

Sale of Goods

- Contract whereby the seller transfers or agrees to transfer property in goods to the buyer for a money consideration called the price
 - Elements
 - Formation
 - Ordinary elements of a contract must be present
 - Offer
 - Acceptance
 - Consideration
 - Contract may be made in writing, by word of mouth, or by implication from the conduct of the parties
 - Goods
 - Includes all personal chattels other than things in action and money
 - Includes crops and things attached to or forming part of land which are agreed to be severed for sale
 - Eg. removal of house in entirety: *Symes v Laurie*
 - Does not include land
 - Does not include shares or debentures
 - Does not include software package supplied as an online download
 - Classification of goods
 - Existing
 - Goods owned or possessed by the seller
 - Future
 - Goods to be manufactured or acquired at a later date
 - Specific
 - Goods identified and agreed upon
 - If goods perish without knowledge of the seller, contract is void
 - Unascertained
 - Goods under a description where no particular goods are identified and agreed upon eg. 100 apples
 - Money consideration
 - Can't give away free or transferred by means of barter
 - Fact that price is not stated in a contract does not contract ineffective
 - Buyer must pay reasonable price (question of fact)
 - Where agreement to sell goods at price fixed by a valuation of a third person
 - Agreement avoided if they do not make valuation
 - If buyer has already taken the goods, he must pay a reasonable price
 - If seller/buyer stops third party, innocent party can bring action for damages
 - General rule: price is paid upon delivery
 - Transfer of property
 - Main substance must be for the transfer of ownership in goods
 - Where transfer is ancillary, won't be for transfer of goods
 - eg. where agreement is the skill and experience to be displayed by one of the parties in performance and the transfer is only ancillary

- Capacity to buy and sell
 - Minors or person with mental incapacity or drunkenness
 - Must pay a reasonable price
- Sale and agreement to sell
 - Sale
 - Occurs where the ownership of the goods is transferred to the buyer at the time of the contract
 - Rights under a sale
 - Seller can sue buyer for price
 - Buyer can sue for damages if seller defaults, or for conversion when seller wrongly disposes
 - Risk of loss after sale is with the buyer as ownership has passed
 - Agreement to sell
 - Arises where the ownership of the goods is to be transferred at a future time, or subject to some condition
 - A contract to sell unascertained goods is not a sale but an agreement to sell, and needs some act to complete the sale such as delivery or appropriation of specific goods: *Jams v GMB Imports Pty Ltd* [1979]
 - Rights under a sale
 - Seller can sue buyer for damages if buyer defaults
 - Buyer can only sue for damages if seller defaults as property has not passed
 - Risk of loss is with the seller as ownership has not passed

Terms of the Contract

- Conditions, warranties and stipulations
 - Condition
 - Term so vital to the existence of the contract
 - Breach gives the innocent party a right to rescind the contract and claim for such damages as he or she may have sustained
 - Can just bring action for damages only
 - Includes
 - Time of delivery (unless contrary intention is shown)
 - Warranty
 - Term of lesser importance
 - Breach merely gives rise to a claim for damages
 - No right to repudiate the contract and reject the goods
 - Include
 - Usually time of payment
 - Intermediate stipulation
 - Neither a condition or warranty
 - Breach may constitute repudiation depending on seriousness of the breach: s4(5) SOG Act
 - General rules
 - Express condition or warranty will negate an implied condition or warranty if inconsistent with it
 - Whether a stipulation is a condition or warranty is a matter of construction
- Conditions implied in contracts of sale

