

Sale of Goods

Sale of Goods Ordinance (Cap.26)

- Codifying statute
- Looking at the words of the statute and not the cases preceding the statute (before the UK 1979 Act)
- Only look at the cases when:
 - (1) When the statute is itself unclear (in order to see what the statute is getting at; maybe the statute is qualifying/codifying/enunciating what has been determined by the case law);
 - (2) Where a term, say “mercantile quality”, has acquired a technical meaning and earlier case laws may be cited to illustrate this meaning; or
 - (3) Where a point is not covered by the statute, older decisions may be followed. (standard practical approach to a codifying statute like SOGO)

For the purpose of SOGO,

- (1) Start with the SOGO text
- (2) Read the cases that may illuminate/explain the facts or (possibly) explain problems that may arise from reading the text (may possibly be answered by looking at previous case law or cases decided after the enactment of the SOGO)

Remember: SOGO only applies to ‘contracts for the sale of goods’

I. Terminology

(a) Contract of sale of goods

- A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration (purpose of a contract of sale) **(s.3(1))**
 - What we are concerned about in the sale of goods is an agreement either to transfer the property right now or transfer property in the future
- May be absolute or conditional **(s.3(2))**
- Acquisition of goods by seller may depend on a contingency which may or may not happen **(s.7(2))**

(b) Sale

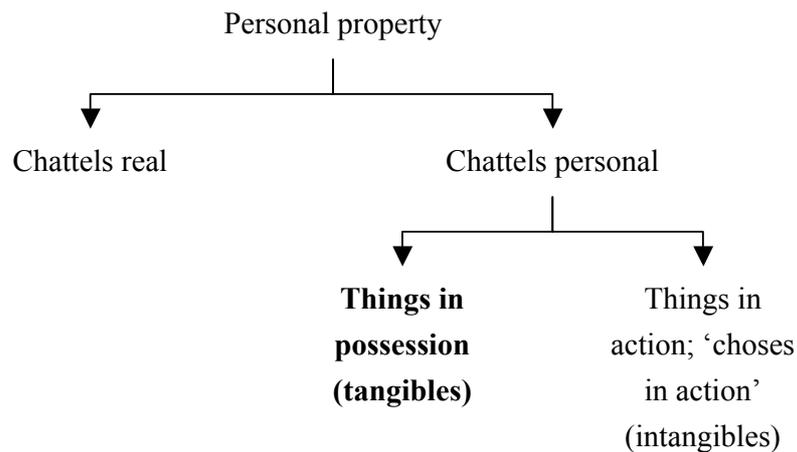
- Where the contract of sale has the effect of transferring property in the goods right there and then at the time of contract of sale **(s.3(3))**

(c) Agreement to sell

- Where property is to transfer in the future (**s.3(3)**)
- Becomes a **sale** when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred (**s.3(4)**)
- If unascertained goods at time of contract, must be agreement to sell as s.18 states that property in unascertained goods cannot pass; the goods must be ascertained/become identifiable before any property can pass

(d) Goods (subject matter of the contract)

- includes all chattel personal other than things in action and money; includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale (**s.2**)



- Examples of goods: ships, aircraft and vehicles; domestic animals, and wild animals which have been reduced into captivity or are dead; water, oil and gases (even air, in the form of compressed air)
- Emblements
 - Crops grown manually (by agricultural labour)
- Industrial growing crops
 - Crops grown by industry, (manual labour)
- Things attached to or forming part of the land which are agreed to be severed before or under the contract of sale

- When things are attached to land, becomes part of the land
 - If agree to sever the crops or whatever and entered into a contract agreement, those crops to be severed under the contract of sale (in terms of contract of sale) then form goods for the purposes of the sale of goods
- Things in action (intangibles)? Not goods for the purpose of SOGO
- A basic example: a contract is an agreement between two parties under which A agrees to do something for B (though B may also agree to do something for A, not look at one side) ; under that contract, B has a right to exercise against A, that right being an intangible right that is enforceable by B against A; that right is a piece of intangible property you have captured, the right itself is a choses/thing in action (a choses/thing that can only be enforced by way of an action in court); choses in action are not the subject of the SOGO
 - Cheque: distinguish cheque itself (physical presence) and the right manifested/evidenced by the cheque (under which someone can claim payment and thus enforceable against the person issuing the cheque); the rights under the cheque are choses in action and the cheque itself is a thing/piece of paper (but not necessarily a thing in action)
 - Animal in the wild state; electricity and other forms of energy; human remains, tissue and organs and bodily products; various forms of IP; computer software and other material in digitised form (distinct from the disk or other object storing it); information, etc.
- Money in the sense of HK dollars/currency: not subject matter of SOGO
- But possible to have a contract of sale relating to money not necessarily be , e.g. very rare bank note no longer in circulation/no longer in use as currency; but very valuable; such bit of money literally, the note itself, the piece of paper representing the money, can be the subject matter of a contract of sale
 - Distinguish money as currency (tangible) and an actual bank note which is bought and sold for its rarity value

