Directives

CHAPTER 1

INTRODUCTION

The subject-matter of personal property Issues and disputes concerning personal property are a common feature of legal practice, ranging from arguments about who is entitled to what in the warehouse of an insolvent trader, to claims for the recovery of dematerialised securities. In the modern world the nation's wealth is overwhelmingly in personal property, whether a business's tangible interests in vehicles and machinery, including multi-million pound physical assets like ships and aircraft, or in intangible holdings in shares, debt securities, receivables, insurance policies, intellectual property rights and investment products. English law benefits from many classic treatises on land law, intellectual property law and on the law of trusts, but the remainder of the law of property is less well-served. Land has not been the main repository of wealth for a number of centuries. We aim to provide a rational and well-organised treatment of the legal rules and principles of both tangible and intangible personal property. **1–001**

Three principal questions We have adopted an analytical approach which differentiates three principal questions which arise with respect to personal property. First, we identify the interests in things which are recognised by English law, and we attempt to describe the rights, powers and other incidents of the legal entitlement to such interests, including the question of the right to exclude others, and the persistence of those interests against other persons (the "interests in things" question). Secondly, we examine the various modes of acquiring, transferring and otherwise disposing of, or losing, such interests. We attempt to differentiate sharply whether those modes of acquisition or disposition arise from consensual or voluntary acts or transactions of the interested party, from those cases where interests are acquired or lost by operation of law (the "transfer of interests" question). Thirdly, we examine the various claims, remedies and procedures for vindicating or enforcing those interests, whether arising from misappropriation, wrongful retention, or loss or damage to the claimant's assets (the "protection and enforcement of interests" question or the "vindication" question). **1–002**

What is property? The concept of property has proved controversial for philosophers, economists and lawyers. In the context of this treatise we do not propose to engage in these debates. Those interested in both the philosophical foundations of property law[1], and its historical foundations[2], are well-served by **1–003**

[1] Significant discussions include: Hohfeld, W., "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 16 and (1917) 26 Yale L.J. 710 (also as *Fundamental Legal*

the literature. We shall draw upon the history of the subject where it is necessary to an understanding of the modern law, such as with the forms of action for wrongful interference with goods. Property is defined in a number of statutes for particular purposes, usually by reference to different categories of property, and without shedding further light on the nature of the concept.[3] In conventional language there is an ambiguity in the word "property" between its use to describe a thing or item, and its use as an assertion of an entitlement or claim to a thing. It is necessary to stress that when used in a legal sense the word "property" describes a relationship between a person and a thing, and not the thing itself.[4] Some theories of property, such as that of Hohfeld and those who follow him, emphasise the network of legal relationships between persons which result, and stress that property rights are not rights against things.[5] Such accounts have been dubbed "bundle of rights" theories of property by Professor Penner who defends the lay person's view that a property right is a right against a thing.[6] On balance it is submitted that both the relationship between the person and the thing, and the person entitled to the thing and other persons, are equally significant. In the words of Professor Gray: "the law of property is concerned with entire networks of legal relationships existing between individuals in respect of things."[7] We shall briefly consider a number of suggested characteristics of property rights in law.

Conceptions as Applied to Judicial Reasoning by Wesley Newcomb Hohfeld ((1919), new edn, edited by Campbell, D. and Thomas, P. (2001)); Lawson, F. and Rudden, B., *The Law of Property*, 3rd edn (2002); Waldron, J., *The Right to Private Property* (1990); Munzer, S., *A Theory of Property* (1990); Harris, J.W., *Property and Justice* (1996); Penner, J.E., *The Idea of Property in Law* (1997); Goode, R., "Ownership and Obligation in Commercial Transactions" (1987) 103 L.Q.R. 433; Vandevelde, K., "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 Buffalo Law Review 325; Gray, K., "Property in Thin Air" [1991] C.L.J. 252; Campbell, K., "On the General Nature of Property Rights" (1992) 3 K.C.L.J. 79; Gray, K., "Equitable Property" (1994) 47(2) C.L.P. 157; Rudden, B., "Things as Things and Things as Wealth" (1994) 14 O.J.L.S. 81; Eleftheriadis, P., "The Analysis of Property Rights" (1996) 16 O.J.L.S. 31; Penner, J., "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA Law Review 711.

[2] See generally: Milsom, S.F.C., *Historical Foundations of the Common Law*, 2nd edn (1981), pp.262–275, pp.366–379; Baker, J.H., *An Introduction to English Legal History*, 4th edn (2002), Ch.22; *The Oxford History of the Laws of England, Volume XII 1820–1914 Private Law* (2010), Ch.7. For earlier historical accounts: see Pollock, F. and Maitland, F., *History of English Law Before the Time of Edward I* (1895; reprinted 1968) ("Pollock and Maitland, HEL"), II 149–182' Sir William Holdsworth, *A History of English Law*, 3rd edn (1923) ("Holdsworth, HEL"), III 401-544.

[3] For example, the very wide definitions in s.4(1) of the Theft Act 1968 and s.5(2) of the Fraud Act 2006. See also s.68(11) of the Trustee Act 1925 and s.436 of the Insolvency Act 1986.

[4] Stressed by the legal philosopher Jeremy Bentham: "in common speech in the phrase 'the object of a man's property', the words 'the object of' are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length." Bentham, J., *An Introduction to the Principles of Morals and Legislation* (Harrison, W. (ed), 1948), p.337, fn.1. See also Gray, K., "Equitable Property" (1994) 47(2) C.L.P. 157, at p.160: "Property is not a thing at all, but a socially approved power-relationship in respect of socially valued assets."

[5] *Fundamental Legal Conceptions as Applied to Judicial Reasoning* by Wesley Newcomb Hohfeld ((1919), new edn, edited by Campbell, D. and Thomas, P. (2001)), 50–89. See also Honore, A.M. "Ownership" in Guest A.G., (ed), *Oxford Essays in Jurisprudence [First Series]* (1961), 106 and Campbell, K., "On the General Nature of Property Rights" (1992) 3 K.C.L.J. 79.

[6] Penner, J., "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA Law Review 711. See also Penner, J.E., *The Idea of Property in Law* (1997), pp.23–31.

[7] Gray, K., *Elements of Land Law*, 1st edn (1987), p.8. See now Gray, K. and Gray, S., *Elements of Land Law*, 5th edn (2008), p.6: "a network of jural relationships between individuals in respect of valued resources."

The right or incident of transferability A common incident of property rights is that they are should generally be transferable or alienable. In the most prominent judicial discussion of the nature of property rights in *National Provincial Bank Ltd v Ainsworth* Lord Wilberforce insisted: **1–004**

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."[8]

Whilst judicial emphasis on the incident of transferability of property rights is consistent[9], the significance of alienability has been challenged by theorists.[10] Nevertheless it is submitted that transmissibility is a general incident of property rights in English law. Alienability or transferability is the default position. Inalienability is exceptional. Ultimately all assets or wealth are transferable, if only upon death or bankruptcy.

The power of excludability In seeking to identify the hallmark of a property right modern property theory emphasises the notion of excludability. That is the power of a person to either exclude or permit access to or recourse by other persons to a particular asset. Property rights, or ownership in particular, consist in ability to exert such control. In the words of Professor Gray: "Property is not about *enjoyment* of access but about *control* over access. 'Property' is the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources."[11] Similarly a recent analysis of equitable property has emphasised the beneficiary's negative right to exclude others from the enjoyment of the trust property.[12] **1–005**

The incident of exigibility A further incident of property in the full sense is that it comprises rights which depend upon the existence of the asset to which an entitlement is claimed. Rights in personam (against a person) can embrace all types of claims such as in debt, for wrongfully inflicted personal injury or for the wrongful misappropriation or destruction of an asset. However a right in rem (against a thing) presupposes the continued existence of that thing. This is the idea of exigibility. According to Professor Birks: "a right in rem is one whose exigibility is defined by reference to the existence and location of a thing, the *res* to which it relates. A right in rem cannot survive the extinction of its *res*. I cannot eat my cake and own it"[13] Furthermore an assertion of a right in rem in the full **1–006**

[8] [1965] AC 1175, at pp.1247–8, HL. See 1–057 to 1–060.

[9] *Attorney-General of Hong Kong v Nai-Keung* [1987] 1 W.L.R. 1339, at 1342 (PC: Lord Bridge); *de Rothschild v Bell* [2000] 2 QB 33. See also *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 C.L.R. 1, 13–14 (HCA: Brennan C.J.).

[10] For a robust example of this position see Birks, P., *An Introduction to the Law of Restitution*, revised edn (1989), 49: "The difference [between personal and proprietary rights] has nothing to do with alienability. Rights *in personam* can be alienable, and rights *in rem* can be inalienable."

[11] Gray, K., "Property in Thin Air" [1991] C.L.J. 252, at p.292. See also Penner, J.E., *The Idea of Property in Law* (1997), pp.68–104.

[12] Nolan, R., "Equitable Property" (2006) 122 L.Q.R. 232.

[13] Birks, P., *An Introduction to the Law of Restitution*, revised edn (1989), pp.49–50. See also Penner, J.E., *The Idea of Property in Law* (1997), pp.30–31.

sense can only meaningfully be made against a person who has control over the asset claimed. It follows that claims arising from the misappropriation (and especially the consumption or destruction) of assets may involve both in personam and in rem rights, but the latter can only sensibly be advanced against a person in possession or control of the asset claimed. The most significant practical application of the distinction between in personam and in rem rights is the testing-ground of insolvency where a claimant who can assert a real right against a trustee-in-bankruptcy is in a superior position to the general body of unsecured creditors.

1–007 **Summary** It is submitted that each of these three incidents of alienability, excludability and exigibility captures a facet of the phenomenon of property. Whilst some assets may be inalienable they may still be entitled to protection in the sense afforded to other readily transferable assets. Most items of wealth described in this work are freely alienable. Transferability is such a significant incident of most types of wealth that a theory of property rights which ignored alienability would be an impoverished one. Similarly the notion of excludability captures an important feature of entitlement to property, namely the ability to licence access or enjoyment by other persons of particular repositories of wealth. Lastly, the concept of exigibility clarifies that a full-blown assertion of entitlement to an asset depends upon the location and existence of that asset. Accordingly the Hohfeldian analysis of property as a spider's web of right, duties, privileges and immunities obtaining between persons, whilst valuably identifying the significance of jural relations between persons, neglected the significance of property as an assertion of an entitlement to an interest in an asset. The lay person's view of property as a claim to a thing equally contains an element of truth about legal claims to and concerning assets.

A. REAL PROPERTY AND PERSONAL PROPERTY

1–008 **Real and personal property** The fundamental distinction in the English law of property is between real property and personal property.[14] A more modern formulation might distinguish between interests in land and other property. There were three principal reasons why the common law distinguished real from personal property for most of its history. First, in the feudal society of the medieval period land as the most significant source of wealth was made subject to the doctrines of tenures and estates. This embraced the theoretical proposition that all land in England and Wales is held as tenant of the Crown. More practically these doctrines permitted the ready creation of estates and interests divided both spatially and temporally.[15] Secondly, if the owner were dispossessed his interest in land could be specifically recovered in the real actions.[16] The right to recover other physical assets in specie was not available at law until the middle

[14] For the standard land law texts see: Harpum, C., Bridge, S. and Dixon, M., *Megarry & Wade: The Law of Real Property*, 8th edn (2012); and Gray, K. and Gray, S., *Elements of Land Law*, 5th edn (2008).

[15] Holdsworth, *HEL* II 199–201, 250; Pollock and Maitland *HEL* I 210–218.

