Atiyah and Adams'

Fourteenth Edition

Sale of Goods

Christian Twigg-Flesner
Rick Canavan

Pearson

Atiyah and Adams' Sale of Goods

where the buyer makes it clear that they are buying a particular thing because of its unique qualities, and that no other will do.[67]

For this reason, the sale of a manufactured item will nearly always be a sale by description (except where it is second-hand) because items made to an identical design are not generally bought as unique goods but as goods corresponding to that design. So it has been held in Australia that the sale of an ordinary pair of 'walking shoes' was a sale by description, although the buyer had tried on and examined the shoes and might well have been thought to be buying the particular pair as specific goods.[68] As we have seen, even the purchase of a used car which was fully examined by the buyer was held in *Beale* v *Taylor*[69] to be a sale by description because the buyer had relied in part on a newspaper advertisement issued by the seller.

These cases suggest that the real question at issue in deciding whether the sale should be classified as a sale by description is whether, on the true construction of the contract, the buyer has agreed to buy a specific item exactly as it is to the exclusion of all liability on the part of the seller. For example, the buyer may examine a used car and the seller may offer it for sale in terms which amount to saying: 'There is the car; there is my offer; I guarantee nothing; take it or leave it.' In this event it is thought the sale would be held to be a sale of a specific thing and not a sale by description.

One of the consequences of the 1893 Act was that if the sale was held to be a sale by description there would often be an implied condition under s. 14 that the goods were merchantable. This consequence of holding a sale to be by description was so important that it seems that the courts in practice tended to interpret s. 13 with half an eye to s. 14. In other words, if the court thought that on the true construction of the contract the seller should be held to warrant the merchantability of the goods, it would tend to hold the sale to be a sale by description, but after the 1973 Act the condition of merchantability was not limited to sales by description, resulting in s. 13 being construed ever more narrowly, or having less and less practical relevance ever since, despite changes to the quality warranty in the 1994 legislation.

The application of s. 13

Note that s. 13 (unlike s. 14) applies even though the goods are not sold by a person who sells 'in the course of a business'. Thus in *Varley* v *Whipp*,[70] the defendant agreed to buy from the plaintiff a second-hand reaping machine, which was stated to have been new the previous year and hardly used at all. This was a gross misdescription, and the defendant declined to accept it or pay for it. The defendant could not rely on s. 14 (which imposes requirements as to quality and fitness for purpose) because the plaintiff was not a dealer in agricultural machinery, but as the goods did not correspond with the description it was held that there was a breach of s. 13. (Changes made by later legislation are immaterial to this point.)

[67] Ibid.
[68] *David Jones Ltd* v *Willis* (1934) 52 CLR 110.
[69] Above, n. 31.
[70] [1900] 1 QB 513. Note also *Beale* v *Taylor*, above, p. 118 (private sale of second-hand car).

The relationship between the description and the quality or fitness of the goods

As we shall see later, s. 14 deals with implied conditions as to the quality and fitness of the goods for a particular purpose. Section 13 does not on the face of it deal with quality or fitness for purpose. As we have seen from *Arcos Ltd* v *E A Ronaasen & Son*,[71] it is quite possible for goods to be of satisfactory (formerly merchantable) quality and fit for their purpose and yet not correspond with their description.

Conversely, if the goods do correspond with their description, the fact that they are unsatisfactory or not fit for the purpose for which they are sold will not enable the buyer to plead a breach of s. 13. In this event the buyer will frequently be able to rely on s. 14(2) or (3), but there are some circumstances in which they may wish to use s. 13 rather than s. 14 even though their complaint may in a broad sense be said to be one of quality. First, as seen above, s. 13 applies to a sale by a private seller while s. 14 only applies to a seller who sells in the course of a business. So a person who buys from a non-business seller can only complain about quality if they can bring their case under s. 13. This explains a case like *Beale* v *Taylor*[72] where the buyer of the car obtained damages for breach of the condition implied by s. 13 – the car was wrongly described as a 1961 Herald. If the buyer had been buying from a business seller, he would probably have had a clear case for damages under s. 14 on the ground that the vehicle was not of merchantable quality (the relevant quality warranty at the time).

But secondly, the buyer may wish to rely on s. 13 because the goods are in fact of satisfactory quality in a general sense, but still do not amount to the goods they thought they were buying. In the hypothetical example given earlier, a person who buys an item of clothing described as 'pure wool' may very well want to return it if they discover that it is not, even though it may be perfectly satisfactory, and of good quality. But they can only do that under s. 13 because there would be no breach of s. 14 on these facts.

