

CHAPTER 1

INTRODUCTION

SCOPE OF THE ENQUIRY

[1.01] This book is concerned with what laymen might term ‘sales of goods’ to consumers who are within England and Wales. Such transactions will normally be governed by English law (see para 18.13). The fundamental transaction in such activity must be that which is technically characterised as a sale of goods (see para 1.02).

This is a specialised area of the common law which largely developed in the eighteenth and nineteenth centuries, typically in relation to merchants purchasing for resale. It was first codified as a set of general rules in the Sale of Goods Act 1893. However, even in 1893 there may be observed some special rules fashioned for export sales; and, since then, export sales have become such a specialised area of law as to be beyond the scope of this work. For the UK,¹ the 1893 Act was subsequently re-enacted with amendments in the Sale of Goods Act 1979 (SGA). Unless otherwise stated, subsequent references to the SGA are to the SGA 1979;² the 1979 Act in fact only consolidated all the statutory amendments previously made to the 1893 Act.³ Since then, Parliament has pursued a policy of piecemeal amendment.⁴ Ignoring export sales, this body of legislation applied to goods bought for resale and those bought for consumption, whether the buyer be a business or a private person.

However, with the twenty-first century there has been introduced a further formal distinction in respect of goods bought for private consumption: these are to be found in the EU-led special developments in respect of consumer sales in the Sale and Supply of Goods to Consumers Regulations 2002 (SSG Regs).⁵ So, it would seem that English law has at last reached a point where this book may consider alone a separate body of law relating to sales to private consumers (see para 1.02), where perhaps the single most important complicating factor is the need for ‘buyers’ to finance the acquisition of goods (see para 1.03). Additionally, such sales may bring into play a whole range of specialised statute-based rules of criminal law, largely introduced as ancillary supports for the civil law, e.g. the Consumer Credit Act 1974 (see para 1.03); and so the totality of the transaction must inevitably involve consideration of the interplay of civil and criminal ‘remedies’ (see paras 1.04 and 1.05). Sometime in the future, the common law of contract basis of the subject may be displaced by an EU Code.⁶

1 The modern American sales code is to be found in art 2 of the Uniform Commercial Code (UCC).

2 For the contracts to which the 1979 Act applies, see s 1 and Sched 1.

3 E.g. by the Supply of Goods (Implied Terms) Act 1973, the Unfair Contract Terms Act 1977.

4 By the Sale of Goods (Amendment) Act 1994; the Sale and Supply of Goods Act 1994; the Sale of Goods (Amendment) Act 1995.

5 2002 SI 3045; and see further, para 14.01.

6 Ridge (2006) 156 NLJ 902.

The categories of contract

[1.02] **Basic sales.** In terms of legal analysis, no doubt the greater number of sales are achieved within the scope of the SGA by way of a simple sale of goods with payment on delivery (s 28: set out, para 23.16). The SGA 1893 purported to do no more than ‘codify the law relating to the sale of goods’ and expressly left the general principles of the common law untouched save insofar as they are inconsistent with the terms of the Act (now 1979 Act, s 62(2): set out, para 10.18). However, subsequent statutes have steadily reduced the role of the common law in the regulation of consumer sales (see below).

Within the context of sales of goods, the draftsman of the SGA 1893 (Sir Mackenzie Chalmers) endeavoured to capture the spirit of the common law rules, leaving alterations in the common law of England to be made by Parliament.⁷ The underlying philosophy was to hold the ring between two equal parties whilst they achieved a true bargain,⁸ the rules themselves being displaceable by contrary agreement: this attitude is often described as *laissez-faire*. Whilst Chalmers for the most part succeeded in embodying this philosophy in his draft, e.g. *caveat emptor* (see para 15.22), it may be questioned however, whether (a) the optimum moment was chosen for codification in terms of common law development, and (b) Chalmers was as successful in achieving his objective as is sometimes traditionally held. *A fortiori*, the continued universal use of the philosophy as regards sales of goods may itself be criticised.⁹ The assumption of equality of bargaining power must clearly be erroneous in some cases, e.g. consumer standard-form contracts (see para 11.08); and it would seem an almost impossible task to formulate a set of even *prima facie* rules which would do justice to all parties in all the circumstances obtaining at the time of codification, let alone subsequently.¹⁰ For consumer sales (see below), there are now considerable powers to insist that the express terms are consumer-friendly, both prospectively¹¹ and retrospectively.¹²

Consumer sales. English statute first introduced notions of consumer contracts in the context of exclusion clauses: there has since 1977 been a concept of ‘dealing as consumer’ (Unfair Contract Terms Act 1977 (UCTA), s 12: see para 18.18); and

7 See Chalmers’ Preface to the 1894 Edition of his Commentary on the SGA. Some changes were made by Parliament, particularly during the course of extending the Bill to Scotland, e.g. the requirement as to notice in SGA, s 18, rr 2 and 3. See further Lord Diplock in *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 501. See also Kerr (1978) 41 MLR at 17–18; Rodger (1992) 108 LQR 570; Mitchell (2001) 117 LQR 645, at 659–61.

8 Per Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465. See *Unfair Terms in Contracts* (2002, Law Comm 205), para 2.1; and standard form contracts, para 11.08.

9 Is it true to say that in modern consumer sales the SGA is still interpreted neutrally by the courts? See further, para 1.04; and generally *Chitty on Contracts*, 28th edn, Vol 1, para 1-010.

10 See Bridge [1991] LM & CLQ 52 at 53. For further discussion as to whether there are any general principles of commercial law and whether the subject should be codified as a whole, see Goode, *Commercial Law*, 3rd edn, Chap 40.

11 The OFT has wide powers to require suppliers to re-write their standard-form contracts (see para 11.08).

12 The courts have powers to strike down clauses in particular consumer contracts which are unfair or unreasonable (see paras 11.14 and 18.20).

this has, subsequently, been utilised in amendments to the SGA (see paras 11.05A and 11.12). Whilst there have, since, been other Westminster-inspired definitions of consumer,¹³ in the twenty-first century, the dominant definition in our field has become the Euro-inspired one of the ‘consumer’, as meaning (SSG Regs, reg 2):

‘any natural person who in the contracts covered by these Regulations, is acting for purposes which are not directly related to his trade, business or profession.’

As the Euro-version is compulsory, English law has begun to adapt the old ‘dealing as consumer’ concept to conform. The basic issues for parliamentary draftsman in the next few years are as follows:

- (1) Whether we should retain a single code for all sales, or move to a separate consumer sales code.¹⁴
- (2) Bearing in mind the pressures on the Parliamentary timetable, how should the new statutory provisions be kept up to date.¹⁵ This appears to involve at least two major policy decisions: (a) whether any consumer sales code should be drafted in general or detailed form; and (b) to what extent (if any) the details should be fleshed out by statutory instrument.

[1.03] Consumer supplies. Whilst the basic transaction considered above rightly envisages the parties making a simultaneous exchange of the price for the goods, it is a fact of life that many consumers wishing to obtain goods in England and Wales do not have within their own resources the cash to pay for them on delivery. Broadly speaking, such consumers have available to them the following alternative methods of immediate acquisition:

- (a) a cash *sale* (see para 1.07) financed by a *loan* (see para 7.01, *et seq.*); or
- (b) an instalment contract, which may take any of these forms—
 - (i) a credit or conditional *sale* (see para 1.10) or
 - (ii) a simple *hiring*, rental or leasing (see para 1.17), or
 - (iii) a *hire-purchase agreement* (see para 1.20).

It is submitted that it is unrealistic to look at the law relating to consumer sales without examining all these alternative forms of supply contract used to attain the same objective. It will be noted at once that the above forms of contract utilise two different types of contract to transfer the use-value of goods to consumers:¹⁶

- (1) sales (see para 1.06, *et seq.*);
- (2) hiring (see para 1.17, *et seq.*); and
- (3) loan (see para 7.01, *et seq.*).

For a long time it was a fundamental weakness of our law that these different solutions to the same problem were governed by disparate pieces of legislation, or in some cases were subject to no legislative control at all. However, this weakness

13 See Cartwright, *Consumer Protection and the Criminal Law*, 2–4; and generally, below Chap 4.

14 See Bridge (2003) 119 LQR 173. For a possible model, see the US Uniform Commercial Code, Art 2: see para 1.01.

15 See Brownsword & Howells (1999) 19 LS 287; and para 8.17B.

16 Besides the legal differences mentioned in the text, the different forms may have different financial implications, which the consumer should examine for the best deal.

was tackled by the Consumer Credit Act 1974 (CCA).¹⁷ Whilst the SGA replaced the pre-existing common law of sale (see para 1.02), the CCA assumes the existence of the common law relating to supplies of goods and then makes detailed changes to it: so, to understand the CCA, the underlying common law must first be appreciated. The CCA, because it has to deal with a number of different legal transactions which may be used to achieve the same objective, is necessarily complicated. Indeed, it is a monument to the drafting skills of the author, Mr Francis Bennion,¹⁸ who had planned to draft in layman's language (see below para 5.06) a comprehensive scheme built of brand-new concepts (see para 5.26). Whereas the SGA 1893 was in a sense typical of the nineteenth century in its reflection of the notion of freedom of contract,¹⁹ the CCA is a leading example of post-1945 legislation with an axe to grind,²⁰ and increasingly reliant on criminal sanctions.²¹

With our accession to the EEC in 1973 (see para 1.03A), an entirely new factor has been introduced. In the 1970s, the EEC began the process of evolving its own community-wide policy on consumer affairs (see para 3.10); and of mixed EEC and domestic origins has been the enactment of the Consumer Protection Act 1987 (CPA) containing both civil and criminal provisions relating to three distinct aspects of consumer supplies.²² By 1990, much of the centre of thinking and activity on reform of consumer law had passed to Brussels, with the EU-inspired SSG Regulations (see para 14.01). Apart from the potentially-significant domestic Deregulation Act 1994 (see para 5.10), the major UK-inspired development has been the Consumer Credit Act 2006 (see para 5.11).

[1.03A] The European Union (EU). In 1973, the United Kingdom became a member of the EEC, thereby undertaking all the rights and obligations arising, *inter alia*, from the Treaty of Rome, the articles of which have unfortunately been renumbered (old numbers in brackets where appropriate). Under this Treaty, the Community must strive towards the approximation of laws (Art 3(h)) and harmonise legislation (Art 94 [ex 100]), including the progressive approximation throughout the EEC of the different national policies and laws. Whilst the original Treaty of Rome did not lay down a clear basis for an EEC consumer protection policy, the EEC promoted a number of uniform consumer laws (see para 3.10) indirectly justified on the basis of various provisions of the Treaty.²³ The Maastricht Treaty 1991 introduced two relevant changes. *First*, it added to the Treaty of Rome a new objective of strengthening consumer protection to safeguard the 'economic interests of consumers' and provide 'adequate information to consumers' (Art 153 [ex 129A]). They do not necessarily preclude more stringent such national pro-

17 See the Preamble to the CCA. For the objectives of this Act, see further the Crowther Report upon whose recommendations it was substantially based: para 5.03.

18 He has produced a monumental loose-leaf commentary on the Act *Consumer Credit Control*—set out according to an entirely novel pattern.

19 It has been pointed out that the apparent simplicity of the drafting of the SGA is misleading: Goode, *Commercial Law*, 3rd edn, 192–93.

20 See Nicol (1981) 44 MLR 21.

21 For the interpretation problems to which this gives rise, see para 1.05.

22 (a) Consumer Safety (see para 4.31, *et seq.*); (b) Misleading Pricing (see para 8.09, *et seq.*): (c) Product Liability (see para 17.21, *et seq.*).

23 Mostly justified under old Arts 36, 100, 100A, 235. See generally Goode, *Consumer Credit Law & Practice*, Pt II.

tective measures as are compatible with the Treaty (see para 3.10). *Second*, it asserted the new principle of subsidiarity (so far seemingly little-used by the EU), which was supposed to restrict the organisation (now designated EU) from more enthusiastic intervention in fields so far occupied by national laws (Art 3B).