[16] Holdsworth, *HEL* III Ch.1; Pollock and Maitland *HEL* II 570–572.

of the nineteenth century.[17] Thirdly, as a matter of succession upon death interests in land went generally to the heir at law, usually in accordance with primogeniture, the eldest son, whereas in general upon intestacy the personal property went to the next of kin, often the widow. The rules were modified over the centuries as testamentary freedom increased, and the last vestiges of the real and personal property divide in the law of succession were swept away by the Administration of Estates Act 1925.

1–009 **What is "land" or real property?** The principal enactment in the law of property contains a relatively comprehensive definition or description of what is encompassed by "land" which is the term of art (not "real property") used by the Law of Property Act 1925.[18] It obviously encompasses the land itself, and any crops or other vegetation growing thereon,[19] any buildings, any parts of such buildings, whether divided horizontally or vertically. It also includes incorporeal hereditaments, easements, and privileges. Importantly it includes any goods (including the raw materials of buildings, such as concrete, bricks and tiles) which become affixed to the land.[20] Two areas of potential overlap here with property law in general are the latter category of fixtures, and crops which may also be dealt with as goods whilst they are still attached to the land.[21] Interests in land have also been extended by pragmatic reasoning to include the title deeds to land,[22] heirlooms,[23] and keys,[24] originally with the purpose of permitting specific recovery of items closely associated with the use and enjoyment of the land, although not affixed to it.

1–010 **Chattels real and chattels personal** Once the category of real property was identified and distinguished, the remaining property rights were then traditionally divided into chattels real and chattels personal. Chattels real were leasehold interests in land. The distinction was of significance for the previous law on succession. For all practical purposes it is no longer common to speak of chattels

[17] s.78 of the Common Law Procedure Act 1854.

[18] s.205(1)(ix) of the Law of Property Act 1925: '"Land" includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land;. . . and "mines and minerals" include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same . . .; and "manor" includes a lordship, and reputed manor or lordship; and "hereditament" means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir.'

[19] Note that "industrial growing crops" and also "emblements" can also be "goods" for the purpose of an agreement to sell goods: s.61(1) of the Sale of Goods Act 1979.

[20] See Harpum, C., Bridge, S. and Dixon, M., *Megarry & Wade: The Law of Real Property*, 7th edn (2008), Ch.23.

[21] See the definition of goods in s.61(1) of the Sale of Goods Act 1979. See below at para.1–030, n.99.

[22] *Harrington v Price* (1832) 3 B & Ald 170, 110 E.R. 63 (trover).

[23] *Viscount Hill v Dowager Countess Hill* [1897] 1 QB 483, 494–495 (Chitty L.J.). See also *Pusey v Pusey* (1684) 1 Vern 273, 23 E.R. 465 (Ch), which might be thought to involve either the equivalent of title deeds or an heirloom, but was treated as a seminal authority of the specific recoverability of goods in equity. See para.17–012.

[24] *Elliott v Bishop* (1854) 10 Exch 496, 156 E.R. 534, affirmed (1855) 11 Ex 113, 156 E.R. 776.

real as anything other than interests in land, and the modern conception of land law embraces both real property, strictly so-called, and leasehold interests in land. This is reflected in the leasehold being one of only two legal estates capable of existing at law in land.[25] Accordingly it is proposed not to deal with leasehold interests in land in this work.[26]

1–011 **What is personal property?** The law of personal property *is the law of property*, or in economic terms, the law governing wealth and resources, save that one important category of resources is carved out. Personal property is therefore a residual category, comprising the predominant part of English property law once the topic of interests in land has been identified for the purpose of specialist treatment, because of the distinctive features of land (relative permanence, importance as the location for human accommodation and activity, and public policy concerns relating to exploitation of resources, ready transferability and desirability of registration of interests).[27] English land law is notoriously complex, and conceptually and doctrinally rich. On occasion, the subject of personal property has suffered unflattering comparison with the learning on real property. Aspects of the English law of personal property have been described as unsophisticated.[28] However we hope to show that this perception is a caricature, and that the law of personal property, or moveable wealth, is both developed and sophisticated. It is also important because any new item of wealth or other resource which is clearly not an interest in land falls within the scope of this category. As Bell has observed: "the list of personal property is an open-ended one: any novel phenomenon that is recognised as property will in practice be classified as personal property."[29] Recent cases include discussion as to the proprietary nature and status of milk quotas[30], bodily fluids[31] and carbon trading units.[32]

[25] s.1(1)(b) of the Law of Property Act 1925 (since January 1, 1926).

[26] This approach is followed in all modern works on personal property: e.g. Williams, J.H. and Crowdy, W.M., (eds), *Goodeve's Modern Law of Personal Property*, 4th edn (1904), p.1: "personal property other than interests in land."

[27] In the language of Professor Birks it is a residual, contextual, sub-category of the legal-conceptual category of property law (when the contextual sub-set of land law is taken out): Birks, P., "Before We Begin: Five Keys to Land Law" in Bright, S. and Dewar, J., (eds), *Land Law: Themes and Perspectives* (1998), 457; Birks, P., "Personal Property: Proprietary Rights and Remedies" (2000) 11 K.C.L.J. 1. We shall see that residual categories are a recurring feature of categorisation in personal property law.

[28] For example, *Clough Mill v Martin* [1985] 1 W.L.R. 111, at p.124 (Oliver L.J.).

[29] Bell, A.P., *Modern Law of Personal Property in England and Ireland* (1989), p.1.

[30] *Swift v Dairywise Farms Ltd* [2000] 1 W.L.R. 1777 (Ch D: Jacob J.), affirmed but without reference to this point of law: [2001] EWCA Civ 145, [2003] 1 W.L.R. 1506 (note), [2001] 1 B.C.L.C. 672, [2001] NPC 23.

[31] *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1.

[32] *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156, [2012] Bus LR 1199, [2012] 3 All E.R. 425; see also *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm), para.[129].

Nomenclature It was the absence of entitlement to specific relief which yielded the nomenclature of *personal* property.[33] The forms of action for trespass to goods, conversion and trover resulted in damages only.[34] There was accordingly no power at common law to compel delivery up of a chattel. Maitland traced the origins of the distinction between real and personal property back to Bracton[35] in the thirteenth century, and his discussion of the form of action of detinue, which gave the defendant adjudged to have wrongfully detained the plaintiff's goods the option of either delivering up the chattel or paying for its value. Maitland observed: "Bracton is led to make the important remark that there is no real action for chattels – an important remark, for it is the foundation of all our talk about real and personal property."[36] Before then, as Fry and Bowen L.JJ. noted in 1890, the distinction between real property and personal property had not yet emerged.[37] 1–012

B. CATEGORIES OF PERSONAL PROPERTY

Having assigned chattels real to the law governing interests in land, personal chattels[38] are then usually sub-divided into things or choses in possession (sometimes described as tangible personal property) and things or choses in action (intangible personal property). This principal division in the law of personal property can be found in Sir William Blackstone's *Commentaries*: "Property in chattels personal may be either in possession; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing; or else it is in action; where a man hath only a bare right, without any occupation or enjoyment."[39] 1–013

[33] Such a power was first introduced by statute by s.78 of the Common Law Procedure Act 1854, which no longer necessarily left the option of returning the goods or paying damages to the defendant, and is now to be found in s.3 of the Torts (Interference with Goods) Act 1977.

[34] Maitland, F.W., *The Forms of Action at Common Law* (1936) 65, 71; Baker, J.H., *An Introduction to English Legal History*, 4th edn (2002), pp.394–399.

[35] Maitland, F.W., *The Forms of Action at Common Law [–] A Course of Lectures* (1936; reprinted 1954) (Chaytor, A. and Whittaker, W., (eds)), p.48.

[36] Maitland, F.W., *The Forms of Action at Common Law [–] A Course of Lectures* (1936; reprinted 1954) (Chaytor, A. and Whittaker, W., (eds)), p.48. At p.74 Maitland quotes and translates Bracton (fn.102b): "At first sight it may appear that the action should be both real as well as personal, tam rem quam in personam, since a particular thing is claimed, and the possessor is bound to give it up, but in truth it will be merely in personam, for he from whom the thing is claimed is not absolutely bound to restore the thing, but is bound in the disjunctive to restore the thing or its price, and by merely paying is discharged, whether the thing is forthcoming or no." Earlier, at p.71, Professor Maitland noted the introduction of the power to compel delivery up, first introduced by s.78 of the Common Law Procedure Act 1854, and concluded: "This statute has removed the original basis for the use of the terms by which we call lands 'real' and chattels 'personal' property." However he noted that the distinction survived in law of intestate succession. The significance of the distinction for succession was swept away by the Administration of Estates Act 1925.

[37] *Cochrane v Moore* (1890) 25 QBD 57, p.65.

[38] Traditionally "chattels personal". The more modern English syntactical arrangement was preferred by Parliament in s.61(1) of the Sale of Goods Act 1979.

[39] Sir William Blackstone (Blackstone, W., *Commentaries on the Laws of England*, 1st edn (1765–1769), University of Chicago reprint edn, 1979) ("Bl Comm"), II 389.

either resell the goods as owner[273] or retain them for his own use.[274] The right to resell is statutory when the seller is an unpaid seller within the meaning of s.38 of the Sale of Goods Act 1979,[275] but arises anyway when the buyer commits a repudiatory breach.[276] Such revesting would not be possible, however, where the buyer (to whom property has passed) has already sold the goods to a third party. Where the buyer has possession of the goods as well as property, it is much less clear that property will revest.[277] On one view, it should do by way of analogy with the situation where the seller (or buyer) rescinds the contract for misrepresentation,[278] or the situation where the buyer rejects the goods.[279] The implied condition subsequent in the latter case is, of course, subject to the loss of the right to reject once the goods have been accepted, and there could also be similar limits on an implied condition subsequent triggered by the buyer's breach.[280] It has been pointed out that if there were an express provision in the contract of sale that property revested on the buyer's breach after possession had been transferred to the buyer, this might well be registrable as a charge or a bill of sale.[281]

resale under s.48 as a special type of "rescission", see Kershaw, R., "Seller and Buyer in Possession" in Palmer, N. and McKendrick, E., *Interests in Goods*, 2nd edn (1998), p.329.

[273] *RV Ward Ltd v Bignall* [1967] 1 QB 534, 544, 550.

[274] Bridge, M., (ed), *Benjamin's Sale of Goods*, 8th edn (2010), para.15–112.

[275] s.39(1)(c).

[276] Bridge, M., (ed), *Benjamin's Sale of Goods*, 8th edn (2010), paras 15–105, 15–112. See *Commission Car Sales (Hastings) v Saul* [1957] N.Z.L.R. 144; *Compagnie de Renflouement de Recuperation et de Travaux Sous-Marins V S Baroukh et Cie v W Seymour Plant Sales & Hire* [1981] 2 Lloyd's Rep. 466, 482.

[277] For discussion, see Beale, H., (ed), *Chitty on Contracts*, 31st edn (2012), para.43–386; Bridge, M., (ed), *Benjamin's Sale of Goods*, 8th edn (2010), para.15–117; Bridge, M., *The Sale of Goods*, 2nd edn (2009), para.11.54.

[278] See para.13–035.

[279] See para.10–056.

[280] See Bridge, M., (ed), *Benjamin's Sale of Goods*, 8th edn (2010), para.15–117 who suggests that such a limit might be on a "reciprocal" basis.

[281] Bridge, M., *The Sale of Goods*, 2nd edn (2009), para.11.54.

