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| **(1) Is this contract governed by the *Sale of Goods Act*?** |

1. **Is this a contract for goods? – If yes, then governed by SOGA.**
2. **Is this a contract for land? – If yes, then not governed SOGA**
   1. **Statutory starting point 🡪 s.1(b)**
      1. Goods include growing crops and things attached to or forming part of the land – agreed that these are to be severed either before or under the contract of sale
   2. **Timing at which the goods are to be severed**
      1. *Fredkin v. Gliens*: If the time is specified then contract for sale of goods. If unspecified then sale of interest in land. Becomes sale of land when the goods are severed.
      2. *Carlson v. Duncan*: If time is unspecified (“as much time as you please”) then goods must be severed within a reasonable time for contract to be for sale of goods.
3. **Is this contract a barter? If yes, then not governed by SOGA.**
4. **Is the price set out in money or money value? If yes, then not a barter, it’s a sale.**
   1. **Statutory starting point 🡪 s.6**
      1. A contract of sale of goods is a contract where the seller transfers/agrees to transfer the property in the goods to a buyer for money or money value
      2. Dollar value of what the buyer is paying must be either set out in money terms **or** be easily ascertainable (10% of the market value)
      3. *Messenger v. Greene*: If property is parted with for valuable consideration that is either actual money **or** measured in money terms (ascertainable/determinable), then the contract is not a barter.
5. **Is this contract for labour? If yes, then not governed by SOGA.**
6. **Is this contract for materials? If yes, then governed by SOGA.**
   1. *Robinson v. Graves*: Ask whether the application of skill and labour in the production of the product is the substance of the contract. If so, then contract for labour
      1. *Preference for goods test* 🡪 If one party is meant to own goods at end of contract that originally belonged to other party then sale of goods
      2. *Preference for labour test* 🡪 Is the price for labour or goods higher? Usually labour will be more expensive.
      3. *Essence test* 🡪 Is the contract essential for owning property (sale of goods) or having work done (labour contract)?
7. **Is this contract for labour and materials? If yes, then 3 options for the buyer to get protection for the portion pertaining to goods**
   1. *Young and Marten Ltd. v. McManus Childs Ltd.*: In a contact for both goods and labour the buyer can get protection similar to SOGA from the common law to the extent that the contract is for goods. (Uses method iii)
      1. Expressly stipulate in the contract what protection that goods are getting
      2. Divide the contract into 2 🡪 one for goods, one for labour
      3. Use the common law instead of the statute re: *Young*
   2. *Gee v. White Spot*: If the contract is primarily to transfer goods from one party to another then an incidental service component won’t change its characterization from a sale of goods contract
8. **Is this a lease contract? If yes, then not governed by SOGA.**
9. **Can this lease contract be characterized as a sale? If yes, then governed by SOGA.**
   1. **Essential difference** 🡪 A contract of sale transfers a general property interest whereas a lease contract transfers a specific property interest (temporary possessory interest
   2. A true lease is when B uses the property for a period of time, then returns it to A with the value intact
   3. A lease becomes a sale when there is a compulsory lease period + something else
      1. Automatic transfer to title to the lessee at the end of the lease
      2. Possession reverts back to the lessor at the end of the lease but there is no commercial value remaining in the property
      3. Option to purchase is exercised **or** it’s not a true option
   4. *Lee v. Butler*: A conditional sale (eg. hire-purchase agreement) is where the lessee has possession but the seller retains ownership, and the lessee will become the owner once payments are complete is a sale of goods.
      1. Lessee can transfer good title to a *bona fide* 3rd party purchaser for value prior to completing payments.
      2. WHY? – **s.30(3)** A buyer in possession dealing with a good faith purchaser can transfer title to equity’s sweetheart as if buyer was the true owner’s agent
      3. To get this protection ES must characterize the lease as a sale
   5. *Helby v. Mathews*: A lease cannot be characterized as a sale if the ownership will not inevitably pass at the end of the lease period.
      1. A  *bona fide* purchaser for value would not be able to claim the protection of **s.30(3)**
10. **Is this an agency/consignment contact?**
11. **If yes, can it be characterized as a sale? If yes, then there are two contracts of sale – both of which are governed under SOGA** 
    1. **True consignment**🡪 A passes ownership to C through B
       1. The contract of sale is between A and C
       2. B is never the owner and has no responsibilities of ownership
    2. **Sale** 🡪 when the consignment contract between A and B can be characterized as a sale
       1. There are two contracts of sale: one between A + B, and B + C
       2. B obtains ownership in the interim and passes it to C
    3. A consignment contract is characterized as a conditional sale when B will become the owner if B is unable to find a buyer
    4. *Weiner v. Harris:* A *true agency* contract exists when B gets possession of goods from A with no right to buy + instruction to sell.
       1. If B sells goods to C and C is a BFPV, C can claim protection of **s.59**
       2. Although B is in breach of its agency contract with A, B has possession and can transfer good title to C
       3. A is estopped from denying B’s ostensible authority to sell
    5. *Re: Stephanian’s Persian Carpets Limited*: A *true consignment* exists when B never becomes the owner, never has the responsibilities of ownership.
       1. It cannot be characterized as a conditional sale when B will not become the owner if B is unable to find a buyer.
       2. If B has no obligation to pay A until B either sells the goods or buys the goods then this is a consignment contract
    6. If the contract between A + B can be characterized as a conditional sale then a BFPV can claim the protection of **s.30(3)**
       1. If it’s a conditional sale then B is a buyer, not an agent
       2. Ownership passes through B to C and C gets good title

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| **(2) What are the elements of the contract governed under SOGA?** |