- Condition as to title
 - That the seller has the right to sell the goods
 - If buyers title is avoided due to lack of title of the seller
 - Refund for any moneys paid even if buyer had temporary use and enjoyment: Rowland v Divali [1923]
 - If seller acquires title before buyer rescinds, seller can hold the buyer to the contract: Patten v Thomas Motors Pty Ltd [1965]
 - Following warranties as to title are also implied by the Sale of Goods Act
 - Goods are free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made
 - Buyer will have and enjoy quiet possession of the goods
- Correspondence with description
 - Only applies if goods are sold by description
 - Requirement is satisfied where the buyer has not seen the goods but is relying on a description alone: Valey v Whipp [1900]
 - Or where the buyer has seen and examined the goods provided the buyer bought them as corresponding to a description: Beale v Taylor [1967]
 - Where sold by sample as well as description, must correspond with both
 - Buyer entitled to reject goods, or sue for damages as buyer did not receive what was bargained for
- Merchantable Quality
 - Usually only applies where goods are bought by description
 - Sale by description so long as it is not merely as the specific thing but as a thing corresponding to a description: Grant v Australia Knitting Mills Ltd
 - Eg. can be something displayed before him on the counter
 - Means in essence that the goods are commercially saleable under the description they were sold
 - Fit for a purpose that they are normally used, having regard to the price paid and other circumstances of sale:
 - No implied condition if buyer has examined the goods in regard to defects which such examination ought to have revealed: Henry Kendall & Sons v William Lillico & Sons
- Fitness for purpose
 - If buyer expressly or by implication makes known to the seller the particular purpose the goods are required, so as to show that he relied on the sellers skill or judgement, and the goods are of a description which it is in the course of the sellers business to supply
 - Goods must be reasonably fit for such purpose
 - Seller does not need to be informed of the particular purpose where such purpose is the ordinary use for which such goods are used
 - eg. milk vendor supplying milk to customer should have stated that the milk was not for human consumption
 - Where prescribed use is not the only or ordinary use, buyer must bind the mind of the seller to the particular purpose and that he is relying on the seller
 - Reliance does not need to be expressed in the contract for sale
 - Sufficient if matters are adverted to during negotiations

- Sufficient if buyer only relies partially on the skill and judgement of seller, as long as the matters of which the buyer complains are items that were relied upon
 - NOTE: where knowledge is not passed, caveat emptor applies
 - Let the buyer beware
 - No implied condition or warranty as to fitness for any particular purpose
 - Sale by Sample
 - Implied condition that: s20 SOG Act
 - The bulk will correspond with the sample in quality
 - The buyer will have a reasonable opportunity of comparing the bulk with the sample
 - The goods will be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample: Drummond v Van Ingren & Co
- Exclusion of the terms implied by the Sale of Goods Acts
 - Implied terms may be negated or varied by express agreement between the parties: s57 SOG
 - A clause may be included in the contract excluding liability as follows
 - All conditions, warranties and liabilities implied by statute, common law or otherwise are excluded
 - Does not protect the seller against any express warranty which may be included in the contract: Andrews Bros v Singer
- When a condition is to be treated as a warranty
 - Instead of repudiating, a buyer may waive a condition or elect to treat the breach of condition as a breach of warranty: SOG s16
 - Where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect

Transfer of Property

- Property and possession
 - Property relates to ownership or title
 - Possession refers to the custody or control of goods
- Transfer of ownership or property in goods
 - Primary rule for ascertaining when the ownership passes to the buyer: s22 SoG Act
 - Specific goods – at the time as the parties intend it to pass, taking into account the terms of the contract, the conduct of the parties and the circumstances of the case
 - Unascertained goods – no property can pass unless and until the goods become ascertained
 - Subject to above, following sub rules
 - Unconditional contract for the sale of specific goods in a deliverable state
 - Passes when the contract is made, immaterial whether the time of payment or delivery have been postponed
 - Sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them in a deliverable state

- Does not pass until thing is done and buyer has notice of it
 - Contract for sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act for the purpose of ascertaining the price
 - Does not pass until this is done and buyer has notice
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 - Goods delivered to buyer on approval, or on 'sale or return'
 - When buyer signifies their approval or acceptance, or does any act adopting the transaction
 - If doesn't signify but retains the goods, the expiration of a time fixed for return or a reasonable time has passed
 - reasonable is a question of fact
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 - Sale of unascertained or for future goods by description
 - When goods of that description and in a deliverable state are unconditionally appropriated to the contract
 - Where seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer
 - Seller is deemed to have unconditionally appropriated the goods of the contract
 - Agreement covers by description unascertained goods
 - Once goods answering that description and in a deliverable state are unconditionally appropriated to the contract
- Reservation of right of disposal
 - Seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled
 - Property in the goods does not pass to the buyer until conditions imposed are fulfilled
- Romalpa Clauses
 - Allows seller to rollover the goods in the event of buyer's insolvency, therefore preventing the goods from becoming part of the property of the buyers estate distributable amongst the creditors
 - Will state something such as
 - Until the purchase price is paid, the buyer acts as agent for the seller when selling the goods
- Risk
 - Risk of loss or damage to the goods is linked with ownership
 - Risk of loss prima facie passes with property
 - Loss of specific goods destroyed at the time of agreement
 - Falls upon the seller and contract is void
 - A contract for the sale and delivery of an indivisible parcel of goods may be avoided if part of the goods is not forthcoming
 - Perish of stock of goods from which seller intended to fulfil sale of unascertained goods has perished
 - No ground for avoidance, seller required to find other goods to tender in performance of the contract

