Commercial Transactions

McDougall – Fall 2011 (Brittany Weikum)

INTRODUCTION

**Types of Property**

* Real
* Personal
  + Chattels real
  + Chattels personal
    - Choses in possession (“goods”)
    - Choses in action
      * Documentary intangibles
      * Pure intangibles (no paper form)

**Property Interests (personal property)**

* Ownership
* Bailment (non-security or security) [temporary transfer of property – possession]
* Non-bailment SI

**Transfer of Property Interests**

* Absolute
  + Sale (chose in possession)
  + Assignment (chose in action)
  + Negotiation (negotiable property)
  + Gift (any)
* Conditional
  + Sale (chose in possession)
  + Assignment (chose in action)
* Temporary – bailment (non-SI or SI)

**Obligations**

Secondary

In rem

In rem

In personam

* Primary

In rem

In personam

In personam

**THE CONTRACT OF SALE OF GOODS**

***Sale of Goods Act***

* Sale is defined, and contract of sale is defined for the purposes of a statute
  + **Sale:** includes a bargain and sale as well as a sale and delivery
  + **Contract of sale:** includes an agreement to sell as well as a sale
* Buyer has a different meaning in certain other statutory regimes
  + **Buyer**: means a person who buys or agrees to buy goods
* Property has a very specific meaning in the *SGA*
  + **Property**: means the general property in goods and not merely a special property
* Section 2 to 5 are also definitions
  + **Section 2**: a thing is done in good faith within the meaning of the act when it is in fact done honestly, whether done negligently or not
  + **Section 3**: a person is insolvent within the meaning of the act who: (1) has ceased to pay the persons debts in the OCB, or (2) cannot pay the persons debts as they become due
  + **Section 4:** goods are in a deliverable state within the meaning of the act when they are in such a state that the buyer would under contract be bound to take delivery of them
  + **Section 5**: a person is deemed to be in possession of goods, or of the documents of title to goods, if the goods or documents are in the persons actual custody or are held by another who is subject to the persons control or for the person or on the persons behalf
* **Section 6** – contractual issues (sale and agreement to sell)
* When this statute applies to a particular transaction, this section applies
  + **Section 6:** (1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price, (2) There may be a contract of sale between one part owner and another, (3) A contract of sale may be absolute or conditional, (4) If under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale**, [if the buyer now owns property, it is a sale]** (5) If the transfer of the property in the goods is to take place at a future time or is subject to some condition to be fulfilled later, the contract is called an agreement to sell, **[if it is conditional or to take place later, then the contract is an agreement to sell]** (6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred **[an agreement to sale becomes the sale the moment the buyer becomes the owner. Not an agreement to sell]**
* The contract of sale can start off as a sale, it is never an agreement to sell.
  + = i.e. pick up the materials = that is a sale
* Buy a used car from the outset, you are the owner and all the responsibilities that arise from that
* Buy something by description = start off an agreement to sell (because transfer of property is to take place at a future time)

**General Notes**

* Factors Act
* Agency
* **Big difference in BC Statute -** the buyer’s lien – peculiar to BC
* BC statute deals with leases (no consumer leases will be on the exam which fits in that definition of section 1 directly the subject of the statute)
* In section 20 – provision that prevents certain contracts (deals with leases/retail sales)

**No waiver of warranties or conditions**

**20**  (1) For the purpose of this section, retail sale or lease includes every contract of sale or lease made by a seller or lessor in the ordinary course of the seller's or lessor's business but does not include a sale or lease of goods

(a) to a purchaser for resale or to a lessee for subletting,

(b) to a purchaser or lessee who intends to use the goods primarily for business purposes,

(c) to a corporation or an industrial or commercial enterprise, or

(d) by a trustee in bankruptcy, a liquidator or sheriff.

(2) Despite section 18 (e) or 69, in the case of a retail sale or lease of goods, other than goods that on reasonable inspection appear to be used goods or goods that are described or represented by the seller or lessor to be used, any term of a contract of sale or lease, or any collateral or contemporaneous contract or agreement, that purports to negative or in any way diminish the conditions or warranties under sections 17, 18 and 19 of this Act, is,

(a) if a term, severable from the contract and void, or

(b) if a collateral or contemporaneous contract or agreement, void.

(3) Despite section 18 (e) or 69, in the case of a retail sale or lease of new or used goods,

(a) any term of a contract of sale or lease, or

(b) any collateral or contemporaneous contract or agreement,

that purports to negative or in any way diminish the condition or warranty under section 16 is,

(c) if a term, severable from the contract and void, or

(d) if a collateral or contemporaneous contract or agreement, void.

**Limits of the Scope of the Contract**

* Contract of sales of goods is a contract
* **In order for the statute to apply, you must be satisfied you have a contract.**
* Whereby a seller transfers property to a buyer.
  + Both defined terms in section 1.
  + Transferring the property in goods or agreeing to transfer this ownership.
* The transfer occurs at the moment the buyer becomes the property holder. What has to be agreed to transfer is the property, not something less.
* So if the person transferring is not the owner, with a few exceptions, the statute doesn’t apply.
* An interest of a licence holder or a mortgage is being promised to transfer, never promised ownership, than the statute doesn’t apply.
* Property is a defined term
  + **General property means ownership**. Special property is a property interest that isn’t ownership.
* Need to know who the owner is and whether the contract is all about transferring property, general property which appears to mean ownership from one person to another.
* It has to be for a money consideration. Limits barter. It is a contract of sale but it is not governed by the *SGA*
  + May be deliberate to get around the *SGA* or it can work the other way occasionally. Give monetary value to the goods being given in order for the statute to apply.
* If we do have a transaction, you are giving me my computer and you are giving me your computer. Assigning the value of 500 to these two computers. One contract of sale, but under that contract of sale, there are two sales, there are two people are buyers and there are two people that are sellers = goods going in both directions. Both parties are buyers and both parties are sellers, just two different goods involved. You have to analyze two sales, problem with one item and not the other. Usually that’s not the case.
* **The statute says we are reallocating risk to buyers or sellers not dependent on who owns the property.** It doesn’t mean the owner of the bread is not responsible for it, the buyer of the bread has been contractually responsible to the owner for the risks. Buyer might be responsible for the risk according to the statute. Detach the property consequences from the contract consequences.
* If I am selling something, transferring property consequences but also contractual responsibilities. But they don’t necessarily coincide.
* A contract of sale of unique goods. As soon as the contract is entered into, property transfers to the buyer. You are the owner of it now. By virtue of the fact it is unique goods.

**For the *SGA* to apply:**

1. **Goods**
2. **Sale for monetary consideration**
3. **Sale – is it a SALE contract or some other type of transaction?**
   1. **Sale**
   2. **Lease (in BC, certain consumer leases are covered)**
   3. **Consignment (Not *SGA*)**
   4. **Secured transaction (Not *SGA*)**

**The Concept of Goods**

**Terms**

* Contract: name is a SALE
  + Name of the K is a sale, but also the transfer of ownership after sale (must differentiate between the 2)
* Transfer 🡪 K and property law implicated
  + When and how it occurs
  + Who it affects and what happens next

**Definition of Goods**

* Goods
  + Need to have a K for the *SGA* to apply
  + Broad definition
  + Intended to include subject matter which includes land
* **"goods"** includes
  + (a) all chattels personal, other than things in action and money, and
  + (b) growing crops, whether or not industrial, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale;
* Much easier to make things a goods contract, rather than a land contract. Land system is very archaic.
* Crops= CL used to distinguish between natural crops and the industrial fruits of the land.
  + Deliberately planted to be harvested = not goods. However, natural crops were a land concept.
* Water = land contract or the gravel.
* **Whether or not they are industrial, they are still goods. Anything on the land is a goods contract as long as under the contract it’s supposed to be removed.**

***Marshall v. Green***

* One of the most commonly encountered issues arising of the definition of section 1 is the extent to which the section was intended to codify the ratio in *Marshall v. Green*
* Facts: defendant entered lands of the plaintiff and cut down some trees; agreed these trees should be cut down as soon as possible (defendant was a timber merchant); after D had cut down trees (which he had already sold, but no delivery), the P revoked the K;
* Before the *SGA*, simply dealing with the issue of whether a person committed trespass by going on someone else’s property.
  + Legal right to go on the property because they have a contract that allows them to cut down the trees.
* Issue: did this K need to be in writing?
* Issue: a goods contract or a lands contract??
  + Need to be in writing if: a sale of lands, tenements, or hereditaments, or any interest in or concerning them
  + There are certain natural growths, which under certain circumstances, have been held to be under this [land], and need to be in writing
* Introduced the idea that the division between natural and industrial crops should not be there.
* Instead: if to derive no benefit from the land and to be immediately withdrawn = goods contract; but if should deprive further benefit from land = land
* If industrial: produced not spontaneously = goods ALWAYS, even if not for immediate removal
* Here, sale of goods (timber) not interest in land = no writing required

**What is the statute intending?**

\* the Fredkin and Carlson case present 2 differing views

***Fredkin v. Gliens***\*this is the correct view according to Brucey

* Broad view of the statute
* Issue: sale of an interest in land or goods?
* Issue: why did they need to know that?
  + Know whether the various conditions, warranties and remedies applied
* Contract to remove wild grass to turn it into hay (land at CL)
* Does the *SGA* apply?
  + Here, goods included emblements [annual crops grown cultivated by a tenant and thought to be owned by/property of the tenant], industrial growing crops and things attached which are agreed to be severed before sale or under a K for sale
  + Here, not emblements or an industrial growing crop, so would need to fit under the “severable” condition
* The intention of the parties as evidenced by the contract is the determining factor in arriving at the conclusion whether the article is a chattel
* Purpose of being cut down and taken away? GOODS
* There doesn’t appear to be any limit of time imposed by the statute within which the intended severance is to take place
* **Held: this is a K to sever something from land = GOODS (what was intended to be sold and purchased)**

***Carlson v. Duncan***

* Restrictive approach to “goods”
* Removal of timber
* \*\*temporal restriction on removal of goods
* Objection by current owner (to removal)
* Is there an enforceable right?
* Registration requirements?
* Held: contract for an interest in land; no intention here to treat timber as a chattel (could use own judgement as to when, if ever, remove the timber) and the K did not provide the timber should be severed before sale or under K of sale (in the meantime before severance, he has title to an interest in the timber which is part of the land)

In BC🡪 tend to want to make things LAND rather than GOODS (should meet both requirements) – not clarified

Tangible versus Intangible

Aside from land issues, fairly clear what is goods

**Sale Distinguished from Other Transactions**

**Section 6**

* Goods have to be the main point of the K to fall within section 6; cannot be incidental to the K
  + ie. Labour K 🡪 get goods by performance of the K BUT the K is not governed by the *SGA* (main point of the K isn’t goods).
  + Don’t get the benefits implied by the *SGA* if no *SGA*
* 3 main scenarios where this problem arises:
  + Where skill and labour is used to create the goods which are ultimately transferred to the buyer
  + Where skill and labour are supplied along with the goods (installation) which are transferred to the buyer
  + Where technically there is no transfer of property in goods “under the contract” because of laws of accession or fixtures
* How do you know?
  + No easy answer, as no single test
* However this distinction is becoming less important for implying warranties (for fitness and quality) – would seem illogical to deny warranties in one instance but not the other
* Distinction may still be important for some purposes/issues: passage of property in the goods, the risk of loss or damage to the goods and the right to reject for defective performance.

***Gee v. Whitespot***

* Go to the restaurant and get food
* Is this a goods K or a labour K?
* Botulism from a sandwich
* Issue: can you sue for a breach of K? Has to be a K for a sale of goods
  + Obligation to provide food fit for consumption (*SGA* implies this into K)
* So is this a service K or K for goods?
  + Goods: go to Whitespot to get food, not to get service; however, the court leaves it open that this could be a service K depending on the restaurant (more expensive, the more likely service K)
  + **Primary purpose is the sale of goods** (service is incidental)
* Held: basis for claim in K

**Tests**

1. Consideration test
   * What the buyer is paying to get certain aspects of the K (what proportion is goods)
   * Quantum: if labour > goods = service K
2. Essence test
   * What is the point of the K? What does the person really want?

***Robinson v. Graves***

* Talks about tests 1 and 2 (above)
* Issue: commission a work of art – K for sale of goods or labour?
  + Buyer had second thoughts
* Is K enforceable and if governed by goods 🡪 not enforceable as it didn’t have written evidence
  + If in BC, no written evidence required
* But, if labour 🡪 ENFORCEABLE
* Discussion of well-known cases
  + *Clay v. Yates*: essence test
    - K for skill and labour or materials?
    - Every case must be judged individually (based on the facts)
    - Value of artistry over materials (canvas or marble) = labour
  + *Lee v. Griffin*
    - Whether making dentures is “sale of goods”
    - Goods or labour? Goods – buying dentures (principal subject matter are teeth, not the skill of the dentist)
* Must look at the substance of the K – substance of the K was the production of something to be sold by the dentist to the customer = goods; but if substance is that skill and labour have to be exercised for the production of the article and it is only ancillary that there will pass from the artist to client some materials in addition to the skill involved, this does not make any difference to the result as substance is skill and experience of the artist producing the picture
* Labour K here
  + Importance of L is paramount; breach of K

1. Consumer protection test (any significant element)

* Probably approach of WhiteSpot case
* As long as there are goods in some significance = *SGA*
* Policy approach

1. Severing test (break contract down)

* Sever the K – 2 separate K’s instead of one
* Fairly artificial but can deliberately do this if worried

1. Not Important test (\*best approach if you can use it)

* Doesn’t matter if the *SGA* applies
* Problem: have to decide if this is a new implied term or a codified one – would CL apply?

***Young v. Martens*** *– in notes at beginning*

* Roofing case – problem with roofing materials
* Doesn’t matter if *SGA* applies - why? Because to the extent the *SGA* implies terms, the CL implies them in any event
* *SGA* codified CL contracts

***The Canadian Banknote Engraving and Printing Co. v. The Toronto Railway Co*.**

* Buyer refusing to pay for work done (P printed coupons for the D, which they refused to accept)
* D says, this is a sale of goods, so the Statute of Frauds applies, and here there was no writing, so K was unenforceable
* Transfer of ownership
* Value is governed by *SGA*
* Bulk paying for the skill
* *SGA* applies
* Burton: if the K is intended to result in the transfer for a price from one party to the other of a chattel which the other had no previous property in, it is a contract for sale of a chattel

**Has to be a Sale** (for money consideration)

* Have to quantify what is being paid in monetary terms
* **Can only be barter if the barter can be assigned monetary value**
* Piano case (*Mason*) 🡪 not governed by the *SGA*; price not entirely quantified (used old piano)
* The essence of a sale is transfer for a PRICE (money consideration) which the buyer pays or agrees to pay. If using other goods to pay, the total price not being fixed in money, this is barter, not money consideration.

***Messenger v. Green***

* As long as money value assigned to goods given in payment
* In a sale there is a fixed price, in a barter there is not (ie if there is a total price that say trousers are making up, that is a sale, but if there is not fixed price, probably barter)
* Customer here paid in wood
* Governed by *SGA* or CL? ***SGA***
  + Need to know because specific remedy requested
* Do not overlook both aspects of the sale (both directions) – was trading to offset accounts here

X - $2

Y - $5

Z - $6 (paid in wood – assumed value of both sides)

\*\*both parties could claim “fitness for purpose” etc.

If possible, the courts will try to make the *SGA* apply; but you could always deliberately structure your K so the *SGA* doesn’t apply.

**Sale**

* 3rd element
* Seller 🡪 buyer (transfer of ownership)
  + Doesn’t have to be a guarantee this won’t happen
  + As long as promised ownership (intended to have it happen)

**Lease – No *SGA***

* Less important now that the BC *SGA* covers consumer leases – still important to distinguish for non-consumer leases (also for K’s entered into before the 1993 amendments and K’s not covered by BC law)
* Owners argue K is a lease to avoid *SGA*; Lessee argues K is a sale so it will be governed by the *SGA* (consumer friendly)
* Lessor [usually owner – and intends to always remain owner] 🡪 Lessee [bailment interest (possession) – certain entitlements for a period of time]

**When is a lease a sale?**

* Problem: where there is a lease with an option to purchase
* Selling goods on credit
  + Historically: seller will say, I don’t think the buyer should be able to complain when they haven’t paid – so they created the lease to avoid this (protections)
* Courts are reluctant to agree something is a lease (escaping protection of the *SGA*)

**Lease**

* To the rest of the world – *nemo dat*
  + Cannot give what you do not have
  + Do not get ownership if you don’t have it to give
* As between parties – K principles come into play
* *SGA*: have exceptions to this property principle
  + End up giving them property ownership
  + Need to find a rule that specifically covers your situation
* Provisions: section 30 & 59
  + **Section 30(1) & (3)**
    - 30(1): if you are a buyer or a seller in a K for sale, buyer doesn’t have ownership yet or seller who has given it up, but you are in possession of the goods, then if you deal with another person and purport to sell them the goods, they are able to get ownership (new buyer gets ownership)
    - 30(3): if I have delivered goods to you, but you do not own them yet, if you sell those goods to someone, they will get ownership

#### 

#### Seller or buyer in possession after sale

**30**  (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.

(2) Subsection (1) does not apply to a sale, pledge or other disposition of

(a) goods, or

(b) documents of title to goods, other than negotiable documents of title,

that is out of the ordinary course of business of the seller, pledger or disposer if, before the sale, pledge or disposition, the owner's interest in the goods is registered in the personal property registry in accordance with the regulations made under the Personal Property Security Act, and Part 4 of that Act applies to the registration.

(3) If a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or 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 any lien or other right of the original seller in respect of the goods has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(4) Subsection (3) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods by a person who has obtained possession of the goods under a security agreement by which the seller has a security interest as defined in the Personal Property Security Act.

(5) The interest of an owner under subsection (1) that, immediately before October 1, 1990, was covered by an unexpired registration under the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, is deemed for the purposes of subsection (2) to be registered in the personal property registry and the registration continues,

(a) in the case of an interest in a motor vehicle registered under section 7 of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, for the unexpired portion of the registration, and

(b) in the case of an interest in goods other than a motor vehicle under section 7 of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, for 3 years from October 1, 1990.

(6) Before the expiry of the registration under subsection (5) (a) or (b), registration of the owner's interest may be further continued by registration in the personal property registry in accordance with regulations made under the Personal Property Security Act, and Part 4 of the Personal Property Security Act applies to the registration.

* Policy: facilitates commerce
* Both 30(1) and (3) depends on the parties (initial B&S) being parties to a K of sale
* If not 🡪 3rd party does not take ownership
* Section 59:
  + In other jurisdictions, this would be in the *Factors Act*
  + If there is a mercantile agent in possession of goods, anything the agent does with respect to the goods is BINDING (breach of agency however)
    - Third parties have to characterize K as an agency agreement (between original B&S)

#### 

#### Disposition by mercantile agent

**59**  (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, subject to this Act, as valid as if the mercantile agent were expressly authorized by the owner of the goods to make the sale, pledge or other disposition, if the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make it.

(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 notice 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 documents 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 to the contrary.

***Lee v. Butler***

* Parties trying to avoid *SGA* – entered into leases
* Contract for furniture (called a lease)
* Lease says these goods are leased with rental payments, but at the end of the payments, title would pass; make 2 payments – then ownership would transfer
* Until payments are made, lessee cannot deal with the property
* Lessee here transferred to 3rd party (can keep?)
* Characterization?
  + If lease, 3rd party screwed
  + **But this is a SALE – required payments and transfer of ownership (disguised conditional sale)**
  + Third party takes ownership!