CHAPTER 11

PROPERTY ASPECTS OF SALE OF GOODS: INTERESTS IN BULK GOODS

A. THE LAW BEFORE THE SALE OF GOODS (AMENDMENT) ACT 1995

Introduction As discussed in the previous chapter, property cannot pass in unascertained goods.[1] In relation to wholly unascertained, that is, generic, goods, this comes from "the very nature of things", since it is impossible to own goods if they cannot be identified in any way.[2] Although there are many consequences of the passing of property in a contract for the sale of goods,[3] the most severe is the effect of insolvency. In particular, a buyer who pays before the passing of property is at risk of suffering a considerable loss if the seller becomes insolvent before property passes, as the buyer only has an unsecured claim for damages for breach of contract or for the return of the price.[4] In a number of cases before the law was changed in 1995,[5] pre-paying buyers in this position have tried to argue that property has passed, where they consider that there are goods owned by the seller which could be said to be the subject-matter of the contract, even where ascertainment, in the strict sense, had not yet occurred. If the buyer could successfully argue that it had a proprietary interest in such goods, it would be able to claim those goods to the extent of its interest, and they would no longer be available to the other creditors of the seller. **11–001**

Delivery from a defined bulk There are two situations in which such claims have been made. The first is where the contract provides that delivery to the buyer should be out of a defined bulk, such as the hold of a ship, or where there is later agreement to this effect, for example, by the issuing of a delivery order by the seller specifying the bulk as the source of the delivery.[6] The second is where the contract did not so provide, but the buyer was under the impression that delivery would be made out of goods owned by the seller which were stored, in bulk, in a particular location.[7] Although in neither situation was a buyer **11–002**

[1] s.16 of the Sale of Goods Act 1979.

[2] In *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 90, PC.

[3] Discussed at paras10–016 et seq.

[4] This was graphically pointed out by Blackburn J. in *Martineau v Kitching* (1871–1872) L.R. 7 QB 436, 454.

[5] By the Sale of Goods (Amendment Act) 1995, which amended the Sale of Goods Act 1979 by introducing s.20A and B, as well as s.18 r.5(3) and (4) and amending the definitions of "goods" and "specific goods".

[6] *Re Wait* [1927] 1 Ch 606.

[7] *Re London Wine Co. (Shippers) Ltd* [1986] P.C.C 121; *In re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 90, PC, and at 89 where the distinction between the two situations is clearly described.

successful in the absence of ascertainment,[8] the first situation is distinguishable from the second. If a bulk is sufficiently defined, the goods in the bulk, taken as a whole, are ascertained. Thus, a contract to sell "all the wheat in my silo" is, and always has been, a contract for specific goods.[9] Although this kind of contract is not common, the principle can be seen exemplified in the cases where goods have been said to be ascertained by exhaustion.[10]

11–003 **Sale of an undivided share** It has always been the law that ascertained goods could be owned in common by two or more people in undivided shares,[11] either as joint tenants or tenants in common.[12] Examples of this outside the context of goods in bulk are where a racehorse is co-owned by a number of people, or a ship.[13] A co-owner's undivided share can be the subject of a contract of sale of goods[14]: this is made clear by s.2(2) of the Sale of Goods Act 1979, which provides that "there may be a contract of sale between one part owner and another" and is now made clear in the definition of "goods" in s.61(1), which was amended in 1995 to include "an undivided share in goods".[15] It is slightly less clear that this section applies to where the owner of goods sells them to two or more as co-owners, or where a co-owner sells part of his share,[16] but the better view is that it applies to both, since this was the position at common law.[17] Although, before 1995, an undivided share in goods was not included in the definition of specific goods, this was probably the law.[18] However, as the matter was not free from doubt, the definition was amended in 1995 to make this clear.[19] Therefore, even before 1995, where a bulk from which delivery was to be made was ascertained, it was possible for the parties to agree that the subject-matter of the sales contract could be an undivided share in that bulk.

[8] The goods were held to have been ascertained in *Re Stapylton Fletcher* [1994] 1 W.L.R. 1181 (see para.11–006) and also, by exhaustion, in *Wait & James v Midland Bank* (1926) 31 Com Cas 172 and in *Karlshamns Oljefabriker v Eastport Navigation Corp; The Elafi* [1981] 2 Lloyd's Rep. 679.

[9] See *Karlshamns Oljefabriker v Eastport Navigation Corp; The Elafi* [1981] 2 Lloyd's Rep. 679, 683.

[10] Fn.8.

[11] Co-ownership was recognised in Roman law, see Just. Institutes 2.1.27. See Ch.4 for an account of co-ownership of goods in English law.

[12] A joint tenancy would only be possible if the co-owners gained their shares at the same time as unity of time is required: if this is not the case it would be a tenancy in common, see Goode, R. and Mills, S., *Goode on Proprietary Rights and Insolvency in Sales Transactions*, 3rd edn (2009) para.1.54, fn.84. See also para.4–002 above.

[13] Co-ownership of a ship is envisaged, for example, by s.10 of the Merchant Shipping Act 1995.

[14] *Venning v Leckie* (1810) 13 East 7; *Marson v Short* (1835) 2 Bing NC 118 (both concerning sales of shares in horses); cf. *Re Sugar Properties (Derisley Wood) Ltd* (1987) 3 B.C.C. 88

[15] Sale of Goods Amendment Act 1995 s.2.

[16] McKendrick, E., (ed), *Goode on Commercial Law*, 4th edn (2009), p.217.

[17] *Venning v Leckie* (1810) 13 East 7; *Marson v Short* (1835) 2 Bing NC 118; Bridge, M., (ed), *Benjamin's Sale of Goods*, 8th edn (2010), para.1–081.

[18] The main reason for this, put forward by the Law Commission in their Report No. 215 "Sale of Goods forming part of a bulk" (1994) ("LC report 215") para.5.4, is that where the goods cannot be divided, such as a racehorse or a ship, it would otherwise be impossible for property to pass without destroying the goods.

[19] "Specific goods … includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on" (s.61(1) as amended by the Sale of Goods (Amendment) Act 1995 s.2.

Sale of specified quantities of goods in bulk The problem with this reasoning was that, unlike where a buyer was buying a share in a racehorse, those who buy goods in bulk do not want an undivided share, and thus the contract is not expressed in this way. Buyers rarely, if ever, buy a third of the wheat in a silo or half the oil in a tanker.[20] An undivided share in a bulk will diminish or increase as the bulk does; thus the buyer of a fraction of a bulk takes the risk of that diminution or increase.[21] This is not usually a risk that a buyer would be willing to take: what it wants is a right to particular quantity of goods, not a right to participate in what is effectively a joint enterprise.[22] Thus, the cases concerning goods in bulk considered by the courts before 1995 involved contracts the subject-matter of which were specified quantities of goods, rather than fractions of an agreed bulk, even though the seller was contractually obliged to deliver out of the ascertained bulk. Despite this, attempts were made to argue that the buyer owned an undivided share in the bulk, either at law or in equity, but these attempts were largely unsuccessful. Despite the amendments made in 1995, much of the reasoning in these cases remains good law in relation to cases to which s.20A and B do not apply, and so they will now be examined. 11–004

Co-ownership at law The argument that a pre-paying buyer of a specified quantity of goods bought while stored in bulk became a tenant in common at law together with the seller and other buyers of goods in that bulk, was made in two cases (one Scottish) where the buyer had received a delivery order in respect of those goods: *Hayman & Son v M'Lintock*[23] and *Laurie and Morewood v Dudin and Sons*.[24] The argument was supported on an old case, *Whitehouse v Frost*,[25] where it had been held that property could pass in goods which remained unseparated from a bulk, on the basis that nothing more needed to be done between the seller and the buyer: all that needed to be done was for the goods to be separated by the person in actual possession of them, who had been instructed to do so by the sellers and who had accepted that instruction. In both *Hayman* and *Laurie* the court roundly rejected the argument, and held that in the light of s.16 of the Sale of Goods Act 1893, the result in *Whitehouse v Frost* was no longer good law.[26] The crucial point was that the goods sold to the buyer had not been separated from the bulk, and so were not ascertained.[27] If, on the other hand, the seller (or the warehouseman as the seller's agent) had set aside goods for the 11–005

[20] Bridge, M., (ed), *Benjamin's Sale of Goods*, 8th edn (2010), para.18–333; LC Report 215 paras 3.20, 4.2.

[21] Bridge, M., (ed), *Benjamin's Sale of Goods*, 8th edn (2010), para.18–337.

[22] This is a different point from the question of whether risk has passed in the goods bought: this is, and always was, possible in relation to goods in bulk, but related to the whole of the goods and not just the possible fluctuations of quantity. *Inglis v Stock* (1885) 10 H.L.C. 263; *Stern v Vickers* [1923] 1 KB 78.

[23] 1907 S.C. 936, 941 (1st Division).

[24] [1926] 1 KB 223, 225, CA.

[25] (1810) 12 East 614.

[26] 1907 S.C. 936, 951, [1926] 1 KB 223, 235–236. This view was more recently confirmed by Mustill J. in *Karlshamns Oljefabriker v Eastport Navigation Corp; The Elafi* [1981] 2 Lloyd's Rep. 679, 684.

[27] For discussion of what counts as ascertainment, see para.10–031. There is a separate argument that the warehouseman (or a seller) who attorns to the buyer in respect of an undivided quantity may be personally liable for non-delivery on the basis of an estoppel: see *Gillett v Hill* (1834) 2 C&M 530; *Woodley v Coventry* (1863) 2 H&C 164; *Knights v Wiffen*, L.R. 5 QB 660.

buyer so that they were ascertained, property would then pass to the buyer. This would not be affected by the fact that the goods were subsequently stored in bulk with goods of other buyers, since the resulting mixture would (in the absence of contrary intention) be co-owned by all those whose goods were stored together in the proportions of their contributions.[28] The co-ownership is not affected by an agreement between the owners and the person storing the goods that equivalent goods will be returned to the co-owners rather than the actual goods which they presented for storage.[29]

11–006 ***Re Stapylton Fletcher Ltd*** This analysis was applied in *Re Stapylton Fletcher Ltd*.[30] In this case, cases of wine kept in one storage unit (Unit 13) were sold to customers by the insolvent company. When a sale was made, the wine sold would be taken out of Unit 13 and placed in another storage unit (Unit 12, called the customers reserve storage unit). The relevant cases were not marked with the customer's name, but a record was kept in the recording system that a quantity of certain wine for a particular customer had been moved and was stored in Unit 12. If there was already wine of an identical kind and vintage in a stack in Unit 12 the bought wine would be added to that stack, and delivery would be made from the top of an appropriate stack from Unit 12 as and when a customer called for delivery. This was to avoid disturbing the wine in the stack any more than was necessary. On these facts, Judge Paul Baker QC held that there was an appropriation of the wine to the contract of sale, and a second contract, of storage, whereby the wine was stored in bulk for the customers, who then owned each stack as tenants in common. This analysis seems reasonably uncontentious, although it depended very much on the particular facts of the case.[31]

The judge in *Re Stapylton Fletcher Ltd* also had to consider wine that was bought en primeur and stored in a bonded warehouse (pending payment of duty when the goods were delivered to customers). At no stage was the wine for any particular customer separated, and it was stored in bulk, though separately from the seller's own wine. Surprisingly, the judge held that here, too, there was ascertainment prior to storage; probably because of the unfairness of the strict application of s.16 at the time. This unfairness has now been addressed by s.20A. Further, in *Everwine Ltd v The Commissioners of Customs and Excise*,[32] which also concerned goods in a bonded warehouse, the importing company (the seller) successfully argued that it did own the goods, since then it could have given a valid notice objecting to forfeiture.[33] In that case the seller's goods were mixed with the buyers' goods in the warehouse: *Re Stapylton Fletcher* was thus said to be distinguished. However, there seems to be little distinction between the two cases. In *Everwine* the importer bought a consignment of wine, as in *Stapylton*