A third type of case in which a buyer might wish to rely upon s. 13, even though their complaint is in a broad sense about quality, occurs where the contract contains a clause excluding liability for matters of quality, but not for matters of description – something which could happen despite the Unfair Contract Terms Act.

Particular problems often arise where goods are described in general terms, but are adulterated or contaminated so that the goods themselves are not greatly changed but their utility is affected. The point is illustrated by the decision of the House of Lords in *Ashington Piggeries Ltd* v *Christopher Hill Ltd*[73] where herring meal contaminated with a substance which made it unsuitable for feeding to mink was sold to the buyers for use as mink food. It was held that there was no breach of s. 13 because the goods were still properly described as 'herring meal',[74] and it was pointed out that not every statement about the quality or fitness of the goods can be treated as a part of the 'description'.

On the other hand, in *Pinnock Bros* v *Lewis and Peat Ltd*[75] the contract was for the sale of copra cake but the goods delivered were in fact a mixture of copra cake and castor

[71] [1933] AC 470.
[72] Above, n. 31.
[73] [1972] AC 441.
[74] Lord Dilhorne dissented on this point – see ibid., pp. 484–5.
[75] [1923] 1 KB 690.

beans; it was held that the goods did not correspond with their description. As Lord Wilberforce pointed out in *Ashington Piggeries*, the question of whether a substance which has added to it a contaminant or unwanted material remains in substance what it always was, though with the addition or contamination, or whether it really becomes a different substance altogether, 'may, if pressed to analysis, be a question of an Aristotelian character'. But he went on to say that the Sale of Goods Act was not intended to provoke metaphysical discussions as to the nature of what was delivered as compared with what was sold. The question of whether the goods correspond with their description is intended to be a broader, more common sense test of a mercantile character. The question of whether that is what the buyer bargained for has to be answered using the tests buyers in the market would apply, leaving more delicate questions of condition, or quality, to be determined under other clauses of the contract or sections of the Act.[76]

So where there was a contract for the sale of 500 tons of Argentina Bolita beans but the goods delivered contained a small proportion of other beans, the court referred the case back to arbitrators to find whether the goods as a whole would still be called by someone in the trade 'Argentina Bolita beans'.[77]

In some cases, the description may carry with it an implication of quality of a certain kind. For instance, in the New Zealand case of *Cotter* v *Luckie*[78] the buyer bought a bull described as 'a pure bred polled Angus bull' from the seller. The bull had been wanted, as the seller knew, for breeding purposes, but it turned out to have a physical abnormality which prevented it from breeding. The court held that the sale was a sale by description and that the description implied that the bull was capable of breeding. The court said:

> The question . . . for decision is whether this was or was not a sale by a description having the effect of describing the animal as a stud bull. Both parties are farmers. The respondent could have no use for the animal save for the purpose of serving his cows, and it is to be observed that it was sold not as a bull merely, but as a pure-bred polled Angus bull. The descriptive words appear to me to be meaningless unless intended to convey the impression that the animal might be used to get this class of stock.[79]

There is another type of case which may involve the relation between s. 13 and the quality or fitness of the goods. If the contract calls for goods of a certain quality, this quality may itself become part of the contract description, but it seems that statements as to quality will not usually be treated as part of the contract description.[80] On the other hand, there are some cases in which quality and description significantly overlap. To take an example once given by Lord Denning, if the goods being sold are said to be 'new-laid eggs' this goes both to quality and description.[81] However, for most purposes such cases

[76] [1972] AC 441, 489.

[77] *Gill & Duffus* v *Berger & Co Inc* [1981] 2 Lloyd's Rep 233, and, after the resubmission [1983] 1 Lloyd's Rep 622, reversed on different grounds [1984] AC 382.

[78] [1918] NZLR 811.

[79] At p. 813. See also some of the examples discussed by the CA in *Ashington Piggeries* [1969] 3 All ER 1496, 1512, such as the description of goods as 'oysters' which may carry the implication that they are fit for human consumption.

[80] See the *Ashington Piggeries* case [1972] AC 441 and *Border Harvesters Ltd* v *Edwards Engineering (Perth) Ltd* 1985 SLT 128.

