Chapter One

The Nature and Sources of Commercial Law in Zambia

1.1 What is commercial law?

Commercial law as a concept has eluded definition in English law because its ambit has never been precisely determined. Unlike the position obtaining in many civil law countries and in the United States of America where the Uniform Commercial Code exists, English law from which much of Zambian commercial law borrows, has no single identifiable commercial code. The content of academic courses and texts on what is referred to as commercial law and sometimes as mercantile law varies significantly from one part of the Commonwealth to another. What is perhaps undisputable is that commercial law is an agglomeration of subjects including agency, sale of goods, carriage of goods, hire purchase, negotiable instruments and the principles of banking. Even an attempt to describe the content of commercial law presents a lot of difficulty to the student of law as it does to the legal practitioner. For instance, it cannot be denied that matters to do with partnerships, companies, intellectual property, and trade and investment, securities, the capital and financial markets, finance and taxation etc., are all matters of commercial law, yet most of these subjects are dealt with separately and distinctly from commercial law in academic courses. Company law has, most surprisingly, been divorced from commercial law notwithstanding the prominent role that companies occupy in the commercial life of any society.

The trend, therefore, is to be selective on what topics to cover under 'commercial law' and there is normally no attempt to be exhaustive no matter how desirable in theory this may be.

In common parlance, commerce is understood as the exchange of merchandise and services; the business of buying and selling. Commercial law can, therefore, be defined as the part of the law regulating commercial activity in society. Professor Goode defines 'commercial law' as the totality of the law's response to the needs and practices of the mercantile community.'[1] From this definition it should follow that certain subjects have to be part of commercial law no matter how selective the course is intended to be. Sale of goods is one such subject.

For purposes of this book, the focuss is on five main components of commercial law namely, Agency, Sale of Goods, Hire Purchase,

[1] Goode, *Commercial Law* (2nd ed., 1995) p. 1205.

Negotiable Instruments and Insurance. These are the topics that make up the current commercial law syllabus at the University of Zambia.

1.2 Historical development of commercial law in Zambia

Long before colonialism, there is no doubt that there were already forms of commercial activity which were not formally regulated. The trade practices and patterns of the people of that time were centred largely around customary rules which changed from place to place. Although some forms of money was used in some parts of pre-colonial Zambia, what is beyond doubt is that the people at the time heavily practised the barter system of trade. Loyalty to traditional leadership and kinship played a dominant role in dispute resolution in the commercial arena as it did in other areas of everyday life. The advent of colonialism naturally had a disruptive effect on traditional commercial practices. Increasingly barter trade and other forms of customary trade practices gave way to the Western form of commercial transactions. As the early time commercial practices were rudimentary and unwritten, they were easily consumed by the Western type, regulated commercial practices and rules.

The history of Zambian commercial law cannot be discussed in isolation from the history of the Zambian legal system in general. It is important to state that at independence in 1964, Zambia, a former British colony, retained most of the imported English law, both common law and statutory law, with minor adjustments to suit local circumstances. The importation and retention of English law was effected through various pieces of legislation, notably the Zambia Independence Act[2] of 1964 and the Zambia Independence Order,[3] both of which in effect provided that all existing laws in force in the territory on 24 October 1964 or which were passed before that date but were to come into force thereafter, continued in force unless expressly revoked by Parliament.

There are two other pieces of legislation whose provisions cannot be ignored. These are the English Law (Extent of Application) Act[4] and the British Acts Extension Act.[5] The former Act declares the extent to which the law of England applies to the Republic of Zambia. It provides that subject to the provisions of the Constitution of Zambia and to any other written law, the common law, the doctrines of equity and the statutes which were in force in England on the 17th August 1911 (being the commencement date of the Northern Rhodesia Order in Council, 1911) as well as any statute of a later date than the 17th of August 1911 in force

[2] Section 2(1).
[3] Section 4(1) and section 6.
[4] Chapter 11 of the Laws of Zambia.
[5] Chapter 10 of the Laws of Zambia.

in England, applied to the Republic. Furthermore, any statute which would be applied by any Act or otherwise, and the English Supreme Court Practice Rules in force in 1999 apply to the Republic.

The British Acts Extension Act, on the other hand provides for the extension or application of certain British Acts to Zambia and for amendments to certain British Acts in their application to Zambia. A schedule to that Act lists a number of British Acts passed after the 17th of August 1911. These are: the Conveyancing Act, 1911; the Forgery Act, 1913; the Industrial and Provident Societies (Amendment) Act, 1913; the Larceny Act,1916; the Bills of Exchange (Time of Noting) Act, 1917; the Married Women (Maintenance) Act, 1920; the Gaming Act, 1939 and the Law Reform (Enforcement of Contracts) Act, 1954.

1.3 The sources of Commercial Law in Zambia

It will be obvious from what has been stated in the preceding part that commercial law in Zambia is very much a function of imported English law. In Zambia, the sources of commercial law are: English common law, principles of equity, imported English statutory law and local statutory law. Over time, local case law has tremendously grown. It is this home grown jurisprudence that requires to be nurtured.

