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INTRODUCTION – WEEK ONE

Commercial law is an aspect of many different types of law. It encompasses areas of private law (covering relationships between people – torts, contract, property) and public law (constitutional law criminal, tax, etc.).

SALE OF GOODS

- Every sale of goods is a contract
- Property (does not equal land) – personal property
- Overlap between contract law and property law can create difficulties
- Few SOG disputes make it to court
 - Level of expensive of goods in question, etc.

INTRODUCTION AND HISTORY

Law pertaining to the sale of goods can be traced back to the Law of Merchants which governed merchants trading in Europe in the Middle Ages. In 1888 Sir Mackenzie Chalmers undertook the task of drafting a Sale of Goods Bill to codify the law; “to set out, in concise language and logical form, those principles of the law which have already stood the test of time”.¹ After significant amendment, the Bill was enacted as the Sale of Goods Act 1893 (UK). This was adopted into New Zealand law in a nearly identical form as the Sale of Goods Act 1895 and was re-enacted in 1908. The Sale of Goods Act 1908 has been subject to relatively few amendments in comparison with its English counterpart. Its operation has been affected, however, by the enactment of other statutes, particularly the Consumer Guarantees Act 1993. The Sale of Goods Act 1908 was repealed on 1 September 2017, and its content became pt 3 of the Contract and Commercial Law Act 2017 (“CCLA”).² The effect of this relatively new Act (the CCLA) is intended to be the same while the new Act has modernised language

Contract and Commercial Law Act 2017

Holderness 9.2-9.3

Although only a few technical changes have been made by the Act, the Act acts as a code.

New section

201 Savings

- (2) The rules of the common law, except to the extent that those rules are inconsistent with the express provisions of subparts 1 to 5 or this subpart, continue to apply to contracts for the sale of goods.

1908 s 60(2)

¹ MD Chalmers “Codification of Mercantile Law” (1903) 19 LQR 10 at 11.

² M Barber “1 Part of 3 of the Contract and Commercial Act 2017” (October 2018 ed, LexisNexis, Wellington) at 10.1.1.

This provision has the effect of allowing the common law to continue (except where inconsistent with the Act). Additionally, the common law rules relating to contract will also apply to the sale of goods. Note: Provision only refers to the 'common law' – not rules of equity, etc. – see *Thomas Borthwick & Sons Ltd v South Otago Freezing Co. Ltd*.

It has been common throughout time for judges and academics to suggest changes to the Act, in order to allow progress to continue. For example in *Ashington Piggeries*:

**Ashington Piggeries v Christopher Hill [1972] AC 441 at 501 per Lord Diplock:*

“Because of the source of the rules stated in the Sale of Goods Act 1893 the classification adopted is by reference to the promises made in relatively simple types of contracts for the sale of goods which were commonly made in the nineteenth century and had been the subject of judicial decision before 1893. But although the language in which the rules are expressed is appropriate to these simple types of contracts, it has to be applied today to promises made in much more complicated contracts which cannot be readily allotted to any single class of contract which appears to be primarily envisaged by a particular section or subsection of the code. **Unless the Sale of Goods Act 1893 is to be allowed to fossilise the law and to restrict the freedom of choice of parties to contracts for the sale of goods to make agreements which take account of advances in technology and changes in the way in which business is carried on today, the provisions set out in the various sections and subsections of the code ought not to be construed so narrowly as to force upon parties to contracts for the sale of goods promises and consequences different from what they must reasonably have intended.** [Suggesting business has changed and modern changes need to be incorporated – hard in practise due the wording of the statute]. They should be treated rather as illustrations of the application to simple types of contract of general principles for ascertaining the common intention of the parties as to their mutual promises and their consequences, which ought to be applied by analogy in cases arising out of contracts which do not appear to have been within the immediate contemplation of the draftsman of the Act in 1893.”

Facts:

Ashington Piggeries requested CH supply them with a Mink feed, which helped the Mink to grow. At first, there were no problems. However, CH then entered a contract with a Norwegian company to supply Red Herring food, which produced the chemical DMNA, which was highly toxic to Mink. As a result, Mink started dying and AP withheld payment. CH sued and AP counter sued.

