

Sale of Goods: Sale by a non-owner

I. General rule: *nemo dat quod non habet*

“...where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.” (s.23(1))

Exceptions:

- (1) Subject to the provisions of the SOGO (s.23(1))
- (2) Owner of the goods is by his conduct precluded from denying the seller’s authority to sell (s.23(1)) (see below)

II. Exceptions to the general rule

[Idea behind all the exceptions: where owner clothes someone (seller) as having authority, the buyer should be protected, even though the seller may not really have authority]

(i) Estoppel (s.23(1))

“...owner of the goods is by his conduct precluded from denying the seller’s authority to sell (s.23(1))

*“...wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain.”
(Lickbarrow)*

- rarely ever applied
- ‘far too wide...cannot be relied on without considerable qualification’ (*Farfuharson*)

Owner of goods will lose his title to 3p if:

- (1) He has in some way represented (or held out) the truth of a fact or state of affairs which has led the buyer to believe that the seller is the owner of the goods or is authorised to deal with them on the owner’s behalf;
- (2) Buyer has relied on this representation (word/conduct).

Application of s.23(1)

- Estoppel exception only apply where there is a sale by the non-owner
- Not apply to agreement to sell (*Shaw*)

Effect of estoppel

- 3p will get a good title against all the world (*Eastern Distributors*)

Types of estoppel

(1) Apparent authority

- Representation (express/implied) that seller has owner's authority to sell goods as agent
- Representation to the particular buyer, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it
- Distinguish:

- ✚ Estoppel by representation

- *Henderson v Williams*: representation as to seller's authority made directly by owner to warehouseman cf. *Farquharsons*: no communications at all between owner and buyer

- ✚ Estoppel by conduct

- For an owner merely to allow another person to have possession of his goods carries with it no implication that that person has any authority to sell them, even if the possession is given with a view to the person trying to find a buyer (e.g. *Jerome v Bentley*);
 - ✓ Not matter that 'seller' was allowed to arm with the document of title as well as the goods, even if owner negligent in not checking identity or credentials of 'seller' (*Central Newbury*)

(2) Estoppel by negligence

- Have to show (1) owner owed a duty to be careful; (2) the duty of care was broken, on the facts of the case and (3) that this breach of duty was the effective cause of the claimant's action in entering into the transaction by which he claims to have acquired the goods
 - ✓ Hard to persuade court that owner owed duty of care to specific claimant
 - ✓ Hard to persuade court that owner's negligence would cause him to lose his title to his goods

(ii) Sale under the Factors Ordinance, s.3 (s.23(2)(a))

“Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Ordinance, be as valid as if he were expressly authorised by the owner of this goods to make the same:

Provided that the person taking under the disposition acts in good faith, and has not, at the time of the disposition, notice that the person making the disposition has not authority to make the same.” (s.3(1))

Normally, the mere fact that seller has possession of owner’s goods gives rise to no inference that seller has owner’s authority to sell them to buyer, and if seller purported to make such a sale, owner is not estopped from denying that seller has such authority. The same rule applies where seller has documents of title relating to the goods. But if seller is a mercantile agent and all other conditions of s.3(1) are satisfied, buyer is entitled to infer that seller is acting with owner’s authority, and buyer will get a good title as against owner.

Mercantile agent

- “a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods” (s.2)
- Must be someone who has a business, and who in the course of that business buys or sells goods for other people
- Not be a mere servant or shopman (*Lowther*)
- Not matter authority limited (*Lowther*)
- Possible to be first-time business as mercantile agent (*Mortgage Loan v Richards*)
 - *Lowther*: Agent originally had his own shop (not business as mercantile agent), first time to act as mercantile agent
 - *Weiner*: Agent originally business as shopowner
 - *Budberg*: Legal profession; possible to be mercantile agent (but held not to be as not obtain possession in capacity as agent)
- Possible to have only one principal (*Lowther*)

Requirements of s.3(1)

(1) Possession with consent of owner

- Obtain possession with consent in capacity as mercantile agent (*Lowther*)
 - Owner must consent to agent having them for a purpose which is in

some way or other connected with his business as a mercantile agent (need not actually be for sale, may be for display or to get offer or merely to put in his showroom) (*Pearson*)

- ◇ *Budberg*: friend
 - ◇ *Staffs v British Wagon*: ‘Seller’ in business of mercantile agent, as hirer (bailee) in the particular transaction involved
 - ◇ *Astely*: ‘Seller’ two businesses, hiring out cars and dealing in cars; possession as hire-purchaser and not motor dealer
- Not matter obtained by fraudulent misrepresentation or deception (e.g. secret intention to break agency) (*Folkes v King*) or fraud (*Lowther*)
 - If circumstances were such as to make the owner the victim of a material mistake of identity, consent obtained by fraud might amount to no consent at all (*Folkes v King*)
 - Possession and disposition had to be at the same time (*Beverley v Oakley*)
 - Not sufficient that the person in question had once had possession as mercantile agent but had lost it prior to the purported disposition
 - Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: Provided that the person taking under the disposition has not, at the time thereof, notice that the consent has been determined. (s.3(2))
 - Consent deemed to continue
 - Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Ordinance, be deemed to be with the consent of the owner. (s.3(3))
 - BOP on owner (s.3(4))

