# Commercial Transactions – Spring 2015 – Rosalyn Chan

* *SOGA* merely codifies existing common law, but ***Re Wait*** states that equitable law still applies!
* ***Ashington Piggeries v Christopher Hill, Ltd*** prefers to consider first the transacation between the buyer and seller in light of common sense and good faith in business, then examine the particular provisions of the code on which the parties rely

# The Contract of Sale of Goods

## Is it goods or land?

* The intention of the parties is a determining factor for whether something that is not obviously one or the other is land or goods: ***Fredkin v Gliens*** (contract for sale of grass, intended to be turned into hay)
	+ **S1** – goods – (b) includes growing crops and things attached to or forming part of the land which are agreed to be severed before the sale or under the contract of sale
		- (a) all chattels personal, other than things in action and money
* If the thing that was sold was to be delivered/taken right away so that the buyer didn’t derive any benefit from the land, the contract was for a chattel: ***Carlson v Duncan*** (contract for the sale of trees, granting purchaser as much time as he wanted to remove the timber)
	+ If the thing that was sold was remaining on the land so the purchaser could derive benefit from it, it’s an interest in land
	+ Whether or not something is a chattel or land interest depends on the terms of the contract

## Is it a sale governed by *SOGA* or some other sales/barter?

* **S6** - (1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to a buyer for **money or money value** (the price).
	+ (2) There can be a contract for sale between one part owner and another
	+ (3) It can be absolute or conditional
	+ **(4)** If under the contract, the property is transferred from the seller to the buyer, the contract is called a sale (WOAH NO WAY)
	+ **(5)** If the transfer of property is to take place in the future, or subject to some condition to be fulfilled later, it’s an agreement to sell.
	+ **(6)** An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled so that the property can be transferred
* ***Mason & Risch Ltd v Christner***: consideration that was in part a good with no value assigned and in part money was considered to be a barter and not a sale
* It is not a barter if a monetary value is assigned to the consideration – sales include agreements where property is parted with for valuable consideration, whether there is an actual money payment or not, provided that the bargain be made and value measure in money terms: ***Messenger v Greene*** (contract for sale and delivery of wood and a contract for sale of provisions – accounts offset so no money passed)

## Is it a sale or some other transaction?

* Problem categorizing sales vs other transactions in at least three different situations:
	1. Where skill and labour is used to create the goods which are ultimately transferred to the buyer
	2. Where skill and labour are supplied along with the goods which are transferred to the buyer (ie: installation)
	3. Where technically there was no transfer in goods “under the contract” because of the law of accession or fixtures (***Fairbanks Soap Company v Sheppard***)

### Is it a sale of goods or a contract for labour and materials?

* The question to ask is whether the application of skill and labour in the production of the product is the substance of the contract: ***Robinson v Graves*** (A hired a painter to paint a portrait and all the supplies were supplied to the painter – here, the portrait was only incidental to hiring the painter for their artistic abilities)
	+ If there is skill exercised in carrying out the contract, it’s for labour: ***Clay v Yates***
	+ If the goods are the primary subject matter of the contract, it’s a contract of sale: ***Lee v Griffin***
	+ ASK: why did you choose that specific person to contract with?
* To protect yourself, split the commission into two contracts, one for the materials and one for labour
* If you supply goods/materials along with the labour, you can imply fitness warranties from common law (since *SOGA* is just a codification of common law) into the contract – you are warranting that the materials will be of good quality and reasonably fit for the purpose:  ***Young and Marten Ltd v McManus Childs Ltd*** (work was to be done on the roof and the roofer was to supply the materials (never mentioned in the contract), which ended up being faulty)
* Where the contract is primarily to provide a good, the incidental service component does not change its characterization as a sale of goods contract: ***Gee v White Spot*** (P got botulism poisoning from beef dip)
	+ Items must have a fixed price to be included
	+ If it were a fancier restaurant, it is probably a contract for service as you pay for the atmosphere and service, not so much for the food ingredients (argue it on the facts)

### Is it a sale of goods or a lease/hire-purchase contract?

* **S1** – lease – a lease or an agreement to lease where the lessee is acquiring the goods that are being leased primarily for personal, family, or household purposes
* Hire-purchase/conditional sale: at the end of the payments, buyer gets title, but gets possession right away (installment plan)
* **True lease:** possession reverts back to the lessor at the end of the payment period
	+ You can have the option to buy, but the sale must only occur if the option is exercised
	+ If the option to buy is not a true option (it is a super low price compared to market value), it is deemed to be part of the overall sales contract
	+ If the lessee is allowed to terminate the lease early – true lease
	+ If the lease is for a mandatory period of time and at the end, the lessee doesn’t become the owner or goods are returned – true lease
	+ If there is a compulsory time period of the lease which exhausts the value of the goods – true lease
* If you fully intend to buy the goods in the end, it is a sale of goods even though it was a hire-purchase agreement: ***Lee v Butcher*** (hire-purchase agreement for furniture, but L had agreed to buy the goods)
	+ **S30(2)** – if the buyer is in possession, they can pass a good title to buyer2 even if they don’t have title
	+ **S9 *Factors Act*** gives a good faith buyer title
* If there was no intention or obligation to buy the good in the end, it is a hire-purchase contract: ***Helby v Mathews*** (A owned the piano he gave to B under an agreement and B used the piano as collateral for an advance with R (wrongly) – A demanded it back and R refused saying they got it in good faith and without notice so S9 *FA* shouldn’t apply – payments were optional and ownership was not inevitable!)

### Is it an agency contract for sale or a consignment?

* If it is an actual consignment, then there is only a contract of sale between the consignor and the buyer
* If it is actually a contract of sale masquerading as a consignment, there are two contracts of sale: one between the consignor and consignee, and one between the consignee and the buyer – ownership passes to the consignee in the interim
	+ In a time-limited consignment, where B is obligated to buy the goods if they don’t find a buyer, *SOGA* applies from consignor to consignee right away, and then from consignor to buyer if there is a sale
* Not a buyer if you’re to be remunerated for your services with a percentage of the sale – it is clear that no person who is an agent can be allowed to buy that which he is instructed to sell: ***Weiner v Harris*** (P consigned jewellery to F with no right to buy, who sold it to D as collateral – P wanted it back and argued F didn’t have agency to do what he did – P lost)
	+ **S59:** protects third parties when the mercantile agent is in possession of goods and enters into a transaction with a good faith purchaser – the consignor is bound by the agent
* A true consignment is when the consignee never becomes the owner – if they can't find an seller, it would go back to the consignor: ***Re Stephanian’s Persian Carpets Limited*** (A consigned carpets to S, who sells them to B, but S still had possession and went bankrupt – who gets the carpets? A since it was a true consignment)

# Elements of the Contracts

* **S73:** preserves the common law – most aspects of a sales transaction are governed by the rules of contracts, including offer and acceptance
* **S8:** contracts of sale can be in writing, oral, or implied

## Incapacity

* **S7:** incapacity can make a contract void or voidable
	+ **(3)** An incapacitated person has to pay a reasonable price for necessaries bought/sold (**(1)** goods suitable to the condition of life of a persons, and to the person’s actual requirements at the time of the sale and delivery
* A contract entered into by a drunk person is not void, but voidable – you have to disaffirm it, not enough to not affirm it and must be done within a reasonable time or it may be taken to say you’ve made an election to keep the contract: ***Bawlf Grain Co v Ross*** (guy bought wheat when drunk, told it was shipping when sober, waited a month to try to rescind when the price rose)

## Formalities/Writing Requirements

* *SOGA* no long directly imposes any writing requirements but **S8** contemplates that other statutes may impose formalities, such as the *Business Practices and Consumer Protection Act*
	+ **(1)** Subject to this or any other Act, a contract of sale may be made in **writing**, either with or without seal, or **by word of mouth**, or **partly in writing and partly by mouth**, or may be **implied** from the conduct of the parties
	+ **(2)** Nothing in this section affects the law relating to corporations

## Price

* Price is an important part of the contract of sale (**S6**) but what happens if they haven’t agreed on the price?
* **S12:** **(1)** the price in a contract may be (a) set by the contract, (b) left to be set as agreed in the contract, or (c) determined by the course of dealing between the parties
	+ **(2)** if the price is not determined in accordance with (1), the buyer must pay a reasonable price
	+ (3) What is a reasonable price is a question of fact dependent on the circumstances of each case.
* **S13: (1)** If there is an agreement to sell goods on the terms that the price is to be set by the valuation of a third party, and the third party cannot or does not do so, the agreement is avoided
	+ **(2)** If the goods or any part of them have been delivered to and appropriated by the buyer, (1) does not apply and the buyer must pay a reasonable price for the goods
	+ (3) If the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.
* If a contract is silent on price, silence brings in the doctrine of reasonable price – the law will fix a price which is reasonable if the two parties can’t agree: ***Montana Mustard Seed Co v Gates*** (contract for seeds that had a price, but not for the one that P actually received – contract doesn’t fail)