1. **Does the buyer have capacity? If not, s.7 states that the contract is void or voidable**
   1. **Void**🡪 the contract never existed, therefore there can be no enforcement or remedies
   2. **Voidable** 🡪 the contract exists until the buyer actively disaffirms it, at which point the contract is rescinded
   3. **Rescission** 🡪 the contract is set aside and the parties are set back to square one
   4. **Contract of sale for necessaries** 🡪 **s.7(3)** states that if an incapacitated person enters into a contract of sale for necessaries at a reasonable price then the contract stands
      1. If an incapacitated person pays an unreasonable price then under **s.7(2)** the contract is preserved and the price is replaced with a reasonable one
   5. *Bawlf Grain Co. v. Ross*: An incapacitated person must actively disaffirm the contract within a reasonable time of regaining capacity.
      1. Reasonable time is determined dependant on the nature of the goods
      2. Silence stretching past the elapse of the reasonable time period will be deemed to be affirmation of the contract
2. **Have the parties agreed on the price? If not, and the contract is silent on price then under s.12(2) the buyer must pay a reasonable price.**
   1. **s.12(1) 🡪** price can be set in 3 ways
      1. set by the contract, contract sets a mechanism to agree, determined by the course of dealings between the parties and the customary use of the product
   2. *May v. Butcher*: An agreement to agree is not enforceable.
      1. But the doctrine of reasonable price cannot be used since in such a situation the contract is not silent on price.
   3. *Montana Mustard Seed Co. v. Gates*: A contract will not fail if it is silent on price.
      1. The doctrine of reasonable price will come into play as per **s.12(2)**
      2. The courts will fix a reasonable price to be determined in all the circumstances if the parties cannot agree on one.
   4. **s.13(1) 🡪** If a contract stipulates that the price is to be set by third party valuation and the 3rd party doesn’t do so, the contract is avoided (rescission).
      1. If (any part of) the goods have been delivered to and appropriated by the buyer then the buyer must still pay a reasonable price for the goods.
3. **Is this contract for future or existing goods?**
4. **Is this contract for specific, ascertained, or unascertained** **goods?**
   1. **future goods**🡪 **s.1** states that these are goods that are to be manufactured or acquired *by the seller* after the making of the contract of sale
      1. A contract for future goods is *an agreement to sell* under **s.9**
      2. It is a breach if this contract does not become a *sale* for existing goods
   2. **existing goods** 🡪 goods that are owned by or in possession of the seller under **s.9(1)**
      1. Can follow an agreement to sell for future goods
   3. **specific goods**🡪 goods that are identified and agreed upon at the time of the sale
   4. **ascertained goods** 🡪 goods that were previously unascertained have now been affirmed/appropriated into the contract
   5. **unascertained goods** 🡪 goods that are not identified at the time of the sale
      1. Are intended to become ascertained, but will never become specific
5. **Have the goods perished? Only relevant for specific goods.**
   1. **A contract for the sale of specific goods** 🡪 **s.10**
      1. a contract for sale
      2. of specific goods
      3. goods perished at the time the contract was made
      4. the seller was unaware
      5. therefore, the contract is void – this can be used to the benefit of 3rd parties who wish to claim that there was never a contract
   2. **An agreement to sell specific goods** 🡪 **s.11**
      1. an agreement to sell (a conditional sale)
      2. specific goods
      3. the goods perish due to a true supervening event
      4. before the risk has passed to the buyer
      5. therefore, the contract is rescinded
6. **What types of obligation exist in the contract?**
   1. Terms in the contract can be either conditions, warranties, or intermediate
      1. Certain terms (for example, **ss.16-19** of SOGA) can never be intermediate terms because the statute classifies them as conditions or warranties.
      2. The breach of a condition allows for the injured party to repudiate the contract, reject the goods, and cancel any future primary obligation
      3. The breach of a warranty allows for the injured party to bring a damages claim, but not to reject the goods or cancel any future primary obligations
      4. An intermediate term defies classification until the breach occurs, at which point the severity of the consequences are assessed to determine if it should be treated as a breach of condition or warranty
   2. **Warranty** 🡪 as per **s.1** a warranty is a term that is collateral to the main purpose of the contract,
   3. **Condition** 🡪 as per **s.15(1)**, if the seller breaches a condition, then the buyer can elect to terminate the contract, or treat it as a breach of warranty and affirm the contract
      1. Under **s.15(4)**, if there is a contract for specific goods and the property has passed from the seller to the buyer, then the buyer must treat a breach of condition as a breach of warranty
      2. Under **s.23(2)**, property passes in an unconditional sale for specific goods in a deliverable state when the contract is made
      3. *Leaf v. International Galleries*: Therefore, the *prima facie* combination of **s.15(4) + s.23(2)** means that in an unconditional sale for specific goods in a deliverable state when the seller breaches a condition of the contact, the buyer will never have the right to reject the goods and terminate the contract.
   4. **Intermediate term**🡪 Not governed by SOGA, use the common law
   5. *Hong Kong Fir v. Kawasaki*: The correct test to determine if a breach should lead to repudiation is whether the breach leads to the injured party being deprived of all or a substantially all of the benefit that they contracted for.
   6. *Cehave v. Bremer*: Unless the beach of an intermediate term goes to the heart of the contract, it gives rise to damages, not the right to reject the goods and terminate the contract.
      1. “Quality” is an intermediate term
      2. Use the common law to classify is upon breach
   7. *Bunge v. Tradax*: At common law, certain terms will always be a condition or a warranty.
      1. A specific quantum is almost always a condition
   8. **Implied terms** 🡪 the court has the power to imply the terms into the contract
      1. Usually involves the implied conditions and warranties in **ss.16-19** of SOGA.
   9. *Canadian Pacific Hotels Ltd. v. BMO*: There are two ways to imply a term into a contract.
      1. Operation of law – common law or statute
      2. The situation of the parties – common industry practice or to give the contract business efficacy
   10. Under **s.69**, the freedom to contract out of any implied terms is codified.
       1. Can do so through an express agreement, course of dealings, or usage
7. **Does the contract contain an exclusion or limitation clause?**
8. **If yes, what implied terms of SOGA is it purporting to contract out of?**
9. **If yes, is this exclusion or limitation clause valid?**
   1. SOGA contains a number of implied conditions and warranties that are implied into contract by operation of law in the absence of an agreement to the contrary.
   2. **Exclusion clauses 🡪** can deny that express conditions or warranties are terms of the contract.
      1. Exclusion clauses are attacked on two grounds: that the buyer is unaware of the clause’s significance or in the case of standard form contracts, that there was no real bargaining.
   3. *Tercon v. BC*: When assessing the enforceability of an exclusion clause the court must apply a 3-part test – onus on the party seeking to rely on the clause
      1. As a matter of interpretation, does the clause apply to the established circumstances?
      2. Was the clause unconscionable at the time the contract was made?
      3. Should the court refuse to enforce it based on public policy?
10. **Although the parties are free to contract out of anything under s.69, is this freedom to contract of this specific condition or warranty limited in the consumer context by s.20?**
    1. **s.20** states that a retail sale is a sale of goods is between a buyer who doesn’t want the goods for a primarily business purpose and a seller who is in the business of seller these goods.
    2. **s.20(2)** states that in this standard consumer context for new goods, the parties cannot contract out of the implied terms in **ss.17-19**
       1. implied condition that the goods correspond with the description, are fit for the purpose, are of merchantable quality, of durability, that the bulk will correspond with the sample in quality, a reasonable opportunity to compare the bulk and sample, free from any defect rendering the goods unmerchantable that is not apparent on reasonable inspection
    3. **s.20(3)** states that in this standard consumer context for new or used goods, the parties cannot contract out of **s.16**, which deals with 3rd party interests
       1. an implied condition that the seller has the right to sell the goods, quiet enjoyment, and free from any charge or encumbrance
    4. *Tilden v. Clendenning*: In the consumer setting, a signature is not enough to hold the buyer to an onerous exclusion clause.
       1. The party seeking to enforce the exclusion clause must prove that it took measures to inform the other party.
    5. *Harry v. Kreutziger*: Unconscionability issues arise in the making of the contract and can lead to rescission.
       1. Inequality of bargaining power + substantial unfairness in the bargain = a presumption of unfairness that the stronger party must rebut.
       2. Judge the transaction to determine whether it is divergent from community standards of morality.
    6. *Gaertner v. Fiesta Dance Studios*: Simply doing justice can be a sufficient basis for protecting weaker parties.
       1. The court will not protect people who enter into foolish contracts, but they will not enforce a contract where a weaker party has been fraudulently induced into payment.

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| **(3) Who has privity to the contract governed under SOGA?** |

1. **Can the party claiming protection do so under SOGA if they are not a party to the contract? No.**
   1. **Horizontal privity 🡪** A sells to B to benefit C. C is not party to the contract between A + B and cannot sue to enforce contractual obligations even though the contract was for C’s benefit.
   2. *Lyons v. Consumers Glass Co. Ltd.*: A 3rd party who suffers harm due to the seller’s breach of an implied condition under SOGA has to recourse against the seller because he was not party to the contract.
   3. **Vertical privity 🡪** A sells to B who then sells to C. C has no recourse against A and is limited to enforcing B’s obligations to C.
   4. *Chabot v. Ford Motor*: A 3rd party cannot claim the benefit of an exclusion clause in a contract to which they are not a party.
      1. An exclusion clause will be construed *contra proferentem* (very strictly) against the party who is seeking to rely on it.
      2. A party must explicitly renounce their rights, for example, under the common law of tort, in order for the court to enforce the exclusion clause.
   5. *Fraser River Pile & Dredge v. Can-Dive Services*: An example of how the Canadian common law is creating specific exceptions to privity of contract.
      1. A 3rd party can rely on an exclusion clause in a contract to which they are not a party, if that exclusion clause was meant to benefit them, the parties to the contract knew that the 3rd party was the type to benefit, and the 3rd party was engaged in the very activities contemplated by the scope of the contract.

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| **(4) Have property and/or risk goods passed from the seller to the buyer?** |