[28] *Indian Oil Corp Ltd v Greenstone Shipping SA (The Ypatianna)* [1988] 1 QB 345; *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep. 284. For further discussion of mixtures of goods, see paras 4–021–4–022 and 12–015 et seq.
[29] *Mercer v Craven Grain Storage Ltd* [1994] CLC 328 HL.
[30] [1994] 1 W.L.R. 1181.
[31] For example, there might not have been an appropriation were wine for more than one customer removed from Unit 13 at the same time.
[32] [2003] EWCA Civ 953.
[33] Sch.3 of the Customs and Excise Management Act 1979.

but rather than agreeing to sell it all to certain customers, it only sold part of it: the point on segregation remains the same. Section 20A now potentially applies to the situation in *Everwine*: this point was mentioned but not pursued on appeal.[34]

Re Wait 11–007 In *Re Wait*[35] the owner of an ascertained parcel of 1,000 tons of wheat on board a particular ship sold 500 tons to a buyer, who pre-paid. Before the 500 tons was removed from the bulk, the owner became insolvent. This then raised starkly the precarious position of the pre-paying buyer described above.[36] Given the rejection in previous cases of the argument that a buyer has an interest in the bulk as a tenant in common at law,[37] the buyer in *Re Wait* did not even attempt this argument, but instead argued, first, that it was entitled to specific performance of the contract to deliver 500 tons and, second, that there had been an equitable assignment to it of 500 tons of the 1,000 tons in the bulk.[38] The claim for specific performance was founded on s.52 of the Sale of Goods Act 1893, which provided for such a remedy "in any action for breach of contract to deliver specific or ascertained goods". The Court of Appeal had no difficulty in holding that the goods here were neither specific nor ascertained, as the contractual quantity had not been separated from the bulk.

Equitable assignment 11–008 The equitable assignment claim was more complex. One way of putting it was to say that, if the contract was specifically enforceable, equity would treat as done that which ought to be done, and so the beneficial interest in the goods would be immediately assigned in equity. This argument was based on *Holroyd v Marshall*.[39] This argument was rebutted by the decision that specific performance was not available. Even, however, if all the criteria for specific performance were not necessary for the doctrine in *Holroyd v Marshall* to apply, one immovable criterion was that the subject-matter of the contract must be sufficiently identified, and this is not the case where it is a quantity of goods in a bulk.[40]

Equitable lien 11–009 The second way of putting the equitable assignment claim was that, when the buyers paid, the seller became a trustee for them of the relevant part of the bulk: this seems to have been put on the basis that some sort of equitable lien arose.[41] An equitable lien is a security interest which would attach to the whole bulk, but would only extend to the amount owing to the lienee, that is, here, the amount of the purchase price.[42] Therefore, the fact that the contractual quantity of goods was not ascertained would not have prevented this

[34] [2003] EWCA Civ 953 [19].
[35] [1927] 1 Ch 630.
[36] See para.11–001.
[37] See para.11–005.
[38] In the Court of Appeal, the buyer abandoned the alternative argument, made below, that the money he had prepaid was held on trust for him, see [1927] 1 Ch 606, 615–616.
[39] (1862) 10 H.L.C. 191, 209. For discussion of this principle see paras 7–068 et seq.
[40] [1927] 1 Ch 606, 622, 635.
[41] [1927] 1 Ch 606, 629.
[42] Paras 15–116 et seq.

argument succeeding. However, the argument was rejected, chiefly by Atkin L.J., for two interconnected reasons. First, because, without express provision, the parties did not intend to assign the goods in equity before property passes at law: they must be taken to have intended their contract to be governed by the terms of the Sale of Goods Act alone, and there was no room for any other legal or equitable rights to be implied.[43] Further, the fact that the buyer has pre-paid should make no difference. Although equitable liens exist to protect a pre-paying buyer in the context of sale of land, Atkin L.J. made it clear that, in his view, they did not arise in the context of sale of goods. He said that the seller is protected by the possessory lien and the right of stoppage in transit[44] until delivery, but after delivery is not protected (unless he takes steps to be so[45]) and the buyer who pre-pays before delivery should not be in a better position.[46] As discussed below, eventually, nearly 70 years after *Re Wait*, the legislature took a different view and introduced a limited protection for a pre-paying buyer of goods in bulk.

11–010 **Express equitable interests** Despite Atkin L.J.'s strong view that the Sale of Goods Act was a complete code of the rights and obligations between the parties to a contract of sale,[47] he conceded that this could be displaced in a particular case if the parties intended to create an equitable interest. He said that:

> "A seller or a purchaser may, of course, create any equity he pleases by way of charge, equitable assignment or any other dealing with or disposition of goods, the subject-matter of sale; and he may, of course, create such an equity as one of the terms expressed in the contract of sale."[48]

It is, perhaps, difficult to see why in most situations a seller might want to do this, but it does look as though he was envisaging that a seller could declare himself trustee of the bulk for himself and the buyer, which could only be on the basis of equitable co-ownership.[49] However, in the absence of clear words it is very unlikely that such a trust will be held to have been created.

11–011 **Where there is no defined bulk** The cases discussed above all deal with situations where there is a bulk defined either by the contract between the parties or by later agreement. However, where delivery of the goods can come from any source, arguments based on a legal tenancy in common or an equitable assignment have even less chance of success. This is because there are no goods which can be owned in common, at law or in equity, or over which an equitable

[43] [1927] 1 Ch 606, 635–637.
[44] Sections 39, 41, 44 and 46 of the Sale of Goods Act 1979.
[45] See Ch.12.
[46] Sargant L.J. disagreed. He thought that the pre-paying buyer would have had an equitable lien if the sale had been of the entire bulk, and so that there should be no difference if it was of part of a bulk. Of course, the presumption in s.18 r.5(1) would have led, in the case of a contract for the sale of the entire bulk, to the property passing as soon as the bulk was ascertained (subject to the contrary intention of the parties). The reasoning that there should be no difference between the position of a buyer who buys the entire bulk and one who buys part of it was the main argument for the reform leading to s.20A.
[47] Sargant L.J. disagreed with this view, [1927] 1 Ch 606, 655.
[48] [1927] 1 Ch 606, 636. See also *In Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 91, PC.
[49] See In *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 91, PC.

lien can arise. It is not relevant that the seller owns a quantity of goods of the contractual description from which delivery could be made: if the source of delivery has not been appropriated then no interest can arise. This is, perhaps, most graphically demonstrated by the position of Mr. Strong (S) in the case of *Re London Wine Company (Shippers) Ltd*.[50] In that case, purchasers entered into contracts with the company to buy wine. They paid the purchase price, and were each told that they were the 'sole and beneficial owner' of the purchased wine. However, the seller was not obliged to deliver wine from any particular source, and did not identify any source for delivery, nor was any wine ever appropriated for any buyer. S bought a quantity of wine of a certain description, and, by chance, the seller owned only that quantity of wine of that particular description. If the source of delivery had been identified, property would have passed to S by exhaustion,[51] but since it did not, there was no wine in which property could pass.[52] Nor, by extension, could it pass to several purchasers as tenants in common who collectively were in the same position as S, in that they had bought the total quantity of that wine owned by the seller. Nor was there any property to be the subject-matter of a trust or equitable lien.[53] Since the seller and a warehouseman had represented to certain purchasers and pledgees that wine had been appropriated and held to their account, this might have given the purchasers and pledgees an action in conversion against the warehousemen and the seller,[54] but did not bind a third party who took an interest in the seller's goods (such as a bank who had taken a floating charge).[55] These conclusions are supported by the decision of the Privy Council in *In re Goldcorp Exchange Ltd*.[56]

B. THE SALE OF GOODS (AMENDMENT) ACT 1995

Section 20A and B[57] The position before 1995, then, was that a buyer of goods in an identified bulk could not, as a matter of law, obtain property in the goods until the goods were separated from the bulk, or became ascertained by **11–012**

[50] [1986] P.C.C 121.
[51] s.18 r.5(3) of the Sale of Goods Act 1979.
[52] [1986] P.C.C 121. Oliver J. commented that: "The fact that the Company had at the date of the invoice that amount of wine and that amount only is really irrelevant to the contract…the Company was, under the contract, at liberty to deliver to the purchaser any bottle of wine which tallied with the description", ibid 152.
[53] See also similar reasoning in *In re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 92, PC.
[54] *Gillett v Hill* (1834) 2 C&M 530; *Woodley v Coventry* (1863) 2 H&C 164; *Knights v Wiffen*, L.R. 5 QB 660. However, it is not clear that even an action based on estoppel will lie when there is no identified bulk, see *In re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 93, PC.
[55] [1986] P.C.C 121, 157–166; *In re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 94, PC.
[56] [1995] 1 A.C. 74. The Privy Council also rejected further variations of the estoppel argument, see pp.94–95.
[57] Very similar sections have more recently been added to sale of goods statutes in other Commonwealth countries, for example, s.25A of the New South Wales Sale of Goods Act 1923, s.20A of the South Australia Sale of Goods Act 1895 and s.20A of the Singaporean Sale of Goods Act (revd edn 1999). The Hong Kong Law Commission Law Reform Commission reviewed this area of the law as part of a general review of the law on sale of goods (Consultation paper on contracts for the supply of goods (December 2000) paras 9.1 to 9.65) and recommended reform along the lines of s.20A and B (Report on contracts for the sale of goods (February 2002) paras 9.1 to 9.68)), but the recommendations have not yet come into force (see Report on Contracts for the Supply of Goods:

is no longer the case in the UK) they cannot meaningfully be segregated. A party holding 50 shares in a company with 500 issued shares, owns 10 per cent of the company.[29]

20–010 **Harvard Securities: *Hunter v Moss* revisited** The decision in *Hunter v Moss* was revisited in *Re Harvard Securities Ltd*[30] where an insolvent stockbroking firm held shares for its clients in undifferentiated blocks. Neuberger J. held he was bound by *Hunter v Moss*, and expressly rejected an argument that the Court of Appeal case had been decided per incuriam.[31] Neuberger J. contented himself at first instance (without being "particularly convinced by the distinction") by distinguishing the two streams of authority on the basis that one concerned goods, and the other shares. Furthermore there can be an effective equitable assignment of an unascertained part of a debt or a fund, and shares appear to be treated as analogous to a debt or a fund, rather than to goods.[32]

20–011 **Conclusion** It is submitted that despite its cursory reasoning and limited discussion of relevant authority the decision in *Hunter v Moss* can be defended.[33] Both *Re London Wine* and *Re Goldcorp Exchange* are not directly on point because when construed the transactions both involved the sale of generic goods by description, with no identified source. *Re Wait* was directly on point, but its reasoning has been found wanting in its own commercial context of dealings in bulk shipments of commodities. Indeed it is the restrictive approach to certainty in respect of fungible goods, at least where they are part of an identified source, that can be seen as anomalous. Parliament has intervened to remedy the problem of quasi-specific and quasi-ascertained goods (and thereby reversed the result in *Re Wait*) by inserting s.20A into the Sale of Goods Act 1979.[34] Where assets are fungible it is submitted that *Hunter v Moss* represents the preferable approach. The principle should be applied to all fungible intangible property and not confined to shares, as suggested in *Re Harvard Securities*. Where no fund or source can be identified it follows that no trust can arise.[35] The practical implications of *Hunter v Moss* for modern methods of dealing in company shares and debt securities are analysed in Ch.23.