## Categorization of the Subject Matter of the Contract

* Goods can be classified as either “existing” or “future” AND “specific”, “unascertained”, or “ascertained”. Any good will have only one designation from each classification.
* **S1 – “future goods”:** goods to be manufactured or acquired by the seller after the making of the contract of sale. **S9(3)** makes it clear that such a contract starts as an agreement to sell.
	+ **“specific goods”:** goods identified and agreed on at the time a contract of sale is made
* **S9: (1)** the goods that form the subject of a contract of sale may either be existing goods, owned or possessed by the seller, or future goods
	+ **(2)** there may be contract for the sale of goods, the acquisition of which by the seller depends on a contingency that may or may not happen.
	+ **(3)** if by a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

|  |  |  |
| --- | --- | --- |
| **Specific Goods** | **Unascertained Goods** | **Ascertained Goods** |
| * Goods identified and agreed upon at the time the contract of sale is made
* Buyer immediately becomes to owner and has no opportunity to reject goods
* If the contract is for specific goods, but they don’t exist yet, there is no contract: ***Bell v Lever Bros***
 | * Goods are not identified at the time of the sale
* Buyer is not the owner until they’ve had a chance to inspect the goods and make sure it conforms with the contract
* The contract must contain a description
* It’s always just an agreement to sell
 | * The process of appropriation when the goods become ascertained
* You have to agree that the goods provided are the ones described
* When you know exactly what goods you are getting, it goes from unascertained to ascertained
 |

## Perished Goods

* **S10:** A contract for the sale of specific goods is void if, without the seller knowing, the goods have perished at the time when the contract is made
* **S11:** If there is an agreement to sell specific goods, and those goods subsequently perish before the risk passes to the buyer, the agreement is avoided.

## Types of Obligations

* Conditions are generally more important terms than warranty terms. A third type of term has emerged: the intermediate term.
* **S1 “warranty”:** an agreement with reference to goods that are the subject of a contract of sale, but collateral to the main purpose of that contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated
* **S15(2):** Whether a stipulation in a contract of sale or lease is a contract or a warranty depends in each case on the construction of the contract – doesn’t matter what you call it!
* Whether it is a condition or a warranty, once the buyer has accepted the goods, or is deemed to have accepted the goods, the claim is barred – you can’t reject after you accept: ***Leaf v International Galleries*** (“Constable” painting – specific good, wanted to rescind after years)
	+ **S15(4):** if the contract is for specific goods and property passes, breach of a condition is treated as a breach of a warranty
	+ **S23(2)**: for specific goods, property and goods pass to the buyer when the contract is made – no way to avoid the contract
	+ Rescission is possible for misrepresentations, but only within a reasonable time
* The correct test to determine if a breach should lead to a rescission is to look at the events which have occurred as a result of the breach and to decide if these events deprived the party attempting to rescind of the benefits that it expected to receive from the contract – breach must lead to the party not being able to obtain all or a substantial proportion of the benefits that they intended to receive by entering into the contract: ***Hong Kong Fir v Kawasaki***
	+ Assess the consequences of the breach to determine whether it is a condition or a warranty
* Intermediate terms give rise to damages, not the right to reject, unless the breach goes to the root of the contract: ***Cehave v Bremer***
* Breach of an innominate term gives the right to rescind the contract if the innocent party was deprived of “substantially the whole benefit which it was intended he should obtain from the contract.” Time/quantity is generally of the essence in mercantile contracts (non-consumer) and so would be a condition because it would deprive the other party of substantially the whole benefit: ***Bunge v Tradax***
	+ Where there is a number in the contract, it’s a condition as it demonstrates want for commercial certainty and efficiency

|  |  |  |
| --- | --- | --- |
| **Mere Puffs** | **Representations** | **Terms** |
| * No reasonable person would think you are guaranteeing what you say
 | * No obligation has been breach
* Only damages are in tort law
* For specific goods, statements are usually representations – caveat emptor
* If you hold a party to their falsehood, get estoppel
* If you hold a party to the truth, get damages for misrepresentation
* Misrepresentations happen before acceptance
 | * If it’s unascertained good, anything said about the description is likely to be seen as a term
* There are more remedies available if it’s a term
* Breach of condition: termination, damages, specific performance, relieved of obligations
* Breach of warranty: damages, no termination
 |

## Implied Terms

* **S69:** Any right, duty or liability that would arise under a contract of sale by implication of law can be negative or varied by (a) express agreement, (b) by the course of dealings between the parties, or (c) by usage, if the usage is such as to bind both parties to the contract.
* There are two ways to imply a term into a contract: 1) operation of law – common law or statute can imply terms into a contract, or 2) a term can be implied through the parties’ situation or actions (custom/usage in the industry, or by necessity to make the contract work for the parties – is it necessary, NOT reasonable, to make the contract work): ***Canadian Pacific Hotels Ltd v BMO***

## Exclusion and Limitation Clauses

* Most of *SOGA* only applies in the absence of an agreement to the contrary because the Act respects freedom of contract
	+ This presupposes that parties are in equal positions to bargain
* Clauses which deny that express warranties or representations are/aren’t included in sales contract
* Clauses which limit or negative a buyer’s rights in the event of non-performance or defective performance by sellers
* Exclusion clauses attacked on two grounds:
	+ Buyer usually unaware of the significance of the clauses and their rights
	+ Many consumer sales transactions involve the use of adhesion or standard form contract which means there’s no real bargaining
* When assessing enforceability of exclusion clauses, the courts must apply a three part test: ***Teracon v BC***
	1. As a matter of interpretation, does the clause apply to the circumstances established?
	2. Was it unconscionable at the time the contract was made?
	3. Should the court refuse enforcement based on public policy (the onus of proof lying with the party seeking to avoid enforcement)?

## Consumer Protection and the Contract of Sale

* **S20:** No waiver of warranties or conditions for retail sales or leases
* **S69:** Any right, duty or liability that would arise under a contract of sale by implication of law can be negative or varied by (a) express agreement, (b) by the course of dealings between the parties, or (c) by usage, if the usage is such as to bind both parties to the contract.
* The court will not protect you from making foolish contracts, but where you are fraudulently induced into payment, this is going to be found to be fraud – simply doing justice can be a sufficient basis for protecting weaker parties:  ***Gaertner v Fiesta Dance Studies*** (nurse got tricked into signing up for crazy dance lessons that cost $$$$$)
* In the consumer sphere, sufficiency of notice and proportionality trump the *L’Estrange* notion that a signature alone is binding. If a term of the contract is particularly onerous, the party looking to enforce that term must prove that it took measures to properly notify the other party: ***Tilden Rent-A-Car*** (rented a car and signed an agreement without notice of an onerous exclusion clause)
	+ When a term is inconsistent with the true object of a contract, the party whose interests are being protected must call them to the other party’s attention or they aren’t binding
* There are two different approaches to a test for unconscionability: ***Harry v Kreutziger*** (tricked into selling fishing boat and license for way less than market value and now, can’t get another license)
	1. Inequality (of both the circumstances and process) plus substantial unfairness leads to a presumption of unconscionability which the stronger party must rebut (Morrison test)
	2. Community standards of commercial morality (a simplified Lloyds test)
	+ There is a presumption of fraud for unconscionable bargains – the other party has to prove it wasn’t unfair – undue influence is about relationships and unconscionability is about unfair advantage

# Obligations of Suppliers and Manufacturers

* *SOGA* says nothing about obligations owed by persons who are not immediate parties to the contract of sale

## The Privity Problem

* Horizontal privity: contract between A and B to benefit C
* Vertical privity: A sells to B, who sells to C
* Where there is no privity of contract between P and the seller, P cannot bring an action under *SOGA*: ***Lyons v Consumers Glass Co Ltd*** (mom buys bottle from company, baby uses it – glass breaks and shatters her eye – horizontal privity as injury is to baby, but contract is with mom)
* Exclusion clauses don’t prevent negligence claims: ***Chabot v Ford Motor*** (P bought a Ford car from dealers and it caught on fire 3 weeks later during normal use – the contract had clauses excluding liability from both the seller and Ford – too bad, they’re both liable – vertical privity as contract is with dealer, but want to sue manufacturer)

## Models for Reform

### US Developments

* Public policy demands that an implied warranty be imposed upon the manufacturer that goods are wholesome and fit for use, and that said warranty runs with the sale of the goods for the benefit of the consumer. In the reasonable contemplation of the parties to the warranty, if a person other than the contracting party might be expected to become a user of that good, their lack of privity shouldn’t stand in the way of prosecution against the manufacturer. The implied warranty of merchantability extends to the purchaser, his family, and to other persons using it with consent: ***Henningsen v Bloomfield Motors*** (buyer and wife claiming action against car manufacturer)

### Quebec Developments

* Where an obligation is identified with the thing transferred, the successor by particular title of the first seller is not regarded as a third party. The dealer is not only passing title and possession entitlements, but also passing on claims with regard to quality to the buyer – the obligations: ***General Motors Products of Canada v Kravitz*** (contract for sale of a car – contract between the manufacturer and dealer had promises and buyer wants those promises as well)

### \*CANADIAN COMMON LAW

* If there is a clause in a contract to which you are not privy, but it is meant to benefit you as the third party, you can use that clause as a defence to any claims, provided you can show that the parties must’ve known that you would be the type of party to benefit from the clause: ***Fraser River Pile & Dredge v Can-Dive Services*** (FR owner a ship that sank while it was under charter by CD, who was negligent – FR recovered from insurance who wanted to sue CD, but there was a clause in contract between FR and insurance company that protected such actions)
	+ Did the parties to the contract intend to extend this benefit to this type of third party?
	+ Are the activities performed the very activities contemplated in the scope of the contract?