Matty B thinks that it is important to update the wording of the statute to ensure the statute stays relevant in the modern world.

Thomas Borthwick & Sons Ltd v S Otago Freezing Co Ltd [1978] 1 NZLR 538 at 545 per Cooke J:

“We think s 60(2) [old s.201(2)] of the Sale of Goods Act 1908 ... was intended at least primarily to preserve rules of substantive law on matter not covered by the express provisions of the statutory code. In any event we can find nothing in s 60(2) or elsewhere in the act ... to exclude the discretionary jurisdiction to grant the remedy of injunction.”

Suggests equity also continues to apply to the sale of goods, except where excluded by the Act. Main effect of this is the injunction remedy continues to apply.

In the case, the Court of Appeal considered that the forerunner of s 201(2) was intended at least primarily to preserve the rules of substantive law which were not covered expressly by what was then the Sale of Goods Act 1908, and found nothing in the Act or in *Riddiford v Warren* to preclude the grant of the equitable remedy of injunction to restrain a breach of a negative covenant in a contract which was in part an agreement to sell goods. **On this view, there exists a residual equity applicable to contracts for the sale of goods in cases where the provisions of the Act are not inconsistent with it**

The **facts** of this case broadly are the two parties had an agreement (lasting 20 years) to buy stock from the respondent, kill and process the stock then sell the stock back to the respondent for export and sale. After being subject to a successful takeover, one of the companies attempted to repudiate the contract with three days' notice.

CONTRACTS FOR THE SALE OF GOODS

Holderness 9.5-9.9

RELEVANT STATUTE OVERVIEW

120 Contract of sale of goods

A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration (the **price**).

- Intuitive – where A pays B money for goods
- A sale can be between part owners, it can be absolute or conditional, as per sections 121 and 122.

121 Contracts of sale may be between one part-owner and another

A contract of sale may be between one part-owner and another.

122 Contracts of sale may be absolute or conditional

A contract of sale may be absolute or conditional.

1908 s 3

- Must be a contract by which the seller agrees to transfer property and/ or goods.

PROPERTY

119 Interpretation

(1) In this Part, unless the context otherwise requires,—

property means the general property in goods, and not merely a special property

1908 s 2

- General property means ownership – transferring ownership to the purchaser.
- Special property is where you have a right to goods less than ownership
 - Leins or bailment are the most common
 - Essentially where someone has the rights to possess the goods but someone else owns them.

GOODS

119 Interpretation

(1) In this Part, unless the context otherwise requires,—

goods—

(a) includes—

- (i) all kinds of movable personal property, including animals; and
- (ii) emblements, growing crops, and things attached to, or forming part of, the land that are agreed to be severed before sale or under the contract of sale; and
- (iii) computer software; but

(b) does not include money or things in action

1908 s 2

- (i) covers most tangible property, vehicles, ships, etc.
- (ii) does the 'attached to the land' relate to all three or only the last item? "Clearly" the last item (things attached to or forming part of the land). Due to the lack of comma after it and context.
 - See *Scully v South* for definition of Emblements.
- (iii) may turn out to be incorrect as there is no physical manifestation and therefore cause problems in future.
- (b) covers intangibles (e.g. IP rights, shares) – i.e. not physical 'stuff'.

Scully v South [1931] NZLR 1187 at 1190 per Adams J:

"[E]mblements are *fructus industriales*, the growing crops of the soil which are annually produced by the labour of the cultivator."

A distinction was drawn in Roman law, which has subsequently been adopted in English and New Zealand law, between *fructus industriales* and *fructus naturales*. The former are crops intended to be harvested within one year and which are produced by human labour. The latter are items such as grass and trees where the labour employed in the planting is so small in relation to the natural growth that they are regarded as the natural produce of the soil. *Fructus industriales* are clearly goods within the definition in s 119. If *fructus naturales* are severed, or the agreement includes an obligation to sever, they are also defined as goods.

See 10.2.1 in "Commercial Law in New Zealand" for more information on this.