1. **Who has property in the goods?** 
   1. Under **s.6(1)**, the point of a sale is to transfer a property interest.
      1. It is a total failure of consideration if this does not happen.
   2. The assumption of many risks and the ability to assert many rights depends on who has property in the goods.
      1. For example, under **s.25** risk of loss remains with the seller until property passes to the buyer, regardless of whether possession has been transferred. Under **s.23(2)**, property passes in an unconditional sale for specific goods in a deliverable state when the contract is made
      2. Therefore, in an unconditional sale for specific goods in a deliverable state, risk passes to the buyer when the contract is made.
   3. There are 3 ways to transfer property/ownership from the seller to the buyer
      1. At the time the contract is created 🡪 **s.23(2)**
      2. At the happening of an automatic event
      3. When the parties fulfill an obligation 🡪 **s.23(3) + s.23(4)**
2. **According to SOGA, has property in the goods transferred to the buyer?**
3. **Property and possession are not synonymous.**
   1. **s.4** states that goods are in a deliverable state when they are in a condition where the buyer would be bound to take delivery of them – they are in the contracted for state.
   2. **s.22(1)** states that property in **specific** or ascertained goods is transferred when the parties intend
      1. Parties should make this intention clear in the contract
      2. If it is not clear what the parties intended, then move to **s.23**
   3. *Liberty Wine Merchants v. Isaak*: The rules in **s.23** only applies if there is no discernible intention as to when property is to pass, as per **s.22**.
      1. This intention does not need to be explicit – retailor and consumer context looks to what the retailor is seller and what the consumer is actually purchasing.
   4. **s.23(1)** states that if the contract is silent as to intention as per **s.22**, then the following rules govern the passing of property.
      1. **s.23(2)** states that in an unconditional sale for **specific goods** that are in a deliverable state property passes when the contract is made.
      2. *Leaf v. International Galleries*: Therefore, the *prima facie* combination of **s.15(4) + s.23(2)** means that in an unconditional sale for specific goods in a deliverable state when the seller breaches a condition of the contact, the buyer will never have the right to reject the goods and terminate the contract.
      3. Since this is unfair, courts will often construe one of the three requirements in **s.23(2)** to avoid this result: not an unconditional sale, not specific goods, not in a deliverable state.
   5. *Kursell v. Timer Operations and Contractors*: This is an example of courts going out of their way to avoid the unfairness that stems from **s.15(4) + s.23(2)**.
      1. Specific goods are identified and agreed upon at the time the contract is made.
      2. Goods cannot be specific for the purposes of **s.23(2)** if steps still have to be taken to ascertain the goods.
      3. Goods cannot be in a deliverable state for the purposes of **s.23(2)** if the buyer must do something to put them into a deliverable state.
      4. **s.23(3)** wouldn’t apply either since it only contemplates the seller having to do something to put the goods in a deliverable state.
   6. **s.23(3)** states that in a contract for the sale of **specific goods** and the seller must do something to put them into a deliverable state then property passes when this thing is done and the seller has given the buyer notice.
   7. **s.23(4)** states that in a contract for the sale of **specific goods** in a deliverable state but the seller has to take a step to ascertain the price then property passes when this thing is done and the seller has given the buyer notice.
   8. **s.23(5)** states that when goods are delivered subject to approval by the buyer or on sale/return, the property passes to the buyer when the buyer accepts or is deemed to accept after the lapse of a reasonable time.
   9. **s.21** states that no property can be transferred to the buyer until the goods are ascertained.
      1. Ascertainment is a necessary precondition to passing property, but property does not pass by virtue of ascertainment.
   10. **s.23(7)** states that in a contract for the sale of **unascertained goods** (they will become ascertained) or for future goods (they will become existing goods) by description the property passes when goods fitting the description are unconditionally appropriated to the contract.
       1. The contract is only an agreement to sell until the goods become existing or ascertained.
       2. Goods can be appropriated to the contract by the seller with the assent of the buyer.
       3. Goods can be appropriated to the contract by the buyer with the assent of the seller.
   11. **Unconditional appropriation** 🡪 the process of agreeing that the goods provided are the goods that were described in the contract.
       1. In a contract for unascertained goods, ascertainment and appropriation are one and the same.
   12. *Carlos Federspiel v. Charles Twigg*: Sets out how unascertained goods can be unconditionally appropriated (and therefore ascertained) into the contract, at which point the property passes to the buyer.
       1. One party must have an intention to attach the goods irrevocably to the contract.
       2. The other party must then assent to this.
       3. Must involve actual or constructive delivery of the goods to the buyer.
       4. Risk passes when property passes, so if risk is still with the seller then there is a presumption that property has not passed to the buyer.
       5. Appropriation is usually the last act done by the seller, usually when the goods leave their contract. Therefore, if the seller still has to do an important and decisive act there is a rebuttable presumption that the property will not pass to the buyer until this act is done.
   13. *Sells v. Thomson*: Assent by the other party is essential to unconditional appropriation.
       1. Since actual or constructive delivery is key to unconditional appropriation, the buyer can withdraw implied assent by subsequent notice of cancellation before the seller has made the goods ready for delivery.
4. **Which party bears the risk of a loss?**
   1. Risk passes according to the intention of the parties
      1. If this intention is unclear, according to **s.25(1)** risk passes from the seller to the buyer along with property, regardless if delivery has been made or not.
      2. Therefore, risk *prima facie* passes along with property according to the rules stipulated in **s.23**
   2. **s.25(2)** stipulates that if delivery is delayed through the fault of either party, then the goods are at the risk of the party in fault in regards to any loss stemming from that fault.
      1. If property has passed to the buyer, but the seller is at fault in delaying delivery of the goods and the buyer suffers losses, then the seller bears the risk.
      2. Transfer of property and risk are not synonymous here.
   3. *Jerome v. Clements*: Under **s.25(1)** risk passes along with property.
      1. To determine if property passes first look to the parties’ intentions. If these are unclear, **s.23**
      2. For the purposes of **s.23(3)**, it does not mater how trivial the work left to be done by the seller is to put the specific goods into a deliverable state.
      3. If it hasn’t been done and the buyer has not been given notice, then property hasn’t passed and neither has risk.

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| **(5) What are the seller’s title obligations?** |

1. **In the absence of any contradictory, express or implied terms, SOGA implies ss.16-19 into the contract as a seller’s obligation.**
2. **s.16 stipulates the seller’s title obligations to the buyer** 
   1. **s.16(a)** states that there is an implied condition on the part of the seller that the seller has either the right to sell the goods, or in an agreement to sell, that the seller will have the right to sell the goods when the property is to pass.
      1. A breach of this implied condition gives the buyer to repudiate the contract and reject the goods
   2. **s.16(b)** states that there is an implied warranty that the buyer is to have and enjoy quiet possession of the goods
   3. **s.16(c)** states that there is an implied warranty that the goods are free from any charge or encumbrance in favour of a 3rd party
      1. A breach of these implied warranties does not give the buyer the right to reject the goods and terminate the contract, limited to a claim in damages.
3. **Have the parties tried to contract out of s.16(a)?**
4. **Despite s.20(3) it is worth a shot for parties in a retail sale to try and contract out.**
   1. **s.20(3)** states that in this standard consumer context for new or used goods, the parties cannot contract out of **s.16**, which deals with 3rd party interests
      1. an implied condition that the seller has the right to sell the goods, quiet enjoyment, and free from any charge or encumbrance
   2. *Tilden v. Clendenning*: In the consumer setting, a signature is not enough to hold the buyer to an onerous exclusion clause.
      1. The party seeking to enforce the exclusion clause must prove that it took measures to inform the other party.
   3. *Harry v. Kreutziger*: Unconscionability issues arise in the making of the contract and can lead to rescission.
      1. Inequality of bargaining power + substantial unfairness in the bargain = a presumption of unfairness that the stronger party must rebut.
      2. Judge the transaction to determine whether it is divergent from community standards of morality.
   4. *Gaertner v. Fiesta Dance Studios*: Simply doing justice can be a sufficient basis for protecting weaker parties.
      1. The court will not protect people who enter into foolish contracts, but they will not enforce a contract where a weaker party has been fraudulently induced into payment.
5. **Parties in a commercial context can contract out of s.16(a) but it is very difficult to convince the court that this is actually what you intended to do because “the whole object of a sale is to transfer property from one person to another.”**
   1. *Sloan v. Empire Motors*: A general or “catch-all” exclusion clause saying “there are no implied warranties/conditions” is not enough to contact out of **s.16(a).**
      1. The exclusion clause must be very specific, it helps to include the particular property interest.
6. **Has the buyer accepted the goods? If yes, s.15(4) operates. If no, buyer can reject the goods.**
   1. *Butterworth v. Kingsway*: Under **s.15(4)** if the buyer has accepted the goods then a breach of the condition in **s.16(a)** must be treated as a breach of warranty.
      1. The buyer cannot reject the goods and terminate the contract and the buyer is limited to a claim in damages.
      2. In the cases of “feeding title,” the contract can be rescinded up until the good title passes down.
   2. *Rowland v. Divall*: There is no property in stolen goods and so a seller in possession cannot transfer title in those goods to a buyer.
      1. Such a breach of **s.16(a)** is a “total failure of consideration” that allows the buyer to treat it as a breach of condition and reject the goods at a later date than usual.
7. **Does the seller have the power to vest full and complete rights over the goods in the buyer?**
   1. This particular breach of **s.16(a)** can overlap with the implied warranties in **s.16(b) + s.16(b)**.
   2. *Niblett v. Confectioner’s Material*: If the goods sold are subject to a trademark infringement injunction then the seller had no right to sell the goods in breach of **s.16(a)**.
      1. Therefore, the buyer can reject the goods and terminate the contract.
   3. *J Barry Windsor & Assoc. v. Belgo Co.*: If the federal regulations prevent the goods in question from being sold then the seller is in breach of **s.16(a)**.
8. **Warranties of “quiet possession” (s.16(b)) and “freedom from encumbrances” (s.16(c)).**
   1. Sellers will want to contract out of these implied warranties because otherwise the seller is responsible for parties and situations that the seller could not possibly know about.
      1. For a breach of implied warranty the buyer never has the right to reject the goods.
      2. Future obligations continue so the buyer must pay for the goods, then claim losses in damages.
   2. **s.16(b)** overlaps with both **s.16(a) + s.16(c)** and states that there is an implied warranty that no 3rd party is going to come along and interfere with the buyer’s quiet enjoyment of the goods
      1. This is tested at the time of possession
      2. This protection is ongoing for a period of time following transfer of possession
   3. **s.16(c)** is tested at the time the contract is made and is an implied warranty that the property is free of any 3rd party security interests
      1. Since new charges could arise between the contract being made and possession transferring, **s.16(b)** can be used to deal with those.
   4. **s.20(3)** states that in this standard consumer context for new or used goods, the parties cannot contract out of **s.16**, which deals with 3rd party interests
   5. *Microbeads AC*: Even if there were no issues at the time the contract was made, property passed, or possession was transferred, the seller is still liable to the buyer under **s.16(b)** for a period of time after the transfer of possession.
      1. WHY? – “shall have and enjoy” has a future duration element
      2. This places an ongoing obligation on the seller in regards to 3rd party interests

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| **(6) What are the seller’s obligations as to description and quality?** |