[29] McKendrick, E., (ed), *Goode on Commercial Law*, 4th edn (2009), p.64. See also Goode, R., "Are Intangible Assets Fungible?" [2003] L.M.C.L.Q. 74; Worthington, S., "Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts" [1999] J.B.L. 1; and Beaves, A.W., "Global Custody—A Tentative Analysis of Property and Contract" in Palmer, N. and McKendrick, E., (eds), *Interests in Goods*, 2nd edn (1998), p.117.

[30] *Re Harvard Securities Ltd (In Liquidation), Holland v Newbury* [1997] 2 B.C.L.C. 369; noted Villiers, T., (1998/9) 9 K.C.L.J. 112. See also *Denis MPC Ho v Chan Kam Tim* [1998] HKCFI 589.

[31] Either on the basis that it did not consider *In Re Wait* [1927] 1 Ch. 606 (which was cited in argument) or the basis that it was impliedly over-ruled by *In re Goldcorp Exchange Ltd* [1995] 1 A.C. 74 (albeit that was a Privy Council authority).

[32] [1997] 2 B.C.L.C. 369, at p.383.

[33] See also Martin, J., *Hanbury & Martin: Modern Equity*, 18th edn (2009), paras 3–021 to 3–023.

[34] By the Sale of Goods (Amendment) Act 1995. See Ch.11.

[35] *Bishopsgate Investment Ltd v Homan* [1995] Ch 211, 218–219; *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, 104–105; *Various Customers of BA Peters Plc v Moriarty* [2008] EWCA Civ 1604, [2008] B.P.I.R. 1180, para.[9] (Lord Neuberger M.R.), affirming sub nom. *Re BA Peters Plc* [2008] EWHC 2205 (Ch), [2008] B.P.I.R. 1180, para.[18]; *Re Global Trader Europe Ltd In Re Global Trader Europe Ltd (In Liquidation)* [2009] EWHC 602 (Ch), [2009] 2 B.C.L.C. 18, [2009] B.P.I.R. 446.

CHAPTER 21

DEBTS AND THINGS IN ACTION

Introduction Divisions and subdivisions in the law of property take a series of binary forms. First of all property is divided into realty and personalty. The distinction is not, as might be imagined, between land and non-land, but rather tracks the historical distinction between property the subject of a real action for its recovery and property the subject of a personal action. Since the rights of a leasehold tenant in land were protected by a personal and not a real action,[1] a leasehold interest in land has always been regarded as personalty. The fact that since 1925 one of the two recognised legal estates in land has been the term of years absolute[2] does not undo this profound historical truth. 21–001

Things in action As for personalty, a distinction is classically drawn between things in action[3] and things in possession, though there is a discernible modern tendency for the former to be labelled as intangible property or simply intangibles.[4] As with things in possession, things in action are divisible into legal and equitable things in action, though the distinction is of diminished importance in the modern law.[5] The distinction between things in possession and things in action goes to the way in which rights to them may be enforced. Since things in possession are capable of being physically possessed, rights in them can be asserted by use and enjoyment. In contrast, rights in things in action can be asserted only by taking action legal action or proceedings,[6] though having standing to bring legal proceedings does not necessarily mean that the subject-matter of those proceedings is a thing in action.[7] Things in action are 21–002

[1] Real Property Limitations Act 1833 s.36, abolished real actions.

[2] Law of Property Act 1925 s.1(1).

[3] For the historical development of the subject of things in action, see Holdsworth, W.S., *A History of English Law*, 1st edn (1925), Ch.7; Sweet, C., "Choses in Action" (1894) 10 L.Q.R. 303, (1895) 11 L.Q.R. 238; Elphinstone, H., "What is a Chose in Action?" (1893) 9 L.Q.R. 311; Cyprian Williams, T., "Property, Things in Action and Copyright" (1895) 11 L.Q.R. 223.

[4] See para.21–005.

[5] The application of the joinder rules to the assignment of legal things in action is an exception. See Ch.27. An interest in a trust fund is an equitable and not a legal thing in action, so too an interest in a partnership. A debt is the clearest example of a common law thing in action.

[6] *Torkington v Magee* [1902] 2 KB 427, 430, DC. See also Marshall, R., *The Assignment of Choses in Action* (1950), Ch.1, noting that an expansive definition of choses in action in modern times is in part due to the above dictum of Fry L.J. in *Colonial Bank Ltd v Whinney* (1885) 30 Ch D 261, 285; Smith, M. and Leslie, N., *The Law of Assignment*, 2nd edn (2013), Ch.2.

[7] *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840, CA; *Link Organisation Plc v North Derbyshire Tertiary College* [1999] E.L.R. 20, 29, CA. See Smith, M. and Leslie, N., *The Law of Assignment*, 2nd edn (2013), pp.34–36, on things in action as private law, as opposed to public law, rights. See also *WA Sherratt Ltd v John Bromley (Church Stretton) Ltd* [1985]

therefore said to be capable of being "turned into money".[8] The abstract nature of things in action means that they do not attract the error, sometimes seen with things in possession, of confusing the object with the property in it, the chair with rights in the chair. The common law[9] of property is essentially about rights in things and the volume of rights that accompanies a particular type of proprietary interest.[10] It is nevertheless customary to refer by way of shorthand to things in possession and things in action, rather than to rights in things in possession and rights in things in action. Moreover, the difference between the thing and rights in the thing is more elusive for things in action than for things in possession.

21–003 **Practical differences** The distinction between things in possession and things in action is not just a matter of taxonomy but has practical consequences too, though these are fewer in the modern law than was formerly the case.[11] For example, things in action are not goods for the purpose of the Bills of Sale Acts 1878–1891[12] and are subject to different processes of execution in the enforcement of judgments.[13] The rules on assignment, which necessarily dispense with delivery as a means of perfecting a transfer, apply to things in action[14] and not to things in possession. The tort of conversion does not apply to things in action.[15] Things in action are excluded from the definition of goods, to which the Sale of Goods Act 1979 applies.[16] Other points of distinction have fallen away. For a period, things in action, unlike things in possession, were conceived to be personal in nature, and as such incapable at common law of being assigned or made the subject of a grant.[17] The reputed ownership doctrine,[18] which never

QB 1038, CA, where the defendant in liquidation had no right in the nature of a thing in action to recover money that it had paid into court, the disposition of which lay in the discretion of the court: *R-Marley Laboratory Ltd* [1952] 1 All E.R. 1037, CA (application for costs).

[8] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 913, HL. This may be too narrow from an historical perspective: rights of entry have in the past been viewed as things in action: Holdsworth, W.S., *A History of English Law*, 1st edn (1925), Ch.7, 304.

[9] In the broader sense including equity.

[10] See Honore, A., "Ownership", in Guest, A., (ed), *Oxford Essays in Jurisprudence* (1961).

[11] For example, under the old system of matrimonial property, the wife's things in possession vested on marriage absolutely in the husband, but things in action had first to be recovered: Sweet, C., "Choses in Action" (1894) 10 L.Q.R. 303, 315–316.

[12] Bills of Sale Act 1878 s.4; *Re Sugar Properties (Derisley Wood) Ltd* [1988] B.C.L.C. 146. In *Cochrane v Moore* (1890) 25 QBD 57, CA, the court left open the question whether the gift of a quarter share in a racehorse could be completed by delivery or whether the share was incorporeal property incapable of physical delivery. The latter is certainly the correct proposition. The re-characterisation of certain sales of a quantity of goods in an identified bulk as shares in that bulk, in the Sale of Goods Act 1979 as amended, required a change to be made to the general definition of delivery so that it accommodated a type of appropriation not amounting to delivery: ss.20A–B, 61(1). See paras 11–012 et seq.

[13] A writ of fieri facias (High Court, RSC Ord.47) or a warrant of execution (County Court, CCR Ord.26) lies against goods. Where, for example, a judgment creditor seeks execution against a debt owed to the judgment debtor, this is done by means of a third party debt order (formerly a garnishee order) (CPR Pt 72).

[14] Some things in action are subject to their own transfer rules: Chs 32–33.

[15] *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1.

[16] s.61(1).

[17] Holdsworth, W.S., *A History of English Law*, 1st edn (1925), Ch.7, 306–307. Equitable rights, by their nature, were things in action. The claimant had a right against the legal owner of personalty or land to apply it in favour of the claimant. They were assignable.

extended to things in action, no longer applies in bankruptcy, though it is referred to for the purpose of its exclusion in the law of distress.[19] Whereas things in action could not be the subject of the offence of larceny, they may now be the subject of theft.[20] The old rule of writing for sale of goods contracts[21] never applied to the sale of things in action.

21–004 **Scope of things in action I** Initially confined to debt claims and breach of contract claims, things in action have taken on an expanded meaning in the last few centuries. A few examples, some of which were formerly contested as things in action, but all now undisputedly established as such, attest to the expansion of this type of property. Things in action now include claims to money payable on an uncertain event[22] and rights to prove in a winding-up.[23] They include also actions in tort[24] and shares in a company.[25] Undivided shares in things in possession are also things in action.[26] Formerly, there were doubts about copyright, patents and other forms of intellectual property[27]—since there was a negative right to complain of interference rather than a present and positive right to enforce,[28] and since they conferred a permanent right rather than the transitory right characteristic of a thing in action—but it is now well settled that they are things in action.[29] Information is a less clear case,[30] but it seems that it may be in

[18] Bankruptcy Act 1914 s.38(2)(c) (repealed by the Insolvency Act 1985), which provided that goods for the purpose of the provision did not include things in action other than trade debts.

[19] Law of Distress (Amendment) Act 1908 s.4(1). Distress at common law will be superseded by a non-statutory process when the relevant provisions of the Tribunals, Courts and Enforcement Act 2007 (s.71 and Sch.12) come into force.

[20] Theft Act 1968 s.4(1).

[21] Statute of Frauds 1677 s.17, subsequently Sale of Goods Act 1893 s.5, repealed 1954.

[22] See *Brice v Bannister* (1878) 3 QBD 569, CA, and thus assignable under s.25(6) of the Judicature Act 1873, now s.136 of the Law of Property Act 1925. In *Brice*, moneys to be paid in the future under a shipbuilding contract had not yet been earned by the builder, yet they represented a thing in action. For the limits on this ruling in insolvency cases, see paras 38–028 et seq.

[23] *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] A.C. 626, 658, CA (common ground between the parties).

[24] Cyprian Williams, T., "Is a Right of Action in Tort a Chose in Action?" (1894) 10 L.Q.R. 143. Cf. Elphinstone, H., "What is a Chose in Action?" (1893) 9 L.Q.R. 311, 314–315 (advocating that the amount recoverable has to be ascertainable in advance, which would also exclude from the category an action for damages for breach of contract).

[25] *Humble v Mitchell* (1839) 11 A&E 205, 113 E.R. 392 ("mere choses in action, incapable of delivery"). For the nature of a share, see *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279, 288; *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26 at [26], [2007] 1 A.C. 508. A share in a company does not exist until it is issued and, on issue, it is created and not transferred: *Re VGM Holdings* [1942] 1 Ch 235, 241, CA; *Her Majesty's Commissioners for Revenue & Customs v First Nationwide* [2012] EWCA Civ 278. A shareholder's right to a declared dividend is a separate thing in action: *Re Severn and Wye and Severn Bridge Railway Co* [1896] 1 Ch 559 (limitations).

