

## **Sale of goods: Passing of property**

[as between seller and buyer]

### **I. Basic rules**

#### **(a) No property can pass in unascertained goods (s.18)**

- *Re Wait*: equitable interests play no part in sale of goods
  - Parties to contract of sale can create an equitable interest in goods by express agreement (even so as a term of sale contract; but *Re Wait* has eliminated any possibility that such an interest will be held to have arisen by inference or by operation of law
  - Cannot be a valid trust of unidentified property (*Re Wait*, *Re London Wine*)
- Only when unascertained goods are ascertained will passing of property be possible; but ascertainment not necessarily result in passing of property: still need an appropriation or an intention manifested in some other way (*Re London Wine*)
  - ‘Ascertainment’ – become ‘identified in accordance with the agreement after the time a contract of sale is made’ (*per* Atkin LJ, *Re Wait*)
    - ◆ Usually follow from act of one or both parties or someone designated by them
    - ◆ May be automatic when goods capable of prospective identification
    - ◆ May be by exhaustion (*Wait & James*)
      - If no duty to satisfy from existing stock, goods not ascertained (*Re London Wine*)
      - Even if at time of contract, contract quantity equals to seller’s total stock or collective contract quantity exhausts seller’s stock, not necessarily mean appropriation as seller may be at liberty to fulfil contract from some other source (*Re London Wine*)
  - ‘Appropriation’ – act which is intended and agreed, in terms of the contract, to transfer ownership to the buyer
    - ◆ Even if at time of contract, contract quantity equals to seller’s total stock or collective contract quantity exhausts seller’s stock, not necessarily mean appropriation as seller may be at liberty to fulfil contract from some other source (*Re London*

*Wine)*

- ◆ Cf. *Stapylton Fletcher Ltd*: steps taken by seller after each sale to segregate the relevant quantity from general stock and place them into separate storage; even though no steps taken to allocate particular lots to individual sales, sufficient appropriation, tenant in common
- No present passing of property in future goods (s.7(3))

### **(b) Intention of the parties paramount (s.19)**

(1) *Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*

(2) *For the purpose of ascertaining the intention of the parties, regards shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.*

- Always subject to s.18
- Express and implied intention both given effect
  - Example: *Re Anchor Line*: contract to sell for deferred payment stated risk passed to buyer, court held implied that property remained in buyer (but isn't the converse true?)
  - Intention of parties may sometimes be overridden by the considerations of practicality or by weightier rules of law, e.g. *Romalpa* cases where goods lost their identity

## **II. Statutory presumptions (s.20)**

*Unless a different intention appears...*

(i) **Rule 1:** *Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.*

- *Tarling v Baxter* (standard r.1 case)
- *Dennant v Skinner*: sale contract concluded on the fall of the hammer at an auction sale; subsequent document stating property not passed ineffective (probably a matter of consideration)

- 3 conditions:
  - (1) Unconditional sale – not subject to any condition upon the fulfilment of which the passing of the property depends
  - (2) Specific goods – see ‘Terminology’ notes
  - (3) In a deliverable state – ‘in such a state that the buyer would, under the contract, be bound to take delivery of them’ (s.2(4))
    - Question of fact
    - ‘[S]tate in which the thing will be the article contracted for by the buyer’ (*Underwood*)
    - ‘[N]ot mean deliverable in the sense that it is properly packed or anything of that kind’ (*Underwood*); not restricted to ‘physically deliverable’ (e.g. fruit ready for picking)
    - ‘[E]verything done to it that the sellers had to do to it as an article’ (*Underwood*)
    - ‘where there is work to be done in relation to the article sold before the contractual obligations of the sellers are completed, what is the relevant importance of that work in relation to the contract when deciding whether the property has passed and in particular whether the article or goods in question is or are at a particular moment of time in a deliverable state under [s.20 r.1]’ (*Philip Head*)
    - Examples
      - ◆ *Kursell*: trees not cut; timber not in deliverable state
      - ◆ *Underwood*: fixture to land; buyer’s intention to buy loose chattel; the act of detaching has to be done before the chattel can be deliverable as fixture has to be detached so as to make it a chattel again
      - ◆ *Philip Head*: very heavy carpet not in deliverable state as not laid

- Sealy's view: problem as buyer's right to reject due to breach of condition lead to
- My view: no problem as duty to take delivery  $\neq$  right to accept/reject/repudiate
  - Take delivery first, then decide whether accept/reject/repudiate

(ii) **Rule 2: Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.**

- Examples: *Underwood*; *Philip Head*
- Where act to put goods into deliverable state to be done by buyer or 3p?
  - ◆ R.2 not apply
  - ◆ Court may imply a condition that property not pass till goods have been put into deliverable state
    - Example: only in deliverable state upon obtaining of certificate for condition of second-hand car; immaterial whether obtained by seller or buyer

(iii) **Rule 3: Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other acts or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.**

