

## CHAPTER THREE

### THE PASSING OF PROPERTY AND RISK

The Sale of Goods Act sets out the rules for determining when property passes from the seller to the buyer. The importance of determining when the property passes is

- i). that the risk of accidental loss or damage passes to the buyer when the property passes unless otherwise agreed.
- ii). once the ownership passes the owner can sue for the price, under the provisions of s49 (1). S.O.G.A.
- iii) If the seller resells the goods once ownership has passed then the subsequent buyer does not take title to the goods unless he comes under an exemption to the *Nemo Dat Rule* under s24 S.O.G.A.1979.

It is essential to distinguish between specific and unascertained goods.

**Specific Goods:** Goods identified before or at the time of the contract.

**Unascertained Goods:** Identification takes place after the agreement is made. The rules governing the passing of property in specific goods are contained in s17 & 18 rules 1 - 4. The rules governing the passing of property in unascertained goods are contained in s16 & s18 r5.

#### **s17 Sale of Goods Act. 1979. The passing of property in Specific Goods.**

- (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 purposes 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.*

**Analysis.** In a contract for the sale of specific goods the property passes at the time when the parties intend it to pass. It is open to the parties to agree to make their own provisions as to when property is to pass and the courts will give effect to it. If no time is specified for the passing of the property then s18 provides rules for the ascertaining of the parties intention. The rules can be excluded because s18 begins " unless a contrary intention appears

#### **s18. Sale of Goods Act 1979. Rules of guidance for the passing of property.**

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

**Rule 1.** *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.*

**Analysis.** Rule 1 is the rule, which applies in most retail sales. It is important to look at the effect / significance of this rule.

Under s20, once the property has passed the buyer bears the risk of loss or destruction of the goods except if the seller is at fault. This is illustrated by R.Lowe in his text book 'Commercial Law' as follows : A buyer buys furniture from the seller's furniture store. It is agreed that the furniture be delivered and paid for in a month's time when the buyer moves into a new house. The seller's show room is destroyed by fire before the month is up. All the contents are destroyed. The seller is not to blame for the fire. In this situation the property has under s18 rule 1 3 passed to the buyer. By s20 the risk has also passed to the buyer. The buyer is liable to pay the price under s49(1). A modern court may look to negate the operation of rule 1 if its affect is harsh. **Ward v Bignall**<sup>1</sup> per Lord Diplock. 'Very little would be needed in modern times to give rise to the inference that the property in specific goods is to pass only on delivery or payment.'

**An unconditional contract.** No one is sure what that means. Perhaps a contract with no conditions negating the rule. If so it is superfluous. If it was intended to mean a contract with no conditions then it is a nonsense.

**Goods in a deliverable state.** This means that the buyer under the contract is bound to take delivery of the goods if they are in a deliverable state. **Underwood v Burgh Castle Brick & Cement Syndicate**<sup>2</sup> the claimant had sold a condensing engine weighing up to 30 tons, which was embedded in a flooring of concrete. The sellers had to detach the engine from its base and dismantle it ready for delivery. During loading onto a train, part of the engine was accidentally broken and the buyers wanted to reject it. The court

<sup>1</sup> **Ward v Bignall** [1967] Q.B. Per Lord Diplock.

<sup>2</sup> **Underwood v Burgh Castle Brick & Cement Syndicate** (1922) 1 K.B. 343.

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held that at the time of the contract the machine was not in a deliverable state. This meant that Rule 1 did not apply. Instead Rule 2 applied, so risk remained with the sellers.

**Rule 2** *Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.*

### Analysis.

- i). Rule 2 only applies if something has to be done to the goods, eg repairs or alterations - in order to make them deliverable and the property does not pass until the work is carried out and
- ii). The Buyer must be given notice of its completion. The act does not stipulate when the buyer has been given notice. Must it be actual notice or do the postal rules apply ?

**Rule 3** *Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.*

**Analysis.** If the BUYER (as opposed to the seller who is governed by Rule 3 above) has to ascertain the price of the goods the property passes under Rule 1. In **Turley v Bates**<sup>3</sup> the seller agreed to sell a quantity of clay to the buyer. The buyer was to load and weigh the clay in order to ascertain the price. It was held: that ownership had passed when the contract was made. This was affirmed in **Nanka Bruce v Commonwealth Trust Ltd.**<sup>4</sup> where a sub buyer weighed the goods in order to determine the price.