Lockwood Buildings Ltd v Trust Bank Canterbury Ltd [1995] 1 NZLR 22

This case sets out the distinction of fixtures (part of the land) and chattels (not part of the land). If a fixture it will only be covered by the Act if it is agreed to be severed.

Facts: Dispute was between the mortgagee and the owner of the house, neither of which owned the house. Lockwood show home – they did have a debenture over the house but not ownership. The bank was the mortgagee of the home. Designed, furnished and attached to the land just as an ordinary house would be. Notice on the door saying it was a show home. Agreement between the owner and Lockwood that the house was there for a minimum of 12 months. But it did sound temporary. Owner got into financial trouble, Lockwood came and took the house and sold it. Bank brought an action against Lockwood in trespass. Bank said the house was part of the land. Lockwood argued the same argument in *Neylon* – that the house was temporary. Consequently, where the contract of sale hold no provision that the house is temporary, the show home may be a fixture.

But how was the bank to know that? The bank is not a mind reader and sees the house on the land – on the facts, the bank was entitled to look at the land and think the house was part of it.

CA considered the starting point of this analysis was “a wholly objective and purely visual” approach – not on what has been said and done in the original agreement.

PRICE

- Section 120 requires money consideration (called “the price”).
- Legally, money is legal tender, defined to be notes and coins.
- Money consideration also includes a promise to pay money in the future.
- Foreign currency is included as money consideration.
- A method which allows the seller to obtain money is a money consideration (e.g. credit card, debit card).
- Clearly excluded from money consideration is barter (e.g. swapping goods – watermelon for cheese). Therefore, where barter has occurred, there is no sale of goods and the Act does not apply.

Davey v Paine Bros Ltd [1954] NZLR 1122

- Exchange of two cars, price of each car was fixed at 550 pounds (slightly different from a pure barter).
- Court may have been willing to view it as two sales of goods, rather than none.
 - Because the price of goods were settled on, essentially saying the money cancelled each other out.
- Judgement is not clear as to what the court was doing.

ANALYSIS OF DAVEY

Car trade in example:

Money still changes hands and is a SOG.

But no clear authority on this point.

Difficulties arise where the parties exchange goods and one party also pays some money on top of the goods. Similar to a trade-in but not the same. This is not clear whether this is a SOG or not.

Different from a trade-in because the only price is put on the difference in value between the cars. Where as a trade-in involves the value of the goods **and** the value of difference.

It is unclear what the correct approach is in these kinds of situation. **One option** is to view an exchange or part-exchange, at least where the price of the goods in question is identified by the parties, as consisting of two sales of goods. This, however, requires one contract to be effectively read as being two, and for each to be said to involve money consideration despite no payment ever being due. **An alternative** would be to apply a similar test to that used for work and materials contracts, namely to inquire into the “substance” of the contract, or what is its main object. This would have the benefit of including typical motor vehicle trade-in transactions, but its application would be more difficult in many other part-exchange situations.

CRIMINAL CONTEXT

It can sometimes be a crime to sell certain goods, for example in *L.D. Nathan* (below):

Attorney-General v L.D. Nathan & Co Ltd [1990] 1 NZLR 129, at 132 per Cooke P:

“In my opinion what occurred in the present case was a sale of the wine in the ordinary and popular sense. It was also a sale of the wine in the Sale of Goods Act sense. By s 3(1) of that Act of 1908 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”. That is what occurred here.”

In other words, it will be a sale where you have the bundling of goods together. It is no good to say you’re selling one and giving away another for free. Both of these goods will be found to have been sold under the Act.

Facts: A bottle of wine was given away at a supermarket with a certain quantity of beef (approx. 5kg). Assuming you were of legal purchasing age (20 years old). Question was, whether supermarkets had sold the wine. The supermarket argued that the wine wasn’t sold, but was a gift, clearly in response to being charged with selling alcohol without a license (no supermarkets sold booze in 1990).

129 Fixing contract price

- (1) The price in a contract of sale may be—
 - (a) fixed by the contract; or
 - (b) left to be fixed in a manner agreed in the contract; or
 - (c) determined by the course of dealing between the parties.
- (2) The buyer must pay a reasonable price if the price is not determined in accordance with subsection (1).

1908 s 10

- The price does not have to be explicitly in the contract (can be implied).