The weight to be attached to each of these sources of commercial law will vary from situation to situation. In the area of sale of goods, for example, Zambia still applies the English Sale of Goods Act of 1893 and the Factors Act of 1889. In the area of negotiable instruments Zambia applies the English Bills of Exchange Act of 1883. The common law surrounding these Acts is clearly almost as binding in Zambia as it is in England itself. Although home grown legislation such as the Hire Purchase Act[6] and the Insurance Act[7] occupy a prominent role in regulating commercial activity in Zambia, the interpretation of these statutes is heavily influenced by English law.

While the wisdom of having foreign legislation in politically independent Zambia with an undeveloped legal system could not be questioned at Independence just over four decades ago, the absurdity of relying on British statutory law, a fair volume of which has been repealed, is obvious to any scholar of legal theory. That discussion, however, will be left for another occasion.

[6] Chapter 339 of the Laws of Zambia.
[7] No. 27 of 2001.

Chapter Two

The Law of Agency

2.1 Nature of Agency

The law recognises that it is impossible for any individual person to act on his on behalf all the time. Acting through 'middlemen' is a familiar practice that mankind has employed from time immemorial. In the area of business and commerce, activity would literally grind to a halt if businessmen and merchants could not employ the services of other people with expertise such as factors, brokers, forwarding agents, auctioneers and the like, and were expected to do everything themselves.

Besides convenience and practicality, it is easy to appreciate, in commerce at least, that employment of intermediaries in some circumstances is inevitable. Unlike the person employing them, agents may possess special skills, knowledge, experience or expertise necessary for the making of sound business decisions. Since an agent is primarily engaged to negotiate and conclude a contract with a third party on behalf of another person called the principal, such specialised knowledge or skill may be essential. For instance, stockbrokers, estate agents, insurance brokers, travel agents, etc., all use their special skills or expertise in advising the person engaging them to decide whether or not to enter into a contract. Agents may also be used to market and sell goods and services in order to maximise profits.

The common law position that he who can act for himself may act through an agent is summed up in the Latin maxim *qui facit per alium facit per se*. The two notable exceptions to the position that *qui facit per alium facit per se* are: where personal performance is required; and where the parties involved expressly or by necessary implication prohibit delegation.

It must be emphasised that agency is one of the long established exceptions to the doctrine of privity of contract which normally operates to prevent a person acquiring rights under a contract unless he is party to it. However, by this exception to that rule, where a contract is concluded by an agent on behalf of the principal, the agent's acts are treated as if they were those of the principal. The principal steps into the shoes of the agent and becomes a party to the contract through the agent.

In certain situations, business cannot be conducted in any way than through agents. Take the case of limited liability companies, for example. These are corporate entities which, though they may have legal existence,

have a natural limitation to perform. They cannot conduct business in any way than through the medium of human agents.

The words 'agent' and 'agency' carry a special legal meaning quite apart from the every day usage of the terms. These terms must, therefore, be used with care. The law attaches special incidents to the agency relationship which is not necessarily so in the every day understanding and usage of the concept. In common parlance the words 'agent' and 'agency' are used to describe what may not amount to agency in the legal sense. The word agent is, for example, often used to describe a person who buys and sells a particular manufacturer's products or merchandise under a special arrangement or agreement called a franchise or a concession. This kind of arrangement is not agency in the legal sense because the trader does not contract with his customers in a manner that brings about a contract between those customers and the manufacturer. While not all those referred to as agents in common parlance are in fact agents in law, the converse is also true. Persons who are agents in law may not necessary be called by that name; for example, lawyers, factors and brokers all act as agents but are never referred to as agents. It is, therefore, possible to have parties to a business arrangement describe themselves as principal and agent when in fact they are not so in law. Likewise, parties may have a contractual arrangement which makes no express mention that theirs is a principal-agent relationship, yet the law will regard the arrangement as one of agency. It is therefore, imperative for the commercial lawyer and the student of law alike to have a fair appreciation of agency as a legal concept and its legal dimensions since it will always be necessary when considering any agreement or situation in which one person represents another to decide whether that agreement or situation is one of principal and agent, or some other kind of relationship.

2.2 Definition of Agency

In law, the word 'agent' is used to refer to a person who has legal authority to bind another by entering into contract with a third person on that other's behalf. The significant feature of the relationship is that the agent has power to bind his principal to a contractual relationship with a third party without the agent himself becoming a party to the contract.

Agency therefore, is a relationship that arises when one person called the agent has legal authority to bind another person called the principal into a contractual relationship with others on the principal's behalf. It will be appreciated that agency will involve two relationships, namely that of principal and agent and that of principal and third party. In certain

situations a third relationship, that of between agent and third party, may also be created.

2.3 Classification of Agents

Agents may be classified either in accordance with the extent of their power or according to the type of business they are engaged in. They can also be classified according to the extent of their authority. There are three categories of agents, namely,

(i) General agents;
(ii) Universal agents; and
(iii) Special agents.

