

Chapter 13

1. Why is it important to distinguish the events that caused the contract goods to perish from the position before the contract was made from those events that arose after the contract came into existence?

Goods perishing before the contract is made are dealt with by s 6 SGA whereas those that perish after the contract is made is dealt with by s 7 SGA.

Section 6

Section 6 provides that where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void. It is important to explain what is meant by “perish”.

Although this word is not defined in the SGA 1979, it is clear that it covers a number of different situations beyond the actual physical destruction of the goods, and includes perishing in a commercial sense. Where there has been total physical destruction of the goods then there can be little doubt that they have perished within the meaning of the Act. Beyond total destruction, the Court of Appeal held in *Asfar & Co v Blundell* [1896] 1 QB 123 that goods will be deemed to have perished if they become significantly altered so that, for ‘commercial purposes’, they can no longer be said to be the same goods that were the subject of the contract. In the New Zealand case of *Oldfield Asphalts Ltd v Grovedale Coolstores (1994) Ltd* [1998] 3 NZLR 479 it was held that where the goods become so damaged that they are deemed to be different from those the parties had contracted for they will be deemed to have perished. In this case, the question concerned whether or not a building came within definition of specific goods under the New Zealand equivalent of s 6 and whether, as a result of fire, the building had perished, thereby entitling the buyer to treat the contract as void. The court rejected the argument that s 6 was confined to perishable goods such as food. In *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co Ltd* [1929] 1 KB 574 the court held that goods that have been irretrievably lost due to theft could be said to have perished.

In *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co Ltd* [1929] 1 KB 574 (KB) the question concerned goods that sustained only partial loss. Barrow agreed to sell a specific lot of 700 bags of ground nuts to Phillip. Unknown to either party, before the contract of sale had been made, 109 of the 700 bags had disappeared, believed stolen. 150 bags were delivered to Phillip, at which time it was discovered that no more of the 700 bags remained. Barrow sued Phillip for the price of all 700 bags. Wright J rejected the claim. He found that there was no prospect of the goods being recovered and held that s 6 (of the SGA 1893) applied where even part of the goods had perished at the time the contract was made and that the contract was therefore void. This case clearly turned on its own facts. The sale was for a specific indivisible lot of 700 bags of nuts. Had the contract been severable (i.e. for the sale of separate lots, with each lot being invoiced and paid for separately) then it would seem that only the contract(s) representing the missing goods would have been held to be void.

Given the broad meaning attributed to the word 'perish', you should explain the importance of maintaining flexibility in the operation of the section which, in appropriate cases, should be treated more as a rule of construction. This is an impressive point to make as it demonstrates your understanding of the relationship of the section to other aspects of commercial law, such as the statutory implied terms. You should explain that unless the courts adopt a flexible approach, a seller might too easily be able to protect himself under s 6 in a case where the implied conditions as to quality in s 14 would render him liable to the buyer. This is because a seller who delivers goods which are of unsatisfactory quality or unfit for purpose will generally be liable to the buyer irrespective of whether the defect arose before or after the making of the contract, unless he can avail himself of s 6, in which case he avoids all liability to the seller as the contract will be void. For example, in the New Zealand case of *Rendell v Turnbull & Co* (1908) 27 NZLR 1067, the seller contracted to sell a quantity of table potatoes. At the time of making the contract, the potatoes were in such a poor state that they could not properly be described as table potatoes. The buyer sued for damages on the ground that the seller had breached the implied term as to description. The court rejected the buyer's claim and held that as the potatoes had perished the contract was void by virtue of s 6. This, of course, produces the rather curious result that a seller will be in a better position if the goods deteriorate so badly that they can no longer be described as the same goods under the contract, thus availing him of the provisions of s 6.

Unascertained goods

You will by now have explained that s 6 applies only to contracts for the sale of specific goods. You should not explain that in addition to the provisions contained in s 6, the common law might also declare void a contract for the sale of unascertained goods where the goods either do not exist or have perished at the time of the making of the contract, thereby making it impossible from the outset for the contract to be performed.

Section 7

Section 7 deals with the position where there is an agreement to sell specific goods which *subsequently* perish before the risk passes to the buyer. Section 7 provides that where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided. The section makes plain that once the risk has passed to the buyer it will not be possible to avoid the agreement. Neither will the agreement be avoided if, when the goods perish, property has already passed to the buyer (*Horn v Minister of Food* [1948] 2 All ER 1036). This is because s 7 applies only to agreements to sell and not to sales. When property in the goods passes to the buyer an agreement to sell becomes a sale, thus ousting the section. Unlike s 6, which renders the contract void, under s 7 the agreement is avoided.