**SO 🡪 compulsory payments + at end, ownership = SALE**

***Helby v. Mathews***

* Parties trying to avoid *SGA* – entered into leases
* Lease K for a piano
* Rent payment with ownership at end
* BUT wasn’t required payments (if lease ended early, property wouldn’t transfer)
  + He could return the piano at any time and upon doing so would no longer have to make payments
* Piano was then transferred to a secured party as collateral (now SP wants it – can they have it?)
* Lease or sale??
  + Here, this was a lease (no *SGA*)
  + An agreement to buy imports a legal obligation to buy – here, he could buy if he pleased but was under no obligation to do so
* Intended this lease would be finalized but it wasn’t at this time, so this cannot be considered a sale
* Distinguished from *Lee*

**True Lease vs. Sale**

* Compulsory payments/transfer ownership 🡪 SALE
* True Lease
  + Terminate early
  + No transfer of ownership
* Compulsory payments with the term exhausting the value of the property 🡪 SALE
* Lease + option to purchase (exercised later)
  + Here, characterize the lease
    - Ie. if lease exhausts value – SALE (doesn’t matter about option)
  + If no, characterize option
    - True option (lease) or not (sale)
* Lease + true option = LEASE until option is exercised (then SALE [*SGA*])
  + The hallmark of a true option – the party who purchases will pay FMV when option is exercised
  + True option = lease
* Lease + option
  + Buy goods at the end of the lease for $5
  + Not a true option, but a token payment which we can predict at the outset that this will be exercised
  + So compulsory lease + option **= contract of sale even if the option is not exercised**
  + **If not compulsory – NEVER a sale, even with an option as we don’t know if it will be exercised (even if token)**
* Grey area: what if token payment is not minimal? Or cannot predict FMV?
  + Bit of a gamble but the higher the amount the more likely it will be a true option
* Put yourself in the position of the parties at the time they entered into the agreement and whether a reasonable person would consider it to be a genuine pre-estimate of the FMV
* If a true lease – not a SI
* If a sale – probably a SI (then litigation over PPSA)

**Consignment**

* Transfer of possession
* Consignment K: should avoid calling a K this
  + Generally means an agency K
* Owner [consignor/principal] 🡪 agent [consignee] 🡪 buyer
* True consignment: when the buyer buys goods, there is a K for sale between the buyer and the consignor ONLY
* Sometimes the arrangement between the consignor and consignee is in substance a K of sale dressed up to look like a consignment
  + If this is the case – 2 sale K’s!!
  + *SGA* between owner and buyer and potentially between owner and agent (depending on characterization)
* To whom does the *SGA* apply (if it does)?
  + Btw consignor/owner and buyer (will want to know with whom they have a K)
* Hallmark of the agency K?
  + Not expected for the agent to become the owner of the goods
* Sale between consignor and consignee?
  + K provide that the consignee will take possession for a period of time and required to purchase if no buyer found
    - Sale from the outset
  + Agent is given various responsibilities towards the goods, characteristic of an owner
    - Assumes risk of damages/loss
    - Pays taxes
    - Maintaining goods
  + **\*doesn’t make the consignee the owner, just means transaction is governed by the *SGA***

**Ramifications**

* Turns out to be a sale?
  + Consignor & Consignee = B&S
  + Buyer buys them from consignee (transfers from consignor)
  + If consignment a sale 🡪 PPSA
  + *Factors Act* does not apply if a sale
    - Designed to protect 3rd parties
    - Applies if consignment
    - Section 58/59 in *SGA* (Part 7)
    - Estopped from denying your agent can transfer
    - \*to get the benefit of part 7 – need an agent!
    - If characterized as a sale – no part 7

***Weiner v. Harris***

* Individual enters into a K to sell jewellery
* K characterized them as principal – agent
* Used jewellery as collateral in a ST
* 3rd party wants to use section 59 (to keep jewellery)
* Court: this is a consignment
  + Section 59 applies and the 3rd party gets protection

***Re Stephanian’s Persian Carpets***

* True consignment? (for the purposes of the PPSA)
* Lender/secured creditor [usually owner (CS)] 🡪 borrower/debtor
  + Interest in property (conditional) “collateral” (borrower/debtor)
* Conditional sale: *SGA* applies, but PPSA calls this a ST
  + Owner (title until paid; security for payment)
  + Buyer (possession)
  + Have to meet requirements under the PPSA

\*\*need to know

* Sale or not? *SGA*
* Sale or a ST or both? *SGA* and PPSA
* Lease or consignment that are actually sales – probably also a SI
* To avoid PPSA: make sure sale from the outset and not an agreement to sell (conditional)

**Elements of the Contracts**

* Section 73: preserves the law of K
  + 73(1): common law rules continue to apply to K for sale of goods
  + Missing from this list in 73(1) is equity but these are normally assumed to apply (ie. estoppel)
  + **Section 73**: (1)Except so far as they are inconsistent with the express provisions of this Act, the rules of the common law, including the law merchant and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, continue to apply to contracts for the sale of goods, (2) This Act does not affect the enactments relating to bills of sale, (3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale that is intended to operate by way of mortgage, pledge, charge or other security.
* Section 69: contract out of what the law would say about your transaction
  + K out of the *SGA* provisions (rights, duties, liabilities)
    - BUT this does not mean you can K out of the characterization issues (this is for the law alone to determine)
  + **Section 69**: Any right, duty or liability that would arise under a contract of sale by implication of law may be negatived or varied: (a) by express agreement, (b) by the course of dealing between the parties, or (c) by usage, if the usage is such as to bind both parties to the contract.
* **Capacity (not on exam)**
  + Section 7: deals with capacity to K
  + Arises usually with children
  + Section 7 does not deal with all capacity issues (ie. artificial persons, etc)
* **Formalities (not on exam)**
  + Section 8: eliminates formality requirements in K (for sale of goods) in BC (eliminates the statute of frauds)
  + This is NOT true of most *SGA*’s in Canada (most preserve writing requirements)
  + Section 8 does not abolish rules relating to the form of the K (does not abolish parol evidence rule)

**Price**

* Has to be money consideration
* Parties might not have to agree on price
* Section 12 and 13
  + Talk about price in a K
  + **Section 12:**  (1) The price in a contract of sale 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 subsection (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.
  + **Section 13:** (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, subsection (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.
* **Section 12:** sets out how you can figure out price (3 ways)
  1. Agreed
  2. Left to be set as agreed (concern here 🡪 certainty of terms (ie. need method)) – can’t be an agreement to agree
  3. Determined by the course of dealing between the parties
* Section 12(2): if not determined by s. 12(1), the buyer will pay a reasonable price
* \*don’t have to agree on a price for there to be a binding K\*

***Montana Mustard Seed Co. v. Gates***

* *May and Butcher* case
  + K to buy war surplus tents (said would agree on $ later)
  + One party claiming lack of certainty of terms (ie agreeing to agree on a price – not allowed); other says see s. 12
  + HOL – no contract when agree to agree (however, it is not the law that mere difficulty in establishing what is a reasonable price voids the K – the *SGA* assumes it is always possible to determine what is a reasonable price)
  + HOL said cannot use 12(2) to get access to a reasonable price when the parties agreed to use 12(1) 🡪 provisions are mutually exclusive
  + Can only use 12(2) when K is completely SILENT on price
  + Need to avoid this result (stay silent)
* So in Montana Mustard…
  + Arguing silent on $
  + So, be silent or – other solution! Be very creative in what the parties have said and imply a $ in without using 12(2)
  + Courts are very good at inventing prices
  + There must be a K between the parties before the doctrine of reasonable price can be applied
  + Here – silent on the prices for the lower grade (court may imply a term that the price for goods shall be reasonable where it is not expressly agreed)
* Section 13:
  + Elaboration on s. 12(1)(b)
  + **S. 13(1) – (3): READ**
  + Engaging third party? Might want to opt out of 13 as it can have bad effects

**Perished Goods (not on exam)**

* Section 10 and 11 – goods perish before risk happens
* Codification of the law of frustration & mistake (goods have perished, disappeared🡪 effect on K?)
* Bell case (from first year)
* Avoiding the law on frustration
* Probably want to K out of this

**Types of Obligations**

* Crucial: statute requires you to be able to categorize the goods as a particular type
  + **Existing goods** versus **future goods**
  + **Specific goods** versus **unascertained goods** (ascertained later on)
* These labels are put on goods **at the time the K is entered into**
  + If future, should become existing later on
  + If unascertained, should become ascertained later on
  + Ascertained never becomes specific and vice versa
* Future goods is a defined time
  + An agreement to sell, not a sale (ownership passes, which cannot happen here)
  + **Future goods:** means goods to be manufactured or acquired by the seller after the making of the contract of sale
  + Seller does not own the goods OR the goods don’t exist yet
  + Provisions dealing with sale don’t apply yet
* Section 9: contingency – possible the seller will never own
  + **Section 9:**  (1) The goods that form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods, (2) There may be a 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.
* At what point does future become existing (q of ownership [property])?
* When do the goods exist? How much of the ship needs to be built for example? Really case specific!

**Specific versus Unascertained**

* More important categorization\*\*
* Statute doesn’t really help
* Specific goods defined terms 🡪 section 1
  + **Specific goods**: means goods identified and agreed on at the time a contract of sale is made
  + Know precisely what goods you are getting (not a goat [unasc.] but this goat[specific])
  + Goods that are the subject of the K
* Don’t know for sure what goods you are going to end up with = unascertained
* Unique? Probably specific
* Remedy of specific performance – usually only available for specific goods
* Need to know this distinction!!
* Section 15(4)
  + Remedies for breach of K
  + Accepted the goods as buyer – cannot then reject them
  + K, if for specific goods – if title has passed, you cannot reject them
* Unascertained will become ascertained at some point but will never become specific
  + This is also an agreement to sell (cannot pass property in goods if you don’t know which you are actually selling)
  + Process of transforming unascertained to ascertained – appropriation

**Categorization of Obligations in the K**

* Statements made: some are important, some are irrelevant

**Mere puff** **mere representations** **terms [obligations]**

Chitchat operative parts of the K (in comparison to recitals/representations)

* Some representations move over to terms (representations become terms when it actually gets into K)
* *SGA*: categorize by
  + Importance (only primary)
    - Condition
    - Warranty
      * Means 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 K as repudiated
    - Intermediate term
  + Method of communication (primary and secondary)
    - Express – can be: (1) oral or (2) written (in some jurisdictions there is a writing requirement for express terms – this doesn’t apply to implied terms, just express. The Statute of Frauds does not affect implied contractual terms), or (3) both!
    - Implied – can be implied by: (1) necessity, (2) law (common law or statute), or (3) custom and usage
  + Primary (importance categorization only applied to primary terms) or secondary (remedial) obligations

**Characterization of Obligations in a K**

1. Express or Implied
   * This can apply to primary or secondary obligations
2. Conditions, Intermediate Terms or Warranties
   * This applies ONLY to primary obligations, there is no such categorization of secondary obligations

***Leaf v. International Galleries***

* K for painting that they no longer want (the plaintiff, when trying to resell the painting, found out it was not actually by the artist the defendant said it was by – rude)
* Could argue breach of a term in the L and this reject the goods or argue misrepresentation (rescinded)
  + Too late to reject the goods – there was clearly a breach but the time has passed during which the buyer was entitled to reject the goods
* Can rescind for misrep? NO 🡪 this representation made in into the K and became a term and you can no longer rescind on misrep as it is a term (would need to be a breach – but once accepted or deemed accepted the claim is barred)
* Artist: this term of the K was either a condition [reject before acceptance] or a warranty [claim for damages]
* Here, a condition! Too late to reject the goods
* Misrepresentation
  + Options: (1) can hold the person to the truth (rescind with misrep) or (2) can hold the person to the falsehood (estoppel)

**Importance**

* Categorization of primary obligations (condition, warranty, intermediate term) is only important if you want access to the secondary obligation of termination – if you want access to the secondary obligations of debt or damages you don’t have to characterize the primary)
* Important only if you want access to secondary obligations
  + Damages
  + Debt
  + Termination (this one mainly)
* **Only for a breach of a condition and sometimes an intermediate term 🡪 termination**
* SGA takes the characterization out of the parties hands: section 16 to 19 contain various implied terms in the K and designates whether they are implied conditions or warranties
  + 16(a): breach of this – termination
  + 16(b): no termination
* This characterization/labelling occurs only when the K is entered into – already know whether breach of that term will lead to termination or not
* The problem with this is that it makes it very difficult in certain circumstances to know whether a breach of an obligation is going to undermine the whole purpose of the K and this be a condition
* **S.15(3) 🡪** can’t label terms as conditions or warranties, it is up to the law itself to determine whether something is a condition or a warranty. Warranty only gives right to damages, does not give rise to right to treat the contract as repudiated
* the most important terms are conditions, the least important are warranties

**How do you distinguish condition versus warranty (damages only)?**

* **Section 15:**
  + Depends on the construction of the K (up to the law itself)
  + Most important terms 🡪 conditions
  + Least important terms 🡪 warranties
  + **Section 15:**  (1) If a contract of sale or lease is subject to any condition to be fulfilled by the seller or lessor, the buyer or lessee may (a) waive the condition, or (b) elect to treat the breach of the condition as a breach of warranty, and not as a ground for treating the contract as repudiated. (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 subsection (2), a stipulation may be a condition though called a warranty in the contract. **(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.** (5) If a lessee has accepted goods or part of them, the breach of a condition to be fulfilled by the lessor can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the lease as repudiated, unless there is a term of the lease, express or implied, to that effect. (6) Section 39 applies to a determination of whether a lessee has accepted goods or part of them under subsection (5) of this section. (7) Nothing in this section affects any condition or warranty the fulfillment of which is excused by law because of impossibility or otherwise.
* Termination does not mean total elimination of the K, but just the primary obligation

**Rescission vs. Repudiation vs. Rejection** (some people had Qs)

* All of these words appear in the SGA
* Rescission = avoiding/setting aside...ELIMINATING the K, meaning you return to where you were before the K was made (unlike how the term “termination” is used, since in termination, only obligations from that point forward are extinguished)
  + Denning is bad for misusing the word rescind
  + HOWEVER, ONE section of the SGA uses the word “rescind” to mean “terminate”!!! be aware of this (s.51(1))
* Repudiation = rejection of some of the basic obligations under a K; important NOT to use this as a synonym for rescission (rescission is a REMEDY); usual remedy for repudiation is termination
* Rejection = the factual result of repudiation

**Categorization of Obligations:**

* Implied vs. Express
* Primary vs. Secondary
  + Under PRIMARY obligations, there are:
    - Warranties
    - Conditions
    - Intermediate Terms

**Conditions vs. Warranties:** s.15, ss. 16-19

* Important = conditions
* Not so important = warranties
* These labels are placed at the formation of the K

***Hong Kong Fir Shipping v. Kawasaki Kaisha Ltd.***

* *SGA* problem
* Certain terms that do not attract either the label “condition” or “warranty” because we cannot tell whether a breach will/will not undermine the contract
* “Innominate Terms”; now known as intermediate terms – wait until the breach occurs (if serious you have the same remedies as if it were a condition, if not serious you get the same remedies as if it were a warranty) – IT do not become confitions or warranties but rather are treated as such
* **Terms implied by the *SGA* will always be conditions/warranties...other terms are to be interpreted based on the time the K was entered into**
  + **Implied terms – know whether it is a condition or warranty because the SGA tells you**
  + **Other non-implied terms – labeling process, have to determine what the parties (as reasonable people) would have decided at the time they entered into the K**

***Cehave NV v. Bremer Handelsgesellschaft***

* Denning imported the idea of intermediate terms into the SGA
* K for the sale of citrus pulp pellets – K said they had to be of a particular quality and specified the price to be paid
* Citrus pulp pellets were not of the quality promised when they arrived (breach of a term)
* Price had gone down, so buyer wants out of contract (buyer didn’t want to be held to the contract price as the market price had fallen)...uses poor quality as an excuse to get out (terminate the obligation to pay)
* Buyer’s argument was that this was a broken CONDITION, at that the K could be terminated (breach of term regarding quality – terminate and reject, thus obligation to pay did not arise)
* Buyer went out and bought same pellets for lower price, used them for the purpose he would have
* Denning thinks that having to characterize at formation of the K is silly; here, we see based on the buyer’s actions that the fundamental purpose of the K was not ruined by the breach (how could this be a condition? Buyer used the same bad quality shit for the purpose he intended)
  + Purpose of the K was not undermined
* On the other hand, he does not want to call a term for quality a warranty...can never return shoddy goods (would have to accept any goods regardless of how poor the quality with the only remedy being in damages)...so he imports the “intermediate term” (don’t know what remedy is until breach occurs)
* Denning says damages is an adequate remedy here
* This case can be criticized: Denning overlooks that the statute says, straight up, that quality terms are conditions! Denning is wrong here; **bad law**
* **Therefore, can be intermediate terms in the SGA but only if not explicitly covered by the SGA (ie if the SGA says an implied term is a condition, there is nothing you can do about it)**
* 17(1) and 18(b) make quality a condition (in the case of 18(b), “merchantable quality”); Denning sucks at law! Makes a good point though...why should MINOR breaches in quality result in termination of the contract?
* Certainty is crucial in commercial matters...intermediate terms do NOT get used...they seem fair, but they do not make practical sense to have, because they invite litigation...
* Only generally in consumer situations will intermediate terms be used
* Parole Evidence Rule: Oral evidence will not be used to decide disputes under a contract where the express terms comprise the entirety of the contract

***Bunge v. Tradax***

* not directly a SGA case, but is a mercantile case
* relates to agreement that parties had that they would be given 15 days’ notice that a ship was ready – this was broker, insufficient notice was give
* question was whether this was a breach of a condition, intermediate term, or warranty and thus could terminate the contract
  + results of the breach were not particularly severe so an argument that damages should be sufficient and the contract should carry on
* HL said that certainty is crucial in commercial matters- between commercial parties you need to know
* Therefore, courts tend to characterize terms as conditions or warranties and not as intermediate terms
* In this case, the court characterized it as a condition
* Wherever the parties have agreed on a number, it is almost always going to be a condition (date, time, quantity, dimension, etc.) 🡪 in a mercantile contract between two commercial parties, courts will almost automatically find that it is a condition

Be aware that this labeling process occurs and about the remedy of termination. Generally will be conditions and warranties, intermediate terms are unusual in SGA contexts - not as uncommon in consumer SGA contexts.

**Implied Terms v. Express Terms**

* Express terms are oral, written or both 🡪parole evidence rule applied to express terms only
  + Parole evidence: if you have a written K that looks like a complete K, court will not accept oral evidence to decide disputes under the K
* Implied terms 🡪 parole evidence rule has absolutely no application

***Canadian Pacific Hotels Ltd. v. Bank of Montreal***

* Deals with Implied terms (how they get implied into Ks):
* Categorizations:
  1. Necessary for business efficacy
     + Implied by parties (dealt with in this case)
  2. Custom or Usage
     + Implied by parties
     + Parties have always dealt in this way or in an industry/area that it is clear that certain terms exist
  3. Law
     + Implied by the law (CL or statute [SGA or other])
* Here, can a term be implied because it is REASONABLE to?
  + NO
  + ONLY when it is necessary/crucial (not reasonable)
  + Technique to prevent litigation...many things could be reasonably implied
* Test for Necessity:
  + Look at what else is in the contract (express)
  + Also look at what law puts in the contract, and what is there by custom/usage (implied)
  + Is there still something missing that is necessary for the contract to operate?
  + (Rare, says the court)
* Note: Legally implied terms can come from Statute or CL

Section 69:

* **Section 69**  Any right, duty or liability that would arise under a contract of sale by implication of law may be negatived or varied: (a) by express agreement, (b) by the course of dealing between the parties, or (c) by usage, if the usage is such as to bind both parties to the contract.

**Exclusion and Limitation Clauses:**

* + Exclusion clauses particularly subject to scrutiny
  + Principle of freedom of contract presupposes that parties are approximately equal in terms of bargaining power – however this is not always the case (exclusion clauses exemplify this)
  + Generally they can be grouped into 2 categories:
  + Clauses which deny that express warranties/representations are included in sales contracts
  + Clauses which limit or negative a buyer’s rights in the event of non-performance or defective performance by sellers
* Exclusion causes are attacked on 2 grounds:
  + Buyer is seldom aware of the presence or significance of these clauses, and is such deceived as to the nature and extent of her rights under the K
  + No realistic degree of bargaining because of standard form contracts (powerless to protect themselves)
* Unfairness – main reason for holding these clauses inapplicable
  + In order for most E and L clauses to be enforceable, different TESTS:
    - 1) notice
    - 2) construction
    - 3) no unconscionability (***Hunter v. Syncrude* case**)
    - 4) fair (fundamental breach doctrine dressed up) (***Hunter v. Syncrude***)
    - 5) against public policy to enforce
  + Which test(s) to use is an unsettled area of law

**Back to the *SGA*: Primary Obligations Included by Statute**

* Seller = Obligation to transfer property (canNOT contract out of)
* Buyer = Obligation to pay (canNOT contract out of)
* Statute (*SGA*) adds some additional terms (CAN contract out of):
  + `Seller’; elements to include:
    - Description
    - Quantity
    - Title (incidental matters connected to ownership; security interests involved, encumbrances...seller likely wants to contract out of this)
    - Risk (buyer may want seller to retain risk longer)
    - Delivery
  + ‘Buyer’; elements to include
    - Quantum
    - Form
    - Time
    - Deposit
* Course from here on out will deal with commercial matters rather than consumer matters; there are other statutory regimes that apply to consumer contracts, and that varies widely between jurisdictions...also the subject of frequent changes; more practical to study strictly commercial matters
* One of the most complicated Acts in BC is the *Business Practices and Consumer Protection Act* (too convoluted and complex to deal with here); rarely litigated, also
* Extra “layers” that only apply to consumer situations:
  + common law
  + *SGA* (certain provisions only apply to consumer situations): we WILL deal with these
  + *BPCPA*
    - Formed by the amalgamation of the *Trade Practices Act* and *Consumer Protection Act*
    - Old Consumer Protection Act prevented unconscionable and deceptive acts and practices
      * expands parties that can be held liable, eliminates privity doctrine
      * reverses burden of proof; makes it very easy for the consumer to allege a deceptive/unconscionable act...other party has to prove that it was not deceptive/unconscionable
    - **We are not responsible for any of these provisions...but be aware! (Zzz Zzz)**
    - Definitions ‘n’ Shit:
      * + Goods: defined differently (includes “credit”...wtf; also includes fixtures)
        + Suppliers: expansive definition...many many peoples
        + Deceptive Acts: defined in s. 4
        + Flipped Burden of Proof: s. 5
    - Cannot contract out of BPCPA
    - **Cases: (not responsible forrrrr)**
      * Brucey says nothing about reasoning and barely goes over facts...just says that these were cases of deceptive practices...can be found to be deceptive practice when away from place of business (conventions/expos)

Property/Ownership

* Promise to transfer property
* Promise has been performed?

**Property Aspects**

* In rem:
  + Who is owner?
  + When did it occur? Section 22 and 23
  + Consequences
    - Risk section 25
    - Rights against the world
    - Other in rem rights
* In personam rights
  + Under sale K – s.15(4)

**Contracts Aspects**

* Promise to transfer property
* Auxiliary matters
* Section 16
  + Revelation of others interests
  + Guarantees about enjoyment
* Section 25
  + Reallocation of responsibility for risks

*SGA*

* Many protections extend to consumer leases
* Section 20: contradicts rule that you are able to negate or vary aspects of the statute
  + **Prohibits contracting out in certain contexts**
* Section 16 to 19
  + Various terms implied that protect buyers
  + These are what are considered in section 20

**Section 20**

* Section 20(1): the retail sale [definitional issues]
  + “ordinary course of business”
  + Exclusions (a) – (d)
  + “primarily”
* Section 20(2)
  + If you do have a retail sale, except if the goods appear to be used or are used, then you can’t K out
* Section 20(3)
  + Covers section 16
  + NEW and USED goods
  + Q: does this actually do anything?