[26] *Re Sugar Properties (Derisley Wood) Ltd* [1988] B.C.L.C. 146.

[27] See para.21–005.

[28] Elphinstone, H., "What is a Chose in Action?" (1893) 9 L.Q.R. 311, 314.

[29] *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, 93, CA (copyright); *Edwards & Co v Picard* [1909] 2 KB 903, 905, CA (patent); *Beecham Group Plc v Gist-Brocades NV* [1986] 1 W.L.R. 51, 59, HL (patent); *British Nylon Spinners Ltd v ICI Ltd* [1953] Ch 19, 26, CA (patent). The same is inferentially recognised in legislation providing for the transfer of intellectual property rights, e.g. Trade Marks Act 1994 s.24, or recognising a right as a property right, e.g. Copyright, Designs and Patents Act 1988 s.213(1) (design). See Ch.26.

some circumstances a thing in action[31] and that know-how and confidential information may be protected in a way that is similar to the protection of property rights.[32] Although there are various difficulties presented by computer programs,[33] where a distinction has to be drawn between the program itself and the physical medium that embodies it, they should be regarded as things in action.[34] In one respect at least, the category of things in action has suffered a retrenchment. The right to sue in conversion, based on the right to immediate possession of a thing, is no longer classed as a thing in action.[35] Apart from this instance, the increased transferability of things in action, first in the case of the universal assignments that accompany death and bankruptcy[36] and then with the introduction of statutory assignment,[37] has had a broadening impact on the category of things in action.

21–005 **Scope of things in action II** The modern law[38] starts with the authoritative pronouncement that personal property is divided into things (or choses) in possession and things (or choses) in action.[39] It is either the one or the other, so that, given the almost self-evident character of things in possession, things in action may be taken as the residue. Residual categories have a tendency to harbour miscellaneous elements and therefore to repel systematic definition. Things in action are, therefore, most accurately defined as items of personal property that are not things in possession. This distinction is sometimes (and increasingly) usefully expressed in the alternative form, not historically rooted in English law, of tangible personalty and intangible personalty. A distinction between the tangible (or corporeal) and the intangible (or incorporeal) has the

[30] *Boardman v Phipps* [1967] 2 A.C. 46, 91 (Viscount Dilhorne—not infrequently described as property), 102–103 (Lord Cohen—not strictly property), 107 (Lord Hodson—disagreeing with the view that information cannot be property), 115 (Lord Guest—information and knowledge can be trust property), 127–128 (Lord Upjohn—generally not), HL. For the view that a "spectacle" cannot be owned, see *Victoria Park Racing v Taylor* (1937) 58 C.L.R. 479 (a horse race). It has also been said that, copyright apart, there is no property in words transmitted over a telephone: *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 357 (telephone tapping). See further Ch.33.

[31] *Boardman v Phipps* [1967] 2 A.C. 46, HL.

[32] *Boardman v Phipps* [1967] 2 A.C. 46, 128 (Lord Upjohn: information "not property in any normal sense but equity will restrain its transmission to another in breach of some confidential relationship"), HL.

[33] For the question whether they are things in possession or things in action, and whether, if they are the former, they are "goods" under the Sale of Goods Act 1979, see *St Albans City and District Council v International Computers Ltd* [1996] 4 All E.R. 181, CA, where a preliminary attempt is made to deal with some of these issues.

[34] See generally Moon, K., "The nature of computer programs: tangible? goods? personal property? Intellectual property?" [2009] E.P.I.R. 396 for an extensive review of this area. See further Ch.28.

[35] *Franklin v Neate* (1844) 13 M&W 480, 153 E.R. 200.

[36] See Cyprian Williams, T., "Is a Right of Action in Tort a Chose in Action?" (1894) 10 L.Q.R. 143, 145–146, 148, noting that actions for damage to property passed on death and that certain rights, not assignable outside bankruptcy, nevertheless passed to assignees in bankruptcy.

[37] See Ch.27.

[38] See Smith, M. and Leslie, N. *The Law of Assignment*, 2nd edn (2013), Ch.2.

[39] *Colonial Bank Ltd v Whinney* (1885) 30 Ch D 261, 285, CA—"all personal things are either in possession or action", there being "no *tertium quid* between the two" (Fry L.J.). Historically, leases of land constituted personal property. The present distinction concerns so-called chattels personal and does not include chattels real.

precious advantage of not being mired by history and, as far as intangible property goes, of not attracting the somewhat misleading association with litigation. There are types of intangible property, especially emergent forms of property,[40] that are not things in action in the sense of being enforceable by action.[41] Though centuries of personal property law cannot be erased so as to dispense altogether with the notion of things in action, the time is ripe for folding things in action into the broader description of intangible property. It has been said that the drawing of a distinction between things in action and pure intangibles is unlikely to have any practical application,[42] which is no doubt correct, but running the notions of things in action and intangible property side by side gives rise to an excess of terminology and thus complicates an already cluttered scene. Unless it is necessary to refer to things in action, as it might be where past authority is under consideration or the structure of personal property law is under consideration, it is better to refer to intangible property than to things in action.

21–006 **Pure intangibles** Things in action, in turn, are divided into documents of title (or negotiable instruments)[43] and non-documentary things in action. The former are often referred to as documentary intangibles and the latter as pure intangibles.[44] A pure intangible will very frequently, nevertheless, be evidenced in writing. It may however exist in purely electronic form. This chapter deals with the nature of those things in action that are pure intangibles.[45] It deals also with probably the most important or characteristic example in practice of a pure intangible, namely debt, whilst certain other examples, such as shares in a company and intellectual property rights, are the subject of other chapters in this work. The transfer of rights in pure intangibles is dealt with elsewhere.[46]

21–007 **Meaning of property** While the above definition of things in action in negative terms best expresses the character of things in action in modern times, the real question is how far do the outer limits of things in action go? This is but another way of asking the question whether something is or is not property. This is not a question asked in the case of items that are potentially things in possession, but is peculiarly relevant to things in action. In this connection, the following words of Lord Wilberforce are useful in framing the line of inquiry:

[40] Such as carbon trading allowances (*Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156, [2012] Bus LR 1199), waste management licences (*Re Celtic Extraction Ltd* [2001] Ch 475, CA) and milk quotas (*Swift v Dairywise Farms Ltd* [2000] 1 W.L.R. 1177, affirmed [2003] 1 W.L.R. 1606 (Note), [2001] EWCA Civ 145).

[41] See *Attorney General of Hong Kong v Nai-Keung* [1987] 1 W.L.R. 1339, PC, where Hong Kong legislation distinguished things in action and intangible property.

[42] This was the conclusion reached in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) at [61], [2013] Ch 156, [2012] Bus LR 1199.

[43] Discussed in Ch.23.

[44] For the view that something (export quotas) may for statutory purposes be intangible property without being a thing in action, see *Attorney General of Hong Kong v Nai-Keung* [1987] 1 W.L.R. 1339, 1342, PC (theft legislation concerning "things in action and other intangible property"). A related issue concerns the meaning of property in insolvency legislation: see para.21–010.

[45] *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156, [2012] Bus LR 1199.

[46] Ch.27.

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."[47]

An obvious starting point is the distinction between contract and property, yet the apparently clean separation between "what I *own* and what I *am owed*"[48] is denied by the way in which contractual promises can be treated as items of property.[49] The former view that contractual rights, as opposed to actions for breach of contract, were not things in action no longer holds.[50] Contractual rights, besides being assignable subject to certain exceptions, are now things in action,[51] with some exceptions of uncertain scope.[52] They are regarded as vesting in the obligee from the time the contract is made.[53] Nor can it be said with full confidence that contract ousts property if one disregards third parties and looks only at the relations between obligor and obligee: the ability of an obligor to take from the obligee security over its own indebtedness[54] prevents this simplifying step from being taken. As against that, the equitable jurisdiction to relieve against forfeiture has not been extended to contractual rights,[55] so the law on contractual rights as property between the contracting parties themselves is not quite coherent.

[47] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1247–1248, HL. See also *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156, [2012] Bus LR 1199.

[48] McKendrick, E., *Goode on Commercial Law*, 4th edn (2010), pp.30–31 (original emphasis).

[49] "[A] bare contractual claim is also a form of property": *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38 at [167], [2012] 1 A.C. 383 (Lord Mance). This assimilation of contract and property is largely due to equity, which treated a promise to grant security as tantamount to security and which permitted the assignment of debts and contractual rights at a time when this was refused by the common law. See McKendrick, E., *Goode on Commercial Law*, 4th ed. (2010), 31. See also Worthington, S., "The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation", in Degeling, S. and Edelman, J., (eds), *Equity in Commercial Law* (2005) ("[E]quity, acceding to commercial pressure, has effectively eliminated the divide between property and obligation").

[50] See Tolhurst, G., *The Assignment of Contractual Rights* (2006), para.2–04.

[51] See *Manley v Law Society* [1981] 1 All E.R. 401, 408, 413, CA, treating the right to have a compromise agreement enforced as a thing in action. Options are also treated as things in action: *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, 441, CA. Cf. *Stephenson Bros Ltd v Commissioners of Customs and Excise* [1953] 1 W.L.R. 335, where the court held that a contractual offer to supply a free gift contained in pictorial stamps did not amount to a thing in action.

[52] In *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, at [29], Sedley L.J. states that the proposition that all contractual rights are things in action is wrong, though he is inclined to accept that those contractual rights that did amount to things in action might be treated as possessions for the purpose of art.1 to the First Protocol to the European Convention on Human Rights. Lewison J. at [43] agreed that the first of these propositions was wrong and regarded as dubious the proposition that a thing in action was necessarily a possession for the purpose of the First Protocol. Authorities that in substance deny certain contractual rights to be things in action are *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896 (a bare right to rescind a contract may not be the subject of an assignment) and *Brown v Metropolitan Counties Life Assurance Society* (1859) 28 L.J.Q.B. 36 (a bare licence to seize goods may not be assigned).

[53] *Bank of Boston Connecticut v European Grain and Shipping Ltd (The Dominique)* [1989] A.C. 1056, 1066, CA.

[54] *Re Bank of Credit and Commerce International SA (No. 8)* [1998] A.C. 214, HL. A contractual right to receive medical treatment was held not to be a possession for this purpose.

[55] *Scandinavian Trader Tanker Co AB v Flota Petrola Ecuatoriana* [1983] 2 A.C. 694, HL; *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 W.L.R. 776, HL.

Debt Debt is perhaps the oldest and arguably the most important example of a thing in action. A debt is an obligation that consists of a duty to pay a specified sum of money,[56] either on demand or at a future date that may either be fixed or dated according to an event that is sure to happen.[57] A contingent obligation to pay a sum of money is not a debt.[58] To be a debt, a money obligation must have fallen due though it may not yet be payable.[59] A debt will not fall due if it arises only in consequence of work to be performed and that work has not yet been carried out.[60] Nevertheless, apart from the classification of an entitlement to be paid in the future as a debt, the extension of the category of things in action to accommodate contractual rights has this consequence. A right to be paid under a contract for work to be done in the future under that contract, though not a debt, is a thing in action and therefore assignable.[61] This principle, nevertheless, will not apply in bankruptcy or insolvent liquidation where the performance for which the payment is to be made has not yet been rendered at the date of the insolvency proceedings.[62] A debt may be either legal or equitable.[63] An action for damages is

21–008

[56] It may arise in various circumstances, such as under a contract or by judgment. A debt created by a deed is a specialty and governed by its own rules on the limitation of actions: Limitation Act 1980 s.8 (12 years). On the meaning of a provable debt in bankruptcy, see *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286, [2012] 2 B.C.L.C. 233.

