Sale of Goods/ Contractual Relations
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AN OVERVIEW OF THE LIABILITIES ARISING FROM CONTRACTS FOR THE SALE OF GOODS (2)[1]

1. INTRODUCTION

In the first part of this article, we, among other things, examined the first three out of the five default rules that govern the passing of property in goods subject of a contract of sale in the absence of an agreement between the buyer and the seller. In this second part of the article, we shall examine the last two default rules in contracts for the sale of goods.

2. THE PASSING OF PROPERTY IN A CONTRACT FOR SALE OF GOODS

2.1 Rule 4

When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer: —

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

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Goods are said to be delivered on approval basis when they are delivered by the seller to the buyer for inspection and approval, and the sale is completed only after the buyer accepts the goods.[2] It is also known as a sale on satisfaction or sale on trial. It implies that the goods are sent to the buyer on the condition that if he likes the goods, he can keep them, else return them.[3] Sellers use this method to induce sales that buyers may not be enthusiastic about, while buyers use it to examine and inspect goods they may not otherwise buy.[4] A period is usually given for the potential buyer to return the goods if he is not satisfied with them.

Similar to the above is when goods are delivered *on sale or return* basis. This means that the buyer can return them if he is unable to sell them within a specified time. This method is usually adopted by shops or retailers to obtain products from whole sellers for sale, so that if the retailers are unable to sell the goods, they can return them to the seller.

2.1.1 **Application of Rule 4**

This rule in essence provides that when goods are delivered to the buyer "on approval" or "on sale or return" basis the property passes when the buyer signifies his approval or acceptance to the seller. The rule equally applies where the buyer retains the goods beyond the stipulated time (or beyond a reasonable time where no time is specified) without signifying his rejection of the goods; or does any other act that can be construed to amount to adopting the transaction, such as where he pledges or resells the goods. In **Kirkham v. Attenborough**,[5] the phrase "*does any other act adopting the transaction*" was defined as "*an act inconsistent with his being other than a purchaser*". In that case K delivered jewelry to W on sale or return basis. W pledged it with A. It was held that the pledge was an act by W adopting the transaction, and therefore the property in the jewelry passed to him, so that K could not recover it from A. Accordingly, W was bound to pay the purchase price of the jewelry to K.

Where a period of time is stipulated and the buyer retains the goods beyond that period of time without signifying his rejection, he is automatically deemed to have accepted the goods. Where no period of time is stipulated, but the buyer retains the goods beyond a reasonable period as may be determined

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2 See, https://www.captainbiz.com/blogs/sale-on-approval-basis-under-gst/, accessed on 27/9/2024.
3 See,https://www.toppr.com/guides/principles-and-practice-of-accounting/sale-of-goods-on-approval-or-return-basis/goods-sent-frequently/, accessed on 27/9/2024.
4 See,https://ironcladapp.com/journal/contracts/sale-on-approval-contract/, accessed on 27/9/2024.
5 [1997] 1Q.B 201.

by the facts of each case, he would be deemed to have accepted the goods. For example, in **Poole v. Smith's Car Sales [Balham] Ltd**[6] a car was handed over to the defendant by the plaintiff 'on sale or return'. The defendant returned the car to the plaintiff nearly three months later in poor condition and the car had been driven 16,000 miles. Upon receiving the car, the plaintiff realized that the car was damaged. He rejected the car and sued for the price. The court held that since both parties had treated the contract as one of sale or return, the property had passed under Rule 4(b) to the defendant, since more than a reasonable time had elapsed. Therefore, the defendant was bound to pay the price of the car.

However, if forces or factors outside the buyer's control prevent the buyer from returning the goods, the buyer would not be deemed to have adopted the transaction by retaining the goods beyond the stipulated or reasonable time. The case of **Re Ferrier**[7] lucidly illustrates this point. In that case, goods were delivered to B on sale or return within one week. Two days later they were seized by execution creditors of B, who retained them until after a week was over. His trustee in bankruptcy claimed the property had passed as a result of the retention of the goods. However, the court held that B's failure to return the goods in that circumstance did not amount to retention of the goods so as to adopt the transaction. Accordingly, the seller was entitled to recover the goods.

Finally, on Rule 4, it should be noted that without the express or implied acceptance by the buyer, property (and risk) in goods taken on sale or return remains in the seller. If they are destroyed or stolen while in the buyer's possession, the seller cannot sue for the price, unless the damage or loss was occasioned by the buyer's default. Thus, the seller bears all the risk until the buyer expressly or impliedly accepts the goods.[8]

2.2 **Rule 5**

(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state

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6 [1962] 1 W.L.R 744.
7 [1944] 44 Ch 295.
8 See, M. C. Okany, *Nigerian Commercial Law*, African-Feb Publishers Limited (2019) at pp. 251-252.

are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Section 5(1) of the Sale of Goods Act defines "future goods" as "*goods to be manufactured or acquired by the seller after the making of the contract of sale*." This can be contrasted with ascertained and specific goods which we explained with examples in the first part of this article.

Rule 5[1] provides that property in such unascertained or future goods sold by description passes to the buyer only after the goods are unconditionally appropriated to the contract with the assent of the parties, which may be express or implied. For goods to be termed unconditionally appropriated the goods must be identified and set apart from the bulk by the agreement between the parties for the purpose of satisfying obligations under the contract of sale, so that the contract cannot apply to any other goods.

Rule 5[2] provides that when the seller delivers the goods to the buyer through a carrier, bailee, or custodian without reserving a right of disposal, it will be said that the seller has unconditionally appropriated them to the contract. However, this is still subject to the condition that goods must be clearly identified. Thus, in **Healey v. Howlett & Sons**[9] the seller contracted to sell 20 boxes of mackerel to the buyer. He dispatched by rail 190 boxes to go to various customers. However, he did not label the boxes to go to particular locations leaving it to the railway company to allot the appropriate number of boxes to the various buyers. The fish deteriorated before the 20 boxes were allotted to the buyer. It was held that since the 20 boxes had not been allotted before the fish deteriorated, property in the fish remained with the seller. Accordingly, the seller must bear the loss.

3. Conclusion

[9] [1917] 1 K.B. 337.

We have examined in the two parts of this article the various default rules that apply to determine the passing of property in goods, the subject matter of a contract of sale. It is important to emphasize that these rules are default rules. They only apply in the absence of an express stipulation by the parties as to when the property or the risk in the contract passes from the seller to the buyer. Thus, it is very important that parties when making a contract of sale of goods have these rules in mind and endeavor to contract themselves out of them by making an express stipulation as to when the property or risk in the goods will pass from the seller to the buyer, otherwise, the rules would apply with the full force of the law.

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