- 1320 *Milgate v Kebble* (1841) 3 M. & G. 100 (retention of key to premises): cf. *Wrightson v McArthur and Hutchisons* (1919) Ltd [1921] 2 K.B. 807.
- 1321 *Paton's Trustees v Finlayson*, 1923 S.C. 872; *GE Ry v Lord's Trustee* [1909] A.C. 109; *Milgate v Kebble* (1841) 3 M. & G. 100. See further Benjamin's Sale of Goods, 11th edn (2021), at paras 15-038—15-039, and (on trust receipts) Benjamin at paras 18-504 et seq.
- 1322 *Dixon v Yates* (1833) 5 B. & Ad. 313. cf. *Cooper v Bill* (1865) 3 H. & C. 722. See also *Tansley v Turner* (1835) 2 Bing. N.C. 151.
- 1323 *Goodall v Skelton* (1794) 2 H.B.I. 316; *Boulter v Arnott* (1833) 1 Cr. & M. 333. See also *Milgate v Kebble* (1841) 3 M. & G. 100; and cf. *Holderness v Shackels* (1828) 8 B. & C. 612.

- 1324 *Miles v Gorton* (1834) 2 Cr. & M. 504, 513, 514; *Grice v Richardson* (1877) L.R. 3 App. Cas. 319, 323, 323–324 (the buyer's agreement to pay warehousing charges to the seller does not prevent continuance of the lien).
- 1325 In *United Plastics Ltd v Reliance Electric (NZ) Ltd* [1977] 2 N.Z.L.R. 125 it was held that the corresponding section in the New Zealand Act applied only where the seller had never parted with possession of the goods.
- 1326 On attornment, see above, para.35-030.
- 1327 *Poulton Son v Anglo-American Oil Co Ltd* (1911) 27 T.L.R. 216. (Under the common law before the Act, the seller lost his lien in these circumstances: *Cusack v Robinson* (1860) 1 B. & S. 299, 308.) The seller's conduct may, however, be evidence of waiver: see s.43(1)(c) (see below, paras 46-322, 46-325); and the delivery of a document of title to the goods may bring s.47(2) into operation (see below, para.46-343).
- 1328 See above, para.46-312.
- 1329 cf. the analogous case in s.45(6) (see below, para.46-336).
- 1330 On waiver, see s.43(1)(c) (see below, para.46-325). cf. s.45(7) (see below, para.46-336).
- 1331 This section sets out what was the position at common law: *Dixon v Yates* (1833) 5 B. & Ad. 313, 341–342; *Bunney v Poyntz* (1833) 4 B. & Ad. 568; *Miles v Gorton* (1834) 2 Cr. & M. 504 at 513; *Kemp v Falk* (1882) L.R. 7 App. Cas. 573, 586.
- 1332 *Kemp v Falk* (1882) L.R. 7 App. Cas. 573, 586; *Ex p. Cooper* (1879) 11 Ch. D. 68, 73 (both cases of stoppage in transit: see below, para.46-336). Section 42 does not apply where the seller's bailee attorns to the buyer: *Miles v Gorton*, above, at 509–510; *Hammond v Anderson* (1803) 1 Bos. & P. N.R. 69 (as explained in *Ex p. Cooper* above, at 74–75).
- 1333 See s.38(1)(a) (see above, para.46-312).
- 1334 *Ex p. Chalmers* (1873) L.R. 8 Ch. App. 289; *Longbottom Co Ltd v Bass, Walker Co* [1922] W.N. 245; *Re Grainex Canada Ltd*, 34 D.L.R. (4th) 646 (1987). *Longbottom Co Ltd v Bass, Walker Co* [1922] W.N. 246.
- 1335 *Merchant Banking Co of London v Phoenix Bessemer Steel Co* (1877) 5 Ch. D. 205, 219–220; *Longbottom Co Ltd v Bass, Walker Co* [1922] W.N. 246.
- 1336 An express term in the contract itself, however, may entitle the seller to exercise a general lien over any goods of the buyer in the seller's possession.
- 1337 For this right, see s.19 (see above, paras 46-170—46-172). See also Benjamin's Sale of Goods, 11th edn (2021), paras 5-133 et seq., 18-469 et seq., 20-150 et seq. cf. the retention of title under *Romalpa* clauses: see above, paras 46-173—46-188.
- 1338 See above, para.46-313.
- 1339 1979 Act s.32 (see above, paras 46-270—46-272). By s.32(1), delivery to a carrier is prima facie deemed to be delivery to the buyer.
- 1340 *Bolton v Lancs and Yorks Ry* (1866) L.R. 1 C.P. 431, 439; *Badische Anilin und Soda Fabrik v Basle Chemical Works* [1898] A.C. 200 (for this purpose “the post office is simply a carrier of parcels like any other carrier”: at 204); but cf. *Postmaster-General v WH Jones Co (London) Ltd* [1957] N.Z.L.R. 829.
- 1341 This was the rule at common law, and it is not altered by the Act: *Dunlop v Lambert* (1839) 6 Cl. & F. 600; *Badische case* [1898] A.C. 200, 207, 209.

- 1343 *Sanders Bros v Maclean* (1883) 11 Q.B.D. 327, 341; *The Prinz Adalbert* [1917] A.C. 586, 589. There is no need for an attornment by the carrier to the buyer.
- 1344 See below, paras 46-327 et seq.
- 1345 See above, para.46-319.
- 1346 The buyer may, however, have previously been in possession as bailee, and the seller may assent to the buyer's holding for himself as from the date of the contract. cf. s.41(2) (see above, para.46-319). cf. also a symbolic or constructive delivery in a sale and leaseback transaction: *Michael Gerson (Leasing) Ltd v Wilkinson* [2000] Q.B. 514.
- 1347 See above, paras 46-239 et seq. (The definition of "delivery" in s.61(1) reads: "voluntary transfer of possession from one person to another".) Where delivery and payment of the price are to be contemporaneous, the seller will intend to retain his lien (and so intend not to complete delivery) until payment: *Kidman v Patterson* (1887) 8 N.S.W.L.R. (L.) 290.
- 1348 s.43(1)(b), see above. Even in this situation, the contract itself may create a special right in the seller which is analogous to a lien: *Dodsley v Varley* (1840) 12 A. & E. 632 (goods delivered to warehouse employed by buyer, but the course of dealing (s.55(1)) was that they were to remain there until they were paid for). In New Zealand, an express power for the seller to retake possession upon the buyer's default has been interpreted to allow the unpaid seller's lien to revive: *Bines v Sankey* [1958] N.Z.L.R. 886, 895–896. (But cf. *United Plastics Ltd v Reliance Electric (NZ) Ltd* [1997] 2 N.Z.L.R. 125). cf. also *Howes v Ball* (1827) 7 B. & C. 481 (commented on in *Sewell v Burdick* (1884) 10 App. Cas. 74, 96); *Re Hamilton Young Co* [1905] 2 K.B. 772.
- 1349 s.45(1) and (2) (see below, paras 46-329—46-333).
- 1350 *Cusack v Robinson* (1861) 1 B. & S. 299, 308; *Baldey v Parker* (1823) 2 B. & C. 37, 44. See above, para.46-034; Benjamin's Sale of Goods, 11th edn (2021), para.15-050.
- 1351 *Wallace v Woodgate* (1824) Ry. Moo. 193 (followed in *Jeffcott v Andrew Motors Ltd* [1960] N.Z.L.R. 721, 730, CA); *Mason v Morley* (1865) 11 Jur.(N.S.) 459, 461. See Benjamin at para.15-055.
- 1352 *Valpy v Gibson* (1847) 4 C.B. 836; *United Plastics Ltd v Reliance Electric (NZ) Ltd* [1997] 2 N.Z.L.R. 125.
- 1353 s.29(4). See *Harman v Anderson* (1809) 2 Camp. 243; *Capital and Counties Bank Ltd v Warriner* (1896) 12 T.L.R. 216. See also s.45(3) (see below, para.46-334).
- 1354 *Hawes v Watson* (1824) 2 B. & C. 540.
- 1355 *M'Ewan and Sons v Smith* (1849) 2 H.L.C. 309.
- 1356 See s.42 (see above, para.46-321).
- 1357 See s.47(1) (see below, paras 46-340—46-341).
- 1358 e.g. by wrongfully reselling (*Chinery v Viall* (1860) 5 H. & N. 288) or consuming the goods (*Gurr v Cuthbert* (1843) 12 L.J. Ex. 309). See Benjamin's Sale of Goods, 11th edn (2021), para.15-057.
- 1359 *Bank of Africa Ltd v Salisbury Gold Mining Co Ltd* [1892] A.C. 281, 284 (lien on a member's shares in a company). cf. *Clifford Harris & Co v Solland International Ltd* [2005] EWHC 141 (Ch), [2005] 2 All E.R. 334.

- 1360 *Boardman v Sill (1808) 1 Camp. 410(n)* (a claim for a lien for warehouse charges: approved (obiter) in *Yungmann v Briesemann (1892) 67 L.T. 642, 644*); *Weeks v Goode (1859) 6 C.B.(N.S.) 367*. cf. *White v Gainer (1824) 2 Bing. 23* (no waiver of lien for work done on chattels).
- 1361 Benjamin submits at para.15-059 that s.43(2) also applies when the seller has resumed possession of the goods by exercising his right of stoppage in transit.
- 1362 cf. *Jacobs v Latour (1828) 5 Bing. 130* (a stable-keeper's lien lost when creditor caused sheriff to take the goods in execution).
- 1363 It is not clear whether the lien would cover the costs of the judgment as well as the judgment debt itself (the price).
- 1364 The position was the same before the Act: *Houlditch v Desanges (1818) 2 Stark. 337; Scrivener v GN Ry (1871) 19 W.R. 388*.
- 1365 s.47(1) (see below, paras 46-340—46-341).
- 1366 *M'Ewan Sons v Smith (1849) 2 H.L.C. 309*. Nor can the fact that the unpaid seller has knowledge of a sub-sale be used to found an estoppel, so as to prevent him from setting up his lien: *Poulton and Sons v Anglo-American Oil Co Ltd (1910) 27 T.L.R. 38, 39*.
- 1367 See s.47(1) and (2) (see below, paras 46-340—46-344); Benjamin's Sale of Goods, 11th edn (2021), paras 15-092—15-100; attornment by bailee to the buyer (*M'Ewan and Sons v Smith*, above); and s.25 (see above, paras 46-220—46-231).

(ii) - Stoppage in Transit

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Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 6. - Remedies of the Seller

(a) - Rights of Unpaid Seller against the Goods

(ii) - Stoppage in Transit¹³⁶⁸

Right of stoppage in transit

46-327 Section 44 of the Act provides:

“Subject to this Act, when the buyer of goods becomes insolvent¹³⁶⁹ the unpaid seller¹³⁷⁰ 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,¹³⁷¹ and may retain them until payment or tender of the price.”¹³⁷²

The main purpose of the right of stoppage is to enable the unpaid seller, by resuming his lien,¹³⁷³ to gain priority (in regard to the goods) over the general creditors of an insolvent buyer who becomes bankrupt.¹³⁷⁴ By stopping the goods in the course of their transit, the seller puts the carrier under an obligation to redeliver the goods to him,¹³⁷⁵ and thereby reacquires the right to possession of the goods.¹³⁷⁶ But the exercise of the right of stoppage does not of itself terminate the contract of sale¹³⁷⁷: it merely prevents the buyer from obtaining possession of the goods, and puts the seller in a position in which he can effectively exercise his statutory power of resale.¹³⁷⁸ The practical importance of the right of stoppage in transit has greatly diminished with the development of more sophisticated methods of payment, particularly the use of bankers’ commercial credits¹³⁷⁹ when the parties carry on business in different countries: where a bank is in possession of the documents of title to the goods until payment it is in a position to protect both the seller and itself if the buyer becomes insolvent. The right of stoppage in transit may be exercised despite the fact that property

in the goods has passed to the buyer¹³⁸⁰; where the property remains in the seller,¹³⁸¹ he may withhold delivery by virtue of his ownership.¹³⁸²

Who is entitled to exercise the right

⁴⁶⁻³²⁸ The definition of seller in the Act¹³⁸³ includes one who agrees to sell: thus a buyer who resells the goods before the property in the goods has passed to him may exercise the right of stoppage as against the sub-buyer.¹³⁸⁴ The right of stoppage has also been extended to some quasi-sellers¹³⁸⁵; and it is submitted that a surety of the buyer who has paid the seller would be entitled to exercise it.¹³⁸⁶ A commission agent may accept an order to obtain goods for his principal by buying them in his own name¹³⁸⁷ and consigning them to him: such an agent is treated as a seller¹³⁸⁸ of the goods to his principal and may exercise the right of stoppage in transit if the principal becomes insolvent.¹³⁸⁹ Obviously, the seller's agent may exercise the right of stoppage on his behalf.¹³⁹⁰ Where the right was exercised by a purported agent who lacked actual authority to do so, the seller may subsequently ratify the agent's act, provided the ratification is before the transit terminates.¹³⁹¹

Duration of transit

⁴⁶⁻³²⁹ Section 45 contains seven subsections setting out various rules on the duration of transit¹³⁹² for the purposes of the unpaid seller's right of stoppage. These rules reflect the following principle:

“The essential feature of a stoppage in transit ... is, that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them.”¹³⁹³

The whole of s.45 indicates that the carrier “middleman” must be independent of both the seller and the buyer, in the sense that he is not acting exclusively as the agent of one of them, even though he may have been appointed by only one of them.¹³⁹⁴

“In course of transit”

⁴⁶⁻³³⁰ By s.45(1):

“Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee¹³⁹⁵ or custodier¹³⁹⁶ for the purpose of transmission to the buyer, until the buyer or his agent¹³⁹⁷ in that behalf takes delivery¹³⁹⁸ of them from the carrier or other bailee or custodier.”¹³⁹⁹

The duration or extent of the transit will normally depend on the interpretation of the particular words used in the contract or in the directions of the buyer to the seller.¹⁴⁰⁰ If the ultimate destination is specified by the buyer,¹⁴⁰¹ and no fresh directions by the buyer are needed,¹⁴⁰² transit will continue until the goods reach that ultimate destination. So long as the seller knows he is delivering to a carrier, who receives them in that capacity,¹⁴⁰³ the right of stoppage arises despite the fact that the buyer had not informed the seller of the ultimate destination of the goods.¹⁴⁰⁴

Delivery

- 46-331 The question whether delivery has taken place may depend on the buyer's intention to take delivery¹⁴⁰⁵ or the carrier's intention not to deliver until the freight has been paid.¹⁴⁰⁶ The buyer will not obtain possession of the goods merely by marking them or by taking samples while they remain in the carrier's possession.¹⁴⁰⁷ A bankrupt buyer¹⁴⁰⁸ (or his trustee in bankruptcy)¹⁴⁰⁹ may terminate the transit by accepting delivery; but the seller's right of stoppage will be preserved by the bankrupt buyer's refusal to accept delivery.¹⁴¹⁰

Shipment on buyer's ship: transfer of bill of lading

- 46-332 Transit prima facie comes to an end¹⁴¹¹ when goods are shipped by the seller on a ship belonging to the buyer¹⁴¹²; but the seller may continue the transit by taking in his name a bill of lading for the goods to be delivered “unto order or assigns”.¹⁴¹³ Similarly, a seller may preserve his right of stoppage in the case of a delivery to a ship under a FOB contract, if pending the issue of the bill of lading, he takes a mate's receipt acknowledging that the goods are shipped on account of the seller.¹⁴¹⁴ The transfer of a bill of lading by the seller to the buyer (or his agent) does not in itself terminate the transit for the purposes of stoppage in transit¹⁴¹⁵: provided that possession of the goods was intended by the parties to pass directly from the seller to the carrier, and to be received by him as carrier (i.e. purely in his capacity as such and not as agent of the buyer), the transit as between the seller and the buyer will continue.¹⁴¹⁶

Buyer obtains delivery before arrival

46-333 Section 45(2) provides:

“If the buyer or his agent in that behalf¹⁴¹⁷ obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.”¹⁴¹⁸

In many circumstances of inland transport the consignee may, in the absence of special terms in the contract of carriage, demand the goods from the carrier at a place en route to the designated destination¹⁴¹⁹; similarly, circumstances may arise in which the carrier attorns¹⁴²⁰ to the buyer in the course of the transit, and thus terminates the transit.¹⁴²¹

Acknowledgment to the buyer

46-334 Section 45(3) provides:

“If, after the arrival of the goods at the appointed destination,¹⁴²² the carrier or other bailee or custodian acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination¹⁴²³ for the goods may have been indicated by the buyer.”

Such an acknowledgment is an illustration of the doctrine of attornment¹⁴²⁴: a bailee who acknowledges to the claimant that the claimant now has title to a chattel, becomes the bailee of the claimant.¹⁴²⁵ The assent of both parties (the carrier¹⁴²⁶ and the buyer)¹⁴²⁷ is required to the change from the carrier holding the goods as carrier to holding them as warehouseman or agent for the buyer.¹⁴²⁸ The buyer’s request to the carrier to hold the goods in the carrier’s warehouse pending further instructions from the buyer, is strong evidence that the carrier thereupon becomes the buyer’s agent so that transit ends.¹⁴²⁹

Other provisions as to transit

46-335 Section 45 further provides:

Arrangement of Act

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier 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.¹⁴³⁰

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case¹⁴³¹ whether they are in the possession of the master as a carrier or as agent to the buyer.”

Under subs.(5) the proper test to apply¹⁴³² is whether the master of the ship is an employee of the shipowner¹⁴³³ or of the buyer as demise charterer¹⁴³⁴: in the latter situation, the seller loses his right of stoppage upon delivery to the ship, unless he takes a bill of lading in a form under which he retains control over the goods¹⁴³⁵; in the former situation, transit is not terminated by delivery to the ship.

46-336 Section 45 continues:

Arrangement of Act

(6) Where the carrier or other bailee or custodier wrongfully¹⁴³⁶ refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.¹⁴³⁷

(7) 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 transit, unless such part delivery has been made under such circumstances as to show an agreement¹⁴³⁸ to give up possession of the whole of the goods.”

1439

Subsection (7) implies that normally part delivery is not to be treated as delivery of the whole.¹⁴⁴⁰ But circumstances may indicate constructive delivery of the whole; thus where the goods constitute one entire machine, and the consignee is permitted to take an essential part of it, that transfer might amount to transfer of the whole machine.¹⁴⁴¹

Methods of exercising right of stoppage

46-337 It is provided by s.46:

Arrangement of Act

“(1) The unpaid seller may ¹⁴⁴² exercise his right of stoppage in transit either by taking actual possession of the goods or by giving notice ¹⁴⁴³ of his claim to the carrier or other bailee or custodier in whose possession the goods are.

(2) The notice may be given either to the person in actual possession of the goods ¹⁴⁴⁴ or to his principal. ¹⁴⁴⁵

(3) If given to the principal, the notice is ineffective unless given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.”

¹⁴⁴⁶

The seller takes the risk of the stoppage being unjustified ¹⁴⁴⁷ so that the carrier is not concerned to investigate the facts to see whether the seller is justified in stopping the goods ¹⁴⁴⁸; the carrier must give effect to the stoppage as soon as he is satisfied that it is the seller who claims the goods. ¹⁴⁴⁹

Duties of the parties after notice is given

46-338 By s.46(4):

“When notice of stoppage in transit is given by the seller to the carrier or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller; and the expenses of the re-delivery must be borne by the seller.” ¹⁴⁵⁰

The stoppage does not entitle the seller to direct the carrier to deliver the goods to him except at the contractual destination. ¹⁴⁵¹ The only effect on the contract of carriage is to prevent delivery to the consignee at the destination, and to entitle the seller to direct delivery there ¹⁴⁵² to himself or

to his order.¹⁴⁵³ The exercise of the seller's power places the seller¹⁴⁵⁴ under a direct obligation to the carrier either to take delivery or to give him directions for delivery.¹⁴⁵⁵ In order to regain actual possession of the goods, the seller must pay any unpaid freight due to the carrier¹⁴⁵⁶ and if he fails to do so, he must pay damages to the carrier for the amount of the freight.¹⁴⁵⁷ Similarly, if the seller fails to give directions to the carrier after the stoppage, he will be liable to the carrier in damages for expenses, such as demurrage or landing charges.¹⁴⁵⁸ If the carrier disregards a valid notice, and delivers the goods to the consignee, e.g. by mistake,¹⁴⁵⁹ he is liable to the seller for conversion,¹⁴⁶⁰ since by the notice the seller resumes the right to possession of the goods.¹⁴⁶¹

Stoppage limited to the goods themselves

- 46-339 Since the right of stoppage is a right exercisable only against the goods themselves, the unpaid seller has no right against money paid or payable to the buyer under a policy of insurance for damage suffered by the goods in the course of transit.¹⁴⁶² (The same principle prevents the unpaid seller from using his right of stoppage, after the actual transit has ended, to intercept the price due to be paid to the buyer under a sub-sale of the same goods.¹⁴⁶³)

Footnotes

- 1368 In the [1893 Act](#), and in the common law cases before that Act, the Latin phrase *in transitu* was used. The [1979 Act](#) uses the English phrase “in transit”.
- 1369 [s.61\(4\)](#): see above, para.[46-314](#).
- 1370 [s.38](#): see above, para.[46-312](#). (The seller is “unpaid” where only part of the price has been paid.)
- 1371 [s.45](#) (see below, paras [46-329—46-331](#)).
- 1372 The right of stoppage may be negated or varied by agreement: [s.55](#).
- 1373 Which he would normally have lost by delivery of the goods to the carrier: [s.43\(1\)\(a\)](#) (see above, para.[46-323](#)). But the right under [s.44](#) does not depend on the seller having previously enjoyed a right of lien under [s.41](#).
- 1374 For the justification of the doctrine, see Benjamin’s Sale of Goods, 11th edn (2021), para.15-064.
- 1375 [s.46\(4\)](#) (see below, para.[46-338](#)).
- 1376 *Booth S.S. Co Ltd v Cargo Fleet Iron Co [1916] 2 K.B. 570, 581*.
- 1377 [s.48\(1\)](#) (see below, para.[46-346](#)).
- 1378 [s.48\(3\)](#) (see below, para.[46-353](#)). cf. a retention of title clause: see above, paras [46-171—46-188](#).
- 1379 See above, paras [36-452](#) et seq.

- 1380 s.39(1) (see above, para.46-305); *Bloxam v Sanders* (1825) 4 B. & C. 941, 948 (cited with approval in *Ex p. Chalmers* (1873) L.R. 8 Ch. App. 289, 291–292). The effect of the property passing is that the goods are then at the risk of the buyer: see above, paras 46-189—46-192.
- 1381 This may include the situation when the seller has retained a right of disposal over the goods, in accordance with s.19 (see above, paras 46-170—46-172).
- 1382 s.39(2) (see above, para.46-307). See also *Bolton v Lancs. and Yorks Ry* (1866) L.R. 1 C.P. 431, 439; *Ex p. Chalmers*, see above, at 292.
- 1383 s.61(1) (see above, para.46-015).
- 1384 *Jenkyns v Usborne* (1844) 7 M. & G. 678, 698–699.
- 1385 See above, para.46-310; *Imperial Bank v London and St Katharine Docks Co* (1877) 5 Ch. D. 195.
- 1386 See above, para.46-310.
- 1387 This means that the agent pledges his own (and not his principal's) credit when buying the goods: *Feise v Wray* (1802) 3 East 93; *Ex p. Miles* (1885) 15 Q.B.D. 39, 42.
- 1388 At least for the purpose of the remedy of stoppage in transit: *Cassaboglou v Gibb* (1883) 11 Q.B.D. 797; cf. Vol.I, para.21-181. (By virtue of s.38(2), his remedies under the Act will now include the three “real” remedies in s.39(1).)
- 1389 *Ireland v Livingston* (1872) L.R. 5 H.L. 395, 408–409; *Cassaboglou v Gibb* (1883) 11 Q.B.D. 797, 804, 806–807 (following *Feise v Wray* (1802) 3 East 93).
- 1390 *Whitehead v Anderson* (1842) 9 M. & W. 518.
- 1391 *Hutchings v Nunes* (1863) 1 Moo. P.C. N.S. 243; *Bird v Brown* (1850) 4 Ex. 786. (Under the general law of agency, the principal may ratify only if he was competent at the time of the ratification to do the act in question: see Vol.I, para.21-034; Bowstead and Reynolds on Agency, 22nd edn (2021), paras 2-047 et seq.)
- 1392 “Transit” does not mean that the goods must be actually moving at the relevant time: they must, however, be still in the possession of the carrier. The duration of transit is a question which is entirely distinct from the passing of property: *Bethell v Clark* (1888) 20 Q.B.D. 615, 617.
- 1393 *Schotmans v Lancs Yorks Ry* (1867) L.R. 2 Ch. App. 332, 338.
- 1394 Thus the mere fact that the carrier was appointed by the buyer does not mean that transit ended when the delivery was made to the carrier: *Bethell v Clark*, above, at 617. See also *Ex p. Rosevear China Clay Co* (1879) 11 Ch. D. 560.
- 1395 These words would include a carrier by air: see McNair, Law of the Air, 3rd edn, pp.161–163. (s.45(1) of the 1893 Act read “... a carrier by land or water or other bailee ...”).
- 1396 The Scottish term for bailee.
- 1397 *Bethell v Clark* (1888) 20 Q.B.D. 615 at 620. It is immaterial that the buyer has instructed his agents to forward the goods to another destination: *Kendal v Marshall Stevens Co* (1883) 11 Q.B.D. 356; *Jobson v Eppenheim Co* (1905) 21 T.L.R. 468. See also *Dixon v Baldwen* (1804) 5 East 175.

- 1398 Defined in s.61(1): see above, para.46-015. Although the buyer may have taken delivery of the goods, the seller may still, through the reservation of the right of disposal, have rights over them: see above, paras 46-170—46-172.
- 1399 See *Todd* [1978] *J.B.L.* 39.
- 1400 For illustrations, see *Jackson v Nichol* (1839) 5 *Bing. N.C.* 508; *Ex p. Watson* (1877) 5 *Ch. D.* 35 (as explained in *Ex p. Miles* (1885) 15 *Q.B.D.* 39, 46, 47); *Kemp v Ismay, Imrie Co* (1909) 100 *L.T.* 996.
- 1401 *Bethell v Clark* (1888) 20 *Q.B.D.* 615. See also *Coates v Railton* (1827) 6 *B. & C.* 422.
- 1402 cf. *Valpy v Gibson* (1847) 4 *C.B.* 836, 865 (goods received by buyer's shipping agents who had no authority to forward the goods until they received the buyer's order to do so).
- 1403 Delivery to a ship (unless it is the buyer's ship) is "an indication that the goods were to go on a voyage": *Kendal v Marshall Stevens Co* (1883) 11 *Q.B.D.* 356, 367.
- 1404 *Ex p. Rosevear China Clay Co* (1879) 11 *Ch. D.* 560 (FOB contract).
- 1405 *James v Griffin* (1837) 2 *M. & W.* 623 (wharf not intended to be "place of final deposit"). See also s.45(4) and *Bolton v Lancs and Yorks Ry* (1866) *L.R. 1 C.P.* 431. cf. *Fairfax v Illawarra Steam Navigation Co* (1872) 11 *S.C.R. (N.S.W.)* 103. cf. also symbolic or constructive delivery in a sale and leaseback transaction: *Michael Gerson (Leasing) Ltd v Wilkinson* [2000] *Q.B.* 514.
- 1406 *Edwards v Brewer* (1837) 2 *M. & W.* 375. cf. *Allan v Gripper* (1832) 2 *Cr. & J.* 218; *Crawshay v Eades* (1823) 1 *B. & C.* 181.
- 1407 *Whitehead v Anderson* (1842) 9 *M. & W.* 518, 535.
- 1408 *Scott v Pettit* (1803) 3 *Bos. & P.* 469. On bankruptcy, see above, para.46-315.
- 1409 *Ellis v Hunt* (1789) 3 *T.R.* 464.
- 1410 *Ex p. Cooper* (1879) 11 *Ch. D.* 68, 73. (See above, para.46-315.)
- 1411 This proposition may have to give way to the parties' intention: *Merchant Banking Co v Phoenix Bessemer Steel Co* (1877) 5 *Ch. D.* 205, 219.
- 1412 *Van Casteel v Booker* (1848) 2 *Exch.* 691, 699, 708; *Berndston v Strang* (1867) 4 *Eq.* 481, 488–489; (*on appeal*) (1868) *L.R. 3 Ch. App.* 588; *Ex p. Francis Co Ltd* (1887) 56 *L.T.* 577; *Schotmans v Lancs and Yorks Ry* (1867) *L.R. 2 Ch. App.* 332 (buyer's ship employed as general trader). cf. s.45(5) (see below, para.46-335).
- 1413 *Van Casteel v Booker* (1848) 2 *Exch.* 691, 699, 708–709; *Berndston v Strang* (1867) 4 *Eq.* 481, 488–489. On such a reservation of a right of disposal, see s.19(2) (see above, para.46-171) and Benjamin's Sale of Goods, 11th edn (2021), para.18-473.
- 1414 *Craven v Ryder* (1816) 6 *Taunt.* 433; *Ruck v Hatfield* (1822) 5 *B. & Ald.* 632. cf. *Cowasjee v Thompson* (1845) 5 *Moo. P.C.* 165. On mate's receipts in general, see Benjamin at paras 18-386 et seq.
- 1415 *Schotmans v Lancs and Yorks Ry* (1867) *L.R. 2 Ch. App.* 332 at 337.
- 1416 *Lyons v Hoffnung* (1890) 15 *App. Cas.* 391; *The Tigress* (1863) 32 *L.J. Adm.* 97; *Ex p. Golding Davis Co Ltd* (1880) 13 *Ch. D.* 628, 633. (But if the buyer transfers the bill of lading to a sub-buyer or pledgee, s.47(2) will apply: see below, paras 46-343—46-344).
- 1417 This means an agent with authority to take delivery at a place other than the appointed destination: *Mechan Sons Ltd v NE Ry*, 1911 *S.C.* 1348, 1357–1358.

- 1418 *Johann Plischke and Sohne GmbH v Allison Bros Ltd [1936] 2 All E.R. 1009*. The common law before the Act was to the same effect: *Whitehead v Anderson (1842) 9 M. & W. 518, 534*.
- 1419 *Cork Distilleries Co v GS and W Ry (1874) L.R. 7 H.L. 269*. See also *L and NW Ry v Bartlett (1861) 7 Hurl. & N. 400, 407–408*. However, in modern conditions it may often be impossible or impracticable for the carrier to deliver the goods to the consignee at any place en route to the appointed destination. The terms of the contract of carriage may expressly or by implication deny the consignee the right to demand the goods before arrival at that destination. (On container transport, see Benjamin's Sale of Goods, 11th edn (2021), paras 21-099 et seq.) The buyer's tortious acquisition of possession without the carrier's consent should not terminate the transit: Benjamin's Sale of Goods, para.15-074; and see *Todd [1978] J.B.L. 39, 43–44*.
- 1420 See above, para.35-030; cf. see below, para.46-334.
- 1421 *Reddall v Union Castle Mail S.S. Co Ltd (1914) 84 L.J. K.B. 360*. The carrier is not obliged to attorn to the buyer in the course of transit: *Jackson v Nichol (1839) 5 Bing. N.C. 508*.
- 1422 This depends on the provisions of the contract for sale: *Mechan Sons Ltd v NE Ry, 1911 S.C. 1348, 1356, 1358*. The name of the person to whom the goods are sent, as well as the place, is implied in "destination": *Ex p. Miles (1885) 15 Q.B.D. 39, 45*.
- 1423 *Kendall v Marshall, Stevens Co (1883) 11 Q.B.D. 356; Bethell v Clark (1888) 20 Q.B.D. 615, 617; Ex p. Miles (1885) 15 Q.B.D. 47* (referring to *Ex p. Watson (1877) 5 Ch. D. 35*). See also *Rodger v Comptoir D'Escompte de Paris (1869) L.R. 2 P.C. 393*.
- 1424 See above, para.35-030. Attornment cannot be inferred from the mere fact that the carrier has notified the buyer that he is ready to deliver the goods: *Mechan Sons Ltd v NE Ry, 1911 S.C. 1348* at 1359.
- 1425 *Henderson Co v Williams [1895] 1 Q.B. 521; Dublin City Distillery Ltd v Doherty [1914] A.C. 823, 847–848*. See also *Bolton v Lancs and Yorks Ry (1866) L.R. 1 C.P. 431, 438; Ex p. Cooper (1879) 11 Ch. D. 68, 78*. At common law, the bailee was also estopped (by the attornment) from denying the claimant's title to the chattel, but by s.8(1) of the Torts (Interference with Goods) Act 1977 the bailee may now set up the title of a third person in reply to the claimant's demand for the chattel: see above, paras 35-015—35-017, 35-030.
- 1426 *Whitehead v Anderson (1842) 9 M. & W. 518* (silence on the part of the carrier is insufficient to show assent); *Coventry v Gladstone (1868) L.R. 6 Eq. 44*.
- 1427 *Bolton v Lancs and Yorks Ry (1866) L.R. 1 C.P. 431, 438; Ex p. Barrow (1877) 6 Ch. D. 783, 789*. Silence and delay on the part of the buyer may lead to an inference of assent, e.g. after the carrier sends the buyer a notice that he will hold the goods as warehouseman and charge rent to the buyer: *Taylor v GE Ry (1901) 17 T.L.R. 394; Ex p. Catling (1873) 29 L.T. 431*.
- 1428 The parties may agree that the change is made despite the fact that the carrier insists on his lien until freight has been paid: *Kemp v Falk (1882) 7 App. Cas. 573, 584; Crawshay v Eades (1823) 1 B. & C. 181; Ex p. Barrow (1877) 6 Ch. D. 783, 789; Ex p. Cooper*

- (1879) 11 Ch. D. 68, 72–73, 74, 76 (delivery of part after payment of part of the freight). cf. *Whitehead v Anderson* (1842) 9 M. & W. 518, 535–536.
- 1429 *Johann Plischke and Sohne GmbH v Allison Bros Ltd* [1936] 2 All E.R. 1009.
- 1430 *Bolton v Lancs and Yorks Ry* (1866) L.R. 1 C.P. 431. (The buyer's consent is needed for "delivery": see above, paras 46-241 et seq.). A bankrupt buyer, by refusing to take delivery, preserves the seller's right of stoppage: see above, para.46-315.
- 1431 cf. delivery to the buyer's ship: see above, para.46-332.
- 1432 The question depends on the intention of the parties as shown by the terms of the charterparty and particularly by the form of the bill of lading: in whose name and to whose order was it made out? See Benjamin's Sale of Goods, 11th edn (2021), paras 15-082, 20-150 et seq.
- 1433 As in the case of a charterparty which is not by demise. In a charter by demise (a type of "lease" of a ship: see Scrutton on Charterparties and Bills of Lading, 24th edn (2019), para.1.013 et seq.) the charterer is in possession of the ship and the master is his employee.
- 1434 *Berndtson v Strang* (1868) L.R. 3 Ch. App. 588.
- 1435 *Berndtson v Strang*, above (bill of lading for the goods to be delivered to the seller's "order or assigns"). In *Ex p. Rosevear China Clay Co* (1879) 11 Ch. D. 560, although delivery had been made to a ship chartered by the buyer, the stoppage was made before any bill of lading had been signed.
- 1436 "Wrongfully" implies that the carrier has no legal justification for refusing to deliver, e.g. no lien for unpaid freight or demurrage (see below, para.46-338). But the carrier need not attorn to the buyer in the course of transit: see above, para.46-333.
- 1437 *Bird v Brown* (1850) 4 Ex. 786. cf. s.45(1) (see above, para.46-330).
- 1438 On the part of *both* parties: *Kemp v Falk* (1882) 7 App. Cas. 573, 586.
- 1439 *Jones v Jones* (1841) 8 M. & W. 431; *Tanner v Scovell* (1845) 14 M. & W. 28; *Bolton v Lancs and Yorks Ry* (1866) L.R. 1 C.P. 431, 440; *Ex p. Cooper* (1879) 11 Ch. D. 68; *Kemp v Falk* (1882) 7App. Cas. 579, 586. cf. s.42 (see above, para.46-321).
- 1440 *Mechan Sons Ltd v NE Ry*, 1911 S.C. 1348, 1358. Unpaid freight charges indicate that delivery of part is not constructive delivery of the whole: *Ex p. Cooper* (1879) 11 Ch. D. 68.
- 1441 *Ex p. Cooper* (1879) 11 Ch. D. 68, 75–76. cf. s.45(3) (attornment, see above, para.46-334).
- 1442 At common law, no particular formality was needed: *Snee v Prescot* (1753) 1 Atk. 245, 250; *Litt v Cowley* (1816) 7 Taunt. 169. The seller's notice may be given with the full agreement of the buyer: *Nicholls v Le Feuvre* (1835) 2 Bing. N.C. 81.
- 1443 The notice may tell the carrier not to deliver to the buyer (e.g. *Booth S.S. Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570, 592) or to hold the goods to the seller's orders.
- 1444 *Whitehead v Anderson* (1842) 9 M. & W. 518, 534.
- 1445 Notice to the consignee is probably not sufficient: *Phelps, Stokes Co v Comber* (1885) 29 Ch. D. 813, 822, 826.
- 1446 e.g. a shipowner who receives notice is under a duty to communicate it with reasonable diligence to the master of the ship carrying the goods: *Kemp v Falk* (1882) 7 App. Cas.

- 573, 585–586 (failure in this duty would render the shipowner liable to the seller, either in conversion, or under s.60).
- 1447 *The Tigress* (1863) 32 L.J. Adm. 97, 101. Thus, a shipowner need not require the seller to show that the bill of lading has not been transferred by the buyer to a third person: see below, paras 46-337, 46-338.
- 1448 *The Tigress* (1863) 32 L.J. Adm. 97. (See also s.46(4).) If the seller acts without justification, e.g. if the buyer is not insolvent, the buyer's remedy is a claim for damages against the seller: *The Constantia* (1807) 6 C.Rob.Adm.R. 321, 326. (The seller is still bound to deliver to the buyer, who apparently has no claim against the carrier.)
- 1449 *The Tigress* (1863) 32 L.J. Adm. 97, at 101. If the carrier is aware of a legal defect in the seller's claim, he need not give effect to the stoppage; if the carrier is uncertain as to his position, he can interplead: above at 102; *Bethell v Clark* (1888) 20 Q.B.D. 615. On interpleader proceedings, see CPR Pts 17 and 33.
- 1450 *The Tigress* (1863) 32 L.J. Adm. 97.
- 1451 *Booth SS Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570, 600–601. The carrier may redeliver to the seller before the goods are carried to the contractual destination, but it is prudent for the carrier to do so only under an indemnity from the seller.
- 1452 *Booth SS Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570.
- 1453 1979 Act s.46(4), see above. See also *United States Steel Products Co v GW Ry* [1916] 1 A.C. 189, 203.
- 1454 Even where he is not a party to the contract of affreightment: *Booth S.S. Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570.
- 1455 *Booth SS Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570.
- 1456 *Booth SS Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570, 583, 588. The carrier's lien on the goods for the freight takes priority over the seller's right of stoppage (which in turn takes priority over any general lien on the goods which the consignment contract may give the carrier in respect of sums owing to him from the consignee under other transactions): *United States Steel Products Co v GW Ry*, above; *Oppenheim v Russell* (1802) 3 Bos. P. 42; *Nicholls v Le Feuvre* (1835) 2 Bing. N.C. 81 (shipping agent's general lien).
- 1457 *Booth SS Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570, 583.
- 1458 *Booth SS Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570, 583. (See the last clause of s.46(4) above.)
- 1459 *Litt v Cowley* (1816) 7 Taunt. 169. (This case is no longer authority on the question of re vesting of title: see now s.48(1) (see below, para.46-346).)
- 1460 *The Tigress* (1863) 32 L.J. Adm. 97; *Mechan Sons Ltd v NE Ry*, 1911 S.C. 1348. The action will fall under s.60 and is classified as an action in tort, not in contract: *Pontifex v Midland Ry* (1877) 3 Q.B.D. 23: it will be governed by the Torts (Interference with Goods) Act 1977. Refusal of the carrier to deliver upon demand being made by the seller would also be evidence of conversion: *Wilson v Anderton* (1830) 1 B. & A. 450, 456; *The Tigress* (1863) 32 L.J. Adm. 102.
- 1461 Sales of Goods Act s.44 (see above, para.46-327). Other remedies of the seller may include an injunction: *Schotmans v Lancs and Yorks Ry* (1867) L.R. 2 Ch. App. 332,

340; or Admiralty proceedings if the goods are in the possession of a shipowner: *The Tigress*, above (a proceeding by the seller to recover, by arrest of the ship, damages for refusal to deliver goods to him).

1462 *Berndtson v Strang (1868) L.R. 3 Ch. App. 588, 591*. See also *Latham v Chartered Bank of India (1873) 17 Eq. 205, 216*. cf. *Phelps, Stokes Co v Comber (1885) 29 Ch. D. 813*. cf. also *Northern Grain Co v Wiffler (1918) 223 N.Y. 169* (where the carrier has sold the goods to meet his freight charges, the unpaid seller's right of stoppage can attach to the balance of the proceeds of the sale).

1463 See below, para.46-345.

(iii) - Sub-sales and Other Subsequent Transactions

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(a) - Rights of Unpaid Seller against the Goods

(iii) - Sub-sales and Other Subsequent Transactions

Sub-sale by buyer

46-340 Section 47(1) of the Act provides:

“Subject to this Act,¹⁴⁶⁴ the unpaid seller’s right of lien or retention or stoppage in transit is not affected by any sale or other disposition of the goods¹⁴⁶⁵ which the buyer may have made, unless the seller has assented to it.”

Thus, the fact that the seller knows of a sub-sale, or knows that the sub-buyer has paid the buyer, will not deprive the seller of his lien,¹⁴⁶⁶ nor can such knowledge be used to found an estoppel, so as to prevent the seller from setting up his lien.¹⁴⁶⁷ (The important exception to subs.(1) is found in subs.(2), which concerns the transfer of a document of title.¹⁴⁶⁸) But the “assent” of the seller to the sub-sale will prevent his remedy by way of lien or stoppage.¹⁴⁶⁹ In one case before the 1893 Act,¹⁴⁷⁰ the sellers were held to have assented to the buyers dealing with the goods, because the sellers had issued to the buyers a warrant which was (by custom) treated as a representation that the goods were free from any seller’s lien. But in a case¹⁴⁷¹ interpreting s.47 of the 1893 Act, it was held that:

“... the assent which affects the unpaid seller’s right of lien must be such an assent as in the circumstances shews that the seller intends to renounce his rights against the goods.¹⁴⁷² It is not enough to shew that the fact of a sub-contract has been brought to

his notice and that he has assented to it merely in the sense of acknowledging the receipt of the information ...”

Example of “assent”

- 46-341 In another case,¹⁴⁷³ the sellers were held to have “assented” to the sub-sale, and thus to have lost their lien: the sellers sold cartons in the possession of a wharfinger to the buyer for resale to two of the buyer’s customers and agreed with the buyer that the price should be paid by the buyer out of the money received from the sub-sales. The sellers made out delivery orders in favour of the buyer, who sold some of the cartons to a sub-buyer and gave him a delivery order. The sub-buyer paid the buyer but the buyer failed to pay the original sellers. The court held that the sellers had “assented” to the sub-sale “in the sense that they intended to renounce their rights against the goods and to take the risk of [the buyer’s] honesty”.¹⁴⁷⁴

Attornment

- 46-342 Attornment¹⁴⁷⁵ obviously comes within “assent”, as where the unpaid seller who retains possession of the goods attorns to the sub-buyer, by acknowledging to the sub-buyer that he holds the goods on behalf of the sub-buyer, or to his order.¹⁴⁷⁶ The same principle applies where the seller accepts a delivery order in favour of a sub-buyer in respect of a certain quantity of goods held in bulk in his warehouse: the seller is estopped from denying the sub-buyer’s title (vis-à-vis himself¹⁴⁷⁷) despite the fact that a specific part of the bulk has not been appropriated to the sub-buyer.¹⁴⁷⁸

Transfer of document of title

- 46-343 It is provided by s.47(2):

“Where a document of title¹⁴⁷⁹ to goods has been lawfully transferred¹⁴⁸⁰ to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith¹⁴⁸¹ and for valuable consideration, then—

(a)if the last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transit is defeated; and

(b)if the last-mentioned transfer was made by way of pledge¹⁴⁸² or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transit can only be exercised subject to the rights of the transferee.”¹⁴⁸³

The person who transfers the document of title to the buyer may himself create the document (e.g. a delivery order); it is therefore unnecessary that he should have received it from a third person before he can “transfer” it within the meaning of subs.(2).¹⁴⁸⁴ So when sellers gave a delivery order to a buyer for part of a consignment of seed, and the buyer indorsed the order to sub-buyers who took in good faith and for value, it was held that the order was a document of title whose transfer terminated the seller's right to a lien.¹⁴⁸⁵ It has been said obiter that the words of subs.(2) confine it to cases where a document of title is transferred to the buyer and the same document is then transferred to the sub-buyer or transferee.¹⁴⁸⁶ Thus, where the original seller gave delivery orders to the buyer, who (instead of indorsing them over to the sub-buyer) sent them to the warehouseman and gave fresh delivery orders to the sub-buyer, the latter was not protected by the subsection.¹⁴⁸⁷

Indorsement of a bill of lading by the buyer to a third party

46-344 Section 47(2) expressly covers pledges of a document of title. Before the *1893 Act*, it was held that where a bill of lading for goods in transit had been indorsed by the buyer to a third person to secure a loan to the buyer, the unpaid seller had a claim in equity to stop the goods, subject to the mortgage: subject to repayment of the loan, the seller had a right to the surplus of the proceeds of the goods in preference to the general creditors of the buyer.¹⁴⁸⁸

“The unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee ... enabled the unpaid vendor in equity to stop in transit everything which was not covered by that pledge.”¹⁴⁸⁹

Stoppage in respect of price payable under sub-sale

46-345 A principle similar to that applied in the pledge cases has been applied in *Ex p. Golding Davis Co Ltd*,¹⁴⁹⁰ where a buyer resold the goods while the transit continued, but the sub-buyer had not yet paid the price under the sub-sale. On the ground that the seller has an equitable right to stop the goods in transit “except in so far as it is necessary to give effect to interests which other persons

have acquired for value”,¹⁴⁹¹ the Court of Appeal allowed the seller (who had given notice of stoppage before the transit ended) to intercept the unpaid purchase price due from the sub-buyer and to take from it the full price due to him as original seller, leaving only the balance to the buyer.¹⁴⁹² It is very doubtful whether this remedy should be allowed after the transit has ended, but before the price due under the sub-sale has been actually paid by the sub-buyer to the buyer.¹⁴⁹³ A special term in the contract may, however, purport to entitle the seller to “trace” and recover the proceeds of sub-sales made by the buyer.¹⁴⁹⁴

Footnotes

- 1464 s.25 (see above, paras 46-220—46-231); s.47(2).
- 1465 A sale of unascertained goods is within the section: *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* [1960] 1 Q.B. 159, 167–168.
- 1466 *McEwan and Sons v Smith* (1849) 2 H.L. Cas. 309.
- 1467 *Poulton and Sons v Anglo-American Oil Co Ltd* (1910) 27 T.L.R. 38, 39.
- 1468 See below, paras 46-343—46-344. In the 1893 Act, the provision now contained in s.47(2) was the proviso to s.47, and is referred to as such in the cases.
- 1469 The previous law was to the same effect: Blackburn, Sale, 1st edn, p.271; *Stoveld v Hughes* (1811) 14 East 308; *Pearson v Dawson* (1858) El. Bl. & El. 448; *Merchant Banking Co v Phoenix Bessemer Steel Co* (1877) 5 Ch. D. 205.
- 1470 *Merchant Banking Co v Phoenix Bessemer Steel Co* (1877) 5 Ch. D. 205.
- 1471 *Mordaunt Bros v British Oil and Cake Mills Ltd* [1910] 2 K.B. 502, 507.
- 1472 Or an intention “that the sub-contract shall be carried out irrespective of the terms of the original contract”: [1910] 2 K.B. 502, 507.
- 1473 *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* [1960] 1 Q.B. 159.
- 1474 [1960] 1 Q.B. 159 at 167. (The assent was given in anticipation of the sub-sale.)
- 1475 See above, para.35-030.
- 1476 And without notice to the sub-buyer of his claim to a lien (or to a contingent lien) over the goods in respect of the unpaid price: *Pearson v Dawson* (1858) El. Bl. & El. 448. cf. *Hawes v Watson* (1824) 2 B. & C. 540 (attornment by seller’s warehouseman).
- 1477 The seller may, however, defend a claim by reference to a third party who has a better title than himself: see s.8 of the Torts (Interference with Goods) Act 1977 (see above, paras 35-015—35-018).
- 1478 *Woodley v Coventry* (1863) 2 H. & C. 164; *Knights v Wiffen* (1870) L.R. 5 Q.B. 660. (On the passing of property in part of a larger bulk, see above, paras 46-160 et seq.)
- 1479 See above, para.46-015.
- 1480 On the meaning of “lawfully transferred”, see s.61(1) (“delivery”) (see above, paras 46-015, 46-236 et seq.) and s.11 of the Factors Act 1889. (These two provisions must be read together: *Cahn and Mayer v Pockett’s Bristol Channel Steam Packet Co Ltd* [1899] 1 Q.B. 643, 665.)
- 1481 On the meaning of “good faith” see s.61(3), above, para.46-016.

- 1482 See above, paras 35-121 et seq.
- 1483 The corresponding provision in the 1893 Act was “the proviso to section 47”, and is referred to as such in the reported cases (s.10 of the Factors Act 1889 has a similar effect).
- 1484 *Ant Jurgens Margarinefabrieken v Louis Dreyfus Co* [1914] 3 K.B. 40.
- 1485 *Ant Jurgens Margarinefabrieken v Louis Dreyfus Co* [1914] 3 K.B. 40. The document of title need not be one in respect of specific goods: [1914] 3 K.B. 40, 45; *Capital and Counties Bank Ltd v Warriner* (1896) 1 Com. Cas. 314. (But on this point, see Nicol (1979) 42 M.L.R. 129.)
- 1486 *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* [1960] 1 Q.B. 159, 168.
- 1487 *DF Mount Ltd v Jay and Jay (Provisions) Co Ltd* [1960] 1 Q.B. 159, 168. But s.25 overlaps with s.47(2), and is not limited to cases where the buyer transfers the same document as that which is in his possession with the consent of the seller: [1960] 1 Q.B. 159, 169. (See above, paras 46-218 et seq.) For a critical review of this decision, see *Borrie* (1960) 23 M.L.R. 100.
- 1488 *Kemp v Falk* (1882) 7 App. Cas. 573, 576–577 (upholding *Re Westzinthus* (1833) 5 B. & Ad. 817; and *Spalding v Ruding* (1843) 6 Beav. 376; affirmed (1846) 15 L.J. Ch. 375).
- 1489 *Kemp v Falk*, above, at 582.
- 1490 (1880) 13 Ch. D. 628.
- 1491 (1880) 13 Ch. D. 628 at 638.
- 1492 This could simply be a novel way of implementing a valid stoppage: Benjamin’s Sale of Goods, 11th edn (2021), para.15-100.
- 1493 The Court of Appeal was ready to allow it in *Ex p. Falk* (1880) 14 Ch. D. 446, but it was seriously doubted in the House of Lords in the same case: *Kemp v Falk* (1882) 7 App. Cas. 573, 577–578 (the appeal turned on a different point). See Benjamin’s Sale of Goods, para.15-100, and cf. see above, paras 46-340—46-341.
- 1494 On such retention of title clauses, see above, paras 46-173 et seq. (On tracing orders, see Vol.I, paras 32-176 et seq.)

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Contract not rescinded by exercise of lien or stoppage

⁴⁶⁻³⁴⁶ Section 48(1) provides ¹⁴⁹⁵:

“Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller ¹⁴⁹⁶ of his right of lien or retention or stoppage in transit.”

The seller may terminate ¹⁴⁹⁷ further performance of the contract only by taking further steps. ¹⁴⁹⁸ The important effect of s.48(1) is that where the property in the goods has passed to the buyer, the exercise of the lien or of the right of stoppage does not in itself revest the property in the seller; the property is revested in the seller only when he validly terminates the contract, by reselling or otherwise. ¹⁴⁹⁹

Power of the seller to pass a good title to a second buyer

⁴⁶⁻³⁴⁷ The seller has the power to transfer a good title to the goods to a second buyer in several situations, in some of which he does not have, as against the original buyer, the right to resell the goods. ¹⁵⁰⁰ In a resale, the seller has such a power to pass to a second buyer a good title to the goods:

(1)when, at the time of the resale, he has the property in the goods¹⁵⁰¹: as owner, the seller can transfer a good title to a new buyer under a second contract of sale¹⁵⁰²;

(2)under s.24, discussed above¹⁵⁰³;

(3)even where the property in the goods has passed to the original buyer, the seller has power, by reselling, to pass a good title to a second buyer where he has exercised his right of lien or of stoppage in transit. This is provided by s.48(2): “Where an unpaid seller who has exercised his right of lien or retention or stoppage in transit resells the goods, the buyer acquires a good title to them as against the original buyer”. The effect of the subsection¹⁵⁰⁴ is that the title of the second buyer is good as against the original buyer,¹⁵⁰⁵ whether or not the seller, as against the original buyer, has a right of resale.¹⁵⁰⁶

Right to resell

46-348 The seller has the right to resell (viz the power to transfer a good title in the goods to a second buyer, but without committing any breach of his contract with, or any tort against the original buyer) in the following situations¹⁵⁰⁷:

(1)where he has in the original contract expressly reserved a right to do so¹⁵⁰⁸;

(2)in the two situations specified in s.48(3)¹⁵⁰⁹;

(3)where the buyer repudiates his obligations under the contract or commits a fundamental breach. The seller is entitled at common law to terminate the contract and to deal with the goods as their owner¹⁵¹⁰;

(4)(possibly) where the seller can act as an “agent of necessity” on behalf of the buyer.¹⁵¹¹

Repudiation or fundamental breach by the buyer

46-349 If the buyer repudiates his obligations under the contract,¹⁵¹² the seller is entitled¹⁵¹³ to accept the repudiation, viz to treat the contract as terminated and to deal with the goods as their owner.¹⁵¹⁴ The buyer will be treated as having repudiated the contract if he becomes insolvent, and informs the seller of his insolvency in circumstances which show that he is unable or unwilling to pay the price of the goods.¹⁵¹⁵ But a mere declaration of insolvency by a party to a contract will not, on its own,¹⁵¹⁶ amount to a repudiation of his obligations, since he may still intend to perform and have a reasonable expectation of his ability in the future to do so.¹⁵¹⁷ On similar principles the seller is entitled¹⁵¹⁸ to terminate the contract where the buyer has committed a fundamental breach of his

contractual obligations.¹⁵¹⁹ In a contract in which the buyer undertakes other important obligations in addition to payment of the price, the seller may terminate the contract on the ground of the buyer's breach of one of these obligations, despite the fact that the buyer has paid the price.¹⁵²⁰ The result is that, as from the time of the termination, he is released from any obligation to perform his remaining contractual duties.¹⁵²¹ The seller can no longer sue the buyer for the price,¹⁵²² but the contract remains alive for the purpose of assessing the seller's right of action for damages for the buyer's breach,¹⁵²³ and for purposes incidental thereto.¹⁵²⁴

Seller's remedies after termination

- 46-350 A New Zealand case¹⁵²⁵ deals with the common law rights of the seller of goods to resell following his termination of the contract on the ground of the buyer's repudiation or fundamental breach.¹⁵²⁶ Where a contract for the sale of land is validly terminated by the vendor on account of the purchaser's repudiation or default in completion, the vendor is entitled to deal with the property as owner and to resell¹⁵²⁷; he may retain the whole of the proceeds of the resale (even when he sells at a higher price¹⁵²⁸) and either: (a) claim from the original purchaser any difference between the original price and that under the resale,¹⁵²⁹ after giving credit for any deposit paid; or (b) keep the deposit.¹⁵³⁰ The New Zealand case¹⁵³¹ holds that exactly the same principles apply to the seller's termination of a contract for the sale of goods: that at common law the seller's acceptance of the buyer's repudiation revests the property in the seller¹⁵³² so that he can resell as owner,¹⁵³³ keep the whole proceeds of the resale and either forfeit the deposit¹⁵³⁴ paid by the buyer or sue for damages for any net deficiency after giving credit for the deposit paid.¹⁵³⁵

Where the seller retains property in the goods

- 46-351 If the seller is to exercise his common law power to resell, in terms of the preceding paragraphs, he will usually need to obtain possession of the goods. In two English cases where the goods had been delivered to the buyer but the property in them remained with the unpaid seller, it was held that a seizure of them by the seller operated as a "rescission" or termination of the contract and that this applied even where the seizure was made under an express power in the contract to do so upon the buyer's default.¹⁵³⁶ Where the contract confers no power to retake the goods, the unpaid seller who retains the property may be entitled to retake them from the buyer, by analogy with the position on contracts for the sale of land¹⁵³⁷: where the purchaser has been let into possession of land pending completion, and he commits a breach of contract entitling the vendor to terminate the contract, the vendor who chooses to terminate is entitled¹⁵³⁸ to be reinstated in possession of

the land¹⁵³⁹; the vendor resumes his position as full owner, and may therefore resell.¹⁵⁴⁰ Where the seller cannot himself retake the goods he may seek specific restitution of the goods by bringing proceedings for wrongful interference with them.¹⁵⁴¹

Where the buyer has property in the goods

46-352 However, it is submitted that the seller cannot lawfully retake (or obtain an order for specific restitution of) the goods, where, following the contract of sale, the buyer has both possession of, and the property in, the goods¹⁵⁴²; any retaking of the goods by the seller in these circumstances would (except in cases of fraud or misrepresentation) be a conversion against the buyer.¹⁵⁴³ In the cases which support this proposition, the seller did not purport, prior to the retaking, to terminate the contract of sale on the ground of the buyer's repudiation or fundamental breach, but it is submitted that this would not have altered the position¹⁵⁴⁴: the assumption behind these cases is that, once the seller has lost both his possession and his right to stoppage in transit, and has transferred the property in the goods to the buyer, he has no remedy against the goods themselves¹⁵⁴⁵ and his only remedy is a claim for the price or for damages under the contract.¹⁵⁴⁶ This submission is made despite¹⁵⁴⁷ the fact that, in two other apparently similar situations, the property in the goods will revest in the seller, namely, when the buyer validly rejects the goods,¹⁵⁴⁸ or the seller or buyer "rescinds"¹⁵⁴⁹ the contract on the ground that the other's misrepresentation induced him to enter the contract.¹⁵⁵⁰ Where a contract of sale of goods is voidable by the seller for the fraud of the buyer, a retaking of the goods by the seller without the knowledge of the buyer (but before a resale to an innocent sub-buyer) rescinds the contract and revests the property in the goods in the seller¹⁵⁵¹: the retaking is treated as an unequivocal act of election to rescind the contract.¹⁵⁵²

Statutory right of resale

46-353 Section 48(3) provides that:

"Where the goods are of a perishable nature, or where the unpaid seller¹⁵⁵³ 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."¹⁵⁵⁴

Under his common law rights¹⁵⁵⁵ the seller may terminate the contract and keep the goods for his own use; he may also be entitled to terminate for a breach other than a failure to pay the price. The assumption behind the part of s.48(3) dealing with perishable goods is that the seller retains possession of the perishable goods and is only willing (and contractually obliged) to deliver the goods to the buyer in return for contemporaneous payment.¹⁵⁵⁶ Goods will be “perishable” within the meaning of the subsection when they are likely to deteriorate physically as time elapses,¹⁵⁵⁷ and also, it is submitted, when they are likely to change in a commercial sense,¹⁵⁵⁸ viz when “it is not dealt with by business people as the thing which it originally was”.¹⁵⁵⁹ Although it has been argued¹⁵⁶⁰ that for the resale of perishable goods the further condition set out in s.48(3) applies, viz “and the buyer does not within a reasonable time pay or tender the price”, it is submitted that the better view is that this condition is inapplicable. Benjamin submits¹⁵⁶¹ that it could be the purpose of the subsection, in the case of a contract relating to perishable goods, to make time of the essence of the contract,¹⁵⁶² at least when payment and delivery were concurrent conditions,¹⁵⁶³ so that, upon the buyer’s failure to pay on the stipulated date, the seller is immediately entitled to resell.¹⁵⁶⁴

Resale upon giving notice to the buyer

- 46-354 The second aspect of s.48(3) applies irrespective of the nature of the goods: it enables the unpaid seller, by giving notice, to make payment within a reasonable time¹⁵⁶⁵ thereafter to be of the essence of the contract,¹⁵⁶⁶ so that failure to pay within a reasonable time after notice will entitle the seller to treat the contract as repudiated: he can then terminate the original contract and resell the goods.¹⁵⁶⁷

The seller’s power of resale when he is out of possession

- 46-355 There are a number of judicial statements which assume that the unpaid seller’s statutory power of resale under s.48(3) may be validly exercised only where the seller is in possession of the goods at the time of the resale.¹⁵⁶⁸ But it is submitted that a seller has the right and the power to pass a good title to a second buyer under a resale, not only at common law,¹⁵⁶⁹ but also under s.48(3) where, at the time of the resale, he has: (a) the property in the goods¹⁵⁷⁰; or (b) possession of the goods¹⁵⁷¹; or (c) the immediate right to possession as against the original buyer.¹⁵⁷²

Resale terminates the original contract

- 46-356 Although s.48(3) does not expressly provide that the original contract is terminated by the resale,¹⁵⁷³ the Court of Appeal has decided that, by exercising the statutory right of resale under the subsection, the seller thereby “rescinds” or terminates the original contract but may sue the original buyer for damages.¹⁵⁷⁴ The result¹⁵⁷⁵ of this interpretation of subs.(3) is that the seller who resells under s.48 cannot thereafter sue the buyer for the original price (even though he is willing to give the buyer credit against the price for the net proceeds of the resale); the seller is relegated by the subsection to his claim for damages for non-acceptance under s.50.¹⁵⁷⁶ The practical result is that the seller is not accountable to the buyer for any profit above the original contract price which he makes on the resale; nor has the buyer a right of action against a seller who does not act with reasonable care in making the resale.¹⁵⁷⁷

Express reservation of the right of resale

- 46-357 Section 48(4) of the Act provides:

“Where the seller expressly¹⁵⁷⁸ reserves the right of resale in case the buyer should make default,¹⁵⁷⁹ and on the buyer making default resells the goods, the original contract of sale is rescinded¹⁵⁸⁰ but without prejudice to any claim the seller may have for damages.”¹⁵⁸¹

Since the original contract is terminated, the seller is entitled to retain any profit which he may make on the resale above the price in the original contract. If, however, the seller can resell only at a loss, the original buyer is, by this subsection, liable to pay damages, viz the amount by which the contract price exceeds the resale price, and the expenses of the resale.¹⁵⁸²

Express reservation not exclusive remedy

- 46-358 Where the contract confers an express right of resale or of repurchase on the innocent party, following a default by the other party, the former may pursue his ordinary remedies at common law without complying with the terms of the special remedy conferred by the contract.¹⁵⁸³ It is submitted that, in the same way, the seller could exercise his statutory right of resale under s.48(3) without relying on his contractual right to resell.¹⁵⁸⁴

The method of reselling

- 46-359 Neither the Act nor the common law provides authority on the question of the method of exercising the seller's right to resell. It therefore seems that the seller is free to sell to anyone he chooses and that he is under no restriction as to the price he obtains, or whether the sale is by public auction or made privately, without advertisement. He is under no obligation to the buyer to act reasonably in deciding whether or not to resell; but if he acts unreasonably the rules of mitigation may limit the damages which he can recover from the original buyer following the resale.

Forfeiture of deposits

- 46-360 Whether the seller resells under his common law rights, under his statutory right, or under an express power, it is submitted that the same rules apply to the forfeiture of deposits¹⁵⁸⁵ or other prepayments made by the buyer. The seller is bound to bring the deposit into account if he sues the buyer for damages, since he cannot allege a net deficiency without taking the deposit into account.¹⁵⁸⁶ If, however, the seller makes no claim for damages under the original contract, he is entitled to keep all the proceeds of the resale and to forfeit the deposit¹⁵⁸⁷ paid by the defaulting original buyer.¹⁵⁸⁸ (The rules applicable to a clause "forfeiting" sums already paid by the buyer under a contract for payment of the price by instalments are discussed elsewhere.¹⁵⁸⁹)

Footnotes

- 1495 For a suggestion as to the purpose of s.48(1), see *RV Ward Ltd v Bignall [1967] 1 Q.B. 534, 549*.
- 1496 See above, para.46-312.
- 1497 s.48(1) uses the term "rescinded" (as does s.48(4)) but the more usual terms now are "terminate" or "treat the contract as discharged".
- 1498 e.g. reselling under s.48(3) (see below, para.46-348).
- 1499 See below, paras 46-348—46-351.
- 1500 The seller will be liable in damages to the original buyer for breach of contract (and in tort, if the property in the goods has passed to the original buyer).
- 1501 This situation is not mentioned in s.48, but it is implicit in it: Benjamin at para.15-102; *RV Ward Ltd v Bignall [1967] 1 Q.B. 534, 545*.
- 1502 *Lickbarrow v Mason (1793) 6 East 21, 24, 25; Wait v Baker (1848) 2 Exch. 1.*

- 1503 See above, paras 46-214 et seq. For a comparison of the statutory powers of resale ([s.24](#) and [s.48\(2\)](#), see below) see Benjamin's Sale of Goods, 11th edn (2021), para.15-103.
- 1504 The subsection assumes that the seller who has, in the past, validly exercised his right of lien or stoppage, continues in possession, with the right to possession as against the original buyer, up to the time of the resale: see Benjamin at para.15-102.
- 1505 Who therefore could not sue the second buyer for trespass, or conversion. The limitation in the subsection "as against the original buyer" is included because the original seller's own title to the goods may be inferior to that of a third party. cf. see above, paras 35-015—35-017.
- 1506 *R. v Ward Ltd v Bignall [1967] 1 Q.B. 534, 549*. The seller will be liable in damages to the original buyer if he had no right to resell: *Bloxam v Sanders (1825) 4 B. & C. 941, 949*. (On the possibility of the original buyer claiming the difference between the higher resale price and the original price, on a principle analogous to "waiver of tort", see Benjamin at para.15-104.)
- 1507 Where there is a contract to sell unascertained or future goods by description, but the seller has not yet assumed any obligation to deliver particular goods, he is entitled to deal as owner with any goods of his which happen to meet the description.
- 1508 [1979 Act s.48\(4\)](#): (see below, para.46-357).
- 1509 See below, para.46-353.
- 1510 See below, paras 46-349—46-351.
- 1511 See Vol.I, paras 21-038, 32-146; Benjamin's Sale of Goods, 11th edn (2021), para.15-106. cf. *Prager v Blatspiel, Stamp and Heacock Ltd [1924] 1 K.B. 566*.
- 1512 See Vol.I, paras 27-048—27-049. The buyer must show by his actions, or his failure to fulfil his obligations, that he intended to abandon the contract, e.g. *Bloomer v Bernstein (1874) L.R. 9 C.P. 588*. cf. [s.31\(2\)](#) (see above, paras 46-263—46-266).
- 1513 But not obliged: he has the option of either affirming the contract, or of treating it as discharged in the sense of refusing further performance: *Mersey Steel and Iron Co Ltd v Naylor, Benson Co (1884) 9 App. Cas. 434, 440*; *Michael v Hart Co [1902] 1 K.B. 482, 490*. On the general principle, see *White and Carter (Councils) Ltd v McGregor [1962] A.C. 413*; Vol.I, paras 27-048 et seq.
- 1514 *Cornwall v Henson [1900] 2 Ch. 298* (a contract for the sale of land). See below, paras 46-350, 46-351, 46-352.
- 1515 *Re Phoenix Bessemer Steel Co (1876) 4 Ch. D. 108*; *Ex p. Stapleton (1879) 10 Ch. D. 586*; *Morgan v Bain (1874) L.R. 10 C.P. 15*; *Mess v Duffus (1901) 6 Com. Cas. 165*. See above, para.46-314.
- 1516 A special term in the contract may entitle the other party to rescind or terminate the contract upon the occurrence of such an event, e.g. suspension of payment: *Shipton, Anderson Co (1927) Ltd v Micks, Lambert Co [1936] 2 All E.R. 1032*.
- 1517 *Mess v Duffus (1901) 6 Com. Cas. 165*.
- 1518 But, as with a buyer, not obliged.
- 1519 See Vol.I, paras 27-001 et seq. See [s.10\(1\)](#) and [\(2\)](#) (see above, para.46-128) and cf. [s.11](#) (see above, para.46-056) and [s.53\(1\)](#) (see below, para.46-418). The power to terminate

- is implied by s.50(3) (see below, para.46-015) see Benjamin's Sale of Goods, 11th edn (2021), para.15-109.
- 1520 If the price has been paid, s.48(3) (see below, para.46-353) is not applicable.
- 1521 *Honck v Muller* (1881) 7 Q.B.D. 92; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch. D. 339, 364–365; *Heyman v Darwins Ltd* [1942] A.C. 356, 399. See Vol.I, para.27-005.
- 1522 *Chinery v Viall* (1860) 5 H. & N. 288. See below, paras 46-356 et seq.
- 1523 *Michael v Hart Co* [1902] 1 K.B. 482 at 490; *Johnstone v Milling* (1886) 16 Q.B.D. 460, 467; *Moschi v Lep Air Services Ltd* [1973] A.C. 331; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; cf. *Johnson v Agnew* [1980] A.C. 367.
- 1524 e.g. an arbitration clause: *Heyman v Darwins Ltd* [1942] A.C. 356. See Vol.I, para.27-078.
- 1525 *Commission Car Sales (Hastings) Ltd v Saul* [1957] N.Z.L.R. 144.
- 1526 It is submitted that it would be too late for the seller to purport to terminate the original contract if the buyer had already transferred the property in the goods to a third person. cf. s.23 (see above, paras 46-208—46-213).
- 1527 *Cornwall v Henson* [1900] 2 Ch. 298 (vendor held not entitled to terminate the contract).
- 1528 *Ex p. Hunter* (1801) 6 Ves. Jr. 94, 97.
- 1529 *Noble v Edwards* (1877) 5 Ch. D. 378, 385 (*appeal allowed on a different point*: (1877) 5 Ch. D. at 393–394).
- 1530 *Howe v Smith* (1884) 27 Ch. D. 89, 104–105 (vendor remained in possession). On the forfeiture of deposits, see below, para.46-360; Vol.I, paras 29-259—29-270.
- 1531 *Commission Car Sales (Hastings) Ltd v Saul* [1957] N.Z.L.R. 144 (following *Howe v Smith* (1884) 27 Ch. D. 89).
- 1532 See Benjamin's Sale of Goods, 11th edn (2021), para.15-113.
- 1533 This position is accepted (without discussion) by the judge in *Compagnie de Renflouement, etc. v W Seymour Plant Sales Hire Ltd* [1981] 2 Lloyd's Rep. 466, 482. As owner the unpaid seller may, of course, keep the goods for his own use instead of reselling.
- 1534 On the difference between a deposit and a part payment of the price, see *Reid Motors Ltd v Wood* [1978] 1 N.Z.L.R. 319, 325, 329.
- 1535 *Commission Car Sales (Hastings) Ltd v Saul* [1957] N.Z.L.R. 144 at 146. An earlier Canadian case is to the same effect: *McCowan v Bowles* [1923] 3 D.L.R. 756. cf. *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111, 118–119, 122 (retention of title clause on which see above, paras 46-173—46-188). cf. also *Armour v Thyssen Edelstahlwerke AG* [1991] 2 A.C. 339, 353.
- 1536 *Hewison v Rickets* (1894) 63 L.J. Q.B. 711; *Att-Gen v Pritchard* (1928) 97 L.J. K.B. 561. The situation is different in the case of a contract to let out goods on hire, with only an option to purchase: *Brooks v Beirnstein* [1909] 1 K.B. 98.
- 1537 See Benjamin at para.15-115. cf. *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111. But in *Keetley v Quinton Pty Ltd* (1991) 4 W.A.R. 133 it was held that the seller was not

- entitled to retake the goods in these circumstances (unless there was express power to do so conferred by the contract).
- 1538 In equity (see the cases in the following footnote) or at law: Williams on Vendor and Purchaser, 4th edn, pp.1004–1005.
- 1539 *Clark v Wallis* (1866) 35 Beav. 460. cf. *King v King* (1833) 1 My. K. 442; *Hope v Hope* (1856) 22 Beav. 351, 365. See Williams at pp.1004-1005, 1009. cf. also Misrepresentation Act 1967 s.1(b) (see Vol.I, para.9-152).
- 1540 cf. *Howe v Smith* (1884) 27 Ch. D. 89, 105 (vendor remained in possession).
- 1541 Under s.3(2)(a) of the Torts (Interference with Goods) Act 1977 the court may make an order for delivery of the goods which does not give the defendant the alternative of retaining them on payment of their value as assessed by the court. See Benjamin at para.15-116. See CPR Pt 45 para.4(1). cf. s.52 (see below, paras 46-448—46-452).
- 1542 Benjamin at para.15-117. cf. retention of title clauses (on which see above, paras 46-173 —46-188, above).
- 1543 *Page v Cowasjee Eduljee* (1866) L.R. 1 P.C. 127 (see below, para.46-456). See also *Stephens v Wilkinson* (1831) 2 B. A. 320, 327; *Gillard v Brittan* (1841) 8 M. & W. 575; *Re Humbertson* (1846) De G. 262. The seller's seizure may also be a breach of s.12(2) (b) (see above, para.46-076): *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 42 A.L.J.R. 280.
- 1544 See the dicta in *Page v Cowasjee Eduljee* (1866) L.R. 1 P.C. 127, 145. cf. *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 Q.B. 210 (voluntary transfer of title back to the seller).
- 1545 It is implicit in the decision in *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 42 A.L.J.R. 280, that the seller cannot enforce his right to the price by seizing the goods from a buyer who has both the property in, and possession of the goods.
- 1546 Otherwise the statutory restrictions on the real remedies of lien and stoppage could easily be evaded. cf. s.11(4) which might provide an analogy (see above, para.46-068). An express power in the contract might entitle the seller to retake or to resell in these circumstances: *Bines v Sankey* [1958] N.Z.L.R. 886 (but the Bills of Sale Act 1878 might then apply).
- 1547 See Benjamin's Sale of Goods, 11th edn (2021), para.15-118.
- 1548 *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459, 487; *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 W.L.R. 1126, 1130. See above, para.46-281. It could be argued, however, that rejection is a voluntary and deliberate act by the then owner (the buyer).
- 1549 This use of this word has different consequences in the context of misrepresentation from those when the contract is “rescinded” in the sense of terminated by the innocent party upon the other party's repudiation or fundamental breach.
- 1550 See Vol.I, paras 9-120 et seq. See especially s.1(b) of the Misrepresentation Act 1967 (see Vol.I, para.9-152).
- 1551 *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525, 551, 554, 558 (the analogy with termination for breach (“repudiation”) was not accepted by the Lords Justices in another respect: at 550, 556, 559); *Newtons of Wembley Ltd v Williams*

- [1965] 1 Q.B. 560, 571. The difference is discussed by Beale, Remedies for Breach of Contract (1980), pp.117–118.
- 1552 *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525.
- 1553 For definition, see above, para.46-312. (The seller is “unpaid” when only part of the price has been paid. cf. on severable contracts: see above, paras 46-263, 46-287; Vol.I, paras 24-026, 24-036.)
- 1554 This subsection confers a *right* (as against the original buyer) to resell, whereas s.48(2) conferred a *power* to confer a good title. cf. s.12(1) (see above, paras 46-075 et seq.).
- 1555 See above, paras 46-349—46-352.
- 1556 See s.28 (see above, para.46-237).
- 1557 e.g. potatoes are “a perishable commodity” in the sense that if they are held too long they become rotten: *Sharp v Christmas* (1892) 8 T.L.R. 687, 688. cf. the discussion of the meaning of the word “perish” in ss.6 and 7 (see above, paras 46-045—46-050). cf. on the concept of the goods having changed in nature in a commercial sense: *Asfar Co v Blundell* [1896] 1 Q.B. 123; *Duthie v Hilton* (1868) L.R. 4 C.P. 138 (cement, after being submerged, had ceased to be “cement”); *Dakin v Oxley* (1864) 15 C.B.(N.S.) 646 (entitlement of carrier to freight when goods are delivered in a damaged state). *Asfar & Co v Blundell*, above, at 128. An example would be a souvenir designed for sale on one specific occasion.
- 1560 Sutton, Sales and Consumer Law, 4th edn, p.620.
- 1561 Benjamin’s Sale of Goods, 11th edn (2021), para.15-122.
- 1562 See Vol.I, paras 24-012—24-036. cf. a case before the Act: *Sharp v Christmas* (1892) 8 T.L.R. 687, 688, where the time for the buyer to take delivery of potatoes (“a perishable commodity”) was held to be of the essence of the contract.
- 1563 See s.28 (see above, para.46-237).
- 1564 cf. the power to sell any perishable goods in a bankrupt’s estate: *Insolvency Act 1986* s.287(2)(b).
- 1565 This is a question of fact: s.59. The calculation of the time runs from the date the notice is given, and the reasonableness of any time fixed by the notice will be judged as at that time: *Charles Rickards Ltd v Oppenheim* [1950] 1 K.B. 616, 624–625 (not a case on s.48(3), but on a similar common law rule). The court will also take into account any previous delay on the buyer’s part: above.
- 1566 Apart from s.48(3), a stipulation as to time of payment would not normally be of the essence: s.10(1) (see above, para.46-128).
- 1567 This is in accord with the common law: see Vol.I, paras 24-012—24-034.
- 1568 *RV Ward Ltd v Bignall* [1967] 1 Q.B. 534, 545; *Commission Car Sales (Hastings) Ltd v Saul* [1957] N.Z.L.R. 144, 146.
- 1569 See above, paras 46-349—46-352.
- 1570 See above, para.46-347. The seller may be able to retake the goods, or recover possession by bringing proceedings for wrongful interference with the goods in which he seeks an order for specific delivery of the goods.

- 1571 This is what the draftsman of [s.48\(3\)](#) had mainly in mind: cf. [s.48\(2\)](#) immediately preceding. The remedies of lien and stoppage (see above, paras [46-316](#) et seq., [46-327](#) et seq.) are aimed at giving the seller an entitlement to possession.
- 1572 There are a number of grounds on which the seller who is out of possession may be entitled to resume the right to possess them: see Benjamin's Sale of Goods, 11th edn (2021), para.15-125. So long as the buyer continues in possession of the goods, there is a risk that the buyer may transfer a good title to a third party: [s.25](#) (see above, paras [46-220](#)—[46-231](#)).
- 1573 cf. [s.48\(4\)](#).
- 1574 *RV Ward Ltd v Bignall [1967] 1 Q.B. 534*. (A resale of part of the goods has the same effect: at 550.)
- 1575 A further implication is that the termination of the contract divests the original buyer of his property in the goods if the property had passed to him before the termination: *RV Ward Ltd v Bignall*, above.
- 1576 *RV Ward Ltd v Bignall [1967] 1 Q.B. 534*. Forfeiture of any deposit paid by the buyer is a separate question: see below, para.[46-360](#).
- 1577 But if the *seller* sues for damages, it is submitted that a resale at a lower price than the seller ought reasonably to have obtained on the resale will constitute a failure to mitigate: see Vol.I, paras [29-098](#) et seq.; see below, paras [46-371](#) et seq.
- 1578 Similar rules apply where a relevant usage of trade confers a right of resale upon the seller: *Re Tait (1841) 2 Mont.D. De G. 170*.
- 1579 It is submitted in Benjamin's Sale of Goods, 11th edn (2021), para.15-129, that it would be possible for the parties to agree to an express right which arose upon an occurrence not involving the buyer's "default"; and that an express right to resell could be wider than [s.48\(4\)](#) in other ways.
- 1580 Thus the seller resells as owner, not as agent for the original buyer: *RV Ward Ltd v Bignall [1967] 1 Q.B. 534*, 551. cf. [s.48\(3\)](#), see above.
- 1581 The subsection follows the common law: *Lamond v Davall (1847) 9 Q.B. 1030*.
- 1582 See below, paras [46-385](#)—[46-386](#). The buyer is not liable to be sued for the whole of the agreed price: *Lamond v Davall*, above, at 1032. See also *Hore v Milner (1797) Peake 58n*.
- 1583 *Shipton, Anderson Co (1927) Ltd v Micks, Lambert Co [1936] 2 All E.R. 1032*. cf. the same rule for contracts for the sale of land: *Howe v Smith (1884) 27 Ch. D. 89, 105*.
- 1584 Unless the terms of the contract indicated that the contractual remedy was to be the exclusive remedy.
- 1585 "A deposit is ... a security for completion of the purchase": *Howe v Smith*, above, at 98. See Vol.I, paras [29-259](#)—[29-270](#). A "trade-in" of goods may be intended to be treated in the same way as a deposit: *Commission Car Sales (Hastings) Ltd v Saul [1957] N.Z.L.R. 144, 145*.
- 1586 [*1957] N.Z.L.R. 144* at 146.]
- 1587 The Privy Council has held, in a case on the sale of land, that a deposit must be "reasonable" in amount for the forfeiture rule to apply: *Workers Trust Merchant Bank Ltd v Dojap Investments Ltd [1993] A.C. 573* (above, para.29-263). cf. *Reid Motors*

Ltd v Wood [1978] 1 N.Z.L.R. 319, 325–329. The [Unfair Terms in Consumer Contract Regulations 1999](#) or for contracts entered into on or after 1 October 2015, the [Consumer Rights Act 2015](#) may now also apply: see above, paras [40-223](#) et seq.

- 1588 *Commission Car Sales (Hastings) Ltd v Saul*, above, at 146 (following the principles laid down in cases on contracts for the sale of land: *Ockenden v Henly (1858) E.B. & E. 485*; *Howe v Smith (1884) 27 Ch. D. 89* at 104–105; *Shuttleworth v Clews [1910] 1 Ch. 176*). cf. *Damon Compania Naviera SA v Hapag-Lloyd International SA [1985] 1 W.L.R. 435* (recovery of damages measured at the amount of unpaid deposit). See Benjamin's Sale of Goods, 11th edn (2021), paras 15-132—15-133. (It is submitted that *Gallagher v Shilcock [1949] 2 K.B. 765*, having been overruled on another (but relevant) point (see *RV Ward Ltd v Bignall [1967] 1 Q.B. 534* (see above, para. [46-356](#))) should not be followed in regard to the recovery of deposits.)
- 1589 Vol.I, paras [29-268](#)—[29-270](#). cf. see above, paras [41-346](#)—[41-348](#).

(b) - Action for the Price

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 6. - Remedies of the Seller

(b) - Action for the Price

Action for price when property has passed

46-361 Section 49(1) provides ¹⁵⁹⁰ that:

“Where, under a contract of sale, ¹⁵⁹¹ the property in the goods has passed to the buyer and he wrongfully neglects or refuses ¹⁵⁹² 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.” ¹⁵⁹³

The claim for the price is a claim for a debt, as distinct from a claim for damages. ¹⁵⁹⁴ The property may pass to the buyer before delivery of the goods to him, and before his acceptance of the goods ¹⁵⁹⁵; hence, the price may sometimes be claimed under s.49(1) even where the buyer refuses to accept the goods. ¹⁵⁹⁶ The passing of the property will depend on the terms of the contract; e.g. since under a FOB contract property does not pass before shipment, ¹⁵⁹⁷ the seller may sue for the price only after he has put the goods on board. ¹⁵⁹⁸

Action for the price where property has not passed

46-362 Where the property in the goods has not passed to the buyer, no action for the price can be brought under s.49(1), ¹⁵⁹⁹ despite the fact that it is a wrongful act of the buyer which prevents the passing of the property. ¹⁶⁰⁰ Thus, where the buyer under a FOB contract failed (in breach of his contractual

obligation) to designate an effective ship, the seller's remedy was not a claim for the price but a claim for damages for non-acceptance, because the property in the goods could not pass until the goods were actually put on board a ship.¹⁶⁰¹ There is a contrasting decision of the House of Lords in a Scottish appeal, where a machine had been delivered to the buyer, who was bound to keep and pay for it, unless it failed on a stipulated test to do specified work. The buyer neglected to put the machine to this test, but it was held that the seller could recover the price: the buyer's own failure to give it a fair test according to the contract relieved the seller of having to prove that the condition did not apply.¹⁶⁰²

Wrongful neglect or refusal to pay

- 46-363 The question whether the buyer has wrongfully¹⁶⁰³ neglected or refused to pay the price¹⁶⁰⁴ depends on his duty to pay,¹⁶⁰⁵ and this is not the same question as whether the seller is entitled to bring an action for the price, because other conditions must also be satisfied for such an action to lie in terms of either ss.49(1) or (2). Since the terms of the contract will specify when payment is due, the meaning of "wrongful" must be gathered from those terms¹⁶⁰⁶; thus, where the contract entitles the buyer to a period of credit, he will not be liable to an action for the price until that period has expired.¹⁶⁰⁷ The buyer may similarly show that his failure to pay the price is not "wrongful" where the seller has waived¹⁶⁰⁸ the time for payment fixed by the contract.

Payment to be made in special way

- 46-364 Where payment is to be made in a special way the seller cannot sue for the price as an ordinary debt.¹⁶⁰⁹ Thus, if it is agreed that the price of the goods should be an item in settlements of accounts between the parties at stated intervals, the seller can sue only by showing a settlement of accounts on which the balance is in his favour.¹⁶¹⁰

Justification for refusal to pay

- 46-365 The buyer's failure to pay the price may be justified on the ground that the seller had previously broken his contractual obligation in such a way as to disentitle him to the price, e.g. by failure to deliver, or by delivering defective goods¹⁶¹¹ or the wrong quantity. Similarly, the seller cannot claim the price from the buyer if it turns out that the seller has no title to the goods.¹⁶¹² But the buyer may be liable to pay the price if, before the goods were delivered to him, they perished

while the risk was on him.¹⁶¹³ A previous breach of contract by the seller may not, however, be sufficiently serious to relieve the buyer of his entire obligation to pay the price: in these circumstances the buyer may rely on a set-off against the seller,¹⁶¹⁴ or may bring a counterclaim for damages.

Claim for price due on “a day certain”

46-366 Section 49(2) provides that:



“Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses¹⁶¹⁵ 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.”¹⁶¹⁶

Where the goods have not been delivered to the buyer, the seller’s entitlement to sue for the price depends on his continuing ability and willingness to deliver the goods to the buyer in accordance with the contract.¹⁶¹⁷ The meaning of “a day certain” in this provision has been held to be “a time specified in the contract not depending on a future or contingent event”.¹⁶¹⁸ Thus, where the price was payable against delivery of the shipping documents,¹⁶¹⁹ the case did not fall within s.49(2).¹⁶²⁰ It is submitted¹⁶²¹ that the better view is that a day can be “certain” under s.49(2) only if it is fixed in advance by the contract in such a way that it can be determined independently of the action of either party or of any third person. If, for example, an instalment of the price becomes due when the seller has reached a specified stage in the construction of the goods, it is submitted that the instalment should not be held to be “payable on a day certain” within the meaning of this subsection.¹⁶²² It has been said that the section does not apply if the date for payment was initially fixed but subsequently has been varied to so that the payment is no longer due on “a day certain”.¹⁶²³ However, the price must also be due “irrespective of delivery”. This may not cover a case in which the price is due so many days or months after delivery, as is commonly provided in retention of title cases.

¹⁶²⁴



Action for the price outside s.49

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There are a number of judicial statements which assume that s.49, above, provides an exhaustive statement of the circumstances in which the seller may sue for the price.¹⁶²⁵ However, it is submitted that the seller should be entitled to sue for the price whenever the terms¹⁶²⁶ of the contract expressly or impliedly so provide¹⁶²⁷; and that by the terms of the contract, the time fixed for payment need not be related either to delivery or to the passing of property.¹⁶²⁸ The contract may provide that the price is to be paid before delivery is made (e.g. “net cash before delivery”) and that property is to pass only upon delivery.¹⁶²⁹ The implication of these provisions is that the price must be paid on demand or within a reasonable time,¹⁶³⁰ and thus it has been held in Australia that the seller may sue for the price, although neither subsection of s.49 applied.¹⁶³¹ But in *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd*¹⁶³² Popplewell J held that, despite the arguments made in this paragraph, the seller can bring an action for the price only in the circumstances set out in s.49; and this was affirmed by unanimously by the Court of Appeal.¹⁶³³ In *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*¹⁶³⁴ the Supreme Court held that the bunker supply contract fell outside the Sale of Goods Act and accordingly it was not necessary to decide whether an action for the price under the Act would have been maintainable in the circumstances. However, Lord Mance, delivering the unanimous judgment of the Court, said that he would have overruled the decision of the Court of Appeal in *Caterpillar* on this point. Section 49 was not a complete code of situations in which the price may be recoverable under a contract of sale. There was room for claims for the price in other circumstances, including the present case, where the bunkers remained the seller’s property but were at the buyer’s risk and where under the contract the buyer was permitted to use the goods before payment.