# The Passing of Property and Risk

## Significance of Situs of Property

* Location of goods is relevant since many rights/risks depend on whether property has passed to the buyer
* **S43:** The mere fact that the buyer has become the owner doesn’t, of itself, mean that they have immediate right to possession
* **S30(1):** If a person having sold goods continues or is in possession of the goods, or of the document of title to the goods, the delivery or transfer by that person, or by an agent, of the goods or documents of title under any sale, pledge, or other disposition of them, or under any agreement for the sale, pledge or other disposition of them, to any person receiving the same in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the delivery or transfer
	+ There are circumstances in which a seller may confer a good title on a third party, superior to the interests of the buyer
	+ **S30(3)**: A buyer in possession to whom property hasn’t passed yet may confer a good title on a good faith third party and defeat the property interest of the seller

## Rules Governing Passing of Property

* **S22**: **(1)** If there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at the time the parties to the contract intended it to be transferred
	+ **(2)** For ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties and the circumstances of the case
* **S23: (1)** Unless a different intention appears, the intention of the parties as to the time at which the property in the goods is to pass to the buyer is governed by the rules set out in this section
	+ **(2)** If there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, are postponed
	+ **(3)** If there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing is done and the buyer has notice of it
	+ **(4)** If there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing is done and the buyer has notice of it
	+ **(5)** When goods are delivered to the buyer on approval or “on sale or return”, or other similar terms, the property passes to the buyer as follows:
		- (a) when the buyer signifies approval or acceptance to the seller or does any other act adopting the transaction;
		- (b) if the buyer does not signify approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been set for returning the goods, at the end of that time, and, if no time has been set, at the end of a reasonable time
	+ **(6)** For the purposes of (5), what is a reasonable time is a question of fact
	+ **(7)** If there is a contract for the sale of unascertained or future goods by description, the property in the goods passes to the buyer when goods of that description and in a deliverable state are unconditionally appropriated to the contract
		- (a) by the seller with the assent of the buyer, or
		- (b) by the buyer with the assent of the seller
	+ **(8)** for the purposes of (7), the assent may be express or implied, and may be given either before or after the appropriation is made
	+ **(9)** If, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for transmission to the buyer, and does not reserve the right of disposal, the seller is deemed to have unconditionally appropriated the goods to the contract
* Where the parties’ intention is not discoverable in accordance with S22(2), S23 imputes intention in the cases stipulated
* The buyer only gets in rem rights once the seller’s obligations are fulfilled and goods are delivered

## The Importance of Passing Property

* Property passes when it is intended according to **S22: *Liberty Wine Merchants v Isaak*** (wine home brew store – products sold in two parts, sale of wine kit, and service of making the wine on premises – intention is obviously to transfer property when kit is purchased, otherwise it would violate liquor laws)

## Passing of Property for Specific Goods

* Specific goods are goods identified and agreed upon at the time the contract of sale is made – if steps have yet to be taken to ascertain the goods, property hasn’t passed yet: ***Kursell v Timber Operators and Contractors*** (contract to buy trees in a forest and then there was a forest fire – seller wants to claim the price of the trees saying property passed)
	+ **S23(2)**

## Passing of Property for Unascertained Goods

* Until goods have been selected, separated, or manufactured and separated, there can be no transfer of property because S21 provides that property shall not pass until the goods are ascertained – the contract is only an agreement to sell until then
* Mere ascertainment will not cause property to pass – the intention of the parties is the governing factor and if no intention is discoverable in accordance with S22(2), S23(6) applies.
* Unconditional appropriation: 1) Parties must have had a reasonable intention to attach the goods irrevocably to the contract, 2) it happens by agreement of the parties, 3) it must involve actual or constructive delivery, 4) risk must pass, and 5) it is the last act done by the seller, usually when the goods leave their control: ***Carlos Federspiel v Charles Twigg***
* Any implied assent to an appropriation of goods was withdrawn by the notice of cancellation – the buyer can prevent assumption of assent before the unconditional appropriation is said to have occurred – as long as you cancel an order before the seller has made it ready for delivery, you can reject it: ***Sells v Thomson***

## Risk and Frustration

* **S25: (1)** Unless otherwise agreed, the goods remain at the seller’s risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer’s risk, whether delivery has been made or not
	+ **(2)** If delivery has been delayed through the fault of either buyer or seller, then despite (1), the goods are at the risk of the party in fault as regards any loss that might not have occurred but for that fault
	+ **(3)** Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party
* Risk passes according to S25, or parties often stipulate in contracts when risk passes – risk determines who bears the burden of an uncertainty – who bears the cost of an unexpected occurrence
* To determine intention, look at the terms of the contract and the parties’ conduct. The statutory rule regarding transfer of property must give way to the intention of the parties and the circumstances of the case: ***Jerome v Clements Motor Sales Ltd*** (contract for a car, needed repairs, that was destroyed during a garage fire)
	+ It doesn’t matter how trivial the thing left to be done by the seller is to put it in a deliverable state (**S1(4)**: goods are in a deliverable state when they are in such a state that the buyer would be bound to take delivery of them), if it’s not done, property hasn’t passed
	+ If there is no other intention, assume that, until the buyer has possession, risk is with the seller

# The Seller’s Title Obligation

* **S16:** In a contract of sale or lease, **unless the circumstances of the contract are such as to show a different intention**, there is
	+ **(a)** an implied **condition** on the part of the seller or lessor that
		- (i) in the case of a sale or lease, the seller or lessor has a right to sell or lease the goods, and
		- (ii) in the case of an agreement to sell or lease, the seller or lessor will have a right to sell or lease the goods at the time when the property is to pass or the lessee is to take passion of the leased goods,
	+ **(b)** an implied **warranty** that the buyer or lessee is to **have** and **enjoy** quiet possession of the goods, and
	+ **(c)** an implied **warranty** that the goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer or lessee before or at the time the contract is made
* **S20:** No waiver of warranties or conditions for retail sales or leases

## the Right to Sell Goods

* There is no property in stolen goods – a person in possession of stolen goods doesn’t own those goods, which means they can’t transfer title in those goods to a potential buyer: ***Rowland v Divall***
* Where the seller has breached condition of title (**S16(a)(i)** & **(b)**), the buyer is entitled to recover the price without any allowance being made for the use of the goods. When the buyer has no right to sell the goods in the first place, the buyer retains the right to reject the goods at a later date than normal – treat it as a breach of condition, not just a breach of warranty: ***Rowland v Divall*** (P bought car from D, who sold it to X, and discovered much later that it was a stolen car – P wants money from D back on total failure of consideration – D says only breach of warranty)
* **S15(4):** If you have accepted goods, you must treat a breach of condition as a breach of warranty – even if you don’t have title to a good, if you sell it and you had an interest, you are passing on the interest – once you finish making payments to perfect your title, you are feeding the title and validating all subsequent titles that were defective – rescission can occur before feeding the title for subsequent buyers, but can only recover damages after: ***Butterworth v Kingsway Motors Ltd*** (B paid monthly payments on car, sold to C before finishing payments, so it still belonged to A. C then sold to D, then to E, then to F. B continued making payment, but learned she was still not allowed to sell. F wrote a letter to E wanting to repudiate the sale. F got out before title perfected, so is fine. Everyone else can only get damages)
	+ Until title feeds, you can claim total failure of consideration for something sold to you where the seller didn’t have title to transfer on

## The Scope of **S16(a)**

* S16(a) doesn’t state that the seller has title to the goods sold, but that the seller has the right to sell the goods which may or may not mean that the seller has title.
* The right to sell means the seller has the power to vest full and complete rights over the goods in the buyer –the right of quiet enjoyment can be interfered with if there is an injunction on the goods: ***Niblett v Confectioner’s Material*** (Contract for the sale of 3000 cases of milk – 2000 were delivered. But 1000 other cases were subject to a trademark infringement injunction – buyer wanted to rescind contract as they were not delivered in accordance with contract)
	+ Might be more of a S16(b) breach since trademark infringement wouldn’t be an issue if buyers took labels off
* If a vendor can be stopped by the process of law from selling, he doesn’t have a right to sell (duh): ***J Barry Windsor*** (contract for sale of lamps, but federal regulations prevented selling those types of lamps – buyer wins on S16(a))

## exclusion of the Implied Condition of the Right to Sell

* You can’t contract out of the obligation to transfer title because that is essentially the purpose of a sales contract and doing so would undermine the whole point of the contract (S20 – no waiver of warranties or conditions). It is difficult to contract out via general provisions, such as saying “there are no implied warranties/conditions”, but it is possible to contract out if you specifically say S16 doesn’t apply: ***Sloan v Empire Motors*** (P was to pay installments for a car, but the insurance co seized it – P sued D for breach of warranty of title for total failure of consideration as title was encumbered)