**Rule 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 the goods without giving notice of rejection, 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.*

**Any other act adopting the transaction.** This was defined in **Kirkham v Attenborough**<sup>5</sup> as being an act inconsistent with his being other than a purchaser. Goods were sent to X on sale or approval, which were then pledged with a pawn-broker. The court held it was an act adopting the transaction. Property had passed to the prospective purchaser. He could therefore pass a good title to the pawn broker. In **Genn v Winkel**<sup>6</sup> the court had to consider whether or not a buyer, passing goods to a second buyer for approval, was another act adopting the transaction under the original 14 day approval contract. It seems from the judgements that if and when the sub-buyer accepts the goods the buyer adopts the transaction and property passes to the buyer. If on the other-hand the sub-buyer does not accept the goods and returns them to the first buyer within the 14 day approval period, property will not have passed to the first prospective buyer.

**Prospective Buyer as bailee.** During the approval period the prospective buyer is a bailee at law. He has the option to buy. The risk remains under s20 with the seller, but, the bailee has a duty of care to the bailor. So if he is negligent and as a result the goods are damaged or destroyed he will be liable to the seller.

**Passing of property and risk in unascertained goods.** The original version of s16. S.O.G.A. 1979 stated that "where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." This caused considerable problems with respect to the part purchase of undivided bulk goods and the provision was amended in 1994 to enable part purchasers to become owners of a specific percentage of the whole.

### s18.. Rule 5. S.O.G.A. 1979. provides

- (1). *Where there is a contract for the sale of unascertained future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods 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.*

<sup>3</sup> **Turley v Bates** (1863) 2 H&C 200

<sup>4</sup> **Nanka Bruce v Commonwealth Trust Ltd.** [1926] A.C. 77 Privy Council.

<sup>5</sup> **Kirkham v Attenborough** (1897) 1 Q.B. 201.

<sup>6</sup> **Genn v Winkel** [1911] K.B.

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- (2). *Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (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.*

**Analysis :** Property in unascertained goods passes to the buyer when certain conditions are satisfied :-

- a) goods must comply with the contract description and must be in a deliverable state.
- b) goods must be unconditionally appropriated to the contract, either by the seller with the buyer's assent, or by the buyer with the seller's assent.

**What amounts to unconditional appropriation ?** In *Carlos Pederspiel v Charles Twigg*<sup>7</sup> the court said that goods are appropriated to the contract when the parties must have had or could be reasonably supposed to have had an intention to attach the contract irrevocably to those goods, eg in a contract for the sale of bags of coal, the goods are unconditionally appropriated to the contract when the seller unloads the bags into the buyer's coal shed.

**What amounts to an assent to appropriation ?** This may be either express or implied, and can be given before or after the appropriation is made. In *Pignataro v Gilroy*,<sup>8</sup> a seller sold 140 bags of rice to the buyer. At that time no particular bags were earmarked to the contract. Subsequently a delivery order for 125 bags was sent to the buyer and he was informed that the other 15 bags were in a different warehouse waiting for collection. The buyer delayed collecting the bags for a month by which time they had been stolen. The court held the buyer's delay amounted to consent to the seller's appropriation of the 15 bags to the contract.

Rule 5 (b) concerns the position where the seller delivers the goods to a carrier. Such delivery is treated as unconditional appropriation unless the seller reserves a right of disposal. However, if the goods are mixed with other goods on delivery to the carrier then no property passes to the buyer until that part subject to the contract is separated from the rest according to *Healey v Howlett & Sons*.<sup>9</sup> The buyer ordered 20 boxes of fish from the seller. The seller dispatched 190 boxes by rail and told the railway staff to set aside 20 boxes for the buyer. The train was delayed and before the 20 boxes were set aside the fish deteriorated. The court held that no property in the fish had passed to the buyer and so the fish was still at the seller's risk. Contrast this where a buyer knowingly buys part of a bulk and a specific percentage is allocated to him. Under the new 1994 provisions he could become the owner of a percentage of the whole.

### THE PASSING OF RISK

**General principle:** Risk of accidental loss or damage falls on the owner of the goods. However, in special circumstances the Sale of Goods Act provides that risk does not always follow ownership directly so that some other person besides the owner may have to cover the cost of accidental loss or damage.

#### s20 Sale of Goods Act 1979.

- (1). *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.*
- (2) *But where delivery has been delayed through no fault 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.*
- (3) *Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.*

**Analysis.** Under s20(1). S.O.G.A. The goods remain at the seller's risk until the property in them is transferred to the buyer. When the property is transferred to the buyer then the goods are at the buyer's risk, whether or not they have been delivered to the buyer.