Claim for damages as an alternative to action for the price

- 46-368 In most cases there would in any event be a claim for damages for non-acceptance, but even if such a claim were not available, there is no reason why an inability to bring an action for the price under s.49 should prevent the seller from claiming damages for breach of the terms of the contract concerning payment.¹⁶³⁵

Claim for consequential loss in addition to the price

- 46-369 The seller may wish to claim damages in addition to his claim for the agreed price, on the ground that the buyer’s failure to pay the price at the agreed time caused consequential loss to the seller. The traditional common law rule that interest cannot be awarded by way of general damages for delay in payment of a debt has recently been abandoned and (subject to the normal rules of remoteness and mitigation) damages for loss of interest may be recovered provided the loss is pleaded and proved.¹⁶³⁶ The contract itself may provide for interest to be payable; and interest

can also be claimed under statute or statutory powers.¹⁶³⁷ The seller may also be entitled to claim damages for expenses incurred by him,¹⁶³⁸ e.g. for storage during the buyer's delay in taking delivery, or for his own "care and custody of the goods" during such delay.¹⁶³⁹

Footnotes

- 1590 This section follows the previous common law: *Scott v England* (1844) 14 L.J. Q.B. 43. See also *Studdy v Sanders* (1826) 5 B. & C. 628.
- 1591 It is submitted that any express provision of the contract should prevail over s.49 to the extent of any inconsistency: see Benjamin at para.16-002; cf. s.55, and see below, paras 46-367—46-368.
- 1592 See below, para.46-363.
- 1593 Many cases before the Act illustrate the proposition that, where there is no specific term of the contract dealing with the time when the price is to be paid, the seller cannot sue for the price until the property in the goods has passed to the buyer: *Atkinson v Bell* (1828) 8 B. & C. 277; *Boswell v Kilborn and Morrill* (1862) 15 Moo. P.C. 309. The seller may, however, obtain a declaratory judgment to the effect that the buyer is bound to pay the price upon the seller's fulfilling his obligations: see below, para.46-389. The seller cannot sue for the price if he has terminated the contract following the buyer's repudiation or fundamental breach: *Chinery v Viall* (1860) 5 H. & N. 288; *Att-Gen v Pritchard* (1928) 97 L.J. K.B. 561. See above, paras 46-349—46-352.
- 1594 For the importance of this distinction, see Vol.I, para.29-010. Where the seller claims the price, he may be awarded damages if they are his correct remedy: *Mediterranean and Eastern Export Co Ltd v Fortress Fabrics (Manchester) Ltd* [1948] 2 All E.R. 186.
- 1595 On the passing of property, see above, paras 46-130 et seq. In special circumstances, the doctrine of estoppel by conduct may operate to prevent the buyer from disputing the fact that property has passed to him: *Colley v Overseas Exporters* [1921] 3 K.B. 302, 311–312. cf. *Knights v Wiffen* (1870) L.R. 5 Q.B. 660.
- 1596 Alternatively, the seller could claim damages under s.50(1) (see below, para.46-370). To claim the price the seller must show that he continues to be able and willing to deliver the goods: *Maclean v Dunn and Watkins* (1828) 6 L.J. (O.S.) C.P. 184, 190.
- 1597 Benjamin's Sale of Goods, 11th edn (2021), para.20-152.
- 1598 *Green v Sichel* (1860) 7 C.B.(N.S.) 747; *Henderson and Glass v Radmore Co* (1922) 10 Ll.L. Rep. 727. Even after shipment, however, the seller may have reserved a right of disposal, in which case he may sue for the price only if he has waived his right of disposal (where this is possible): Benjamin at para.20-226.
- 1599 See, however, s.49(2) (see below, para.46-366).
- 1600 *Stein, Forbes Co v County Tailoring Co* (1916) 86 L.J. K.B. 448; *Colley v Overseas Exporters* [1921] 3 K.B. 302. See also *Nortier Co v Wm Maclean Sons Co* (1921) 9 Ll.L. Rep. 192. The decision of the House of Lords in *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413 (see Vol.I, paras 27-063, 29-109) may affect the rule on

- wrongful prevention of the passing of property: see Benjamin at paras 16-021—16-022, 16-059, 20-234; *White and Carter*'s case was distinguished in *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 *Lloyd's Rep.* 250, CA (charterparty case); and cf. *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 *Lloyd's Rep.* 81, 94; on appeal, [1962] 1 *Lloyd's Rep.* 610. But see *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA (The Odenfeld)* [1978] 2 *Lloyd's Rep.* 357, 372–373.
- 1601 1601 *Colley v Overseas Exporters*, above.
- 1602 1602 *Mackay v Dick* (1881) *L.R.* 6 *App. Cas.* 251 (distinguished in *Colley v Overseas Exporters*, above, at 307–308, on the ground that *Mackay v Dick* concerned a condition subsequent, a “resolutive condition” after the property had passed to the buyer).
- 1603 1603 It is normally the duty of a debtor to tender the amount due to his creditor without waiting for a demand: see Vol.I, para.24-011. On the effect of tender of the price to the seller, see Vol.I, paras 24-082 et seq.
- 1604 1604 Both s.49(1) and (2) contain this phrase. (The definition of the price is found in ss.2(1), 8 and 9.)
- 1605 1605 1979 Act ss.27 and 28 (see above, paras 46-236—46-237).
- 1606 1606 See s.10(1) (above, para.46-128).
- 1607 1607 *Ferguson v Carrington* (1829) 9 *B. & C.* 59; *Strutt v Smith* (1834) 1 *Cr. M.R.* 312.
- 1608 1608 See Vol.I, paras 25-042 et seq.
- 1609 1609 *Garey v Pyke* (1839) 10 *A. & E.* 512. cf. *Smith v Winter* (1852) 12 *C.B.* 487. On payment by negotiable instrument, see Vol.I, paras 24-072—24-080; on payment by banker's commercial credit, see above, paras 36-452 et seq.
- 1610 1610 *Garey v Pyke* (1839) 10 *A. & E.* 512.
- 1611 1611 *Wayne's Merthyr Steam Coal and Iron Co v Morewood* (1877) 46 *L.J. Q.B.* 746; *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 *K.B.* 343 (goods damaged in process of loading before property passed to the buyer).
- 1612 1612 *Dickenson v Naul* (1833) 4 *B. & Ad.* 638; *Allen v Hopkins* (1844) 13 *M. & W.* 94. (Although this decision is based also on the fact that the buyer had had to pay the value of the goods to the true owner, it is submitted that the principle need not be so limited.)
- 1613 1613 See above, paras 46-189—46-192.
- 1614 1614 See s.53(1)(a) (see below, paras 46-418 et seq.). See also s.53(4) (see below, para.46-418). cf. *Berger Co Inc v Gill Duffus SA* [1984] *A.C.* 382, 392 (see below, para.46-370).
- 1615 1615 See above, paras 46-363—46-365.
- 1616 1616 The subsection is based on *Dunlop v Grote* (1845) 2 *Car. & K.* 153 (“if the delivery of the said iron should not be required before ... 30th April”, payment was to be made on that date).
- 1617 1617 *Maclean v Dunn and Watkins* (1828) 6 *L.J. (O.S.) C.P.* 184, 190.
- 1618 1618 *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 *Com. Cas.* 39, 43 (sellers were entitled “at any time to invoice the buyers ...”).
- 1619 1619 Similarly, where the goods were sold on terms of “prompt cash against invoice”: *Henderson and Keay Ltd v AM Carmichael Ltd*, 1956 *S.L.T. (Notes)* 58.

- 1620 *Stein, Forbes Co v County Tailoring Co* (1916) 86 L.J. K.B. 448. (An earlier case, *Polenghi v Dried Milk Co Ltd* (1904) 10 Com. Cas. 42, is inconsistent with this view: see Benjamin's Sale of Goods, 11th edn (2021), paras 19-375—19-376.) For other cases on overseas sales, see *Muller, Maclean Co v Leslie and Anderson* (1921) 8 Ll. L. Rep. 328, 330–331; *Nortier Co v Wm Maclean Sons Co* (1921) 8 Ll.L. Rep. 192, 194; *Colley v Overseas Exporters* [1921] 3 K.B. 302, 311; *Tradax Internacional SA v Goldschmidt SA* [1977] 2 Lloyd's Rep. 604, 614.
- 1621 See Benjamin at paras 16-027, 19-375—19-376.
- 1622 Benjamin's Sale of Goods, 11th edn (2021), para.16-027. Some dicta in the Court of Appeal cast doubt on this submission: *Workman, Clark Co v Lloyd Brazileno* [1908] 1 K.B. 968, 977, 978, 981; see Benjamin at paras 16-026, 19-375—19-376, 19-352 (s.50(1) also assumes that the normal remedy when the property has not passed is a claim for damages for non-acceptance).
- 1623 *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 W.L.R. 2365 at [44]). The sellers did not rely on s.49(2) (at [23]).
- 1624 cf. *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2015] EWHC 2022 (Comm) although held that the Sale of Goods Act did not apply to the bunker supply contract, the judge would have held that s.49(2) applies where payment is to be within a fixed period after delivery. This point was not considered in detail by the Court of Appeal [2015] EWCA Civ 1058 or Supreme Court [2016] UKSC 23. In *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 All E.R. (Comm) 393 Longmore LJ (at [44]) indicated that a term for payment 30 days after invoice would have fallen within s.49(2), but as the sending of an invoice itself depended on delivery, it seems questionable whether this is a term for payment on a day certain “irrespective of delivery”. However, this reasoning was followed in *Readie Construction Ltd v Geo Quarries Ltd* [2021] EWHC 3030 (QB) where it was held that an action for the price under s.49(2) would be available even though delivery was a condition precedent to the payment of the price. See below, paras 46-367—46-368.
- 1625 *Stein Forbes Co v County Tailoring Co* (1916) 86 L.J. K.B. 448; *Colley v Overseas Exporters* [1921] 3 K.B. 302 at 310; *Muller, Maclean Co v Leslie and Anderson* (1921) 8 Ll. L. Rep. 328 at 330–331; *Plaimar Ltd v Waters Trading Co Ltd* (1945) 72 C.L.R. 304, 318; cf. *Martin v Hogan* (1917) 24 C.L.R. 234; *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413, 437; *Otis Vehicle Rentals Ltd v Ciceley Commercials Ltd* [2002] EWCA Civ 1064 at [12].
- 1626 The terms must permit the seller to recover the price by action, and not merely specify when the price is payable; the buyer's duty to pay the price is not identical with the seller's entitlement to sue for the price. Retention of title clauses (see above, paras 46-173 et seq.) often provide that the seller may maintain an action for the price, notwithstanding that the property in the goods will not pass until full payment of the price has been made. See also *Armour v Thyssen Edelstahlwerke AG* [1991] 2 A.C.

339. However, in the light of the decisions in *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 W.L.R. 2365, below, and of dicta in that case about when an action may be brought under s.49(2) (see above, para.46-366), there must now be doubt whether such a provision will be effective. Longmore LJ found himself “in the somewhat unsatisfactory position of concluding that, if property never passed to Holt Liverpool, FG Wilson have no claim for the price nor even a claim to damages. That is just an inherent result of a retention of title clause and shows that it has dangers as well as benefits” (at [56]). That conclusion does indeed seem unsatisfactory.

1627 Benjamin’s Sale of Goods, 11th edn (2021), at paras 16-028—16-029. It is, however, arguable that to increase the scope of the action for the price has the undesirable effect of limiting the scope of the mitigation rules.

1628 cf. s.28 (see above, para.46-237). The wide freedom of the parties to fix their own terms is supported by *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413 (see Vol.I, paras 27-063, 29-109).

1629 *Minister for Supply and Development v Servicemen’s Co-op Joinery Manufacturers Ltd* (1951) 82 C.L.R. 621, 636.

1630 *Minister for Supply and Development v Servicemen’s Co-op Joinery Manufacturers Ltd* (1951) 82 C.L.R. 621, 636, 642 (cf. the view of the dissenting judge at 644).

1631 *Minister for Supply and Development v Servicemen’s Co-op Joinery Manufacturers Ltd* (1951) 82 C.L.R. 621, 636, 642.

1632 [2012] EWHC 2477 (Comm), [2012] 2 Lloyd’s Rep. 479 at [53]. In the previous edition of this work (at [43]–[402]) it was suggested that where it is agreed that until all the instalments are paid, the goods remain the property of the seller, and that upon default in payment of an instalment or upon the occurrence of a certain event (e.g. the bankruptcy of the buyer) the total amount is to become payable that the seller should be able to sue for the price even though the claim would be outside the scope of s.49. Reliance was placed in particular on *McEntire v Crossley Bros Ltd* [1895] A.C. 457, 465. The decision in *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 W.L.R. 2365 that an action for the price can only be brought in accordance with the terms of s.49 seems to preclude such an argument.

1633 [2013] EWCA Civ 1232, [2014] 1 W.L.R. 2365. Section 49 is not just a default rule that can be negative or varied by agreement in accordance with s.55 of the Act: see at [53]. [2016] UKSC 23 at [40]–[58].

1634 cf. Longmore LJ in *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 W.L.R. 2365, [54]–[56]. While noting the artificiality, Lord Mance, delivering the unanimous judgment of the Supreme Court in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2016] UKSC 23, saw no reason why a claim for damages for non-payment should not in principle be available (at [48]–[49]).

1635 *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 A.C. 561. See Vol.I, para.29-289.

- 1637 See Vol.I, paras 29-291 et seq. Note especially the Late Payment of Commercial Debts (Interest) Act 1998.
- 1638 See below, paras 46-385—46-386.
- 1639 s.37 (see above, paras 46-292—46-293).

(c) - Action for Damages

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 6. - Remedies of the Seller

(c) - Action for Damages¹⁶⁴⁰

Damages for non-acceptance

- 46-370 Where the property in the goods has not passed to the buyer, the seller's remedy in most circumstances¹⁶⁴¹ is an action for damages: for damages for non-acceptance under s.50(1), for consequential losses or expenses under s.54,¹⁶⁴² or for losses or expenses under s.37.¹⁶⁴³ Section 50 provides:

Arrangement of Act

“(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.”¹⁶⁴⁴

“(2) 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.”¹⁶⁴⁵

“(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 at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.”

Section 50(1) is based on wrongful neglect or refusal by the buyer to pay the price,¹⁶⁴⁶ and on wrongful neglect or refusal to accept the goods.¹⁶⁴⁷ Where the buyer has not taken delivery of the

goods and there is some doubt as to whether the property in the goods has passed to the buyer, the seller who sues for the price¹⁶⁴⁸ runs the risk that the court may hold that property had not passed to the buyer: in this event, it follows that the seller's only remedy is a claim for damages for non-acceptance, and that the seller was subject to the rules on mitigating his loss (e.g. by reselling) as from the date when the buyer should have accepted the goods. The seller's damages (for the buyer's refusal to accept the goods, or the documents representing the goods) may be reduced "by any sum which the buyers could establish they would have been entitled to set up in diminution of the contract price" as a result of any *previous* breach by the sellers.¹⁶⁴⁹ Section 50(2) comes into operation either where there is no available market (within the meaning of s.50(3))¹⁶⁵⁰ or where the "prima facie" rule in s.50(3) is deemed to be inapplicable for some special reason.¹⁶⁵¹

An available market

- 46-371 The rule in s.50(3) is that when the buyer fails both to pay the price and to accept the goods, the seller's damages are calculated by deducting from the contract price the market price at the time and place fixed by the contract for acceptance.¹⁶⁵² The doctrine of mitigation¹⁶⁵³ is one of the bases of this principle: it is assumed that with this additional amount of money the seller could, by selling in the market at the current price, put himself into the same financial position he would have been in had the contract been performed according to its terms.¹⁶⁵⁴ There have been different views as to the meaning of an "available market".¹⁶⁵⁵ An early view was that an available market is some place (e.g. an exchange) where the goods in question can be sold¹⁶⁵⁶; a later view was that it "means a particular level of trade"¹⁶⁵⁷ in a particular locality; another that it refers to a sufficient demand for the goods "to absorb readily all the goods that were thrust on it"¹⁶⁵⁸; yet another that it means a situation where the current price for the goods may fluctuate according to supply and demand¹⁶⁵⁹ (which rules out the situation "where the goods can only be sold at a fixed retail price"¹⁶⁶⁰). It is submitted that the courts are likely to eschew formal limitations on the meaning of an "available market",¹⁶⁶¹ especially in the light of the fact that the concept provides only a *prima facie* measure of damages which need not be applied when there is some justification for not doing so. The availability of buyers and sellers, and their ready capacity to supply or to absorb the relevant goods¹⁶⁶² is the basic concept of an "available market": it is submitted that there is no need to add to this the test of a price liable to fluctuations in accordance with supply and demand, as occurs in official exchanges or certain commodity markets. A fixed market price may render s.50(3) ineffective as a ground for substantial damages, but it should not make the term "available market" inapplicable.¹⁶⁶³ A fluctuating market price indicates the existence of an available market, but it should not be a necessary test. In order to establish that there was a market for the goods at a particular price it is not necessary to identify a willing buyer at a specified price. The judge is entitled to infer the existence of a market from any sufficient evidence relevant to that issue. He is entitled to infer the value of goods from any sufficient relevant evidence of value.¹⁶⁶⁴

Available market temporal element

- 46-372 The temporal test implied in the “ready” or “immediate” accessibility to substitute buyers or sellers should, it is submitted,¹⁶⁶⁵ be a test of a reasonable time after the breach, given the nature of the goods in question¹⁶⁶⁶ (e.g. whether they are perishable or durable goods) and the business situation of the claimant.¹⁶⁶⁷ With many types of goods there would need to be the possibility of an immediate resale or new purchase before the test would be satisfied; but this test permits some flexibility in the particular circumstances. With some types (or quantities) of goods, negotiations with potential buyers would take several days to achieve a sale: in these circumstances, the market price should be fixed on the assumption that the hypothetical seller had begun to negotiate sufficiently far ahead to enable a sale to be made on the day in question.¹⁶⁶⁸ The question also arises whether the concept of “market” extends to places other than the place of delivery.¹⁶⁶⁹ It has been assumed by one judge that the seller might have to send the goods elsewhere,¹⁶⁷⁰ and, in another case where the seller’s business area was the East Riding of Yorkshire, it was assumed that was the area in which he should seek a substitute buyer.¹⁶⁷¹ It is submitted that the test is one of reasonableness,¹⁶⁷² in the light of the time, expense and trouble involved.¹⁶⁷³

Size of available market

- 46-373 The size of the market is also relevant: thus, a few sales of small quantities of the relevant goods will not constitute an available market.¹⁶⁷⁴ The House of Lords (in a case of a seller’s breach) has been willing to accept that there could be a market in which to buy 15,000 tons of lard where the only purchases which could be made were of smaller quantities (up to 2,000 tons at a time) and spread over a period.¹⁶⁷⁵ Thus, a seller who cannot find a substitute buyer for a large quantity of goods may have to mitigate by dividing it into separate sales of quantities which are readily saleable.¹⁶⁷⁶ A very high or a very low price may¹⁶⁷⁷ indicate that there is either a scarcity or glut¹⁶⁷⁸ of the relevant goods,¹⁶⁷⁹ and so no available market. But the fact that the market price is seriously affected by a governmental intervention (e.g. the sudden imposition of import restrictions) does not prevent there being an available market.¹⁶⁸⁰ A “black” market, where the goods are bought and sold surreptitiously to evade contractual restrictions (e.g. restrictions on price or supplies) may also be an available market.¹⁶⁸¹

Fixed retail price

- 46-374 A problem has arisen when the relevant goods can be sold only at a fixed retail price. It has been considered in two cases ¹⁶⁸² where, after the buyer defaulted, the seller was able to resell only at the same fixed price: in both cases the court held that the same result would follow whether or not there was an available market, so that a definite decision on the meaning of the term was not necessary. The result of the two decisions is that if the seller had the ability and the opportunity to make a profit for every buyer he could find (because the supply of the goods exceeded the demand) he is entitled to the loss of profits on the sale to the defaulting buyer. ¹⁶⁸³ But if the demand for the goods exceeded the supply, so that the seller could readily sell every item he could obtain from the manufacturers, he is not entitled to loss of profits on the first sale when he made the same profit on a substituted sale following the first buyer's default. ¹⁶⁸⁴ The former situation is illustrated by *Thompson Ltd v Robinson (Gunmakers) Ltd*. ¹⁶⁸⁵ The plaintiffs, car dealers, agreed to sell a new Vanguard car to the defendants, at the retail price fixed by the manufacturers. On the defendants' refusal to accept the car, the plaintiffs persuaded the wholesale suppliers to take the car back. Although there was no difference between the current retail price and the contract price, Upjohn J awarded damages for the loss of profit on the sale. There was no shortage of Vanguard cars to meet all immediate demands in the locality: since a substitute buyer could not be found readily, the judge thought that there was not an available market. ¹⁶⁸⁶ If the second buyer was an additional customer of the seller, and not merely a substituted customer, and the seller had the ability and the opportunity of making two profits on the two transactions, he is entitled to damages for his loss of the first profit when the first buyer defaults. ¹⁶⁸⁷
- 46-375 The second situation, where the demand for the goods in question exceeds the supply, occurred in *Charter v Sullivan*. ¹⁶⁸⁸ The defendant refused to accept delivery of a Hillman Minx car which he had agreed to buy from the plaintiff, a car dealer, at the fixed retail price. Within 10 days the plaintiff resold the car to another buyer at the same price. As the evidence showed that the plaintiff could find a buyer for every Hillman Minx car he could get from the manufacturers, the Court of Appeal refused to allow him to recover more than nominal damages: he made the same number of sales (and therefore the same number of fixed profits) as he would have done if the defendant had performed his contractual obligation; hence it was a substituted, not an additional sale, because the seller had the ability to make only one sale and one profit. ¹⁶⁸⁹

The relevant “market”

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Normally, the concept of “available market” should be the same, whether the defaulting party is the buyer or the seller.¹⁶⁹⁰ But the claimant’s position could be crucial: if he is a seller, the issue is the availability of alternative buyers; whereas, if he is a buyer, it is the availability of alternative sellers.¹⁶⁹¹ The selling, not the buying, price is relevant in one situation, but not necessarily the other, and vice versa.¹⁶⁹² Thus, the relevant available market is that available to the innocent party in the circumstances in which he is placed by the breach.¹⁶⁹³ But there are other types of market relationships which may be relevant,¹⁶⁹⁴ e.g. between wholesaler and retailer, retailer and private buyer, as the prices for the goods in question may vary according to the particular relationship in which the claimant and defendant are involved.¹⁶⁹⁵

The relevant time

46-377 Section 50(3) provides that “the market or current price” is to be taken “at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept”. The contract itself will normally fix the exact time for acceptance.¹⁶⁹⁶ Where the goods are to be delivered within a stipulated period of time, the time when the goods ought to have been accepted is the time, within the period, when the goods were actually tendered to the buyer by the seller.¹⁶⁹⁷ Where the contract provides that delivery is to be made by separate deliveries of part of the goods at stated times or intervals, the damages in respect of the buyer’s failure to accept an instalment must be calculated by reference to the market price prevailing at the time fixed for delivery of that instalment.¹⁶⁹⁸

No time fixed for acceptance

46-378 The final provision in s.50(3) deals with cases of the buyer’s refusal to accept delivery of the goods when tendered by the seller under a contract which did not fix a time for acceptance: in these circumstances, the *prima facie* rule for the assessment of damages is based on the market price “at the time of the refusal to accept”. But the calculation of the market price at the time of the buyer’s “refusal to accept” in terms of s.50(3) does not apply to an anticipatory breach by the buyer.¹⁶⁹⁹ A Divisional Court has held¹⁷⁰⁰ that a contract for delivery within a reasonable time is not a contract with a fixed time for acceptance of the goods within the scope of the analogous s.51(3).¹⁷⁰¹

Postponement of time fixed for delivery

46-379

Where the buyer requests and obtains the seller's consent to postpone¹⁷⁰² the time for delivery fixed by the contract, but fails to accept the goods when the seller tenders them at the substituted time (or within the extended period), the calculation of the seller's damages will be made on the basis of the market price at the substituted time (or at the last day of the extended period)¹⁷⁰³; if the seller agreed to postpone the original delivery date but no definite date or period was substituted by agreement, the calculation of damages will be made at the market price at a reasonable time after the last request by the buyer for postponement of delivery, or at the date when the seller refused to give any further time.¹⁷⁰⁴ Where the request for postponement of the agreed delivery date came from the seller, and at first the buyer agreed to waive delivery at that date but later repudiated his obligations in breach of the contract, the damages should be calculated on the basis of the market price at the time of the buyer's repudiation.¹⁷⁰⁵

Proof of the market price

- 46-380 If there is proof of the market price at the date of the buyer's breach,¹⁷⁰⁶ the actual price obtained by the seller upon his reselling the goods at a later date is irrelevant to the assessment of damages, whether the resale price is higher or lower than the market price.¹⁷⁰⁷ But where normal proof of the market price of the goods is not available (viz by reference to published or recorded prices of deals at the relevant date) the court may accept other evidence, e.g. proof of the price at which the seller in fact resold the goods to a new buyer,¹⁷⁰⁸ or of an offer for the goods received by the seller,¹⁷⁰⁹ or proof of compromises in other disputes relating to the market value of similar goods at the same time.¹⁷¹⁰

Relevance of price on an immediate resale

- 46-381 If the seller has, at the date of the buyer's breach, only the one set of the relevant goods, viz the set left on his hands following the buyer's breach, the price (higher¹⁷¹¹ than the market price) which he actually receives by reselling *immediately* is a direct consequence of the buyer's breach, and should be taken into account in assessing the seller's damages.¹⁷¹² The seller should recover only his actual loss, viz the difference between the contract price and the actual resale price, since, but for the breach, he would not have had the opportunity of reselling.¹⁷¹³ If, on the other hand, the seller had, at the date of the breach, further supplies of the relevant goods, a resale of only some of his stock at a higher than market or current price could not necessarily be attributed to the buyer's breach and, in these circumstances, the seller should be entitled to the normal measure of damages under s.50(3).¹⁷¹⁴ Although there is no authority directly in point to support the submissions just made, inferences may be drawn from cases where the seller chooses to retain the goods for a period,

instead of reselling them in the market immediately following the buyer's breach. The Court of Appeal has held¹⁷¹⁵ that if the seller subsequently resells the goods at a gain because the market price rises after the date of the breach, the enhanced price received by the seller does not reduce his damages, which are still to be determined by the difference between the contract price and the market price on the date of the breach. By retaining the goods after that date the seller is taking on himself the risk of fluctuations in the market price: if the price later fell, the buyer would not be liable for the seller's additional loss, and, correspondingly, the seller is entitled to the gain if the price later rises.¹⁷¹⁶ There should be symmetry of risk. From this reasoning it may be inferred that if the seller does not take a chance on later fluctuations in the market price, but chooses to sell the one set of goods immediately upon the breach and happens to obtain a price higher than the market price at that time, his damages should be limited to his actual loss.¹⁷¹⁷

Damages where there is no available market

46-382 If s.50(3) does not apply, because there is no available market, the court is thrown back on the general principle enunciated in s.50(2), see above. The seller's loss is the difference between the contract price and the value of the goods to the seller at the time and place of the breach,¹⁷¹⁸ and any relevant evidence may be admissible to prove this value.¹⁷¹⁹ The seller's damages will be assessed on the basis that he should have acted reasonably in mitigating his loss.¹⁷²⁰ He is entitled to deal with the goods "in any reasonable way",¹⁷²¹ e.g. by adapting them to suit another customer, and his damages will then include the cost of the adaptation, as well as the loss of profit on the first sale.¹⁷²² Although the seller need not incur speculative expenditure,¹⁷²³ there may be circumstances in which it would be reasonable for the seller, under the rules of mitigation, to incur a limited amount of expenditure to adapt the goods in such a way as to make them readily saleable.¹⁷²⁴ If the seller has been able to resell, he may claim the loss of profits on the abortive sale on the ground that the second buyer was an additional, not a substituted, buyer. The test is whether the seller had the ability and the opportunity to make the two separate profits¹⁷²⁵: if the seller had fulfilled the first contract, would he have been able to fulfil the second contract as well? If so, he is entitled to recover from the defaulting buyer his loss of profit on the first contract.¹⁷²⁶

Anticipatory breach by the buyer: repudiation accepted¹⁷²⁷

Where the buyer commits an anticipatory breach by repudiating, before the date fixed for delivery, his obligation to take delivery of the goods the seller has an option¹⁷²⁸: he may either accept the repudiation and so treat it forthwith as a breach, or he may continue to treat the contract as binding and thus not accept the repudiation as a breach.¹⁷²⁹ If the seller accepts the buyer's anticipatory repudiation, he may sue immediately for damages for breach of contract: but in those situations

in which there is an available market for the goods,¹⁷³⁰ the relevant date for ascertaining the market price remains *prima facie* (and subject to any requirement of mitigation) the date fixed for delivery,¹⁷³¹ since that is when the contract ought to be performed.¹⁷³² If the action is heard before the date for delivery arrives, the court should attempt to estimate what the market price is likely to be at that future date.¹⁷³³ But if the seller does accept the buyer's anticipatory repudiation, he is forthwith subject to the rules on mitigation and must take reasonable steps to minimise his loss.¹⁷³⁴ Where the seller should have mitigated by reselling,¹⁷³⁵ the relevant market price is that existing at the date he ought reasonably to have resold,¹⁷³⁶ not that at the date of the repudiation, nor that at the date when the repudiation is accepted.¹⁷³⁷

Repudiation not accepted

46-384 If the seller does not accept the buyer's anticipatory repudiation, he may continue to treat the contract as binding on both himself and the buyer, and wait until the date fixed for delivery before he tenders the goods: if the buyer then fails to accept the goods, the seller thereupon should mitigate his loss by taking reasonable steps (viz in normal circumstances by reselling forthwith).¹⁷³⁸ Where there is an available market for the goods, the relevant market price will be that at the date fixed for delivery: if the seller did not accept the buyer's anticipatory repudiation, a higher or a lower market price at the date of the repudiation, or at any date during the period up to the date fixed for delivery, is irrelevant, because the rules of mitigation do not apply until the date of the actual breach.¹⁷³⁹ Of course, during the interval the contract is kept alive for the benefit of *both* parties¹⁷⁴⁰: the buyer may change his mind and accept the goods when tendered¹⁷⁴¹; or the seller may decide to accept the repudiation (before it has been retracted by the buyer) whereupon the rules of mitigation will forthwith apply to the seller; or the obligations of the parties may be determined by the occurrence of a frustrating event¹⁷⁴²; or the buyer may exercise a right under the contract to cancel it.¹⁷⁴³

Special cases of seller's damages¹⁷⁴⁴

46-385 If the unpaid seller resells under his statutory powers (s.48(3) and (4)),¹⁷⁴⁵ he may claim damages, which will be:

- (a)the difference between the original contract price (less any deposit¹⁷⁴⁶ paid) and the price obtained on the resale (provided that it was not less than either the market price¹⁷⁴⁷ or a reasonable price¹⁷⁴⁸); and

(b)any expenses reasonably incurred by the seller as a result of the buyer's breach of contract or in connection with the resale (e.g. reasonable advertising expenses¹⁷⁴⁹ or storage charges).¹⁷⁵⁰

Similarly, where there is a market, and the seller resells at the market price immediately upon the buyer's failure to accept the goods, he will (in addition to damages under s.50)¹⁷⁵¹ be entitled to damages for any expenses reasonably incurred in effecting the resale.¹⁷⁵²

“Special damages”

46-386 Section 54 preserves the right of both the buyer and the seller to recover “special damages”.¹⁷⁵³ Consequential losses and expenses are often claimed by the buyer,¹⁷⁵⁴ but seldom by the seller, who normally has not made other arrangements which both depend on the fulfilment of the contract and also involve losses or expenses which fall within the tests for remoteness.¹⁷⁵⁵ The seller's normal loss when the buyer fails to pay the price on the agreed date is the loss of the use of the money: for this type of loss, the seller may claim interest¹⁷⁵⁶ and, in some circumstances, damages,¹⁷⁵⁷ provided that it was not unreasonable to think that the buyer was assuming responsibility for such a loss.¹⁷⁵⁸

Footnotes

- 1640 The general rules on damages are examined in Vol.I, Ch.29.
- 1641 Except where s.49(2) applies or there is a special term in the contract: see above, paras 46-366—46-368. The seller may only be able to bring an action for damages if it is or would have been willing and able to deliver the goods; see above, paras 46-237 and 46-267. If it is shown that on the balance of probabilities the seller would have been able to do so, the damages should not be discounted for the chance that it would not have been able to do so: *AerCap Partners 1 Ltd v Avia Asset Management AB [2010] EWHC 2431 (Comm)*, [2010] 2 C.L.C. 578 at [76].
- 1642 See below, paras 46-385—46-386.
- 1643 See above, paras 46-292—46-293.
- 1644 This subsection is wide enough to cover non-acceptance when the property has already passed to the buyer, in which case it allows damages for non-acceptance as an alternative remedy to a claim for the price. But a claim in debt for the price is more advantageous to the seller (see above, para.46-361, Vol.I, paras 24-037 and 29-010).
- 1645 subs.(2) uses the language of the first rule in *Hadley v Baxendale (1854) 9 Exch. 341* (see above, Vol.I, para.29-126). It is submitted that the common law developments

- (since the date of the [1893 Act](#)) in the rules for remoteness of damage may be used to aid the interpretation of the subsection (see Vol.I, paras [29-124](#) et seq.).
- 1646 See above, paras [46-363—46-365](#).
- 1647 See above, para. [46-236 \(s.27\)](#). cf. see above, para. [46-292 \(s.37\)](#).
- 1648 So long as the seller is claiming the price, he must hold the goods available for delivery to the buyer when the buyer pays the price.
- 1649 *Berger Co Inc v Gill Duffus SA [1984] A.C. 382, 392*.
- 1650 See below, para. [46-371](#).
- 1651 See below, para. [46-382](#). The Court of Appeal may now be more willing to depart from the *prima facie* rules on the Act: see *Bence Graphics International Ltd v Fasson UK Ltd [1998] Q.B. 87* (see below, paras [46-420, 46-422—46-423](#)). See also *Bern Dis A Turk Ticaret SA TR v International Agri Trade Co Ltd [1999] 1 All E.R. (Comm) 619, CA*.
- 1652 A claim under [s.50\(3\)](#) will not be affected by a clause excluding liability for loss of profit: *Glencore Energy UK Ltd v Cirrus Oil Services Ltd [2014] EWHC 87 (Comm)* (“The contract price/market price differential is not a computation of lost profit. Lost profit is the difference between the total net cost to the seller of acquiring the goods and bringing them to market on the one hand and the net sale price that would have been achieved on the other” (at [98])). For a discussion of the market price rule generally and how it interacts with the compensation principle, see *M. Bridge [2016] L.Q.R. 405*.
- 1653 See Vol.I, paras [29-096](#) et seq.
- 1654 But if [s.50\(3\)](#) applies, the plaintiff need not satisfy the requirements of reasonable mitigation: *Shearson Lehman Hutton Inc v Maclaine Watson Co Ltd (No.2) [1990] 3 All E.R. 723, 726*.
- 1655 See *Waters (1958) 36 Can. Bar Rev. 360; Lawson (1969) 43 A.L.J. 52, 106*.
- 1656 *Dunkirk Colliery Co Ltd v Lever (1878) 9 Ch. D. 20, 25* (an obiter dictum made prior to the 1893 Act, which was not expressly accepted by the other Lords Justices; followed in *Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch. 177*).
- 1657 *Heskell v Continental Express Ltd [1950] 1 All E.R. 1033, 1056*. See also *The Arpad [1934] P. 189, 191* (“Market means buyers and sellers”; at 202).
- 1658 *Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch. 177, 187*. (See on this case see below, para. [46-374](#)).
- 1659 *Charter v Sullivan [1957] 2 Q.B. 117, 128* (see below, para. [46-375](#)). To the same effect, see *Eclipse Motors Pty Ltd v Nixon [1940] V.L.R. 49*. cf. *Marshall Co v Nicoll Son, 1919 S.C. 244, 253*.
- 1660 *Charter v Sullivan [1957] 2 Q.B. 117, 128*.
- 1661 *Charrington Co Ltd v Woorder [1914] A.C. 71, 82* (“Market” is “a term of no fixed legal significance”: per Lord Dunedin). See also *Charter v Sullivan* above at 128; and *ABD (Metals and Waste) Ltd v Anglo-Chemical Ore Co Ltd [1955] 2 Lloyd's Rep. 456, 466*. (“... there must be sufficient traders who are in touch with each other ...”) (followed in the *Shearson Lehman (No.2) case [1990] 3 All E.R. 723, 730*). The existence or absence of an available market need not be specifically contemplated by the parties: *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No.2) (The Marine Star) [1994] 2 Lloyd's Rep. 629*. “The best evidence of market value is constituted by

arm's length deals actually made in the market. The last transaction effected effectively sets the benchmark": *Glencore Energy UK Ltd v Cirrus Oil Services Ltd [2014] EWHC 87 (Comm)* at [70].

- 1662 *Marshall Co v Nicoll Son, 1919 S.C. 244, 253; affirmed 1919 S.C.(H.L.) 129; Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch. 177, 187.* There is no "available market" for a unique article like a second-hand car: *Lazenby Garages Ltd v Wright [1976] 1 W.L.R. 459, CA*; nor is such a market likely in a "command economy": *Derby Resources AG v Blue Corinth Marine Co Ltd (The Athenian Harmony) [1998] 2 Lloyd's Rep. 410, 416.* In *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63*, a case of non-delivery by a seller, it was said that there may be a market for used goods even if the precise model or brand sold was not available: "the availability of equivalent second-hand goods capable of performing the same functions in much the same way would constitute an available market for 'the goods in question'. A buyer of such equivalent goods would be in the same financial position as if the contract had been performed" (at [93]). In *Hughes v Pendragon Sabre Ltd (t/a Porsche Centre Bolton) [2016] EWCA Civ 18* a rare new limited edition Porsche was sufficiently specialised for there to be insufficient activity to evidence a market. In *Septo Trading Inc v Tintrade Ltd [2020] EWHC 1795 (Comm)*, although no evidence had been adduced of actual sales, there was held to be an available market in off-spec oil given that the market for fuel oil was large and diverse.
- 1663 *Waters (1958) 36 Can. Bar Rev. 360, 371; Lawson (1969) 43 A.L.J. 106, 110*; see below, paras 46-374. cf. McGregor on Damages, 21st edn (2021), paras 25-130 et seq.
- 1664 *Bulkhaul Ltd v Rhodia Organique Fine Ltd [2008] EWCA Civ 1452, [2009] 1 Lloyd's Rep. 353* at [29].
- 1665 This submission is "consistent with the effect of the *Garnac Grain* case" (see below, para.46-373 (note)) but it is not based on any express reference to "a reasonable time after breach" in any case: the *Shearson Lehman case (No.2) [1990] 3 All E.R. 723* at 730.
- 1666 It is most unlikely that there will be an available market where the goods have been specially manufactured to suit the particular requirements of the buyer: *Elbinger Aktien Gesellschaft v Armstrong (1874) 9 Q.B. 473, 476–477; Hinde v Liddell (1875) 10 Q.B. 265, 269*. cf. *Borries v Hutchison (1865) 18 C.B.(N.S.) 445, 447; Re Vic Mill Ltd [1913] 1 Ch. 183, 187*; on appeal, above at 465, 472-473.
- 1667 It is submitted that the opinion of Sellers LJ on this point in *Charter v Sullivan [1957] 2 Q.B. 117, 133–134* is not correct. cf. *Lesters Leather and Skin Co v Home and Overseas Brokers Ltd (1948) 64 T.L.R. 569* (eight or nine months' delay in obtaining substitute goods: see below, para.46-392). In *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63*, a case of non-delivery by a seller, there was held to be no relevant market when there was only a possibility that equivalent goods would become available within about three months (at [95]).
- 1668 The *Shearson Lehman (No.2) case [1990] 3 All E.R. 723, 731*.

- 1669 It is submitted that *Wertheim v Chicoutimi Pulp Co [1911] A.C. 301* (see below, para.46-414: delayed delivery) which is often cited in this connection, really concerns the question of reaching a market *value* in one place by basing the calculation on the market price elsewhere; it did not decide that the latter place constituted an available market. cf. however, the approval of *Wertheim's* case by Auld LJ in *Bence Graphics International Ltd v Fasson UK Ltd [1998] Q.B. 87, 103–105* (see below, paras 46-420, 46-422).
- 1670 *Dunkirk Colliery Co v Lever (1878) 9 Ch. D. 20, 25.*
- 1671 *Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch. 177.* cf. *Lesters Leather and Skin Co v Home and Overseas Brokers Ltd (1948) 64 T.L.R. 569* (seller's breach: see below, para.46-392).
- 1672 *Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2 Q.B. 459, 499;* *Lesters Leather and Skin Co v Home and Overseas Brokers Ltd (1948) 64 T.L.R. 569* (seller's breach).
- 1673 cf. *Ströms Brucks Aktie Bolag v Hutchinson [1905] A.C. 515* (breach of charterparty: plaintiffs recovered cost of transporting the substitute goods to the contractual place of delivery).
- 1674 *Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2 Q.B. 459, 498.*
- 1675 *Garnac Grain Co Inc v HMF Faure Fairclough Ltd [1968] A.C. 1130, 1138* (see below, para.46-392); cf. (in the Court of Appeal) *[1966] 1 Q.B. 650, 687.*
- 1676 *Tredegar Iron and Coal Co v Gielgud (1883) 1 Cab. El. 27.* In the case of the sale of 10,000 tonnes of gasoline it was held that there could be an available market where the seller could have disposed of the gasoline in smaller cargo loads of 1,000 to 3,000 tonnes over a period of about two weeks from the buyer's breach: *Petrotrade Inc v Stinnes Handel GmbH [1995] 1 Lloyd's Rep. 142.*
- 1677 But not necessarily: *Bradley Sons Ltd v Colonial and Continental Trading Ltd [1964] 2 Lloyd's Rep. 52, 64.*
- 1678 *Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2 Q.B. 459* at 498; *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co [1954] 1 Lloyd's Rep. 65, 69.*
- 1679 cf. *O'Hanlan v GW Ry (1865) 6 B. S. 484, 494.*
- 1680 *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co [1954] 1 Lloyd's Rep. 65, 69.*
- 1681 *Mouat v Betts Motors Ltd [1959] A.C. 71;* *British Motor Trade Association v Gilbert [1951] 2 T.L.R. 514.* (These decisions imply that the sellers were entitled to mitigate by themselves going into the black market to buy a substitute. It is, however, doubtful whether a black market where the goods are available in breach of statutory controls would be treated similarly.)
- 1682 *Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch. 177;* *Charter v Sullivan [1957] 2 Q.B. 117.*
- 1683 *Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch. 177* (following *Re Vic Mill Ltd [1913] 1 Ch. 465*).
- 1684 *Charter v Sullivan [1957] 2 Q.B. 117.*

- 1685 See above. In *Lazenby Garages Ltd v Wright* [1976] 1 W.L.R. 459, the Court of Appeal distinguished the sale of a second-hand car, a “unique article” for which there is no “available market”, from that of a new car.
- 1686 [1955] Ch. 177, 187. See above, paras 46-371—46-373. Moreover, since the market price rule in s.50(3) was only a “prima facie” rule, the judge held that it did not apply where it was clearly foreseeable by the parties that the rule would not compensate the seller for his loss of profit if the buyer defaulted: [1955] Ch. 177 at 188.
- 1687 *Re Vic Mill Ltd* [1913] 1 Ch. 465. cf. *Interoffice Telephones Ltd v Robert Freeman* [1958] 1 Q.B. 190 (hire of telephone equipment). cf. Vol.I, para.29-153.
- 1688 [1957] 2 Q.B. 117.
- 1689 The court considered it immaterial whether or not there was an “available market”: for tests for this, see above, paras 46-371—46-373.
- 1690 *Lawson* (1969) 43 A.L.J. 106, 113. The parties may in their contract agree which market is to be the relevant one for fixing market value: *Orchard v Simpson* (1857) 2 C.B. (N.S.) 299.
- 1691 *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459, 497; *C Czarnikow Ltd v Bunge Co Ltd* [1987] 1 Lloyd's Rep. 202, 205. The difference is referred to in *The Arpad* [1934] P. 189, 211; and in *Dominion Motors Ltd v Grieves* [1936] N.Z.L.R. 766, 771.
- 1692 *Kwei Tek Chao v British Traders and Shippers Ltd*, above at 497–498.
- 1693 But the individual characteristics of the claimant (e.g. his personal skill in negotiating) are not relevant: *Shearson Lehman Hutton Inc v Maclaine Watson Co Ltd (No.2)* [1990] 3 All E.R. 723, 726.
- 1694 FOB contracts raise problems as to the relevant market: see Benjamin’s Sale of Goods, 11th edn (2021), paras 20-236 et seq. (cf. also at para.19-353).
- 1695 *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033. See also *Rice v Baxendale* (1861) 7 H. & N. 96, 100. cf. *Charrington and Co Ltd v Woorder* [1914] A.C. 71, where the House of Lords held that a contractual provision for the “fair market price” for beer meant, in the circumstances, the market for tied public houses and not that for free houses; cf. also *James Buchanan Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] A.C. 141 (there may be different market prices for the same type of goods, depending on whether the goods are intended for export or not). If the claimant cannot find a relevant market for the goods, he may try any reasonable alternative market relationship: *O'Hanlan v GW Ry* (1865) 6 B. & S. 484, 494.
- 1696 See above, paras 46-236, 46-237, 46-246 et seq. The time may be fixed by reference to the happening of an event, e.g. the arrival of a ship: *Melachrino v Nickoll Knight* [1920] 1 K.B. 693, 696 (on s.51(3)). Since the seller will normally know of the buyer’s refusal to accept on the day he tenders delivery of the goods, he will in most cases (where there is an available market for the goods) be able to find a substitute buyer on the same day. cf. *Kaines (UK) Ltd v Österreichische Warrenhandelsgesellschaft, etc* [1993] 2 Lloyd's Rep. 1 (seller’s breach: buyer should have re-purchased on the next day: at pp.11, 12). cf. see below, para.46-393.
- 1697 cf. the rule in cases of non-delivery: see below, para.46-393.

- 1698 1979 Act s.50(3) above. There appear to be no reported cases directly in point, but the cases on the buyer's damages for non-delivery under an instalment contract are analogous: *Brown v Muller* (1872) L.R. 7 Ex. 319; *Roper v Johnson* (1873) L.R. 8 C.P. 167 (see below, para.46-393).
- 1699 See below, paras 46-383—46-384.
- 1700 *Millett v Van Heek Co* [1920] 3 K.B. 535; *Melachrino v Nickoll and Knight* [1920] 1 K.B. 693, 696. In the Court of Appeal, opinions on the point were reserved: [1921] 2 K.B. 369; Atkin LJ thought that there were arguments against the view taken by the Divisional Court: above at 378. The Privy Council, in a case on a seller's breach, doubted whether any meaning could be given to the similar concluding words of the corresponding provision (s.51(3)): *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91, 104 (see below, para.46-396).
- 1701 See below, para.46-394.
- 1702 On waiver, see Vol.I, paras 6-089 et seq., paras 25-042 et seq.
- 1703 *Hickman v Haynes* (1875) 10 C.P. 598, 607 (following the similar rule in the case of the seller's failure to deliver: *Ogle v Earl Vane* (1868) L.R. 3 Q.B. 272 (see below, para.46-395)).
- 1704 *Hickman v Haynes* (1875) 10 C.P. 598. (This case was mentioned with approval by the HL in *Johnson v Agnew* [1980] A.C. 367, 401.)
- 1705 *Hartley v Hymans* [1920] 3 K.B. 475, 496 (following the similar rule in the case of the seller's failure to deliver: *Tyers v Rosedale and Ferryhill Co* (1875) L.R. 10 Ex. 195 (see below, para.46-395)). In *Hartley v Hymans*, above, the market price had fallen heavily between the contractual date for delivery and the date of the buyer's repudiation; but the judgment is very brief on the question of the assessment of damages.
- 1706 The court may infer the approximate market price on a given date from evidence that there was a steady decline in that price between an earlier and a later date: *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91, 106, PC.
- 1707 *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep. 658.
- 1708 *Maclean v Dunn* (1828) 4 Bing. 722, 729; *Ex p. Stapleton* (1879) 10 Ch. D. 586, 590. (Aliter if the resale was on significantly different terms: *Macklin v Newbury Sanitary Laundry* (1919) 63 S.J. 337.) cf. *Aryeh v Lawrence Kostoris Son Ltd* [1967] 1 Lloyd's Rep. 63, 73.
- 1709 The seller may be able to establish the “current price” by seeking several offers for the goods from prospective buyers, with a view to accepting the best price obtainable.
- 1710 *Hong Guan Co Ltd v R Jumabhoy Sons Ltd* [1960] A.C. 684, 703–704.
- 1711 If the seller resells at *lower* than the market price, he cannot recover the difference between the contract price and the actual resale price: s.50(3).
- 1712 See the second rule of mitigation: Vol.I, para.29-112; *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rys* [1912] A.C. 673, 689.
- 1713 Benjamin's Sale of Goods, 11th edn (2021), paras 16-077—16-078. cf. *R Pagnan and Fratelli v Corbisa Industrial Agropacuaria* [1970] 1 W.L.R. 1306 (see below, para.46-403).

- 1714 cf. the similar problem in *Charter v Sullivan* [1957] 2 Q.B. 117 (see above, para.46-375); *In Re Vic Mill Ltd* [1913] 1 Ch. 465. This approach is consistent with that suggested in relation to buyers' damages discussed below paras 46-398—46-408.
- 1715 *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep. 65.
- 1716 The court followed the reasoning of the Privy Council in *Jamal v Moolla Dawood* [1916] 1 A.C. 175, 179. See also *Koch Marine Inc v D'Amica Societa di Navigazione ARL (The Elena D'Amica)* [1980] 1 Lloyd's Rep. 75, 87–90.
- 1717 cf. below, para.46-403.
- 1718 *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep. 509, 530.
- 1719 *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep. 509 (seller able to find a substitute buyer: resale price evidence of seller's loss); *Derby Resources AG v Blue Corinth Marine Co Ltd (The Athenian Harmony)* [1998] 2 Lloyd's Rep. 410, 416 (evidence of the market price of the goods at a different place and even at a different time may be the only available means of quantification.) See also *Robbins of Putney Ltd v Meek* [1971] R.T.R. 345.
- 1720 *Gebruder Metelmann GmbH Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep. 614 (where the physical goods cannot be immediately resold, it may be reasonable for the seller (e.g. when prices are falling) to resell in a "terminal" or "futures" market, which is a mechanism by which he can insulate himself from future changes in market values); Vol.I, paras 29-096 et seq.; *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep. 509, 530, 531.
- 1721 *Re Vic Mill Ltd* [1913] 1 Ch. 465, 473.
- 1722 [1913] 1 Ch. 465 at 473, 474. cf. see below, para.46-404.
- 1723 cf. *Jewelowski v Propp* [1944] K.B. 510.
- 1724 cf. below, para.46-403.
- 1725 *Re Vic Mill Ltd* [1913] 1 Ch. 465; *Hill Sons v Edwin Showell Sons Ltd* (1918) 87 L.J. K.B. 1106, HL.
- 1726 *Re Vic Mill Ltd* [1913] 1 Ch. 465, 472, 474. cf. *Charter v Sullivan* [1957] 2 Q.B. 117, 130 (see above, para.46-375, and also Vol.I, paras 29-108 and 29-113). The burden of proof lies on the defaulting buyer to show that the seller could have earned only one profit: *Hill Sons v Edwin Showell Sons Ltd* (1918) 87 L.J. K.B. 1108, 1114. See *Thompson Ltd v Robinson (Gunmakers) Ltd* [1955] Ch. 177 (see above, para.46-375) (distinguished in *Lazenby Garages Ltd v Wright* [1976] 1 W.L.R. 459 (seller able to find a substitute buyer for a second-hand car at a higher price: no damages awarded) (see above, para.46-374)). See also *Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd* [2008] EWCA Civ 955, [2009] Bus. L.R. 529.
- 1727 See Vol.I, paras 27-070 et seq.; *George* [1971] J.B.L. 109. cf. see below, para.46-392.
- 1728 The seller is not obliged to act "reasonably" in exercising this choice: *Tredegar Iron and Coal Co Ltd v Hawthorn Bros Co* (1902) 18 T.L.R. 716, 716–717; *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413. See Vol.I, para.29-123.
- 1729 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788.
- 1730 See above, paras 46-371 et seq.

- 1731 It is submitted that the provision in s.50(3) that, when no time is fixed for acceptance, damages should be assessed by reference to the market price “at the time of the refusal to accept” should not apply to an anticipatory breach by the buyer. cf. see below, paras 46-396—46-397.
- 1732 *Frost v Knight* (1872) L.R. 7 Ex. 111, 113; approved by the House of Lords in *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788; *Melachrino v Nickoll and Knight* [1920] 1 K.B. 693 (seller’s anticipatory repudiation); *Millett v Van Heek* [1920] 3 K.B. 535, [1921] 2 K.B. 369, CA. It is submitted that the contrary statement in *Tredegar Iron and Coal Co (Ltd) v Hawthorn Bros Co* (1902) 18 T.L.R. 717, is incorrect. (On the question of discounting any sum not due until a future date, see below, para.46-396; Vol.I, para.29-010.)
- 1733 See the cases cited in the preceding note.
- 1734 *Roth Co v Tayson Townsend Co* (1895) 73 L.T. 628, 629–630; affirmed on appeal (1896) 12 T.L.R. 211, 212; *Tredegar Iron and Coal Co (Ltd) v Hawthorn Bros Co*, above; *Sudan Import and Export Co (Khartoum) v Société Générale de Compensation* [1958] 1 Lloyd’s Rep. 310, 316. cf. below, paras 46-396—46-397.
- 1735 The onus of proof is on the buyer. cf. the analogous cases where the seller is in default: *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] A.C. 1130.
- 1736 *Melachrino v Nickoll and Knight* [1920] 1 K.B. 693, 697, 699; *Sudan Import and Export Co (Khartoum) Ltd v Société Générale de Compensation* [1958] 1 Lloyd’s Rep. 310, 316. The same rule applies to the analogous case of the seller’s anticipatory breach which is accepted by the buyer: *Kaines (UK) Ltd v Österreichische Warrenhandelsgesellschaft, etc.* [1993] 2 Lloyd’s Rep. 1.
- 1737 Although the date of the seller’s acceptance of the repudiation may be the date when he ought to have resold (e.g. if there was an available market), it will not always be the same date: *Kaines (UK) Ltd v Österreichische etc.* [1993] 2 Lloyd’s Rep. 1 (seller’s breach). Incorrect statements are found in earlier cases to the effect that the relevant date is the date of the seller’s acceptance of the repudiation.
- 1738 For an illustration, see *Tredegar Iron and Coal Co (Ltd) v Hawthorn Bros Co* (1902) 18 T.L.R. 716.
- 1739 *White and Carter (Councils) Ltd v McGregor*; *Tredegar Iron and Coal Co (Ltd) v Hawthorn Bros Co*, above cf. *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91, 102, 105 (see below, paras 46-396—46-397).
- 1740 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788, 805.
- 1741 In which case, the buyer is not in breach of his contractual obligations, since his earlier repudiation is a “mere nullity” when not accepted by the seller: *Phillpotts v Evans* (1839) 5 M. & W. 475, 477; *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413, 444.
- 1742 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788 at 805. See Vol.I, Ch.26.
- 1743 The *Fercometal* case, above, at 805–806.

- 1744 Where the buyer fails to pay the agreed deposit, and the seller later accepts the buyer's repudiation of the contract, the seller may recover damages measured at the amount of the deposit: *Damon Compania Naviera SA v Hapag-Lloyd International SA [1985] 1 W.L.R. 435*; *Griffon Shipping LLC v Firodi Shipping Ltd (The Griffon) [2013] EWCA Civ 1567*, [2014] 1 All E.R. (Comm) 593.
- 1745 See above, paras 46-353, 46-357.
- 1746 On the position in regard to the deposit if the seller does not claim damages, see above, para.46-360.
- 1747 If there was an available market: s.50(3) (see above, paras 46-370 et seq.).
- 1748 See above, para.46-382.
- 1749 *RV Ward Ltd v Bignall [1967] 1 Q.B. 534*.
- 1750 s.37 (see above, paras 46-292—46-293). See *Vitol SA v Phibro Energy AG (The Mathraki) [1990] 2 Lloyd's Rep. 84* (buyer's breach caused seller to become liable in damages to the carrier).
- 1751 See above, paras 46-370 et seq.
- 1752 See the doctrine of mitigation: Vol.I, paras 29-096 et seq.
- 1753 See below, paras 46-390, 46-427—46-428. This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special remedies for buyers in consumer sales contracts, see above paras 40-514 et seq. e.g. below, paras 46-407, 46-415.
- 1755 Vol.I, paras 29-124 et seq. The seller may claim expenses on resale, storage charges when the buyer delays in taking delivery, or cancellation expenses (*Bem Dis Turk Ticaret SA TR v International Agri Trade Co Ltd [1999] 1 All E.R. (Comm) 619*).
- 1756 See Vol.I, paras 29-286 et seq. (s.54 preserves the right "... to recover interest ...").
- 1757 See Vol.I, para.29-287; and see above, para.46-369.
- 1758 See *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48, [2009] 1 A.C. 61*, discussed above, Vol.I, paras 29-144 et seq.

(d) - Other Remedies of the Seller

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Section 6. - Remedies of the Seller

(d) - Other Remedies of the Seller

Miscellaneous remedies of the seller ¹⁷⁵⁹

- 46-387 When the buyer has possession of the goods but not the property in them, he is the bailee of the seller who may be entitled, either under the terms of the contract ¹⁷⁶⁰ or under the ordinary law of contract, to determine the bailment and demand the immediate return of the goods, if the buyer commits a breach of his obligations under the contract. ¹⁷⁶¹ The appropriate remedies are the proprietary ones for chattels under the law of torts, ¹⁷⁶² viz proceedings for wrongful interference with the goods ¹⁷⁶³ in which the claimant seeks an order for the specific delivery of the goods, ¹⁷⁶⁴ or damages for conversion when the buyer has dealt with the goods in a manner which denies the seller's title to them. ¹⁷⁶⁵ In appropriate cases the seller may also be able to obtain an injunction against the buyer to prevent him from breaking his contractual obligation, e.g. under an exclusive purchasing agreement. ¹⁷⁶⁶
- 46-388 Remedies for mistake, fraud and misrepresentation are considered in Vol.I, ¹⁷⁶⁷ as is forfeiture of deposits and prepayments. ¹⁷⁶⁸ The seller may have special remedies where he has taken a negotiable instrument ¹⁷⁶⁹ or a documentary credit ¹⁷⁷⁰ for the price, or an export credit guarantee ¹⁷⁷¹; or where the contract contains an arbitration clause. ¹⁷⁷² The provisions of s.60 should also be noted.

Declarations

- 46-389 The seller may in appropriate circumstances obtain a declaration setting out his legal rights against the buyer.¹⁷⁷³ For instance, although the seller who retains the property in the goods cannot normally sue for the price,¹⁷⁷⁴ he may obtain a declaration that the buyer is bound to pay the price upon the seller's fulfilling his obligations, e.g. upon tender of the shipping documents.¹⁷⁷⁵ But the Court of Appeal¹⁷⁷⁶ has decided that a declaration of indemnity should not be made where, as a result of the buyer's breach of contract, a third party (e.g. the supplier to the seller) has a potential claim against the seller: if that liability is not too remote a head of loss in the seller's action against the buyer, the proper course is for the court to reserve that head of damages.¹⁷⁷⁷

Footnotes

- 1759 s.52 (specific performance) applies in practice only to claims by the buyer (see below, paras 46-448—46-452): *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com. Cas. 39, 46. (On the wording of the section, it is just possible to argue that the section could apply to the seller's claim to recover the goods.) See also *Elliott v Pierson* [1948] 1 All E.R. 939, 942; *Treitel* [1966] J.B.L. 211, 229–230.
- 1760 1761 *McEntire v Crossley Bros* [1895] A.C. 457, 464; and see above, paras 46-349—46-352. On repudiatory breach, see Vol.I, paras 27-001 et seq. Under the terms of the contract, the seller may also be entitled to “trace” and recover the proceeds of sub-sales made by the buyer: *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676 (see above, paras 46-173—46-188).
- 1762 e.g. *Bishop v Shillito* (1818) 2 B. & A. 329n. (conversion); *Rew v Payne, Douthwaite Co* (1885) 53 L.T. 932. For these actions in general, see Salmond and Heuston, on the Law of Torts, 21st edn (1996), paras 6.1 et seq. cf. below, paras 46-455—46-456.
- 1763 Under the *Torts (Interference with Goods) Act 1977*.
- 1764 See above, para. 46-351; see below, para. 46-448.
- 1765 The seller who is entitled to immediate possession may also have these proceedings against *strangers* who interfere with the possession of the buyer. cf. s.46(4) (see above, para. 46-338).
- 1766 *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch. 799. See Vol.I, paras 30-075 et seq.; Sharpe, Injunctions and Specific Performance, looseleaf edition, paras 9-130 to 9-200. cf. below, para. 46-453.
- 1767 Vol.I, Chs 8 and 9.
- 1768 Vol.I, paras 29-259 et seq. and 32-074. See also above, para. 46-360.
- 1769 See above, paras 36-001 et seq.
- 1770 See above, paras 36-456 et seq.

- 1771 See Benjamin's Sale of Goods, 11th edn (2021), Ch.24.
- 1772 Above, Ch.34.
- 1773 e.g. *Household Machines Ltd v Cosmos Exporters Ltd [1947] K.B. 217*; *Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 Q.B. 297* (see below). See Zamir and Woolf, The Declaratory Judgment, 4th edn, and see below, para.46-454 (buyer's claim).
- 1774 s.49(1) (see above, para.46-361); but he may be entitled to do so under s.49(2) (see above, para.46-366) or an express term in the contract (see above, paras 46-367—46-368).
- 1775 *Polenghi Brothers v Dried Milk Co Ltd (1904) 10 Com. Cas. 42*. The court has a discretion to make a negative declaration e.g. to the effect that the claimant is not liable to the defendant in respect of a certain matter: *Messier-Dowty Ltd v Sabena SA [2000] 1 W.L.R. 2040, CA*.
- 1776 *Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 Q.B. 297*.
- 1777 *[1952] 2 Q.B. 297*. cf. *Deeny v Gooda Walker Ltd (No.3) [1995] 4 All E.R. 289* (not a sale of goods case).

(a) - Damages for Non-Delivery

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Section 7. - Remedies of the Buyer

(a) - Damages for Non-Delivery

Introduction ¹⁷⁷⁸

46-390 Section 51 of the Act¹⁷⁷⁹ lays down the following rules:

Arrangement of Act

“(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.”¹⁷⁸⁰

(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.¹⁷⁸¹

(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) at the time of the refusal to deliver.”

In addition to this section, the buyer may by s.54 also recover interest¹⁷⁸² and special damages, e.g. for expenses or for unusual loss resulting from special circumstances known to the seller,¹⁷⁸³ or, in certain circumstances, loss of profits under a resale.¹⁷⁸⁴ A clause in the contract may permit the buyer, upon the seller’s default, to repurchase elsewhere, and to claim any loss from the seller.¹⁷⁸⁵

The minimum legal obligation¹⁷⁸⁶ of the seller is the basis for assessing damages against him for failure to deliver the goods.¹⁷⁸⁷ Thus, where the contract was for “200 tons, 5 per cent. more or less”, the margin was held to be at the seller’s option and the damages were assessed on the basis of failure to deliver 190 tons.¹⁷⁸⁸

Damages where there is an available market

- 46-391 Section 51(3) spells out the normal application of the rule in s.51(2) to the situation where there is “an available market” for the goods. The normal measure of damages when the seller¹⁷⁸⁹ fails to deliver the goods is the difference between: (a) the market price of the relevant goods at the time fixed for delivery and at the place fixed for delivery; and (b) the contract price.¹⁷⁹⁰ One of the grounds for this measure of damages is the doctrine of mitigation¹⁷⁹¹ since s.51(3) assumes that the reasonable buyer should have gone into the market, immediately following the seller’s breach of contract, and bought substitute goods.¹⁷⁹² Section 51(3) is only a “prima facie” rule, and will not apply when the parties ought, at the time of making the contract, to have contemplated as reasonable men that the rule would not compensate the buyer for his loss, should the seller fail to deliver.¹⁷⁹³ Nor will it apply if it is inappropriate in special circumstances.¹⁷⁹⁴

An available market

- 46-392 The meaning of “available market” has already been considered,¹⁷⁹⁵ which is in general as applicable to the buyer’s claim as it is to the seller’s.¹⁷⁹⁶ The buyer is naturally concerned with an available market in the sense of his ability to *buy* substitute goods, i.e. the ready capacity of willing sellers to supply quickly goods of the relevant category.¹⁷⁹⁷ Thus if the demand for the goods exceeds the supply, so that some prospective buyers are unable to obtain the goods they wish, the rule in s.51(3) will not apply.¹⁷⁹⁸ An excessive price may show that the supply of the goods is insufficient to constitute an “available market”.¹⁷⁹⁹ The willing sellers should be immediately accessible to the buyer, and within a reasonable distance of the place fixed by the contract for delivery.¹⁸⁰⁰ But the question of the time within which the substitute goods are available may depend on the nature of the goods in question and the business situation of the buyer.¹⁸⁰¹ Where the buyer needed to obtain 15,000 tons of lard for immediate delivery in the United Kingdom, the House of Lords apparently accepted¹⁸⁰² that there could be an available market from the buyer’s point of view when he could buy in the United States of America, for delivery to ports for shipment to the United Kingdom, smaller quantities separately (up to 2,000 tons at a time) and spread over a period. In another case, where the sellers failed to deliver goods of merchantable quality at a

United Kingdom port, the Court of Appeal held¹⁸⁰³ that the fact that there was a market for the purchase of similar goods in India did not require the buyers to mitigate by ordering substitute goods from India.

The relevant time for taking the market price

46-393 Section 51(3) specifies:

“... the time or times when [the goods] ought to have been delivered or (if no time was fixed)¹⁸⁰⁴ at the time of the refusal to deliver.”

The terms of the contract will normally fix the relevant time.¹⁸⁰⁵ When the contract specifies that delivery is to be made by separate instalments at different times, the market price for each instalment is taken separately at the date when the particular instalment should have been delivered.¹⁸⁰⁶ Where the contract fixes a period within which the seller is to make delivery of the goods, the time for fixing the market price in the event of non-delivery is the last possible time within that period.¹⁸⁰⁷ If the contract requires the seller to deliver the goods after transporting them to a specified destination, it is the normal¹⁸⁰⁸ rule that the time and place of the final destination are the time and place which are relevant for fixing the relevant market price.¹⁸⁰⁹ If the obligation imposed on the seller is to deliver the goods on a fixed date, it may be assumed that he has the whole of the usual business hours of that day in which to make delivery.¹⁸¹⁰ In these circumstances the relevant time for taking the market price under s.51(3) should be the first practical opportunity which the buyer reasonably¹⁸¹¹ had to buy in the market, e.g. normally on the next business day.¹⁸¹²

No time fixed for delivery¹⁸¹³

46-394 A Divisional Court has decided¹⁸¹⁴ that a contract for delivery of the goods within a reasonable time is not a contract with a fixed time for delivery within s.51(3); but the Court of Appeal in the same case expressly reserved its opinion¹⁸¹⁵ on this point.¹⁸¹⁶ It is submitted that the natural application of the concluding words of s.51(3) would be to a contract where the seller was to deliver at the request of the buyer.¹⁸¹⁷ Where delivery is to be made within a reasonable time of the making of the contract,¹⁸¹⁸ the relevant market price should not necessarily be that prevailing at the date of the seller's refusal to deliver but at the time, perhaps later than the refusal, when it would have been reasonable for the seller to deliver.¹⁸¹⁹

Postponement of time fixed for delivery

- 46-395 If the time fixed for delivery was postponed at the seller's request,¹⁸²⁰ but he fails to deliver the goods at or before the postponed date of delivery, the breach occurs at the latter date¹⁸²¹ and the damages should be assessed on the basis of the market price at that date.¹⁸²² If the request for postponement of the delivery date was made by the buyer, and the seller agreed to the postponement but later repudiated his obligation to deliver,¹⁸²³ this repudiation will constitute a breach by the seller,¹⁸²⁴ so that the damages should be calculated by reference to the market price at the date of the seller's repudiation.¹⁸²⁵

The seller's anticipatory repudiation: repudiation accepted¹⁸²⁶

- 46-396 Where the seller, before the date fixed for delivery of the goods, repudiates his liability under the contract, the buyer has a choice.¹⁸²⁷ If he treats the repudiation as an immediate breach of contract, the relevant date for taking the market price is, *prima facie*, and subject to the rules on mitigation, the due date for delivery—not the date of the repudiation¹⁸²⁸ nor the date of the buyer's acceptance of the repudiation.¹⁸²⁹ If the buyer's claim is heard before the date for delivery arrives, the court must attempt to estimate what the market price is likely to be at that date,¹⁸³⁰ e.g. by taking into account the current trend of the market. However, under the rules of mitigation¹⁸³¹ the buyer must, following his acceptance of the repudiation, take reasonable steps to reduce his loss, e.g. by buying substitute goods in the market.¹⁸³² If the seller¹⁸³³ fails to produce evidence to show that the buyer ought reasonably to have bought substitute goods at a time earlier than the date fixed for delivery under the contract, the buyer's damages should be calculated with reference to the market price at that date.¹⁸³⁴ But where the seller can prove that the buyer should have mitigated his loss by repurchasing before the due date, the relevant market price is that existing at the date the buyer ought reasonably¹⁸³⁵ to have bought the substitute goods.¹⁸³⁶ However, if the buyer accepts the anticipatory repudiation but does not in fact mitigate by repurchasing in the market when he ought reasonably to have done so, the market price may fall between that date and the date fixed for delivery: it has been held that in these circumstances the buyer's damages will be assessed by reference to the lower price at the later date.¹⁸³⁷

Repudiation not accepted

- 46-397 If the buyer chooses not to accept the seller's anticipatory repudiation, it is treated as a "nullity"¹⁸³⁸ and the contract continues to bind both parties¹⁸³⁹: the buyer will then await the date fixed for delivery, and the seller will commit a breach of contract only if he then fails to deliver. Thus, the seller may change his mind before the due date and (without breach of contract) fulfil his contractual obligation by delivering on that date¹⁸⁴⁰; or the contract may be terminated without a breach by the seller, e.g. by the seller exercising a right under the contract to cancel it,¹⁸⁴¹ or be discharged by frustration.¹⁸⁴² The rules on mitigation¹⁸⁴³ do not apply to the buyer until the seller commits an actual breach, and thus the buyer's damages are assessed with reference to the market price at the date of the breach.¹⁸⁴⁴

The market price: relevance of resale at a different price

- 46-398 The methods of ascertaining the market price in a buyer's claim are the same as in a seller's claim¹⁸⁴⁵; but when the buyer is claiming under s.51(3), the relevant price is the *buying* price at which the buyer could obtain equivalent goods.¹⁸⁴⁶ In *Williams Bros v Ed T Agius Ltd*,¹⁸⁴⁷ the House of Lords held that where there is evidence of the market price at the date of the seller's breach, the buyer's damages for non-delivery cannot be reduced by reference to the fact that he had actually resold goods of the same description at a price lower than what happened to be the market price at the time fixed for delivery. In these circumstances, the buyer is entitled to fulfil his obligations under the sub-contract by buying equivalent goods in the market at the price current at the time of non-delivery.¹⁸⁴⁸ Conversely, the fact that the buyer has resold the goods at a higher price will normally be disregarded on the grounds that the buyer can buy replacement goods in the market to satisfy the sub-buyers.

Resale of self-same goods

- 46-399 If the buyer has re-sold the self-same goods, the buyer will not be able to purchase a substitute with which to perform the contract, and so will default on the sub-sale. The buyer may recover loss of profit on the resale only when the parties contemplated that the buyer might re-sell the self-same goods, and thus would not be able to substitute other identical goods, and the buyer has indeed lost the sub-sale.¹⁸⁴⁹

Sub-buyer has released buyer from liability

- 46-400 If the buyer may be liable to the sub-buyer for the difference between the sub-sale price and the market price, straightforwardly compensatory damages should be available. However, although the sub-buyer has a claim against the buyer for damages for the difference between the sub-sale price and the market price, the sub-buyer may have released the buyer from liability. In this case there seem to be three possible approaches.¹⁸⁵⁰

The first is that the resale should always be ignored. Disregarding the sub-sale might be justified on the basis that it is the buyer's good fortune that it has not incurred liability to the sub-buyer, and has nothing to do with the seller; but in cases in which the buyer was obliged to supply the self-same goods to the sub-buyer, to disregard the sub-sale seems to give the buyer more than the buyer would have received had the contract been performed.

Therefore it may be better to adopt a second approach. If the sub-sale was of identical goods such that the buyer could not use other goods to satisfy the sub-sale, nor could it legally have re-sold the goods in the market, the buyer's loss should be limited by the amount it would have received under the sub-sale.

- 46-401 The courts have sometimes taken a third view which takes into account to purpose for which it was contemplated that the innocent party would use the goods. Adopting this approach, no substantial damages would be awarded when it appears that the buyer has used goods in a way contemplated without incurring liability.¹⁸⁵¹ A similar approach was taken by the Court of Appeal in *Euro-Asian Oil SA (formerly Euro-Asian Oil AG) v Credit Suisse AG*,¹⁸⁵² a case of non-delivery, approving the trial judge's decision to limit the claimant's recovery to the loss on the sub-sale, rather than the higher difference between the contract price and the market price at the date for delivery, even though the buyer could have fulfilled the sub-sale using other goods, on the ground that the parties contemplated a sub-sale. It is submitted that this case should not be followed and that the buyers should have recovered the difference in value because the buyer was not obliged to deliver the self-same goods under the sub-sale.¹⁸⁵³

No evidence of market price

- 46-402 Where normal proof of the market price at the date of the seller's breach is not available, other evidence may be relied upon, e.g. the price at which a sub-buyer had agreed to take the goods from the buyer,¹⁸⁵⁴ or the price in an offer to buy from a third party, or the amount paid by the buyer in compromising disputes relating to the market value of similar goods at the relevant time.¹⁸⁵⁵

Substitute goods obtained at below market price

- 46-403 Where there is normal proof of the market price at the place and date fixed for delivery, damages for non-delivery should be calculated by reference to that price despite the fact that the buyer had succeeded in obtaining substitute goods at a price lower than that price, or even at no cost to himself (e.g. by gift). ¹⁸⁵⁶ The buyer could have made the same profit by buying and reselling even if the contract had been performed. If the buyer does not buy substitute goods in the market immediately following the seller's failure to deliver, his damages should be assessed by reference to the market price at that date despite the fact that the buyer later bought substitute goods at a lower price. ¹⁸⁵⁷ The position may be different if the buyer later bought the *same* goods from the seller at a price lower than the market price. In one case, ¹⁸⁵⁸ the buyer justifiably rejected the goods on the ground of their defective quality. There were continuous negotiations ¹⁸⁵⁹ between the parties following this rejection, leading to the buyer finally accepting the same goods from the seller at a reduced price. The Court of Appeal held that the market price rule in s.51(3) did not apply: the buyer had suffered no loss since the price at which he obtained the goods was less than the market price for similar goods at the date of the seller's breach of contract. In this case, the goods would not have been available had the contract been performed.

Damages for non-delivery in the absence of an available market

- 46-404 If there was no available market for goods of the contractual description at the time and place of the seller's failure to deliver (e.g. because the goods were to be specially manufactured ¹⁸⁶⁰) the buyer's damages must be assessed under the general rule of s.51(2), see above. ¹⁸⁶¹ The assessment must be made on the basis of the value ¹⁸⁶² of the contract goods at the time and place of the breach, ¹⁸⁶³ which may be ascertained by any relevant evidence, such as the cost of the nearest equivalent, ¹⁸⁶⁴ or a resale price, or the profits which the buyer would have made had he acquired the goods and manufactured them into other articles, as the seller knew that he intended to do. ¹⁸⁶⁵ The price under a resale may be put in evidence in order to show "the real value of the goods", despite the fact that the seller did not know of the resale ¹⁸⁶⁶; but a resale price fixed some months earlier is not satisfactory evidence of the value of the goods at the time of the breach of contract. ¹⁸⁶⁷ The buyer must mitigate if reasonable steps are open to him, but what is reasonable is a question of fact. ¹⁸⁶⁸ Thus, where the seller tendered to the buyer a bill of lading which was not accurately dated, but the buyer could nevertheless have legally compelled his sub-buyers to accept the goods, the Court of Appeal held that the buyer had not failed to mitigate when he refused to enforce the

sub-contracts because to do so in the circumstances would have injured his commercial reputation by giving him a bad name in the trade.¹⁸⁶⁹

Purchase of near equivalent

46-405 The buyer may¹⁸⁷⁰ be able to buy substitute goods from another source: in these circumstances, the price at which he reasonably¹⁸⁷¹ bought them will be the basis for assessing his damages under the general principle of s.51(2).¹⁸⁷² Provided that the buyer's mitigating action was reasonable in all the circumstances,¹⁸⁷³ he may recover as damages the reasonable cost of obtaining goods which are the nearest available equivalent in quality and price to goods of the contractual description¹⁸⁷⁴; he may also claim the extra expense of adapting the substitute goods to suit his requirements, to the extent that goods of the contractual description would suit these requirements.¹⁸⁷⁵ However, the courts are anxious to prevent the buyer from receiving an extra benefit at the seller's expense. If the substitute goods bought by the buyer were later resold by him at an extra profit because they were of better quality or higher value than goods of the contractual description, the extra profit must be set off against the cost of buying the substitute goods which the buyer claims from the defaulting seller.¹⁸⁷⁶ But if the buyer acts reasonably in buying "near equivalent" goods for his own use (and not for resale nor for the purpose of making a profit through using them),¹⁸⁷⁷ it is submitted that he should not be compelled, by a reduction in his damages for their cost, to "pay for" an extra benefit to himself because of some advantage which the substitute goods have over those of the contractual description.¹⁸⁷⁸

Offers by the seller to mitigate his breach

46-406 The rules of mitigation do not oblige the buyer to accept from the seller goods which do not conform with the contractual standard and which he is therefore entitled to reject.¹⁸⁷⁹ Thus, where the buyer properly rejects goods on the ground of their defective quality, he is not obliged to accept them when the seller offers them in mitigation of his breach of contract.¹⁸⁸⁰ However, the buyer may be bound to accept a reasonable offer by the seller to mitigate his breach by supplying goods which are in fact up to the contractual standard, but are to be delivered on different terms so far as the timing and method of payment are concerned.¹⁸⁸¹ Thus, where sellers in breach offered to continue deliveries in accordance with the contract if the buyers would pay cash against each delivery in lieu of the agreed credit terms, the Court of Appeal held that it would have been reasonable for the buyers to have accepted the seller's bona fide offer and thus to have mitigated their loss.¹⁸⁸² Even where the seller fails to take the initiative, it may be reasonable for the buyer to minimise his loss by offering to repurchase the goods at a later date but at the original price.¹⁸⁸³

Loss of profits under sub-sale

- 46-407 Where a market price at the date of the seller's breach is ascertainable, a higher or lower price at which the buyer has resold the goods to a sub-buyer is generally irrelevant to the assessment of damages for the seller's failure to deliver.¹⁸⁸⁴ Thus, the seller cannot take advantage of the fact that the buyer, following the seller's failure to deliver, fulfilled his obligations under a resale by using other goods, and thereby made a greater profit on the resale than he would have done if the seller had not broken the contract.¹⁸⁸⁵ The buyer may have contracted to sell to his sub-buyer the very same goods as he bought from the seller,¹⁸⁸⁶ or he may have fixed the same delivery date in the contract of resale as in the original contract.¹⁸⁸⁷ In these two situations, when the seller fails to deliver on the due date, the buyer cannot, despite the presence of an available market, avoid loss under the contract of resale: but the buyer can recover damages for that loss only where the seller should have contemplated, at the time the original contract was made, both that the buyer was, or was probably,¹⁸⁸⁸ buying for resale,¹⁸⁸⁹ and that the buyer could perform his obligations under a contract of resale only by delivering the same goods.¹⁸⁹⁰ Thus, in the leading case of *Hall v Pim*,¹⁸⁹¹ the buyers bought a cargo under a CIF contract, which expressly contemplated that the buyer might resell during the voyage,¹⁸⁹² and that any resale would be of the identifiable or named cargo, which meant that the buyers would necessarily be in default under the sub-contract if the sellers failed to deliver under the original contract.¹⁸⁹³ The buyers were able to recover the difference between the contract price and the resale price since “the seller in such a case contracted to put the buyer in a position to fulfil his sub-contracts if he entered into them”.¹⁸⁹⁴ But the actual loss of profits on a resale will be awarded only if the terms of the resale were reasonable and usual.¹⁸⁹⁵
- 46-408 Although the decision in *Hall v Pim* has been criticised,¹⁸⁹⁶ it is submitted that it is sound in principle.¹⁸⁹⁷ It can be distinguished¹⁸⁹⁸ from another House of Lords' decision, *Williams v Agius*,¹⁸⁹⁹ on the ground¹⁹⁰⁰ that the original contract of sale in *Hall v Pim* contemplated that the buyer might resell the identical cargo, so that he would necessarily be in default under the sub-sale if the seller failed to deliver under the original sale; whereas in *Williams v Agius* the buyer could reasonably, under the rules of mitigation, have gone into the market to procure a substitute. Since the resale was not “for the identical article which was the subject of the principal sale”,¹⁹⁰¹ the buyers were entitled to fulfil their contract of resale by buying in the market at the date of the breach.¹⁹⁰²

Assumption of responsibility

- 46-409 Following the recent decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*¹⁹⁰³ it now seems that a claimant will not recover, even for losses that were not unlikely to occur in the usual course of things, if the defendant cannot reasonably be regarded as having assumed responsibility for losses of the particular kind suffered. In that case, time-charterers of a vessel that was re-delivered late were held not liable to the owners for loss of the following fixture; their liability was merely to pay the difference between the charter rate and the market rate for the period of delay. One of the principal reasons, at least by Lord Hoffmann (with whom the other members of the majority agreed), was that there was a general understanding in the industry that the charterer would be liable only for the lower amount.¹⁹⁰⁴ Since *Hall v Pim*¹⁹⁰⁵ is said to be a decision that “astonished the Temple and surprised St Mary Axe”,¹⁹⁰⁶ it might seem to be open to the same criticism as the majority of the House of Lords made of the decision of the lower courts in *The Achilleas*. In that case only Lord Walker referred to *Hall v Pim* and he said that “[it] is now generally regarded as a sound decision on its special facts”. However, care must be taken in arguing by analogy to *Hall v Pim*, and when the facts are not on all fours with that case it must also be asked whether it was reasonable to think that the seller was assuming responsibility for the loss. That applies even if the loss was not unlikely to occur on the ordinary course of things or its likelihood been brought to the seller’s attention.

Loss of future business

- 46-410 Where, at the time they made their contract, it was within the reasonable contemplation of the parties that defects in the goods supplied by the seller (in breach of his warranty as to their quality) might lead to sub-buyers (customers of the buyer) withdrawing their custom from the buyer, damages have been awarded for loss of profits on “repeat orders” from the sub-buyers.¹⁹⁰⁷ It is submitted that a similar principle should apply where the seller’s failure to deliver causes the buyer a general loss of custom which was within the reasonable contemplation of the parties at the time of contracting, subject again to whether it was reasonable to think that the seller was assuming responsibility for the loss.¹⁹⁰⁸

Loss of profits on resale: no available market

- 46-411 If there was no market for the goods in question but the seller knew,¹⁹⁰⁹ or ought to have known,¹⁹¹⁰ that the buyer bought the goods with a view to resale, the buyer is entitled to his loss

of profit on the resale¹⁹¹¹ when the seller fails to deliver the goods.¹⁹¹² Thus, if the goods were to be specially manufactured for the buyer, and the seller knew that they were to be resold by him, the buyer's loss of profit is the measure of damages when the seller fails to deliver.¹⁹¹³

Damages payable by the buyer to the sub-buyer

46-412 Wherever the buyer can recover loss of profits on a resale,¹⁹¹⁴ he is also entitled to recover the loss which he incurred as a result of being made liable in damages to his sub-buyer for breach of the terms of the contract of resale,¹⁹¹⁵ subject again to whether it was reasonable to think that the seller was assuming responsibility for the loss.¹⁹¹⁶ In *Grébert-Borgnis v J and W Nugent*¹⁹¹⁷ the seller had actual knowledge, at the time of contracting, that the buyer had already sold the goods on the same terms (except as to price) to a sub-buyer in France, and that the buyer was purchasing the goods in order to fulfil that contract. The Court of Appeal awarded the buyer damages¹⁹¹⁸ in respect of the compensation which the buyer had been compelled to pay to the sub-buyer in proceedings in France.¹⁹¹⁹ Where the buyer can recover damages in respect of compensation paid to his sub-buyer, he may also recover costs reasonably incurred by him in defending a claim made by his sub-buyer.¹⁹²⁰ The buyer may be entitled to substantial damages from the seller even before he has discharged his liability to the sub-buyer by payment.¹⁹²¹ If the sub-buyer has not claimed damages from the buyer by the time the buyer's claim against the original seller is being decided by the court, the buyer may be entitled to a declaration of indemnity in respect of the sub-buyer's potential claim¹⁹²²; or the court may reserve this item of the buyer's claim for assessment of damages if and when the sub-buyer's claim is met by the buyer.¹⁹²³

Footnotes

1778 General principles on the law of damages are discussed in Vol.I, Ch.29. The rules to be discussed in this section are "default rules" in the sense that the parties are free to fashion their own compensatory scheme, subject to the rules on penalties (see Vol.I, paras 29-203 et seq.) and legislative controls such as the Unfair Contract Terms Act 1977 (see Vol.I, Ch.17). In *Bunge SA v Nidera BV [2013] EWHC 84 (Comm), [2013] 1 Lloyd's Rep. 621* Hamblen J said, in relation to the Default Clause in a GAFTA sale contract, that: "There is nothing unusual about the parties seeking to set out the measure of damages in advance and being confined, for good or bad, to that measure even if it does not reflect the measure that would be available at common law" (at [51]). The penalty rules do not appear to have been argued. However, the judge thought that the measure applied by the Default Clause did not depart from the rules of common law. cf. the Supreme Court held that the clause was not intended to be a complete code

for the assessment of damages but covered some of the same field [2015] UKSC 43, [32], [61]. In *Novasen SA v Alimenta SA* [2013] EWHC 345 (Comm), [2013] 1 Lloyd's Rep. 648, at [18], Popplewell J said that the Default Clause did not constitute a penalty clause, applying his dicta in *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB); see above, para.29-249.