[57] Certainty may for present purposes be liberally understood. An obligation to pay an infant a sum of money on majority is capable of amounting to a debt even though the infant may not live to see majority: see *Goss v Nelson* (1756) 1 Burr 216, 97 E.R. 286.

[58] Whether owed to or by a company in administration or liquidation, it may be the subject of a set-off; Insolvency Rules rr.2.85(4)(b), 4.90(4)(b). No similar account is taken of contingent obligations owed *to* a bankrupt: Insolvency Act 1986 s.323. Contingent liabilities raise great problems in the context of provable clams in bankruptcy and winding-up: see *Glenister v Rowe* [2000] Ch 76, CA; *Bloom v Pensions Regulator* [2011] EWCA Civ 1124, [2012] 1 All E.R. 1455 (and the authorities discussed at length therein). The contingent obligation may take the form of a "flawed asset", in which case payment may be discretionarily withheld from one person, often in favour of another, on the occurrence or non-occurrence of a stipulated event. To the extent that the event is an insolvency event, this may offend insolvency principles, notably, the so-called anti-deprivation principle, on which see paras 38–024 et seq.

[59] *Webb v Stenton*(1883) 11 QBD 518, CA; *Booth v Trail* (1883) 12 QBD 8, DC; *Re Davis & Co, Ex p. Rawlings* (1889) 22 QBD 193, 199, CA; *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 W.L.R. 1035, PC. It must be *debitum in praesenti* even if *solvendum in futuro*, though the precise amount might not at the relevant time have been quantified (see *Re Tout and Finch Ltd* [1954] 1 W.L.R. 178 (retention moneys in a building contract)). The distinction between *debitum in praesenti* and *solvendum in futuro* often arises in the case of proceedings for the garnishing or attachment of a debt. See *Edmunds v Edmunds* [1904] P 362; *Tapp v Jones* (1875) LR 10 QB 591, DC. But courts sometimes take "due" and "payable" in a particular context such as insolvency to mean the same thing: see, e.g. *Re Stockton Malleable Iron Co* (1876) 2 Ch D 101; *Re Fastnedge* (1874) LR 9 Ch App 383. The significance of a debt falling due though it is not yet payable lies also in the way that such a debt may be the subject of a legal set-off: *Watson v Mid-Wales Railway Co* (1867) LR 2 CP 593; *Re Pinto Leite and Nephews* [1929] 1 Ch 221.

[60] *Wilmot v Alton* [1897] 1 QB 17, CA. "There are amounts which may or may not become due according as the conditions of the contract are or are not fulfilled": ibid, 21.

[61] *Brice v Bannister* (1878) 3 QBD 569, CA.

[62] *Re Jones, Ex p. Nichols* (1883) 22 Ch D 783, CA; *Re Tout and Finch Ltd* [1954] 1 W.L.R. 178; *Wilmot v Alton* [1897] 1 QB 17, CA; *Re De Marnay* [1943] 1 Ch 126.

[63] *Webb v Stenton* (1883) 11 QBD 518, CA. A trustee's duty to pay beneficiaries at stated intervals gives rise to an equitable debt.

CHAPTER 31

NEGOTIATION OF DOCUMENTARY INTANGIBLES

A. INTRODUCTION

Negotiability issues This Chapter deals with the transfer of real rights under negotiable documents.[1] The rules at play here are distinct from those applicable in the case of statutory and equitable assignment. Whether they exclude the application of assignment rules to the rights contained in the documents is a different matter, which will be discussed where appropriate. Since this work deals with personal property, not all matters arising out of negotiable instruments are discussed.[2] Warranty and estoppel liability, as matters of a contractual character, are therefore excluded from this work. These liabilities are not *transferred* with the instrument. In the case of negotiable documents of title to goods, liabilities may in certain circumstances be transferred with or in association with the instrument. This is dealt with in the chapter on novation.[3] **31–001**

B. BILLS OF EXCHANGE AND PROMISSORY NOTES

General

Scope of Act The Bills of Exchange Act 1882 is a codified treatment of the law relating to the transfer of rights under bills of exchange and promissory notes,[4] the two types of negotiable instrument expressly dealt with by the legislation. The provisions of the Act dealing with bills of exchange apply also, with necessary modifications, to promissory notes.[5] Bills of exchange and promissory notes will both be referred to in this chapter as instruments, except in so far as there is a need to distinguish them. Since the 1882 Act is a codification of the antecedent law dealing with negotiable instruments, there is good reason to apply its provisions by way of analogy to those negotiable instruments that are not **31–002**

[1] Discussed in Ch.22.

[2] For example, personal liability arising from an estoppel (such as that which prevents an acceptor (Bills of Exchange Act 1882 s.54(2)(a)) or an indorsee (Bills of Exchange Act 1882 s.55(2)(b)) from denying the genuineness of a drawer's signature) falls outside this work, even though the person benefiting from the estoppel sues on the bill. A fortiori, liability for breach of warranty (for example, the drawer's and indorser's engagements that a bill will not be dishonoured (Bills of Exchange Act 1882 s.55(1)(a)), which is for damages and not for the amount due on the bill, is excluded.

[3] Ch.30.

[4] For their definition, see Ch.22.

[5] s.89(1).

expressly covered by the Act.[6] This chapter will not attempt a full exposition of the law relating to negotiable instruments. Instead, it will focus on the proprietary aspects of the instrument as between the immediate parties to it and as between those parties and remote parties.

Liabilities on contracts contained in the instrument

31–003 **Ownership** The transfer of a negotiable instrument vests in the holder[7] certain entitlements against those who are parties to the bill. These entitlements may be seen in the ordinary case as the incidents of ownership of the instrument. Nevertheless, the holder seeking to assert those entitlements may have a defective title. The instrument, for example, may have been transferred to the holder for a limited purpose[8] or, in the case of a bearer instrument, the holder may have obtained the instrument from someone without authority to transfer it or may even be himself a thief. If the holder is, however, a holder in due course, he will take the instrument clear of any defect in the title of his transferor.[9] It may happen that payment is made under the instrument to a holder with a defective title.[10] In that case, the true owner[11] will have an action in conversion against the holder but may elect instead to claim the proceeds of payment in a restitutionary action for money had and received.[12]

Holders

Payees, bearers and indorsees

31–004 **Holder** There are various categories of holder of a negotiable instrument, the rights of whom depend upon the particular category in which they fall. A holder is defined by the Bills of Exchange Act as either the payee, or the indorsee or the bearer.[13] In all cases, the holder must be in possession of the bill[14] to enforce the contracts on the instrument.[15] In the case of an order bill or note, an indorsement must also be made for the transferee to be a holder.[16] The rights of a holder, therefore, differ from those of an assignee of a debt or of contractual rights in that

[6] This may not be a straightforward matter. In the case of scrip, for instance, the obligation to deliver shares can only be performed by the company. The liability, if any, of an intermediate indorser, in the event of the company defaulting, can only arise in damages. In practice, instruments of this kind are likely to remain in bearer form so that the problem does not arise.

[7] See para.31–004.

[8] Cf. *Sewell v Burdick* (1884) 10 App Cas 74, HL.

[9] See para.31–023.

[10] On the right of a person liable on the instrument to refuse payment to a holder with a defective title, see below.

[11] An expression that is used in s.80.

[12] *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1, HL.

[13] s.2.

[14] s.2.

[15] Possession at the date of conversion, or the right to immediate possession, will suffice for an action in conversion.

[16] *Good v Walker* (1892) 61 L.J.Q.B. 736.

the negotiable instrument itself is capable of being owned and must be in the possession of the person seeking to enforce liabilities arising thereunder.[17] Liabilities under the various contracts on the instrument remain revocable as long as the instrument has not been delivered.[18] In its brief definition section, the Act leaves undefined payee and indorsee, but the meaning of these expressions may be gathered from various other provisions of the Act. The Act does define "bearer" in the definition section as "the person in possession of a bill or note which is payable to bearer".[19] A bill or note is payable to bearer when it is either expressed to be payable to bearer, or has been indorsed in blank with no subsequent indorsement in favour of a named holder.[20] It may also be treated as payable to bearer where the payee is a fictitious or non-existent person.[21]

31–005 **Payee** A payee has to be named or indicated with reasonable certainty in the instrument[22] and is either a bearer or a specified person to whom or to whose order[23] payment is to be made under the instrument.[24] To be a holder, the payee must also be in possession of the instrument.[25]

31–006 **Indorsee** The meaning of an indorsee may be inferred from the definition of "indorsement",[26] which requires not merely indorsement but also delivery. An indorsee is therefore a named or otherwise identified[27] person to whom possession of the instrument has been transferred actively or constructively. A constructive delivery will occur if a third party in possession of the instrument attorns to the indorsee. It should also occur if the holder himself indorses the instrument in favour of the indorsee and then attorns to that indorsee. Delivery is defined in the Sale of Goods Act 1979 in identical terms, save that the 1979 Act requires it also to be "voluntary". The significance of the omission of "voluntary" in the Bills of Exchange Act is that delivery may in limited circumstances occur if the instrument finds its way into the indorsee's hands via a person who has no authority to deliver it. This may not be significant in the case of a bearer, since the Act requires him only to be in possession and not to have delivery of the instrument made to him. It is possible, however, that a person to whom a negotiable instrument is indorsed may acquire it other than by means of a

[17] Beale, H., (ed), *Chitty on Contracts*, 31st edn (2012), Vol.II para.34–002 (Hooley).

[18] s.21(1); *Citibank NV v Brown Shipley & Co Ltd* [1991] 2 All E.R. 690, 699.

[19] s.2.

[20] s.8(3) ("the only or last indorsement is an indorsement in blank").

[21] s.7(3); *Bank of England v Vagliano Bros* [1891] A.C. 107, HL; *North and South Wales Bank v Macbeth* [1908] A.C. 137, HL; *Vinden v Hughes* [1905] 1 KB 795.

[22] s.7(1). See Ch.22.

[23] A person designated as payee (whether named or bearer) by the original payee.

[24] s.3(1).

[25] s.2.

[26] Defined self-referentially in s.2 as an indorsement completed by delivery. Sections 32 and 34 inform us that an indorsement is a writing on the bill signed by the indorser which "specifies the person to whom, or to whose order, the bill is to be payable" (special indorsement) or does not specify that person and may take the form of a "simple signature" (blank indorsement).

[27] s.32(4) contemplates an indorsee as either being named or "designated"; s.34(2) states that a special indorsement "specifies" the payee. The requirement in s.7(1) that the payee be named "or otherwise indicated [in the bill] with reasonable certainty" supports the conclusion that the indorsee need not be exactly named.

voluntary transfer of possession from the indorser. For such a delivery to be effective in transferring rights to the indorsee, there cannot be a forgery[28] or any other material alteration[29] of the instrument. Furthermore, a delivery must be "by or under the authority"[30] of the person liable on the instrument[31] in the case of immediate parties and of remote parties other than holders in due course.[32] In the case of holders in due course, a valid delivery by "all prior parties" is "conclusively presumed".[33] Consequently, it is the case of a holder in due course taking delivery of the instrument as an indorsee where the absence of a requirement of voluntary delivery is relevant.