You should also explain that although s 7 provides a statement of the common law doctrine of frustration, it is more limited in its scope for three reasons. First, the section is limited to an agreement to sell specific goods that perish before the risk has passed to the buyer. Second, it does not apply to goods that become ascertained after the contract is made. Third, only agreements to sell (specific goods) are covered and not immediate sales. Furthermore, it can be seen from the wording of s 7 that its application is excluded where either the seller or

the buyer is at fault. This is also the case with frustration at common law (*Bank Line Ltd v Arthur Capel & Co* [1919] AC 435). 'Fault' means a 'wrongful act or default' (s 61 (1) SGA).

Section 7 will not apply to contracts for the sale of future goods, so that if such goods fail to materialise, the contract will not be avoided by the section although such a contract may be frustrated at common law (*Howell v Coupland* (1875-76) LR 1 QB 258).

Unascertained goods

As with s 6, s 7 applies only to contracts for the sale of specific goods. It is important to distinguish between purely generic unascertained goods and unascertained goods from an identified bulk. For this, you could helpfully refer to the dictum of Blackburn J at first instance in *Howell v Coupland* where he explained that "had the contract been simply for so many tons of potatoes of a particular quality, then, although each party might have had in his mind when he made the contract this particular crop of potatoes, if they had all perished, the defendant would still have been bound to deliver the quantity contracted for; for it would not have been within the rule of a contract as to a specific thing. But the contract was for 200 tons of a particular crop in particular fields, and therefore there was an implied term in the contract that each party should be free if the crop perished. The property and risk had clearly not been transferred under the terms of this contract, so that the consequence of the failure of the crop is, that the bargain is off so far as the 120 tons are concerned.

Finally, you should explain the relationship between s 7 and the doctrine of frustration. Although s 7 has many similarities to the common law rules of frustration, the Law Reform (Frustrated Contracts) Act 1943 (which applies to common law frustration by setting out the legal consequences of a contract that has been held to have been frustrated) has no application to contracts avoided by s 7.

Where the risk in the goods has not yet passed to the buyer, and s 7 has no application, then the common law rules of frustration might apply. These rules are not limited to the circumstances set out in s 7 and might therefore apply even where the goods have not perished. In broad terms, a contract will become frustrated at common law where its main purpose has become impossible to properly achieve and in such cases, the parties may be relieved from any further obligations under the contract and may also be entitled, for example, to recover monies that had already been transferred under the contract. As with s 7, neither party may be at fault if the common law rules are to apply.

If, before the agreement is avoided or frustrated, the buyer has paid some money to the seller, then, if the agreement is avoided under s 7, the buyer is entitled to recover advance monies paid provided there has been a total failure of consideration. A total failure of consideration will occur where the buyer has received nothing and has therefore had no benefit under the agreement. However, where the contract is frustrated at common law, then the position is governed by the Law Reform (Frustrated Contracts) Act 1943, s 1(2) of which provides that all sums paid or payable in pursuance of the contract before the time when the parties were discharged shall, in the case of sums paid, be recoverable from him and, in the case of sums payable, shall cease to be payable, provided that, if the party to whom the sums were paid or payable incurred expenses before the time of discharge in or for the purpose of the performance of the contract, then the court may, if it considers it just to do so,

having regard to all the circumstances of the case, allow him to retain (or recover) the whole or any part of the sums paid or payable, provided that this is not in excess of the expenses actually incurred. Unlike the position under s 7, it is unnecessary to show a total failure of consideration for s 1(2) to operate.

2. If a case similar to the facts in *Howell v Coupland* were to arise today, would the buyer be obliged to accept the crop that had in fact been harvested even if this was less than the contract amount?

This question requires you to demonstrate your understanding of the cases, especially *Howell v Coupland* (1875-76) LR 1 QBD 258 and *HR & S Sainsbury Ltd v Street* [1972] 1 WLR 834.

In *Sainsbury*, it was held that where only part of the goods have perished, then the seller might be required to make the remaining (unperished) goods available to the buyer, although the buyer in such a case will not be under any obligation to accept them. In *Sainsbury*, Street agreed to sell 275 tons of barley to Sainsbury, this barley being grown on Street's farm. Due to a poor harvest and without any fault on Street's part, the crop only came to 140 tons. As a result, Street acted on the basis that the contract was frustrated and he sold the available crop to a third party. Sainsbury claimed damages from Street and conceded that, in the event of Street's failure through no fault of his own to produce a crop of 275 tons, Street was under no obligation to make good the difference, but asserted that Street was in those circumstances under an obligation to deliver the quantity that was actually harvested. MacKenna J held that where a buyer contracts with a seller to purchase a specific portion of a crop, and performance becomes impossible owing to a failure of the crop without any default on the part of the seller, then the seller is not liable to the buyer in damages, although he is obliged to deliver the actual amount that has been harvested. His Lordship confirmed the rule in *Howell v Coupland*, but held that that did not affect Street's obligation to deliver the quantity actually produced. He arrived at this decision on the basis that there was no implied term in the parties' contract that the seller need not deliver to the buyer the actual quantity harvested in the event of the seller's inability through no fault of his own to produce the whole contracted amount.