- 1779 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special rules in relation to buyer's remedies in consumer sales contracts; see above, paras 40-467 et seq.
- 1780 The buyer may claim damages for non-delivery even where the property in the goods has passed to the buyer; but, whether or not the property in the goods has passed to the buyer, his damages for the seller's failure to deliver should be assessed on the same basis.
- 1781 This subsection is in terms of the first rule in *Hadley v Baxendale* (1854) 9 Exch. 341 (see Vol.I, para.29-124). It does not refer to the further limitation that there will not be liability if it was unreasonable to think that the buyer was assuming responsibility for such a loss: see *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 A.C. 61, discussed above, Vol.I, paras 29-144 et seq. It may be argued that that the question of assumption of responsibility is merely an aspect of the remoteness rule, in which case s.51(2) might prevent it applying in sale of goods contracts, but s.51(2) is probably best viewed as a "default rule" which applies only when the circumstances do not indicate otherwise. If on the facts it was not reasonable for the buyer to think that the seller was assuming responsibility for a particular loss, the loss will not be recoverable even though it would otherwise fall under s.51(2). See above, Vol.I, para.29-144.
- 1782 Vol.I, paras 29-286 et seq.
- 1783 See below, paras 46-404, 46-412.
- 1784 See below, paras 46-407—46-412.
- 1785 It was held in *Simmonds v Millar Co* (1898) 15 T.L.R. 100 that, in making such a repurchase, the buyer is not acting as the seller's agent: hence, the seller cannot claim any profit arising from the fact that the buyer was able to repurchase at a price lower than the contract price.
- 1786 See Vol.I, paras 29-001, 29-092.
- 1787 *Cockburn v Alexander* (1848) 6 C.B. 791, 814.
- 1788 *Re Thornett and Fehr and Yuills Ltd* [1921] 1 K.B. 219, 229–230. cf. *Bunge Corp New York v Tradax Export SA, Panama* [1981] 1 W.L.R. 711; *Paula Lee Ltd v Robert Zehil Co Ltd* [1983] 2 All E.R. 390 (not a sale of goods case).
- 1789 By analogy, the same measure of damages has been used when an auctioneer at an auction expressed to be "without reserve" is liable to the highest bidder under a collateral contract that he would sell to that bidder: *Barry v Davies (trading as Heathcote Ball Co)* [2000] 1 W.L.R. 1962, CA. (the goods were new).
- 1790 When s.51(3) applies, and the market price at the time of the breach is the same as, or less than, the contract price, the buyer is still entitled to nominal damages: *Erie County*

- 1791 *Natural Gas and Fuel Co Ltd v Carroll* [1911] A.C. 105, 117–118, PC (citing *Valpy v Oakeley* (1851) 16 Q.B. 941; and *Griffiths v Perry* (1859) 1 E. & E. 680). cf. *Charter v Sullivan* [1957] 2 Q.B. 117. See also Vol.I, para.29-011. “The contract price/market price differential is not a computation of lost profit”: *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm) at [98], see above, para.46-371.
- 1792 See Vol.I, paras 29-096 et seq.
- 1793 The injured party should ordinarily go out into the market to make a substitute contract to mitigate his loss: *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 A.C. 353 at [79]; *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) at [160]. The purpose for which the buyer wanted the goods is normally irrelevant: hence, where the buyer is a non-profit-making organisation the ordinary rule still applies: *Diamond Cutting-Works Federation Ltd v Triefus Co Ltd* [1956] 1 Lloyd's Rep. 216, 227. On the possible relevance of the buyer's lack of financial resources, see Vol.I, paras 29-100—29-103.
- 1794 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 (see below, paras 46-420, 46-422—46-423) cf. on the analogous s.50(3): *Thompson Ltd v Robinson (Gunmakers) Ltd* [1955] Ch. 177 (see above, para.46-374).
- 1795 See below, paras 46-407, 46-412. *Carbopego-Abastecimento de Combustives SA v Amci Export Corp* [2006] EWHC 72 (Comm), [2006] 1 Lloyd's Rep. 736 (date of breach assessment need not be followed if it would give rise to injustice). cf. *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 A.C. 353; in *Bunge SA v Nidera BV* [2013] EWHC 84 (Comm), [2013] 1 Lloyd's Rep. 621 at [55] the judge questioned whether the *Golden Victory* should apply to one-off sales contracts. An appeal was dismissed by the Court of Appeal on other grounds [203] EWCA Civ 1628, [2014] 1 Lloyd's Rep. 404 (see Vol.I, para.29-091). The Supreme Court confirmed that the market price rule should be applied at the date of delivery. But disagreeing with the judge and Court of Appeal applied the principle in *The Golden Victory* which allows contingencies other than a change in the market price to be taken into account if subsequent events show that they would have reduced the value of performance even without the defaulter's renunciation [2015] UKSC 43, [16], [18], [85]. As to the question whether the subsection is appropriate when the buyer has paid the price to the seller in advance of the time fixed for delivery, and the market price rises between the time when the seller fails to deliver and the judgment in favour of the buyer, see Benjamin's Sale of Goods, 11th edn (2021), para.17-009; *Peel* [2016] L.Q.R. 177 and *Yip and Goh* [2016] J.B.L. 335. On the possible relevance of the buyer's lack of financial resources, see Vol.I, paras 29-100—29-103.
- 1796 See above, paras 46-371—46-381.
- 1797 *Lawson* (1969) 43 A.L.J. 106, 113.
- 1798 cf. see above, paras 46-371—46-381. Where goods are in short supply, so that retail sellers have agreed to a fixed price for selling the goods, a “black market” operating in defiance of contractual obligations has been treated as relevant to fix the market price when that is the only source of substitute goods available to the disappointed buyer: *Mouatt v Betts Motors Ltd* [1959] A.C. 71; *British Motor Trade Association v*

- Gilbert* [1951] 2 T.L.R. 514. In *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63, it was said that there may be a market for used goods even if the precise model or brand sold was not available: “the availability of equivalent second-hand goods capable of performing the same functions in much the same way would constitute an available market for ‘the goods in question’. A buyer of such equivalent goods would be in the same financial position as if the contract had been performed” (at [93]). However, it was held there was no relevant market when there was only a possibility that equivalent goods would become available within about three months (at [95]).
- 1798 cf. *Charter v Sullivan* [1957] 2 Q.B. 117 (the opposite case, where the buyer defaulted in this situation: see above, para.46-375).
- 1799 cf. *O'Hanlan v GW Ry* (1865) 6 B. S. 484, 494.
- 1800 Reasonableness is judged from the buyer’s point of view: *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] A.C. 1130; *Lesters Leather and Skin Co Ltd v Home and Overseas Brokers Ltd* (1948) 64 T.L.R. 569. See above, paras 46-376—46-377, and cf. *Hasell v Bagot, Shakes and Lewis Ltd* (1911) 13 C.L.R. 374.
- 1801 cf. *Charter v Sullivan* [1957] 2 Q.B. 117 at 133–134 (see above, para.46-375).
- 1802 *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd*, above, at 1138. cf. the different opinion in the same case in the Court of Appeal: [1966] 1 Q.B. 650, 687. cf. also *Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep. 142 (see above, para.46-373).
- 1803 *Lesters Leather and Skin Co Ltd v Home and Overseas Brokers Ltd* (1948) 64 T.L.R. 569 (snake skins).
- 1804 Time may be fixed by reference to the happening of a future event, e.g. the arrival of a ship at a certain destination: *Melachrino v Nickoll and Knight* [1920] 1 K.B. 693, 696 (“if no time was fixed” does not apply to anticipatory repudiation by the seller: see below, paras 46-396—46-397).
- 1805 See above, paras 46-236 et seq.
- 1806 *Brown v Muller* (1872) L.R. 7 Ex. 319; *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Re Voss* (1873) L.R. 16 Eq. 155.
- 1807 *Leigh v Paterson* (1818) 8 Taunt. 540, 541. cf. see above, para.46-377.
- 1808 cf. *Van den Hurk v R Martens Co Ltd* [1920] 1 K.B. 850 (the parties knew that the goods could not be examined until the time they finally reached the sub-buyer: see below, para.46-417).
- 1809 *Melachrino v Nickoll and Knight* [1920] 1 K.B. 693; *ABD (Metals and Waste) Ltd v Anglo Chemical and Ore Co Ltd* [1955] 2 Lloyd's Rep. 456, 466. On the relevant time in FOB and CIF contracts, see Benjamin’s Sale of Goods, 11th edn (2021), paras 19-299—19-316, 20-210 et seq., 21-037.
- 1810 cf. *Leigh v Paterson* (1818) 8 Taunt. 540. cf. also s.29(5) (see above, para.46-249).
- 1811 See Vol.I, para.29-099. In *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) (a case involving shares rather than goods) Andrew Smith J held that the question is whether the buyer was reasonable in delaying making a purchase (at [214]).

- 1812 *Kaines (UK) Ltd v Österreichische Warrenhandelsgesellschaft, etc.* [1993] 2 *Lloyd's Rep.* 1, 11, 12. cf. *Gainsford v Carroll* (1824) 2 *B. & C.* 624, 625 (the buyer “might have purchased” similar goods “the very day after the contract was broken”); *Roper v Johnson* (1873) *L.R. 8 C.P.* 167 at 179 (“... there is no breach until that day has passed”); *Gelmini v Moriglia* [1913] 2 *K.B.* 549 (duty to pay on a certain day: the cause of action is complete on the following day). It is submitted that the (obiter) view of Lord Wilberforce in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 *Lloyd's Rep.* 109, 117, that s.51 provides “for damages to be ascertained by reference to the price as on the last day for performance” should not be followed. (The case concerned a special clause in the contract, referring to “the date of default” which was construed to mean the day immediately following the last day for performance, on the ground that this accorded “with commercial reality and business sense”: [1978] 2 *Lloyd's Rep.* 109 at 117, 129, 131.) See also *C Czarnikow Ltd v Bunge Co Ltd* [1987] 1 *Lloyd's Rep.*, 202, 205; Benjamin’s Sale of Goods, para.17-008. cf. the *Golden Strait* case [2007] *UKHL* 12, [2007] 2 *A.C.* 353 at [79]–[80] (see Vol.I, para.29-091).
- 1813 On anticipatory repudiation, see below, paras 46-396—46-397.
- 1814 *Millett v Van Heek Co* [1920] 3 *K.B.* 535. cf. see above, para.46-378.
- 1815 [1921] 2 *K.B.* 369.
- 1816 In *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] *A.C.* 91, 104, the Privy Council doubted whether the second limb of s.51(3) had any meaning at all.
- 1817 See the dictum of *Atkin LJ* [1921] 2 *K.B.* 369 at 378. But see *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] *A.C.* 91, 104.
- 1818 Or from some other fixed point of time.
- 1819 *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1971] *A.C.* 91. cf. *Melachrino v Nickoll and Knight* [1920] 1 *K.B.* 693, 696.
- 1820 But a mere *forbearance* by the buyer from insisting upon delivery upon the original contractual date for delivery will not entitle him to claim damages on the basis of a higher market price at a later date: *Re Voss* (1873) *L.R. 16 Eq.* 155 (distinguishing *Ogle v Earl Vane* (1868) *L.R. 3 Q.B.* 272).
- 1821 If a period was fixed within which the postponed delivery was to take place, the last day of the period should be taken: *Ogle v Earl Vane* (1868) *L.R. 3 Q.B.* 272. cf. *Leigh v Paterson* (1818) 8 *Taunt.* 540, 541. If there was a simple waiver by the buyer of the date fixed for delivery, without a specific date being substituted, a reasonable time (presumably calculated from the due date) is taken as the new date for delivery: *Sheik Mohammad Habib Ullah v Bird Co* (1921) 37 *T.L.R.* 405, 406; *Johnson Matthey Bankers Ltd v The State Trading Corp of India Ltd* [1984] 1 *Lloyd's Rep.* 427, 436–437.
- 1822 *Ogle v Earl Vane* (1868) *L.R. 3 Q.B.* 272 (this decision was mentioned with approval by the House of Lords in *Johnson v Agnew* [1980] *A.C.* 367, 401); *Blackburn Bobbin Co Ltd v TW Allen Sons Ltd* [1918] 1 *K.B.* 540, 553–554; *affirmed on another ground:* [1918] 2 *K.B.* 467; *Sheik Mohammad Habib Ullah v Bird Co* (1921) 37 *T.L.R.* 405, 406, PC (accepting the principles in *Tyers v Rosedale and Ferryhill Iron Co Ltd* (1875) *L.R. 10 Ex.* 195, where the buyer requested postponement) (see below); the *Johnson Matthey* case [1984] 1 *Lloyd's Rep.* 427. cf. above, para.46-379.

- 1823 Unless there was a binding variation (viz supported by consideration), the seller may by giving reasonable notice to the buyer that he retracts his agreement to the postponement, oblige the buyer to accept the goods upon the expiry of that notice: see Vol.I, paras 6-089, 25-042 et seq.
- 1824 *Tyers v Rosedale and Ferryhill Iron Co Ltd*, above. cf. *Hartley v Hymans [1920] 3 K.B. 475* (see above, para.46-379).
- 1825 *Tyers v Rosedale and Ferryhill Iron Co Ltd (1875) L.R. 10 Ex. 195*. If at the request of the buyer, the delivery date was postponed indefinitely, the buyer may give notice fixing the date for delivery a reasonable time thereafter: (*1875*) *L.R. 10 Ex. 195* at 199. (As to postponement of delivery by instalments over a period, see also at 199.) cf. above, para.46-383. See *George [1971] J.B.L. 109*.
- 1826 *Fercometal SARL v Mediterranean Shipping Co SA [1989] A.C. 788; Kaines (UK) Ltd v Osterreichische Warrenhandelsgesellschaft, etc. [1993] 2 Lloyd's Rep. 1*. See Vol.I, para.27-070. The buyer is not bound to act "reasonably" in choosing between his alternative courses of action: see Vol.I, para.29-099.
- 1827 The last part of s.51(3), see above ("if no time was fixed ...") does not apply to an anticipatory breach by the seller: *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory [1979] A.C. 91*, following *Millett v Van Heek Co [1921] 2 K.B. 369* (Court of Appeal affirmed [*1920*] *3 K.B. 535*). See also *Bunge SA v Nidera BV [2015] UKSC 43*.
- 1828 *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd [1968] A.C. 1130, 1140; Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory [1979] A.C. 91* at 102. (But in this case, the PC was not asked to consider whether the rules on mitigation applied.) See Note (*1978*) *41 M.L.R. 486*. The earlier authorities were *Roper v Johnson (1873) L.R. 8 C.P. 167*; and *Melachrino v Nickoll and Knight [1920] 1 K.B. 693, 699*.
- 1829 *Melachrino v Nickoll and Knight [1920] 1 K.B. 693, 699; Millett v Van Heek Co [1921] 2 K.B. 369; Roper v Johnson (1873) L.R. 8 C.P. 167*. cf. *The Mihalis Angelos [1971] 1 Q.B. 164*. A discount should be made in respect of any accelerated receipt (through the damages award) of any sum due in the future: cf. *Lavarack v Woods of Colchester Ltd [1967] 1 Q.B. 278*; and see Vol.I, para.29-010.
- 1830 See Vol.I, paras 29-096 et seq. It is not strictly a "duty" to mitigate: the buyer's damages are assessed on the basis that he should have acted reasonably so as to mitigate his loss.
- 1831 *Kaines (UK) Ltd v Osterreichische, etc. [1993] 2 Lloyd's Rep. 1; Melachrino v Nickoll and Knight [1920] 1 K.B. 693, 697; Garnac Grain Co Inc v HMF Faure and Fairclough Ltd [1966] 1 Q.B. 650, 687* (on appeal [*1968*] *A.C. 1130, 1140*). If the buyer reasonably attempts to mitigate by buying substitute goods in the market, he is entitled to have his damages assessed by reference to the market price at the date of the repurchase, despite the fact that the market price happened to be lower by the time the due date for delivery arrived: *Melachrino v Nickoll and Knight [1920] 1 K.B. 693* at 697, 699. cf. *Roth Co v Taysen Townsend Co (1896) 12 T.L.R. 211* (buyer's anticipatory refusal: see above, para.46-383). See also Vol.I, para.29-121.
- 1832 The onus of proof is on the contract-breaker: *Roper v Johnson (1873) L.R. 8 C.P. 167*; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd [1968] A.C. 1130*.

- 1834 *Roper v Johnson*, above; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd*, above, at 1140; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory [1979] A.C. 91* at 105. (The seller in this case did not argue that the buyer should have mitigated by buying in the market between the date he accepted the seller's repudiation and the date when delivery could have been required under the contract: the market price was falling between the two dates.)
- 1835 The buyer is allowed a "reasonable time" after his acceptance of the seller's breach before he must repurchase: *Kaines (UK) Ltd v Österreichische, etc. [1993] 2 Lloyd's Rep. 1* at 11, 12 (buyer should have repurchased on the next day). cf. *Tredegar Iron and Coal Co Ltd v Hawthorn Bros Co (1902) 18 T.L.R. 716*.
- 1836 *Kaines (UK) Ltd v Österreichische, etc. [1993] 2 Lloyd's Rep. 1*; *Melachrino v Nickoll and Knight [1920] 1 K.B. 693* at 697, 699. cf. above, para.46-383.
- 1837 This was the actual decision in *Melachrino v Nickoll and Knight [1920] 1 K.B. 693, 698* (although the judgment contains many other propositions cited in this paragraph).
- 1838 *Phillpotts v Evans (1839) 5 M. & W. 475, 477*; *White and Carter (Councils) Ltd v McGregor [1962] A.C. 413, 444*.
- 1839 *Fercometal SARL v Mediterranean Shipping Co SA [1989] A.C. 788*.
- 1840 *Leigh v Paterson (1818) 8 Taunt. 540*.
- 1841 cf. the *Fercometal case [1989] A.C. 788*.
- 1842 *Avery v Bowden (1855) 5 E. & B. 714; affirmed (1856) 6 E. & B. 953*.
- 1843 During the interval, the buyer may at any time decide to accept the seller's repudiation (provided it has not been retracted by the seller), whereupon the rules on mitigation will apply.
- 1844 *Leigh v Paterson*, above (damages assessed by reference to the market price on the last day of the period fixed for delivery); *Brown v Muller (1872) L.R. 7 Ex. 319*; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory [1979] A.C. 91, 104*. See also the explanation of *C Sharpe Co Ltd v Nosawa [1917] 2 K.B. 814* in Benjamin's Sale of Goods, 11th edn (2021), paras 19-302—19-305. The buyer's damages cannot be reduced because the market price was lower at the date of the repudiation (or at any date between the repudiation and the due date for delivery): *Tredegar Iron and Coal Co Ltd v Hawthorn Bros Co (1902) 18 T.L.R. 716* (buyer's breach).
- 1845 See above, paras 46-380—46-381 (also paras 46-371—46-378).
- 1846 See above, para.46-376. In *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63* it was said that there may be a market for used goods even if the precise model or brand sold was not available: "the availability of equivalent second-hand goods capable of performing the same functions in much the same way would constitute an available market for 'the goods in question'. A buyer of such equivalent goods would be in the same financial position as if the contract had been performed" (at [93]). "The best evidence of market value is constituted by arm's length deals actually made in the market. The last transaction effected effectively sets the benchmark": *Glencore Energy UK Ltd v Cirrus Oil Services Ltd [2014] EWHC 87 (Comm)* at [70]. The relevant market price may also depend on the relevant market relationship, e.g. whether between wholesaler and retailer, or between

- retailer and private buyer, or any other relationship. But the individual characteristics of the claimant (e.g. his personal skill in negotiating) are not relevant: *Shearson Lehman Hutton Inc v Maclaine Watson Co Ltd (No.2) [1990] 3 All E.R. 723, 726. [1914] A.C. 510* (see below, para.46-408).
- 1847 Even if the sub-sale was of the identical goods bought by the buyer from the defaulting seller, the buyer's damages are nevertheless assessed with reference to the market price, since the buyer's liability in damages to the sub-buyer might easily exceed the price in the sub-sale: *[1914] A.C. 510* at 523. But see below, para.46-400.
- 1848 See Vol.I, para.29-172 and below, para.46-407.
- 1849 See Vol.I, paras 29-173—29-178.
- 1850 *Bence Graphics International Ltd v Fasson UK Ltd [1998] Q.B. 87* (see below, paras 46-420, 46-422—46-423).
- 1851 *[2018] EWCA Civ 1720, [2019] 1 Lloyd's Rep 444.*
- 1852 See further, Vol.I, paras 29-173—29-178.
- 1853 cf. *Williams Bros v Ed T Agius Ltd*, above. But a sub-sale with a different place of delivery, or under different terms, may not be relevant: *Ayreh v Lawrence Kostoris Son Ltd [1967] 1 Lloyd's Rep. 63, 72–73*. cf. *Macklin v Newbury Sanitary Laundry (1919) 63 S.J. 337* (buyer's breach: see above, para.46-380).
- 1854 *Hong Guan Co Ltd v R Jumabhoy Sons Ltd [1960] A.C. 684, 703–704*. The court may also infer the approximate market price on a given date from evidence that there was a steady decline in that price between an earlier and a later date: *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory [1979] A.C. 91, 106*.
- 1855 The buyer's opportunity to buy at the lower price did not arise only because of the seller's breach: see *Joyner v Weeks [1891] 2 Q.B. 31, 34*; and cf. *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co [1954] 1 Lloyd's Rep. 65*. cf. also above, para.46-380; *Erie County Natural Gas and Fuel Co Ltd v Carroll [1911] A.C. 105* (see below, para.46-405).
- 1856 This reasoning is supported by the analogous case of the buyer's breach: *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co*, above; *Jamal v Moolla Dawood [1916] 1 A.C. 175, 179* (on which cases, see above, paras 46-376—46-377).
- 1857 *R Pagnan Fratelli v Corbisa Industrial Agropacuaria [1970] 1 W.L.R. 1306* (distinguished in *Mobil North Sea Ltd v PJ Pipe Valve Co [2001] 2 All E.R. (Comm) 289*). cf. *Bence Graphics International Ltd v Fasson UK Ltd [1998] Q.B. 87* (see below, paras 46-420, 46-422—46-423). cf. also *Nimmo v Habton Farms [2003] 1 All E.R. 1136* (breach of warranty of authority).
- 1858 The final purchase was not "an independent or disconnected transaction": *[1970] 1 W.L.R. 1306* at 1315. The decision in *Pagnan* would not preclude a claim for any consequential loss caused by the delay between the date fixed for delivery in the original contract and the date of actual delivery under the new arrangements.
- 1859 *Hinde v Liddell (1875) L.R. 10 Q.B. 265*. The effect of governmental regulation of the market may also mean that there is no available market in which the buyer can obtain substitute goods: *J Leavey Co Ltd v Geo H Hirst Co Ltd [1944] K.B. 24, 28*.

- 1861 The fact that there is no available market in which the buyer can purchase the goods does not mean that the buyer's loss should be measured by the profit the buyer might have made from the goods: *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [100]. Nor does the fact that the buyer has not purchased a substitute mean that it has suffered no loss (at [102]). The buyer's damages should be assessed by reference to the cost of procuring the nearest equivalent goods (at [103]).
- 1862 The "value" of goods for which no substitutes are available may, in appropriate circumstances, include an element of subjective or idiosyncratic value: *Harris, Ogus and Phillips* (1979) 95 L.Q.R. 581 (applied, but not in the context of a sale of goods, in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344 at 360; and in *Farley v Skinner* [2001] UKHL 49, [2002] 2 A.C. 732 at [21]) (see Vol.I, paras 29-158 et seq.).
- 1863 *Borries v Hutchinson* (1865) 18 C.B.(N.S.) 445, 465; *Elbinger Actien-Gesellschaft v Armstrong* (1874) L.R. 9 Q.B. 473, 476; *Hinde v Liddell* (1875) L.R. 10 Q.B. 265.
- 1864 *Hughes v Pendragon Sabre Ltd (t/a Porsche Centre Bolton)* [2016] EWCA Civ 18.
- 1865 *J Leavey Co Ltd v George H Hirst Co Ltd* [1944] K.B. 24 at 29.
- 1866 *Grébert-Borgnis v J and W Nugent* (1885) 15 Q.B.D. 85, 89–90; *The Arpad* [1934] P. 189, 210, 219–221, 230 (breach of contract of carriage treated as analogous to seller's failure to deliver: at 223, 233).
- 1867 *The Arpad* [1934] P. 189, 210 (five months earlier).
- 1868 *Payzu Ltd v Saunders* [1919] 2 K.B. 581 at 588, 589. cf. *The Solholt* [1983] 1 Lloyd's Rep. 605 (see below, para.46-406). See Vol.I, para.29-111.
- 1869 *James Finlay Co Ltd v NV Kwik Hoo Tong HM* [1929] 1 K.B. 400, 410, 415, 418. Compare the case in which the victim of a breach pays compensation to a sub-purchaser though not legally obliged to do so: above, para.29-039.
- 1870 It is submitted that (despite the assumption to the contrary in *C Sharpe Co Ltd v Nosawa* [1917] 2 K.B. 814, 820) the buyer is not *obliged* to buy the nearest equivalent in mitigation of his loss: see Benjamin's Sale of Goods, 11th edn (2021), para.17-025.
- 1871 The buyer has a reasonable time to decide whether or not to buy substitute goods: *C Sharpe Co Ltd v Nosawa* [1917] 2 K.B. 814, 820.
- 1872 cf. the similar rule in the case of a seller's claim for damages (see above, para.46-382).
- 1873 *Hinde v Liddell* (1875) L.R. 10 Q.B. 265, 268, 270; *Erie County Natural Gas and Fuel Co Ltd v Carroll* [1911] A.C. 105, 117. cf. *Le Blanche v LNW Ry* (1876) 1 C.P.D. 286, 302. It will normally be unreasonable for the buyer to order the manufacture of substitute goods, where none are readily available: *Elbinger Actien-Gesellschaft v Armstrong* (1874) L.R. 9 Q.B. 473; *Sealace Shipping Co Ltd v Oceanvoice Ltd (The Alecos M)* [1991] 1 Lloyd's Rep. 120 (criticised by Treitel (1991) 107 L.Q.R. 364) ("spare propeller" not included in sale of ship).
- 1874 *Hinde v Liddell* (1875) L.R. 10 Q.B. 265. See also *Blackburn Bobbin Co Ltd v TW Allen Sons Ltd* [1918] 1 K.B. 540, 554 (the appeal was decided on another ground: [1918] 2 K.B. 467). The nearest equivalent may be of superior quality and so higher in price than the contract goods: *Hinde v Liddell*, above; *Diamond Cutting Works v Treifus* [1956] 1

- 1875 *Lloyd's Rep.* 216. cf. *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 *Lloyd's Rep.* 509, 519. cf. also *Le Blanche v LNW Ry* (1876) 1 C.P.D. 286.
- 1876 *Blackburn Bobbin Co Ltd v TW Allen Sons Ltd* [1918] 1 K.B. 540, 554.
- 1877 *Hinde v Liddell* (1875) L.R. 10 Q.B. at 270; *Erie County Natural Gas and Fuel Co Ltd v Carroll*, above (see Benjamin's Sale of Goods, 11th edn (2021), para.17-024). cf. *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rys* [1912] A.C. 673 (see below, para.46-421).
- 1878 cf. *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447. (This decision has been overruled on another point: *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827.)
- 1879 See above, para.46-066.
- 1880 *Heaven and Kesterton Ltd v Etablissements Francois Albiac Cie* [1956] 2 *Lloyd's Rep.* 316, 321. cf. *R Pagnan Fratelli v Corbisa Industrial Agropacuaria* [1970] 1 W.L.R. 1306 (see above, para.46-403). The buyer may also be required to act reasonably in considering an offer by the seller to modify defective goods: *Manton Hire and Sales Ltd v Ash Manor Cheese Co Ltd* [2013] EWCA Civ 548 (on the facts the buyer had not acted unreasonably).
- 1881 *Payzu Ltd v Saunders* [1919] 2 K.B. 581; *Heaven and Kesterton Ltd v Etablissements Francois Albiac Cie* [1956] 2 *Lloyd's Rep.* 316, 321. cf. *Houndsditch Warehouse Co Ltd v Waltex Ltd* [1944] K.B. 579 (genuine offer by seller to accept return of goods which buyer alleged not to correspond with sample).
- 1882 *Payzu Ltd v Saunders* [1919] 2 K.B. 581. (The goods could not be obtained from any other source; nor was there any doubt about the seller's ability and willingness to fulfil his offer.) cf. above, para.29-111 and the criticism of *Bridge* (1989) 105 L.Q.R. 398. cf. where the seller refused to "guarantee" a substituted delivery date: *ABD (Metals and Waste) Ltd v Anglo-Chemical Ore Co Ltd* [1955] 2 *Lloyd's Rep.* 456.
- 1883 *Sotiros Shipping Inc and Aeco Maritime SA v Sameiet Solholt (The Solholt)* [1983] 1 *Lloyd's Rep.* 605 (the buyer had cancelled the original contract on the ground of the seller's failure to deliver by the agreed date. The hypothetical offer by the buyer would have been without prejudice to his claim for damages for the delay).
- 1884 *Williams Bros Ltd v Ed T Agius Ltd* [1914] A.C. 510; *James Finlay Co Ltd v NV Kwik Hoo Tong HM* [1929] 1 K.B. 400, 411; *The Arpad* [1934] P. 189, 214, 223, 230; *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459, 489–490. Where the buyer is a trader, most sellers would be able to contemplate the possibility of resale: *The Arpad* [1934] P. 189, 230; *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 489. cf. however, *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 (see below, paras 46-420, 46-422—46-423). But the *Bence Graphics* case was distinguished in *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) (a case involving shares rather than goods) on the grounds that the Bear Stearns case was a case of non-delivery rather than of delivery of defective goods (at [208]).
- 1885 *Sheik Mohammad Habib Ullah v Bird Co* (1921) 37 T.L.R. 405, PC.
- 1886 *Williams Bros v Ed T Agius Ltd* [1914] A.C. 510 at 523; *The Arpad* [1934] P. 189 at 215.

- 1887 *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 K.B. 535, 541; *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 489–490.
- 1888 *Re R and H Hall Ltd and WH Pim (Junior) Co's Arbitration* [1928] All E.R. Rep. 763, 766, 767, 769; *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 K.B. 535, 540.
- 1889 e.g. *Frank Mott Co Ltd v Muller Co (London) Ltd* (1922) 13 Ll.L. Rep. 492; *Household Machines Ltd v Cosmos Exporters Ltd* [1947] K.B. 217, 219. The seller may even know that the buyer has already entered into an existing sub-contract and was buying in order to fulfil that particular contract: *Aryeh v Lawrence Kostoris Son Ltd* [1967] 1 Lloyd's Rep. 63, 68.
- 1890 *Re R and H Hall Ltd and WH Pim (Junior) Co's Arbitration* [1928] All E.R. Rep. 763; *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 489–490; *Aryeh v Lawrence Kostoris Son Ltd* [1967] 1 Lloyd's Rep. 63, 67–68, 72. cf. *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422 at 436; *Euro-Asian Oil SA (formerly Euro-Asian Oil AG) v Credit Suisse AG* [2018] EWCA Civ 1720, [71]–[72] (see below, para.46-443). *Re R and H Hall Ltd and WH Pim (Junior) Arbitration* [1928] All E.R. Rep. 763. See Benjamin's Sale of Goods, 11th edn (2021), paras 17-030—17-033.
- 1891 *[1928] All E.R. Rep. 763* at 765, 766, 768. This type of contract might, depending on the circumstances, be one where the sub-buyers are “identified” as third parties intended to have an enforceable claim against the seller under the Contracts (Rights of Third Parties) Act 1999: see above, Vol.I, para.20-091; see below, paras 46-436, 46-445.
- 1892 *[1928] All E.R. Rep. 763* at 766, 768, 769, 771.
- 1893 *[1928] All E.R. Rep. 763* at 765.
- 1894 *[1928] All E.R. Rep. 763* at 765.
- 1895 *[1928] All E.R. Rep. 763* at 767, 768, 773. In *Household Machines Ltd v Cosmos Exporters Ltd* [1947] K.B. 217, where there was no available market for the goods, the damages were less than the actual profit, which was held to be “too high” (at 219). (This was applied in *Coastal International Trading Ltd v Maroil AG* [1988] 1 Lloyd's Rep. 92, 96.) cf. *Horne v Midland Ry* (1872) L.R. 7 C.P. 583; (1873) L.R. 8 C.P. 131 (delayed delivery under contract of carriage); *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528 (delayed delivery under contract of sale: see below, para.46-415); *The Arpad* [1934] P. 189, 201.
- 1896 In the Court of Appeal the decision has been said to be dependent on the special fact that the contract expressly provided for resale: *James Finlay Co Ltd v NV Kwik Hoo Tong HM* [1929] 1 K.B. 400, 410–412, 417–418. (cf. at 415, where Greer LJ approved the decision.)
- 1897 See Benjamin's Sale of Goods, 11th edn (2021), at paras 17-032—17-033. It is also significant that in *Koufos v C Czarnikow Ltd* [1969] 1 A.C. 350, the House of Lords frequently referred to statements made in *Hall v Pim* on the general question of remoteness of damage in contract, without any suggestion of disapproval of the actual decision in the case: above at 387–388, 405–406, 410, 414, 424. (See Vol.I, paras 29-132—29-134.)
- 1898 This was considered to be a difficulty in *James Finlay Co Ltd v NV Kwik Hoo Tong HM* [1929] 1 K.B. 400, 410, 415, 417.

- 1899 *Williams Bros v Ed T Agius Ltd* [1914] A.C. 510 (see Benjamin at paras 17-032—17-033).
- 1900 A further distinction is that in *Hall v Pim* the buyer, by reference to a higher resale price, claimed as damages a *larger* sum than “the market price at the breach” test would have given him; whereas in *Williams v Agius* the innocent buyer claimed damages on the basis of this, the normal test, but the defaulting seller argued that the buyer was entitled only to a reduced sum because the resale price happened to be *lower* than the market price at breach. But cf. *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 (see below, paras 46-420, 46-422—46-423).
[1914] A.C. 510, 523; The Arpad [1934] P. 189, 214, 215.
- 1901 Their Lordships followed *Rodocanachi v Milburn* (1886) 18 Q.B.D. 67 (“That case rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods”: *[1914] A.C. 510, 530–531*).
[2008] UKHL 48, [2009] 1 A.C. 61, discussed above, Vol.I, paras 29-144 et seq.
- 1902 See above, Vol.I, para.29-146.
- 1903 *Re R and Hall Ltd and WH Pim (Junior) Co's Arbitration* [1928] All E.R. Rep. 763.
- 1904 *James Finlay & Co Ltd v Kwik Hoo Tong HM* [1929] 1 K.B. 400, 417, per Sankey LJ (echoing a submission of counsel); quoted by Lord Walker in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48 at [64].
GKN Centrax Gears Ltd v Matbro Ltd [1976] 2 Lloyd's Rep. 555, 573–574, 579–580 (not following *Simon v Pawsons and Leaf's Ltd* (1933) 38 Com. Cas. 151, 158). See below, para.46-433. cf. *Jackson v Royal Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377 (loss of repeat orders caused by breach of obligation to maintain confidence; see Vol.I, para.29-156).
- 1905 See previous paragraph.
- 1906 e.g. *Frank Mott Co Ltd v Muller Co (London) Ltd* (1922) 13 Ll.L. Rep. 492. See also *Grébert-Borgnis v J and W Nugent* (1885) 15 Q.B.D. 85, 89.
- 1907 *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 K.B. 535, 541. See also above, para.46-407.
- 1908 The sub-contract must be of a usual type, and the profit must be reasonable in amount: see above, para.46-407.
- 1909 *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 K.B. 535, 541; *Household Machines Ltd v Cosmos Exports Ltd* [1947] K.B. 217, 219; *J Leavey Co Ltd v George H Hirst Co Ltd* [1944] K.B. 24. See also *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep. 175, 183–184; *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No.2) (The Marine Star)* [1994] 2 Lloyd's Rep. 629.
- 1910 *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459, 489.
- 1911 See above, para.46-407.
- 1912 *Re R and H Hall Ltd and WH Pim (Junior) Co's Arbitration* [1928] All E.R. Rep. 763 at 767, 769 HL, following *Grébert-Borgnis v J and W Nugent* (1885) 15 Q.B.D. 85. The breach of the original contract must have been the cause of the breach of the contract of resale.

- 1916 See above, para.[46-409](#) and, more generally, Vol.I, paras [29-144](#) et seq.
- 1917 See above, following *Elbinger Actien-Gesellschaft v Armstrong* (1874) *L.R. 9 Q.B. 473*: see below, para.[46-417](#).
- 1918 In addition to the buyer's loss of profit under the contract of resale.
- 1919 The French award was not "necessarily" the sum to be awarded: ([1885](#)) *15 Q.B.D. 85*, [93](#). The seller would not be liable in respect of unusual clauses in the contract of resale, of which he had no knowledge, e.g. a penalty clause: ([1885](#)) *15 Q.B.D. 85* at 90. It is submitted that the *Grébert-Borgnis* decision is to be preferred to that in *Borries v Hutchinson* (1865) *18 C.B.(N.S.) 445*.
- 1920 cf. *Agius v Great Western Colliery Co* [1899] *1 Q.B. 413*, [420](#) (analogous case where seller delayed delivery: see below, para.[46-415](#)); see also the analogous cases where the goods were defective in quality (see below, paras [46-418—46-443](#)).
- 1921 *Total Liban SA v Vitol Energy SA* [2001] *Q.B. 643* (referring to various techniques available to prevent any "windfall" recovery by the buyer).
- 1922 *Household Machines Ltd v Cosmos Exporters Ltd* [1947] *1 K.B. 217*. (But see above, para.[46-389](#).)
- 1923 *Trans Trust SPRL v Danubian Trading Co* [1952] *2 Q.B. 297*, *303*, *307*; *Total Liban SA v Vitol Energy SA* [2001] *Q.B. 643*. cf. *Deeny v Gooda Walker Ltd (No.3)* [1995] *4 All E.R. 289* (not a sale of goods case). In another context it has been held that reasonable payments made when there was no obligation to make them may be recovered.

(b) - Damages for Delay in Delivery

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 7. - Remedies of the Buyer

(b) - Damages for Delay in Delivery

Delay in delivery

- 46-413 The Act contains no provision which expressly provides for the assessment of the buyer's damages when the seller fails to deliver on the date fixed for delivery, but the buyer accepts delivery of the goods from the seller at a later date.¹⁹²⁴ Where there is an available market¹⁹²⁵ for the goods, the usual measure of the buyer's damages¹⁹²⁶ is the difference between (a) their market value at the time and place¹⁹²⁷ fixed by the terms of the contract for delivery; and (b) their market value at the time when (and the place where)¹⁹²⁸ the goods were in fact delivered to the buyer.¹⁹²⁹ Apart from consequential losses, such as extra or wasted expenses¹⁹³⁰ or loss of profits,¹⁹³¹ this sum should put the buyer into the financial position he would have been in if the seller had fulfilled his contractual obligation. Where there is no available market for the goods, the court may use any relevant test to arrive at the "value" of the goods at the time fixed for delivery and at the actual date of delivery. Thus, when the goods were to be delivered at Hull, whence the buyer (to the seller's knowledge) intended to send them to a sub-buyer on the Continent, the value was said to be dependent on the relative cost of freight and insurance on the transport to the Russian destination at the different times.¹⁹³²

Resale prices are irrelevant

- 46-414 The market prices at the due date for delivery and at the actual date of delivery cannot be proved (except in the absence of other evidence of market value) by either the contract price or by the price under a resale of the goods to a sub-buyer. Whether the resale price is higher or lower than

the market price at the date of actual delivery, the buyer's damages must be calculated exclusively by reference to the market prices at the due date and at the actual date, since the buyer could have bought other goods to fulfil his obligations under the sub-contract and the market price of the goods delivered late by the seller would then be relevant to those goods left on his hands at that date.¹⁹³³

Loss of profit caused by delay in delivery

46-415 Where the seller makes a late delivery of a profit-earning chattel,¹⁹³⁴ the buyer may (in the absence of an available market for such a chattel¹⁹³⁵) recover damages for loss of use, based on the normal use made of such a chattel, not on an exceptional use unknown to the seller.¹⁹³⁶ The buyer's claim is for "user profits", viz the loss of profits which he would have made from use of the goods during the period after the goods should have been delivered until the actual date of delivery.¹⁹³⁷

In *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*¹⁹³⁸ the plaintiffs were launderers and dyers who wished to expand their business by installing a larger boiler. The defendants were engineers who agreed to sell them a large boiler, and a delivery date was fixed. While the boiler was being dismantled for delivery it was damaged, and delivery to the plaintiffs was not made until five months after the delivery date. The plaintiffs sued for damages for delay in delivery¹⁹³⁹ and claimed loss of profits in respect of:

- (1)the large number of new customers they could have taken on had the boiler been installed on the due date; and
- (2)the amount which they could have earned under special, "highly lucrative", dyeing contracts with the Ministry of Supply.

The defendants knew that the plaintiffs were launderers and that they wanted the boiler for immediate use; the Court of Appeal held that with such knowledge the reasonable man could have foreseen that delay in delivery would lead to some loss of business (and therefore loss of profits) though he would not have foreseen the loss of profits under the special contracts with the Ministry, since these were special circumstances not within the defendant's actual knowledge. Hence, the plaintiffs could not recover the actual loss they had incurred under these contracts, but only the normal loss of business¹⁹⁴⁰ in respect of dyeing and laundering contracts to be reasonably expected.¹⁹⁴¹

Contemplated loss as limit on liability

46-416 In *Cory v Thames Ironworks and Shipbuilding Co Ltd*¹⁹⁴² coal merchants bought the hull of a floating boom derrick from the sellers, who finally delivered it six months late. The normal use of the hull would have been as a coal store, but the buyers (unknown to the sellers) intended to use

it for a new method of transferring coal from colliers to barges. Some loss of profits from delay was within the reasonable contemplation of the parties at the time the contract was made, and the buyers actually lost profits through the delay; but their recovery was limited to the extent of the profits which would have been made through the method of using the hull which the seller could reasonably have contemplated. The court did not hold that no loss of the reasonably contemplated type in fact occurred merely because the buyers did not intend to earn profits by the normal use of the hull; the buyers intended to earn profits by its use, and they had actually lost greater profits than they claimed.

Loss on resale

46-417 Normally, the buyer cannot recover his loss of profits under a resale when the seller makes a late delivery under the original contract.¹⁹⁴³ Where, however, the seller actually¹⁹⁴⁴ contemplated a resale by the buyer, he will be liable for the buyer's loss of profits under the resale caused by the seller's failure to deliver on time¹⁹⁴⁵; in these circumstances, the seller may be liable to the buyer in respect of the latter's liability in damages to his sub-buyer caused by the seller's delay.¹⁹⁴⁶

Again, there will now be liability only if it was reasonable to think that the seller was assuming responsibility for the loss.¹⁹⁴⁷

Footnotes

- 1924 The case probably falls under the general provisions of s.53(2). See *Taylor & Sons Ltd v Bank of Athens* (1922) 91 L.J. K.B. 776, 778. cf. s.54 (see above, para.46-386).
- 1925 On the meaning of this term, and the evidence to prove the market price, see above, paras 46-371—46-381.
- 1926 This is the same as in cases of delay in the carriage of goods by sea: see *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350, especially at 400, 407, 417–418 (cf. at 392, 393, 427).
- 1927 *Aryeh v Lawrence Kostoris Son Ltd* [1967] 1 Lloyd's Rep. 63, 73.
- 1928 In the cases cited in the next footnote, the place is assumed to be the same place as in (a).
- 1929 *Addax Ltd v Arcadia Petroleum Ltd* [2000] 1 Lloyd's Rep. 493. See also *Borries v Hutchinson* (1865) 18 C.B.(N.S.) 445, 465; *Elbinger Actien-Gesellschaft v Armstrong* (1874) L.R. 9 Q.B. 473, 477; *Koufos v C Czarnikow Ltd* [1969] 1 A.C. 350 at 417–418; *Taylor & Sons Ltd v Bank of Athens* (1922) 91 L.J. K.B. 776. It could be argued that the seller, by tendering the goods late, has estopped himself from relying on s.51(3). In *Galaxy Energy International Ltd v Murco Petroleum Ltd* [2013] EWHC 3720 (Comm),

- [2013] *C.L.C.* 1007 a spread of prices provided by Platts gave the best evidence of market value.
- 1930 e.g. extra freight and insurance incurred by the buyer: *Borries v Hutchinson*, above. See also *Smeed v Foord* (1859) 1 *E. & E.* 602; *Hydraulic Engineering Co Ltd v McHaffie Goslett Co* (1878) 4 *Q.B.D.* 670; *Watson v Gray* (1900) 16 *T.L.R.* 308; *Steam Herring Fleet Ltd v VS Richards Co Ltd* (1901) 17 *T.L.R.* 731; *John M Henderson Co Ltd v Montague L Meyer Ltd* (1941) 46 *Com. Cas.* 209; *Aruna Mills Ltd v Dhanrajmal Gobindram* [1968] 1 *Q.B.* 655. See Vol.I, paras 29-025 et seq.
- 1931 See below, paras 46-415—46-417.
- 1932 *Borries v Hutchinson* (1865) 18 *C.B.(N.S.)* 445. See also *Fletcher v Tayleur* (1855) 17 *C.B.* 21.
- 1933 *Slater v Hoyle Smith Ltd* [1920] 2 *K.B.* 11, 23–24, per Scrutton LJ, whose criticism of the inconsistent decision of the Privy Council in *Wertheim v Chicoutimi Pulp Co* [1911] A.C. 301 should, it is submitted, be accepted (see Vol.I, para.29-063). But cf. *Bence Graphics International Ltd v Fasson UK Ltd* [1998] *Q.B.* 87 (see below, paras 46-420, 46-422—46-423). (See Benjamin's Sale of Goods, 11th edn (2021), para.17-039.) In *Wertheim* the Privy Council assessed the damages as the difference between: (a) the market value at the port of delivery at the due date for delivery; and (b) the actual price obtained on their resale. But the buyer was not bound to fulfil the sub-contracts by delivering the specific goods which he received under the original contract (cf. above, para.46-408). It is submitted that the choice of the buyer not to repurchase in the market on the date of the breach should not benefit the defaulting seller any more than it should harm him by increasing the damages payable by him if the resale price is below the market price at that date. cf. the analogous position in *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co Ltd* [1954] 1 *Lloyd's Rep.* 65 (see above, para.46-381).
- 1934 Or part of a profit-earning chattel: *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 *K.B.* 528, 543–544; *Elbinger Actien-Gesellschaft v Armstrong* (1874) *L.R.* 9 *Q.B.* 473, 477.
- 1935 Where there is an available market, the buyer should normally be able to avoid loss of profits by immediately purchasing or hiring a substitute. cf. *Smeed v Foord* (1859) 1 *E. & E.* 602.
- 1936 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 *K.B.* 528. See also *Cory v Thames Ironworks and Shipbuilding Co Ltd* (1868) *L.R.* 3 *Q.B.* 181 (see below, para.46-416). cf. *Re Trent and Humber Co* (1868) *L.R.* 4 *Ch. App.* 112, 117; *Fletcher v Tayleur* (1855) 17 *C.B.* 21; *Watson v Gray* (1900) 16 *T.L.R.* 308; *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 *Lloyd's Rep.* 175 (carrier's delay).
- 1937 The earlier cases concerned delay in delivery of ships or vessels which clearly were intended to earn profits for their owners, e.g. *Cory v Thames Ironworks Co*, above, *Re Trent and Humber Co*, above; *Steam Herring Fleet Ltd v VS Richards Co Ltd* (1901) 17 *T.L.R.* 731; or some essential part of a ship, e.g. *Wilson v General Screw Colliery Co* (1877) 37 *L.T.* 789 (propeller shaft); *Saint Line Ltd v Richardsons Westgarth Co Ltd* [1940] 2 *K.B.* 99, 104–105 (engines).

- 1938 [1949] 2 K.B. 528. (The language in which the judgment was expressed may need to be modified in the light of *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350, but their Lordships appear to have accepted that the *Victoria Laundry* case was correctly decided even on the basis of their slightly different formulation of the remoteness test: [1969] 1 A.C. 350 at 389, 399, 414, 415. See Vol.I, paras 29-124 et seq.)
- 1939 A similar boiler was not readily available on the market.
- 1940 On the loss of custom in general, viz loss of business or custom resulting from the fact that the buyer was forced to default in fulfilling his sub-contract, see above, para.46-410, see below, para.46-433.
- 1941 cf. cases on delayed delivery of part of a machine in a contract of carriage (Vol.I, paras 29-126, 29-155); and cases concerning the buyer's loss of profit on a resale (see below, para.46-417).
- 1942 (1868) L.R. 3 Q.B. 181. See the analysis of the case in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528 at 538.
- 1943 cf. above, paras 46-407—46-412; and *Portman v Middleton* (1858) 4 C.B.(N.S.) 322.
- 1944 Or where he "ought" to have contemplated a resale as "probable": see above, para.46-407.
- 1945 *Hydraulic Engineering Co Ltd v McHaffie Goslett Co* (1878) 4 Q.B.D. 670. It is submitted that the buyer should not be allowed to recover his gross profit (viz gross receipts) as well as his wasted expenses: cf. below, para.46-431.
- 1946 *Elbinger Actien-Gesellschaft v Armstrong* (1874) L.R. 9 Q.B. 473, 479; *Hydraulic Engineering Co Ltd v McHaffie Goslett Co* (1878) 4 Q.B.D. 670, 674, 677; *Agius v Great Western Colliery Co* [1899] 1 Q.B. 413 (where the buyer reasonably defends the claim brought against him by his sub-buyer, he may also recover from the seller his reasonable costs: above; cf. below, paras 46-439—46-443; see above, para.46-412). The situation where the seller knew that the buyers were already contracted to deliver to a sub-buyer might, depending on the circumstances, in future give the sub-buyer a claim against the seller under the Contracts (Rights of Third Parties) Act 1999. See above, paras 20-091 et seq.; see below, paras 46-436, 46-445.
- 1947 See above, para.46-409 and, more generally, Vol.I, paras 29-144 et seq.

(i) - Diminution in Value

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 7. - Remedies of the Buyer

(c) - Damages for Defective Quality

(i) - Diminution in Value

Breach of warranty

46-418 **Section 53 of the Act¹⁹⁴⁸** prescribes the measure of damages for breach of warranty, viz a contractual undertaking which is not, or cannot be, treated by the buyer as a ground for rejecting the goods¹⁹⁴⁹:

Arrangement of Act

“(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—

(a) set up¹⁹⁵⁰ against the seller the breach of warranty in diminution or extinction of the price,¹⁹⁵¹ or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) 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.¹⁹⁵²

(3) In the case of breach of warranty of quality¹⁹⁵³ 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 fulfilled the warranty.

(4) 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.”

¹⁹⁵⁴

The succeeding paragraphs in this part of the chapter cover all breaches of ss.13, 14 and 15 of the Act and any other breach of a contractual undertaking about the condition or attributes of the goods to be delivered.¹⁹⁵⁵

Damages for diminution in market value

⁴⁶⁻⁴¹⁹ As is illustrated by s.53(3) the usual measure of damages for breach of the seller's contractual **U** undertaking as to the quality or condition of the goods is the difference¹⁹⁵⁶ between: (a) the value of the goods if they had complied with the undertaking, measured at the time¹⁹⁵⁷ and place¹⁹⁵⁸ of delivery; and (b) the actual value of the goods, in their actual condition, at the same time and place.¹⁹⁵⁹ This is the “*prima facie*” measure of damages, which will be superseded where the buyer claims loss of profits or other consequential losses.¹⁹⁶⁰ Where there is a market price¹⁹⁶¹ for goods of the contractual description and quality, this will fix their “value”; in the absence of an available market, any relevant¹⁹⁶² evidence should be admitted, e.g. the price at which a sub-buyer had agreed to buy the goods from the buyer before the defect was discovered may be some evidence of their value,¹⁹⁶³ as may the price at which an offer for the goods was made by a third person.¹⁹⁶⁴ The value of the defective goods actually delivered by the seller may be fixed by any relevant evidence,¹⁹⁶⁵ e.g. the price at which the buyer has been able to resell the goods to a sub-buyer who has knowledge of their defective condition.

¹⁹⁶⁶

U The courts may follow the commercial practice of fixing a “*price allowance*” for damaged goods.¹⁹⁶⁷

Prima facie rule only

- 46-420 Section 53(3) lays down only a “prima facie” rule, from which the court may depart in appropriate circumstances. For instance, the time when the actual value of the goods in their defective state is assessed may be postponed until the defect is discovered.¹⁹⁶⁸ Similarly, when the seller knows that the buyer intends to resell the goods to a sub-buyer at another place, and that the goods will not be examined until they reach the sub-buyer (e.g. because they are packaged), the date at which the latter examines the goods may be the date at which the market price should be taken to assess the buyer’s damages for the defective condition of the goods.¹⁹⁶⁹ Again, a warranty as to quality may relate to the future (e.g. that seed will produce a certain crop) so that there can be no question of the buyer’s opportunity to resell the defective goods until the defect becomes apparent at a later date. The market value test should not be applied until the future event is known.¹⁹⁷⁰ In *Bence Graphics International Ltd v Fasson UK Ltd*¹⁹⁷¹ the Court of Appeal held that s.53(3) provided only a “prima facie” rule, which should not be applied if it would give the buyer “more than his true loss”.¹⁹⁷² Section 53(2) should be the “starting point”.¹⁹⁷³

Damages for the cost of adaptations, or of substitute goods ¹⁹⁷⁴

- 46-421 If there is no market, damages may be awarded on the basis of the cost of bringing the defective goods up to the contractual standard which would make them saleable.¹⁹⁷⁵ In some circumstances the buyer may be entitled to claim, as damages for defective quality, the cost of buying substitute goods to perform the function intended to be performed by the contractual goods.¹⁹⁷⁶ The House of Lords has been willing to award damages on this basis when machines were bought to perform in a specified way: but the House also held that the damages for the cost of the substitute machines should take account of any extra profit to the buyer resulting from the replacement of the defective machines. The evidence showed that the new machines bought by the buyer to replace the defective machines were so superior in efficiency and in economy of working expenses that it would have been to the buyer’s pecuniary advantage to have replaced the seller’s machines by them even if the seller’s machines had complied with all the contractual specifications. The House held that, even though the buyers may not have been under a “duty” to mitigate their loss in this way,¹⁹⁷⁷ when their action had in fact diminished their loss, their claim for damages for the cost of installing the newer machines must take account of the extra profit¹⁹⁷⁸ (including the saving of expenses) resulting from this action.¹⁹⁷⁹ Similarly, where the buyer claims damages for his loss of profit or other consequential losses caused by the defective quality of the goods delivered by the seller, the seller may show that the buyer ought reasonably to have mitigated his loss by acquiring substitute goods.¹⁹⁸⁰

Buyer performing sub-contract despite seller's breach

46-422 It was held by the Court of Appeal in *Slater v Hoyle and Smith Ltd*¹⁹⁸¹ that where the seller delivers defective goods, but the buyer is nevertheless able to perform a sub-contract by delivering the goods to his sub-buyer, the buyer's damages against the seller should not be reduced by taking this into account; the buyer is entitled to rely on the normal measure of damages under s.53(3) viz the difference between (a) the market price, at the time and place of delivery, of goods up to the contractual quality; and (b) the market price, at the time and place of delivery, of the goods actually delivered.¹⁹⁸² However, the authority of *Slater v Hoyle and Smith Ltd* has been severely undermined by the decision of the Court of Appeal in *Bence Graphics International Ltd v Fasson UK Ltd*.¹⁹⁸³ The seller knew that the buyer would sell on to others (after manufacturing the goods into another product); the Court of Appeal held that the parties contemplated that the measure of damages for defects in the goods should be the extent of the buyer's liability (if any) to those others resulting from the defect. In *Bence's* case the decision in *Slater's* case was doubted, on the ground that s.53(3) laid down only a *prima facie* rule, which should not be applied if it would give the buyer "more than his true loss".¹⁹⁸⁴

46-423 The *Bence* case has been the subject of trenchant criticism on the grounds that remoteness is relevant only to claims for consequential loss, not to the difference in value between the goods delivered and the goods as they should have been; the question is simply how to measure the buyer's loss. In line with the solutions suggested in cases of non-delivery and late delivery, the sub-sale should be taken into account only when the buyer was legally obliged to supply the exact same goods under the sub-sale, in which case it is arguable that if the buyer received the full sub-sale price, it suffered no loss at all.¹⁹⁸⁵ If the buyer was not so obliged, it might have fulfilled the sub-sale by purchasing and processing other goods, or have used other goods from stock, and then have re-sold the contract goods at their actual value (if any); in either case the buyer should be entitled to the difference between the value the goods should have had and their actual value.

¹⁹⁸⁶

U The fact that they were able to pass on the defective goods without incurring liability again seems to be their own good fortune.¹⁹⁸⁷ In such cases, the fact that the buyer's purpose appears to have been achieved should be irrelevant.¹⁹⁸⁸ In cases where the sub-sale requires delivery of the same goods, the position is more nuanced because there is an argument that allowing damages in such a case results in the buyer being placed in a better position than it would have been if the contact had been performed. Even in those cases it might be argued that the buyer should always be entitled to the difference between the contract price and the market price, by analogy to the

decisions on failures to provide services which do not result in any further loss to the claimant.¹⁹⁸⁹ But that approach is less readily justified on the basis of compensation, unless the buyer is to be treated as having a performance interest for loss of which the buyer should always be compensated, even though the buyer would not have received the full value of the goods if the contract had been performed; and it was submitted earlier that this is not the normal understanding.¹⁹⁹⁰ It is true that in cases in which the buyer has reached a reasonable settlement with the sub-buyer, who has retained the goods, the amount paid under the settlement has been treated as the most that the buyer can recover, even if the settlement was at an undervalue, but the point seems to have been assumed rather than argued.¹⁹⁹¹

Footnotes

- 1948 s.53(5) relates only to Scots law and is therefore not reproduced here. Section 53 does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special remedies for buyers in consumer sales contracts, see above, paras 40-467 et seq.
- 1949 If the buyer is entitled to, and does reject the goods his damages are assessed on the basis of the seller's failure to deliver (s.51: see above, paras 46-390 et seq.). Completely different principles from those in s.53 may apply in the case of incorrect documents being supplied under overseas sales: see Benjamin's Sale of Goods, 11th edn (2021), paras 19-317 et seq., 20-204.
- 1950 The meaning of set-off is examined in *BICC Plc v Burndy Corp [1985] Ch. 232, 247–251, 254–259* (not a sale of goods case); and in *Axel Johnson Petroleum AB v MG Mineral Group AG [1992] 1 W.L.R. 270*. By a term in the contract, the buyer may agree to waive his right to a set-off against the price: see *Caterpillar (NI) Ltd (formerly FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd [2013] EWCA Civ 1232, [2014] 1 W.L.R. 2365*. cf. also *Hong Kong and Shanghai Banking Corp v Kloeckner Co AG [1990] 2 Q.B. 514* and *Connaught Restaurants Ltd v Indoor Leisure Ltd [1994] 4 All E.R. 834* (not sale of goods cases). But such a term may be invalid under Unfair Contract Terms Act 1977 or under the Unfair Terms in Consumer Contract Regulations 1999, or for contracts entered into on or after 1 October 2015, the Consumer Rights Act 2015, see above paras 40-223 et seq.
- 1951 s.53(1)(a) and (4) follow the law in *Mondel v Steel (1841) 8 M.W. 858*. The buyer may also have a set-off (in respect of the seller's previous breach of warranty) when the seller claims damages for non-acceptance: see above, para.46-370. The buyer need not set up his defence: the fact that the buyer has paid the full price, or that the seller has recovered the full price by action against the buyer, does not prevent the buyer from subsequently bringing a separate action against the seller for breach of warranty: cf. the analogous case of a building contract: *Davis v Hedges (1871) L.R. 6 Q.B. 687* (the sale of goods case is expressly said to be the same: at 690). The buyer cannot

- defend by way of set-off if the seller sues to enforce a negotiable instrument (*Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 *Lloyd's Rep.* 271; cf. *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 *W.L.R.* 713) or a different contract (*Bow, McLachlan Co Ltd v Ship (Camosun)* [1909] A.C. 597, 610–613 (mortgage back to the seller)). On the question of an equitable set-off against a claim in debt, see *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] Q.B. 137 (a landlord and tenant case).
- 1952 This subsection is in terms of *Hadley v Baxendale* (1854) 9 *Exch.* 341 (see Vol.I, para.29-126); *H Parsons (Livestock) Ltd v Uttley Ingham Co Ltd* [1978] Q.B. 791, 800, 807. Consequential damages can be claimed under s.53(2) if they arise directly and naturally from the breach: *Saiopol SA v Inerco Trade SA* [2014] EWHC 2211 (Comm). In *McAlpine Grant ILCO Ltd v AFR Refrigeration Ltd* [2020] EWHC 106 (QB) the natural consequences of breach when a refrigeration unit failed included the damage to expensive drugs which were spoiled as damages may be claimed under s.54 (see below, paras 46-424—46-443).
- 1953 It is submitted that a similar measure would apply to breaches of other undertakings, such as those relating to the fitness of the goods for a particular purpose (s.14(3)), or to the description of the goods (s.13).
- 1954 It is not clear whether the word “further” relates to fresh damage suffered after the first action was disposed of, or to damage which was not taken account of in assessing the extent of the reduction in the price in the first action. *Mondel v Steel* (1841) 8 M.W. 858, suggests the latter interpretation, but the former is probably the more normal meaning of the word “further”. (Another possible meaning could be that “further” refers to a sum “over and above” the price (at least in cases where the breach of warranty had been set up in “extinction” of the price).)
- 1955 Where the buyer is a consumer he has new remedies under Pt 5A of the Act or the Consumer Rights Act 2015 where the goods delivered to him do not conform to the contract: these remedies are likely to be more advantageous to him than those under s.53. See above, paras 40-467 et seq.
- 1956 s.53(3) assumes that the buyer has paid the full price for the goods (cf. s.53(1)(a)). The fact that the buyer has paid the price to the seller makes no difference to the measure of damages: *Loder v Kekule* (1857) 3 C.B.(N.S.) 128.
- 1957 The buyer is entitled to any rise in the market price between the date of the contract and the date of delivery: *Jones v Just* (1868) L.R. 3 Q.B. 197 (the court treated as irrelevant the actual resale price obtained by the buyer at a date later than the date of delivery). cf. the similar situation in assessing the market price: see above, paras 46-371—46-373.
- 1958 1959 If the goods were to be delivered by separate instalments, the measure of damages in s.53(3) should be applied separately to each delivery: *Slater v Hoyle and Smith Ltd* [1920] 2 K.B. 11, 19. See, applying the market price rule, *Amira G Foods Ltd v RS Foods Ltd* [2016] EWHC 76 (QB).
- 1960 *Saiopol SA v Inerco Trade SA* [2014] EWHC 2211 (Comm). See below, paras 46-427 et seq.
- 1961 See above, paras 46-371 et seq.

- 1962 The contract price should not be taken: *Loder v Kekule* (1857) 3 C.B.(N.S.) 128; *Slater v Hoyle and Smith Ltd* [1920] 2 K.B. 11 at 17, 18. (cf. *Dingle v Hare* (1859) 29 L.J. C.P. 143; *Minster Trust Ltd v Traps Tractors Ltd* [1954] 1 W.L.R. 963, 988–989.)
- 1963 As suggested in *Clare v Maynard* (1837) 6 A. & E. 519. The sub-sale price is normally irrelevant: *Slater v Hoyle and Smith Ltd* [1920] 2 K.B. 11 cf. *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 (see below, paras 46-420, 46-422—46-423). (cf. see above, paras 46-407—46-409, 46-414.)
- 1964 *Cox v Walker* (1835) 6 A. & E. 523n.
- 1965 There is normally no market in the ordinary sense for damaged or defective goods: *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422, 438. (The appeal was allowed, but on a different ground: [1951] 2 K.B. 314.) As to damages in respect of goods not of merchantable quality, see *Jackson v Chrysler Acceptances* [1978] R.T.R. 474.
- 1966 *Cox v Walker*, above; *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422, 438. (But the evidence of “hypothetical buyers” may be weak: at 439.) This example of setting the value by using a resale price was cited with approval and followed in *BP Oil International Ltd v Glencore Energy UK Ltd* [2022] EWHC 499 (Comm) at [227]. Where a market price could be determined in this way, it would not be appropriate to award damages on the basis of the cost of cure.
- 1967 [1951] 1 K.B. 422 at 439–440 (allowance of 15 per cent on the price); *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] Q.B. 44, 63. cf. the remedy of a reduction in price where the buyer is a consumer: above, para.40-521.
- 1968 *Naughton v O'Callaghan* [1990] 3 All E.R. 191; *Bominflot Bunkergesellschaft fur Mineralole mbH & Co v Petroplus Marketing AG (The Mercini Lady)* [2012] EWHC 3009 (Comm), [2013] 1 Lloyd's Rep. 360 at [60]–[61]; *Saipol SA v Inerco Trade SA* [2014] EWHC 2211 (Comm) (approving arbitrators' assessment of damages on that basis).
- 1969 *Van den Hurk v Martens Co Ltd* [1920] 1 K.B. 850. See above, para.46-379. cf. the similar ruling in *Kwei Tek Chao v British Traders Ltd* [1954] 2 Q.B. 459. Normally, the place of delivery is the place for examination of the goods under s.34.
- 1970 *Ashworth v Wells* (1898) 14 T.L.R. 227. cf. *Loder v Kekule* (1857) 3 C.B.(N.S.) 128, 140 (seller's negotiations with the buyer delayed the resale of the defective goods).
- 1971 [1998] Q.B. 87 (see below, paras 46-422—46-423) (applied in *Bern Dis A Turk Ticaret S/A v International Agri Trade Co Ltd* [1999] 1 All E.R. (Comm) 619, CA).
- 1972 [1998] Q.B. 87 at 102. See also *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] 2 Lloyd's Rep. 243; *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) at [124]–[139].
- 1973 [1998] Q.B. 87, 102.
- 1974 The consumer may now have the further remedies of repair or replacement: see above para.40-520.
- 1975 *Minster Trust Ltd v Traps Tractors Ltd* [1954] 1 W.L.R. 963, 988–989. The cost of repairs to the goods was also accepted as a basis for damages in *Mondel v Steel* (1841) 8 M. & W. 858, 872. cf. buying the nearest equivalent goods and adapting

- them: see above, para.46-405. However, in *Peebles v Rembrand Builders Merchants Ltd Unreported 18 April 2017, Sheriff Court (Tayside, Central and Fife) (Dundee)*, the court refused to award the full cost of replacing defective roof tiles because the expense was unreasonable and the claimant had failed to mitigate its loss.
- 1976 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rys Co of London Ltd [1912] A.C. 673.*
- 1977 If the buyers had claimed the normal measure of damages under s.53(3) see above, there would have been no need to mitigate at a later date: see Benjamin's Sale of Goods, 11th edn (2021), para.17-055. But cf. *Bence Graphics International Ltd v Fasson UK Ltd [1998] Q.B. 87* (see above, para.46-420, see below, paras 46-422—46-423).
- 1978 The extra profit in fact exceeded the cost of the substitute.
- 1979 cf. *Erie County Natural Gas and Fuel Co Ltd v Carroll [1911] A.C. 105* (see above, para.46-405); *Nadreph Ltd v Willmett Co [1978] 1 W.L.R. 1537* (not a sale of goods case). cf. also *Hussey v Eels [1990] 2 Q.B. 227* (not a sale of goods case).
- 1980 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] A.C. 673.*
- 1981 *[1920] 2 K.B. 11.*
- 1982 The buyers were not obliged to deliver to the sub-buyer the goods which they bought from the original seller, and in fact some of the goods which they delivered to the sub-buyer came from a different source. It is submitted that the decision in this case is to be preferred to the reasoning of the Privy Council in the analogous case of *Wertheim v Chicoutimi Pulp Co [1918] A.C. 301* (late delivery), which is criticised see above, para.46-415 (note), and in Benjamin at paras 17-039, 17-057—17-058. However, in *Bence Graphics International Ltd v Fasson UK Ltd [1998] Q.B. 87* at 103–105, Auld LJ approved the decision in *Wertheim*'s case (see below (this paragraph) and see Vol.I, paras 29-063, 29-173 and 29-182).
- 1983 *[1998] Q.B. 87.* See *Louis Dreyfus Trading Ltd v Reliance Trading Ltd [2004] EWHC 525 (Comm)*, *[2004] 2 Lloyd's Rep. 243* (parties contemplated sale of the same goods to the sub-buyer under a specific contract); *Choil Trading SA v Sahara Energy Resources Ltd [2010] EWHC 374 (Comm)* at [124]–[139].
- 1984 *[1998] Q.B. 87* at 102 (see above, para.46-420). The *Bence Graphics* case was distinguished in *Bear Stearns Bank Plc v Forum Global Equity Ltd [2007] EWHC 1576 (Comm)* (a case involving shares rather than goods) on the grounds that in the *Bear Stearns* case the parties had not contemplated that the buyers would resell precisely the same shares (at [204]–[207]); and that it was a case of non-delivery rather than of delivery of defective goods (at [208]).
- 1985 See Treitel (1997) 113 L.Q.R. 188 and Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.20-051. See also Benjamin's Sale of Goods, 11th edn (2021), para. 17-057. Contrast McGregor on Damages, 21st edn (2021), paras 25-068—25-069.
- 1986 See Vol.I, para.29-063; and Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.20-051. This was the approach taken in *BP Oil International Ltd v Glencore Energy UK Ltd [2022] EWHC 499 (Comm)*. The approach in *Slater* was applied

- because the parties did not contemplate that the particular goods supplied to the buyer would be used to satisfy a particular sub-contract.
- 1987 See the powerful criticism of *Treitel* (1997) 113 *L.Q.R.* 188, and Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.20-054. In *OMV Petrom SA v Glencore International AG [2016] EWCA Civ 778, [2016] 2 Lloyd's Rep. 432* Christopher Clarke LJ seemed to think that the *Bence Graphics* case could not stand with *Slater v Hoyle Smith Ltd*, but left the matter open (at [45]–[46]).
- 1988 This is consistent with the approach advocated in the case of non-delivery at Vol.I, paras 29-173 and 46-422—46-423 above.
- 1989 See above, para.29-183.
- 1990 See Vol.I, para.29-064.
- 1991 *Biggin v Permanite [1951] 2 K.B. 314; Fluor v Shanghai Zhenhua Heavy Industry Co Ltd [2018] EWHC 1 (TCC)* at [465].

(ii) - Losses other than Diminution in Value

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 7. - Remedies of the Buyer

(c) - Damages for Defective Quality

(ii) - Losses other than Diminution in Value

The buyer's actual or imputed knowledge of the defect

- 46-424 Where the seller delivers goods which fail to meet the contractual description or standard, the buyer may not immediately discover the defect or the failure of the goods to satisfy the description. As soon as the buyer knows of the defect, he will be unable to recover damages for any further or consequential loss which he ought reasonably to have avoided by taking remedial or precautionary steps.¹⁹⁹² The buyer is not justified in continuing to rely on the seller's warranty after he knows that the goods are defective in that respect.¹⁹⁹³ After the buyer knew of the defect, he cannot, by reselling the goods to a third person, increase the original seller's liability by holding him liable for the buyer's own responsibility towards his sub-buyer.¹⁹⁹⁴ If the buyer acquired knowledge of the defect at a time when the goods were already in the hands of the sub-buyer, he ought to have notified the sub-buyer if the latter could take reasonable steps to avoid further loss or injury.¹⁹⁹⁵

The buyer's failure to discover the defect

- 46-425 It is not yet established, however, whether the same principle applies where the buyer ought reasonably to have discovered a defect which was not obvious.¹⁹⁹⁶ The buyer is not debarred from claiming damages merely because he did not make a thorough examination of the goods delivered by the seller to see whether they complied with the contract. Where the defect is not patent or obvious, he may rely on the seller's contractual undertaking as to quality or description. But in

the cases¹⁹⁹⁷ supporting this proposition, there is an underlying assumption that the buyer acted reasonably in not examining the goods, or in not discovering the defect in question. The language used in the judgments, however, suggests that when the circumstances ought to have put the buyer on inquiry, so that as a reasonable man he ought then to have discovered the defect, he should not be able to recover damages in respect of further loss caused by the defect which he should reasonably have been able to avoid after the date when he ought to have discovered it.¹⁹⁹⁸ The first question will be whether the buyer's actions or omissions broke the chain of causation between the breach and any subsequent loss or damage. The buyer's knowledge is highly relevant to this. Reckless conduct on the buyer's part is likely to break the chain of causation, whereas merely unreasonable conduct will not necessarily do so.¹⁹⁹⁹ The second question is, if the buyer was aware of the breach, or possibly if he should have been aware of it,²⁰⁰⁰ whether he took reasonable steps to mitigate the loss.²⁰⁰¹

Defects only discoverable on use

46-426 Sometimes the seller knows that there are some possible defects in the goods which can be discovered only by the buyer, or the ultimate buyer, actually using them.²⁰⁰² Thus, the presence of a deleterious substance in a fur skin collar could not be discovered until it was worn and the defect shown by the injury to the skin of the wearer.²⁰⁰³ And where seed of inferior quality is delivered to a farmer, the fact of the inferior quality may not become apparent until the crop has been grown.²⁰⁰⁴ In these circumstances there can be no question of the buyer failing to discover the defect before the use of the goods reveals it.²⁰⁰⁵

Additional or wasted expenses²⁰⁰⁶

46-427 If it was within the reasonable contemplation of the parties, at the time of making the contract, that the buyer was not unlikely to incur additional expenses if the seller delivered defective goods in breach of his undertaking as to their description or quality, the buyer may recover from the seller the reasonable amount of any expenses which he has reasonably incurred as the result of the seller's breach.²⁰⁰⁷ Thus, where defective steam turbines were delivered it was not disputed that the buyers could recover damages for the extra coal consumption and labour due to the defects in the machines during the period of their use.²⁰⁰⁸ Similarly, the buyer may be able to recover expenses incurred by him in reliance on the seller's undertaking as to the quality of the goods, where the breach of the undertaking made the expenditure futile.²⁰⁰⁹

Limits on recovery of reliance loss

- 46-428 But the buyer may recover his wasted expenditure only to the extent that it would have been covered by the gross return which he would have made from his use of the goods if the seller had fully performed the contract.²⁰¹⁰ This proposition refers only to expenditure which the buyer intended to recoup from his gross return, not to additional expenditure incurred by the buyer after, and as a result of, the breach. It is unsettled how far the buyer can recover damages in respect of both his “expectation interest” (the profit or gain which he expected to receive from performance of the contract but which was prevented by the seller’s breach of contract) and his “reliance interest” (wasted expenditure).²⁰¹¹

Fines paid by the buyer

- 46-429 If it was within the reasonable contemplation²⁰¹² of the parties at the time of making the contract that the buyer might be prosecuted if the goods supplied by the seller were defective, e.g. food unfit for human consumption,²⁰¹³ the buyer (in the absence of fault on his part) has been held entitled to recover from the seller both the fine and the costs of his defence.²⁰¹⁴ If, however, the buyer’s own negligence led, at least partly, to the imposition of the fine, it has been said that the buyer is not entitled to recover damages in respect of it.²⁰¹⁵ However, a number of later cases²⁰¹⁶ have raised the issue of public policy.²⁰¹⁷ In these it has been said that if the punishment inflicted by a criminal court is personal to the offender, the civil courts should not entertain an action by the offender to recover an indemnity against the consequences of that punishment.²⁰¹⁸ It is submitted that the issue should turn on whether or not the buyer had mens rea²⁰¹⁹: if he had not, the court should be willing to award him damages in respect of a fine imposed on him.

The buyer’s loss of profit²⁰²⁰

- 46-430 Where, at the time of making the contract, the seller knew, or ought reasonably to have contemplated, that the buyer intended to use the goods to produce a profit,²⁰²¹ and that a breach of the seller’s undertaking as to description or quality of the goods would impede that profit-making, the buyer may recover damages for his loss of profits caused by the breach.²⁰²² Where the goods sold were a profit-earning machine,²⁰²³ which the seller undertook would perform in a specified manner or at a specified rate, the buyer may claim (subject to his taking reasonable steps to mitigate his loss) his loss of profits caused by the failure of the machine to perform as warranted. Thus,

in *Cullinane v British "Rema" Manufacturing Co Ltd*²⁰²⁴ where the seller warranted that a clay-pulverising machine had a certain productive capacity, but the machine failed to achieve this, the Court of Appeal held that the buyer was entitled to recover his net²⁰²⁵ loss of profits during the normal commercial life of the machine.²⁰²⁶ But any claim for loss of profits must be considered in the light of the requirement to mitigate: for a period after delivery it may be reasonable for the buyer to use the machine to see if it meets the warranty, but as soon as a reasonable buyer would have replaced the defective machine with one which functioned properly or efficiently,²⁰²⁷ the buyer should not be entitled to claim for any further loss of profits.²⁰²⁸ Only if no suitable replacement can reasonably be found should the buyer's claim for loss of profits extend over the full period of the original machine's expected life.²⁰²⁹

Claims for both wasted expenses and loss of profits²⁰³⁰

46-431 Difficult problems arise from a split claim for damages which is based partly on the expenses incurred by the claimant which the breach renders useless, and partly on the loss of profits caused by the breach. In *Cullinane v British "Rema" Manufacturing Co Ltd*²⁰³¹ (discussed in the preceding paragraph), the majority of the Court of Appeal held that the plaintiff could not claim both his capital loss (expenditure incurred) and his loss of profits²⁰³²: in their opinion, the plaintiff must elect²⁰³³ between these two claims, and either seek to be put back into the position he would have been in if the contract had not been made (viz recover his net outlay, his "reliance expenditure") or, alternatively, claim what he would have received if the contract had been fully performed (viz the gross profit he would have received if the machine had functioned in accordance with the contractual warranty). It is submitted that the position taken by the majority in this case is confusing: their concern to avoid double recovery led them to overlook the fact that a *net* loss of profit can be calculated in such a way as to avoid overlapping with the wasted capital expenditure. As Morris LJ pointed out in his dissent,²⁰³⁴ the plaintiff was claiming only his net profit calculated after a deduction of depreciation, which represented the return to the buyer of the capital element; therefore, his claim for his net capital outlay did not overlap with his claim for loss of net profits.²⁰³⁵ It is submitted that the view of Morris LJ is to be preferred, and that a split claim should be permitted so long as the calculations show that no overlapping occurs in the different heads of claim.²⁰³⁶

Loss of profits under a sub-sale

46-432 Where the seller knew that the buyer intended to resell the goods, and ought reasonably to have contemplated that a breach of his contractual undertaking as to the description or condition of the

goods would be not unlikely to cause the buyer to lose the profit he hoped to make under the sub-sale,²⁰³⁷ the buyer may recover damages in respect of such a loss of profits caused by a breach of the seller's undertaking,²⁰³⁸ provided it was reasonable to think that the seller was assuming responsibility for the loss.²⁰³⁹

Loss of future business

- 46-433 Where, at the time they made their contract, it was within the reasonable contemplation of the parties that defects in the goods supplied by the seller (in breach of his warranty as to their quality) might lead to sub-buyers (customers of the buyer) withdrawing their custom from the buyer, damages may be awarded for loss of profits on "repeat orders" from the sub-buyers²⁰⁴⁰ and for expenses reasonably incurred by the buyer in attempting to minimise a possible loss of business.²⁰⁴¹

Loss of amenity

- 46-434 In the chapter on Damages in Vol.I²⁰⁴² there is an examination of the recent authorities on damages for "loss of amenity". In no reported cases has such an award been made to a buyer of goods, but it is possible that an analogy might be drawn from the cases on the purchase of land or building construction.

Physical injury to the buyer

- 46-435 If it was in the reasonable contemplation of the parties, at the time of making the contract, that the seller's breach of his contractual undertaking as to quality or description was not unlikely to cause physical injury to the buyer's person²⁰⁴³ or property, the buyer may recover damages for such injury.²⁰⁴⁴ Thus, where the buyer of woollen underwear contracted dermatitis through the defective condition of the garment, he recovered substantial damages from the retailers for breach of the statutory condition imposed by s.14 of the Act.²⁰⁴⁵ (There may often be concurrent liability in tort,²⁰⁴⁶ but the advantage of suing in contract is that the claimant may not have to prove the negligence of the defendant.)

Loss through injury to others

- 46-436 Where it was within the reasonable contemplation of the parties that the goods sold to the buyer would be used by members of the buyer's family, and that a defect in them was not unlikely to cause injury to them, the buyer is entitled to recover damages (in contract) for any pecuniary loss (such as expenses) caused to him by such injury.²⁰⁴⁷ So where food for human consumption was sold to the buyer and eaten by his wife who died as a result, the buyer recovered damages for the medical and funeral expenses he had paid, and for the loss of his wife's services which led to his employing extra staff.²⁰⁴⁸ But it should be noted that under the [Contracts \(Rights of Third Parties\) Act 1999](#) members of the buyer's family may be sufficiently "identified" as third parties intended to have conferred on them the benefit of a term of the contract, so as to be entitled to enforce that term directly against the seller.²⁰⁴⁹

Damage to other property of the buyer²⁰⁵⁰

- 46-437 Where it was within the reasonable contemplation of the parties that a defect in the goods bought by the buyer was not unlikely to cause loss of, or damage to, other property belonging to the buyer, his damages may include compensation for this loss or injury.²⁰⁵¹ So where game farmers bought compounded meal for feeding to their pheasants and many chicks died and others grew up stunted because the meal contained a toxic substance, the farmers recovered damages for the loss of the birds and the reduced value of the survivors.²⁰⁵² If the other property was damaged in the course of the use made of the goods by the buyer, the category of use in question must be one which was within the reasonable contemplation of the parties as a not unlikely use of the goods. If there are several categories of ordinary or common use, the buyer may recover if his use of the goods was within one of these categories,²⁰⁵³ even though it may not have been the main type of use.²⁰⁵⁴

Disruption to buyer's business

- 46-438 Where defective performance of a contract causes disruption to a business, for example because its staff have to spend time dealing with the ensuing problems, the reasonable costs can be recovered.²⁰⁵⁵

Compensation paid to a stranger (other than a sub-buyer) 2056

- 46-439 It may have been within the reasonable contemplation of the parties at the time of making the contract that: (a) if the goods were defective, a third person (or his property) was not unlikely to be injured as a result of the defect; and (b) as a result the buyer was not unlikely to be held legally liable to compensate the third party for his injury or loss. In these circumstances, if such an injury occurs, and the defect was in breach of the seller's contractual obligations to the buyer, the latter may recover as damages from the seller the damages ²⁰⁵⁷ and costs paid to the third party, ²⁰⁵⁸ and the buyer's own costs incurred in reasonably defending the third party's claim. ²⁰⁵⁹ The legal basis of the buyer's liability towards the stranger is normally under the law of torts, ²⁰⁶⁰ but it could be under a contract, e.g. a contract of employment.

Buyer must not act unreasonably

- 46-440 The buyer is not justified in continuing to rely on the seller's warranty after he knows that the goods are defective in that respect. ²⁰⁶¹ Where a buyer bought a trailer coupling, the House of Lords held that the warranty ²⁰⁶² that it was reasonably fit for towing trailers would continue in effect for a reasonable time after delivery, so long as it remained in the same apparent state as that in which it was delivered (apart from normal wear and tear). But as soon as the buyer learned ²⁰⁶³ that the handle of the locking mechanism of the coupling was missing, he could no longer rely on the seller's warranty to excuse him from making his own examination to see if it was still safe to use. The buyer was held liable ²⁰⁶⁴ to third parties injured when the trailer broke away, but he could not recover from the seller the damages paid to them, because his reliance on the warranty was no longer justified. The buyer's actions or omissions may break the chain of causation between the breach and any subsequent loss or damage. The buyer's knowledge is highly relevant to this. Reckless conduct on the buyer's part is likely to break the chain of causation, whereas merely unreasonable conduct will not necessarily do so. ²⁰⁶⁵ If the buyer was aware of the breach, and possibly if he should have been aware of it, ²⁰⁶⁶ he will not be able to recover for losses he could have avoided by taking reasonable steps to mitigate the loss. ²⁰⁶⁷

Compensation paid by the buyer to a sub-buyer 2068

- 46-441 This paragraph is concerned with the situation where the seller was in breach of his contractual undertaking as to the description or condition of the goods and (1) it was within the reasonable

contemplation of the parties, at the time of making the contract, that²⁰⁶⁹ (a) the buyer would, or probably²⁰⁷⁰ would, resell the goods to a sub-buyer; and (b) that the contract of sub-sale would, or probably would, contain the same,²⁰⁷¹ or a similar,²⁰⁷² contractual undertaking as to the description or condition of the goods; and (c) that it was not unlikely²⁰⁷³ that a breach of the seller's undertaking would cause the buyer to be in breach of his undertaking to the sub-buyer who would claim damages from the buyer for the loss or damage he suffered; and (2) it was reasonable to think that the seller was assuming responsibility for the loss.²⁰⁷⁴ If loss or injury occurs in these circumstances, the buyer who has paid damages and costs²⁰⁷⁵ to his sub-buyer for breach of the undertaking in the sub-sale may recover this amount from the seller, together with his own costs²⁰⁷⁶ in reasonably defending the sub-buyer's claim, as damages for the seller's breach of the original contract.²⁰⁷⁷ A reasonable settlement with the sub-buyer out of court may be the basis of the buyer's claim for damages²⁰⁷⁸; but the seller may attempt to show that the buyer was not liable to pay anything to the sub-buyer²⁰⁷⁹ or may produce new evidence or new factors to show that the sum paid was not reasonable.²⁰⁸⁰ As soon as the buyer, whether before or after reselling the goods, has discovered²⁰⁸¹ the defect in their description or condition, he is unable to pass on to his seller any liability which he thereafter incurred towards his sub-buyer (but which he could reasonably have avoided) in respect of that defect,²⁰⁸² e.g. where he could, by passing on the knowledge to his sub-buyer, reduce his liability towards the sub-buyer.²⁰⁸³

Compensation paid to sub-buyers in a series of “string contracts”²⁰⁸⁴

46-442 This paragraph is concerned with the situation where the seller was in breach of his contractual undertaking as to the description or condition of the goods, and it was within the reasonable contemplation of the parties, at the time of making the contract, that:

- (a)the buyer intended²⁰⁸⁵ to resell, or probably²⁰⁸⁶ would do so, and that his sub-buyer would probably resell, and so on, so that there would be a series of sub-sales or “string contracts” of the same goods; and
- (b)that each contract in the series would, or probably would, contain the same,²⁰⁸⁷ or a similar,²⁰⁸⁸ contractual undertaking as to the description or condition of the goods; and
- (c)that it was not unlikely that a breach of the seller's undertaking would cause the buyer and each sub-buyer in the series to be in breach of his undertaking to his own buyer²⁰⁸⁹; and
- (d)that it was not unlikely that, in the case of such a breach, the ultimate buyers would recover damages from their sellers, so that liability would in turn be passed up the chain of sellers and buyers.²⁰⁹⁰

In these circumstances, the buyer who has paid to his sub-buyer damages and costs²⁰⁹¹ for breach of the undertaking in the first contract of sub-sale (which the sub-buyer claimed from the buyer,

as the result of similar payments of compensation between successive sub-buyers down the chain) may recover the amount paid by him to the sub-buyer,²⁰⁹² together with his own reasonable costs²⁰⁹³ in reasonably defending the sub-buyer's claim against him; the damages and costs paid or incurred by the buyer are taken as the measure of damages for the seller's breach of the original contract.²⁰⁹⁴

Chain of sales

- 46-443 In a chain of sales, the buyer may sometimes be precluded from relying on the normal rule for the assessment of damages laid down by s.53(3). In *Biggin & Co Ltd v Permanite Ltd* Devlin J held that where the sub-sale was within the contemplation of the parties, the original buyer's damages must be assessed by reference to it, whether he likes it or not: if it is the original buyer's:

“... liability to the ultimate user that is contemplated as the measure of damage and if in fact it is used without injurious results so that no such liability arises, the [original buyer] could not claim the difference in market value, and say that the sub-sale must be disregarded.”²⁰⁹⁵

Whether that is always the correct approach was discussed earlier.²⁰⁹⁶

Variations in descriptions or undertakings

- 46-444 The question whether the contractual undertakings as to the description or condition of the goods in the string contracts must be the same as in the original contract caused difficulty in the earlier cases.²⁰⁹⁷ In *Biggin & Co Ltd v Permanite Ltd*,²⁰⁹⁸ Devlin J said:

“If the variation to a description is such that it is impossible to say whether the injury that ultimately results would have flowed from the breach of the original warranty, the parties must as reasonable men be presumed to have put the liability for the injury outside their contemplation as a measure of compensation. If this is, as I believe, the nature of the principle, it must be applied very differently according to whether the injury for which the defendant is being asked to pay is a market loss or physical damage.

In the former case²⁰⁹⁹ ... any variation that is more than a matter of words is likely to be fatal, because there is no way of telling its effect on the market value. In the latter case the nature of the physical damage will show whether the variation was material or not.”

It is submitted that this passage states the correct principle. If one of the buyers in the chain added to the description of the goods sold to him, or varied the undertaking as to their condition, the original seller should still be liable for the loss or injury suffered by the ultimate buyer if it was caused by a defect in the goods covered both by the original seller's description or undertaking and also by the descriptions or undertakings in all the intervening contracts.²¹⁰⁰

A direct claim by the sub-buyer against the seller

⁴⁶⁻⁴⁴⁵ Under the [Contracts \(Rights of Third Parties\) Act 1999](#)²¹⁰¹ a sub-buyer as a "third party" may be able to enforce²¹⁰² a term in the main contract between the seller and the buyer if *either* the contract expressly provides that he may; *or* the term purports to confer a benefit on him and he is sufficiently "identified" (e.g. as a sub-buyer, an agent or employee of the buyer). But the contract may show that the third party was not intended to be entitled to enforce the term. Where the buyer has already agreed to sell the goods to the sub-buyer, the [1999 Act](#) will not apply merely if the seller knows that the buyer is buying the goods in order to fulfil that contract; the contract must purport to benefit the third party which seems to require at a minimum that it refers to the third party.²¹⁰³ It is conceivable that the contract between the buyer and the seller might expressly entitle the sub-buyer to enforce an obligation on the seller (e.g. an obligation to deliver to the sub-buyer's premises) or it might "purport to confer" such a benefit on the sub-buyer so as to bring the case within the Act.