A general agent is one appointed to perform some task in a general area. He has authority to enter into any contract on behalf of his principal which are normally within the scope of the trade business or profession in which the agent is employed. For example, an agent appointed to manage a property would have implied authority to enter into tenancy agreements and cleaning contracts on behalf of the principal.

A universal agent, on the other hand, has unlimited authority to enter into any contract for which his principal has contractual capacity. An example would be where a principal with significant interests in Zambia desires to go and live abroad and appoints an agent to deal with his matters locally.

A special agent is engaged to undertake or perform a particular task or a special function only, for example, an estate agent appointed to find a purchaser for a principal's property or a lawyer engaged to represent a client in a particular matter will act as a special agent relative to the assignment.

Commercial agents are self-employed intermediaries who have continuing authority to negotiate the sale and purchase of goods on behalf of another person.

Agents may also be classified according to the nature of the business they undertake. In this regard an inexhaustive list of examples would include:

(i) Brokers;
(ii) Factors;
(iii) Auctioneers;
(iv) Confirming houses;
(v) Del credre agents;
(vi) Estate agents;
(vii) Travel agents;
(viii) Insurance brokers;
(ix) Lawyers.

2.4 Formalities for the creation of Agency

The general rule is that a contractual relationship may arise without any formalities being complied with. Agency is normally in the form of a contract. The law indeed prescribes no formalities whatsoever for parties intending to enter into an agency relationship. An agency agreement may thus be express or implied and if express, it may be in writing or it may be oral. In fact, as will be seen in the next chapter, many agency relationships arise without the parties consciously deciding to enter into such relationship.

The one situation where the law requires some formality to be complied with in creating an agency contract is where the agent is being appointed to execute a deed, for example, a conveyance on a sale of land. In that case the law requires that the agent must be appointed by deed.

2.5 Capacity

As a general rule, there is no requirement that an agent must have full contractual capacity when he acts on behalf of the principal. This is because the contract is that of the principal, not the agent. The principal must, however, have contractual capacity at the time the contract in question is entered into. In this regard, therefore, it is legally possible for a minor to act on behalf of an adult principal in bringing about a binding contractual relationship with a third party who has contractual capacity. The agency contract between the principal and the agent will however, not be binding on the agent because of the agent's minority. For the same reasons that the law denies minors from entering into contractual relations of any kind, minors are generally not engaged as agents for persons with full contractual relations.

Some agents, notably company directors and other officers of limited liability companies, and partners in a firm of partners, will be required to have contractual capacity. The Zambian Companies Act[1] provides that a person shall not be eligible for appointment as director if such person is an infant or is under legal disability[2]. Likewise, a person without contractual capacity cannot be a partner in a partnership. This in the Zambian context essentially means that only a person of eighteen years and above can be director in a company, or a partner in a partnership.

[1] Chapter 388 of the Laws of Zambia.
[2] *Ibid.,* section 207.

2.6 Creation of the Agency Relationship

An agency relationship may arise in any of the ways considered below. As already stated, as a general rule there are no formalities that ought to be satisfied in order for an agency relationship to arise. In considering whether an agency relationship exists, it is the substance rather than the form that matters. In some cases the parties may not in fact even consider the relation between them as an agency relationship. Conversely, the parties may call their relationship as one of agency when in fact it is not agency in the true sense of the word.

An agency relationship may arise by:

(a) Express appointment.

(b) Operation of the law.

Agency by Express Appointment

Usually, but not always, an agency relationship arises by express agreement between the principal and the agent. Express appointment of an agent may be oral or in writing. Whichever of the two ways is employed, the agency is created by agreement between the principal and the agent. An agency thus created usually defines the mandate and authority of the agent. As the terms of the agency will normally be a matter of evidence between the parties, it is often advisable though not always necessary that the parties to an agency relationship clearly set out these terms in writing, but as is considered below, terms may be implied in agency arrangements on the same basis as terms are implied in contracts generally.

Parties to a business arrangement may refer to themselves as principal and agent, and yet what exists between them is not a contract of agency in the eyes of the law. Conversely, parties may not refer to themselves as principal and agent and yet between them the relationship subsisting is that of principal and agent.

Agency by operation of the law

In certain instances agency will arise without the parties expressly stating that such a relationship has come into existence between them or indeed that they desire that such a relationship be created. The circumstances will be such that the law deems a relationship to have come into existence. There are three notable instances when an agency relationship will be deemed to have come into existence by operation of the law.

(a) Agency of necessity

The law recognises that in certain situations emergencies arise which may necessitate a person to act promptly in order to protect the interests of another by doing acts which that other person may have done if he were himself present. In such circumstances, the law implies authority on the part of a person to bind another by any act honestly done on his behalf under the pressure of a real commercial necessity even if the person acting in fact acts without the antecedent authority of the person on whose behalf he acts. Agency is said to arise in such situations by implication of the law. The agency that so arises is known as agency of necessity. A typical example of a situation when an agency of necessity will arise is where a carrier of perishable goods suffers a break down and engages another transporter to carry the goods to their destination, or sells them off quickly at the nearest available market to avoid total loss of the consignment.

