would not strictly be correct if, as would usually be the case, the bus came with a driver. In that case, the owner would remain in possession through the driver and the contract would be simply one for use of the bus. The position is the same in a commercial context, where a piece of plant, such as a bulldozer or a crane, is supplied with an operator (except where, as is often the case, the operator is transferred with the equipment and becomes for the time being the employee of the hirer). In this latter case, it would be accurate to describe the transaction as hire.

LEASES

In recent years, it has been common for contracts for the use of goods to be made and described as 'leases'. So, a car may be 'leased' rather than bought as may major items of office equipment or computers. There can be a number of advantages in this from the customer's point of view. One is that such transactions appear to be of an income rather than a capital nature, so they will not show up in the company's balance sheet as a capital purchase. This can be attractive as it may make the company's financial position look better. Nor is this necessarily a cosmetic benefit since there can be perfectly good business reasons for wishing to avoid tying up capital in equipment, particularly where it has to be borrowed at high rates of interest. Apart from these financial advantages, there may also be tax benefits for a business in leasing equipment rather than buying it. **2–12**

Although the term 'lease' is very commonly used to describe such transactions, there is at present no separate legal category of leases of goods, unlike leases of land which have been recognised from the 12th century. Therefore, in law, most leases will simply be contracts of hire. In some cases, however, there may be an understanding that at the end of the period of the lease the customer may or will buy the goods. This may amount to no more than a non-binding arrangement, in which case it will have no effect on the legal nature of the transaction. If, however, the customer has an option to buy the goods at the end of the lease, the transaction will in substance be one of hire purchase. If the customer has agreed to buy the goods at the end of the lease, then it would seem that the contract is actually one of sale.

It is worth noting that, in many 'leases', the 'lessor' is not the supplier but a bank or finance house. In such cases, the supplier sells the goods to a bank which then leases them to the customer. This produces a triangular relationship similar to that in a hire purchase contract, shown diagrammatically at para 2–09. This rather artificial arrangement can give rise to difficulties, particularly when the goods turn out to be defective. It is natural to assume that the supplier is the person primarily responsible for the quality of the goods, but the fact that there is usually no contract between the supplier and the customer makes it difficult to give effect to this assumption. The lessor would be under implied obligations as to the quality of the goods, but is likely to have attempted in its standard form of lease to escape from these obligations. The confusion between supplier and lessor is accentuated by the practice, apparently common in the photocopier leasing trade, of the finance house adopting a name confusingly similar to that of the supplier.[14]

PRACTICAL SIGNIFICANCE OF THESE DISTINCTIONS

2–13 Many readers may feel that this quite elaborate catalogue of different transactions is a typical example of the passion of lawyers for making things more complicated. The practical difficulty is the predominance of statute law in this area. Each of the statutes deals with a particular contract and each is therefore peculiar to that contract. This is particularly so with the Sale of Goods Act 1979, which applies only to contracts for the sale of goods strictly defined and which is much the most important statute in the field.

Judges have reduced these difficulties in practice by being willing, in some cases, to apply the rules of the Sale of Goods Act by analogy with other contracts. This was particularly true in relation to implied undertakings as to the ownership and quality of the goods, and Parliament adopted this approach in 1982 when it passed the Supply of Goods and Services Act. This provided for implied terms as to ownership and quality in contracts of exchange and work and materials, which were in identical terms to those contained in the Sale of Goods Act.

Nevertheless, the 1982 Act only dealt with these problems and, important as they are, they make up only a proportion of the whole. No doubt, in some other areas, judges will solve problems by applying the Sale of Goods Act 1979 by analogy. This technique works best where the solution can, at least in theory, be explained as turning on the implied understanding of the parties, but there are some provisions in the Sale of Goods Act which cannot possibly be explained in such a way (see particularly the rules discussed in Chapter 6).

14 See *Lease Management Services v Purnell Secretarial Services* [1994] Tr LR 337.

CHAPTER 3

MEANING AND TYPES OF GOODS

This chapter deals with some basic definitions. This is not very exciting but it is essential in order to understand what follows.

THE DEFINITION OF GOODS

Section 61(1) of the Sale of Goods Act 1979 states that 'goods': **3–01**

> Includes all personal chattels other than things in action and money, [and, in Scotland, all corporeal moveables except money] and, in particular, 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

The words in brackets reflect the different legal terminology of Scotland and may be ignored for present purposes. The remainder of the text uses some unfamiliar language and requires further explanation.