**Exceptions to the general rule.** There are three qualifications to this general principle.

- a). s20(1). Subject to any contrary agreement between the parties, the goods remain at the seller's risk until ownership (not possession) is passed to the buyer. Thus the seller can state in the contract that the risk shall pass to the buyer before ownership passes. The problem is most likely to arise where the buyer negotiates for a portion of a larger lot, for example, a share in an oil cargo. Since the oil cannot be ascertained until off loaded and divided ownership cannot pass immediately according to s16

<sup>7</sup> *Carlos Pederspiel v Charles Twigg* [1957] 1 Lloyd's Rep 240.

<sup>8</sup> *Pignataro v Gilroy* (1919) 1 K.B. 459

<sup>9</sup> *Healey v Howlett & Sons* (1917) 1 K.B. 337.

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S.O.G.A. unless the additional requirements of allocating a percentage under the new s16 1994 provisions are complied with. The ordinary rule under s20(1) therefore is that the seller bears the risk until the property is ascertained.

In **Stern v Vickers**,<sup>10</sup> a seller agreed to sell 120,000 gallons of spirit out of a 200,000 gallon lot, to the buyer. The seller sent a delivery warrant to the buyer. The buyer delayed for several months, acting on the warrant, by which time the spirit had deteriorated. The court held that the parties must have intended the risk to pass when the delivery warrant was sent to the buyer, who had to bear the loss, and pay the price of the Spirit, even though the ownership of the Spirit had not passed to the buyer because the seller had not set aside the 120,000 gallons.

b). s20(2). Where delivery has been delayed through the fault of either the buyer or seller, the party at fault must bear the risk of any loss which might not have occurred but for the delay.

In **Demby Hamilton v Barden** <sup>11</sup> a buyer bought 30 tons of apple juice, and took delivery of 20.5 tons. He failed to give instructions for the delivery of the rest, which went putrid. The court held that the buyer was at fault and therefore had to bear the loss.

c). s33 S.O.G.A. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they were sold, the buyer must never the less (unless otherwise agreed) take any risk of deterioration in the goods necessarily incident to the course of transit.

If the seller agrees to deliver the goods at his own risk at a place which is different from where they are sold, then the buyer must never the less bear the risk of any deterioration in the goods which result from their transit. s33 can itself be excluded by the parties.

### Perishing goods

*s6 Sale of Goods Act 1979. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.*

*s7 Sale of Goods Act 1979. 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 risk passes to the buyer, the agreement is avoided.*

**Analysis.** Perishing goods are goods that have changed their commercial character. They do not actually have to be destroyed. In **Asfar v Blundell** <sup>12</sup> dates were submerged under water and impregnated with sewage during transit. The court held that the goods had commercially perished and could no longer be sold as dates and so the provisions of s7 applied. The topic of perishing goods subdivides into specific and unascertained goods.

**Pre-Contract destruction of the subject matter.** Regarding specific goods that perish before the contract is made, without the sellers knowledge, under the provisions of s6. Sale of Goods Act 1979 the contract is void. This section is a statutory version of **Couturier v Hastie**.<sup>13</sup> If the goods never existed they cannot be said to have existed. The contract is void at common law. This case involved the sale of a cargo of corn. The goods had already been sold by the ship's master at the time of the sale to the claimant buyer. Thus at the time of the contract the goods did not exist. The contract was accordingly void.

**Pre Contract destruction of part of a consignment.** s6 applies if part of the goods have perished, provided that the contract is indivisible. In **Barrel. Lane. Ballard v Phillips** <sup>14</sup> the seller contracted to sell a 700 bags lot of nuts. 109 of the bags had been stolen before the contract was concluded. This was unknown to either of the parties. The contract was held to be void under s6.

**Specific goods that perish after the contract is made.** s7. Sale of Goods Act 12979 provides that where there is a contract for the sale of specific goods and the goods through no fault of either party perish, before the risk passes to the buyer, the agreement is avoidable.

<sup>10</sup> **Stern v Vickers** [1923] 1 K.B. 78.

<sup>11</sup> **Demby Hamilton v Barden** [1949] 1 All.E.R. 435. K.B.D.

<sup>12</sup> **Asfar v Blundell** (1896) 1 Q.B. 123.

