reaction which was potentially harmful to all animals and particularly to mink. These facts raised the questions of whether the plaintiff was liable to the defendant and whether the supplier was liable to the plaintiff. The House of Lords held that as between the plaintiff and defendant it was not part of the description that the goods should be suitable for feeding mink. As between the plaintiff and its supplier, the House of Lords held that the goods did comply with the description 'Norwegian herring meal' which was part of the description but it was not part of the description that the goods should be 'fair average quality of the season'. Of course, the goods could not have been correctly described as 'meal' if there was no animal to which they could be safely fed. Why were the words 'fair average quality of the season' not part of the contractual description? The answer given by the House of Lords was that these words were not needed to identify the goods.

8–20 In *Harlingdon and Leinster Enterprises v Christopher Hull Fine Art* (1989),[19] both the defendant and the plaintiff were art dealers. In 1984, the defendant was asked to sell two oil paintings which had been described in a 1980 auction catalogue as being by Gabriele Munter, an artist of the German expressionist school. The defendant contacted the plaintiff amongst others and an employee of the plaintiff visited the defendant's gallery. Mr Hull, for the seller, made it clear that he was not an expert in German expressionist paintings. The plaintiffs bought one of the paintings for £6,000 without making any more detailed inquiries about it. The invoice described the painting as being by Munter. In due course, it was discovered to be a forgery. The majority of the Court of Appeal held that it had not been a sale *by* description. The principal test relied on by the Court of Appeal was that of reliance. It was pointed out that paintings are often sold accompanied by views as to their provenance. These statements may run the whole gamut of possibilities from a binding undertaking that the painting is by a particular artist to statements that the painting is in a particular style. Successful artists are of course often copied by contemporaries, associates and pupils. It would be odd if the legal effect of every statement about the identity of the artist was treated in the same way. This is certainly not how business is done since much higher prices are paid where the seller is guaranteeing the attribution and the Court of Appeal therefore argued that it makes much better sense to ask whether the buyer has relied on the seller's statement before deciding to treat the statement as a part of the description. On any view, this case is very close to the line. It appears plausibly arguable that the majority did not give enough weight to the wording of the invoice or

19 [1991] 1 QB 564; [1990] 1 All ER 737.

to the fact that the buyers appear to have paid a 'warranted Munter' price. It should be noted that the buyers did not argue, as they might have done, that it was an express term of the contract that the painting was by Munter.

8–21 In this last case, as the attribution to Munter was the only piece of potentially descriptive labelling attached to the painting, the Court of Appeal held that it was not a sale by description. In other cases, such as the *Ashington Piggeries* case, whilst it may be clear that some of the words attached are words of description, it may be held that other words are not. Whether one is asking the question as to whether there is a sale by description or the question what is a description, the questions whether the words are used to identify the goods and whether they are relied on by the buyer will be highly relevant factors.

Where there has been a sale by description, the court then has to decide whether or not the goods correspond with the description. In a number of cases, courts have taken very strict views on this question. An extreme example is *Re Moore and Landauer* (1921).[20] That was a contract for the purchase of Australian canned fruit. It was stated that the cans were in cases containing 30 tins each. The seller delivered the right number of cans but in cases which contained only 24 tins. It was not suggested that there was anything wrong with the fruit or that it made any significant difference whether the fruit was in cases of 30 or 24 cans. Nevertheless, it was held that the goods delivered did not correspond with the contract description. Similarly, in *Arcos v Ronaasen* (1933),[21] the contract was for a quantity of staves half an inch thick. In fact, only some 5% of the staves delivered were half an inch thick, though nearly all were less than 9/16th of an inch thick. The evidence was that the staves were perfectly satisfactory for the purpose for which the buyer had bought them—that is, the making of cement barrels—but the House of Lords held that the goods did not correspond with the description. The buyer is unlikely to take a point of this kind unless he or she is anxious to escape from the contract, for example, because the price of tinned food or wooden staves has fallen and it is possible to buy more cheaply on the market elsewhere.