1. **s.17(1)** **states that in a contract for the sale of goods by description, the seller has an implied condition that the goods correspond with that description**
   1. **s.17(2)** states that if it’s a sale by sample and the goods correspond with the sample but don’t match the description then it’s still a breach of this implied condition
   2. *Taylor v. Combined Buyers*: A sale for specific goods an be a sale by description if the thing is expressly sold as a certain kind/class/species.
      1. Any statements made to its essential attributes are part of the description
      2. Any statements as to quality or other unessential attributes of the thing are merely representations.
      3. If a misrepresentation is fraudulent and the same statement is also a breach of the implied condition in **s.17(1)**, then the buyer can either claim for rescission/damages or repudiation/rejection of the goods
   3. *Frey v. Sarvajc*: If a buyer receives goods that don’t correspond with the description then the buyer can either claim a breach of **s.17(1)** or misrepresentation under the common law of contact.
      1. *caveat emptor*: general rule that when there is no fraud or misrepresentation then the buyer cannot complain of any defects in a product that he had the chance to inspect prior to purchase.
      2. *patent defect*: discoverable on ordinary/reasonable inspection
      3. *latent defect*: not discoverable on ordinary/reasonable inspection and if the seller ought to have known of these latent defects then the seller has an obligation under SOGA to speak of it
   4. **Specific goods 🡪** What is in the contract speaks to the essential attributes of the goods and is included in the description for the purposes of **s.17(1)**
      1. Some sales for specific goods are by description, for example, conditional sales
   5. **Unascertained goods 🡪** Everything that is sale about the goods is part of the description for the purposes of **s.17(1)**
      1. All sales for unascertained goods are by description
2. **Have the parties tried to contract out of ss.17-19?**
   1. **s.20** states that a retail sale is a sale of goods is between a buyer who doesn’t want the goods for a primarily business purpose and a seller who is in the business of seller these goods.
   2. **s.20(2)** states that in this standard consumer context for new goods, the parties cannot contract out of the implied terms in **ss.17-19**
      1. implied condition that the goods correspond with the description, are fit for the purpose, are of merchantable quality, of durability, that the bulk will correspond with the sample in quality, a reasonable opportunity to compare the bulk and sample, free from any defect rendering the goods unmerchantable that is not apparent on reasonable inspection
   3. *Hart-Parr Company v. Jones*: The court is reluctant to uphold exclusion clauses contracting out of **s.17**, especially if it is generic and absolute.
      1. To contract out of **ss.17-19** you need to draft a specific exclusion clause.
      2. In a sale by description, the seller cannot disguise the goods to look as though they conform and then argue that the buyer had a reasonable chance to inspect if the defect wouldn’t have been apparent on its face.
3. **How does s.17 work in the context of specific goods?**
   1. The problem with **s.17** and specific goods is that **s.23(2)** says that property passes immediately and **s.15(4)** says that for specific goods in which property has passed, the buyer loses the right to terminate the contract and reject the goods.
   2. *Beale v. Taylor*: If a thing is sold corresponding to a description then it is sold by description, even if it is a specific good.
   3. *Varley v. Whipp*: If a buyer has not seen the specific goods and the description motivates the buyer, then it is a sale by description for the purposes of **s.17**
      1. In a sale by description for specific goods, property does not pass when the contract is made
      2. It passes when the buyer verifies that the implied condition that the goods correspond with their description has been met
      3. Therefore, a buyer retains his ability to reject the goods and terminate the contract up until he has accepted the goods.
      4. This may be wrong according to Bruce, but could still argue it on an exam.
4. **How does the implied condition in s.17(1) interact with the implied condition of “merchantable quality” in s.18(b)?**
   1. **s.18(b)** states an implied condition that the goods are of “merchantable quality” if the seller deals in goods of that description
      1. Proviso in the seller’s favour that if the buyer examines the goods then the buyer loses the implied condition of merchantability in regards to defects that the examination should have revealed
   2. *Ashington Piggeries*: The test of description under **s.17(1)** is broader than the test for merchantable quality under **s.18(b)**
      1. Goods can fit the description even if they are not of merchantable quality
      2. “Best quality” is not part of the description, it speaks to **s.18(b)**
      3. Defects as to quality may be treated as a condition or a warranty (intermediate term)
5. **Implied condition under s.18(b) of “merchantable quality.”**
   1. Courts have given a broad scope to “merchantable,” reducing the usefulness of this section for buyers.
      1. There is an implied condition that the goods are of merchantable quality if the goods are bought by description from a seller who deals in goods of that description **BUT**…
      2. If the buyer examines the goods then the buyer loses the implied condition of merchantability in regards to defects that the examination should have revealed
   2. **s.20(2)** states that in this standard consumer context for new goods, the parties cannot contract out of the implied terms in **ss.17-19**
   3. *Barlett v. Sidney Marcus*: Goods are not of merchantable quality if they are for no use or any purpose for which such goods would normally be used
      1. Based on a general buyer’s perspective, if the goods are useable then they are merchantable.
   4. *Kendall v. Lillico*: If the goods fit their description and there are some buyers willing to buy them under that description for ordinary market price, then the goods are merchantable.
      1. This is an objective standard.to be assessed at the time of sale.
   5. *BS Brown & Sons v. Craiks*: Goods are of merchantable quality if they are acceptable for any use or purpose that goods of that description would normally be used for.
      1. Price can be a factor in determining if the goods are of merchantable quality
      2. If a higher quality form of the good has a substantially higher market value and this price is the one stipulated in the contract, then the seller cannot provide the lower quality form and claim that it fits the description.
   6. *Hartman v. McKerness*: If the goods correspond sufficiently with their description, the law will not protect buyer who make improvident bargains.
      1. A “sophisticated and knowledgeable” buyer will have a difficult time showing that he relied on the seller’s representations to enter into the contract.
      2. If the seller doesn’t deal in goods of that description, a buyer can’t claim the protection of **s.18(b)**
   7. *IBM v. Shcherban*: Goods are not of merchantable quality if the complaint is such that no buyer would want the goods with that defect.
      1. It is irrelevant how small and easily mended the defect is
      2. In this situation, the buyer is entitled to reject the goods for breach of the implied condition
   8. *Thornett & Fehr v. Beer & Sons*: For the purposes of the proviso in **s.18(b)**, a “reasonable inspection” requires not only that the buyer has the opportunity to inspect the goods, but also that he has actually examined them.
      1. If a buyer has every chance to inspect further but doesn’t because he is satisfied with the initial inspection, the courts have said that this is enough to constitute inspection for the purposes of **s.18(b)** and the buyer loses the implied condition of merchantable quality.
6. **Implied condition under s.18(c) of “durability.”**
   1. Courts have wondered whether this actually gives the buyer any additional protection since durability is covered by **s.18(a) + s.18(b)** to a certain extent.
   2. *Mash & Murrell* *v. Joseph Emanuel*: The implied condition of durability under **s.18(b)** continues for a reasonable time within all the circumstances.
      1. Even if the goods were in good condition when shipped, if when they are delivered it cannot be said that they could be used by any buyer then the implied condition is breached
      2. The buyer can then reject the goods
   3. *Buckley v. Lever Bros*: The implied condition of durability applies so long as the goods remain in the condition they were in at the time of transfer.
      1. Applies to both the explicit condition in **s.18(c)** and the implicit condition in **s.18(b)**
7. **Implied condition under s.18(a) of “suitability for a particular purpose.”**
   1. If the buyer is buying goods for a particular purpose and either explicitly or implicitly make this known to the seller, and the buyer is relying on the seller’s skill or judgment to provide goods that are suitable for the stipulated purpose, and the seller is in the course of providing goods of this description **THEN** there is an implied condition that the goods are reasonably fit for that purpose.
      1. Proviso in the buyer’s favour that sale under a trade name has been construed narrowly to only encompass situations where the buyer directs the seller to the trade name good in order to fulfill his purpose for purchasing the goods
      2. Easier to get than **s.18(b)** due to judicial construction.
   2. **s.20(2)** states that in this standard consumer context for new goods, the parties cannot contract out of the implied terms in **ss.17-19**
   3. *Crowther v. Shannon Motor Co,*: Goods must work for a reasonable time in order to be “reasonably fit for the purpose” under **s.18(a)**.
      1. WHY? – because if it doesn’t work for a reasonable amount of time it is probably because it was not reasonably fit for the purpose in the first place.
      2. Cars are usually bought for the purpose of “driving along the road”
      3. There is a difference between a cheap, minor repair (in which case it will be reasonably fit for the purpose) and a serious defect that is liable to destroy the good’s usefulness at any time (in which case it is not reasonably fit for the purpose.)
   4. *Kendall v. Lillico*: If a purpose is broad enough to cover different qualities of the good, then price can indicate to the seller what the buyer’s particular purpose is.
      1. If the seller recommends a product, they are inviting the seller to rely on their skill and judgment for the purposes of **s.18(a)**
   5. *Baldry v. Marshall*: For the purposes of the proviso in **s.18(a)** relating to sale under a trade name, the mere fact that a good is described in the contract by its trade name doesn’t necessarily make it a sale under a trade name.
      1. For the seller’s purposes, the seller can only claim the proviso when the buyer tells the seller he has been recommended an item, mentions the trade name, asks if it will fulfill his particular purpose, requests that the seller provide the particular item.
      2. **Test 🡪** Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer to his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be?
8. **Is the buyer’s complaint excepted from the scope of s.18(a)?**
   1. Allergic reactions are not subject to the usual strict liability imposed on the seller by **s.18(a)**
      1. The law expects idiosyncratic users to disclose these peculiarities to the seller
   2. *Esborg v. Bailey Drug Co.*: In order to rely on an allergy/hypersensitivity, a buyer will have to show that this reaction was not uncommon: that it wasn’t unique/peculiar/isolated.
      1. **Test 🡪** The buyer must show **(I)**the product contains a harmful ingredient, **(ii)**this ingredient is harmful to a *reasonably foreseeable and appreciable* class of people or *potential users* of the product,and **(iii)**the buyer has been innocently injured in the use of the product in the manner and for the purpose it was intended to be used
   3. *Griffiths v. Peter Conway*: The buyer must make the seller away of any peculiarities that affects the buyer in using the goods for the purpose in which the buyer is intending to use it.
      1. If the seller in unaware then the seller cannot exercise her skill and judgment in relation to the suitability of the goods that they are selling.
   4. *Ingham v. Emes*: The burden is on the buyer to tell the seller about their known abnormality or allergy in order to claim the protection of **s.18(a)**.