Under the EU Treaties, Member States must give effect to Community law, which takes precedence over English law, e.g. CPA, s 1(1) (see para 17.23). Those Community laws extant at the time of our accession were given the force of law within the UK by the European Communities Act 1972 (ECA), subsequent changes in the Treaties, and sometimes also laws,²⁴ being similarly incorporated. For our purposes, EU attempts to harmonise consumer law of Member States may be roughly divided into two types.

1. *Positive harmonisation*. Positive Community law is of two sorts:

- (a) 'Self-executing' laws which take direct internal effect in precedence to the domestic law of Member States.²⁵ These include provisions of the Treaties and Regulations,²⁶ which have general applications, whereas Decisions deal only with an individual case.²⁷ The Treaties and Regulations may be enforced in the UK by way of actions for breach of statutory duty (see para 3.21) and sometimes by the criminal law.²⁸
- (b) Directives, which are only valid provided *intra vires* the article of the Treaty under which they are made.²⁹ The Directive will specify only the result to be achieved in domestic law, but leave to the national authorities the choice of form.³⁰ The UK has adopted the practice of fulfilling its Community obligations by the enactment of statutes or statutory instruments (see para 3.10), which should simplify public enforcement (see para 28.02).

There are also EU Codes of conduct (see para 3.14).

2. *Negative harmonisation*. This comes into play where national measures ostensibly adopted to protect, say consumers, are incompatible with the Treaty. Theoretically, consumers adversely affected may complain to the EU Commission directly so that the latter may take up the matter before the European Court of Justice (Art 226 [ex 169]), in which case the decision of that Court is binding on the UK and overrides national legislation. In practice, such UK consumers are more likely to seek remedies within the UK courts, as the

24 *DEFRA v ASDA Stores Ltd* [2004] 1 All ER 268, HL (ECA referred to Community grading rules 'for the time being').

25 ECA, s 2(1). E.g. *Conegate Ltd v Customs and Excise* [1987] QB 254 CJEK (old Arts 30, 36); Sunday trading (see para 8.13). Directly applicable provisions of Community law should prevail over future Acts of Parliament: ECA, s 2(4); and see below.

26 E.g. Regulations (based on Art 95) are used to provide arrangements for co-operation between public authorities, e.g. cross-border enforcement institutions (see para 3.03A).

27 Art 249 [ex 189]. E.g. exempted from old Art 85 under Community Regulation 17. See generally *Morris* [1989] JBL 233; and para 2.13.

28 *Secretary of State for Environment v Asda Stores Ltd* [2002] 2 CMLR 66, DC.

29 *R (on the application of BAT) v Secretary of State for Health* [2003] All ER (EC) 604, ECJ (tobacco advertising: see para 8.06A); *R (ABNA Ltd) v Secretary of State for Health* [2004] 2 CMLR 39.

30 See Art 249 [ex 189] of the Treaty of Rome. For the process of making directives, see para 3.10.

Community treaties and law are directly enforceable in Member States, e.g. competition law (see para 2.12), taking precedence over domestic law: according to s 2(4), post-1972 UK legislation 'shall be construed and have effect subject to' UK statutes and statutory instruments incorporating EU law into UK law (see above).³¹ The breach of Community law may be used as a cause of action, e.g. for breach of statutory duty (see above); or as a defence, where a party is sued in the UK courts, e.g. for breach of contract where relevant English statute contravenes Art 12 [ex 6] of the Treaty. Sometimes, it will be appropriate for the aggrieved consumer to apply for judicial review or damages against the State,³² as where the State has neglected to implement a Directive,³³ so narrowing the distinction between Directives and Regulations (see above). However, it would seem that an aggrieved consumer cannot rely on Community law rights as against a private defendant in respect of an unimplemented directive.³⁴ In all cases, reference or appeal lies from the courts of the United Kingdom to the European Court of Justice (CJEC; Art 234 [ex 177]).

Interpretation of the Acts³⁵

[1.04] Civil statutes. In the preface to his commentary on the SGA 1893, Chalmers says that the pre-Act cases are only law insofar as they illustrate the words of the statute,³⁶ though the effect of this statement has since been complicated by the 1979 almost verbatim re-enactment of the SGA. In the nineteenth century, the typical judicial attitude to codifying Acts, such as the SGA, was that they should be interpreted according to the literal rule of statutory construction;³⁷ but in the twentieth century the courts have not in respect of all issues arising under the SGA maintained such a lofty impartiality.³⁸ *A fortiori*, it may be doubted whether the old impartiality will be visited upon the consumer protection legislation of later centuries, e.g. the Supply of Goods (Implied Terms) Act 1973 (SOGIT) and the

31 S 2(4) of the 1972 Act. This is an example of a 'Henry VIII clause' (see para 4.24) and has been used to overrule, e.g. Pt 2 of the CPA (see para 4.32).

32 *R v Secretary of State for Transport, ex p Factortame No 5* [2000] 1 AC 524, HL (damages); *Three Rivers DC v Bank of England* [2000] 3 All ER 1, HL (misfeasance in public office).

33 On such 'vertical direct effect' of directives, see Goode, *Op. cit.*, Pt X, para 4; Gordon and Miskin (1996) 146 NLJ 1055; Craig (1997) 113 LQR 67.

34 'Horizontal direct effect', e.g. *El Corte Inglés SA v Cristina Blezquez Rivero* [1996] CLY 1175, ECJ (Consumer Credit Directive); *R v Secretary of State for Employment, ex p Seymour-Smith* [1997] 2 All ER 273, HL. But there may be some help from the rules of interpretation where there is a relevant national provision (see para 1.04); and EU Regulations are directly enforceable: *Consorzio Del Prosciutto Di Parma v Asda Food Stores Ltd* [2002] 1 CMLR 43, HL.

35 See generally Interpretation Act 1978.

36 See Chalmers, *Sale of Goods*, 18th edn, vii. Cf. Atiyah, *Sale of Goods*, 10th edn, 1; Goode, *Commercial Law*, 3rd edn, 187, 190. See also per Lord Herschell in *Bank of England v Vagliano Brothers* [1891] AC 107, at 144–145, HL. For an application of this philosophy, see *Re Wait* (set out at para 20.22).

37 See generally, Allen, *Law in the Making*, 7th edn, 482–593; Willis (1938) 16 Can BR 1.

38 E.g. *caveat emptor* (see Chaps 13–14), the exceptions to the *nemo dat* rule (see Chap 21). See Goode, *Op. cit.*, 21–22, 192.

Supply of Goods and Services Act 1982 (SGSA),³⁹ where perhaps the evident bias of the legislation should lead to the adoption of the mischief rule of statutory interpretation.⁴⁰ Thus, in *Wilson v First County Trust Ltd* (set out para 3.09A) the House of Lords examined *obiter* the external permissible aids in interpreting s 127 of the CCA. In delivering the leading Judgment, Lord Nicholls pointed out that it is well-settled that the courts may look outside the statute in order to identify the ‘mischief’ Parliament was seeking to remedy (para 56), and even statements made in Parliament by the Minister or other promoter of the Bill;⁴¹ and others of their Lordships gave the following additional examples of permissible external aids to interpretation: the additional background material found in published documents, such as a government White Paper, the explanatory notes published with a Bill, answers given to written parliamentary questions, issues explored by Select Committees, reports made and statistics collected (at paras 56, 118, 142). However, their Lordships unanimously rejected the Court of Appeal’s reliance on the record of parliamentary debates on the ground that it involved ‘questioning’ what is said in Parliament contrary to Art 9 of the Bill of Rights 1689,⁴² though drawing a clear distinction between that and the enquiry for incompatibility which the courts were bidden to conduct by s 4 of the Human Rights Act 1998 (at paras 65, 116, 141. See further below, para 3.09). In relation to the CCA, perhaps the most well-known external aid is the Crowther Report upon which it was based (see para 5.03); and its intention to protect consumers has been said to justify a purposive approach to interpretation.⁴³

The interpretation of uniform statutes enacted or authorised by Parliament and derived from treaties or similar arrangements, e.g. EU Directives, is another matter entirely. In part, this is because these are more likely to be drafted according to the Continental, rather than the English model: indeed, especially in statutory instruments, there may simply be a copy-out by the English language version of Directives more or less verbatim, e.g. the Unfair Terms in Consumer Contracts (UTCC) Regulations (see para 11.12, *et seq.*) although it is not necessary to do so (see Art 249: see para 1.03A). Even in such cases, English courts could adopt their traditional English approach to interpretation, though perhaps at the risk of defeating the harmonisation intent lying behind the enactment.⁴⁴ In part, it seems

39 See respectively the following final Law Commission Reports: *First Report on Exemption Clauses* (Law Com No. 24, 1969); *Implied Terms in Contracts for the Supply of Goods* (Law Com No. 95, 1979).

40 Compare *Stevenson v Rogers* (set out at para 14.04); *R & B Customs Brokers Ltd v United Dominions Trust Ltd* (see para 18.18). See generally Atiyah (1985) 48 MLR 1.

41 At para 60, citing *Pepper v Hart* [1993] AC 593, HL. See also Lord Hope (at para 113); Lord Hobhouse (at paras 139–40) also noted the undesirable waste of resources involved.

42 Lord Nicholls at para 53; Lord Hope at paras 111, 116–7; Lord Hobhouse at para 143; Lord Scott at para 173; and Lord Rodger at para 178. See also Kavanagh (2005) 121 LQR 98.

43 *Broadwick Financial Services Ltd v Spencer* (set out at para 8.22), *per* Dyson LJ at para 21. In *OFT v Lloyds TSB* (see para 16.11), the CA looked at the long title of the CCA (at paras 18 and 76) and the Crowther Report which preceded it (at para 55: see para 5.03); whilst at first instance Gloster J adopted a purposive approach to interpretation (para 23) and mentioned the anomalies which might arise if four party transaction were not included in the CCA (para 33).

44 Unless such an approach is expressly excluded (e.g. CPA, s 1(1): see para 17.24). See generally Mann (1983) 99 LQR 376.

to follow from the ECA⁴⁵ and from a modern rule of interpretation applied by UK courts to try to interpret national legislation, where possible, consistently with EU rules.⁴⁶

[1.05] Criminal statutes. Here, the matter of interpretation is further complicated because, particularly in recent years, Parliament has sought to put more effective teeth into its consumer protection statutes by imposing criminal sanctions for breach of their provisions in such profusion as almost to overshadow the civil law.⁴⁷ Some of these statutes, such as the Trade Descriptions Act 1968 (TDA) impose only criminal sanctions for breach of their provisions (s 35: set out at para 10.19); and it is a well-known maxim that penal provisions are to be interpreted restrictively in favour of freedom of the subject.⁴⁸ Yet this will not necessarily preclude the courts from looking at the mischief in need of a remedy⁴⁹ though such an approach has been explicitly rejected with regard to the CCA.⁵⁰

Indeed, the CCA not only forbids the parties from contracting out of its provisions (s 173: see para 18.11), but contains a mixture of civil and criminal sanctions, sometimes even in respect of the same prohibited conduct⁵¹ and expressly limits the sanctions to those specifically provided in the Act (s 170: see para 10.19). Yet another approach is to be found in the CPA, where some whole topics are regulated by civil obligations and others by criminal sanctions.

Finally, there must be borne in mind the possible effect on consumer protection statutes of the Human Rights Act 1998 and the 'convention rights' it introduces (see para 3.09A). Suppose the courts are faced with a UK statute or statutory instrument inconsistent with convention rights, whether passed before or after the 1998 Act. First, the 1998 Act requires the court to give effect to the consumer protection statute in a way that is compatible with convention rights 'so far as it is possible to do so'.⁵² Second, it will try to do so even if this is inconsistent with a previous Court of Appeal interpretation.⁵³

The basic categories of contract utilised to effect a consumer supply of goods (see para 1.03) are sale, hire and hire purchase (hp), all discussed below. Into which of these categories a particular transaction falls is a matter of substance, not form: see *Forthright Finance Ltd v Carlyle Finance Ltd* (set out at para 1.22).