***Gaertner v. Fiesta Dance Studios***

* Led to the provisions that regulate dance lessons/gym memberships
* Case of a court doing justice (no doctrine followed)
* Deeming, cruel & fraudulent hoax and the K cannot stand
* Recognized however that without this deeming and cruel element, the courts are not empowered to relieve a man of the contract he made under no pressure and with his eyes open, merely because his contract was an act of folly
* K signed to participate in special dance lessons (told contest/competition 🡪 induced)

***Tilden Rent-a-Car Co. v. Clendenning***

* Illustrates CL reluctance to say the fine print is binding because it is in the written K
* Issue: whether the defendant is liable for the damage caused to the automobile while being driven by him by reason of the exclusionary provisions which appeared in the K (which he did not read nor had ever read)
* LeStrange Case: signed K? deemed to be notice of all terms – distinguished from the case here (this rule does not apply in this circumstance)
* Also cannot rely on provisions of the K which you have no reason to believe are being assented to by the other party – Tilden took no steps to alert the customer to the onerous provisions; clerk knew he did not read; and the small print discouraged reading 🡪 unaware of the clauses and as such these clauses cannot be relied on by Tilden
* BUT, now where the terms are especially onerous or unusual, they need to be pointed out

***Harry v. Kreutziger – did not read (review)***

* Unconsciousability doctrine
* Limited of statute illustrated
  + Only regulates sellers being unconsciousable towards buyer
* In this case, a BUYER was unconsc.
* CL flexible in this situation (also with remedies)
* New test – Lambert set out (pg 122)
  + Less formulaic
  + Inequality of bargaining power (coupled with undue pressure)
  + **Single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded.**

***SGA***

* Affects 2 major areas of law
  + Codification of property and contract law
    - Property: how the world changes, how one party now has rights they can asset against the world that weren’t there before
    - Contract: between parties (obligations between); people outside K have not changed (have no new view); different rights and duties – personal between the parties
  + Statute confirms and adds to these rules

**THE PASSING OF PROPERTY AND RISK**

* Has the promise been performed? What does that mean to the world?
* **Property aspects – affect the world**
  + Rights the owner has can be asserted against the world (generally)
* Q: who is the owner? When did it occur (crucial)? Other in rem rights? How do these claims constrain your rights?
* Payment obligations arise on transfer
* Transfer of property is significant

**Situs of Property (location of property in the goods)**

* The buyers right to reject specific goods, whether risk of loss has passed to the buyer and the sellers right to resale **may all depend on whether property has passed to the buyer**
* However the mere fact that the buyer has become owner does not, in itself, confer upon him an immediate right to possession [s.43]. Other examples of where situs isn’t that important:
  + Buyer right to reject is not fettered merely because he has become the owner and upon rightful rejection property will reinvest in the seller (except for specific goods)
  + Passing title to a third party (either buyer or seller)

**When does it transfer?**

* **Section 22**
  + Specific or ascertained goods
  + When parties intended it to be transferred (subject to the qualification in section 21 that in a contract for sale of unascertained goods, property may not pass until the goods are ascertained)
* Section 22(2)
  + Look at K and circumstances to decide on intention
  + Can’t decide? Go to section 23!
* **Section 22:**  (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 intend** 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.
* **Section 23**
  + You don’t want to use these; make sure you put intentions in K as to when risk passes or when property passes
  + Decide: K is silent and whether goods are specific or unascertained
  + Governed by the following rules:
    - Unascertained goods – 23(7)
    - Specific – 23(2)(3)(4)

\*not a complete set of rules (might not be a rule that covers your situation) – go back to section 22 and leave it to the courts

* Section 23(2)
* **Specific: if there is an unconditional K, then the property passes when the K is made. Doesn’t matter if payment is made or delivered or both**
* **Problem:** operating with 15(4) [for specific goods, if property has passed [here on making the K] breach of any condition is only warranty – must accept goods], produces a profoundly unfair result – cannot reject (specific) goods!
* **Section 23**  (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 subsection (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 subsection (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.

***Kursell v. Timber Operators and Contractors – Specific Goods***

* Nationalization of a forest
* K to buy a forest, before got the goods, the forest was nationalized
* Issue: is the buyer responsible for the forest? Is the seller entitled to be paid?
  + Only entitled if buyer owns the forest
    - Then seller entitled to be paid even though buyer has no forest
* Here, the property had not passed and therefore the timber was not at the risk of the purchasers (found not to be specific goods and not in a deliverable state (even if specific, need to be in a deliverable state)) until the buyer had severed it)
  + here the contract set out that trees in area X would be cut at a certain price, where those trees were a certain diameter
  + here not every tree in the forest were to pass to B; only those whose diameter met the certain requirement
  + how much passed depnded on how the trees were cut
  + so the timber was not ascertained or in a deliverable state
  + the B cannot be bound to take delivery of an undetermined part of a tree not yet identified.
* Rule: specific goods pass on the contract being made – here, not specific goods (neither identified or agreed upon at the time the K for sale was made) – and not in a deliverable state until severed!

**2 aspects focused on for specific goods – unconditional and deliverable state**

* What is a deliverable state?
* Section 4 – when they are deliverable
* **Section 4:** Goods are in a deliverable state within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.
* Unconditional contract?
* No one knows what this means
* No conditions? This is impossible – *SGA* has implied in
* No condition precedent/subsequent? This is unclear

**Section 23**

* 23(2): where the courts can, they ignore this (if consequences are bad)
* 23(3): seller has to do something to put goods in a deliverable state? – pass when done and notice to buyer
* 23(4): price unknown? Not till this procedure figured out (and notice)
* 23(3) & (4) apply in very specific situations
* Specific goods – usually go back to section 22 and the courts make up some sort of agreement
* 23(7): unascertained
  + K for sale, property passes when goods of that description are deliverable and unconditionally appropriated
  + Involves both parties
  + Can K out of this
  + Unascertained 🡪 impossible if buyer is owner

**Appropriation**

* Turning unascertained goods into ascertained goods
* Ascertainment of goods is a necessary precondition to the passing of property, but mere ascertainment will not cause property to pass. The intention of parties is the governing factor
  + If no intention is discoverable in accordance with s.22(2), subsection 7 of s.23 applies
* What constitutes appropriation?
  + ***Carlos Federspiel Co. v. Charles Twigg Ltd.***
    - Issue: whether property in the goods passed from the sellers to buyers?
    - Goods being shipped overseas, hadn’t been loaded onto the ship – company (seller) goes into receivership and all the seller’s goods came under the control and management of the receiver
    - Necessary for them to be loaded for appropriation?
    - Section 23(7) principles
      * These are always used
        + Question of common intention (require both parties – unlike specific goods)

To constitute appropriation of the goods to the K, the parties must have had or reasonably supposed to have had, an intention to attach the K irrevocably to those goods, so that those goods and no others are the subject of the sale and become property of the buyer.

* + - * + Actual or constructive delivery (appropriation by the seller involves actual or constructive delivery)

Delivery does not mean putting them in the others custody but that at any point you want, you can come and get them

Control not custody (separate concept)

Constructive? Symbolic delivery (keys or title paper given)

(actual) Delivery is the transfer of possession whereas appropriation transfers ownership (from case) (appropriation = CD)

* + - * Normally property and risk go together, so unless they are deliberately separated, if you know the risk is at/for the buyer, the goods are appropriated
        + If at sellers risk 🡪 prima facie indication the property has not passed to the buyer
      * When the goods are taken out of the hands of the seller (out of control of seller) 🡪 this is usually determinative
      * Appropriating act – last act to be completed by the seller (ie if buyer comes to get them and the seller has gotten them ready – they are the buyers problem now) – last important and decisive act by the seller – doesn’t pass until act is DONE
      * Agreement of the parties that appropriation is made…(agreement made on change of ownership can be made)

***Caradoc Nurseries Ltd. v. Marsh***

* Here, buyer was refusing to pay for the goods (unascertained trees delivered in Spring; buyer says they were supposed to be delivered in Fall and now won’t accept them – seller suing for price)
* Issue: did property in the goods pass to the buyer?
* Action for the price can only be brought under the *SGA* when the property is passed to the buyer (if it hasn’t passed, then only damages can be claimed)
* Nothing was written in the contract expressing the intentions of the parties in regards to passing of property – must fall back on Act
* Buyer had given an implied assent in advance (by the terms of the contract) to appropriation
* Seller appropriated the goods when they became irrevocable (when he pulled up to deliver, could no longer turn around and change them for other goods)
* Do not need acceptance, but only tender (giving over the goods)

***Sells v. Thomson***

* Possible to reverse the authorization a buyer has given to a seller (with notice)
* K for delivery of books
* Buyer cancelled before shipment
  + Breach of K (anticipatory)
  + Seller continued with order and sent books
  + Want $ (price of goods)
* Buyers breach is revocation of consent
  + Title had not passed to the goods, no action for the price

**Section 25**

* \*should indicate when property shall pass in the K
* If property has passed?
  + Goods are at risk of the new owner.
  + Responsible if the goods do something to someone else (injury).
* *SGA* preserves this (section 25) but also provides a way around it…unless otherwise agreed
  + Section 25(1): remains at sellers risk till transferred to buyer
  + Does not change laws of property but adds responsibility
  + Why do this? Because of the ambiguity of when property passes
* Who bears responsibility for insuring the goods?
  + Main concern so usually contracted for
  + Seller [own prop] – K passes on respon. to buyer -> buyer [risk]
  + 3rd party injury? Claim against seller
  + This does not make buyer owner
* Have to make it clear you understand the distinction between risk and property and this must be clear in the K, or they pass together (assumed)
* **Section 25:**  (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 subsection (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

***Jerome v. Clement Motor Sales***

* K for sale of car
* Money and trade-in
* Vehicle needed work done (seller still doing this when car was destroyed by fire)
* Whose responsibility was this?
  + Issue: property and risk passed?
  + No tort claim – because you need to have a property interest
  + Court split on whether it had passed or not (2 assessed together 🡪 not clearly divided in K)
    - Dissent- Laidlaw
      * property passes when parties intended it to
        + this is a finding of fact based on the intent of parties as demonstrated by the terms of K, conduct of the parties, and the circumstances of the case.
      * while normally there is the assumption that goods do not pass until the work is done, this can be displaced by the intent of parties
      * The language of the contract made clear that the property would pass on payment of the purchase price, not based on date of delivery
      * The intent of the parties was clearly that the buyer would immediately lose title of the trade in, and would only keep using the car by permission of the seller.
      * the fact that the seller kept possession of the new car to do some repairs is not determinative.
      * immediately after the K seller was free to dispose of the used car- indeed, he had the cars registered in his name.
      * then buyer signed the transfer documents, transfered new car into name of buyer, seems clear seller intended to divest himself of ownership (B can't now claim that ownership never passed to her)
      * looks at other evidence which suggests that title had passed, and B was just waiting to acquire possession.
      * Anyways Laidlaw basically just reads the plain language of the K which said that ownership passed on payment (conduct supported this)
      * if the seller had gone bankrupt or something everyone would have agreed that B should get the car, having paid for it.
      * So notwithstanding certain repairs were to be done by the seller pursuant to the K, the intent of the parties was clearly that the property was to be passed on payment of the delivery price.
    - Schroeder JA (majority)
      * P wants to recover the price paid by her for the new car, saying she never got it
        + not claiming value of cars, since one she never gave up possession over, other burned while she remained in ownership
      * the question is who had the risk over the car.
      * SGA says for specific or ascertained goods, property passes when parties intend it to pass
        + look at terms of K, conduct of parties, circumstances of the case
        + unless different intention appears, where there is a contract for specific goods and the seller is bound to do something to put them in a deliverable state, property does not pass until that thing is done and the buyer is given notice.
        + "deliverable state" means a state under which the buyer would be bound by the contract to accept
      * it doesn't matter that the things to be done by seller here were trivial.
      * P must show a different intention (to the “being bound to do something to put them in a deliverable state bullshit) to defeat the ordinary rule
        + P says the transfer of the permits, and the payment of the transfer fee demonstrate a contrary intention to ordinary rule
      * what about the term which states that property doesn't pass until full payment is made?
        + must look at the purpose of the term in the contract
        + the term was included to protect the seller against loss of a seller's lean if the good came into the possesion of the pruchaser before the payment of the purchase-price.
        + plus, the full purchase price hadn't been paid, because P kept possession of the trade in.
    - Analysis-McGillivray JA
      * Looks at SGA which says that, barring contrary intention, goods only pass when all changes that need to be made have been made.
      * payment of the cash balance does not evidence a contrary intention, nor does registration
      * of course you would register quickly, you want to use the car ASAP
      * Anyways, normally when a contract like this where the vendor must do some repairs prior to delivery, the buyer has the right to demand delivery in the correct from, and may reject the goods if they don't meet the contract terms.
  + Ratio
    - where the transfer has been complete, the buyer owns the car and holds the risk
    - if the transfer had not been complete, the seller would hold the whole of the risk.
    - simply demonstrates that risk and transfer of ownership are related.

**Frustration (not on exam)**

* Different type of risk
* Risk = responsibility here
* What is used by the parties if they don’t like the outcome/risk allocation

**THE CONTRACTUAL RESPONSIBILITY OF THE SELLER**

* Implied terms of the *SGA*
* **Cannot K out of:** responsibility to pass property
* Property cannot be passed? Undermined K!
  + Profound repudiation; denied the other party the purpose of K
* Obligations: delivery, quality, payment, etc.
  + Can be K’ed out of (except in retail sale)
* **These are personal in nature** (no 3rd party effect)
* Section 16 – 19
* Section 17 – 19: obligations relating to quality and nature of goods

**The Seller’s Title Obligations**

**Section 16**

* **Section 16**: 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 possession 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 when the contract is made.
* Relates to the characteristics associated with title (quality of title and right to sell)
* Obligation to transfer title that is useful to you (enjoy the goods)
* Guaranteeing there are not other people with property interests that will adversely affect your enjoyment of the goods
* Implies a condition and 2 warranties – various terms are implied UNLESS the circumstances of the contract are such that they show a different intention
* **Implies 3 terms into K of sale**
  + Heading: implied undertaking as to title
  + 16(a) conditions
    - Seller has the right to sell the goods
    - Not saying the seller must own the goods
  + 16(b)&(c) warranties [not conditions, cannot terminate and reject on this basis]
    - Should turn these into conditions
  + 16(b)
    - Implied warranty that the buyer is to have quiet possession of the goods
    - Insurance obligation the seller has (ongoing obligation)
    - Relates to the period after the K
    - Quite alarming obligation – will want to K out of
  + 16(c)
    - Very important
    - Implied warranty that the goods are free of any charge or encumbrance unknown to the buyer at the time the K is entered into
    - Not ongoing
    - Only a warranty so if there are charges:
      * A breach, but cannot reject goods
      * Think secured transactions, someone could come take these goods away from you
      * K out of this IMMEDIATELY on the one hand, on the other side, will want to make this a condition (buyer)
* 16(a): Right to sell (condition)
* Timing = upon passing of property, NON-ongoing
  + License
  + Statutory Prohibition
  + Contractual obligation
* 16(b): Quiet enjoyment (warranty)…
* Timing = post-delivery, ongoing (up to a few years? probably should not assume more than a few weeks in most cases)
  + Uninterfered with use
  + Durability (?)…questionable whether 16b breached when the problem is that the goods suck
  + S.18 actually says the goods have to be durable (BC…o/jurisdictions do not have comparable provision)…how long do these terms last?
* 16(c): Charges/encumbrances (warranty)[security interests]…
* time of k/passing of property? (fuzzier here)…
  + Under PPSA, can give third parties SIs even when you do NOT own the goods
  + Old law: could not give Sis when you did not own
  + PASSING OF CUSTODY is the appropriate time?
    - Ie. Buyer only truly safe once the seller has nothing at all
  + Causes huge problems in practice
  + No case law on this for this course, because cases deal w/security regimes that we not handling
    - Non-consensual (SGA often the source of these…gives buyers/sellers liens]
    - Consensual

**The Nature of the Right to Sell Goods**

***Rowland v. Divall***

* Stolen Goods
* What happens if I sell you goods to which I have no title?
* True owner comes along and wants goods back
  + Buyer wants to find BREACH of CONDITION, so that he can get money back…with a warranty, obligations continue, would have to sue for damages
* PROBLEM:
  + Buyer argues 16(a); breach of implied term…no right to sell
  + Seller’s argument: Buyer cannot reject the goods, because s. 15 says that if these are SPECIFIC goods, and PROPERTY has passed, or if they are unascertained and the buyer accepts them, cannot terminate k
    - Court accepts that 15(4) prevents you from terminating…
    - Court discusses possibility of using TOTAL FAILURE OF CONSIDERATION doctrine:
      * Allows other party to claim back anything that it GAVE under the K
      * Here, other party got “de facto” possession, but the heart of the contract is to give title + right to possession, NOT merely custody
    - DECISION: Buyer GOT nothing under the K! Entitled to get money back.
* From the case:
  + Scrutton LJ: normally cannot get rescission of the K unless you can give the goods back – here, cannot. However, in the case of rescission for a breach of the condition that the seller has the right to sell the goods, it cannot be that the buyer is deprived of his right to get back his purchase money because he cannot restore the goods which, from the nature of the transaction, are not the goods of the seller at all and which the seller has no rights to under any circumstance (can’t deprive the buyer of a remedy in this case)
  + Atkin LJ: here there has been a total failure of consideration in that the buyer has not gotten any part of what he paid for (although he had de facto possession, he could not have actual possession as it was not for the seller to give). There can be no sale of goods at all where the seller has no right to sell (overrides rule about accepting). No right to sell? Grounds for rejecting the goods and repudiating the K despite any acceptance (within the meaning of the provision) - buyer has not received any part of what he contracted to receive (property and right to possession) and that being so, there has been a total failure of consideration!!

***Butterworth v. Kingsway***

* + Bowman has contract with R - Lease with an option to purchase
  + Lease gives possessory interest (but R does not own yet until she finishes making payments)
  + R is NOT allowed to assign her interest to anyone else
    - Nonetheless, R made a contract for sale with someone else…who in turn sold to someone else…etc.\one of these buyers, down the line, is the plaintiff (Butterworth) who bought it from the defendant, a car dealer
  + 15 July ’52, plaintiff notified of this by B (that he did not have good title to the car as B owned it)
  + 17 July ’52, plaintiff notifies defendant of this (that the sale was incomplete – demanded money back)
  + 25 July ’52, final payment by R to B (perfecting title – in that now R had good title)
  + Litigation comes later
  + ISSUE:
    - Is there a breach of contract that would allow plaintiff to reject the goods?
  + “Feeding of Title”: means that when Rudolph made the final payment, the title passed…but this was not the case when the K was made…is rejection of goods possible?
  + DECISION: There WAS a breach entitling the plaintiff to the full purchase price of the car…since title had not been fed, and the seller supposedly had “no right to sell” (at the time the car was rejected [July 17], title had not been perfected [July 25, final payment made])
  + Right to rescind based on Rowland – when he wrote the letter he rescinded the K (relevant date) – this lack of right to sell trumps acceptance/use (which normally would turn condition into warranty)
  + BRUCEY’s two cents:
    - R had some sort of interest…property interest even if not full ownership
    - Not OWNERSHIP, but buyer here still has some sort of interest…the car ie legally leased, though not owned….so the lease interest is effectively sold
    - Should this really be considered a “total failure of consideration”? Probably not
    - Be careful with applying TFoC doctrine
    - “Feeding the Title”:
      * when you test for a breach of 16(a), you are supposed to test for the right to sell at the time property passed
      * but this case makes it seem that title being fed later on disqualifies you from using this
      * Feeding the Estoppel = land doctrine…only operates when transferee is given NOTHING (ie. Total failure of consideration)…but here, this case seems to create the rule that Feeding the title works when only a lesser interest is passed on…inconsistent?
    - Brucey questions whether this is good law…likes Rowland case but not this one

**Facts:** Woman bought car, but title wasn’t to pass until all payments were made. Before all payments were made she sold the car, which was subsequently sold a few times all before the initial payments were complete. Finally a party realized that there is not ownership of car: notification and then claims for possession. P nonw wants to reject goods and there are a series of claims up the line.

* If you don’t get title because the seller doesn’t have title, but before you take legal action the seller does get legal title, the title gets “fed to you”.
* “Feeding of title” means that under s. 16(a) you cannot reject the goods. Goods were stuck with the party who did not reject the goods before the title was fed.
* In B.C, under 16(4), it has been accepted and used, preventing product from being returned. Final payment
* had been made, which court found significant.
* You can only claim damages in the amount of the difference between the value of the car when you were supposed to have obtained title and the value when you actually did obtain title.