Historically, English lawyers have divided property into 'real property' (basically, land) and 'personal property' (all forms of wealth other than land). This terminology has found its way into ordinary usage. In origin, real property was property which could be recovered by a real action, that is, an action which leads to the recovery of property *in specie* and not to damages for its non-return. Unfortunately, when this distinction was first drawn (in the 12th century), only freehold estates could be recovered by real action. Purists therefore took the view that leasehold estates were not real property. By the 15th century, leasehold interests were as effectively protected by the courts as freehold interests, but the terminology survived and leasehold interests were called 'chattels real'. This terminology is now archaic, but it survived long enough to influence the definition in 1893, and the 1979 Act simply repeats the wording of the 1893 Act.

Etymologically, the words 'chattel' and 'cattle' appear to be different spellings of the same old Norman French word, which meant property, but, over the centuries, 'cattle' has been narrowed to its modern meaning of livestock while the word 'chattel' has retained its wider meaning. So, 'personal chattels' would mean all forms of property other than 'real property' (freehold interests in land) and 'chattels real' (leasehold interests in land). The Act goes on specifically to exclude 'things in action' and 'money'. 'Things in action' are those forms of property which cannot be physically possessed so that they can only be enjoyed by bringing an action. This includes such things as shares, patents, copyrights, trademarks, rights under bills of exchange and policies of insurance. The exclusion of 'money' presumably means that a contract to purchase foreign exchange is not a sale of goods. On the other hand, a contract to purchase banknotes issued by the Confederate States of America probably is a contract for the sale of goods, since the notes will have been bought for their historic interest and are no longer usable as currency.

The second half of the definition deals with the case of the sale of growing crops, etc, which has already been discussed.

A problem of great practical importance is whether computer software is goods. Where it is supplied on a disk, it would seem that the disk is goods but, in practice, software suppliers often simply instal the system on the customer's computer(s) and go away. In this case, there is no physical object which is transferred and the software supplier will often retain ownership of the program, simply giving the customer a licence. In the Court of Appeal, in *St Albans City and District Council v International Computers Ltd* (1996),[1] Sir Iain Glidewell took the position, *obiter,* that, if not goods, software should be treated *like* goods for the purpose of the implied terms as to quality. It must, however, be arguable that the software supplier is providing a service rather than goods and is, therefore, only under a duty of care.

EXISTING AND FUTURE GOODS

3–02 The Sale of Goods Act 1979 contains two explicit sets of sub-divisions of goods. One is existing and future goods and the other specific and unascertained goods (discussed in 'Specific and unascertained goods', below). Section 5(1) says that:

> The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by him after the making of the contract of sale, in this Act called future goods.

Future goods are also defined by s 61(1) as:

> …goods to be manufactured or acquired by the seller after the making of the contract of sale.

It will be seen that goods which are in existence may be future goods, as where the seller has agreed to sell goods which at the time of the

1 [1996] 4 All ER 481.

contract are owned by someone else. A typical example of future goods would arise where the seller was to make the goods, but the category would appear also to include things which will come into existence naturally, as where a dog breeder agrees to sell a puppy from the litter of a pregnant bitch. In such a case, there is an element of risk that things will not turn out as the parties hope; for instance, that all the puppies die or that the buyer had contracted for a dog puppy and all the puppies are bitches. In such a case, the court will have to analyse the agreement to see whether the seller's agreement was conditional on there being a live puppy or a puppy of the right sex.

SPECIFIC AND UNASCERTAINED GOODS

Section 61(1) defines 'specific goods' as 'goods identified and agreed on at the time a contract of sale is made'. **3–03**

Unascertained goods are not defined by the Act but it is clear that goods which are not specific are unascertained. It is important to emphasise that the distinction relates to the position at the time the contract of sale is made. Later events will not make the goods specific but they may, and often will, make them ascertained.