45 S 2(4) and see *Three Rivers D C v Bank of England (No. 2)* [1996] 2 All ER 363; *U v V* [1977] Eu LR 342 (not a sale case; Hansard admitted).

46 E.g. UTCC Regs, reg 7; Enforcement Orders (see para 6.06). See also Maltby (1993) 109 LQR 301.

47 See Borrie, *The Development of Consumer Law and Policy* (1984), 45.

48 E.g. *Davies v Sumner* (set out at para 4.03A). See generally, Glanville Williams, *Criminal Law, The General Part*, 2nd edn, para 76; per McNeil J in *Miller v FA Sadd & Son Ltd* (set out at para 4.05) at 270c; per Ormrod LJ in *Westminster CC v Ray Allen (Alanshops) Ltd* [1982] 1 All ER at 774B.

49 *Attorney General's Reference (No. 1 of 1988)* [1989] 2 All ER 1, HL (insider trading); *R v Deegan* [1998] 2 Crim App R 121, CA (flick-knives); *Interfact Ltd v Liverpool CC* [2005] 1 WLR 3118, DC at para 19 (videos).

50 See *National Westminster Bank v Devon CC* (1996) 13 Tr LR 70, DC, esp. per Kennedy LJ at 75D; *Coventry City Council v Lazarus* [1996] CLY 1165. But compare *Scarborough BS v East Riding of Yorkshire CC* [1997] CCLR 47, DC.

51 E.g. entering into consumer credit agreements whilst an unlicensed trader: CCA, ss 39, 40. These provisions are discussed at para 6.28.

52 S 3(1). E.g. *Wilson v First County Trust Ltd* in the CA (set out at para 9.20).

53 See Emmerson (1999) 149 NLJ 1899 at 1900.

DEFINITION OF A CONTRACT OF SALE

Sales in general⁵⁴

[1.06] Introduction. The contract of sale is defined by s 2 of the SGA,⁵⁵ and Chalmers suggests that this definition is merely declaratory of the common law (see s 62(2)). Traditionally, the contract of sale was rigidly distinguished from several other contracts which it resembled, but which had their own common law rules (see para 15.21, *et seq.*). Yet the distinction should not today be over-emphasised for the following reasons:⁵⁶

- (a) As the SGA 1893 was supposed to be a codification of the common law, the latter's rule for the analogous transaction may well be the same as the comparable SGA rule.⁵⁷
- (b) There is a modern tendency to enact statutory provisions for all transactions for the supply of goods which are virtually identical with those applicable to sales of goods: this has already happened in relation to the statutory implied terms in hire-purchase agreements in the SOGIT 1973 (see Chaps 12–16), the statutory restrictions on exclusion clauses in the Unfair Contract Terms Act 1977, ss 6–7 (see further Chap 18) and the statutory implied terms in quasi-sales and simple hirings in the SGSA (see further Chaps 12–16).
- (c) There are a number of hybrid transactions which involve elements of both sale and an analogous transaction, e.g. sale and fitting of a carpet, installation of central heating, sale of patented goods under licence. *Prima facie*, the following analyses would appear possible: (i) there is a single contract, which may be categorised according to the predominant aspect;⁵⁸ (ii) there are two separate contracts, one of sale, and the other of, e.g. labour; (iii) there is a single hybrid contract, partly of sale or quasi-sale (see para 2.10) and partly of, e.g. labour⁵⁹ or hiring.⁶⁰ See further, para 15.26.

[1.07] Definition. Like most commercial law statutes, the SGA contains a definition section which describes the ambit of the Act (s 2), what may be termed its 'gateway'. A contract of sale is defined by s 2(1) of the SGA as follows:

54 See generally Atiyah, *Sale of Goods*, 11th edn, 2005; Benjamin's *Sale of Goods*, 6th edn, 2002; Blackburn on *Sale*, 3rd edn, 1910; Chalmers, *Sale of Goods*, 18th edn, 1981; Chitty on *Contracts*, 28th edn, 1999, Vol 2, Chap 41.

55 For the sale contracts to which the 1979 Act applies, see para 1.01; and for the definition of sales, see para 1.07.

56 Certain contracts for the supply of goods must still be evidenced in writing: see para 9.02.

57 E.g. *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, HL (implied term as to fitness in the unamended SGA); and see further paras 15.24–5.

58 E.g. *Vigers v Cook* [1919] 2 KB 475, CA (funeral); *Dawson (Clapham) Ltd v Dutfield* (set out at para 2.10—sale); *Young & Marten Ltd v McManus Childs Ltd* (analogous transaction); *Common Services Agency v Purdie and Kirkpatrick* 1995 SLT (Sh Ct) 34 (photocopier rented at cost per copy).

59 E.g. *Watson v Buckley* [1940] 1 All ER 174, at 179–180. See further below, para 2.05; Atiyah, *Op. cit.*, 9; and generally Gearty (2002) 118 LQR 248. But see para 1.07. As to quasi-sale, see fn 73 para 2.10.

60 E.g. *The Saint Anna* [1983] 2 All ER 691 (charterparty held to include sale of oil on board at commencement of charter).

‘A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.’

This definition requires that *all* the following components should be present before a transaction passes through the gateway and falls within the SGA.⁶¹

1. *A contract.* The Act makes no attempt to interfere with the ordinary rules concerning the formation of contracts governed by English law. It just requires that there should be a contract (see Chap 10). But, even this apparently simple requirement may give rise to problems. *First*, what is the position of drugs supplied under the NHS? As between dispensing chemist and the patient there would appear to be no contract at all;⁶² but would the court imply analogous terms as to the quality of the drugs supplied?⁶³ *Second*, account must be taken of the modern practice of franchising, which may make it difficult for the consumer to determine the identity of his retail supplier.⁶⁴ Even if the consumer is aware that he is dealing with a ‘franchise’, the expression covers a wide variety of business arrangements, including business-format franchising⁶⁵ and licences to supply⁶⁶ or to occupy premises. The fact situation may vary between (a) an entirely independent business-concession, e.g. shop-within-a-shop or a market hall, (b) a joint operation between the owner of the premises and the franchiseholder, and (c) the latter as a mere promoter of stock owned by the tenant of the premises. Is it significant who remunerates the salesman? *Third*, there is the problem of ‘free gifts’ (see below). *Fourth*, the parties may *prima facie* assign their contractual rights (see para 7.16).
2. *Made in respect of ‘goods’.* The meaning of the term ‘goods’ will be dealt with later (para 2.01 *et seq.*). However, the insistence on a supply of ‘goods’ distinguishes a sale of goods from a supply of services (see para 2.05). Nor is a contract for the supply of services turned into a sale of goods just because under that contract the general property in some goods is incidentally transferred from one to another.⁶⁷ There should also be distinguished pyramid sales (see para 1.09).
3. *To transfer the ‘property’ in those goods.* The object of the contract must be to transfer the property in those goods (see para 1.08) from seller to buyer (see para 1.09), delivery not being an essential element. Thus, the Act provides that

61 Can a contract fall within the SGA definition where it contains all these elements, plus some additional ones, e.g. installation? See para 1.06.

62 *Pfizer Corp v Ministry of Health* [1965] AC 512, HL (see further, para 4.29). *Contra* drugs supplied under private prescription, where a price is paid. The presence or absence of a retail supply contract may have implications for product liability: see paras 17.04 and 17.24. As to the supply of electricity, see para 3.07.

63 See para 15.25; and further Atiyah, *Sale of Goods*, 10th edn, 9; Treitel, *Law of Contract*, 11th edn, 97, fn 91; Woodroffe, *Goods and Services—The New Law*, para 2.06; and below, para 4.29.

64 As to franchising, see [1986] JBL 206. For the control of franchising by competition law, see para 2.13.

65 This type of franchising involves the sale of business knowledge and experience, coupled with a licence to use or sell a particular product, brand name, logo etc. See also para 1.09.

66 The supply may be of goods, e.g. motor trade distributorships, or of services, e.g. credit card franchises (see para 7.09).

67 E.g. *Appleby v Sleep* [1968] 2 All ER 265, DC (supply of drugs under NHS: see further para 4.30).

‘“Sale” includes a bargain and sale as well as a sale and delivery’ (s 61(1))⁶⁸ and sharply distinguishes between the contract and the transfer of property in the goods (see para 1.10).

4. *In exchange for the price.* Section 2(1) requires that the transfer of property be for ‘a money consideration, called the price’. The concept of price is considered later (see para 2.06). Property and price must be exchanged, though not necessarily simultaneously (s 28: see para 23.22). Further, one who merely finances a sale by provision of the price does not thereby become a buyer of the subject-matter.⁶⁹ Normally, the insistence on consideration will clearly distinguish a sale from a gift (see para 2.08), though there may be difficulties in drawing the borderline in respect of so-called ‘free gifts’, and under the Unsolicited Goods and Services Acts 1971–5 the recipient of unsolicited goods may treat those goods as a gift rather than the offer to sell that their supplier intended (see para 8.18). Moreover, the requirement that the consideration for a sale be money, termed the ‘price’ (see para 2.06), distinguishes a sale from a barter or exchange (see para 2.10).

[1.08] The object of the contract. The substance of the contract⁷⁰ must be ‘to transfer the property in goods’ from the seller to the buyer, though the SGA does not insist on an immediate transfer of property (see para 1.10). The Act provides that ‘property’ means ‘the general property in the goods, and not merely a special property’.⁷¹ However, the general property in the goods is not always the most important consideration. Thus, the Act distinguishes between property and title (see Chap 19), and sometimes allows a person to pass a good title even though he does not possess the property in the goods (see Chap 21). Moreover, the Act contemplates that the parties may contract out of the implied obligation on the part of the seller that he will transfer a good title.⁷² Particularly after the SOGIT in 1973 imposed obligatory implied terms as to title, there was a very real problem with regard to whether or not a contract which purported to oust completely the implied undertakings as to title was a contract for sale of goods at all.⁷³ However, the importance of this issue was lessened by the SGSA: if such a transaction is not a sale of goods, it may be an analogous transaction (quasi-sale) within the later Act.⁷⁴

The insistence of the SGA on at least an agreement to transfer the general property in goods (see para 1.10), combined with its evident indifference as to whether there is any transfer of possession (see para 1.07), is underlined by s 62(4) (see para 1.02). Thus, there must be distinguished from sale all the following:

68 And see *Watts v Seymour* [1967] 2 QB 647, DC.

69 *Ebeling v Theo & Jos Van Der Aa, SA* [1955] 2 LIR 641. For financing of price, see further, paras 2.20–4.

70 *Contra* where the ‘goods sold’ are a mere token: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, HL (gambling chips). Are the chips a form of money (see para 2.02)?

71 S 61(1). As to ‘special property’, see below. This emphasis of English sales law on the passing of property has been described as ‘obsessional’: Goode, *Commercial Law*, 3rd edn, 194.

72 It will be argued later that the Act only insists that the seller promises to transfer the general property in the goods to the buyer insofar as he is able to do so: see para 12.17.

73 See the dispute between Preston and Carr: (1974) 37 MLR at 599–600. If the transaction could not be classed as a sale of goods, then it appeared to escape the statutory prohibition against contracting out of the implied terms as to title.