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| **(7) What are the seller’s obligations under a sale by sample?** |

1. **Is this a sale by sample? If yes, then implied conditions in s.19.**
   1. **s.19(1)** stipulates that a contract for sale is a sale by sample if there is an express or implied term in the contract to that effect.
   2. **s.19(2)** sets out 3 implied conditions if it is a sale by sample
      1. **s.19(2)(a)** says there is an implied condition that the bulk must correspond with the sample in terms of quality
      2. **s.19(2)(b)** says there is an implied condition that the buyer has a reasonable opportunity to compare the bulk with the sample
      3. **s.19(2)(c)** says that there is an implied condition that the goods must be free from any defect that renders them unmerchantable that would not be apparent on a reasonable examination of the goods
   3. **s.20(2)** states that in this standard consumer context for new goods, the parties cannot contract out of the implied terms in **ss.17-19**
   4. *Cudahy Packing Co. v. Narzisenfeld:* In a sale by sample the seller selects the sample as she is presumed to know the quality of the goods she is proposing to sell.
      1. To facilitate trade she is therefore allowed to offer a sample as the standard of the bulk.
      2. Both parties must understand that the goods being exhibited are representative of the bulk
      3. It is not a sale by sample when the buyer selects a small portion of the bulk to inspect
   5. *Steels & Busks v. Bleecker Bik*: A “reasonable inspection” for the purposes of **s.19(2)(c)** depends on normal trade practices and what was contemplated by the contracting parties.
      1. If the buyer is relying on a visual inspection, the defect isn’t detectable by this, then the defect is latent and excluded from this implied condition
      2. Latent defects are dealt with under **s.18(b)**
   6. *Godley v. Perry*: A “reasonable inspection” for the purposes of **s.19(2)(c)** involves a common sense approach and must be undertaken in order to claim this protection.

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| **(8) What are the seller’s obligations as to delivery?** |

1. **Is it stipulated in the contract where, when, and how delivery is to take place?**
2. **If no, look to SOGA.**
   1. **Delivery 🡪** defined in **s.1** as the voluntary transfer of possession from one person to another.
   2. **s.31** stipulates that the seller has the duty to deliver the goods and the buyer has the duty to accept and pay for them
   3. **s.5** deems someone to be in possession of the goods if in custody
   4. **s.32** states that if the contract doesn’t stipulate when delivery and payment are to happen, they are deemed to happen simultaneously
      1. If the contract is silent as to delivery or payment then they occur simultaneously
      2. If the contract is silent as to delivery and payment then they occur when property passes
      3. Delivery is a condition, the breach of which allows for the seller to terminate the contract and reject the goods
   5. **s.14(1)** states that unlike delivery, time of payment is a warranty and not of the essence of the contract
      1. **s.14(2)** states that whether any other time stipulations are of the essence depends on the contract
   6. *Bowes v. Shand*: Whether stipulations as to time are of the essence is up to the contract and the nature of the goods being contracted for.
      1. In commercial (mercantile) contracts, time is of the essence.
      2. Therefore, it is a condition.
   7. **s.33** states that whether the buyer must take possession of the goods or if the seller must send them to the buyer is a question of fact depending on the contract
      1. **It is not stipulated whether these are conditions or warranties, therefore they are intermediate terms.**
      2. **s.33(3)** states that in a sale for specific goods if the parties at the time the contract is made know where the goods are then that is the place of delivery
      3. **s.33(4)** states that if the seller must send the goods to the buyer but there is no set time, the seller must send them within a reasonable time
      4. **s.33(9)** states that unless the contract states otherwise, the seller bears any cost of putting the goods into a deliverable state
3. **Have the goods been accepted?**
4. **Until the goods have been accepted by the buyer only a conditional property passes. For the purposes of s.15(4) the buyer must “unconditionally accept” the goods. Until then, she can reject them.**
   1. **s.39** stipulates when a buyer has been deemed to have accepted the goods
      1. **s.39(a)** when the buyer implicitly or explicitly communicates acceptance to the seller
      2. **s.39(b)** when the goods have been delivered and the buyer does something that is in consistent with the seller’s ownership
      3. **s.39(c)** when the goods have been delivered and a reasonable amount of time has passed without the buyer indicating to the seller that the buyer has rejected them
   2. **s.38** stipulates that the buyer is not deemed to have accepted the goods under **s.39** if goods are delivered that the buyer has not yet examined until the buyer has had a reasonable opportunity to examine the goods for the purpose of ascertaining that they are in conformity with the contract.
      1. Courts have seen **s.38** as subordinate to **s.39**
      2. If you can make out deemed acceptance under **s.39** then the buyer loses his right to a reasonable time for examination under **s.38**
   3. **s.41** stipulates that when the seller is ready and willing to deliver the goods, asks the buyer to take delivery and the buyer refuses to do so within a reasonable time, then the buyer is liable for
      1. any loss stemming from this refusal
      2. a reasonable charge for the care of the goods
5. **Has the property quantity been delivered?**
   1. **s.34(1)** states that if the buyer gets less than what was contracted for, then the buyer may reject them**.**
   2. *Re*: *Moore and Landauer*: Quantity is a part of the description and is essential to the contract.
      1. A seller cannot supply goods that correspond with the contract description, quantity aside, and then say that this quantity is fit for the purpose.
   3. **s.34(2)** states that if the buyer gets less and accepts the goods, then the buyer must pay for them at the contracted for rate, adjusted to the quantity actually received and accepted.
   4. **s.34(3)** states that if the buyer gets more than contracted for, then the buyer can either accept what was contracted for and reject the rest, or reject the whole.
   5. **s.34(4)** states that if the buyer accepts more than what was contracted for, then the buyer must pay for them at the contracted for rate, adjusted as to the quantity actually received and accepted.
   6. **s.34(5)** states that if the buyer gets mixed goods of a different description that what was contracted for, then the buyer can either accept the contracted for goods and reject the rest or reject the whole
6. **Did the buyer and seller contract for delivery by installments?**
7. **If no, then the buyer is not bound to accept delivery by installments (s.35(1)).**
8. **If yes, then s.35(2) applies.** 
   1. In a contract for the sale of goods that are to be delivered in stated installments, and the installments are to be paid for separately, then the contract is severable
   2. If the seller then make a defective delivery as to one or more installment or the buyer refuses to take delivery of/pay for one or more installment then there is a breach (of quality, time, or quantity)
   3. The characterization of which as a condition or a warranty depends on the contract
      1. **s.15(4)** states that If a contract of sale is not severable and the buyer has accepted the goods or part of them then a breach of condition can only be treated as a breach of warranty
      2. But **s.35(2)(a)** applies if the contract is severable, each installment has to be paid for separately
   4. *Maple Flock v. Universal Furniture Products Ltd.*: It is up to the court to determine if the effect of the breach in regards to an installment should have on the whole 🡪 **TEST**
      1. What is the ratio quantitatively that the breach bears on the contract as a whole?
      2. What is the degree of probability or improbability that such a breach will be repeated?

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| **(9) What are the buyer’s obligations?** |

1. **The buyer has an obligation to accept the goods.**
   1. **s.31** stipulates that the seller has the duty to deliver the goods and the buyer has the duty to accept and pay for them
   2. **s.41** stipulates that when the seller is ready and willing to deliver the goods, asks the buyer to take delivery and the buyer refuses to do so within a reasonable time, then the buyer is liable for
      1. any loss stemming from this refusal
      2. a reasonable charge for the care of the goods
2. **The buyer has an obligation to pay for the goods.**
   1. **s.31** stipulates that the seller has the duty to deliver the goods and the buyer has the duty to accept and pay for them
      1. **s.31** states there is an obligation to pay, but **s.34** can change the buyer’s obligation to pay (amount, when to pay, what you’re paying for etc.) under the contract as a result of the seller’s breach of delivery obligations and the buyer then accepts
   2. **s.32** states that if the contract doesn’t stipulate when delivery and payment are to happen, they are deemed to happen simultaneously
      1. If the contract is silent as to delivery or payment then they occur simultaneously
      2. If the contract is silent as to delivery and payment then they occur when property passes
      3. Delivery is a condition, the breach of which allows for the seller to terminate the contract and reject the goods
   3. **s.14(1)** states that unlike delivery, time of payment is a warranty and not of the essence of the contract
      1. You can still have a valid contract even if payment has not been agreed upon because it is not of the essence of the contract
   4. *Kay Corporation et al. v. Dekeyser*: If there is not time of payment stipulated in the contract then the buyer must be ready to pay upon delivery due to the operation of **s.32**
   5. **s.51(3)** states that if the goods are of a perishable nature and the buyer doesn’t pay within a reasonable time, then the unpaid seller may resell the goods.

