

Sale of Goods: Remedies of seller and buyer

I. Remedies of seller

(i) Action for the price (personal remedy)

(a) Where the property has passed to the buyer (s.51(1))

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

- Neglect or refusal not ‘wrongful’ if price is not yet due under the terms of the contract or if seller is in breach of certain obligations on his part

(b) Where the price is payable on a day certain irrespective of delivery (s.51(2))

“Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.”

- Where by the terms of a contract of sale the price is to be paid by instalments, each payable ‘on a day certain’, each instalment of the price may be sued for as it becomes due (*Lloyd Brasileiro*)

(c) Where the risk has passed

- Where risk has passed to buyer before property has passed and the goods are destroyed or lost in an event covered by the concept of ‘risk’

(d) Other situations

- Only action for damages for non-acceptance, even if the buyer by his own wrongful act has prevented the price from becoming due and payable (*Stein; Colley*)

(e) The right to interest on the price (s.56)

- Right to claim damages at common law preserved by s.56
- At common law, interest is payable only if the contract so provides

(ii) Action for damages for non-acceptance (personal remedy)

“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.”
(s.52(1))

- Measure of damages: estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract **(s.52(2))**
 - ✓ ‘First rule’ in ***Hadley v Baxendale***
 - ✓ Claims for unusual losses: refer to ‘second rule’ in ***Hadley***
 - ✓ Where available market, measures of damages prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or , if no time was fixed for acceptance, then at the time of the neglect or refusal to accept **(s.52(3))**
 - ✚ Applies also to anticipatory breach
 - ✚ Seller has duty to mitigate: If, when buyer refuses to accept the goods, there is a market where other buyers are ready to take them off seller’s hands and pay the going price, he will be discharged his duty to mitigate if he disposes of the goods promptly to such a buyer
 - ✧ If seller does not do this and he is later able to obtain only a smaller price, buyer will rightly be able to argue that he should not be liable for the whole of seller’s loss as the opportunity to mitigate was not taken
 - ✧ For anticipatory breach accepted by seller: seller may be under an obligation to resell the goods as soon as possible after he has accepted buyer’s repudiation, if this takes place against the background of a falling market
 - [If not accept anticipatory breach: under no duty to mitigate until an actual breach occurs]
 - ✚ Available market = goods available for sale in the market at the market or current price in the sense of the price, whatever it may be, fixed by reference to supply and demand as the price at which a purchaser for the goods in question can be found, be it greater or lesser than or equal to the contract price (***Sullivan***)
 - ✚ Place of relevant market: whether a market existed for goods of the contract description at the place where the buyer ought to have taken delivery, and uses as a yardstick the price prevailing on that

market

- ✧ For international sale where buyer's breach takes place after goods have been shipped: If available market for such goods 'afloat': price on this market; if not, port of arrival (*Muller*)
- ✓ If no available market, ordinary contract law rules: court estimate seller's loss as best it can
 - ✚ If seller has lost a profit on a retail sale, he can claim the amount of that profit
 - ✚ If seller has resold to a substitute buyer at a lower price, the resale price will be at least prima facie evidence of his loss
- ✓ Seller will be able to claim as damages the reasonable costs of reselling the goods and any incidental expenses (s.39)

(iii) Seller's right to terminate contract upon breach or repudiation by buyer

- If buyer wrongfully fails or refuses to perform one or more of his obligations under the contract, this may be a breach or repudiation of the contract which will allow the seller to terminate the contract and treat himself as discharged from further performance
- Whether can do so determined by normal contract principles

(iv) Remedies of an unpaid seller (real remedies; right against the goods)

Unpaid seller's right (whether property passed or not) (s.41)

- (1) Lien on the goods or right to retain them for the price while he is in possession of them
 - (2) In case of buyer's insolvency, right of stopping the goods in transitu after he has parted with the possession of them
 - (3) A right of re-sale as limited by SOGO
- Note: where property not passed, unpaid seller has rights similar to rights of lien and stoppage in transitu (s.42)

Unpaid seller (s.40)