74 See para 2.10. *Quaere* whether SGSA, s 1 is subject to this same limitation as s 2 of the SGA?

- (a) *Bailments*, e.g. hirings, where the essence of the transaction is the transfer of possession whilst the bailor retains the general property in the goods (see para 1.17).
- (b) *Security transactions*, where the secured party will have something less than the unfettered general property in the goods.⁷⁵ But this exception does not include a sale with a reservation of title,⁷⁶ nor a genuine sale rather than a charge.⁷⁷

[1.09] The parties. The essence of a sale is the transfer of the property in goods from one person (the ‘seller’) to another (the ‘buyer’).⁷⁸ Indeed, the common law rule was that a man could not purchase his own goods;⁷⁹ but this would seem to be amended to the extent that the Act allows one part-owner to sell to another.⁸⁰ Moreover, it is clear that the SGA will cover the situation where an owner of goods buys them back from one who has a legal right to dispose of them, such as a court Enforcement Officer (see paras 19.15–6). The requirement seems to be that the buyer must stand to gain some part of the general property in the goods from the seller; and for this reason it is essential to distinguish carefully a contract of sale from a contract of agency—one who sells from one who acts as an agent in effecting a sale.⁸¹ Thus a franchise to sell goods may create just an agency, to which the SGA is inapplicable,⁸² with separate contracts for the sale of goods made within that regime.⁸³ Alternatively, a franchise agreement may itself provide for the supply of goods to the franchise-holder (distributor).⁸⁴ One particular variant of franchising is pyramid-selling.⁸⁵ Such direct selling of goods, also known as ‘Network Marketing’, can be a legitimate form of self-employment, whereby participants earn both by recruiting other participants and selling goods to end-users. Unfortunately, such form of business can also be used to fleece participants, as where a participant’s earnings

75 With a lien he will have only possession, with a pledge he will have possession plus a special property; and with a mortgage or charge his general property will be subject to an equity of redemption: see para 25.02.

76 *Armour v Thyssen* (set out at para 20.28).

77 *Welsh Development Agency v Export Finance Co Ltd* [1992] CLY 2541, CA; and see generally para 25.33.

78 According to s 61(1), ‘“seller” means a person who sells or agrees to sell goods’ and ‘“buyer” means a person who buys or agrees to buy goods’.

79 Atiyah, *Sale of Goods*, 10th edn, 30, citing cases on the old liquor licensing Acts (see generally para 6.05).

80 S 2(2). As to whether a sale by a part-owner of his interest is a sale of goods, see para 20.22A.

81 *AMB Imballaggi Plastici SRL v Pacflex Ltd* [1999] 2 All ER (Comm) 249, CA. There may be practical difficulties, as where the alleged agent is a commission agent, or a *del credere* agent (one who guarantees performances by his principal), or acts in both capacities (e.g. mail order catalogue agent). Cf. *Potter v Customs and Excise Comrs* [1985] STC 45, CA (Tupperware parties); comp-u-card (1985 *Which?* 3).

82 E.g. *B Davis Ltd v Tooth & Co Ltd* [1937] 4 All ER 118, PC. See also Murdoch (1975) 91 LQR at 365; and generally, para 1.07.

83 *Rose and Frank Co v Crompton Bros* [1925] AC 445, HL (franchise agreement prevented from being a contract by the ‘honourable pledge clause’: see generally, para 10.01).

84 *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 217, CA, esp. *per* Salmon LJ at 222.

85 The principal legitimate trade body is the Direct Selling Association, which has its own Code of Practice (see para 3.13). Distinguish direct selling from franchising (see para 1.07).

depend almost entirely on his recruitment of others. Attempts to control such abuses were first introduced in Part XI of the FTA; but, this proving inadequate, its provisions have been bolstered by the Trading Schemes Act 1996. These controls are based on the widely defined 'trading schemes' (FTA, s 118 (as substituted)); on the power to make detailed regulations controlling such 'trading schemes';⁸⁶ and on the imposition of a number of criminal sanctions on scheme promotions.⁸⁷ In 2007, these rules for trading schemes may be overtaken by the UCP Directive (see below, para 4.20, item (j)).

[1.10] Contract and conveyance. It has already been pointed out that the two elements of *contract* and *conveyance* are both present in the one transaction of a contract of sale (see para 1.07). Indeed, the Act uses different terminology according to whether or not the property has passed under the contract. Section 2 says:

- (4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.
- (5) Where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called 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'.

Thus, a sharp distinction is drawn between a sale and an agreement to sell: the one is an executed contract, the other executory.⁸⁸ The distinction is important, because the executory contract creates only personal rights between the parties whereas an executed contract gives the buyer an interest in the goods themselves.⁸⁹ Where it is convenient to avoid making such a judgment it is normal to use some neutral expression such as 'contract of sale'.

[1.11] Absolute and conditional sales. Section 2(3) of the SGA recognises that 'A contract of sale may be absolute or conditional'. 'Conditional' in this subsection does not refer to conditions in the sense of essential promises in the contract (see para 11.04), nor usually to conditions precedent to the existence of the contract (see para 15.21), but to conditions precedent or subsequent to *performance* of the contract itself.⁹⁰

(a) *Conditions precedent.* These may suspend the passing of the property in the goods which are the subject-matter of the contract⁹¹ until some act is performed either:

86 See the Trading Schemes Regulations, 1997 SI 30 (as amended), set out in Thomas, *Encyclopedia of Consumer Law*, Pt 2, para 1712, *et seq.*

87 FTA, ss 120 (1) (as amended), 120 (2), 122. There are the usual enforcement arrangements (see Chap 28), with special defences for an innocent advertiser or supplier (see para 28.16). Such schemes may also attract injunctions: OFT, *AR-2006/7*, 27.

88 For examples of the use of the dichotomy between 'sale' and 'agreement to sell', see SGA, ss 5(3), 6, 7.

89 For further consideration of the conveyancing effect of the contract, see Chap 19.

90 E.g. *Bentworth Finance Ltd v Lubert* (set out at para 15.23); *Financings Ltd. v Stimson* (set out at para 10.08).

91 The condition is normally precedent only to performance, but it could go further and be precedent to formation of the contract itself: see generally, para 15.21.

- (i) *by one of the parties.* This act may be a conditional performance,⁹² but need not necessarily be so;⁹³ and the contract may make that act precedent to performance by the other party either expressly⁹⁴ or impliedly.⁹⁵
- (ii) *by some third party.* Thus, in *Marten v Whale*:⁹⁶

M agreed to buy a plot of land from T, subject to M's solicitor's approval of title; and, in consideration of this agreement, T agreed to buy M's car. T took possession of the car 'on loan' and sold it to a *bona fide* purchaser. Subsequently, M's solicitor disapproved T's title to the land.

The Court of Appeal held that the two sales were interdependent, so that there was a conditional sale of the car within s 2(3); and that, even though the condition had never materialised, T was able to pass a good title as a buyer in possession (see para 21.46).

- (b) *Conditions subsequent.* In *Total Gas Marketing Ltd v Arco British Ltd*⁹⁷

A operated a North Sea oilfield and T refined petrol from several such oilfields. A and T entered into an agreement for T to buy A's oil as from a given date. This agreement was made conditional on A before that date becoming party to an allocation agreement with other oil producers for the commingling of their oils at T's delivery terminal. By the given date, A had not entered into such an allocation agreement. T argued that this entitled him to terminate his agreement with A; but A claimed that their obligations under the contract were merely suspended until A entered the allocation agreement.

The House of Lords held that, particularly because A's entry into the allocation agreement was to happen before first delivery (see below, para 23.25), it was clearly intended to be a contingent condition; and A's failure to do so meant that T was no longer bound by the contract. Examples of such conditions subsequent in the retail trade may include some situations where the supplier grants an unfettered right to return goods without cause,⁹⁸ or direct financing where there is an initial contract of sale between dealer and consumer (see para 10.09).

One particular form of contract of sale whose performance is conditional is that where the seller's duty to transfer the *property* in the goods is made conditional upon the buyer's prior observance of all the terms of the agreement; and, in particular, his payment by instalments of part or all of the price. So common has this situation become that there has developed a tendency to describe only such situations as a 'conditional sale': they are dealt with below (see para 1.14).

92 E.g. *Trans Trust SPRL v Danubian Trading Ltd* (see para 27.35); or the type of 'conditional sales' considered below, para 1.14.

93 E.g. certificates of quality and inspection (see para 14.02); some prize competitions (see para 8.16).

94 E.g. the type of 'conditional sale' considered below in para 1.14.

95 E.g. a sale of goods not then in a deliverable state: see the SGA, s 18, r 2 (para 20.11).

96 [1917] 2 KB 480, CA: see further, paras 15.21 and 21.46.

97 [1998] 2 Lloyd's Rep 209, HL, where obligation to enter the allocation agreement was termed a 'contingent condition or a condition precedent'. See also Smith & Thomas, *Casebook on Contract*, 11th edn, 2000, 424.

98 For further discussion of express rights of cancellation, see para 10.28; and for sale or return transactions, see para 20.23, *et seq.*

Instalment sales

[1.12] Introduction. The parties may enter into a contract (commonly by retail) which, whilst satisfying the definition of a contract of sale above considered, differs from an ordinary sale in some fundamental characteristics. *First*, it provides for payment of the price by (normally approximately equal) instalments and usually after an initial deposit. *Second*, it may oust the ordinary presumption that delivery and payment are concurrent terms (SGA, s 28: see para 23.16), providing for early delivery and subsequent payment of the price by instalments.⁹⁹ *Third*, the transactions are normally conducted by way of standard-form contracts.¹⁰⁰ Since 1938, the legislature has recognised that such sale contracts have much in common with hire-purchase (hp) agreements,¹⁰⁰ and accordingly the Hire Purchase Act 1938 (HPA 1938) sought to extend some hp controls to such sales. The Hire Purchase Act 1964 (HPA 1964) introduced a further refinement:¹⁰¹

- (1) *Conditional sales.* Where the contract suspended the passing of property until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled, the transaction was to attract almost all the restrictions applicable to hp (see para 1.14).
- (2) *Credit sales.* Where the property passed at latest on delivery, it attracted only a few of the restrictions (see para 1.13).

The result of this momentous innovation was as follows: henceforth, the crucial distinction in consumer instalment transactions was frequently no longer whether the customer had agreed to buy at the outset, but whether the property passed on, or before, delivery. Unfortunately, the position was not quite so simple as this.¹⁰² Subsequently, the distinction between conditional sale and hp has begun to break down: see *Forthright Finance Ltd v Carlyle Finance Ltd* (set out at para 1.22).

[1.13] Credit sales. Where the property in goods passes on or before delivery, the buyer clearly has a good title which he can pass to another under the *nemo dat* rule (see para 19.11), or which might fall into his insolvency (see para 19.23). For the purpose of the statutory control of instalment contracts, the HPA 1938 (since replaced) introduced a category now termed a ‘credit sale agreement’ and defined in the CCA as:¹⁰³

‘An agreement for the sale of goods, under which the purchase price or part of it is payable by instalments, but which is not a conditional sale agreement’.

However, the purpose of this definition is not clear as the term ‘credit sale’ nowhere features in the body of the CCA, though it figures in Sched 2.¹⁰⁴ On the other hand, many ‘credit sales’ will amount to regulated consumer credit agreements (see

⁹⁹ Distinguish instalment deliveries and matching payments where the rule in s 28 of the SGA is observed. For instalment contracts, see para 23.23, *et seq.*

¹⁰⁰ For argument that, until the conditions are fulfilled, a conditional sale is a type of bailment, see para 1.14.

¹⁰¹ The HPA 1938 was itself consolidated in the HPA 1965: see para 1.24.

¹⁰² See Macleod, *Consumer Sales Law*, 1st edn, para 1.12.

¹⁰³ See s 189(1). These agreements may be constituted by two or more documents: s 189(4). See also the Health and Safety at Work Act 1974, s 53; and CPA, s 45(1).