Footnotes

- 1992 This principle is implicit in the decision of the House of Lords in *Lambert v Lewis [1982] A.C. 225*. (See below, para.46-440.) See also *British Oil and Cake Co Ltd v Burstall Co (1923) 39 T.L.R. 406, 407; Hammond Co v Bussey (1887) 20 Q.B.D. 79, 86*.
- 1993 *Lambert v Lewis [1982] A.C. 225*. The rules of mitigation apply to this situation.
- 1994 *Biggin & Co Ltd v Permanite Ltd [1951] 1 K.B. 422, 435* (the appeal was decided on another point). See also *GC Dobell Co Ltd v Barber and Garratt [1931] 1 K.B. 219, 238, 246–247*.
- 1995 *Biggin & Co Ltd v Permanite Ltd [1951] 1 K.B. 422, 435*.
- 1996 *Biggin & Co Ltd v Permanite Ltd [1951] 1 K.B. 422, 435*. See also *Smith v Johnson (1899) 15 T.L.R. 179, 180*.
- 1997 *Pinnock Bros v Lewis and Peat Ltd [1923] 1 K.B. 690, 698; British Oil and Cake Co Ltd v Burstall Co (1923) 39 T.L.R. 406* at 407. cf. *GC Dobell Co Ltd v Barber and Garratt [1931] 1 K.B. 219*. cf. also the analogous cases of *Mowbray v Merryweather [1895] 2 Q.B. 640, 644, 646, 647; Scott v Foley, Aikman Co (1899) 16 T.L.R. 55*.

- 1998 *Lambert v Lewis* [1982] A.C. 225 was based partly on the buyer's actual knowledge and partly on his imputed knowledge: see Benjamin's Sale of Goods, 11th edn (2021), para.17-059. cf. Vol.I, para.29-104. It is submitted that the speech of Lord Diplock indicates that he would treat imputed knowledge of the defect as actual knowledge for the purpose of the legal principle in question. See also *Smith v Johnson* (1899) 15 T.L.R. 180; *Wagstaff v Shorthorn Dairy Co* (1884) Cab. Ell. 324.
- 1999 The authorities on when the claimant's intervening act or omission will break the chain of causation are helpfully reviewed in *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482 at [42]–[47]. See Vol.I, para.29-078. Applied in *Stacey (t/a The New Gailey Caravan/Motorhomes Centre) v Autosleeper Group Ltd* [2014] EWCA Civ 1551.
- 2000 See para.46-425.
- 2001 See Vol.I, paras 29-096 et seq.; *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482 at [49]–[50].
- 2002 *Kasler and Cohen v Slavouski* [1928] 1 K.B. 78, 85–86.
- 2003 *Kasler and Cohen v Slavouski*, above, at 84. See also *Hammond Co v Bussey* (1887) 20 Q.B.D. 79, 86.
- 2004 *Wagstaff v Shorthorn Dairy Co* (1884) Cab. Ell. 324.
- 2005 See also the facts of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803, where the House of Lords' decision was based on the assumption that the farmer was entitled to recover all his costs wasted in cultivating the worthless crop, as well as the net profit he would have made from a successful crop: see below, para.46-431.
- 2006 See Vol.I, paras 29-025 et seq. This heading may even cover pre-contract expenditure if it was in the reasonable contemplation of the parties as not unlikely to be wasted in the event of a breach: *Anglia Television Ltd v Reed* [1972] 1 Q.B. 60; *Lloyd v Stanbury* [1971] 1 W.L.R. 535 (neither case is on the sale of goods). See Vol.I, para.29-033.
- 2007 *Smith v Johnson* (1899) 15 T.L.R. 179.
- 2008 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] A.C. 673, 683. (In fact, the buyers later replaced the defective turbines with a newer, more efficient, model: see above, para.46-421.) See also *Molling Co v Dean Son Ltd* (1901) 18 T.L.R. 217 (wasted freight and customs duty; on avoidance of double recovery in such cases, see Benjamin's Sale of Goods, 11th edn (2021), para.17-061).
- 2009 Illustrations of this type of recovery are *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 Q.B. 292 (see below, para.46-430); *Molling Co v Dean Son Ltd*, above; *Richard Holden Ltd v Bostock Co Ltd* (1902) 18 T.L.R. 317; *Bostock Co Ltd v Nicholson Sons Ltd* [1904] 1 K.B. 725. If s.53(3) applies, so that the buyer could buy substitute goods in the market, he will not be able to claim for wasted expenditure. See also *Stoljar* (1975) 91 L.Q.R. 68.
- 2010 See Vol.I, paras 29-027, 29-031. (The onus of proof is on the seller to show that the buyer would not have recouped all of his expenditure if the contract had been fully performed by the seller: para.29-027.)

- 2011 See below, para.46-431; Vol.I, para.29-032.
- 2012 And if it was reasonable to think that the seller was assuming responsibility for the loss: see above, para.46-409 and, more generally, Vol.I, paras 29-144 et seq.
- 2013 But see s.21 of the Food Safety Act 1990 (defence of due diligence).
- 2014 *Cointat v Myham & Son* [1913] 2 K.B. 220 (reversed on question of warranty: (1914) 30 T.L.R. 282). cf. *Crage v Fry* (1903) 67 J.P. 240 (no evidence as to what influenced the court in imposing the fine); *Marles v Philip Trant Sons Ltd* [1954] 1 Q.B. 29, 39–40. cf. also *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep. 313.
- 2015 *Cointat v Myham Son* [1913] 2 K.B. 220, 222.
- 2016 *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 K.B. 652; *Proops v WH Chaplin Co* (1920) 37 T.L.R. 112, 114; *Askey v Golden Wine Co Ltd* (1948) 64 T.L.R. 379 (only the third case concerned the sale of goods).
- 2017 If the buyer is acquitted, he may recover his costs in defending a prosecution resulting from the seller's breach of warranty, since public policy is not in question: *Proops v WH Chaplin Co* (1920) 37 T.L.R. 112.
- 2018 See also *Payne v Ministry of Food* (1953) 103 L.J. 141.
- 2019 There was mens rea in the plaintiff in both *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 K.B. 652; and *Askey v Golden Wine Co Ltd* (1948) 64 T.L.R. 379.
- 2020 For loss of profits under a sub-sale, see below, paras 46-432—46-433.
- 2021 The seller must have actual or imputed knowledge of the category of use intended by the buyer: *Bunting v Tory* (1948) 64 T.L.R. 353 (seller did not know that buyer intended to use a bull for breeding): see the discussion in Benjamin's Sale of Goods, 11th edn (2021), paras 17-065; and cf. see above, paras 46-407, 46-420.
- 2022 *Richard Holden Ltd v Bostock Co Ltd* (1902) 18 T.L.R. 317. See also *Wagstaff v Shorthorn Dairy Co* (1884) Cab. Ell. 324; *Ashworth v Wells* (1898) 14 T.L.R. 227; *Randall v Raper* (1858) E.B. & E. 84; and the facts of *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 K.B. 1003; on appeal [1911] A.C. 394 where the sub-buyer had grown inferior seeds, and his damages appear to have been assessed on the above basis. Or part thereof: cf. see above, para.46-415 for authority in an analogous situation.
- 2023 [1954] 1 Q.B. 292.
- 2024 viz after deducting from his expected gross profits (or gross receipts) the necessary expenditure in earning it.
- 2025 [1954] 1 Q.B. 292, 303, 308 (at 315, Morris LJ, dissenting, accepted this proposition).
- 2026 In the *Cullinane case* [1954] 1 Q.B. 292 it was held that the buyer did not act unreasonably in continuing to use the machine after he knew that its performance was defective: [1954] 1 Q.B. 292, 314, 316. But cf. *Lambert v Lewis* [1982] A.C. 225 (see above, para.46-425 and below, para.46-440).
- 2027 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] A.C. 673 (see above, para.46-421); *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 Q.B. 292, 314, 316. cf. *Lambert v Lewis* above (see below, para.46-440). If the substitute machine made extra profits,

- these will be taken into account in assessing damages for the cost of the substitute: *British Westinghouse* case, above (see above, para.46-421).
- 2029 *Macleod* [1970] *J.B.L.* 19, 26; *Stoljar* (1975) 91 *L.Q.R.* 68, 77–78.
- 2030 The question would also arise of a ceiling on recovery imposed by the gross return expected by the buyer: see Vol.I, paras 29-027, 29-031.
- 2031 [1954] 1 *Q.B.* 292 (criticised by *Macleod* [1970] *J.B.L.* 19; *Stoljar* (1975) 91 *L.Q.R.* 68; and Street, Principles of the Law of Damages (1962), pp.242–245).
- 2032 [1954] 1 *Q.B.* 292, 302, 303, 308, 311, 312.
- 2033 The Court of Appeal took the same position in cases not concerned with the sale of goods: *Anglia Television Ltd v Reed* [1972] 1 *Q.B.* 60, 63–64; *CCC Films Ltd v Impact Quadrant Films Ltd* [1985] *Q.B.* 16. cf. *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 *A.C.* 803, 812 (the leading speech approved damages which included both wasted costs and loss of profit).
- 2034 [1954] 1 *Q.B.* 292, 315, 317–318.
- 2035 *Macleod* [1970] *J.B.L.* 19. The distinction between gross and net profits is recognised (in relation to recoupment of expenditure) in the *CCC Films case* [1985] *Q.B.* 16, 32.
- 2036 See *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* [1964] *A.L.R.* 1083. See also Vol.I, para.29-032. Split claims were allowed in two earlier cases at first instance (neither of which was referred to in the *Cullinane case* [1954] 1 *Q.B.* 292, 314): *Foaminol Laboratories v British Artid Plastics* [1941] 2 *All E.R.* 393; and *Molling Co v Dean Son Ltd* (1901) 18 *T.L.R.* 217.
- 2037 Or under potential sub-sales: see *Richard Holden Ltd v Bostock Co Ltd* (1902) 18 *T.L.R.* 317.
- 2038 *Molling Co v Dean Son Ltd*, above, at 218. cf. above, paras 46-407, 46-411, 46-430.
- 2039 See above, para.46-409 and, more generally, Vol.I, paras 29-144 et seq.
- 2040 *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 *Lloyd's Rep.* 555, 573–574, 577, 579–580 (not following *Simon v Pawsons and Leaf's Ltd* (1933) 38 *Com. Cas.* 151, 158). See also *Aerial Advertising v Batchelor's Peas* [1938] 2 *All E.R.* 788. cf. *Cointat v Myham Son* [1913] 2 *K.B.* 220 reversed on another point (1914) 30 *T.L.R.* 282. cf. also *Amstrad Plc v Seagate Technology Inc* (1998) 86 *B.L.R.* 34. cf. also *Jackson v Bank of Scotland* [2005] *UKHL* 3, [2005] 1 *W.L.R.* 377 (see Vol.I, para.29-156).
- 2041 *Richard Holden Ltd v Bostock Co Ltd* (1902) 18 *T.L.R.* 317.
- 2042 See Vol.I, paras 29-159 et seq.
- 2043 *Grant v Australian Knitting Mills Ltd* [1936] *A.C.* 85. See also *Wren v Holt* [1903] 1 *K.B.* 610; *Gedding v Marsh* [1920] 1 *K.B.* 668; *Morelli v Fitch Gibbons* [1928] 2 *K.B.* 636; *Andrews v Hopkinson* [1957] 1 *Q.B.* 229; *Godley v Perry* [1960] 1 *W.L.R.* 9. (The damages may include the normal heads of damages in the assessment in tort for personal injuries or death: [1960] 1 *W.L.R.* 9 at 13.) Special rules apply to the award of interest on such damages: see Vol.I, para.29-295. cf. *Busby v Berkshire Bed Co Ltd* [2018] *EWHC* 2976 (*QB*) where the unusual circumstances of the accident meant that personal injury as a result of a defective bed could not have been reasonably foreseen and could not have been in anyone's prior contemplation.

- 2044 *Grant v Australian Knitting Mills Ltd [1936] A.C. 85*. The buyer will not be able to continue to rely on the undertaking after he knew (or ought reasonably to have known) that the goods were defective: cf. *Lambert v Lewis [1982] A.C. 225* (see below, para.46-440).
- 2045 *Grant v Australian Knitting Mills Ltd [1936] A.C. 85*. (The relevant provision was s.14 of the South Australian Act, which was identical with **s.14 of the 1893 United Kingdom Act** before the 1973 amendment.)
- 2046 See above, Vol.I, paras 3-021 et seq.
- 2047 *Priest v Last [1903] 2 K.B. 148*; *Frost v Aylesbury Dairy Co Ltd [1905] 1 K.B. 608*; *Jackson v Watson Sons [1909] 2 K.B. 193*; *Square v Model Farm Dairies (Bournemouth) Ltd [1939] 2 K.B. 365, 374*. On the recovery of damages in respect of loss suffered by third parties, see Vol.I, paras 20-049 et seq.
- 2048 *Jackson v Watson Sons [1909] 2 K.B. 193, CA*.
- 2049 See Vol.I, paras 20-091 et seq.
- 2050 cf. above, para.46-436, last sentence.
- 2051 *Borradaile v Brunton (1818) 8 Taunt. 535* (defective anchor cable caused loss of the anchor); *Randall v Newson (1877) 2 Q.B.D. 102* (pole for a carriage broke in use, frightening the horses, which were injured); *Bostock Co Ltd v Nicholson Sons Ltd [1904] 1 K.B. 725* (impure acid caused waste of other ingredients mixed with it); *Wilson v Rickett Cockerell Co Ltd [1954] 1 Q.B. 598* (coalite exploded when burning in grate causing damage to the room and furniture); *H Parsons (Livestock) Ltd v Uttley Ingham Co Ltd [1978] Q.B. 791*. See above, para.46-435 (note) and Vol.I, para.29-135.
- 2052 *Hardwick Game Farm Ltd v SAPPA [1969] 2 A.C. 31*. (The decision of the House of Lords assumes that the game farmers were entitled to recover damages for these losses.) See also *Smith v Green (1875) 1 C.P.D. 92* (cow with infection infected others); *H Parsons (Livestock) Ltd v Uttley Ingham Co Ltd [1978] Q.B. 791* (defective hopper caused mouldy food, which was fed to pigs).
- 2053 *Bostock Co Ltd v Nicholson Sons Ltd [1904] 1 K.B. 725*.
- 2054 *Hardwick Game Farm Ltd v SAPPA [1969] 2 A.C. 31*. cf. *Bunting v Tory (1948) 64 T.L.R. 353*. cf. also *Christopher Hill Ltd v Ashington Piggeries Ltd [1972] A.C. 441* (claim against the third party under s.14).
- 2055 See Vol.I, para.29-196. *Azzurri Communications Ltd v International Telecommunications Equipment Ltd [2013] EWPCC 17* (the exercise of pulling out and replacing handsets caused significant disruption to business but investigation of faults was part of the normal support function: at [93]).
- 2056 Compare below, para.46-441.
- 2057 A reasonable settlement out of court would be included: see the analogous situation, see below, para.46-441, and *Mowbray v Merryweather [1895] 2 Q.B. 640*.
- 2058 This principle is implicit in the decision of the House of Lords in *Lambert v Lewis [1982] A.C. 225*. The previous cases were not on sale of goods but on contracts where chattels were to be supplied for the use of the plaintiff and others: *Mowbray v Merryweather [1895] 2 Q.B. 640* (approved by the House of Lords in *Lambert v Lewis*, above); *Scott v Foley, Aikman Co (1899) 16 T.L.R. 55* (breach of a warranty as to the

- condition of appliances on a ship). cf. *Hadley v Droitwich Construction Co Ltd [1968] 1 W.L.R. 37*.
- 2059 *Scott v Foley, Aikman Co (1899) 16 T.L.R. 55* at 56. On reasonableness in appealing, cf. *Vogan v Oulton (1899) 81 L.T. 435* (a case of hire). The buyer may also recover the costs incurred by him in successfully defending a claim brought against him by a stranger as a result of the seller's breach of contract: see the analogous case where the plaintiff's lorry was negligently repaired by the defendants: *Britannia Hygienic Laundry Co Ltd v John I Thorncroft Co Ltd (1925) 41 T.L.R. 667* (reversed by the Court of Appeal on a different view of the facts: (1926) 42 T.L.R. 198). On the basis for the assessment of costs, see below, para.46-441 (note).
- 2060 *Mowbray v Merryweather [1895] 2 Q.B. 640*; *Scott v Foley, Aikman Co (1899) 16 T.L.R. 55*.
- 2061 *Lambert v Lewis [1982] A.C. 225* (cf. see above, para.46-424).
- 2062 Under s.14(1) of the 1893 Act. (See now s.14(3) of the 1979 Act.)
- 2063 Although the House of Lords did not advert to the situation where the buyer *ought* reasonably to have known of the missing handle, it is submitted that the same legal consequences should apply in the case of imputed knowledge (see above, para.46-425).
- 2064 On the ground of his negligence in continuing to use the coupling without having it examined.
- 2065 The authorities on when the claimant's intervening act or omission will break the chain of causation are helpfully reviewed in *Borealis AB v Geogas Trading SA [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482* at [42]–[47] and applied in *Stacey (t/a The New Gailey Caravan/Motorhomes Centre) v Autosleeper Group Ltd [2014] EWCA Civ 1551*. See Vol.I, para.29-078.
- 2066 See para.46-425.
- 2067 See paras 29-096 et seq.; *Borealis AB v Geogas Trading SA [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482* at [49]–[50].
- 2068 The sub-buyer may possibly have a direct claim against the seller: see below, para.46-445.
- 2069 The composite propositions in the first two sentences of this paragraph are supported by the cases cited in the following footnotes. In particular, the propositions are supported by the judgment of Bowen LJ in *Hammond Co v Bussey (1887) 20 Q.B.D. 79, 94–95* (a passage cited with approval by the Court of Appeal in *Biggin & Co Ltd v Permanite Ltd [1951] 2 K.B. 314, 318–319*). The cases on a chain of sub-sales (see below, para.46-442) also support these propositions. In one case, *Bostock Co Ltd v Nicholson Sons Ltd [1904] 1 K.B. 725*, the buyer's claim failed, but it is submitted in Benjamin's Sale of Goods, 11th edn (2021), para.17-076, that the case is no longer authoritative.
- 2070 *Hammond Co v Bussey (1887) 20 Q.B.D. 79, 88, 89*.
- 2071 As in *Hammond Co v Bussey (1887) 20 Q.B.D. 79, 88, 89*.
- 2072 The possibility of a “similar” warranty leading to recovery of damages by the buyer was mentioned (obiter) in *Hammond Co v Bussey (1887) 20 Q.B.D. 79, 89, 96*. See further the discussion, see below, para.46-444.

- 2073 In *Hammond Co v Bussey* (1887) 20 Q.B.D. 79, 89, 96, reference was made at 93 to the parties' reasonable contemplation that "the highly probable result of a breach" of the original undertaking would be a lawsuit between the buyers and their sub-buyers. But it is submitted that the "not unlikely" test is now the correct one (see Vol.I, para.29-139).
- 2074 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 A.C. 61, described as exceptional in *Saipol SA v Inerco Trade SA* [2014] EWHC 2211 (Comm). See above, para.46-409 and, more generally, Vol.I, paras 29-144 et seq.
- 2075 The costs must be reasonably incurred (and will be assessed on the standard basis): *Hammond Co v Bussey*, above; *Pinnock Bros v Peat and Lewis Ltd* [1923] 1 K.B. 690, 698; *Sidney Bennett Ltd v Kreeger* (1925) 41 T.L.R. 609. See Benjamin at para.17-077, and cf. above, para.46-407; see below, para.46-444.
- 2076 The buyer's own reasonable (see para.46-439 (note), above) costs will be assessed on the standard basis which is now the proper basis for the recovery of the claimant's costs incurred in litigation with a third party: *British Racing Drivers' Club Ltd v Hextall Erskine Co* [1996] 3 All E.R. 667 (not a sale of goods case). cf. the analogous case in delayed delivery: *Agius v Great Western Colliery Co* [1899] 1 Q.B. 413.
- 2077 In some situations, the buyer's damages may be *restricted* by reference to the extent of the buyer's liability towards his sub-buyer (see below, para.46-443).
- 2078 *Biggin & Co Ltd v Permanite Ltd* [1951] 2 K.B. 314 (applied in *Meadowbank Vac Alloys Ltd v Eurokey Recycling Ltd* Unreported 16 May 2016, QBD Manchester District Registry). (It is also implicit in this case that it may be reasonable for the buyer to submit his dispute with the sub-buyer to arbitration.) cf. *Grébert-Borgnis v J and W Nugent* (1885) 15 Q.B.D. 85.
- 2079 *Biggin & Co Ltd v Permanite Ltd* [1951] 2 K.B. 314, 320 (citing *Kiddle v Lovett* (1885) 16 Q.B.D. 605). The principle in *Biggin's* case covers compromises of issues of liability as well as of quantum: *Royal Brompton Hospital NHS Trust v Hammond* (1999) 149 N.L.J. 89.
- 2080 *Biggin & Co Ltd v Permanite Ltd* [1951] 2 K.B. 314, 321, 325. No matter how reasonable a settlement may appear to the parties, it does not determine the liability of a third party: *PO Developments Ltd v Guy's and St Thomas' NHS Trust* (1998) 62 Con. L.R. 38 (not a sale of goods case). The reasonableness of a settlement must be judged in the light of the facts available at the time it was made: *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep. 688.
- 2081 On the question of *imputed* knowledge, see above, paras 46-424—46-436.
- 2082 *British Oil and Cake Co Ltd v Burstall Co* (1923) 39 T.L.R. 406, 407; *GC Dobell Co Ltd v Barber and Garratt* [1931] 1 K.B. 219, 238 (cf. at 246–247); *Biggin & Co Ltd v Permanite Ltd* [1951] 2 K.B. 314 at 435. cf. *Lambert v Lewis* [1982] A.C. 225 (see above, para.46-440).
- 2083 The sub-buyer would thereupon come under a duty towards the buyer to take reasonable steps to mitigate his loss caused by the defect.
- 2084 This paragraph was cited in *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] 2 Lloyd's Rep. 243 at [24].

- 2085 e.g. *GC Dobell Co v Barber and Garratt* [1931] 1 K.B. 219 at 231; *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422, 431; reversed by the Court of Appeal on another ground: [1951] 2 K.B. 314.
- 2086 cf. *Hammond Co v Bussey* (1887) 20 Q.B.D. 79, 88, 89.
- 2087 e.g. *Kasler and Cohen v Slavouski* [1928] 1 K.B. 78, 85; *GC Dobell Co v Barber and Garratt* [1931] 1 K.B. 219 (warranty as to quality implied by statute).
- 2088 See below, para.46-444.
- 2089 But consider the question of a buyer's knowledge (actual or implied) at a date after the contract was made: see above, para.46-440.
- 2090 *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422 at 431–432. See also *Kasler and Cohen v Slavouski* [1928] 1 K.B. 78 at 85, 87.
- 2091 The total costs may include both those incurred by the buyer and also by sub-buyers lower in the chain, provided each acted reasonably in incurring the costs: *Kasler and Cohen v Slavouski* [1928] 1 K.B. 78; *Godley v Perry* [1960] 1 W.L.R. 9, 16–17. See also *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 K.B. 690. (cf. above, para.46-441.) The costs will be each party's own reasonable costs assessed on the standard basis (see above, para.46-441 (note)) and the assessed costs paid to the next person in the chain. cf. the similar situation where there is a breach of the implied condition as to title in a chain of sub-sales: *Butterworth v Kingsway Motors* [1954] 1 W.L.R. 1286, 1297–1300; *Bowmaker (Commercial) Ltd v Day* [1965] 1 W.L.R. 1396.
- 2092 *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 K.B. 690; *GC Dobell Co v Barber and Garratt* [1931] 1 K.B. 219; *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422.
- 2093 *Kasler and Cohen v Slavouski* [1928] 1 K.B. 78. cf. see above, para.46-441.
- 2094 See also the limitation in the last sentence of para.46-441, see above.
- 2095 [1951] 1 K.B. 422 at 436.
- 2096 See above, paras 46-398 et seq. The principle stated in the text was followed in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 (see above, paras 46-420, 46-422—46-423); but see the criticism of *Treitel* (1997) 113 L.Q.R. 188, who argues that *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422, was a “consequential loss” case where the remoteness rules were relevant. See also *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] 2 Lloyd's Rep. 243.
- 2097 In *Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 K.B. 348, 359, it was held to be “essential” that the contractual description should be the same; but recovery was allowed in *British Oil and Cake Co Ltd v Burstall Co* (1923) 39 T.L.R. 406 despite some differences in the wording of the contracts.
- 2098 [1951] 1 K.B. 422, 433–434; reversed by the Court of Appeal on a different point: [1951] 2 K.B. 314.
- 2099 As illustrated by *Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd*, above.
- 2100 cf. *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 K.B. 690, at 696–697, 698–699; cf. also *Lambert v Lewis* [1982] A.C. 225, 275–278 (see above, para.46-440).
- 2101 See above, Vol.I, paras 20-091 et seq.
- 2102 As far as remedies are concerned, the third party is treated as a party to the contract: s.5(1).

2103 See Vol.I, paras 20-094—20-099.

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(d) - Other Remedies of the Buyer

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 7. - Remedies of the Buyer

(d) - Other Remedies of the Buyer ²¹⁰⁴

Rejection of the goods: termination of the contract

- 46-446 Where the seller repudiates his obligations under the contract, or commits a fundamental breach of contract or a breach of condition, the buyer may choose to treat the contract as terminated, reject the goods,²¹⁰⁵ and sue for damages. Where the buyer justifiably rejects the goods, he can treat the seller's failure to deliver goods in conformity with the contract as a simple case of failure to deliver, and the buyer's damages will be assessed in accordance with s.51.²¹⁰⁶

Restitution: recovery of money paid to the seller

- 46-447 Section 54 of the Act²¹⁰⁷ provides that:

“Nothing in this Act affects the right of the buyer or the seller ... to recover money paid where the consideration for the payment of it has failed.”²¹⁰⁸

The claim referred to in this provision is one in restitution where the claimant has failed to receive the benefit of the other party's performance.²¹⁰⁹ For instance, the buyer has a claim in restitution to recover the price he has paid to the seller if the seller, in breach of his obligation under s.12(1), failed to pass a good title to the goods sold.²¹¹⁰ Similarly, if the seller failed to deliver the goods²¹¹¹ or delivered goods which the buyer was entitled to and did reject, the buyer may recover the deposit²¹¹² or prepayment of the price²¹¹³ (or part of the price) which he paid to the seller.²¹¹⁴

Even where the buyer himself is in default as to his obligations, he may be entitled to claim restitution of advance payments made to the seller.²¹¹⁵

Specific performance²¹¹⁶

⁴⁶⁻⁴⁴⁸ Section 52²¹¹⁷ provides:

Arrangement of Act

“(1) In any action for breach of contract to deliver specific or ascertained goods²¹¹⁸ the court may, if it thinks fit, on the plaintiff’s²¹¹⁹ application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.

(2) The plaintiff’s application may be made at any time before judgment or decree.

(3) The judgment or decree may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court.”

²¹²⁰

Before the [1893 Act](#), the remedy of specific performance was an equitable one,²¹²¹ and the courts have used the cases in equity to guide their use of [s.52](#).²¹²²

Specific or ascertained goods

⁴⁶⁻⁴⁴⁹ “Specific goods” are defined by [s.61\(1\)](#) as “goods identified and agreed on at the time a contract of sale is made²¹²³ and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid”.²¹²⁴ “Ascertained goods”, according to Atkin LJ in *Re Wait*,²¹²⁵ “probably means identified in accordance with the agreement after the time a contract of sale is made”, i.e. goods which were unascertained²¹²⁶ at the time the contract was made.²¹²⁷ The 1995 extension of the definition means that if a bulk (such as the cargo of a ship) was identified and agreed upon when the contract was made, an order of specific performance may be made under [s.52](#) in respect of a fraction or percentage of the bulk. But where the part sold is a specified quantity to be taken from an identified bulk it appears that no order can be made, because the goods are not “specific” in terms of the new definition, and they remain unascertained. In *Re Wait*,²¹²⁸ the

majority of the Court of Appeal held that no order for specific performance should be made of a sub-contract to sell 500 tons out of a consignment of 1,000 tons of wheat bought by the seller, because the 500 tons were neither specific nor ascertained goods.²¹²⁹ (This decision preceded the new definition, but the facts fall outside it, because no “fraction or percentage” was specified).

Order for specific delivery

- 46-450 Instead of asking for an order under s.52, the buyer who has the property in the goods may, in proceedings for wrongful interference with the goods, seek an order for specific delivery of the goods which does not give the seller the alternative of retaining them on payment of their value as assessed by the court.²¹³⁰ But in such proceedings the court has a discretion whether or not to make such an order.²¹³¹

Discretion of the court

- 46-451 Section 52 confers a wide discretion on the court, similar to the discretionary nature of the equitable remedy of specific performance.²¹³² No order should be made if the goods sold were “of a very ordinary description”²¹³³ and were not alleged to be “peculiar” in the sense that similar goods could not be obtained elsewhere.²¹³⁴ (The award of damages is considered to be an “adequate” remedy in such cases.) An order has been made in respect of a ship, which “was of peculiar and practically unique value to” the buyer, who wanted it for immediate use²¹³⁵; another order was made for the specific delivery of an ornamental door designed by the famous architect Adam.²¹³⁶ Similarly, before the 1893 Act, specific performance could be granted to compel sellers to transfer rare or unique articles such as a jewel,²¹³⁷ china vases,²¹³⁸ particular stones from Old Westminster Bridge,²¹³⁹ and, in some cases, chattels which (although not unique) possessed a special value to the plaintiff.²¹⁴⁰

- 46-452 In addition to considering the type of goods in question, the court is entitled to look at all the circumstances of the case,²¹⁴¹ including the conduct of both the buyer²¹⁴² and the seller,²¹⁴³ and to consider the hardship which an order would inflict on the seller.²¹⁴⁴ If the seller becomes insolvent after he has received the price from the buyer but before he has delivered the goods and before the property in them has passed to the buyer, an order for specific performance will give the buyer priority over other creditors of the seller by taking the goods out of the seller’s estate: for this reason an order is unlikely to be made in these circumstances.²¹⁴⁵ Conversely, if the property has passed to the buyer before the seller becomes insolvent, an order will normally

be made.²¹⁴⁶ By subs.(3) of s.52, the court, when making an order for specific performance, also has a wide discretion to impose conditions: thus, the buyer may be ordered to pay the price into court as a condition of the order being made against the seller.²¹⁴⁷ In another case, a court of first instance made an order in favour of sub-buyers upon payment of their share in the freight of the consignment.²¹⁴⁸

Injunction

46-453 This is the appropriate remedy when the buyer seeks an order of the court restraining the breach of a purely negative promise by the seller.²¹⁴⁹ Like specific performance, an injunction is an equitable²¹⁵⁰ and discretionary²¹⁵¹ remedy, but, unlike specific performance, it is not expressly referred to in the Act.²¹⁵² An order for specific delivery of the chattel sold may be supported by an injunction restraining the seller from parting with the chattel to anyone but the buyer.²¹⁵³ Similarly, the court has power by injunction to prevent a specific chattel from being removed out of the jurisdiction until a question relating to it has been decided by the court,²¹⁵⁴ or to restrain the seller from preventing the due execution of the contract where the goods sold to the buyer are on the land of the seller, and the contract gives the buyer a right to enter the land to remove the goods.²¹⁵⁵ But an affirmative obligation will not be enforced by injunction merely because it implies a negative obligation: where a colliery agreed to sell to the buyer all the coal produced for five years, an injunction was not granted to prevent the colliery from being sold to third parties within the five years.²¹⁵⁶

Declaration²¹⁵⁷

46-454 In appropriate circumstances, the buyer may obtain a declaration setting out his legal rights against the seller.²¹⁵⁸ A declaration may be made before any breach of contract has occurred, and may thus guide the parties in the implementation of a contract whose performance is spread over a long period.²¹⁵⁹ Even where the defendant is liable to pay damages, the claimant may claim only a declaration that the defendant was in breach of contract and that the damages for the loss caused by the breach amounted to a stated sum.²¹⁶⁰ In one case,²¹⁶¹ the buyers obtained against the sellers, who had committed a breach of their obligation to deliver, a declaration of indemnity that the buyers were entitled to recover from the sellers such damages as the buyers might be held liable to pay (as a result of the seller's breach) in respect of their legal liability to a sub-buyer.²¹⁶² However, the Court of Appeal, in another case,²¹⁶³ has said that the proper course in this situation is for the court to reserve that head of damages.

Claims for possession or damages for conversion

46-455 Where the property in the goods and the immediate right to possession²¹⁶⁴ of them has passed to the buyer, he may bring against the seller²¹⁶⁵ a proprietary action for chattels under the law of torts, viz proceedings for wrongful interference with the goods seeking an order for specific delivery of the goods,²¹⁶⁶ or damages for conversion when the seller's detention of the goods amounts to a denial of the buyer's title to them.²¹⁶⁷ In *Chinery v Viall*,²¹⁶⁸ where the unpaid seller, without a right to resell, wrongfully resold the goods at a time when the original buyer was entitled to possession of them (the sale being on credit terms),²¹⁶⁹ the seller was held liable to the original buyer for damages for non-delivery,²¹⁷⁰ or for conversion.²¹⁷¹

Wrongful re-taking by seller

46-456 Where the property in the goods has passed to the buyer, and the seller has delivered them to him, but the price remains unpaid, the contract of sale is not terminated by the act of the seller in tortiously retaking the goods and reselling them.²¹⁷² In these circumstances, the seller still has his action for the price, while the buyer (even where his failure to pay the price is a breach of contract) has an independent claim²¹⁷³ for conversion for the full value of the goods at the time of the retaking²¹⁷⁴: these are separate claims and neither is a defence to the other.²¹⁷⁵

Footnotes

2104 Remedies in cases of illegality, mistake, misrepresentation, frustration and other invalidating causes, are examined in Vol.I.

2105 See above, para.46-056.

2106 See above, paras 46-390 et seq. Under Pt 5A of the Act and now the Consumer Rights Act 2015, the consumer's remedies where the goods do not conform to the contract include "rescission". The traditional remedy of rejection is also available to the consumer, who must therefore compare the relative advantages in pursuing either remedy. See above, paras 40-515—40-525.

2107 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. In consumer contracts for the sale of goods the 2015 Act provides special rules in relation to rejection in consumer sales

- contracts and provides that in principle the trader has a duty to give the consumer a refund; see above, paras 40-516, 40-548, 40-560.
- 2108 Other aspects of s.54 are mentioned see above, paras 46-390, 46-427, 46-429.
- 2109 See Vol.I, paras 32-063 et seq. Goff and Jones, Law of Unjust Enrichment, 9th edn (2016), Chs 12–16.
- 2110 *Rowland v Divall [1923] 2 K.B. 500* (see Vol.I, para.32-066; see above, para.46-083; and Benjamin's Sale of Goods, 11th edn (2021), paras 4-002 et seq.); *Barber v NWS Bank Plc [1996] 1 W.L.R. 641*. cf. *Yeoman Credit Ltd v Apps [1962] 2 Q.B. 508*. See the Law Commission's Report No.160 (1987), paras 6.1–6.5.
- 2111 If the contract was divisible, the buyer could recover only the part of the money paid which was apportioned to that part of the contract which the seller had failed to perform: *Fibrosa Spolka Akcyjna v Fairbairn Combe Barbour Ltd [1943] A.C. 32, 77*; *Devaux v Conolly (1849) 8 C.B. 640*. See also *Biggerstaff v Rowatt's Wharf Ltd [1896] 2 Ch. 93*; *Behrend Co Ltd v Produce Brokers Co Ltd [1920] 3 K.B. 530*; *Ebrahim Dawood Ltd v Heath Ltd [1961] 2 Lloyd's Rep. 512* and *BP Oil International Ltd v Vega Petroleum Ltd [2021] EWHC 1364 (Comm)*.
- 2112 *Fitt v Cassanet (1842) 4 M. G. 898*.
- 2113 e.g. *Comptoir D'Achat et De Vente du Boerenbond Belge SA v Luis de Ridder Limitada (The Julia) [1949] A.C. 293*; the *Fibrosa case [1943] A.C. 32*.
- 2114 The claim in restitution can avoid the rules on damages: see Vol.I, para.32-068. (The buyer could, alternatively, sue for damages—which would include the amount paid to the seller—but he would then have to prove his loss and would be subject to all the rules on damages.)
- 2115 Vol.I, paras 29-267—29-270.
- 2116 *Treitel [1966] J.B.L. 211*; Sharpe, Injunctions and Specific Performance (looseleaf), paras 8-230—8-510; Jones and Goodhart, Specific Performance, 2nd edn, pp.143–154; Spry, The Principles of Equitable Remedies, 9th edn (2012), Ch.3; and Vol.I, Ch.30, especially paras 30-027—30-031.
- 2117 This section does not apply to consumer contracts for the sale of goods which fall within Ch.2 of Pt 1 of the Consumer Rights Act 2015. Under Pt 5A of the Act and the Consumer Rights Act 2015, the remedy of specific performance is available to a consumer-buyer to enforce his requirement of the repair or replacement of non-conforming goods. See *Harris (2003) 119 L.Q.R. 541*. However, the use of specific performance under those provisions is subject to different rules from those governing its use under s.52. See above, para.40-524 on the discretion to order specific performance of the trader's obligations under the Act and para.40-514 in relation to consumer's other remedies generally.
- 2118 See above, paras 46-040 et seq. Provided that the goods are specific or ascertained, s.52 applies whether or not the property in the goods has passed to the buyer: *James Jones Sons Ltd v Tankerville [1909] 2 Ch. 440, 445*; *Re Wait [1927] 1 Ch. 606, 617*; *Cohen v Roche [1927] 1 K.B. 169, 180*. Goods are not ascertained for the purposes of s.52 if they are yet to be manufactured and even then will form an unidentifiable part of the seller's output: *TTK LIG Ltd [2011] EWCA Civ 1170, [2012] 1 All E.R. (Comm) 429* at [89].

- 2119 If a third party is entitled to enforce a term of the contract under the *Contracts (Rights of Third Parties) Act 1999*, he may claim any remedy which would be available to him if he were a party: see above, Vol.I, para.[20-105](#).
- 2120 The last subsection, which refers to Scots law, is omitted. The implementation of [s.52](#) is covered by a procedural rule, which provides that a judgment or order for the delivery of goods which does not give the defendant the alternative of paying the assessed value of the goods may be enforced by a “writ of specific delivery” without alternative provision for recovery of the assessed value of the goods: *CPR r.83.14*.
- 2121 Details must be sought in standard works on equity: Fry, *Specific Performance of Contracts*, 6th edn, especially pp.36–41; McGhee (ed) *Snell’s Equity*, 34th edn (2019), Ch.17. See also Vol.I, Ch.[30](#).
- 2122 e.g. *Re Wait [1927] 1 Ch. 606, CA*.
- 2123 Thus, an order for specific performance could not be made where the seller agreed to supply all the coal that might be required for the buyer’s steel works: *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd [1909] A.C. 293, 311*. For an examination of the problems of enforcing long-term supply contracts, see Sharpe at paras 8-390—8-510, 9-130—9-200. Jones and Goodhart at pp.148–149, argue that English courts should follow US practice in being willing to grant specific performance of contracts to sell all the seller’s output or to satisfy all the buyer’s requirements.
- 2124 The words “and includes … as aforesaid” were added by [s.2\(d\) of the Sale of Goods \(Amendment\) Act 1995](#). The effect of this change on the availability of specific performance is examined see Vol.I, para.[30-029](#); paras [46-160](#) et seq. *[1927] 1 Ch. 606* at 630.
- 2125 See above, paras [46-040](#) et seq., para.[46-131](#). cf. see above, para.[46-149](#).
- 2126 *Thames Sack and Bag Co Ltd v Knowles Co Ltd (1918) 88 L.J. K.B. 585, 588* (“‘ascertained’ means that the individuality of the goods must in some way be found out”); cf. *Laurie and Morewood v Dudin Sons [1926] 1 K.B. 223, CA* (no appropriation by a warehouseman of 200 quarters of maize out of a bulk of 618 quarters). cf. also ss.[16, 17](#) (see above, paras [46-131, 46-134](#)).
- 2127 *[1927] 1 Ch. 606*. (The dissenting judge, at 656, held that [s.52](#) included “the enforcement of a specific equitable assignment or lien”.)
- 2128 See also *Re London Wine Co (Shippers) [1986] P.C.C. 121* and *VTB Commodities Trading DAC v JSC Antipinsky Refinery [2020] EWHC 72 (Comm)*. On the facts of *Re Wait* an order of specific performance would have given the buyer priority over the general creditors in the seller’s bankruptcy.
- 2129 Under [s.3\(2\)\(a\) of the Torts \(Interference with Goods\) Act 1977](#): see above, para.[46-448](#). (By [s.2\(1\) of this Act](#), the old action of detinue was abolished.) See *Cohen v Roche [1927] 1 K.B. 169, 179–180*.
- 2130 1977 Act s.3(3)(b), (4) and (6). See *Howard E Perry Co Ltd v British Railways Board [1980] 1 W.L.R. 1375, 1382–1383*; *Cohen v Roche*, see above, at 180–181; above, para.[35-013](#); see below, paras [46-451—46-452](#).
- 2131 See Fry, *Specific Performance of Contracts*, 6th edn, pp.36–41. In view of this discretion, the buyer should always ask for damages in the alternative. The buyer may

- be estopped from seeking an order for specific performance after he has elected to accept damages in lieu thereof: *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] A.C. 511* (sale of land).
- 2133 Where damages would be an adequate remedy: *Re Wait [1927] 1 Ch. 606, 630* (“Possibly the statutory remedy [s.52] was intended to be available even in those cases”). See *Treitel [1966] J.B.L. 211*; and Vol.I, paras 30-018 et seq. The wider use of specific performance in the sale of goods is discussed in *Butler v Countrywide Finance Ltd [1993] 3 N.Z.L.R. 623*. See also Vol.I, paras 30-027—30-030.
- 2134 *Fothergill v Rowland (1873) L.R. 17 Eq. 132, 139; Cohen v Roche [1927] 1 K.B. 169* at 179–181 (“ordinary Hepplewhite furniture” which “possessed no special features at all”). See also *Re Clarke (1887) 36 Ch. D. 348, 352*; and *Whiteley Ltd v Hilt [1918] 2 K.B. 808, 819* (a hire-purchase case); *Société des Industries Metallurgiques SA v The Bronx Engineering Co Ltd [1975] 1 Lloyd’s Rep. 465, CA*. cf. *Lingen v Simpson (1824) 1 Sim. & St. 600; Sky Petroleum Ltd v VIP Petroleum Ltd [1974] 1 W.L.R. 576* (interlocutory injunction granted to protect the plaintiff’s supply of scarce goods).
- 2135 *Behnke v Bede Shipping Co Ltd [1927] 1 K.B. 649, 661*. See also *Allseas International Management Ltd v Panroy Bulk Transport SA [1985] 1 Lloyd’s Rep. 370; CN Marine Inc v Stena Line A/B (The Stena Nautica) (No.2) [1982] 2 Lloyd’s Rep. 336, 341, 348–349; Eximenco Handels AG v Partrederiet Oro Chief (The Oro Chief) [1983] 2 Lloyd’s Rep. 509, 521*. cf. a case where the buyer merely intended to resell at a profit: *Cohen v Roche*, above, at 179–181.
- 2136 *Phillips v Lamdin [1949] 2 K.B. 33, 41–42*. In Australia, an order has been made in respect of a taxi-cab to which a taxi-cab licence was attached: *Dougan v Ley (1946) 71 C.L.R. 142*.
- 2137 *Pearne v Lisle (1749) Amb. 75, 77.*
- 2138 *Falcke v Gray (1859) 4 Drew. 651, 658.*
- 2139 *Thorn v Commissioners of Public Works (1863) 32 Beav. 490.*
- 2140 Fry at p.39, citing *North v Great Northern Ry (1860) 2 Giff. 64, 69* (an injunction case). See also *Harris, Ogus and Phillips (1979) 95 L.Q.R. 581* and cf. the assessment of damages for a personal and subjective “loss of amenity” in *Ruxley Electronics and Construction Ltd v Forsyth [1996] A.C. 344*; and in *Farley v Skinner [2001] UKHL 49, [2002] 2 A.C. 732* (see Vol.I, paras 29-158 et seq.).
- 2141 Fry at Pt III. It is submitted that inadequacy of the price should not be a ground for refusing an order: cf. cases on the sale of land: *Coles v Trecothick (1804) 9 Ves. 234, 246; Sullivan v Jacob (1828) 1 Moll. 472, 477*. cf. also *Falcke v Gray (1859) 4 Drew. 651* at 664–665 (specific performance denied when parties had not been on an equal footing). The defence of set-off is available in a claim for non-money relief (such as specific performance) which itself arises upon non-payment of money: *BICC Plc v Burndy Corp [1985] Ch. 232*.
- 2142 e.g. Snell’s Equity, 34th edn (2019), paras 17-039, 17-045; Vol.I, paras 30-054—30-055.
- 2143 e.g. whether the seller had entered into the contract as the result of a mistake.

- 2144 The authorities for the latter part of this proposition are not sale of goods cases: *Tamplin v James* (1880) 15 Ch. D. 215, 221; *Stewart v Kennedy* (1890) 15 App. Cas. 75, 105; *Patel v Ali* [1984] Ch. 283.
- 2145 See *Re Wait* [1927] 1 Ch. 606, 640. See Jones and Goodhart at pp.150–152. cf. *Anders Utiklens Rederi A/S v O/Y Louisa Stevedoring Co A/B (The Golfstraum)* [1985] 2 All E.R. 669, 674.
- 2146 *Re BA Peters* [2008] EWHC 2205 (Ch), [2008] B.P.I.R. 1180 at [65]–[66].
- 2147 *Hart v Herwig* (1873) L.R. 8 Ch. App. 860, 864 (a similar injunction case). cf. *Langen and Wind Ltd v Bell* [1972] Ch. 685. cf. also *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] A.C. 207 (sale of shares: buyer to pay interest on purchase price retained until order made).
- 2148 *Re Wait* [1926] Ch. 962, 972. The Court of Appeal, however, did not consider this, as it held that no order should have been made: [1927] 1 Ch. 606.
- 2149 e.g. the seller's express undertaking not to sell similar goods during the two-year period of the contract to any other manufacturer than the buyer: *Donnell v Bennet* (1883) 22 Ch. D. 835.
- 2150 Sharpe, Injunctions and Specific Performance; Kerr, Injunctions, 6th edn, pp.409 et seq.; Ashburner's Principles of Equity, 2nd edn, pp.384–387; Snell's Equity, 34th edn (2019), Ch.18; Spry, The Principles of Equitable Remedies, 9th edn (2013), Chs 4 and 5; *Doherty v Allman* (1878) 3 App. Cas. 709, 719–721. See also Vol.I, paras 30-075 et seq.
- 2151 Snell at para.18-36; *James Jones Sons Ltd v Tankerville* [1909] 2 Ch. 440, 445–446. (But see Snell at para.18-35 (quoting *Doherty v Allman*, above, at 720).)
- 2152 See, however, s.62(2) preserving “the rules of common law”, which might include the rules of equity: Benjamin's Sale of Goods, 11th edn (2021), paras 1-007—1-011.
- 2153 *Behnke v Bede Shipping Co Ltd* [1927] 1 K.B. 649. cf. *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* [1909] A.C. 293, 310.
- 2154 *Hart v Herwig* (1873) L.R. 8 Ch. App. 860. cf. *North v Great Northern Ry* (1860) 2 Giff. 64 (plaintiff hired coal wagons of special value to him: railway company could be restrained from selling them).
- 2155 *James Jones Sons Ltd v Tankerville*, above (timber growing on the seller's land). cf. *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1983] 2 A.C. 787 (injunction to buyers to sign document needed by sellers to comply with letter of credit: Master of Supreme Court to sign if buyers failed to do so). cf. also an injunction to enforce a buyer's agreement to obtain all his supplies from the seller: *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch. 799; and an injunction to enforce a “solus agreement”: *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269 (see Vol.I, paras 18-171, 30-090).
- 2156 *Fothergill v Rowland* (1873) L.R. 17 Eq. 132. (Such an injunction would have amounted to specific performance “by a roundabout method”: at 140.) cf. *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 W.L.R. 576 (interlocutory injunction).
- 2157 See Zamir and Woolf, The Declaratory Judgment, 3rd edn. cf. above, para.46-389.

- 2158 Declaratory proceedings in the Commercial Court are often quicker and cheaper than arbitration: *JH Vantol Ltd v Fairclough Dodd Jones Ltd* [1955] 1 W.L.R. 642, 648 (approved by the House of Lords in the same case: [1957] 1 W.L.R. 136, 137, 138, 144).
- 2159 *Spettabile Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 121 L.T. 628, 635.
- 2160 *Louis Dreyfus Co v Parnaso Cia Naviera SA* [1959] 1 Q.B. 498, [1960] 2 Q.B. 49. If it would serve a useful purpose, the court may use its discretion to make a negative declaration e.g. to the effect that the claimant is not liable to the defendant in respect of a certain matter: *Messier-Dowty Ltd v Sabena SA* [2000] 1 W.L.R. 2040, CA.
- 2161 *Household Machines Ltd v Cosmos Exporters Ltd* [1947] K.B. 217.
- 2162 The amount of this liability was not ascertained at the time of the hearing between the buyer and seller. On this type of liability, see above, para.46-412. cf. *Total Liban SA v Vitol Energy SA* [2001] Q.B. 643.
- 2163 *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 Q.B. 297. But see the uncertainty which this decision has created: *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 W.L.R. 280, 284. cf. *Deeny v Gooda Walker Ltd (No.3)* [1995] 4 All E.R. 289 (not a sale of goods case).
- 2164 cf. the seller's right to a lien: see above, paras 46-316 et seq.
- 2165 Such an action may also lie against strangers: *Chinery v Viall* (1860) 5 H. & N. 288 (stranger taking goods out of seller's possession); cf. *Lord v Price* (1874) L.R. 9 Ex. 54 (buyer did not have immediate right to possession); *Langton v Higgins* (1859) 4 H. & N. 402 (wrongful second sale by seller to second buyer); *Denny v Skelton* (1916) 115 L.T. 305 (part of a cargo taken mistakenly in the name of the wrong sub-buyer). Quaere whether the buyer could bring an action on the case for injury to his reversionary interest in the goods: cf. *Mears v L and SW Ry* (1862) 11 C.B.(N.S.) 850; and see *Bloxam v Sanders* (1825) 4 B. & C. 941, 949.
- 2166 See above, para.35-013. cf. s.52 (see above, para.46-448). In proceedings for wrongful interference, the court has a discretion not to order specific delivery of the goods: see above, paras 35-013, 46-451, 46-452.
- 2167 cf. see above, para.46-387.
- 2168 (*1860*) 5 H. & N. 288.
- 2169 Even where the buyer had failed to pay the price on the date fixed by the contract, he would be entitled to possession of the goods if he tendered the price to the seller within a reasonable time and before the seller had justifiably resold or terminated the contract: *Martindale v Smith* (1841) 1 Q.B. 389. See also *Bloxam v Sanders* (1825) 4 B. & C. 941. *Fitt v Cassanet* (1842) 4 M. & G. 898.
- 2170 *Bloxam v Sanders*, above, at 949. The damages for conversion are assessed on the basis of the buyer's actual loss, which is the difference between the market price of the goods at the time of the conversion and the contract price: *Chinery v Viall* (1860) 5 H. & N. 288. See also above, paras 35-017, 35-018. cf. *Johnson v Stear* (1863) 15 C.B.(N.S.) 330; *Brierly v Kendall* (1852) 17 Q.B. 937 (wrongful sale by pledgee); *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 W.L.R. 295 (wrongful sale

- of goods held on hire-purchase terms; distinguished in *Chubb Cash Ltd v John Crilley Son [1983] 1 W.L.R. 599*).
2172 *Page v Cowasjee Eduljee (1866) L.R. 1 P.C. 127*.
2173 Proceedings for wrongful interference under the Torts (Interference with Goods) Act 1977.
2174 *Stephens v Wilkinson (1831) 2 B. & Ad. 320, 327*; *Page v Cowasjee Eduljee*, above, at 147.
2175 *Page v Cowasjee Eduljee (1866) L.R. 1 P.C. 127*; *Stephens v Wilkinson (1831) 2 B. & Ad. 320, 327*; *Gillard v Brittan (1841) 8 M. & W. 575*; *Re Humberston (1846) De & G. 262*.

Section 8. - Consumer Protection Act 1987

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 46 - Sale of Goods

Section 8. - Consumer Protection Act 1987 ²¹⁷⁶



Replace footnote 2176 with: See Miller, Product Liability and Safety Encyclopaedia (1979–date), Div. V; Miller and Goldberg, Product Liability (2004); Stapleton, Product Liability (1994); Whittaker, Liability for Products (2005); Benjamin's Sale of Goods, 11th edn (2021), paras 14-234 et seq. The Act is subject to relatively minor amendments by the [Product Safety and Metrology etc. \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/696\)](#) reg.6 and Sch.3 and subject to those amendments takes effect as retained EU law, see Vol.I, paras [1-016](#) et seq.

Part I of the 1987 Act

46-457

[Part I of the Consumer Protection Act 1987](#) ²¹⁷⁷ is intended to implement Council Directive 85/374 ²¹⁷⁸ on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. Very broadly the effect of the Directive is to impose liability on manufacturers and certain other persons for death, personal injury and physical damage to property caused by defective, i.e. unsafe, products. The liability imposed is (subject to certain defences) a strict liability and does not depend upon proof of negligence. The claimant still bears the burden of proving that the injury or damage complained of was caused by the product and that the product was defective. ²¹⁷⁹ But, where [Pt I of the 1987 Act](#) applies, he is relieved from the necessity of proving—as would be the case at common law—either that he was in a contractual relationship with the defendant or that the defendant was negligent. The Act is therefore of particular significance (*inter alia*) in relation to pharmaceutical products, chemical compounds, foodstuffs, machinery, vehicles and building materials, where a claimant might otherwise encounter difficulty in proving fault on the part of the producer.

Products covered by Pt I

- 46-458 All goods are covered,²¹⁸⁰ including component parts and raw materials.²¹⁸¹

Meaning of “defect”

- 46-459 The definition of “defect” in s.3 is closely related to the type of damage which is remediable. There is a defect in a product for the purposes of Pt I if “the safety of the product is not such as persons generally are entitled to expect”; and for those purposes *safety* in relation to a product includes safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.²¹⁸² By s.3(2) all the circumstances are to be taken into account in determining that standard.²¹⁸³ But three circumstances are specifically mentioned. First:

“... the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product.”²¹⁸⁴

Secondly, “what might reasonably be expected to be done with or in relation to the product”.²¹⁸⁵ Thirdly, “the time when the product was supplied²¹⁸⁶ by its producer to another”.²¹⁸⁷ However, the subsection recognises that improvements over time may render a product progressively more safe, since it provides that a defect is not necessarily to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.²¹⁸⁸ It will nevertheless be appreciated that the safety standard embodied in this provision is one which is extremely difficult to apply: the product does not have to be absolutely safe and the degree of safety which persons generally are entitled to expect may well depend upon the practicability, and cost, of rendering the product more safe.

Damage giving rise to liability

- 46-460 By s.5(1), *damage* means death or personal injury²¹⁸⁹ or any loss of or damage to property (including land). It should be noted that no claim can be made for economic loss incurred by the fact that the product cannot be used or that its use is impaired, or for expenses incurred in replacing

or repairing the product or rendering it safe for use. Further s.5 proceeds to impose important restrictions in the case of loss of or damage to property.

Causation

- 46-461 The claimant must prove that the defect in the product caused the damage.²¹⁹⁰

Damage to product itself

- 46-462 First, there is no liability under Pt I where a defect in the product causes loss of or damage to the product itself; nor can the producer of a component or materials be liable for loss of or damage to the product of which the component or materials form part. Section 5(2) provides:

“A person shall not be liable ... for the loss of or any damage to the product itself or for the loss of or damage to the whole or any part of any product which has been supplied with the product in question comprised in it.”

Property not for private use

- 46-463 Secondly, by s.5(3), liability will not be incurred for:

“... any loss of or damage to property which, at the time it is lost or damaged, is not—

(a)of a description of property ordinarily intended for private use, occupation or consumption; and

(b)intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption.”²¹⁹¹

Damage not exceeding £275

- 46-464

Thirdly, by s.5(4), no claim can be made by a person for loss of or damage to property if the amount which would fall to be awarded to that person does not exceed £275.

Who can sue

- 46-465 The right of action conferred by Pt I is not expressly limited to “consumers”. Any person can sue. An action may be brought in respect of death or personal injury even though the product was acquired by a person for the purposes of his business. However, in respect of loss of or damage to property, the restriction imposed by s.5(3) (see above) virtually limits the right of action to consumers.

Upon whom liability is imposed

- 46-466 Section 2(2) of the Act lists the persons upon whom liability for any damage is imposed. The first such person is “the producer of the product”.²¹⁹² In this context it is necessary to bear in mind that both the producer of a defective component or defective materials and the producer of the finished product which is rendered defective by the inclusion of the defective component or materials may be liable.²¹⁹³ The second is “any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product”.²¹⁹⁴ The third is:

“... any person who has imported the product into the United Kingdom from outside the United Kingdom in order, in the course of a business of his, to supply it to another.”²¹⁹⁵

No doubt the person upon whom liability will most frequently be sought to be imposed will be the producer, e.g. the manufacturer of the product. But the second case mentioned is important for “own brand” products and the third is a novel imposition of liability in tort upon traders who are merely importers. Where two or more persons are liable by virtue of Pt I for the same damage, their liability is joint and several.²¹⁹⁶

Supplier

- 46-467 By a somewhat complicated provision, s.2(3) further extends liability in certain circumstances to any supplier of the product, i.e. “any person who supplied the product (whether to the person who suffered the damage, to the producer of any product in which the product in question is comprised

or to any other person)".²¹⁹⁷ One purpose of this provision is to enable the person who has suffered the damage, e.g. a retail customer, to trace back the chain of supply to a person or persons who will be liable to him in situations where the identification of those persons is not reasonably practicable, for example, where the product does not bear the manufacturer's name. A supplier will be liable if he fails to comply with a request made by the person who has suffered the damage to identify one or more of the persons mentioned in s.2(2) (para.46-466, above). However, a supplier may avoid such liability if, on receiving the request, he identifies the person who supplied the product to him. So, for example, a retail customer who is injured by a defective product may first make such a request to the retailer, who can avoid liability by identifying the wholesaler who supplied him with the product. Subsequent requests may then be made to the prior wholesaler, etc. up the chain of supply until the retail customer has identified the persons referred to in s.2(2) upon whom liability is imposed.

Defences

46-468 Section 4(1) of the Act sets out six defences that are available notwithstanding the strict liability imposed. It is a defence for the person proceeded against to show:

"(a)that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation; or

(b)that the person proceeded against did not at any time supply²¹⁹⁸ the product to another; or

(c)that the following conditions are satisfied, that is to say—

(i)that the only supply²¹⁹⁹ of the product to another by the person proceeded against was otherwise than in the course of a business of that person's; and

(ii)that s.2(2) does not apply to that person or applies to him by virtue only of things done otherwise than with a view to profit; or

(d)that the defect did not exist in the product at the relevant time²²⁰⁰; or

(e)that the state of technical and scientific knowledge at the relevant time²²⁰¹ was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control; or

(f)that the defect—

(i)constituted a defect in a product ('the subsequent product') in which the product in question had been comprised; and

(ii)was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product.”

Only two of these defences require comment. The defence set out in s.4(1)(d), enables a person to escape liability if he can prove that the defect arose after the time when he supplied the product to another, for example, because of subsequent contamination, or improper treatment, storage, installation or maintenance.²²⁰² The defence set out in s.4(1)(e), sometimes referred to as “the state of the art” or “development risks” defence, is controversial. The Directive allowed Member States, if they so wished, to adopt such a defence, and the United Kingdom exercised this option.²²⁰³ It is of particular importance in relation to pharmaceutical and medical products, to which the thalidomide cases bear witness.

Contributory negligence

46-469 Contributory negligence on the part of the person suffering the damage is also a defence.²²⁰⁴

Limitation

46-470 The Act establishes²²⁰⁵ a three-year limitation period in which to commence proceedings.²²⁰⁶ Actions are also subject to an overriding 10-year cut-off period.²²⁰⁷

Liability in contract²²⁰⁸

46-471 Part I of the Act in no way affects the remedies of a buyer of goods against his immediate seller for breach of the express or implied terms of the contract of sale.

Consumer safety

46-472 Part II of the 1987 Act²²⁰⁹ deals with consumer safety. Section 11 of the Act enables the Secretary of State to make regulations for the purposes of securing that goods are safe, that unsafe goods are not made available to persons generally or to persons of a particular description, and as

to information provided in respect of goods. A considerable number of regulations has been made.²²¹⁰ Contravention of the regulations constitutes a criminal offence.²²¹¹ But a failure to perform an obligation imposed by the regulations is also actionable as a breach of statutory duty owed to any person who may be affected by the failure.²²¹²

- 46-473 The Secretary of State is also empowered to issue prohibition notices²²¹³ and notices to warn²²¹⁴ in respect of goods which he considers are unsafe, and the enforcement authority²²¹⁵ may issue a notice (a suspension notice) prohibiting a person for a limited period from supplying goods if it has reasonable grounds for suspecting that a safety provision has been contravened in relation to the goods in question.²²¹⁶ Goods which contravene a safety provision may be the subject of a forfeiture order.²²¹⁷

The General Product Safety Regulations 2005²²¹⁸

- 46-474 These regulations implement Directive 2001/95 of the European Parliament and Council on general product safety. They apply to nearly all products,²²¹⁹ including second-hand or reconditioned goods, intended for consumers or likely to be used by consumers. The central obligation in the Regulations is imposed by reg.5(1): “No producer shall place a product on the market unless it is a safe product”. But “producer” is widely defined²²²⁰ and a person may also be liable as a “distributor” of a product.²²²¹ The Regulations contain detailed enforcement provisions.

Misleading price indications

- 46-475 Part III of the 1987 Act²²²² rendered it an offence to give, in the course of a business, a misleading price indication to consumers.²²²³ This was intended to deal (inter alia) with the abuses that can arise from the making of so-called “bargain offers”. Part III ceased to have effect as a result of the Consumer Protection from Unfair Trading Regulations 2008²²²⁴ which impose a more general prohibition on misleading commercial practices.

Footnotes

- 2176 See Miller, Product Liability and Safety Encyclopaedia (1979–date), Div. V ; Miller and Goldberg, Product Liability (2004) ; Stapleton, Product Liability (1994) ; Whittaker, Liability for Products (2005) ; Benjamin's Sale of Goods, 11th edn (2021), paras 14-234 et seq . The Act is subject to relatively minor amendments by the [Product Safety and Metrology etc. \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/696\)](#) reg.6 and Sch.3 and subject to those amendments will take effect as retained EU law, see Vol.I, paras 1-016 et seq.
- 2177 [1987 Act ss.1-9](#).
- 2178 [1985] O.J. L210/29.
- 2179 See paras [46-459](#), [46-461](#), below.
- 2180 “Product” is defined in [s.1\(2\)](#) to mean any goods or electricity. “Goods” are defined in [s.45\(1\)](#) to include substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle.
- 2181 [1987 Act s.1\(2\)](#). But see [ss.1\(3\)](#), [4\(1\)\(f\)](#). The exception for game and primary agricultural produce was removed by [SI 2000/2771](#), implementing Directive 1999/34 ([1999] O.J. L141/20).
- 2182 [1987 Act s.3\(1\)](#).
- 2183 See *Richardson v LRC Products* [2000] *Lloyd's Rep. Med.* 280 (burst condom leading to pregnancy); *A v National Blood Authority* [2001] 3 All E.R. 289 (blood infected with hepatitis C); *Abouzaid v Mothercare (UK) Ltd*, *The Times*, 20 February 2001 (cover attachment to child's pushchair snaps back); *Foster v Biosil* (2001) 59 B.M.L.R. 178 (breast implants); *B v McDonald's Restaurants Ltd* [2002] EWHC 490 (QB) (scalding coffee); *Palmer v Estate of Palmer* [2006] EWHC 1284 (QB) (seat belt); *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2009] R.T.R. 8 (handlebar of bicycle); *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] 2 W.L.R. 531 (failed replacement hip not defective).
- 2184 [1987 Act s.3\(2\)\(a\)](#).
- 2185 [1987 Act s.3\(2\)\(b\)](#).
- 2186 [1987 Act s.46](#).
- 2187 [1987 Act s.3\(2\)\(c\)](#).
- 2188 [1987 Act s.3\(2\)](#).
- 2189 Defined in [s.45\(1\)](#). See also [s.6\(3\)](#) (congenital disabilities).
- 2190 But see *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2009] R.T.R. 8 (where various possible explanations exist); *Lexus Financial Services T/A Toyota Financial Services UK Plc v Russell* [2008] EWCA Civ 424, [2008] P.I.Q.R.P. 13 (probability).
- 2191 Despite the clumsy double negative, and the use of the word “and” in subs.(3), it is clear that for damage to property to be compensatable the property must fall within both (a) and (b) of this subsection.
- 2192 [1987 Act s.2\(2\)\(a\)](#). “Producer” is defined in [s.1\(2\)](#).
- 2193 But see [s.4\(1\)\(f\)](#).
- 2194 [1987 Act s.2\(2\)\(b\)](#). cf. *Tesco Stores Ltd v Pollard* [2006] EWCA Civ 393.

- 2195 1987 Act s.2(2)(c) (as amended by the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/696) reg.6 and Sch.3. “Supply” is defined in s.46. See also *Ide v ATB Sales Ltd* [2008] EWCA Civ 424, [2009] R.T.R. 8.
- 2196 1987 Act s.2(5).
- 2197 See s.1(3). See also s.46 (“supply”).
- 2198 Defined in s.46.
- 2199 1987 Act s.46.
- 2200 “The relevant time” is defined in s.4(2). In essence, it is the time of supply to another. See *Piper v JRI Manufacturing Ltd* [2006] EWCA Civ 1344, [2006] All E.R. (D) 181 (Oct).
- 2201 1987 Act s.4(2).
- 2202 *Piper v JRI Manufacturing Ltd* [2006] EWCA Civ 1344, [2006] 92 B.J.M.L.R. 141 (hip prosthesis).
- 2203 In *Commission of the EC v UK (C300/95)* [1997] All E.R. (EC) 481, it was held that s.4(1)(e) had fully implemented art.7 of the Directive. For a discussion of the defence, see *Newdick* (1988) 47 C.L.J. 55, (1992) 20 Anglo-Am L.R. 309; *Hodge* (1998) 61 M.L.R. 560. The defence was not made out in *A v National Blood Authority* [2001] 3 All E.R. 289; and in *Abouzaid v Mothercare (UK) Ltd*, *The Times*, 20 February 2001.
- 2204 1987 Act s.6(4)(5).
- 2205 Through s.6 and Sch.1, inserting s.11A into the Limitation Act 1980.
- 2206 See Vol.I, para.31-009. For substitution under the general provisions of the Limitation Act 1980 s.35, see *OB v Aventis Pasteur SA* [2008] UKHL 34, [2008] 4 All E.R. 881; *O'Byrne v Aventis Pasteur SA (C-358/08)* EU:C:2009:744, ECJ.
- 2207 Limitation Act 1980 s.11A(3); Vol.I, para.31-009.
- 2208 Liability under Pt I is a liability in tort: s.6(7).
- 2209 ss.10–19.
- 2210 Or under the Consumer Safety Act 1978. See Miller, Product Liability and Safety Encyclopedia (1979–date), Div.IV; Benjamin's Sale of Goods, 11th edn (2021), para.14-268.
- 2211 1987 Act s.12.
- 2212 1987 Act s.41.
- 2213 1987 Act s.13(1)(a). But see the limit imposed by s.13(7), added by SI 2005/1803 reg.46(4).
- 2214 1987 Act s.13(1)(b), i.e. to warn consumers.
- 2215 Defined in s.45(1) and by reference to s.27. For enforcement, see Pt IV of the Act (ss.27–35).
- 2216 1987 Act ss.14, 15.
- 2217 1987 Act s.16.
- 2218 SI 2005/1803. Subject to the amendments introduced by the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/696) reg.6 and Sch.9 the General Product Safety Regulations form part of retained EU law. See Miller, Product Liability and Safety Encyclopedia (1979–date), Div.IV; Benjamin's Sale of Goods, 11th edn (2021), para.14-278.

- 2219 Defined in reg.2(1).
- 2220 SI 2005/1803 reg.2(1).
- 2221 SI 2005/1803 reg.2(1).
- 2222 ss.20–26.
- 2223 s.20(1). See *R. v Warwickshire CC Ex p. Johnson [1993] A.C. 583*.
- 2224 SI 2008/1277. These Regulations were amended in 2014 (see SI 2014/870 above, para.40-008).

Section 1. - In General

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 1. - In General

Simon Whittaker

General nature of the contract

- 47-001 A contract of suretyship is in essence a contract by which one person (the surety) agrees to answer for some liability of another (the principal debtor) to a third person (the creditor). The contract may be constituted by a personal engagement on the part of the surety, or by a charge on property without any personal liability, or by both.¹ Prima facie a surety does not merely undertake to perform if the principal debtor fails to do so; he undertakes to see that the principal debtor will perform.² Important results flow from this prima facie rule of construction. In particular it means that a surety is normally liable to the same extent as the principal debtor for damages for breach of the latter's obligations even though he has not in terms guaranteed the payment of damages.³

Parties to the contract

- 47-002 In *Duncan Fox & Co v North & South Wales Bank*⁴ it was pointed out by Lord Selborne that there are three possible variations in the parties to a contract of suretyship. The first and simplest case is that in which all three parties concerned are parties to the contract in the sense that both the principal debtor and the creditor agree that the surety's liability is a secondary liability only, and that the principal debtor is primarily liable for the obligations guaranteed. But it also is possible that the contract of suretyship may be recognised only as between the principal debtor and the surety, or as between the creditor and the surety, in which event the rights and duties arising out of the contract of suretyship only affect those parties.

Contract of suretyship as against principal debtor alone⁵

- 47-003 It is by no means unusual for a party to a contract to be a principal debtor as against the creditor, but a surety as against another debtor. Such an arrangement is commonly entered into where the creditor wishes to avoid the technical rules relating to contracts of suretyship under which the surety may become discharged from liability in various circumstances.⁶ In this event, the transaction takes effect according to its terms,⁷ that is to say, there will be a contract of suretyship between the principal debtor and the surety, but there will be no contract of suretyship between the surety and the creditor. The creditor is accordingly entitled to treat the surety as a principal debtor in every respect.⁸

Creditor knows or later discovers that not principal but surety

- 47-004 However, the mere fact that two parties have, on the face of some written document or instrument, apparently contracted as joint (or joint and several) debtors does not preclude the possibility that one of the debtors is in fact a surety: it is still open to one of the debtors to prove by parol evidence that the creditor knew that the intention of the debtors was that one should be a surety and not a principal debtor.⁹ Thus, it has been held that an agreement expressly declaring a party to be liable “as a primary obligor and not merely as a surety” does not prevent that party being a surety for the purpose of determining the effect of the voidness of the main agreement.¹⁰ Furthermore, even if the creditor does not know that one of the debtors intends to contract only as surety at the time of making the contract, but subsequently has notice of this fact, he will thereafter have to treat that debtor as a surety, with the consequence that any variation by the creditor and principal debtor will discharge the surety.¹¹ And if two parties contract as joint principals in the first instance, but they subsequently agree between themselves that one of them is to assume primary liability, the creditor will, on acquiring notice of this fact, be obliged to treat the other as a surety only.¹²

Contract of suretyship as against creditor alone

- 47-005 It is also perfectly possible for a surety to guarantee the liability of a third person in such circumstances that a contract of suretyship is created as against the creditor, but not as against the principal debtor. Normally a guarantee is entered into at the request, express or implied, of the principal debtor, and this suffices to create a contract of suretyship as against him, but the contract may not be entered into at his request at all. For example, a “recourse agreement”¹³

entered into by a dealer at the request of a finance company, whereby the dealer guarantees the due performance of a hire-purchase agreement, may be a contract of suretyship as against the creditor (the finance company) but there will not be a contract of suretyship as against the debtor (the hirer). Similarly, it often happens that a surety guarantees a loan made to a company at the request of the company's parent or holding company, and the company-debtor may not itself be in a contractual relationship with the surety.¹⁴ In practice, however, this will usually make little difference to the rights and duties of the parties. The principal right of a surety as against the debtor is his right to be indemnified by him if called on to meet the liability,¹⁵ and even if there is no contract of suretyship as against the debtor, there will still be a right to an indemnity, though in this case it will arise only by way of subrogation or by way of a right to restitution.¹⁶ Such a right may be less extensive than a contractual right to an indemnity in some cases. For example, a surety has a right that the principal debtor should meet his obligations and this right may be enforceable to some extent even before the surety has been called upon to pay¹⁷; but a guarantor who has no contract of suretyship as against the debtor probably has no right to require the debtor to meet his obligations, and subrogation and restitution probably give no remedy until actual payment.¹⁸ There is also a danger that subrogation rights may be lost by a technical "payment" of the debt, even though the money is provided by the surety.¹⁹

Indemnities

- 47-006 The term "indemnity" is used in the law in several different senses. In its widest sense it means recompense for any loss or liability which one person has incurred, whether the duty to indemnify comes from an agreement or not.²⁰ For example, where a breach of contract gives rise to a claim for damages, that claim may include a claim to be indemnified against some loss or liability.²¹ So also, on rescission of a contract for misrepresentation, the representee may be entitled to an indemnity against liabilities incurred under the contract even where there is no claim to damages.²² In cases of this nature the claim to an indemnity arises by operation of law, not out of a contract of indemnity.²³ A person who breaks a contract or makes a misrepresentation is not agreeing to indemnify the other party against the loss he may suffer. Indemnities of this nature fall outside the scope of this chapter. But an obligation to indemnify another may also arise out of a contract of indemnity, and the term "contract of indemnity" is also used in more than one sense.²⁴ In its widest sense a contract of indemnity includes all contracts of guarantee and many contracts of insurance; in its narrow sense, a contract of indemnity is used in contrast to a contract of guarantee, and it is in this narrow sense that the term is generally used in this chapter.

Guarantees and indemnities: the significance of the distinction

- 47-007

The distinction between a contract of indemnity and a contract of guarantee was originally evolved by the courts in the process of construing s.4 of the Statute of Frauds 1677 which required writing for certain classes of contracts including contracts of guarantee, and it is therefore dealt with in detail in the consideration of that section.²⁵ But the distinction has also come to have a more general importance throughout the law of suretyship and it is therefore necessary to explain it briefly here. Thus, apart from the fact that contracts of guarantee but not of indemnity must be evidenced by a note or memorandum in writing under the Statute of Frauds, the distinction is of importance in at least three other situations. First, the question whether a surety is liable where the main contract is void because of the principal debtor's incapacity, has been said to depend on the distinction between guarantees and indemnities,²⁶ and the same may also be true of other invalidating causes. Secondly, the liability of a guarantor is normally co-extensive with the liability of the principal debtor, so that if the debtor is discharged the surety will also be discharged, whereas if the contract is one of indemnity, the surety is not necessarily discharged.²⁷ Thirdly, certain other rules of law apply to guarantees (where only a secondary liability is undertaken) but not to indemnities (where a primary liability is undertaken), for example, the rule that any material variation of the contract between the debtor and the creditor will in principle discharge a guarantor but not a person undertaking a primary liability.²⁸

Guarantees and indemnities: the distinction itself

47-008

U The distinction between the two contracts is, in brief, that in a contract of guarantee the surety assumes a secondary liability to answer for the debtor who remains primarily liable; whereas in a contract of indemnity the surety assumes a primary liability, either alone or jointly with the principal debtor.²⁹ Whether a contract falls into one class or the other, and whether the normal incidents of a contract of that class are modified, are ordinary questions of construction.³⁰ In this respect, while the presence or absence of the language of "guarantee" in the document is not conclusive, outside the context of documents issued by banks,³¹ the absence of language appropriate to provide for the creditor "the additional security of a demand bond" has been said to create a strong presumption in favour of a merely secondary liability.

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U Moreover:

"... with the parties free to agree whatever terms they choose, there is in this field of law a spectrum of contractual possibilities ranging from the classic contract of guarantee, properly so called, at the one end, where liability of the guarantor is exclusively secondary and will be discharged if, for example, there is any material variation to the underlying contract between principal and creditor, to the performance or demand bond (or demand guarantee)³³ at the other end, where liability in the giver of the bond may

be triggered by mere demand and without proof of default by the principal (and indeed where it may be apparent that the principal is not in default)."³⁴

However, as has been explained, the nature of the relationship between the creditor and the surety may differ from the nature of the relationship between the debtor and the surety. It is therefore possible that even where the relationship between the surety and the creditor is that of a contract of indemnity, the debtor may still be primarily liable as between himself and the surety.³⁵ Thus although a contract of indemnity cannot itself *be* a contract of suretyship, the party liable under such a contract may be a surety as against the debtor and it is common and convenient to speak of him as such, even though he has assumed a primary liability towards the creditor. On the other hand, it is of course perfectly possible to have a contract of indemnity in which there is no suretyship at all, because, for example, the party liable under the indemnity has not contracted at the request of another debtor. Thus a dealer who agrees by a “recourse agreement” to indemnify a finance company against any loss under a hire-purchase transaction is not a surety either against the creditor or against the debtor. And even where, as between two debtors, one is primarily liable and the other only secondarily liable, there is not necessarily a contract of suretyship. For instance, where a tenant assigns his interest under a lease and the assignee covenants to indemnify the assignor against liability for breach of covenants in the lease, the assignee is, as between himself and the assignor, primarily liable, but there is no contract of suretyship between them.³⁶ And similarly, where property is sold subject to a mortgage, the mortgagor is not surety for the purchaser.³⁷

Performance guarantees³⁸

- 47-009** A number of cases have involved discussion of the nature of “performance guarantees” which are, in essence, exceptionally stringent contracts of indemnity.

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U They are contractual undertakings, normally granted by banks, to pay or repay, a specified sum in the event of any default in performance by the principal debtor of some other contract with a third party, the creditor. Sometimes the bank’s liability arises on mere demand by the creditor, notwithstanding that it may appear on the evidence that the principal debtor is not in any way in default, or even that the creditor himself is in default under the principal contract.

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U Such guarantees are sometimes called “first demand guarantees”

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U or “demand bonds”.

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U It has been held that performance guarantees of this nature are analogous to a bank's letter of credit, and that the bank's liability is of a primary nature which is unaffected by allegations that the creditor is in breach of the main contract between him and the principal debtor.

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U

U The question whether a particular instrument (such as a "refund guarantee") takes the form of an independent performance bond (or stand-by letter of credit) or a true "see to it" guarantee is one of construction of the instrument in its factual and contractual context having regard to its commercial purpose.

44

U While there may be a number of indications in an instrument which argue in favour of it being a "true guarantee" or, conversely, an "on-demand bond", according to a much-cited passage in Paget's Law of Banking:

"... [w]here an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee."⁴⁵

On the other hand, it has been said that there is a "strong presumption" that a "guarantee" concluded other than by a bank is not a demand or independent performance bond,⁴⁶ although this presumption may be rebutted.⁴⁷

U

However, in *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd*, the Court of Appeal recently expressed considerable reservation about the use of presumptions in determining whether an undertaking is a true "see to it" guarantee or instead a demand guarantee.

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U There, a parent company had undertaken to guarantee "absolutely and unconditionally ... as primary obligor and not merely as the surety" payment of the final instalment by the buyer of a ship, the buyer being its subsidiary, a special purpose vehicle. In this context, the Court of Appeal⁴⁹ noted that the concern of guarantees of both types was to provide against the risk of failure of performance by the obligor arising from deficiencies in the latter's "financial or commercial probity" (the "counterparty risk"), while demand guarantees also have the purpose of contributing to the cashflow of the creditor.⁵⁰ The Court of Appeal rejected the argument that

the distinction between true guarantees and demand guarantees should take as its starting point the nature of the guaranteeing institution: such an approach is “misconceived” as what matters for dealing with the counterparty risk “is not the nature of the business carried on by the guarantor as such, whether banking, other financial business or commercial trading activity. It is simply the commercial and financial strength and probity of the guarantor”.⁵¹ Moreover, “whether an institution may be equiparated with a bank because of its financing function is not a simple binary question” as in the case of a guarantee by a parent company which exercises a “financing function beyond that which might arise between parent and subsidiary in an established group of companies in relation to the group’s business the obligor”.⁵² Finally, in the shipbuilding context it has long been established that payment and refund guarantees may be demand guarantees.⁵³ As a result:

“in the present context there ought to be no room for a priori preconceptions or assumptions about the nature of the instrument to be derived from the identity of the guarantor. What matters is the wording in which the parties have chosen to express their bargain, interpreted in accordance with the well-established rules of construction.”⁵⁴

For this purpose, the citation of cases where a similarly worded guarantee is held to be a true guarantee or instead a demand guarantee are of assistance only in limited circumstances as in this context an argument from the construction of the same words in another contract “is only capable of application if the words used in the document *taken as a whole* are materially identical; and if the contractual context in which they are used is materially identical”.⁵⁵ The Court of Appeal’s conclusion on the language of the particular instrument was that it was a demand guarantee.⁵⁶

Where the guarantee is a demand guarantee, in the event of fraud the court may be able to intervene to protect the guarantor, but the court has refused to imply a term to the effect that the beneficiary of such a guarantee will give notice of a claim only if there is reasonable cause.⁵⁷ Clear evidence is needed that the beneficiary’s demand is fraudulent to the knowledge of the bank if the bank is to be restrained from paying under such a guarantee or bond, but this does not mean that all possible explanations other than fraud must be totally ruled out. It means that fraud must be the “only realistic inference”.⁵⁸

Performance guarantees: counter-guarantee or indemnity

- 47-010 The bank or other financial institution which grants a performance guarantee will, of course, demand a counter-guarantee or indemnity from the customer at whose request the guarantee is granted.⁵⁹ As the customer will be liable to reimburse the bank on their payment under the guarantee, and as he will be unable to prevent the bank from paying (except in cases of fraud) when demand is made on the bank, his position is clearly perilous: “these performance guarantees are virtually promissory notes payable on demand”.⁶⁰ Such a counter-indemnity by a customer in

favour of a guaranteeing bank takes effect according to its terms. For example, where the customer agrees to indemnify the bank in respect of claims made “under or *in connection with* the issue of the guarantee” and the guaranteee obligations are expressed not to be “in any way discharged or diminished” by the guaranteee’s total or partial invalidity, then the bank may claim on the indemnity in respect of payments made by it under or in connection with the guarantee even if the latter was at no time legally valid.⁶¹ Of course, the party at whose request a performance guarantee is issued, may have his remedy on the contract in the event of his being wrongfully called upon to pay, as the result of his bank’s being similarly called upon. But where the other contracting party is abroad, and the contract is governed by the law of a foreign country, this remedy may in practice be of small value.

Performance guarantees: injunction to restrain creditor

- 47-011 It may, however, be somewhat easier to obtain an injunction to restrain the creditor himself from receiving payment from the bank, particularly where an interim remedy is being sought; but even in this sort of procedure, it has been held that an interim remedy should not normally be given unless the validity of the bond or guarantee is itself being challenged, or unless the circumstances are such that they would justify the grant of a freezing injunction.⁶²

Performance guarantees: implicit obligation of repayment

- 47-012 In *Cargill International SA v Bangladesh Sugar and Food Industries Corp* the Court of Appeal accepted that a party to a contract who has paid money under a performance bond to the other party may recover the amount received to the extent to which it exceeds the true loss sustained.⁶³ This obligation was said to be implicit in the nature of the contract.⁶⁴ According to Potter LJ, in view of the very considerable commercial advantages which a performance bond gives to its beneficiary:

“... the obligation to account later to the seller, in respect of what turns out to be an overpayment, is a necessary corrective if a balance of commercial fairness is to be maintained between the parties.”⁶⁵

Furthermore, the court construed a clause of the contract between the parties which referred to the bond being “forfeited” as referring to the bond (i.e. the exercise of party’s right to call on the bond as against the bank), not to the moneys paid under the bond, a result which, according to the learned Lord Justice, “accords more with reason, fairness and commercial good sense” as to exclude the obligation to account “would be to provide the defendant with a substantial windfall in any case where it had suffered no loss or relatively nominal loss, and would run counter to

the general proposition that compensation for breach of contract depends on proof of loss".⁶⁶ On the other hand, in *Uzinterimpex JSC v Standard Bank Plc*⁶⁷ a demand guarantee was given by a seller's bank to a buyer's bank (which financed the transaction) in respect of advance payments of the purchase price of goods not delivered. In these circumstances, the Court of Appeal refused to imply a term that, if any demand made under it should exceed the loss sustained by the buyer of goods or the buyer's bank, or should otherwise be excessive, the buyer's bank would repay the excess to the seller's bank/guarantor on the basis that if such a term were not implied, the buyer's bank would obtain a windfall.⁶⁸ According to Moore-Bick LJ,

“The guarantee stands as an independent contract between [the seller's bank] and the [buyer's bank] and is capable of operating effectively without the need for such a term. If a demand under the guarantee resulted in the wrongful refund of part of the price due to the seller, the seller would have a remedy against [the buyer] under the contract of sale ... That provides the answer to the ‘windfall’ argument, despite the fact that in this case the remedy may be of little practical value because [the buyer] is insolvent.”⁶⁹

Moreover, in the learned Lord Justice's view, there are:

“... other, and perhaps even stronger, reasons why [the argument for an implied term] must be rejected. It is essential to the maintenance of international commerce, much of which is supported by undertakings of this kind given by banks and other financial institutions, that the documents by which those undertakings are given should operate in accordance with the terms which appear on their face ... [Banks] cannot be expected to be aware of, or to implement, terms that do not appear on the face of the documents. The implied term for which [the seller's bank] contends would have the potential effect of imposing on [the buyer's bank] a liability which could not be identified from the face of the document and which would be very uncertain in its effect.”⁷⁰

And in *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA*⁷¹ the Court of Appeal rejected an analogous claim by a bank based on constructive trust. There the bank had paid under an on-demand performance guarantee in respect of a buyer's obligations to a seller, but it was later established by arbitration that the sums paid had not fallen due by the buyer. According to Tomlinson LJ (with whom Rimer and Longmore LJJ agreed), the principles according to which such a guarantee is independent of disputes between the seller and the buyer:

“... are completely inimical to the implication of a trust impressed upon the monies in the Seller's hands by reason of circumstances arising after accrual of the Seller's completed cause of action under the guarantee. It is critical to the efficacy of these financial arrangements that as between beneficiary and bank the position crystallises as at presentation of documents or demand as the case may be, and that it is only in the

case of fraudulent presentation or demand by the beneficiary that the bank can resist payment against an apparently conforming presentation or demand.”⁷²

Nor is there anything unconscionable in the seller retaining sums paid by the bank in these circumstances.⁷³

“Charge-back transactions”

- 47-013 In *Tam Wing Chuen v Bank of Credit & Commerce Hong Kong Ltd*⁷⁴ the Privy Council considered the legal effect of a deposit of funds by A to B to be used to secure a loan by B to C, a transaction known as a “charge-back”. It held that the question whether A (the depositor) should be considered *personally liable* to B in respect of the loan (and therefore a guarantor) is a question of construction of the contract under which he made the deposit. In this respect, Lord Mustill observed that the mere “[c]onsistency with [such a personal] liability [in the depositor] which could have been expressed is no ground for imposing a liability which was not expressed”.⁷⁵

Assignment by creditor of benefit of contract guaranteed

- 47-014 In *Kumar v Dunning*, the Court of Appeal held that an assignment of the reversion of a lease may pass the benefit of a covenant by a surety which guaranteed the tenant’s covenants, even in the absence of an express assignment of such benefit.⁷⁶ The court was satisfied that such a covenant by the surety “touches and concerns the land” so as to come within the general rules as to the running of positive covenants with land⁷⁷ and that this result accorded with “the commercial common sense and justice of the case”.⁷⁸ However, the court⁷⁹ distinguished the position in an Australian case, in which it was held that an assignment of a mortgage did not operate to transfer the benefit of a covenant by a surety that the borrower would repay the principal debt on the basis that neither the borrower’s nor the surety’s covenant to pay the principal could “touch and concern” the land.⁸⁰ This approach was followed by the House of Lords in *P & A Swift Investments v Combined English Stores Group Plc*⁸¹: as Lord Templeman observed, “[a] covenant by a surety that a tenant’s covenant which touches and concerns the land shall be performed and observed must itself be a covenant which touches and concerns the land”.⁸² However, this position at common law was changed as regards “new tenancies” (notably, those which were entered on or after 1 January 1996)⁸³ by s.3(1) of the Landlord and Tenant (Covenants) Act 1995, which provides that:

“... the benefit and burden of all landlord and tenant covenants of a tenancy—

- (a)shall be annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them, and
- (b)shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them.”