[81] *Toepfer* v *Continental Grain Co Ltd* [1974] 1 Lloyd's Rep 11, 13. Today, the common description 'free range eggs' might be a more pertinent example.

give rise to no special problems. Breach by the seller will normally involve liability under ss. 13 and 14, and the overlap is of no particular importance. It would only be of importance where the implied condition under s. 14 is not applicable for some reason (e.g. where the seller is not a dealer) and the buyer has to rely exclusively on s. 13. They may then wish to argue that the term 'new-laid eggs' implies not merely that the eggs are literally new-laid, but that they are of good quality because that is the natural implication of the term. Conversely, if the buyer cannot complain about the quality (e.g. because of a valid exclusion clause) they are not entitled to raise the same complaint under the guise of a failure to conform to description.[82]

Compliance with s. 13

Whether goods correspond with their description will normally be a simple question of fact, but it must be stressed that the duty of the seller is very strict indeed. We have already referred to *Arcos Ltd* v *E A Ronaasen & Son* as an example of the severity of the duties which the section can place on the seller. Although some of these older cases are (as we have seen) questionable insofar as they hold trivial breaches to be breaches of conditions, that does not affect their authority as to what is a breach. It is still quite clear that any non-conformity with the contract description (so long as it is a part of the description which constitutes a term of the contract)[83] is a breach of contract, subject only to the *de minimis* principle.

Reference has already been made to the fact that 'microscopic' deviations may be disregarded in relation to the quantity of goods delivered, in accordance with the maxim *de minimis*, and there seems no reason to doubt that the same is true of compliance with the contract description.[84] However, in *Moralice (London) Ltd* v *E D & F Man*,[85] McNair J held that where the price is payable by means of a documentary credit against shipping documents, the maxim *de minimis* has no application as between the seller and the bank: the shipping documents must comply strictly with the requirements of the letter of credit.[86] McNair J went on to suggest that in this situation it is probably a necessary inference that the *de minimis* maxim is also excluded even in the contract of sale as between buyer and seller.

In a number of more recent cases, *Arcos Ltd* v *E A Ronaasen & Son* has been distinguished by the courts. Where goods have been sold in some such terms as 'fair average quality' or the like, it has been held that this phrase must be construed as commercial people would construe it and as referring only to such qualities as are normally observable by ordinary visual examination. Therefore, goods contaminated by some undetectable substance could still be of 'fair average quality'. Similarly, in *Steel & Busks Ltd* v *Bleecker Bik &Co Ltd*[87]

[82] *Toepfer* v *Continental Grain Co Ltd* [1974] 1 Lloyd's Rep 11, 13.

[83] See the discussion of this point, above, p. 124 *et seq*.

[84] *Arcos Ltd* v *E A Ronaasen & Son* [1933] AC 470, see above; *Margaronis Navigation Agency Ltd* v *Henry W Peabody & Co Ltd* [1965] QB 300; *Tradax International SA* v *Goldschmidt SA* [1977] 2 Lloyd's Rep 604.

[85] [1954] 2 Lloyd's Rep 526; see also *Soproma SpA* v *Marine & Animal By-Products Corpn* [1966] 1 Lloyd's Rep 367, 390.

[86] But in practice this kind of problem would in most cases now fall under the *Uniform Customs and Practice for Documentary Credits*, which has a built-in version of *de minimis*, less strict than the common law version – see below, p. 347.

[87] [1956] 1 Lloyd's Rep 228; *F E Hookway & Co Ltd* v *Alfred Isaacs & Sons Ltd* [1954] 1 Lloyd's Rep 491.

it was held that goods accorded with their description – which was 'quality as previously delivered' – despite the presence of some new chemical, not present in the original deliveries, which rendered the goods unfit for the buyers' purposes. Sellers J found that 'by the standard applied and accepted in the trade they complied with the description and were of the quality called for by the contract, quality not being affected by the chemical'. This decision was approved by the House of Lords in the *Ashington Piggeries*[88] case on the ground that statements of this kind are not intended to be treated as part of the contract description of the goods. They are intended to indicate the quality desired, but not to identify the goods which the contract calls for. But this does not mean that the buyer is without remedy, for they may be able to claim damages under s. 14(2) or (3).