Could undo on basis that person didn’t have right to sell goods

**Scope of 16(a): section 16(a) does not state that the seller has the 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**

***Niblett v. Confectioners’ Materials***

* Sale for 3000 cases of condensed milk
* 100 of the cases were marked as “Nissly” (brand)
* Nestle: IP rights violated
* Confectioners agreed that they were in violation
* Sold the goods anyways
* Decision: 16(a) and (b) violated
* Niblett was allowed to reject the goods:
  + 16(b) breached because could not legally USE the goods as they were
  + 16(a) no right to sell goods that are in breach of someone’s IP rights
    - Question: does 16(a) breached when ONLY seller is affected? Or only when buyer AND seller are affected? (ie. By claims of Nestle corporation)…court doesn’t answer
    - Subsequent cases decide that 16(a) can be used as a basis to reject even when buyer and seller are affected in the same way (??? Go back and understand this)

***J. Barry Windsor v. Belgo Canadian Mfg. Co.***

* Defendant sells plaintiff 3000 lamps, which were known to be acquired for resale
* Lamps were not CSA approved (requirement in BC) so the buyer’s buyer refused to accept (possibility of government injunction if sales go ahead)
* Buyer/Plaintiff argues that there was no right to sell as such a sale was prohibited
* Buyer has full ability to use…no injunction
* Buyer wants to reject
* At TIME goods sold, there was no right to sell on part of seller because even though the seller WASN’T stopped by injunction, he COULD have been….not legally allowed to sell the lamps
* If you could be restrained by injunction from selling them, you have no right to sell them (if a vendor can be stopped by process of law from selling he has no right to sell)
* May have succeeded under 16(b) if purpose was to resell…no quiet enjoyment when cannot sell goods due to illegality

Title by estoppel

* *Butterworth v. Kingsway Motors*
  + Woman who wasn’t supposed to sell the vehicle until she paid for it
  + They get title before you complain about it, you lose your claim

Seller – land - > buyer

Mortgagee [ownership] (S 🡪B)

* Buyer can see breach (failure to transfer ownership – b/c of m’ee) or hold other party to the effectiveness of the K
* So:
  + 1. Reject and terminate the K OR
  + 2. Affirm the K – seller title by estoppel (buyer is) and ROW (true owner)
  + \*\*seller cannot deny the buyer is owner of the land
* Subsequently: seller becomes owner
  + Feeding of the estoppel? Not clear
  + With respect to the rest of the world? Cases split
    - YES – become owner (buyer) as against ROW
    - NO – unless the seller had absolutely no interest at all
* So, if goods, with seller as lessee, this is the same scenario
* Goods 🡪 called feeding of title

**Section 16(b)**

* Enjoyed quiet possession (ongoing obligation)

***Microbeads AC v. Vinhurst Road Markings***

* Swiss company sold machinery to an English company – 2 or 3 years later, another English company said they had a patent on these machines and sought an injunction to prevent the use of these machines – does the English company who bought these machines have an action against the Swiss?
* Illustrates how this can be of use (s.16(b))
* At the time of sale, this is all good – the patent was not made public at this time (so breach of the “right to sell” condition)
* But 16(b) has an ongoing obligation – implied warranty of quiet possession and enjoyment
  + Shall have an enjoy apply not only to the time of the sale but also to the future
* Here, intellectual property rights prevented use of the machine – breach of warranty
* Criticized: for how long this went on (2 yrs)

Ct’d

* Deals with 3rd party interfering? Arguable
* Can this involve durability as well?
* Question: to what extent can you K out of these? Particularly 16(a)?
  + Giving no guarantees under 16(a)
  + ***Sloan v. Empire Motors***
    - Creditor owned the vehicle; seller had an interest only as a buyer under a conditional sale contract
    - Buyer then couldn’t be the owner
    - Focus on 16(a)
    - Breach of implied term of right to sell assuming that term is in the K
    - Has to be abundantly clear that what you intend to do it contract out

**THE SELLER’S OBLIGATIONS AS TO DESCRIPTION AND QUALITY**

**Section 17: Description**

* **Section 17:**  (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 as 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.
* 17(1) implied condition the goods correspond with description
* Qualification: **where there is a sale by description** (also an issue in 18(b))
  + Problem: what is a K for sale by description? As is, where is there NOT a sale by description?
  + **3 questions:**
    - What is a K for sale by description?
    - What is the description?
    - What is correspondence?
* Question: how at all does this change the law?
  + If no section 17 how would you go about complaining about this?
    - Quite a strong position inherent in K law
    - 2 ways this comes in
      * Representation: this is a statement of fact (guaranteed on misrepresentation law not K law)
      * Term: promise in K law (led to breach and remedies)

***Taylor v. Combined Buyers Ltd.***

* Court differentiates between specific goods and unascertained goods (influences how section 17 operates)
* Seeing it? Specific goods (doesn’t contemplate specific goods unseen)
  + Representation if seen
* Unascertained: don’t know what they are
  + Ordering a horse based on PROMISES because the horse doesn’t exist yet
  + These are pretty big assumptions
* Presumptively terms about description are for ascertained goods
  + Contract for unascertained = contract for sale by description
* Therefore:
  + Section 17(1): in K for unascertained goods
  + in specific goods, presumed to be a sale by identification

**Still, why do we need section 17?**

* Absent section 17, figure out description and categorize it (warranty, intermediate term, condition)
* Section 17 – turns everything into a condition

***Frey v. Sarvajc***

* Covers sale by description and representation
* Sold truck as ‘1992’
* Turned out vehicle supplied was made up of 3 different vehicles and didn’t work very well
* Truck was seen and inspected 🡪 SPECIFIC GOODS
* K said: sold as is without any express warranty
  + There have been cases where “as is” does not relieve liability where there is a fundamental breach of K (breach that deprives the buyer of substantially the whole benefit they were to obtain under the agreement) – not the case here (truck was not completely unroadworthy as to deprive the buyers of substantially the whole benefit)
* Issues:
  + Does caveat emptor apply or is it ousted by fraudulent misrepresentation?
  + Whether the description of the truck itself was misrepresentation?
  + Damages?
* *Caveat emptor*: buyer beware (normally up to the buyer to inspect or you are just fucked)
* Can silence constitute a misrepresentation?
  + Misrepresentation here: this truck is made up of 3 vehicles
  + Patent versus latent defects
    - Patent: CE only applies here. Could be discovered if inspected (the problem) by a reasonable buyer
    - Latent: hidden defect (fraud). Deliberately hide defect – misrep by the seller; buyer can rescind. Probably also fraud (damages in tort)
  + Here, no latent defect but patent (different serial number which would have been easily discovered on inspection by a mechanic) – CE applies (no remedy under this)
* Breach of section 17? YES
  + To advertise the truck as it was, was misleading (did not match the description) – the odometer is a crucial piece of information for prospective buyers
  + Here, since the goods were accepted, under 15(4) this could only be treated as a breach of warranty (damages, not rejection)
* Case expands notion of sale by description to encompass cases where goods have been seen and inspected as long as the description of the goods is fundamental to what is being purchased.
* Don’t necessarily go straight for s. 17! There was a breach of condition. Go misrepresentation route for rescission. If there is also fraud, go after tort damages.

Other notes:

* while the car was sold "as is" some cases suggest that where there is a fundamental breach, this doesn't apply
  + but here there was no fundamental breach- car was still basically road worthy
* if buyers want a warranty that the car had been in no previous accidents, they should include that in the bill of sale directly as a warranty
* P argues "latent structural defect"
  + if latent defects are actively concealed by the seller or the seller otherwise attempts to mislead a purchaser or lull his suspicions, caveat emptor doesn’t apply
  + mainly applies to real property though
* normal caveat emptor rule is that where the S has not been fradulent, it is up to B to obtain warranty before agreeing to buy
  + there is typically no duty to disclose as between parties in this kind of sitaution
  + "patent defects" are discoverable by inspection and ordinary vigilance, and caveat emptor applies
  + latent defects would not be revealed by any inquiry which the B could make prior to purchsae
* Here, the differing serial numbers were discoverable on inspection by a mechanic, and a mechanic's inspectionis a matter of ordinary vigilance on the party of many buyers
  + so the defects were patent and discoverable by inspection and ordinary vigilance on the part of the purchasers, so caveat emptor applies
* **What about sale by description** 
  + the description was for a car with 58K miles on it, but the different parts of the car had different mileages (so the truck actually contained an engine of unkown mileage)
  + true description would have been "true mileage unknown" since the mileage on the various component parts of the truck were not uniform, and the engine mileage was not ascertainable
  + it was misleading to advertise the truck as one homogenous unit with a mileage of 58K
    - so the breach of condition of goods by description is made out
  + BUT 15(4) applies to say that the buyer having accepted the goods cannot use the condition, must be treated as a warranty
    - so buyers to get damages for breach of warranty
    - the damages are the difference between the described goods and the goods actually received.
    - so buyer gets the difference between the price paid and the actual value of the truck

Ratio

* caveat emptor applies for patent defects, but not necessarily latent defects
  + defects are patent when the defect is discoverable by inspection and ordinary defect, latent defects are not
* Where the goods are different from what is described, that breaches the implied condition of goods sold by description (here, this was specific goods, so this expands the general notion that section 17 only applies to unascertainable goods – where fundamental can use this)
* 15(4) may apply to change this condition into a warranty
  + damages will be for the difference in the price paid and the actual value of the goods
* keep in mind that a misrepresentation may also allow you to use recission to avoid the contract altogether
  + but here since a reasonable inspection would have revealed the defects, caveat emptor applies

***Hart-Par Co. v. Jones***

* Same theme as Sloan case (section 16)
  + Can you exclude implied conditions?
* The defendant here was refusing to pay because: (1) the engine delivered was not the one he ordered and that he refused to accept it, and (2) that there was a total failure of consideration
* Issue here: can you exclude the guarantee of correspondence?
  + Yes, but the court will be reluctant to find this is the case (must be very clear this is what you are intending to do) – cannot be held to alter the subject matter of the sale nor to give the vendor a right to supply any article he may choose, unless clear language to that effect is used
* Reasonable time for rejection/acceptance? There is no acceptance precluding you from rejecting the item if it did not fulfill the requirements of the K (see page 191 – important here??)

***Torpey v. Red Owl***

* US decision
* Injured by exploding bottle of apple sauce
* Wasn’t bought by description – she chose it (without hindrance from the dealer or anyone she chose the article she desired)
* Very rare to find an authority that takes this approach

***Sams v. Ezy-Way Foodliner Co.***

* Issue same as 18(b)
* Glass in hot dogs – merchantable or not?
* Argument: not a sale by description as she chose the one she wanted (by identification)
* Court disagrees – sale by description
* What is the description?
  + JORDAN’S HOT DOG (does not say glass included) – was a trade name describing the contents to the prospective customer (the printed word was the silent salesman)

***Varley v. Whipp***

* \*\*changed the law
* Machine not seen before agreed to purchase; didn’t match oral description; the defendant rejected the goods and the plaintiff now brings this action to recover the price
* Specific goods (farm equipment) described (not seen)
* Sale by description? Section 17?
* The term “sale of goods by description” must apply to all cases where the purchaser has not seen the goods, but is relying on description alone
* Where goods are not seen, even if specific, they are sold by description – no identification otherwise than by description – section 17 applies!
* Side note: property passed – on acceptance (which here never occurred)

***Bealz v. Taylor***

* Extended to case where specific goods where they are seen (as long as it sold not merely as the specific thing but as a thing corresponding to a description)
* Car made up of 2 cars – lack of correspondence
* Analysis
  + Where goods are sold by description there is an implied condition that the goods shall correspond with that description. (s. 17)
  + normally applies where B hasn't seen goods, but may apply if seen if the deviation is latent
  + so was this a sale by description or a purchase of specific goods?
    - Specific goods may be sold "by description" if the good is sold as corresponding to a description.
  + Here P was coming to buy an H convertible, and that's what he saw
    - this is why he made an offer.
  + But the car didn't match the description, although D didn't know this and neither party could without through inspection
  + here notwithstanding the inspection, P purchased on the basis of the car corresponding to the description, so s. 17 can apply.
* **Ratio** 
  + again, purchase of a specific good may fall under s. 17 where the goods are sold as described
  + even testing may not be enough to get around this if the purchaser makes their decision on the basis of the description
    - what if the problem was patent?

**Questions:**

* Not clear why section 17 can convert representations into terms? Do you lose the right to rescind?

**s. 17**

* What does section 17 do to existing law on the description?
  + Quite different from the other implied terms
  + s. 17 is always thought of changing the law, not just codifying existing law
* In *Varley v. Whip*, Salmons J. differentiates between how it operates between UA goods and specific goods
* The description can therefore come from representation or terms. All of this becomes a condition for UA goods through a. 17(1). Converts representations through terms, but it also converts what would otherwise be warranties into conditions into the contract. **To the extent of any deviation in terms of description, it’s a breach of a condition.** Basis for rejecting the goods.
* What is said about the goods – conveniently forgotten.

**UA Goods [Not Seen]**

* largely goods that are not seen
* essential to know what you are going to get

Doesn’t convert representations into terms into the contract, with specific goods (has to be a condition already)

Specific

* [seen]

Relationship between description and usability

Relationship between s. 17 and the provisions implied into the contract (s. 18)

What if the goods meet the description and are not usable? Does that affect how s. 17 interacts with s. 18? What if the goods do not meet the description and are usable?

***Arcos Ltd. v. EA Ronaasen & Son***

* Order for unascertained goods. Wood to be used to make barrels. Specific dimensions required.
* Goods still perfectly usable but they did not match the description in the K
* Can they be rejected?
  + Yes – picked for the purpose they are intended. Simply mean there isn’t a breach of s. 18.
  + Breach of s. 17 – description was very precise, not limited by the purpose of the goods.
* Stands on its own.
* **Just because merchantable doesn’t mean they satisfy the description under the K.**

***Ashington*** ***Piggeries Ltd v. Christopher Hill Ltd. (opposite situation)***

* Goods don’t work. Nonetheless, they are in conformity with the description laid out in the contract.
* Mink dying of liver disease because of a feed being supplied by the appellants (defendants)
* **Usability part of the description of the goods? NO**
* The Court took a common sense approach. Does it look like herring meal?
  + Yes it was. Corresponds with the description of s. 17
  + Didn’t purposefully add the poison
* Court aware is that there is an attempt to use s. 17 to get around s. 18(a)
* Try to avoid that by using common sense approach – doesn’t really make it s. 17 (the defect was more in quality or condition rather than description)
* At the end of the day its herring meal – essential components – if in addition there is some chemical additive – not going to change the essential conformity with the description

**s. 17**

* Almost all contracts will have these sales by description
* 3 questions:
  + 1) What is a contract by description?
    - Almost all contracts
  + 2) What is the description?
    - Anything said about the goods (broad definition). Question the hot dog with the glass in it is consistent with piggeries case. Not necessarily
    - Some limiting through the scope of description
      * Salmonds does it by saying through specific goods just the essential components for the purposes of s. 17
  + 3) What is conformity by description?
    - Condition that there be conformity with that description
    - Does make warranties into conditions
    - Representations into conditions for contracts (UA goods)
    - How much does the conformity have to be?
      * Precise – Arkos
      * Other decisions, piggeries, more or less, that it is conformity with the description.

**s. 18 – the work is mainly done by s. 18 in addition to s 17**

* **Section 18:** Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows: (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 it 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; (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; (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; (d) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade; (e) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent with it.
* Contains an array of protections
* These provisions deal with **quality**. What goods are like – usability
  + Quality in s. 18, s. 17 is just the description.
* Parties tend not to say much about this.
* Default provision in the law is there is no problem with usability
* In BC,
  + (A) If the buyer tells the seller what the buyer’s purpose is for the goods and the buyer relies on the seller’s expertise and skill and the seller is in the business of such things, implied condition that the goods are reasonably fit for that purpose.
    - ***real workhorse – goods are supplied under the contract of sale***
    - ***you can complain of a breach of contract of goods that are received but are not part of what you buy – ie things you get to help set up the piece of equipment you bought***
  + (B) Confined to sales with description.
    - If goods are bought by description from a seller, who deals with goods of that description, implied condition that the goods are of a merchantable quality.
* Protection
* Except the way out – if the buyer has examined the goods, no implied condition with respect to defects that the examination ought to reveal.
* The seller has to deal with goods of that description
  + Doesn’t say it has to be in the ordinary course of business.
* The goods are of a merchantable quality
  + Question is what it is you can complain of as a buyer?
* Courts have taken a very narrow category
  + notional list of all the possible uses of the description of the goods
  + B – buyer’s purpose – if you get the goods and they can’t be used for the buyer’s purpose
  + If the goods can be put to one of the possible uses – then they are of merchantable quality. EASY FOR SELLER TO MEET.
* (C) implied condition that the goods will be durable for a reasonable period of time taking into account the use one would normally have for the goods and all the surrounding circumstances of the sale.

***Bartlett v. Sidney Marcus Ltd.***

* Car had various problems – and the buyer is arguing that the car is not of merchantable quality and not fit for purpose
* MQ is so general – as long as it is usable in general sense, even though it needs some work (doesn’t need to be perfect)
  + Test: it may not be in perfect condition but yet it is in a usable condition = merchantable
  + Similar to test for 18(a) – fit for purpose if it is roadworthy (even though not perfect as a new car would be)
* Specifically alludes 18(a) and 18(b)
* No breach – reasonably fit for use as a car on the road so no breach of either

***Kendall v. Lillico (aka Hardwick v. SAPPA)***

* Illustrates the limitations of s. 18(b)
* Food item that killed off the animals
* Turkeys died because of being fed Brazilian ground nut extractions
  + Extractions – used to feed to a number of animals – various things that were known and not known
* Wasn’t known would kill off poultry of this type, wasn’t known that it wouldn’t have that effect on other animals
* The problem was that there were spores of a fungus and that killed off the birds
* Oddly enough, the buyers further down the chain didn’t know much compared to the manufacturers. The buyers had the expertise.
* Applying s. 18(a) and s. 18(b). How they were actually situated.
* Majority: generous point of view in terms of the seller.
* Court has to take all knowledge
* Goods actually do have certain uses
* Court said that in this case despite the fact that the birds were killed off, could reasonably be used to be fed to other animals that would not die from it. Meant there was a purpose to which the goods could say
* Also rejected to import something from 18(a), don’t characterize the buyer and the seller. Isn’t a restriction into s. 18(b).
* Majority said price is not relevant. Not part of the description.

merchantable quality in this case – must be of no use for any purpose for which goods that complied with the description under which the goods were sold would normally be used and hence were not saleable under that description (if the description was so general that goods sold under it were normally used for several purposes then goods would be merchantable under that description if they were fit for any one of these purposes)

price – dissent highlights that the price should play some role in deciding on merchantability – as there are markets for second hand goods!! Also what about warning?

Does time have any real effect here??

***BS Brown & Sons Ltd. v. Craiks Ltd.***

* Issue was more apparent
* Contract for rayon
* Buyer wanted rayon to be used to make clothing, but seller thought they wanted it for industrial uses
  + Turned out, rayon has two different purposes – industrial and clothing
  + Argued the cloth they ordered (the description) only had one purpose, being dress making, so the cloth delivered was not of merchantable quality (did not satisfy this purpose and there was no other purpose it could have )
  + Rayon was not suitable for dress making due to an irregular weave
* No breach for 18(b), might be alright if you accept that the rayon might be alright for these
* No breach of 17 – no problem with description
* Buyer said price should be taken into account, reasonably high – indicated that rayon was not to be used for industrial purposes
* Lord Reid: suppose that the market price for better quality is substantially higher than that for the lower quality – it cannot be right then if the K was for the higher quality, the seller would be entitled to provide the lower quality, simply because both fit under the same description (are both commercially saleable)
  + Remember in Lillico: said that is various qualities are under one description, then the lowest quality so sold under that description is what is meant by merchantable (commercially saleable under that description) – there no issue of price (brazil nuts)
* Court: where there is a significant difference for various purposes – if the price of a given contract – high end, where nobody would pay that price.
  + Have to use caution not to get the parties out of a bad bargain. Not so high that it wouldn’t be immediate obvious to a seller that the use of rayon for clothing.
  + Some scope to include price to limit for the goods to use

Analysis- Dilhorne

* looks at the prices paid for the cloth (sometimes this is a very relevant consideration and sometimes it is not)
* if the cloth was saleable at the time of delivery for any other purpose, then normally it cannot be said that it was not of merchantable quality (ie if it could be sold for an industrial purpose, then MQ)
* merchantable only means "commercially saleable"
  + but sometimes price is important
  + If the contract price was so far above the price the goods would have fetched if sold for another purpose, this may lead to a finding that the goods are not of merchantable quality (if sold for industrial purpose the price was substantially lower, this would indicate not of MQ for dress making) – if the K price was WAY above what the goods would have been sold for, for another purpose, this may indicate that goods sold for the other purpose were unsaleable at anything approaching the K price, then it might be held that the goods were not of MQ. (so if the other purpose you sell the goods for is significantly lower than what the K purpose would fetch, may be not MQ)

***IBM v. Shcherban***

* Scale weighing machine – problem was that the covering was shattered
* Buyer is purporting to reject the goods, not of a merchantable quality
  + MQ includes state or condition – what would a reasonable man accept? Would a reasonable man accept a broken scale, meant for resale?
* Court accepts the argument

**Section 18**

* 18(a) – more helpful to buyers than 18(b)
* Merchantable quality
  + 18(b):
    - If the buyer has examined the goods 🡪 no implied term of MQ
    - Not intended to cover specific goods (chance to see/examine)
    - BUT – problem: goods by description can be either specific or unascertainable
    - So in 18(b), which goods aren’t covered by the provision??
* 3 issues:
  + What constitutes an examination?
    - More than just seeing the goods (some sort of conscious effort to inspect the goods for quality)
  + If you have examined, what sort of examination do you need to undertake (ought)?
    - So, if you do, what sort of exam must you engage in for the seller still to be liable? A reasonable exam
  + Are you required to make an examination?
    - No – but once you have started, you are required to continue the exam (whatever might be reasonable in the circumstances) (reasonable will reveal patent defects, assumedly)
* Done an exam but not a reasonable exam which would have revealed the problem? Cannot rely
* \*\*exam must occur BEFORE K is entered into
* Sale by sample – can argue under 18(b) but will likely be dealt with under section 19

***Thornett & Fehr v. Beer & Son***

* Give in barrels – was of unmerchantible quality
  + Discovered after K was entered into
  + Buyer shown barrels before (inspected outside of barrels, but didn’t open)
* Buyer doesn’t get protection (no implied condition the goods are merchantable due to the examination proviso)
  + Outside checking was an examination – should have inspected inside (ought to be reasonable)
  + There was no doubt that an examination of the inside would have revealed the defects complained of (reasonable exam)
* Criticized: the section doesn’t say reasonable (as compared to 19(2)(c))
* Canadian courts have followed this, but it’s not the law in England anymore

***Van Doren v. Perlman et al.***

* Fur coat
* Specific goods: shown fur
* Given every chance to inspect it, but didn’t detect it had bald spots
* Can she reject? YES
* No one wants it to have bald spots! Wouldn’t be expected of a person in this situation to inspect (did what was reasonable in the circumstances)
* Buyer must also be allowed a reasonable time for examination and acceptance – question in each case what this is

**18(b)**

* Duration of merchantability?
* How long does it last? When do you test these protections?
* Required to be an insurer as a seller? Does it have to last for a period of time afterwards?
* **Answer: yes, some sort of duration to this**
  + If there is a quality inherent in the goods causing them to deteriorate over time
  + Should last until delivery
* Result driven issue really
* Cases here: Mash and Buckley