(2) Possession of goods or of documents of title to goods

(3) Sale, pledge of other disposition

(4) ‘When acting in the ordinary course of business as a mercantile agent’

- Acting in such a way as a mercantile agent acting in the ordinary course of business of a mercantile agent would act

- ‘within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the [buyer] to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make.’ (*Oppenheimer*)

(5) Good faith and no notice of agent’s lack of authority at time of disposition

- Closely tied up with ‘ordinary course of business’ point
- BOP on buyer: (1) owner consented to the mercantile agent having possession, (2) agent acted in the ordinary course of business and (3) buyer acted in goods faith and had no notice (*Heap v Motorists’ Advisory Agency*)

Effect of FO s.3

- Only adversely affect title of person who had entrusted the goods or documents of title to the mercantile agent (*National Employers’*)

(iii) Sale under power of sale or court order (s.23(2)(b))

- SOGO provisions do not affect the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction
 - Examples of special common law: sale under common law powers of pledge or by an agent of necessity
 - Examples of statutory power: unpaid seller, bailee of uncollected goods, landlord who has distrained upon his tenant’s goods, sheriff who has seized goods under a writ of execution
 - Examples of court order: inherent powers, pursuant to rules of court (may do so even if against owner’s wishes)

(iv) Sale in market overt (s.24)

“Where goods are openly sold in a shop or market in Hong Kong, in the ordinary course of the business of such shop or market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.”

- Market: open, established public market constituted by law or custom

(v) Sale under a voidable title (s.25)

“Where the seller of goods has a voidable title thereto, but his title has not been

avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

Voidable title:

- (1) Misrepresentation (whether fraudulent or innocent)
- (2) Undue influence
- (3) Duress
- (4) Fraud
- (5) Drunkenness

Void title:

- (1) Mistake negating consent: one party labouring under a mistake or parties at cross-purposes
 - (i) Latent ambiguity;
 - (ii) One party under mistake as to terms and mistake known to other party;
 - (iii) Mistake of identity
 - ✓ Contract entered into in writing
 - ✚ Identity of party assumes greater significance
 - ✧ *Cundy v Lindsay*: rogue purported to be identifiable well-known firm; contract void
 - ✧ *King's Norton Metal*: firm purported to be large (not heard of) but in fact a rogue; mistake as to attributes, not identity
 - ✓ Contract concluded orally
 - ✚ Presumption that each party to the transaction intends to deal with the party in front of him (a strong one: *Shogun*)
 - ✧ *Lewis v Averay*: rogue purported to be well-known actor; contract voidable for fraud but not void for mistake
 - ✧ *Ingram v Little*: sisters sold car to rogue; steps taken to ascertain identity of rogue; contract void
- (2) Common mistake: parties did initially reach agreements
- (3) Frustration: contract end automatically by operation of a rule of law, irrespective of the wishes of the parties

Where title voidable:

- (1) If sold to buyer before original owner purports to exercise his right to avoid the first transaction, buyer obtained good title under s.25
- (2) If, before buyer made purchase, original owner has validly exercised his right to avoid the first transaction, claim of buyer under s.25 will be defeated

How original seller may validly exercise his right to avoid the first transaction:

- (1) Must give notice (communicate) to the other party ('seller') of his intention to rescind, or retake possession of the goods
 - Must elect to do so within a reasonable time and cannot do so after he has done anything to affirm the contract with knowledge of the facts giving rise to the option to rescind
 - Communication not sufficient if spoken to 3p or made a private note
 - Communication need not be formal provided it is a distinct and positive repudiation of the transaction
- (2) In exceptional circumstances, where one party, by absconding, deliberately puts it out of the power of the other to communicate his intention to rescind which he knows the other will almost certainly want to do
 - Some overt means, falling short of communication or repossession, on the owner's part might be sufficient to evince an intention to rescind (*Car & Universal*)
 - ✧ Examples: notifying police, notifying relevant association
 - ✧ Note: *Car & Universal*'s rogue fraudulent; position where 'rogue' innocent unknown

(vi) Sale by seller continuing in possession (s.27(1) and FO s.9)

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

Document of title

- 'includes any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document

used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented' (s.2)