¹⁰⁴ Example 5. As to the effect of these statutory examples, see para 5.06.

para 5.19), in which case they will be subject to restrictions as to the following matters: seeking business¹⁰⁵ and antecedent negotiations,¹⁰⁶ entry into the agreement,¹⁰⁷ cancellation;¹⁰⁸ during the currency of the agreement;¹⁰⁹ guarantees and indemnities;¹¹⁰ preliminary notices before enforcement;¹¹¹ death of the buyer;¹¹² negotiable instruments;¹¹³ and extortionate credit bargains (CCA, ss 137–40: see para 29.40). But, to save imposing burdens on suppliers out of all proportion to the monetary amounts involved, the provisions as to entry and cancellation do not apply to small agreements.¹¹⁴

Conditional sales¹¹⁵

[1.14] Introduction. This paragraph is concerned with the situation where there is an instalment sale (see para 1.12) which satisfies the definition contained in the SGA (see para 1.07) but also contains a reservation of the property in the goods—usually until payment of the full price. In such circumstances, unless and until that condition is satisfied, the buyer obtains no general property in the goods to transfer to another,¹¹⁶ whether for value (see para 1.15), or upon execution, bankruptcy or distress (see para 19.15, *et seq.*). Not only will the property remain in the unpaid supplier,¹¹⁷ but the deposit¹¹⁸ and payment terms will normally be arranged to confer throughout the contract a ‘residual value’ on the buyer.¹¹⁹ The contract may also include two further provisions. *First*, in the event of the buyer’s default, the seller would be granted an express right to recover possession of the goods (see below), which might be exercised either just to encourage the buyer to make good his default, or to enable the seller to resell the goods to recoup his loss;¹²⁰ and any such resale should be free of any interest of the buyer in the goods.¹²¹ *Second*, to

105 CCA, ss 43–47: see further, para 8.21, *et seq.*

106 CCA, s 56: see further, para 16.08.

107 CCA, ss 55, 60–63: see further, para 9.06, *et seq.*

108 CCA, ss 67–73: see further, para 10.29, *et seq.*

109 CCA, ss 77, 81, 82, 94–97: see further respectively, paras 15.17, 15.16, 26.22 and 26.19.

110 CCA, ss 105–113: see further, paras 25.11–13.

111 CCA, ss 76, 89, 98: see further, paras 24.28–32 and 26.10.

112 CCA, ss 86(2): see further, para 24.47.

113 CCA, ss 123–125: see further, paras 25.08–9.

114 CCA, s 74(2). For ‘small agreements’, within the CCA, see para 5.17.

115 See generally Melville (1974) 124 NLJ 615; Jones, *Chattel Mortgages*, 6th edn, 1933, Chap 19; Goode, *Commercial Law*, 3rd edn, 709–13.

116 Whilst the buyer is in possession before the passing of property, it has been pointed out that the transaction is a form of bailment: Jones, *ibid*, para 932; and the *Romalpa* case (see para 25.29). *Contra* Bridge LJ in *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 at 35D.

117 The commercial principle is the same for hp: see para 1.20. The supplier’s security in an unregulated agreement is ultimately recaption and resale: see para 27.02. For restrictions in respect of regulated agreements, see para 24.27, *et seq.*

118 The size of the deposit will normally be calculated to cover at least the drop in value on supply of the goods, e.g. the market price drop from new to second-hand.

119 See para 27.12. As to the supplier’s interest in the goods, see para 24.22.

120 E.g. *Hewison v Ricketts* (set out at para 27.19).

121 Because the buyer (unlike a mortgagor: see para. 1.08) has no equity of redemption: see para 24.22.

preserve the market value of this right of repossession and resale, the agreement would contain provisions for the maintenance of the goods (see para 11.08).

Licences to seize. For some time, there were anxieties that this licence for the seller to repossess the goods (see para 1.14) might bring the transaction within the purview of the Bills of Sale Act 1882, which rendered void almost every chattel mortgage by an individual which was not in the statutory form (see para 25.26); and, as the statutory terms did not provide adequate security, creditors would normally seek to avoid the Act altogether.

However, in *McEntire v Crossley Brothers*,¹²² the House of Lords held that such a conditional sale did not fall within the 1882 Act because Crossley as owner was not *granting*, but *reserving*, a licence to seize (see para 25.27). As we shall see later, this distinction is important for English law (see para 25.01); but it should be noted that US law has long foresworn such sophistry, treating conditional sales as a type of chattel mortgage.¹²³

Fortunately, proposed reform of the English chattel mortgage law may remove entirely this arcane branch of the law, first from company law and then generally (see paras 25.28; 25.38).

[1.15] Dispositions by the buyer. Whilst the reservation of property by a conditional seller was a sensible first step to protect him against non-payment by the buyer (see para 1.14), an ever-present danger was that the conditional buyer might contract to dispose to a third party either of (i) the title to the goods or (ii) his interest in them.

1. *Dispositions of title.* Suppose the conditional buyer sold or pledged the goods to a *bona fide* third party. It is true that, because the conditional buyer did not himself have a good title to the goods, as a general rule he could not pass one to that third party: this is because of the *nemo dat* rule (see para 19.11). However, he may be able to pass a good title to a *bona fide* purchaser or pledgee by way of one of the following exceptions to the *nemo dat* rule:

(a) Buyers in possession (see para 21.43). The matter was litigated in *Lee v Butler*:¹²⁴

Under an agreement made with a furniture dealer (A), B was to take immediate possession of some furniture in return for a promise to pay 'as and by way of rent' £1 on May 6th and £96 on the following August 1st. *Inter alia*, the agreement provided that, if B removed the goods, A might repossess them, and all sums previously paid should be appropriated to rent only; but, if B performed all the terms of agreement, the rent should cease, and the goods should then, but not before, become the property of B. Before all the instalments were paid, B sold the furniture to a *bona fide* purchaser (bfp). The Court of Appeal found that B had 'agreed to buy' the furniture, and therefore passed a good title to the bfp under s 9 of the Factors Act 1889.

It was, of course, to meet this threat that the hp form of agreement was invented (see para 1.20), though subsequent case law has cast doubts on the

122 [1895] AC 457, [1895–6] All ER Rep 829, HL. See further Macleod, *Consumer Sales Law*, 1st edn, para 1.14A.

123 See Jones, *Chattel Mortgages*, 6th edn, 1933, Chap 19; and below, para 1.26.

124 [1893] 2 QB 318, [1891–4] All ER Rep 1200, CA.

ambit of the threat.¹²⁵ Nevertheless, it was thought that conditional sales had so much in common with hp agreements that this case-law distinction between the two types of contract was therefore partially destroyed by statute (see para 1.12): where a conditional sale falls within the CCA definition (see para 1.16) but not otherwise, the buyer is deemed not to be a person who has 'agreed to buy' within the meaning of s 9 (see para 21.46).

- (b) A further limited exception to the *nemo dat* rule was created for dispositions of motor vehicles to 'private purchasers' (see para 21.55) made by one who was a conditional buyer or a hirer under an hp agreement (see para 1.22). In neither case does it matter whether or not the agreement is regulated by the CCA 1974 (see para 5.13).

Recognising that there will be some circumstances where a reservation of property may be insufficient to defeat the claim of a *bona fide* purchaser or pledgee to whom the conditional buyer has transferred the goods, the unpaid conditional seller may at this point attempt to transfer his claim to (or 'trace') the proceeds of that disposition (see para 27.14).

2. *Dispositions of his interest.* Suppose the conditional buyer (Z), instead of trying to dispose of a good title to the goods (see above), instead merely attempts to assign his interest in them to X.¹²⁶ He has contractual rights under the conditional sale; namely, to present possession of the goods and later acquisition of the property in them.¹²⁷ The result of such an assignment would be that X (the 'assignee') would *prima facie* 'stand in the shoes of' Z (the 'assignor'), taking over his position as conditional buyer (see para 2.22).

[1.16] Statutory definition. For the purposes of the statutory control of instalment contracts, there was introduced in 1964 a category termed a 'conditional sale' and now defined by the CCA as:¹²⁸

'an agreement for the sale of goods or land under which the purchase price or part of it is payable by instalments, and the property in the goods or land is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods or land) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled'.

Typically, the contract will provide that the property is not to pass until the whole of the purchase price has been paid.¹²⁹ Further, it should be noted that the definition

125 See *Newtons of Wembley Ltd v Williams* (set out at para 21.51). It has even been suggested that a transfer by one who has only agreed to buy cannot be a sale within s 2 of the SGA: *Re Interview* [1975] Ir 382 at 395. *Sed quare?* See further, para 21.49.

126 The rights of the conditional buyer may not be assignable: see the discussion of the similar issues which may arise with regard to a hirer under an hp agreement (para 1.23).

127 These contractual rights amount to a chose in action (see para 7.16), which may *prima facie* be assigned either in equity or under statute (see para 7.17, *et seq.*).

128 See s 189(1): these agreements may be constituted by two or more documents (s 189(4)). With the addition of a reference to land, this definition is taken verbatim from the HPA 1964, s 29(1). For an example, see Sched 2, Example 4. See also HPA 1964, s 29(1); SOGIT, s 15(1); CPA, s 45(1).

129 Suppose the agreement provides that the property is to pass when part of the price has been paid. When that point is reached, does it become a 'credit sale agreement,' (see para 1.13); does it cease to be a 'conditional sale agreement'?

has been extended to include conditional sales of land,¹³⁰ though this jurisdiction has been largely transferred to the FSA (see para 3.02).

However, the CCA is not applicable to all conditional sales within the foregoing definition: for the most part, the provisions of the Act extend only to regulated agreements (see para 5.13). Where there is a regulated conditional sale, it is subject to all the same statutory restrictions as a credit sale agreement (see para 1.13) plus the following: first, it has already been seen that a buyer under such a conditional sale is not one who has 'agreed to buy' (see para 1.15); and second, such conditional sales have been largely assimilated to hp agreements (see para 1.24), being subject to the statutory restrictions in respect of the buyer's death (CCA, ss 86, 128: see para 24.44/5), his default,¹³¹ his right to terminate¹³² and the seller's right to repossess (CCA, ss 87–93: see para 24.27, *et seq.*).

BAILMENT AND HIRING

[1.17] Bailment generally.¹³³ In English law, bailment is the transfer (delivery) of *possession* of goods by one person (the bailor) to another (the bailee) on condition, express or implied, that the goods shall be returned to the bailor (or dealt with according to his instructions) as soon as the purpose for which they were bailed is ended.¹³⁴ It is distinguished from sale by reason of the fact that the normal objective of a bailment is to effect a transfer of the *possession* of goods, whereas the objective of a sale is to effect a transfer of the *general property* in goods.¹³⁵ Exceptionally, under a bailment the bailee may acquire the property in the goods from his erstwhile bailor, as where there is a hire-purchase agreement (see para 1.20) or perhaps a sale or return transaction (see para 20.23); or the bailee may have the right to mix and substitute other identical goods, e.g. in a grain store.¹³⁶ Moreover, where under a contract for the sale of goods the property and possession of goods are for some time separated, as English law allows (see para 19.01), for that space of time there may also be a bailment: if possession passes before property, the buyer will be in possession as bailee of the seller,¹³⁷ whilst if the property passes before possession, the seller will be in possession as bailee of the buyer. The separation of property and possession under a contract of sale may have implications for risk (see para 22.08).

130 Conditional sales of land are uncommon: Goode, *Consumer Credit Law & Practice*, para 38.5. Distinguish mortgages of land, in respect of which the CCA restrictions are considered at para 25.23.

131 CCA, ss 87–89, 90–93, 129–136: see below respectively, paras 24.30, 24.34 and 24.39.

132 CCA, ss 99–100, 102–103: see below respectively, paras 26.05 and 26.04. But not in the case of land after title has passed to the debtor: CCA, s 99(3).

133 See generally *Chitty on Contracts*, 28th edn, Vol 2, Chap 32; Palmer, *Bailments*, 2nd edn; Bell, *Personal Property*, Chap 5. For argument that the concept of bailment is redundant, see McMeel [2003] LMCLQ 169.

134 Winfield and Jolowicz on *Tort*, 16th edn, para 1.12. Distinguish a mere contractual licence to park a caravan on a site: *Hinks v Fleet* [1986] CLY 151, CA.

135 For the duty of delivery in relation to goods sold, see para 23.03.

136 *Mercer v Craven Grain Storage Co* [1994] CLC, HL (see 111 LQR 10); and Bridge, *Sale of Goods*, 54–7.

137 As under a conditional sale: see para 1.14. Nevertheless, that bailment will cease when some later event causes the property in the goods to pass to the buyer: see para 25.20.