***Mash & Murrell v. Joseph Emanuel***

* K to buy potatoes; being shipped from Cyprus to England; turned bad on the way (no good for human consumption)
* Seller argued: given the nature of the K, property passed when goods loaded on board (delivery)
* Court said: nonetheless, this condition of merchantability has to last for a reasonable time given the nature of the goods (to be merchantable means they will be in that condition when appropriated to the K and for a reasonable time afterwards – normal transit to the destination and for disposal after)
  + Had to be of merchantable quality upon arrival

Perishable: subject to contracting out and expiry dates (compromise) – indicate you are not responsible; seller liable to insure the goods (still responsible for the goods even though they have passed)

Other goods: courts not so flexible

***Buckley v. Lever Bros.***

* Clothes bin (wood) that shattered and injured the P
* Fine when delivered; used 2 or 3 times only
* Seller liable: NO
* Buckley (very restrictive)
  + Clothes pins shatter
  + Here, allowed the claim on the basis the goods were “new”
  + Seller is not meant to be an insurer of the goods – if they appear to be used, the buyer cannot bring a claim in 18(b)
    - Good must be NEW or unused (whatever conditions/warranties there were at the time of the transaction, they would apply only if at the time of the accident the goods were in the condition they were at the time of transfer to the purchaser)
  + But potato case?? Mash – but here, they were quite different from when they were delivered
    - Here, merchantable quality continues for a period of time (broader approach)
    - Does this apply to anything apart from perishable goods? Not clear – what is perishable really? Brucey thinks this should apply beyond food

In BC:

* 18(c) [taking over the role of 18(b)]: goods are to be durable (what does “durable” mean? Very unclear)
  + Implied; reasonable time; having regard to normal use and all of the surrounding circumstances of the sale
* In a retail sale: cannot K out of section 18

**18(a)**

* Pre-requisites:
  + 1. Have to make known to the seller your particular purpose
    - So has to show you relied on the seller’s skill or judgement
  + 2. In the seller’s business to provide goods of that description
    - One off sale? Some give on this
* If met, then:
  + Implied condition the goods are reasonably fit for the purpose
    - This extends to any goods that come along with the goods in question (ie any goods you need to set up a piece of equipment)
* Proviso (trade names):
  + Buyer friendly
  + In the case of a K for specified article under its trade name – no implied condition
  + So today – does this eliminate the usefulness of 18(a)? Everything is under a trade name..
    - Hasn’t been interpreted this way
    - Cases illustrate generosity
    - Crother: 18(a)
    - Bartlett: 18(b)

***Crother v. Shannon Motor Co.***

* Relied on the seller’s skill and judgment
* Purpose was made known to the sellers
* Sellers argued: fit for purpose = purpose of driving along the road
  + Judge disagrees that the car here fulfilled that purpose
* Here, car was not reasonably fit for the purpose – relevant time is the time of sale
* Distinguished from Bartlett where the court found the buyer of a second hand car should realize defects will eventually appear

***Marshall v. Ryan Motors***

* Car was a piece of shit
* Claiming: damages for breach of warranty in the K and in the alternative, for breach of an implied condition or warranty that the car was reasonably fit for the purposes of the appellant
* Issue: purpose was not told
  + Where an article which is *prima facie* applicable to one purpose only is sold by its ordinary recognized description, then, inasmuch as there is a sale for a particular purpose which is understood by the buyer and seller, the fact that the buyer does not make known to the seller the particular purpose for which the article is required, otherwise than by the ordinary description of the article, does not exclude the article from the condition “reasonably fit for purpose” (ie if there is only one purpose, this doesn’t need to be made explicitly known)
  + In any event, the purpose was made known here: to get from place to place
  + Here, used for ordinary purposes and it still sucked

***Kendall v. Lillico***

* Turkeys died (ate bad nuts)
* Problem: several buyers were at least as knowledgeable as the seller
* Is it correct then to say the buyer can rely on the seller’s judgement/skill?
  + This is possible
* Purpose: this can also be implied, for 18(a) more appropriate to use the price

**Proviso? Specified article ≠ no protection**

* Courts say this (patent/trade) doesn’t mean very much
* Drafted in the 1800’s when this wasn’t as common (unusual to have a trade name)
* Ignore this except in very rare cases

Really a question of reliance!!

***Baldry v. Marshall***

* K for a car (Bugati)
* Rejection? NO – can’t rely (sold by trade name)
* The mere fact that an article sold is described in the contract by its trade name does not necessarily make the sale a sale under a trade name
* **Bankes Test\*\*\*\*VIP** 
  + Sale under a trade name
    - Proviso doesn’t operate if seller proposes brand name
      * Ie where a buyer asks a seller for an article which will fulfill some particular purpose, and in answer to that request the seller sells him an article by a well-known trade name, there I think it is clear that the proviso doesn’t apply
    - Buyer says I’ve been recommended this brand for my particular purpose and seller confirms – no proviso
      * Seller says, it is suitable
    - HOWEVER where the buyer says I have been recommended this specific brand as suitable for the particular purpose for which I want, please sell it to me – proviso DOES apply (no implied condition for you)
* **Test is: did the buyer specify it under its trade name in such a way as to indicate that he satisfied, rightly or wrongly that it will answer his purpose and that he is not relying on the skill and judgement of the seller, however great that skill or judgment may be.**
* Presumption you are in the first category when buying shit (seller proposing these goods are what you need for this purpose)
* Proviso really means nothing for 18(a)

**18(a)**

* 18(b) has a particular issue: durability
* 18(a) has a controversial aspect
  + Allergies!
  + **Is a seller liable under s. 18(a) when there is something idiosyncratic about the buyer?**
    - Courts haven’t shown a lot of generosity to buyers in this instance
    - Tort standards are used (little justification to why this is)
      * Reasonably foreseeable
      * Court examines various issues under 18(a) that 18(a) doesn’t say should be part of the consideration

**Problems with 18(a)**

* Normal versus not (goods)
* Examine the buyer (categorize into normal and abnormal)
  + There to protect normal people (can change over time)
* Courts put a burden on the buyer to explain the abnormality to the seller
* May be able to complain about this under consumer protection legislation

***Esborg v. Bailey Drug Co.***

* The normality of the P in terms of the reaction
* Here: hair treatment
* Had a bad reaction; had never previously used such substances
* Breach of 18(a)?
* There have been 2 different approaches (summarized at 258)
  + Majority versus minority view
    - Majority: if the article sold can be used by a normal person without bad things – no breach
    - Min: if there is a group of people that have this reaction, this condition can be breached
* If there is a group of people who are innocently allergic then there can be liability for the seller under 18(a)
* P trying to establish breach of condition
  + Test (page 259):
    - (a) product has to contain a harmful ingredient
    - (b) the ingredient has to be harmful to a reasonably foreseeable and appreciable class or number of potential users of the product
    - (c) the plaintiff has been innocently injured in the use of the product in the manner and for the purpose intended
* Has to be part of an appreciable class
* Innocently injured
  + Used it properly
  + If she knew she was susceptible to such a reaction

***Griffiths v. Peter Conway Ltd.***

* Doesn’t look so much at the person but at the **product**
* Reaction to a tweed coat
* Is the product normal? Is there something in the product which is inherently dangerous?
* Here: no normal skin would have had this reaction
* **Normal product? Seller will not be liable under 18(a)**
* Required use? Must tell the seller the purpose for which the buyer intends to use (even if the buyer doesn’t know) – imposes a burden on the buyer
  + Have to inform the seller of your idiosyncratic issue (part of the purpose)
* **where a person has an allergy or other idiosyncrancy to an ordinary product that is not normally dangerous they can only rely on the fitness for purpose warranty if they have made that idiosyncracy known to the seller.**

***Ingham v. Emes***

* Bad reaction to hair treatment – not like the tweed case above as these are inherently dangerous products whereas a jacket is not
* Had used this product before and had a bad reaction (idiot)
* However she had forgotten and a skin test was provided (she did it) and she didn’t react
* Know or ought to have known – had obligation to tell seller (wouldn’t have satisfied the test above?)

\*\*so which is the right approach – looking at the buyer or product?? Depends on dangerousness of product??

**Section 19**

* **Section 19** (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.
* Least frequently used
* Sale by sample
* 19(1): if there is a term to this effect
* Q: what constitutes a sale by sample?? See case below…

***Cudahy Packing Co. v. Narzisefeld***

* If I show you products like you are going to get and you examine them, is it a sale by sample if it includes what I showed you?
  + **Only a sale by sample if you don’t get the sample you were shown to induce you (and you know this) – it must have the understanding of both parties that the sample constitutes the standard with which the goods not exhibited with correspond**
* Here🡪EGGS
* Provided cases to examine
* Merchantable quality?
* Goods here were not sold by sample (no section 19)
  + Eggs shown were part of the total and buyer knew it (part of the bulk was shown – not a sample)
* So 18(b)?
  + Limited by the examination provision (reasonable)
  + No breach of 18(b), no reasonable examination
* 19(2)(a):bulk will correspond with the sample (if sale by sample)

**DO THIS:**

1. Need to have an express term in the K
2. Make it clear what you see isn’t what you will receive

**If a sale by sample:**

* 3 implied conditions (s. 19(2))
  + 19(2)(a): bulk will correspond with sample in quality
  + 19(2)(b): buyer will have a reasonable opportunity to compare the bulk to the sample
    - What does this mean? Time?
  + 19(2)(c): implied condition that the goods be free from any defect rendering them unmerchantable on reasonable examination of the sample

Brucey gets a bit off track:

* In regards to 19(2)(b)
  + Section 38: reasonable opportunity to examine before having said accepted them
  + Section 39: deemed acceptance
  + These are inconsistent in many scenarios
  + **39 always prevails**
  + So under 19(2)(b):
    - Interpreted as having a temporal aspect (time)
    - Way around problems in 38/39
  + Examining goods:
    - 38 – reasonable opportunity to inspect
    - 39 – acceptance (3 methods) \*\*prevails over 38 – can we get around this? YES – with specific provisions in 19(2)(b)
    - 15(4) – no termination if accepted
  + Obligation to keep the sample
    - Seller
    - For the purposes of the comparison

***Steels & Busks v. Bleecker Bik & Co. Ltd.***

* Not sure if problem comes under (a) or (c) [decided on (a)]
* K for rubber to be used for making suspenders and corsets
* Sample shown: white rubber
* Bulk turned yellow
  + Caused by a chemical turned it to the colour of peeeee!
  + Sample didn’t have the chemical
* Courts avoid paragraph (c)
* Has to be correspondence, but it doesn’t need to be exact
  + General correspondence between sample and bulk
  + May mean there are chemical differences between the 2
* Visually the products corresponded \*\*no breach in this case

**19(2)(c)**

* Required to examine the sample, but required to examine it for patent not latent defects
* If your examination of the goods – should be free from patent defects not present in the sample but also any latent (in Brucey’s opinion)
* In Brucey’s opinion:
  + If sample has a defect (if a reasonable examination would have revealed A – no claim)
    - Latent
    - Patent A
  + Then bulk (if a different defect or latent defect – can claim)
    - Latent
    - Patent B

What constitutes a reasonable examination? Depends on what the parties want

***Godfrey v. Perry et al.*** – reasonable exam

* Sale of a toy (sling shot); broke and shot him in the eye
* Seller bringing claim against the distributor
  + 19(2)(c)
* Whether the buyer is deprived because the sample would have revealed the defect (on exam)?
  + Reasonable exam? YES
    - Not necessarily a very detailed examination (can’t be expected to subject it to any number of tests)
    - Understood by common sense standards of everyday life

**Comparison of 16, 17, 18, 19**

* Section 16: reasonably difficult to K out of (a)
  + Kind of stands on its own
* Have a problem under 16? One option
  + But 17, 18, 19 can be all used (can dress up an issue under more than one of these)
    - In the alternative

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | 17 | 18(2) | 18(b) | 18(c) | 19 |
| Apply to all sales? | Sales by description (not much of a limit) | n/a | Description (not much of a limit) | n/a | sample |
| Seller (types of)? | n/a | Ordinary course of business of seller | OCB of seller | n/a | n/a |
| Burdens on the buyer? | n/a | Purpose and reliance | Reasonable examination (if undertaken) | n/a | 2(c) – examine goods |
| Temporal limits? | Passing of property or delivery | Duration (depends on purpose) | duration | Duration for a period afterwards | 2(b) time to compare duration |

16, 17 – 19: in personam rights

3 obligations: (1) transfer of title; (2) quality; (3) delivery

**DELIVERY OBLIGATIONS**

* Possession is a quality, not a property interest
* 2 meanings of possession:
  + Legal
  + Colloquial
* Section 31: the duty of the seller to deliver the goods and the buyer to accept/pay for
  + What do you have to do to have delivered the goods?
  + Delivery – defined in section 1
    - Transfer of possession (voluntary)
      * What is “possession”? custody?
* In K: set out the delivery obligations and when this will be fulfilled
* 4 aspects to delivery:
  + Where
  + When
  + How
  + How much – delivered over a period of time or all at once?
  + (also remember obligation to deliver quality goods)
* Then must decide:
  + Conditions or warranties? Damages or reject?
    - Particularly complicated with: how much
      * 15(4): cannot terminate if part are accepted

**Delivery Issues**

* Where, when, how and how much issues
* Section 32 – payment and delivery are concurrent conditions
  + One is not a condition precedent to the other
  + Generally, one of the parties will go first (pay, then deliver or vice versa) – but here they are concurrent
  + If you leave it this way – they will happen at the same time (one party cannot use the others parties failure to say deliver as an excuse to not follow through on their obligation – ie if you don’t pay, I don’t deliver)
  + Another consequence of this: generally speaking the delivery obligations are conditions as opposed to warranties. Payment obligations are not generally conditions as opposed to warranties (parts of payment are [that you have to pay] but not when and how). So here even if not paid, must deliver (breach of condition if you don’t).
* Section 32: time of delivery, is it a condition, and when is it supposed to occur
  + **Section 32:**  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 of the goods
* Section 14: time issues (not directly delivery but interpreted to say that time of delivery is a condition)
  + 14(1) & (2) if the parties have stipulated a time in the K for delivery, then it is for the essence. Not stated? Timing wasn’t so important
* How do you know when goods should be delivered if not stipulated? Courts usually then tie it in with some other event – section 32 (with payment)
  + **Often supposed all these things happen at the passing of property (default)**
  + May be worked out with the form of contract as well (type of K)
  + Delivery – breach of K and other party can terminate

***Bowes v. Shand***

* Specific issue: whether there can be a breach of this condition when the delivery is early?
* YES – this can cause just as much hardship as late delivery
* Shipment of rice from India; K said delivery would occur in 2 months (loaded on ship). Most was loaded in February (as opposed to March and April); documentation of the loading was in the K period – question is whether this series of events was a breach?
* Issue of the bill of lading was not delivery, shipping was!

**So timing is a CONDITION**

**Can you change the delivery obligations in a K?**

* YES – provided that the right person changes the delivery obligations
* Obligation to the benefit of both parties? Both parties must be involved in the change
* To your own benefit? Modify to the extent it is to your own benefit (affects only your benefit)? Through waiver or estoppel or contract itself
  + Next case (***Charles Rickards Ltd. v. Oppenheim***) discusses this.
  + Purchase of a car, work done on a car. K to do that work. K said would be finished at a particular time. There were a series of problems and the work was continually late being done. Series of indulgences by the buyer, a new date imposed. Eventually the buyer had enough and wanted to terminate if the work wasn’t done at a particular time – can this be terminated? Depends on what you mean by waiver – **an alteration under K, a suspension of an obligation under estoppel or the unilateral change under a K (pure waiver or abandonment).**
    - No more consideration issues – this isn’t a difficulty any more
    - Here, estoppel – by his conduct he made a promise not to insist on his strict legal rights (cannot go back on it) – can then give reasonable notice to resume prior position
    - Look at the new agreement – this is what the party has agreed upon
    - Reasonable notice – resume your old K position (entitled to give notice indicating that once again, time if of the essence) – then entitled to cancel the contract
      * This is what the party did here (must be reasonable)

**Facts:** Buyer of Rolls Royce waived time requirements for work to be done on car. After some delay told subcontractors if wasn’t paid in 4 weeks would cancel the K. The goods weren’t delivered within that timeframe, so he cancelled. HELD – valid.

* If someone has waived a delivery time they may not be stopped from *saying* time is of the essence.
* Reasonableness of the length of the notice is to be judged at the time at which it is given.
* Three types of waiver: 1) PERMANENT WAIVER – not req’d to make a decision, but you surrender a right that you have permanently, as such they are quite rare; 2) WAIVER BY ESTOPPEL – this is also voluntary, but different consequences than permanent. Person to whom promise was made had to have relied upon it. It is terminable w/ sufficient notice, and effect of promissory estoppel can be negated; 3) WAIVER BY ELECTION – req’d to make a choice to go one way or another (ie anticipatory breach)
* This case is second type of waiver

McD disagrees with Denning – this isn’t a waiver, it is simply a way of describing what is at the end of the process and what is there that used to be there. Must describe not only which obligation is being waived, but HOW this will happen. Three ways to do this: 1) ELECTION – easiest to achieve, req’s both parties to be involved (consideration). Party receiving waiver doesn’t need to do anything, communication is enough fix result (termination or affirmation of K). This only arises when one party has necessary choice b/w two inconsistent alternatives. 2) PROMISSORY ESTOPPEL – Operates in equity, so effect only lasts as long as necessary or fair, thus presumptively only temporary or suspensory in effect. 3) ABANDONMENT OF RIGHTS – similar to election, but where you just eliminate a choice (this is indicated in s. 15(1)(a))

**Section 33: where and how**

* **Section 33**  (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, express or implied, 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 subsection (2) that place 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 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) For the purposes of subsection (7), 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
* Place of business not residence
* Seller does not have to transport it to you – just have the good ready for the buyer to come and get
* Custody as opposed to possession? The statute is not clear
* 33(1) seems to relate delivery obligations to custody
* Will probably want to indicate in the contract how exactly this is going to occur and not default to 33

**How much issue (quantitative issues of delivery)**

* Section 34 and 35
* Section 34: deals with basic quantity (absolute amounts – buyer gets too much or too little) and if some are right and some are wrong
* Section 35: where you have goods being delivered at a different time
* Section 15(4): generates the problems addressed in 34/35
  + Provision that deals with the buyers right to terminate the K for breach of a condition
  + If a K of sale is not severable, and the buyer has accepted the goods or part of them, then the breach of any condition is treated as though it were a breach of warranty and they cannot reject the goods
* 34 & 35 provide alternative answers to 15(4) in certain cases as they are more specific provisions
  + When and how do they do this however
* 15(4) contains a way out of itself anyways – if a K of sale is not severable
  + So they first thing you do is sever the K: say what has been accepted is part of a different K

#### Delivery of wrong quantity

**34**  (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.

#### Installment deliveries

**35**  (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 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

*In Re Moore and Landauer* – Delivery of the proper quantity (section 34)

* Whatever is put into the description must be given (doesn’t matter is commercial value is the same!!) – a man who bought 30 in a case may have resold them as such and would be placed in considerable difficulty if the goods tendered to him do not comply with the description under which he bought and has resold
* Entitled to reject all of the goods (even if some match the description) – this is the option under section 34
* Cans of fruit – 30 tins per case (was in the K) – overall quantity was fine but delivered in a combination of 24 and 30 per case (packaged wrong)
* Court held: can reject! This is a breach
* Parties only include numbers in a K because it is important (making this a condition)
* Note: description problems often mixed with quantity problems

**Section 35(2)**

* Must decide outside of 35 whether you have severable contracts – if you do, no section 35
* Here, have **only 1 contract with deliveries by instalments**
* Gives you 2 options with defective delivery, but before you can use (a) and (b) – instalments must be stated and each instalment is to be separately paid for. If you don’t have both these conditions, you are not in section 35(2).
* Repudiation of the whole contract OR a severable breach
* Doesn’t tell us what a repudiation of the whole contract is (doesn’t provide remedies)…but probably means the K can be terminated from this point on (reject from this stage forward)
* Severable breach giving rise to compensation but not repudiation
  + Almost like breach of a warranty…can claim damages but have to keep defective deliveries and be ready to collect other deliveries.

