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.

This is particularly likely where the goods have actually been delivered and accepted by the buyer. Nevertheless, it remains imprudent for the parties to make such an agreement granted that courts sometimes hold such agreements to be inadequately certain. These dangers can be avoided entirely by providing machinery for dealing with those cases where later agreement proves impossible or by simply providing that the price 'shall be such as the parties may later agree or in default of agreement a reasonable price'.

FIXING THE PRICE BY THIRD PARTY VALUATION

4–07 This is dealt with by s 9 of the Sale of Goods Act 1979, which is set out above. The provisions are reasonably straightforward. Price fixing by third party valuation is valid but dependent on the third party actually undertaking the valuation. If one party prevents the valuation, he or she is said to be liable to an action. Presumably, it would be the seller who would usually prevent the valuation by not making the goods available. It is worth noting that the result of such obstruction by the seller is not a contract to sell at a reasonable price as is the case where the goods are delivered and no valuation takes place, but an action for damages. This may not make much difference in practice, since what the buyer has been deprived of is the chance to purchase the goods at the price the valuer would have fixed and a court would almost certainly hold this to be the same as a reasonable price. (In many cases, the buyer will not in fact recover substantial damages. This will become clearer after reading Chapter 10.)

An important question is what, if anything, sellers can do if they think the valuation too low, or what buyers can do if they think it is too high. No doubt, the valuation is not binding if it can be shown that the valuer was fraudulently acting in concert with the other party. Apart from this case, it would seem that it is binding as between seller and buyer. However, the party who is disappointed with the valuation will have an action against the valuer if it can be shown that the valuation was negligent. This was clearly accepted by the House of Lords in *Arenson v Casson* (1977),[7] a case involving the sale of shares in a private company at a price fixed by valuation. In order to show that a valuation was negligent, it is not sufficient to show that other valuers would have reached a different figure. It must be shown that the figure produced was one that no reasonably competent valuer could have arrived at.

7 [1977] AC 747.

PRICE FLUCTUATIONS

If the contract is to run over a long period, a price which appears sensible at the time the contract is made may come to seem quite inappropriate later on. Two questions arise in this context. The first concerns the steps the parties can take to provide for economic or market fluctuations; the second is whether the law will intervene to relieve a party who has entered into a fixed price contract which has been overtaken by massive inflation (or indeed deflation). **4–08**

We have already seen that the parties may, at least in some cases, deal with price fluctuations by allowing one party to vary the price, but clearly, in many cases, such an arrangement will not be acceptable to the other party involved. The parties may agree to re-negotiate prices from time to time but, apart from the difficulties which have already been pointed out, an endless cycle of re-negotiation may not be commercially sensible.

It may, therefore, be desirable to provide a more structured solution, either by linking the price to an index or by providing a formula for measuring increases or decreases in costs. At one time, it was thought, because of some remarks by Denning LJ in *Treseder-Griffin v Cooperative Insurance Society Ltd* (1956),[8] that such attempts might be contrary to public policy. The argument was that resistance to inflation demanded unwavering allegiance to nominalism; the principle that a pound is a pound is a pound. It is true that many economists think that systems in which all wages are indexed to the cost of living fuel inflation, since wage increases filter fairly quickly back into the cost of living so that the increases feed on themselves and multiply. However, it is quite a different matter to forbid individuals to recognise the realities of inflation and guard against it, and this was recognised in the case of *Multiservice Bookbinding v Marden* (1979),[9] where an English mortgage in which the capital repayments and interest were tied to the Swiss franc was held to be valid.

Granted that provision against cost fluctuations in a long term contract is permissible, how should it best be done? The most extensive experience is in relation to construction contracts where two systems have emerged. One is to take a baseline price and permit additions (and reductions) because of prescribed increases (or decreases) in cost. In principle, this should produce a fair result, but there are serious practical difficulties in defining which cost increases can be passed on and to what extent, especially as material and labour costs are not **4–09**

8 [1956] 2 QB 127.
9 [1979] Ch 84.

spread evenly over the life of the contract. This solution tends to produce complex formulae and much scope for dispute.

The other system is for the basic price to be indexed. In the building industry, there are appropriate indices which are independent and regularly published. This produces a simple calculation and it may be assumed that, in the long run, occasional minor roughnesses even themselves out. However, this system does depend on the existence of an appropriate index. It would not be sensible, for example, to link sales of oil to the Retail Price Index since that may be going up when the price of oil is coming down. It would probably not make sense to tie petrol prices at the pump to OPEC posted prices or prices on the Rotterdam spot market, since the first may be too stable and the latter too volatile to produce a sensible result. To pursue the index solution therefore requires the most careful examination of whether or not the index under consideration is appropriate.