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| **(10) What are the buyer’s remedies?** |

1. **Does the buyer have the right to reject the goods?**
   1. **s.15(2)** states that if a stipulation in a contract of sale is a condition then the breach of it allows the buyer to treat the contract as repudiated, but this depends on the construction of the contract
      1. The breach of an intermediate term may also lead to the right to reject the goods if the consequences are severe enough.
   2. **Wrong quantity**
      1. **ss.34(1)** states that if the buyer gets less than what was contracted for, then the buyer may reject them**.**
      2. **s.34(3)** states that if the buyer gets more than contracted for, then the buyer can either accept what was contracted for and reject the rest, or reject the whole.
      3. **s.34(5)** states that if the buyer gets mixed goods of a different description that what was contracted for, then the buyer can either accept the contracted for goods and reject the rest or reject the whole.
      4. *William Barker (Junior) & Co. v. Edward Agius Ltd.*: The buyer has a right to accept the goods that are in accordance with the contract and reject the rest **or** reject them all.
         1. **s.39(b)** doesn’t apply to make the buyer keep the whole bulk just because he purports to resell the portion in conformity.
         2. Even though part of what was delivered was accepted, the buyer can wait until a later time to reject the nonconforming portion of the goods – **s.15(4)** doesn’t prevent this
   3. **Installment deliveries**
      1. **s.35(2)** states that in a contract for the sale of goods that are to be delivered in stated installments, and the installments are to be paid for separately, then the contract is severable
      2. If the seller then make a defective delivery as to one or more installment or the buyer refuses to take delivery of/pay for one or more installment then there is a breach (of quality, time, or quantity)
      3. The characterization of which as a condition or a warranty depends on the contract
         1. **s.15(4)** states that If a contract of sale is not severable and the buyer has accepted the goods or part of them then a breach of condition can only be treated as a breach of warranty
         2. But **s.35(2)(a)** applies if the contract is severable, each installment has to be paid for separately
      4. *Maple Flock v. Universal Furniture Products Ltd.*: It is up to the court to determine if the effect of the breach in regards to an installment should have on the whole 🡪 **TEST**
         1. What is the ratio quantitatively that the breach bears on the contract as a whole?
         2. What is the degree of probability or improbability that such a breach will be repeated?
2. **Has the buyer lost her right to reject the goods?**
   1. Under **s.15(4)**, if there is a contract of sale that is not severable and the buyer has accepted goods or part of them **or** there is a contract for specific goods and the property has passed from the seller to the buyer, then the buyer must treat a breach of condition as a breach of warranty
      1. For the purposes of **s.35(2)**, if the contract is not severable (installments are not paid for separately) then a breach will fall under **s.35(2)(b)** – a warranty
   2. Under **s.23(2)**, property passes in an unconditional sale for specific goods in a deliverable state when the contract is made
   3. *Leaf v. International Galleries*: Therefore, the *prima facie* combination of **s.15(4) + s.23(2)** means that in an unconditional sale for specific goods in a deliverable state when the seller breaches a condition of the contact, the buyer will never have the right to reject the goods and terminate the contract.
      1. Since this is unfair, courts will often construe one of the three requirements in **s.23(2)** to avoid this result: not an unconditional sale, not specific goods, not in a deliverable state.
   4. *Wojawkowski v. Pembina Dodge Chrysler Ltd.*: Until the goods are accepted by the buyer, only conditional property in them has passed and so the buyer is allowed to reject the goods and repudiate the contract up until he has “unconditionally accepted the goods.”
      1. Therefore, **s.15(4)** does not operate until a buyer has accepted under **s.39**
   5. **s.39** stipulates when a buyer has been deemed to have accepted the goods
      1. **s.39(a)** when the buyer implicitly or explicitly communicates acceptance to the seller
      2. **s.39(b)** when the goods have been delivered and the buyer does something that is inconsistent with the seller’s ownership
      3. **s.39(c)** when the goods have been delivered and a reasonable amount of time has passed without the buyer indicating to the seller that the buyer has rejected them
   6. **s.38** stipulates that the buyer is not deemed to have accepted the goods under **s.39** if goods are delivered that the buyer has not yet examined until the buyer has had a reasonable opportunity to examine the goods for the purpose of ascertaining that they are in conformity with the contract.
      1. Courts have seen **s.38** as subordinate to **s.39**
   7. *Hardy & Co. v. Hillerns and Fowler*: **s.38 + s.39** operate independently.
      1. If you can make out deemed acceptance under **s.39** then the buyer loses his right to a reasonable time for examination under **s.38**
      2. If the buyer has done any act which prevents the seller from resuming possession, that act is necessarily inconsistent with the seller’s ownership
   8. *Rafuse Motors v. Mardo Construction Ltd.*: What constitutes a “reasonable time” under **s.38** depends on the nature of the goods and circumstances of the case.
      1. Can take into consideration the plaintiff’s role in inducing the delay
3. **Does the buyer have a right to equitable remedies? Yes, if the contract is for specific or ascertained goods.**
4. **There are four factors that the court will consider in deciding whether or not to grant equitable remedies such as specific performance or injunction.**
   1. No available market – to get specific performance or an injunction the injured party has to convince the court that common law remedies (damages) won’t right the wrong because money can’t get you what you want
      1. How unique are the goods? Could you buy a substitute on the open market?
      2. The goods must really be irreplaceable, not generic.
   2. Economic circumstances – a damages claim is useless because by the time a court order comes down, the buyer won’t be able to use them
      1. Party in breach must know of these circumstances.
   3. The remedy cannot be too complicated to order
      1. The goods must be specific or ascertained because having the ascertain goods is too complicated to enforce
      2. **Specific goods get you specific performance**
   4. Delay - if the buyer waits too long then this can indicate to the seller that they won’t have to perform their obligations
   5. **s.55(1)** codifies that in an action for breach of a contract for specific or ascertained goods, the injured party can make an application to the court for equitable remedies.
      1. Up to the court’s discretion to award these or not.
   6. *Re: Wait*: Common law authority for proposition **c**.
      1. For example, wheat is an unascertained good and the court deems that it would be too complicated to order the seller to ascertain and deliver these goods.
      2. Limited to a claim in damages.
   7. *Sky Petroleum*: Courts can also grant injunctions at their discretion to restore the contractual positions of the parties until the rights and wrongs of the parties can be aired in court.
      1. Common law authority for proposition **b**.
      2. For example, the economic circumstances are such that not granting the equitable remedy would force the corporation out of existence.
5. **Does the buyer have a right to statutory remedies? Yes, if the contract is for unascertained or future goods.**
6. **Can the buyer use the real remedy of the buyer’s lien to hold the seller to its obligations to deliver the goods and transfer property?**
   1. **Under SOGA the buyer has a general, non-possessory lien that is also automatic**
      1. **general 🡪** when the object that triggered the lien is not also the object over which the lien operates
      2. **non-possessory 🡪** the buyer is not in possession of the object over which the lien operates
      3. **automatic 🡪** it arises by operation of law (SOGA) when the seller breaches the contract
   2. **s.75(1)** stipulates who has the lien 🡪 a seller makes an agreement to sell in the normal course of his business and…
      1. **(a)**the buyer pays all or part of the price, **(b)**the goods are unascertained or future, and **(c)**the buyer is acquiring the goods in goods faith for use primarily for personal, family, or household purposes (consumer use)
   3. **s.75(2)** stipulates what the lien is over
