

Sale of Goods: Conditions and Warranties

I. Terms

Conditions (s.13)	Warranties (s.13)	Innominate terms
Breach of which may give rise to a right to treat the contract as repudiated	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	Terms which may be breached in ways that are either as a condition or a warranty
Goes to the root of the contract	Does not go to the root of the contract	Key: Whether breach deprive party of something fundamental (goes to the root of the contract) If yes for a <u>particular</u> breach: condition If no: confined to remedy in damages
Innocent party may waive the condition, or elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated (s.13(1))		

Term named as condition?

- Name not conclusive (s.13(2))
- Look at the circumstance up to the point of contracting to ascertain the parties' intention

Is time of the essence?

(1) Time of payment – not of the essence, unless otherwise intended (s.12(1))

- E.g. “pay on Monday” – not of the essence

Time of payment can be made to be of the essence, e.g. by ‘notice of time of the essence’; whether notice reasonable depends on the circumstances (possible even if only lapse of 1 day)

- E.g. ‘pay on Monday’; buyer said could only pay on Tuesday; seller allowed but absolutely on Tuesday or else treat contract as repudiated; time of payment made to be of the essence

(2) Time of other acts – depends on the terms of the contract (**s.12(1)**); intention at time of contract; look at the circumstances

- E.g. Time of delivery – rule of thumb: unless very strong evidence/reasonable notice to that effect, dubious whether time of delivery will be treated as of the essence – depends on the construction of the contract and the circumstances

Frustration (s.13(4))

“Nothing in [s.13] shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise”

II. Implied undertaking as to title (s.14)

<i>Every contract of sale</i>	<i>Contract of sale which appears from the contract or is to be inferred from the circumstances an intention that the seller should transfer only such title as he or a 3p may have</i>
<p>Implied <u>condition</u> (s.14(1)(a))</p> <ul style="list-style-type: none"> ➤ Sale – <u>Right to sell</u> goods ➤ Agreement to sell – right to sell the goods at the time when property is to pass 	<p>Implied <u>warranty</u> (s.14(2)(a))</p> <ul style="list-style-type: none"> ➤ All charges or encumbrances known to seller and not known to buyer have been disclosed to buyer before the contract is made ➤ Together with s.14(1)(a) – implied <u>condition</u> of right to sell subject to s.14(2)(a)
<p>Implied <u>warranty</u> (s.14(1)(b))</p> <ul style="list-style-type: none"> ➤ Goods free, and will remain free until the time when the property is to pass, from any charge or 	<p>Implied <u>warranty</u> (s.14(2)(b))</p> <ul style="list-style-type: none"> ➤ Seller ➤ 3p whose title the parties intend to be transferred

encumbrance not disclosed or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known	<ul style="list-style-type: none">➤ Anyone claiming through or under the seller or 3p➤ Not disturb buyer's quiet possession of the goods, otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made
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Remember:

Condition – breach gives rise to rescind; with the rescission buyer can demand a return of the purchase money, unless he has, with knowledge of the facts, held on to the bargain so as to waive the condition

- Right to sell; not undertake to give good title; seller still in breach even if transaction comes within an exception to nemo dat and buyer is able to get a goods title
- for SOGO s.14, buyer not deprived of right to get back purchase money because cannot restore goods which, from the nature of the transaction, are not the goods of the seller at all, and which the seller therefore has no right to under any circumstances (Rowland v Divall)
- Ground: total failure of consideration; not matter car used before found out condition breached (Rowland; Butterworth)

Warranty – Breach gives rise to remedy in damages and will not be able to reject the goods

- **s.14(1)(b)** and **14(2)(b)** – irrelevant that seller not know of encumbrance or charge
- Still breached where encumbrances or charges arise after sale and passing of property; condition as to title not breached but warranty as to quiet possession and free from encumbrances or charges breached (Microbeads)
- Scope of right to quiet possession:
 - ◆ Breach where buyer's possession disturbed by lawful act of 3p who asserts a superior title or a right which impairs the buyer's title or his freedom to possess and use the good
 - ◆ Breach where tort committed by seller himself or his agents

- ◆ Not breach where stranger who has no connection with seller commits a tort which interferes with buyer's rights

III. Sale by description (s.15)

Implied condition – goods shall correspond with the description (s.15(1))

- If sale by sample, not sufficient that bulk of goods corresponds with sample if goods not also correspond with description, i.e. goods must comply with both sample and description (s.15(1))
- Not prevented from being sale by description, by reason of being exposed for sale or hire, they are selected by the buyer (s.15(2))
- Strict compliance: justification for commercial certainty and efficiency

Re Moore

Cans described to be packed in cases containing 30 cans each; only half packed so; held condition broken; seller entitled to reject the whole

Arcos

Staves specified to be half an inch in thickness; most turned out not to comply; fit for the known purpose of making cement barrels; HL held buyers entitled to reject the whole (reject for non-conformity).