<sup>13</sup> **Couturier v Hastie** [1856] (1856) 5 HLC 673

<sup>14</sup> **Barrel. Lane. Ballard v Phillips** [1929] 1 K.B. 154

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If a contract becomes impossible to perform it is frustrated at common law. Contrast the difference between the scope of s7 and the common law. A contract for the sale of crops to be grown on a specific farm will not be avoided under s7 S.O.G.A. simply because the crops don't materialise. However, the contract may be frustrated at common law under the rule in **Howell v Coupland**.<sup>15</sup>

**The Perishing of Unascertained Goods.** The effect of the perishing of unascertained goods is governed by the common law. It is essential to distinguish between purely generic unascertained goods eg 500 tons of wheat, from unascertained goods from a specific source, e.g. 500 tons from a specific ship. If the purely generic goods perish it is still possible to perform the contract, so the seller must obtain goods from another source. If he doesn't he must pay damages for non-delivery.

Regarding unascertained goods from a specific source, if the source ceases to exist at the time of the contract, the contract is void. It is impossible to perform the contract, for example, where a ship is lost. Both the seller and buyer are excused.

### RESERVATION OF TITLE

**s19. Sale of Goods Act 1979.** gives the seller of specific goods or where goods are subsequently appropriated to the contract, the right to retain the property in the goods until certain conditions are met. This is typified by the so called Romalpa Clause from the case of the same name.

- 19(1) *Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian 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.*
- (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 to be taken to reserve the right of disposal. (normal cif)*
- (3) *Where the seller of goods draws on the buyer for the price, and transmits a 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. (again in any sales contract payable by bill of exchange there is a statutory reservation of title until the bill of exchange is honoured).*

### SALE BY A PERSON NOT THE OWNER

**s21 Sale of Goods Act 1979 :** The general rule is expressed in the maxim *Nemo dat quod non habet*, that is to say, no one can transfer a better title in property than he himself has. If one has no title in the goods one cannot transfer a title. This principle is given effect in

**s21(1). Sale of Goods Act 1979.**

- 1) *Subject to this act, where goods are sold by a person who is not their owner, and 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, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.*

One problem in this area of the law is that there is frequently a conflict between the owner of goods and the ultimate buyer of the goods. If a car is stolen and or acquired by a fraudulent means and finds its self in the hands of an innocent buyer the law has to make a policy choice between two conflicting innocent interests. Can the ultimate purchaser take a good title or can the owner claim the goods back ?

In the development of our law two principles have striven for mastery, i) the protection of property, and ii) the protection of commercial transactions and in particular the person who takes in good faith. The law has tried to deal with the conflict by having a basic rule that property must be protected and then developed a number of exceptions to the basic rule, whose purpose is to protect commercial transactions. This is the basic *Nemo Dat* principle embodied in s21, followed by a list of exceptions to protect and facilitate commercial transactions and the innocent purchaser.

<sup>15</sup> **Howell v Coupland** [1876] 1 Q.B. 258.

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**Estoppel.** The concluding words of s21(1), unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. Estoppel means the original owner is precluded / prevented from saying that the sale to the ultimate purchaser was unauthorised. Thus estoppel is a rule of evidence. However, the courts have interpreted this provision in s21 fairly narrowly. Atiyah<sup>16</sup> states that there are two types of estoppel, namely Estoppel by conduct and Estoppel by negligence.

**Estoppel by Conduct.** Often in this sort of case the original owner will have been induced by some fraud to hand over physical possession of the goods. Case law suggests simply handing over physical possession is not conduct which prevents the original owner setting up his ownership. In **Central Newbury Car Auctions Ltd v Unity Finance**<sup>17</sup> a rogue acquired a car from C.N.C.A. on H.P. terms. In his application form for H.P. he gave a false name and address. He was allowed to take the car away and sold it to U.F. who then argued that C.N.C.A. were estopped from establishing their ownership of the car. The court rejected that argument.

**Estoppel by Negligence.** In **Moorgate Mercantile Co. v Twitchings**<sup>18</sup> a number of finance companies had set up a company called Hire Purchase Information. The object was that H.P. agreements could be registered with it so that dealers considering the purchase of a car could contact the H.P.I. to see if there were any outstanding H.P. agreements on the car. The scheme was not compulsory. 98% of all finance companies belonged to it. Moorgate entered into a H.P. agreement but failed to register it with H.P.I. The hirer of the car under the agreement offered to sell it to Twitchings. Twitchings inspected the H.P.I. Seeing nothing registered he bought the car. Twitchings argued estoppel. The House of Lords rejected the argument and held by a majority that the car belonged to Moorgate Mercantile Co for the reason that failure to register by Moorgate had not resulted in a representation that there was no H.P. agreement on the car and neither had they been negligent because there was no duty to register, since registration was voluntary. Wilberforce made a powerful dissenting judgement which is worth reading. The general conclusion is that a narrow interpretation is placed on estoppel and the courts have leaned in favour of the property rights of the original owner.