As we shall see (in Chapter 6), the distinction between specific and unascertained goods is of particular importance in the passing of property between seller and buyer. It may prove helpful, therefore, to explain further that unascertained goods may be of at least three different kinds. One possibility is that the goods are to be manufactured by the seller. Here, they will usually become ascertained as a result of the process of manufacture, although, if the seller is making similar goods for two or more buyers, some further acts may be necessary to make it clear which goods have been appropriated to which buyer. The second possibility is that the goods are sold by a generic description, such as '500 tons Western White Wheat'. In such a case, the seller could perform the contract by delivering any 500 tons of Western White Wheat (provided that it was of satisfactory quality, etc). If the seller was a trader in wheat, he or she might well have more than 500 tons of wheat but would not be bound to use that wheat to perform the contract; he or she could and often would choose to buy further wheat on the market to fulfil the order. Where there is an active market, sellers and buyers may be entering into a complex series of sales and purchases according to their perception of how the market is moving and leaving who gets what wheat to be sorted out later. This is obviously particularly likely where the sales are for delivery at some future date rather than for immediate despatch. In this situation, the seller may form plans to use a parcel of wheat to deliver to buyer A and another parcel to buyer B. Usually, the forming of these plans will not make the goods ascertained until the seller makes some act of appropriation which prevents a change of mind.

3–04 A third, and perhaps less obvious, possibility is that the goods may be part of an undivided bulk. So, if the seller has 1,000 tons of Western White Wheat on board the SS Challenger and sells 500 tons to A and 500 tons to B, these are sales of unascertained goods, since it is not possible to tell which 500 tons has been sold to which purchaser. Important practical consequences flow from this rule: in this situation, the goods become ascertained only when it can be established which part of the cargo is appropriated to which contract. So, in *Karlhamns Oljefabriker v Eastport Navigation* (1982),[2] 22,000 tons of copra were loaded on board a ship in the Philippines, of which 6,000 tons were sold to a Swedish buyer. At this stage, of course, the goods were unascertained. The ship called at Rotterdam and at Hamburg on its way to Sweden and 16,000 tons were offloaded at these two ports. It was held that the goods became ascertained on the completion of discharge in Hamburg, as it was then possible to say with certainty that the remainder of the cargo was destined for the purchaser.

This rule was significantly modified by the Sale of Goods (Amendment) Act 1995. Under the terms of this Act, if a seller sells part of an undivided bulk, the buyer may become a tenant in common of a proportional share of the whole bulk (see Chapter 6).

SALES AND AGREEMENTS TO SELL

3-05 Section 2 of the Sale of Goods Act 1979 draws a distinction between sales and agreements to sell. Section 2(4) provides:

> 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.

Section 2(5) states:

> Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled, the contract is called an agreement to sell.

The reason for this distinction arises from an ambiguity in the word 'sale' which may refer either to the contract between buyer and seller or to the transfer of ownership from seller to buyer which is the object of the agreement. In English law, it is possible, in principle, for ownership to pass from seller to buyer simply by agreement, without either delivery of the goods or payment of the price.

2 [1982] 1 All ER 208.

CHAPTER 4

THE PRICE

INTRODUCTION

In a contract of sale, the irreducible minimum of obligations is for the seller to deliver the goods and the buyer to pay the price. This chapter considers the rules about the ascertainment of the price, and Chapter 5 describes the rules about payment of the price and delivery of the goods. **4–01**

Sections 8 and 9 of the Sale of Goods Act 1979 deal with the price. Section 8 provides:

> (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealings between the parties.
> (2) Where the price is not determined as mentioned in sub-s (1) above, the buyer must pay a reasonable price.
> (3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 9 states:

> (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and he cannot or does not make the valuation, the agreement is avoided; but if the goods or any part of them have been delivered to and appropriated by the buyer, he must pay a reasonable price for them.
> (2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.

These sections do not appear in fact to cover all the difficulties that can arise, and in practice resort is also made to the general principles of contract law.

THE PARTIES SAY NOTHING ABOUT THE PRICE

The fact that no price has been agreed might be good evidence that the parties had not completed a contract but it is clear that in practice people often make binding contracts without having agreed on the payment terms. Many people will ask a solicitor to handle the buying **4–02** or selling of their house without agreeing or even asking about the cost, though the practice of asking for an estimate and 'shopping around' is becoming more widespread. Similarly, a customer may ring up an established supplier and ask for certain specified goods to be sent round without asking the price. In such a case, it is clear that there is a contract to buy at a reasonable price (s 8(2)).