Mere holders, holders for value and holders in due course

31–007 **Types of holder** As stated above, payees, bearers and indorsees are all different types of holder. In addition, holders exist in three qualities: mere holders, holders for value and holders in due course. As between mere holders and holders for value, the difference between them is that the latter provide consideration for the instrument. This consideration comes in two forms. It is either any consideration sufficient to support a simple contract, which is the ordinary consideration, executory or executed, of contract law. For example, if A draws on B Bank a cheque to pay C, in return for C making an advance to D, then C in making that advance gives consideration for the cheque.[34] If A requests the promise of an advance to D, the giving of that promise will also suffice. C also provides consideration if C has already made the advance to D and the cheque is given in return for C discharging the debt owed by D.[35] But if A draws on B Bank to pay C, in return for D making an advance to E (or to A), then C does not give consideration for the cheque drawn by A. The consideration for the cheque must move from C if A is to incur liability for drawing the cheque.[36] Alternatively, the consideration may take the form of an antecedent debt or liability.[37] The antecedent debt or liability is that of the drawer of a bill of exchange (or maker of a promissory note).[38] Although this antecedent debt or liability appears on its face

[28] s.24. A forged or unauthorised signature is "wholly inoperative" and no right to enforce payment accrues through that signature: ibid. The 1882 Act does not define a forgery. An agent with authority to sign cheques per procuration (per pro.) for limited purposes does not forge his principal's signature when he signs in this way for unauthorised purposes: *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA.

[29] s.64. A material alteration avoids the instrument against all parties with the exception of the person altering it or authorising or assenting to the alteration: ibid. See para.22–024

[30] See *Dextra Bank Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All E.R. (Comm) 193; *Citibank NV v Brown Shipley & Co Ltd* [1991] 2 All E.R. 690. It is the general authority to deliver, rather than the precise words of delivery, that has to be authorised.

[31] Drawer, acceptor or indorser, as the case may be: see ss.54–55.

[32] s.21(2)(a).

[33] s.21(2); *Marston v Allen* (1841) 8 M&W 494, 151 E.R. 1134.

[34] *Diamond v Graham* [1968] 1 W.L.R. 1061, CA.

[35] *MK Development Co Ltd v Housing Bank* [1991] 1 Bank LR 74, CA.

[36] See *Pollway Ltd v Abdullah* [1974] 1 W.L.R. 493, 497, CA.

[37] s.27(1).

[38] *AEG (UK) Ltd v Lewis* [1993] 2 Bank LR 119, CA; *Oliver v Davis* [1949] 2 KB 727, CA; *Crears v Hunter* (1887) 19 QBD 341, CA; *Currie v Misa* (1875) LR 10 Ex 153, affirmed (1876) 1 App Cas 554.

to be a matter of past consideration, this is not really the case. An antecedent debt or liability is more than a benefit previously conferred by the payee on the drawer of the cheque. If A draws on B Bank to pay C, to whom A is previously indebted, the cheque amounts to conditional payment of the debt owed by A to C.[39] In discharging A, C provides present consideration for A's obligation on the cheque as drawer. The same should also be the case if the debt is owed to C, not by A but by D, and C discharges D at the request of A when taking the cheque in payment.

31–008 **Holder for value** A holder may be a mere holder as against some parties to the instrument and a holder for value as against others. So, a holder is treated as a holder for value if consideration has been given for the instrument at any time, but only as regards acceptors and those who became parties to the instrument before the value was given.[40] Suppose that A draws upon B (who accepts the bill of exchange) to pay C for goods supplied by C to A. C now indorses the bill for value to D who in turn indorses it by way of gift to E. E is treated as a mere holder as far as D is concerned but as a holder for value with respect to A, B and C.[41] It is as though D's rights of enforcement of the antecedent contracts on the bill had been added to E along with the bill itself. In other cases, a mere holder, as one who has not provided consideration, may not enforce a contract contained in the instrument. E would therefore have no action against D as an indorser of the bill. In the above example, note that, as far as D and E are concerned, it does not matter whether A gave value to B for the latter's acceptance, since the acceptance predated the value given by D.[42] Since there is a rebuttable presumption that all prior signatories have become parties to the bill for consideration,[43] this means that E, as a mere holder, would, in an action on the bill against A, B or C, benefit from the presumption that D, a prior holder, gave value for the bill.

31–009 **Presumption of holder in due course** There is also a rebuttable presumption that the holder of an instrument is a holder in due course.[44] Nevertheless, once the defendant introduces prima facie proof of fraud in the negotiation of the bill, the burden of proof that value has been given in good faith reverts to the holder.[45] A holder in due course is the equivalent of the bona fide purchaser for value without notice who exists in the world of goods. According to s.29, he is someone taking

[39] *Gunn v Bolckow Vaughan & Co* (1875) LR 10 Ch App 491; *Re Romer & Haslam* [1893] 2 QB 286, CA; *Bolt & Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd* [1964] 2 QB 10, CA.

[40] s.27(2).

[41] If in this example C had not provided value for the bill, then E would not be able to claim the status of holder for value since E has to build on prior value given by a party to the bill: see *MK Development Co Ltd v Housing Bank* [1991] 1 Bank LR 74, 89, CA (cf. *Diamond v Graham* [1968] 1 W.L.R. 1061, CA).

[42] McKendrick, E., *Goode on Commercial Law*, 4th edn (2010), p.532: "[A] donor, though he cannot be sued by his donee, may be sued by the first holder to give value and by any subsequent holder, whether or not he gave value."

[43] s.30(1).

[44] s.30(2).

[45] *Fuller v Alexander* (1882) 47 LT 443; *Powszechny Bank Zwiakowy W Polse v Paros* [1932] 2 KB 353, CA. On the presence of fraud, see *Bank für Gemeinwirtschaft AG v City of London Garages Ltd* [1971] 1 W.L.R. 149, CA.

an instrument complete and regular on the face of it, before it is overdue,[46] for value,[47] in good faith and without notice of any defect in the title of the person negotiating it to him[48] or of a previous dishonouring of the instrument.[49] One question that arises is whether a holder may be a holder in due course, if aware when taking the bill of a defect in title of a previous holder, in circumstances where the transferor was a holder in due course. The purification of a bill in the holding chain that arises when a holder in due course intervenes, it is submitted, accrues for the benefit of later holders even if they are at the time of transfer aware of a defect in title that occurred prior to the intervention of the holder in due course. Section 29, admittedly, requires a holder in due course to take the bill in good faith, but the concern of the section is with the immediate transaction that takes place between the transferor and the new holder. Any other result would impair the marketability of the bill in the hands of a holder in due course seeking to transfer it to a new holder. Even if a holder is not one who takes the bill in due course, payment may have the same effect as if it had been made to the holder in due course. Section 59(1) provides that an instrument is discharged by payment in due course, which is payment "to the holder thereof in good faith and without notice that the holder's title to the bill is defective".

31–010 **Payee as holder** Although the payee in possession is a holder,[50] he cannot be a holder in due course since the instrument is not negotiated to him.[51] The Act gives no guidance on defences to payment that might be raised against the payee: it makes no provision for the enforcement of payment under an instrument by someone who is not the holder. Consequently, payees are subsumed under the category of mere holder or holder for value as the case may be.[52] Yet, just as a drawee appearing later in the holding chain may be a holder in due course,[53] so too a payee who is not the drawer may become a holder in due course when appearing later in the holding chain.[54] This has been held to be the case where the drawer is also the payee[55] despite a provision in the Act that would remit the drawer who has paid the bill to his former rights against the acceptor.[56]

31–011 **Complete instrument** The meaning of "an instrument complete and regular on the face of it" is not without some difficulty. A complete instrument cannot be an inchoate instrument, which itself may be either a signed blank paper delivered by

[46] s.29(1)(a).
[47] So he cannot be a mere holder.
[48] s.29(2)(b).
[49] ss.29(1)(a) and 36(5).
[50] s.2.
[51] *Jones (RE) Ltd v Waring & Gillow Ltd* [1926] A.C. 670, HL. Section 29(1)(b) refers to defects in title of the person who "negotiated" a bill of exchange and s.21(2), in distinguishing immediate and remote parties to a bill, includes a holder in due course in the latter category.
[52] But for case law assimilating the payee to a holder in due course, see below.
[53] Guest, A.G., *Chalmers and Guest on Bills of Exchange*, 17th edn (2009), para.4–060, citing *London Provincial & South Western Bank Ltd v Buszard* (1918) 35 T.L.R. 142. See also s.29(3).
[54] See s.29(3).
[55] *Jade International Steel Stahl und Eisen GmbH & Co KG v Robert Nicholas Steels Ltd* [1978] QB 917, CA.
[56] s.59(2)(b).

the signatory with the intention that it be converted into a bill by filling in the requisite details,[57] or a bill deficient in "any material particular".[58] In the former case, the authority thus given to the holder[59] to make use of the signature as that of drawer, acceptor or indorser depends on the intention of the signatory since the instrument "must be filled up … strictly in accordance with the authority given".[60] In the latter case, the "person in possession"[61] of the instrument has a "prima facie authority to fill up the omission in any way he thinks fit". Nevertheless, this prima facie authority must yield in the face of a more limited authority since here too the instrument "must be filled up … strictly in accordance with the authority given". In both cases, the instrument must be completed within a reasonable time.[62]

Inchoate instrument and holder in due course Although it might appear that a holder filling up an inchoate instrument cannot be a holder in due course, s.20 has been treated as having retrospective effect.[63] Consequently, the act of filling up the instrument in either of the two ways sanctioned by s.20 can convert a holder retrospectively into a holder in due course.[64] A holder lacking authority to fill up an instrument, or doing so too late, cannot be a holder in due course, though a subsequent holder unaware of these shortcomings can be.[65] 31–012

Regularity The regularity of an instrument on its face cannot be literally confined to the front of the instrument, to the exclusion of the rear. It means, disregarding external evidence,[66] that there is nothing in the outward appearance of the instrument[67] to indicate that there is anything suspicious about it.[68] Where for example the holder of an instrument was a payee named "Fathi and Faysul Nabulsy Company", the omission of the word "Company" from an indorsement by the company was an irregularity, since it was unclear whether the indorsement was the indorsement of the company itself or a purported indorsement by the 31–013

[57] s.20(1). The authority thus given to use the signature as that of drawer, acceptor or indorser depends on the intention of the signatory since the instrument "must be filled up … strictly in accordance with the authority given": s.20(2).
[58] See *Gerald McDonald & Co v Nash & Co* [1924] A.C. 625, HL.
[59] Guest, A.G., *Chalmers and Guest on Bills of Exchange*, 17th edn (2009), para.2–136.
[60] s.20(2).
[61] s.20 confines this expression to cases where the instrument lacks a material particular. There is no reason in principle why the range of persons to whom authority is given to complete a blank signed paper or to fill out material particulars should be different.
[62] s.20(2).
[63] *Glenie v Bruce Smith* [1908] 1 KB 263, 268, CA ("in the case of a bill so filled up persons have just the same rights as persons in the same position with regard to an ordinary bill"); *Gerald McDonald & Co v Nash & Co* [1924] A.C. 625, 647–648, HL. The issue normally arises where bills of exchange are signed by way of guarantee.
[64] *Lombard Banking Ltd v Central Garage and Engineering Ltd* [1963] 1 QB 220. This is implicit too in *Yeoman Credit Ltd v Gregory* [1963] 1 W.L.R. 343.
[65] s.20 (proviso).
[66] Which may, however, be relevant to notice and good faith: see para.31–017.
[67] *Arab Bank Ltd v Ross* [1952] 2 QB 216, 226, CA; *Yeoman Credit Ltd v Gregory* [1963] 1 W.L.R. 343.
[68] *Arab Bank Ltd v Ross* [1952] 2 QB 216, 226, CA.