Title of Transferee

- General rule - Buyer cannot obtain a better title to such goods than that of the transferrer
- Buyer does not acquire a good title where
 - Seller is not the owner and does not sell them with the consent of the owner
- Exceptions
 - Where the owner is estopped from denying the authority of the seller
 - Where seller appears to have authority to sell the goods and the goods are bought by the buyer in good faith and for value
 - Merely parting with possession of goods will not of itself raise an estoppel against the true owner.
 - Must usually have been conduct on the part of the true owner amounting to a representation that the person in possession of the goods was entitled to sell them
 - A sale by a mercantile agent or a sale under special common law or statutory power of sale
 - When goods are sold by a mercantile agent to a person who takes them bona fide, such person obtains a good title to the goods, notwithstanding that the principal may have revoked the agent's authority to sell
 - A sale by a person having a voidable title
 - Eg. a title gained through fraud
 - If title has not been avoided at the time of 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
 - If seller's title is void, buyer gains no title
 - A sale by a seller or buyer in possession after the sale
 - Further sale of the same goods by a seller still in possession
 - If the person receiving them is acting in good faith and without notice of the previous sale, has the same effect as if the transaction was authorised by the owner that is the original purchaser: s27 SoG Act
 - Pacific Motor Auctions v Motor Credits
 - Sale by buyer in possession
 - If the person receiving them is acting in good faith and without notice of the rights of the original seller, has the same effect as if the buyer was a mercantile agent entrusted by the owner with the goods or documents of title: SOG s208
 - Onus is on the purchaser
 - Notice means actual and not constructive notice
 - Obviously suspicious such as to put the buyer on inquiry is enough: Robinson Motors v Fowler

Performance of the contract

- Payment and delivery are concurrent conditions
 - Seller must be ready and willing give possession of the goods in exchange for the price vice versa: s31
- Rules as to delivery
 - s32 SoG Act Rules
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 - Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending on each case on the contract between the parties

- Apart from any contract, the place of delivery is the seller's place of business or the seller's residence
 - Where goods are to be delivered by no time is fixed
 - Must send in reasonable time
 - Where the goods at the time of sale are in possession of a third person
 - No delivery unless the third person acknowledges to the buyer that he or she holds the goods on the buyer's behalf
 - Demand or tender of delivery must be at a reasonable hour
 - Expenses of putting the goods in a deliverable state fall on the seller (unless otherwise agreed)
 - Where the seller is authorised or required to send the goods to the buyer
 - Delivery to a carrier for the purpose of transmission to the buyer is, prima facie, deemed to be a delivery of the goods to the buyer
 - General rule that the seller must make the arrangements with the carrier for delivery
 - If goods to be delivered by boat
 - Generally duty of the seller to notify the buyer so that the buyer may insure the goods – if no notification, goods are at seller's risk
 - If buyer does not take delivery within a reasonable time after a request, buyer is liable for any loss occasioned by the buyer's failure, and also for a reasonable charge for the care and custody of the goods
 - Does not affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract
- Constructive or symbolic delivery
 - Eg. handing keys to a boatshed to a buyer so that he can take delivery of a boat at his convenience
 - To be valid, constructive delivery must have the effect of immediately subjecting the goods to the control of the person to whom delivery has been made
- Delivery of wrong quantity or mixed goods
 - When delivered less than what was contracted for
 - Buyer may reject them, or accept and pay for them at the contract rate: s33
 - When delivered more than what was contracted for
 - Buyer may accept the goods included in the contract and reject the rest, reject the whole, or accept the whole and pay for them at the contract rate
 - When delivery is mixed with goods of a different description
 - Buyer may accept the goods contracted for and reject the rest, or reject the whole: *London Plywood v Nasic Oak*
- Instalment Deliveries
 - Unless otherwise agreed, the buyer of the goods is not bound to accept delivery by instalments
 - If the default in instalment delivery amounts to a slight breach of the contract only and persistent breach or repudiation of the contract is not contemplated, then the failure to a minor degree of delivery would not amount to a repudiation of the whole contract
 - Consider
 - 'First, the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability or improbability that such a breach will be repeated' – *Maple Flock v Universal Furniture Products*