Section 8(3) of the Sale of Goods Act 1979 provides that what is a reasonable price is a question of fact. If the seller is in business, evidence of his or her usual prices will be good evidence of what is a reasonable price but, in theory at least, it is not decisive. Undoubtedly, however, the scope for arguing that the seller's usual prices are not reasonable must be limited in some cases. If a Chelsea housewife telephones an order to Harrods Food Hall, it may be doubted whether she can resist paying their standard charges on the ground that she could have bought the goods more cheaply at a supermarket. No doubt, one reason for this is that a court would be entitled to take into account the size, location and expense of the seller's premises and the quality of service offered in deciding what was reasonable. Another different argument pointing to the same result would be that it is the universal practice of English grocers to price the goods on their shelves so that customers may reasonably expect that all goods will be sold at marked prices, no more and no less.

Obviously, however, there are sales where the seller is not in business or is not in the business of selling goods of the kind sold. In such cases, there will be no seller's standard price to appeal to and the court will have to do the best it can with such evidence as the parties present to it.

THE PARTIES FIX THE PRICE IN THE CONTRACT

4–03 This is the simplest and probably most common situation. Obviously, the parties may fix the price in a number of different ways. I may sell my car for £3,000 but, if I take the car to the filling station, I would ask for as much petrol as was needed to fill the tank at 73p per litre; in the first case, a global price and, in the second, a unit price. It may make sense in some cases to fix a price in relation to some objective external measure, for example, 1,000 barrels of oil delivered on 1 December 1999 at the best price quoted that day on the Rotterdam spot market.

An important point often overlooked in practice is what the price includes. Retail sellers are usually obliged to quote VAT inclusive prices but, in most other cases, prices are VAT exclusive unless otherwise agreed. It may be important to know whether the price covers packing and delivery. Such matters are covered in well drafted conditions of sale and purchase but are otherwise often forgotten.

THE PRICE IS LEFT TO BE FIXED IN A MANNER AGREED BY THE CONTRACT

Section 8(1) of the Sale of Goods Act 1979 clearly contemplates that the contract may leave the prices to be fixed later in an agreed manner. One such manner would be third party valuation, but this is expressly dealt with by s 9 and is discussed separately below. The Act is silent on other methods of price fixing and the matter is not free from difficulties. **4–04**

One possibility is that the contract may provide for the price to be fixed by the seller (or the buyer). At first sight, it seems strange for one party to agree that the price is to be fixed by the other, but such contracts are in fact quite common. A classic example is the contracts made by oil companies to supply petrol to filling stations. These are nearly all on a long term basis because the companies are anxious to have guaranteed outlets. Typically, therefore, filling station operators agree to take all their supplies of petrol from a particular company for a period of five years. Obviously, it is not possible to make such a contract at a fixed price since no one knows what the price of oil will be next month, let alone over the next five years. It would be legally permissible to provide for price indexation but, in practice, very difficult to find a sufficiently flexible and comprehensive index. Often, the problem is solved by providing that the price is to be the list price at the date of delivery. There have been at least 20 litigated cases arising out of such contracts over the last 35 years, since owners of filling stations are often anxious to escape from one petrol company into the arms of another, but in none of these cases has it been argued that the price agreement is invalid.

One explanation for this would be that the buyer is protected in such cases by the requirement to pay the list price since this is the price that is being charged to all filling stations tied to that particular company and, if a company were to treat all of its outlets badly, then those which were approaching renewal date would switch to another supplier. If this is right, then a seller who agrees to sell at list price at date of delivery and who does not in fact have a price list may be in a different position. It would be possible to say that unilateral price fixing is only adequately certain where it contains some objective element.

However, in *May and Butcher Ltd v R* (1934),[1] Lord Dunedin said: **4–05**

> With regard to price, it is a perfectly good contract to say that the price is to be settled by the buyer.

1 [1934] 2 KB 17n.

In *Lombard Tricity Finance Ltd v Paton* (1989),[2] this was assumed to be correct by the Court of Appeal and was applied to a contract which entitled a lender to change the interest rate unilaterally.