***Maple Flock v. Universal Furniture Products***

* A or b??
* Test here is quasi-statutory
* Here, there was a K for the supply of flock. Various deliveries made – no problem with the first deliveries but the 16th delivery they did a test of the flock that was delivered and there was a chemical present that made the flock unusable
* What is the remedy here? A or B?
* Court says (pg 300):
  + Test!!
    - First the ratio quantitatively of this to the whole
    - The probability the breach will be repeated
* Here, neither part of this test is satisfied

**OBLIGATIONS OF SUPPLIERS AND MANUFACTURERS**

**Who is the buyer and who is the seller?**

* Excursion back to privity

**Obligations of Buyers and Manufacturers**

* Privity: parties to the K are the only ones liable under the K and able to enforce terms of K
  + Exceptions to this?
  + Vertical and horizontal privity

***Lyons v. Consumers Glass Co. Ltd et al*** - horizontal

* Glass baby bottle purchased
* Bottle shattered and put the babies eye out
* No K with the baby (no claim in K as no K with the baby)
* No 3rd party claim
* Mother could bring claim 🡪 but only for her own damages (she wasn’t injured)
* Courts in the US are more open to family claims under one K

**Privity**

* Privity issue can be to the advantage of consumers
* If you were to eliminate privity, always a question about how much we could abolish without causing hardship
  + Often dealt with through legislation

***Chabot v. Ford Motor Co. of Canada et al***. (vertical)

* Why the preservation of privity may be good
* Cars behaving badly
  + P bought the car from S (dealer); P used the car as normal with no signs of difficulty; then broke down and burned up completely; the K appeared to exclude all warranties except those from the manufacturer
* Seller and manufacturer being sued
* Warranties given 🡪 how does this affect liability?
* Sales K between buyer and seller
* Warranty between buyer and manufacturer (guarantee K) – also with the dealer (2 warranties)
* Warranty K (between S&B) seemed to exclude all the implied terms and import just the manufacturers warranty
  + Relieved seller /retailer of any liability
  + Seemed to also exclude tort liability
* Court said: can exclude terms but the warranty K wasn’t worded clearly enough to get rid of liability under *Sale of Goods* (ie didn’t exclude CONDITIONS)
* What is the effect of the manufacturer’s warranty provisions on the seller’s contractual liability to the buyer?
* Here, privity protected the consumer
  + K with the manufacturer has no impact on K with the seller (cannot delete terms in one based on the other)
  + Has to be obvious you’re excluding liability
    - Here, wasn’t told of the exclusion of tort liability

How can we change the privity issue? Statute (not responsible for this)

**Models for Reform: US Developments**

***Henningsen v. Bloomfield Motors*** (horizontal/policy)

* Person injured in car (wife of purchaser)
* Could she bring an action? YES
* Abolished horizontal privity
* Social justice demands you be able to sue a manufacturer, even if you have no K at all, **as long as a member of a class of people expected to take part**
* Wife was a family member
* This is typical in the US cases because of open ended ability to argue social justice

***Morrow v. New Moon Homes Inc.*** (vertical)

* Illustrates why it often helps to abolish VP
* Defective mobile home purchased
* Wanted to sue manufacturer in Oregon
* Problem: the person they bought it from wasn’t worth suing
* Accepted here that we abolished vertical privity – consumer is said to be in K with and can sue the manufacturer
* Not merchantable here
* Manufacturer can be held liable for direct economic loss attributable to a breach of his implied warranties, without regard to privity (implied warranties flow from M to C, even though with privity they should only be between M&S)

**Models for Reform: Quebec Law**

***General Motors v. Kravitz*** (civil law)

* Whether the consumer can sue the manufacturer
* Confirms in civil law that it is easy to bring this claims against a manufacturer
* Acknowledges the only Ks are between the manufacturer and seller and between the seller and consumer
* But lets the consumer have the benefit of the K between the M & S without being a party to it
* Same property rights are passed on (in both)
* But new personal obligations are created between seller and consumer (not the same as M&S)
* In Quebec – say when K entered btw seller and consumer the real rights and personal obligations are passed on
  + Has 2 sets of personal obligations (their own and those between M&S)
  + To what extent can this be CL? No reason why not!
* Common law changes? Not really exceptions to privity at all (according to Brucey)

**Models for Reform: Canadian Common Law**

***Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd***.

* SCC allowed a particular exception for horizontal privity
* C is a tortfeasor who damaged a barge
* B is owner (insured)
* A is insurance company
* C – not a party to the K but caused damage
* Insurance company brings a tort claim against C (C argues no standing)
* Usually subrogation clause (taking over someone’s claim) – gives an insurer the right to bring claims against a third party responsible for a loss to an insured for which a claim has been paid (ie claim against the third party on behalf of the wronged party)
  + But here, no subrogation clause (no allowed to sue third party on behalf of insured – privity)
* C could raise clause in K (not to take over B’s tort claims)
* A said you’re not a party to this K, C, so too bad – cannot use this as a defence
  + Also K was changed to include subrogation so it does apply to you
* Issues: can C rely on a defence in a K which it is not a party too? YES. What if parties change K?
  + **Where there is a term which clearly benefits you, you can use it as a defence**
* Exception: only to allow access for defences if the term in the K is designed to protect someone like you (this is pretty much just like promissory estoppel)
* Kit says: 3rd party can rely on the contractual elimination of subrogation rights to prevent being sued even though not privy to the K containing the elimination
* Can C, who is outside the k, rely on a defense in a k to which it is not a party, and 2nd, if it could, in theory use sucha defense, what if those other parties CHANGED their contract so that defense was no longer there?
* C CAN do this…where there is a term in someone else’s k that is clearly designed to benefit you, then you are able to take advantage of this even though not a party to the k
* In order to take advantage of term that is no longer there…
* Term “crystallizes” at the point when you need it…at the TIME the tort occurred, the clause existed….although parties can change as between themselves later, you have access because it was there when you needed it
* So, minor exception to horizontal privity, and only to get access to defenses…NOT to bring a claim (shield, not sword), and only if k designed to protect you
* Brucey says, in operation, this is really just estoppel…representation to third party that they’d have a defense…

**BUYERS REMEDIES**

**Buyer’s Obligation to Pay**

* One of 2 obligations on buyers
* Section 31: to accept the goods and to pay for them
* 38/39: acceptance? Later
* What is obligation to pay? Quantum, time, methods
  + Question of construing the K
* Money consideration
* Up to you to determine quantum (unless using section 12)
* What are these obligations?
  + 14(1): time of payment is not a condition (does not allow seller to terminate)
* But failure to pay at all – breach of condition
* Grey area as to where these 2 intersect (no help in statute)
* Casual approach to time of payment?
  + There to protect buyers
  + Gives rise to a claim to be paid – doesn’t really change very much (remedy is to be paid)
* Complicated: method/form of payment
* Various mechanisms
  + Letters of credit
    - Negotiable instrument/quasi – negotiable
    - Solves problems of both the buyer and the seller, being non-payment and having to pay if the contractual obligations are not fulfilled
  + Cash/coins

***Kay Corporation v. DeKeyser et al.***

* Time of payment!!
* A valid contract can be completed under the SGA even if the time for payment hasn’t been agreed on (not relevant to the formation of the K)
* In order for the concurrent condition/presumption not to apply, the parties must have agreed otherwise (be in the K, not just by their conduct)
* Here, required payment against the documents (ie on delivery)

**International Sales (not exactly what you think)**

* International versus domestic sales?
  + The who, the how, and the rules differ
  + WHO
    - Normally large commercial parties, usually speculators, things shipped in large bulk
    - Often parties not interested in the underlying subject matter of the transaction at all
    - What this means is, that a number of rules governing such sales, reflect what these transactions actually are, a form of gambling
  + HOW
    - Such sales are normally documentary
    - This means that the performance is conducted through the exchange of papers (shipping documents, financial documents, contracts)
    - Contract as a commodity? Certain K’s are highly standardized and are bought and sold themselves
    - What documents and when depend on the rules chosen
  + RULES
    - English law – the law of choice
    - Trade association standard form contracts
    - Incoterms (published by the International Chamber of Contracts)
      * Terms on when K will be ratified, when risk will pass, etc.
    - Uniform customs and practice for documentary credits
      * Guidelines about documentary credits will work (letter of credit)
      * People just don’t trust each other in the international context
    - The United Nations Convention on the International Sale of Goods [CISG] (can apply where the nationals involved belong to the contracting states who have ratified)
      * Uniform law project
      * Does not apply if you have a British national company (UK never ratified)
      * Can opt out of this – so this really doesn’t apply
      * If you want the actual goods, you can opt into it

The English Law

* Still largely common law, with some limited statutory intrusion. UK *Sales of Good Act* for instance. Reluctance to statutorily intrude on this area
* English law of contract

Trade Association Standard Form K (see slide)

* Publish standard form contracts for dealing in certain commodities
* Virtually a form of private legislation
* Futures contracts – contract for goods that don’t necessarily exist
* Where such contracts are “futures contracts” they are in themselves a commodity

Incoterms (not responsible for term at 288)

* Essentially a form of short hand to describe who is responsible for what, when
* They act as an aid to interpretation of certain agreements by clarifying what was intended by the parties
* Examples include the FOB (free on board) or CIF (cost insurance freight)
* Under FOB for instance, the sellers obligation is to deliver the goods to the designated port, for loading on the designated ship. Delivery occurs then, and risk passes at ship rail. Payment is against documents
* Under CIF, delivery occurs with the tendering of the documents (ie a bill of lading). Has said to be a sale of documents. Risk passes, once goods have been appropriated to the particular contract
  + This can be hard to prove – which contract? But if boat sinks after documents passed – buyers problem.

UCP

* Set of guidelines that parties may, and often do, incorporate into their contracts to govern the use of letters of credit.
* They have acquired a great deal of weight in international commercial circles

CISG

* Parties can opt out of it. The standard contracts of most of the major trading associations referred to above exclude it
* What is it? It’s an attempt to provide a uniform set of rules for the sale of goods
* These rules were made for the sales of goods parties actually intend to use
* Not as readily applicable to commodity sales

How a FOB sale works

* See slide

How a CIF sale works

* See slide
* Policy: don’t want to be able to transfer a loss unilaterally to someone else

Peculiarities of how these types of contracts work:

* Time, is always of the essence (breach of this always allows cancellation)
* Strict compliance is mandatory, deviation entitles cancellation
* In a sale of goods, the court cares little for the underlying subject matter
* Ie if one appropriates goods under a CIF contract, but the goods are lost before arrival, the buyer must still pay

The documents

* Three common types of documents
  + Bill of lading
  + Certificates of marine insurance
  + Letters of credit

Bill of Lading

* Loading
* Receipt really
* Functions also as a K, effectively incorporating terms of carriage (route, liability, etc)
* Entitles bearer to collect cargo at port of discharge
* Negotiable – can be endorsed in favour of a third party
* A negotiable instrument is valuable in its own right
* They are thus subject to some stringent requirements
* A contract that calls for a bill in a particular form, or pertaining to a particular thing, must comply strictly with the terms of that contract, if it does so though, it must be accepted…except in known cases of fraud

Certificates of Marine Insurance

* The party selling the goods may be obliged to provide one (to insure the goods in transit)
* May be transferred to a third party

Letters of Credit

* Payment mechanism
* The letter of credit creates a separate and independent contract as between the seller and the issuing bank, or more frequently the seller and the advising/confirming bank
* Intended to provide comfort to the seller that they will definitely be paid after they have shipped the goods
* Using the banks good name to guarantee the payment
* Basically how they work:
  + Seller – documents called for in the letter - > bank
  + Bank - monies - > seller
  + See slides for more complete picture
  + Will not ship goods until the credit is in place
* The parties to the various contracts arising under a letter of credit, or documentary credit, deal in documents, NOT goods
* The conformity of the documents is therefore the be all and end all in terms of compliance with said documents, except in KNOWN cases of fraud. Defects in the goods aren’t relevant
* The parties cannot frustrate the ability of either side to rely on the documentary credit.

Buyers obligation (pay for and accept the goods – lose the right to reject on acceptance) / Sellers obligations (quality, description, title, delivery)

* Many obligations are being transferred into paper obligations (except quality/description/title)
* Accepting and paying with paper
* If the paper is fine, you cannot complain about the underlying goods
* Can still complain about the quality/descript/title (still have the underlying sales contract which sets out the obligations)

***Michael Doyle v. Bank of Montreal***

Facts

* P exports foods, suing BMO because BMO accepted a promissory note it ought not to have.
* P sold fish to B in Holland, secured by letter of credit under which BMO was to be intermediary
  + documents need to correspond to K in order to be acceptable.
* first 2 shipments were fine, last was rotten, and the B wanted to reject. so Bank (in Holland) looked at the documents to see if there was any technical variance
  + there was a defect found in the certificates of quality
  + so third transaction was rejected, and BMO was not to issue credit to P
* Then P gets documents fixed, 4th shipment accepted, but the BBanks says the deadline for the 3rd shipment had expired.
* So BMO had the ownership of the rejected herring, and a credit note from the Dutch bank that would not be reimbursed
* There is a document called an advice which the P got from BMO. This lets the P know the BMO has received an irrevocable letter of credit, it listed the terms that must be met, and purported to deny any responsibility on the part of BMO
  + basically it meant that the BMO would pay P by way of a bank draft in exchange of the documents, and that BMO would then be reimbursed by the SBANK.
* the missing document was supposedly a "health certificate"
  + facially the document provided did not look like a health caertificate, but in fact it could only have been issued if the fish were wholesome.
    - so it did meet the terms of K
  + but for transfers of documentary credit, the banker may reject it if the documents don't appear exactly right.

Analysis

* a banker may reject a document which does not on its face answer completely and strictly to the requirements of the credit, even though it is in fact the document called for in the contract.
  + So BMO could have rejected the documents since they didn't appear correct (although they were).
  + but having accepted them, can it now use this problem as a defence?
* there was a draft tender with the document, which was to be paid 60 days after the bill of lading date.
  + this is an unconditional promise of the bank to pay
  + once such a document is accepted by the bank, it can't change its mind
  + once it accepted the documents, it must pay the P
* So, BMO has a bankers lien on the goods now. The SBANK believed the documents were not good enough
* the thing is that the bankers are not responsible for looking behind the documents- the documents ARE the transfer
* Basically, the intermediary bank can recover in four situations
  + where the seller has falsified the documents or has been grossly negligent
  + the documents were genuine but not what the credit called for, but was not obvious.
    - the defect must be latent in order for this section to apply.
  + where the issuing bank and the intermediary bank disagree as to whether or not the documents are correct
    - basically this applies where the contract is ambigious, and the seller is trying to take advantage of an ambiguity in some way.
* none of these apply.

Ratio

* Shows the operation of the letter of credit, and what can go wrong.
* An intermediary bank can recover from the seller where the seller has acted fradulently in creating the documents, has presented documents that were genuine and appeared correct, but where not what the contract called for, or where the seller is taking advantage of an ambiguity in the different meanings of the goods as described in the contract.
* Macdougall thought this was to show that banks are only interested in the validity of the documents, not the actual goods
  + **if the documents are not absolutely correct, they needn't be accepted.**

***United City Merchants***

* If docs in right FORM, but you know they are INACCURATE, is this a reason to reject the docs?
* Here, inacc Bill of Lading
* Had to stipulate particular day goods loaded on board…
* Ships were NOT loaded on ship that day, but docs wrongly indicated that they were
* MISTAKE does not entitle you to reject….only if there is FRAUD
* The party presenting the doc did not know of the error/was not done at the request of that party…therefore no rejection
* Court here was invited to consider whether certain mistakes WOULD allow rejection…court didn’t suggest that this would ever be the case…only where inaccuracy in FORM
* Docs are in order but fraudulent – as long as the party who presented them didn’t know, they must be accepted

**Remedies!**

* TRUE Remedies: [primary obligation broken…move to secondary obligation….DAMAGES]
  + Right to have goods, for instance, replaced by right to have payment
* POWER (to do something): doesn’t operate as a secondary obligation
  + No replacement of obligation;
  + Power to END a relationship (termination)
* JUDICIAL RELIEF
  + Law itself provides something to the parties…
  + RESCISSION
  + Not in control of either party
  + Arises from problem in the formation of the k itself
  + Although, sometimes remedy for breach, when parties agree

**Remedies in the *SGA*:**

* Basically codification of CL
* Seller + Buyer:
  + Creation of contract itself leads to personal obligations
  + Also creates REAL rights, that get transferred (ownership of rights transferred)
  + Remedies that you get can therefore be:
    - * 1) Real
      * 2) Personal
    - Breach of real right, does not mean real remedy, and breach of personal right does not necessarily = remedy that is personal in nature
    - Breach of real right often = damages remedy (personal), but can also lead to right to repossess
    - Secured transactions: personal obligation to pay creditor can lead to a real remedy by repossessing property
    - Remedies for Breach of PERSONAL OBLIGATIONS:
      * Lien
      * Equitable Remedies (specific performance, injunction)
      * Damages Termination
      * Debt
* Right to Reject Goods:
  + Arises because buyer has power to terminate
  + **Only arises as a result of breach of CONDITION**
  + Statute sometimes takes this away, however, **(15(4))**
  + Cases we look at: look at when we LOSE this right
  + The right to reject is quite easily lost, leaving a buyer only with a right to claim damages
  + Different factors are involved in the loss of this right to reject for specific versus ascertained goods
  + With specific goods, because of the wording of 15(4), the right to reject the goods is lost as soon as the property passes. Because in some contracts property in specific goods passes immediately when the contract is entered into (23(2)), the buyer never has the right to reject the goods – however some courts have been good at circumventing this situation

**Loss of Right to Reject**

***Wojakowski v. Pembina Dodge Chrysler***

* K for sale of goods in a deliverable state
* Breach of an implied condition (fit for purpose) as the car was a rusted POS
* Here, K for specific goods!!
* 15(4) = NEVER have a right to reject the goods if property has passed (which it is deemed to on K)
* NO possibility to reject goods in these circumstances
* Notwithstanding this rule, if there are problem with goods, the courts will work hard to find a loophole to allow buyer to reject goods
* Here – found that the P never unconditionally accepted the second automobile and as such, didn’t lose the right to reject
* Until the goods are accepted by the purchaser only a conditional property passes, which doesn’t satisfy 15(4)

**Section 39**

* **Section 39**  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.
  + If goods have been accepted, cannot reject (**39**) whether specific or ascertained
    - (a) buyer tells seller that goods are accepted
    - (b) if buyer does any act which is inconsistent with the seller being the owner
    - (c) after lapse of reasonable time
  + In section 39…election to accept – irrevocable
    - (a) No particular form required…anything will do!
    - (b): what ACTIONS constitute an implied election?
      * Delivery required for this provision…and THEN buyer does act inconsistent…
      * Difficult interpretation!
      * Problem: ties passage of ownership to ability to reject goods…no reason why this goes hand in hand (except with respect to specific goods)…leads us to believe that with unascertained goods, you can lose the right to reject based on this fuzzy provision
      * Unclear what “an act inconsistent..” means:
        + Because of the ambiguity in the wording….gives court huge scope for flexibility in how they interpret this…quite a bit of litigation
      * This in conjunction with s.38: (extent to which section 39 is qualified by 38 is an issue)
        + Explicitly says that you CANNOT be deemed to have accepted the goods until you’ve had a chance to examine
        + How does this modify 39(b)…can you do an act inconsistent, without having examined? What happens then?

Easy Answer: 39 prevails over 38…you will NOT be able to reject if one of the paragraphs in 39 is satisfied

Courts conveniently ignore the word “ownership” in 39 and replace it with an idea of POSSESSION…so, if buyer does an act inconsistent with seller OWNING (ie. HAVING RIGHT TO POSSESS)…no rejection

***Hardy & Co. v. Hillerns and Fowler***

Wheat arrives – had subcontracted to sell most of the wheat (this wheat was forwarded to these subcontractors on arrival, before reasonable samples taken – reasonable exam under s.38)

Sample taken….indicated that wheat NOT in conformity with what was expected

Buyer wants to reject wheat – is this possible??

Here, section 38 is trumped by 39: doesn’t matter if the reasonable time for examination hasn’t expired – any act done to satisfy section 39 will render this immaterial

Material date: date of rejection (when ownership revests in the sellers)

Arguably, buyer has not become OWNER of wheat yet

Arguable property has not passed

Nonetheless, court said goods could not be rejected

Further, nothing done to DELAY examination of goods, but buyer….buyer immediately checked to see if in conformity

Court said because goods not IMMEDIATELY available for the seller to come repossess when buyer rejected them, this was an act inconsistent with “seller owning”…nonsense…only inconsistent with Seller being capable of having possession (it was with the potential of revested ownership that the resale was inconsistent with (couldn’t possess right away due to resale) or that on transfer the goods weren’t property of the seller (Atkins))

Weird interpretation? But this is how the provision is read

* + - 39(c): reasonable time
      * As we know….law prefers status quo…assumes parties prefer status quo
      * The INACTION in this period of time communicates the implicit statement that you are happy with the way things are
      * WHAT constitutes a reasonable time? Fact-specific…make an argument
      * ***Rafuse Motors Ltd. v. Mardo Construction Ltd.*** 
        + Probably overly generous
        + Most contexts: Days ONLY, not WEEKS
        + Here, in considering whether the time is or is not reasonable, any inducement by the seller to extend the period of trial of the goods is relevant – here there were numerous inducements made (promises of repair etc)
        + Here, tractor meant to be usable in various seasons
        + Various failings evident mostly in winter, but in other seasons as well
        + Here, court gave 5 months
  + Reminder: 15(4) says if you’ve accepted PART, cannot reject
  + Peculiar rule in 34(5) dealing with mixed goods…
    - Buyer entitled to accept goods in conformity with K, and reject goods that are not
    - Recall: in better position if lesser breach than if greater breach
    - ***William Barker v. Edward Agius*:**
      * When ship arrived there was a delay in unloading due to danger of combustion…upper deck coal removed and given to buyer (and was resold and delivered)
      * Buyer inspected LOWER coal…found breach of quality (sized did not match the contract description)
      * Issue: was the right to reject either the whole or the defective part of the goods delivered lost by reason of resale of part of the goods? [still a right to examine and reject within a reasonable time of arriving, even though it was argued the right to reject was lost when the ship was loaded at its starting point]
      * Loss of ability for buyer to reject ANY of the goods?
      * First consideration – this was an act inconsistent with the ownership of the seller [sold part] and second this contract is not severable [only breach of warranty not condition]
      * But what of MIXED GOODS? Can reject part if they are not in accordance with the K and accept the part that is (and if part of the goods are not in accordance, the buyers are entitled to reject the whole)
      * Court will assume that goods are in compliance with contract…no PROOF that coal above deck was NOT in conformity….accepted that these were MIXED goods
      * Buyer could reject lower deck coal
* **Section 38** (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.