SALES AND OTHER TRANSACTIONS

- Barter and (genuine) gifts are not sale of goods.
- A contract for the supply of services is not a sale of goods.
- Example: If mechanic offers to fix your car – removes a part and replaces it, this contract involves both the supply of services and goods.
- Act only applies to contracts for the sale of goods.

Robinson v Graves [1935] 1 KB 579 per Greer LJ

- English CA
- **Facts:** Painting of a portrait. Is this a sale of goods? Paying for the artist to paint it for you
- Per Greer LJ:
 - If you fixed ... that the substance of the contract was a contract to produce something to be sold by the dentist to the dentist's customer, then that is a sale of goods. **But if, on the other hand, the substance of the contract is that skill and labour have to be exercised for the production of the article, and that it is only as ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the article,** that does not affect the conclusion that the contract is one for work and labour and materials, because the substance of the contract is for the skill and experience of the artist in producing the article.
- Must ask, **what is the substance of the contract?**
 - Is this contract the substance of a transfer of goods, or the work involved by the other party?
 - On the facts, the substance was an agreement for the exercise of skill, and the materials involved (paint, canvas, etc.) were only ancillary to that purpose.

Printcorp Services Ltd v Northern City Publications Ltd [1990] BCL 1604 per Fisher J

- **Facts:** Involved contract to print newspapers. Within the contract, there was much focus on the quality of printing. Is this a contract for the sale of goods?
- Fisher J:
 - The modern criterion seems to be the relative importance for the contract of the roles of the work and the materials respectively [mostly from *Robinson v Graves*] ... The question is whether the real substance of the contract is to be found in the provision of the chattels or in the provision of the services.

The test is easier to state than to apply. In many cases it may be difficult to say whether one or the other is more important in that both may be essential. It is rather like asking whether it is more important for a human to have a brain or a heart. The lack of either would be an embarrassment.

- Can be a difficult test to apply, but still seems to be the law.
- Fisher J applied that test in the case, and held the ink and paper produced was dominant rather than the services and skill of the printer. Consequently held to be a SOG.

Whyte v Owl Electrical Ltd (1995) 6 TCLR 299

- Another NZ decision (HC)
- **Facts:** Purchase and installation of electrical fittings. Was this a SOG?
- Court inquired what was the relative value of the two in the price? (cost of fittings vs. labour).
- Barker J found the relative value of each was approx. 50/50. Ultimately concluded that this was **not** a contract for the SOG. He noted that in the contractual document itself, there was explicit reference to labour and materials and work and installation, also noted that the job involved a substantial amount of re-wiring. Dominant cost was the installation rather than the fittings.
- It was held that the appropriate test was whether the contract was in substance a contract for the sale of goods or for work and materials; that the determination of which aspect of the contract was in the ascendant was a question of degree, involving the weighing of the various relevant factors; and that in the particular case the overall impression of the contract was of one predominantly for the provision of work and materials.
- It was also noted in distinguishing *Printcorp* that *Whyte* was concerned with the supply of items attached to realty, with the supply of goods and the performance of work being distinct elements; *Printcorp*, by contrast, concerned a contract where all the work went into the making of the goods to be supplied.
- **Matt thinks** the case was quite close to the line, he does not see much difference between the *Printcorp* case and this one. Barker J noted the labour in *Printcorp* was to make the labour (making the transfer of goods more dominant) whereas here the labour was to install the goods. Barker J thinks this is one way to differentiate the cases.
- **Matt thinks** if there was reform in the area, you could get rid of this test and apply the Act in many situations where you could invoke the Act where goods and services are supplied. But this is not the current state of the law.

FORMALITY

125 How contract of sale is made

- (1) A contract of sale may be—
 - (a) made in writing (either with or without seal); or
 - (b) made orally; or
 - (c) made partly in writing and partly orally; or
 - (d) implied from the conduct of the parties.
- (2) This section is subject to the provisions of this Act and of any other Act.
- (3) Nothing in this section affects the law relating to corporations.

1908 s 5

- No real formalities required, a contract of sale may be any of the above.
- Historically there were required formalities, but this is no longer the case.