There are many everyday transactions of bailment, such as the deposit of goods for safe custody or storage, the leaving of goods for the purpose of cleaning or repair, the hiring out of goods (para 1.18), a pledge (para 25.15), the carriage of goods, a supply of software on licence.¹³⁸ Whilst the relationship between bailor and bailee is frequently based on contract (see para 1.18); this is not necessarily the case,¹³⁹ as where a carrier or repairer acts gratuitously (without consideration), or goods are delivered before contract (see para 10.09). Indeed, there may also be a bailment where the bailee sub-bails the goods in such a way that there is no contract of bailment between bailor and sub-bailee.¹⁴⁰ The rights of the bailor and bailee to sue a third party in respect of the wrongful retention, destruction of, or damage to, goods will be dealt with later (paras 19.04, 19.06 and 19.10); but, whichever of the two recovers, he may have a duty to account to the other to the extent of that other's interest in the goods.¹⁴¹ A bailee of goods from their apparent owner owes no duty of care in the tort of negligence to their true owner to investigate title, in the absence of anything to put him on enquiry.¹⁴²

[1.18] Simple hiring agreements. The English contract to hire chattels may be defined as one whereby the hirer obtains a right to use the chattel hired, in return for a consideration (see para 10.01) which is normally, but not necessarily, the payment to the owner money,¹⁴³ this usually being termed 'rent' or 'hire-rent'. The commercial world has developed the practice of describing simple hiring agreements by different appellations according to context,¹⁴⁴ of which the following are examples:

- (a) 'Charter' is the expression that has long been used in relation to the hiring of ships, and over the years a separate body of law has developed relating to charterparties which is beyond the scope of this work.¹⁴⁵
- (b) An 'equipment lease' is a contract between two commercial parties, lessor and lessee, giving the lessee possession and use of a specific asset on payment of rentals over a primary period: the lessor retains ownership of the asset, which will *never* pass to the lessee, unlike in hp.¹⁴⁶ Such leases are commonly divided according to whether or not the asset value is amortised (recovered) by the lessor over the primary period as: (i) finance (or full payout) leases,¹⁴⁷ are

138 *Watford Electronics Ltd v Sanderson CFL Ltd* (see para 18.21; unappealed point).

139 The obligations of the bailee to take care of goods is grounded in the tort of negligence: *Graham v Voigt* [1990] CLY 4310, Aust. See generally, Chap 17. Cf. involuntary bailees: para 8.18.

140 *The Pioneer Container* [1994] 2 AC 324, PC (see [1996] JBL 329). McMeel, *Op. cit.*, at 197–8.

141 *O'Sullivan v Williams* [1992] 3 All ER 385, CA.

142 *Marcq v Christie Manson & Woods Ltd* (set out at para 10.11), Tuckey LJ at para 50.

143 Distinguish sale of goods, where the consideration must be money: see para 1.07.

144 See Goode, *Hire Purchase Law & Practice*, 880–3; Soper & Munro, *The Leasing Handbook*, esp. Chap 19 for the terms of the leasing contract; Davies, *Equipment and Motor Vehicle Leasing and Hiring*.

145 'Large ticket' ship leases are properly 'demise charters'. As to the leasing of ships and oil rigs, see generally Soper & Munro, *Op. cit.*, 317–18.

146 See para 1.24. This ownership technicality is crucial for the tax-treatment of the two types of contract—particularly who is to claim the capital allowance of 'big-ticket' items (see below)—and as to the incidence of VAT between VAT-registered businesses.

147 See generally, Davies [1984] JBL 468; Goode, *Commercial Law*, 3rd edn, Chap 28; Soper & Munro *ibid.*, 58 *et seq.* 319–21 (vehicle fleet management).

the most common type and have much in common with conditional sales (see para 1.14), hire purchase (see para 1.20) and chattel mortgages;¹⁴⁸ (ii) operating leases.¹⁴⁹

- (c) '*Contract hire*' (or car leasing) is a specialised form of operating lease, used for self-drive fleets of motor vehicles, where the lessor undertakes some of the responsibility for the management and maintenance of the vehicles.
- (d) '*Rental agreement*' is the expression normally reserved for retail business and used in relation to the short-term hiring to private consumers of motor vehicles and the indefinite hiring of televisions, videos and furniture.

Leaving aside charterparties of ships, the common law rules are the same for all forms of simple hiring: basically, these will mostly be the same as for bailments generally (see para 1.17), of which simple hiring is but a species; but they may be varied or ousted by the terms of the contract of bailment and there will frequently be found a standard-form contract spelling out the obligations of bailor and bailee in considerable detail (see para 11.08)—and hence leaving little scope for the common law rules. Moreover, whilst the contract of hiring gives the hirer an interest which is *prima facie* assignable (see para 1.23), the absence of an option to purchase means that the hirer has no such interest in the goods which could be seized by way of execution or upon which distress can be levied;¹⁵⁰ and treatment of simple hiring agreements is likely to be materially different for the purposes of business taxation and grants. The terms statutorily implied in a 'contract for the hire of goods' in favour of the hirer will be dealt with later (see Chaps 12–15). Because the essence of a bailment is a transfer of possession (see para 1.17), the hiring, with its obligation to pay rent, does not commence until delivery and the bailee is *prima facie* under a duty to return the goods when the agreement is determined (see para 27.21).

Distinguish simple hiring from hp. Hire-purchase does, but simple hiring does not, include an option to purchase,¹⁵¹ though this apparently simple distinction has given rise to difficulty with perpetual hiring agreements (see para 1.24) and has a number of consequences. *First*, the exception to the *nemo dat* rule is applicable in respect of motor vehicles let on hp, though not under simple hiring agreements.¹⁵² *Second*, there are some differences in treatment as between simple hirings and hp as regards both minimum payment clauses (see paras 27.37 and 27.50) and the measure of damages in claims against the other party by a bailor (see para 27.31) or bailee (see para 29.25).

[1.19] Statutory definition. Relevant to this work, there are two different statutory definitions of bailment that are particularly important, depending on the purpose required.

148 Where there is an option to purchase, such transactions are sometimes termed 'industrial hp' or 'equipment leasing', or 'lease purchase', or 'personal leasing', regardless of legal niceties (see para 1.25). For sub-leasing, see para 1.17. Distinguish the (normally longer term) lease of land, governed by the law of real property: for fixtures, see para 25.23.

149 Such schemes are commonly used, together with a supply of services, for those types of goods which enjoy an active second-hand market, e.g. crane and driver; aircraft and crew, or for specialist equipment suffering high obsolescence rates, e.g. computers and software.

150 See Goode, *Hire Purchase Law and Practice*, 2nd edn, 633, 893.

151 The distinction may be vital: *Galbraith v Mitchenall Estates Ltd* (set out at para 27.21). For the option to purchase in hp agreements, see para 1.22.

152 As to the *nemo dat* rule, see para 19.11; and as to this exception thereto, see para 21.55.

1. For statutory implied terms in bailments, there is the definition to be found in the SGSA (see para 12.01A).
2. For statutory control of instalment contracts, there was introduced by the CCA a category termed 'consumer hire agreement' and defined (as amended in 2006) as:¹⁵³

'an agreement made by a person¹⁵⁴ with an individual (the hirer)¹⁵⁵ for the bailment or (in Scotland) the hiring of goods to the hirer, being an agreement which

- (a) is not a hire-purchase agreement (see para 1.24), and
- (b) is capable of subsisting for more than three months'.¹⁵⁶

This careful definition is aimed primarily at situations where a consideration is payable before the expiry of the bailment: typically, it will extend to periodic domestic rental/hire and the leasing of business equipment and vehicles (see para 1.18). Whether the lessor ('owner') is leasing office equipment to solicitors, medical instruments to doctors, plant and machinery to builders, cars to businessmen or television sets to consumers, the Act and regulations will broadly apply if the agreement is not exempt and the lessee or hirer is not a company. Some further points may be noticed about this definition. *First*, it relates only to goods let as such and does not extend to leases of land.¹⁵⁷ *Second*, whilst it clearly comprehends all the types of simple hiring agreements considered above, in England it would also appear to cover gratuitous bailments.¹⁵⁸ *Third*, since the 2006 Act it is no longer limited by the value of the rentals at the time the agreement is made.¹⁵⁹ *Fourth*, in *Dimond v Lovell*:¹⁶⁰

D was an innocent driver in a road traffic accident. Whilst D's car was being repaired, she hired a replacement, for a period which turned out to be eight days, from accident hire company (A) upon the following terms: the rental period must not exceed 28 days; D would not have to pay the hire charges immediately; instead, A was given authority to sue the negligent driver (L) and recover its charges from him.

In the House of Lords, the case primarily concerns consumer credit (see para 5.13), but in relation to whether the accident hire agreement amounted to a consumer hiring within the above definition, the Court of Appeal held as follows: s 15 was also capable of applying to a single period of hiring and where the charges were paid upon completion of the litigation against D many months later; but the

153 Ss 15(1), 189(1): these agreements may be constituted by two or more documents—s 189(4). E.g. see CCA, Sched 2, Examples 20, 24. See generally Palmer and Yates [1979] 38 CLJ 180.

154 Presumably, the draftsman used the expression 'person' to cover both leasing and sub-leasing. But he then appears to deal with the same point again in his s 189(1) definition of 'owner'. Cf. the description of the transferor under s 8 as 'creditor' (see para 5.19); and as to 'creditor', see further, para 5.25. For contracts governed by foreign law, see para 18.13.

155 For the meaning of 'individual', see below, para 5.24. 'Hirer' is defined by s 189(1). For discussion of the similar definition of 'debtor', see para 5.24.

156 *Dimond v Lovell* (below).

157 *Contra* conditional sales: see para 1.15. As to 'goods', see para 2.01. Does 'goods' include credit cards (see para 5.30)?

158 As to which, see para 1.17. Could this lead to the application of the CCA rules as between bailor and sub-bailee?

159 S 15(1)(c) of the 1974 Act was repealed by s 2(2) of the 2006 Act.

160 [1999] 3 All ER 1, CA (see [1999] JBL 452, at 454–8).

accident hire agreement fell outside s 15 because the bailment was not capable of subsisting for more than three months (s 15(1)(b)).

CCA provisions. Where a 'consumer hire agreement' does fall within the ambit of the CCA, in which case it is termed 'regulated' (see para 5.13), the legislature has sought to reduce the advantages to be derived from utilisation of this form instead of an instalment sale or hp agreement. Accordingly, the CCA has made applicable almost all the same restrictions as obtain in the case of credit sales (see para 1.13), except that the unfair credit bargain provisions do not apply to consumer hirings (see para 29.46). However, despite the similar retention of ownership of goods let on hire, it was not possible to utilise all the further rules in respect of conditional sales (see para 1.16). Instead, the CCA introduced separate provisions as follows: the hirer is granted a special, more limited right of termination (s 101: see para 26.07); and there are limited restrictions upon the owner's right of recaption,¹⁶¹ together with some financial relief to the hirer in that event (s 132: see para 27.50).

DEFINITION OF A CONTRACT OF HIRE PURCHASE¹⁶²

Development of the common law form

[1.20] **Background.** As will be seen below, the English contract of hire purchase (hp) started life as a form of sale, switched to a form of bailment towards the end of the nineteenth century, and has evolved into such a specialised form of bailment as now to be regarded as something *sui iuris*.¹⁶³

Hp is in economic terms (see para 1.14), but perhaps not in legal theory, a fiction:¹⁶⁴ historically, evolution consists of increasingly sophisticated attempts by legal draftsmen to devise on behalf of suppliers under instalment contracts a form of contract which would preserve for the supplier such rights in the goods supplied as would provide adequate security for the subsequent payment of the 'price'. There are three major dangers which the supplier must face. *First*, he must secure his rights to the goods against the consumer and the latter's creditors (see para 1.21). *Second*, he must try to prevent the consumer overriding his possessory or proprietary interest in the goods in favour of a *bona fide* purchaser (bfp) or other transferee (see paras 1.22–23). *Third*, when the supplier has secured his legal interest in the goods, he must take steps to ensure that these rights continue to be of adequate value. Throughout the nineteenth century, the legal form of the contract

161 Recaption is subject to the notice procedure (see para 24.28) and time orders (see para 24.40) but not the protected goods rules (see para 24.35). Court actions for recovery of the goods are brought under the Torts Act 1977, s 3 (see para 24.26).