- Act must be done by seller
  - ◆ *Turley v Bates*: when by seller at his own expense; r.3 not apply; looked at intention of parties
  - ◆ *Nanka-Bruce*: weighing of goods by buyer's customers merely a test to see whether goods fitted the weights as represented (as weight represented, priced fixed)
  - ◆ If price not ascertained but risk/property passed, estimated price to be paid by buyer (*Castle v Playford*) (add to notes on price)

**(iv) Rule 4: Where goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer—**

- (a) *when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;*
- (b) *if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.*

- ‘On approval’ or ‘on sale or return’ – the person to whom the goods have been delivered has the option of buying the goods or not as he chooses, and until he has bought them (or deemed by r.4 to have done so), property in the goods remains with the seller
  - ◆ No sale until option exercised
- Adoption of transaction – act inconsistent with his being other than a purchaser/his option to return
  - ◆ Some act of election on buyer’s part (by words or conduct)
  - ◆ Not sufficient for seller simply to show that buyer is unable to return the goods (*Elphick*: horse delivered on 8 days’ trial died from an illness on the third day)
  - ◆ Example: ‘buyer’ sells or pledges the goods (*Kirkham*: jewellery)
- Possible to become owner by inaction (r.4(b)) (*Poole*)
- Notice of rejection – In the absence of a contrary intention, a notice rejecting unsold goods did not have to be in writing or to identify with certainty the goods to which it related, but sufficed if it identified them generically so long as the generic description enabled them to be identified with certainty (*Atari* (UK: 1998))
  - ◆ Not matter actual quantity and identity of unsold goods are not specified in the notice
  - ◆ Not matter goods were not physically capable of collection when the notice was issued, provided that the goods are collected within reasonable time to return to the ‘seller’
- Rebuttable presumption – e.g. ‘Goods had on approbation or on sale or return remain the property of [the ‘seller’] until such goods

are settled for or charged.’; different intention found; property not passed until goods paid for or charged (*Weiner v Gill*)

(v) **Rule 5: (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.**

**(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.**

- ‘Appropriation’ – act which is intended and agreed, in terms of the contract, to transfer ownership of a specific article to the buyer (and nothing remains to be done in order to pass it) (*Wait v Baker*)
  - ◆ By or under the *authority* of one party with the assent of the other
  - ◆ Involve actual or constructive delivery (*Twigg*)
  - ◆ More than a mere act of selection and more than a purely contractual earmarking of goods to answer the contract
  - ◆ Assent – appropriation involving change of ownership made by parties’ agreement (*Carlos*)
    - Mere notice to other party not necessarily give rise to an inference of assent
      - *Pignataro*: deemed assent where buyer silent for a long time after receiving notice of appropriation made in consequence of his own letter
  - ◆ Appropriating act usually last act to be performed: If a further important and decisive act to be done by seller after making goods ready, prima facie goods not unconditionally appropriated and property not pass under r.5(1) till final act done (*Twigg*: FOB contract; intention of property passing upon shipment; not when goods packed; in principle may still put some other goods on board)

- ◆ Examples
  - *Aldridge v Johnson*: assent before appropriation by way of buyer inspecting barley in bulk and sending sacks; barley appropriated when filled into sacks provided by buyer (155 out of 200 sent) and thus property in those 155 sacks passed; no property in barley, equivalent to the remaining 45 sacks to be filled, passed (bulk in excess of that purchased by buyer)
  - *Rohde*: subsequent assent after selection
  - *Langton*: property passed when oil filled into buyer's bottles; assent (inferred) by way of sending bottle
  - *Mucklow*: painting of buyer's name on unfinished barge not appropriation as seller not bound to supply the exact barge; may satisfy contract with another barge
- ◆ Even if at time of contract, contract quantity equals to seller's total stock or collective contract quantity exhausts seller's stock, not necessarily mean appropriation as seller may be at liberty to fulfil contract from some other source (*Re London Wine*)
- ◆ Cf. *Stapylton Fletcher Ltd*: steps taken by seller after each sale to segregate the relevant quantity from general stock and place them into separate storage; even though no steps taken to allocate particular lots to individual sales, sufficient appropriation, tenant in common

### III. Acceptance and rejection

#### Acceptance

- Latest point at which property can pass under a contract of sale
- Point at which buyer loses, or abandons, any right he may have to reject the goods, after which his remedy, if any, is confined to a damages claim
- Property may pass before time of acceptance/rejection
  - Rejection leading to reversioning of property in seller
  - Property passed subject to a condition that it reverts if upon examination of the goods the buyer finds them to be not in accordance with the contract
    - ◆ “conditional property” (condition subsequent)
    - ◆ No acceptance as long as merely dealing with condition subsequent in a way not inconsistent with seller’s reversionary interest (**s.37**) (*Kwei Tek Chao*)
      - Consistent: pledge or transfer of documents
      - Inconsistent: dispatch of goods to 3p