But if the statement is part of the contract description it must be strictly complied with, though it does not follow that a description must always be taken literally. If goods have acquired a trade description they may correspond to their description even if they are not what a literal reading of the trade description suggests they are. As Darling J said in *Lemy* v *Watson*,[89] 'If anybody ordered Bombay ducks and somebody supplied him with ducks from Bombay the contract to supply Bombay ducks would not be fulfilled.'[90] Usually this approach would be adopted to protect a buyer but it may sometimes protect the seller. In *Grenfell* v *E B Meyrowitz Ltd*,[91] the defendants were held not to be in breach of s. 13 when they supplied goggles of 'safety-glass' to the plaintiff, which subsequently splintered in an accident, as it was proved that 'safety-glass' had acquired a technical trade meaning and the goggles in fact conformed to the normal design.[92] Similarly, in *Peter Darlington Partners Ltd* v *Gosho Co Ltd*,[93] there was a contract for the sale of 50 tons of canary seed on a 'pure basis'. It was shown that there was no such thing in the trade as 100 per cent pure seed, and that the highest standard of purity was 98 per cent; it was therefore held that the buyers were in breach in refusing to accept 98 per cent pure seed.

Knowledge by the buyer and contracting-out

It is, perhaps, slightly odd that s. 13 says nothing about the possibility that the buyer may examine the goods and come to realise that the description is not entirely accurate, or perhaps that they should have realised this. As we shall see later,[94] there are now severe limits on the extent to which a seller can contract out of liability under s. 13, so this

[88] [1972] AC 441, 471, 514.
[89] [1915] 3 KB 731, 752.
[90] Bombay duck, or bummalo is, in fact, a lizard fish which is usually dried before being eaten, it does not come exclusively from Mumbai (Bombay).
[91] [1936] 2 All ER 1313. As to the meaning in the motor trade of a 'new' car, see *Morris Motors Ltd* v *Lilley* [1959] 1 WLR 1184; *R* v *Ford Motor Co* [1974] 1 WLR 1220.
[92] But this decision seems out of tune with the modern trend towards consumer protection; although trade terms may be allowed a technical meaning between businessmen, it is not so clear today that a consumer would be held bound by such a meaning unless he knew of it. There would clearly have been a breach under the Trade Descriptions Act 1968, which was enacted to deal with such situations and this would continue to be the case under its successor legislation, The Consumer Protection from Unfair Trading Regulations 2008 (SI 1277/2008), which make it an offence to provide false information to a consumer. While those regulations do not apply to business to business sales, it seems hard to imagine a court would reach the same conclusion.
[93] [1964] 1 Lloyd's Rep 149.
[94] See p. 196 *et seq*.

possibility cannot be dealt with by holding that the implied condition is excluded by a contrary intention where the buyer knows that the description is inaccurate. Nevertheless, it would be very odd to hold that the seller is liable for a breach of s. 13 in such a case, and it must be expected that the courts would strive to avoid such a result; for instance, by holding that the sale is not by description.[95]

3 Implied terms that the goods are of satisfactory quality

There are two distinct cases where the Act implies a term that the goods supplied are of satisfactory quality, namely s. 14(2) and s. 15(2). These state that:

> 14. (2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
>
> (2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among other things) are in appropriate cases aspects of the quality of goods___
>
> (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
>
> (b) appearance and finish,
>
> (c) freedom from minor defects,
>
> (d) safety, and
>
> (e) durability.
>
> (2C) The term implied by subsection (2) does not extend to any matter making the quality of goods unsatisfactory___
>
> (a) which is specifically drawn to the buyer's attention before the contract is made,
>
> (b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or
>
> (c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

Section 14(6) provides that as regards England, Wales and Northern Ireland, the terms implied by subs. (2) (and subs. (3), the fitness for purpose warranty, which is dealt with below) are conditions, so that, subject to the changes noted later,[96] the effect of breach of these terms is the same as under the previous law. In Scotland, the effect of the breach depends upon its materiality.

Section 15(2) provides:

> In the case of a contract for sale by sample[97] there is an implied term:
>
> (c) that the goods shall be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

Again, in England, Wales and Northern Ireland this implied term is a condition.[98] In Scotland, the effect of breach again depends on its materiality.

[95] See p. 117 *et seq*. and especially *Harlingdon & Leinster Ltd* v *Christopher Hull Fine Art Ltd* [1991] 1 QB 564.
[96] See below.
[97] The meaning of this term is discussed at p. 178 below.
[98] 1994 Act, Sched. 2, para. 5(6)(b).