“No doubt there may be microscopic deviations which business men and therefore lawyers will ignore.” (*per* Lord Atkin)

Which out of the many words used in reference to the goods being sold are part of their contract ‘description’?

- Depend on the context: parties can make any element or item part of the description and, if the court concludes that that was their intention, the buyer is entitled to stipulate that that, and that alone, is what he shall get
 - ✚ Commercial context of commodity goods: packing of goods, dimensions of goods, references to origins, analysis, etc.
 - ✚ Specific or identifiable goods: open to court to hold that, although descriptive words were used, the goods were not ‘sold by’ that description
 - ✚ Sale by description and by sample (see below)
- Keys:
 - (1) ‘Whether a particular item in a description constitutes a substantial ingredient of the ‘identity’ of the thing sold, and only if it does to treat

it as a condition' (*Reardon*)

- ✚ Sufficient weight attached to the particular words?
- ✚ “It is one thing to say of given words that their purpose is to state (identify) an essential part of the description of the goods. It is another to say that they provide one party with a specific indication (identification) of the goods so that he can find them and if he wishes sub-dispose of them...
If in the second sense, the only question is whether the words provide a means of identifying the vessel. If they fairly do this, they have fulfilled their function. It follows that if the second sense is correct, the words used can be construed much more liberally than they would have to be construed if they were providing essential elements of the description.” (*per* Lord Wilberforce, *Reardon*)
- ✚ Only words that ‘identify’ are under **s.15**
- ✚ If only ‘identification’, warranty

Reardon

“known as Hull No 354 until named”; in fact “Oshima No 004”; sufficient ‘identification’

(2) Whether ‘sufficient influence in the sale to become an essential term of the contract’ (*Harlingdon*)

- ✚ Part of the ‘description’ by which they are sold? (*Harlingdon*)
- ✚ Influence => reliance
- ✚ If contract by sale and by description: characteristics of the goods which would be apparent on reasonable examination of the sample are unlikely to have been intended by the parties to form part of the description by which the goods were sold, even though such characteristics are mentioned in references in the contract to the goods that are its subject matter (*Gill v Berger*)

Harlingdon

Not sale by description where buyer relied on his own judgment in sale of painting purported to be the work of Gabriele Munter

Note: sale in reliance on a statement that a painting was by a

particular artist may amount to a sale by description

Harlingdon decided on its own facts.

Where goods deteriorated or been adulterated, there will come a point where it is arguable that they are not simply different in quality from what might have been expected, but are not goods answering to the contract 'description' at all

- Matter of degree
- *Pinnock*: copra cake adulterated with castor beans and rendered poisonous; held 'could not properly be described as copra cake at all'
- *Ashington*: herring meal mixed into a feeding compound for mink which had become toxic through reaction to a preservative; not shown to be toxic to other animals and remained suitable for other commercial purposes; held answer the description 'herring meal'

IV. Implied undertakings as to quality or fitness for purpose (s.16)

- (i) **No general rule: *Caveat emptor* (buyer cannot claim that his purchases were defective unless he protected himself by obtaining express guarantee from the vendor)**

"Except as provided by this section and section 17, and subject to the provisions of any other enactment, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale." (s.16(8))

Apart from statute, a term about quality or fitness for a particular purpose may be implied by usage (s.16(4)).

