

## Transfer of Property

### Sale by Sample

**S 20** of the *Goods Act* provides that

- (1) A contract of sale is a contract for sale where there is a term in the contract express or implied to that effect.
- (2) In the case of a contract for sale by sample –
  - a. There is an implied condition that the bulk shall correspond with the sample in quality;
  - b. There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
  - c. There is an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

**Implied condition of a sale by sample** supposedly means that where a sample is offered in the course of negotiation, with the implicit or explicit assurance that the bulk will correspond to the sample.

And where the parties intend that the contract is a sale by sample contract, that the seller it'll be found to have breached the term where the bulk does not conform to the sample.

A sale **does not** become a sale by sample contract simply because a sample is offered to the buyer prior to the sale taking place.

Section 20(1) serves to restate this limitation by requiring that the parties must have expressly or implicitly required that the contract be a sale by sample contract.

- Authority: ***Drummond & Sons v EH Van Ingen*** p61.

Things to note from Lord MacNaghten's statement in *Drummond & Sons v EH Van Ingen*:

- The sample and the context within which it is offered must reflect the intent of the parties that the contract is to be a sale by sample contract.
- Second the buyer must have an opportunity to examine the sale.
- Any defects which a reasonable examination cannot reveal cannot be argued against the seller.
- However, if a defect could not reasonably have been discerned the buyer does not lose the benefit of the implied term.
- Where the bulk does not correspond with the sample, there is no defence to argue that a simple procedure can be applied to the bulk to bring them into the same condition and quality as the sample. (If rest of order does not match initial sample)
  
- In the case of ***Godley v Perry***, the sale of a toy catapult which broke causing a serious injury to a child, was held to be a breach of a sale by sample contract because the sample which was shown was superior to the toy received and sold in bulk.
- Plaintiff sued the shopkeeper, who in turn with the wholesaler pleaded the s 20 equivalent against them.
- Court held that both the sale by the wholesaler to the shopkeeper and by the importer to the wholesaler were sales by sample and that the defect within the catapult could not have been discerned by examination.

- In ***LG Thorne Ltd v Thomas Borthwick & Sons (Asia) Ltd***, a sample was offered to the plaintiff in the course of negotiations.
- Plaintiff was satisfied and thus compelled to enter in a contract with the defendant.
- However, the contract itself had no references to the sample.
- Dispute arose as goods provided were different to sample.
- Was it a sale by sample? High court held that the parole evidence rule applied and that verbal exchanges as to the sample could not be used to vary the terms of the written contract.
- Thorne illustrates the limitation that is created by s 20(1) in that in order for the implied condition to apply, there must first be a term that the contract itself is a sale by sample contract.

## The Right to Sell, Quiet Possession and Freedom from Encumbrance

**Section 17(a)** of the **Goods Act** contains a provision imposing an **implied condition** that the seller has a right to sell the goods. Requires that the seller either has title or has a right to sell the goods on behalf of the true owner.

The **purpose** for this provision is to ensure that when the buyer purchases goods from the seller they will receive the goods free from any action by the true owner trying to recover these goods.

Selling stolen goods, or goods without owner's consent

- Breach of this section is a breach of a condition which gives rise to a right in the buyer to treat the contract as repudiated (rejected) and to claim damages for the breach of the condition
- Authority: ***Rowland v Divall***
  - Divall unknowingly bought a car from a thief
  - Divall later sold car to Rowland who fixed it up and sold it to a police officer.
  - Police officer had car taken off him and requested refund from Rowland. Rowland then sued Divall.
  - Court of Appeal found in favour of Rowland on the basis that he had not received what he had paid for (a non-stolen car).

Seller will assume liability regardless of whether they knew there was an impediment to their right to sell the goods.

There is a possibility for the seller to 'perfect' their title and thereby evade liability

Example: Selling items before the rights are transferred to the seller. This could be due to needing the money to buy items from true owner.

Implied condition that the seller has the right to sell is not constrained strictly to ownership, a seller may breach the condition where other rights and obligation affect the goods. For example case below.

- Authority: ***Niblett Ltd v Confectioner's Materials Co Ltd***
  - Seller sold goods which had a trademark upon them
  - Goods belonged to the seller but the trademark belonged to a third party who sued for infringement.
  - Held that the seller has breached the implied condition

## Perfecting of Title

Perfecting of title will **nullify** the **liability** that arises where a seller has sold goods without having the right to sell them.