4–10 Earlier, a question was proposed as to whether English law would relieve a party who had entered into a fixed price contract which was overtaken by later events. In general, the answer is that it will not and indeed there is only one case which contradicts that rule. This was the decision of the Court of Appeal in the striking case of *Staffordshire Area Health Authority v South Staffordshire Waterworks* (1978).[10] In this case, the defendant entered into a contract in 1929 to supply water to the plaintiffs. The contract provided that 'at all times hereafter' the hospital was to receive 5,000 gallons of water a day free and all the additional water it required at the rate of 7 old pence (2.9 new pence) per 1,000 gallons. (This rate was about 70% of the then market rate.) By 1975, the market rate was 45p per 1,000 gallons. The Court of Appeal held that the defendants were entitled to give notice to terminate the agreement.

A number of observations may be made about the case. First, the termination came 46 years after the contract was made and the market price was then some 16 times the contract price (depending on what arithmetical allowance is made for the free gallons). In any view, therefore, the facts were strong and are unlikely to recur often. Secondly, only one of the judges (Lord Denning MR) explicitly based his decision on the effects of inflation; the other two judges purported to decide the case by reading the words 'at all times hereafter' as controlling the price only so long as the agreement continued and not as referring to its duration. It is difficult to believe, however, that they ignored the actual situation in arriving at this somewhat strange construction of the agreement.

10 [1978] 3 All ER 769; [1978] 1 WLR 1387.

CHAPTER 5

DELIVERY AND PAYMENT

INTRODUCTION

Section 27 of the Sale of Goods Act 1979 provides: **5–01**

> It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Section 28 states:

> Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

This chapter considers the legal problems arising from the duty of the seller to deliver the goods and of the buyer to accept and pay for them. It will discuss, first, the problems relating to payment and the relationship between payment and delivery, then, the rules about delivery and finally the buyer's duty of acceptance.

PAYMENT

Section 28 states that, unless otherwise agreed, payment and delivery are concurrent conditions. This means that they should take place at the same time. Obviously, the parties may have agreed expressly or by implication that payment is to precede delivery or the other way round and this is extremely common. In practice, payment and delivery cannot take place simultaneously without the willing co-operation of both parties and this means, as the second half of s 28 makes clear, that the seller who complains that the buyer has not paid must show that he or she was ready and willing to deliver and, conversely, a buyer who complains of the seller's failure to deliver must show that he or she was ready and willing to pay the price. In practice, this is often done by tendering the goods or the price respectively. **5–02**

It is worth examining in a little more detail the position where the parties agree that payment is to precede delivery or vice versa. In commercial sales, it is often agreed that goods will be delivered on usual trade terms, such as payment within 30 days or payment within 30 days of receipt of invoice. The effect of such an agreement is that the seller must deliver first and cannot subsequently have a change of mind and insist on payment on delivery. This would be so even if there were grounds for thinking that the buyer might not be able to pay. (It is arguably a defect in English law that, unlike some other systems, once the contract is under way, there is no right to require convincing assurances that the other party can and will perform.)[1] A seller in this position has, in effect, to gamble on whether any information about the buyer's inability to pay turns out to be true, since the loss from delivering goods to a buyer who cannot pay for them will usually be greater than any liability in damages that might be incurred for non-delivery.

For the same reason, a seller cannot refuse to deliver because the buyer has been late in paying on an earlier contract. Sellers often think they are entitled to do this and frequently do, but it is clear that this is wrong. In *Total Oil v Thompson* (1972),[2] a petrol company entered into a typical contract to supply petrol to a filling station. The contract provided for delivery on credit terms, but the filling station owner turned out to be a bad payer and the petrol company attempted to change to a cash on delivery basis. It was held that they were not entitled to do this. A seller is, of course, entitled to change the payment terms in respect of future contracts.

5–03 It may be agreed that the buyer is to pay in advance. This often happens in international sales where the buyer agrees to pay by banker's letter of credit. In this case, it is clear that the seller's obligation to deliver is conditional on the buyer having opened a letter of credit which complies with the terms of the contract. So, in *WJ Alan Co Ltd v El Nasr Export and Import Co* (1972),[3] there was a contract for the sale of coffee beans and the buyer agreed to open a credit in Kenyan shillings. In fact, the credit opened was in pounds sterling, though for the correct amount at the then prevailing rate of exchange. It was held that the seller's obligation to deliver (indeed, to ship) the goods was conditional on the buyer opening a credit in Kenyan shillings.

Questions may arise about the form of payment. The starting point is that, in the absence of contrary agreement, the seller is entitled to be paid in cash but, of course, the parties are free to make other agreements.