The only type of case where estoppel has been successfully raised is where the original owner has positively represented that the seller owns the goods or assigned a document giving that impression. In **Henderson & Co v Williams**,<sup>19</sup> the original owners were induced to sell goods to a rogue. The contract was void for mistake. The original owners instructed the defendant, (another party) to hold the goods for the rogue. The rogue then sold the goods to the claimant, (the ultimate purchaser). The claimant became suspicious and made enquiries as to the goods. The claimant was told by the defendant that they were holding the goods for the rogue, and consequently that they would hold them for the claimant. The Court of Appeal held that those facts meant that the original owners were estopped from denying the claimant's right to the goods.

In **Eastern Distributors v Goldring**<sup>20</sup> the owner of a van wanted to buy a car from Goldring, a car dealer. He couldn't pay the deposit. He made an arrangement whereby the owner of the van signed a proposal form which showed that Goldring owned both vehicles, and that the owner wanted to buy them both on H.P. Goldring submitted the forms to Eastern Distributors and they rejected the proposal for the car but accepted the proposal for the van. Goldring sold the van to Eastern Distributors. The owner claimed back the van. The court held that Eastern Distributors were able to successfully raise the defence of estoppel. In signing the proposal form the owner had represented that Goldring had the right to sell the van and as Eastern Distributors had acted on reliance on the representation by buying the van the owner was estopped from denying good title.

### s23. Sale of Goods Act 1979. Sale under a voidable title.

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 acquired a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

<sup>16</sup> see in his book Sale of Goods

<sup>17</sup> **Central Newbury Car Auctions Ltd v Unity Finance** (1957) 1 Q.B. 371.

<sup>18</sup> **Moorgate Mercantile Co. v Twitchings** (1977) A.C.

<sup>19</sup> **Henderson & Co v Williams**. (1895) 1 Q.B. 521.

<sup>20</sup> **Eastern Distributors v Goldring** (1957) 2 Q.B. 600

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The seller of goods with a voidable title can confer a good title on the buyer as long as his title has not been avoided at the time of the sale, and provided the buyer buys in good faith and without notice of the seller's defect of title. This is merely a statutory restatement of the common law rule.<sup>21</sup> It is intended to protect an honest buyer who has bought goods from someone who obtains possession by fraud.

If the owner wishes to protect himself he must avoid the contract before the goods are passed to an innocent person. There is no obligation to communicate with the rogue since it may not be possible to do so. Communication of the intention to the police of the A.A. where suitable is sufficient.<sup>22</sup>

**Sale by a Mercantile Agent** s2(1). Factors Act 1899. Provides that any person who is a mercantile agent can pass a good title to a buyer even though the agent is not the owner of the goods.

**Description of a mercantile agent.** s1 Factors Act 1899. He is an agent who in the ordinary course of his business has authority to sell goods or to consign goods for the purpose of sale or to buy goods or raise money on the security of goods.

### Conditions.

- a). A mercantile agent must be in possession of the goods with the consent of the owner :- when he will have the necessary authority to sell the goods and authority extends to apparent authority. In **Pearson v Rose & Young**<sup>23</sup> consent was obtained by fraud. The owner of the car left it with the mercantile agent for him to obtain offers. The mercantile agent tricked the owner into leaving the log book with him and then sold the car, which was then resold. The owner sued the ultimate buyer for recovery of the car. The Court of Appeal held that the owner had consented to the mercantile agent having possession of the car as a mercantile agent, that is to say the mercantile agent had apparent authority to sell the car: title passed to the ultimate buyer.
- b). The mercantile agent must be acting in the ordinary course of his business. In **Stadium Finance v Robbins**<sup>24</sup> it was held that it is not in the ordinary course of business to sell a second hand car without a log book. The buyer should be put on inquiry. However, in **Astey v Martin**<sup>25</sup> the court held that in the case of a brand new car the absence of a log book was not necessarily fatal.
- c). The buyer must take in good faith and without notice of the mercantile agent's lack of authority to sell. Notice in commercial law means actual notice and not merely constructive notice.

**Sale by a seller in possession.** s24. Sale of Goods Act 1979 & s8. Factors Act 1889. Where a seller of goods continues in possession of the goods, or document of title to them then any delivery or transfer by him or by a mercantile agent acting for him to any person who takes in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer was expressly by the owner of the goods permission to do so.