Thus, with the qualifications which appear in [s.3\(3\) of this Act](#), the benefit of a covenant by a surety guaranteeing the tenant’s covenants will pass on assignment by the landlord whether or not it “touches and concerns the land”.⁸⁴

Guarantees of tenancy covenants on assignment: common law

- 47-015 At common law, a tenant remains liable on assignment of his interest under the lease for the payment of rent and due performance of other tenants’ covenants, this being the result of privity of contract remaining between the landlord and original tenant, even though assignment creates privity of estate between the landlord and tenant’s assignee.⁸⁵ Furthermore, any guarantee of a tenant’s covenants in principle also remains enforceable by the landlord (and, as we have seen, often by the landlord’s assignees)⁸⁶ notwithstanding assignment by the tenant.

“New tenancies”: breaking privity of contract

- 47-016 However, this position was radically altered by the provisions of the [Landlord and Tenant \(Covenants\) Act 1995](#).⁸⁷ First, the key purposes of this Act were to “break privity of contract” after assignment by the tenant and, on the fulfilment of certain conditions, by the landlord, terminating their contractual obligations inter se, but to preserve and extend the effectiveness of tenancy obligations for those within privity of estate.⁸⁸ However, this “breaking of privity” does not rule out the creation of liability in a former tenant for the performance of the tenant’s covenants by his assignee as [s.16\(1\) of the 1995 Act](#) provides that:

“... where on an assignment a tenant is to any extent released from a tenant covenant of a tenancy by virtue of this Act ... nothing in this Act ... shall preclude him from entering into an authorised guarantee agreement with respect to the performance of that covenant by the assignee”,

[s.16\(8\)](#) expressly declaring that

“... the rules of law relating to guarantees (and in particular those relating to the release of sureties) are, subject to its terms, applicable in relation to any authorised guarantee agreement as in relation to any other guarantee agreement.”⁸⁹

It is clearly important to note that [s.16](#) applies only to “*new tenancies*” as defined by [s.1 of the Act](#), which include, notably, those made on or after 1 January 1996⁹⁰ and is carefully restricted by [subss.3 and 4 of s.16](#), to which further reference should be made. On the other hand, a landlord is not *automatically* entitled to require as a condition for his consent to an assignment under the terms of a lease granted before the coming into force of the [Landlord and Tenant \(Covenants\) Act 1995](#) the entering by the assigning tenant of an “authorised guarantee agreement” under [s.16 of that Act](#), for by [s.19\(1\) of the Landlord and Tenant Act 1927](#) such a consent to assignment can be refused only if it is reasonable for him to do so⁹¹ and any unreasonable refusal would prevent a landlord’s requirement of such a guarantee from being “*lawfully imposed*” as the [1995 Act](#) requires.⁹² Moreover, where the renewal of a tenancy granted before the coming into force of the [1995 Act](#) is to be ordered under [Pt 2 of the Landlord and Tenant Act 1954](#),⁹³ the landlord may not as a condition of his consent to renewal of the lease require a clause in the new lease to allow him automatically to require an “authorised guarantee agreement” be entered by the tenant on the latter’s assignment.⁹⁴ Given that the [1995 Act](#) prevents a landlord from enjoying the rights on assignment of the term of the lease which he had enjoyed under the old law, the [1954 Act](#) does not entitle the landlord to say that on renewal under that Act, he should be given as generous terms as the [1995 Act](#) provides:

“The [1995 Act](#) represents a sea change in the law relating to the tenant’s liability after he assigns the lease, and it also alters the law relating to the landlord’s power to impose terms on assigning the lease. It does not merely represent a sea change in what had been common practice, but in what a landlord can lawfully require, both in terms of what is to be included in the lease initially and what he can demand on assignment.”⁹⁵

Instead, at least in some circumstances, a clause allowing a landlord to require such a guarantee by the tenant only if reasonable represents a fair balance between the interests of the landlord and of the tenant.⁹⁶ If, prior to assignment, performance of the tenant’s covenants is guaranteed by a third party, that person will be released on assignment to the same extent as the tenant.⁹⁷ And if the landlord purports to require such a third party surety to guarantee performance by the assignee, that agreement will not count as an “authorised guarantee agreement” (as not being made with the tenant⁹⁸) and may be void as frustrating the operation of the Act for his release.⁹⁹ The Court of Appeal has held that a clause in a contract of guarantee of a tenant’s obligations under a lease which requires the guarantor to give a *further* guarantee in respect of an assignee of a lease is not enforceable, as this would frustrate the operation of the Act.¹⁰⁰

All tenancies: former tenants and guarantors

- 47-017 Secondly, [s.17 of the Landlord and Tenant \(Covenants\) Act 1995](#), which applies to *all tenancies* whether new or otherwise,¹⁰¹ subjects the liability of a former tenant *or his guarantor* for rent, service charge or liquidated damages for breach of covenant, to a condition of service by the landlord within six months of the charge becoming due of a notice informing either the tenant, or the guarantor as the case may be, “that the charge is now due; and that in respect of the charge the landlord intends to recover from the former tenant [or guarantor] such amount as is specified in the notice and (where payable) interest calculated on such basis as is so specified”.¹⁰² Where such a notice has been served, the former tenant or guarantor’s liability is in principle restricted to the amount specified in it.¹⁰³ Moreover, [s.19\(1\) of the same Act](#) provides that where any person makes full payment as he has been duly required to under [s.17](#), then he “shall be entitled … to have the landlord under that tenancy grant him an overriding lease of the premises demised by the tenancy”. The purpose of such a legally imposed lease is to give the claimant some control over the defaulting tenant and in this respect [s.19\(8\)\(a\)](#) provides that where two or more requests for such an overriding lease are made on the same day, then a request by a former tenant shall be treated as made before a request made by a guarantor.

All tenancies: new variations

- 47-018 Thirdly, [s.18\(1\) and \(2\)](#) provide that a former tenant “shall not be liable … to pay any amount in respect of the covenant to the extent that the amount is referable to any relevant variation of the tenant covenants of the tenancy effected after the assignment”, “relevant variation” being defined by [s.18\(4\)](#). Similarly, [s.18\(3\)](#) provides that a *guarantor* of a former tenant’s covenants “(where his liability … is not wholly discharged by any such variation of the tenant covenants of the tenancy) shall not be liable under the agreement to pay any amount in respect of the covenant to the extent that the amount is referable to any such variation”. It is to be noted that [s.18](#) applies to *all tenancies* whether new or otherwise,¹⁰⁴ but *only to new variations* of tenant covenants (i.e. those effected on or after 1 January 1996).¹⁰⁵

Footnotes

1 *Smith v Wood [1929] 1 Ch. 14; Re Conley [1938] 2 All E.R. 127.*

2 *Moschi v Lep Air Services Ltd [1973] A.C. 331. cf. Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd [1996] 1 A.C. 199; Sunbird Plaza Pty Ltd v Maloney (1988) 166 C.L.R. 245, HC Aus.*

- 3 *Moschi v Lep Air Services Ltd [1973] A.C. 331*. For other consequences of this rule of construction, see paras 47-040—47-041, 47-090.
- 4 *(1880) 6 App. Cas. 1, 11–12*. See also *Selous Street Properties Ltd v Oronel Fabrics Ltd [1984] 270 E.G. 643*.
- 5 This paragraph was quoted by Rix LJ (with whom Sir Anthony Clarke MR and Arden LJ agreed) with apparent approval in *Berghoff Trading Ltd v Swinbrook Developments Ltd [2009] EWCA Civ 413, [2009] 2 Lloyd's Rep. 233* at [25].
- 6 See below, paras 47-089 et seq.
- 7 *Duncan Fox & Co v North and South Wales Bank*, above, at 11–12; *Nicholas v Ridley [1904] 1 Ch. 192*.
- 8 See footnote above. See also *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd [1975] 1 W.L.R. 1474*.
- 9 *Mutual Loan Fund Association v Sudlow (1858) 5 C.B.(N.S.) 449*.
- 10 *Heald v O'Connor [1971] 1 W.L.R. 497*; cf. *General Produce Co v United Bank Ltd [1979] 2 Lloyd's Rep. 255*.
- 11 *Oakeley v Pasheller (1836) 4 Cl. & Fin. 207*; *Overend Gurney & Co v Oriental Financial Corp (1874) L.R. 7 H.L. 348*; *Goldfarb v Bartlett [1920] 1 K.B. 639* and see below, para.47-108.
- 12 *Rouse v Bradford Banking Co Ltd [1894] A.C. 586*.
- 13 As to these, see above, para.41-182. Recourse agreements will usually be drafted as indemnities and not guarantees (see below, paras 47-006 et seq., 47-045 as to this distinction) but there is nothing to prevent such an agreement being drafted as a guarantee, though it will not be a security within the meaning of s.189(1) of the Consumer Credit Act 1974, for it is not entered into at the request (express or implied) of the debtor or hirer.
- 14 See, e.g. *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV [1979] 2 Lloyd's Rep. 488*.
- 15 See below, para.47-131.
- 16 See below, para.47-132.
- 17 See below, para.47-139.
- 18 See also below, paras 47-135, 47-138. And see below, para.47-149, as to subrogation.
- 19 *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV [1979] 2 Lloyd's Rep. 488*.
- 20 *Pitts v Jones [2007] EWCA Civ 1301, [2008] 2 W.L.R. 1289* at [21]. cf. Vol.I, para.17-018.
- 21 See, e.g. *Lister v Romford Ice & Cold Storage Co Ltd [1957] A.C. 555* (employer's right to indemnity in respect of vicarious liability arising from employee's negligence); cf. *Morris v Ford Motor Co Ltd [1973] Q.B. 792*.
- 22 See Vol.I, paras 9-138—9-139.
- 23 There are some cases in which it is hard to say whether the liability arises by operation of law or from an implied contract of indemnity; see, e.g. *Secretary of State v Bank of India [1938] 2 All E.R. 797, 800*.
- 24 An obligation to indemnify may also arise under an indemnity clause, for example, in a contract of sale under which the buyer agrees to indemnify the seller in respect of any losses incurred by way of liability for negligence to a third party caused by the goods sold: see Vol.I, para.17-018.

- 25 See below, paras 47-043 et seq.
- 26 See below, paras 47-040—47-041.
- 27 See below, paras 47-090 et seq.
- 28 *Holme v Brunskill* (1877) 3 Q.B.D. 495 (on which see below, paras 47-108 et seq.); *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497.
- 29 This sentence was quoted by the Court of Appeal with apparent approval in *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [20]. See also *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2010] All E.R. (D) 86 (Oct) at [23]–[25]; *Slade v Abbhi* [2018] EWHC 2039 (Comm) at [92]–[94] affirmed sub nom. *Abbhi v Slade* [2019] EWCA Civ 2175, [2019] Costs L.R. 2039; *Brown-Forman Beverages Europe Ltd v Bacardi UK Ltd* [2021] EWHC 1259 (Comm) at [10].
- 30 *Moschi v Lep Air Services Ltd* [1973] A.C. 331; *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595; *Multiplex Construction Europe Ltd v Dunne* [2017] EWHC 3073 (TCC), [2018] B.L.R. 36.
- 31 See below, para.47-009 (performance guarantees).
- ③32 *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [30]. But see below, para.47-009 in relation to *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd* [2021] EWCA Civ 1147, [2021] 1 W.L.R. 5408 (appeal outstanding) where the CA expressed considerable reservation about the use of presumptions of this nature in the context.
- 33 On which see below, para.47-009.
- 34 *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2010] All E.R. (D) 86 (Oct) at [34], per Sir William Blackburne. See also *Catalyst Business Finance Ltd v Very Tangy Television Ltd* [2018] EWHC 1669 (QB) at [30] (“hybrid document in which some of the obligations are primary and some secondary”).
- 35 But the “common form” provision stating that the guarantor is liable as a principal debtor does not convert every guarantee into an indemnity: *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep. 255.
- 36 *Baynton v Morgan* (1888) 22 Q.B.D. 74 and see *Allied London Investments Ltd v Hambrø Life Assurance Ltd* (1983) 269 E.G. 41; and *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 E.G. 643 and 743. On the effect of the Landlord and Tenant (Covenants) Act 1995 on tenant’s covenants on assignment see below, paras 47-015—47-017.
- 37 *Re Errington* [1894] 1 Q.B. 11.
- 38 See further above, paras 39-130 et seq.
- ④39 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] Q.B. 159; *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] Q.B. 146; *Howe Richardson Scale Co Ltd v Polimex-Cekop* [1978] 1 Lloyd's Rep. 161; *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 W.L.R. 392; *Attaleia Marine Co Ltd v Bimeh Iran (Iran Insurance Co) (The Zeus)* [1993] 2 Lloyd's Rep. 497. cf. *Trafalgar House Construction*

(Regions) Ltd v General Surety & Guarantee Co Ltd [1996] 1 A.C. 199; Frans Maas (UK) Ltd v Habib Bank AG Zurich [2001] Lloyd's Rep. Bank 14; Solo Industries UK Ltd v Canara Bank [2001] EWCA Civ 1059, [2001] 1 W.L.R. 1800; Banque Saudi Fransi v Lear Siegler Services Inc [2005] EWHC 2395, [2006] 1 Lloyd's Rep. 273; Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA [2012] EWCA Civ 1629, [2012] 2 C.L.C. 986; Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd [2021] EWCA Civ 1147, [2021] 1 W.L.R. 5408 (appeal outstanding) at [22]–[28].

- ④0 See cases cited in previous note; cf. *General Surety & Guarantee Co Ltd v Francis Parker Ltd (1977) 6 Build. L.R. 16*. This does not mean, though, that a bank must always pay when asked: “a Bank is not obliged to accept without investigation a demand which is ambiguous, or potentially misleading”: *Frans Maas (UK) Ltd v Habib Bank AG Zurich*, above, at [27].

- ④1 See further on the nature and variety of such guarantees, Benjamin's Sale of Goods, 11th edn (2021), Ch.24 especially at paras 24-003—24-006, contrasting “orthodox guarantees” and “autonomous guarantees”. Benjamin's Sale of Goods, paras 24-007—24-010 explains the various international uniform rules which may be incorporated into an “autonomous guarantee”, notably the I.C.C. Uniform Rules on Demand Guarantees (URDG 458) whose revised version URDG 758 applies, subject to contrary intention, to any guarantee incorporating the URDG issued on or after 1 July 2010. For an example of the application of the URDG 458 see *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV [2011] EWCA Civ 827, [2011] 2 Lloyd's Rep. 379*.

- ④2 *Marubeni Hong Kong and South China Ltd v The Mongolian Government [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497* at [30].

- ④3 See cases cited above, second note in the present paragraph. As to bankers' letters of credit, see above, paras 36-452 et seq.

- ④4 *Gold Coast Ltd v Caja de Ahorros del Mediterraneo [2002] 1 Lloyd's Rep. 617, 620; Marubeni Hong Kong and South China Ltd v The Mongolian Government [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497* at [28]; *Yuanda (UK) Co Ltd v Multiplex Construction Europe Ltd [2020] EWHC 468 (TCC)* at [38]–[46] and see *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd [2021] EWCA Civ 1147, [2021] 1 W.L.R. 5408 (appeal outstanding)* discussed below in this paragraph.

- 45 Paget's Law of Banking, 11th edn (1996), quoted with approval by the Court of Appeal in *Caja de Ahorros v Gold Coast Ltd [2002] 1 Lloyd's Rep. 617* at [16]; *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA [2012] EWCA Civ 1629, [2012] 2 C.L.C. 986* at [26]–[27]; *Caja de Ahorros v Gold Coast Ltd [2001] EWCA Civ 1806, [2002] 1 Lloyd's Rep. 617* at [16]; *Caterpillar Motoren GmbH & Co KG v Mutual Benefits Assurance Co [2015] EWHC 2304 (Comm), [2015] 2 Lloyd's Rep. 261* at [13]–[15], [19]–[22] and [25]–[27]; *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd [2015] EWHC 999 (Comm), [2015] 2 Lloyd's Rep. 123* at [69]–[85]; *Autoridad del Canal de Panama v Sacyr SA [2017]*

EWHC 2228 (Comm), [2017] 2 Lloyd's Rep. 351 at [81]–[103]. But where a contract contains a clause as is mentioned in (iv) of “Paget’s presumption” (quoted in the text) this may be explicable as inserted so as to put beyond doubt that the rule applicable to true guarantees does not apply: *[2015] EWHC 2304 (Comm)* at [21], referring to *Caja de Ahorros v Gold Coast Ltd del Mediterraneo [2001] EWCA Civ 1806, [2002] 1 Lloyd's Rep. 617* at [25]. The passage quoted in the text appears in almost identical words in Paget’s Law of Banking, 15th edn (2018), para.35.8. But an instrument issued by a bank may on its terms and in its context, be construed as a true guarantee, that is, an instrument of secondary liability, whose purpose is to guarantee the liability of one party to another: *Yuanda (UK) Co Ltd v Multiplex Construction Europe Ltd [2020] EWHC 468 (TCC)* at [52]–[56].

46 *Marubeni Hong Kong and South China Ltd v The Mongolian Government [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497* at [30]; *IIG Capital LLC v Van Der Merwe [2008] EWCA Civ 542, [2008] 2 Lloyd's Rep. 187* at [8]; cf. *Caterpillar Motoren GmbH & Co KG v Mutual Benefits Assurance Co [2015] EWHC 2304 (Comm), [2015] 2 Lloyd's Rep. 261* at [20] (no material distinction between bank and other financial institution, such as an insurance company engaged in the business of providing bonds to its customers).

47 *IIG Capital LLC v Van Der Merwe [2008] EWCA Civ 542, [2008] EWCA Civ 542* at [33], per Waller LJ (with whom Lawrence Collins and Rimer LJJ agreed). cf. *Carey Value Added SL v Grupo Urvasco SA [2010] EWHC 1905 (Comm), [2011] 2 All E.R. (Comm) 140* at [38]–[43]; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd [2010] EWHC 2443 (Ch), [2010] All E.R. (D) 86 (Oct)* at [53]; *North Shore Ventures Ltd v Anstead Holdings Inc [2011] EWCA Civ 230, [2011] 2 Lloyd's Rep. 45* at [46]–[47]; *Ultrabulk A/S v Jagatramka [2017] EWHC 2792 (Comm), [2018] 1 Lloyd's Rep. 384* at [16]. Where the principal contract is in the nature of a financing transaction (even though in the form of a sale and demise charter with a “deed of guarantee” as part of it), any presumption generally applicable to non-banking cases will more readily give way to language to the contrary: *Bitumen Invest AS v Richmond Mercantile Ltd FZC [2016] EWHC 2957 (Comm), [2017] 1 Lloyd's Rep. 219* at [17] (where the fact that the trigger for payment was the issue of a demand for an amount certified by the beneficiary of the guarantee provided the key feature in finding it to be an “on demand guarantee” (*[2016] EWHC 2957 (Comm)* esp. at [21]–[26])). Where the instrument is made outside the banking context (as in the case of an undertaking by a parent company of the principal debtor), and it imposes (even to an extent) autonomous liabilities, it has been said that the presumption in *Marubeni Hong Kong and South China Ltd* referred to in the text is not likely to assist in determining the *extent* of an on-demand obligation undertaken and the latter should be decided by considering the words used free of any presumption: *Rubicon Vantage International Pte Ltd v Krisenenergy Ltd [2019] EWHC 2012 (Comm), [2020] 1 Lloyd's Rep. 383* at [18].

48 *[2021] EWCA Civ 1147, [2021] 1 W.L.R. 5408* (appeal outstanding).

49 Popplewell LJ with whom Sir Geoffrey Vos MR and Baker LJ agreed.

50 *[2021] EWCA Civ 1147* at [28]–[29].

51 *[2021] EWCA Civ 1147* at [29] per Popplewell LJ.

52 *[2021] EWCA Civ 1147* at [30].

53 [2021] EWCA Civ 1147 at [31].

54 [2021] EWCA Civ 1147 at [32]. Popplewell LJ later observed at [41] that the application of a presumption (such as is found in Paget's Law of Banking, 11th edn (1996) quoted above in this paragraph) "does not sit entirely comfortably with the statements" by the Court of Appeal "albeit outside the shipbuilding context, that the instrument in each of those cases should be construed 'by looking at it as a whole without any preconceptions as to what it is)": [2021] EWCA Civ 1147 at [41] quoting Tuckey LJ in *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2001] EWCA Civ 1806, [2002] 1 Lloyd's Rep. 617 at [15] as endorsed by Waller LJ in *IIG Capital v Van Der Merwe* [2008] EWCA Civ 542, [2008] 2 Lloyd's Rep. 187 at [7].

55 [2021] EWCA Civ 1147 at [33]–[34].

56 [2021] EWCA Civ 1147 at [37]–[38] and [51].

57 *State Trading Corp of India Ltd v ED & F Man (Sugar) Ltd* [1981] Com. L.R. 235.

58 *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep. 554 at 561; *TTI Team Telecom International Ltd v Hutchison 3G UK Ltd* [2003] EWHC 762, [2003] 1 All E.R. (Comm) 914 at [29] et seq.; *Korea Industry Co v Andoll* [1990] 2 Lloyd's Rep. 183, CA Sing. cf. *Themehelp Ltd v West* [1995] 3 W.L.R. 751 which concerned a claim by the principal debtor for an injunction to restrain the beneficiary of the bond from serving notice under the guarantee.

59 cf. *Wahda Bank v Arab Bank Plc* [1996] 1 Lloyd's Rep. 470 in which the Court of Appeal held that such a counter-guarantee was intimately connected with such a performance bond with the result that, in the absence of any express choice, it felt entitled to find that the parties intended the counter-guarantee to be governed by the same law as governed the guarantees.

60 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] Q.B. 159 at 170, per Lord Denning MR.

61 *Gulf Bank KSC v Mitsubishi Heavy Industries (No.2)* [1994] 2 Lloyd's Rep. 145.

62 *Bolivinter Oil SA v Chase Manhattan Bank SA* [1984] 1 W.L.R. 392; *Potton Homes Ltd v Coleman (Contractors) Overseas Ltd* (1984) 28 Build. L.R. 19.

63 [1998] 1 W.L.R. 461 at 463, applied by *Tradigrain SA v State Trading Corp of India* [2005] EWHC 2206 (Comm), [2006] 1 Lloyd's Rep. 216.

64 [1998] 1 W.L.R. 461, 465, referring to the decision of Morison J below from which no appeal on this issue was made, though the CA clearly agreed with it (the appeal concerned the question whether the "forfeit" clause excluded this obligation as discussed in the text); see also *Comdel Commodities Ltd v Siporex Trade S.A.* [1997] 1 Lloyd's Rep. 424, 431 (expressly approving Morison J's decision as to implicit obligation); *Tradigrain SA v State Trading Corp of India* [2005] EWHC 2206 (Comm), [2006] 1 Lloyd's Rep. 216 at [26] (interpreting *Cargill* as basing the obligation on an implied term in the contract).

65 [1998] 1 W.L.R. 461 at 469.

66 [1998] 1 W.L.R. 461 at 469.

67 [2008] EWCA Civ 819, [2008] Bus. L.R. 1762.

68 [2008] EWCA Civ 819 at [19].

69 [2008] EWCA Civ 819 at [20], per Moore-Bick LJ.

70 [2008] EWCA Civ 819 at [23], per Moore-Bick LJ.

- 71 [2013] EWCA Civ 1679, [2014] 1 Lloyd's Rep. 273. cf. *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629, [2012] 2 C.L.C. 986 (where the Court of Appeal decided that the instrument was an on-demand performance guarantee); above, para.47-009.
- 72 [2013] EWCA Civ 1679 at [22] and see similarly at [25], relying on *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] Bus. L.R. 1762. Moore-Bick LJ held, in the alternative, that if it were relevant to have regard to matters arising after the accrual of the seller's cause of action against the bank (which he considered it was not) then the seller's contractual obligation to account to the buyer for any sums paid by the bank to the seller which were not owed to the seller would be "diametrically inconsistent with the notion of the Seller holding the money on trust for the Bank": [2013] EWCA Civ 1679 at [27].
- 73 [2013] EWCA Civ 1679 at [23].
- 74 [1996] B.C.C. 388.
- 75 [1996] B.C.C. 388 at 393.
- 76 [1989] 1 Q.B. 193; *Harpum* [1988] 47 C.L.J. 180; not following the decisions at first instance in *Pinemain Ltd v Welbeck International Ltd* (1984) 272 E.G. 1166; *Re Distributors and Warehousing Ltd* [1986] B.C.L.C. 129; and *Coastplace Ltd v Hartley* [1987] 1 Q.B. 948. The Landlord and Tenant (Covenants) Act 1995 ss.17–19 restrict the liability of former tenants and their guarantors in various respects, these provisions applying to tenancies made before as well as after this Act: s.1(2) and see below, paras 47-016 et seq.
- 77 *Mayor of Congleton v Pattison* (1808) 10 East 130, 138; *Vernon v Smith* (1821) 5 B. & Ald. 1.
- 78 *Kumar v Dunning* [1989] 1 Q.B. 193, 201, per Sir Nicolas Browne-Wilkinson VC.
- 79 [1989] 1 Q.B. 193 at 206–207.
- 80 *Consolidated Trust Co Ltd v Naylar* (1936) 55 C.L.R. 423.
- 81 [1989] 1 A.C. 632 and see *Coronation Street Industrial Properties Ltd v Ingall Industries Plc* [1989] 1 W.L.R. 304.
- 82 [1989] 1 A.C. 632, 637.
- 83 Landlord and Tenant (Covenants) Act 1995 s.1(3); Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995 (SI 1995/2963).
- 84 A "tenancy" is defined by the Landlord and Tenant (Covenants) Act 1995 s.28(1) as including an agreement for a tenancy, "assignment" (which is defined as including "equitable assignment") extends the Act's reach to an assignment which is not yet effective in law, such as a specifically enforceable agreement to assign or an unregistered or formally defective assignment: *Sackville UK Property Select II (GP) No.1 Ltd v Roberson Taylor Insurance Brokers Ltd* [2018] EWHC 122 (Ch), [2018] L. & T.R. 22 at [32], where it was, however, held that the party whose assignment had not been registered was not the "tenant" within the meaning of the lease (and so not able to exercise a contractual right of termination) as not being a "successor in title" of the assignor: [2018] EWHC 122 (Ch) at [33]–[34].
- 85 *City of London Corp v Fell* [1994] 1 A.C. 458, 465.
- 86 See above, para.47-014.
- 87 See generally Megarry & Wade, The Law of Real Property, 7th edn (2008) by Harpum, paras 20-064 et seq.; *Lang and Shakespeare* (2021) 25 L. & T. Rev. 10.

- 88 Landlord and Tenant (Covenants) Act 1995 especially ss.3–8. For analysis of these and other provisions of the Landlord and Tenant (Covenants) Act 1995, see *Bridge* (1996) 55 C.L.J. 313.
- 89 cf. *Prudential Assurance Co Ltd v Ayres* [2008] EWCA Civ 52, [2008] L. & T.R. 30 at [46] where the “ordinary rules of law relating to guarantees (in particular those relating to the discharge of sureties)” were excluded by the terms of the guarantee.
- 90 Landlord and Tenant (Covenants) Act 1995 s.1(1) and (3); Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995 (SI 1995/2963).
- 91 *Wallis Fashion Group Ltd v CGU Life Assurance Ltd* [2000] L. & T.R. 520, 526, (2001) 81 P. & C.R. 28.
- 92 Landlord and Tenant (Covenants) Act 1995 s.16(3)(b).
- 93 Landlord and Tenant Act 1954 s.35.
- 94 *Wallis Fashion Group Ltd v CGU Life Assurance Ltd* [2000] L. & T.R. 520, 528–529.
- 95 [2000] L. & T.R. 520 at 529, per Neuberger J.
- 96 [2000] L. & T.R. 520 at 531. cf. *Legends Surf Shops Plc v Sun Life Assurance Society Plc* [2005] EWHC 1438 (Ch), [2006] 1 P. & C.R. D. G1.
- 97 Landlord and Tenant (Covenants) Act 1995 ss.16(4), 24(2). An assignment by a tenant of the lease to the guarantor of that tenant’s covenants (the guarantee being expressed as imposing the same liability as if principal debtor) has been held void under the 1995 Act: *EMI Group Ltd v O & HQ1 Ltd* [2016] EWHC 529 (Ch), [2016] Ch. 586 at [77]–[91]. This is because on such an assignment the provisions of the Act would apply as follows: (i) the original tenant (T1) is released from the tenant covenants (s.5(2)(a)); (ii) the guarantor is released from the tenant covenants as from T1’s release (s.24(2)); (iii) the effect of s.24(2) is that as from the release of T1 (i.e. as from the assignment to the guarantor/second tenant (T2)), the guarantor should be released from its liabilities as guarantor; however, (iv) as from the assignment to T2/the guarantor, T2 becomes bound by the tenant covenants (s.3(2)(a)). As a result, the assignment releases the guarantor from the tenant covenants but at the same moment binds the guarantor to them as T2, the liability under the guarantee being the same or essentially the same as the liability of T1. Such an assignment “frustrates” the operation of s.24(2)(b) and is therefore rendered void by s.25(1)(a): [2016] EWHC 529 (Ch) at [79]–[80]. Given that the assignment is void, the lease remains vested in the original tenant and the purported assignee remains bound as guarantor of that tenant’s covenants: [2016] EWHC 529 (Ch) at [89]–[91].
- 98 Landlord and Tenant (Covenants) Act 1995 ss.16(4), 16(1), above.
- 99 Landlord and Tenant (Covenants) Act 1995 ss.16(4), 25(1).
- 100 *K/S Victoria Street (A Danish Partnership) v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, [2012] 2 W.L.R. 470 at [21]–[24], [34], [44], [46], [51], [53], considering that (i) “any agreement which involves a guarantor of the assignor guaranteeing that assignor’s assignee” is invalidated under s.25(1) except to the extent that such an agreement requires a guarantor to guarantee a liability undertaken by a tenant under an “authorised guarantee agreement”; but that (ii) a guarantor of an assignor can validly guarantee the liability of an assignee on a further assignment (largely approving *Good Harvest Partnership LLP v Centaur Services Ltd* [2010] EWHC 330 (Ch), [2010] Ch. 426 especially at [22]–[23]). The question whether a clause comes within s.25(1) depends on

ordinary rules of construction and the maxim *verba intelligenda ut res magis valeat quam pereat* (on which see Vol.I, para.15-089) should not be used simply as a means to avoid the consequences of s.25 being applied to the contract which the parties have made: *Tindall Cobham 1 Ltd v Adda Hotels [2014] EWCA Civ 1215, [2015] 1 P. & C.R. 5* at [29]–[32] (where the proper meaning of a condition of consent by landlord to assignment by tenant required tenant to procure a continuing guarantee from an existing guarantor, and therefore fell within s.25). cf. *Pavilion Property Trustees Ltd v Permira Advisers LLP [2014] EWHC 145 (Ch), [2014] 1 P. & C.R. 21* at [15]–[20] (not discussed by the Court of Appeal in *Tindall Cobham 1 Ltd v Adda Hotels [2014] EWCA Civ. 1215*) where the court found that the language of a guarantee was “open to interpretation” and felt able to avoid the illegality required by s.25 by construction under the maxim. It has also been held that a court can sever parts of a contract which cannot have effect under s.25 (*Pavilion Property Trustees Ltd v Permira Advisers LLP [2014] EWHC 145 (Ch)* at [21]–[22]), though the Court of Appeal in *Tindall Cobham 1 Ltd v Adda Hotels [2014] EWCA Civ 1215* at [46] considered that the principle of severance would not be applied for this purpose unless the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording that remains, the remaining terms are supported by consideration and the removal of the unenforceable provisions does not alter the character of the contract: *Sadler v Imperial Life Assurance Co of Canada [1988] I.R.L.R. 388, 393* and see generally on severance Vol.I, paras 18-252 et seq. See also *UK Leasing Brighton Ltd v Topland Neptune [2015] EWHC 53 (Ch), [2015] 2 P. & C.R. 2* (assignment by tenant in breach of covenant; re-assignment back and fresh guarantee); *EMI Group Ltd v Prudential Assurance Co Ltd [2020] EWHC 2061 (Ch), [2021] 1 P. & C.R. 17* at [33] and [34] (guarantee guaranteed only T1’s obligations and not T2’s as a matter of construction and therefore did not fall foul of s.25).

- 101 Landlord and Tenant (Covenants) Act 1995 s.1(2).
- 102 Landlord and Tenant (Covenants) Act 1995 s.17(2), (3); *Scottish & Newcastle Plc v Raguz [2007] EWCA Civ 150, [2007] 1 Bus. L.R. 851*. Notice sent to the intended recipient at last residential address is effective notice: *Commercial Union Life Assurance Co Ltd v Moustafa [1999] L. & T.R. 489*. There is no requirement that a landlord must, in enforcing a guarantee, also serve the former tenant with the notice required under s.17(2) of the 1995 Act: *Cheverell Estates Ltd v Harris [1998] 1 E.G.L.R. 27*. The requirements contained in s.17 do not apply to a claim by a tenant sued by its landlord for an indemnity or contribution “in quasi contract” from an assignee or its guarantor (*Fresh (Retail) Ltd v Emsden [1999] C.L.Y. 3693*) nor to such a claim under an express indemnity contained in the assignment, the latter on the basis that it is not a “tenant covenant” for these purposes: *MW Kellogg Ltd v Tobin [1999] L. & T.R. 513*.
- 103 Landlord and Tenant (Covenants) Act 1995 s.17(4).
- 104 Landlord and Tenant (Covenants) Act 1995 s.1(2).
- 105 Landlord and Tenant (Covenants) Act 1995 s.18(6); Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995 (SI 1995/2963).

(a) - Agreement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 2. - Formation of the Contract

(a) - Agreement

Offer and acceptance: revocation of offers

- 47-019 A contract of suretyship is formed, like any other contract, by offer and acceptance, supported by consideration. But difficulty has been encountered in applying the ordinary principles to contracts of this nature, particularly with regard to the revocation of guarantees. The difficulty stems largely from the fact that it is frequently hard to say whether the contract is intended to be unilateral or bilateral.¹⁰⁶ If the guarantee is given in return for a *promise* by the creditor that he will enter into some transaction with the principal debtor, then the guarantee will constitute a binding bilateral contract as soon as it is given and accepted, and it cannot then be revoked.¹⁰⁷ But if (as is more usually the case) the guarantee is given in return for an act or forbearance on the part of the creditor, the contract will not be made until the act is done or the forbearance is given, and until then, the guarantee remains revocable.¹⁰⁸

Continuing guarantees

- 47-020 Where the guarantee is a continuing one, the question whether it can be revoked after the consideration has been partly performed depends on whether the consideration is divisible or entire.

¹⁰⁹

- U** In the former situation the guarantee is treated rather like a standing offer which is accepted pro tanto by part performance of the consideration, but remains revocable at all times as to future

liabilities. Therefore, in the case of a continuing guarantee to secure the balance of a running account at a bank, a surety may at any moment revoke his guarantee in respect of future advances,

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U though it is common practice to require a specified period of notice to be given before such a guarantee can be revoked and this is thought to be binding on the surety.

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U Where, on the other hand, the consideration for the guarantee is entire and indivisible, the surety has no right to revoke his guarantee unless such a right is expressly conferred by the agreement.

112

U Thus the guarantor of rent payable under a lease for 14 years could not revoke his guarantee before the expiry of the lease, though the guarantor of rent under a weekly tenancy can do so.

113

U It has been held that a surety cannot revoke a fidelity bond given to secure the due performance of some office by the debtor, on the ground that the appointment of the debtor is an indivisible consideration

114

U; but if the appointment can be terminated by notice there seems no reason why the consideration should not be treated as divisible. The principle underlying these cases seems to be that if, in reliance on the guarantee, the creditor has entered into an irrevocable transaction with the debtor, he should not be deprived of his security by revocation of the guarantee. But where the transaction entered into by the creditor is itself terminable, he would not be prejudiced if the guarantee were revoked as to the future, for the creditor could then decide whether or not to terminate the main transaction. However, in many continuing guarantees express provision is made for termination on notice by the guarantor, and where this is the case the effect of any notice of termination on the liability of the guarantor is a matter of construction of that term, taking into account other terms of the contract and, if need be, the wider context of the guarantee.

115

U

Revocation by death

47-021

Death of the surety does not by itself operate to revoke a guarantee,¹¹⁶ but notice of his death will do so provided that the guarantee was itself revocable,¹¹⁷ and that there is nothing to the contrary in the terms of the guarantee.¹¹⁸ Where specified notice is required to be given to revoke a guarantee, the executors of the surety will normally have to give the required notice after his death.¹¹⁹ But

where the executor of a deceased surety was himself the principal debtor, and he failed to give notice of revocation, it was held that knowledge of the facts by the creditor was sufficient to bring the guarantee to an end.¹²⁰ Where a guarantee is continuing, it has been held that the supervening insanity of the guarantor revokes the guarantee as from notice to the creditor.¹²¹

Footnotes

- 106 As to this distinction, see Vol.I, paras 1-073, 4-102 et seq.
- 107 But a guarantee of a future consumer credit agreement generally remains revocable until the credit agreement is made, see *Consumer Credit Act 1974* s.113(6).
- 108 See further Vol.I, paras 4-103—4-106; *Offord v Davies* (1862) 12 C.B.(N.S.) 748.
- ①109 See Vol.I, para.4-107 and further Philips and O'Donovan, *The Modern Law of Guarantee*, 4th edn (2020), paras 9-045—9-052.
- ①110 *Coulthart v Clementson* (1879) 5 Q.B.D. 42, 46–47; *Lloyd's v Harper* (1880) 16 Ch. D. 290; and see *Hamilton's Executor v Bank of Scotland*, 1913 S.C. 743.
- ①111 Paget's *Law of Banking*, 15th edn (2018) by Odgers, para.18-33 and see *Lloyd's v Harper* (1880) 16 Ch. D. 290 at 319; *Bank of Credit and Commerce International SA v Simjee [1997]* C.L.C. 135 at 137–139. cf. Philips and O'Donovan, *The Modern Law of Guarantee*, 4th edn (2020), para.9-047, which notes the apparent incompatibility of the effectiveness of a clause requiring a particular notice of revocation (and thereby limiting its availability to the guarantor) with analysis in terms of standing offer, as here consideration for the guarantee (and therefore its status as contractual) rests on the making of each advance by the creditor. On the construction of such express terms governing notice of revocation see below, para.47-078.
- ①112 *Lloyd's v Harper* (1880) 16 Ch. D. 290 esp. at 315.
- ①113 *Wingfield v De St Croix* (1919) 35 T.L.R. 432.
- ①114 *Re Crace* [1902] 1 Ch. 733.
- ①115 See further below, para.47-078.
- 116 *Bradbury v Morgan* (1862) 1 H. & C. 249.
- 117 *Coulthart v Clementson* (1879) 5 Q.B.D. 42.
- 118 *Re Silvester* [1895] 1 Ch. 573; *Basch v Stekel* [2001] L. & T.R. 1, 7–8, CA applying the general rule stated in Vol.I, para.23-005.
- 119 *Re Silvester*, above.
- 120 *Harriss v Fawcett* (1873) L.R. 8 Ch. App. 866.

121 *Bradford Old Bank Ltd v Sutcliffe [1918] 2 K.B. 833.*

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(b) - Consideration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 2. - Formation of the Contract

(b) - Consideration

General

- 47-022 A contract of suretyship, like any other contract, must be supported by consideration if it is not contained in a deed.¹²² Where the surety guarantees some future debt or transaction, the consideration may be a promise on the part of the creditor to grant the credit or enter into the transaction, or the actual act of doing so.¹²³ Even if the surety derives no benefit from the transaction, the creditor suffers a detriment which is sufficient consideration. More difficulty arises where the surety guarantees some past debt or transaction. *Prima facie* such a guarantee is given merely for past consideration and is void.¹²⁴ So where a surety guaranteed payments under a hire-purchase agreement entered into four days previously, it was held that the guarantee was given for past consideration only and was void.¹²⁵ However, if the consideration is expressed so as to be ambiguous whether it is past or not, it is open to the creditor to show that the consideration was not past. Thus where a guarantee was expressed to be given “in consideration of your having this day advanced to” the principal debtor some £750, it was held that parol evidence was admissible to prove that the money was advanced simultaneously with the giving of the guarantee, and that there was therefore good consideration.¹²⁶ Moreover, in accordance with the position as regards contracts in general, consideration to support a promise of guarantee may be found in an act done before it is made, provided that the act is done at the guarantor’s request, that the parties understood that the act was to be remunerated in some way and that the conferment of a benefit would have been legally enforceable had it been promised in advance.¹²⁷

Forbearance as consideration for past debt or transaction

- 47-023 A guarantee even of a past debt or transaction will be valid if the creditor promises to forbear from suing, or to give time to, the principal debtor, or if he actually does so at the request of the surety. The mere fact of forbearance, however, is not enough: there must be an actual promise to do so, or the forbearance must be at the request (express or implied) of the surety.¹²⁸ It is unnecessary that the forbearance should be for any specific length of time; forbearance for a reasonable time will suffice, and a promise or request to forbear will (if no time is stipulated for) normally be construed as referring to forbearance for a reasonable time.¹²⁹ Actual withdrawal of proceedings against the principal debtor at the request of the surety will be a good consideration even if there is no promise that new proceedings will not be started.¹³⁰

Guarantee of past and future transactions

- 47-024 If the surety guarantees past transactions in return for an undertaking by the creditor to continue to deal with the debtor, or to grant him further credit, there will be good consideration. In practice the surety frequently guarantees both past and future transactions in return for such an undertaking, and such a guarantee is good as to both sets of transactions,¹³¹ for consideration to be executed on the one side is at all events *prima facie* consideration for all that is done on the other, and all the promises are to be referred to all the considerations.¹³²
- 47-025 Difficult questions of construction may arise in these cases, since guarantees may be expressed in terms which leave it doubtful whether the surety is guaranteeing past and future transactions, or past ones only.¹³³ In these circumstances extrinsic evidence is admissible to show that the parties contemplated future transactions as falling within the guarantee, and that the whole guarantee is therefore valid.¹³⁴ But if it is evident that the guarantee was intended to be limited to past transactions alone, for example, because the surety knew that the principal debtor was already indebted to the creditor in an amount exceeding the limit of the surety's guarantee, the guarantee will be void as being given without consideration.¹³⁵ On the other hand, a guarantee to a bank in consideration of the bank's agreeing to advance £750 to the principal debtor was held to be good although in fact the debtor already owed the bank more than £750 and the new advance was merely used to pay off the existing debt without any money actually passing.¹³⁶
- 47-026 Where a guarantee is given in respect of both past and future transactions it is sometimes important to distinguish between cases where the consideration consists of a promise by the creditor to enter

into the future transactions and cases where the consideration is the creditor's act of entering into those transactions. In the former event the guarantee will be binding as to the past transactions as soon as the contract is made; in the latter case the guarantee will not be binding unless in fact the creditor does enter into future transactions.¹³⁷ So where A guaranteed past debts owed by B to C in consideration of C "recommencing to supply" B, and in fact C never did recommence to supply B because B never asked him to, it was held that the guarantee was void as lacking consideration.¹³⁸ So also where the surety guaranteed past debts in consideration of the creditor agreeing to supply such goods as he might think fit to the debtor, it was held that the guarantee was not binding in the absence of evidence that goods had in fact been supplied¹³⁹; although the creditor had apparently promised to supply the debtor, the promise was illusory since the creditor was not obliged to supply unless he wished, and the consideration had therefore to be found in an actual supply.

Footnotes

- 122 e.g. *Go Capital Ltd v Phull [2020] EWHC 1235 (Ch)* at [46]–[47]. For the requirements for deeds, see Vol.I, paras 1-080 et seq. It was suggested in *Amalgamated Investment & Pty Co Ltd v Texas Commerce International Bank Ltd [1982] Q.B. 84* that promissory estoppel could operate in the case of a representation that a transaction (there a guarantee) had legal effect even if the transaction was not binding (notably for want of consideration). The possibility of a guarantee being enforceable by way of estoppel in the absence of consideration is an example of the wider question of the relationship between the defensive nature of promissory estoppel and the doctrine of consideration which is discussed in Vol.I at para.6-106.
- 123 cf. *Pitts v Jones [2007] EWCA Civ 1301, [2008] 2 W.L.R. 1289* (consideration for promise of guarantee found in promisors' co-operation in making other transactions).
- 124 *French v French (1841) 2 M. & G. 644*. As to a guarantee of past and future transactions, see below, paras 47-024—47-026.
- 125 *Astley Industrial Trust Ltd v Grimston Electric Tools (1965) 109 S.J. 149*.
- 126 *Goldshede v Swan (1847) 1 Ex. 154*.
- 127 *Pau On v Lau Liu Long [1980] A.C. 614, 629; Longulf Trading (UK) Ltd v Niyazi Onen Gida Sanayi AS [2019] EWHC 1573 (Comm)* at [11]–[12] and see Vol.I, para.6-034. The passage in the text from "More difficulty" to the end was quoted with apparent approval by the court in *Longulf Trading (UK) Ltd v Niyazi Onen Gida Sanayi AS [2019] EWHC 1573 (Comm)* at [11].
- 128 *Crears v Hunter (1887) 19 Q.B.D. 341; Miles v New Zealand Alford Estate Co (1886) 32 Ch. D. 266; Provincial Bank of Ireland v Donnell [1934] N.I. 33*. cf. *Flying Music Co Ltd v Theater Entertainment SA [2017] EWHC 3192 (QB)* at [71]–[73] (forbearance to cancel performance of theatrical production which was the subject of contract with a company for non-payment held to be consideration for guarantee of that company's debts by its directors).
- 129 *Oldershaw v King (1857) 2 H. & N. 517; Crears v Hunter*, above.
- 130 See footnote above. See also *Clarke & Walker Pty v Thew (1967) 116 C.L.R. 465*.

- 131 *Johnston v Nicholls* (1845) 1 C.B. 251; *Boyd v Moyle* (1846) 2 C.B. 644; *White v Woodward* (1848) 5 C.B. 810. cf. *Tailby v HSBC Bank Plc* [2015] B.P.I.R. 143, Ch D (earlier provision of a continuing facility to principal debtor was a “real commercial benefit” to the guarantor and this constituted consideration).
- 132 *Harris v Venables* (1872) L.R. 7 Ex. 235, 240.
- 133 See, e.g. *Chapman v Sutton* (1846) 2 C.B. 634; *Morrell v Cowan* (1877) 7 Ch. D. 151.
- 134 *Butcher v Steuart* (1843) 11 M. & W. 857; *Goldshede v Swan* (1847) 1 Ex. 154; *Steele v Hoe* (1849) 14 Q.B. 431; *Edwards v Jevons* (1849) 8 C.B. 436; *Colbourn v Dawson* (1851) 10 C.B. 765; *Broom v Batchelor* (1856) 1 H. & N. 255.
- 135 *Bell v Welch* (1850) 9 C.B. 154.
- 136 *Hamilton v Watson* (1845) 12 Cl. & F. 109; cf. *Glyn v Hertel* (1818) 8 Taunt. 208 and, as to the meaning of an “advance”, *Burnes v Trade Credits Ltd* [1981] 1 W.L.R. 805.
- 137 Unless, of course, there is a separate consideration in respect of the past transactions, i.e. a requested forbearance or promise to forbear, see above, para.47-023. If the guarantee is expressed to be in consideration *both* of a forbearance in respect of past transactions, *and* entry into future transactions, it is presumably a question of construction whether the guarantee is conditional on the future transactions.
- 138 *Greenham Ready Mixed Concrete v CAS (Industrial Developments)* (1965) 109 S.J. 209.
- 139 *Westhead v Sproson* (1861) 6 H. & N. 728.

(c) - Grounds of Vitiating of the Contract

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Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 2. - Formation of the Contract

(c) - Grounds of Vitiating of the Contract

Introduction

- 47-027 In general, a contract of suretyship may be vitiating on the same grounds as other contracts, for example, it may be voidable on the ground of the creditor's fraud or undue influence. However, contracts of suretyship give rise to three particular questions which relate to possible vitiating elements: the first is under what circumstances the contract may be vitiating by the pre-contractual conduct not of the creditor but of a third party, notably, the principal debtor; the second is whether the nature of the contract demands a duty of disclosure on the part of the creditor by way of exception to the rule for contracts generally¹⁴⁰; and the third is whether the consumer's rights to redress in relation to certain unfair commercial practices in traders are available to a guarantor acting other than in the course of business against a creditor acting in the course of a business. The answer to this third question (which is in the negative) will be discussed in the wider context of the legislative protection of sureties.¹⁴¹

Vitiating of the contract and third party behaviour

- 47-028 As regards the first of these questions, a distinction can be drawn between those cases in which the ground on which the surety is seeking to avoid the contract depends on an action or omission on the part of the creditor or on the existence of a particular relationship between the creditor and himself, and those where it does not.

Mistake

- 47-029 In the case of vitiating on the ground of common fundamental mistake, the conditions for relief do not include any requirement as to the action or omission of the other party to the contract, nor do they rest on any special relationship between the parties, as does vitiating on the ground of presumed undue influence. Thus, where a surety seeks to avoid the contract on the grounds of common fundamental mistake by way of application of the doctrine in *Bell v Lever Bros Ltd*,¹⁴² it is irrelevant whether his mistake was caused by any (equally mistaken) action or omission of the creditor or whether it was caused by a third party. In *Associated Japanese Bank (International) Ltd v Crédit du Nord SA*¹⁴³ a bank, A, entered a sale and leaseback agreement with B in relation to four specified engineering machines and under which B received a sum of money from the bank. As a condition of the transaction, another bank, C, agreed to guarantee B's obligations under it. It was later discovered that the leaseback transaction was a fraud by B who had deceived both banks, there being no machines in fact in existence. In an action by A against C under the guarantee, C's defence of common fundamental mistake was upheld: for both banks, the non-existence of the machines made the contract of guarantee essentially different from the one which they had believed they entered at contract.¹⁴⁴ The fact that the mistake of the guarantor was induced by the fraud of a third party is relevant only in that it provides a reasonable ground for the guarantor's belief, in the absence of which relief on this ground may be denied.¹⁴⁵

Non est factum

- 47-030 The position is similar in relation to non est factum. This ground of vitiating of a contract arises where a person who suffers from a disability, for example, blindness or illiteracy, signs or otherwise executes a document believing it to be essentially different from that which he has in fact signed, as long as he commits no negligence in so doing.¹⁴⁶ Although such a belief is often brought about by fraud or misrepresentation by the other party to the document, it appears that this is not necessary for the defence to apply.¹⁴⁷ In principle, therefore, a guarantor may rely on the defence of non est factum even where his mistake is induced by a third party (notably by the fraud of the principal debtor). For example, in *Lloyds Bank Plc v Waterhouse*¹⁴⁸ an illiterate farmer had signed a guarantee of a loan by a bank to his son, allegedly on the basis of a misrepresentation by the latter as to its effect. However, the Court of Appeal did not rely on this misrepresentation, by which the bank could also be said to be affected, as the basis for refusing to enforce the guarantee for the benefit of the bank,¹⁴⁹ but instead did so by upholding his defence of non est factum.

Fraud, misrepresentation or undue influence by the creditor

- 47-031 It is clear that a surety who has been induced to enter the contract by the fraud or misrepresentation of the creditor can avoid the contract, whether or not the latter has acted on the contract by granting credit to the principal debtor.

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U Similarly, a contract of suretyship may be avoided by the surety where the creditor has exercised actual undue influence on him in relation to the contract

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U or where the relationship between them gives rise to a presumption of undue influence.

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U It is clear, however, that the relationship between a bank and its customer is not one which ordinarily gives rise to a presumption of undue influence,

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U although on the facts actual undue influence may be proved.

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U In principle, a contract of suretyship may be vitiated on the ground of economic duress by the creditor on the surety, subject to the conditions for that ground of vitiating and bearing in mind that where a lawful threat of action by the creditor (such as a refusal to deal further with a company without the making of a personal guarantee by its directors) is unlikely to be illegitimate where justified by the creditor's commercial self-interest.

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Fraud, misrepresentation or undue influence by a third party

- 47-032 For a party to a contract to avoid it on the ground of fraud, misrepresentation, actual undue influence or duress, he must show some action or conduct by the other party to the contract, whether this is a misrepresentation of fact or wrongful conduct amounting to undue influence

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U or illegitimate pressure amounting to duress.

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U In the case of presumed undue influence, a party must show the existence of a relationship which gives rise to that presumption between himself and the other party.

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U More difficult, therefore, is the question whether a creditor may be affected by the fraud, misrepresentation, duress or actual undue influence of a third party, often the principal debtor, on the surety and whether he will be affected by the existence of a relationship which gives rise to a presumption of undue influence between such a third party and the surety.

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U Older authorities give clear support for three propositions. First, a creditor is responsible for the actions and is imputed with the knowledge of any agent whom he chooses to employ in the transaction.

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U For example, in *Lloyds Bank Ltd v Bundy*,

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U a transaction entered by a bank with the defendant as a result of the actual undue influence of its bank manager was set aside, the manager acting for the bank in the transaction. Secondly, where the creditor knows of or is otherwise a direct party to the misrepresentation or undue influence by the principal debtor to the surety, then the contract of suretyship is voidable at the latter's option.

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U Similarly, where a creditor knows of the existence of a relationship giving rise to a presumption of undue influence between a third party and the surety, then the contract of suretyship is voidable at the surety's option (though this proposition has been qualified by the decision of the House of Lords in *Etridge's* case as described below

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U Thirdly, as Lord Cranworth LC stated in *Owen v Homan*,

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U where:

“... the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain [the surety's] concurrence, [the creditor] is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge.”

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- 47-033 In the modern law, a not infrequent problem has arisen in which a bank (the creditor) agrees to lend money to a husband (the principal debtor)¹⁶⁷ if his wife agrees to stand surety or to a charge on the matrimonial home. The husband often undertakes to obtain his wife's agreement to the transaction and in order to do so he may resort to misrepresentation or the exercise of actual undue influence (there being no presumption of undue influence between a husband and wife).¹⁶⁸ The courts have used various analyses to determine whether the creditor bank is to be affected by this wrongful conduct in the principal debtor. While older authority recognised that in some circumstances the creditor could be affected by the wrongful act of the husband,¹⁶⁹ after 1985 the courts distinguished two types of situation. Where the bank was able to be said to have entrusted to the principal debtor the task of obtaining the execution of the document, then the latter is constituted the creditor's agent for this purpose so as to infect the creditor with any undue influence he may have exercised or misrepresentation which he may have made.¹⁷⁰ On the other hand, where the bank had not so entrusted the principal debtor, it was unaffected by any undue influence or misrepresentation of the principal debtor, nor is it under an obligation to see that the surety is separately advised.¹⁷¹

Creditor on constructive notice: *Barclays Bank Plc v O'Brien*¹⁷²

- 47-034 However, in *Barclays Bank Plc v O'Brien*,¹⁷³ the House of Lords rejected this resort to the notion of agency to analyse the relationships of the parties in this type of case, stigmatising it as artificial.¹⁷⁴ The House of Lords preferred to rely instead on the ordinary equitable doctrine of notice.¹⁷⁵ Thus, according to Lord Browne-Wilkinson, with whom the rest of their Lordships agreed:

“A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (e.g. against a creditor) if either the husband was acting as the third party's agent¹⁷⁶ or the third party had actual or constructive notice of the facts giving rise to her equity.”¹⁷⁷

Lord Browne-Wilkinson indicated that constructive notice would be found by the courts where the creditor knew of certain facts which put him on inquiry as to the possible existence of the rights of the other and he failed to make such inquiry or take such other steps as were reasonable to verify

whether such earlier right did or did not exist.¹⁷⁸ In the present context, this would be the case where the transaction to be guaranteed is on its face of no financial advantage to the wife and, secondly, where the relationship between the parties is such that there is a substantial risk that the husband has committed some legal or equitable wrong in obtaining her consent which would allow the wife to set it aside.¹⁷⁹ His Lordship noted that in the ordinary case:

“... a creditor will have satisfied these requirements if it insists that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice.”¹⁸⁰

It was further observed that this doctrine of notice could apply wherever there is an emotional relationship of cohabitation between the principal debtor and the would-be surety or where otherwise the creditor is aware that the surety reposes trust and confidence in the principal debtor in relation to his or her financial affairs.¹⁸¹ Finally, it is clear that this approach based on notice of an equitable right can also apply to cases where a third party is in a relationship with the surety which gives rise to a presumption of undue influence, as long as the creditor has notice of the circumstances from which the court derives the presumption.¹⁸² So, for example, where a bank is aware that the principal debtor is the surety's solicitor, it would be put on notice as to the presumption of undue influence which arises between a solicitor and his client.¹⁸³

Etridge's case

⁴⁷⁻⁰³⁵ *Barclays Bank Plc v O'Brien*¹⁸⁴ was later followed by the House of Lords in *Royal Bank of Scotland v Etridge (No.2)*,¹⁸⁵ where the foundation and implications of the doctrine of constructive notice were explained and refined.¹⁸⁶ In *Etridge (No.2)*, the House of Lords made clear that this doctrine was to be confined to cases of suretyship where the relationship between the principal debtor and the surety is non-commercial¹⁸⁷ and where the transaction between the lender and the surety is on its face to the disadvantage of the latter.¹⁸⁸ Where this is the case, the lender is said to be “put on inquiry” as to the circumstances in which the suretyship contract was made. As to past cases, the lender will escape being fixed with constructive notice if it took:

“... steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice ... For the future a bank satisfies these requirements if it insists that the wife attend a private meeting with a representative of the bank at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice. In exceptional cases the bank, to be safe, has to insist that the wife is separately advised.”¹⁸⁹

Where a lender entrusts this task to an independent legal adviser, the House of Lords indicated the steps which such an adviser ought to take.¹⁹⁰

Non-disclosure

- 47-036 Some early nineteenth century authority suggests that a creditor owes a duty of disclosure to a would-be surety as to those facts which are material to the risk which the surety would run if he enters the contract. In *Railton v Mathews*,¹⁹¹ a case which concerned the situation of a person standing surety for the fidelity of a person who is the servant or agent of the creditor, Lord Campbell stated that:

“... if the [creditors] had facts within their knowledge which it was material the surety should be acquainted with, and which [they] did not disclose ... the undue concealment of those facts discharges the surety.”¹⁹²

However, in *Hamilton v Watson* the House of Lords held that a bank which knew of the existence of a debt already owed by the debtor did not have to disclose this fact to the guarantor of a further loan, which was used to repay the first.¹⁹³ Lord Campbell rejected the guarantor’s argument that “it is essentially necessary that every thing should be disclosed by the creditor that is material for the surety to know”.¹⁹⁴ In his view:

“If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept: whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner—for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure.”¹⁹⁵

However, Lord Campbell considered the following to be:

“... the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect.”¹⁹⁶

For this purpose, the courts distinguished clearly between contracts of guarantee and contracts of insurance, which at common law require disclosure of all material facts.¹⁹⁷ However, in *London General Omnibus Co Ltd v Holloway*,¹⁹⁸ the Court of Appeal allowed a surety for the fidelity of a servant to avoid the contract on the ground of the creditor's failure to disclose previous known dishonesty of the servant by treating this failure as a misrepresentation:

“Not to disclose such dishonesty is a misrepresentation ... because by non-disclosure the master must be assumed to be contracting on the assumption ... that the suretyship relates to a servant whom the master at the time of taking the security does not know to have been guilty of dishonesty in such service.”¹⁹⁹

This approach clearly seeks to assimilate the position governing contracts of suretyship to the rule applicable to contracts generally which, while denying the existence of a duty of disclosure, allows a partial disclosure of facts to be treated as misrepresentation.²⁰⁰ On the other hand, it has been held that there is no duty on a banker to disclose to a surety the fact that the principal debtor's husband is an undischarged bankrupt and has authority to draw on her account.²⁰¹ And it has been held that the scope for non-disclosure or incomplete disclosure amounting to implied misrepresentation is considerably reduced where the contract is made in the context of an elaborate regime of disclosure undertaken by the parties in response to specific requests for information by the would-be surety: here there is “essentially the environment of caveat emptor”.²⁰²

- 47-037 The question of the existence or extent of a duty of disclosure in contracts of suretyship was the subject of comment by their Lordships in *Royal Bank of Scotland Plc v Etridge (No.2)*.²⁰³ While it was accepted that a suretyship contract is not a contract uberrimae fidei and that there is no general duty of disclosure,²⁰⁴ Lord Scott quoted with approval Vaughan Williams LJ's statement in *London General Omnibus Co Ltd v Holloway* to the effect that there is a “general proposition that a creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist, for the omission to mention that such a fact does exist is an implied representation that it does not”.²⁰⁵ He referred to a dictum of King CJ in the Supreme Court of South Australia, according to whom the duty of disclosure extends to:

“... unusual features surrounding the transaction between the creditor and the surety: (1) of which the creditor is or ought to be aware; (2) of which the surety is unaware and (3) which the creditor appreciates, or ought in the circumstances to appreciate might be unknown to the surety and might affect his decision to enter into the guarantee.”²⁰⁶

In Lord Scott's view:

“... this statement of the extent of the disclosure obligation may be too wide. But at least, in my opinion, the obligation should extend to unusual features of the contractual relationship between the creditor and the principal debtor, or between the creditor and other creditors of the principal debtor, that would or might affect the rights of the surety.”²⁰⁷

Moreover, Lord Nicholls regarded it as:

“... a well-established principle that ... a creditor is obliged to disclose to a guarantor any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor might naturally expect”.²⁰⁸

However, “[t]he precise ambit of this disclosure obligation remains unclear”.²⁰⁹

- 47-038 Further light was cast on the creditor’s duty of disclosure by *North Shore Ventures Ltd v Anstead Holdings Inc*,²¹⁰ where the Court of Appeal reviewed earlier authorities.²¹¹ The court concluded that the instrument before it was:

“... not a contract uberrimae fidei but a loan guarantee. The authorities are clear that in such a case the duty of disclosure does not go further than the limit set by Lord Campbell in *Hamilton v Watson* and by Lord Scott of Foscote in *Royal Bank of Scotland Plc v Etridge (No. 2)*.²¹² Accordingly there is no duty to disclose facts or matters which are not unusual features of the contractual relationship between the creditor and the debtor, or between the creditor and other creditors of the debtor.”²¹³

The Court of Appeal therefore held the contract of guarantee binding on the surety, even though the creditor had failed to disclose that the principal debtors were being investigated for embezzlement and that their bank accounts had been frozen as these were not “unusual features of the contractual relationship between the creditor and the debtor”.²¹⁴ Although it was not therefore necessary for its decision, the Court of Appeal also expressed the view that where a duty of disclosure does arise the creditor is not absolved from it because he reasonably believes that the surety knows of it already: “[i]f the belief of the creditor turns out to be not well founded then ... he should suffer the consequences not the surety”.²¹⁵ On the other hand, in *Deutsche Bank AG v Unitech Global Ltd* the Court of Appeal held that where the contract provided that the guarantor owed “an obligation to indemnify [the creditor] if any amount is not recoverable on the basis of a guarantee ‘for any reason’”, then these “wide words” would encompass irrecoverability by reason of non-disclosure and so allow recovery under this true indemnity provision.²¹⁶ It has indeed been held

that the limited duty of disclosure applicable to contracts of guarantee does not apply to contracts of indemnity.²¹⁷

Liability in damages for misrepresentation and non-disclosure

47-039 A creditor who induces a surety to enter the contract by fraud²¹⁸ or misrepresentation of fact²¹⁹ may clearly be liable in damages in tort in accordance with the general position. More difficult is the extent of a creditor's liability in damages in the tort of negligence. In *Perry v Midland Bank Plc*,²²⁰ it was held that once a bank had undertaken the task of explaining the nature and effect of a transaction, then its failure to do so adequately would entail liability in damages by way of application of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.²²¹ Moreover, in *Cornish v Midland Bank Plc*, Kerr LJ expressed the view that a bank is under a duty at least to its own customers to proffer some adequate explanation of the nature and effect of the document which is executed between them.²²² In *Barclays Bank Plc v O'Brien*,²²³ as a result of which in certain circumstances a creditor would find it necessary to proffer such an explanation,²²⁴ Scott LJ accepted that:

“... if the surety is a customer²²⁵ or if the creditor assumes the role of advisor, it may be that the creditor will be found to have owed a contractual or a tortious duty of care to the surety.”²²⁶

But he added that:

“... if there is no more than that the creditor, in an attempt to satisfy itself that the surety properly understands the proposed transaction and that the transaction will not subsequently be impeachable, offers an explanation of the transaction and of the security document, I do not think that the creditor should be taken to have assumed a tortious duty of care. If the explanation was inadequate, the security might not be enforceable but it would not follow that liability in damages would attach.”²²⁷

Footnotes

140 For the general position, see Vol.I, para.9-021 and see below, paras 47-036—47-039.

141 Below, paras 47-153—47-154.

142 [1932] A.C. 161. See also *Great Peace Shipping Ltd v Tsavliris Salvage Ltd* [2002] EWCA Civ 1407, [2003] Q.B. 679 where the existence of a distinct equitable jurisdiction for mistake

was denied on the ground of its being irreconcilable with *Bell v Lever Bros Ltd*, on which see Vol.I, paras 8-055—8-060.

143 [1989] 1 W.L.R. 255.

144 [1989] 1 W.L.R. 255 at [68]–[69]. The court also held that as a matter of construction the guarantee contained an implied condition that the machines in fact existed.

145 cf. [1989] 1 W.L.R. 255 at [68] and see Vol.I, para.8-039.

146 See, e.g. *O'Brien v Australia and New Zealand Bank Ltd* (1971) 5 S.A.S.R. 347 (difference between a guarantee of future indebtedness and a guarantee and indemnity of future indebtedness not sufficiently fundamental to sustain a plea of non est factum).

147 See *Saunders v Anglia Building Society* [1971] A.C. 1004 and Vol.I, paras 5-049 et seq.

148 [1991] Fam. Law 23. cf. *Barclays Bank Plc v Schwartz*, *The Times*, 2 August 1995.

149 This defence had been pleaded at first instance but was abandoned on appeal.

150 *Mackenzie v Royal Bank of Canada* [1934] A.C. 468; and see s.1(b) of the Misrepresentation Act 1967 and Vol.I, para.9-152. An “entire agreement clause” in a contract of suretyship may, depending on its terms, exclude liability in the creditor based on collateral warranty or misrepresentation, subject to applicable legislative controls: *Pananicola v Sandhu* [2011] EWHC 1431 (QB), [2011] 2 B.C.L.C. 811, [41], [44], [46] and cf. Vol.I, paras 9-153, 9-160 and 15-031. Following the general position, where a guarantor is aware of his right of rescission for misrepresentation by the creditor, he may lose it by affirmation: *Luttman-Johnson v West Sussex Agri Ltd, Re Luttman-Johnson* [2021] EWHC 2580 (Ch), [2022] B.P.I.R. 53 at [44]–[51]; and on the general law see Vol.I, paras 9-141—9-142.

151 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326.

152 See Vol.I, paras 10-072 et seq.

153 *National Westminster Bank Plc v Morgan* [1985] A.C. 686, 708–709; *Goldsworthy v Brickell* [1987] Ch. 378.

154 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326.

155 *Instagroup Ltd v Carroll* [2022] EWHC 464 (QB) at [70]–[71] and [78]–[86] referring in particular to *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40, [2021] 3 W.L.R. 727. On the general requirements for duress see Vol.I, paras 10-003 et seq. and on the illegitimacy of the threat in lawful act economic duress see paras 10-056—10-065.

156 See *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180; and see *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, 209, in which Lord Browne-Wilkinson expressed the view that actual undue influence is a species of fraud.

157 Burrows, A Restatement of the English Law of Contract, 2nd edn (2020), ss.37(1) and 39, observing (at p.212) that the law governing undue influence or misrepresentation by third

parties presumably applies also to duress. On the law of duress generally see Vol.I, paras 10-047 et seq.

①158 See Vol.I, paras 10-082—10-083 where the important decision of the HL on the proper categorisation of undue influence in *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* is discussed.

①159 See generally Vol.I, paras 10-139 et seq.

①160 *Barwick v English Joint Stock Bank (1867) 2 L.R.Ex. 259, 265; Bank of Montreal v Stuart [1911] A.C. 120*; and see *UBAF v European American Banking Corp [1984] Q.B. 713* (company liable for misrepresentation by duly authorised agent); *O'Sullivan v Management Agency and Music Ltd [1985] 1 Q.B. 428, 470* (company affected by undue influence of share-holding directors).

①161 [1975] Q.B. 326.

①162 *Spencer v Handley (1842) 4 M. & G. 414; O'Sullivan v Management Agency and Music Ltd*, above, at 447–448 and 464.

①163 See para.47-035.

①164 cf. *O'Sullivan v Management Agency and Music Ltd [1985] 1 Q.B. 428* at 464.

①165 (1853) IV H.L.C. 997.

①166 (1853) IV H.L.C. 997 at 1035.

167 In some cases, the husband is not the principal debtor but, for example, a director of a limited company which is the principal debtor. As long as the surety has no direct financial interest in the company, this situation is treated no differently from where it is the principal debtor himself who defrauds the surety: see *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180, 199*.

168 *Mackenzie v Royal Bank of Canada [1934] A.C. 468; Kings North Trust Ltd v Bell [1986] 1 W.L.R. 119; Midland Bank Plc v Sheppard [1988] 2 All E.R. 17*. See further *Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44, [2002] 2 A.C. 773* at [32]–[33], [36]; *Thompson v Foy [2009] EWHC 1076 (Ch)* at [100]–[101]; *Hewett v First Plus Financial Group Plc [2010] EWCA Civ 312, [2010] 2 F.L.R. 177* at [29]–[30] (relating the parties' relationship of trust and confidence to a duty of disclosure in the husband); *Royal Bank of Scotland v Chandra [2011] EWCA Civ 192, [2011] Bus. L.R. D149* especially at [31]–[32]; *Annulment Funding Co Ltd v Cowey [2010] EWCA Civ 771, [2010] B.P.I.R. 1304* and Vol.I, para.10-119.

169 *Turnbull & Co v Duval [1902] A.C. 429*. The basis of this decision was considered “obscure” by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien [1994] 1 A.C. 180* at 191.

- 170 *Kings North Trust Ltd v Bell*, above; *Coldunell Ltd v Gallon [1986] Q.B. 1184*; *Avon Finance Co Ltd v Bridger (1979) reported [1985] 2 All E.R. 281* (both cases of adult children obtaining elderly parents' agreements).
- 171 *Coldunell v Gallon [1986] Q.B. 1184*; *Bank of Baroda v Shah [1988] 3 All E.R. 24*.
- 172 For more detailed discussion of this topic, see Vol.I, paras 10-141—10-155.
- 173 *[1994] 1 A.C. 180*.
- 174 *[1994] 1 A.C. 180* at 195. cf. *[1993] Q.B. 109, 113, 144, CA*.
- 175 *[1994] 1 A.C. 180, 195*.
- 176 Lord Browne-Wilkinson made clear that the term agent here was to be understood in a real sense and that such cases will be rare: *[1994] 1 A.C. 180* at 195.
- 177 *[1994] 1 A.C. 180* at 195.
- 178 *[1994] 1 A.C. 180* at 195–196.
- 179 In *CIBC Mortgages Plc v Pitt [1994] 1 A.C. 200*, the House of Lords followed this approach based on notice, but held that on the facts there was nothing in the nature of the transaction to put the lender on notice of the risk of either undue influence or fraud by a husband to his wife.
- 180 *[1994] 1 A.C. 180* at 196.
- 181 *[1994] 1 A.C. 180* at 198.
- 182 This was assumed by the House of Lords in *CIBC Mortgages Plc v Pitt [1994] 1 A.C. 200* at 211 and cf. *Bainbrigge v Browne (1881) 18 Ch. D. 188, 197*.
- 183 See Vol.I, para.10-108. In *Barclays Bank Plc v O'Brien*, Scott LJ noted that none of the decided cases of the previous decade had concerned a case of presumed undue influence by the principal debtor over the surety: *[1993] Q.B. 109, 113*.
- 184 *[1994] 1 A.C. 180*.
- 185 *[2001] UKHL 44, [2002] 2 A.C. 773*.
- 186 See further Vol.I, paras 10-144—10-155.
- 187 *Moody v Condor Insurance Ltd [2006] EWHC 100 (Ch), [2006] 1 All E.R. 934* (fraud in the principal debtor practised on a commercial guarantee corporation and unknown to the creditor does not affect the validity of the guarantee).
- 188 *[2001] UKHL 44* at [41], [44]–[49] and see *Mahon v FBN Bank (UK) [2011] EWHC 1432 (Ch) [2011] B.P.I.R. 1029* at [51], [59]; Vol.I, para.10-148.
- 189 *[2001] UKHL 44* at [50] and see Vol.I, paras 10-149—10-150.
- 190 *[2001] UKHL 44* at [56], [64]–[67]. See Vol.I, para.10-151.
- 191 *(1844) 10 Cl. & Fin. 934*.
- 192 *(1844) 10 Cl. & Fin. 934* at 943. cf. *Owen v Homan (1851) 3 Mac. & G. 378, 396*, where Lord Truro stated that the rule as to disclosure is the same for contracts of suretyship and of insurance.
- 193 *(1845) 12 Cl. & Fin. 109*, 118.
- 194 *(1845) 12 Cl. & Fin. 109* at 119.
- 195 *(1845) 12 Cl. & Fin. 109* at 119.
- 196 *(1845) 12 Cl. & Fin. 109* at 119.
- 197 *The North British Insurance Co v Lloyd (1854) 10 Ex. 523, 533*. See further *Seaton v Heath [1899] 1 Q.B. 782, 792* and see above, paras 44-033 et seq. The position at common law

as regards insurance was radically reformed by the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) and the [Insurance Act 2015](#), as explained above, paras 44-046 et seq.

198 [\[1912\] 2 K.B. 72](#).

199 [\[1912\] 2 K.B. 72](#) at 77, per Vaughan Williams LJ. cf. [Smith v Bank of Scotland \(1813\) 1 Dow. 272, 292](#); and [Lee v Jones \(1864\) 17 C.B.\(N.S.\) 482, 503](#). In the case of a continuing guarantee this limited duty of disclosure will continue to operate as regards the future liability of the surety. If, therefore, the surety engages for the honesty of an employee, and the employer discovers that the employee has been dishonest, but instead of dismissing him, continues him in his employment without notifying the surety of the facts, the surety will not be liable for subsequent defaults by the employee: [Phillips v Foxall \(1872\) L.R. 7 Q.B. 666](#); [Sanderson v Aston \(1873\) L.R. 8 Ex. 73](#).

200 See Vol.I, paras 9-021, 9-024.

201 [Cooper v National Provincial Bank \[1946\] K.B. 1](#); and see [National Provincial Bank v Glanusk \[1913\] 3 K.B. 335](#); [Westpac Securities Ltd v Dickie \[1991\] 1 N.Z.L.R. 657](#).

202 [Geest Plc v Fyffes Plc \[1999\] 1 All E.R. \(Comm\) 672, 685](#).

203 [\[2001\] UKHL 44, \[2002\] 3 W.L.R. 1021](#).

204 [\[2001\] UKHL 44, \[2002\] 3 W.L.R. 1021](#) at [112], per Lord Hobhouse of Woodborough; at [185], per Lord Scott of Foscote.

205 [\[1912\] 2 K.B. 72, 78](#).

206 [Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd \(1991\) 58 S.A.S.R. 184](#).

207 [\[2001\] UKHL 44](#) at [188].

208 [\[2001\] UKHL 44](#) at [81]. cf. [Levett v Barclays Bank Plc \[1995\] 1 W.L.R. 1260](#) at 1273 and [Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department \[1996\] 1 Lloyd's Rep. 200, 227 \(affirmed on other grounds \[2000\] 1 A.C. 486\)](#) in which it was accepted that a creditor must disclose any unusual features in the transaction, but that this did not extend to unusual features of the risk.

209 [\[2001\] UKHL 44](#) at [81].

210 [\[2011\] EWCA Civ 230, \[2012\] Ch. 31](#).

211 Notably, [Hamilton v Watson \(1845\) 12 Cl. & Fin. 109](#); [National Provincial Bank v Glanusk \[1913\] 3 K.B. 335](#); [Smith v Bank of Scotland 1997 S.C. \(H.L.\) 111](#), especially at 118; [London General Omnibus Co Ltd v Holloway \[1912\] 1 K.B. 72](#); [Royal Bank of Scotland Plc v Ettridge \(No.2\) \[2001\] UKHL 44, \[2002\] 3 W.L.R. 102](#).

212 [\[2001\] UKHL 44](#) at [188], above, para.47-037.

213 [\[2011\] EWCA Civ 230](#) at [31], per Sir Andrew Morritt C (with whom Smith LJ agreed); [Deutsche Bank AG v Unitech Global Ltd \[2013\] EWHC 2793 \(Comm\), \[2014\] 2 All E.R. \(Comm\) 268](#) at [47], [49]–[51] (affirmed on other grounds [\[2016\] EWCA Civ 119, \[2016\] 1 W.L.R. 3598](#) though see at [19]); [Barclays Bank Plc v Borkhatria \[2018\] EWHC 1326 \(Comm\)](#) at [19]–[23]. In [Borkhatria](#), it was said that while in principle the limited duty of disclosure does not continue after the execution of the guarantee, it is arguable that it revives in relation to variations of the guarantee and also in relation to requests to the guarantor to consent to variations to the contract between the creditor and debtor which would otherwise have discharged the guarantee: [\[2018\] EWHC 1326 \(Comm\)](#) at [32]–[37].

- 214 *[2011] EWCA Civ 230* at [32]. The CA did not express a view on the question whether a suitably drafted term of the guarantee could exclude the effect of an otherwise operative non-disclosure on the validity of the contract of guarantee: *[2011] EWCA Civ 230*.
- 215 *[2011] EWCA Civ 230* at [37], per Sir Andrew Morritt C.
- 216 *[2016] EWCA Civ 119*, *[2016] 1 W.L.R. 3598* at [20] applied by *Barclays Bank Plc v Borkhatria* *[2018] EWHC 1326 (Comm)* at [41]–[46].
- 217 *GPP Big Field LLP v Solar EPC Solutions SL* *[2018] EWHC 2866 (Comm)* at [127]–[130], [143] and [148] (Richard Salter QC sitting as a Deputy Judge of the HC) referring (at [128]) to “long-standing and authoritative dicta” in support of this view (*Duncan Fox & Co v North & South Wales Bank (1880) 6 App. Cas. 1* at 10–11 (Lord Selbourne L.C.)), to *Deutsche Bank AG v Unitech Global Ltd* *[2016] EWCA Civ 119* (which proceeded on the basis that the duty does not apply to contracts of indemnity), and considering that the limited duty of disclosure for guarantors is “in modern conditions … anomalous and difficult to justify”. It was further held that any such a duty of disclosure had not been breached: *[2018] EWHC 2866 (Comm)* at [153] and [156].
- 218 See Vol.I, para.9-055.
- 219 *Misrepresentation Act 1967 s.2(1)*. See further Vol.I, para.9-083. This would apparently apply also to misrepresentations of law: Vol.I, para.9-020. As will be seen (below, paras 47-153—47-154), a “consumer surety” cannot have a “right to redress” under *Pt 4A of the Consumer Protection from Unfair Trading Regulations 2008* (SI 2008/1277) and this means that such a person does not lose any right to damages under *s.2 of the 1967 Act* by way of application of *s.2(4)*: see above, para.40-220.
- 220 *[1987] F.L.R. 237* (decision at first instance not challenged on appeal).
- 221 *[1964] A.C. 465*. It is unclear how the interpretation of *Hedley Byrne* on the basis of “assumption of responsibility” taken by the House of Lords in *Henderson v Merrett Syndicates Ltd* *[1995] 2 A.C. 145*; *White v Jones* *[1995] 2 A.C. 207*; and *Williams v Natural Life Health Foods Ltd And Mistlin* *[1998] 1 W.L.R. 830* will affect the approach of the courts to liability in the tort for negligent non-disclosure, but the tendency of these decisions has been to extend liability for pure economic loss: see further Vol.I, paras 3-074 et seq.
- 222 *[1985] 3 All E.R. 513, 522–523*.
- 223 *[1993] Q.B. 109 (affirmed on different grounds [1994] 1 A.C. 180)*.
- 224 *[1993] Q.B. 109, 140* and see above, para.47-034.
- 225 Purchas LJ expressed the view that the duty of care in *Perry v Midland Bank Plc* *[1987] F.L.R. 237* arose purely from the fact that the surety was also the bank’s customer: *[1993] Q.B. 109, 147*.
- 226 *[1993] Q.B. 109, 140–141*.
- 227 *[1993] Q.B. 109* at 140–141. No view was expressed on this issue in the House of Lords: *[1994] 1 A.C. 180*.

(d) - Effect on Surety of Vitiating of the Transaction Guaranteed

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 2. - Formation of the Contract

(d) - Effect on Surety of Vitiating of the Transaction Guaranteed

Incapacity of principal debtor: minors

- 47-040 Formerly, the question whether a surety who had undertaken to meet a liability which was void as against the principal debtor on account of the latter's minority, was himself liable was said to depend on whether the contract was a guarantee or an indemnity. If he had merely guaranteed the liability, it was held that he could not be liable because there was no default by the minor in not meeting the liability, and the surety could not be called upon to meet his liability unless there was such default.²²⁸ Where, on the other hand, the surety had assumed a primary liability to indemnify the creditor in any event, the minority of the debtor provided no defence to the surety.²²⁹ The significance of this distinction here, which had been the subject of criticism, was removed by [s.2 of the Minors' Contracts Act 1987](#) which provides that where a guarantee is given in respect of an obligation of a party to a contract which is itself unenforceable against that party because he was a minor, then the guarantee shall not for that reason alone be unenforceable against the guarantor.²³⁰
- 47-041 It is uncertain whether the distinction drawn formerly between guarantees and indemnities in relation to a minor's obligations applies to a surety who engages to answer for the ultra vires liability of a company (though the impact of the ultra vires doctrine has been considerably attenuated²³¹). In *Garrard v James*²³² it was held that the question was one of construction. If the surety intends to assume the risk of non-payment by the debtor on the grounds of financial inability only, he will not be liable if the reason for the non-payment is legal incapacity rather than financial inability; if, on the other hand, the surety intends to assume the risk of non-payment for any reason, then he is liable even if the reason for non-payment is legal incapacity.²³³ It is thought that this is a better approach than that adopted in the cases concerned with minors, but in *Yeoman Credit Ltd v*

*Latter*²³⁴ (itself such a case) it seems to have been assumed that the distinction between a guarantee and an indemnity governs the company cases in the same way as it did the minority cases.

Other invalidating cause

- 47-042 Where the transaction guaranteed by the surety is affected by some other invalidating cause, e.g. fraud or misrepresentation, the question whether the surety is liable may again depend on the distinction between a contract of guarantee and a contract of indemnity. If the contract is one of guarantee the surety cannot be liable if the principal debtor is not liable.²³⁵ But there is no reason why a contract of indemnity should not be so drafted as to extend to losses incurred by the creditor even under a void transaction, though clear words would probably be needed to produce such a result.²³⁶ On the other hand, where a contract of suretyship guarantees the payment of a certain sum, this sum having been agreed by the parties to represent the amounts payable under a contract for services rendered to the principal debtor, the surety cannot avoid liability by pointing to a “manifest error” as regards the computation of the liabilities of the principal debtor.²³⁷

Footnotes

- 228 *Coutts & Co v Browne-Lecky* [1947] K.B. 104; *Stadium Finance Co Ltd v Helm* (1965) 109 S.J. 471. The correctness of *Coutts & Co v Browne-Lecky*, above, was reserved in *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep. 289.
- 229 *Wauthier v Wilson* (1912) 28 T.L.R. 239; *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828.
- 230 The *Minors' Contracts Act 1987* also repealed s.1 of the Infants' Relief Act 1874 whose provisions were the basis for the distinction definitively removed by s.2 of the 1987 Act in relation to minors.
- 231 See above, Vol.I, paras 12-020 et seq.
- 232 [1925] Ch. 616; see also *Heald v O'Connor* [1971] 1 W.L.R. 497, 506. The ultra vires doctrine was largely, though not wholly, abrogated by s.9 of the European Communities Act 1972: see Vol.I, paras 12-027 et seq. and *TCB Ltd v Gray* [1985] Ch. 621 (affirmed [1987] Ch. 458).
- 233 [1925] Ch. 616 at 622.
- 234 See above, in which *Yorks Ry Wagon Co v Maclare* (1881) 19 Ch. D. 478, another company case, was explained in this way.
- 235 *Swan v Bank of Scotland* (1836) 10 Bligh.(N.S.) 627; *Brown v Blaine* (1884) 1 T.L.R. 158; *Temperance Loan Fund Ltd v Rose* [1932] 2 K.B. 522; *Barclays v Prospect Mortgages Ltd* [1974] 1 W.L.R. 837. But cf. Vol.I, para.10-066, as to duress.
- 236 cf. *Bentworth Finance Ltd v Lubert* [1968] 1 Q.B. 680, 686; *Gulf Bank KSC v Mitsubishi Heavy Industries (No.2)* [1994] 2 Lloyd's Rep. 145.

237 *Try Build Ltd v Blue Star Garages Ltd [1999] 66 Con. L.R. 90.*

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Section 3. - Formalities

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 3. - Formalities

Statute of Frauds 1677 s.4. ²³⁸

- 47-043 This section provides that:

“... no action shall be brought ... whereby to charge the defendant upon any special promise to answer for the debt default or miscarriage of another person ... unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.”

“Debt, default or miscarriage”

- 47-044 These words appear to cover any form of legal liability, so that a promise by A to pay compensation to B for a tort committed by C against B in consideration of B not suing C, is within the statute and must be evidenced in writing.²³⁹ Moreover, they have been held to cover an agreement to give a guarantee, as well as an actual guarantee.²⁴⁰ On the other hand, it has been said that:

“... since a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is primarily liable to the creditor, it follows that if, or at any rate in so far as, a contract covers loss to the creditor which does not involve a liability of the other to him, that contract cannot be a contract of guarantee.”²⁴¹

Thus, a contract under which a person stands “surety” for a building contractor’s due *performance* of a contract and which is subject to a condition of automatic termination on that contractor’s voluntary liquidation is not a contract of guarantee since it imposes responsibility on the “surety” on the mere *non-performance* of the contractor’s obligations and not only on their breach, there being no breach on operation of the condition.²⁴² The requirements of the section do not apply to an agreement which varies a guarantee and which is relied on by a guarantor as a defence to an action on the guarantee,²⁴³ but they do apply to any subsequent agreement between the guarantor and the creditor which creates a new contract of guarantee.²⁴⁴

Guarantees and indemnities distinguished

- 47-045 It has been established from a very early date that the words “debt, default or miscarriage of another person” mean that the section only applies where there is some person other than the surety who is primarily liable.²⁴⁵ The section therefore applies when the surety assumes a secondary liability and agrees to be answerable if the principal debtor fails to meet his liability, but it does not apply where the surety assumes a primary liability. This is the origin of the distinction between contracts of guarantee and contracts of indemnity, the former falling within the section, and the latter outside it.