## The Warranties of Quiet Possession and Freedom from Encumbrances

* **S16(b)** & **(c)** means that the seller is responsible even for things they couldn’t possibly know so will obviously want to contract out of this
* **S20(3)** prevents contracting out of S16 for retail sales
* S16(b) gives the buyer ongoing protection for a period of time after the contract so the buyer is still able to enjoy possession of goods. The breach does not have to occur at the time of the contract. You can recover damages for breach of warranty, even if the seller is innocent too: ***Microbeads AC*** (contract for sale of equipment that had IP issues – someone claimed patent rights, so the buyer wasn’t allowed to use the goods and claimed a breach of S16(b))

# the Seller’s Obligation as to Description and Quality

## Sales by Description

* **S17: (1)** In a contract for the sale or lease of goods by description, there is an **implied** **condition** that the goods must correspond with the description.
	+ **(2)** If the sale or lease is by sample, as well by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.
	+ This section is most broad and all contracts are subject to this, but it’s not very useful for specific goods
* **S18(b):** If goods are bought by description from a seller or lessor who deals in goods of that description, whether the seller or lessor is the manufacturer or not, there is an implied **condition** that the goods are of merchantable quality; **but if the buyer or lessee has examined the goods**, there is no implied condition as regards defects that the examination ought to have revealed
* You have to figure out which statements were mere puffs, representations, and terms
	+ **Breach of a term can lead to damages, termination, or specific performance**
	+ Misrepresentation can lead to right to rescind
	+ If the statement is factual, it is not a term, it is a representation (caveat emptor)
		- For unascertained goods, the description can’t be factual because you haven’t seen it – it is always a term
		- For specific goods, caveat emptor – check the damn thing yourself – it’s always a representation
* The law of misrepresentation has not been eliminated by S17: ***Frey v Sarvajc*** (car was sold as is, but it was previously a total loss car, which wasn’t revealed, with parts that had way more mileage than stated)
	+ The general rule is caveat emptor: where there is no fraud, no representations, the buyer can’t complain of defects in a product that he had an opportunity to inspect before the purchase
	+ Latent defect: if there is a latent/hidden defect in the goods and the seller ought to know about them, but nothing an ordinary/reasonable inspection of the goods would show, then the seller is responsible for that latent defect
		- This works best if the buyer has no expertise
		- Although misrepresentations must generally be express, silence can constitute misrepresentation in the context of latent defects – can result in tort damages or rescission
	+ Patent defect: discoverable by inspection and normal buyer vigilance
* The court is reluctant to find an exclusion clause applicable, especially if it’s generic and absolute – you must be specific to contract out of S17: ***Hart-Parr Company v Jones*** (bought a tractor and told seller engine was new, but it was just repainted to look brand new – can’t say it’s sale by description and supply something completely different – no chance for inspection until paint came off so any inspection beforehand was not sufficient)
* The problem with S17 and specific goods is that S23(2) says that property passes immediately and S15(4) says that for specific goods in which property has passed, the buyer loses the right to terminate the contract and reject the goods. Whether it is for specific or unascertained goods, if the buyer has not seen the goods – it is a sale by description – if it is the description that motivates the buyer to buy, S17 can apply: ***Varley v Whipp*** (contract for machine – second-hand item contract, which is almost always sale by description – buyer never saw it, but bought based on seller’s statements)
* A thing is sold by description, even though it is a specific good, so long as it is not sold merely as the specific thing, but as a thing corresponding to a description: ***Beale v Taylor*** (contract for specific used car and the buyer saw it, but turns out it wasn’t a 1961 convertible, but two cars stuck together)
* Sale for specific goods is a sale by description under S17 and S18(b) insofar as the thing is expressly sold of a certain kind/class/species, but statements made to the quality or other unessential attributes of the thing are not part of the description, but merely representations, and inoperative unless fraudulent: ***Taylor v Combined Buyers*** (NZ) (P bought car from D and now wants to reject it as either a breach of implied condition or fraudulent misrepresentation)
	+ **Where you have a contract for unascertained goods**, anything said about the goods is part of the description for the purpose of S17 – renders all terms into conditions instantly and expands common law to include mere representations into the contract
	+ **Where you have a contract for a specific good**, only what the contract says about the goods (essential quality/character) is the description for S17 – doesn’t expand common law
* Breach of S17 is not dependent on a breach of S18 – just because the good supplied is perfectly suitable for the purpose or of merchantable quality, the buyer is entitled to reject the goods if they don’t conform with the contract exactly: ***Arcos Ltd v EA Ronaasen*** (there was a contract for wood with precise dimensions to make barrels – the delivered wood didn’t conform exactly with the description)
* The test of description is intended to be a broader, more common sense test of mercantile character – goods can meet a description even though they are not fit for use or of merchantable quality: ***Ashington Piggeries*** (contract for animal feed of “the best quality”, which ended up killing the minks – still meets the description of herring meal even if there is a bad chemical in it)
	+ If a contract contains an express statement of quality, intention dictates whether it is a condition or warranty – where the goods are still useful for something, it goes to the value of the goods (a warranty)

## The Implied Condition of Merchantable Quality

### The Standard of Merchantable Quality

* **S18(b):** If goods are bought by description from a seller or lessor who deals in goods of that description, whether the seller or lessor is the manufacturer or not, there is an implied **condition** that the goods are of merchantable quality; **but if the buyer or lessee has examined the goods**, there is no implied condition as regards defects that the examination ought to have revealed
* Courts have given a generous scope to what can be considered “merchantable” – reduces usefulness of S18(b) to buyers
* Goods are unmerchantable if they are of no use for any purpose for which such goods would normally be used – it may not be in perfect condition, but if it’s in useable condition, it is still merchantable – look at a general buyer!: ***Bartlett v Sidney Marcus*** (a contract for a second-hand car that had lots of issues later on)
* As long as the seller supplies something that meets one possible use, it doesn’t matter that this particular buyer can’t use it – it will still be of merchantable quality: ***Kendall v Lillico*** (contract for a Brazilian nut that had toxic mold)
	+ In determining S18(b) and the possible purposes that a reasonable buyer might have (objective standard), you can take into account subsequent knowledge
	+ DISSENT: The conditions that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist, and not being limited to their apparent condition would buy them if in reasonably sound order and condition and without special terms
* Price can be relevant, only if it is such a high price that you necessarily have to imply a particular quality constraint into the description. The best thing for sellers to do is make a more detailed description to reduce the number of purposes the goods could be used for – if someone could still use it for other purposes, it is still of merchantable quality: ***BS Brown & Sons v Craiks*** (contract for rayon to make clothing that wasn’t suitable for that clothing)
* The law doesn’t protect people from improvident bargains – it doesn’t protect against people who make careless purchases – caveat emptor – if it sufficiently corresponds to the description, no claim: ***Hartmann v McKerness*** ($50,000 fake watch, but corresponded to the eBay ad)
* Even if the complaint is small and easily mended, if NO buyer would want the good with that defect, the buyer is entitled to reject the good: ***IBM v Shcherban*** (glass on a dial shattered on a machine) – not too trivial for S18(b)
	+ DISSENT: This is fucking stupid.

### Implied Durability

* **S18(c)**: There is an implied condition that the goods will **be durable for a reasonable period of time** having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale or lease
* Guarantee of merchantable quality lasts at least between the time the contract is entered into, and when goods are delivered to the buyer. If goods are delivered and it can be said that they can’t be used by ANY buyer at that time, the buyer can reject the goods: ***Mash & Murrell*** (a bunch of potatoes went bad during shipment)
* As long as the goods are of merchantable quality at the time the contract is entered into, or at least when the property passes, the fact that they don’t last much longer is of no relevance to S18(b): ***Buckley v Lever Bros*** (clothespins shattered – nothing showed when they were delivered that there was anything wrong with them)
	+ Warranties only apply if goods, at the time of the accident, were in the condition they were in at the time of the transfer to the buyer

### The Effect of Inspection or Opportunity to Inspect on S18(b)

* A “reasonable examination” requires that not only the buyer should have had the opportunity to inspect the goods, but he must have actually examined them: ***Thornett & Fehr v Beer & Son*** (there were vegetable glues that weren’t merchantable quality, but the buyer had already looked at them, so sucks to be him)

## The Implied Condition of Suitability for a Particular Purpose

* **S18(a):** if the buyer or lessee, expressly or by implication, **makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller’s or lessor’s skill or judgment,** and the goods are of a description that is in the course of the seller’s or lessor’s business to supply, whether the seller or lessor is the manufacturer or not, there is an **implied condition that the goods are reasonably fit for that purpose**, except that in the case of a contract for the sale or lease of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose
	1. Buyer must buy goods for a particular purpose
	2. Purpose must be known to the seller
	3. The seller knew or ought to have known that the buyer was relying on the seller’s skill to select the goods
* Buyer must meet several requirements before being able to use S18(a) – which can be more useful to buyers than S18(b)
* If the good doesn’t last for a reasonable time, but breaks within a short time – that is evidence which goes to show it was not reasonably fit for the purpose at the time it was sold – so depending on the purpose, there can be some ongoing protection: ***Crowther v Shannon Motor Co*** (used car that broke down after only 2000 miles)
* There is a presumption of reliance of the buyer on the seller – for S18(a), the courts are more willing to let the price imply a particular purpose. Unless the seller knew the nature of the buyer’s business, his only clue to the quality which the buyer wanted would be the price which the buyer was prepared to pay: ***Henry Kendall v Lillico*** (Brazilian nut feed that had toxic mold and killed the birds – not fit for purpose since, you know, the birds died)
* The mere fact that an article sold is described in the contract by its trade name doesn’t necessarily make it a sale under a trade name. Three scenarios regarding sales with trade names: 1) where the buyer mentions a particular purpose and the seller offers the trade name, 2) if the buyer mentions that the trade name would fulfill his purpose, and the seller affirms, or 3) the buyer directs the seller to give him the trade name to fulfill his purpose. The exception to S18(a) only applies to 3) because there is no reliance on the seller: ***Baldry v Marshall*** (contract for Bugatti that didn’t fulfill buyer’s purpose)