- (1) Whole of price not been paid or tendered
- (2) Bill of exchange or other negotiable instrument received as conditional payment, and condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise (e.g. buyer became insolvent)

- Includes anyone in position of a seller, e.g. seller's agent to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price (**s.40(2)**)
- Not concerned with the rights and wrongs of the situation; concerned with whether payment has been made or tendered
 - ✓ May be unpaid seller even during time when the period for credit is still running
- 'Unpaid' so long as part of price unpaid
- Remedies of unpaid seller in case of acceptance of negotiable instrument suspended while instrument current; revive if instrument dishonoured or if buyer becomes insolvent

Unpaid seller's lien (possessory security)

Where unpaid seller in possession of goods, entitled to retain possession until payment or tender of price if:-

- (1) goods sold without any stipulation as to credit
 - (2) goods sold on credit but terms of credit expired
 - (3) buyer becomes insolvent (**s.43**)
- Not matter seller in possession as buyer's agent or bailee (**s.43(2)**)
 - May have right of lien even if only part of price unpaid (**s.40(1)(a)**)
 - Right of lien over part of goods of which delivery not made, unless part delivery show agreement to waive lien or right of retention (**s.44**)
 - If unpaid seller parts with goods, cannot reassert lien even if he gets back possession (*Valpy v Gibson*)

Right of lien lost where:-

- (1) goods delivered to carrier or other bailee for the purpose of transmission to buyer, without reserving the right of disposal of the goods (**s.45**)
 - (2) when buyer or his agent lawfully obtains possession of the goods (**s.45**)
 - (3) by waiver (**s.45**)
 - (4) price paid
 - (5) document of title to goods has been lawfully transferred to buyer and buyer transfer that document to a person taking the document in goods faith and for valuable consideration under a sale (**s.49 proviso; DF Mount**)
- Unpaid seller not lose lien or right of retention by reason only that he has obtained judgment for the price of the goods (**s.45(2)**)

Unpaid seller's right to stop goods in transitu

"...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 transitu, 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." (s.46)

- Immaterial whether property in goods has passed (ss.41 and 42)
- Not affected by sub-sale by buyer unless seller assented or document of title transferred to sub-buyer (s.49)

Insolvent (s.2)

- Where buyer either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has been adjudged bankrupt or not

Duration of transit (s.47)

(1) In course of transit from time when delivered to carrier by land or water, or other bailee for the purpose of transmission to buyer, until buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee (s.47(1))

- ✓ ***Reddall***: If goods pass at successive stage of the transit from one carrier to another, transit continues until destination reached, not matter whether intermediate carrier receives instructions direct from buyer or seller, provided instruction given to facilitate transit upon journey originally intended and communicated to buyer

(2) If buyer or his agent obtains delivery before goods' arrival at appointed destination, transit at an end (s.47(2))

- ✓ ***Reddall***: Where the original transit is interrupted by buyer, the test is whether the goods will be set in motion again without further orders from buyers; if not, transit at an end and right to stop lost

(3) If, after arrival of goods at appointed destination, carrier or other bailee acknowledges to buyer or his agent that he holds the goods on buyer's behalf and continues in possession of them as bailee for buyer or his agent, transit at an end; immaterial that further destination indicated by buyer (s.47(3); ***Taylor***)

(4) If goods rejected by buyer and carrier or other bailee continues in possession, transit not at end, even if seller refuses to receive them back (s.47(4))

(5) Where carrier or other bailee wrongfully refuses to delivery goods to buyer or his agent, transit at an end (s.47(6))

- (6) When goods delivered to ship chartered by buyer, question of fact as to whether in possession of master as carrier or as buyer's agent (**s.47(5)**)
- (7) Where part delivery to buyer or his agent, remainder of goods may be stopped in transitu unless such part delivery shows an agreement to give up possession of the whole of the goods (**s.47(7)**)

How stoppage in transitu effected (**s.48**)