A question of substance rather than of form

- 47-046 The question whether or not a person agrees “to answer for the debt … of another person” is one of substance rather than of form.²⁴⁶ So, where a chairman of a company (the principal debtor) told a creditor that he would make sure that the money owed would be forthcoming, it was held that in substance the chairman had promised to answer for payment by the debtor so as to come within s.4 of the Statute of Frauds.²⁴⁷ In *Actionstrength Ltd v International Glass Engineering INGLE SpA*,²⁴⁸ the claimant was a building sub-contractor which, fearing non-payment by the main contractor, obtained a promise from the employer that the latter:

“… would ensure that the claimant would receive any amount due to it from [the main contractor] … if necessary by redirecting to the claimant payments due by [the employer] to the [main contractor].”²⁴⁹

The main contractor was not party to this agreement nor had it accepted that money due to it could be paid to the claimant. The employer applied to the court to strike out the sub-contractor’s claim as possessing no reasonable prospect of success on the ground, *inter alia*, that even on the assumption that the factual allegations of the sub-contractor were true, the agreement constituted a guarantee

and failed for lack of the requisite formalities under the [Statute of Frauds](#). The Court of Appeal agreed, holding that the agreement as alleged was a guarantee. According to Simon-Brown LJ:

“If payment to the creditor (of an assumed contingent liability) is to be made only from funds which the promisor would otherwise have to pay the debtor, that is one thing and understandably outside the Statute. The payment claimed here seems to me quite another thing. It is, indeed, on analysis quite inaccurate to describe it as a payment out of funds otherwise due to the [main contractor]. Rather it would be a payment out of the [employer’s] own funds since the [main contractor] would still remain entitled to be paid.”²⁵⁰

Thus, the absence of the agreement of the main contractor to the redirection of the funds by the employer (and therefore the potential for discharge of the debt owed to it by the employer by the latter’s payment of the sub-contractor) was crucial to determining whether it was a guarantee. If agreement by the main contractor had been forthcoming, the agreement would have created a primary liability in the employer (the agreement being “tantamount to, if not in strict law, a novation or assignment of liability”), but in its absence it was clear that the employer had agreed to accept a secondary liability in respect of the main contractor’s liabilities.²⁵¹

A question of construction

- 47-047 According to Lord Diplock in *Moschi v Lep Air Services Ltd*, in distinguishing between guarantees and indemnities, “every case must depend upon the true construction of the actual words in which the promise is expressed”.²⁵² However, it has been said that:

“The fact that the parties have used the word ‘guarantee’ is not itself conclusive, but in doubtful cases it may provide some guide, especially if the word is repeated a number of times in the document … Another guide is whether the creditor’s rights against the principal debtor and against the guarantor, or indemnifier, are co-extensive. If the person liable under the contract may be liable for a greater amount than the principal debtor, the contract is probably one of indemnity.”²⁵³

On the other hand, it has been held that the absence of usual provisions included in contracts of guarantee (for example, to permit variation of the obligations or giving of time without discharge of the surety) is “at best neutral” in construing a promise as a guarantee or an indemnity.²⁵⁴ In common with the general position, this process of construction should bear in mind the factual matrix in which the words were used by the parties.²⁵⁵

Examples

- 47-048 Given that s.4 applies only where there is some person other than the surety who is primarily liable, it does not apply where there has never been any party liable other than the defendant.²⁵⁶ So, if A orders goods and instructs them to be delivered to B, and the intention of the parties is that A alone is to be liable for the price, this does not fall within the section.²⁵⁷ This is not indeed a contract of suretyship at all but a mere contract for the sale of the goods to A. But if the intention of the parties is that the recipient of the goods is to be primarily liable, and the other party is only to be liable if the recipient does not pay, this is a contract of guarantee within the section.²⁵⁸ Similarly, the section does not apply where there was originally another party liable to the creditor but his liability has been discharged. So if A agrees to pay B a debt owed to B by C, and B agrees to discharge C, this is a novation and not within the section²⁵⁹: A is not agreeing to meet C's liability, for that liability has gone; he is agreeing to meet a new liability which is his alone, and the section does not apply.²⁶⁰ The same is true where C owes a debt to B and B agrees to discharge C in return for a new joint obligation undertaken by A and C together; A is not undertaking to answer for C's old debt (for that has gone) but for the new joint debt on which he is primarily liable.²⁶¹ It has also been held that a promise by A to B that A will pay to C a debt due from B to C is not within the section; if the promise were made by A to C it would be a promise to answer for the debt "of another", but where the promise is made to B himself, it is a promise to answer for the promisee's own debt and not for the debt "of another".²⁶² So also a promise by a principal debtor to indemnify another if he will act as surety for him is not within the section for the debtor is undertaking to answer for his own debt or default and not for that "of another".²⁶³ A further example may be found in the situation where A agrees with C that he will put B in funds to pay B's liabilities to C, as in the case where A agrees to fund B's litigation costs to be incurred by C (B's solicitor) in circumstances where it was clear that B was not able to pay them himself.²⁶⁴ This contract was interpreted as an agreement by A to pay C for his legal services "in any event"²⁶⁵ and independently of any default by B: A's liability was therefore primary rather than secondary and fell outside the statute.²⁶⁶ Moreover, quite apart from the use of words of indemnification, a clause according to which the promisor agrees to be "bound by any acknowledgment or admission by the [first debtor] and by any judgment" in favour of the creditor against the first debtor clearly indicates the imposition of a primary liability; and a "conclusive evidence" provision in the same clause demonstrates that the liability of the promisor is not dependent upon any conclusive determination of the first debtor's liability to the creditor, and this provides "a compelling indication that the [promisor's] liability under the deed of indemnity is primary rather than secondary".²⁶⁷ Finally, there may be a third possibility beyond the distinction between a guarantee and an indemnity, that is, that an alleged guarantor or surety has not taken on any personal obligation (primary or secondary) but has merely acted as an agent for a third party primarily liable, by doing no more than, for example, communicating what that third party

is itself to do to satisfy the primary liability, as in the case where a company director says that he will see to it that the company performs a given task, which is not necessarily to be construed as that director taking any obligation on himself personally.²⁶⁸

- 47-049 Even where there is another debtor it does not necessarily follow that the contract is one of guarantee within the section. Thus if two debtors contract jointly (or jointly and severally) each is answerable for his own debt, and not for the debt of the other, and the case is not within the section. And where the liability assumed by the defendant is different from the liability assumed by the other debtor the case will not be within the section, for it cannot be said here that the defendant has promised to answer for the debt or default of another. Thus where a person acts as surety for a debtor under a consumer credit agreement, but the surety's liability extends to situations in which the debtor himself is not liable, this is a contract of indemnity not within the section, for the surety has clearly assumed a separate and distinct obligation, and is not merely guaranteeing the debtor's obligations.²⁶⁹ On the other hand, where A agrees to "assume full responsibility for ensuring" that B "has and will at all times have sufficient funds and other resources to fulfil and meet all duties, commitments and liabilities" to C, then this promise gives rise to a "see to it' obligation": B's liability is primary, A's is secondary and A's agreement constitutes a guarantee.²⁷⁰

Guarantee only if secondary liability as against creditor

- 47-050 In considering whether the surety has undertaken a primary or a secondary liability, it must be recalled that the position as between the creditor and the surety may differ from the position as between the surety and another debtor.²⁷¹ If two joint debtors agree as between themselves that one is to be primarily liable and the other to bear a secondary liability only, this will create the relationship of principal debtor and surety as between them. But if they both assume a joint primary liability as against the creditor there will be no contract of guarantee within the section.²⁷²

Guarantee as incident to wider transaction

- 47-051 Even where a person clearly does promise to answer for the debt, default or miscarriage of another, the promise will not be within the section where it is merely an incident to a wider transaction. The question is whether the main object of the parties is that one should guarantee the liability of another or whether the promise arose as an incident to a wider transaction with a different object (where the promise is to be seen as one of indemnity).²⁷³ So, for example, where a person contracts to buy goods as agent for a principal on the terms that he is to be liable for the price if the principal fails to pay, this does not fall within s.4 even though the agent is in a sense promising to answer for the debt of the principal, for the object of the parties is to effect a sale of goods, not to enter

into a contract of guarantee.²⁷⁴ Similarly, where a person promises to pay off an encumbrance on property in which he has an interest in order to secure its release, the mere fact that the encumbrance arose out of another's debt does not bring the case within the section.²⁷⁵ On the other hand, where a company director guarantees the debts of a company, this falls squarely within the section²⁷⁶ even though the director may himself have a charge on the company's assets.²⁷⁷ And the mere fact that the promise is related to one or more other transactions does not take the promise outside s.4. So, in *Pitt v Jones*, the managing director and major shareholder in Company A wished to sell his shares to Company B (which was to finance the purchase by borrowing the money from Company A).²⁷⁸ In order to effect the sale, the director persuaded the minor shareholders (and employees) of Company A not to exercise their right of pre-emption over his own shares and to agree to the loan by Company A; he also arranged that the minority shareholders should enjoy an option to sell their own shares to Company B and agreed with them that if Company B could not pay for their shares on exercise of this option, he would do so. In these circumstances, the Court of Appeal held that while these transactions were linked, they were not one identical transaction: the director had no interest in the contract between the minority shareholders and Company B "in the sense that he could not possibly benefit" from the share-options, though the latter were a way of persuading the minority shareholders to co-operate with the sale of his own shares.²⁷⁹ As a result, the director's promise to pay for their shares if Company B did not do so fell within s.4 and was unenforceable for want of formality.

"Implied guarantees"

- 47-052 In *Silverburn Finance (UK) Ltd v Salt*,²⁸⁰ continuing written personal guarantees by a company's directors had been terminated by guarantors at the same time as the termination by the company of the main contract in respect of which the guarantees had been made. About a month later, a new main contract was concluded by the company on the same terms as previously and the question arose as to the position of the guarantors. Although it had not been pleaded, the question was raised by the Court of Appeal as to whether the guarantees could be implied on the renewal of the earlier main agreement. In Mummery LJ's opinion:

"... any implication of an agreement to supply a guarantee would face the difficulty of non-compliance with the statutory requirement of writing. That requirement cannot be satisfied by reference back to the guarantees [earlier supplied in writing], as they had been revoked. They are only written evidence of guarantees that have since ceased to exist."²⁸¹

Rix LJ agreed at least in the absence of an express agreement that the old guarantees would stand as a sufficient note or memorandum of the new or revived guarantees.²⁸²

Requirements of the section ²⁸³

- 47-053 The section requires that the agreement or a note or memorandum thereof should be in writing, and this has been held to mean that all the material terms of the contract must be stated in the writing.²⁸⁴ It was formerly held that the writing should also include a statement of the consideration but this gave rise to many difficulties, and it was eventually provided by [s.3 of the Mercantile Law Amendment Act 1856](#) that this should no longer be necessary in the case of contracts of guarantee.

Written agreement or note or memorandum

- 47-054 As Lord Brandon observed in *Elpis Maritime Co Ltd v Marti Chartering Inc Co (The Maria D)*,²⁸⁵ [s.4](#) provides two ways in which a guarantee may be enforceable: the first is by having a written agreement signed by the party to be charged or by his agent and the second is by having a note or memorandum of the agreement similarly signed.²⁸⁶ Where, therefore, A has previously made an oral agreement with B to guarantee C's liabilities to B, it is immaterial whether A's subsequent signature of a document incorporating the terms of such a guarantee was made on its own behalf or only as agent for C. For if A signed on its own behalf as a contracting party, then the oral agreement became subsumed in the written one and is enforceable in the first way which [s.4](#) provides. On the other hand, if A signed as agent for C, the oral agreement of guarantee between A and B does not become subsumed in the written one, but the written one duly signed is nevertheless a memorandum of the oral agreement so as to satisfy the second way which [s.4](#) provides.²⁸⁷ The memorandum need not be prepared for the purpose of satisfying the statutory requirement of written evidence. Any writing which contains the requisite particulars will suffice so long as it comes into existence before an action is brought on the contract.²⁸⁸

Written agreement

- 47-055 The Court of Appeal has held that the written agreement for the purposes of the Statute can be contained in "a sequence of negotiating emails or other documents of the sort which is commonplace in ship chartering and ship sale and purchase", although it reserved the question whether "the pattern of contract negotiation and formation habitually adopted in other areas of commercial life" would present difficulty for the adoption of the same approach.²⁸⁹

Note or memorandum

- 47-056 In order to satisfy the Statute the document which is relied on as a note or memorandum of the agreement must itself acknowledge or recognise the existence of a contract and this cannot be the case where it is expressed as “subject to contract”.²⁹⁰ It must also contain a statement of its material terms.²⁹¹ On the other hand, it has been held that:

“... where ... there is an offer in writing made by the party to be bound which contains the essential terms of what is offered *and* the party to be bound accepts that his offer has been accepted unconditionally, albeit orally, there is a sufficient note or memorandum to satisfy section 4.”²⁹²

It is sometimes possible for two documents to be read together so as to find a note or memorandum satisfying the section, but in order for this to be done it is necessary that the document containing the defendant’s signature should contain some reference, express or implied, to the other document which it is sought to read with the first²⁹³; and any memorandum or note:

“... must not only state the terms of the contract but also contain an acknowledgment or recognition by the signatory to the document that a contract had been entered into.”²⁹⁴



Rectification and the Statute

- 47-057 Where as a result of a shared mistake a guarantee instrument does not record the common intention of the parties, and the creditor is entitled to invoke the court’s equitable jurisdiction to rectify the instrument so as to accord with their common intention, the creditor’s claim under the instrument as so rectified does not offend s.4 of the Statute of Frauds.²⁹⁵

Signature to agreement or memorandum²⁹⁶

- 47-058

The note or memorandum of the guarantee must be “signed by the party to be charged” or by his agent.

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U It is not necessary that it should be signed by the other party to the transaction.²⁹⁸ Nor for this purpose need it be a “signature” in the popular sense for it suffices if the defendant’s name is written or printed by himself or even by an agent²⁹⁹; and it may appear anywhere in the document so long as it is intended to authenticate the whole document.³⁰⁰ Where the defendant wrote and signed a guarantee which contained a mistake, and on the mistake being discovered, he wrote a memorandum across the original guarantee correcting the mistake, but did not sign it afresh, it was held that his original signature was a signature of the whole and satisfied the section.³⁰¹ And where the director of a company agreed orally to guarantee the company’s liabilities and signed a contract on behalf of the company, but omitted to sign a guarantee form in the same document, it being orally agreed that his one signature should be sufficient to deal also with his personal capacity, it was held that the requirements of the statute had been satisfied.³⁰² Moreover, as has been indicated, where an agent has orally agreed to a personal guarantee, but signs a document which includes such a guarantee only on behalf of his principal, he is bound personally: “[t]he question is not what is the intention of the person signing the memorandum, but is one of fact, viz is there a note or memorandum of the promise signed by the party to be charged?”³⁰³ On the other hand, it has been held that where an alleged guarantee was contained in an email sent with the would-be guarantor’s authority, the automatic insertion of an email address in the message by an internet service provider did not constitute a signature by its writer within the meaning of s.4 as it did not represent any intention to authenticate the message by the writer.³⁰⁴ However, the court accepted that:

“... if a party or a party’s agent sending an e-mail types his or her or his or her principal’s name to the extent required or permitted by existing case law in the body of an e-mail, then ... that would be sufficient signature of the purposes of section 4 [of the Statute of Frauds].”³⁰⁵

Alteration in memorandum

- 47-059 Where a memorandum is altered after it has been signed either in order to correct a mistake in the written statement of an existing contract³⁰⁶ or before the parties are contractually bound at all,³⁰⁷ parol evidence is admissible to show that the signature was intended to apply to the memorandum as altered.³⁰⁸ But such signature cannot authenticate subsequent alterations which

effect a variation of a contract concluded and binding on the parties at some time previous to the alterations.³⁰⁹

Effect of non-compliance with the section

- 47-060 It is well settled that a failure to comply with the section renders the contract unenforceable rather than void.³¹⁰ So far as contracts of guarantee are concerned, the principal consequence of this is that the section may be satisfied by a written document which is made or signed only after the contract was originally created. Thus a recital in a will confirming a guarantee previously given orally has been held to satisfy the section.³¹¹

Estoppel

- 47-061 In *Actionstrength Ltd v International Glass Engineering IN GL EN SpA*³¹² the House of Lords considered how, if at all, a person could be estopped from relying on the invalidity of a guarantee owing to its failure to fulfil the requirements of s.4 of the Statute of Frauds. There a sub-contractor entered into an agreement with the main contractor to supply labour to enable the latter to build a factory for an employer. When arrears built up on the sums due to it from the contractor, the sub-contractor threatened to withdraw its labour and, it alleged, concluded a contract with the employer by which the latter promised to ensure that the sub-contractor received any amount due to it from the main contractor. The sub-contractor then continued to supply labour for the project, allegedly in reliance on this contract. The Court of Appeal had held that the alleged agreement fell within s.4 of the Statute³¹³ and before the House of Lords the sub-contractor did not challenge this decision, but argued either as a matter of estoppel or otherwise, more generally, that it would be unconscionable for the employer to rely on the Statute and to go back on its promise on which it had relied.³¹⁴ However, the House of Lords rejected these arguments. For Lord Hoffmann,

“The terms of the Statute of Frauds ... show that Parliament, although obviously conscious that it would allow some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious. This means that while normally one would approach the construction of a statute on the basis that Parliament was unlikely to have intended to cause injustice by allowing people to break promises which had been relied upon, no such assumption can be made about the Statute of Frauds. Although the scope of the Statute of Frauds must be tested on the assumption that the facts alleged by [the sub-contractor] are true, it must not be construed in a way which would undermine its purpose.”³¹⁵

None of the facts before the House distinguished the case from those which attend the giving of every guarantee: the only assurance given to the sub-contractor was the promise of guarantee itself.³¹⁶ On these facts, therefore, the purpose of the Statute should not be subverted by the acceptance of an estoppel.³¹⁷ On the other hand, two of their Lordships indicated the circumstances in which an estoppel could apply so as to prevent reliance on the Statute.³¹⁸ So, Lord Clyde suggested that what is required is “some additional encouragement, inducement or assurance” and “some influence exerted by [the employer] on [the sub-contractor] to lead it to assume that the promise would be honoured”.³¹⁹ For Lord Walker of Gestingthorpe, an example of when estoppel may arise in this context would be where there was some:

“... unambiguous representation that there was an enforceable contract, or that [the employer] would not take any point on s.4 of the Statute of Frauds.”³²⁰

Consumer credit agreements

- 47-062 Contracts of guarantee (which for this purpose include certain contracts of indemnity) relating to consumer credit agreements and to consumer hire agreements may also be affected by the special requirements of the *Consumer Credit Act 1974*, for the details of which reference should be made to Ch.41.³²¹

Footnotes

- 238 See generally, *Actionstrength Ltd v International Glass Engineering INGLEN SpA [2003] UKHL 17, [2003] 2 A.C. 541*. On satisfying the statutory requirements of form as regards contracts concluded by electronic means, see Vol.I, paras 7-007—7-012.
- 239 *Kirkham v Marter (1819) 2 B. & Ald. 613*.
- 240 *Compagnie Generale d'Industrie v Myson Group Ltd (1984) 134 New L.J. 788*.
- 241 *Northwood Development Co Ltd v Aegon Insurance Co (UK) Ltd (1994) 10 Const. L.J. 157, 163*, per HH Judge Harvey QC.
- 242 *Northwood Development Co Ltd v Aegon Insurance Co (UK) Ltd*, above.
- 243 *Re a Debtor (No.517 of 1991), The Times, 25 November 1991*.
- 244 *Samuels Finance Group Plc v Beechmanor Ltd (1994) 67 P. & C.R. 282, 284–285*.
- 245 *Birkmyr v Darnell (1705) 1 Salk. 27*; and see cases cited in 1 Sm.L.C., 13th edn, 331.

- 246 *Motemtronic Ltd v Autocar Equipment Ltd* Unreported 20 June 1996, CA (Civ) transcript No.656 of 1996, referred to by CA in *Actionstrength Ltd v International Glass Engineering INGLE SpA* [2001] EWCA Civ 1477, [2002] 1 W.L.R. 566 (*affirmed on other grounds* [2003] UKHL 17, [2003] 2 A.C. 541) both citing with approval the dictum to this effect of Vaughan Williams LJ in *Harburg India Rubber Comb Co v Martin* [1902] 1 K.B. 778, 784–785; *Quest 4 Finance Ltd v Maxfield* [2007] EWHC 2313 (QB), [2007] 2 C.L.C. 706.
- 247 *Motemtronic Ltd v Autocar Equipment Ltd*, above. See also *Erith Holdings Ltd v Murphy* [2017] EWHC 1364 (TCC) at [88] and [90].
- 248 [2001] EWCA Civ 1477, [2002] 1 W.L.R. 566. The decision of the Court of Appeal on this point was not appealed to the House of Lords, on whose decision on a defence of estoppel; see [2003] UKHL 17, [2003] 2 A.C. 541 and below, para.47-061.
- 249 [2001] EWCA Civ 1477, [2002] 1 W.L.R. 566 at [17].
- 250 [2001] EWCA Civ 1477, [2002] 1 W.L.R. 566 at [35]. The CA rejected the contention that there is a rule of law according to which there is no guarantee within the **Statute of Frauds** where the promisor does not undertake to be liable generally but only in respect of specific funds or sources within his control: at [47]–[51], not following in this respect *Harvey v Edwards Dunlop & Co Ltd* (1927) 39 C.L.R. 302, 311, per Higgins J.
- 251 [2001] EWCA Civ 1477 at [34]–[35].
- 252 [1973] A.C. 331, 349. See also *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2010] All E.R. (D) 86 (Oct) at [19]–[27]; *Multiplex Construction Europe Ltd v Dunne* [2017] EWHC 3073 (TCC), [2018] B.L.R. 36 at [40]–[42] (referring to the significance of the commercial purpose of the provision contained in a wider transaction); *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) at [122]–[126]. In *Abbhi v Slade* [2019] EWCA Civ 2175, [2019] 2 C.L.C. 949 at [44], it was observed that in determining whether a contract created a primary or a secondary liability, while the circumstances of the case and the terms of the contract are ones of fact, the question “whether or not a contract on those terms is or is not a contract of guarantee is an issue of legal classification and thus a question of law” (per Flaux LJ, with whom King and David Richards LJJ agreed).
- 253 *Clement v Clement* (1996) 71 P. & C.R. D19, CA, per Warner J, quoted with approval by Peter Gibson LJ in the CA. See also *Dennis v Revenue and Customs Commissioners* [2018] UKFTT 735 (TC), [2019] S.F.T.D. 593 at [31]–[34], [44]–[46], where a clause in a shareholders’ agreement was held not to constitute a “guarantee” of a loan for the purposes of s.253(4) of the Taxation of Chargeable Gains Act 1992 on the ground that the principle of co-extensiveness was not satisfied, it being added that in the circumstances there was also no meaningful right of subrogation, this being a normal incident of a contract of guarantee).
- 254 *Associated British Ports v Ferryways NV* [2008] EWHC 1265 (Comm), [2008] 2 Lloyd’s Rep. 353 at [61], per Field J, quoted with approval by Maurice Kay LJ (with whom Sir Anthony Clarke MR and Jacob LJ agreed) [2009] EWCA Civ 189, [2009] 1 Lloyd’s Rep. 595 at [12].
- 255 *Clement v Clement*, above and see below, paras 47-065 et seq. and Vol.I, paras 15-047 et seq. esp. at paras 15-055—15-060.
- 256 *Lakeman v Mountstephen* (1874) L.R. 7 H.L. 17.
- 257 *Birkmyr v Darnell* (1705) 1 Salk. 27.

- 258 *Simpson v Penton* (1834) 2 Cr. & M. 430.
- 259 As to novation, see Vol.I, para.22-089.
- 260 *Goodman v Chase* (1818) 1 B. & Ald. 297; *Butcher v Steuart* (1843) 11 M. & W. 857.
- 261 *Ex p. Lane* (1846) 1 De G. 300.
- 262 *Eastwood v Kenyon* (1840) 11 A. & E. 438; *Guild & Co v Conrad* [1894] 2 Q.B. 885, discussed and followed by *Abbhi v Slade* [2019] EWCA Civ 2175, [2019] 2 C.L.C. 949 at [44]–[49].
- 263 *Thomas v Cook* (1828) 8 B. & C. 728.
- 264 *Abbhi v Slade* [2019] EWCA Civ 2175, [2019] 2 C.L.C. 949 at [45]. *Abbhi v Slade* was applied in *Credico Marketing Ltd v Lambert* [2021] EWHC 1504 (QB) at [226] where a document entitled “guarantee” and containing indemnities also contained a clause containing “a free-standing and independent obligation … which was not a promise to be liable for the obligation of another party in the event that the other party failed to comply with an obligation owed to the person seeking to enforce the guarantee”. This obligation was held to be unaffected by the requirements of the *Statute of Frauds*.
- 265 [2019] EWCA Civ 2175 at [46]. The CA later noted that, under the oral agreement, A’s obligation to put B in funds arose *before* any liability in B arose to C and was therefore not coterminous with B’s: at [50]. On the rule of construction that *prima facie* a surety’s obligations are co-extensive with those of the principal debtor, see below, para.47-071.
- 266 [2019] EWCA Civ 2175 at [49], applying the analysis of the CA in *Guild & Co v Conrad* [1894] 2 Q.B. 885. The CA considered that it made no difference that A’s obligation was to put B in funds to pay C rather than to pay C directly: at [50].
- 267 *ABM AMRO Commercial Finance Plc v McGinn* [2014] EWHC 1674 (Comm), [2014] 2 Lloyd’s Rep. 333 at [36], per Flaux J, followed by *Catalyst Business Finance Ltd v Very Tangy Television Ltd* [2018] EWHC 1669 (QB) at [41]–[47].
- 268 *MyBarrister Ltd v Hewetson* [2017] EWHC 2624 (Ch), [2018] Bus. L.R. 752 at [62]–[63].
- 269 *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828; *Unity Finance Ltd v Woodcock* [1963] 1 W.L.R. 455; *Goulston Discount Co Ltd v Clark* [1967] 2 Q.B. 493. See also *Consumer Credit Act* 1974 s.113(7).
- 270 *Associated British Ports v Ferryways NV* [2008] EWHC 1265 (Comm), [2008] 2 Lloyd’s Rep. 353 at [60], per Field J, quoted with approval by Maurice Kay LJ (with whom Sir Anthony Clarke MR and Jacob LJ agreed) [2009] EWCA Civ 189, [2009] 1 Lloyd’s Rep. 595 at [11] (not in the context of the *Statute of Frauds*).
- 271 See above, paras 47-003—47-005.
- 272 But it has been held that there may still be a contract of guarantee for other purposes: *Heald v O’Connor* [1971] 1 W.L.R. 497. cf. the position in relation to bills of exchange. While the position of a person liable as drawer or indorser of a bill of exchange is in some respects similar to that of a surety for the acceptor (*Duncan Fox & Co v North & South Wales Bank* (1880) 6 App. Cas. 1, 19), he cannot set up the *Statute of Frauds* as a defence to an action on the bill: *McCall Brothers Ltd v Hargreaves* [1932] 2 K.B. 423. But he can do so if it is sought to impose on him a liability under a parol agreement, and the liability does not arise simply from his position as drawer or indorser under the *Bills of Exchange Act* 1882: *Steele v M’Kinlay* (1880) 5 App. Cas. 754; *Jenkins & Sons v Coomber* [1898] 2 Q.B. 168.

- But contrast *Lombard Banking Ltd v Central Garage & Engineering Co* [1963] 1 Q.B. 220; *Yeoman Credit v Gregory* [1963] 1 W.L.R. 343.
- 273 *Sutton v Grey* [1894] 1 Q.B. 285; *Harburg India Rubber Co v Martin* [1902] 1 K.B. 778, 786; *Pitt v Jones* [2007] EWCA Civ 1301, [2008] 2 W.L.R. 1289 at [32].
- 274 *Couturier v Hastie* (1852) 8 Exch. 40; reversed on other grounds (1856) 5 H.L.C. 673; *Sutton v Grey*, above.
- 275 *Fitzgerald v Dressler* (1859) 7 C.B.(N.S.) 374; *Marginson v Ian Potter & Co* (1976) 136 C.L.R. 161.
- 276 *Harburg India Rubber Co v Martin* [1902] 1 K.B. 778.
- 277 *Davys v Buswell* [1913] 2 K.B. 47.
- 278 *Pitt v Jones* [2007] EWCA Civ 1301, [2008] 2 W.L.R. 1289.
- 279 [2007] EWCA Civ 1301 at [36]–[38], per Smith LJ.
- 280 [2001] EWCA Civ 279, [2001] 2 All E.R. (Comm) 438.
- 281 [2001] EWCA Civ 279, [2001] 2 All E.R. (Comm) 438 at [32].
- 282 [2001] EWCA Civ 279, [2001] 2 All E.R. (Comm) 438 at [40].
- 283 There is authority on earlier provisions governing contracts for the sale or other disposition of an interest in land under the **Statute of Frauds s.4** and **s.40 of the Law of Property Act 1925** for the view that if a material term has been omitted from the memorandum, a claimant may waive such a term where it is solely for his benefit and not of a major importance, and enforce the contract without the term in question: *Morrell v Studd and Millington* [1913] 2 Ch. 648, 660; *North v Loomes* [1919] 1 Ch. 378, 385–386; *Ram Narayan s/o Shankar v Rishad Hussain Shah s/o Tusaduq Hussain Shah* [1979] 1 W.L.R. 1349, 1351. Conversely, a party may cure the omission of a term to his detriment by consenting to perform it: *Martin v Pycroft* (1852) 2 De G.M. & G. 785; *Scott v Bradley* [1971] Ch. 850. Contrast *Burgess v Cox* [1951] Ch. 383, 391. The formal requirements governing contracts for the sale or other disposition of land are now contained in **s.2 of the Law of Property (Miscellaneous Provisions) Act 1989**, on which see Vol.I, paras 7-013 et seq.
- 284 *Holmes v Mitchell* (1859) 7 C.B.(N.S.) 361; *State Bank of India v Kaur* [1996] 5 Bank L.R. 158; *MP Services Ltd v Lawyer* (1996) 72 P. & C.R. D49.
- 285 [1992] 1 A.C. 21; and see *Baughen* (1992) Conv. 330. There is no requirement that any note or memorandum must always postdate the “main contract”, i.e. the contract whose obligations are guaranteed or be contemporaneous with it: *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2011] EWHC 56 (Comm), [2011] 2 All E.R. (Comm) 95 at [77], per Christopher Clarke J (affirmed without reference to this point [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542).
- 286 [1992] 1 A.C. 21 at 27.
- 287 [1992] 1 A.C. 21 at 33; and see below, para.47-058.
- 288 See *Lucas v Dixon* (1889) 22 Q.B.D. 357 (sale of goods); cf. *Farr, Smith & Co Ltd v Messers Ltd* [1928] 1 K.B. 397 (sale of goods); *Daniels v Trefusis* [1914] 1 K.B. 788 (contracts for the sale of an interest in land).
- 289 *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542 at [22], per Tomlinson LJ and see further at [29] (with whom Rix LJ and Sir Mark Waller agreed).

- 290 *Carlton Communications Plc v Football League* [2002] EWHC 1650 at [78] applying *Tiverton Ltd v Wearwell Ltd* [1975] Ch. 146 (Law of Property Act 1925 s.40). See also *Motemtronic Ltd v Autocar Equipment Ltd* Unreported 20 June 1996, CA, transcript No.656 of 1996, per Aldous LJ.
- 291 [2002] EWHC 1650 at [79]; *Fairstate Ltd v General Enterprise & Management Ltd* [2010] EWHC 3072 (QB), [2010] All E.R. (D) 301 (Nov) at [58] and [88] (identification of principal debtor and duration of guarantee both material) and cf. above, para.47-053 (note) referring to the possibility of permitting a claimant to waive a material term omitted from a memorandum where it is solely for his benefit and not of a major importance.
- 292 *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) at [16], [2006] 2 All E.R. 881, per Judge Pelling QC.
- 293 *Timmins v Morland Street Property Ltd* [1958] Ch. 110 (a case on s.40 of the Law of Property Act 1925); *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] Lloyd's Rep. 542 at [24].
- ②294 *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265 at [24] per Tomlinson LJ, so interpreting *Timmins v Morland Street Property Ltd* [1958] Ch. 110 at 116; *Slade v Abbhi* [2018] EWHC 2039 (Comm) at [110]–[112]; affirmed on other grounds sub nom. *Abbhi v Slade* [2019] EWCA Civ 2175, [2019] 2 C.L.C. 949. cf. *Lynch v Cadwallader* [2021] EWHC 328 (Ch), [2021] B.P.I.R. 854 at [96]–[97].
- 295 *GMAC Commercial Credit Development Ltd v Sandhu* [2004] EWHC 716 (Comm), [2006] 1 All E.R. (Comm) 268, especially at [58]; following *USA v Motor Trucks Ltd* [1924] A.C. 196, PC (land contract) and see Vol.I, paras 5-057 et seq. on rectification more generally.
- 296 cf. the position under s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, on which see Vol.I, paras 7-041—7-045.
- ②297 The burden of proof as to the fact of signature is on the party relying on the guarantee on the balance of probabilities, and if the apparent signature of the person named as guarantor is denied by that person the court may hold on the overall evidence (including, but not limited to, expert evidence as to the signature) that the party relying on it has failed to discharge this burden of proof: *Lynch v Cadwallader* [2021] EWHC 328 (Ch), [2021] B.P.I.R. 854 at [74]–[83] and [99] (in the context of proof of debt in the alleged guarantor's bankruptcy); it was also found (at [85]) that the apparent witness to the signature had not signed. Where the original signed guarantee document cannot be found, signature may be established by other evidence: *Bank of Scotland v Mazamal Hussain* [2011] EWHC 1934 (QB) at [42]–[44]; *Mitsui OSK Lines Ltd v Salgaocar Mining Ltd* [2015] EWHC 565 (Comm) at [41].
- 298 *Laythoarp v Bryant* (1836) 2 Bing. N.C. 735.
- 299 *Leeman v Stocks* [1951] Ch. 941. And see Vol.I, paras 7-009—7-011 on the status of “electronic signatures” for this purpose.
- 300 *Caton v Caton* (1867) L.R. 2 H.L. 127.
- 301 *Bluck v Gompertz* (1852) 7 Ex. 862.
- 302 *VSH Ltd v BKS Air Transport Ltd* [1964] 1 Lloyd's Rep. 460.

- 303 *Re Hoyle [1893] 1 Ch. 84, 100*, per Smith LJ, quoted with approval by Lord Brandon in *Elpis Maritime Co Ltd v Marti Chartering Co Ltd (The Maria D) [1992] 1 A.C. 21* at 32–33; *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542* at [37].
- 304 *J Pereira Fernandes SA v Mehta [2006] EWHC 813 (Ch), [2006] 2 All E.R. 881* at [25]–[30], per Judge Pelling QC. cf. *Neocleous v Rees [2019] EWHC 2462 (Ch), [2020] 2 P. & C.R. 4* at [54] where it was said (for the purposes of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989) that no distinction should be drawn between a manually typed name at the end of an email and an “automatically” generated name as the latter “involved the conscious action at some stage of a person entering the relevant information and settings” in the email software: cf. Vol.I, para.7-043.
- 305 *J Pereira Fernandes SA v Mehta*, above, at [31]. See also *WS Tankship IIBV v Kwangju Bank Ltd [2011] EWHC 3103 (Comm), [2012] C.I.L.L. 3155* at [155] (bank causing its name to appear in header of “SWIFT message” is sufficient signature). It was common ground before (and accepted by) the CA that an electronic signature is sufficient and that a first name, initials or perhaps a nickname will suffice, as long as it was done in a manner which indicates that it is intended to authenticate the document: *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542* at [32]. These cases are discussed by the Law Commission, Electronic execution of documents, Consultation Paper No.237 (21 August 2018) paras 3.59–370 and see also Law Commission, Electronic execution of documents, Law Com. No.386 (3 September 2019), paras 3.25–3.26.
- 306 *Bluck v Gompertz (1852) 7 Ex. 862.*
- 307 *Stewart v Eddowes (1874) L.R. 9 C.P. 311* (sale of goods); *Koenigsblatt v Sweet [1923] 2 Ch. 314* (sale of land).
- 308 *New Hart Builders Ltd v Brindley [1975] Ch. 342* (sale of land). On the effect of alteration of the instrument of guarantee in any material particular without the knowledge or consent of the surety while in the hands of the party to whom it was given see below, para.47-120.
- 309 *New Hart Builders Ltd v Brindley [1975] Ch. 342* although the court considered that there was no logical ground for this distinction, 352.
- 310 *Leroux v Brown (1852) 12 C.B. 801; Maddison v Alderson (1883) 8 App. Cas. 467, 474.*
- 311 *Re Hoyle [1893] 1 Ch. 84.*
- 312 *[2003] UKHL 17, [2003] 2 All E.R. 615.*
- 313 *[2001] EWCA 1477, [2002] 1 W.L.R. 566*, see above, para.47-046.
- 314 *[2003] UKHL 17* at [16], [42].
- 315 *[2003] UKHL 17* at [20].
- 316 *[2003] UKHL 17* at [9], [28], [35], [53]–[54].
- 317 *[2003] UKHL 17* at [9], [53]. See similarly *Bank of Scotland v Wright [1990] B.C.C. 663*, see below, para.47-083 (no estoppel so as to extend guarantor’s liability beyond that to which it applies as a matter of construction of the document which satisfies the Statute of Frauds s.4).
- 318 Lord Hoffmann explicitly reserved this question: *[2003] UKHL 17* at [29]. Lord Bingham implicitly agreed with the position taken by Lord Walker of Gestingthorpe noted in the text: *[2003] UKHL 17* at [9].
- 319 *[2003] UKHL 17* at [35].

- 320 [2003] UKHL 17 at [51] referring to *Shah v Shah* [2001] EWCA Civ 527, [2002] Q.B. 35 (in the context of deeds) on which see Vol.I, para.1-100.
- 321 Above, paras 41-182 et seq.

Section 4. - Construction of the Contract

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Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 4. - Construction of the Contract

General

- 47-063 Difficult questions frequently arise as to the extent of the liability which the surety has undertaken. These are essentially questions as to the true construction of the contract in each particular case, and it is sufficient here to indicate the general approach of the courts to these questions and to draw attention to some of the principal types of difficulty which have arisen.³²² Despite some contradictory dicta in the cases,³²³ the traditional general approach seems to be that contracts of this kind must be strictly construed in favour of the surety and that no liability is to be imposed on him which is not clearly and distinctly covered by the contract.³²⁴ The strict approach applies also to attempts to exclude rules of common law or equity incidental to the contract of suretyship. As Lord Jauncey of Tullichettle observed:

“... there is no doubt that in a modern contract of guarantee parties may, if so minded, exclude any one or more of the normal incidents of suretyship. However if they choose to do so clear and unambiguous language must be used.”³²⁵

One reason for this strict construction may be that, in principle, the surety need receive no benefit from the contract which is, so far as he is concerned, gratuitous; this may not, however, be the case, for example, where the guarantor has a commercial interest in keeping the principal debtor afloat.³²⁶ Secondly, in most cases contracts of guarantee are drafted by the creditor and therefore, in cases of ambiguity, are traditionally to be construed *contra proferentem*, that is, against the creditor and in favour of the surety.³²⁷ However, it appears that the role of this traditional maxim of construction is less prominent than formerly and that, particularly in commercial cases between parties of equal bargaining power, the courts seek to resolve ambiguities in a contract term by reference to its context in the wider contract, its factual matrix and commercial common sense rather than by reference to this traditional maxim.³²⁸

- 47-064 The principle of strict construction does not mean that the court should not look beyond the terms of the written instrument. As in all cases of construction, the court is entitled to look at the surrounding circumstances in order to see what was the subject matter which the parties had in contemplation at the time the contract was made, and to determine the scope and object of the guarantee.³²⁹ A guarantee of a tenant's obligations under a lease may extend, on its true construction, to the liabilities of the tenant under a statutory continuation of the lease,³³⁰ but *prima facie* it seems that a guarantee of the covenants of a tenant on a lease do not so extend.³³¹ On the other hand, the court should not "disregard the clear wording of a document simply on the basis of an abstract expectation as to the bargain the parties might have struck".³³² Instead, there should be an indication in the document itself that general words were not intended to cover a particular circumstance. So, for example, the stipulation of a particular rate of interest on amounts owed under a secured guarantee indicated that an "all moneys and liabilities" clause should not include liability for assigned debts, since the opposite construction would allow the creditor to change the debtor's unsecured debts into secured ones and to alter the rate of interest without any consent on the part of the debtors, still less on the part of the guarantor.³³³

Modern approach to construction

- 47-065 Some of the cases decided on the construction of guarantees and indemnities upholding a strict construction were decided at a time before the modern approach to the construction of contracts in general had become firmly established and it may be questioned whether they are compatible with it. According to the modern approach to construction:

"… against the background of the admissible matrix of facts known to or at least reasonably available to the parties, the meaning sought is that of the language in question would convey to the reasonable man. In that context, the language used is to be given its natural and ordinary meaning, unless the reasonable man would conclude that something has gone wrong in expressing the parties' intentions."³³⁴

Viewed in this way, the reasonable man might conclude that the parties must, for whatever reason, have used wrong words or syntax.³³⁵

Application by courts to contracts of guarantee

- 47-066

This approach to construction has been applied by the courts to contracts of guarantee

³³⁶

U and in *Kookmin Bank v Rainy Sky SA* was applied by the Supreme Court to an “advance payment bond”, a form of refund guarantee.³³⁷ So, it has been held that where a promise of guarantee is ambiguous on its face as to who is to benefit from the guarantor’s undertaking, the court may look at extrinsic evidence to ascertain the proper meaning which the guarantee would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time it was given.³³⁸ Moreover, a contract of guarantee has also been construed so as to correct a clear mistake in its drafting. In *Vodafone Ltd v GNT Holdings (UK)*³³⁹ a director of a company, company A, had signed on its notepaper a guarantee of the obligations of its subsidiary, company B, and this was expressed to be for the benefit of company C. However, company B had entered an agreement not with company C but with company D, which was in the same group of companies as company C: company C was merely a holding company and no company in the group other than company D had entered such an agreement. In these circumstances, it was held that the guarantee was given by company A in respect of company B’s liabilities to *company D*: “something went wrong with the drafting of the [guarantee] letter ... To construe it literally would be a commercial nonsense.”³⁴⁰

- 47-067 However, courts have at times sounded more cautious notes as to the implications of the modern approach to construction in the context of guarantees. In *Fairstate Ltd v General Enterprise & Management Ltd*³⁴¹ the High Court followed the modern approach to construction, considering that these principles meant that, in a suitable case:

“... extrinsic evidence may be relied upon to identify the guarantor, the creditor, the principal debtor or the obligation to be guaranteed, where any of these have been inadequately or ambiguously described in the relevant document.”

But “the Court will be slow to deprive the defendant of a legitimate statutory defence [under the Statute of Frauds] on the basis of contested oral evidence alone”.³⁴² In particular, as earlier noted, where a mistake has led to the omission of a material term from any writing, the contract may be unenforceable under the Statute of Frauds, unless the court is able to rectify the written instrument under normal rules.³⁴³ In *Fairstate* itself:

“... the sheer length of the catalogue of corrections and additions that [the court] should have to make to the Guarantee Form in order to turn it into an effective guarantee for this transaction”

prevented it from doing so, as this would “be writing a new and different contract for the parties”.³⁴⁴ Moreover, in *Dumford Trading AG v OAO Atlantybfot*³⁴⁵ the Court of Appeal considered that (apart from the doctrines of rectification or misnomer³⁴⁶), where an existing person is named as guarantor in the guarantee document, there is a danger that extrinsic evidence from the surrounding matrix of facts could create an ambiguity otherwise not present.³⁴⁷ Where, therefore, company A in a group of companies was identified as guarantor by the document of guarantee, the court should not look at extrinsic evidence (such as the postal address given for this company) so as to construe this unambiguous reference as being to company B, a very similarly-named company in the same group.³⁴⁸

“Clear words” and “strict construction”

- 47-068 It has been suggested that “it may be that the concept that a guarantee should be ‘strictly construed’ now adds nothing” to the modern approach to interpretation,³⁴⁹ but in *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank Plc*³⁵⁰ the Court of Appeal took the view that the modern approach is not inconsistent with a maxim of construction which requires “clear words” to exclude or limit prevailing rules,³⁵¹ since:

“... the reasonable man does not expect fundamental principles of law, equity and justice, such as rights of set-off or of subrogation to be excluded unless the contract clearly says so.”³⁵²

The role of “business common sense”

- 47-069 In *Kookmin Bank v Rainy Sky SA*³⁵³ Lord Clarke of Stone-cum-Ebony (with whom Lord Phillips of Worth Matravers, Lords Mance, Kerr of Tonaghmore, and Wilson agreed) agreed with Lord Neuberger MR in *Pink Floyd Music Ltd v EMI Records Ltd*³⁵⁴ in considering that the *Investors Compensation* case and *Chartbrook Ltd v Persimmon Homes Ltd*³⁵⁵ show that:

“... the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant ... [T]he relevant reasonable person is one who has all the background knowledge which would have reasonably have been available to the parties in the situation in which they were at the time of the contract.”³⁵⁶

The particular issue before the Supreme Court was “the role to be played by considerations of business common sense in determining what the parties meant”,³⁵⁷ there being a contrast of approach in the Court of Appeal below.³⁵⁸ In Lord Clarke’s view, it is not necessary:

“... to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning.”³⁵⁹

Rather:

“... [i]f there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”³⁶⁰;

but “[w]here the parties have used unambiguous language, the court must apply it”.³⁶¹ The Supreme Court applied this approach to the construction of the advance payment bonds before it, with the result that, in the context, in the bank’s “promise to pay ... on your first written demand, all such sums due to [the buyer] under the [ship-building] Contract” the words “such sums” referred to refunds to which the buyer was entitled in the case of any insolvency event and not merely to “pre-delivery instalments” (as the banks had argued). For this purpose, the Court took into account the view of the experienced commercial judge at trial that the bank’s construction would have:

“... the surprising and uncommercial result that the Buyers would not be able to call on the Bonds on the happening of the event, namely the insolvency of the Builder, which would be most likely to require first class security.”³⁶²

Construction so as to “validate if possible”

- 47-070 In *Pavilion Property Trustees Ltd v Permira Advisers LLP*³⁶³ a contract of guarantee was concluded between a landlord of premises and the assignee of the tenant of those premises, but its terms were ambiguous as to whether the guarantor’s obligation related only to the obligations of the assignee or also to those of the “next assignee”. The effect of the *Landlord and Tenant (Covenants) Act 1995 s.25(1)*³⁶⁴ was held to be that:

“... if the guarantee is held to extend to the obligations of the Assignee and the Next Assignee, then the guarantee is either void in its entirety or void as to some part, if one can sever the provisions which impose a liability in relation to the obligations of the Next Assignee.”³⁶⁵

Given this effect, Morgan J considered that it was proper “to recall the Latin maxim *verba ita sunt intelligenda ut res magis valeat quam pereat* or, in English, ‘validate if possible’”³⁶⁶ and, as a result, to construe the guarantee in a way which avoided the illegality by holding that it extended only to the obligations of the assignee.³⁶⁷ On the other hand, in *Tindall Cobham 1 Ltd v Adda Hotels*³⁶⁸ (which concerned a clause in a lease which allowed the landlord to give consent to an assignment on the condition that the “tenant shall procure that the guarantor and any other guarantor of the tenant shall covenant by deed with the landlord” on certain terms), the Court of Appeal noted that the maxim *ut res magis valeat* originated in a concern in the courts to choose a meaning which will “produce the most commercial workable version of the contract” and “was not devised as a means of avoiding the consequences of legislation being applied to the contract which the parties had made”.³⁶⁹ The maxim should therefore not be used “to create an interpretation of the contract or other instrument which on ordinary principles of construction cannot be justified”.³⁷⁰ And as a matter of ordinary language the clause in the lease imposed a condition on the tenant that he should procure a new guarantee from the guarantors and such a clause falls within s.25 of the 1995 Act.³⁷¹

Co-extensiveness principle

- 47-071 In contracts of guarantee there has traditionally been a strong *prima facie* rule of construction that the surety’s obligations are co-extensive with those of the principal debtor.³⁷² Indeed as has been noted above, if the surety’s obligations are not co-extensive with, but greater than those of the principal debtor, the contract is normally thought to be an indemnity and not a guarantee.³⁷³ Many consequences flow from the principle of co-extensiveness; in particular many of the rules relating to the discharge of the surety are often treated as dependent on this principle.³⁷⁴ But there is also a tendency to decide new questions by reference to the principle.³⁷⁵ For example, it has been held that where a surety has guaranteed fulfilment of a party’s obligations under a contract containing an arbitration clause and expressly extending to any award made under it, the surety will be liable in full for an award made under the clause including interest and costs.³⁷⁶ In another case, it was held that the guarantor of a tenant’s obligations under the lease had undertaken a primary liability, and was therefore liable not only for rent payable under the lease, but also for damages in tort (for mesne profits) where the tenant had wrongfully retained possession after expiry of the lease.³⁷⁷ Similarly, where a surety agreed to pay interest as a secondary rather than a primary liability this

“can only … mean that he guaranteed to pay interest on the loan at the contractual rate payable by the principal debtor”.³⁷⁸ On the other hand, the House of Lords sanctioned what appears to be a major breach of the co-extensiveness principle by holding that a guarantor may be liable for instalments accrued due even though the debtor’s primary obligation to pay these instalments has been transmuted into a secondary obligation to pay damages for breach.³⁷⁹ But no reference was made to the co-extensiveness principle in the speeches in this case, so the present status of this principle remains somewhat uncertain.

Certification of amounts due to creditor

- 47-072 In *North Shore Ventures Ltd v Anstead Holdings Inc*,³⁸⁰ the Court of Appeal was prepared to accept that a “conclusive evidence clause” by which:

“… [a] certificate signed by [the creditor] of the amount for the time being of the Indebtedness and/or the amounts due to [the creditor] shall be conclusive evidence for all purposes against the guarantors unless manifestly incorrect”

could take effect on its terms, though it was to be strictly construed so that any ambiguity is resolved in favour of the guarantor.³⁸¹ The Court of Appeal held that, in its contractual context, the proper construction of the clause before it was that the guarantors “did not agree to pay the indebtedness as certified, rather the entitlement to certify was limited to the indebtedness for the time being”,³⁸² distinguishing for this purpose the position in *IIG Capital LLC v Van der Merwe*³⁸³ where the definition of “guaranteed moneys” which the guarantors there agreed to pay included those “expressed to be due, owing or payable, to the Lender from or by the Borrower”, which showed that the guarantors “were undertaking more than a secondary obligation, thereby approximating to a performance bond”.³⁸⁴ The Court of Appeal further held that there had been an enforceable variation between the creditor and the principal debtor and that this meant that the certification (which related to the amount due under the unvaried principal agreement) was subject to a manifest error on the face of the certificate, even though this error was not manifest at the time of the certification.³⁸⁵

Arbitration awards

- 47-073 Another possible departure from the co-extensiveness principle is to be found in the well-established rule that general words in a guarantee, by which a surety guarantees all the obligations of a principal debtor, do not of themselves have the effect of making the surety bound by an

arbitration award, even though the guaranteed contract contained an arbitration clause out of which the arbitration arose.³⁸⁶

Liability under a guarantee and entitlement to petition in bankruptcy

47-074 As has been noted,³⁸⁷ *prima facie* a surety does not merely undertake to perform if the principal fails to do so; he undertakes to see that the principal debtor will perform and this means that a guarantor is liable in damages to the creditor for loss caused by the principal debtor's failure to perform and not merely to any sum owed by the principal debtor to the creditor. Under the *Insolvency Act 1986* a creditor's ability to present a bankruptcy petition exists only where the liability is "for a liquidated sum".³⁸⁸ In *McGuiness v Norwich and Peterborough Building Society*³⁸⁹ the question arose as to the circumstances in which a creditor benefiting from a guarantee could petition for bankruptcy of the guarantor. Having reviewed the development of the bankruptcy legislation and earlier authorities, the Court of Appeal held that for these purposes

"... a debt for a liquidated sum must be a pre-ascertained liability under the agreement which gives rise to it. This can include a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure."³⁹⁰

"The issue therefore in relation to guarantees is whether the liability of the guarantor can be treated as one which is reduced to a specified and agreed sum by the guarantee itself."³⁹¹

In the court's view, this causes no difficulty where the guarantee is construed as containing a promise by the guarantor to pay the principal sum due and interest in the event of the debtor failing to pay, but where a guarantee is of the "see to it" type liability under it would not constitute a debt for a liquidated sum.³⁹² The Court of Appeal accepted that a guarantee can be drafted so as to create liabilities both in debt and for damages.³⁹³ As regards the contract before the court, a clause which made the sums due under the guarantee payable on demand was to be read as a direct promise to pay the principal debtor's liabilities when they fell due and this meant that the guarantor's liabilities were for a liquidated sum.³⁹⁴ While expressly obiter, the Court of Appeal considered that in its context a second clause in the contract under which the guarantor undertook "obligations ... [as] principal, not just as surety" confirmed that the "on demand clause" created a liability in debt.³⁹⁵

Guarantee and penalty clause in main contract

- 47-075 In *Azimut-Benetti SpA (Benetti Division) v Healey*³⁹⁶ the question arose whether a guarantor's liability could include liability for a sum agreed as payable on breach by the principal debtor which fell foul of the common law rule against penalty clauses. Blair J concluded (though obiter given that the relevant clause in the main contract was held not to be a penalty³⁹⁷) that while "by clear drafting a guarantor's liability may be other than co-extensive with that of the principal debtor", the standard clause in the guarantee before him by which the liability of the guarantor was not to be:

"... impaired, diminished, discharged or released by reason or in consequence of ... the irregularity, illegality, unenforceability or invalidity in whole or in part"

of the main contract made by the principal debtor was not apt to impose on the guarantor a liability for a sum irrecoverable against the principal debtor as a penalty.³⁹⁸ This was so on its terms, because the invalidity of the clause in the main contract meant that there was no relevant "liability" in the principal debtor but there was a more general reason in the fact that the rule against penalties is based on public policy and "it would be contrary to principle to allow the indirect enforcement of a claim for a penalty in this manner".³⁹⁹

Conditional guarantees⁴⁰⁰

- 47-076 A guarantee may, on its true construction, be conditional.⁴⁰¹ So, for example, where a person executed a guarantee on the faith of a representation that it would also be executed by another person as co-surety, the liability of the former was held to be conditional on the execution of the guarantee by the latter.⁴⁰² Similarly, if a loan is guaranteed and the loan is expressed to be secured, the guarantee may be conditional on the existence of the security. So in *Greer v Kettle* where a person guaranteed a loan which was expressed to be secured by a charge on certain shares, and the shares had not been validly issued, it was held that the surety was not liable.⁴⁰³ In order to establish such a condition, the guarantor must show that the giving of some other valid security formed part of the contract of guarantee: it must have been brought home to and accepted by the lender.⁴⁰⁴ A guarantee which shows on its face that it was intended to be a joint guarantee, executed by several parties, is not binding on a party who has properly signed it, if it transpires that the signatures of other intended guarantors have been forged, and it is immaterial that the other party is unaware of the forgery.⁴⁰⁵ While a guarantee may also be held to be conditional on the execution of a second guarantee on identical terms contained in a different document, the fact that the documents formed part of some larger transaction is not by itself sufficient.⁴⁰⁶ On the other hand, the Privy Council

distinguished *Greer v Kettle* in *Australia & New Zealand Banking Group Ltd v Beneficial Finance Corp Ltd*⁴⁰⁷ where a letter of guarantee contained a recital stating that the debt to be guaranteed was secured by a floating charge, and the floating charge, though in existence, was not executed for some eight months. It was held that the recital could not have been literally intended to mean that the charge had already been granted because the loan was not being provided (or the charge given) until after the letter of guarantee was signed. It was therefore sufficient that the floating charge should be in existence and available to be assigned to the guarantors, if and when they were called upon to meet their liability.

Guarantees to, or for, a firm

- 47-077 Prima facie, a surety who engages to be answerable for a particular person is not to be understood as engaging himself to answer for that person's partners.⁴⁰⁸ But if in the light of the surrounding circumstances it is evident that the surety intended to guarantee the liabilities of a person as a partner in a firm, the mere fact that the guarantee is expressed in terms to relate only to the one partner, will not protect the surety from liability for the firm's debts.⁴⁰⁹ By s.18 of the Partnership Act 1890, a continuing guarantee given either to a firm, or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm in question. Any change in the identity of the creditor will discharge the surety unless the contract otherwise provides.⁴¹⁰

Continuing guarantees

- 47-078 It is often a difficult question whether a guarantee, for example, of the price of goods to be supplied, or money to be lent up to a specified amount, is intended to extend to a single or definite number of transactions, or whether it is intended to be continuing.

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U In the former event, payment by the principal debtor for the goods sold, or repayment of the money lent, brings the surety's liability to an end; in the latter event, the surety remains liable if further goods are supplied or money lent up to the limit of the guarantee. Whether the guarantee is continuing in any given case is a question of construction; no hard and fast rule can be laid down, and the construction of one document affords little or no guidance to the construction of another.

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U Each case depends entirely on the language used, and the document must be looked at with reference to the circumstances under which it was given.

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U A guarantee which was expressed to cover “further advances” has been held not to extend to the situation where, on the date for repayment, a fresh loan is arranged at an enhanced rate of interest, but no money actually passes.

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U On the other hand, a contract of guarantee may be construed as having been given in respect of obligations arising out of a contemplated course of dealing rather than under a specific contract; where this is the case:

“... provided the course of dealing remains within the scope of that contemplated by the guarantee, the details of the manner of dealing as between principal and creditor are no concern of the guarantor; and any variations in them will not affect the continuing nature of his liability.”

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A typical example of this may be found in the “freestanding ‘all moneys’ guarantee” in respect of present and future indebtedness commonly given by directors to banks in respect of their company’s liabilities.

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47-078A Where the guarantee is a continuing one, in the absence of any express provision in the contract providing for termination of the guarantee by the giving of a prescribed period or form of notice, a guarantor is entitled at any time to revoke the guarantees in respect of the future liabilities, but the guarantor remains responsible for any sums incurred by the principal debtor which are the subject of the guarantee up to the time of revocation.

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U Where express provision is made for termination on notice by the guarantor, the effect of such a notice of termination on the liability of the guarantor is a matter of construction of that term, taking into account other terms of the contract and, if need be, the wider context of the guarantee.

In *National Westminster Bank Plc v Hardman*

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U a surety guaranteed payment on demand to a creditor of the continuing liability of a principal debtor, the contract providing that the “Guarantee shall be continuing security and shall remain in force ... until determined by three months’ notice in writing from the Guarantor”. The surety gave such notice, but no demand was made before the expiry of the three months. The Court of

Appeal held the surety not liable on the guarantee, even in respect of advances made until the date of expiry. As a matter of construction, no sums fell due on the guarantee until demand was made and after the period of notice, the guarantee terminated. However, the contract of guarantee may instead be construed as enabling “the surety by the service of a notice to bring to an end the continuing character of the guarantee so that from the expiry of the notice its subject matter becomes the obligations of the principal to the creditor at that time”, and where this is the case, after termination by notice “the guarantee remains in force but only as a guarantee of the performance of identified obligations” so that, in the case of a demand guarantee, any demand “can only relate to such of the obligations of the principal at the time of the expiry of the notice as still remain unperformed at the time of the demand on the surety”.

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U Finally, even where the guarantee is a continuing one, a further question of construction may sometimes arise which may determine the running of time for the purpose of the [Limitation Act 1980](#). This is discussed elsewhere.

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Limited guarantee

47-079

U Where a guarantee, whether continuing or for a particular transaction, is given subject to a limit on the amount for which the surety may be held liable, one important question of construction often causes difficulty. This is whether the surety has guaranteed the whole liability or debt, though his own liability is for the limited amount, or whether he has guaranteed only part of the liability or debt. The distinction is important principally where the debtor or the surety becomes bankrupt. If the surety has guaranteed only part of the debt, and he pays the creditor the amount for which he is liable, then, in the event of the debtor's bankruptcy, the creditor can only prove against the bankrupt's trustee for the balance of the debt, while the surety can prove against the bankrupt's trustee for the amount he has paid.

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U Similarly, where it is the surety himself who becomes bankrupt, the creditor can only prove against his trustee for the part of the debt which he has guaranteed. On the other hand, where the surety has guaranteed the whole debt, though subject to a limit on his liability, the position is different. In this event, the creditor can prove for the whole debt against the bankrupt debtor even though the surety has paid under his guarantee, and the surety has no right of proof of his own, at least until the creditor has recovered 100 pence in the pound.

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U Similarly, if the surety is bankrupt, and has guaranteed the whole debt, the creditor can prove against his trustee for the whole amount though he cannot of course recover more than 100 pence in the pound.

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- 47-080 The principle of construction which has been laid down for determining, in the absence of express agreement, whether the surety has undertaken to answer for the whole debt or only a part of it, is as follows.⁴²⁴ Where the surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal debtor to the creditor, the guaranteee is *prima facie* to be construed as being of part only of the debt. This is because in such a case the creditor can increase the total debt without reference to the surety, and if the surety was to be understood as guaranteeing the whole debt his rights could be gravely prejudiced in the event of the debtor's bankruptcy. On the other hand, where the surety has given a guarantee limited in amount for a debt already ascertained which exceeds that limit, the guaranteee is *prima facie* to be construed as a guaranteee of the whole debt, though subject to the limit specified.

Variation between guarantee and transaction guaranteed

- 47-081 Where a surety guarantees performance of a transaction subsequently to be entered into between the principal debtor and the creditor, the surety will not be liable if the transaction as entered into is different in terms from that guaranteed, and this principle is very strictly applied.⁴²⁵ For example, a guarantee of a loan to be repayable in instalments was held not enforceable when the loan agreement provided that the whole loan was to be repayable if default was made in the payment of one instalment.⁴²⁶ So also where a surety guaranteed the floating balance on a current account up to a specified amount, she was held not liable when the bank simply credited the debtor with the whole amount guaranteed instead of advancing it as and when required.⁴²⁷ And where the surety guaranteed repayment of a loan to be repayable in three months' time, and the loan was made so as to be immediately repayable, the surety was not liable even though repayment was not in fact sought for over three months.⁴²⁸ On the other hand, where a surety guaranteed a loan to be made by a bank, and in fact the loan was provided through a subsidiary of the bank with the knowledge of all parties concerned, the guaranteee was held enforceable at the suit of the bank.⁴²⁹

Conditions precedent to liability of surety

- 47-082

Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor.⁴³⁰ But the contract may, of course, lay down conditions precedent to the surety's liability. It may, for instance, provide that the creditor is first to take proceedings (civil⁴³¹ or criminal⁴³²) against the debtor; it may provide that the surety is to be liable only where the debtor repudiates his obligations and the repudiation has been accepted by the creditor⁴³³; or that the surety is to be liable only after previous demand against him,⁴³⁴

or after notice of the debtor's default has been given.⁴³⁵

Estoppel by convention

47-083 Estoppel by convention may arise where the parties to a transaction have acted on the agreed assumption that a state of facts can, for the purpose of that transaction, be regarded as true, and where this is the case, the parties are precluded from denying the truth of those assumed facts if it would be unjust to allow them or only one of them to do so.⁴³⁶ Estoppel by convention may apply in the context of the enforcement of contracts of guarantee.⁴³⁷ For example, in *Bank of Scotland v Wright*,⁴³⁸ the defendant guarantor argued that his liability did not extend to the liability of one of the two companies of which he was a director. While Brooke J rejected this argument as a matter of construction, he considered the question whether in any event the defendant was estopped by convention from asserting that the guarantee did not extend to the liability of the second company. However, in this respect he held that one of the conditions for the application of the doctrine was not present as he was not satisfied that the defendant had behaved in any way towards the creditor which would make it unconscionable for him to deny that his guarantee covered the liability in question or to rely on the Statute of Frauds.⁴³⁹ For, according to Brooke J, while estoppel by convention may apply to the enforcement of a guarantee, for the court to allow it to do so in order to extend the guarantor's liability beyond that to which it applies as a matter of construction, "would deprive the Statute of Frauds of much of its effectiveness".⁴⁴⁰

Footnotes

322 See Vol.I, paras 15-047 et seq. on the modern approach of the courts to construction of contracts generally.

323 See *Eshelby v Federated European Bank Ltd [1932] 1 K.B. 254, 266*.

324 *Blest v Brown (1862) 4 De G.F. & J. 367, 376.*

- 325 *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 A.C. 199, 208.
- 326 See *Multiplex Construction Europe Ltd v Dunne* [2017] EWHC 3073 (TCC), [2018] B.L.R. 36 at [26]–[28].
- 327 *Eastern Counties Building Society v Russell* [1947] 1 All E.R. 500, 503; affirmed [1947] 2 All E.R. 734; *West Horndon Industrial Park Ltd v Phoenix Timber Group Plc* [1995] 1 E.G.L.R. 77. Construction of a written instrument against the person who made it has been termed the “classic form” of the rule of construction contra proferentem: *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 C.L.C. 573 at [14] and is to be distinguished from the traditionally strict approach to the construction of exclusion clauses: see Vol.I, para.17-012.
- 328 See *Multiplex Construction Europe Ltd v Dunne* [2017] EWHC 3073 (TCC), [2018] B.L.R. 36 at [26]–[34]. See further Vol.I, para.17-012 (in relation to the construction of exclusion clauses). See also below, para.47-065 on the modern approach to construction.
- 329 *Heffield v Meadows* (1869) L.R. 4 C.P. 595; *Leathley v Spyer* (1870) L.R. 5 C.P. 595; *Nottingham, etc. Hide Co Ltd v Bottrill* (1873) L.R. 8 C.P. 694; *Bank of Scotland v Wright* [1990] B.C.C. 663, 675; *Grovewood (LE) v Lundy Properties* (1995) 69 P. & C.R. 507.
- 330 *Associated Dairies Ltd v Pierce* (1982) 265 E.G. 127; *Capital and City Holdings Ltd v Dean Warburg Ltd* (1989) 58 P. & C.R. 346, CA.
- 331 *A Plessner & Co Ltd v Davis* (1983) 267 E.G. 1039.
- 332 *Kova Establishment v Sasco Investments* [1998] 2 B.C.L.C. 83, 88, per John Martin QC.
- 333 *Kova Establishment v Sasco Investments* [1998] 2 B.C.L.C. 83, 89.
- 334 *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank Plc* [2002] EWCA Civ 691 at [54], per Rix LJ. The modern approach can be seen very clearly in the speech of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 W.L.R. 1381 at 1385 but has more recently been particularly associated with the “principles of construction” set out by Lord Hoffmann in *The Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, especially 912–913, per Lord Hoffmann. See also *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 A.C. 251 at [9]–[11]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 and Vol.I, paras 15-047 et seq.
- 335 *The Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 at 913; *Prudential Assurance Co Ltd v Ayres* [2008] EWCA Civ 52, [2008] L. & T. R. 30 at [22] and see below, para.47-066.
- 336 *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank Plc* [2002] EWCA Civ 691 at [19]; *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429 especially at [13] and [15]; *Dumford Trading AG v OAO Atlantybfot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289 at [34]; *Fairstate Ltd v General Enterprise & Management Ltd* [2010] EWHC 3072 (QB), [2011] 2 All E.R. 497 (Comm) at [75]; *Cattles Plc v Welcome Financial Services Ltd* [2010] EWCA Civ 599, [2010] 2 Lloyd's Rep. 514 at [34]–[35], [43]; *National Merchant Buying Society Ltd v Bellamy* [2013] EWCA Civ 452, [2013] 2 All E.R. (Comm) 674 at [40]; *Harvey v Dunbar Assets Plc* [2013] EWCA Civ 952, [2013] B.P.I.R. 722 at [28]–[30]; *Ziggurat (Claremont Place) LLP v HCC International*

- Insurance Co Plc* [2017] EWHC 3286 (TCC), [2018] B.L.R. 98 at [22]; *Travis Perkins Trading Co Ltd v Bambhra* [2022] EWHC 138 (QB) at [14]–[18].
- 337 [2011] UKSC 50, [2011] 1 W.L.R. 2900 and see above, para.47-009.
- 338 *Gastronome (UK) Ltd v Anglo Dutch Meats (UK) Ltd* [2006] EWCA Civ 1233, [2006] 2 Lloyd's Rep. 587 at [14], [18]–[19]; cf. *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] Q.B. 84 (guarantee expressed on its terms to cover loan by bank held in the “factual matrix” of the contract also to cover loan by bank’s subsidiary).
- 339 [2004] EWHC 1526 (QB), [2004] All E.R. (D) 194 (Mar).
- 340 [2004] EWHC 1526 (QB) at [74], per Christopher Moger QC sitting as a deputy judge of the High Court; cf. *Fairstate Ltd v General Enterprise & Management Ltd* [2010] EWHC 3072 (QB), [2011] 2 All E.R. 497 (Comm) at [75] (number of corrections and additions prevented court from so construing it).
- 341 [2010] EWHC 3072 (QB), [2011] 2 All E.R. 497 (Comm).
- 342 [2010] EWHC 3072 (QB) at [76].
- 343 Above, paras 47-056—47-057 and see above, Vol.I, paras 5-057 et seq. especially at para.5-060 for the relationship between the modern approach to construction and rectification.
- 344 [2010] EWHC 3072 (QB) at [82].
- 345 [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289 (application for summary judgment under Pt 24 CPR).
- 346 On which see Vol.I, paras 5-057 et seq. and 15-106 respectively.
- 347 [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289 at [36].
- 348 [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep. 289 at [36].
- 349 *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429 at [19], per Holman J.
- 350 [2002] EWCA Civ 691.
- 351 *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 A.C. 199, 208.
- 352 [2002] EWCA Civ 691 at [56], per Rix LJ, relying in particular on *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 A.C. 251 at [10] (Lord Bingham). See also Andrews and Millett, *The Law of Guarantee*, 7th edn (2015) p.116.
- 353 [2011] UKSC 50, [2011] 1 W.L.R. 2900.
- 354 [2010] EWCA Civ 1429, [2011] 1 W.L.R. 770 at [17].
- 355 [2009] UKHL 38, [2009] 1 A.C. 1101, [21]–[26].
- 356 [2011] UKSC 50 at [14], per Lord Clarke of Stone-cum-Ebony.
- 357 [2011] UKSC 50 at [15], per Lord Clarke of Stone-cum-Ebony.
- 358 cf. [2010] EWCA Civ 582 at [19] (Sir Simon Tuckey) and [35]–[44] (Patten LJ).
- 359 [2011] UKSC 50 at [20].
- 360 [2011] UKSC 50 at [21].
- 361 [2011] UKSC 50 at [23] quoting with approval *Society of Lloyd's v Robinson* [1999] 1 W.L.R. 756, 763, per Lord Steyn. See also (though not in the context of suretyship) *Arnold v*

- Britton* [2015] UKSC 36, [2015] A.C. 1619 at [15]–[23], [66] and [76]–[77]; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 W.L.R. 1095 at [8]–[15].
- 362 [2011] UKSC 50 at [21] at [41], per Lord Clarke of Stone-cum-Ebony and see also at [45].
- 363 *Pavilion Property Trustees Ltd v Permira Advisers LLP* [2014] EWHC 145 (Ch), [2014] 1 P. & C.R. 21.
- 364 ss.5, 24 and 25. See above, para.47-016.
- 365 [2014] EWHC 145 (Ch), [2014] 1 P. & C.R. 21 at [19], per Morgan J.
- 366 [2014] EWHC 145 (Ch) at [20], referring to Lewison, *The Interpretation of Contracts*, 5th edn (2011), para.7.16. And see Vol.I, para.15-089.
- 367 [2014] EWHC 145 (Ch) at [20]. Morgan J held, in the alternative, that if the guarantee were to be construed so as to extend to the obligations of the next assignee, he could sever “the good from the bad” so as to leave a guarantee extending only to the assignee: [2014] EWHC 145 (Ch) at [21]–[22].
- 368 [2014] EWCA Civ 1215, [2015] 1 P. & C.R.
- 369 [2014] EWCA Civ 1215 at [30], per Patten LJ (with whom Ryder and Longmore LJJ agreed).
- 370 [2014] EWCA Civ 1215 at [31], per Patten LJ.
- 371 [2014] EWCA Civ 1215 at [33], [36] and [43].
- 372 *Moschi v Lep Air Services Ltd* [1973] A.C. 331. See *Steyn* (1974) 90 L.Q.R. 246.
- 373 See above, paras 47-007—47-008, 47-045.
- 374 See below, paras 47-089 et seq.
- 375 See also the significance of the “co-extensiveness principle” in the context of statutory demands under the *Insolvency Act 1986* in *Octagon Assets Ltd v Remblance* [2009] EWCA Civ 581, [2010] Bus. L.R. 119; *White v Davenham Trust Ltd* [2011] EWCA Civ 747, [2011] Bus. L.R. 1443, below, para.47-128.
- 376 *Compañía Sudamericana De Fletes SA v African Continental Bank Ltd* [1973] 1 Lloyd's Rep. 21.
- 377 *Associated Dairies Ltd v Pierce* (1982) 265 E.G. 127.
- 378 *MP Services Ltd v Lawyer* (1996) 72 P. & C.R. D49 at D50, per Millett LJ.
- 379 *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, see below, para.47-104.
- 380 [2011] EWCA Civ 230, [2012] Ch. 31.
- 381 [2011] EWCA Civ 230 at [46] citing *British Linen Asset Finance Ltd v Ridgeway* [1999] G.W.D. 2-78 (Sheriff Principal).
- 382 [2011] EWCA Civ 230 at [46], per Sir Andrew Morritt (with whom Smith LJ agreed at [56]).
- 383 [2008] EWCA Civ 542, [2008] 2 Lloyd's Rep. 187 at [31] and cf. above, para.47-009.
- 384 [2011] EWCA Civ 230 at [46], per Sir Andrew Morritt C.
- 385 [2011] EWCA Civ 230 at [50]–[53], [58]–[61] cf. [68] (Tomlinson LJ). While a majority of the Court of Appeal in *North Shore Ventures Ltd* [2011] EWCA Civ 230 considered that the error in the certificate need not be manifest at the time of certification, in *ABM AMRO Commercial Finance Plc v McGinn* [2014] EWHC 1674 (Comm), [2014] 2 Lloyd's Rep. 333 at [51] Flaux J held that these observations were obiter to the Court of Appeal's decision (which rested on the fact that there was a manifest error on the face of the certificate) and

needed to be “viewed with some circumspection”. In his view, the possibility of establishing manifest error later (notably, at “a full blown trial as to which debts might or might not have led to recovery”) “would render the conclusive evidence clause nugatory”: *[2014] EWHC 1674 (Comm)* at [52].

- 386 *Re Kitchin* (1881) 17 Ch. D. 668; *Bruns v Colocotronis* [1979] 2 Lloyd’s Rep. 412; *Ards BC v Northern Bank Ltd* [1994] N.I. 121, CA NI; *Sabah Shipyard (Pakistan) Ltd v Pakistan* [2007] EWHC 2602 (Comm), [2008] 1 Lloyd’s Rep. 210.
- 387 Above, para.47-001.
- 388 Insolvency Act 1986 s.267(2)(b).
- 389 [2011] EWCA Civ 1286, [2012] 2 All E.R. (Comm) 265; applied in *Dunbar Assets Plc v Fowler* [2013] B.P.I.R. 46, [2013] All E.R. (D) 02 (Jan); *Agarwal v ABN AMRO Bank NN* [2017] B.P.I.R. 816 at [72]–[76].
- 390 [2011] EWCA Civ 1286 at [36], per Patten LJ (with whom Moses and Ward LJJ agreed) and see at [39].
- 391 [2011] EWCA Civ 1286 at [42], per Patten LJ.
- 392 [2011] EWCA Civ 1286 at [42]–[43].
- 393 [2011] EWCA Civ 1286 at [58].
- 394 [2011] EWCA Civ 1286 at [61].
- 395 [2011] EWCA Civ 1286 at [67]. cf. *Davies v Revelan Estates (Wigston) Ltd* [2019] EWHC 1766 (Ch), [2019] B.P.I.R. 1102 at [22]–[24] where the contract was held to be one of indemnity giving rise to a claim only in damages and therefore for an unliquidated sum.
- 396 [2010] EWHC 2234 (Comm), [2011] 1 Lloyd’s Rep. 473.
- 397 [2010] EWHC 2234 (Comm) at [29]. On the general common law governing penalty clauses, see Vol.I, paras 29-203 et seq.
- 398 [2010] EWHC 2234 (Comm) at [23] and [24], per Blair J.
- 399 [2010] EWHC 2234 (Comm) at [24] approving *Citicorp Australia Ltd v Hendry* (1985) 4 N.S.W.L.R. 1 at 21D, CA NSW.
- 400 In *Harvey v Dunbar Assets Plc* [2013] EWCA Civ 952, [2013] B.P.I.R. 722 at [21]–[22] the Court of Appeal quoted with approval the text of this paragraph up to “not by itself sufficient”.
- 401 English law does not recognise any wider relief in equity based on a mere expectation on the part of a guarantor that a further guarantee will be executed by a third person: *Capital Bank Cashflow Finance Ltd v Southall* [2004] EWCA Civ 817, [2004] 2 All E.R. (Comm) 675 at [16], discussing *Bleyer v Neville Jefferson Advertising Pty Ltd Unreported 1987 NSW*.
- 402 *Evans v Bremridge* (1855) 25 L.J. Ch. 102, 334; but the position is otherwise if another person fails to execute a guarantee for a different liability for there would then be no right to contribution (see below, para.47-141) and the surety who has executed would not be prejudiced: *Coope v Twynham* (1823) 1 T. & R. 426. If A (a bank) requires B (the director of C Co) to provide both real security and his own personal guarantee for a loan to C Co, but executes only the guarantee, A may enforce the guarantee against B as A may waive the condition designed to protect its position: *Barclays Bank Plc v Sutton* [2015] EWHC 3192 (QB) at [21] and [26].
- 403 [1938] A.C. 156.

- 404 *Byblos Bank SAL v Al-Khudhairy* [1987] *B.C.L.C.* 232; *Gray v TCB Ltd* [1988] *F.L.R.* 116. cf. *Barclays Bank Plc v Quincecare* (1988) reported [1992] 4 *All E.R.* 363.
- 405 *James Graham & Co (Timber) Ltd v Southgate Sands* [1985] 2 *All E.R.* 344; *Harvey v Dunbar Assets Plc* [2013] *EWCA Civ* 952, [2013] *B.P.I.R.* 722 at [23], [25]–[26], [32]–[33], [44] where the Court of Appeal emphasised that the *prima facie* position described in the text to which this note refers may be displaced as a matter of construction of the contract (though it was not so displaced in the terms of the contract before it).
- 406 *Capital Bank Cashflow Finance Ltd v Southall* [2004] *EWCA Civ* 817, [2004] 2 *All E.R.* (*Comm*) 675 at [17].
- 407 (1982) 44 *A.L.R.* 241.
- 408 *Montefiore v Lloyd* (1863) 15 *C.B.(N.S.)* 203.
- 409 *Leathley v Spyer* (1870) *L.R.* 5 *C.P.* 595.
- 410 *First National Finance Corp Ltd v Goodman* (1983) *Com. L.R.* 184.
- ❶411 *Silverburn Finance (UK) Ltd v Salt* [2001] *EWCA Civ* 279, [2001] 2 *All E.R. (Comm)* 438. See also above, para.47-010.
- ❷412 *Coles v Pack* (1869) *L.R.* 5 *C.P.* 65, 70.
- ❷413 *Nottingham Hide Co v Bottrill* (1873) *L.R.* 8 *C.P.* 694.
- ❷414 *Burnes v Trade Credits Ltd* [1981] 1 *W.L.R.* 805.
- ❷415 *National Merchant Buying Society Ltd v Bellamy* [2013] *EWCA Civ* 452, [2013] 2 *All E.R. (Comm)* 674 at [33], per Rimer LJ (with whom Kitchin and Longmore LJJ agreed).
- ❷416 [2013] *EWCA Civ* 452 at [33].
- ❷417 *Silverburn Finance (UK) Ltd v Salt* [2001] *EWCA Civ* 279, [2001] 2 *All E.R. (Comm)* 438 at [28].
- ❷418 [1988] *F.L.R.* 302.
- ❷419 *Bank of Credit and Commerce International SA v Simjee* [1997] *C.L.C.* 135 at 138 per Hobhouse LJ (with whom Lord Woolf MR and Morritt LJ agreed) so holding as a matter of construction of a term which provided that the effect of termination of the contract was to “crystallize” the guarantor’s liability; and see further [1997] *C.L.C.* 135 at 137–140. See also *Euler Hermes SA (NV) v Mackays Stores Group Ltd* [2022] *EWHC 1918 (Comm)* at [37]–[42], where a clause in a continuing demand guarantee providing for termination on notice by the guarantor stated that liability would cease on expiry of the notice period “except for any liability arising hereunder before that date”, this being construed in the light of other terms of the contract and the latter’s wider commercial and legal context to encompass contingent liability in respect of sums regarding which payment had been deferred and which could

have been the subject of a demand by the creditor if not paid by the principal debtor. See also Philips and O'Donovan, *The Modern Law of Guarantee*, 4th edn (2020), paras 9-038—9-042.

④20 Vol.I, paras 31-046—31-048.

④21 *Re Sass* [1896] 2 Q.B. 12 at 15.

④22 *Re Sass* [1896] 2 Q.B. 12 at 14–15. In *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc (In Administration)* [2021] EWCA Civ 1523, [2022] Bus. L.R. 10 at [148]–[149] it was said that the observations of Vaughan Williams J in *Re Sass* as regards the effect of part payment of a guarantee of the whole debt are better seen as limited to an exposition of the rule against double proof in insolvency rather than of the general common law position. On the latter see below, para.47-089.

④23 *Re Houlder* [1929] 1 Ch. 205; see also *Commercial Bank of Australia Ltd v Official Assignee* [1893] A.C. 181. Similarly, if one co-surety pays part of what is due, the creditor can prove against another for the whole debt where it is the whole debt which has been guaranteed; but payment by the *debtor* of part of the debt before proof discharges the debt pro tanto and the creditor can then only prove against a surety for the balance in any event.

424 *Ellis v Emmanuel* (1876) 1 Ex. D. 157.

425 Cases of this nature are often treated on the same principle as cases in which there is a subsequent variation of the contract between the creditor and the principal debtor (as to which see below, paras 47-108 et seq.) but although the questions are clearly analogous, the cases here discussed concern the question whether the surety is ever bound at all, not whether the surety is discharged.

426 *Clarke v Green* (1849) 3 Ex. 619; and see *Pickles v Thornton* (1876) 33 L.T. 658.

427 *Archer v Hudson* (1844) 7 Beav. 551.

428 *Bonser v Cox* (1844) 6 Beav. 110, 117.

429 *Amalgamated Investment & Pty Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84.

430 *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 348; and see *DFC Financial Services Ltd v Coffey* [1991] B.C.C. 218; cf. *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 1 W.L.R. 1474, 1483.

431 *Holl v Hadley* (1835) 2 A. & E. 758; *Lawrence v Walmsley* (1862) 12 C.B.(N.S.) 799.

432 cf. *London Guarantee Co v Fearnley* (1880) 5 App. Cas. 911 (prosecution of employee required expressly by contract of insurance against employee's dishonesty).

433 *Reliance Car Facilities Ltd v Roding Motors* [1952] 2 Q.B. 844.

④34 *Re Brown's Estate* [1893] 2 Ch. 300; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 K.B. 833; *Bank of Adelaide v Lorden* (1970) 127 C.L.R. 185; *General Surety & Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 Build. L.R. 18; *Duchess Theatre Co v Lord* [1993] N.P.C. 163; *Hampton v Minns* [2002] 1 W.L.R. 1; *Barclays Bank Plc v Price* [2018] EWHC 2719

(*Comm*) at [20]. Where the surety's obligation is primary rather than secondary (as with a true guarantee), a requirement of payment on demand will not import a contingency, so that the cause of action accrues when the debt falls due rather than only on demand, but this does not apply where payment is promised within a period after demand: *Re Brown's Estate* [1893] 2 Ch. 300; *M.S. Fashions Ltd v Bank of Credit and Commerce International SA* [1993] Ch. 425, 435–436, 447–448; *Levin v Tannenbaum* [2013] EWHC 4457 (Ch) at [25]–[37].

435 cf. *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 W.L.R. 74. See also *Bache & Co (London) Ltd v Banque Vernes et Commerciales de Paris* [1973] 2 *Lloyd's Rep.* 437 (notice of default conclusive evidence of guarantor's liability).

436 See generally, Vol.I, paras 6-116—6-125.

437 *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84; *Bank of Scotland v Wright* [1990] B.C.C. 663; *Actionstrength Ltd v International Glass Engineering INGLEN SpA* [2003] UKHL 17, [2003] 2 A.C. 541 and see above, para.47-061.

438 *Bank of Scotland v Wright* [1990] B.C.C. 663. See similarly *Ing Lease (UK) Ltd v Harwood* [2008] EWCA Civ 786, [2009] 1 All E.R. (*Comm*) 1055 where such a common understanding was held not established on the facts.

439 [1990] B.C.C. 663 at 679 and 681.

440 [1990] B.C.C. 663 at 680. And see similarly *Actionstrength Ltd v International Glass Engineering INGLEN SpA* [2003] UKHL 17, [2003] 2 A.C. 541 on estoppel and the Statute of Frauds more generally, see above, para.47-061.

Section 5. - Implied Terms

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Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 5. - Implied Terms

General law applicable in principle

- 47-084 In principle, the general law governing the implication of terms may apply in the context of contracts of suretyship. As explained in Vol.I of the present work, for this purpose the law distinguishes between terms implied in law and terms implied in fact.⁴⁴¹ For the former, the courts do not apply a narrow test of necessity but instead draw on a broader range of factors so as to determine whether the proposed term is a necessary incident of the type of contract in question.⁴⁴² By contrast, as regards terms implied in fact in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*⁴⁴³ the Supreme Court reaffirmed the traditional test of necessity (and not merely reasonableness or fairness) and for this purpose reference may be made to the term being necessary to give business efficacy to the contract or to be so obvious that it goes without saying.⁴⁴⁴ In general, however, contracts of suretyship have not attracted many examples of either category of implied term.

Terms implied in law

- 47-085 In the case of terms implied in law, this general absence may be explained by the fact that to a considerable extent the common law itself (or rather, equity) has often set the legal incidents of contracts of guarantee without use of the technique of implied term of the kind so important, for example, in contracts for the sale of goods before the law was codified by the *Sale of Goods Act 1893*⁴⁴⁵ or, more currently, contracts of employment.⁴⁴⁶ The law's direct regulation of contracts of suretyship in this way can be seen, in particular, in the rules governing the discharge of the surety through variation of the contract between the debtor and the creditor,⁴⁴⁷ binding agreement to give time to the debtor,⁴⁴⁸ release of a co-surety,⁴⁴⁹ or release or surrender of securities.⁴⁵⁰

The resulting protections for the surety may be excluded by agreement, this being determined as a matter of construction of the contract including by implication from what has been agreed,⁴⁵¹ although it has sometimes been said that clear words will be needed to exclude rights in the surety.⁴⁵² A possible exception to this general pattern of a lack of use of terms implied in law in contracts of suretyship may, however, be found in the case of neglect in relation to securities. Here it is established that equity may intervene so as to discharge the surety,⁴⁵³ but there are cases which have accepted (if in special circumstances) an implied term in a contract of guarantee that the creditor will take reasonable care to ensure that the security is sold at the best price (which would allow the surety a claim for damages if the creditor has failed to do so).⁴⁵⁴ On the other hand, it has been held that a creditor owes no duty to a guarantor of a loan to act reasonably to ensure that the loan is applied for the purposes for which it is given, whether that duty is put by way of an implied term in the contract or of the tort of negligence.⁴⁵⁵ In a very different context, it has been held that a party to a contract who has paid money under a performance bond to the other party may recover it by implication arising from the nature of the contract, provided that the latter has suffered no damage in consequence of the first party's breach.⁴⁵⁶

Terms implied in fact

47-086

U In general, the nature of most contracts of guarantee as written contracts of some length sometimes concluded with the benefit of legal advice (even if not negotiated) argues against the implication of terms in fact: as was observed in *Marks & Spencer Plc* (though not in the context of suretyship):

“... a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them.”⁴⁵⁷

A recent example of the court refusing a claim based on an implied term in a contract of guarantee may be found in *CVLC Three Carrier Corp v Arab Maritime Petroleum Transport Co.*

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U The defendant had given a guarantee of the charterer's performance of two charterparties to the owners of the vessels; its wording was not in a standard form but was composed of many very standard phrases used in guarantees. The owners subsequently purported to terminate the charters on the ground of breaches by the charterers, served notice of arbitration of a claim against the guarantor and sought to arrest a vessel belonging to the guarantor as security for the owners' claim under the guarantee. The guarantor argued that a term should be implied that the owners would not seek security over and above that provided by the contract of guarantee, and claimed damages on the basis that the owners' attempt to arrest its vessel was in breach of this implied term. In the High

Court,⁴⁵⁹ Cockerill J applied the guidance of the Supreme Court in *Marks & Spencer Plc* to the implication of terms, observing that “the legal hurdle for implication of a term is a high one”.⁴⁶⁰ She noticed that, while most implied terms fall to be implied on specific facts, this could not be the case in relation to the contract before her which (as far as it appeared from the arbitral proceedings) did not concern a “unique type of contract”; this meant that the finding of an implied term by the arbitrator meant in effect that “many guarantees will contain this implied term, even though the parties have not chosen to write it down”.⁴⁶¹ Moreover, the effect of the alleged implied term would be to exclude the normal position which is that:

“... a party entering into a contract is not circumscribed as to the steps it can take to secure its claim in the event of an arguable default.”⁴⁶²

The implied term is therefore “in the nature of an exclusion clause” and the law generally requires clear words before it concludes that a contract has taken away the common law rights or remedies of one of the parties.⁴⁶³ Cockerill J concluded that:

“... structurally one would expect there to be a right of security. The analysis of the correct approach to implication seems to preclude the implication of a term barring security.”⁴⁶⁴

She therefore allowed the appeal from the arbitrator’s award based on such an implied term, as reached by diverging from the correct test for implication.⁴⁶⁵ Finally, it has been said that courts will rarely imply terms into a letter of credit or first demand guarantee as a matter of business efficacy given the particular need for certainty in these types of instrument.⁴⁶⁶

Footnotes

441 See esp. Vol.I, paras 16-005 and 16-015.

442 See Vol.I, paras 16-005 and 16-014, and authorities there cited.

443 [2015] UKSC 72, [2016] A.C. 742 and see also *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] I.C.R. 531 at [5].