In many cases, it would be relatively easy to infer that payment by cheque was acceptable. Usually, payment by cheque is said only to amount to a conditional discharge, that is. the buyer is only discharged when the cheque is paid. This means that if the buyer's cheque bounces,

1 Cf Uniform Commercial Code 2.609.
2 [1972] 1 QB 318.
3 [1972] 2 QB 189.

the seller has a choice to sue either on the cheque or on the underlying transaction of sale. In the same way, it has been held that a buyer who pays by banker's letter of credit is only conditionally discharged by the opening of the credit. So, in *EDF Man Ltd v Nigerian Sweets and Confectionery Co Ltd* (1977),[4] the buyer had arranged a credit with a bank which went into liquidation before paying the seller. It was held that the buyer was liable for the price. On the other hand, it was held in *Re Charge Card Services Ltd* (1989)[5] that a customer whose payment by credit card is accepted is absolutely discharged, so that, if the credit card company becomes insolvent and does not pay the retailer, the retailer cannot recover payment from the customer.

In international sales, the price may be expressed in a foreign currency. In this situation, it is vital to distinguish between the money of account and the money of payment. The money of account is the currency which measures the extent of the buyer's obligation; the money of payment is the currency in which payment is actually to be made. The two may be, but need not be, the same. The distinction is, of course, crucial in the case of fluctuations in currency value between the date of the contract and the date of payment. So, it is the practice of the Rotterdam spot market in oil for all transactions to be in US dollars even though, as will often be the case, neither buyer nor seller is American. In such a market, which is highly international, there are powerful arguments of convenience for all transactions being measured in a single currency.[6]

DELIVERY

The first thing to say about 'delivery' is that the word bears a meaning **5–04**
in the Sale of Goods Act 1979 quite different from its colloquial meaning. If I say that a grocer will deliver, this would usually be taken to mean that the groceries will be brought to the house of a customer. In the Sale of Goods Act, the word does not have any necessary connotation of taking the goods to the customer and refers simply to the seller's obligation to hand the goods over. In the basic case, the seller performs his or her obligations by making the goods available to the buyer at his or her (the seller's) place of business.

It is undoubtedly prudent for the parties to spend some time thinking about delivery, and well drafted conditions of sale or purchase contain provisions which deal with such questions as

4 [1977] 2 Lloyd's Rep 50.
5 [1989] Ch 497.
6 See Dicey and Morris, *The Conflict of Laws*, 11th edn, 1987, pp 1441–42.

whether the customer is to collect the goods 'ex works' and, if so, whether the goods will be packed and whether labour will be available to help with loading. In many cases, sellers may quote a price which includes carriage and, in this event, it is desirable to fix the destination and whether the price includes unloading and positioning or installation.

The Act provides an answer to some of these questions, which applies in the absence of contrary agreement. In other cases, the parties may use shorthand expressions like 'fob Felixstowe' or 'cif Hamburg' to which the courts have attached a body of meaning arising out of scores of litigated cases.

The meaning of delivery

5–05 Section 61(1) of the Sale of Goods Act 1979 states that 'delivery' means 'voluntary transfer of possession from one person to another'. This is slightly misleading, as it suggests that delivery necessarily involves the seller handing the goods to the buyer. Although the typical case is undoubtedly that of the seller making the goods available to the buyer at the place and time set out in the contract, there are many cases where this does not happen.

In some cases, the buyer will already have been in possession of the goods. A typical example would be where goods were being acquired on hire purchase and the customer exercised an option to buy the goods at the end of the period of hire. It would be absurd to require formal delivery and re-delivery of the goods. They are sufficiently delivered to the buyer in this case because there is a change in the capacity in which the goods are possessed.

Conversely, the goods may be delivered even though the seller stays in possession, if the capacity in which he or she is in possession changes. An example would be the practical position of the dealer in the standard hire purchase car triangle (see Chapter 2). The dealer sells the car to the finance company but the car is never physically transferred to the finance company. It goes straight from dealer to customer. Physical transfer to the customer is a sufficient delivery to the finance company because the customer has only received possession because of a contract which recognises that the finance company is the owner of the car [7]

In some cases, it may be sufficient to transfer the means of control. So, delivery of a car may be made by transfer of the keys, and delivery

7 This is easy enough to say in the standard situation where there are no complications. It has caused considerable difficulty where the underlying transactions are illegal: *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210; [1970] 3 All ER 664.

of goods in a warehouse in the same way. This last example is very old and was discussed by Roman lawyers. It is sometimes called a symbolic delivery but, at least for classical Roman law, delivery of the key at the warehouse was required and this strongly suggests that control was the test.[8]

Section 29(4) of the Sale of Goods Act 1979 deals with the case of goods which are in the possession of a third party. It provides: **5–06**

> Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf; nothing in this section affects the operation of the issue or transfer of any document of title to the goods.