- (ii) **Statutory exceptions: 'where the seller sells goods in the course of a business'**

Ss.16(2) and 16(3) apply only 'where the seller sells goods in the course of a business'; scope of protection:

- (1) People who buy as consumers from a retailer or manufacturer
- (2) Merchant transacting with another merchant (whether manufacturers,

wholesalers, importers, retailers or any other kind of dealer)

- (3) Buyer who deals with a person who in the course of a business is acting as agent for another (including undisclosed principal; **Boyter**), unless where the fact that the seller (the agent's principal) is not selling in the course of a business is known to the buyer or reasonable steps have been taken to bring this fact to the buyer's notice (**s.16(5)**)

Scope of protection not cover:

- (1) Seller being a private person, regardless of whether the buyer is a business buyer or another private person (*caveat emptor*)

'In the course of a business'

- Does not matter that the relevant business does not normally include that of selling goods, or of selling goods of the type in question (**Stevenson** (CA: UK: 1999))
- Even if one-off and merely incidental to the business

(iii) Implied condition that goods are of merchantable quality (s.16(2))

"Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality..."

Merchantable quality (s.2(5))

- (a) as fit for the purpose or purposes for which goods of that kind are commonly bought;
 - (b) of such standard of appearance and finish;
 - (c) as free from defects (including minor defects);
 - (d) as safe; and
 - (e) as durable,
- as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.

Quality of goods (s.2(1))

- Includes their state or condition

Purpose or purposes

- Usual or normal purpose for which such goods are bought (or at least one such purpose: **Henry Kendall**)

- Under s.2(5), if one purpose among a range of purposes satisfied, no longer necessarily of merchantable quality; look at all the circumstances and decided whether of merchantable quality in that particular circumstances
 - ✚ Arguable matter

Durability

- Durable as at the time of delivery (*Cordova*)
- Where it was contemplated that the goods were to undergo a journey, they would not be regarded as being of merchantable quality unless, at the time they were delivered, they were in a fit state to endure a normal journey of that kind and be in a merchantable state when they arrived (*Mash*)

Goods supplied

- Not just goods sold
- Include the container in which the goods are supplied (*Gedding*)

Exceptions

(a) *as regards defects specifically drawn to the buyer's attention before the contract is made*

(b) *if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal*

- apply only if buyer has examined the goods and the defect ought to have been reveal by such an examination as he actually did make

(c) *if the contract is a contract for sale by sample, as regards defects which would have been apparent on a reasonable examination of the sample*

- complements **s.17(2)(c)** (seller undertakes responsibility for any defect making the quality of the goods unmerchantable which would not be apparent on reasonable examination of the sample)
- responsibility for any defect which would be apparent lies with buyer
- applies whether or not buyer has actually made an examination

(iv) Implied condition as to fitness for purpose (s.16(3))

“Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the

goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied...”

Particular purpose, made known expressly or by implication

- Where goods have only one purpose, or one obvious purpose, this has been regarded as the ‘particular’ purpose; if the obvious purpose, court will take it for granted that this purpose was made known to the seller
 - ✚ Example: where instructions supplied with goods (*Wormell*: UK: 1987)

Reliance

- Must have been something said or done to bring home to the seller the fact that he was being relied upon to supply goods fit for the buyer’s particular purpose
- Presumption that once a particular purpose has been made known to the seller, it is assumed that the buyer will have relied on the seller to provide goods fit for that purpose, provided that such reliance was reasonable on the facts
 - ✚ Reliance may be partial (*Henry Kendall*)
- If shown that buyer did not (or unreasonable for buyer to) rely on seller’s skill or judgement, no implied condition under s.16(3)
 - ✚ If particular purpose made known and specifications not tied seller’s hands so that seller has scope to exercise judgment and skills, reasonable for buyer to rely on seller’s judgment and skills (*Cammell*)
 - ✚ If buyer relied on his own skill and judgment, s.16(3) not apply (e.g. seller not aware of situation at place of sale; buyer knows all that; buyer saw goods and read its description; therefore buyer relied on own skill and judgment to see whether suitable for resale (*Teheran-Europe*))
 - ✚ Sufficient that buyer should rely on the skill and judgment of a person from whom the seller had acquired the goods (*Britvic* (UK: 2002))
 - ✚ Seller to show buyer did not rely on his skill and judgment, or that it was unreasonable for him to do so