- (1) By taking actual possession
- (2) By giving notice of claim to carrier or other bailee in whose possession the goods are; notice to person in actual possession or his principal; if to principal, must be given at such time and in such circumstances that P, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer
 - ✓ If notice given, carrier or other bailee in possession must re-deliver goods to, or according to the directions of seller
 - ✓ When seller purports to exercise right to stop in transit, carrier must assume seller is acting within his rights (*The Tigress*)
 - ✓ Expenses of re-delivery to be borne by seller
 - ✓ If, when he receives notice of stoppage, carrier has lien on goods for unpaid freight, seller liable to pay freight (*Booth*)

Right of re-sale

No automatic rescission (**s.50(1)**)

- Subject to other provisions in s.50, contract not rescinded by mere exercise of unpaid seller's right of lien or retention or stoppage in transitu
- If buyer pay price, can require goods to be delivered
- If property passed, remain buyer's notwithstanding that seller has exercised right of lien or stoppage in transitu
- Seller must take further step to terminate contract and revest property in himself or vest it in a new buyer

When seller has right of resale

[Right to resell – seller not liable for resell]

[Re-sell under s.27 or FO – seller liable for breach of contract with first buyer and, if property passed, in tort]

- (1) Where unpaid seller give notice to buyer of intention to resell and buyer does not within a reasonable time pay or tender price (**s.50(3)**)

- (2) Where seller unpaid and goods of perishable nature (**s.50(3)**)
- (3) Where seller expressly reserves a right of re-sale in case the buyer should make default(**s.50(4)**)
 - Right of resale not limited to cases where unpaid seller exercised right of lien or stoppage
 - S.48 does not have effect of excluding or restricting common law right fo resale: where right of resell reserved in contract in specific event, e.g. *Romalpa* cases and where buyer could be in breach of his obligation to pay the price on the agreed date, in a case where time has been made of the essence

Effect of resale by seller

- If unpaid seller who has exercised his right of lien or retention or stoppage in transitu resells the goods, buyer acquires a good title thereto as against the original buyer (**s.50(2)**)
 - ✓ If property remained in seller, new buyer would obtain good title at common law and not require protection of s.50(2)
 - ✓ Second buyer acquires good title whether or not unpaid seller had a right of resale as against the original buyer (as under **ss.50(3) and 50(4)**)
 - ✚ Apart from ss.50(3) and 50(4), unpaid seller would be liable to original buyer liable for damages for non-delivery and, if property passed, in tort
- Whole contract rescinded by resale of part of goods (*RV Ward*)
- s.50(3): contract rescinded (*RV Ward*) and party may recover loss occasioned by buyer's breach from buyer
 - ✓ comparable to damages for non-acceptance
 - ✓ if property passed, reverts in seller
 - ✓ if resale made for a higher price, seller may keep it all
- s.50(4): contract rescinded and sell may claim damages
 - ✓ comparable to damages for non-acceptance
 - ✓ if property passed, reverts in seller
 - ✓ if resale made for a higher price, seller may keep it all

s.50(2)	s.27
Seller must be unpaid	Apply whether seller is unpaid or not
Apply where unpaid seller has exercised right of lien or retention or stoppage in transit	Where seller 'continues or is in possession of the goods, or of the documents of title to the goods'
No requirement that goods or document of title delivered to second buyer	Only where goods or document of title delivered to second buyer
No requirement that purchaser is bona fide or takes without notice	Only protect bona fide purchaser who takes without notice
Only benefit second buyer	Operate for the benefit of second buyer/pledge/diposee (and someone who has agreed to buy or take under a pledge or other disposition – FO s.9)

Effect of sub-sale or pledge by buyer (s.49)

- Normally not affect right of lien and right to stop goods in transitu (**s.49**)
- Exceptions:
 - Seller assented (**s.49**)
 - ✚ **Mordaunt**: seller's assent – shows seller intends to renounce his rights against the goods, that contract will be carried irrespective of the terms of the original contract (see also **DF Mount**)
 - Document of title to goods has been lawfully transferred to buyer and buyer transfer that document to a person taking the document in goods faith and for valuable consideration:
 - ✚ sale: rights lost
 - ✚ pledge or other disposition for value: rights subject to rights of transferee (**s.49 proviso**)
 - ✚ must be same document of title (**DF Mount**)