## Exceptions – Allergies and the Idiosyncratic User

* One particular aspect of fitness for purpose arises as the result of the susceptibility of some people to allergic reaction to certain substances
* Should these buyers be able to use S18(a) – does it depend on whether they know of the allergy or if the allergy is common?
* To rely on an allergy/hypersensitivity, a plaintiff will have to show that a) the product involved a harmful ingredient, b) such an ingredient is harmful to a reasonably foreseeable and appreciable class or the # of potential users of the product, and c) P has been innocently injured in the use of the product in the manner and for the purpose intended: ***Esborg v Bailey Drug Co*** (a woman bought hair dye, didn’t use a patch test for possible sensitivity and developed itching)
* The essential matter is for the seller to know in such cases with regard to the purposes for which the article is required consists in the particular abnormality or idiosyncrasy from which the buyer suffers – if he doesn’t know, how can he decide or exercise skill in relation to the suitability of the goods that he is selling?: ***Griffiths v Peter Conway*** (P bought a tweed coat and developed dermatitis, but didn’t tell the seller about her abnormality)
* The buyer has the burden to tell the seller about their abnormality or allergy to get protection under S18(a): ***Ingham v Emes*** (had her hair dyed, did a patch test which was fine, but after full dye, developed dermatitis – full purpose was to have her hair dyed as a person allergic to Inecto)

## Sale by Sample

* **S19: (1)** A contract of sale or lease is a contract for sale or lease by sample if there is a term in the contract, express or implied to that effect
	+ **(2)** In a contract for sale or lease by sample, **(a)** there is an **implied** **condition** that the **bulk** must correspond with the sample in quality, **(b)** there is an **implied** **condition** that the buyer or lessee must have a reasonable opportunity of comparing the bulk with the sample, and **(c)** there is an **implied** **condition** that the goods must be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample
* Where a sale is sales by sample the buyer can have recourse by S17, 18 and 19 to address the problem
* To be a “sample”, you need to have presented to you by the seller a portion of what it is you’re going to get and a promise (implicit or explicit) from the seller that the rest of the goods is just like the sample – it is difficult to argue sale by sample if the buyer is selecting the bulk: ***Cudahy Packing Co v Narzisenfeld*** (sale of eggs, buyer inspected the crate of eggs before buying – other eggs he got wasn’t the same quality and he want to reject bulk under S19)

### The Function of the Sample: Reasonable Inspection

* “Reasonable examination” depends on the contract and contemplation of the parties – if the bulk corresponds with the same based on the same inspection, it is enough – if the sample has the same defect as the bulk, you can’t use S19 – use S18(b): ***Steels & Busks v Bleecker Bik*** (a chemical additive in the bulk that wasn’t in the sample, not visible upon visual inspection – latent “defect”)
* A “reasonable examination” involves common-sense standards – you don’t have to test something to death to find the problems: ***Godley v Perry*** (toy hurt a kid’s eye and the toy was sale by sample)

# Delivery

|  |  |  |  |
| --- | --- | --- | --- |
| **WHERE** | **WHEN** | **HOW** | **HOW MUCH** |
| 33(2), 33(3) | 33(4), 14, 39, 32, 41(1), 35(2) | JK DON’T NEED TO KNOW | 34(1), (3), (4), (5) |

* **S1 “delivery”:** a voluntary transfer of possession from one person to another
* **S5:** A person is deemed to be in possession of the goods, or of the documents of title to goods, if the goods or documents are in the person’s actual custody or are held by another who is subject to the person’s control or for the person or on the person’s behalf.
* **S31:** It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale
* **S33:** **(1)** Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties
	+ **(2)** Apart from any such contract, the place of delivery is the seller’s place of business, if the seller has one, and if not, the seller’s residence
	+ **(3)** If the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then despite (2), that is the place of delivery
	+ **(4)** If under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is set, the seller is bound to send them within a reasonable time
	+ **(5)** If the goods at the time of the sale are in the possession of a third person, there is no delivery by seller to buyer unless and until that third person acknowledges to the buyer that the third person holds the goods on the buyer’s behalf
	+ **(6)** Nothing in this section affects the operation of the issue or transfer of any document of title to goods
	+ **(7)** Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour
	+ **(8)** What is a reasonable hour is a question of fact
	+ **(9)** Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the **seller**
* **S38: (1)** If goods are delivered to the buyer that the buyer has not previously examined, the buyer is not deemed to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract
	+ **(2)** Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, the seller is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract
* **S39:** The buyer is deemed to have accepted the goods when
	+ **(a)** the buyer intimates to the seller that the buyer has accepted them,
	+ **(b)** the goods have been delivered to the buyer and the buyer does any act in relation to them which is inconsistent with the ownership of the seller, **or**
	+ **(c)** after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that the buyer has rejected them.
* **S41:** **(1)** When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after the request take delivery of the goods, the buyer is liable to the seller for **(a)** any loss occasioned by the buyer’s neglect or refusal to take delivery, and **(b)** a reasonable charge for the care and custody of the goods.
	+ **(2)** Nothing in this section affects the rights of the seller if the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract

## Time of Delivery

* **S14:** **(1)** Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale
	+ **(2)** Whether any other stipulations as to time is of the essence of the contract or not depends on the terms of the contract
	+ **(3)** In a contract of sale, unless there is evidence to the contract, “month” means calendar month
* **S32:** Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession
	+ If you’re going to complain about delivery, you have to show that you were ready and willing to pay at that time
	+ If payment is a warranty and delivery is a condition, and the payment is late – you don’t have to deliver, but you can’t terminate the contract – you can use for damages if you can show you were ready to deliver
	+ If payment and time of delivery are conditions, and the payment is late – you can terminate the contract and claim damages, but you still have to show that you were ready to deliver at the time specified
* The specified time of delivery must be complied with, otherwise it is a breach – time of delivery is of the essence and is a condition: ***Bowes v Shand*** (contract for rice to be shipped in Mar/Apr, but most loaded in Feb – breach because bulk was loaded too early)
* If the parties make time of the essence, a buyer can waive it, but can also impose a new deadline. Just because a buyer has waived one or more deadlines doesn’t mean the seller can say that time, the new deadline, is not of the essence (no estoppel on that biatch): ***Charles Rickards v Oppenheim*** (contract for car that had to be put in a certain condition before possession transfer and the seller was consistently late, failing to meet consecutive deadlines set by the buyer)

## Delivery of the Property Quantity

* **S34:** **(1)** If the seller delivers to the buyer a quantity of goods less than the seller contracted to sell, the buyer may reject them
	+ **(2)** If the buyer accepts the delivered goods, the buyer must pay for them at the contract rate
	+ **(3)** If the seller delivers to the buyer a quantity of goods larger than the seller contracted to sell, the buyer may **(a)** accept the goods included in the contract and reject the rest, or **(b)** reject the whole
	+ **(4)** If the seller delivers to the buyer a quantity of goods larger than the seller contracted to sell and the buyer accepts the whole of the goods delivered, the buyer must pay for them at the contract rate
	+ **(5)** If the seller delivers to the buyer the goods the seller contracted to sell mixed with the goods of a different description not included in the contract, the buyer may **(a)** accept the goods that are in accordance with the contract and reject the rest, or **(b)** reject the whole.
	+ **(6)** This section is subject to any usage of trade, special agreement or course of dealing between the parties.
* A vendor must supply goods in accordance with the contract description, including quantity, and he is not entitled to say that another description of goods will suffice for the purposes of the purchaser. The buyer may be placed in considerable difficulty by having goods tender to him which do not comply with the description under which he bought, or under which he has resold: ***Re Moore and Landauer*** (contract for 30 tins/case, but some were delivered as 24/case and the buyers are entitled to reject the whole deliver)
	+ Packaging the goods wrong can constitute wrong delivery

