

Sale of goods: Risk and Frustration

(Even upon which seller ceases to be, and buyer becomes, the owner of the goods (or, in exceptional cases, succeeds to such title as the seller has)

Agreement to sell	Sale
<i>Property remains with seller</i>	<i>Property passed to buyer</i>
Contract still executory	Contract executed
Buyer – rights in personam Seller – proprietary rights (rights in rem)	Buyer – rights in rem
Buyer’s remedy against seller – damages for non-delivery (s.53) – exceptionally specific performance (s.54)	Buyer’s remedies against seller – damages for non-delivery (s.53) – tort
Seller’s remedy against buyer – damages for non-acceptance (s.52) – seller continues to be responsible for goods	Seller’s remedy against buyer – damages for non-acceptance (s.52) – damages for contract price (s.51) – buyer responsible for goods
Seller – can in principle sell goods to 3p and give this second buyer a good title Buyer – cannot do more than agree to sell them to 3p	Seller – cannot in principle sell goods to a second buyer Buyer – can sell them on to 3p and give a good title
Risk of loss on seller	Risk of loss on buyer
Contract may be frustrated if goods perish (s.9)	Contract not frustrated if goods perish
If good requisitioned, taken as prize, etc., loss borne by seller and any compensation payable to seller	If good requisitioned, taken as prize, etc., loss borne by buyer and any compensation payable to buyer
Seller’s insolvency: buyer no right to goods; only right to prove in the insolvency for the return of any part of the price which he has paid and for damages in respect of any loss that he has suffered	Seller’s insolvency: buyer may claim the goods
Buyer’s insolvency: seller can claim back the goods even though they have	Buyer’s insolvency: seller cannot claim back any goods which have been

been delivered to buyer	delivered to buyer; can only prove in the insolvency for so much of the price as is outstanding and for any loss that he has suffered
Any profit or increase belong to seller	Any profit or increase belong to buyer

[Note: not all fixed rules of law]

Significance of property

- It is what buyer has bargained for
- If buyer does not get the ownership, he can recover the whole of the price that he has paid, as money paid on a total failure of consideration, despite the fact that he may have had the possession and use of the goods for a considerable time before this fact is discovered (*Rowland v Divall*)
- If only frame claim in damages, smaller sum, reflecting what he had lost in practical, rather than in conceptual terms

Two typical types of cases where the timing of passing of property is of significance

(1) Goods perished

- E.g. Agreed to pass property but goods burned down before possession passed
Who bears risk of destruction? Analyse movement of property
One possible analysis: Specific goods > property passed immediately > risk on buyer (usually) > buyer still has to pay

(2) Insolvency of seller

- E.g. Contract of sale; buyer paid; seller became insolvent
Assets transferred to liquidator
As property not passed, buyer only queue up for distribution of liquidated assets

I. Relationship of property to risk

Risk in SOGO

- risk that the goods will be wholly or partly destroyed or damaged
- concerned with events not attributable to the act or fault of either of the parties, or which are dealt with expressly by the terms of the contract
- prima facie: risk passes with property (s.22)
 - Where delivery delayed due to either buyer's or seller's fault, goods at risk of party at fault (proviso; *Demby Hamilton*)

- Duties or liabilities of either seller or buyer as bailee of goods not affected (proviso; *Wiehe v Dennis Bros*)
- Risk may be passed in unascertained goods (cf. property of unascertained goods)
 - Not possible with goods sold purely by description, so long as no steps have been taken to appropriate goods to the contract or to identify the source from which they will be appropriated

Effect, as between the parties, of the passing of the risk

If risk passed at time of loss or damages	If risk not passed at time of loss or damages
Buyer have to pay price even though he does not (and will not ever) get the goods	Seller cannot compel buyer to pay the price, or to take delivery of any remaining goods, or of the goods in their damaged state
Buyer cannot sue seller in damages for failing to make delivery, or for delivering less than the contract quantity or damaged goods	Seller cannot sue buyer for damages for refusing to pay the price or take delivery

II. Statutory provisions relating to perishing of specific goods

(a) Section 8: specific goods which have perished

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.