Fit

- Fit for all particular purposes (**Henry Kendall**)
- Question to ask: Were the goods supplied reasonably fit for the specified purpose?
 - ✚ Rarity of the unsuitability would be weighed against the gravity of its consequences
 - ✚ Unfit: Including where goods have hidden limitations requiring special precautions unknown to the buyer or seller (**Henry Kendall**)
- The wider the purpose, the greater would be the dilution of the sellers' responsibility under s.16(3) (**Aswan**)
- No breach where failure to meet the intended purpose arises from an abnormal feature or idiosyncrasy, not made known to the seller by the buyer, in the buyer or in the circumstances of the use of the goods by the buyer, whether or not the buyer is himself aware of the abnormal feature or idiosyncrasy

Henry Kendall

Facts

Groundnut extraction toxic to poultry but perfectly suitable for cattle, pigs and other livestock

SAPPA: only compounded feeding stuffs for poultry, pheasants and pigs; known to Grimsdale

Grimsdale (SAPPA's seller): sell cattle and poultry feeding stuffs; known to Kendall

Kendall (Grimsdale's seller): sell meal to Grimsdale

Held

S.16(2) – not breached as one among a range of purposes satisfied

S.16(3) – as between SAPPA and Grimsdale, Grimsdale apparently breached; as between Grimsdale and Kendall, Kendall breached as one of the two particular purposes not satisfied

Ashington

Facts

Herring meal in feeding compound sold by seller toxic to buyer's mink; seller's Norwegian supplier no knowledge of precise use of herring meal, but knew that it would be used in compounding animal foodstuffs; herring meal affected animals to varying degrees

Held

Although only buyer had any expertise relating to mink, seller and his supplier held liable under s.16(3) as relied on to supply goods which were reasonably fit for feeding to animals generally (not limited to mink)

V. Sale by sample (s.17)

- (a) *there is an implied condition that the bulk shall correspond with the sample in quality;*
- (b) *there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;*
- (c) *there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. (s.17(2))*

Contract for sale by sample

- Where there is a term in the contract, expressed or implied, to that effect **(s.17(1))**
- Not sufficient that the buyer should merely have seen a specimen of the goods in question
- Parties must have agreed that the sale shall be a sale *by reference to* that sample
- Note: function of sample very similar to that of a contractual description, or perhaps to supplement that contractual description

Reasonable examination (for s.17(2)(a))

- Not expect microscopic examination (***Drummond***)
 - ✚ “cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time.”**(Drummond)**

- ✓ Correspondence in quality - ‘qualities which were patent, or discoverable from such examination and inspection of the samples as, under the circumstances, the respondents might reasonably be expected to make’
- ✓ Extent to which sample may be held to speak must depend on the contract and what is contemplated by the parties (*Steels v Bleecker*)
- ✚ Therefore, seller not guarantee that the bulk will comply with sample in every possible respect, but only will be as like the sample as an ordinary comparison or inspection would reveal
 - ✓ To get protection above this, rely on ss.16(2) and 16(3) or stipulate for an express warranty
 - ✓ Limited further protection by s.17(2)(c)

VI. Exclusion of implied terms and conditions (s.57)

“Where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Control of Exemption Clauses (Cap.71)) be negated or varied by express agreement, or by the course of dealing between the parties, or by usage by the usage is such as to bind both parties to the contract.” (s.57(1))

“An express condition or warranty does not negative a condition or warranty implied by [the SOGO] unless inconsistent therewith.” (s.57(2))

CECO s.11

- ✚ Applies to all contracts of sale of goods (s.11(4))
- ✚ Not apply to exempted supply contracts (s.16)

As against a person dealing as consumer

- S.14, 15, 16 and 17 SOGO cannot be excluded or restricted (s.11(1) and 11(2))

As against a person dealing otherwise than as consumer

- S.14 SOGO cannot be excluded or restricted (s.11(1))
- S.15, 16 and 17 can be excluded or restricted by reference to a contract term, but only in so far the term satisfies the requirement of reasonableness

Dealing as consumer (s.4)

“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;
(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 of consumption.”

- ✚ On a sale by auction or by competitive tender, the buyer is not in any circumstances to be regarded as dealing as consumer (s.4(2))
- ✚ BOP on seller to show buyer not dealing as consumer (s.4(3))

The “reasonableness” test (s.3)

- ✚ Fair and reasonable 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 (s.3(1))
- ✚ Look at **Schedule 2** of CECO (s.3(2))
- ✚ Have regard to the language in which the term is expressed – whether understood by the person as against whom another person seeks to rely upon the term (s.3(4))

Other exemption clauses

- ✚ Look at other provisions of the CECO to see whether they apply