**The Right to Damages and Specific Performance**

* Breach of Contract…Money Substitute
  + Normal remedy for breach at CL
  + Law is filled with damages cases and the principles used to come up with the right amount
  + Parties may have express agreement on damages
  + While there is freedom of K with respect to primary obligations ….court will not accept a secondary obligation that does not conform in value with the value of the primary obligations…must reflect, reasonably, same value
  + Quantum of damages must reflect loss
  + Various aspects of damages:
    - WHEN do you have a claim?
      * Breach of ANY term…must BE a term, but can be condition/warranty/intermediate term
      * Representations do not = terms, does not give rise to damages
    - WHAT do you get? (assessment)
      * CL has many useful principles!
      * Statute does not say from whose perspective these damages are measured
        + From Contracts: generally speaking, assessed from plaintiff’s perspective…what has been lost, rather than what has been gained by defendant…
        + Mitigating Factors (insufficient efforts to mitigate…)
        + Even if you can show mitigation, defendant not liable for ALL losses…must be losses within the framework of the rules of Hadley/Baxendale…cannot be too REMOTE

Buyer’s Remedy – Damages

* Standard common law remedy
* Breach of any term – gives rise to damages
  + Question of how much
* Compensation through money!
* Rules here can be difficult to apply – quantum issues!! Can never advise anyone on exactly how much damages they will get
* For the exam: aren’t given enough numbers to do an actual calculation. Be able to make arguments on damages in a more abstract/general way

***Wertheim v. Chicoutimi Pulp Co.***

* Illustrates the principle of “no more no less” – overarching principle is always **compensation**
* Be put in the place you would have been if the K had been performed
* A late delivery of goods send from Canada to England
* Cost: 38 shillings
* If it would have arrived at time it was supposed to – market price would be 70s
  + Expected profit – 32 shillings (if delivered on time)
* Market price had fallen to 42 shilling and 6 pence by time of delivery
* Buyer claimed difference between 2 amounts (27 s)
* Buyer was able to sell it for 65 shillings
  + While normally in damages you would get the differences in market price (what you could sell them for on the open market) – but if you actually sell them for more than the market price, the difference is your damages
  + If goods never delivered – would get the amount to buy the goods on the open market (the profit you might have fetched is irrelevant, where no question of lost profits arises)
* Court said **actual loss here was actually 5 shillings**! Can’t be put into a better place than you would have been if the K would have been performed (measure of damages in such a case is the difference between the contract price and the value of the goods to the purchaser when obtained)
* Damages reduced to 5s a ton

**C’td…**

* If evidence is available to show that party did not sustain such a loss that they claimed – the normal rules won’t be used
* ***Cullinane v. British “Rema” Mfg. Co.*** - How can you explain why damages are being awarded – nature of the damages
  + 3 reasons why you are getting damages (expectation [capital expenditure, timeliness, profit], reliance [expenditures – capital]). Do not look at the others parties e or r!!
    - Because you thought something was going to occur under the K and because of the breach you are not (damages are a method to put yourself in the position you should have been in) – contract law is forward looking – put you in place you should have been in
    - Reliance interest – you have a K and it was expected to be performed and your reliance on it being performed has caused you to incur certain expenditures (had to hire someone to help you, reject other arrangements etc.). Breach means your reliance was at least partially wasted. Restores you rather than puts you in a future position (tort like).
    - Because of the restitution interest. Here, we have a K that I have broken – as a result I have gained something that I would not have gained if I had not broken the K. I have to disgorge what it is that I have gained by virtue of the breach of K. regardless of whether expectations were hurt in any way or relied on it in any way. Expectations and reliance are irrelevant. Not based on your loss, but my gain – could occur if you suffered no damages at all (based on fairness). This reason is highly unusual in the law of K and in the *SGA*. If I have gained something you would normally have to show that I actually owed you some fiduciary obligation (not just buyer seller). Breach of FO, not K that causes disgorgement. If there is an award on this basis it is not totally clear why this is called damages in the K basis – more like an unjust enrichment claim in a K context (but don’t need the K to claim this).
      * Where this does apply: Under the K, you have delivered something to me and I am unable to give it back to you (even though K is terminated or rescinded) – money substitute for what is unable to be returned is called a restitutionary claim in damages. This is less problematic – because here gain is equal to loss (you actually have lost) – not a true restitutionary claim.
* Can you claim that you expected certain profits you didn’t get and what you spend money on isn’t worth it?
  + Can you claim for losses under both reasons? Expectation and reliance
    - A number of cases say NO – this is overcompensation (getting the gain without incurring any expenses)
    - ***Cullinane*** – cannot get both
    - No more no less!! Not being overcompensated – then it doesn’t matter if some are compensated as both
    - Piece of machinery supposed to perform in a particular way and it wasn’t
    - This meant 2 things: buyer had paid too much for the machine (wasted expenditure [reliance]) and the buyer couldn’t make as much profit using the machine (expectation)
    - Whether the buyer is able to claim both an amount for the limited profits as well as an amount representing a reduction in the value?
      * NO – can get capital costs OR lost profit, but not both
      * Pg 365 – claim for both is not sustainable; the proposition itself is self-evident
* Which you get is generally left up to the P (to claim one or the other)
  + Can certainly opt to claim the higher amount
  + If a party is claiming capital costs – the court usually doesn’t ask about profits (and vice versa)
  + If claiming loss of profits – need to be able to prove you would have made money in the first place?
  + Cannot claim based on reliance basis if other party can get evidence that by breaching, they saved you money or saved you from losing money
    - ***Bowlay Logging Ltd. v. Domtar Ltd.*** 
      * Party doing the work incurred many expenses to prepare, then the other party broke the K by refusing to let them on the land
      * Claim based on expenses incurred
      * Court agreed with D that damages should not be awarded as the D established that the P would have sustained loses that exceeded their expenses and they did them a favour by breaching the K (even if there had been no breach, the P would have lost money)
        + Where it can be seen that the P would have incurred a loss on the K as a whole, the expenses he has incurred flow from entering the K to begin with, not losses flowing from the D’s breach – not right to compensate the P here as this is essentially making the D an insurer of the P’s enterprise
      * This is hard to prove – preventing you from sustaining a lose
      * Could be conceivable in some cases people want to lose or realize they will
* ***Koufos*** and ***Parsons*** case – reason for damages
* ***Wharton*** – whether you can get money damages for something that cannot actually be purchased (mental distress damages)
* Limits of your responsibility
  + What are the limits on paying you to fulfill your expectations?
  + Remoteness test
    - Not strict in K
    - Do not have to pay you damages for all of your losses – some I am not responsible for
  + Obligation to fulfill your primary obligation is strict – do not delivery is breach (cannot claim it was not your fault) – my responsibility to perform my primary obligations
  + So how do we know?? Remoteness test!! Tells us which losses the other party is responsible for
    - Comes from: ***Hadley v. Baxendale***
  + ***Koufos v. C. Czarnikow, Ltd.*** - lays out the test
    - Damages in K: fairly and reasonable considered as arising naturally. That is the loss from the breach of K itself [doesn’t matter who the parties are, what they intended or what they intended to do next – comes from the provision itself] **or** the damages that may reasonably be in the contemplation of both parties at the time it was entered into as what would happen/be incurred when breached [because of the reason for entering the K – the surrounding circumstances (wanted goods for a particular reason) – purpose under the K is unrealizable because of the breach – probable result of breach!!]
      * OR – cumulative OR – in that it means AND (get both)
      * First part: general rule/general damages
      * Second part: special damages
      * Both require knowledge at the time the K is entered into
      * Need to know what your **purpose** is to claim under the second branch
      * Fairly onerous burden on a P to establish the second part of this test – the idea being damages in K flow from the allocation of risk that the parties voluntarily entered into at the time they made the K, since K is voluntary, both parties should be fully apprised of the risks they are taking by entering into the K – if I don’t know your special circumstances, I should not be responsible for these losses
      * Probability of consequence, not reasonably foreseeability
    - Court here, the question was how do we draw the line – how do we know what these special circumstances were and what knowledge was had? Is this just another way of saying “reasonably foreseeable”? NO – a balancing is involved here. The right to damages is much easier to establish in K but the quantum is much easier in tort. Liability in K is strict, in tort normally on fault. Once you establish the right, you get more in tort as the remoteness test in K is harder to establish.
* ***Parsons Ltd. v. Uttley Ingham & Co.*** 
  + Ventilation closed when it should have kept open (breach)
  + Pig nuts went mouldy and when fed to pigs they died
  + Is the seller responsible for the losses incurred? (whether the damage is recoverable from the makers of the hopper, or whether it is too remote?)
  + Denning said he is frustrated with the difference between K and tort
    - Remoteness in contract depends on what the parties reasonably contemplated at the time of K (in the case of breach of K, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of making the K, would contemplate them as being of a very substantial degree of probability)
    - What a man contemplates and what he reasonably foresees! This is a fine distinction, difficult to make
  + Justify a different result because of the quantum
  + Now can choose which to bring it under – loss of profit or physical damages – the test is different depending on which you proceed under??
    - Loss of profit cases: defaulting party is only liable for the consequences if they are such as at the time of the K, he ought to have reasonably contemplated as a serious possibility or danger (H&B)
    - Physical damage cases: the defaulting party is liable for any loss or expense which he ought reasonably to have foreseen at the time of the breach as a possible consequence, even if only a slight possibility (this is tort as applied to contract – seems only fair that the manufacturer would be liable for the same amount in both, and it shouldn’t depend on who is suing them through what method for the defect)

Last Class Continued…

* ***Hedley v. Baxendale*** is THE test for assessing damages (aside from punitive damages that is)
* This has been extended even to mental distress damages (historically not available in contract law but increasingly over time – the courts are more and more willing to award damages to remedy for more tort like claims)
* ***Wharton*** – type of case where mental distress damages are awarded
  + In addition to the costs in remedying the noise, you also get an award for the distress it has caused you
* Can claim such a loss but it must come within the H&B test
  + Contract was designed to get you a particular emotion and the breach gives you the opposite state of mind
* Mitigation principle – need to keep claims within reason
  + Court will consider whether you have mitigated the losses (sometimes described as a duty, but not really a duty – more of a factor that is kept in mind)
  + Not a particularly onerous factor – usually by reference to the market (what a reasonable person would do in the market)
  + Generally: Impecuniosity [being broke] does not preclude your need to mitigate – this has been relaxed in BC (is some give on this) – comes within the H&B principle – don’t need to mitigate in the usual way if it was known you can`t do this
* Statute does have some provisions on damages:
  + Section 52 (part 6): actions for breach of the contract
  + Damages and debt
  + 52 & 53 – will come back to (seller remedies)
  + 54 & 56 – buyer’s remedies
    - Not exhaustive by any means
    - Don’t do anything the CL wouldn’t do in any event
    - Not delivering the goods (54) versus something is delivered but it is not what was required under the K (56)
  + 54: includes situations where something is delivered but the buyer rightly rejects
    - If there is a delivery date and the seller delivers something that is rightly rejected, if it is an early delivery, the buyer must wait until the date passes (seller can try and remedy)
    - Right to damages
    - 54(2): general damages for breach (measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the sellers breach of K)
    - 54(3): formula might be (sets out) 
      * 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.
      * Available market? Measure of damages is the difference
      * Special damages: responsible for consequential losses (most of what the cases are about)
  + 57: confirms that you can get special damages (illusion to H&B second branch)
    - **Section 57**  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.
  + Various principles help: ***Hall Case*** (?)
    - Example of the generosity that should be used in using the second branch of H&B
    - K to deliver wheat at a particular time
    - It was known the buyer would be reselling this wheat in a subcontract
    - Had to be delivered on time so the subK’s could be honoured
    - At the time of the main K, then the subK’s were entered into – was not able to fill some of the subs due to breach of the main (not delivered on time)
    - Buyer could get replacement wheat on the market (general damages), the claim here was for the damages claimed under the sub (seller to be responsible for the amounts the buyer is going to have to pay to the subpurchasers)
    - Argument was: under H&B you had to know as the seller not just that there would be subs but what the subs actually were and how much the losses would be if you failed to fulfill the main.
    - For the second branch, you don’t need to know specifically what the amount was
    - The amount of specific knowledge is not high, the general purpose must be known but the precise details need not be known (even if you know them)
* H&B – will DEFINITELY be on the exam
* Section 56 (remedy for breach of warranty):
  + The way it is worded makes the provision look fairly restrictive
  + Breaches of warranties relating to quality of the goods (56(3))
  + But this section really applies to any breach of a term, regardless of what it is (doesn’t need to be warranty of quality)
  + 56(1): sets out the right to damages
    - (a) &(b) – procedural issues
  + 56(2): H&B – what you get by way of damages (general) – 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
  + Go to 57 for special damages
  + In *SGA* cases when claiming damages, it is actually quite rare to refer to the sections at all **(but we need to on the exam)**
  + What is the test/formula for GD?
    - 56(3): difference between the value that the goods had at the time of delivery and the value that they should have had if there was NO breach
      * 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.
    - Contract price in theory is irrelevant here (in practice it is often used to set up the value the goods should have had)
      * K – price is $10
      * Non-deli (s. 54): market price (15) – contract price = 5 + special
      * War (s. 56): goods delivered (15) – K goods (if no breach) (19) = 4 + special (paid 10, should have gotten something worth 19 dollars)
  + ***Ford Motor Co of Canada Ltd. v. Haley***: what issues are involved in establishing the value of the goods delivered?
    - The P has no incentive in establishing the value of the goods that are delivered
    - In Canada, the goods delivered are assumed to be worth nothing (because of the point above)
    - Practically speaking the burden is on the defendant to establish this value
  + ***Sunnyside Greenhouses v. Golden West Seeds***:
    - Damages for the expectation and reliance interests??
    - Panels in the green house were shitty
    - Under section 56
    - Got goods worth this, and they should have been worth that
    - Also claimed there were associated costs involved (installation and removal) that shouldn’t have been incurred
    - Court says: can’t claim BOTH
    - But the court here says, this is ridiculous – if you have suffered both, this is not overcompensation (breach caused both of these losses and you can get both)
    - Illustrates what a special damages claim is and the idea that the strict segregation is artificial and sometimes you can claim both and not be overcompensated
* **On the exam, we will have a damages issue!!! But we won’t need to calculate the exact damages**
* Second source of personal remedies is equity (injunctions and specific performance)
  + Breach: you can elect to go after the common law remedies, which is the avenue which says you are done with the primary obligations, go for the secondary obligations
  + Can elect to however to pursue the equitable remedies – do not want to go after secondary, want to remain with the primary (want what was promised, performed)
* Equitable in nature = discretionary
* Section 55: confirms the availability of specific performance if there is a breach (but doesn’t give you a right to it)
* Section 55: (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 plaintiff may be made at any time before judgment.
* How do you get these? Discretionary; show you come with clean hands; come in a timely fashion; show that giving the order won’t cause the other party or third party any undue hardship; court does not want to have itself work too hard (difficult to monitor whether being complied with, the court will not make the order – will not order work to be done); equity first looks to see what the common law would do – if satisfied the CL remedies are adequate, you will not get the equitable remedy (in *SGA* cases, you as the plaintiff, you have to prove damages are not an adequate remedy, you need the order of SP) – essentially you cannot go into the market and get what you want (generally arises when there is something unique about the goods – specific versus unascertained goods (get specific performance almost always only for SPECIFIC goods)
* These remedies are **unusual**

***Re Wait***

* K for half of the load of wheat (had been paid for but wasn’t delivered)
* Before the wheat was delivered, the seller went into bankruptcy
* Now wheat wasn’t going to be delivered
* Buyer is an unsecured creditor – not going to get money
* Would be satisfied getting the wheat – would need specific performance
* Court refused – you have to show that damages would not be an adequate remedy and not specific goods here

International Sales/Vienna Convention….not responsible for

* Statute confirms availability of specific performance in s.55, but this doesn’t mean that other equitable remedies are not available
* If damages are adequate, should not be entitled to equitable remedies
* ***Sky Petroleum v. VIP Petroleum***:
  + Contract to supply petroleum over a period time
  + Classic case of unascertained goods
  + Failure to deliver
  + Motion for an injunction
  + Injunction awarded for supplier to finish supplying….this was because the company would go out of business without this contract and on the available evidence at this time the judge could not rule on the case [said because of the unusual nature of the petroleum industry, the buyer just couldn’t go out on the market and buy, so used an injunction]
  + Goes against general principles [court refuses SP of a K to sell and purchase chattels not specific or ascertained]….can you really not compensate with damages?

**“Buyer’s Lien”: Security interest**

* Liens generally:
  + Think of it as “holding something hostage”
* Unclear whether property interest…tend to think of it that way
* Liens can be CONSENSUAL or NON-consensual
  + We will look at **non-consensual**
    - Buyer’s liens and sellers liens are non-consensual
    - Arise automatically
    - Law gives you property interest when obligation not fulfilled….say the buyer doesn’t pay….lien creates right to “hold onto” the property, or perhaps “use” it
    - Useful because it is not personal in nature….exercise against the THING, not the PERSON….very often useless to exercise a personal remedy because the person is incapable of paying
* Liens can also be POSSESSORY or NON-possessory
  + **Buyers lien = non-possessory, seller’s lien = possessory**
* Liens can also be GENERAL or SPECIFIC/PARTICULAR
  + Specific:
    - I repair your car, you don’t pay me
    - I hold your car hostage….
    - The CAR ITSELF gave rise to the cause of concern
    - **SELLER’s lien is SPECIFIC/possessory**
  + General
    - The item you have the lien on has nothing to do with the transaction itself
    - Law can give lien over someone’s house, for example, where house has nothing to do with the transaction
    - **BUYER’s lien is GENERAL/non-possessory**
* S.74 ,75, 76 = BUYER’S LIEN
  + 75(2)(a):
    - Lien is for the amount that you pay, and it covers ALL goods that are in the possession of the seller, that are LIKE the ones you should have got…provided no third party owns the goods (ie. must be owned by seller)
  + 75(2)(b)
    - Also have a lien against any account in a saving institution in which seller usually deposits proceeds of sale
  + Oversecurity! Woohoo
  + (Note: SELLING the things you have a lien over is a SEPARATE remedy…more on this later)
  + 76(1)(a)
    - Lien disappears when seller fulfills contract
  + 76(3)
    - Buyer’s lien does not bind goods that are sold in good faith to a different buyer, whether or not that sale is in the OCB of the seller
* **Section 75**  (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 unascertained 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 subsection (2).
* (2) The lien under subsection (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.
* Section 76: (1) A buyer's lien is discharged when the seller
  + (a) fulfills the contract 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 subsection (1) (a) or under subsection (1) (b) is at the option of the seller, but a discharge of the lien under subsection (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 SELLER’S RIGHTS AND REMEDIES**

* “Unpaid Seller”
* Seller has 2 sets of remedies: (1) one set personal, composed of an action against the buyer for the price or for damages, and (2) the other real, composed of actions the seller can take with respect to the goods
* S.43(1) sets out the THREE (3) possible remedies:
  + (a) lien on the goods (ie the goods that are the subject matter of the contract….goods MUST therefore be ascertained/specific to have this lien) while seller in possession of them (this provides a “legal reason” for not fulfilling your obligation, essentially…right to KEEP, but not the right to resell)
  + (b) in the case of an insolvent buyer, right to stop goods in transit
  + (c) right to resell
* The first 2 [(a)&(b)] are in practice just preliminary steps towards the right of resale
* Two situations (buyer owner or not):
  + 1) Collateral “x” has been sold to a buyer….buyer has become owner, but has not paid
  + 2) Collateral “x” has been sold, but property has not passed, and buyer has not paid
  + If you want to sell the goods to a different buyer, what do you do?
    - In situation #2, this is fine…you still own the goods! Creation of “lien” prevents buyer from saying seller is in breach of K
    - But in situation #1, seller needs both a LIEN and needs the right to re-sell (can’t sell goods you are not the owner of!)
  + **EXAM: do not need to deal with (b) [stopping goods in transit]**
  + S.44:
    - Cases where seller may retain possession of unpaid for goods
    - 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
  + S.45:
    - Unpaid seller who has made part-delivery may exercise the right of lien on the remainder…not the same in other provinces!
    - 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.
  + S.46:
    - Lien ends when buyer pays or when seller loses possession of the goods (note: continuous possession required…KEEP in possession…)
    - (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.

Unpaid Seller’s Lien – seller must actually have the goods (or an important symbol of them) in order to have the lien

***Snagproof Ltd. v. Brody***

* A lien cannot be claimed for a balance owing in respect of an installment already delivered against installments still to be delivered, even though the contract be an entire one, for though entire in a sense it is also apportionable in a sense – upon delivery of the goods, the seller lost the ability to claim a lien

**S.51: DEALS WITH RIGHT to RESELL!**

* 51(1): K not rescinded (this means TERMINATED here….careful!) by an unpaid seller’s exercise of a lien…ie. **all obligations still intact**
* 51(2): when an unpaid seller exercises lien, and then resells the goods, the new buyer acquires good title to the property as against the original buyer (**this benefits the NEW BUYER only…not the seller! Ie. This is not a defense for the seller**)
* **51(3)and(4): situations where right to resell arises:**
  + 51(3): where perishable goods, or where notice of intention to resell is given to original buyer….seller acquires right to resell
  + 51(4): if seller expressly reserves right to resell in the case that the buyer defaults, original K of sale is rescinded, but without prejudice to any claim the seller may have for damages (ie. RESTORES TITLE, but preserves right to claim damages…not usually the case with rescission)
* **Section 51** (1) Subject to this section, a contract of sale is not rescinded (terminated) 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 for any loss occasioned by the buyer's breach of contract.
* (4) If the seller expressly reserves a right of resale in case the buyer should default, and on the buyer defaulting resells the goods, the original contract of sale is rescinded by that act, but without prejudice to any claim the seller may have for damages.

***R. v. Ward & Bignall***

* Man bought 2 cars; put down a deposit of 25 pounds; on the way to get the balance he had second thoughts and came back and said he no longer wanted the vehicles (because of a misrep of one of them); plaintiffs said ownership passed to you so you must pay for them but in the event that you don’t, we will mitigate and sell them but you will owe us the difference; found a buyer for one of the cars but not the other
* Two cars….specific goods…ownership passed to first buyer right away, but seller retained possession
  + Buyer owns the car….but seller retains possession….buyer says he shouldn’t have to pay because seller has possession….but seller says, wtf I don’t own this…
* Gap in statute
* Court says that buyer must still pay UP, but then buyer is entitled to net proceeds of resale (???)