      1. It is for the amount that the buyer has paid towards the purchase price
      2. It is over all goods that are in/come into the seller’s possession and are held for sale
      3. It is over all goods that correspond with the description of/any sample of the goods under the agreement to sell
      4. It is over all goods that have not passed to a different buyer under a different contract of sale
      5. **Most importantly, it is over any account in a savings institution in which the seller usually deposits proceeds of sale**
   4. **s.76(1)** stipulates when the buyer’s lien is discharged
      1. **(a)**when the seller fulfills the contract of sale by passing the property in the goods, or **(b)**when the seller refunds the buyer that she has paid towards the purchase price
      2. **s.76(2)** states that the buyer can still maintain and action against the seller for breach
      3. **s.76(3)** states that the lien does not bind goods appropriated into a sale made in good faith to a different buyer
7. **Does the buyer have a right to claim damages?**
8. **Yes, the buyer can claim damages for non-delivery and late delivery.**
   1. **s.54(1)** states that a buyer can maintain an action for damages if the seller wrongfully neglects or refuses to deliver the goods to the buyer
      1. These are general damages subject to rules in the first branch of *Hadley v. Baxendale*
      2. **s.54(2)** states that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller’s breach
      3. **s.54(3)** provides a formula for assessing the quantum of damages when there is an available market
         1. difference between the contract price and market price at the time the goods ought to have been delivered **or** if no time was stipulated then at the time of refusal
         2. If there is no market then the damages are *prima facie* the lost profits
         3. For a later delivery it is either the cost of substituting during delay or the difference in market price between the date of breach and date of delivery
   2. *Re: R&H Hall Ltd.*: If the damages being claimed are special and not general damages then they fall under the second branch of *Hadley v. Baxendale*
      1. Buyer must show that the parties contemplated the special damages and then are not confined to the formula under **s.54(3)** for assessing damages
   3. **s.57** preserves a seller’s right to claim special damages by way of the second branch of *Hadley v. Baxendale*
      1. For example, a sub-sale like in *Re: R&H Hall Ltd.*
9. **Yes, the buyer can claim damages for a breach of conditions or warranties of quality.**
   1. **s.56(1)** if the seller breaches a warranty, or if the buyer elects/is compelled to treat any breach of a condition as a breach of warranty the buyer can then **(a)**set up an action for the price, damages still available, or **(b)**claim for damages
      1. **s.56(2)** states that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller’s breach
   2. *Sunnyside Greenhouses v. Golden West Seeds*: A loss of profit that is the direct and natural consequence of the breach may be claimed in addition to capital loss subject to the principle of no over-compensation.
      1. **s.56(3)** provides a formula for assessing the quantum of damages when a warranty of quality is breached
         1. The loss is the difference between the actual value of the goods at time of delivery and the value they would have had if they had answered to the warranty.
   3. **s.57** preserves a seller’s right to claim special damages by way of the second branch of *Hadley v. Baxendale*
      1. For example, a sub-sale like in *Re: R&H Hall Ltd.*
   4. *Ford Motor Company v. Haley*: When there is a breach of the implied condition of fitness of purpose under **s.18(a)** the damages are *prima facie* the full purchase price subject to any diminution by such residual value that the seller may be able to establish
      1. The law assumes that the goods have **no** value to the buyer
      2. In theory, the buyer can accept the goods and still recover the full contract price as damages for the quality condition
10. **Are these damages subject to any limitations? Yes, all common law rules apply.**
    1. Rarely will the damages be for their gain/profits stemming from the breach
    2. Losses can be assessed as either *reliance* (backwards looking) or *expectation* (forward looking) losses
       1. *Cullinane*: Usually the injured party can elect to sue for either reliance losses or expectation losses, or both as long as it won’t lead to over-compensation.
          1. The court will remove this election though if one figure is unreliable or unjustifiable or if the buyer was in a losing contract then costs cannot be claimed.
       2. *Bowlay Logging*: In a losing contract, if a party in breach can show that the injured party’s costs would have been higher than any potential gains **“even-if”** the contract hadn’t been breached.
    3. Could be entitled to either/both but injured party cannot be better off because of damages than he/she would have been if the breach hadn’t occurred **-** no over-compensation
       1. *Wertheim v. Chicoutimi Pulp Company*: The injured party cannot be in a better position after damages are awarded than she would have been had the contract been fulfilled.
          1. If using the formulas in **s.54(3) + s.56(3)** would result in overcompensation, then use the common law
11. **Remoteness analysis**
    1. **Remoteness** 🡪 can the damages be found to be *legally attributable* to the actions of the party in breach?
    * **General damages** 🡪 those losses that can be fairly and reasonably considered to arise naturally from the breach in the usual course of things or those losses that could reasonably be supposed to be in the contemplation of the parties at the time of the contract
    * **Special damages** 🡪 if there are special circumstances surrounding the contract and potential breaches then these must be known and communicated to the defendant by the plaintiff
12. **Losses attributable to the plaintiff**
    * **“Even-if”** 🡪 the plaintiff would have sustained the losses even-if the defendant wasn’t in breach (*Bowlay Logging*)
    * **Mitigation** 🡪 plaintiff suffered losses due to breach but losses are too high 🡪 plaintiff must act reasonably to contain losses 🡪 then assess damages based on difference between contract price and market value (*Chicoutimi*)
    1. **When do you get damages?**
       1. When the other party is in breach of a primary obligation
       2. *Wharton v. Tom Harris Chevy*: Non-pecuniary damages for mental distress can be awarded when **(1)** it is an important part of the contract to provide peace of mind and enjoyment –AND/OR– **(2)** for physical inconvenience and discomfort caused by a breach and mental suffering directly related to that inconvenience – the inconvenience must be a physical experience, not disappointment
    2. **What do you get?**
       1. **Debt claim 🡪** foran amount agreed upon in advance and stipulated in the contract
          1. This is an action to collect that liquidated amount
          2. No causation, remoteness, mitigation analysis
          3. Problem with stipulating amount in advance is that *if the court construes this as a penalty clause* then it will be struck out/altered etc.
          4. If the amount isn’t a *reasonable pre-estimate* of the damages that would arise as a result of the breach, then it’s a penalty clause
       2. **Damages claim 🡪** first brought if the parties didn’t agree on an amount in advance or the court struck down the agreed upon amount as a penalty clause
          1. If the parties didn’t agree on the amount in advance then the injured party must *first* bring a damages claim
          2. Court determines the amount of damages – analysis of causation, remoteness, and mitigation
          3. Party in breach must then pay the injured party this court-assessed amount of damages
          4. Then, if the party in breach doesn’t pay then injured party must bring a *debt claim*
    3. **Can you get the same damages in contract and tort?**
       1. Undecided – 2 approaches
       2. *Koufos v. C. Czarnikow*: Remoteness test in tort and contract are different due to the voluntary assumption of risk in contract and the assumed common knowledge of the parties.
          1. Orthodox approach
          2. Tort losses are recoverable if they were reasonable foreseeable.
          3. Losses are recoverable in contract if they are not particularly unusual. Particularly unusual means it would only happen in the minority of cases and would therefore be too remote
       3. *Parsons Ltd. v. Uttley Ingham & Co.*: In cases where the breach of contract leads to physical damage, the test for remoteness is similar to that in tort – the contractor is liable for all such loss or expense as could reasonably have been foreseen, at the time of the breach, as a (slight) possible consequence of it
          1. Denning’s rogue approach