## Delivery by Installments

* **S35:** **(1)** Unless otherwise agreed, the buyer of goods is not bound to accept delivery by installments.
	+ **(2)** If there is a contract for the sale of goods to be delivered by stated installments, **which are to be separately paid for** (!!!), and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is **(a)** a repudiation of the whole contract, or **(b)** a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.
* Repudiation of the contract only affects the relationship from termination onwards
* If the contract isn’t severable and the buyer has accepted some goods, S15(4) states the breach of condition is treated as a warranty and you can’t reject defective deliveries later BUT S34 is more specific so trumps S15(4), so you can reject everything, but you need to have all the goods read to return (if you’ve used earlier deliveries, you can’t)
* The court assumes S35(2) is also concerned with quality as much as time/quantity. The test for whether 35(2) applies: 1) The ratio must be quantitatively large which the breach bears to the contract as a whole and 2) the degree of probability/improbability that such a breach will be repeated: ***Maple Flock*** (contract for flock to be made in installments and paid separately and there was a quality issue with one delivery – can’t reject whole contract, just damages, as breach was a small proportion of all deliveries and it didn’t occur again)

# The Buyer’s Remedies

## The Right to Reject the Goods Tendered

* **S15(2):** Whether a stipulation in a contract of sale or lease is a condition the breach of which may give rise to a right to treat the contract as repudiated, or is a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract
	+ **(3)** For the purposes of (2), a stipulation may be a condition though called a warranty in the contract.
* **S34:** **(1)** If the seller delivers to the buyer a quantity of goods less than the seller contracted to sell, the buyer may reject them
	+ **(2)** If the buyer accepts the delivered goods, the buyer must pay for them at the contract rate
	+ **(3)** If the seller delivers to the buyer a quantity of goods larger than the seller contracted to sell, the buyer may **(a)** accept the goods included in the contract and reject the rest, or **(b)** reject the whole
	+ **(4)** If the seller delivers to the buyer a quantity of goods larger than the seller contracted to sell and the buyer accepts the whole of the goods delivered, the buyer must pay for them at the contract rate
	+ **(5)** If the seller delivers to the buyer the goods the seller contracted to sell mixed with the goods of a different description not included in the contract, the buyer may **(a)** accept the goods that are in accordance with the contract and reject the rest, or **(b)** reject the whole.
	+ **(6)** This section is subject to any usage of trade, special agreement or course of dealing between the parties.
* **S35:** **(1)** Unless otherwise agreed, the buyer of goods is not bound to accept delivery by installments.
	+ **(2)** If there is a contract for the sale of goods to be delivered by stated installments, **which are to be separately paid for** (!!!), and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is **(a)** a repudiation of the whole contract, or **(b)** a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.
* **S38: (1)** If goods are delivered to the buyer that the buyer has not previously examined, the buyer is not deemed to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract
	+ **(2)** Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, the seller is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract
* **S39:** The buyer is deemed to have accepted the goods when
	+ **(a)** the buyer intimates to the seller that the buyer has accepted them,
	+ **(b)** the goods have been delivered to the buyer and the buyer does any act in relation to them which is inconsistent with the ownership of the seller, **or**
	+ **(c)** after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that the buyer has rejected them.
* **S70:** The question of what is a reasonable time is a question of fact
* The seller can tender alternative goods in compliance with the contract, but usually the right to reject goods brings the contract to an end

### The Loss of the Right to Reject: Specific Goods

* **S15(4)**: If a contract of sale is not **severable** and the buyer has accepted the goods or part of them, or if the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect
* **S23: (2)** If there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, are postponed – NEVER HAD THE RIGHT TO REJECT GOODS, SUCKA
	+ **(3)** If there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing is done and the buyer has notice of it
	+ **(4)** If there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing is done and the buyer has notice of it
* Until the goods are accepted by the purchaser, only a conditional property passes, which is not truly “unconditional acceptance” – seller successfully raises S15(4) because S39(b) is fulfilled: ***Wojakowski*** (contract for a car)

### The Loss of the Right to Reject: Acceptance

* **S38: (1)** If goods are delivered to the buyer that the buyer has not previously examined, the buyer is not deemed to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract
	+ **(2)** Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, the seller is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract
* **S39:** The buyer is deemed to have accepted the goods when
	+ **(a)** the buyer intimates to the seller that the buyer has accepted them,
	+ **(b)** the goods have been delivered to the buyer and the buyer does any act in relation to them which is inconsistent with the ownership of the seller, **or**
	+ **(c)** after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that the buyer has rejected them.
* Whether the good is specific or unascertained, the buyer loses the right to reject the goods if there’s acceptance
* S39 is independent of S38 and is immaterial that the reasonable time for examining the goods had not expired when the inconsistent act (with the seller’s title) was done: ***Hardy & Co v Hillerns and Fowler*** (contract for wheat, which the buyer resold – tests afterwards showed that it wasn’t the right quality and the buyer wanted to terminate)
	+ The seller upon receipt of notice of the buyer’s rejection is entitled to have the goods place at his disposal – if the buyer has done any act which prevents the seller from resuming possession, that act is necessarily inconsistent with his right – possession must go back at the time of rejection, not at a later date
* S34(5) applies to situations where the seller delivers a mixture of goods, some that conform with the contract, and some that don’t. The buyer has a right to accept the goods that are in accordance with the contract and reject the rest. S39 doesn’t apply to make him keep the whole bulk just because he purports to resell. Even though part of what was delivered was accepted it can wait until a later time to reject goods if it’s not in conformity with the contract: ***William Barker*** (contract for sale of coal, some parts didn’t conform, but some had already been resold)
* You don’t have to return the goods to the seller to reject it, you just have to communicate refusal – a delay in rejection can be okay depending on the facts (ie: inducements to an extended trial period): ***Rafuse Motors*** (contract for a shitty tractor – P is suing for price, claiming D had tried it out and accept the goods, so can’t reject)

## The Right to Damages and Specific Performance

### The Assessment of Damages

**FORMULAS:**

Goods not delivered or rightly rejected: market price – contract price = damages

Wrong/defective goods delivered but buyer keeps it: market value of what was supposed to be delivered – market value of what was delivered = damages

* The party complaining should be place in the same position as he would’ve been if the contract had been performed – the overarching compensation principle – you can’t use a formula that would result in overcompensation: ***Wertheim v Chicoutimi Pulp Company*** (goods delivered at the wrong time, so breach of warranty – contract value was for $70 and the value of the goods delivered was $42, but it was resold for $65 – damages for $5)
* If you can show that their actual costs would’ve been higher than their potential gain had the breach of contract not occurred, no damages ***Bowlay Logging*** (contract to log wood for timber sale – D didn’t provide enough trucks, so P couldn’t finish)
* If you get the right good, but it can’t perform a particular function, you can either claim for capital cost – gains from selling it (contract price minus the value), or you can sue for loss of profits (either expectation or reliance, but not both): ***Cullinane*** (contract for D to supply a machine to P with a stated production rate that wasn’t met)
* Losses that would only occur in rare cases and that are not in the contemplation of the parties are not recoverable, and vice versa: ***Koufos v C Cazarnikow*** (contract for ship to bring and sell sugar – delay and the market price for sugar fell)
	+ Uses ***Hedley v Baxendale***: 1) Damages should be such as may naturally and usually arise from the breach –OR- 2) Special circumstances known to both parties make the loss in the reasonable contemplation of the parties as a result of such a breach
	+ **The test** for reasonable contemplation: “not unlikely” – remoteness
* 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: ***Parsons Ltd*** (P bought a nut hopper and the installer left the ventilator closed, causing mold – nuts made pigs sick, killing them – even though the damage was far worse than expected, it was the type/kind of damage that was foreseeable even if the extent wasn’t)
* Non-pecuniary damages for mental distress can be award when 1) it is an important part of the contract to provide peace of mind and enjoyment –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: ***Wharton v Tom Harris Chevy*** (R bought car that made weird buzzing noise and couldn’t be repaired)

### Non-Delivery and Late Delivery

* **S54: (1)** If the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for nondelivery
	+ **(2)** The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract
	+ **(3)** If there is an available market for the goods in question, the measure of damages is to be ascertained, unless there is evidence to the contrary, by the difference between the contract price and the market/current price of the goods at the time or times when they ought to have been delivered, or if no time was set, then at the time of the refusal to deliver.
* To measure damages – it is not merely the amount of damage, you must measure by the loss in the market, which arises in the usual course of business from the breach. It also extends (whenever special circumstances require) to such possible damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it: ***Re R&H Hall Ltd*** (contract for the sale of corn, which allowed resale, with original owner delivering bulk at certain dates – failed to deliver and were supposed to give notice – term giving right to resell was enough to assume losses in reasonable contemplation)

### Breaches of Conditions or Warranties of Quality

* **S56**: **(1)** If there is a breach of warranty by the seller, or if the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not merely because of the breach of warranty, entitled to reject the goods, but the buyer may
	+ - **(a)** set up against the seller the breach of warranty in diminution or extinction of the price, or
		- **(b)** maintain an action against the seller for damages for the breach of warranty
	+ **(2)** The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty
	+ **(3)** In the case of breach of warranty of quality, the loss is, unless there is evidence to the contrary, the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty
	+ **(4)** The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent the buyer from maintaining an action for the same breach of warranty if the buyer has suffered further damage
* **S57:** This Act doesn’t affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid if the consideration for the payment of it has failed
* Upon a breach of an implied condition for fitness of purpose, where the buyer can’t rescind, the damage is prima facie the full purchase price, subject to diminution by such residual value, if any, that the seller may be able to establish: ***Ford Motor Company v Haley*** (R bought trucks to haul gravel that didn’t work very well – sues for damages but keeps the trucks)
* Loss of profit, or similar loss, which is the direct and natural consequence of the breach, may be claimed in addition to capital loss, if there is no over compensation: ***Sunnyside Greenhouses v Golden West Seeds*** (S bought roof panels from G and its special purpose was known to G – panels sucked which was a breach of warranty that they would last for 7 years – repairs and replacements)
	+ Contrary to *Cullinane*