162 See generally, Diamond, *Commercial and Consumer Credit*; Dunstan, *Law Relating to HP*, 4th edn, 1939; Earengay, *Law Relating to HP*, 2nd edn, 1938; Goode, *HP Law & Practice*, 2nd edn, 1970; Guest, *Law of HP* (1966); Wild, *The Law of HP*, 2nd edn, 1965; Goode, *Commercial Law*, 3rd edn, 713–19; Cranston, *Consumers and the Law*, 3rd Edn, 232–4; and further, para 1.25.

163 See further, para 1.25. But see the persistent use of the terminology for 'industrial hp' (para 1.18) and consumer contracts termed 'option to own', or 'lease purchase' (see para 1.25).

164 Hp has been described as a legal fiction: the Crowther Report on *Consumer Credit* (Cmnd. 4596), para 5.2.3. But is it?

was evolving to meet these requirements;¹⁶⁵ and it was not until 1895 that the major characteristics of the form were settled.¹⁶⁶ By reason of its complicated nature, the transaction was almost always in writing¹⁶⁷ and commonly in standard form (see para 11.08).

[1.21] Other creditors. Any appropriate form of words will create a debt in the consumer, so that in the event of default the supplier may levy execution on any of the consumer's goods.¹⁶⁸ However, as the supplier also wishes to obtain a preferential claim to those goods as against the consumer's other creditors, one of the following forms was normally used:

- (a) A conditional sale; that is, an agreement to sell with a reservation of property until the price was paid (see para 1.14); or
- (b) An hp agreement; that is, a letting of the goods with an option to purchase.¹⁶⁹

Because they both reserve the property in the goods to the supplier, either type of contract would usually keep the goods supplied out of the consumer's insolvency¹⁷⁰ or any execution levied on the consumer; and it might also give a right to trace.¹⁷¹ However, the supplier's security might still be vulnerable because of the legislation relating to chattel mortgages¹⁷² and landlord's distress.¹⁷³

[1.22] The *bona fide* purchaser or pledgee. In the mid-nineteenth century, the conditional sale with a reservation of property was sufficient to defeat the claims of a *bona fide* purchaser or pledgee because of the rule *nemo dat quod non habet* (see para 19.11). However, an important exception to that rule was enacted in s 9 of the Factors Act 1889 (FA): this provided that, generally speaking, one who had 'agreed to buy' goods should be able to pass a good title to a *bona fide* purchaser or pledgee (see para 21.43). Almost immediately, the Court of Appeal decided that this new exception applied in the case of a conditional buyer (*Lee v Butler*: see para 1.15). This decision immediately threw the instalment credit trade into turmoil; and the new hp form of contract drafted with a view to avoiding this consequence was litigated in *Helby v Matthews*.¹⁷⁴

165 Perhaps an early example was the Scots case of *Cowan v Spencer* (1828), as explained in the judgment of Lord Keith in *Armour v Thyssen* (set out at para 20.28).

166 The major characteristics of hp could be said to have been settled by the HL in 1895 with the following cases: *McEntire v Crossley Bros* [1895] AC 457, HL (see para 1.14); *Helby v Matthews* (set out at para 1.22).

167 The courts were reluctant to accept oral hp contracts: *Scammell & Nephew v Ouston* (set out at para 10.03). But see *Hitchens v General Guarantee Corp'n* [2001] CLY 880, CA.

168 E.g. *Chubb Cash Ltd v John Crilley & Sons* [1983] 2 All ER 294, CA. For levying execution, see generally, para 19.15. To levy execution on the goods of a third party is an act of conversion: see para 19.06.

169 E.g. *Pearce v Brooks* (1866) LR 1 Ex 213; *City Motors (1933) Pty Ltd v Southern Aerial Super Service* (1961) 106 CLR 477, Aust HC, esp. *per* Kitto J at 486–7.

170 The rule extending the ambit of a bankruptcy beyond goods owned by a bankrupt to include also those of which he was the reputed owner has now been abolished: see para 19.15.

171 See *Goode* (1976) 92 LQR 360, at 376. Tracing is considered further, paras 27.13–14.

172 Bills of Sale Act 1882 (see generally, para 25.26).

173 Law of Distress Amendment Act 1908 (see para 19.17), countered by the verbose *Smart v Holt* clause (see para 26.09).

174 [1895] AC 471, [1895–9] All ER Rep 821, HL. The result is the same even if the customer gives a promissory note as collateral security: *Modern Light Cars Ltd v Seals* [1934] 1 KB 32.

The terms of the agreement between the dealer (A) and customer (B) were somewhat similar to those in *Lee v Butler*. B agreed to pay 10/6 per month as rent for hire of a piano, and the property was not to pass until 36 of these instalments had been paid. However, the agreement further provided that B might at any time determine the hiring by delivering the piano to A upon which B should remain liable for all arrears of rent. During the continuance of the agreement, B pledged the piano to C who took it for value, and pleaded title under s 9.

The House of Lords unanimously held, reversing the Court of Appeal, that C had not obtained a good title. Lord Macnaughten explained:¹⁷⁵

‘The contract . . . on the part of the dealer was a contract of hiring coupled with a conditional contract or undertaking to sell. On the part of the customer it was a contract of hiring only until the time came for making the last payment. It may be that at the inception of the transaction both parties expected that the agreement would run its full course, and that the piano would change hands in the end. But an expectation, however confident and however well-founded, does not amount to an agreement, and even an agreement between two parties operative only during the pleasure of one of them is no agreement on his part at law’.

Their Lordships distinguished *Lee v Butler* on the grounds that in that case, as soon as the agreement was made, there was a binding agreement to buy on the part of B and he had no option to return the goods,¹⁷⁶ though their Lordships might not have been so adamant if the *Helby v Matthews* agreement had contained a modern minimum payments clause.¹⁷⁷ Indeed, *Helby v Matthews* was itself distinguished in *Forthright Finance Ltd v Carlyle Finance Ltd*.¹⁷⁸

Forthright supplied a Ford Cosworth car to Senator Motors, a limited company dealer, under a contract described as a ‘Hire Purchase Agreement’: it required Senator to pay all the instalments of hire-rent and conferred the usual option to purchase on it when all the instalments had been paid; but it added that the option was deemed to have been exercised when all instalments had been paid, whereupon the property in the car passed to Senator, unless it told Forthright before completion of the payments that such is not the case. Before it had paid all the instalments, Senator sold the car to Cf. Ltd, who successfully claimed a good title under the above exception (see para 21.52).

Delivering the unanimous judgment of the Court of Appeal, Phillips LJ pointed out that Senator was bound to complete all the payments of hire-rent and held that it was a conditional sale agreement.¹⁷⁹ He distinguished *Helby v Matthews*, where the hirer was *not bound* to continue with the hiring for any particular number of months (at 97) and pointed out that (at 98)

175 At 482. The reasoning is criticised by Atiyah, *Sale of Goods*, 10th edn, 16.

176 See also *Hull Ropes Co Ltd v Adams* (1895) 65 LJQ 114.

177 The object of such a clause has been said to be to place the owner in at least as favourable a position as a conditional seller: Crowther Report on *Consumer Credit* (Cmnd. 4596), para 5.1.3.

178 [1997] 4 All ER 90, CA. The agreement was not regulated because Senator was a Limited company (see para 5.24); and the transaction was therefore capable of falling within the modern equivalent of s 9 of the FA, s 25(1) of the SGA (see para 21.45).

179 He cited the argument that it should be a conditional sale if the customer bound himself to complete all the payments in Goode, *Consumer Credit Legislation*, para 218.

The option not to take title, which one would expect only to be exercised in the most unusual circumstances, does not affect the true nature of the agreement.

His Lordship expressly refrained from deciding whether the agreement would have been a conditional sale if it had contained a positive nominal option, rather than a negative option.¹⁸⁰ The result is that, if the supplier wishes to enter an hp agreement, rather than a conditional sale, it would seem that he cannot legally bind his customer to complete the allotted span of the 'hiring' and hence pay an amount of rent which is equivalent to the deferred price:¹⁸¹ all he can do is to so arrange the payment terms that it is in the customer's interest to complete the hiring (see para 1.25).

[1.23] Other *bona fide* transferees. Besides an outright disposition of the general or special property in the goods by way of sale or pledge respectively (see para 1.22), the hirer under an hp agreement may seek to utilise such interest as he has by way of assignment or lien.

1. *Assignment*.¹⁸² The form of an hp agreement being a hybrid between bailment and sale, the hirer *prima facie* has two contractual interests each capable of independent assignment.¹⁸³
 - (a) His right to hire the goods, which is similar to the right of a hirer under a simple bailment (see para 1.17).
 - (b) His option to purchase, which may be compared with the right of a conditional buyer (see para 1.13), though it is worth less because there is no guarantee that the hirer will exercise his option (see para 1.25).

Despite the fact that the supplier will normally make careful enquiries into the character of the would-be transferee before entering the agreement (see paras 8.35–39), the courts have taken the attitude that this does not evince an intention to restrict the hirer's *prima facie* right of assignment. For this reason, most modern conditional sale and hp agreements expressly forbid assignment by the transferee of his rights under the agreement.¹⁸⁴ Such a clause may limit or exclude the rights which the assignee can acquire against the supplier (see para 7.26), which should render otiose the activities of Vehicle Transfer Agencies (see para 7.26A); but the purported assignee may have a remedy against the assignor.¹⁸⁵ In practice, the supplier will frequently relinquish his interest in the goods to the assignee on payment of the outstanding balance due under the agreement.¹⁸⁶

180 This has significance for the drafting of the agreement: see para 1.25.

181 *Close Asset Finance v Care Graphics Machinery Ltd* [2000] CCLR 43. What would be the effect of an acceleration clause (see para 26.19)?

182 For assignments of choses in action generally, see para 7.16, *et seq.*

183 *Whiteley Ltd v Hilt* [1918] 2 KB 808, CA. See Goode, *HP Law & Practice*, 2nd edn, 525–6, 586–8.

184 Because the two rights of the hirer are independent, the clause must be carefully examined to see whether it has forbidden assignment of either or both the rights of hiring and option: see Goode, *ibid.*, 526–9.

185 E.g. *Butterworth v Kingsway Motors Ltd* (set out at para 12.06). What if, at the time the agreement is made, the transferee makes it clear that he is obtaining the goods as a gift for a third party?

186 What is termed a 'settlement figure'; as to which, see further, paras 26.19 and 26.22.

2. *Liens*.¹⁸⁷ Essentially, a lien is just a right granted by common law or contract to retain possession of goods as security for the performance of particular obligations,¹⁸⁸ though lienees have been granted a special power of sale by the Torts Act 1977 (ss 12–13). In respect of goods supplied on conditional sale, simple hiring or hp, perhaps the most commonly claimed lien is that of a repairer.¹⁸⁹ Whilst no man can create a lien on goods of another without the other's consent, it has been held that a supply on conditional sale, simple hiring or hp normally gives the transferee an implied authority to create a lien for repairs,¹⁹⁰ but only whilst the instalment agreement remains in force (as to which, see paras 26.08–10). To counteract this, the agreement will normally expressly prohibit the transferee from creating any lien over the goods,¹⁹¹ though the transferee may still be left with an ostensible authority to do so whilst the agreement continues, provided that the repairer knows that the goods are supplied on conditional sale, simple hiring or hp.¹⁹²

Statutory definition

[1.24] Upon this common law form of hp, a number of statutory definitions have been imposed. The leading modern definition is to be found in identical form in both SOGIT (s 15) and the CCA:¹⁹³

“hire-purchase agreement” means an agreement, other than a conditional sale agreement, under which—

- (a) goods are bailed or (in Scotland) hired in return for periodical payments by the person to whom they are bailed . . . , and
- (b) the property in the goods will pass to that person if the terms of the agreement are complied with and one or more of the following occurs—
 - (i) the exercise of an option to purchase by that person,
 - (ii) the doing of any specified act by any party to the agreement,
 - (iii) the happening of any other specified event’.