It may be thought that some of these decisions lean somewhat too much to the side of the buyer. In *Reardon Smith v Hansen-Tangen* (1976),[22] Lord Wilberforce said that these decisions were excessively technical. In that case, there was a series of transactions to charter and sub-charter a ship, as yet unbuilt. The size and dimensions of the ship were set out in the contract and the ship was described as 'motor tank

20 [1921] 2 KB 519.
21 [1933] AC 470.
22 [1976] 1 WLR 989; [1976] 3 All ER 570.

vessel called yard number 354 Osaka Zosen'. The ship which was tendered when built complied with the technical specification but had been built at a different yard and therefore had the yard number Oshima 004. The tanker market having collapsed, the charterers sought to escape by saying that the ship did not comply with the description. The House of Lords rejected this argument. The technical reason for doing so was that the yard number did not form part of the description but, in reaching this conclusion, the House of Lords were clearly influenced by the underlying commercial realities of this situation. Since these last three mentioned cases, the Sale of Goods Act has been amended by the Sale and Supply of Goods Act 1994. One effect of those amendments was to remove the right to reject goods where the breach is so slight that to reject goods would be unreasonable. This new restriction on the right to reject applies to beaches of the conditions in sections 13–15, but does not apply to a buyer who is a consumer (see s 15A below, p 164).

Satisfactory quality

8–22 From the time the original Sale of Good Act (of 1893) was passed, until 1994, there was a statutory implied condition that the goods supplied 'are of merchantable quality'. In 1994, s 14 was amended to make it a condition that the goods supplied 'are of satisfactory quality'. The amendments were made by the Sale and Supply of Goods Act 1994, which also removed the definition of 'merchantable' quality and introduced a definition of 'satisfactory' quality.

The thinking behind this change was that the expression 'merchantable quality' is not used anywhere, either in English law or in colloquial English, except in the context of the Sale of Goods Act. It is, therefore, an expression which is understood only by lawyers specialising in sale of goods law. It was thought that buyers and sellers who were told that the goods must be of merchantable quality would not get much guidance from this statement. This may be agreed, but the problem was to find an appropriate substitute. The 1994 Act was based on a Law Commission Report of 1987 in which it had been suggested that 'merchantable quality' should become 'acceptable quality'. It may perhaps be thought to matter relatively little which of these words is used. Although 'acceptable' and 'satisfactory' are both words which are used every day and which most people will understand, they do not by themselves help buyers and sellers to know at all clearly where the line is to be drawn between acceptable and unacceptable and satisfactory and unsatisfactory goods. So, this change by itself is really almost entirely cosmetic.

The relevant parts of s 14, as it now is, read as follows:

> (1) Except as provided by this section and s 15 below and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.
>
> (2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances.
>
> (2B) For the purposes of this Act, the quality of goods includes their state and condition, and the following (among others) are in appropriate cases aspects of the quality of goods:
>
> (a) fitness for all the purposes for which goods of the kind in question are commonly supplied;
> (b) appearance and finish;
> (c) freedom from minor defects;
> (d) safety; and
> (e) durability.
>
> (2C) The term implied by sub-s (2) above does not extend to any matter making the quality of goods unsatisfactory-
>
> (a) which is specifically drawn to the buyer's attention before the contract is made,
> (b) where the buyer examines the goods before the contract is made which that examination ought to reveal, or
> (c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

8–23 The implied conditions as to satisfactory quality, like the parallel obligation as to fitness for purpose, which will be considered shortly, applies only to a seller who sells goods in the course of a business. Section 61(1) says that 'business' includes a profession and the activities of any government department (including a Northern Ireland department) or local or public authority. This is obviously not a definition of business but an extension of it to include activities by bodies which would not fall within the natural meaning of the word business. It should be noted that the Act does not say that the seller must be in the business of selling goods of that kind and, indeed, members of professions or central or local government will not normally be in the business of selling goods of a particular kind but may be within the scope of s 14. Under the original 1893 version of the

section, the implied obligation as to merchantable quality applied only where the goods were 'bought by description from a seller who deals in goods of that description'. The current wording 'where the seller sells in the course of business' dates from an amendment to the original Sale of Goods Act in 1973, and it was clearly intended to widen significantly the scope of the section. There will be relatively few cases which are outside it, except that of the private seller who is, for instance, disposing of his or her car.[23] Even a private seller may be caught where he or she employs a business to sell on his or her behalf because of the provisions of s 14(5) which provides:

> The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

This sub-section was considered by the House of Lords in *Boyter v Thomson* (1995).[24] In this case, a private seller instructed a business to sell a cabin cruiser on his behalf. The buyer purchased the boat thinking that it was being sold by the business and that it was owned by the business. It was agreed that the boat was not of merchantable quality. The buyer did not know that the owner of the cabin cruiser was a private person and no reasonable steps had been taken to bring that to the buyer's notice. The House of Lords held that the effect of s 14(5) was, in the circumstances, that both the principal and the agent were liable to the buyer.