### Specific Performance and Injunction

* **S55: (1)** In any action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff, order that the contract be performed specifically without giving the defendant the option of retaining the goods on payment of damages
	+ **(2)** The order may be unconditional, or on terms and conditions as to damages, payment of the price, and otherwise, as the court thinks just, and the application by the P may be made at any time before judgment
* If the goods aren’t specific or haven’t been ascertained, you can’t get specific performance: ***Re Wait*** (contract for 500 tonnes of wheat that had already been paid for – seller goes bankrupt before delivery)
* You can grant an injunction to restore the former position under the contract until the rights and wrongs of the parties can be fully tried out: ***Sky Petroleum*** (gas station was to be supplied with petrol at fixed price – market price rose and supplier refused to continue supply – gas station wanted an injunction against breaking the contract – serious damage to the business if the court didn’t grant injunction – kind of the same as specific performance here, but apparently not…)

### Statutory Remedies

* **S74: “buyer’s lien”** – a lien arising under S75, **“payment”** – an obligation incurred by the buyer to a person, other than the seller, to whom the buyer remains liable despite a default by the seller, **“seller” – (a)** a successor in interest or title of a seller, and **(b)** a trustee, **“trustee”** – a person who assumes control of a seller’s property by operation of law, under legal process or under the terms of a security agreement, and includes a sheriff, a trustee in bankruptcy, a liquidator and a receiver.
* **S75: (1)** If in the usual course of a seller’s business the seller makes an agreement to sell goods and **(a)** the buyer pays all or part of the price, **(b)** the goods are ascertained or future goods, and **(c)** the buyer is acquiring the goods in good faith for use primarily for personal, family or household purposes, then the buyer has the lien described in (2)
	+ **(2)** The lien in (1) is for the amount the buyer has paid towards the purchase price of the goods and is against
		- **(a)** all goods
			* **(i)** that are in or come into the possession of the seller and are held by the seller for sale
			* **(ii)** that correspond with the description of or with any sample of the goods under the agreement to sell, and
			* **(iii)** the property in which has not passed to a different buyer under a different contract of sale, and
		- **(b)** any account in a savings institution in which the seller usually deposits the proceeds of sales
* **S76: (1)** A buyer’s lien is discharged when the seller (a) fulfills the contracts of sale by causing property in goods to pass to the buyer in accordance with the contract of sale, or (b) refunds to the buyer the money that the buyer has paid towards the purchase price of the goods
	+ **(2)** Whether a buyer’s lien is to be discharged under (1)(a) or (1)(b) is at the option of the seller, but a discharge of the lien under (1)(b) does not affect any right of action the buyer may have for a breach of the contract of sale
	+ **(3)** A buyer’s lien ceases to bind goods that are appropriated to a sale made in good faith to a different buyer, whether or not that sale is in the usual course of the seller’s business

# tHE bUYER’S oBLIGATION TO aCCEPT AND pAY

* Seller isn’t bound to accept payment except in legal tender (unless otherwise agreed)
* If using a bill of exchange or other negotiable instrument, delivery of instrument is regarded as conditional payment – seller can still sue on the instrument itself or for the price of goods if instrument is not honoured
* Documentary transaction: developed to meet concerns of sellers who didn’t want to assume financial risk concomitant to shipping the goods without having first received payment and vice versa
* Solution to this is the letter of credit where a third party, whose financial status and commercial reputation are beyond doubt and agrees to be the drawee of the seller’s draft and promises to honour it
	+ Permits seller to sell without risk of shipping before payment and buyer to buy without risk of payment before receiving goods
	+ Buyer promises to pay price of goods to the seller upon seller tendering appropriate documents
	+ Buyer, seller, issuing banker, and correspondent banker
	+ **First step:** agreement in the contract of sale that payment of price shall be effected by a banker’s letter of credit
	+ **Next:** notification by the issuing bank to the seller or a second bank that a letter of credit has been issued in his favour – second bank is often used for stability in the transaction and can, but doesn’t always, confirm the letter of credit
	+ **Finally,** the seller receives that confirmed letter of credit and then ships the goods and acquires the documents specified in the letter of credit. Seller then tenders the documents to the correspondent bank and if the documents are good, the bank must accept them and perform its promise to pay the price or accept and negotiate the seller’s draft – correspondent bank will then claim reimbursement from the issuing bank

## Time of Payment

* **S14:** **(1)** Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale
	+ **(2)** Whether any other stipulations as to time is of the essence of the contract or not depends on the terms of the contract
	+ **(3)** In a contract of sale, unless there is evidence to the contract, “month” means calendar month
* **S31:** It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale
* S14(1) makes it clear that there can be a valid contract even if time of payment has not been agreed upon – for it to not apply, D has the onus to prove that they otherwise agreed. If the buyer orders goods from the seller without a time being fixed for payment or arrangements being made for credit, he must be ready to pay when the seller makes delivery – the fact that the parties may have had discussions concerning the time of payment or the granting of credit is irrelevant: ***Kay Corporation et al v Dekeyser*** (contract to buy meat to be shipped somewhere – no term about payment and D tried to argue there was no contract at all due to there being no time term)

# The Seller’s Rights and Remedies

* One set of personal rights – composed of an action against the buyer for the price or for damages, the other real – composed of actions the seller can take with respect to the goods

## Real Remedies (as opposed to fake ones)

* **S3:** A person is insolvent within the meaning of the Act who **(a)** has ceased to pay the person’s debts in the ordinary course of business or **(b)** cannot pay the person’s debts as they become due
* **S42**: **(1)** In this part, “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself or herself paid or is directly responsible for the price
	+ **(2)** The seller of the goods is deemed to be an unpaid seller within the meaning of this Act **(a)** when the whole of the price has not been paid or tendered, **or** **(b)** when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled because of the dishonour of the instrument or otherwise
* **S43: (1)** Subject to this or any other Act, even if the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law **(a)** a lien on the goods or right to retain them for the price while the seller is in possession of them, **(b)** in case of the insolvency of the buyer, a right of stopping the goods in transit after the seller has parted with the possession of them, and **(c)** a right of resale as limited by this Act
	+ **(2)** If the property in goods has not passed to the buyer, the unpaid seller has, in addition to any other remedies, a right of withholding delivery similar to and coextensive with the seller’s rights of lien and stoppage in transit where the property has passed to the buyer
* **S44: (1)** Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases: **(a)** if the goods have been sold without any stipulation as to credit; **(b)** if the goods have been sold on credit, but the term of credit has expired; **(c)** if the buyer becomes insolvent
	+ **(2)** The seller may exercise the right of lien even if the seller is in possession of the goods as agent or bailee for the buyer
* **S45:** An unpaid seller who has made part delivery of the goods may exercise the right of lien or retention on the remainder, unless that part delivery has been made under circumstances that show an agreement to waive the lien or right of retention
* **S46: (1)** The unpaid seller of goods loses the lien or right of retention **(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, **(b)** when the buyer or the buyer’s agent lawfully obtains possession of the goods, and **(c)** by waiver of it
	+ **(2)** The unpaid seller of goods, having a lien or right of retention, does not lose the lien or right of retention merely because the seller has obtained judgment or decree for the price of the goods
* **S50:** Subject to this Act, the unpaid seller’s right of lien, or retention or stoppage in transit, is not affected by any sale or other disposition of the goods that the buyer may have made, unless the seller has assented to it; except that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a third person who takes the document as a BFPV, then
	+ **(a)** If such last mentioned transfer was by way of sale, the unpaid seller’s right of lien, or retention or stoppage in transit, is defeated, and
	+ **(b)** If such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller’s right of lien, or retention or stoppage in transit, can only be exercised subject to the rights of the transferee
* **S51: (1)** Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of the right of lien or retention or stoppage in transit
	+ **(2)** When an unpaid seller who has exercised the right of lien, or retention or stoppage in transit, resells the goods, the buyer acquires a good title to it as against the original buyer
	+ **(3)** If the goods are of a perishable nature, **or** if the unpaid seller gives notice to the buyer of the seller’s intention to resell, **and** the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages of any loss occasioned by the buyer’s breach of contract

### Unpaid Seller’s Lien

**S43: (1)** Subject to this or any other Act, even if the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law **(a)** a lien on the goods or right to retain them for the price while the seller is in possession of them

* The refusal to pay can only excuse the seller from further performance if such refusal amounts to a repudiation of the contract
* Where goods sold are delivered in instalments and separate payment is to be made for each instalment, as a general rule and in the absence of an express agreement, a lien cannot be claimed for a balance owing in respect of an instalment already delivered against instalments still to be delivered: ***Snagproof Ltd v Brody*** (B buys clothing from S and they are sent in a shipment – B won’t (can’t because he needs to goods for his business so he can pay) pay until he gets the goods, but S won’t send next batch until he’s paid)
	+ **If it is a severable contract:** the seller cannot withhold delivery of the next instalments until he has been paid for the previous instalments, UNLESS 1) the non-payment involves a repudiation of the contract, or 2) the buyer becomes insolvent

### The Right of Resale

**S43: (1)** Subject to this or any other Act, even if the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law **(c)** a right of resale as limited by this Act

**S51: (3)** If the goods are of a perishable nature, **or** if the unpaid seller gives notice to the buyer of the seller’s intention to resell, **and** the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages of any loss occasioned by the buyer’s breach of contract

* S51(3) is extended to say that after you give notice and the buyer hasn’t paid after a reasonable time, whether or not you resell, the original contract IS rescinded: ***R V Ward v Bignall*** (contract to buy two cars – buyer paid deposit then only wanted to buy one car – seller resells one but not the other – wants to sue for balance of contract price)
	+ 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 you can’t get the price.