444 See Vol.I, para.16-012 and authorities there cited.

445 *Jones v Just* (1868) L.R. 3 Q.B.197 (implied warranty of merchantable quality); *Sale of Goods Act 1893* s.14.

446 Vol.II, paras 42-061 et seq.

447 Below, paras 47-108—47-119.

448 Below, para.47-111.

449 Below, para.47-122.

- 450 Below, para.[47-123](#)—[47-124](#).
- 451 See below, para.[47-091](#) (agreement excluding general rule that on being sued by the creditor for payment of the debt guaranteed, a surety may avail himself of any right to set-off or counterclaim which the principal debtor possesses against the creditor); para.[47-116](#) (agreement to allow variation or giving time); para.[47-122](#) (agreement to allow creditor to release co-surety); para.[47-124](#) (agreement to give creditor the right to release securities); para.[47-138](#) (no right of indemnity in guarantor against principal debtor where they contemplated that, as between themselves, only the guarantor would bear a primary liability to the creditor).
- 452 On the relationship between strict construction traditionally required in the context of suretyship and the modern approach to construction see above, paras [47-063](#)—[47-069](#) esp. at para.[47-068](#). For an example of clear words being required see below, para.[47-149](#) (exclusion of surety's right to securities held by the creditor).
- 453 Below, para.[47-125](#).
- 454 See below, para.[47-127](#) esp. in relation to *Skipton Building Society v Stott [2001] Q.B. 261*.
- 455 *Barclays Bank Plc v Quincecare Ltd (1988) reported [1992] 4 All E.R. 363*, and see below, para.[47-129](#).
- 456 *Cargill International SA v Bangladesh Sugar and Food Industries Corp [1998] 1 W.L.R. 461*; *Comdel Commodities Ltd v. Siporex Trade S.A. [1997] 1 Lloyd's Rep. 424, 431*; *Tradigrain SA v State Trading Corp of India [2005] EWHC 2206 (Comm), [2006] 1 Lloyd's Rep. 216* at [26]; but cf. *Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819, [2008] Bus. L.R. 1762*, on which see above, para.[47-012](#).
- 457 [\[2015\] UKSC 72](#) at [21] per Lord Neuberger (with whom Lord Sumption and Lord Hodge agreed), and see Vol.I, para.[16-012](#).
- ④458 [\[2021\] EWHC 551 \(Comm\), \[2022\] 1 All E.R. \(Comm\) 839](#).
- 459 An appeal was brought under the [Arbitration Act 1996 s.69](#).
- 460 [\[2021\] EWHC 551 \(Comm\)](#) at [51].
- 461 [\[2021\] EWHC 551 \(Comm\)](#) at [54].
- 462 [\[2021\] EWHC 551 \(Comm\)](#) at [55].
- 463 [\[2021\] EWHC 551 \(Comm\)](#) at [55] and see Vol.I, para.[17-008](#) for this general approach to exclusion clauses.
- 464 [\[2021\] EWHC 551 \(Comm\)](#) at [85].
- 465 [\[2021\] EWHC 551 \(Comm\)](#) at [85].
- 466 *Cauxell Ltd v Lloyds Bank Plc, The Times, 26 December 1995* (Cresswell J) cited by Andrews and Millett, *Law of Guarantees*, 7th edn (2015), para.16-018.

Section 6. - Discharge of Debtor

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 6. - Discharge of Debtor

General

- 47-087 No special rules apply to the discharge of a debtor whose debt is guaranteed where this results either from payment of the debt or release by deed. As to the effect of part payment of the debt by the debtor or an agreement to accept part payment of a debt, reference should be made to the relevant passages of Vol.I.⁴⁶⁷

Discharge of debtor by payment by surety

- 47-088 Where a surety enters the contract at the request of the principal debtor, it is clear that payment of the debt by the surety discharges that debt as between the creditor and principal debtor, whether wholly or pro tanto.

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 Indeed, “[a] creditor cannot sue the principal debtor for an amount of the debt which the creditor has already received from a guarantor”.

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 In *Milverton Group Ltd v Warner World Ltd*,

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 the Court of Appeal held that part payment of a debt by a surety would discharge the principal debtor by the amount of the payment. That case concerned the liabilities of an original tenant under a lease whose assignees' sureties had paid monies to the landlord's assignee in consideration of their release by deed. The landlord's assignee argued that these payments did not affect the

original tenant's liability to pay rent under the lease: but the Court of Appeal rejected this argument. According to Hoffmann LJ:

“... for the purpose of deciding whether money owed by more than one person has been paid, I do not think that it is possible for the creditor and one of the debtors to characterise a payment in return for a release as anything other than a part performance of the obligation. If this were possible, a creditor could pick off his debtors one by one and recover in total more than the whole debt. For the payment to count as part discharge of the common obligation, it is sufficient for the payment to be referable to the guarantee.”

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Footnotes

- 467 See paras 6-127 et seq.
- ④468 *Milverton Group Ltd v Warner World Ltd [1995] 2 E.G.L.R. 28; Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc (In Administration) [2021] EWCA Civ 1523, [2022] Bus. L.R. 10* at [96]–[134] esp. at [114], holding that the proposition that payment of part of the debt by a surety discharges the principal debtor pro tanto was the ratio of the CA's decision in *Milverton Group Ltd*. More controversial is the question whether payment of the debt by an *unrequested* surety discharges the debt as between the creditor and principal debtor, this question being linked to the question of recovery of an indemnity by that surety against the principal debtor: see *Birks and Beatson* (1976) 92 L.Q.R. 188; *Friedmann* (1983) 99 L.Q.R. 534; Burrows, *The Law of Restitution*, 3rd edn (2010), pp.460–468. On the question of restitutionary recovery, see below, para.47-132.
- ④469 *M.S. Fashions Ltd v Bank of Credit and Commerce International SA (In Liquidation) [1993] 3 W.L.R. 220, 239*, per Dillon LJ.
- ④470 [1995] 2 E.G.L.R. 28.
- ④471 [1995] 2 E.G.L.R. 28 at 31.

(a) - Discharge of Surety by Payment or Set-off

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Chapter 47 - Suretyship

Section 7. - Discharge of Surety

(a) - Discharge of Surety by Payment or Set-off

General

47-089

Clearly, payment by a surety of amounts owed under the guarantee discharges the surety either wholly or pro tanto, as payment operates to extinguish or to reduce the debt itself.



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More difficulty arises in the context of the insolvency of either the creditor or the principal debtor.

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In *M.S. Fashions Ltd v Bank of Credit and Commerce International SA* the Court of Appeal held that on the insolvency of the *creditor* (there, a bank) a surety may set-off sums paid to the creditor

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in partial discharge of the debt owed by the principal debtor, so that the amount for which the creditor can prove in the insolvency is to this extent reduced.

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However, in *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc (In Administration)* the Court of Appeal held that where the *principal debtor* is in liquidation, in principle the creditor can prove for the whole debt even though the surety has paid in part before the insolvency, as this is required to avoid double-proof of the debt (by the creditor and by the surety for an indemnity from the principal debtor),

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U but this rule finds an exception, *inter alia*, where the surety has released any right it may have to an indemnity against the principal debtor in respect of its payment, as here there can be no competition between the creditor's and surety's claims; in this case, therefore, the creditor must give credit for the payment in the insolvency of the principal debtor so as to follow the general proposition that part payment by the surety extinguishes part of the debt, with the effect that the amount for which the creditor can prove is reduced.

[477](#)



Footnotes

- ①472 According to Scott LJ in *M.S. Fashions Ltd v Bank of Credit and Commerce International SA [1992] B.C.C. 571* at 575 (interlocutory appeal) “[i]t is plain enough that payment by the surety, whether in whole or in part, as the case may be, not only releases the surety but also discharges or reduces, as the case may be, the liability to the creditor of the principal debtor” and see similarly at 577 (Woolf LJ) and also *[1993] Ch. 425* at 439 (Hoffmann LJ) and, on appeal, *[1993] Ch. 425* at 448 (CA, Dillon LJ with whom Nolan and Steyn LJJ agreed). In *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc (In Administration) [2021] EWCA Civ 1523, [2022] Bus. L.R. 10* the CA rejected the argument of counsel that the proposition that part payment of the debt by a surety discharges the surety pro tanto was wrong either on the basis that *M.S. Fashions* turned on the existence of a “principal debtor clause” or that partial discharge of the debt on payment by the surety was inconsistent with the surety’s right to subrogation of the creditor’s rights against the principal debtor: *[2021] EWCA Civ 1523* at [93]–[109] and [179] and [116]–[133] respectively. In this respect, the CA did not follow the apparent view expressed by Lowry J in *Ulster Bank Ltd v Lambe [1966] N.I. 161* at 169 that where a guarantee was for the whole debt and the guarantor paid part of it, the creditor could still sue the principal debtor for the whole debt even outside the context of the debtor’s insolvency: *[2021] EWCA Civ 1523* at [125]–[127].
- ①473 For the position governing statutory demands against an insolvent surety and set-off as between the creditor and principal debtor, see below, para.[47-128](#).
- ①474 In *M.S. Fashions Ltd* this payment took effect by way of operation of statutory set off under the *Insolvency Rules 1986* (SI 1986/1925) r.4.90: *[1993] Ch. 425* at 439. **Rule 4.90** was replaced by the *Insolvency (England and Wales) Rules* (SI 2016/1024) rr.14.25 and **14.26** (in force 6 April 2017). See similarly for individuals the *Insolvency Act 1986* s.323. **Rule 14.25(5) of the 2016 Rules** makes special provision as regards statutory set-off for contingent liabilities (which would include some liabilities under a guarantee) to an insolvent company,

on which see Sealy & Milman, Annotated Guide to Insolvency Legislation, 25th edn (2022), Vol.I, note to r.14.25.

④475 [1993] Ch. 425 at 438.

④476 See also below, para.47-140.

④477 [2021] EWCA Civ 1523 at [168]–[172] and [180]–[182].

(b) - Discharge of Surety through Discharge of Principal Debtor

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 7. - Discharge of Surety

(b) - Discharge of Surety through Discharge of Principal Debtor

Discharge of principal debtor by performance

- 47-090 If the contract is one of guarantee, then performance by the principal debtor which discharges him will necessarily also discharge the guarantor. So, for instance, where the surety guaranteed the due performance by the debtor of his obligations under a hire-purchase agreement, and the hirer terminated the agreement in accordance with its terms and paid the full amounts due under the agreement, the surety was held to be discharged, even though the hire-purchase company did not receive the full amounts it might have expected to receive had the agreement run its full course.⁴⁷⁸ So also, partial performance by the debtor (e.g. part payment of the debt guaranteed) will discharge the surety pro tanto.⁴⁷⁹ On the other hand, if the contract on its true construction is a contract of indemnity under which the surety assumes a greater liability than the principal debtor,⁴⁸⁰ he will not necessarily be discharged merely because the debtor is discharged. So in another hire-purchase case where the surety agreed to indemnify the hire-purchase company against any loss which it might suffer from premature termination of the agreement, it was held that the surety was liable despite the discharge of the hirer.⁴⁸¹

Set-off by principal debtor to be enjoyed by surety

- 47-091 The general rule is that on being sued by the creditor for payment of the debt guaranteed, a surety may avail himself of any right to set-off or counterclaim which the principal debtor possesses against the creditor.⁴⁸² However, parties to a contract of suretyship may contract out of this general

rule expressly or by clear implication from what they have agreed as a matter of construction, the contract requiring to be interpreted in its factual matrix.

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U A number of factors have been discerned by the courts in determining whether the parties have intended that the surety should be liable to the creditor “whatever the state of play” between the creditor and the principal debtor:

“... the inclusion in the guarantees of a conditional agreement to pay; the accruing of the guarantors’ liability to pay at a time when the principal debtors did not yet have any arguable right of set-off (because the default preceded the termination of the [principal] contracts); the guarantors’ obligation to pay ‘forthwith’; and the overall context (factual matrix) of the contractual arrangements.”⁴⁸⁴

Rules of appropriation not affected

- 47-092 Difficulty sometimes arises in deciding whether a performance by the debtor discharges him in respect of the guaranteed liability or in respect of a separate obligation which is not subject to the guarantee. If, for example, the debtor owes two distinct debts to the creditor, only one of which is guaranteed by the surety, and the debtor pays part of the money to the creditor, the question may arise as to which debt is discharged. In these circumstances the general rule is that the contract of suretyship does not affect the normal rights which the debtor and the creditor have of appropriating the payment to a particular debt.⁴⁸⁵ Thus if the debtor pays without making any appropriation the creditor is entitled to appropriate the money to the debt which is not guaranteed.⁴⁸⁶ Where, however, the surety guarantees a running account the rule in *Clayton*’s case⁴⁸⁷ normally applies so that payments in must normally be treated as discharging the earliest debits.⁴⁸⁸ But where a surety guaranteed a running account with a bank and the account was closed, and a new one opened which was not guaranteed, it was held that the bank was entitled to appropriate payments to the new account as the debtor had not appropriated them to the current account.⁴⁸⁹

Discharge other than by performance

- 47-093 If the debtor is discharged not so much because the agreement is fully performed, but rather because, in point of law, he is not liable to the creditor under his agreement in the events which have happened, as, e.g. where a bailee is discharged because the goods are stolen from him without any negligence on his part, a guarantor will also be discharged.⁴⁹⁰ Here again, there could, of

course, be a liability on the part of the surety if he were made answerable for loss of the goods by any means, and not merely for default by the bailee in his obligations, i.e. if the contract were an indemnity and not a guarantee.

Discharge of debtor must be effective

- 47-094 In order to discharge a surety, payment by the debtor must be an effective discharge for him. So where, after making such a payment, the debtor became bankrupt and the payment was avoided as a fraudulent preference, the surety was not discharged.⁴⁹¹ Hence, where it is sought to challenge a payment as a fraudulent preference, a surety for that payment should be joined as a party.⁴⁹²

Discharge of debtor by agreement with creditor

- 47-095 The traditional approach to the question whether an agreement by a creditor not to enforce his right against his debtor has the effect of discharging a surety has been to distinguish between cases of a binding release of the debtor and cases in which the creditor merely agrees not to sue the debtor.

Release of debtor

- 47-096 According to this traditional approach, the release of the principal debtor discharges the surety,⁴⁹³ a rule which reflects the more general effect of release of one of two or more joint (or joint and several) debtors on his co-debtors.⁴⁹⁴ There are two reasons which may be advanced to support the argument that this general approach should be applied to the suretyship context. First, there is a logical argument, linked to the co-extensiveness principle⁴⁹⁵: for if the principal debtor is discharged, then so should the surety whose liability is secondary to the principal debtor. Secondly, it may be argued that any other rule would lead to one or other of two strange results, having regard to the surety's normal right to an indemnity from the debtor.⁴⁹⁶ If the surety were compelled to meet the liability, any attempt by him to sue the debtor for an indemnity might be met by the defence that the debt had gone and that the debtor was no longer liable. But if this were a defence, the surety would be deprived by the act of the creditor of a right which he would have expected to have.⁴⁹⁷ On the other hand, if the debtor remained liable to indemnify the surety despite his own discharge, the effect would be to render the discharge largely nugatory.⁴⁹⁸ Sometimes this is put another way, so that it is said that to release the principal debtor without releasing the surety would deprive the latter of his right to pay off the creditor and sue the principal in the creditor's name by way of subrogation.⁴⁹⁹ However, there are three qualifications to this general rule of discharge

of the surety on release of the principal debtor. First, it does not apply where the original contract of suretyship itself provides for the preservation of the surety's liability⁵⁰⁰; secondly, where there is a reservation of the creditor's rights against the surety at the time of discharging the debtor⁵⁰¹ and, thirdly, where the surety agrees to the continuation of his liability with the creditor before the release of the debtor by the creditor.⁵⁰² In at least some of these circumstances, some of the arguments in favour of discharge of the surety no longer hold good. As to the "logical argument", it may be countered that where a contract of suretyship contains a clause preserving the surety's liability on release of the debtor, it may no longer count as an "ordinary contract of suretyship", but it may nonetheless take effect on its terms.⁵⁰³ Where the agreement of release provides for the preservation of the surety's liabilities, then the principal debtor is on notice of the possible and eventual recourse of the surety against him.⁵⁰⁴ As to the preservation of the surety's liability in the contract of suretyship, this can be supported simply on the basis of the need to preserve the binding force of contracts.⁵⁰⁵

Agreement not to sue

- 47-097 By contrast, the effect of a mere agreement by a creditor not to sue the debtor as regards discharge of the surety (in the absence of any reservation of rights by the creditor) is less clear. For while the established rule as regards the case of an agreement not to sue an ordinary joint (or joint and several debtor) is that it does not discharge the other debtors,⁵⁰⁶ in view of the well-settled rule that a binding agreement to give time to the debtor will discharge a surety, it may be thought anomalous if an agreement not to sue at all were not to have the same effect.⁵⁰⁷ What is clear, though, is that where an agreement not to sue a principal debtor provides that the surety's liability will be preserved, then the surety will not be discharged.⁵⁰⁸ Indeed, for some courts, the presence of such a provision is inconsistent with the interpretation of the contract as one of release⁵⁰⁹ and has therefore encouraged them to interpret the words of release as a promise not to sue.⁵¹⁰

Release with implied reservation

- 47-098 However, the force of this traditional distinction between agreements to release and agreements not to sue a debtor has itself been challenged by the Court of Appeal in two more recent decisions and while these cases both concerned the position of co-debtors, the approach of the judges in them may apply also to the context of suretyship. In *Watts v Aldington, Tolstoy v Aldington* A had gained judgment for £1.5 million plus costs against W and T in respect of libels made against him.⁵¹¹ T was adjudicated bankrupt on his own application, whereas W was adjudicated bankrupt on A's petition. Subsequently, A agreed with W (with whom he had four outstanding proceedings)

to accept £10,000 from W's family "in full and final settlement of judgment and orders and any liability however arising" (cl.6) and in return for not opposing W's appeal from his bankruptcy order. W also made various undertakings not to repeat the libels made about A. A and W's contract further stipulated (by cl.9) that breach of any term by W would give rise to a right in A "to treat the contract as at an end and to proceed for the full entirety under those judgments as though the agreement had never been entered into". The question arose whether this contract discharged T from his liabilities to A under the judgment debt. At first instance, Morritt J construed A's promise under the contract as one not to sue W rather than one to release him, principally on the basis that, as cl.9 made clear, its terms were conditional on performance by W of his side of the bargain: this meant that T was not discharged by A's agreement with W. While the Court of Appeal ultimately affirmed this result, all its members (Neill, Steyn and Simon Brown LJJ) disapproved the approach taken by Morritt J, even though they saw that it enjoyed support in the authorities. For Simon Brown LJ, the difficulty of applying to the contract before the court the distinction between agreements to release and not to sue illustrated "the technicality and intrinsic artificiality of the conventional approach to this rule"⁵¹² as to discharge of co-debtors. In the leading judgment, Neill LJ described how historically the purpose of this distinction was to carve out an exception to the established rule that release of one joint tortfeasor released them all,⁵¹³ which was founded on the unity of the cause of action against them, but he noted how this rule, while still formally valid, had itself been much qualified.⁵¹⁴ Given these changes, Neill LJ considered that:

"... it will often be more satisfactory to consider whether the relevant document is an absolute release or a release with a reservation rather than to consider whether the document can be fitted into the straitjacket of a covenant or agreement not to sue."⁵¹⁵

Moreover, for the Court of Appeal, this question should be resolved by construing the contract as a whole in its factual matrix and implying any terms in it which were necessary.⁵¹⁶ According to Neill LJ:

"In the cases there is much emphasis on an express reservation of rights. But there is apparently no authority holding that an implied reservation is insufficient. That is not surprising because a rule that an implied term, complying with the stringent tests applicable to the implication of terms, cannot render the same service as an express term in this corner of the law would be a curiosity."⁵¹⁷

On the facts before it, the Court of Appeal held that there was clearly an implied reservation by A of his rights against T.

⁴⁷⁻⁰⁹⁹ In *Johnson v Davies*⁵¹⁸ a differently constituted Court of Appeal⁵¹⁹ adopted the approach taken in *Watts v Aldington*, *Tolstoy v Aldington*⁵²⁰ and extended it so as to apply to a joint (but not joint and several) debt.⁵²¹ In *Johnson v Davies* the plaintiffs were sureties for the debts of a

company, the majority of whose shares they owned and which was a tenant under a lease. Under a contract of sale of its shares to the defendants and one Hopkins ("H"), the purchasers agreed, *inter alia*, to indemnify the plaintiffs against claims brought under the lease. Subsequently, H entered an individual voluntary arrangement with his creditors under Pt VIII of the Insolvency Act 1986, under which he was to pay to the supervisor 75 per cent of his net income for five years and any "windfall" assets he may receive within that period. The arrangement further provided that when all moneys to be made available had been distributed to the creditors, he would be released. The plaintiffs were given notice of the creditors' meeting (as required by statute) and were therefore deemed parties to the arrangement following the provisions of the 1986 Act. Later, they were required to pay as sureties for the company under its lease and so claimed to be indemnified for these sums by the defendants, but the defendants countered that they had been released from their obligations under the sale by the release of their co-debtor, H, by the voluntary arrangement. On the facts, the court found that the contract did not on its express or implied terms intend to discharge all the co-debtors on the (conditional) release of one of their number under a "voluntary arrangement".⁵²² Indeed, while it was necessary to imply a term in the contract that the creditors bound by the proposals would take no steps to enforce their debts against the debtor while the debtor complied with his obligations under it, it was not necessary, even if it would be a "convenient and tidy result" that the creditors should take no steps to enforce their debts against any co-debtors.⁵²³ The Court of Appeal has held that the burden of proof as to implied reservation of rights by creditor against co-debtor is on the creditor.⁵²⁴

Application to surety

- 47-100 *Johnson v Davies* concerned the case of an agreement by a creditor and one of several jointly liable persons: it is to be noted that while H and the defendants in that case were liable under a contract of indemnity, this was not a contract of indemnity in the sense of a contract which, while imposing a primary liability on a debtor vis-à-vis the creditor, created a relationship of suretyship with some other person.⁵²⁵ *Johnson v Davies* is not, therefore, direct authority for the proposition that the question whether an agreement between a creditor and a *principal debtor* as to the latter's future obligations (whether put in terms of "release" or "agreement to sue") will operate to discharge a *surety*, whether the suretyship is a contract of guarantee or one of indemnity. However, it is submitted that the same approach as was taken by the Court of Appeal in that case should be extended to these particular examples of joint obligation, with the result that the question of discharge of the surety would be determined as a matter of the construction of the agreement between the creditor and principal debtor and that, following ordinary principles, this should take into account any implied as well as any express terms.⁵²⁶ This approach was approved by Richards J in *Finley v Connell Associates (Application to Strike Out)* in the context of considering the effect on a surety of an agreement between the creditor and principal debtor which was expressed as an agreement not to sue the principal debtor.⁵²⁷ The learned judge noted that the traditional distinction between releases and covenants not to sue had been criticised by the Court of Appeal in the context

of joint debtors in *Watts v Aldington*,⁵²⁸ in particular on the basis that the traditional approach emphasised the significance of an express reservation of rights in order to retain the liability of a joint debtor, whereas such a reservation may, in accordance with the general legal position, be implied. Richards J observed:

“The authorities on sureties often refer in general terms to the distinction between an agreement whereby the creditor releases the debtor (which also discharges the surety) and an agreement whereby the creditor covenants not to sue the debtor (which does not discharge the surety). But it does appear that ... the existence of a reservation of rights against the surety is an essential ingredient in the categorisation of an agreement not to sue. The mere use of the language of a covenant not to sue is not decisive.”⁵²⁹

In his view, moreover, there is no reason why a reservation of rights against a surety should not be implied as well as express:

“... the reasoning in [*Watts v Aldington* is] compelling and [it is] right to follow it even if it is not strictly binding in relation to the effect of an agreement on sureties.”⁵³⁰

- 47-101 If this approach were more generally followed, then, as under the traditional approach, effect would be given to an express reservation of rights against the surety by the creditor, but the absence of such a reservation would not be taken necessarily to imply an intention that the surety should be discharged: a court could hold a principal debtor released, but the surety's liability and right of indemnity against the principal debtor would be preserved. For in answer to the concern that such a construction of the contract would impose a liability on the principal debtor after his release, it may be countered that it would substitute a possible claim by the surety for a claim by the creditor. While this is an unlikely construction in the context of suretyship, it is by no means impossible: to adapt Chadwick LJ's words in *Johnson v Davies*, to give a principal debtor a complete protection against all claimants may be a “convenient and tidy result” but may not be a necessary implication of the agreement between the creditor and principal.⁵³¹ A possible remaining difficulty with such an approach might be seen to lie in the disharmony created with the rule according to which an agreement to give time to the principal debtor discharges the surety, but this disharmony is only apparent for the latter rule does not apply where the creditor reserves his rights against the surety by notifying the debtor when time is given to him.⁵³²

Discharge of debtor by bankruptcy

- 47-102 It is expressly provided by s.281(7) of the Insolvency Act 1986, which substantially re-enacted the earlier law,⁵³³ that:

“... [d]ischarge does not release any person ... from any liability as surety for the bankrupt or as a person in the nature of such a surety.”

But a surety who guarantees the payment of interest on a principal sum so long as it remains due, is not liable to the creditor in respect of interest which would have accrued if the debtor had not become bankrupt and been discharged,⁵³⁴ as the principal is no longer due.⁵³⁵ The question of the effect on a co-debtor of a “voluntary arrangement” made between a debtor and his creditors under Pt VIII of the Insolvency Act 1986 was considered by the Court of Appeal in *Johnson v Davies*.⁵³⁶ There, as has been seen,⁵³⁷ creditors had entered an “individual voluntary arrangement” under Pt VIII of the Insolvency Act 1986 with H, one of their joint debtors, under which he was to pay to the supervisor 75 per cent of his net income for five years and any “windfall” assets he may receive within that period and according to which when all moneys to be made available had been distributed to the creditors, he would be released. The creditors were given notice of the creditors’ meeting (as required by statute) and were therefore deemed parties to the arrangement following the provisions of the 1986 Act. Later, when the creditors made claims against the joint debtors other than H, those joint debtors countered that they had been released from their obligations by the release of H, their co-debtor, by the voluntary arrangement. The Court of Appeal was able to dispose of this argument and hold for the creditors on the ground that the agreement before them did not on its terms intend to discharge the co-debtors,⁵³⁸ but Chadwick LJ (with whom Ward and Kennedy LJJ agreed) went on to consider whether, as had been argued, a debtor’s voluntary arrangement with his creditors under the 1986 Act necessarily discharges his co-debtors.⁵³⁹ In this respect, he noted that s.260(2)(b) of the Insolvency Act 1986 provides that such voluntary arrangements:

“... bind every person who in accordance with the rules had notice of, and was entitled to vote at, the meeting ... as if he were a party to the arrangement”,

but that, unlike the Bankruptcy Act 1914, the 1986 Act makes no express provision for the effect of these arrangements on sureties.⁵⁴⁰ In Chadwick LJ’s view, the legislature’s failure to adopt the earlier statutory precedents gave rise to a strong inference of its deliberate decision that voluntary arrangements should take effect in the same way as did consensual deeds.⁵⁴¹ Finally, the 1986 Act’s provision that a voluntary arrangement “binds every person ... as if he were a party” to it requires the creditor to be treated as if he had consented to the arrangement and so a voluntary arrangement made under the Act does not discharge a co-debtor or surety unless it is to be so construed on its terms, express or implied.⁵⁴² This consensual nature of individual voluntary arrangements suggests that the rule according to which they discharge the surety attracts the same qualifications as apply to voluntary deeds of release and this has been held to be the case as regards the position where an individual voluntary arrangement is agreed on the basis that a creditor reserves his rights against the surety.⁵⁴³ Moreover, such a reservation may be made clear

to the principal debtor in all the circumstances, including the dealings of the parties before the arrangement is made, and need not be included as a term of the arrangement itself.⁵⁴⁴

Discharge of debtor through creditor's breach of contract

- 47-103 Where a person guarantees payment of a sum due from the debtor under an entire contract and the creditor cannot sue the debtor because there has been no complete performance,⁵⁴⁵ the surety is also not liable.⁵⁴⁶ Similarly, if the creditor is guilty of a breach of contract as against the debtor, and as a result the debtor is discharged, a guarantor cannot be liable any more than the debtor.⁵⁴⁷ While, therefore, a repudiatory breach of contract by the creditor once accepted by the debtor discharges both the latter and the guarantor, a non-repudiatory breach will not discharge the guarantor, unless it involves a "not unsubstantial" departure from a term of the principal contract which has been itself "embodied" into the guaranteee.⁵⁴⁸ If such a departure is established, then discharge occurs on the ground of variation of the surety's obligations.⁵⁴⁹ If there is a breach of contract by the creditor which does not discharge the debtor but gives him a right to counterclaim for damages, the surety may be able to avail himself of this right by way of set-off, but he can normally only do this if the principal debtor is joined as a party to the proceedings.⁵⁵⁰ Similarly, if the debtor has some other valid defence to a claim by the creditor, for example, that the creditor has already elected to exercise a remedy inconsistent with a claim for damages⁵⁵¹ or that the sum claimed is a penalty,⁵⁵² or that the creditor has failed to mitigate the damage resulting from the debtor's breach of contract,⁵⁵³ a guarantor can take advantage of the defence available to the debtor. But in all these cases the position is different where the contract is one of indemnity and not guarantee. If, on the true construction of the contract, the surety has undertaken to pay a given sum on a given event, then he is liable to pay it on that event, and it is immaterial that the principal debtor could not be sued for it by the creditor.⁵⁵⁴

Discharge of debtor through debtor's breach of contract

- 47-104 Where the debtor himself is guilty of a breach of contract in consequence of which the creditor elects to treat the contract as discharged, the possibility of the surety being discharged gives rise to considerable difficulty. It must first be seen whether the surety has guaranteed complete performance of the contract by the principal debtor. *Prima facie* the surety is treated as guaranteeing that the debtor will perform his contract; consequently, if the debtor is in breach so that the creditor exercises his right to terminate the contract, the debtor's liability is transmuted into a liability for damages, but the surety remains liable for the performance of that duty, as he is liable for the performance of the original duty.⁵⁵⁵ As has been observed:

“A repudiatory breach [by the debtor] will in the normal course of events lead to the termination of the repudiated contract (although of course it may not do so). It would be extraordinary if a performance guarantee was intended to cease to operate in exactly the situation in which its beneficiary most needs it—when the contract has failed because the principal has repudiated it.”⁵⁵⁶

It is possible, though, that the surety may be held to have guaranteed only the debtor’s primary obligations under the contract and not his secondary obligation (to pay damages) in the event of breach; in this event it seems that the surety would remain liable for his accrued liability in respect of the primary obligations.⁵⁵⁷

Guarantees of payment by instalments

- 47-105 More problems arise with contracts involving payment in instalments, where payment is guaranteed by the surety. The creditor’s right to claim payment of instalments, whether from the debtor or the surety, *prima facie* arises only where the events specified in the contract have occurred; thus; where the contract is prematurely terminated (whether for breach or any other reason) the debtor may never become liable for instalments thereafter due. In this event, the surety cannot be liable either. But the position is different as regards instalments which have accrued due. So where instalments under a shipbuilding contract have accrued due, the fact (if it is a fact) that the buyer’s obligation to pay the instalments has been replaced by a general claim for damages as a result of the shipbuilder’s exercise of his right to rescind or cancel⁵⁵⁸ the contract, will not deprive the shipbuilder of his accrued rights against the guarantor.⁵⁵⁹ It is immaterial whether the shipbuilder issues proceedings against the guarantor before⁵⁶⁰ or after⁵⁶¹ he has rescinded or cancelled the contract. In fact it will be unusual for rescission or cancellation of the contract in such circumstances to deprive the shipbuilder of accrued rights to instalments from the principal debtor,⁵⁶² but it may do so in some circumstances,⁵⁶³ and where this occurs there will now, it seems, be a major breach in the co-extensiveness principle.⁵⁶⁴ The surety will remain liable for instalments, while the principal debtor’s liability will be a liability for damages—which may, of course, in particular circumstances, be for sums significantly less. The surety’s right to an indemnity from the principal debtor⁵⁶⁵ will presumably remain unaffected by this breach of the co-extensiveness principle which means only that the suretyship contract will be treated as an indemnity rather than a guarantee for some limited purposes.

Discharge of debtor as a result of surety’s breach of contract

- 47-106

Where a surety has given an undertaking to ensure that something occurs on which the debtor's liability is contingent, but fails to do so, any resulting lack of liability in the debtor does not prevent liability arising in the surety. Thus, in *Cerium Investments Ltd v Evans*,⁵⁶⁶ a landlord had granted licences to the defendants to assign a lease and an underlease, the defendants covenanting as surety that the assignees would pay the rents and perform the covenants in the leases. The licences further provided that they should become "null and void" if the assignments were not registered with the landlords within a month. Assignments were made but not registered within this time by the assignees. The Court of Appeal upheld a claim by the landlords against the defendants as sureties in respect of arrears of rent not paid by the assignees, holding that the licences were initially effective and that on assignment the defendants as sureties became immediately contractually liable to the landlords in respect of any breach of covenant in the assignees, including their failure to register their assignments. Thus, the defendants could not rely on the subsequent nullity of the licence as a defence to a claim against them as sureties as this nullity was the consequence of their own wrongdoing in failing to ensure that the assignments were registered.

Discharge of debtor by operation of law

- 47-107 A guarantor is generally discharged if the debtor is discharged by operation of law. Thus, where a mortgagee forecloses and thereafter sells the mortgaged property, a guarantor of the mortgage debt is discharged by operation of law because the mortgage debt itself is discharged in these circumstances.⁵⁶⁷ And where a finance company retook the goods from the hirer in breach of the provisions of the *Hire-Purchase Act 1938* so that the hirer was discharged under that Act, the guarantor was also discharged.⁵⁶⁸ On the other hand, the House of Lords has held that a disclaimer of a lease by a corporate tenant debtor's liquidator does not discharge the liability of a guarantor of the tenant's liabilities.⁵⁶⁹ The reason for this failure to discharge the tenant's guarantors is to be found in s.178(4)(b) of the *Insolvency Act 1986*, which provides that such a disclaimer:

"… does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person."

A surety liable under a contract of indemnity is not necessarily discharged if the debtor is discharged by operation of law; but if the creditor is tainted with any illegality this may protect the surety under a contract of indemnity as much as under a contract of guarantee.⁵⁷⁰ Where a guarantee is expressed to render the guarantor liable even if the principal debtor's liability is discharged, the liability which began as a guarantee is in effect transmuted into a liability under an indemnity.⁵⁷¹

Footnotes

- 478 *Western Credit Ltd v Alberry* [1964] 1 W.L.R. 945.
- 479 *Perry v National Provincial Bank* [1910] 1 Ch. 464.
- 480 See above, paras 47-007—47-008.
- 481 *Goulston Discount Co Ltd v Clark* [1967] 2 Q.B. 493; cf. *Bentworth Finance Ltd v Lubert* [1968] 1 Q.B. 680. Contrast Consumer Credit Act 1974 s.113 on which see above, para.41-192.
- 482 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502, 508; *BOC Group Plc v Centeon LLC* [1999] 1 All E.R. (Comm) 53; *Lombard North Central Plc v Nugent* [2013] EWHC 1588 (QB) at [90].
- ④83 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502, 506 and 508; *BOC Group Plc v Centeon LLC* [1999] 1 All E.R. (Comm) 53, 64 and see above, paras 47-065—47-069. Where a contract of guarantee construed as giving rise to a secondary liability made express provision entitling the guarantor to raise “any equivalent rights” in defence of liability as the principal debtor would have against the creditor under the contract between them, this was held to do no more than make “express the principle of co-extensiveness” and was “intended to make express the principle that the liability of the secondary obligor can be no greater than that of the primary obligor”; the guarantor was therefore intended to have whatever defences the principal debtor had, including equitable set-off: *Black & Veatch Corp v Kazstroyservice Global BV* [2021] EWHC 2104 (QB) at [67] and [130], per Jefford J.
- 484 *BOC Group Plc v Centeon LLC* [1999] 1 All E.R. (Comm) 53, per Rix J.
- 485 See Vol.I, paras 24-058 et seq.
- 486 *Re Sherry* (1884) 25 Ch. D. 692.
- 487 (1816) 1 Mer. 529.
- 488 *Re Sherry* (1884) 25 Ch. D. 692.
- 489 *Re Sherry* (1884) 25 Ch. D. 692.
- 490 *Walker v British Guarantee Association* (1852) 18 Q.B. 277.
- 491 *Petty v Cooke* (1871) L.R. 6 Q.B. 790.
- 492 *Re Idenden* [1970] 1 W.L.R. 1015.
- 493 *Commercial Bank of Tasmania v Jones* [1893] A.C. 313. This rule does not apply to an “on-demand guarantee”, where questions whether the debtor is liable under the underlying contract are irrelevant: see *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV* [2011] EWCA Civ 827 [2011] 2 Lloyd's Rep. 379 at [27] and above, para.47-009.
- 494 See Vol.I, paras 19-017 et seq.
- 495 See above, para.47-071.
- 496 See below, para.47-131.

- 497 cf. *Polak v Everett* (1876) 1 Q.B.D. 669, 673–674 (in the context of giving the principal debtor time).
- 498 *Oriental Financial Corp v Overend, Gurney & Co* [1871] 7 Ch. App. 142, 150.
- 499 *Mahant Singh v U Ba Yi* [1939] A.C. 601, 606, per Lord Porter.
- 500 *Cowper v Smith* (1838) 4 M. & W. 519; *Perry v National Provincial Bank* [1910] 1 Ch. 464.
- 501 *Kearsley v Cole* (1846) 16 M. & W. 128, 135; *Bateson v Gosling* (1871) L.R. 7 C.P. 9; *Cole v Lynn* [1942] 1 K.B. 142; *Greene King Plc v Stanley* [2001] EWCA Civ 1966, [2001] B.P.I.R. 491 at [67], [74] and [81] (where the proposition in the text was expressly approved).
- 502 *Davidson v McGregor* (1841) 8 M. & W. 755.
- 503 *Perry v National Provincial Bank* [1910] 1 Ch. 464, especially at 471 and 476.
- 504 *Kearsley v Cole* (1846) 16 M. & W. 128, 135, per Parke B.
- 505 *Perry v National Provincial Bank* [1910] 1 Ch. 464, especially at 476.
- 506 See Vol.I, para.19-017.
- 507 *Bailey v Edwards* (1864) 4 B. & S. 761, 771 where Blackburn J based the rule discharging a surety on the giving of time to the debtor by the creditor on the fact that otherwise surety would be prevented from exercising his right to call upon the creditor to enforce the debt in equity, even though this right was termed by him “of very little practical value, and is seldom, if ever, exercised”. See further, below, para.47-111.
- 508 *Bateson v Gosling* (1871) L.R. 7 C.P. 9.
- 509 *Commercial Bank of Tasmania v Jones* [1893] A.C. 313.
- 510 e.g. *Solley v Forbes* (1820) 2 Br. & B. 38; *Duck v Mayeu* [1892] 2 Q.B. 511.
- 511 [1999] L. & T.R. 578.
- 512 [1999] L. & T.R. 578 at 598.
- 513 [1999] L. & T.R. 578 at 589; *Clayton v Kynaston* (1701) 2 Salk. 573.
- 514 Notably, by s.6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935, re-enacted by s.3 of the Civil Liability (Contribution) Act 1978.
- 515 [1999] L. & T.R. 578, 590.
- 516 cf. above, paras 47-065 et seq.
- 517 [1999] L. & T.R. 578 at 595.
- 518 [1999] Ch. 117.
- 519 Chadwick, Ward and Kennedy LJJ.
- 520 See above, para.47-098.
- 521 [1999] Ch. 117, 127. See also *Sun Life Assurance Society Plc v Tantofex (Engineers) Ltd* [1999] L. & T.R. 568; *Chelsea Building Society v Nash* [2010] EWCA Civ 1247, [2011] B.P.I.R. 381 at [33]–[38].
- 522 See below, para.47-102 on the status of a “voluntary arrangement” for these purposes.
- 523 [1999] Ch. 117, 128.
- 524 *Chelsea Building Society v Nash* [2010] EWCA Civ 1247, [2011] B.P.I.R. 381 at [38].
- 525 See above, paras 47-002 et seq. See further Andrews and Millett, *The Law of Guarantees*, 7th edn (2015), para.9-011.
- 526 In *ADL Advanced Contractors Ltd v Patel* [2021] EWHC 2200 (Comm) at [31] Sir Nigel Teare noted the discussion in the text in the 33rd edn of the present work at para.45-096 (and

also in paras 47-095—47-101 of the present edition more generally) and considered that it had the “flavour of a developing area of the law”. The case before the HC concerned the case where (i) a surety has undertaken a joint liability with another surety, (ii) the liability of the other surety has thereafter been immediately and absolutely released by the creditor, (iii) the release expressly states that the right to sue the first surety was reserved but (iv) the first surety was not party to the later release. The HC considered that “to hold that in such circumstances the first surety was not released (and so to give no effect to the previously established common law principle that a joint debt is destroyed when one surety is released) would be a further development in this area of the law” and on this ground refused to determine it under CPR Pt 24. cf. below, para.47-122 (note).

527 [1999] *Lloyd's Rep. P.N.* 895, *The Times*, 23 June 1999.

528 [1999] *L. & T.R.* 578 and see above, para.47-098.

529 [1999] *Lloyd's Rep. P.N.* 895, 906–907.

530 [1999] *Lloyd's Rep. P.N.* 895, 906–907.

531 [1999] *Ch.* 117, 128.

532 See below, para.47-119.

533 Insolvency Act 1986 s.281(7) (which since 2016 has moved to Pt IX Ch.1A of the Act), itself replacing Bankruptcy Act 1914 s.28(4).

534 *Re Moss* [1905] 2 K.B. 307.

535 See Insolvency Act 1986 s.281(1).

536 [1999] *Ch.* 117; cf. *IRC v Adam & Partners* [1999] 2 B.C.L.C. 730, 737 (corporate insolvency).

537 See above, para.47-099.

538 [1999] *Ch.* 117 at 124–129.

539 [1999] *Ch.* 117 at 129 et seq. and see *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch), [2007] Bus. L.R. 1771.

540 [1999] *Ch.* 117 at 129–130. (The wording of s.260(2) of the 1986 Act has been amended, but without relevant substantive change.)

541 [1999] *Ch.* 117 at 131. Chadwick LJ considered that *Megraph v Gray, Gray v Megraph* (1874) L.R. 9 C.P. 216; *Ellis v Wilmot* (1874) L.R. 10 Ex. 10; *Ex p. Jacobs* (1875) 10 Ch. App. 211 which held that arrangements between debtors and creditors made under the Bankruptcy Act 1869 by their nature discharged a surety were inapplicable to voluntary arrangements under the Insolvency Act 1986 because under the latter the discharge of the debtor depends entirely on the terms of the arrangement rather than taking effect by operation of law (as under the 1869 Act): [1999] *Ch.* 117, 137–138. The Court of Appeal therefore disapproved the views of Jacobs J expressed in the case below at [1997] 1 All E.R. 921, 927; and in *RA Securities Ltd v Mercantile Credit Co Ltd* [1995] 3 All E.R. 581, 586–587.

542 [1999] *Ch.* 117, 137–138.

543 *Greene King Plc v Stanley* [2001] EWCA Civ 1966, [2002] B.P.I.R. 491 at [82]; *Koutrouzas v Lombard Natwest Factors Ltd* [2002] EWHC 1084 (QB).

544 *Greene King Plc v Stanley* [2001] EWCA Civ 1966, [2002] B.P.I.R. 491 at [83].

545 See Vol.I, paras 24-026 et seq.

- 546 *Eshelby v Federated European Bank Ltd* [1932] 1 K.B. 423, 431. See also *Blest v Brown* (1862) 4 De G.F. & J. 367.
- 547 *Watts v Shuttleworth* (1861) 7 H. & N. 353.
- 548 *National Westminster Bank Plc v Riley* [1986] B.C.L.C. 268, 275-276, explaining *Vavasseur Trust Co Ltd v Ashmore* Unreported 1976; *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* [2015] EWHC 999 (Comm), [2015] 2 Lloyd's Rep. 123 at [183]-[199].
- 549 *National Westminster Bank Plc v Riley* [1986] B.C.L.C. 268, 275-276 (referring to *Holme v Brunskill* (1878) 3 Q.B.D. 495 (on which see below, para.47-108), cf. *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* [2015] EWHC 999 (Comm), [2015] 2 Lloyd's Rep. 123 at [185]-[186], which distinguished between discharge of the guarantor on the ground of not unsubstantial non-repudiatory breach by the creditor and on the ground of variation by reference to *Wardens and Commonalty of the Mystery of the Mercers of the City of London v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep. 365 (though the contract there was held not to be a guarantee at least in the ordinary sense (at 369, 371, 374 and 375) and the distinction between discharge by variation and discharge by breach by the creditor reflected a concession by counsel (at 367)).
- 550 *Bechervaise v Lewis* (1872) L.R. C.P. 372; but cf. *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 A.C. 199; *Wilson v Mitchell* [1939] 2 K.B. 869. There is an exhaustive discussion of this question in *Cellulose Products Pty Ltd v Truda* (1971) 92 W.N. (N.S.W.) 561; and see *Indrisie v General Credits Ltd* (1985) V.R. 251 in which the Supreme Court of Victoria held that a surety cannot take advantage of any equitable right of set-off which the principal debtor may have against the creditor. cf. *Ashley Guarantee Plc v Zacaria* [1993] 1 W.L.R. 62 (equitable set-off not a ground for refusing creditor's right to possession as mortgagee).
- 551 *Hewison v Ricketts* (1894) 63 L.J. Q.B. 711. But contrast *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, see below, para.47-105.
- 552 *Cellulose Products Pty Ltd v Truda*, above, at 565. *Sterling Industrial Facilities Ltd v Lydiate Textiles Ltd* (1962) 106 S.J. 669 is inconclusive on this point.
- 553 cf. *Scottish Midland Guarantee Trust v Wooley* (1964) 114 L.J. 272.
- 554 *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 A.C. 199. cf. *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* [2015] EWHC 999 (Comm), [2015] 2 Lloyd's Rep. 123 at [172]-[181] (a term in a contract (assumed to be a true guarantee for this purpose, though held to be a performance bond) whereby the guarantor's obligations "shall not be affected or prejudiced by any dispute" between the creditor and principal debtor held to cover disputes involving an allegation of fraud in the creditor so that guarantor is not discharged).
- 555 *Moschi v Lep Air Services Ltd* [1973] A.C. 331.
- 556 *Manx Electricity Authority v JP Morgan Chase Bank* [2003] EWCA Civ 1324, (2003) 147 S.J.L.B. 1205 at [37], per Rix LJ. See similarly at [47], per Chadwick LJ.
- 557 *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129.
- 558 The HL in *Hyundai Heavy Industries Co Ltd v Papadopoulos* referred to "rescission or cancellation" of the contract where now "termination" is more frequently used: see Vol.I, Ch.27 esp. paras 27-001—27-005.

- 559 *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129.
- 560 *Hyundai Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502.
- 561 *Papadopoulos case* [1980] 1 W.L.R. 1129.
- 562 Rescission ab initio may have this effect, but cancellation (usually known now as termination) on the ground of breach will normally only operate prospectively: *Johnson v Agnew* [1980] A.C. 367, 393. On termination for breach and its effects generally see Vol.I, Ch.27.
- 563 See *Dies v British International Mining & Finance Corp* [1939] 1 K.B. 724, the correctness of which was assumed but not decided in the *Papadopoulos* case, see above. For some of the difficulties arising out of these cases, see *Beatson* (1981) 97 L.Q.R. 389.
- 564 For the co-extensiveness principle, see above, para.47-071.
- 565 See below, paras 47-131 et seq.
- 566 (1991) 62 P. & C.R. 203.
- 567 *Lloyds & Scottish Trust Ltd v Britten* (1982) 44 P. & C.R. 249.
- 568 *Unity Finance Ltd v Woodcock* [1963] 1 W.L.R. 455. The Consumer Credit Act 1974 ss.91 and 113 (replacing Hire-Purchase Act 1965 s.34(2)) indeed expressly provide for this result in the case of a guarantee or indemnity which is a “security” as defined by s.189(1), but this definition does not include “recourse agreements”: see above, paras 41-182, 41-332 and 41-369.
- 569 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] A.C. 70 applied in *Scottish Widows Plc v Tripipatkal* [2003] EWHC 1874 (Ch), [2003] B.P.I.R. 1413.
- 570 See *Unity Finance Ltd v Woodcock* [1963] 1 W.L.R. 455 as explained in *Goulston Discount Co Ltd v Clark* [1967] 2 Q.B. 493. On the modern law of illegality, see Vol.I, Ch.18.
- 571 *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep. 255; cf. *Heald v O'Connor* [1971] 1 W.L.R. 497, 503.

(c) - Discharge of Surety through Variation of Contract between Debtor and Creditor

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Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 7. - Discharge of Surety

(c) - Discharge of Surety through Variation of Contract between Debtor and Creditor

Variation of contract between creditor and debtor

47-108 It is a well established and strictly applied principle that any variation in the terms of the agreement between the creditor and the debtor which could prejudice the surety will, unless he consents thereto, discharge him from liability,⁵⁷² unless the contract of suretyship provides to the contrary.⁵⁷³ It is immaterial that the variation has not in fact prejudiced the surety, or that the likelihood that it may do so is remote.⁵⁷⁴ If the variation could prejudice the surety it alters the nature of the risk which he has undertaken and he is entitled to decide whether he wishes to continue bound or not. But if it is self-evident that the variation is unsubstantial or could not prejudice the surety he will not be discharged.⁵⁷⁵ The principle is applied very strictly so that even the most trifling variation may discharge the surety.⁵⁷⁶ In the leading case of *Holme v Brunsell*⁵⁷⁷ the defendant joined in a bond to guarantee that the tenant of a farm would deliver up the farm and a flock of sheep thereon at the expiration of the lease. The lease was later varied without the knowledge of the surety by the surrender of a small field by the tenant in return for a reduction in the rent. It was held that the surety was discharged since it was possible that the surrender of the field might have affected the tenant's ability to pasture the sheep and so to return them in good condition, and the surety might therefore have been prejudiced by the variation. On the other hand, a guarantor who has entered into a fidelity bond to answer for the conduct of a servant has been held not discharged by trifling variations in the contract of employment, such as an increase in salary,⁵⁷⁸ or an alteration of the length of notice required to terminate the employment,⁵⁷⁹ since it was held that such variations could not have prejudiced the surety. So also a purported variation of the agreement between the creditor and debtor which is, for some reason, ineffective in law will

not discharge the surety since he cannot be prejudiced thereby.⁵⁸⁰ At common law a deed could not be varied by a parol agreement, and therefore such a variation did not affect the surety,⁵⁸¹ but the position was different in equity⁵⁸² and the rules of equity now prevail.

Effect of breach of contract by debtor

- 47-109 The acceptance by the creditor of a fundamental breach or a wrongful repudiation by the principal debtor, with consequential discharge of the principal contract, is not such a variation or discharge of the contract as will discharge the guarantor.⁵⁸³

Agreement by debtor to pay earlier

- 47-110 Where the creditor and principal debtor enter a binding agreement under which the debtor is bound to pay earlier than originally agreed, the surety will be discharged on the ground that this agreement varies the principal contract, unless such an agreement is on the facts obviously incapable of prejudicing him.⁵⁸⁴ On the other hand, the surety is not discharged if the principal debtor merely chooses to pay before the expiry of any period of credit allowed, even if the early payment is made at the creditor's request, since such a payment is not inconsistent with the contract guaranteed and involves no variation of it.⁵⁸⁵ Moreover, where a payment is made by the principal debtor to the creditor under a separate agreement rather than under the original contract guaranteed (and so as not to take effect as a variation of that original contract, save in immaterial respects), the surety will not be discharged.⁵⁸⁶ Here, “[t]he surety remains liable in respect of the original contract, but not of course in respect of the separate payments or loans which have been made”.⁵⁸⁷

Agreement by creditor to give time to the debtor

- 47-111 A binding agreement by the creditor to give time to the debtor is, in effect, one instance of variation, and also discharges the surety.
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- U According to Blackburn J:

“It has been established for a very long time, beginning with *Rees v Berrington*
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U to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether.”

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This rule has been said to be based on “highly technical reasoning”,

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U for, as appears from the above quotation, it is justified by the theoretical possibility that the surety may at any time choose to pay off the creditor and sue the principal debtor for an indemnity.

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U This right would be prejudiced where time has been given to the debtor, if the surety could not then sue him until the time had expired; while if the surety could sue at once the agreement to give time would be deprived of all effect.

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U But in practice the surety would rarely think of exercising this right in any event, and indeed Blackburn J once said

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U that he was “not aware of any instance in which a surety ever in practice exercised this right”.
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U But he also admitted that the rule itself was firmly established.

Binding agreement

- 47-112 It is not the mere giving of time which discharges the surety: there must be a binding agreement to give time.⁵⁹⁶ An agreement by a bank to allow a customer to increase his overdraft is not a binding agreement not to sue for the original debt forthwith.⁵⁹⁷ Where the principal debtor gives the creditor additional security after the contract of suretyship has been made, such as a promissory note payable in some months' time, the surety will be discharged if the creditor has thereby agreed

to waive his rights on the original debt and to give time.⁵⁹⁸ But it is otherwise if the promissory note is merely a collateral security not affecting the creditor's rights on the original debt.

- 47-113 The granting of time does not release the surety where the agreement is made with someone other than the principal debtor, as, for example, where the agreement to give time is made with another surety.⁵⁹⁹ Nor does an agreement to give time release the surety where the creditor has already obtained judgment against both debtor and surety; for after judgment both are equally liable to the creditor even though as between themselves the surety's liability remains a secondary one.⁶⁰⁰

Security given by surety also released

- 47-114 The principle that the variation of the contract between creditor and debtor, or the giving of time, discharges the surety, also has the effect of releasing any securities given by the surety to the creditor.⁶⁰¹

Distinct obligations not discharged

- 47-115 Where the surety has guaranteed several distinct obligations, whether they arise under separate contracts or one contract,⁶⁰² a variation or a giving of time in respect of one obligation will discharge the surety as to that obligation, but not as to the others.⁶⁰³ So where a surety guarantees payment of the price of any goods supplied by the creditor to the debtor, the giving of time in respect of the price of one lot of goods will not discharge the surety with respect to the price of another lot.⁶⁰⁴ But where the obligations are indivisible, as, for example, with regard to the payments of instalments under a hire-purchase agreement, the giving of time with respect to one instalment will discharge the surety with respect to all.⁶⁰⁵

Agreement to allow variation or giving of time

- 47-116 The effect of the rules discussed in the preceding paragraphs is so technical and inconvenient that in practice any well-drawn contract of suretyship will nowadays expressly permit variation of the obligations or the giving of time, without discharging the surety.⁶⁰⁶ At common law, such an agreement takes effect according to its terms,⁶⁰⁷ but in cases of doubt or uncertainty will be construed in favour of the surety.⁶⁰⁸ So, for example, where a contract of guarantee

provided that the guarantor's liability "under or pursuant" to the loan agreement was not to be affected by an arrangement which the creditor may make with the principal debtor and that the creditor could "agree to any amendment, variation, waiver or release ... in respect of an obligation of the [principal debtor] under the Loan Agreement", the question remained whether subsequent contracts of loan between the principal debtor and the creditor which "replaced" the loans guaranteed were indeed "amendments" or "variations" of the guarantor's liability "under or pursuant to" the loans guaranteed or whether they were "substantially different", whether in purpose, amount or terms, so as to fall outside the permitted variation provision in the guarantee contract.⁶⁰⁹ In so holding, the Court of Appeal approved the statement of the law found in Rowlatt on the Law of Principal and Surety (1898), according to which:

"... assent, whether previous or subsequent to a variation, only renders the surety liable for the contract as varied, where it remains a contract within the general purview of the original guarantee ... If a new contract is to be secured there must be a new guarantee."⁶¹⁰

On the other hand, where a clause in a contract of guarantee allows the creditor to vary the loan with the principal debtor but the creditor later agrees in writing with the guarantor not to renegotiate the loan without the latter's consent, then this subsequent agreement in effect reinstates the rule in *Holme v Brunskill*,⁶¹¹ with the result that any variation of the loan to the potential detriment or disadvantage of the guarantor discharges him.⁶¹² And a clause in a contract of guarantee of a lessee's obligations to its lessor which preserved the guarantor's liability "notwithstanding any neglect or forbearance on the part of the Lessor" to enforce the lessee's covenants has been held not to extend to a license by the lessor to allow the lessee to perform its covenants, as it concerned instead decisions by the lessor not to enforce the performance of a covenant against the lessee when in breach of that covenant: as a result, on the grant of such a license, the clause did not protect the lessor/creditor from the effect of the rule in *Holme v Brunskill*.⁶¹³ Finally, a change in the obligations of the principal debtor (for example, as to the rate of interest payable) under a term of the main contract which provides an option in the creditor to do so is not a variation in the contract at all, but the performance of it on its terms and so will not discharge the surety.⁶¹⁴

Contracts of indemnity

⁴⁷⁻¹¹⁷ In *GPP Big Field LLP v Solar EPC Solutions SL* it was held, if obiter,⁶¹⁵ by the High Court that the "overwhelming preponderance of view" in the cases and textbooks cited to it is that the rule in *Holme v Brunskill*⁶¹⁶ applies only to true contracts of guarantee and does not apply to contracts of indemnity.⁶¹⁷ There are, in the view of the High Court, "sound reasons of policy" to support

this conclusion and for not extending the rule beyond the situations established by authority.⁶¹⁸
The rule:

“... unduly favours the guarantor, in that it discharges the guarantor completely upon the occurrence of any variation which is not ‘obviously insubstantial’ or clearly for the benefit of the guarantor.⁶¹⁹ It represents a trap for the unwary creditor. Yet it is plainly not regarded as a fundamental right of the guarantor, since the law (subject to any relevant statutory control of unfair terms) permits the creditor to contract out of it by the terms of the guarantee.”⁶²⁰

Not extending the rule in *Holme v Brunsell* to contracts of indemnity properly so-called, “therefore promotes legal certainty”.⁶²¹

Guarantee of liability after variation

- 47-118 Even where there is no express agreement to allow variation it is sometimes possible for a court to hold that a variation does not discharge the surety because on the true construction of the contract he has guaranteed the liability as varied. Thus where the surety guaranteed the liability of a commission agent up to a specified amount, but nothing was said as to the mode of accounting between the agent and the creditor, it was held that a variation in the mode did not discharge the surety, because he had guaranteed the liability irrespective of changes in the mode of accounting.⁶²² Similarly, where a guarantee is expressed as being in respect of “all sums which are now or may hereafter become owing” to the creditor by the principal debtor, the surety will remain liable for sums so owing even if they were not foreseen by the original contract guaranteed.⁶²³

Reservation of rights against surety

- 47-119 Even if the contract of suretyship itself does not permit variations or the giving of time, the surety will not be released by an agreement to give time if the creditor reserves his rights against the surety by notifying the debtor when time is given to him.⁶²⁴ The consent of the surety is not necessary in this event,⁶²⁵ though it would doubtless be sufficient, but the position is different where there is a variation of the terms of the contract other than a giving of time. In this event a reservation of the creditor’s rights will be ineffective unless the surety consents to it.⁶²⁶ If the surety is informed and consents, he will remain bound in any event, and no further consideration need be provided,⁶²⁷

but mere knowledge of the creditor's intention to give time or vary the contract is not equivalent to consent unless some estoppel arises.⁶²⁸

Footnotes

- 572 *Whitcher v Hall* (1826) 5 B. & C. 269; *Holme v Brunskill* (1877) 3 Q.B.D. 495; *National Bank of Nigeria Ltd v Awolesi* [1964] 1 W.L.R. 1311; *West Horndon Industrial Park Ltd v Phoenix Timber Group Plc* [1995] 1 E.G.L.R. 77; *Howard de Walden Estates Ltd v Pasta Place Ltd* [1995] 1 E.G.L.R. 79; *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 471 (Comm), [2004] 2 Lloyd's Rep. 198 at [58]–[60]; affirmed [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497; *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595 at [12]; *Aviva Insurance Ltd v Hackney Empire Ltd* [2012] EWCA Civ 1716, [2013] B.L.R. 57 at [56]–[79]; *Maxted v Investic Bank Plc* [2017] EWHC 1997 (Ch) at [12] and [20]–[22] (guarantor's consent found in their agreement to variation in their capacity as directors of the principal debtor company). For the effect of the **Landlord and Tenant (Covenants) Act 1995 s.18** on the effectiveness of some variations of a tenant's covenants on guarantees by either a former tenant or his guarantor, see above, para.47-018.
- 573 cf. below, para.47-163, concerning the possible effect of the **Consumer Rights Act 2015 Pt 2** on such an exclusion.
- 574 *Bonar v Macdonald* (1850) 3 H.L.C. 226; *Holme v Brunskill* (1877) 3 Q.B.D. 495.
- 575 *Holme v Brunskill* (1877) 3 Q.B.D. 495 at 505; and see *National Westminster Bank Plc v Riley* [1986] B.C.L.C. 268, 276–277; *Howard de Walden Estates Ltd v Pasta Place Ltd* [1995] 1 E.G.L.R. 79; *De Montfort Insurance Co Plc v Lafferty* (1997) G.W.D. 4–140, [1997] C.L.Y. 5722, Outer House of Ct of Sess.; *Barclays Bank Plc v Kingston* [2006] EWHC 533, [2006] 1 All E.R. (Comm) 519; *Brown-Forman Beverages Europe Ltd v Bacardi UK Ltd* [2021] EWHC 1259 (Comm) at [66]. In *Topland Portfolio No.1 Ltd v Smiths News Trading Ltd* [2014] EWCA Civ 18, [2014] 1 P. & C.R. 17 at [20] it was noted (with apparent approval but expressly obiter) that the HC of Australia in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 C.L.R. 549 at 559 (Mason ACJ, Wilson, Brennan and Dawson JJ) considered that the burden of proof is on the creditor to show that the nature of the alteration can only be beneficial to the surety or that by its nature it cannot in any circumstances increase the surety's risk. In *Brown-Forman Beverages Europe Ltd v Bacardi UK Ltd* [2021] EWHC 1259 (Comm) at [66] this view of the burden of proof as to the immateriality of any changes was followed, concluding (at [71]) that this burden had not been discharged.
- 576 The sentence in the text (together with the earlier sentence “It is immaterial that the variation ... remote”) was seen as containing a summary of the applicable principle by HH Judge Pelling QC in *Brown-Forman Beverages Europe Ltd v Bacardi UK Ltd* [2021] EWHC 1259 (Comm) at [66].
- 577 (1877) 3 Q.B.D. 495.
- 578 *Frank v Edwards* (1852) 8 Exch. 214.
- 579 *Sanderson v Aston* (1873) L.R. 8 Exch. 73.

- 580 *Egbert v National Crown Bank* [1918] A.C. 903, 909–910 (increase in rate of interest forbidden by statute).
- 581 *Davey v Prendergrass* (1821) 5 B. & Ald. 187.
- 582 *Prendergast v Devey* (1821) 6 Madd. 124.
- 583 *Moschi v Lep Air Services Ltd* [1973] A.C. 331. See above, para.47-104.
- 584 *St Microelectronics NV v Condor Insurance Ltd* [2006] EWHC 977 (Comm), [2006] 2 *Lloyd's Rep.* 525 at [36], [38].
- 585 [2006] EWHC 977 at [37].
- 586 *Aviva Insurance Ltd v Hackney Empire Ltd* [2012] EWCA Civ 1716, [2013] B.L.R. 57 at [67]–[80], [86]–[89], following *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] A.C. 1, 21–22.
- 587 [2012] EWCA Civ 1716 at [78], per Jackson LJ.
- 588 *Polak v Everett* (1876) 1 Q.B.D. 669; *Overend Gurney & Co v Oriental Financial Corp* (1874) 7 H.L. 348; *Mahant Singh v U Ba Yi* [1939] A.C. 601.
- 589 (1795) 2 Ves. 540.
- 590 *Polak v Everett* (1876) 1 Q.B.D. 669, 673–674; Mellor and Quain JJ agreed as to the position in law but, unlike Blackburn J, they did not doubt its justice, considering it justified by “policy and convenience”: (1876) 1 Q.B.D. 669 at 674, 676–678; the decision of the QB was affirmed by the CA for the same reasons: (1876) 1 Q.B.D. 669 at 678.
- 591 *Petty v Cooke* (1871) L.R. 6 Q.B. 790, 795.
- 592 See below, para.47-131.
- 593 *Oriental Financial Corp v Overend Gurney & Co* (1871) L.R. 7 Ch. App. 142, 150.
- 594 *Swire v Redman* (1876) 1 Q.B.D. 536, 541. The actual decision in this case was in part overruled in *Rouse v Bradford Banking Co Ltd* [1894] A.C. 586.
- 595 But this happened in *Drager v Allison*, 19 D.L.R. (2d) 431 (1959).
- 596 *Overend Gurney & Co Ltd v Oriental Financial Corp Ltd* (1874) L.R. 7 H.L. 348. cf. *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) at [165]–[166].
- 597 *Rouse v Bradford Banking Co Ltd* [1894] A.C. 586, 594 et seq.
- 598 See *Wyke v Rogers* (1852) 21 L.J. Ch. 611; cf. *Mercantile Bank of Sydney v Taylor* [1893] A.C. 317.
- 599 *Frazer v Jordan* (1858) 8 E. & B. 303; *Clarke v Birley* (1889) 41 Ch. D. 422.
- 600 *Re a Debtor* [1913] 3 K.B. 11.
- 601 *Bolton v Salmon* [1891] 2 Ch. 48; *Smith v Wood* [1929] 1 Ch. 14.
- 602 *Harrison v Seymour* (1866) L.R. 1 C.P. 518.

- 603 *Croydon Commercial Gas Co v Dickinson* (1876) 2 C.P.D. 46; *WR Simmonds Ltd v Meek* [1939] 2 All E.R. 645.
- 604 *WR Simmonds Ltd v Meek* [1939] 2 All E.R. 645.
- 605 *Midland Motor Showrooms Ltd v Newman* [1929] 2 K.B. 256.
- 606 Having noted the observation in the text, the CA has held that the *absence* of such a usual express term is neutral as to the question whether the agreement constitutes a guarantee or an indemnity: *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595 at [12].
- 607 *British Motor Trust Co Ltd v Hyams* (1934) 50 T.L.R. 230; *Perry v National Provincial Bank* [1910] 1 Ch. 464; *Trade Indemnity Co v Workington Harbour, etc.* [1937] A.C. 1, 21. cf. *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] A.C. 199, 205; *Aviva Insurance Ltd v Hackney Empire Ltd* [2012] EWCA Civ 1716, [2013] B.L.R. 57 at [71]. For discussion of the possibility that such a term is not effective to retain the surety's liability by reason of the effect of the Consumer Rights Act 2015 Pt 2, see below, paras 47-160 et seq.
- 608 See *West Horndon Industrial Park Ltd v Phoenix Timber Group Plc* [1995] 1 E.G.L.R. 77. cf. *Samuels Finance Group Plc v Beechmanor Ltd* (1994) 67 P. & C.R. 282, 285 and see above, paras 47-063 et seq.
- 609 *Triodosbank NV v Dobbs* [2005] EWCA Civ 630, [2005] 2 Lloyd's Rep. 588 at [11]-[13], [19], per Longmore LJ, with whom Neuberger and Chadwick LJJ at [27] and [29] respectively agreed; *CIMC Raffles Offshore (Singapore) Ltd v Schahin Holdings SA* [2013] EWCA Civ 644, [2013] 2 Lloyd's Rep. 575 especially at [41]-[53], [61]-[63].
- 610 [2005] EWCA Civ 630 at [14]; applied in *Maxted v Investic Bank Plc* [2017] EWHC 1997 (Ch) at [16]-[19]. See further *Salter* (2017) 8 J.I.B.F.L. 459. See also *Wittmann (UK) Ltd v Willdav Engineering SA* [2007] EWCA Civ 824, [2007] B.L.R. 509 at [20]-[22], where it was also said that any consent to the variation made by the surety must be communicated to the creditor: [2007] EWCA Civ 824 at [27] (Moore-Bick LJ) and see *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) at [173]; *Brown-Forman Beverages Europe Ltd v Bacardi UK Ltd* [2021] EWHC 1259 (Comm) at [52]-[57].
- 611 (1877) 3 Q.B.D. 495, on which see above, para.47-108.
- 612 *Lloyds TSB Bank Plc v Hayward* [2005] EWCA Civ 466.
- 613 *Topland Portfolio No.1 Ltd v Smiths News Trading Ltd* [2014] EWCA Civ 18, [2014] 1 P. & C.R. 17 at [34]-[37].
- 614 *Nationwide Building Society v Christie* [2013] EWHC 127 (Ch) at [15].
- 615 The HC also held that there was no agreement to vary the contract between the principal debtor and the creditor on the facts: *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) at [169]-[170].
- 616 (1878) 3 Q.B.D. 495 at 505 and see above, para.47-108.
- 617 *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) at [131]-[142], [145]-[147] esp. at [145] referring to O'Donovan and Phillips, *The Modern Contract of Guarantee*, 3rd English edn by Courtney and Phillips (2016) para.7-070 (which considers the position not clearly settled), and relying in particular on dicta in *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595 at [1], *Vossloh*

Aktiengesellschaft v Alpha Trains (UK) Ltd [2010] EWHC 2443 (Ch), [2010] All E.R. (D) 86 (Oct) at [26], [27] and *ABM AMRO Commercial Finance Plc v McGinn* [2014] EWHC 1674 (Comm), [2014] 2 Lloyd's Rep. 333 at [37]. See also Andrews and Millett, *The Law of Guarantees*, 7th edn (2015), para.9-025 stating that “the rule in *Holme v Brunskill* applies to guarantees properly so called, and not to demand guarantees, which impose autonomous liability on the guarantor which is independent of the underlying contract” and referring to *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm), [2012] C.I.L.L. 3155 at [143] and [144]. The view taken by the HC in GPP Big Field LLP was followed by the HC in *Brown-Forman Beverages Europe Ltd v Bacardi UK Ltd* [2021] EWHC 1259 (Comm) at [47]–[49], noting that it had been endorsed by Phillips and O'Donovan in Courtney, Philips and O'Donovan, *The Modern Contract of Guarantee*, 4th edn (2020) at para.7-070.

618 *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) at [146].

619 See above, para.47-108.

620 [2018] EWHC 2866 (Comm) at [147], per Richard Salter QC sitting as a Deputy Judge of the HC.

621 [2018] EWHC 2866 (Comm) at [147], per Richard Salter QC.

622 *Stewart v M'Kean* (1855) 10 Exch. 675.

623 *National Merchant Buying Society Ltd v Bellamy* [2013] EWCA Civ 452, [2013] 2 All E.R. (Comm) 674 at [30]–[33].

624 *Overend Gurney & Co v Oriental Financial Corp* (1874) L.R. 7 H.L. 348; *Mahant Singh v U Ba Yi* [1939] A.C. 601.

625 *Kearsley v Cole* (1846) 16 M. & W. 128, 135; *Bateson v Gosling* (1871) L.R. 7 C.P. 9. cf. *Greene King Plc v Stanley* [2001] EWCA Civ 1966, [2002] B.P.I.R. 491 at [74]–[81] (release of debtor subject to reservation of rights against surety), see above, para.47-096.

626 This seems implicit in *Holme v Brunskill* (1877) 3 Q.B.D. 495.

627 *Yates v Evans* (1892) 61 L.J. Q.B. 446, 449.

628 *Polak v Everett* (1876) 1 Q.B.D. 669.

(d) - Discharge of Surety on Other Grounds

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Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 7. - Discharge of Surety

(d) - Discharge of Surety on Other Grounds

Altering the terms of guarantee

- 47-120 If, while the instrument of guarantee is in the hands of the party to whom it was given, it is altered in any material particular without the knowledge or consent of the surety, it will become void and the surety will be discharged.⁶²⁹ The test of materiality for this purpose has been held to be whether there is an alteration which affects “the very nature and character of the instrument” or “one which … is potentially prejudicial to [the non-consenting party’s] legal rights and obligations under the instrument”.⁶³⁰ On the other hand, where a guarantee document is altered in good faith by a third party in circumstances where the guarantee would have been enforceable without the alteration, then the guarantee is valid.⁶³¹ Furthermore, it has been held that where a guarantee document consists otherwise of print, type and ink writing, the most natural inference to draw of an amendment to that document *in pencil* is that it is not, and is not intended to be, an operative and final alteration with the result that it does not count as an alteration of the document so as to discharge the guarantor.⁶³² This decision was explained by the court on the basis that the rule as to alteration of a guarantee leading to discharge rests on a policy of deterrence or punishment of attempted fraud, a policy which cannot apply where, as with a pencilled alteration to a document of this kind, there is no chance of committing a fraud.⁶³³

Breach by creditor of terms of contract of suretyship ⁶³⁴

- 47-121 If the creditor is guilty of a breach of the terms of the contract of suretyship, the question whether the surety is wholly discharged depends on whether the breach goes to the root of the contract,

or evinces an intention to repudiate the contract.⁶³⁵ If it does so, the breach will, in accordance with normal principles, discharge the surety entirely. If, on the other hand, the breach is of a less serious character, the surety will merely have a counterclaim for damages, so that he will, in effect, be discharged to the extent that he has been prejudiced by the breach, but not wholly. It is often difficult to say whether breach by the creditor of a term in a contract of suretyship goes to the root of the contract or not, as may be seen from a number of hire-purchase cases. For example, where the finance company was unable to deliver the goods to the surety this was held in one case to discharge the surety completely,⁶³⁶ and in another case merely to give rise to a counterclaim in damages.⁶³⁷ If the creditor fails to perform some act required by the contract (e.g. to give notice to the surety of the debtor's default), this may be construed as the failure of a condition precedent and the surety cannot then be liable.⁶³⁸ Similarly, breach of a proviso to a term in the contract of suretyship which allows the creditor to give the debtor time may take the creditor outside the permission of the term, so as to allow the operation of the rules as to discharge by reason of variation.⁶³⁹

Release of co-surety

47-122 As will be seen below, one surety has in some circumstances a right of contribution from other co-sureties,⁶⁴⁰ so that the release of a surety by the creditor could prejudice this right of contribution if the release were effective against co-sureties. Accordingly, such a release may also discharge the surety, though here again it is sometimes difficult to say whether he is discharged wholly or only to the extent that he has in fact been prejudiced. If the sureties are jointly or jointly and severally liable it seems that the liability of all the sureties will be treated as an essential part of the contract and a release of one without the consent of the others will therefore discharge all.

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U But where they are only severally liable the position seems to be different.⁶⁴² Even in this case a right to contribution would arise between the sureties so that the release of one may discharge the others to the extent (if any) that they have been prejudiced thereby, i.e. to the extent that they are unable to recover contribution which they could otherwise have recovered.⁶⁴³ It has been held that an appropriately drafted clause in a contract of guarantee may oust the normal rule by which the release of one jointly and severally liable surety discharges the others.⁶⁴⁴

Release or surrender of securities

47-123

The release or surrender of securities held by the creditor could operate to the prejudice of the surety in the same way as the release of a co-surety, so that this also may discharge the surety. The principle to be applied in determining whether the surety is wholly discharged or is only discharged pro tanto seems to be the same as in the case of a release of a co-surety. That is to say, if the existence of the security was an essential part of the contract of suretyship, then release of the security will discharge the surety entirely,⁶⁴⁵ but if it was not an essential part of the bargain (for example, because it was supplied by the debtor after the contract of suretyship was made)⁶⁴⁶ the surety will only be discharged to the extent that he has been prejudiced.⁶⁴⁷ And if he has not been prejudiced at all, for example, because the security was worthless,⁶⁴⁸ or because the security was not one to which the surety was entitled,⁶⁴⁹ he remains liable in full. A similar principle operates where a surety is entitled to the benefit of an insurance policy. So, for example, where a car which was let under a hire-purchase agreement was destroyed in an accident, and the finance company settled the claim against the insurers for less than they should have done, the surety was not liable for the amount which the finance company had failed to claim.⁶⁵⁰

- 47-124 But the contract of suretyship may, expressly or impliedly, give the creditor the right to release securities without thereby prejudicing his rights against the surety. So, for example, where the debtor had mortgaged his farm and stock to a bank for a liability guaranteed by the surety, it was held that the consent of the bank to a sale of some of the stock by the debtor did not discharge the surety, for such normal dealings must have been contemplated by the parties.⁶⁵¹ And if the surety has engaged to answer for the debtor's fraud, he will not be discharged if the debtor fraudulently secures the release of some security.⁶⁵² Where the debtor becomes bankrupt, a secured creditor who exercises his statutory right under the *Insolvency Act 1986*⁶⁵³ to surrender his security and prove for the total liability does not thereby prejudice his rights against a surety.⁶⁵⁴

Neglect of creditor in relation to securities

- 47-125 It is clear that in some cases equity will intervene so as to discharge a surety where the creditor has failed to deal with the security for the debt as he ought.⁶⁵⁵ For example, in *The Mutual Loan Association v Sudlow*,⁶⁵⁶ A had obtained a loan from B upon the security of a bill of sale of A's furniture and of C standing surety for him. On A falling into arrears, the agents of B, his creditor, seized the goods and sold them, apparently at a considerable undervalue. The Court of Common Pleas held that the jury was entitled to hold that C, the surety, was discharged as it was through the misconduct of B's agents that the proceeds of sale were not enough to cover the debt. Secondly, it is also clear that in principle the effect of this equitable relief is to reduce or to extinguish the liability of the surety to the extent to which the security would have satisfied the debt, rather than absolutely.⁶⁵⁷ In *Skipton Building Society v Stott*⁶⁵⁸ the Court of Appeal held that where the liability of a surety is reduced on account of the negligent realisation of security, the basis

of this reduction is the difference in value between the amount realised and the market value of the security at the relevant time (although it is to be noted that this case concerned the breach of an implied term in the contract of guarantee⁶⁵⁹). This effect on the liability of a guarantor of neglect of a creditor in relation to securities may be excluded by the terms of the guarantee, and it has been said that the proper approach to such an alleged exclusion “should seek to interpret the guarantee as a whole as a commercial document and to give it a sensible meaning”, rather than treat it “with the traditional hostility shown to exemption clauses”.⁶⁶⁰ Nevertheless, where such an alleged exclusion was contained in the creditor’s standard document in circumstances where the guarantor had been encouraged to give the guarantee on the basis that the principal debtor had given valuable security and that, if need be, the creditor would realise the market value of that security properly, then it was held that neglect would reduce the guarantor’s liability “unless the terms of the guarantor clearly indicate otherwise”.⁶⁶¹ It is submitted with respect that this approach to the construction of such an exclusion is to be approved: a contract term excluding the *reduction* of a guarantor’s liability is not an exclusion clause properly so-called as it seeks to preserve the guarantor’s liability where equity would reduce or extinguish it; and the approach just described reflects both the modern approach to construction of commercial contracts which sets them in their factual matrix and at the same time preserves a certain force to the traditional requirement of “clear words” to exclude this equitable protection for guarantors.⁶⁶²

Creditor free to decide whether to realise security

- ⁴⁷⁻¹²⁶ In *Standard Chartered Bank v Walker*⁶⁶³ relief on the ground of neglect of creditor in relation to securities was expressed by Lord Denning MR very broadly, linking it to the existence of a duty of care owed by the creditor to the surety in the tort of negligence and suggesting that it may apply even to a case of the failure by the creditor to realise the security at an advantageous time, although he acknowledged that “the creditor can choose the time of sale within a considerable margin”.⁶⁶⁴ Such a broad approach was firmly rejected by the Privy Council in *China and South Sea Bank Ltd v Tan Soon Gin*,⁶⁶⁵ in which Lord Templeman observed that while older authority justified the intervention of equity where the security is surrendered, lost,⁶⁶⁶ not properly perfected⁶⁶⁷ or altered in its condition by reason of what has been done by the creditor, where none of these are the case, the creditor is entitled freely to decide whether to sue the principal debtor, the surety, or to realise the security, or to do none of these.⁶⁶⁸ Thus, while the negligent sale at an undervalue of the property discharges the surety,⁶⁶⁹ the failure to realise the security at all while it declines in value does not, unless the creditor was personally responsible for that decline.⁶⁷⁰ Moreover, it has been held that where a guarantee was given on terms that “all amounts payable by the Guarantor ... shall be paid in full free of set-off or counterclaim”, this was effective to prevent resistance of the creditor’s claim for summary judgment by the guarantor on the ground of the creditor’s negligent realisation of the security for the loan.⁶⁷¹

“Guarantees such as these are the equivalent of letters of credit and only in exceptional circumstances should the Court exercise its power to stay execution.”⁶⁷²

Finally, the Privy Council in *China and South Sea Bank Ltd v Tan Soon Gin*⁶⁷³ also rejected the idea that the creditor could be liable in damages in the tort of negligence to the surety for failing to exercise reasonable care in the realisation of securities⁶⁷⁴: “the tort of negligence has not yet subsumed all torts and does not supplant the principles of equity or contradict contractual promises.”⁶⁷⁵

Implied term

⁴⁷⁻¹²⁷ On the other hand, in *Skipton Building Society v Stott*⁶⁷⁶ the County Court below had apparently accepted an implied term in a contract of guarantee on a building society lender towards a guarantor:

“... to take reasonable care to ensure that the price at which the land [the security] is sold is the best price that can reasonably be obtained”⁶⁷⁷

on the basis that this “implied term reflects the statutory duty of the building society under para.1(1)(a) of Sch.4 to the Building Societies Act 1986”.⁶⁷⁸ While the legal basis of the lender’s duty to take care of the security was not in issue before the Court of Appeal, no adverse comment was directed to the decision below in this respect. Clearly, however, if the legal basis for the duty is an implied term in the contract of suretyship, a lender’s breach would give rise to damages for consequential loss and not merely to the reduction or extinction of the surety’s liability. While such an implied term may be justified in the special circumstances of lending by a building society (owing to the influence of the statutory duty noted above), more generally such a term would be unlikely to pass the traditional test of necessity for the implication of terms in general.⁶⁷⁹ In this respect, the courts’ rejection of a duty of care in the tort of negligence in relation to the realisation of securities suggests an unwillingness to extend the protection which equity has traditionally given to sureties.⁶⁸⁰ On the other hand, where a lease purchase agreement (the principal contract) contains an express obligation in the creditor on its termination to sell the goods, a court may imply a term that the lessor/creditor will take reasonable care to obtain the true value of the goods; if the creditor breaches such an implied obligation, the surety may take advantage of the right of set-off or counterclaim of the lessee/principal debtor.⁶⁸¹ Such a guarantee may properly be construed as being given in respect of obligations arising out of a contemplated course of dealing rather than a specific contract, with the result that any variation in the obligations of the principal debtor under a specific contract will not discharge the surety.⁶⁸²

Statutory demands under Insolvency Act against guarantor

47-128 The questions have arisen as to whether the existence of a set-off as between the principal debtor and creditor, or of security provided by a principal debtor to the creditor, provide grounds under the [Insolvency Rules 1986 r.6.5.\(4\)](#) for setting aside a statutory demand against a guarantor under the [Insolvency Act 1986](#).

[683](#)

U In *Octagon Assets Ltd v Remblance*

[684](#)

U a majority of the Court of Appeal held that, since [r.6.5.\(4\)\(a\)](#) provides for the setting aside of such a demand against a debtor where he enjoys a “counter-claim, set-off or cross-demand which equals or exceeds the amount of the debt ... specified in the statutory demand”, then, where a principal debtor enjoys a counter-claim etc. such a statutory demand against a *guarantor* should be set aside under the discretion under [r.6.5\(4\)\(d\)](#) for cases “where the court is satisfied, on other grounds, that the demand ought to be set aside”:

“... [h]aving regard to the principle of co-extensiveness, it is equally unjust in such circumstances to require the guarantor to face the consequences of bankruptcy”

as it is for the debtor.

[685](#)

U However, in *White v Davenham Trust Ltd*

[686](#)

U the Court of Appeal distinguished this situation from the position where a creditor enjoys security provided by the principal debtor (and cannot therefore serve a statutory demand against him by reason of [r.6.5\(4\)\(c\)](#)) and brings a statutory demand against a guarantor. Given that a creditor who has several remedies can choose which remedy is enforced, at what time, in which order and in what way,

[687](#)

U :

“... it is not open to a guarantor to argue that the creditor should pursue the principal debtor first or should realise security given by the principal debtor first.”

[688](#)



The “co-extensiveness principle” as between principal debtor and guarantor does not apply so as to create a proper analogy between the position of a creditor bringing a statutory demand against the principal debtor who has provided security under r.6.5.(4)(c) and a creditor bringing a statutory demand against a surety where the principal debtor has provided security for the purposes of the discretion under r.6.5.(4)(d).

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U With effect from 6 April 2017, the **Insolvency Rules 1986** were replaced by the **Insolvency (England and Wales) Rules 2016**,

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U but the provisions formerly contained in the **1986 Rules r.6.5(4)** which are the subject of the cases discussed in this paragraph were re-enacted without substantive change in **r.10.5(5) of the 2016 Rules**.

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Other conduct of creditor prejudicial to surety

47-129

U In certain types of transaction, and in particular where a surety engages to answer for the honesty of an employee, the wilful connivance of the creditor in the default of the principal debtor may discharge the surety. In *Dawson v Lawes*,

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U where a surety had signed a fidelity bond for an employee who was from time to time entrusted with money by his employer, the creditor, it was said that there must be:

“... such an act of connivance as enabled the party [sc. the debtor] to get the fund in his hands, or such an act of gross negligence as to amount to a wilful shutting of the person’s eyes to the fraud which the party was about to commit, or something approximating to it, to discharge the surety.”

But mere negligence on the part of the creditor will not normally discharge the surety except, as seen in earlier paragraphs, where the neglect affects some security which would otherwise have accrued to the benefit of the surety.

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U So the negligence of a creditor in not demanding accounts from an employee whose conduct and honesty have been guaranteed will not discharge the surety,

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U nor will acquiescence by the creditor in an irregular mode of accounting,

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U nor will the failure to demand payment of a debt as soon as it is due.

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U Moreover, the Court of Appeal has affirmed

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U that there is no general principle that “irregular” conduct on the part of the creditor, even if prejudicial to the interests of the surety, will discharge him.

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U Short of bad faith, misrepresentation or concealment amounting to misrepresentation, connivance with the default of the principal debtor, or variation of the terms of the contract to the possible prejudice of the surety, the creditor can act as he chooses. Finally, as has been seen,

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U the courts have clearly set their face against imposing a duty of care in the tort of negligence on a creditor to the surety to safeguard the economic welfare of the latter’s position.

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U Thus, in *Barclays Bank Plc v Quincecare Ltd*,

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U it was held that a creditor owes no duty to a guarantor of a loan to act reasonably to ensure that the loan is applied for the purposes for which it is given, whether that duty is put by way of an implied term in the contract or of the tort of negligence.