- Usually documents have nothing to do with title (exception: bill of lading)
- Gives or evidences a person's right to the possession of goods, so that whoever has the document can demand that the goods be delivered to him or to his order
- Rights evidenced by such documents transferable by physical delivery of the document
- Need not be the same one as that possessed at time of sale (*DF Mount*)
- Two categories;
 - (1) Acknowledgement: signed by a person who has physical possession of the goods that he is holding them on a particular person's behalf, and available for delivery to that person (who may or may not be the owner)
 - Typically called 'warrant'
 - Includes a bill of lading (document issued by a sea carrier which acknowledges that the goods in question have been received on board, and which also contains the terms of the contract of carriage)
 - (1) Order: signed by the owner of goods or other person entitled to possession of them, addressed to the warehouseman, carrier or other bailee in whose custody they are, instructing him to deliver the goods to a named person or to his order
 - Usually called 'delivery order'

Significant requirements

(1) Delivery or transfer of possession of goods or documents of title

- Not sufficient that seller should simply resell
- Actual or constructive (*Michael Gerson* (2001))
 - ✧ *Michael Gerson*: E sold plant and machinery to Gerson and leased it back, then subsequently entered into a similar sale and lease-back agreement with S; physical possession with E all along; held sale to S defeated Gerson's title by virtue of s.27(1), as in order for S to be able to grant a lease-back to E there must have been a prior moment in which possession had been constructively delivered to S as buyer

- ✧ Issue of delivery order by seller equivalent to ‘transfer’ of a similar document which came from a 3p (*DF Mount*)

Cf. FO s.2: delivery of goods or document of title not necessary to bring a transaction within it

(2) ‘continues or is in possession’

- Must have continuity of physical possession (*Mitchell v Jones*; *Pacific Motor*)
 - ✧ If in possession at time of sale: ‘continues...possession’
 - ✚ If gave up possession and gave delivery to buyer and subsequently obtain possession again, break in possession
 - ✧ If not had goods when sold them, but came into possession afterwards: ‘in possession’
 - ✧ Includes possession where held at disposal of seller by warehouseman (*City Fur*)
- Change in legal title under which ‘seller’ possess the goods not irrelevant (*Pacific Motor*)
 - ✧ Private transactions between seller and original buyer which might alter the legal title under which the possession was held irrelevant
- Need not be with buyer’s consent

Effect of s.27(1) and FO s.9

- Only affect the title of the buyer who entrusted the goods to the seller (*National Employers’*)
 - ✧ If seller has bad title, buyer only get bad title and thus sub-buyer also has bad title

Possible liabilities of ‘seller’

- (1) Breach of contract with first buyer
- (2) Tort of conversion
- (3) Wrongful interference with the goods

(vii) Sale by buyer in possession (s.27(2) and FO s.10)

“Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other

disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.”

Exception to *Jerome v Bentley*: Although the fact that an owner has let another person have possession of his goods carries no implication or representation that that person has authority to sell them, this latter person may, exceptionally, be deemed to have the power to do so when he is someone who has contracted to buy the goods.

Significant requirements

(1) 'bought or agreed to buy'

- 'bought': not matter the sale was avoided before purchase by innocent 3p (e.g. voidable title obtained by fraud: *Newtons v Williams*)

(2) Possession with consent of seller

- Key to consent: whether seller in fact consented to buyer having possession
 - ✧ Immaterial that consent obtained by criminal offence
 - ✧ Immaterial seller has revoked his consent to the buyer having possession (s.3(2))
- Possession: actual possession by first buyer
 - ✧ Nature of buyer's possession not seem to matter (*Marten*)
 - ✧ But *Forsythe*: held not limited to physical possession
 - ✧ *DF Mount* and *Four Point Garage*: constructive possession
 - ✓ *DF Mount*: goods physically in custody of warehouseman; seller transferred possession to buyer by issuing delivery order
 - ✓ *Four Point Garage*: goods delivered by seller directly to sub-purchase; s.27(2) applied as buyer deemed to have taken constructive delivery of the goods and the seller to have acted as the buyer's agent in making delivery to the sub-purchaser

(3) Delivery or transfer of possession

- 'delivery or transfer': required some voluntary act, though actual physical delivery was not required (*Forsythe*)

- ✧ ‘There must be some act of purported transfer of property by the buyer to the sub-buyer’ (*Forsythe*)
- ✧ Actual or constructive (*Michael Gerson; Four Point Garage*)
- ✧ Mere fact of sale without such delivery or transfer not sufficient
- Document of title need not be the same one which is held in possession with the seller’s consent (*DF Mount*)
 - ✧ Issue of delivery order by buyer equivalent to ‘transfer’ of a similar document which came from a 3p (*DF Mount*)

(4) Sale, pledge or other disposition

Effect of s.27(2) and FO s.10

- Place buyer in possession in the position of a “mercantile agent in possession of the goods or documents of title with the consent of the owner”
- Still need further examination of whether the buyer was acting in the ordinary course of business (*Newtons*) and probably whether there is a sale, pledge or other disposition
- Only affect the title of the seller who entrusted the goods to the buyer (*National Employers’*)
 - ✧ Notional sale by a notional mercantile agent in possession of the goods with the consent of their notional owner
 - ✧ If seller has bad title, sub-buyer also has bad title

(viii) Sale by unpaid seller

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