(e) Specific Goods

- Goods identified and agreed upon at the time a contract of sale is made (s.2)
- Can be ascertained/identified at the time of contract
 - Must be designated as the unique article(s) that the contract is concerned with and be capable of being so designated (and actually so designated)

at the time of the contract

- Not necessary that the relevant goods should be physically present before the parties at that time
- Possible even though only identified by words of description
- E.g. if agree to sell this particular cup of coffee on my desk, that is a specific good; no other cup of coffee will do
- What if contract to sell a hundred tons of wheat (which can be subject matter of contract of sale as can be severed from land by the time of delivery)? Which particular part of wheat? No particular part of wheat is identified/identifiable; as long as by time of delivery able to deliver a hundred tons of wheat one meets the contract; but no particular cargo, no particular crop of wheat identified, etc. At the time agreeing to buy wheat, the goods are not specific, not yet identified, not yet ascertained

(f) Unascertained goods

- No definition in SOGO
 - For our purpose: can draw distinction between specific goods and unascertained goods
 - Unascertained goods: not able to identify any specific consignment, any specific entity of goods; not identified and agreed on at the time of contract
 - ◆ E.g. the hundred tons of goods, at the moment unascertained, nothing has been specifically identified/appropriated in the contract
- **Ascertained goods (s.18)**: goods must be ascertained before there can be a transfer of the property in those goods
 - Goods which at the time of contract are not ascertained but which become identified as the contract goods at some later time (*Re Wait*)
- 3 different categories of unascertained goods:
 - (i) Goods to be manufactured or grown: goods not yet in existence at time of contract; future goods; cannot be specific/ascertained at time of contract as has yet to be produced, cannot be identified yet
 - S.7: there may be a contract of sale of goods of which has yet to exist, which are yet to be in the future; which the seller does not yet own at the time of contract
 - Therefore not necessary to own the good/need not exist at time of contract of sale
 - (ii) Generic goods (sold by description): e.g. 100 tons of wheat, uncertain which particular crop/assignment, any 100 tons of wheat, nothing

specifically identified

(iii) Unidentified part of specified whole:

- E.g. a particular part of specified hundred tons of wheat > identified
- E.g. 50 tons out of a specified hundred tons of wheat; which part of that ton? Unascertained; no property in goods can pass unless and until the 50 tons are ascertained

(g) Existing goods

- Goods owned or possessed by seller at time of contract
- Sale or agreement to sell

(h) Future goods

- Goods to be manufactured or acquired (i.e. in existence but not yet owned or possessed) by seller after contracting
- Agreement to sell (**s.7(3)**)
- 3 types:
 - (i) Goods to be manufactured by seller (unascertained)
 - (ii) Goods to be acquired by seller (may be specific) or goods not yet in existence (unascertained)
 - (iii) Things which do exist, but are not yet 'goods'

(i) Price

- Consideration in a contract of sale must consist of money (price) (**s.3(1)**)
- May be fixed by contract, left to be fixed in manner agreed or determined by the course of dealing between the parties (**s.10(1)**)
 - Where price not determined in accordance with s.10(1), buyer must pay a reasonable price (question of fact; fixed by court) (**s.10(2)**)
 - Where price to be fixed by valuation of 3p, and such 3p cannot or does not make such a valuation, agreement avoided (**s.11(1)**)
 - ◆ If goods or any part of them have been delivered to and appropriated by the buyer, a reasonable price must be paid
 - 'appropriated': dealt with in some way as if he were their owner
 - ◆ Where 3p's failure due to one party, the other party may maintain action for damages
 - If purposefully left price open, as something to be negotiated between the parties in the future, court no choice but declare that there is no

binding contract (*May & Butcher*; cf. *Hillas* (previous course of dealings))

(j) Property

- SOGO only deals with general property in good, and not merely a special property (s.2)
 - SOGO also not concerned with equitable interest

Property

- Not a thing but a set of legal relations existing between persons in respect of things
- Relative, not an absolute concept
- Two elements: interest and title
 - Transfer of such-and-such a title to such-and-such an interest

2 types of property at common law: general property in goods and special property in goods