There are, however, a number of requirements that must be satisfied for the law to hold that there was agency of necessity. These are set out below.

(i) There must be a genuine commercial emergency

As the name aptly suggests, agency of necessity will only arise where there is an emergency. Where the circumstances are such as not to imply an emergency, the law will generally not recognise the person acting on behalf of another as being an agent of necessity**.** It is, for example, the duty of the common carrier, although the actual carriage of the goods is at an end, to take such reasonable care of the goods as a reasonable owner would take of his own goods. In providing for the safety and preservation of the goods (including animals) the carrier may incur reasonable expenses, and he may recover those expenses from the owner of the goods on the basis that he acts as agent of necessity.

Great Northern Railway v. Swarfield **(1874) LR 9**

> The defendant sent a horse from one destination to another using the plaintiffs' railway. The horse was consigned to the defendant himself and the horse box in which the animal was sent was affixed a ticket having upon it the address: 'Swaffield, Sandy.' There was however no direction as to the horse being delivered to any particular place. The horse arrived but defendant was not there to receive it. The plaintiff then put the horse under the care of a livery stable

keeper who lived close at hand. The defendant later on came and demanded the horse but was told that he could only get it upon payment of a certain sum for its up keep. The defendant refused to pay and demanded that the horse be delivered at his house free of expenses and that he be paid for loss of time and expenses. Thus, matters remained, the defendant not sending for the horse and nothing more being done, until the livery stable keeper required payment of his charge for the horse's keep. In fact, the railway company which had placed the horse under his care, and was, therefore, liable, to satisfy his claim, ran up the bill with him to the amount of £17. They paid that bill, sent the horse to the defendant and then brought this action to recover from him the amount that they had so paid to the livery stable keeper.

KELLY, C.B.: We are clearly of the opinion that judgment and verdict must be entered for the plaintiffs for the £17 which they seek to recover.

AMPHLETT, B.: It appears to me, therefore, quite clear that the railway company are entitled to recover the money which they have been obliged to pay to the livery stable keeper.

Prager v. Blastpiel, Stamp and Heacock Ltd **(1924) 1 KB 566**

The plaintiff was a fur merchant carrying on business in Bucharest, and the defendants were fur merchants in London.

In 1915 and 1916, the defendants as agents of the plaintiff purchased for the plaintiff skins to the value of 1900*l*. to be dispatched to Romania or as the plaintiff might direct. Owing to the occupation of Romania by German forces, it became impossible for the defendants to send the skins to the plaintiff or to communicate with the plaintiff. The plaintiff paid for the skins and performed all the obligations of his contract. In 1917 and 1918, the defendant sold the plaintiff's skins, which had gone up in value. After the armistice in November 1918, the plaintiff wrote to the defendant asking for them to send the skins. The defendant replied "we thought it best to realize goods as they were getting stale and there was no knowing how long these troublous times might last." The plaintiff repudiated the sale by the defendant, and brought this action claiming damages for the conversion of the skins. It was contended by the defendants that they were the plaintiff's agents of necessity to sell

the skins. The plaintiff contended that the doctrine of agency of necessity did not apply to the present case, not being the case of a carrier or that of the acceptor of a bill of exchange for the honour of the drawer. He also contended that the facts of the present case did not show any necessity to sell, and that the defendants had not acted bona fide.

Held; on the facts of this case, there was no necessity and that the sellers had not acted bona fide, and were not therefore agents of necessity to resell the goods.

McCARDIE, J.: . . . I can now state quite briefly my conclusions of fact after carefully weighing the whole of the evidence, the correspondence and arguments. I hold in the first place that there was no necessity to sell the goods. They had been purchased by the plaintiff in time of war and not peace. He bought them in order that he might be ready with a stock of goods when peace arrived. He had refused, by letters to the defendants, several profitable offers for some of them before the cessation of correspondence between the defendants and himself. The goods were not perishable like fruit or food. If furs are undressed they may deteriorate somewhat rapidly in the course of a year or two. But these furs were dressed, and not undressed. Dressed furs deteriorate slowly . . . . I see no adequate reason for the sale by the defendants, for I am satisfied that there was nothing to prevent the defendants from putting them into cold storage, and certainly nothing to prevent them from keeping them with proper care in their own warehouse. . . . The defendants could and ought to have stored the goods till communication with the Romania was restored. . . . In the second place, I decide, without hesitation, that the defendant did not act bona fide. I need not repeat the observations I have already made as to the absence of necessity for the sale. I hold that the defendants were not in fact agents of necessity, that the sales of the plaintiff's goods were not justified, and that the defendants acted dishonestly. . . .

(ii) It must have been impracticable to obtain instructions from the principal

It ought to be shown that the person who acted on behalf of another could not obtain that other's instructions before acting because it was impracticable or commercially impossible to obtain instructions. This requirement is no doubt getting more and more watered down with improvements in communication.