- ‘Perish’: include goods which have been stolen, or which have ‘perished’ in part (*Barrow, Lane & Ballard*)
 - ◆ When goods are not lost or destroyed, but simply deteriorate in quality, question to be asked: (1) whether seller has given any warranty as to the condition of the goods or (2) which party has the risk (or both)
 - ◆ If goods deteriorated beyond the point where they cease to conform to their contract description, or are no longer of any commercial use, they have ‘perished’
- Void: contract set aside for all purpose and produces no legal effect
 - ◆ Property therefore not passed
- Parties to a contract on facts similar to *Couturier v Hastie* or *McRae* (if goods not exist at all or seller knew of non-existence, s.8 not apply;

common law position) are free to make any one of three bargains:

- (i) Their contract might be subject to an implied condition precedent that the goods are in existence; if they are not, neither party incurs any liability; neither takes the risk that goods may not exist
- (ii) The seller might contract (warrant) that the goods do exist; if they are not, he will be liable in damages to the buyer; seller takes risk
- (iii) The buyer may agree to take the risk that the goods may have perished prior to the contract – i.e. he agrees to pay for the *chance* of getting the goods; buyer takes risk

(b) Section 9: specific goods which subsequently perish

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

(c) ‘Perishing’ of unascertained goods

(i) Generic goods

- Goods sold purely by description
- Contract made on the understanding that the seller undertakes the entire responsibility of ensuring that goods answering the contract description will be available for delivery to the buyer on the agreed date, and that he accepts all risks incidental to seeing that they are supplied
- *Genus nunquam perit* (generic goods can never perish)
 - Subject to contractual terms? And subject to buyer’s knowledge of supply of goods?

Blackburn Bobbin

Facts: Failure to supply Finland birch due to war interrupting normal practice of direct import and usual practice of not stocking up in the UK

Held: Seller liable; to frustrate a contract, the matter relied on must be something which both parties had in their minds when they entered into the contract and something unforeseen happened to it. Here, the buyers are unaware of the common practice

Intertradex

Facts: Supply of goods to buyer not possible due to seller's supplier's inability to supply caused by breakdown of factory and inadequacies of a railway; buyer unaware there was only one supplier

Held: Seller liable; events not covered by clauses may frustrate contract but shortage of supply, even from sole supplier, caused by commonplace events such as breakdown of factory or inadequacies of a railway are not outlandish enough [note: buyer unaware seller's supplier was sole supplier]

(ii) Goods to be manufactured or acquired by the seller

- Same principles as for generic goods
- Parties may agree to the contrary, e.g. seller's obligations conditional upon the continued availability of the materials which have been lost

(iii) Goods which are to be appropriated from a specific bulk or source

- Contract conditional (implied) upon existence (before and at time of performance) (*Howell v Coupland*)
 - If destroyed by causes out of seller's control and became impossible for performance, seller excused
 - Contract to deliver so many goods, of a particular kind, appropriated from a specific bulk or source
- Not simple case of common-law frustration (where entire contract avoided)
 - Seller excused only in regard to the part of the crop which had failed
 - Seller not excused from obligation to deliver so much as he has been able to produce (*HR v Street*)
- S.7(2): conditional contract for the sale of goods possible, condition may or may not happen
 - Makes it possible to imply an understanding that if there is a shortfall the seller is bound to let the buyer have the smaller amount which has been produced
 - If s.7(2) not preserve *Howell*, s.61(2) (common law) does

III. Frustration of sale of goods contracts

Doctrine of frustration not prevented from applying to contract of sale

- SOGO merely dealt with subject matter (specific goods) of contract
- For unascertained goods and other types of recognised grounds: look to common law

Frustration	Risk
Deals with unforeseen event ➤ something not contemplated by the parties and not provided for by a term of the contract	Provided for in the terms, express of implied ➤ no scope for frustration
Both parties relieved of obligations	Exposes one party to liability