Analysis

* where the seller is unpaid, he has a right to resell where he gives the buyer notice and the buyer doesn't pay in a reasonable time.
  + the D claims that he offered to buy the one car for part of the original K price, and that by refusing to take that offer, P had failed to mitigate
  + No, this was a proposal to rescind the original contract by mutual consent and enter into a new one, and the seller was free to reject this offer.
* what can be claimed here is the difference between the contract price and the market price, not the balance of the purchase price.
  + onus on seller to show market price.
* P says that he should be able to get the full price of the car less any net proceeds from the goods sold.
* where one party breaches the contract such that termination is a possible remedy, the primary obligations continue to be of force until the party elects to terminate.
  + so under a contract of sale, the seller remains liable to transfer the property to the seller, and the liable remains liable to pay.
  + the sale of goods sets out that the contract of sale is not terminate simply by the seller exercising a right of lien or stoppage in transitu.
  + 51(3) says that if the seller gives notice, or if the goods are perishable, the unpaid seller may resell the goods and recover from the original buyer any loss caused by the breach of contract.
  + since time of delivery and payment is not ordinarily deemd to be of the essence, the failure of the buyer to pay is not repudiation; the seller remains obliged to deliver the goods.
  + 51(3) allows the seller to resell with notice or where goods are not- perishable.
* here, since the seller had resold one of the cars, he could not deliver the goods to the buyer- thus he accepted the buyer's repudiation, and can only calim the difference in damages rather than the price of the car.

Ratio

* where the seller resells some of the goods under the contract, he has elected to accept the buyer's repudiation (failure to sell) so can only get the difference between the K price and the market price.
* s 51(3) and s. 51(4) can act together to allow recission, and the seller can still get damages.

**Personal Remedies**

* Mainly available to seller where the buyer hasn’t accepted or paid for the goods
* **Failure to pay:**
  + 2 parts: price itself (not damages) and additional loses on top of the basic price (damages)
  + More usual remedy is the **action for the price** (section 52)
    - Although called an action for the price, this is really just another name for DEBT (remedy = debt)
    - Remedy for debt is a very straight forward common law claim (easiest action to bring) – obligation for a quantified amount of money (breach)
    - Specific amount of money to be paid is NOT paid – claim for debt
    - Here, the obligation to pay the price (in the *SGA*)
* Action in debt – looks like specific performance of a monetary obligations
  + But it is not! Has the same effect but this is not equitable (since debt covers this for monetary obligations, don’t need specific performance to cover this situation)
  + Primary obligation in contract and a secondary obligation by virtue of being a remedy
* Many considerations for damages are completely irrelevant here (because it is debt remedy)
  + ***Standard Radio Inc. v. Sports Central Enterprises Ltd.:***
    - Bringing an action to be paid for services provided
    - Buyer of services says the claim was for too much – failure to mitigate
    - Response to this: supplier is mixing up debt and damages – **you do not need to mitigate in a debt claim, nor are the H&B principles applicable**
* Two situations this occurs:
  + 52(1): If property has passed to the buyer and the buyer refuses to pay – then the seller can bring an action for the price
    - This adds to the CL – you can also bring debt even if the day hasn’t arrived under the K for the price to be paid (usually because there is no day specified) if property has passed and the buyer has not paid
    - No specified date (I think)
    - Buyer may not want this (to pay just because property has passed – may not have even seen them)
      * Buyers may want to contract out of this!
      * Want to make it clear in the K that even if property has passed there is no obligation to pay until the day arrives (if it is clear in the K)
  + 52(2): if under the K of sale, the price is payable on a specific day and the buyer doesn’t pay, an action for the price can be taken, even if property has not been passed and the goods have not been appropriated
    - This is CL – this is just debt
* Deliverable state – ready to be delivered but not actually delivered yet (keep these 2 clear and separate)
* 3 things have occurred:
  + Property passed
  + Delivery occurred
  + Specific date for payment: 52(2) – cannot bring an action before this date (if this is missing, then you look to delivery – payment should be in concurrence with delivery – if not, claim for debt) – no specific date, use 52(1) for property passed
* ***Colley v. Overseas Exporters*** and ***Stein Forbes v. County Tailoring Company*** cases
  + Deals with the situation when you know when the parties should be paid but the day is not certain
  + When the goods are loaded onto the ship – delivery occurs, transfer of property occurs, risk passes, payment obligation arises at this time
  + **Didn’t specify this on a specific DATE**
  + Ship never got nominated to the K – goods were never loaded. Seller is saying not my fault never loaded, pay ME!!
    - Court said no, the time hasn’t arisen under the statute (none of the 3 things occurred)
* Colley:
  + As a general rule, if property has not passed, you can’t use “debt” but can sue for damages (it is an exception where the a specific date is set – here, there was no such date)
* Stein Forbes
  + Same as above – talks about passing (may want to review?)
* Failure to pay the price – there may be additional damages sustained
  + Can be claimed as special damages (passed through mitigation and remoteness test)
* **If the buyer fails to take delivery (second obligation)** 
  + Seller can bring an action for damages
  + Same as damages claimed by the buyer – place the seller should have been in if the K was honoured
* **Section 53: action for damages**
  + 53(2): first part of rule in H&B
  + 53(3): formula that sometimes applies to general damages (available market – difference between K price and market price at the time they ought to have been accepted or time of refusal)
  + K price – 100 dollars, seller can resell at 95 = General damages are 5 dollars
* (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 non-acceptance.
* (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 at the time or times when the goods ought to have been accepted**, or if no time was set for acceptance, then at the time of the refusal to accept.
* What happens if there is an anticipatory breach of K?
  + Have to go into the market and find a substitute and buy it – but when is this to occur?
    - Tell you today I am not going to buy but K is for a month from now (can accept breach or elect to affirm the K and wait and see)
    - Accept the breach today? When do you have to go into the market – can you wait for a good time in the market to expand the damages?
    - Where you have an election, you have to make the election but you’re not really constrained as to when – but you can’t wait too long or you may be seen to have accepted the status quo – but on the other hand, some law says you have a period to make up your mind, but you can’t play the market
    - Is AB is accepted, obligation to go into the market AS SOON AS POSSIBLE
* Special damages:
  + Section 41: if the seller is ready to deliver the goods and the buyer doesn’t take within a reasonable time take the goods, the buyer is liable for hardship etc…(see section)
    - (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.
  + In order to make this claim, don’t have to go through H&B second branch, this section lays out your entitlement
  + ***Charter, Victory Motors, Lazenby***
    - Loss of a sale, buyer caused you to lose a sale, you buyer should be compensating me!
    - So what does this mean? Buyer says someone else buys the good you rejected – your losses are zero. Seller will say this is just general damages but I lost profit – I made 1 sale when I should have made 2!
    - When can you claim this loss of profit?
      * ***Charter*** and ***Victory Motors***
        + New goods – this claim tends to be easier to make if dealing with new goods
        + Deal with cars, but the markets are quite different
        + ***CHARTER***: car was rejected by one buyer, but bought by another buyer once put back in the showroom

Seller’s market (had no problem finding buyers at a fixed price). Seller only had a fixed number of items to sell and he was able to sell all of the inventory – buyer was able to get out of the loss of profit claim on the basis the seller has not lost a sale in the grand scheme of things (no additional costs incurred)

* + - * + ***VICTORY***: more common situation today – an oversupply of consumer goods. Really is the loss of sale here.
      * Tends to be true when you have generic type goods – can buy any one of them as they are all the same (easier to establish)
      * Used goods?
        + ***Lazenby*** case: probably takes too extreme of view of this

Sale of a used vehicle – buyer failed to take delivery. Found another buyer for the goods but claiming loss profit on the basis this new buyer would have bought another car (1 instead of 2)

This was rejected – used cars are all different. Court will not assume a lost sale (not just accept their word with NO evidence that the buyer would have bought something else)

Unique – just because you have something else to buy doesn’t mean they will (want this specific good, no evidence they’d accept something different – no lost profit)

* Equitable remedies:
  + Injunction and specific performance (principle the same as when applied to the buyer)
    - Available but very very rare

**Review…**

* 2 aspects to the sale: property and contract aspects
  + We have been focussing on contract (personal obligations between seller and buyer)
  + Looked at remedies as well (personal and real)
  + Haven’t looked a whole lot at the property aspects – what happens when you become owner, etc.
  + Final topic: relates to property obligations
    - Extend to which the statute allows property interests to pass, even though the basic property rules say it cannot pass
    - If it is transferred, how does this affect the rest of the world?
    - Have a personal obligation to transfer property to you, but you may be prevented by property from fulfilling that obligation
      * NEMO DAT
      * Seller doesn’t own the goods – none the less the buyer can get a property interest
      * Section 26 – 30 (changes to property law) and section 51
      * Section 59 agency rules

**TRANSFER OF TITLE BY A NON-OWNER**

Transfer where you don’t have a sufficient interest to transfer, really (don’t need title)

* Things to look at: preconditions and what it does
* Often these rules operate together – can combine these
* 51(2): despite the seller doesn’t own the goods, the new buyer gets a good title
  + Section doesn’t tell us HOW this operates – appears to be an implied agency in transferring the title
  + Also what you get is a good title as against the original buyer, not against the rest of the world – so if the title against the buyer is limited, you are also subject to those claims
* Section 26: longer way of saying *nemo dat*
  + Acquires no better title than the seller had
  + Qualifications
    - 26(1), where it says that *nemo dat* applies unless the owners conduct precludes the owner from denying the seller’s authority to sell… (estoppel argument)
    - A – seller
    - B – buyer
    - C – owner
    - Can B become the owner? Generally speaking NO (A is not the owner)
    - **26(1) says C can be estopped from denying that’s its actions in allowing A to possess the good constitutes an implied representation that A is authorized to deal in the goods (estoppel by representation)**
    - Here, this makes C the seller of the goods because of the implied agency
  + (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.
* Section 27 (Brucey LOVES this provision)
  + This is unique because BC is the ONLY place in the world that hasn’t abolished this provision – this has never been successfully argued in BC (implicitly repealed?)
  + If goods are sold in market overt [open or public market] – the buyer acquires a good title to the goods, period
    - As long as bought in **good faith** and **without notice of defect**
    - This typically applies to stolen goods
    - Depends on what a market overt is – as long as legally constituted market, you have a market overt
    - Does not apply to horses
  + **27**  (1) If goods are sold in market overt, 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.
  + (2) This section does not affect the law relating to the sale of horses
* Section 29 – qualification to 27
  + Property re-vests in the person who was the owner if the thief is prosecuted to conviction, despite section 27
  + **DAMN QUEER SITUATION**
* Section 30 – main provision that applies
  + Exception to *nemo dat*
  + 30(1) & (3) – not responsible for ANY other parts of section 30 (relates to PPSA)
  + Do essentially the same thing – 30(1) says that if a seller sells the goods but remains in possession of them (no property), the seller can find a new buyer and give that new buyer good title
  + 30(3): the buyer has possession of the goods, but hasn’t yet become the owner of the goods (conditional sales) – protects the new buyer
* Section 30(1): Continues or is in possession of the goods – then any sale, pledge or any disposition of them to a person receiving the same in good faith and without notice, has the same effect as if the person was directly authorized to do the same…missed some of this
  + Have to:
    - Have sold the goods but remain in possession of them
    - This means you are the implied agent of the true owner – what the new buyer gets is the same interest as the actual owner has
* (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.
  + Difference from resale in a lien? Payment?
* (3) If a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or 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 any lien or other right of the original seller in respect of the goods has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.
* Section 51(2): need a lien and need a new buyer – if getting an interest less then title, then 51 is of no use.
* 26(1) only operates when ownership is claimed (not a lesser interest)
* What is B is a secured party and is purporting to lease the goods? Can’t use these – but can use 30(1) – any sale, pledge or disposition
  + True owner may not lose title (like they do in 51/26) – may have only carved out an interest
* Why doesn’t section 30 swallow up the other provisions? Why do you need 51/26?
  + Courts have been pretty good at narrowing these provisions
  + Have to actually receive the goods to take advantage of these – in other provisions there is no such requirement
  + Both of these provisions where the person who used to have ownership has some continuity of possession – uninterrupted possession of the goods for this to apply

FOR USE OF THESE SECTIONS (30(1)&(3)):

* **Must actually receive goods**
* **Must be in continuous possession (no “break” in possession)**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Section** | **Who Uses** | **What it Gives** | **How it Operates** | **Pre-req’s** |
| 26 (proviso at end) | Buyer | Original Owners title | Agency? | Original owner estopped |
| 27 | Buyer | “good title” | magic | Market overt, good faith, no notice |
| 30(1) | Transferee under any disposition | Interest promised | Constructive agency | Seller in possession PLUS: continuity of possession; delivery to new purchaser; good faith and no notice |
| 30(3) | “ | “ | “ | Buyer in possession PLUS the above |
| 59 | “ | “ | Ostensible authority | Mercantile agent in possession, good faith, no notice |
| 51(2) | buyer | Good title | Agency? | Seller’s lien |
| 28 | buyer | Non-voidable title | equity | Good faith, no notice |

**Section 59**

* if a mercantile agent with consent of the owner in possession of goods, you get certain things
* doing something their agency doesn’t authorize them to do
* this does extend beyond sales – deals with agency law, not directly sales law
* What constitutes a mercantile agent?
  + Defined term – but really just an agent

**Section 28**

* Codification of the common law (as is 59)
* If you have somebody (a seller) who has a voidable title to the goods, but it has not been avoided at the time of the sale, the buyer gets good title if there is good faith and no notice
* You would get full title to the goods under this
* 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.

**Case Law**

**Section 26 – Shaw Case**

* Gives a very narrow interpretation to the proviso under the end of 26 (estoppel portion)
* Rogue says I am a car dealer, give me the car and I will sell it to someone for you
* Gave car to this man, who did find someone to buy the car (paid for through cheque which was not honoured – never actually cashed)
* New buyer was in possession of the vehicle
* Rogue disappears – dispute between original owner and new buyer
* New buyer: I tried to pay, not my problem, I didn’t know there was a problem – I should be the owner
* *Nemo dat*: not the owner as the original owner never actually sold it – would give interest to original owner
* Do any other provisions apply to help new buyer?
  + Original owner estopped from denying the person who has possession had permission to sell
  + Court accepts that this is possible – be estopped from denying that this person is your agent
  + Section 26(1): SOLD by a person who is not the owner
    - Doesn’t apply here, because the ultimate purchaser wouldn’t have gotten title until payment was made – this is an agreement to sell, not a sale (sale must be completed, property must pass 🡪has to be TITLE)
* Brucey – this is a very fine distinction (seems angered)

Pacific Motors and Coden Engineering Case – section 30

***Pacific Motors***

* Car dealer needed financing for its inventory
* The way this worked: distributor or manufacturer would sell the vehicle to the dealer and immediately resell to the finance company
* Ongoing permission from the finance company allowing the dealer to deal with these cars that weren’t actually owned by the dealer
* Dealer got into financial difficulties and the finance company withdrew permission. However this continued for a few sales
* Get good title?
  + Section 30(1)
  + Dealer was owner, then agent, then simply a bailment interest
  + This is what section 30 is designed to accomplish
  + Court says: seller **has to** continue in possession of the goods (this is just accepted but it ignores the word or); unbroken possession – this operates. Any break? Can’t use 30(1)
    - 30(1)….designed to deal with parties who are entitled to have [possession of goods, but the quality of whose possession changes over time….owner….then authority to deal…and then ultimately just a bailment interest
    - In order to take advantage of this provision however, person had to have CONTINUED possession of the goods….”unbroken possession” since time of ownership
    - Breaking possession can mean giving anyone else lawful control over/possession of the goods

***Cooden***

* Cooden (owner) sells vehicle to the rogue (Griffiths)
* Griffiths does not pay for the vehicle and the owner wants it back
* Griffiths enters into a transaction to sell the vehicle to a finance company (G is a seller to W who is a buyer)
* G remains in possession of the vehicle (seller in possession) – wrongful, but possession none the less
* C repossess the vehicle – saying can take advantage of 30(1)
  + Transferee under any disposition who gets it from a seller in possession, etc.
  + Court accepts this – extremely generous interpretation (non-consensual can be considered a disposition – snatching!)

**Section 59 – Mercantile agency case (*St. John v. Horwat*)**

* Agent in possession of property and is supposed to do something with that property for the principle
* Gives an interest to the third party which it has no authority to give
* Does the third party get an interest? YES
* Here, have to actually be an agent (doesn’t work with implied agency) and that there is nothing unusual about the transaction (peculiar time, place, price – must be reasonable to the third party (not suspicious))

Facts

* R delivered her van to E
* E was to find a purchaser and make an agreement for sale, then R was to actually sell and transfer the documents
* E sold the van to A without notifying R or getting authorization
* A got E to keep possession, because A intended to resell
  + later A decides to start using the van, and R finds out.
* E plead guilty to theft, but R wants the van back or damages for conversion.

Analysis

* does s. 29 apply in these circumstances?
  + this section allws stolen goods to be revested in to the true owner if the offender is prosecuted to conviction for theft
    - fraud is not enough -it must be theft.
  + but E got possession legally- to use 29, the purported seller must have gotten possesion but theft.
  + obiter- the requirement that the seller must be convicted of theft still applies.
* does s. 58 give A good title?
  + where a mercantile agent is in possession of goods with the conesnt of the owner, any disposition made by the mercantile agent in the ordinary course of business gives good title for a bonafide third party
    - must show a mercantile agent
    - in posession of goods
    - with the consent of the owner
    - sale in the ordinary course of business of a mercantile agent
    - buyer in good faith and no notice.
  + selling vans was E's business, and E normally had the authority to sell vans. So E was a mercantile agent.
  + there is no need to be in possession of documentary title; pysical possession is enough
  + R clearly consented to E's possession.
  + the question of ordinary course of business depends on the percetion of the public dealing with the agent: did the agent appear to have the authority to act on behalf of the principle?
  + We are wondering whether the reasonable person would believe tha tthe agent was idsposing of goods in the ordinary course of business.
    - the fact that the mercantile agent is acting fradulently, or is actually acting outside the course of business, doesn't matter- the focus is on the perception of the reasonable public.
  + the presence or absence of documentary title is relevant only in as much as whether the absence thereof would be notice to the purchaser that the agent is not acting the ordinary course of business.
  + so. 58 appears met.
* S. 26
  + not really necessary to consider estoppel where s. 58 is ade out, since 58 covers this situation more fully.

Ratio

* s. 29 allows goods that were acquired by the seller by theft to be revested in the true owner if the seller is convicted of theft
  + fraud is not sufficient- the goods must have been acquired by theft.
* s. 58 gives good title to a bona fide purchaser without notice where the goods were acquired by a mercantile agent in possession of the goods with the consent of the true owner, and where the sale of goods occurs in the ordinary course of the agent's business
  + a person in a mercantile agent where they ordinarily have the authority to sell that kind of good for people such as the owner. (I think)
  + the ordinary course of business is to be determined by whether a reasonable person would think the agent has the authority to act on behalf of the principal.

Section 28 case – ***Car and Universal Finance v. Caldwell***

* with this section, the seller (the rogue) has voidable title because the contract itself is voidable (it is flawed in some way, here through fraud, so the original seller has the right to rescind) – if the original seller takes action, the sellers title is AVOIDED and he cannot pass on good title – until this time he can if the buyer is in good faith and without notice
* Voidable title – title obtained by the purchaser when the transaction is flawed in some way
* Certain contracts are VOIDABLE
* Car sold to a rogue, who gave a bad cheque – seller found this out but rogue resold the car already
* Issue: whether the defendant avoided the K of sale and recovered title to the car before an additional sale took place
* Notified police!
* D owned a car
* D sold the car to N, who paid with a cheque
* D found out quite quicly the cheque was no good and N was a fraud
  + N had left another car as security, but this car wasn't N's anyways.
* N sold the car to M, who knew the car was stolen.
  + M sold to G and C finance, who purported to hire it to AHK, who seems to have been made up.
* Car was then sold to P
* Once D learned about the fraud, he went to the police and gave them all relevant info.
  + D made clear his desire to terminate the K and take back the car
  + the car was found with M, wh owouldn't give it back, but eventually D got the car as a judgment
* But at this point the car had moved to P
* The question is whether D had avoided the contract and got back title before the sale between M and GC.
  + otherwise, GC as a bonafide party had good title capable of passing to P.

Analysis

* normally in order to affirm a contract, one has to do nothing
* in order to disaffirm however, communication is normally required.
  + but in this case, the rogue is goign to actively avoid communication.
  + does the ability of a rogue to hide deprive the victimized party of the right to rescind?
* what the seller needs to do is establish clearly and unequivocally that he terminates the contract and is no longer to be bound by it.
  + even if he cannot communicate this decision to the seller, he may still be able to make clear he no longer wants to be bound by the contract.
* the seller, on discovering the fraud, must take all possible steps to regain the goods even if he can't find the rogue or otherwise communicate with him.
* The precedent is if a defrauded seller can find the car and retake it before the resale to an innocent purchaser, even if the "buyer" is never communicated with, the contract is at an end and title is restored to the seller.
  + this is an unequivocal act of elect to disaffirm the contract.
* if communications are possible, as in where the disaffirmation is due to an innocent misrepresentation, they will ordinarily be required.
  + but the court will be more flexible where communication is impossible

Ratio

* normally in order to rescind a contract the seller must communicate this intention to the buyer
  + if the seller does not do this before the buyer passes on title, recission is impossible
* however, where the buyer is a rogue or cannot otherwise be communicated with for some reason, the seller must take all possible steps to regain the goods and disaffirm the contract.
* Certain contracts are VOIDABLE; interest made under k is ALSO voidable
* 28 turns equitable principle into statutory principle
* NO possibility of voiding when third party interest affected
* Seller here got goods under a voidable k
* Upon sale to the new buyer…buyer acquires GOOD title if without notice of seller’s voidable interest (rule in this case, what happened here…)
* If contract HAS been avoided, but transferee REMAINs in possession of the good, and then sells them again anyways…new buyer may be SOL (didn’t happen in this case)

END OF MATERIALSSSS