Whereas before, the quickest means of communication would have been the telex machine where no phone facilities existed, the world has in recent years witnessed phenomenon increase in modes of communication. The fax machine, the cell phone, the internet etc., have all made communication easier. This in turn makes the satisfaction of this requirement in proving agency of necessity less easy.

Springer v. Great Western Railway (1921) 1 KB 257; 24 LT 79

The plaintiff instructed the defendant railway company to transport tomatoes from the Channel Island to London, by ship to Weymouth and by train to London. Owing to bad weather, the ship was detained at Channel Island for three days. When the ship finally arrived at Weymouth, the railway company's employees were on strike, and so offloading was delayed for two days. Worried that the tomatoes would go bad, the railway company sold the tomatoes off locally without communicating, as they could have done, with the plaintiff. The plaintiff then brought this action claiming damages for breach of the contract of carriage. The defendant sought to justify their action of selling the tomatoes under an agency of necessity.

Held; that for there to be an agency of necessity, it must have been practically impossible for the 'agent' to obtain the owner's instructions as to what should be done. In the circumstances of this case the defendant should have communicated with the plaintiff when the ship arrived at Weymouth, in order to get the plaintiff's instructions. There was no agency of necessity in this case since communication was not impossible.

The Choko Star (1990) 1 Lloyd's Rep. 516

The master (agent) of a stranded ship entered into a contract with salvers (third parties) to refloat the ship. In doing so, the master was purportedly acting on behalf of the ship owners (Principal No. 1) and the owners of the cargo which was on board the ship (Principal No. 2). Neither the owners of the ship nor the cargo owners had expressly authorised the master to do as he did. Having refloated the ship, the salvers then sought payment from the ship owners as well as the cargo owners. The ship owners paid the salvers for work done under the contract entered into with the master. The cargo owners on the other hand refused to pay arguing that the master had no authority to enter into any contract on their behalf and that accordingly they were not liable to meet the costs

incurred in refloating the ship. The cargo owners contended that there was not, on the facts of the case any agency of necessity as the master could have possibly obtained their instructions, which he did not do. The salvers argued that in the absence of agency of necessity, the master should still be deemed to have had actual implied authority to act.

Held; there was no basis for implying authority for the master to act on behalf of the shop owner where agency by necessity could not operate for want of an essential element, in this case impracticability to obtain instructions. No such term could reasonably be implied to give business efficacy to the contract between the ship owners and the cargo owners.

(iii) The act must be done with the principal's best interest in mind

The law does not encourage people to employ themselves all in the name of agency of necessity and thereby impose liabilities on other people behind their backs. It is a requirement, therefore, that the agent must have acted *bona fide* in the principal's interests rather than the agent's own interests, and must have acted reasonably in the circumstances. The best interests of the principal will however not override the express instructions given.

Fray v. Voules (1859) 120 ER 1125

An attorney was engaged to conduct a case on behalf of his client. He reached a compromise on the advice of counsel. This compromise was contrary to the express instructions given by the client.

Held; that an attorney has no authority to enter into a compromise against the directions of the instructing client even if he is acting bona fide in the interest of his client.[3]

Sachs v. Miklos (1948) 2 KB 23

The defendant accepted to store the plaintiff's furniture for no charge to the plaintiff. Subsequently the plaintiff changed address without informing the defendant. In due course, the defendant's premises were destroyed by bombing and the defendant then wished to use the room in which the plaintiff's furniture was stored. The

[3] Compare this case with that of *Lusaka West Development Co. Ltd & B.S.K. Chiti (Receiver) & Zambia State Insurance Corporation v. Turnkey Properties Ltd* (Supreme Court of Zambia) (1990/1992) ZR 1.

defendant attempted to communicate with the plaintiff by letter addressed to the plaintiff's last known address. He also tried to telephone the defendant, but to no avail. The defendant then sold the furniture to create room for him. The plaintiff then sued the defendant for damages for conversion.

Held; that the defendant was liable. He had not acted in the best interests of the plaintiff but for his own convenience.

Munro v. Willmont (1949) 1 KB 295

The defendant allowed the plaintiff to leave her motor car without payment in the yard of the hotel of which he was licensee and tenant. The storage was intended to be for a short time, but the car remained in the yard for several years. It became an obstacle owing to the conversion of the yard into a garage. After unsuccessful efforts to communicate with the plaintiff, as the car was in a poor condition and had suffered from long exposure in the open air, the defendant spent 85*l.* in repairs and renovations of the car in order to make it saleable. It was then sold at an auction for 100*l.* The plaintiff sued the defendant for damages for detinue and conversion of the car, and the trial judge found that its value on the date of his judgment was 120*l*. whereas, but for the work which the defendant had done to it, it would have been worth only some 20*l.* as scrap.