The most common example of this would be where the seller had put the goods into the hands of someone whose business it is to store other people's goods, such as a warehouseman. Obviously, the seller could tell the warehouseman to deliver the goods to the buyer but the buyer might wish to leave the goods in the hands of the warehouseman. Again, it would be absurd to require a formal delivery and re-delivery, but here agreement between seller and buyer will not be sufficient to effect delivery. The common practice is for the seller to give the buyer a delivery order, that is, a document instructing the warehouseman to deliver to the buyer. The buyer can present this to the warehouseman and ask that the goods be kept on his or her (the buyer's) behalf. Delivery takes place when the warehouseman recognises that the buyer is the person now entitled to the goods (this is technically known as an 'attornment').

This rule does not apply, as s 29(4) of the 1979 Act states, where there is a document of title involved. The notion of a document of title is quite a difficult one and can best be explained by considering the most important example, a bill of lading. A bill of lading is the document issued by the master of a ship to a person who puts goods on board the ship for carriage. The bill has a number of functions. It operates as evidence of the terms on which the goods are to be carried and also as a receipt for the goods. In the days of sail, goods might be put on board a ship for carriage and the bill of lading sent ahead by a faster ship. The practice of dealing in the bills of lading grew up and, by the late 18th century, the courts had come to recognise the bill of lading as having a third function of being a document of title to the goods on board ship. So, if the owners of goods put them on a ship and received a bill of lading made out to themselves or 'to order', they could endorse the bill by writing on its face a direction to deliver

8 See De Zulueta, *Digest 41, 1* and *2*, p 54, discussing D41–1–9.6.

the goods to someone else, and that would transfer to that person the right to receive them from the ship's master. In other words, the shipowner is required to deliver to whoever holds a bill of lading properly endorsed. In the case of commodity cargoes where trading is very active, the goods may be transferred many times while they are on the high seas.

5–07 The principal difference between the warehouseman and the ship's master is that, because the bill of lading is a document of title, the transfer is effective at once without the need for any attornment. In some cases, it is not possible to transfer the bill of lading, for instance, because only part of the goods covered by the bill of lading is being sold. In this situation, the seller may issue a delivery order addressed to the master but, since the delivery order is not a document of title, delivery will not be effective until the master attorns.

Finally, delivery to a carrier may be a delivery to the buyer. This is dealt with by s 32 which provides:

> (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.
> (2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and, if the seller omits to do so, and the goods are lost or damaged in the course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.
> (3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure during their sea transit; and, if the seller fails to do so, the goods are at his risk during such sea transit.

It should be emphasised that the rule that delivery to the carrier is delivery to the buyer is only a *prima facie* rule and can be rebutted by evidence of a contrary intention. So, in the case of sea carriage, if the seller takes the bill of lading to his or her own order, as would usually be the case (so as to reserve a right of disposal, see Chapter 6), this is evidence of a contrary intention. Further, if the seller sends the goods off in his or her own lorry, this will not be delivery to a carrier for this purpose, nor probably if the carrier is an associated company.

5–08 One of the consequences of the rule that delivery to the carrier is delivery to the buyer may be that, as between seller and buyer, the 'risk' of accidental damage to the goods in transit will fall on the buyer. (This is discussed more fully in Chapter 7.) However, this possibility is qualified by s 32(2) and (3) since, if the seller fails to make a reasonable contract of carriage or, in the case of sea carriage, fails to give notice enabling the buyer to insure, the risk will fall back on him or her. (In cif contracts, the most important form of export sale, it is part of the seller's obligations to insure.)

In *Young v Hobson* (1949),[9] electrical engines were sold on for terms (that is free on rail—the seller's price covers the cost of getting the goods 'on rail'). The seller made a contract with the railway under which the goods were carried at the owner's risk when he could have made a contract for them to be carried at the carrier's risk at the same price, subject to an inspection by the railway. This was held not to have been a reasonable contract to have made.

Place of delivery

In many cases, the parties will expressly agree the place of delivery or it will be a reasonable inference from the rest of their agreement that they must have intended a particular place. **5–09**

If there is no express or implied agreement, then the position is governed by s 29(2) which provides:

> The place of delivery is the seller's place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

This reflects the general position that in the absence of contrary agreement it is for the buyer to collect the goods, but the language is very much that of 1893 rather than 1979, reflecting the fact that the 1979 Act was simply a tidying up operation. The language assumes that the seller has only one place of business which will very often not be the case today. Presumably, where the seller has several places of business, the court will look at all the surrounding circumstances to see which of the seller's places of business is most appropriate.

Time of delivery

It is very common, particularly in commercial contracts, for the parties expressly to agree the date for delivery. This may be done either by **5–10**

9 (1949) 65 TLR 365.