This definition is more satisfactory than its predecessors in several ways: it makes it clear that the statutory category of hp cannot include credit sale (see para 1.13),

187 See generally Crossley Vaines, *Personal Property*, 5th edn, Chap 7. A contractual provision granting a lien may be an unfair term: OFT, *UCT Bulletin No 23*, case 21; and see below, para 11.14.

188 E.g. the lien of the unpaid repairer (below), auctioneer (see para 10.11) seller (see para 24.08) or cancelling debtor (see para 10.33).

189 *Tappenden v Artus* [1964] 2 QB 185, CA. *Semble*, the lien probably does not extend to towing and garaging charges: see *Re Southern Livestock Products Ltd* [1963] 3 All ER 801; *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621. As to storage charges, see para 24.09.

190 *Green v All Motors Ltd* [1917] 1 KB 625, CA (hp).

191 Such a provision may be ineffective where contradicted by an express duty in the bailee or conditional buyer to keep in good repair. It may also amount to an unfair term under the UTCC Regulations: see above.

192 *Albermarle Supply Co Ltd v Hind* [1928] 1 KB 307, CA (hp). What if repairer does not know for certain that the goods are on hp, but merely that they are likely to be so?

193 S 189(1). The agreement may be constituted by two or more documents: *ibid* s 189(4). E.g. see Sched 2, Example 10. Cf. *Kay's Leasing Corpn Pty Ltd v Fletcher* (1964) 116 CLR 124, Aust HC. See also SOGIT, s 15(1); CPA, s 45(1).

pledges (see para 25.02) or deliveries on sale or return (see para 20.23). Moreover, it expressly excludes conditional sales (see para 1.14), which exclusion is considered later (see para 1.25).

Perpetual hiring agreements. In modern times, there has been a tendency to use simple hiring as an alternative to instalment sales (see para 1.12) or hp agreements (see para 1.20). If the agreement is truly a simple hiring agreement (see para 1.18), it will be treated as such by the courts.¹⁹⁴ In 1954, it was held that a hiring under which the option was not exercisable until the happening of a future uncertain event was not within an earlier statutory hp definition,¹⁹⁵ but it seems likely that such facts would fall within the above CCA definition.¹⁹⁶ However, the question is a matter of substance, not words, as witness the so-called ‘perpetual hiring agreements’, which provide that all the incidents of property¹⁹⁷ will pass to the bailee except the outward shell of ownership,¹⁹⁸ in which case the agreement might be regarded as hp or conditional sale.¹⁹⁹ If so, they are subject to much the same statutory restrictions (see para 1.16); but, if not, they are subject only to the lesser restrictions on consumer hire agreements (see para 1.19). There is presently debate as to whether more, or less, of these transactions should be regulated (see para 5.11).

[1.25] Difficulties. It is now possible to consider a number of the difficulties arising from the dual nature of hp.

1. *As to the hiring*, there were two ways in which this might be arranged:
 - (a) The hirer might agree to take the goods on hire from, e.g. month to month, what is termed a ‘*periodic hiring*’. From the viewpoint of the supplier, this form suffers from the disadvantage that the hirer might elect to return the goods.
 - (b) The hirer might agree to take the goods on hire for a given number of months (a ‘*fixed-term*’ hiring). From the viewpoint of the supplier, this has the attraction that he is sure to achieve the whole of his hp price, apart from the (usually nominal) option fee. However, this form was thought to be a conditional sale in *Forthright Finance Ltd v Carlyle Finance Ltd*.²⁰⁰
2. *Turning to the option*, there were again two possible forms of contract:²⁰¹

194 See *Galbraith v Mitchenall Estates Ltd* (set out at para 27.21); Cf. *Baker v Monk* (1864) 4 De GJ & SM 388.

195 *R v RW Profitt Ltd* [1954] 2 QB 35 (option exercisable ‘subject to the enactment of the necessary legislation’; not within the definition in the HPA 1938, s 21): see the discussion by Turner in (1974) 48 ALJ 63. The contract might be regarded as a type of conditional sale: see Jones on *Chattel Mortgages*, 4th edn, para 960.

196 Within paragraph (b)(iii), not present in the 1938 definition: see Goode, *Consumer Credit Law & Practice*, para 23.144.

197 For the incidents of property which normally pass on sale, see para 19.10.

198 See *Domestic Electric Rentals Ltd v Dawson* [1943] LJNCCR 31; *Carroll v Credit Services Investments Ltd* [1972] NZLR 460; Goode, *HP Law & Practice*, 57–8.

199 See Jones on *Chattel Mortgages*, 4th edn, paras 952–9; and the Crowther Report, para 5.2.7.

200 Set out at para 1.22, *per* Phillips LJ at 98, without expressly deciding the point. *Contra Close Asset Finance Ltd v Care Graphics Machinery Ltd* [2001] GCCR 2617 (held hp).

201 Where the agreement falls within the CCA, form (a) may cause difficulty with the truth-lending provisions (see para 8.22). As to calculating the APR when levying documentation and option fees, see (1993) 48 CC3/2.

- (a) The hirer was granted an *option* to purchase which he might exercise once he had paid a stipulated amount of hire rent, exercisable on payment of a further sum²⁰² (usually nominal),²⁰³ which in practice was usually added to the last instalment.²⁰⁴
- (b) The price of the *option* was paid at the outset, or included in the hire rent, so that the property in the goods would necessarily pass automatically but for the hirer's express power to terminate. However, the negative option in this form might now turn it into a conditional sale, following *Forthright Finance Ltd v Carlyle Finance Ltd* (above).

It seems to follow that the only safe form of hp remaining is the *periodic hiring* with a *positive option* (see further, para 1.26).

Because of the above dual nature of the hp agreement, the courts have frequently been faced with the problem of whether to apply to it the rules of sale or bailment. It purports to be a species of bailment; and the courts have so treated it when deciding such issues as the owner's measure of damages in contract (see para 27.37), who may maintain an action for wrongful interference with goods (see para 19.06), or whether to imply extra terms in favour of the hirer (see para 15.23). Yet the economic object of the traditional simple transaction is normally to effect a sale,²⁰⁵ and the courts have looked exclusively at this element when determining such issues as the tort damages to which the owner is entitled as against the hirer or his assignee (see paras 27.22 and 27.31), or the hirer is entitled in respect of breach by the supplier (see para 29.34), or when the hirer may plead a total failure of consideration (see para 29.12). Similar inconsistencies of approach may be found in the decisions in relation to hp agreements in respect of such matters as risk (see para 22.01) and illegality (see para 10.20). As it is apparently impossible to decide whether hp has more in common with sale or bailment,²⁰⁶ it has sometimes simply been labelled as a form of contract *sui generis*.²⁰⁷ That this is a sensible way to view the transaction is, perhaps, confirmed by modern developments in, for example, motor finance by way of so-called 'Personal Contract Purchase' or 'Lease Purchase'.²⁰⁸

202 The amount should be kept within the 'exempt supply' limit (£10) so as not to attract VAT (see generally, para 2.06): (1989) 44 CC2/21. As to methods of payment, see para 23.13.

203 Alternatively, the hire-rent may be reduced by agreeing to make a substantial end option payment ('balloon payment'), e.g. to be paid for out of the proceeds of sale: see *Otis Vehicle Rentals Ltd v Ciceley Ltd* (set out at para 27.18). This type of contract is sometimes called 'lease-purchase': see para 1.18A.

204 Suppose a hirer announced during the currency of the agreement that he would not exercise his option when the time came, would he be bound by that announcement, perhaps as a waiver (see para 26.17) or election (see para 26.23)? Cf. *Marseille Fret SA v D Oltmann Schiffahrts GMBH & Co KG* [1981] Com LR 277, DC.

205 Recently, there have been developed variations under which the hirer in effect pays the rental appropriate to a simple lease for the duration of the agreement and is then given the choice of making a larger ('balloon') option payment: see [2000] *Which? Car* 11.

206 See the dicta of the CA in *Felston Tile Co Ltd v Winget Ltd* [1936] 3 All ER 473, CA, criticised *obiter* in *William Cory & Son v IRC* [1964] 3 All ER 66 at 71, 75. But see Goldberg (1972) 88 LQR 21.

207 E.g. *per* Goddard J in *Karflex Ltd v Poole* [1933] 2 KB 251 at 264, 265. See also para 27.31.

208 [2000] *Which? Car*, 11. These are (say) two-year leases under which during that two years the lessee pays rent calculated to be the depreciation of the vehicle. At the end of the period, the lessee may exercise an option to buy (the option fee being the capital value) or return the vehicle (cf personal leases: see para 1.18). See further (1995) 49 CC 5/20; and para 3.26.

The hirer's interest in the goods. The above problems are neatly illustrated by the difficulty of deciding the extent of the hirer's proprietary interest in the goods before he exercises his option to purchase. As we shall see later, the courts have decided that the hirer does not have an equity of redemption in the goods (see para 24.22). However, whilst he does not have an interest recognised by law, during the continuance of the hiring he has an interest whose economic value may be measured by the proportion of the hp price which has been paid: every instalment *pro tanto* reduces the value of the supplier's interest and increases that of the hirer. Yet this hirer's interest is of a peculiarly uncertain nature, inasmuch as the supplier by lawfully terminating the agreement in accordance with its terms, will automatically bring the hirer's interest to an end (see paras 26.08–10).

[1.26] The future. It has been seen that hp evolved as a hybrid form of contract, incorporating elements of both bailment and sale, in order to secure for the supplier the greatest possible amount of security that the 'price' will be paid as promised. In a sense, it typifies the nineteenth century attitude of freedom of contract (*laissez-faire*: para 1.02). Yet this hybrid has unsurprisingly given rise to a number of conceptual problems (see para 1.25). Moreover, subsequent case law has demonstrated that the creation of hp was largely unnecessary for the purposes for which it was created;²⁰⁹ in the important area of implied terms, there has already been imposed an almost uniform statutory system (see Chaps 11–16); and the CCA treats bailment, hp and sale on credit in a very similar manner.²¹⁰ It has been suggested that these developments raise the following issues:²¹¹

- (a) Should hire-purchase be abolished, by enacting that all hp agreements shall be deemed conditional sales? This would appear to have certain advantages and to be the way matters have gone in the United States of America²¹² and Australia.²¹³ Within the CCA, it would make little substantive difference, whilst enabling a modest simplification of that Act; it would make possible the abolition of the separate rules for implied terms in hp agreements found in the SOGIT; and outside the CCA it would cut the Gordian Knot in the shape of the common law rules of damages. Or could we go even further and replace²¹⁴ both hire-purchase and conditional sale by a workable chattel mortgage system with a proper equity of redemption (see paras 25.20 and 25.38)?

209 E.g. *Newtons of Wembley Ltd v Williams* (set out at para 21.51); *Aluminium Industrie Vaassen BV v Romalpa Aluminium* (set out at para 25.29).

210 For the CCA treatment of conditional sales, see para 1.16. Such uniformity was recommended by the Crowther Report on *Consumer Credit* (Cmnd. 4596), paras 5.2 and 5.6.

211 Macleod and Cronin in Chap 22 of *Consumer Credit* (Ed Goode, 1978).

212 See paras 1.18 and 1.24. Except for Pennsylvanian 'bailment-leases': see Jones, *Chattel Mortgages*, 6th edn, 1933, para 960; but see *Op. cit.*, para 955, note 72.

213 Australian Consumer Credit Code 1996, s 10.

214 Such a move was resisted on grounds of freedom of contract: the Crowther Report (above) para 5.2.15, though it did recommend that all the various forms of contract should be subject to the proposed chattel mortgage legislation (as to which see para 25.28).

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- (b) Should there be approved statutory forms of consumer instalment contract, instead of the present (largely theoretical?) Victorian *laissez-faire* arrangements (see para 1.02), mostly reversed by detailed statutory provisions later considered in this book, but beyond the wit of most consumers? We may be moving in that direction with the application by the Office of Fair Trading of the UTCC Regulations (see para 11.12, *et seq.*).