- General property: title to absolute legal interest; full ownership
 - 'Title' in ss.23-28: similar meaning to 'property'
 - Title not necessarily good: may be good/bad/indifferent in the scale of relativity
 - Title transferred always that vested in seller at the time of transfer, unless *nemo dat* rule applies or otherwise contracted (unlikely)
- Special property: possession for a limited interest

II. Sale compared to distinguished from other transactions

Bailment

- Delivery of goods (**possession**) by one person to another for a limited purpose, on terms that the identical goods will be returned to the bailor or delivered to a third party in accordance with his instructions at the conclusion of the bailment
 - E.g. you go to someone and give him your goods for safe-keeping; you as bailor transfer possession of the goods to the person as bailee
- May be for reward or voluntary
- May be evidenced by contract (contract may contain the terms and set out the obligations of the bailee towards bailor)
- Bailee's obligation: to take all reasonable care of the goods; all care as is

reasonable in all the circumstances

- E.g. bailment for reward: paid/compensated to keep the goods; probably higher standard of reasonable care expected than when gratuitous/voluntary
- Typical contract of bailment: one where someone, who wishes to ship goods to someone else, take the goods to shippers to arrange for shipment; the shippers bail the goods with the Fay forwarder, who then issues a receipt and usually at the back of receipt are terms on which the Fay forwarder accept the goods
- Very different from sale of goods: no transfer of general property in goods so much as transfer of possession of goods; key of bailment is the transfer of possession of the goods
 - At common law: 2 types of property: general property in goods and special property in goods
 - Transfer of property for the purposes of SOGO: talking about general property or rights and ownership in the goods
 - Bailment is not interested in general property/ownership in the goods; more interested in possession (special property)
 - ◆ E.g. I transfer pouch to bailee; owner is me; bailee takes the couch and on the way he is robbed; someone took the pouch away; that thief is identified; can the bailee sue the thief? At common law, the bailee has a special property in the goods which is sufficient to enable him to sue the wrongdoer for conversion (tort of treating someone else's goods as your own) even though the bailee does not own the goods; in particular, he has the immediate right to possession; at the time when the goods were stolen from him, he was the bailee of the goods, to whom I have transferred the right to possession of the goods. That immediate right to possession is sufficient to enable the bailee to sue the wrongdoer for conversion. (See *The Winkfield* (1902))
 - Completely different set of rules:
 - ◆ SOG about transfer of general property/ownership
 - ◆ Bailment, not really more interested in ownership, more interested in contracts that pass possession, in particular immediate right to possession, in common law terms, special property in the goods
 - See SOGO s.2: property = general property, not merely a special property
- Note comment on TB p.261 (bottom)

Supply of services (contract for work and materials)

- Whether contract of sale or supply of service determined by the 'substance' of the transaction (*Robinson v Graves*)

- If substance is production of something to be sold: sale
- If substance is the skill and labour to be exercised and only ancillary that there will pass from the supplier to the client some materials in addition to the skill: supply of service
- Suppose the paradigm case of offering to paint a portrait; selling portrait or artistic skills as a great artist in painting a portrait you like? Selling a thing (portrait) or supplying a service or doing both?
- Sometimes may have to analyse the situation to see to what extent it is a contract for supply of services, to what extent a contract for sale of goods/transfer of property (chattel personal) and to what extent which bit relates to which (not necessarily mutually exclusive)
 - An attentive advocate will look at the transaction and say which bit is supply of services and which bit is sale of goods and determine what the consequences are
 - For the purpose of this course: look at the consequences of that part of the transaction that relates to the sale of goods

Hire-purchase

- A type of bailment
- When buy something that one cannot afford to pay cash right away, typically pay by instalments; enter into a contract whereby one hires the good over a certain period, and pay monthly hire over that period, and after that period have an option to pay a nominal sum (usually) to purchase the good
- Hire purchase contract: A contract for hiring the goods by paying monthly instalments (effectively instalments for the price + interest (for delay in paying full price)) and at the end has an **option** to purchase the goods for a nominal amount to become the owner of the goods
 - Free to exercise option
 - Usually also has right to terminate the hiring before the expiry of the contemplated period
 - Outside scope of SOGO (and FO), until option exercised
 - *Helby v Matthews (HL)*

- Sale of goods different in that buyer is contractually bound to complete the transaction
 - Within scope of SOGO
 - Credit sale: immediate delivery, pay instalments, property passed at once
 - Conditional sale: immediate delivery, pay instalments, property not passed till whole price paid
- CECO applies

Questions:

- (1) Where one has a hire-purchase contract (view it as a contract of hire coupled with an option to sell); where there is an option to sell, is that a sale of goods; is it subject to SOGO?
- (2) Why bother to have such a complex transaction? What is the purpose? Why not just buy the car and pay by instalments?