Held; (1) that, assuming, without deciding that the doctrine of agency of necessity was applicable to goods stored in premises, the facts showed no such emergency as would have entitled the defendant to sell as agent of necessity. (2) [Following *Rosenthal v. Alderton and Sons Ltd* (1948), 2 KB 374 and *Sachs v. Miklos* (1948) 2 KB 23] that the plaintiff was entitled to damages on the basis of the value of the car on the day of the judgment in the action; but (3) that the defendant was entitled to credit for what he spent to render the car saleable, since the value of the car on the day of judgment included 85*l*., the property of the defendant in the shape of work done to and materials supplied for the car.

LYNSKEY, J.: . . . I am very doubtful if the doctrine of agency of necessity can be applied to a case of goods of this character and not of a perishable nature which are stored in premises in this country; but the doctrine, if applicable, can be applied only in a case of real emergency which necessitates the disposal of the goods, and to save them from destruction or damage and preserve their value for the bailor. In this case I am not satisfied that there was any emergency at all: the most that can be said for the defendant is that

the motor car, after June or July 1945, became something of an inconvenience, not to himself, but to others who might be using the converted stables as garages for the use of their ambulances. There is no real evidence that there was any necessity for the defendant to dispose of the car. He may have found it inconvenient, to some degree a nuisance; but that is not an emergency which compels him to dispose of it. . .

(b) Agency by ratification

Ratification occurs where the agent does an act on behalf of his principal without the principal's prior authority and the principal subsequently adopts the act done. Ratification need not be expressly done; it may be inferred from an act showing an intention to adopt the act performed on behalf of another without that other's prior authority.

The acts of a person not appointed agent by another may bind that other if he does an act that amounts to ratification of those acts

Waithman v. Wakefield (1807) 170 ER 898; (1807) 1 Camp 120

The defendant's wife ordered some items of clothing from the plaintiff on her husband's account. This she did without any actual or apparent authority. The plaintiff being unpaid, then visited the defendant and his wife, demanding to be paid or to have the goods returned. The defendant disowned the deal and agreed to have the goods returned to the plaintiff. The defendant's wife however refused any suggestion that the goods be returned to the plaintiff. The defendant then backed down and let the wife's wish prevail. The plaintiff then sued the defendant for the price of the goods. The defendant argued that he was not bound by the wife's unauthorised acts and was therefore not liable to pay for the goods sold and delivered to his wife.

Held; the defendant had ratified the transaction by keeping the goods. Ratification need not be express; it may, as was the case here, be implied.

Bank Melli Iran v. Barclays Bank (1951) 2 TLR 1057

On the instruction of a Persian bank, an English bank opened on 9 January 1947, an irrevocable confirmed credit. 40,000 Pounds was payable under the credit against delivery order for 100 new

Chevrolet trucks 'accompanied by invoice, insurance policy and USA Government undertaking confirming that the trucks were new.' The trucks in question were in fact lying in the open exposed to severe winter conditions at Belcelle in Belgium.

The English bank on 17 January 1947, paid 40,000 Pounds under the credit against documents which included a delivery order for the trucks describing them as "new-good"; an invoice stating them to be "in new condition"; and a certificate from an official from the US Government certifying that '100 new, good' "trucks at Barcelle, near Antwerp, Belgium" had been purchased from them.

Held; that payment by the English bank was not authorized by the credit, since (1) the phrase 'in new condition' in the invoice had a meaning essentially different from 'new' in relation to motor vehicles; (2) the certificate did not purport to relate to any specific trucks; and (3) the phrase "new, good" in that certificate and 'new, good' in the delivery order were, like 'new condition' not equivalent to 'new'.

When a letter of credit is opened the relationship between the instructing and the confirming bank is (unless otherwise agreed that of principal and agent. Accordingly, if after the confirming bank has made an unauthorised payment, the instructing bank, knowing of that payment, act in a way inconsistent with repudiation of it, their conduct will amount to ratification of the payment.

There are, however, a number of conditions that must be taken into account in determining whether or not there can, on any given set of facts, be said to be valid ratification. These are considered below.

Habib Devji v. P.C. Tarmohamed & Another (1960) EALR 1022 (High Court for Uganda)

The first defendant asked a friend (Caxton) to help him sell his land. The defendant approached Chatur, the second defendant, who agreed to buy a lease of the land. Secretly, Chatur, claiming to be the first defendant's agent sold the land to the plaintiff who paid Chatur Shs 8,500 as the premium and Shs 1,500 as commission. Upon hearing this, the first defendant claimed the Shs 8,500 premiums from Chatur who never paid it. The first defendant then refused to honour the contract of sale claiming that he had received no value for it and that Chatur was not his agent.

Held; by Sir Audley McKisack that even though the second defendant had never been appointed as agent by the first defendant,

the fact that the latter had claimed the purchase price from the former was ample evidence that he had ratified the contract entered into between the second defendant and the plaintiff, and the second defendant became the agent of the first defendant by ratification. The plaintiff was thus held entitled to recover the premium from the first defendant.