- Authority: ***Butterworth v Kingsway Motors***
  - Seller was a hirer of a car under a hire-purchase agreement. (Hire till paid off)
  - She sold car before it was fully paid off, and bought and sold several times after.
  - In each sale, the implied condition that the seller has the right to sell was breached.
  - Ultimate buyer became aware of this defect and sought a remedy from his immediate seller.
  - The first seller paid all the monies under the hire-purchase agreement and therefore perfected the title shortly after above dot point.
  - This perfected title was then fed down the line. However, the purchase price was repaid to the buyer in this case.
  - The seller Kingsway Motors, recovered some damages from the person who sold them the car.

Implied Warranty of Quiet Possession

**Implied warranty** that the buyer will have **quiet possession** is somewhat related to the implied condition that the seller has the right to sell the goods.

- Authority: ***Microbeads AG v Vinhurst Road Markings Ltd UK***
  - Denning LJ stated ‘the words “a right to sell the goods” means not only a right to pass the property in the machines to the buyer, but also a right to confer on the buyer the undisturbed possession of the goods’.

**Implied warranty** as to **quiet possession** requires the buyer’s possession of the goods shall not be disturbed by others as a result of an act or omission on the part of the seller.

- Authority: ***Rubicon Systems Ltd v United Paints Ltd***

Sale of computer system in which a time-lock had been wrongfully installed, resulted in a breach of the warranty of quiet possession when the time-clock was later activated, denying the buyer access to the system.

- Authority: ***Niblett Ltd v Confectioner’s Materials Co Ltd***
  - The failure to resolve the trademark issue meant that the buyer was denied their right to quiet possession.

The warranty as to quiet possession may be breached where goods are sold to a buyer while the immediate seller has not paid for the goods.

The implied warranty to quiet possession exists both at the time of sale and immediately thereafter. It will often be the case that the implied warranty to quiet possession will be pleaded alongside the implied condition that the seller has the right to sell the good.

Strictness with which implied warranty is applied is evident in the case of *Microbeads* p65.

- The buyer bought a road-marking device from two Swiss companies. Unbeknownst to both the buyer and the seller, an English company had applied for a patent for a road-marking machine.
- Patent had not been granted at the time of sale but granted later.
- Buyer found the road-marking device unsatisfactory and refused to pay for it.
- Swiss sellers sued for the price and the buyer counter-claimed on the basis that the implied warranty as to quiet possession had been breached.
- Sellers claimed that in order for the warranty to have been breached, the defect must have existed at the time of sale.
- However, English court of Appeal disagreed.

- With respect to the equivalent of s17(a) of the Goods Act LJ Denning said:  
 “seems to me that when a buyer has bought goods quiet innocently and later on he is disturbed in his possession because the goods are found to be infringing a patent, then he can recover damages for breach of warranty against the seller. It may be the seller is innocent himself, but when one or other must suffer, the loss should fall in to the hands of the seller: because, after all, he sold the goods and if it turns out they infringe a patent, he should bear the loss. In the present case the Prismo company can sue or infringement now and stop the buyer using the machines. That is a clear disturbance of possession. The buyer is not able to enjoy the quiet possession which the seller impliedly warranted that he shall have.
- While the seller had the right to sell the good, due to no impediment at the time of sale, the later grant of the patent placed the seller in breach of the implied warranty of quiet possession.
- Might seem harsh but the seller has to assume the liability.
- Section 17(C) also provides an implied warranty that the goods are free from encumbrance
- Effect of the implied warranty is that the goods will be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time the contract is made.
- Example: Person bought a car and then sold it, but the previous owner had unpaid taxes owing. Car was seized by the state.
- Plaintiff was forced to pay the tax to retrieve the car so that the car could be returned to the immediate buyer.
- The plaintiff successfully sued the defendant.
- Unpaid taxes were an encumbrance.

## Key Points

For the Goods Act to apply there must be:

- (1) A contract of sale
- (2) Which relates to the goods
- (3) The consequence of which property in the goods passes from one party to the other
- (4) And the property passes in exchange for consideration

The Goods Act implies terms into sale of goods contract. Section 17-20 deal with sales by description, merchantable quality, fitness for purpose, sale by sample, freedom from encumbrance and quiet possession.

S18 of the Goods Act deals with the implied obligation of correspondence with description.  
 S 19 of the Goods Act implies a term that the goods must be fit for the purpose for which they are sold.

S19(b) of the Goods Act provides that where goods are bought by description from a seller who deals in goods of that description (whether they be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality.

S 20 of the Goods Act deals with the implied condition of sale by sample.

S17(a) of the Goods Act contains a provision imposing an implied condition that the seller has a right to sell the goods.

S17(b) of the Goods Act entitles the buyer to the quiet possession of the goods.

S17(c) also provides an implied warranty that the goods are free from encumbrance.