Creditor estopped from enforcing guarantee

47-130 In principle, a creditor may be estopped from enforcing a guarantee under the doctrine of promissory estoppel (sometimes known as forbearance in equity).⁷⁰² However, where, for example, a creditor promises not to enforce a guarantee “indefinitely” while the guarantor works (unpaid) for the principal debtor, such a promise to postpone enforcement is likely to be interpreted as applying only where the creditor agrees to the continuation of the work rather than so as to allow the guarantor unilaterally to prevent the enforcement of the guarantee by continuing to undertake the work.⁷⁰³

Footnotes

- 629 *Davidson v Cooper* (1844) 13 M. & W. 343; and see Vol.I, paras 28-020 et seq.
- 630 *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [2000] 1 W.L.R. 1135 at 1146–1148, per Potter LJ. cf. *Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67, [2003] 2 All E.R. (Comm) 557 at [72]–[74] where an alteration by some co-guarantors was held to be plainly beneficial to the others who were not as a result discharged.
- 631 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 1 W.L.R. 271.
- 632 *Co-operative Bank v Tipper* [1996] 4 All E.R. 366, 372 per Roger Cooke J.
- 633 *Co-operative Bank v Tipper* [1996] 4 All E.R. 366, 372 per Roger Cooke J.
- 634 *Skipton Building Society v Stott* [2001] Q.B. 261, 269–170 where this paragraph was cited with apparent approval.
- 635 For the grounds of what is there called termination for breach see Vol.I, paras 27-009 et seq.
- 636 *Watling Trust Ltd v Briffault Range Co Ltd* [1938] 1 All E.R. 525.
- 637 *Bowmaker (Commercial) Ltd v Smith* [1965] 1 W.L.R. 855.
- 638 *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 W.L.R. 74; cf. *Australia & New Zealand Banking Group Ltd v Beneficial Finance Corp Ltd* (1983) 44 A.L.R. 241 and *Barclays Bank Plc v Quincecare Ltd* (1988) reported [1992] 4 All E.R. 363, 381–382. See also *Greene King Plc v Quisine Restaurants Ltd* [2012] EWCA Civ 698, [2012] 2 E.G.L.R. 64 (notice of arrears held neither a condition nor its breach going to root of contract).
- 639 *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 K.B. 346.
- 640 See below, para.47-141.
- 641 *Mercantile Bank of Sydney v Taylor* [1893] A.C. 317; *Smith v Wood* [1929] 1 Ch. 14; *Liverpool Corn Trade Association v Hurst* [1936] 2 All E.R. 309; cf. *Commercial Bank of Australia Ltd v Official Assignee* [1893] A.C. 181; *Canadian Imperial Bank of Commerce v Vopni*, 86 D.L.R. (3d) 383 (1978). cf. *ADL Advanced Contractors Ltd v Patel* [2021] EWHC 2200 (Comm) at [31] where Sir Nigel Teare noted that there has as yet been no case in which (i) a surety has undertaken a joint liability with another surety, (ii) the liability of the other surety has thereafter been immediately and absolutely released by the creditor, (iii) the release expressly states that the right to sue the first surety was reserved but (iv) the first surety was not party to the later release; in his view, “[t]o hold that in such circumstances the first surety was not released (and so to give no effect to the previously established common law principle that a joint debt is destroyed when one surety is released) would be a further development in this area of the law”. The court then noted the discussion in the 33rd edn of the present work (which appears above, at paras 45-096 and 47-095—47-101) of the approach to the release of one of joint debtors (and joint and several debtors) in *Watts v Aldington, Tolstoy v Aldington* [1999] L. & T.R. 578; and *Johnson v Davies* [1999] Ch. 117.
- 642 *Ward v National Bank of New Zealand Ltd* (1883) 8 App. Cas. 755.

- 643 *Ward v National Bank of New Zealand Ltd* (1883) 8 App. Cas. 766.
- 644 *Bank of Montreal v Dobbin and Dobbin* [1996] 5 Bank. L.R. 190 Court of Queen's Bench of New Brunswick.
- 645 *Smith v Wood* [1929] 1 Ch.14; *Re Darwen & Pearce* [1927] 1 Ch. 176.
- 646 *Polak v Everett* (1876) 1 Q.B.D. 669, 676.
- 647 *Carter v White* (1883) 25 Ch. D. 666, 670.
- 648 *Rainbow v Juggins* (1880) 5 Q.B.D. 422; *Musket v Rogers* (1839) 5 Bing. N.C. 728, 732.
- 649 *Chatterton v Maclean* [1951] 1 All E.R. 761, 766.
- 650 *Goulston Discount Co Ltd v Sims* (1967) 111 S.J. 682 (contract of indemnity; a fortiori for contracts of guarantee).
- 651 *Taylor v Bank of New South Wales* (1886) 11 App. Cas. 596; cf. *Dowling v Ditanda, The Times*, 15 April 1975.
- 652 *Hull Corp v Harding* [1892] 2 Q.B. 494.
- 653 Insolvency Act 1986 s.322, Sch.9 para.17; Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r.14.19(2) (in force 6 April 2017).
- 654 *Rainbow v Juggins* (1880) 5 Q.B.D. 422. cf. *Re Hallett* [1894] 2 Q.B. 256.
- 655 *The Mutual Loan Association v Sudlow* (1858) 5 C.B.(N.S.) 449; *Strange v Fooks* (1863) 4 Giff. 408; *Wulff v Jay* (1872) L.R. 7 Q.B. 756; *General Mediterranean Holding SA SPF v Quocomhaps Holdings Ltd* [2018] EWCA Civ 2416 at [18]–[26].
- 656 (1858) 5 C.B.(N.S.) 449.
- 657 *Watts v Shuttleworth* (1861) 7 H. & N. 353, 354; *Taylor v Bank of New South Wales* (1886) 11 App. Cas. 596, 603. cf. the position where the release or other dealing constitutes a variation of the principal obligation, in which case the surety is entirely discharged: see *Polak v Everett* (1876) 1 Q.B.D. 669, 676–677, and see above, paras 47-108 et seq.
- 658 *Skipton Building Society v Stott* [2001] Q.B. 261, 270–271; *Alpstream AG v PK Airfinance Sarl* [2015] EWCA Civ 1318, [2016] 2 P. & C.R. 2 at [115]–[118].
- 659 See below, para.47-127.
- 660 *Barclays Bank Plc v Kingston* [2006] EWHC 533, [2006] 2 Lloyd's Rep. at [29], per Stanley Burton J. cf. *American Express International Banking Corp v Hurley* [1985] 3 All E.R. 564 at 571 where Mann J treated such an exclusion as “exclusion of liability for negligence” and *Continental Illinois National Bank & Trust Co of Chicago v Papanicolaou (The Fedora)* [1986] 2 Lloyd's Rep. 441 at 444, where a clause which ruled out any “deductions or withholdings” by the guarantor was not treated as an exclusion of liability by the creditor as it did not prevent the guarantor later claiming independently against the creditor. Moreover, the “traditional hostility shown to exemption clauses” has recently been considerably reduced where the contract is concluded between commercial parties: see Vol.I, paras 17-001 and 17-012.
- 661 *Barclays Bank Plc v Kingston* [2006] EWHC 533 at [29].
- 662 See above, paras 47-065—47-069 and especially *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank Plc* [2002] EWCA Civ 691 at [56], above, para.47-068.
- 663 [1982] 1 W.L.R. 1410; and see also *American Express International Banking Corp v Hurley* [1985] 3 All E.R. 564.

- 664 [1982] 1 W.L.R. 1410, 1416, per Lord Denning MR.
- 665 [1990] 1 A.C. 536 and see *Alpstream AG v PK Airfinance Sarl* [2015] EWCA Civ 1318, [2016] 2 P. & C.R. 2 at [121]–[124].
- 666 *Strange v Fooks* (1863) 4 Giff. 408 (security lost by neglect of creditor to give notice of assignment of mortgage to trustees of settlement in which the debtor had an equitable interest); *Wulff v Jay* (1872) L.R. 7 Q.B. 756 (failure to enter and take possession of property under a mortgage when interest became due).
- 667 *Wulff v Jay* (1872) L.R. 7 Q.B. 756 (failure of creditor to register bill of sale).
- 668 *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 A.C. 536, 545 and see *White v Davenham Trust Ltd* [2011] EWCA Civ 747, [2011] Bus. L.R. 1443 at [38]; *Close Brothers Ltd v AIS (Marine) 2 Ltd* [2019] 1 Lloyd's Rep. 510 at [12].
- 669 *The Mutual Loan Association v Sudlow* (1858) 5 C.B.(N.S.) 449; *Standard Chartered Bank v Walker* [1982] 1 W.L.R. 1410; *American Express International Banking Corp v Hurley* [1985] 3 All E.R. 564; cf. *Taylor v Bank of New South Wales* (1886) 11 App. Cas. 596.
- 670 [1990] 1 A.C. 536, 545; *Mahomed v Morris* (No.2) [2001] B.C.C. 233 (no duty in secured creditor to consult debtor or surety before realising the charged assets).
- 671 *Continental Illinois National Bank, etc. v Papanicolaou* [1986] 2 Lloyd's Rep. 441.
- 672 *Continental Illinois National Bank, etc. v Papanicolaou* [1986] 2 Lloyd's Rep. 441, at 445, per Parker LJ.
- 673 [1990] 1 A.C. 536.
- 674 *Standard Chartered Bank Ltd v Walker* [1982] 1 W.L.R. 1410 at 1415; *American Express International Banking Corp v Hurley* [1985] 3 All E.R. 564; and cf. *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch. 949, 966.
- 675 [1990] 1 A.C. 536, 543–544, per Lord Templeman; cf. *Parker-Tweedale v Dunbar Bank Plc* (No.1) [1991] Ch. 12; and *AIB Finance v Debtors* [1998] 2 All E.R. 929, 937 and Vol.I, para.3-034.
- 676 [2001] Q.B. 261.
- 677 [2001] Q.B. 261 at 265.
- 678 [2001] Q.B. 261 at 265.
- 679 On implied terms in suretyship contracts see above, paras 47-084—47-086 and more generally see Vol.I, Ch.16. See also *General Mediterranean Holding SA SPF (aka General Mediterranean Holding SA) v Quocomhaps Holdings Ltd* [2017] EWHC 1409 (QB) (no implied term in principal contract that creditor should take a particular step in foreign court proceedings to protect security) (the CA's decision was concerned only with allegations of breach of duties in equity rather than on the basis of breach of implied terms: *General Mediterranean Holding SA SPF v Quocomhaps Holdings Ltd* [2018] EWCA Civ 2416 at [16]).
- 680 See especially, *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 A.C. 536, above, para.47-126. cf. the rejection by the CA of implied term as the legal basis of the duty of disclosure in contracts of insurance in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co* [1990] 1 Q.B. 665 (*affirmed* [1991] 2 A.C. 249) and see above, para.44-042.
- 681 *Lombard North Central Plc v Nugent* [2013] EWHC 1588 (QB) at [95]–[98] (no such breach on the facts). The general rule is stated in para.47-091.
- 682 [2013] EWHC 1588 (QB) at [53] and cf. above, para.47-078.

①683 s.267–268. See also *Re Salt* [2011] EWHC 2105 (Ch) (no good reason in the circumstances for construing guarantee as implying that a statutory demand could not be made against a guarantor). For the effect of part payment by the surety and set off against statutory demands where either the creditor or principal debtor is insolvent see above, para.47-089.

①684 [2009] EWCA Civ 581, [2010] Bus. L.R. 119.

①685 [2009] EWCA Civ 581 at [46], per Nicholls LJ, and see at [72] (Ward LJ).

①686 [2011] EWCA Civ 747, [2011] Bus. L.R. 1443; applied in *Inbakumar v United Trust Bank Ltd* [2012] EWHC 845 (Ch), [2012] B.P.I.R. 758. In *Promontoria (Chestnut) Ltd v Bell* [2019] EWHC 1581 (Ch), [2019] B.P.I.R. 1241 esp. at [40]–[50], it was held that security provided by guarantors for the indebtedness of a principal debtor is “security” within the meaning of r.6.5(4)(c) for the purposes of statutory demands against those guarantors themselves.

①687 *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 A.C. 536, 545 above, para.47-126.

①688 [2011] EWCA Civ 747 at [39], per Lloyd LJ.

①689 [2011] EWCA Civ 747 at [40] and see at [44].

①690 SI 2016/1024.

①691 The equivalent provisions are: 2016 Rules rr.10.5(5)(a), 10.5(5)(c) and 10.5(5)(d) replacing 1986 Rules rr.6.5(4)(a), 6.5(4)(c) and 6.5(4)(d) respectively.

①692 (1854) 23 L.J. Ch. 434, 441.

①693 Above, paras 47-125—47-127.

①694 *Mansfield Union v Wright* (1882) 9 Q.B.D. 683, 688.

①695 *Durham Corp v Fowler* (1888) 22 Q.B.D. 394.

①696 *Black v Ottoman Bank* (1862) 15 Moo. P.C. 472.

①697 *Bank of India v Trans Continental Commodity Merchants Ltd* [1983] 2 Lloyd's Rep. 298; *Westpac Securities Ltd v Dickie* [1991] 1 N.Z.L.R. 657; *Socomex Ltd v Banque Bruxelles Lambert SA* [1996] 1 Lloyd's Rep. 156, 197–199; *Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC* [2011] EWHC 2718 (Comm) at [37]–[43] and see *Phillips* (1990) J.B.L. 325.

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cf. *Hackney Empire Ltd v Aviva Insurance UK Ltd [2011] EWHC 2378 (TCC), [2011] B.L.R. 726* especially at [92] and [124] where the court “tentatively” recognised “the rule, if it is a rule” in *General Steam Navigation Co v Rolt (1858) 6 C.B.(N.S.) 556* especially at 604–605 that where a creditor acts in a manner in relation to the principal contract which, whilst not amounting to an alteration of its terms, is *prima facie* prejudicial to the surety who has guaranteed the principal debtor’s obligations under the contract, the surety will be discharged (absent any relevant indulgence clause), while holding that on the facts there was no such *prima facie* prejudicial conduct and so the guarantor was not discharged: *[2011] EWHC 2378 (TCC)* at [131] and [142]. On appeal, the Court of Appeal affirmed the decision below, but did not treat *General Steam Navigation Co v Rolt* as authority for a general proposition that creditor conduct prejudicial to the surety will discharge the surety, although it recognised a “common principle” underlying the categories of case where the surety will be discharged to the effect “that the creditor must not transact the surety’s affairs without consulting him”: *[2012] EWCA Civ 1716, [2013] B.L.R. 57* at [70], per Jackson LJ. It is submitted that *Rolt’s* case itself can be seen as an example of early payment of instalments being treated as analogous to release of security (“the withdrawal of a fund which is a security for the thing in respect of the not doing of which [the surety] is now called upon to pay damages”: *(1858) 6 C.B.(N.S.) 556* especially 604–605, per Pollock C.B.), on which see above, para.47-123), or as a case of variation of the principal contract (as per its head-note and *(1858) 6 C.B. (N.S.) 556* especially at 595, Cockburn CJ referring to “the alteration of the contract for the performance of which he consented to be bound”).

⑥99 See above, para.47-126.

⑦00 *Hull Corp v Harding [1892] 2 Q.B. 494; Barclays Bank Ltd v Thienel (1980) 247 E.G. 385; Latchford v Beiren [1981] 3 All E.R. 705; China and South Sea Bank Ltd v Tan Soon Gin [1990] 1 A.C. 536.*

⑦01 *(1988) reported [1992] 4 All E.R. 363.*

702 *Dunbar Assets Plc v Butler [2015] EWHC 2546 (Ch), [2015] B.P.I.R. 1358.* On this doctrine generally see Vol.I, paras 6-144 et seq.

703 *Dunbar Assets Plc v Butler [2015] EWHC 2546 (Ch)* at [49]–[50].

Section 8. - Surety's Right to Indemnity and Contribution

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 47 - Suretyship

Section 8. - Surety's Right to Indemnity and Contribution

Surety's right to indemnity against principal debtor ⁷⁰⁴

- 47-131 A surety who has actually met the liability which he has undertaken to answer for is entitled to be indemnified by the principal debtor; and if he alone is sued by the creditor he can bring in the debtor by a Pt 20 claim (the third-party procedure). ⁷⁰⁵
- U Where the surety has undertaken his liability at the request, express or implied, of the debtor, this right to an indemnity may be said to arise in one of two ways ⁷⁰⁶
- U ; that is, either from an implied actual contract between surety and debtor, ⁷⁰⁷
- U or it may be said to be a restitutionary remedy arising from the fact that the surety has been compelled by law to discharge a debt for which the debtor is ultimately liable. ⁷⁰⁸
- U And the surety and the principal debtor may conclude an express contract of counter-indemnity under which the surety is entitled to be indemnified in respect of sums paid to the creditor under the contract of suretyship ⁷⁰⁹
- U ; where this is the case, the principal debtor's liability under the counter-indemnity may be construed as extending to sums so paid by the surety even though they were not owed by the surety under the contract of suretyship itself. ⁷¹⁰

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Payment without request

- 47-132 Where the surety's liability does not arise from any request by the debtor⁷¹¹ his right to an indemnity must, it seems, be placed on the law of restitution or unjust enrichment. However, in *Owen v Tate*⁷¹² it was held that a right of indemnity is not normally available to a person who has assumed or discharged the liability of another, without any antecedent request of that other. Such a right may arise exceptionally where the claimant has assumed (or paid) the debtor's obligation under some practical necessity, and it is in all the circumstances just and reasonable that he should be indemnified. But it is not clear if the debtor can take the benefit of the payment by the third party without coming under a liability to him.⁷¹³ It is also not entirely clear whether *Owen v Tate* can be reconciled with the general principle that, wherever two persons are liable for the same debt, and as between them, one of them is primarily liable, that party is liable to indemnify the other if the other meets the liability. This broad principle, which is known as the principle of *Moule v Garrett*,⁷¹⁴ is apparently that which underlies the third case referred to by Lord Selborne in *Duncan Fox & Co v North & South Wales Bank*⁷¹⁵ and has been applied in two decisions at first instance to give an indemnity to a lessee who had assigned the lease, not only against the assignee, but also against a surety for the assignee.⁷¹⁶ One possible reconciliation of these decisions with *Owen v Tate*⁷¹⁷ may be made by reference to the purpose of its requirement of a request, which is to exclude from restitutionary relief a person who has officially exposed himself to the liability to make payment.⁷¹⁸ It has been convincingly argued that the requirement of a request has been more broadly interpreted than is necessary to effect this purpose.⁷¹⁹ In the case of a lessee's rights against a guarantor of the assignee of the lease, the payer (lessee) has not officially exposed himself to liability to pay the rent and, even though he cannot be said to have paid at the guarantor's request, he should not on that ground alone be excluded from recovery: both the transaction of assignment and guarantee took as their assumption the existence of the lessee's obligations and also assumed that, to use the expression in *Moule v Garrett*,⁷²⁰ as between the lessee and the guarantor, the latter's would be the primary or ultimate liability.⁷²¹

Payment under unenforceable guarantee

- 47-133 The surety's right to an indemnity is not affected by the fact that the liability which he has discharged was not enforceable against him because of the absence of a written note or

memorandum,⁷²² nor that the liability was not enforceable against the debtor because of an infringement of the *Consumer Credit Act*.⁷²³ This result has been supported on the ground that the *prima facie* construction of the debtor's request to the guarantor is: “‘Pay if I do not,’ and [not]: ‘Pay if I do not and if I am legally compellable to pay’.”⁷²⁴

U On the other hand, it has been held that if the surety pays a statute-barred debt he has no right to an indemnity.⁷²⁵

Presumption of advancement inapplicable

47-134 A surety may, of course, agree that he is not to have any right to be indemnified by the debtor, but a husband who has guaranteed his wife's overdraft will not generally be prevented from recovering an indemnity by an application of the presumption of advancement.⁷²⁶

When right to indemnity arises

47-135 Prima facie the surety's right to an indemnity arises only on actual payment by him,⁷²⁷ though if he pays before the principal debt becomes due he will have no right to be indemnified until the debtor could have been sued by the creditor.⁷²⁸ Thus until actual payment by the surety, no debt is due to him from the debtor.⁷²⁹ Similarly, it has been held that a right to an indemnity (at least a general indemnity, for example, an indemnity against legal liability arising from specified events) does not arise until the person entitled to the indemnity is called upon to pay the principal claim and it is ascertained. Hence the limitation period under such an indemnity agreement does not begin to run until that time.⁷³⁰ This has also been applied to an implied general indemnity, as where charterers are liable to indemnify shipowners for liability on bills of lading signed by the ship's master.⁷³¹ But it seems that the position is different where the indemnity arises out of an express contract which creates a right to an indemnity on a liability “arising”. In such a case the time for limitation purposes will run from the date when the right to an indemnity arises.⁷³² So also, it seems that where the right to an indemnity arises by way of a claim to damages for breach of contract, the limitation period would run from the date of the breach, and not later.

Amount of indemnity

47-136

A surety is in principle entitled to be indemnified for monies paid to the creditor in respect of the principal debtor's liabilities. The question arises, though, whether such an indemnity may include recovery in respect of expenses (notably, legal expenses) incurred by a surety as a result of his liability to the creditor under the contract of suretyship. In this respect, it has been stated that in order to be recoverable from the principal debtor the legal costs in question must have been caused by the default of the principal debtor.⁷³³ Therefore, a "surety is entitled to be reimbursed as to the costs reasonably incurred by him in investigating the validity and quantum of the creditor's claim against the principal debtor",⁷³⁴ but any entitlement to the costs of investigating the enforceability of the guarantee is "more doubtful", as they appear to be incurred for the benefit of the surety alone.⁷³⁵

Surety's right to indemnity in cases of contracts of indemnity

47-137 There does not appear to be any explicit authority on the surety's right to an indemnity where he is himself liable to the creditor under a contract of indemnity as opposed to a contract of guarantee, but equally there does not appear to be any reason to doubt that such a right usually exists.⁷³⁶ Prima facie, if the contract of indemnity were entered into at the request of the debtor, there seems no reason why the surety should not be entitled to an indemnity from the debtor on the normal principle that any person who does something involving him in legal liability at the request of another is entitled to be indemnified by that other.⁷³⁷ And this would presumably remain the case even where the surety's liability is wider than that imposed on the debtor under the principal transaction. But special considerations would obviously apply where the principal debtor was a minor.⁷³⁸ If, on the other hand, the contract of indemnity was entered into without any request by the debtor, then (as seen above)⁷³⁹ there would be no relationship of principal and surety at all between the debtor and the party liable under the indemnity. In such circumstances the party liable under the indemnity could only claim subrogation or restitutionary rights against the debtor, and the debtor's liability would probably be limited by the terms of the original transaction.

Arrangements between principal debtor and guarantor incompatible with guarantor's right of indemnity

47-138 A guarantor is not entitled to an indemnity by way of restitution from a principal debtor where these same parties contemplated that, as between themselves, only the guarantor would bear a primary liability to the creditor. In *Berghoff Trading Ltd v Swinbrook Developments Ltd*⁷⁴⁰

U the partners (A) in a Scottish partnership (B) entered a contract as “guarantors” and “obligors” of the partnership which had been lent money by a bank (C) as part of a wider arrangement under which the partners had sold their interests. The interests were later sold to third parties under a “forced sale” by the bank under a power of attorney, and the loan paid out of the proceeds of sale directly to the bank.⁷⁴¹ According to Rix LJ (with whom Sir Anthony Clarke MR and Arden LJ agreed):

“From beginning to end of the arrangement ... it was always contemplated and expressly provided for that the loan ... would be paid out of the proceeds of sale, directly to the bank’s own account. Since the proceeds would come from the sale of [A’s] partnership interest in [B], it would follow that the loan would be repaid by [A], not by [B]. This therefore is not the normal situation where a guarantor’s right of indemnification or reimbursement from the principal debtor is designed to ensure that the guarantor does not lose out merely from the choice of the creditor as to the source of his payment. This is not the normal situation where as between a principal debtor and his guarantor it is agreed or understood that the debt is only that of the former and that if the guarantor is called upon to pay, he will be reimbursed. This is an entirely special case where, from beginning to end, the funds with which to repay the loan were to come from [A].”⁷⁴²

In these circumstances, the Court of Appeal held that, in the absence of express agreement between A and B to the contrary, A (as guarantor) had no reasonable prospect of success in establishing a claim to an indemnity in respect of its discharge of the debt owed by B (the principal debtor) to C (as creditor).⁷⁴³

Surety's rights before payment

47-139 Even before he makes payment the surety has certain potential or inchoate rights against the principal debtor which may have important practical consequences. Thus it has already been seen that if the creditor prejudices these rights, the surety may be discharged from liability.⁷⁴⁴ And in exceptional circumstances these potential rights may justify the principal debtor in taking appropriate steps to prevent the creditor from enforcing the guarantee against the surety.⁷⁴⁵ Moreover, as soon as the surety’s liability to the creditor arises in the sense that it is currently enforceable, the surety has a right that the debtor should meet the liability. The surety can enforce this right by suing in a quia timet action for a declaration that he is entitled to be exonerated and an order that the debtor pay whatever is due to the creditor.⁷⁴⁶ The court cannot order the debtor to pay the money to the surety for this would not discharge the debtor’s liability to the creditor, but it can order him to pay the money to the creditor.⁷⁴⁷ Such a quia timet action can be brought even if there is no particular fund which can be protected by the court’s order.⁷⁴⁸ It is immaterial that the

creditor has not yet demanded payment, or indeed, that he is unlikely to do so in the immediate future,⁷⁴⁹ even though the surety's liability is expressly conditioned on a demand⁷⁵⁰; but the amount must be due in the sense that the creditor could proceed against the surety forthwith.⁷⁵¹ It is uncertain whether the surety can proceed in this way before payment where there is no contract of suretyship as against the debtor, i.e. where the surety has guaranteed the debt at the request of the creditor and not at the request of the debtor. On principle it would seem not, for in this event the surety's rights arise only by way of subrogation or by way of a claim to restitution, either of which would seem to require actual payment by the surety. These inchoate rights of a party entitled to an indemnity do not generally result in time commencing to run under the [Limitation Act](#).⁷⁵²

Surety's rights against bankrupt debtor

- 47-140** Complex problems sometimes arise in connection with the surety's right to indemnity when the debtor has been adjudicated bankrupt. The Supreme Court has held that, so long as a creditor had not been paid in full, a surety could not compete with the creditor either directly, by proving against the principal debtor for an indemnity, or indirectly, by setting off his right to an indemnity against any separate debt owed by the surety to the principal debtor.⁷⁵³ This position reflects the well-established principle in bankruptcy that there cannot be double proof in respect of the same liability in the same estate.⁷⁵⁴ If the surety discharges the whole liability the creditor has no further interest, and the surety is entitled to prove in the debtor's bankruptcy.

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- U** It has already been seen that if the surety discharges part of the liability, his right to prove against the bankrupt debtor depends on whether he has guaranteed the whole debt, or whether he has only guaranteed part.⁷⁵⁶

Surety's right to contribution from co-sureties⁷⁵⁷

- 47-141** It is an old rule of equity that a surety is entitled to contribution from his co-sureties so that none of them should be required, as between themselves, to pay more than his due share.⁷⁵⁸ The rules of equity continue to apply to claims for contribution between co-debtors; but they have been superseded by the [Civil Liability \(Contribution\) Act 1978](#) in respect of claims between sureties arising out of a liability for *damage* as opposed to *debt*. An example of where a surety would be liable for damage may be found in a case where he guaranteed a seller's liability in respect of goods sold, but where the goods caused damage to the buyer's other property. Similarly, where (as is *prima facie* the case)⁷⁵⁹ a contract of suretyship guarantees performance by the principal debtor of

its payment obligations, the surety is liable in damages rather than in debt to the creditor; whereas, where a surety agrees to pay to the creditor whatever the principal debtor owes to the creditor, then the surety is liable in debt rather than in damages.⁷⁶⁰ This means that in the former, but not the latter circumstances, a claim by a surety for contribution from a co-surety will be governed by the two-year limitation period imposed by s.10 of the Limitation Act 1980.⁷⁶¹ The main features of the statutory right to contribution have been dealt with in an earlier chapter.⁷⁶² The equitable right to contribution arises whether the sureties are joint, joint and several, or several; and whether they are liable on the same or different instruments.⁷⁶³ And one surety has a right to contribution from another even though he did not know of the other's existence at the time he gave his guarantee. The one essential is that the sureties must all be liable in respect of the same debt or liability.⁷⁶⁴ There will, however, be no right of contribution where one surety is a guarantor for another surety.⁷⁶⁵ In this event the second surety is only liable to the extent that the first surety does not pay, so that on payment by the first the second is discharged; conversely if the second surety is called upon to pay he will have a right of indemnity (and not merely contribution) against the first surety, for the first surety is in the position of a principal debtor in this case. The right to contribution may, of course, be excluded or modified by express contract.⁷⁶⁶ For example, if a third party guarantees a bill of exchange for the benefit of a bank which discounts it, the normal understanding will be that the surety guarantees that payment will be made by one or other of the parties to the bill who are liable on it, whether as acceptor, or drawer or indorser. It will not be the normal understanding that the surety intends to place himself on a level with the drawer. So where bills were guaranteed and, on default by the acceptor, were paid by the drawer, it was held that the drawer had no claim for contribution against the surety.⁷⁶⁷

Right of contribution in cases of contracts of indemnity

- 47-142 It is uncertain how far equitable rights of contribution exist between parties liable under contracts of indemnity, as opposed to contracts of guarantee, or where one is liable under a contract of guarantee and another is liable under a contract of indemnity.⁷⁶⁸ Where all are liable under contracts of indemnity there seems no reason why contribution should not be ordered on similar principles to those governing contribution between insurers.⁷⁶⁹ But where one person is liable under a guarantee and another under a contract of indemnity it is difficult to see how contribution could be ordered if only because the latter may be a more extensive liability than the former. However, if the liability of the sureties is a liability for damage as opposed to debt, then contribution will always be recoverable in principle under the Civil Liability (Contribution) Act 1978 s.1.

Amount of contribution

- 47-143

The equitable rule is that *prima facie* all sureties are required as between themselves to contribute to the liability equally and if one of them receives any security from the creditor on discharging his liability, the security must, as between the sureties, be brought into account.⁷⁷⁰ If the security is worth more than the amount paid by the one surety, but less than the amount paid by all the sureties together, it must be apportioned equally between them.⁷⁷¹

Effect of insolvency of one co-surety

- 47-144 At common law, the amount of contribution to which a co-surety was entitled depended on the number of sureties originally liable. So that if there were three sureties and one of them paid the whole debt, he could not recover more than a third from a second surety even though the third surety was insolvent.⁷⁷² But in equity the amount of contribution depends on the number of solvent sureties at the time when contribution is sought,⁷⁷³ so that in the above case contribution of half the debt could be ordered, and the equitable rule now prevails.⁷⁷⁴

Sureties liable for different amounts

- 47-145 If the sureties are not liable for the whole of the amount due from the principal debtor, and they are liable for different amounts, then the equitable rule is that contribution will be ordered so that in the result they will pay in proportion to the maximum liability which each assumed. Thus if one surety is liable up to a maximum of £50 and another up to a maximum of £25, contribution will be ordered between them so as to leave the liability in the proportion of two to one.⁷⁷⁵

Set-off between sureties

- 47-146 If the co-sureties run accounts together, the general rule is that a surety may set-off any monies owing against a claim for contribution by his co-surety. However, if the creditor's claim against the sureties is secured by a charge, then the surety's subrogated claim to contribution is also secured and not subject to set-off.⁷⁷⁶

Contribution where liable for same damage

- 47-147

The right of contribution under the [Civil Liability \(Contribution\) Act 1978 s.1](#) is entirely dependent on the discretion of the court to order such contribution as “may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question”.⁷⁷⁷ Consequently, contribution under the Act need not be based on the principle of equality of treatment among the sureties but may have regard to wider considerations.

Enforcement of right to contribution

47-148 Prima facie the equitable right to contribution arises only when one surety has actually paid more than his due share. So, for example, where there are two sureties equally liable, and one paid half the debt, but the other was not called on to pay anything by the creditor, the former was held not to be entitled to contribution.⁷⁷⁸ But where the liability guaranteed is a debt payable in instalments, one surety cannot claim contribution from another merely because he has paid more than his share of some of the instalments; he must wait until all the instalments have been paid.⁷⁷⁹ The position might be different if separate debts were involved, or even if each instalment created a separate and distinct liability.⁷⁸⁰ As with the surety’s right to an indemnity,⁷⁸¹ the surety may be able to take steps to enforce his potential right to contribution even before he has paid anything. Thus a surety who has had judgment given against him for the full amount of the liability may obtain a prospective order directing a co-surety on payment by the surety of his own share, to indemnify him against further liability and if the principal creditor is a party to the proceedings, the surety can obtain an order directing the co-surety to pay his share directly to the creditor.⁷⁸² The principal debtor should normally be made a party to any proceedings for contribution unless it is plain that no useful purpose would be served by doing so, for example, because he is manifestly insolvent.⁷⁸³ The statutory right to contribution does not appear to be limited in the same way as the equitable right,⁷⁸⁴ so contribution in respect of liability for damage may be sought even prior to payment but no doubt the court will protect the position of the paying surety by appropriate orders.

Surety’s right to securities held by creditor

47-149 A surety who pays the creditor is subrogated to the creditor’s rights against the debtor.⁷⁸⁵ This means, *inter alia*, that he is entitled to the benefit of all securities belonging to the debtor and charged with the liability which the surety has been called upon to meet.⁷⁸⁶ This right extends to securities given to the creditor after the contract of suretyship was entered into.⁷⁸⁷ As in the case of the right to indemnity and contribution, this right does not arise until actual payment by the surety; but (also as in those cases) the surety’s potential right to the securities is recognised and protected even before payment. Thus, as already seen, any release of securities by the creditor may discharge the surety.⁷⁸⁸ Furthermore, if the creditor makes further advances to the debtor (for

which the surety is not liable) on the same security as the original guaranteed loan, the creditor will be postponed, in respect of these advances, to the surety.⁷⁸⁹ Thus, the surety may, on paying off the original debt, require the securities to be transferred to him to satisfy his right to an indemnity in priority to the creditor's later rights.⁷⁹⁰ But where the debtor became bankrupt and the creditor released a security to the trustee in bankruptcy who sold it, it was held that a surety had no equitable charge on the property before payment such as might have justified complaint on the ground that the sale had been made at an undervalue.⁷⁹¹ Prima facie it is not to be expected that the surety should be entitled to recover more than an indemnity by claiming securities or pursuing other subrogation rights, and any surplus must be paid over to the principal debtor.⁷⁹² Very clear words would be required to exclude or modify the principal debtor's rights in this respect.⁷⁹³ As has been seen,⁷⁹⁴ if the creditor's claim against the surety is secured by a charge, then the surety's subrogated claim to contribution is also secured and not subject to set-off.⁷⁹⁵

Mercantile Law Amendment Act 1856 s.5

- 47-150 The surety's right to securities is reinforced by [s.5 of the Mercantile Law Amendment Act 1856](#) which declares that the surety is entitled to have assigned to him "every judgment, specialty or other security which shall be held by the creditor" in respect of the debt.⁷⁹⁶ Under this section it has been held that it is unnecessary that the surety should actually take an assignment of a judgment against the debtor,⁷⁹⁷ but he cannot enforce such a judgment without permission of the court.⁷⁹⁸ The section in effect gives a surety who has paid the guaranteed debt an additional right (both against the debtor and against the co-sureties) to be treated as a statutory assignee of the creditor, and in some respects this right may be wider than his right to indemnity and contribution. For example, a surety who has paid a debt can prove in the bankruptcy of a co-surety for the whole debt though he cannot actually recover more than his due share.⁷⁹⁹

Surety who has paid in same position as creditor

- 47-151 The effect of the equitable principles discussed above and of [s.5 of the Mercantile Law Amendment Act 1856](#) is that in general the surety is, on payment of the debt, in the same position as the creditor himself. Thus, a surety who has paid a Crown debt is entitled to the Crown rights of priority in the bankruptcy of the principal debtor.⁸⁰⁰ And a surety paying a debt which has preference under [s.386 of the Insolvency Act 1986](#) is also entitled to the same priority as the original creditor.⁸⁰¹ But there may be some rights of the principal creditor which are so personal that they do not pass to the surety. It has been held, for example, that the right of a finance company to seize goods let on hire-purchase does not pass to the surety on the ground that it is a "personal right".⁸⁰² But

this decision is hard to understand for the right to seize the goods is merely an incident of the title to the goods and this would seem plainly to pass to the surety under [s.5 of the Mercantile Law Amendment Act](#), though no mention of the section was made in this case.⁸⁰³

Footnotes

- [704](#) See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 19-16—19-21; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015) pp.241–243; Burrows, *A Restatement of the Law of Unjust Enrichment* (2012) s.18(2)(b), pp.101–102; s. 35(2) pp.171, 175–176.
- [705](#) [CPR Pt 20 r.5.](#)
- [706](#) See *Anson v Anson* [1953] 1 Q.B. 636, 641–643.
- [707](#) *Re a Debtor* [1937] Ch. 156.
- [708](#) *Moule v Garrett* (1872) L.R. 7 Ex. 101, 104; *Brook's Wharf v Goodman Brothers* [1937] 1 K.B. 534. A third possibility is to treat the right as arising by way of subrogation, but this would require proceedings to be brought in the name of the creditor. At times it may be important to distinguish between a surety's right to an indemnity and any right of the creditor against the principal debtor which the surety may enjoy by way of subrogation: e.g. *Re Empire Paper Ltd (In Liquidation)* [1999] B.C.C. 406 (compromise agreement preserved “any subrogated claims”).
- [709](#) Philips and O'Donovan, *The Modern Law of Guarantee*, 4th edn (2020), para.12-001 and cf. above, para.[47-010](#) referring to counter-indemnities made in the context of performance guarantees.
- [710](#) *Euler Hermes SA (NV) v Mackays Stores Group Ltd* [2022] EWHC 1918 (Comm) at [43]–[46] (obiter, given that the HC held that the surety did owe the sums which it had paid).
- [711](#) See Vol.I, para.[32-129](#).
- [712](#) [1976] Q.B. 402; *The Zuhal K* [1987] 1 Lloyd's Rep. 151; and see Birks and Beatson in Beatson, *The Use and Abuse of Unjust Enrichment* (1991), Ch.7.
- [713](#) See generally Birks and Beatson in *The Use and Abuse of Unjust Enrichment* (1991).
- [714](#) (1872) L.R. 7 Ex. 101 and See Vol.I, paras [32-115](#) et seq.
- [715](#) (1880) 6 App. Cas. 1, 11, 12.
- [716](#) *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 E.G. 643; *Becton Dickinson Ltd v Zwebner* [1989] Q.B. 208.
- [717](#) [1976] Q.B. 402.

- 718 Goff and Jones, *The Law of Restitution*, 7th edn (2007), pp.430–432 et seq. (this point not being addressed by the 9th edition), cf. Burrows, *The Law of Restitution*, 3rd edn (2010), pp.449–452.
- 719 Goff and Jones *The Law of Restitution*, 7th edn (2007) p.431. cf. Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.20-02 which states that it is not “automatically fatal that [a claimant’s] liability to the third party was voluntarily assumed without any prior request from the defendant: this is merely one factor which may bear on the court’s decision whether to allow a claim”. See also Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.232–234; Burrows, *A Restatement of the Law of Unjust Enrichment* (2012) s.18(2)(b), p.102 (decision in *Owen v Tate* “seems incorrect”).
- 720 (1872) *L.R.* 7 Ex. 101.
- 721 *Becton Dickinson Ltd v Zwebner* [1989] *Q.B.* 208 at 217–218; and see *Kumar v Dunning* [1989] *Q.B.* 193, 201.
- 722 *Alexander v Vane* (1836) 1 *M. & W.* 511.
- 723 *Re Chetwynd's Estate* [1938] *Ch.* 13 (decided under the Moneylenders Acts, which were repealed from 19 May 1985, by the *Consumer Credit Act 1974*).
- ①724 *Argo Caribbean Group Ltd v Lewis* [1976] 2 *Lloyd's Rep.* 289, 295, per curiam (it was held that the undertaking by the surety was one of indemnity rather than true guarantee: *ibid.* at 296). It was suggested (at 295–296) that if the debtor cancels the surety’s instructions to pay the debt, there will no longer be a right of indemnity. This presumably would only be so if the surety is not contractually bound to the creditor. cf. *Euler Hermes SA (NV) v Mackays Stores Group Ltd* [2022] *EWHC 1918 (Comm)* at [43]–[46], where it was said (obiter) that the principal debtor would have been liable to indemnify the surety under their express contract of indemnity on its construction in respect of sums paid under the contract of suretyship even if they were not due).
- 725 *Coneys v Morris* [1922] 1 *Ir.R.* 81.
- 726 *Re Salisbury-Jones* [1938] 3 *All E.R.* 459; *Anson v Anson* [1953] 1 *Q.B.* 636.
- 727 *Re Richardson* [1911] 2 *K.B.* 705; *Re Beavan* [1913] 2 *Ch.* 595 and see Vol.I, para.31-047.
- 728 *Drager v Allison*, 19 *D.L.R.* (2d) 31 (1959).
- 729 *Re Mitchell* [1913] 1 *Ch.* 201; *Re Fenton* [1931] *Ch.* 85; *Re a Debtor* [1956] 1 *W.L.R.* 1226.
- 730 *R & H Green & Silley Weir Ltd v British Rys Board* (1980) reported [1985] 1 *W.L.R.* 570.
- 731 *Telfair Shipping Corp v Inersea Carriers SA* [1985] 1 *W.L.R.* 553.
- 732 *Bosma v Larsen* [1966] 1 *Lloyd's Rep.* 22; followed in *National House-Building Council v Fraser* [1983] 1 *All E.R.* 1090. cf. *City of London v Reeve & Co Ltd* [2000] *C.P. Rep.* 73 at [30] (question when cause of action on a contractual indemnity arises an issue of construction) and see Vol.I, para.31-049.
- 733 *Re Empire Paper Ltd (In Liquidation)* [1999] *B.C.C.* 406, 412; citing *Howard v Lovegrove* (1870) 6 *Exch.* 43; and *Pierce v Williams* (1854) 23 *L.J. Ex.* 322, 323.
- 734 *Re Empire Paper Ltd (In Liquidation)* [1999] *B.C.C.* 406, 412, per Stanley Burnton QC (the report adds “and himself” but this is belied by what follows).
- 735 *Re Empire Paper Ltd (In Liquidation)* [1999] *B.C.C.* 406.

- 736 cf. however, *Argo Caribbean Group Ltd v Lewis* [1976] 2 *Lloyd's Rep.* 289, 295–296 where the right of indemnity was recognised using the language of a guarantor's liability ("pay if I do not") but the express suretyship undertakings were found to include both an indemnity and a true guarantee.
- 737 *Sheffield Corp v Barclay* [1905] A.C. 392.
- 738 Thus the defendant in *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828 could hardly have obtained an indemnity from the minor hire-purchaser.
- 739 See above, para.47-005.
- ①740 [2009] EWCA Civ 413, [2009] 2 *Lloyd's Rep.* 233.
- 741 [2009] EWCA Civ 413 at [34].
- 742 [2009] EWCA Civ 413 at [34].
- 743 [2009] EWCA Civ 413 at [35].
- 744 See above, paras 47-122—47-129.
- 745 *Elian and Rabbath v Matsas and Matsas* [1966] 2 *Lloyd's Rep.* 495. In this case an injunction was granted to prevent the creditor going to arbitration. Presumably, if he sues, the debtor could ask for a stay of proceedings under s.49(3) of the Senior Courts Act 1981. The exceptional nature of the *Elian* case was stressed in *Howe Richardson Scale Co Ltd v Polimex-Cekop* [1978] 1 *Lloyd's Rep.* 161, 165.
- 746 *Wolmershausen v Gullick* [1893] 2 Ch. 514, 528; *Ascherson v Tredegar Dock, etc. Co Ltd* [1909] 2 Ch. 401.
- 747 *Wolmershausen v Gullick* [1893] 2 Ch. 514, 528; *Ascherson v Tredegar Dock, etc. Co Ltd* [1909] 2 Ch. 401.
- 748 *Watt v Mortlock* [1964] Ch. 84.
- 749 *Re Anderson-Berry* [1928] Ch. 290.
- 750 *Thomas v Notts Incorporated Football Club Ltd* [1972] Ch. 596.
- 751 *Tate v Crewdon* [1938] Ch. 869; *Morrison v Barking Chemicals Co* [1919] 2 Ch. 325.
- 752 cf. above, para.47-135.
- 753 *In Re Kaupthing Singer & Friedlander Ltd (In Administration) (No.2)* [2011] UKSC 48, [2011] 3 W.L.R. 939 especially at [12], [53]–[54], [55]. As a result, the SC held that the "rule in *Cherry v Boulbee*" which was described as "a simple technique of netting-off reciprocal monetary obligations" (at [8], per Lord Walker of Gestingthorpe) as well as statutory set-off were ousted by the policy of the law underlying the rule against double proof: [2011] UKSC 48 at [48], [53] and [55].
- 754 *In Re Kaupthing Singer & Friedlander Ltd (In Administration) (No.2)* [2011] UKSC 48 at [11]–[12]; *Re Oriental Commercial Bank* (1871) L.R. 7 Ch. App. 99; *Re Fenton* [1931] 1 Ch. 85; *Re Glen Express Ltd* [2000] B.P.I.R. 456.
- ①755 In *Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc (In Administration)* [2021] EWCA Civ 1523 at [135]–[141], [168]–[172] and [180]–[182] the CA recognised an exception to the rule that the surety cannot set off sums paid to the creditor in the insolvency of the principal debtor for the case where the surety has released the

- principal debtor, as here there can be no competition between the creditor's proof of debt and any claim for an indemnity by the surety. See also above, para.47-089.
- 756 See above, para.47-079.
- 757 See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 19-9—19.13.
- 758 *Dering v Earl of Winchelsea (1787) 2 B. & P. 270.*
- 759 *Moschi v Lep Air Services [1973] A.C. 331.*
- 760 *Hampton v Minns [2002] 1 W.L.R. 1.* cf. the position under the *Insolvency Act 1986* as regards a principal debtor's liability for a "liquidated sum" as explained in *McGuiness v Norwich and Peterborough Building Society [2011] EWCA Civ 1286, [2012] B.P.I.R. 145* above, para.47-074.
- 761 *Hampton v Minns [2002] 1 W.L.R. 1* at 28 and on this limitation period see Vol.I, para.31-015. Where the claim is for debt the appropriate period has been said to be six years by analogy with the *Limitation Act 1980* s.5: *[2002] 1 W.L.R. 1* at 33.
- 762 See Vol.I, paras 19-029 et seq.
- 763 *Re Ennis [1893] 3 Ch. 238.*
- 764 *Coope v Twynam (1823) 1 T. & R. 426; Ellis v Emmanuel (1876) 1 Ex. D. 157, 162;* and see *Fryzman Properties v Bejam (1987) C.L.Y. 1841; Stimpson v Smith [1999] Ch. 340.*
- 765 *Craythorne v Swinburne (1807) 14 Ves. 160; Re Denton's Estate [1904] 2 Ch. 178.*
- 766 *Pendlebury v Walker (1841) 4 Y. & C. Ex. 424; Re Ennis [1893] 3 Ch. 238; Arcedeckne v Howard (1875) 45 L.J. Ch. 622; Stimpson v Smith*, above at 348. It has been assumed that such a modification may be made by implied term: *Hampton v Minns [2002] 1 W.L.R. 1* at 16–17; *Marsden v Elston [2001] EWCA Civ 1746*. To the extent that such an exclusion affects a "business liability", the exclusion may be subject to a test of reasonableness under the *Unfair Contract Terms Act 1977* s.3 (on which, see Vol.I, paras 17-088—17-090). If contained in a consumer contract it may be affected by the *Consumer Rights Act 2015* Pt 2, on which see generally above, paras 40-243 et seq. and below, paras 47-160 et seq.
- 767 *Scholefield Goodman & Sons Ltd v Zyngier [1986] A.C. 562; Caledonia North Sea Ltd v British Telecommunications Plc [2002] 1 Lloyd's Rep. 553, 566–567.*
- 768 This situation could well arise where a hire-purchase contract is guaranteed by a surety, and the dealer also enters into a "recourse agreement" under which he agrees to indemnify the finance company against any loss.
- 769 See above, para.44-118.
- 770 *Steel v Dixon (1881) 17 Ch. D. 825.* cf. *Official Trustee in Bankruptcy v Citibank Savings Ltd [1999] B.P.I.R. 754, SC NSW* (wider equitable considerations relevant to amount of contribution between co-sureties).
- 771 *Berridge v Berridge (1890) 44 Ch. D. 168.*
- 772 *Browne v Lee (1827) 6 B. & C. 689.*
- 773 *Peter v Rich (1830) 1 Ch. Cas. 19, 34.*
- 774 *Lowe v Dixon (1885) 16 Q.B.D. 455.*
- 775 *Ellesmere Brewery Co v Cooper [1896] 1 Q.B. 75; Re Denton's Estate [1903] 2 Ch. 670.*
- 776 *Brown v Cork (1986) P.C.C. 78.*
- 777 Civil Liability (Contribution) Act 1978 s.2(1).

- 778 *Davies v Humphreys* (1840) 6 M. & W. 153; see also *Ex p. Snowdon* (1881) 17 Ch. D. 44.
- 779 *Stirling v Burdett* [1911] 2 Ch. 418.
- 780 *Stirling v Burdett*, above, at 429.
- 781 See above, para.47-131.
- 782 *Wolmershausen v Gullick* [1893] 2 Ch. 514. For form of order, see *Kent v Abrahams* [1928] W.N. 266.
- 783 *Hay v Carter* [1935] Ch. 397.
- 784 See s.1(1) of the Civil Liability (Contribution) Act 1978.
- 785 *Hodgson v Shaw* (1834) 3 My. & K. 183, 190–191.
- 786 It is uncertain whether *Quennell v Maltby* [1979] 1 W.L.R. 318 illustrates any general principle limiting rights of subrogation where a debt is discharged for some ulterior purpose.
- 787 *Forbes v Jackson* (1882) 19 Ch. D. 615.
- 788 See above, para.47-123.
- 789 *Forbes v Jackson* (1882) 19 Ch. D. 615.
- 790 *Forbes v Jackson* (1882) 19 Ch. D. 615; *Craythorne v Swinburne* (1807) 14 Ves. 160, 162, 169; *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank Plc* [2002] EWCA Civ 691 at [43].
- 791 *Pratt's Trustee v Pratt* [1936] 3 All E.R. 901.
- 792 *L Lucas Ltd v Export Credits Guarantee Department* [1974] 1 W.L.R. 909.
- 793 *L Lucas Ltd v Export Credits Guarantee Department* [1974] 1 W.L.R. 909, at 922.
- 794 See above, para.47-146.
- 795 *Brown v Cork* (1986) P.C.C. 78.
- 796 This provision was introduced to overcome the logical problem that on payment by the surety, the principal debtor's debt was discharged and the creditor's rights thereby extinguished: for this effect, see *Hodgson v Shaw* (1834) 3 My. K. 183 at 191.
- 797 *Re M'Myn* (1886) 33 Ch. D. 575; *Batchellor v Lawrence* (1861) 9 C.B.(N.S.) 543.
- 798 CPR Pt 50.1, Sch.1 r.46.2; and see *Kayley v Hothersall* [1925] 1 K.B. 607.
- 799 *Re Parker* [1894] 3 Ch. 400; and see *Brown v Cork* (1986) P.C.C. 78.
- 800 *Re Lord Churchill* (1888) 39 Ch. D. 174; and see *R. v Fay* (1878) 4 L.R.Ir. 606.
- 801 *Re Lamplugh Iron Ore Co Ltd* [1927] 1 Ch. 308; cf. *Re Walters' Deed of Guarantee* [1933] Ch. 321 (both decided under earlier legislation).
- 802 *Chatterton v Maclean* [1951] 1 All E.R. 761, 766.
- 803 However, the case was cited without disapproval in the decision of the House of Lords in *Moschi v Lep Air Services Ltd* [1973] A.C. 331.

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Section 9. - Legislative Protection of Sureties

Introduction

- 47-152 Contracts of guarantee and indemnity have not been the object of general legislative intervention, unlike, for example, contracts of sale of goods⁸⁰⁴ or of consumer credit,⁸⁰⁵ but they have been subject to more general legislative controls on the parties' freedom of contract, such as those created by the Misrepresentation Act 1967⁸⁰⁶ and the Unfair Contract Terms Act 1977 as regards exemption clauses.⁸⁰⁷ Moreover, most clauses in consumer contracts of suretyship are subject to the general test of unfairness contained in Pt 2 of the Consumer Rights Act 2015.⁸⁰⁸ And as has been noted, contracts of guarantee (which for this purpose include certain contracts of indemnity) relating to consumer credit agreements and to consumer hire agreements may be affected by the special requirements of the Consumer Credit Act 1974.⁸⁰⁹ Finally, a "consumer surety" may be protected by the preventive measures against unfair commercial practices put in place by the Consumer Protection from Unfair Trading Regulations 2008, but will not benefit from the rights to redress for consumers introduced by amendment of these regulations in 2014.⁸¹⁰

Footnotes

804 Sale of Goods Act 1979; and see above, paras 46-001 et seq. See also the special provisions governing consumer "goods contracts" (which includes "sales contracts" in Pt 1 Ch.2 of the Consumer Rights Act 2015, above, paras 40-487 et seq.

805 Consumer Credit Act 1974; and see above, Ch.41.

806 Below, para.47-155.

807 Below, paras 47-156—47-159.

808 Pt 2 of the 2015 Act came into force on 1 October 2015 in respect of contracts entered into on or after that date: see further on the temporal application of the 2015 Act, above, para.40-241;

as regards contracts made before that date, the [Unfair Terms in Consumer Contracts Regulations 1999](#) continue to apply as noted above, paras 40-226—40-227. Under earlier law, EU and UK legislation governing “off-premises contracts” could apply to contracts of suretyship: see *Bayerische Hypotheken- und Wechselbank AG v Dietzinger (C-45/96 EU:C:1998:111, [1998] E.C.R. I-1199*, so interpreting Directive 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31, which was implemented in UK law by the [Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 \(SI 2008/1816\)](#). However, Directive 85/577 was repealed and replaced by Directive 2011/83/EU on consumer rights O.J. L304/64, art.3(3)(d) of which excludes from its scope “contracts for financial services” and this exclusion was reflected on the directive’s implementation in the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#) reg.6(1)(b) (excluding from their scope “services of a banking, credit, insurance, personal pension, investment or payment nature”): above, para.40-079. Even if a contract of suretyship were to be held to fall *outside* this exclusion (on the basis that the provision of a guarantee by a consumer to a trader/creditor is not a service “of a banking etc ... nature”), the question still arises as to whether the relevant provisions of the 2013 Regulations apply to contracts under which a consumer *supplies* a service to a trader: on this question see above, paras 40-082, 40-086—40-088 and 40-091.

- 809 See above, paras 41-182 et seq. On the other hand, the ECJ held that contracts of suretyship do not themselves fall within Directive 87/102 of 12 December 1986 concerning consumer credit even where neither the principal debtor nor the surety are acting in the course of their trade, business or profession: *Berliner Kindl Brauerei AG v Andreas Siepert (C-208/98 EU:C:2000:152, [2000] E.C.R. I-1741*.
- 810 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) (“2008 Regulations”). The amendments were made by the [Consumer Protection from Unfair Trading Regulations 2014 \(SI 2014/870\)](#).

(a) - Consumer Protection from Unfair Trading Regulations 2008

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(a) - Consumer Protection from Unfair Trading Regulations 2008

Unfair Commercial Practices by creditors against consumer sureties

- 47-153 As explained generally in Ch.40,⁸¹¹ the [Consumer Protection from Unfair Trading Regulations 2008](#) (which implemented the Unfair Commercial Practices Directive 2005) prohibit “unfair commercial practices” by traders⁸¹² against consumers.⁸¹³ For this purpose, “commercial practices” are unfair if they fail a general test (that a commercial practice “contravenes the requirements of professional diligence” and “materially distorts, or is likely, to materially distort the economic behaviour of the average consumer with regard to the product”⁸¹⁴); if they constitute misleading actions,⁸¹⁵ misleading omissions⁸¹⁶ or aggressive commercial practices⁸¹⁷; or if they are included in a list of “commercial practices which are in all circumstances considered unfair”.⁸¹⁸ Under the [2008 Regulations](#), a “commercial practice” is defined as:

“... any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.”⁸¹⁹

Furthermore, “consumer” means “any individual who in relation to a commercial practice is acting for purposes that are wholly or mainly outside that individual’s business”⁸²⁰ and “product” includes goods, a service, digital content, immoveable property, and rights or obligations.⁸²¹ It will be seen, therefore, that the prohibitions (and consequential enforcement measures⁸²²) in the [2008 Regulations](#) may apply to the relationship between a commercial lender (the “trader”) and a “consumer surety” (i.e. an individual who concludes a contract of suretyship for purposes which are wholly or mainly outside that individual’s business), for in this situation, the consumer surety

may be said to supply a “product” (the financial service of undertaking to be answerable for the principal debtor’s debts⁸²³) to the commercial lender, it being expressly stated by the Regulations that a “commercial practice” by a trader may be “directly connected with the promotion, sale or supply of a product to *or from* consumers”.⁸²⁴

No “rights of redress” for consumer sureties

- 47-154 The Unfair Commercial Practices Directive states that it is “without prejudice to contract law”⁸²⁵ and as originally issued the **2008 Regulations** did not provide a remedy to a consumer who had been affected by any unfair commercial practice by a trader.⁸²⁶ However, on the recommendation of the Law Commissions,⁸²⁷ in 2014 the **2008 Regulations** were amended by the **Consumer Protection (Amendment) Regulations 2014**⁸²⁸ so as to create “rights to redress” in consumers against traders in respect of *certain* unfair commercial practices prohibited by the **2008 Regulations**. The details of these rights are explained above in Ch.40,⁸²⁹ but here it should be noted that they are generally available to consumers who are victims of only two forms of unfair commercial practice —“misleading actions” and “aggressive commercial practices” and who have entered a contract with or made a payment to the trader as a result.⁸³⁰ For present purposes, however, it is to be noted that a consumer surety cannot enjoy any of the “rights to redress” created by the **2014 Regulations**, as the first condition for the existence of these rights is that:

- “(a)the consumer enters into a contract with a trader for the sale or supply of a product by the trader (a ‘business to consumer contract’),
- (b)the consumer enters into a contract with a trader for the sale of goods to the trader (a ‘consumer to business contract’), or
- (c)the consumer makes a payment to a trader for the supply of a product (a ‘consumer payment’).”⁸³¹

It will be seen that a consumer surety will not be in a position to satisfy any of these conditions, given that he or she is not supplied with “a product” by the trader (so as to fall under (a)), does not contract to sell goods to the trader (so as to fall under (b)), nor makes any payment to a trader *for the supply of a product* (so as to fall under (c)): as a result, the rights to redress arise in “consumer to business contracts” only in the case of contracts of sale of goods.⁸³² This absence of any rights to redress in a consumer surety against a trader/lender under the **2008 Regulations** means that a consumer surety will continue to enjoy any right to damages to which he or she is entitled under the **Misrepresentation Act 1967 s.2**.⁸³³

Footnotes

- 811 Above, paras 40-166 et seq.
- 812 For the definition of “trader” see 2008 Regulations reg.2(1) “trader” and “business”, and above, para.40-177.
- 813 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277); Directive 2005/29 on unfair commercial practices [2005] O.J. L149/22: see below, paras 47-153—47-154.
- 814 2008 Regulations reg.3(3).
- 815 2008 Regulations regs 3(4)(a) and 5.
- 816 2008 Regulations regs 3(4)(b) and 6.
- 817 2008 Regulations regs 3(4)(c) and 7.
- 818 2008 Regulations regs 3(4)(d) and Sch.1.
- 819 2008 Regulations reg.2(1) “commercial practice”. On this definition and the question whether an isolated event may constitute a commercial practice for this purpose, see above, paras 40-175—40-176.
- 820 2008 Regulations reg.2(1) “consumer” (as amended by the Consumer Protection from Unfair Trading Regulations 2014 (SI 2014/870) reg.2(3), see above, para.40-177.
- 821 2008 Regulations reg.2(1) “product” (as amended by 2014 Regulations reg.2(6)).
- 822 Notably, criminal offences and the possibility of injunctions brought by designated enforcement authorities: 2008 Regulations Pts 3 and 4 respectively and see above, paras 40-179—40-180, which also explain the possible availability of enforcement orders under Pt 8 of the Enterprise Act 2002.
- 823 “Financial services” are clearly generally included within “product” as the 2005 Directive (which the 2008 Regulations implemented) makes special provision for “financial services” on this premise: 2005 Directive art.3(9), which refers to the definition of “financial service” in Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services [2002] O.J. L271/16, art.2(b), being “any service of a banking, credit, insurance, personal pension, investment or payment nature”.
- 824 2008 Regulations reg.2(1) “commercial practice” (emphasis added).
- 825 2005 Directive art.3(2) and see above, para.40-169. On the recent requirement at the EU law level of rights to redress for consumers, see above, para.40-185.
- 826 2008 Regulations reg.29 in its original form. See above, para.40-166.
- 827 Law Commission, Scottish Law Commission, Consumer Redress for Misleading and Aggressive Practices (2012) Law Com No.332, Scot Law Com No.226.
- 828 SI 2014/870.
- 829 Above, paras 40-181—40-222.
- 830 2008 Regulations reg.27A(4) (as inserted by the 2014 Regulations).

- 831 2008 Regulations reg.27A(2) (as inserted by the 2014 Regulations).
- 832 Moreover, the definition of “product” for the purposes of Pt 4A rights to redress is restricted by 2008 Regulations reg.27D so as to restrict its application to financial services: see above, paras 40-187. The Law Commissions’ Report, Consumer Redress for Misleading and Aggressive Practices (noted above) did not discuss the position of consumer sureties.
- 833 Where a consumer enjoys a right of redress under Pt 4A of the 2008 Regulations (as inserted by the 2014 Regulations) the consumer does not possess any right to damages under the Misrepresentation Act 1967 s.2: Misrepresentation Act 1967 s.2(4) as inserted by 2014 Regulations reg.5 and see above, para.40-220.

(b) - Misrepresentation Act 1967

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(b) - Misrepresentation Act 1967

Misrepresentation Act 1967 and Consumer Rights Act 2015

- 47-155 Until the coming into force of the [Consumer Rights Act 2015](#) on 1 October 2015,⁸³⁴ any attempted exclusion by the creditor of his liability for misrepresentation which induces the surety to contract was subject to a test of reasonableness under [s.3 of the Misrepresentation Act 1967](#),⁸³⁵ whether or not the surety “dealt as consumer” in entering the contract⁸³⁶ and this control affected attempts to exclude the creditor’s liability in damages or to have the contract of suretyship rescinded by the surety.⁸³⁷ However, as regards contracts entered on or after 1 October 2015, [s.3 of the 1967 Act](#) does not apply to contracts where they are “consumer contracts” within the meaning of [Pt 2 of the 2015 Act](#),⁸³⁸ and so where a trader/creditor seeks to exclude or restrict its liabilities for misrepresentation under a contract of suretyship with a consumer/surety, this exclusion or restriction will fall under the general requirements of fairness and transparency which [Pt 2 of the 2015 Act](#) provides.⁸³⁹

Footnotes

834 See further above, para.40-241.

835 See [Unfair Contract Terms Act 1977 s.11](#) and generally, Vol.I, paras 17-069 et seq.

836 [Misrepresentation Act 1967 s.3](#) (as amended by [Unfair Contract Terms Act 1977 s.8](#)). The reference to persons “dealing as consumer” formerly used by the [1977 Act](#) was deleted by the [2015 Act](#): see Vol.I, paras 17-072—17-073.

837 [Misrepresentation Act 1967 s.3\(1\)\(b\)](#) (as amended by [Unfair Contract Terms Act 1977 s.8](#)). This law still applies to contracts made before 1 October 2015.

- 838 2015 Act s.75, Sch.4 para.1, creating new subs.(2) to s.3 of the 1967 Act.
- 839 2015 Act ss.62 and 68–69, on which see above, paras 40-273 et seq. (fairness) and 40-428 et seq. (transparency).

(c) - Unfair Contract Terms Act 1977

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(c) - Unfair Contract Terms Act 1977

Unfair Contract Terms Act 1977 and Consumer Rights Act 2015

- 47-156 Until the coming into force of the [Consumer Rights Act 2015](#) on 1 October 2015,⁸⁴⁰ the [Unfair Contract Terms Act 1977](#) ss.2 and 3 provided controls on exemption clauses which sought to exclude a person's business liability for negligence or for breach of contract respectively, in the latter case being restricted to cases where a party contracts on the other's "written terms of business" or "deals as consumer".⁸⁴¹ However, on the coming into force of the [2015 Act](#), the references in the [1977 Act](#) to "dealing as consumer" were deleted⁸⁴² and s.2 and s.3 no longer apply to "consumer contracts" within the meaning of [Pt 2 of the 2015 Act](#) entered into on or after 1 October 2015, the terms in these contracts instead falling under the controls on the fairness and transparency of terms which [Pt 2 of the Act](#) itself provides.⁸⁴³

Application of 1977 Act to contracts of suretyship

- 47-157 Exemption clauses in contracts of suretyship may be caught by [ss.2 or 3 of the 1977 Act](#) (as amended).⁸⁴⁴ Thus, any attempt by a creditor acting in the course of business to exclude his liability in the tort of negligence, for example, as a result of explaining inadequately the effect of a guarantee,⁸⁴⁵ is subject to a test of reasonableness.⁸⁴⁶ Again, as against a surety dealing on the written standard terms of business⁸⁴⁷ of the creditor who enters the contract in the course of a business,⁸⁴⁸ any exclusion of a surety's right of set-off against the creditor would also be subject to a test of reasonableness.⁸⁴⁹

Exclusion of surety's rights to be discharged

- 47-158 On the other hand, the [Unfair Contract Terms Act 1977](#) does not affect any exclusion in the contract of suretyship of the surety's various rights to be discharged. These rights include a right of a guarantor at common law to be discharged if the principal debtor is discharged,⁸⁵⁰ a right which can clearly be excluded as this is one of the important distinguishing features between contracts of guarantee and contracts of indemnity, where the surety undertakes a primary liability to the creditor, independent of any liability to him in the principal debtor.⁸⁵¹ Moreover, it has also become not infrequent for creditors to exclude a surety's "equitable rights" against the creditor, such as his right to be discharged if the creditor agrees to discharge the principal debtor⁸⁵² or if the creditor varies the terms of the contract with the principal debtor to his prejudice.⁸⁵³ At common law, it is clear that these rights in the surety can be excluded by the contract of suretyship.⁸⁵⁴ These clauses are not caught by the [Unfair Contract Terms Act 1977](#) because, despite common use of the terminology of exclusion, they are not "exemption clauses" within the meaning of [s.13 of that Act](#), for this section ties their effect to the exclusion or restriction of any liability, whether by way of subjecting its enforcement to restrictive conditions⁸⁵⁵ or excluding any right or remedy in respect of the liability.⁸⁵⁶ By contrast, a clause in a contract of suretyship which excludes the discharge of the surety as a result, for example, of the creditor's variation of the contract, does not exclude any right of the surety in respect of a liability in the creditor: rather, it prevents the discharge of the surety from liability to the creditor.
- 47-159 However, the position is different if the circumstances which give rise to the right in the surety to be discharged also give rise to liability in the creditor, for example, where the latter has undertaken by its contract the validity of a security provided by the principal debtor.⁸⁵⁷ In these circumstances, where the surety contracted on the creditor's written standard terms of business any exclusion of liability in the creditor in respect of the validity of the security would be subject to a reasonableness test under [s.3\(2\)\(a\) of the Unfair Contract Terms Act 1977](#).⁸⁵⁸ Similarly, in principle if the creditor's conduct were to give rise to a liability in tort for negligence, then any exclusion of such a liability would be subject to a test of reasonableness where the contract of suretyship was made in the course of the creditor's business.⁸⁵⁹ Formerly an example of such a liability in tort could be found in the case of the creditor's neglect in relation to securities,⁸⁶⁰ but the existence of such a tortious liability has been disapproved by the Privy Council.⁸⁶¹ Finally, if the creditor has undertaken under the contract of guarantee to extend credit to the principal debtor, but has failed to do so in conformity with the contract, then any term of the contract purporting to exclude liability in the creditor for any loss which this causes to the *guarantor* would be caught by [s.3\(2\)\(a\) of the Unfair Contract Terms Act 1977](#) if the creditor acted in the course of business and on his written standard terms of business. However, while a "no set-off" clause in a contract of guarantee (which intends to prevent a guarantor from setting off any claims against the creditor's claim for

payment under the contract) has been held capable of falling within s.3,⁸⁶² in the circumstances of the case (which included the guarantor's access to legal advice at the time of signing the contract) the clause was held reasonable for the purposes of s.11 of the 1977 Act.⁸⁶³

Footnotes

- 840 Pt 2 of the Consumer Rights Act 2015 came into force on 1 October 2015 so as to apply to contracts made on or after that date: see above, para.40-241 (noting the qualifications on this position).
- 841 Unfair Contract Terms Act 1977 ss.2 and 3 and see Vol.I, paras 17-085—17-095.
- 842 2015 Act s.75, Sch.4 paras 5(2) and 11 and see Vol.I, paras 17-072—17-073.
- 843 2015 Act s.75, Sch.4 paras 4 and 5 inserted new s.2(4) and 3(3) in the 1977 Act. On these changes see generally Vol.I, para.17-071.
- 844 See above, para.47-156.
- 845 *Perry v Midland Bank Plc [1987] F.L.R. 237*; and see above, para.47-039 for the ambit of such a liability in the tort of negligence.
- 846 Unfair Contract Terms Act 1977 ss.2(2) and 11 and cf. *Smith v Eric S Bush [1990] 1 A.C. 831*.
- 847 On these requirements see Vol.I, paras 17-088—17-090. cf. above, para.47-156 on the effect of the Consumer Rights Act 2015 in this respect.
- 848 Unfair Contract Terms Act 1977 ss.1(3) and 3(1).
- 849 Unfair Contract Terms Act 1977 s.3(2)(a) and cf. *WRM Group Ltd v Wood [1998] C.L.C. 189*. On the surety's right of set-off see above, para.47-091.
- 850 See above, para.47-090, where it is noted that this rule does not apply to contracts of indemnity.
- 851 See above, paras 47-008, 47-045.
- 852 See above, para.47-095.
- 853 See above, paras 47-108 et seq.
- 854 See above, paras 47-096, 47-116.
- 855 Unfair Contract Terms Act 1977 s.13(1)(a). This definition applies to the controls found in ss.2(2) and 3(2)(a) of this Act: see Vol.I, para.17-079. While not concerned with exemption clauses in this sense, s.3(2)(b) of the same Act (on which see Vol.I, paras 17-090—17-095) is not likely to come to the aid of the surety in these circumstances, for it is difficult to see how an exclusion by a creditor of the surety's rights to be discharged would constitute as against the surety an attempt "(i) to render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all".
- 856 1977 Act s.13(1)(b). Nor, it is submitted, does the reference at the end of s.13 to the exclusion or restriction of liability "by reference to terms and notices which exclude or restrict the relevant obligation or duty" help the surety, as the discharging effect with which the various

rights of the surety are concerned does not arise from breach of any obligation or duty in the creditor: cf. Vol.I, para.[17-081](#).

- 857 *TCB Ltd v Gray [1987] Ch. 458n* (in which the court rejected the contention that there was such an undertaking).
- 858 **Unfair Contract Terms Act 1977 s.3(1)**. It would appear that if such a clause failed the reasonableness test, it could nevertheless still be effective to prevent the surety from being discharged from his liability, as the effect of [s.3](#) is to prevent the creditor from “excluding or restricting any liability of his in respect of breach … except in so far as … the contract term satisfies the requirement of reasonableness”. cf. Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.7-069.
- 859 **Unfair Contract Terms Act 1977 ss.1(3) and 2(2)**. As earlier noted, these provisions do not apply to “consumer contracts” made on or after 1 October 2015: above, para.[47-156](#).
- 860 *Standard Chartered Bank v Walker [1982] 1 W.L.R. 1410, 1416*.
- 861 *China and South Seas Bank v Tan Soon Gin [1990] 1 A.C. 536, 543–544*; and see above, para.[47-126](#).
- 862 *Governor and Co of the Bank of Scotland v Singh* Unreported 17 June 2005, QB Mercantile Ct, Manchester at [71]–[75] (although the decision of HH Judge Kershaw QC on this point is not free from doubt given the points which he makes at [75]). On the application of [s.3 of the 1977 Act](#) to exclusions of rights of set off more generally see Vol.I, para.[17-079](#).
- 863 *Governor and Co of the Bank of Scotland v Singh* Unreported 17 June 2005, QB Mercantile Ct, Manchester at [80]–[81], [84].

(d) - Consumer Rights Act 2015

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(d) - Consumer Rights Act 2015

Introduction

- 47-160 As explained in Ch.40, the EU Directive on unfair terms in consumer contracts of 1993⁸⁶⁴ was formerly implemented in UK law by the [Unfair Terms in Consumer Regulations 1999](#)⁸⁶⁵ but, for contracts made on or after 1 October 2015 the [Consumer Rights Act 2015](#) revoked the [1999 Regulations](#) and created its own controls on unfair terms in consumer contracts, implementing the 1993 Directive and in certain respects going beyond its requirements.⁸⁶⁶ After IP completion day, the provisions of the [2015 Act](#) which implemented the 1993 Directive became part of retained EU law as amended by regulation, and this status affects the status of case law of the Court of Justice of the EU relevant to their interpretation.⁸⁶⁷ These legislative controls on unfair contract terms in the [2015 Act](#) have been discussed generally earlier in the present volume,⁸⁶⁸ but here some account will be made of their possible effects on contracts of suretyship.

Application of these controls to contracts of suretyship

- 47-161 The question whether the 1993 Directive itself (which the [1999 Regulations](#) and then the [2015 Act](#) implemented) applies to contracts of suretyship received no definitive answer until the Order of the Court of Justice of the EU in *Tarcău v Banca Comercială Intesa Sanpaolo România SA* in 2015.⁸⁶⁹ The Directive does not list the types of contract to which it applies beyond defining their parties, and these parties are referred to in its English version as the “seller or supplier” (the person contracting in the course of business) and the “consumer” (the individual not contracting in the course of business).⁸⁷⁰ This terminology (which was followed by the UK’s implementation

in the 1999 Regulations⁸⁷¹) suggested that the business sells goods (or other property) or supplies services (including financial services) *to* the consumer,⁸⁷² and this in turn suggested that the 1993 Directive applies to contracts of suretyship only in the rare situation where the *creditor* is a consumer, and the surety the person acting in the course of business.⁸⁷³ However, other language versions of the 1993 Directive instead refer more openly to a “professional” or “trader” defined in a similar manner,⁸⁷⁴ and, noting this, the Court of Justice of the EU clarified that the 1993 Directive applies to *all types* of consumer contract, defined merely by reference to their parties: persons contracting in the course of business on the one hand, and consumers, viz, natural persons contracting other than in the course of business, on the other.⁸⁷⁵ According to the Court of Justice, this interpretation gives effect to the purpose of the Directive in the protection of consumers as “weaker parties” as regards both their bargaining power and their level of knowledge.⁸⁷⁶ This general view was then applied to the context of contracts of suretyship by the Court of Justice in *Tarcău*.⁸⁷⁷ There, the parents of the director and sole shareholder of a commercial company had guaranteed and provided real security for the payment of sums owed by that company to a bank. The national court making the preliminary reference considered that the 1993 Directive (and therefore its national implementing legislation) applied only to contracts for the supply of goods or services *to* consumers,⁸⁷⁸ but the Court of Justice confirmed that the Directive applies to “all contracts” between consumers and sellers or suppliers and that:

“... [t]he purpose of the contract is thus, subject to the exceptions listed in the recital 10 of the Directive ... irrelevant in determining the scope of the directive.”⁸⁷⁹

As a result, the 1993 Directive could apply to a contract of guarantee undertaken by a “consumer” or to another contract under which a “consumer” provides security for the performance of an obligation by another person, even if that other person is a commercial company rather than another consumer.⁸⁸⁰ Indeed, in the view of the Court of Justice, the protection provided by the 1993 Directive for consumers as “weaker parties”:

“... is particularly important in the case of a contract providing security or a contract of guarantee concluded between a banking institution and a consumer. Such a contract is based on a personal commitment of the surety or guarantor to pay a contractual debt owed by a third party. That commitment involves onerous obligations for the person entering into it, the effect of which is to subject that person’s own property to a financial risk which is often difficult to quantify.”⁸⁸¹

For this purpose, “consumer” is an “objective” concept (and therefore does not depend on the knowledge or bargaining power of the individual) and is to be assessed by reference to the “functional criterion” of whether the contract arose in the course of activities outside his trade, business or profession.⁸⁸² The question whether a particular person is to be categorised as a “consumer” in this way remains for the national court to determine taking into account of all the

circumstances,⁸⁸³ but in the case of security being provided for performance of the obligations of a commercial company, this would turn on whether he “... acted for purposes relating to his trade, business or profession or because of functional links he has with that company, such as a directorship or non-negligible shareholding” or whether instead “he acted for purposes of a private nature”.⁸⁸⁴ It is submitted that, given the reasoning of the Court of Justice, the 1993 Directive applies to all types of suretyship contracts and that no distinction is to be made for this purpose between contracts of guarantee and contracts of indemnity as this distinction is understood by English law.⁸⁸⁵ Indeed, in its earlier decision in *Bucura v SC Bancpost SA*, the Court of Justice held that the 1993 Directive could apply to a contract under which the alleged “consumer” contracted as “co-debtor” to a person concluding a contract of consumer credit.⁸⁸⁶

Part 2 of the Consumer Rights Act 2015

47-162 It is submitted, therefore, that earlier English decisions on the application of the 1999 Regulations to contracts of suretyship must be read subject to the very clear ruling by the Court of Justice in *Tarcău* on the application of the 1993 Directive.⁸⁸⁷ Similarly, the provisions of the **Consumer Rights Act 2015** (principally contained in Pt 2) which replaced the 1999 Regulations and which re-implemented the 1993 Directive in UK law by subjecting the terms of a consumer contract to requirements of unfairness and transparency must also be interpreted as applying to contracts by which a “consumer” guarantees the debt or other obligation of a third party, whether or not that third party is itself a “consumer”.⁸⁸⁸ In this respect, the terminology used by the 2015 Act to designate the parties to “consumer contracts” fits more naturally the context of suretyship, as it refers to the business party as the “trader” rather than the “seller or supplier”.⁸⁸⁹ It should also be noted that the 2015 Act extends (or appears to extend) the definition of “consumer” to an individual contracting “wholly or mainly” for purposes outside that individual’s trade, etc.⁸⁹⁰ As a result, the explanation of the situations in which an individual concluding a contract of suretyship with a trader (for example, a bank) set out by the Court of Justice in *Tarcău* and its surrounding case-law may need to be adjusted so as to include persons acting *mainly* and not merely *wholly* outside their “trade, business, craft or profession”. In *Harvey v Dunbar Assets Plc*⁸⁹¹ the Court of Appeal was prepared to assume (without deciding) that the decision in *Tarcău* had the effect that an individual who guarantees a company debt *can* be a consumer, provided that he is not connected to the company and has been acting outside his business, trader or profession, though the Court of Appeal held that the individual before them did not satisfy those conditions.

Vulnerable types of clause

47-163

Where a court holds that a contract of suretyship counts as a “consumer contract” (under which a “consumer” undertakes an obligation or liability towards a business creditor, such as a bank), there are a number of possible types of term where the 2015 Act’s controls on their fairness and transparency may be significant. The interpretation of these controls by the Court of Justice of the EU has been demanding, both in relation to the requirement of fairness⁸⁹² and in relation to the requirement of transparency (which stands as an independent requirement and also plays a significant role in the fairness of a contract term).⁸⁹³ In this respect, it is submitted that those clauses under which the creditor excludes the various rights of the surety to be discharged would be particularly vulnerable to the charge of unfairness, given that the average consumer/guarantor may well not “be able to assess the potentially significant economic consequences for him resulting from” such an exclusion.⁸⁹⁴ Perhaps most difficult in this respect is the application of the controls on unfair terms to clauses in a contract of suretyship which retain the liability of the surety even where the principal debtor is discharged. In the case of a contract of guarantee, such a clause excludes a right in the surety against the creditor,⁸⁹⁵ and could well be seen as causing a “significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer”.⁸⁹⁶ However, it is of the very nature of a contract of *indemnity* that liability in the surety exists irrespective of the liability (and therefore of the discharge) of the principal debtor. It could, therefore, be argued that a clause or clauses which merely create this result thereby define the main subject matter of the contract so as to fall within the first limb of the “core exclusion” from the test of unfairness under s.64 of the 2015 Act.⁸⁹⁷

- 47-164 At first sight, more straightforward is the impact of Pt 2 of the 2015 Act⁸⁹⁸ on clauses in a contract of guarantee which on their terms exclude the right of the surety to be discharged by reason of the variation by the creditor of the contract with the principal debtor,⁸⁹⁹ including making a binding agreement to give the latter time,⁹⁰⁰ by reason of the release of any co-surety,⁹⁰¹ or by dealing negligently with any security for the debt,⁹⁰² or excluding the suretyship’s right to set-off or counterclaim.⁹⁰³ Again, such clauses could well be regarded as creating, contrary to the requirement of good faith, a “significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer”.⁹⁰⁴ In the case of a clause in a contract of suretyship which allows the creditor to vary the interest rate which the principal debtor must pay and for which the surety will therefore in principle also be liable, one of the terms listed in Sch.2 Pt 1 of the 2015 Act which “may be regarded as unfair”⁹⁰⁵ appears relevant, as para.11 of Pt 1 of this Schedule includes a:

“... term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.”

However, in Pt 2 of the Schedule the scope of this example is limited as para.11 is stated as not including:

“... a term by which a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer ... without notice where there is a valid reason, if—

- (a)the supplier is required to inform the consumer of the alteration at the earliest opportunity, and
- (b)the consumer is free to dissolve the contract immediately.”⁹⁰⁶

This limitation is clearly intended to deal with terms which allow for a variable interest rate in contracts of loan to consumers, but it could be used by a creditor (the “trader”) to argue that what is fair as regards a (consumer) principal debtor should also be regarded as fair for a (consumer) guarantor. Moreover, Pt 2 of Sch.2 further qualifies the possible unfairness of clauses which reserve a right to unilateral variations,⁹⁰⁷ stating that para.11 does not apply:

“... to a term under which a trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration if—

- (a)the trader is required to inform the consumer with reasonable notice, and
- (b)the consumer is free to dissolve the contract.”⁹⁰⁸

This qualification could well apply by analogy to a “continuing guarantee”⁹⁰⁹ made by a consumer which is of indefinite duration. It will be seen, though, that in either case, the conditions for the application of the qualifications on the example in para.11 are that the consumer is given notice of the variation and also a right to dissolve the contract.

47-165 Perhaps the strongest candidate to be regarded as unfair in a contract of suretyship is where the creditor excludes a consumer surety’s right to be discharged on the ground of the creditor’s neglect in relation to security.⁹¹⁰ Such a clause, which is aimed at defeating the clear policy of protection which equity established for sureties and which is conditional on some negligence in the creditor,⁹¹¹ may well be held to be unfair.⁹¹²

Footnotes

864 Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L95/29 (“1993 Directive”).

865 Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).

866 2015 Act Pt 2 and see above, paras 40-223—40-241.

- 867 On IP completion day, “retained EU law” and the changed significance of the case law of the CJEU generally, see Vol.I, paras 1-020—1-029. On the amendments to Pt 2 of the 2015 Act on IP completion day see above, para.40-241 (none of which are directly relevant for present purposes).
- 868 Above, paras 40-243 et seq.
- 869 C-74/15, EU:C:2015:772, *Order of CJEU 19 November 2015 (“Tarcău (C-74/15)”*) (an “order” is made by the CJEU where it considers that the question for a preliminary ruling admits of no reasonable doubt). In the 32nd edition (2015) of the present work, Vol.II, para.47-161 (and corresponding paragraphs in earlier editions) it was argued that the 1993 Directive (and, therefore, its then UK implementing legislation, the 1999 Regulations) applies to contracts of suretyship where the surety is a “consumer” by reference to the same textual and teleological grounds as those which formed the basis of the reasoning of the CJEU in *Brusse v Jahani BV (C-488/11) EU:C:2013:341, 30 May 2013* and *Šiba v Devēnas (C-537/13) EU:C:2015:14, [2015] Bus. L.R. 291, 15 January 2015* on which its order in *Tarcău* was based: see above, para.40-249.
- 870 1993 Directive art.2(a) and 2(c), and see above, para.40-250.
- 871 1999 Regulations reg.3(1) “consumer” and “seller or supplier”.
- 872 Above, para.40-250.
- 873 An example of a contract covered in this way would be a loan by a private individual to another person, whether for that person’s business or not, which is guaranteed by a bank or other financial institution. Here, the guarantor (the bank) would be acting in the course of a business and the creditor (the lender of the money) could fall within the definition of a “consumer”.
- 874 The non-consumer party to the contract is termed *professionnel* in the French and Gewerbetreibender in the German versions of 1993 Directive art.2(c).
- 875 *Brusse v Jahani BV (C-488/11) EU:C:2013:341, 30 May 2013; Šiba v Devēnas (C-537/13) EU:C:2015:14, [2015] Bus. L.R. 291, 15 January 2015* on which see above, para.40-249.
- 876 *Brusse v Jahani BV (C-488/11)* at para.31.
- 877 C-74/15 (*Order of CJEU*) 19 November 2015.
- 878 *Tarcău (C-74/15)* at para.14.
- 879 *Tarcău (C-74/15)* at para.22. On these “exceptions” see above para.40-249 (note) referring to recital 10 of the 1993 Directive. The CJEU contrasted the position under the former Council Directive 87/102/EEC of 22 December 1986 concerning consumer credit (itself repealed by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers) which applied only to “contracts whereby a creditor grants or promises to grant a consumer a credit” which has led the Court to exclude contracts of guarantee from its scope: *Tarcău (C-74/15)* at para.22, citing *Berliner Kindl Brauerei AG v Siepert (C-208/98) EU:C:2000:152, [2000] E.C.R. I-1741* at paras 17–23.
- 880 *Tarcău (C-74/15)* at paras 24–25.
- 881 *Tarcău (C-74/15)* at para.25.
- 882 *Tarcău (C-74/15)* at para.27 citing *Costea v SC Volksbank Romania SA (C-110/14) EU:C:2015:538, 23 April 2015* para.21, on which see above, para.40-034.
- 883 *Tarcău (C-74/15)* at para.28.

- 884 *Tarcău* (*C-74/15*) at para.29.
- 885 Above, para.[47-007](#).
- 886 *C-348/14, EU:C:2015:447, 9 July 2015* (available in French) at paras 35–38. See also *Dumitraş v BRD Groupe Société Générale* (*C-534/15*) *EU:C:2016:700*, Order of the CJEU of 14 September 2016 (contract of guarantee by individual in context of group of companies); *Bachman v FAER IFN SA* (*C-535/16*) *EU:C:2017:321* (Order of the Court of 27 April 2017, available in French) (contract of novation under which individual undertook obligations arising under earlier commercial contract of loan).
- 887 *Governor and Co of the Bank of Scotland v Singh* Unreported 17 June 2005, QB Mercantile Ct, Manchester; *Manches LLP v Freer* [2006] *EWHC 991 (QB)* at [25]; *Williamson v Governor of the Bank of Scotland* [2006] *EWHC 1289 (Ch)* (1999 Regulations cannot apply to contracts of guarantee undertaken by a natural person acting other than in the course of business). cf. *Barclays Bank Plc v Kufner; Royal Bank of Scotland v Chandra* [2010] *EWHC 105 (Ch)*, [2010] *1 Lloyd's Rep. 677* at [102] (affirmed [2011] *EWCA Civ 192*, [2011] *Bus. L.R. D149* on other grounds); *United Trust Bank Ltd v Dohil* [2011] *EWHC 3302 (QB)* at [73] (1999 Regulations can apply to contracts of guarantee undertaken by a natural person acting other than in the course of business).
- 888 It is to be noted that in *Tarcău* itself the principal debtor was a commercial company: above, para.[47-161](#). The general provisions which implemented the 1993 Directive are contained in the 2015 Act ss.61–64, 67–71, 73–74: see above, paras [40-243](#) et seq.
- 889 Consumer Rights Act 2015 s.2(2) and s.76(2), and see above, para.[40-247](#).
- 890 2015 Act s.2(3); s.76(2), above, para.[40-244](#).
- 891 [2017] *EWCA Civ 60*, [2017] *Bus. L.R. 784* at [68]–[70].
- 892 Above, paras [40-273](#) et seq.
- 893 Above, paras [40-301](#), [40-428](#)—[40-432](#).
- 894 See *Kásler v OTP Jelzálogbank Zrt* (*C-26/13*) *EU:C:2014:282*, 30 April 2014 at para.74 (in relation to the proviso of transparency in art.4(2) of the Directive): see above, para.[40-370](#).
- 895 See above, paras [47-090](#) et seq. as to the nature of these rights.
- 896 2015 Act s.62(4).
- 897 On this exclusion see further above, paras [40-351](#) et seq.
- 898 See above, para.[47-162](#).
- 899 See above, para.[47-108](#).
- 900 See above, paras [47-112](#)—[47-113](#).
- 901 See above, para.[47-122](#).
- 902 See above, para.[47-125](#).
- 903 Above, paras [47-089](#) and [47-091](#) and see Andrews and Millett, *The Law of Guarantees*, 7th edn (2015), para.3-038.
- 904 2015 Act s.62(4).
- 905 2015 Act s.63(1).
- 906 2015 Act Sch.2 Pt 2 para.22.
- 907 2015 Act is found in Sch.2 Pt 2 para.23.
- 908 2015 Act Sch.2 Pt 2 para.23.

- 909 See above, para.47-078.
- 910 See above, para.47-125.
- 911 See above, para.47-129 as to the significance of the term negligence in this context.
- 912 2015 Act s.62(4).

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