## Personal Remedies

* **S41: (1)** When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after the request take delivery of the goods, the buyer is liable to the seller for **(a)** any loss occasioned by the buyer’s neglect or refusal to take delivery, and **(b)** a reasonable charge for the car and custody of the goods.
	+ **(2)** Nothing in this section affects the rights of the seller if the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract
* **S52: (1)** If, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods
	+ **(2)** if, under a contract of sale, the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract
* **S53: (1)** If the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for nonacceptance.
	+ **(2)** The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract
	+ **(3)** If there is an available market for the goods in question, the measure of damages is to be ascertained, unless there is evidence to the contrary, by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was set, then at the time of the refusal to deliver
* **S57:** This Act does not affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid if the consideration for the payment of it has failed
* Debt is the remedy in respect of such promises to pay a liquidated sum of money as the common law enforces this specifically. Damages are the common law remedy in respect of all other promises and of warranties: ***Standard Radio Inc v Sports Central*** (contract to run ads on Z95.3)
	+ P can have a debt claim once showing that a) services were delivered with the expectation of payment, and that b) there was a reasonable expectation to pay
* No action lies for the price of goods until the property has passed, except under a contract of sale where the price is payable on a day irrespective of delivery and the buyer refuses: ***Colley v Overseas Exporters*** (contract for leather to be shipped, but the ship couldn’t be found and goods never arrived – P suing for price)
	+ **GENERAL RULE: if property hasn’t passed, seller’s claim must be for damages for non-acceptance**
* Property passes when there is an appropriation of the specific goods and a tender, or willingness to tender – you can only sue for damages if property hasn’t passed, unless you fall within S52(2): ***Stein Forbes and Co*** (contract for sheepskins, shipped by three different boats – third lot wasn’t accepted by buyers, which was entirely their fault)
* A loss of profit can be claimed if it clearly directly and naturally resulted from the ordinary course of events from a buyer’s wrongful neglect or refusal to accept and pay for the goods bought – if a seller can prove this, it is recoverable as damages under S53(2) BUT where there has been a resale, the seller has the burden of proving a loss of profit beyond what has been recouped by the resale: ***Charter v Sullivan*** (contract to buy a car, but buyer repudiated as he found a better price – P found another seller, but claiming loss of profit claiming he could have sold 2 cars instead of 1 if the buyer had followed through)
	+ You get nominal damages only if you can’t prove there is an available market (ie: if you can’t show your supply is at least as high as the demand, then you are entitled to damages only)
* If there is an available market, where supply is the same or greater than demand, then P is out of a sale, so can claim for loss of profits: ***Victory Motors v Bayda*** (same facts as Charter, but there was an available market)
* S53(2) test: what could reasonably be expected to be in the contemplation of the parties as a natural consequence of the breach?: ***Lazenby Garages v Wright*** (D repudiated a contract to buy a second-hand car and P resells it for a higher price, but still claiming damages for loss of profit of another car)
	+ You can’t use S53(3) where there is no available market – there is no available market for second-hand casr because they’re unique

# Transfer of Title by a Non-Owner

### *Nemo Dat Quod Non Habet*

S26(1) states no one can give more than they have to give, but there is a lot of exceptions to protect BFPVS

* **S26: (1)** Subject to this Act, if goods are sold by a person who is not the owner of them, and who does not sell them under the authority or with the consent of the owner, 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)** Nothing in this Act affects the validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction.
* **S27: (1)** If goods are sold in market overt (stolen goods), according to the usage of the market, the buyer acquires a good title to the goods, as long as they are bought in good faith and without notice of any defect or want of title on the part of the seller (as long as they are a BFPV).
	+ **(2)** This section does not affect the law relating to the sale of horses.
* **S29: (1)** If goods have been stolen and the offender is prosecuted to conviction, the property in the goods stolen revest in the person who was the owner of the goods, or that person’s representative, despite any intermediate dealing with them, whether by sale in market overt or otherwise
	+ **(2)** Despite any enactment to the contrary, if goods have been obtained by fraud or other wrongful means not amounting to theft, the property in the goods does not revest in the person who was the owner of the goods, or that person’s personal representative, merely because of the conviction of the offender.
* S26(1) doesn’t apply to an agreement to sell: ***Shaw v Commissioner of Police*** (agreement for N to give car to a rouge, who sold it to S – the cheque bounces and N wants the car back, but S claims to be the owner)
	+ Mere possession by an intermediate seller does not preclude the owner from asserting his title – transfer of possession is not enough as a disposition must involve a transfer of an interest in the property

### Voidable Title

* **S28:** When the seller of goods has a voidable title to them, but the seller’s title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, if they are bought in good faith and without notice of the seller’s defect of title.
* If communication is possible, there is an inference that contracting parties are required to communicate termination – but a voidable contract can still be terminated without communication where it is impossible (ie: can’t find the rouge). The innocent seller must, once he discovers the fraud, take all possible steps to regain the goods, even though he can’t find the rouge or communicate with him: ***Car and Universal Finance Co v Caldwell*** (D sold car to rouge who sold to a BFPV, who took possession. D found out cheque bounced, tried to find rouge and his car)

### Seller in Possession

* **S30: (1)** If a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for that person, of the goods or documents of title under any sale, pledge or other disposition of them, or under any agreement for the sale, pledge or other disposition of them, to any person receiving the same in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the delivery or transfer
	+ BASICALLY: A seller in possession can confer a good title on a good faith third party as if the true owner had allowed it
* S30(1) is meant to protect innocent purchasers where S26 gives insufficient protection and where the BFPV is deceived by the vendor’s possession of goods or documents: ***Pacific Motor Auctions v Motor Credits*** (A buys cars and sells them to C, who let A keep them and sell them at his dealership – A goes bankrupt and C revokes consent – B comes to buy A’s cars and C wants the cars back, but B is a BFPV so they are protected)
	+ A seller in possession can give good title to a BFPV
* The words “continues in possession” refers to the continuity of physical possession, regardless of any transactions which might alter title. “Disposition” is all acts by which a new legal interest in the property is created/passed on, so retransfer of the property through repossession is a disposition: ***Worcester Works v Cooden*** (C sold car to G and cheque bounces – in the interim, G pretended to sell the car to W, but took the money and the car – C repossesses the car after the cheque bounces and W is suing for conversion, but C is protected by S30(1) since G was no longer “a seller” in possession)

### Buyer in Possession

* **S30: (3)** A buyer in possession to whom property hasn’t passed yet may confer a good title on a good faith third party and defeat the property interest of the seller: ***Head v ICBC*** (P bought a truck, left it with dealer on consignment – a rouge gave P cheques and sold the car to L. P can’t say the car was stolen, and L was in rightful possession as a BFPV, GF purchaser)

### Mercantile Agents

* **S58:** As long as the agent is apparently acting in the course of business, the sale is valid and the principal is bound
* **S59: (1)** If a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by the mercantile agent when acting in the ordinary course of business of a mercantile agent is as valid as if the mercantile agent were expressly authorized by the owner of the goods to make the sale, pledge or other disposition, as long as it’s to a BFPV
	+ **(2)** If a mercantile agent has, with the consent of the owner, been in possession of goods, or of the documents of title to goods, any sale, pledge or other disposition that would have been valid if the consent had continued is valid despite the termination of the consent, if the person taking under the disposition has not at that time noticed that the consent has been terminated.
	+ **(3)** If a mercantile agent has obtained possession of any documents of title to goods because of being or having been, with the consent of the owner, in possession of the goods represented by it, or of any other document of title to the goods, the agent’s possession of the first mentioned documents is, for the purposes of this Act, deemed to be with the consent of the owner.
	+ **(4)** For the purposes of this Act, the consent of the owner is presumed unless there is evidence of the contrary.
* S59 applies as long as these elements are met: (a) mercantile agent, (b) who was in possession of goods, (c) with the consent of the owner, and (d) made a sale in the ordinary course of business of a mercantile agent, (e) where the buyer has acted in good faith and without notice that the mercantile agent didn’t have authority to sell: ***St John v Horvat*** (R gave car to consigners to sell, who sold it to A without R’s knowledge or consent. Consigners plead guilty to theft – R wants the car back, but A is an innocent buyer)
	+ **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.
	+ If the requirements of S58/59 have been satisfied, S26 doesn’t help the original owner.