II. Remedies of buyer

(i) To reject the goods

- Where seller delivers or tenders goods not of the contract description, whether as regards quantity or quality
 - ✚ Where wrong quantity (**s.32** subject to usage of trade, special

agreement or course of dealing):

- ✓ Less than contracted: reject, or accept and pay contract rate
 - ✓ More than contracted: reject, or accept and pay contract rate
 - ✚ Mixed with goods of other description not included in contract: may accept in accordance with contract and reject the rest, or reject the whole (**s.32** subject to usage of trade, special agreement or course of dealing)
 - ✚ Where seller broke condition or committed serious breach of innominate term, may reject
- If buyer entitled to reject goods, can do so for any reason he likes: not required to act reasonably in choosing rejection rather than some other remedy (*Clegg*)
 - May be exercised whether property passed, provided goods not 'accepted'
 - Seller normally has right to cure a defective tender of goods, if this can be done within the time allowed by the contract and is not otherwise inconsistent with the contract (*Borrowman*)
 - Right to reject lost once goods accepted (or deemed so)
 - Loss of right not affect right to claim damages in respect of any shortfall or defect in delivery (s.13(4))
 - If buyer has rightly rejected goods, not bound to return them to seller; sufficient if he intimates to seller that he refuses to accept them (**s.38**)
 - If buyer who has rejected goods has paid all or part of the price and seller does not make an effective substituted delivery, he may claim restitution of the money that he has paid and damages for any incidental or consequential losses, provided not too remote

(ii) Buyer's action for damages for non-delivery (s.53)

"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"

Measure of damages

(1) Estimated loss directly and naturally resulting, in the course of events, from seller's breach of contract (**s.53(2)**)

(2) If available market: prima facie difference between contract price and market or current price at time or times when goods ought to have been delivered, or if no time was fixed for delivery, then at time of neglect or refusal to deliver (**s.53(3)**)

- Place where delivery ought to have been made prima facie relevant place for

reckoning market price

- Unnecessary to award buyer additional damages for any loss of profit which he expected to make from reselling goods, even if seller knew, or ought to have foreseen, at the time of making the contract that this was the buyer's intention

- ✚ Regardless of whether market price higher or lower than contract price
(*Williams v Reynolds; Williams Bros*)

- ✓ *Williams Bros*: market price > buyer's resale price to sub-buyer > original contract price; court awarded damages according to difference between market price and original contract price; sub-sale irrelevant

(3) If no available market: court make own assessment of amount of buyer's loss

(iii) Action for damages for late delivery

- Ordinary contractual principles
- If available market:
 - ✚ Prima facie difference in market price on the two dates
 - ✚ If market rising, substantial damages
 - ✚ If market falling, no loss
- If no available market:
 - ✚ Ordinary contract principles

(iv) Action for damages for breach of warranty (s.55)

- Where breach of warranty, or elected (or is compelled) to treat breach of condition as breach of warranty, no right to reject; may:-
 - (a) set up against the seller the breach of warranty in diminution or extinction or the price; or
 - (b) maintain an action against the seller for damages for the breach of warranty
- Measure of damages: estimated loss directly and naturally resulting, in the ordinary course of events, from the breach
- Measure for breach of warranty of quality: prima facie difference between value of goods at time of delivery to the buyer and value they would have had if they had answered the warranty
 - ✚ Sub-sale normally irrelevant
- Consequential losses assessed on ordinary contractual principles (***H Parsons***)
- Setting up breach of warranty in diminution or extinction or the price not prevent buyer from maintaining action for the same breach if further damage suffered

(v) Buyer's remedies at common law

- Condition: right to terminate
- Warranty: right to claim damages for loss suffered

(vi) Specific performance (s.54)

- Failure to deliver specific or ascertained goods
 - ✚ S.54 cannot be invoked as long as unascertained goods remain unascertained
- On plaintiff's application

- Where court thinks fit
 - ✚ May be given without giving seller option of retaining goods on payment of damages
 - ✚ Given on condition as court thinks just
 - ✚ No specific performance if contract concerned with goods of ordinary description which buyer intends to resell