**The concept of possession.** In **Worcester Works Finance Co v Cooden Engineering Co.**<sup>26</sup> A bought a car from B with a cheque which was dishonoured. A's title was voidable. A resold the car to a finance company, C. The arrangement A made with C was that he was to deliver the car to D who had agreed to buy it on H.P. from C. A retained possession and he allowed the original seller B to take it back. Finance Co sued B for recovery of the car. The C.A. held that A was a seller who remained in possession and by allowing B the original owner to retake the car he had delivered the car to B within s24. This meant B acquired a good title.

**Sale by a buyer in possession.** This exception applies where the buyer takes possession before ownership passes to him. s9. Factors Act 1889, & s25 S.G.O.A. 1979. Where a person has bought or agreed to buy goods and is in possession of the goods or the document of title to the goods with the seller's consent, then any disposition of those goods or the documents of title 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 agent's consent.

<sup>21</sup> See **Phillips v Brookes** [1919] 2 K.B. 243. & **Lewis v Averay** [1972] 1 Q.B. 198.

<sup>22</sup> See **Car and Universal Finance v Caldwell** [1965] 1 Q.B. 525.

<sup>23</sup> **Pearson v Rose & Young** [1951] 1 K.B. 275.

<sup>24</sup> **Stadium Finance v Robbins** [1962] 2 Q.B. 674.

<sup>25</sup> **Astey v Martin** [1968] 2 ALL.ER 36.

<sup>26</sup> **Worcester Works Finance Co v Cooden Engineering Co** [1972] 1 Q.B. 210.

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- a) It applies to someone who has bought or agreed to buy goods. It does not apply to disposition by the hirer of goods under a Hire Purchase agreement.
- b). Only applies to transactions which, if it had been made by a Mercantile Agent would have been in the ordinary course of business of that agent.

In **Newtons of Wembly v Williams** <sup>27</sup> the disposition by B in possession must be in the ordinary course of business of a Mercantile Agent, even though B is not an agent. N sold a car to A under a contract saying that no property in the car was to pass to A until his cheque was cleared. The cheque was dishonoured. A sold it to B in an open air market. B sold it to W. N sued W for the return of the car. The claim failed because the C.A. said that A was a buyer in possession, not a mercantile agent. But the sale to B was in the ordinary course of business of a Mercantile Agent. The court held that B acquired a good title to pass on to W.

This limits the scope of **Universal v Caldwell** but there could still be avoidance in time. s25 is not exclusive of **Caldwell** and therefore it gives a voidable title.

'**With the seller's consent**' In **National Employers Mutual General Insurance Ltd v Jones** <sup>28</sup> it was held that Seller means the true owner, not the person selling the subject matter of the contract to the innocent third party.

There are special rules for the Sale of a motor vehicle under H.P. Part III. Hire Purchase Act.1964 / Consumer Credit Act 1974.

- a). If the hirer of a motor vehicle under a H.P. transfers it to a private purchaser who takes in good faith without notice of the agreement then that private purchaser acquires a good title to the motor vehicle.
- b). If the disposition is to a trade or finance purchaser there is no protection.
- c). If the hirer transfers the vehicle to trade - and then transfers to a private buyer - the private buyer acquires a good title.

<sup>27</sup> **Newtons of Wembly v Williams** [1965] 1 Q.B.560. C.A.

<sup>28</sup> **National Employers' Mutual General Insurance Ltd v Jones** [1990] 1 AC 24 H.L.

## CHAPTER THREE

### PERFORMANCE OF THE CONTRACT UNDER THE SALE OF GOODS ACT 1979

- 27 *It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.*
- 28 *Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.*
- 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 depending in each case on the contract, express or implied, between the parties.*
- 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.*
- 29(3) *Where under the contract 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.*
- 29(4) *Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until a third person acknowledges to the buyer that he holds on his behalf; but nothing in this section affects the operation of the issue or transfer of any document of title to goods.*
- 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.*
- 29(6) *Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.*
- 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.*
- 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.*
- 30(2A) *A buyer who does not deal as a consumer may not*
- 30(2Aa) *where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under ss1 above, or*
- 30(2Ab) *where the seller delivers a quantity of goods larger than he contracted to sell, reject the whole under ss2 above, if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to do so.*
- 30(2B) *It is for the seller to show that a shortfall or excess fell within ss2A above.*
- 30(2C) *ss2A & 2B above do not apply to Scotland.*
- 30(2D) *Where the seller delivers a quantity of goods*
- 30(2Da) *less than he contracted to sell, the buyer shall not be entitled to reject the goods under ss1 above unless the shortfall or excess is material.*
- 30(2Db) *larger than he contracted to sell, the buyer shall not be entitled to reject the whole under ss2 above unless the shortfall or excess is material.*
- 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.*
- 30(5) *This section is subject to any usage of trade, special agreement, or course of dealing between the parties.*
- 31(1) *Unless otherwise agreed the buyer is not bound to accept delivery by instalments.*
- 31(2) *Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments or the buyer refuses or neglects 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.*
- 32(1) *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 delivery of the goods to the buyer.*