8–24 It will be noted that the obligation that the goods shall be of satisfactory quality applies to 'goods supplied under the contract' and not to the goods which are sold. Obviously, the goods which are sold would usually be the goods which are supplied under the contract but this will not always be the case. A good example is *Wilson v Rickett Cockerell* (1954),[25] where there was a contract for the sale of Coalite. A consignment of Coalite was delivered but included a piece of explosive which had been accidentally mixed with the Coalite and which exploded when put on the fire. This case predated the current version of the Act, but the Court of Appeal held that the obligation that the goods should be of merchantable quality applied to all the goods which were supplied under the contract and, of course, it followed that the delivery was defective. The current version of the Act refers to 'goods

23 See *Stevenson v Rogers* [1999] 1 All ER 613, distinguishing *R and B Customs Brokers v United Dominions Trust* [1988] 1 All ER 847: see p 145 below.
24 [1995] 3 All ER 125.
25 [1954] 1 QB 598.

supplied under the contract', and clearly confirms the correctness of this decision.

In the original Sale of Goods Act 1893, there was no statutory definition of 'merchantable quality'. In 1973, a definition was introduced which reflected the case law prior to that date. In 1994, a new definition, now of 'satisfactory quality', was introduced. This new definition, in s 14(2A) and (2B), introduces a number of factors (in sub-s (2B)) not expressly set out in the earlier definition (of merchantable quality). The factors of description and the price spelt out in sub-s (2A) were, however, part of the earlier definition, and thus the earlier case law on them remains relevant. Turning to the matter of price, no doubt there are some goods which are so defective that nobody would buy them whatever the price. In other cases, whether a buyer would buy goods knowing their condition depends upon the price. So, in *BS Brown v Craiks* (1970),[26] the buyer ordered a quantity of cloth which was to be used for making dresses. The cloth delivered was unsuitable for making dresses though it would have been suitable for industrial purposes. The buyer had not told the seller for what purpose the cloth was required. The contract price was 36.25d per yard which was higher, but not much higher, than the going rate for industrial cloth. The House of Lords held that the goods were of merchantable quality. The buyer had paid a high price in the industrial range but had not paid a 'dress price'. If the facts had been exactly the same except that the price had been 50d per yard, the result would presumably have been different, since in such a case there would have been an irresistible argument that the seller was charging a dress price and therefore had to supply goods of dress quality.

8–25 Turning to the factor of description, it is not clear that the law, after the introduction of sub-s (2B), is exactly the same as before. In the earlier case of *Kendall v Lillico* (1969),[27] the plaintiffs bought animal feeding stuff for pheasants which was contaminated with a substance contained in Brazilian ground nut extraction which was one of the ingredients which made up the feeding stuff. The defendant settled the claim of the plaintiffs and claimed over against the suppliers. Although the suppliers had supplied Brazilian ground nut extraction which was contaminated, they were not supplying goods of unmerchantable quality because the Brazilian ground nut extraction was perfectly suitable as a basis for feeding stuff for poultry. The purpose for which the goods bought are to be used is of critical importance in relation to s 14(3), as we shall see below. It is also important, however, as to s 14(2).

26 [1970] 1 All ER 823; [1970] 1 WLR 752.
27 [1969] 2 AC 31.

If the extraction had been sold as poultry feed, it would not have been merchantable because feed which is poisonous to poultry cannot be sold as poultry feed. If sold as animal food, it would be a completely different matter since the extraction was perfectly suitable for feeding to many, though not to all, animals. From this case, it seemed that if the goods as described in the contract had a number of potential purposes, they would be of merchantable quality if they could be used for one of the purposes for which goods of that description were commonly used. Consistent with that, was the decision in *Aswan Engineering v Lupdine* (1987),[28] where the Court of Appeal rejected an argument that the then wording of s 14 meant that goods were not of merchantable quality unless they were fit for all the purposes for which goods of that kind were commonly bought. The definition of 'satisfactory quality', however, refers in s 14(2B)(a) to a list of factors including, 'in appropriate cases,…the fitness of the goods for *all* the purposes for which goods of the kind in question are commonly supplied' (emphasis added). This appears to *reverse* the decision in *Aswan Engineering v Lupdine*.