Rather than leave the price to be fixed by one party, the parties may agree that the price shall be fixed by agreement between them later. This is a common but potentially dangerous course. There is no problem if the parties do agree on a price but difficulties arise if they do not. It might be thought that, in that case, s 8(2) would apply and a reasonable price would be due. However, in *May and Butcher v R* (1934),[3] the House of Lords held otherwise. In that case, there was a contract for the sale of tentage at a price to be agreed between the parties. The parties failed to agree and the House of Lords held that there was no contract. The argument which was accepted was that s 8(2) only applied where there was no agreement as to the price so that its operation was excluded where the parties had provided a mechanism for fixing a price which had not worked. This decision had never been overruled and is still, in theory, binding. Nevertheless, the courts have not always followed it.

In *Foley v Classique Coaches* (1934),[4] the plaintiffs sold land to the defendants who agreed, as part of the same contract, to buy all their petrol from the plaintiffs 'at a price to be agreed between the parties in writing and from time to time'. The transfer of the land was completed and the defendants later argued that the agreement to buy the petrol was not binding as the price was uncertain. This argument was rejected by the Court of Appeal. One can see a number of possible factors influencing this decision. The agreement to buy the petrol was only part, and a relatively small part, of the whole agreement; the rest of the agreement had been performed; the defendants had got the land; and it is reasonable to think that their undertaking to buy petrol made them more attractive purchasers to the plaintiff so that they got a better price. The court also attached importance to a clause in the contract providing for disputes to be referred to arbitration, though the general principle is that an arbitrator ought to reach exactly the same decision as the judge.

4–06 These two cases reflect a tension which exists throughout the law of contract. On the one hand, judges feel that the parties should take care in the formulation of their agreements, employ competent lawyers and leave no loose ends; on the other hand, there is a feeling that the law should seek to serve the realities of commercial life and, if there is a deal, there should be a contract. Probably, no judge holds in its extreme form either view, but some clearly lean more to one side than to the other. Two recent cases from the general law of contract suggest that, at

2 [1989] 1 All ER 918. See, also, *Shell UK Ltd v Lostock Garage* [1976] 1 WLR 1187, where the question went by default.

3 [1934] 2 KB 17n.

4 [1934] 2 KB 1.

the moment at least, the pendulum has swung in favour of the second view. In *Beer v Bowden* (1981),[5] there was a lease for 14 years. The lease provided that the rent should be £1,250 a year for the first five years and thereafter:

> …such rent as shall be agreed between the landlords and the tenant …and in any case…not less than the yearly rental of £1,250.

The contract provided no machinery for fixing the rent if the parties did not agree after the first five years and the tenant argued that he was entitled to stay for the full term at £1,250 a year. The Court of Appeal rejected this argument. It said that the purpose of the minimum rent provision was to cover the situation where rents generally fell and that it did not indicate that if there was no agreement the rent should stay at £1,250. The court considered that the parties had intended to agree that the rent should be a reasonable one. (It is important to note that, in this case, the tenant did not argue that the whole contract was invalid for uncertainty since the last thing he wished to do was to abandon the lease.)

The case suggests that the provision of defective machinery for reaching agreement is not inconsistent with an inference that the parties intend a reasonable price. This view is strongly reinforced by the decision of the House of Lords in *Sudbrook Trading Estate v Eggleton* (1982).[6] In that case, there was a lease with an option for the tenant to buy the landlord's interest at a price to be agreed. The lease, which was clearly professionally drawn up, contained a provision that, if the parties did not agree on the price, it was to be fixed by two valuers, one to be appointed by either side. The lease did not provide for what was to happen if the valuers were not appointed. The tenant sought to exercise the option; the landlord by this time did not wish to sell, refused to appoint its valuer and argued that there was no binding contract. There was an unbroken series of cases for over 100 years accepting this argument but the House of Lords rejected it. Their view was that in substance the parties clearly intended to agree on a reasonable price. This was reinforced by the provision for the appointment of valuers, since they are professional people who would be bound to apply professional, and therefore reasonable, standards. It followed that the agreement was clear and should not fail simply because the parties had provided defective machinery for carrying it out. If necessary, the court could provide a means for discovering a reasonable price.

There is, therefore, a good chance that a court will hold where the parties do not agree that they intended the price to be a reasonable one.

5 [1981] 1 WLR 522; [1981] 1 All ER 1071.
6 [1982] 3 All ER 1; [1983] 1 AC 444.