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- 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 the buyer may decline to treat the delivery to the carrier as a delivery to himself or hold the seller responsible in damages.*
- 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 the sea transit, and if the seller fails to do so, the goods are at his risk during such sea transit.*
- 33 *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.*
- 34(2) *Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and in the case of a contract for sale by sample, of comparing the bulk with the sample.*
- 35(1) *The buyer is deemed to have accepted the goods subject to ss2 below*  
35(la) *when he intimates to the seller that he has accepted them or*  
35(lb) *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.*
- 35(2) *Where goods are delivered to the buyer and he has not previously examined them he is not deemed to have accepted them under ss1 above until he has had a reasonable opportunity of examining them for the purpose*  
35(2a) *of ascertaining whether they are in conformity with the contract, and*  
35(2b) *in the case of a contract for sale by sample, of comparing the bulk with the sample.*
- 35(3) *Where the buyer deals as consumer the buyer cannot lose his right to rely on ss2 above by agreement, waiver or otherwise.*
- 35(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.*
- 35(5) *The questions that are material in determining for the purposes of ss4 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 ss2 above.*
- 35(6) *The buyer is not by virtue of this section deemed to have accepted the goods merely because*  
35(6a) *he asks for or agrees to, their repair by or under an arrangement with the seller, or*  
35(6b) *the goods are delivered to another under a sub-sale or other disposition.*
- 35(7) *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 of division of which would materially impair the value of the goods or the character of the unit.*
- 35A(1) *If the buyer*  
35A(la) *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*  
35A(lb) *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.*
- 35A(2) *In the case of a buyer having the right to reject an instalment of goods, subsection 1 above applies as if references to the goods were references to the goods comprised in the instalment*
- 35A(3) *For the purposes of ss1 above, goods are affected by a breach if by reason of the breach they are not in conformity with the contract.*
- 35A(4) *This section applies unless a contrary intention appears in, or is to be implied from, the contract.*
- 36 *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.*
- 37(1) *Where the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for care and custody of goods.*
- 37(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.*

## CHAPTER THREE

### REMEDIES UNDER THE SALE OF GOODS ACT 1979

- 11(2) *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.*
- 11(3) *Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.*
- 11(4) *Where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated, as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.*
- 11(6) *Nothing in this section affects a condition or warranty whose fulfilment is excused by law by reason of impossibility or otherwise.*
- 15A(1) *Where in the case of a contract of sale*  
(a) *the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by s13, 14, or 15 above, 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 the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.*
- 15A(2) *This section applies unless a contrary intention appears in, or is to be implied from, the contract.*
- 15A(3) *It is for the seller to show that a breach fell within s13 above.*
- 38(1) *The seller of goods is an unpaid seller within the meaning of this Act*  
(a) *when the whole of the price has not been paid or tendered;*  
(b) *when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.*
- 38(2) *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 endorsed, or a consignor or agent who has himself paid (or is directly responsible for) the price.*
- 39(1) *Subject to this and any other Act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law*  
(a) *a lien on the goods or right to retain them for the price while he is in possession of them;*  
(b) *in case of the insolvency of the buyer, a right 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.*
- 39(2) *Where the property in goods has not passed to the buyer, the unpaid seller has (in addition to his other remedies) a right of withholding delivery similar to and co-extensive with his rights of lien or retention and stoppage in transit where the property has passed to the buyer.*
- 41(1) *Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases*  
(a) *where goods have been sold without any stipulation as to credit*  
(b) *where goods have been sold on credit terms but the term has expired*  
(c) *where the buyer becomes insolvent.*
- 41(2) *The seller may exercise his lien or right of retention notwithstanding that he is in possession as agent or bailee or custodian for the buyer.*
- s42 *Where an unpaid seller has made a 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 waive the lien or right of retention.*
- 43(1) *The unpaid seller loses his lien or right of retention in respect of them*  
(a) *when he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal 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.*