8–26 This might appear a rather technical change but, in fact, it is of considerable practical importance. It substantially reduces the need to rely on s 14(3) and show that the seller knows the buyer's purpose in buying the goods. Where goods are bought for one of a number of common purposes, the buyer will be able to rely on s 14(2) if they are not fit for all those purposes even, it would appear, if they are fit for the purpose for which the buyer requires them. Of course, if they are fit for the purpose for which the buyer actually requires them, the buyer will usually suffer no loss but it is likely that, sooner or later, a case will occur where the buyer tries to get out of the contract because of some movement in the market and uses this as an excuse. Suppose, for instance, that the buyer is a dairy farmer who buys the goods for the purposes of feeding to cows and that the same material is commonly fed to pigs but that the particular batch, though perfectly suitable for feeding cows, will not do for pigs. It would appear that, if the buyer realises this at the time of delivery, he could probably reject under the present wording.

8–27 Other factors appearing in the definition of satisfactory quality which did not appear in the definition of merchantable quality are those contained in s 14(2)(B)(c), (d) and (e). These add further detail to the definition. There were very few reported cases which involved consideration of whether these issues fell within the statutory definition of merchantable quality. It was said that there were a large

28 [1987] 1 All ER 135; [1987] 1 WLR 1.

number of small cases coming before county courts or the arbitration process in small claims courts where different judges were taking different views as to where to draw the line. This is obviously a matter of particular importance to consumers. Is a consumer who buys a new washing machine and finds it has a major scratch across the paintwork bound to accept it? Is a consumer whose washing machine stops and is unrepairable after 13 months' use entitled to complain that he expected to get three to five years' repairable use out of the washing machine? Is a combination of minor defects on your new motor car sufficient to make it unsatisfactory? The wording of the new section must make an affirmative answer to these questions much more likely.

There were, however, a number of cases under the old law (relating to merchantable quality) which involved complaints about new cars. Much of this case law is equally applicable to the definition of satisfactory quality. It is extremely probable that a new car will have some defects. Normally, the buyer will in fact expect to get these defects put right under the manufacturer's warranty. This does not affect the seller's obligation to deliver a car of satisfactory quality. In *Bernstein v Pamson Motors* (1987),[29] the plaintiff bought a new car and some three weeks later when it had done only 140 miles, it broke down because the engine completely seized up. It was held that this made the car unmerchantable. Similarly, in *Rogers v Parish*, a new Range Rover had, during its first six months of life, a whole series of defects as to the engine, gear box, body and oil seals. The defects did not make the car unsafe or unroadworthy and each of them was put right but the Court of Appeal held that there was a breach of the requirement of merchantable quality. The Court of Appeal held that the manufacturer's obligations under the guarantee were irrelevant to the legal position of buyer and seller. Any argument that the buyer must expect some defects in a new car could hardly apply on the facts of either of these cases because no buyer would expect his or her car to seize up after 140 miles or to require a replacement engine or gear box in the first six months of its life. These principles are equally applicable in principle to second hand cars (or indeed other second hand goods), though obviously the reasonable expectations of a buyer of second hand goods will not be identical with the reasonable expectations of the buyer of new goods.

In *Shine v General Guarantee Corporation* (1988),[30] the subject of the sale was a 1981 Fiat X1-9 sports car which was offered for sale second

29 [1987] 2 All ER 220.
30 [1988] 1 All ER 911.

hand in August 1982 at £4,595. The evidence was that this was the going rate for such a car in good condition. In fact, for some 24 hours in January 1982, the car had been totally submerged in water and had been written off by the insurance company. The Court of Appeal held that the car was not of merchantable quality since no one would have bought the car knowing of its condition without at least a substantial reduction of the price. It will be seen that this reason in effect, in a case of this kind, requires the seller either to lower the price or to draw the buyer's attention to the relevant defect.

By sub-s (2C), the obligation to supply goods of satisfactory quality is excluded:

(a) as regards a defect which is specifically drawn to the buyer's attention before the contract is made;
(b) where the buyer examines the goods before the contract is made, as regards defects which that examination ought to have revealed;
(c) in the case of a sale by sample, as regards any defect which would have been apparent on an examination of the sample.

The second of these requires a further word of comment. Of course, examination does not exclude liability for defects which would not have been revealed by careful examination. Many of the defects discussed in this chapter are of this kind. Furthermore, this section does not require the buyer to examine the goods so he or she is not prevented from complaining when he or she does not examine at all the defects which a reasonable examination would have revealed. The practical effect of this is that the buyer ought either to carry out a careful examination or no examination at all. To carry out a cursory examination is likely to produce the worst of both worlds.