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| **(11) What are the seller’s remedies?** |

1. **Can the seller get real remedies? Yes, if the buyer breaches obligation to pay.**
   1. **s.42** states that the following remedies apply to anyone in the position of a seller and is “unpaid,” meaning that the buyer has not paid the whole price of the goods
   2. **s.43(1)** sets out 3 remedies that the unpaid seller has against the buyer
      1. **s.43(1)(a)** is a lien on the goods or the right to retain them for the price
         1. This does not rescind the contract
         2. This is a preliminary step on the way to asserting the seller’s right to resell under **s.43(1)(c)**
         3. The seller’s lien is over the contracted for goods and the seller must be in possession of them
         4. **The seller has a specific, possessory lien**
      2. **s.43(1)(b)** gives the seller the right to recall the goods in transit in the case of insolvency
         1. This does not rescind the contract
      3. **s.43(1)(c)** gives the seller a right to resell the goods
         1. Great protection because the goods are the buyer’s property, seller in possession, can sell something you don’t own
         2. This statutory remedy deals with the *nemo dat* issue arising from **s.16(a)** which is an implied condition that the seller has the right to sell the goods
         3. Without **s.43(1)(c)** seller could run into problems with the 3rd party (2nd buyer)
         4. Also deals with the issue where if the seller sells to a 3rd party then the lien is extinguished along with the seller’s delivery obligation to the 1st buyer or if the 1st buyer does pay for the goods then the lien is also extinguished and the seller would be in breach
         5. This section gives the seller protection from both the 1st buyer and 3rd parties by giving the right to resale if the seller meets certain requirements
   3. **s.43(2)** gives the seller an additional remedy to withhold delivery if the property in the goods has not passed to the buyer
   4. **s.44** sets out that in the seller’s lien, an unpaid seller can hold onto goods until the buyer pays for them
      1. The lien is only over the goods that haven’t been paid for
   5. **s.45** deals with part-delivery
      1. Unpaid seller making part delivery can withhold the rest of the goods, unless otherwise agreed to waive lien
      2. Adds in the way the common law doesn’t – partly converts seller’s lien into a general lien but this has been strictly construed and only applies if the parties have agreed to it under the contract
      3. Only used when it is clear that goods were supposed to be delivered in installments
      4. *Snagproof Ltd. v. Brody*: Common law authority for the proposition that a lien can only be exercised for in the case of delivery in installments/part delivery when the parties have expressly agreed to it
   6. **s.46(1)** states that he unpaid seller of goods loses the lien or right of retention when
      1. **(a)** When the seller delivers the goods to a carrier or other bailee for transmission to the buyer without reserving the right of disposal of the goods, AND
      2. **(b)** When the buyer or the buyer’s agent lawfully obtains possession of the goods, AND
      3. **(c)** By waiver of it
   7. **s. 43(1)(b) + s.47** give the seller the right to stop the goods in transit
      1. “…when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit; that is to say, the unpaid seller may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.”
      2. This does not rescind the contract
   8. **s.51(1)** codifies the common law that **s.43(1)(a)/s.43(2), s.43(b)/s.47** lead to the right of resale
      1. **NONE OF THESE ALONE RESCIND THE COMMON LAW**
   9. **s.51(2) + s.43(1)(c) give the seller the money right to resale**
      1. Does not require the seller to be the owner of the goods
      2. Effect is that the buyer #2 gets good title to the goods against buyer #1
      3. Often overlaps with **s.30(3)** because the new buyer gets good title as if it transferred from buyer #1, through the seller as agent, to buyer #2
      4. Potential problem 🡪 the new buyers has good title as against the original buyer but not against 3rd parties with an interest in the goods
         1. seller under **s.16** has to declare all charges on the goods or it’s a breach of contract
   10. **s.51(3)** states that if the goods are of a perishable nature or the seller gives notice then the seller can resell the goods
       1. Can then recover damages from buyer #1 if resold at a loss
          1. If the contract is rescinded, you only get damages for non-acceptance, which is the difference between the contract price and the market price – if the contract is rescinded or treated as such, property reverts back to the seller so the seller has to set off the value of the resale against the debt claim amount
       2. If the goods are perishable then the seller does not have to give notice
       3. If the goods are not perishable then the seller must give reasonable notice for a final chance to pay-up
       4. **THIS HAS THE EFFECT OF RESCINDING THE ORIGINAL CONTRACT**
       5. *R v. Ward v. Bignall*: Extends this provision to say that if a seller gives notice, the buyer hasn’t paid after a reasonable time, then the contract is rescinded
       6. Rescinded regardless if the seller actually resells
   11. **s.51(4)** states that if the seller expressly reserves the right of resale, then the buyer defaults, **the contract is rescinded**, property reverts back to the seller and then can resell to a new buyer
       1. Preserves the right to claim damages
2. **Can the seller get personal remedies?**
3. **Yes, the buyer is liable for refusing or neglecting to accept delivery.**
   1. **s.41(1)** states that when the seller is ready and willing to deliver the gods and the buyer doesn’t take delivery within a reasonable time then the buyer is liable
      1. **s.41(1)(a)** for any loss whatsoever stemming from this refusal
      2. This has the effect of hooking the second branch of *Hadley v. Baxendale*
      3. Buyer is simply liable
      4. However, when a seller sells to a second buyer who would have bought from the seller anyways, lost profit due to reduced sales the second branch of *Hadley v. Baxendale* is necessary
   2. *Charter v. Sullivan*: To claim these special damages there must be **(i)**an available market, and **(ii)**seller must show that its demand at least matched its supply (can sell as many goods as the seller can get a hold of)
      1. Seller must show that this loss of an extra sale directly and naturally resulted from the ordinary course of events from a buyer’s wrongful neglect/refusal to accept/pay for the goods
   3. *Victory Motors v. Bayda*: If there is an available market, where the supply is the same or greater than demand, then the plaintiff will be out of an additional sale
   4. *Lazenby Garages v. Wright*: For specific goods, especially unique ones, it is less likely the seller will be able to claim loss of additional sale (for example, used cars)
      1. Can claim these special damages
      2. **s.41(2)** for reasonable charges for the care/custody of the goods
4. **Yes, can bring an action for the price 🡪 debt claim**
   1. **s.52(1)** states that if the property in the goods has passed to the buyer, the buyer then does not pay for the goods, the seller can maintain an action for the price
      1. Applies if the contract is silent on time of payment
   2. *Colley v. Overseas Exporters/Stein Forbes and Co*: No action lies for the price of goods until property has passed unless as stipulated under **s.52(2)**
      1. Despite lack of fault as to the property not passing the seller still cannot use this provision
      2. Limited to a claim under **s.51(3)** for non-acceptance
   3. **s.52(2)** states that if the time of payment is stipulated and the buyer doesn’t pay, the seller can bring an action for the price even though property hasn’t passed
   4. *Standard Radio Inc. v. Sports Central*: Debt is the remedy in respect of such promises to pay a liquidated sum of money (as long as it isn’t a penalty clause) as the common law enforces this specifically.
      1. Damages are the common law remedy in respect of all other promises and of warranties.
      2. Remoteness and mitigation only apply to a claim in damages and *not* a debt claim
5. **Yes, can claim damages for non-acceptance 🡪 damages claim**
   1. **s.53(1)** states that if a buyer neglects or refuses to accept and pay for the goods the seller may maintain an action for damages for non-acceptance
      1. Property has not passed
   2. **s.53(2)** states that these are general damages – when there is not an available market
      1. First branch of *Hadley v. Baxendale*
   3. **s.53(3)** states that the seller must mitigate by finding another buyer
      1. Then claim damages using the contract price less the market price if there is an available market

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| **(11) Transfer of title by a Non-Owner?** |

1. **What is the position of a buyer who takes from a non-owner?**
   1. **s.26(1)** is the starting position of *nemo dat quod non habet*
      1. If the seller purports to sells goods that he does not own and does not sell them under the authority or with the consent of the true owner then the buyer acquires no better title to the goods than the seller had, unless the owner’s conduct precludes the owner from denying the seller’s authority to sell
   2. **First exception – “estoppel**” – **s.26(2)**
      1. If the true owner’s conduct created the impression that the seller had the authority to sell the goods on the owner’s behalf then the true owner is estopped from denying the seller’s authority to sell.
      2. Conduct requires possession + something else
      3. Contract of sale between the BFPV and the true owner
      4. The BFPV gets whatever interest the true owner had
      5. No protection against 3rd party charges on the goods
   3. **Second exception – “market overt”** – **s.27(1)**
      1. A market overt is a licenced place of doing business that is open to the public
      2. If a BFPV gets stolen goods in a market overt then the buyer gets good title
      3. However, if the thief is prosecuted to conviction under a charge of theft then the goods revert to the true owner under **s.29**
   4. **Third exception – “voidable title” – s.28**
      1. The seller has voidable title (the original contract of sale by which the seller obtained these goods can be rescinded)
      2. The seller is capable of passing good title to a BFPV
      3. Equity won’t avoid the first contract of sale necessarily but it can be avoided, in which case title won’t revert but the original seller will be able to claim damages
         1. For example, unconscionability, undue influence, misrepresentation etc.
      4. *Car and Universal Finance Co. v. Caldwell*: Rescission operates by way of an election with subsequent communication.
         1. If an injured party cannot find the rogue but reasonable efforts have been made, then communication of rescission to the authorities has the effect of rescinding the contract
         2. If the contract is rescinded, then the new BFPV cannot take good title against the injured original seller
         3. Up for debate if this applies in the situation of innocent misrepresentation
   5. **Fourth exception – “deemed agency” – s.30(1)**
      1. A seller in possession can confer whatever interest the original buyer had on the BFPV as if the true owner allowed it.
      2. Contract of sale is between the BFPV and the seller, not the BFPV and the original buyer
      3. Operates in conjunction with the seller’s lien in **s.51(2)**, does not have to be BFPV
      4. *Pacific Motor Auctions v. Motor Credits*: Only the buyer has to be *bona fide*, the seller does not.
         1. The seller in possession does not need permission to be selling
         2. Afford 3rd parties greater protection than **s.26**
      5. *Worcester Works v. Cooden*: “Continues in possession” relates to the continuity of physical possession, regardless of transactions that may alter title.
         1. One is not a seller in possession if that possession is not continuous
         2. For example, interrupted by a repossession even that the BFPV didn’t know about
   6. **Fifth exception – “deemed agency”** – **s.30(3)**
      1. A buyer in possession dealing with a BFPV has the same effect as if the buyer (now seller) was the true owner’s agent
      2. BFPV must characterize the contract between “agent” and principal as a contract of sale
      3. Usually occurs in the situation of a “conditional sale” when ownership is with the principal, possession is with the “agent,” and the “agent” will inevitably get title at some point
      4. BFPV gets whatever the true owner had
   7. **Sixth exception – “unpaid seller’s lien” – s.51(2)**
      1. When an unpaid seller exercises the right of lien, then resells the goods to either a BFPV or someone who isn’t *bona fide* – doesn’t matter
      2. Buyer gets good title against the world
   8. **Seventh exception – “true agency” – s.59(1)**
      1. If the mercantile agent is in possession of the goods with the owner’s consent then a sale to the BFPV is valid
      2. Consignor/principal is bound despite the fact that the agent breached their agency contract
      3. *St. John v. Horvat*: this applies as long as these elements are met – **(i)**a mercantile agent, **(ii)**in possession of the goods, **(iii)**with consent of the owner, **(iv)**made a sale in the ordinary course of business of a mercantile agent, **(v)**BFPV
         1. **Objective test:** To determine whether the disposal of goods was done “*in the ordinary course of business of a mercantile agent”* – conduct of seller or other circumstances that would put a reasonable buyer on notice that this wasn’t such a sale.
         2. Issue here is between the principal and the agent, not the principal and the BFPV