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- 43(2) *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 judgement or decree for the price of the goods.*
- 44 *Subject to this Act, when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit and may retain them until payment or tender of the price.*
- 45(1) *Goods are deemed to be in the course of transit from the time when they are delivered to a carrier or other bailee or custodian, for the purpose of transmission to the buyer until the buyer or his agent in that behalf takes delivery of them from the carrier or other bailee or custodian.*
- 45(2) *If the buyer or his agent in that behalf obtains delivery before their arrival at the appointed destination the transit is at an end.*
- 45(3) *If after arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer or his agent that he holds 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 destination for the goods may have been indicated by the buyer.*
- 45(4) *If the goods are rejected by the buyer and the carrier or other bailee or custodian 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.*
- 45(5) *When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent to the buyer.*
- 45(6) *Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.*
- 45(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 agreement to give up possession of the whole of the goods.*
- 46(1) *The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are.*
- 46(2) *The notice may be given either to the person in actual possession of the goods or to his principal.*
- 46(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 delivery to the buyer.*
- 46(4) *When notice of stoppage is given by the seller to the carrier etc he must re-deliver the goods to the seller's instructions at the seller's expense.*
- 47(1) *Subject to this Act, the unpaid seller's right of lien or retention is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented to it.*
- 47(2) *Where a document of title to goods has been lawfully transferred to any person as buyer and that person transfers the document to a person who takes it in good faith and for valuable consideration then*  
(a) *if the last mentioned transfer was by way of sale the unpaid seller's right of stoppage is defeated; and*  
(b) *if the last mentioned transfer was made by way of pledge 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.*
- 48(1) *Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit.*
- 48(2) *Where an unpaid seller who has exercised his right of line or retention or stoppage in transit resells the goods the buyer acquires good title as against the original buyer.*
- 48(3) *Where the goods are perishable nature or where the unpaid seller gives notice to the buyer of his intention to re-sell and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.*
- 48(4) *Where the seller expressly reserves the right of re-sale in the case the buyer should make default and on the buyer making default re-sells the original contract is rescinded but without prejudice to any claim the seller may have for damages.*

## CHAPTER THREE

### **Actions for Breach under the Sale of Goods Act 1979**

- 49(1) *Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract the seller may maintain an action against him for the price of the goods.*
- 49(2) *Where under the contract the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.*

### **Damages for non-acceptance or non-delivery under the Sale of Goods Act 1979**

Where the breach of contract involves the refusal to take delivery of goods, or a refusal to deliver goods, s50 & s51 Sale of Goods Act 1979 respectively provides that in an available market the damages to be awarded will be the difference between the market price at the time of refusal and the actual contract price. If there was no available market then the actual loss of profit becomes relevant.

- 50(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.*
- 50(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.*
- 50(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, then at the time of the refusal to accept.*
- 51(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.*

In **Thompson v Robinson Gunmakers**<sup>29</sup> the defendant bought a Standard Vanguard car from the plaintiff but latter refused to take delivery. The plaintiff would have made £61 on the sale. The court held that since supply exceeded demand the plaintiff effectively lost a sale and could therefore recover the £61. However, in **Charter v Sullivan**<sup>30</sup> the defendant refused to take delivery of a Hillman Minx. P claimed £97/15/- loss of profit. The court held that since the plaintiff could not get enough cars and could sell every one he could get his hands on he had not lost a sales opportunity. Thus, he could not recover.

Where the contract concerns loss of employment earnings the award will be taxed by the court, since the aim is to put the person in the position he would have been in if the contract was carried out, in which case he would have had to pay tax. The tax is notional and not based on the plaintiff's actual tax rate. High earners fare well, low income earners do badly. Damages cannot subsequently be taxed again by the Government.

- 51(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.*
- 51(3) *Where there is an available market, 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 they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.*
- 52(1) *In any action for breach of contract to deliver specific or ascertained goods the court may if it thinks fit, on the plaintiff's application, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.*
- 52(2) *The plaintiff's application may be made at any time before judgment or decree.*
- 52(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.*
- 53(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 up against the seller the breach of warranty in diminution or extinction of the price; or*
- (b) *maintain an action against the seller for damages for the breach of warranty.*

<sup>29</sup> **Thompson (WL) Ltd v Robinson (Gunmakers) Ltd** [1955] CH177

<sup>30</sup> **Charter v Sullivan** [1957] 2 Q.B 177

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- 53(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.*
- 53(3) *In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.*
- 53(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.*
- 54 *Nothing in the act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.*

An action for the return of monies had and received where consideration totally fails is founded in restitution. The Sale of Goods Act does not provide the remedy, simply recognises its existence and validity and expressly preserves its integrity.

- 55(1) *Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may subject to the U.C.T.A. 1977 be negatived or varied by express agreement or by the course of dealing between the parties or by such usage as binds both parties to the contract.*
- 55(2) *An express term does not negative a term implied by this Act unless inconsistent with it.*