(i) Existence of the principal

The principal must be in existence at the time the act was done. A non-existent principal cannot ratify an act purportedly entered on his or its behalf by an agent before he or it came into existence.

Kelner v. Baxter (1866) LR 2 CP 174; 36 LJ CP 94

Three promoters of a company entered into a contract to purchase wine on 'behalf of the proposed Gravensend Royal Alexander Hotel Company.' The wine was supplied and consumed in the business. The company was incorporated but it collapsed shortly thereafter. The plaintiff then sued the trio on the contract for the price of the goods. The Court of Common Pleas held them liable.

ERLE, C.J.: I agree that if the Gravensend Royal Alexander Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it was held to be binding on the defendants personally. The cases referred to in the course of argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as an agent," but who has no principal existing at the time, and the contract would altogether be inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before….

WILLES, J.: I apprehend the company could only become liable upon a new contract. It would require the assent of the plaintiff to discharge the defendants. Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person

ascertained at the time the act is done, by a person either in existence or in contemplation of law. . . . Both upon principle and upon authority, therefore, it seems to me that the company could never be liable upon this contract; and, as was put by my Lord, construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the person signing it would be personally liable. Putting in the words 'on behalf of the Gravensend Royal Alexander Hotel Company,' would operate no more than if a person should contract for a quantity of corn "on behalf of my horses.". . .

Newborne v. Sensolid (Great Britain) Ltd (1953) 1 QB 45; (1953) 2 WLR 596

A contract for the purchase of tinned ham by the defendant was entered into between 'Leopold Newborne (London) Ltd, per Leopold Newborne, director' and the defendant. The defendant refused to take delivery of the goods and an action was then commenced by Leopold Newborne Ltd against the defendant. Evidence adduced showed that at the time of the contract Leopold Newborne Ltd had in fact not been incorporated. Leopold Newborne then sought to personally enforce the contract.

Held; he could not. The purported principal was not in existence at the time of the contract. *Kelner v. Baxter* distinguished.

PARKER, J.: . . . [Counsel for the plaintiff] asserted that this case was really the converse of the position in *Kelner v. Baxter,* and he says, and I agree, that it would be an odd result if, in such circumstances as arose in *Kelner v. Baxter*, the agent could be held personally liable and yet would be unable to sue . . . .

[Counsel for the defendant] however, argued, and it was an argument which impressed me, that the principal in those cases to which I have referred had no application here. In those cases there was an agent undertaking to do certain things himself as agent for somebody else. In the present case, however, unlike in *Kelner v. Baxter*, there is no signature by anybody at all as agent. To bring this case within the principals in those cases the contract, it seems to me, would have to read 'I, Leopold Newborne, on behalf of the company agree to sell, and have sold to you . . .' and so on, and signed, 'Leopold Newborne, by authority of and as agent for the company." In other words, the agent would have to be contracting to do certain things, albeit as agent. Then applying *Kelner v. Baxter* he could say, there being no company, that he was the real principal and could sue upon the contract. . . .

But that is not this case. This is a contract in which a limited company purports to sell, and sold in these terms 'Leopold Newborne (London) Ltd. We have this day sold to you … (signed) Leopold Newborne.' That seems to me to purport to be the company's signature. The company can only sign by a servant, and it is exactly the same, it seems to me as if the words "Leopold Newborne 'were there as managing director, or as director, or on behalf of the company, the whole thing being the company's signature, and not the signature of an agent who agrees to do certain things on behalf of the company.

It seems to me that the short answer to this case, unfortunately for the plaintiff, is that this company was not in existence, and that the signature on that document, and, indeed, the document itself, the alleged contract No. S.117 is a complete nullity. . . .

Note: *This decision was later affirmed by the Court of Appeal.*

(ii) The principal must be ascertainable.

Watson v. Swann (1862) 11CB (NS) 756; 142 ER 993

The plaintiff asked an insurance broker to effect a policy of general insurance in respect of certain goods. The underwriters were however, not willing to issue such a policy. The broker then declared the same goods at the back of a policy which had been effected earlier in respect of some other goods. The underwriter then initialed it. In due course the goods were lost and the plaintiff sued to recover on the policy.

Held; the 'principal' was not ascertainable at the time the agent effected the policy. The policy was effected before the broker was approached by the plaintiff, therefore he could not be said to have been acting on behalf of the plaintiff. Ratification was therefore, not possible in these circumstances.

WILLES, J.: the law requires that the person for whom the agent professes to act must be capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract.

***Keighley, Maxted & Co. v. Durant* (1901) AC 240; 84 LTR 527**

A principal authorised an agent to buy wheat at a given price in the joint names of the principal and the agent. Having failed to purchase wheat at that price, the agent bought wheat in his own name at a higher price. The principal, being satisfied with this act, purportedly ratified the wheat purchase agreement at a higher price, but failed to take delivery of the wheat. The seller then sued the principal arguing that the sale contract had been ratified.

Held; that the action could not succeed because the agent's act was unauthorised and since the principal's identity had not been disclosed to the seller, the principal could not ratify and consequently was not liable on the contract.