Fitness for purpose

Section 14(3) of the Sale of Goods Act 1979 provides:

> Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known:
>
> (a) to the seller; or
> (b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker,
>
> any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is

> unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.

It should perhaps be noted that, in the 1893 version of the Act, the implied term about fitness for purpose was s 14(1) and the implied term about merchantable quality was s 14(2). This change in the order may reflect a change in view as to which of the obligations is primary and which is secondary. It should be emphasised that, in practice, buyers who complain of the goods being defective very commonly rely on both implied conditions and that there is a significant degree of overlap. Indeed, the buyer may rely also on arguments about description and again there will be overlap between ss 13 and 14(2) because whether the goods are of satisfactory quality will often turn on the description under which they are sold. The two major differences between s 14(2) and s 14(3) are that the buyer may have a better chance of succeeding under s 14(3) if he or she has disclosed a particular purpose for which he or she requires the goods to the seller; on the other hand, there is no liability under s 14(3) if it is shown that the buyer did not rely on the skill and judgment of the seller. There is no such qualification in relation to the obligation of satisfactory quality under s 14(2).

8–28 A layman reading s 14(3) for the first time might be forgiven for thinking that, in order to be able to rely on it, the buyer must do something to draw to the seller's attention the purpose for which he or she requires the goods. However, this is not the way in which the section has been construed. Where goods are produced for a single purpose, the court will easily infer that the goods are being bought for that purpose even though all that the buyer does is to ask for goods of that kind. So, it has been held that to buy beer or milk makes it clear that one is buying it for drinking; that to buy tinned salmon makes it clear that it has been bought for the purpose of being eaten; that to buy a hot water bottle makes it clear that it has been bought for the purpose of being filled with very hot water and put in a bed; and to buy a catapult makes it clear that it has been bought for the purpose of catapulting stones. In other words, if there is a single purpose, it is easy to infer that goods must be fit for that purpose and if the seller is a seller of goods of that kind it will be inferred that the buyer is relying on the seller's skill and judgment, unless it is shown otherwise.

The position is different where goods have more than one purpose. We may distinguish at least two variants on this possibility. One is where goods are used for a purpose which is a specialised and more demanding version of the standard purpose. Suppose that a buyer is buying pig food to feed to a herd of pigs which have super-sensitive

stomachs. Suppose further that he or she orders a pig food from a supplier who supplies pig food which would be entirely suitable for pigs with normally robust digestive systems. In that case, if that is all that has happened the supplier will not be in breach of contract since although what has happened has revealed the ordinary purpose for which the goods were required, it does not reveal the extraordinary requirements of the buyer. In order to be able to complain that the pig food was not suitable for the pigs, the buyer would need to have made it clear to the supplier more precisely what his or her requirements were.[31]

Alternatively, the goods may be capable of being used for a range of purposes which are different, as in *Kendall v Lillico,* where the goods were suitable for feeding cattle but not suitable for feeding poultry. A buyer could recover on these facts if, but only if, he or she had made it clear to the seller that the purpose was to buy food for feeding poultry. In fact, in that case, it was held that the seller did have a sufficient knowledge of the buyer's purpose to make him liable, and this case is therefore an example of goods which were of merchantable quality as cattle feed but which were not fit for the buyer's purpose.[32] Similarly, in *Ashington Piggeries v Christopher Hill,* the goods did comply with the contract description so that there was no liability under s 13 but it was held that the buyer had adequately disclosed to the seller his intention to feed the compound to mink and therefore to found liability on s 14(3).

Finally, it should be emphasised that liability under this sub-section, as indeed under s 14(2), turns on the goods not being of satisfactory quality or fitness for purpose respectively. It is no defence for the seller to show that he or she did all that could possibly have been done to ensure that the goods were fit for the purpose or were of satisfactory quality if in fact they are not.

Sales by sample

Section 15 of the Sale of Goods Act 1979 provides: **8–29**

> (1) A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.
> (2) In the case of a contract for sale by sample, there is an implied term:

31 *Slater v Finning Ltd* [1996] 3 All ER 398 is a good example of such a case. See, also, *Rotherham Metropolitan Borough Council v Frank Haslam Milan* (1996) 59 Con LR 33 for a case where the buyer did not rely on the seller's skill and judgment.

32 It is doubtful, however, whether the goods would now be found to be of satisfactory quality—see the discussion on p 123 above.