MACNAGHTEN, L.J.: as a general rule only persons who are a party to a contract, acting either by themselves or by an authorised agent, can sue or be sued on a contract. A stranger cannot enforce a contract, nor can it be enforced against a stranger. That is the rule; but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification in English law. That doctrine is thus stated by Tindal, C.J. in *Wilson v. Tumman* (1843): 'That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, or whether it be founded on a tort or a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his previous authority.' And so, by a wholesome and convenient fiction a person ratifying the act of another, who without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and no one else? If Tindal, C.J.'s statement is accurate, it would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intention locked up in his own breast; for it cannot be said that a person who so conducts himself does assume to act for anybody but himself. But should the doctrine of ratification be extended to such a case? On principle, I should say certainly not. It is, I think, a well established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed intentions.

Southern Water Authority v. Carey (1985) 2 All ER 1077

The main contractor on a construction project entered into a contract including exclusions of liability which purported to benefit the main contractor and sub-contractors. Later, a sub-contractor, who was engaged after the main contract was made, was sued by the employer for negligence. The sub-contractor tried to ratify the contract so as to rely on the exclusion clause.

Held; inter alia, that the sub-contractor could not claim the benefit of the exclusion clause because they had not authorised the contract and could not ratify because at the time the contract was entered into, they were not ascertainable to the employer, even though the main contractor may have had them in mind as possible sub-contractors *Watson v. Swann* (above) applied

Coral (UK) v. Rechtman (1996) 1 Lloyd's 235

Altro, a well known large trading group based in Vienna traded through a number of subsidiaries. Rechman a director of one of the subsidiaries, 'Altro Mozart Food Handels', negotiated a contract to sell 12,000 tons of sugar to Coral and he signed the contract,'for and on behalf of Altro Mozart Food GmbH'. At the time of the contract, this company in fact never existed. The sugar was not delivered and Coral sought to sue for non-delivery. Altro put forward Handels as the defendants arguing that Rechtman was acting on behalf of that company when he signed the contract. Being concerned about the solvency of Handels, Coral sued Rechtman personally on the contract. In so doing Coral relied on the decision in *Kelner v. Baxter.*

Held; that the identity of the parties to a contract should be decided in each case as a question of fact; the deciding factor being the intention of the parties at the time the contract was made. In this case, it was clear that Rechtman had acted in good faith and that Coral were not concerned which particular subsidiary of the Altro group they dealt with. There appeared on the facts of this case no intention at the time of the contract that Rechtman could be held personally liable for the non-delivery of the sugar. The principal must be ascertainable at the time of the agent's act. An undisclosed principal cannot ratify.

(iii) The principal must have had capacity at the time of the act

At the time the act was performed on behalf of another, that other must have had legal capacity to do the act in question. A minor, for example, generally has no contractual capacity. An act done on behalf of a minor cannot be ratified by the minor on attainment of the age of majority. The logic for this legal rule is easy to appreciate. Persons without legal capacity could contract in the hope that they would in due course acquire legal capacity. This woulde be to circumvent the law.

Where a contract of fire insurance is made by one person on behalf of another without authority, it cannot be ratified by the party on whose behalf it is made after and with knowledge of the loss of the thing insured.

Grover & Grover Ltd v. Matthews (1910) 2 KB 401

> The action was brought to recover a loss under a contract of fire insurance on the plaintiffs' piano factory.
>
> The plaintiffs were the owners of a freehold factory where they carried on the business of pianoforte manufacturers. In March 1908, the plaintiffs by their agent a Mr Brows, took out a Lloyd's policy for 1000*l*. on the factory for 12 months from 26 March 1908, to 25 March 1909 inclusive. This policy was effected by Mr Brows through Mr Dott, an insurance broker at Lloyd's, who effected the policy with certain underwriters at Lloyd's, at a premium of 12s. 6d. Per cent. On 4 March 1909, Mr Brows without any instructions from the plaintiffs wrote to Mr Dott heading his letter 'Fire Insurance, Messrs Grover & Grover, Ltd, 1000*l*.,' and saying, 'I am not sure that it is customary to send renewal notices in the case of insurances at Lloyds and shall be glad to hear from you as to this. The present insurance expires on the 25th inst.' Thereupon on 5 March 1909, Mr Dott causes a slip to be prepared upon which the present action was brought. The slip was initialed by a Mr Stearns who was the defendant's underwriting representative at Lloyd's, and the defendant admitted that if there was a contract of insurance the initialing of the slip by Mr Stearns bound him (the defendant) to the extent of 50*l*., the amount insured by him. On 27 March 1909, the plaintiffs' factory was destroyed by fire. Later in the same day, directors of the plaintiff company had an interview with Mr Brows in order to do anything to be done to make it clear that the factory which had been burnt down was insured, and handed to Mr Brows a cheque for 6*l*. 5s., the amount of the premium on insurance for a year.

Mr Brows on the same evening sent to Mr Dott, the cheque for 6*l*. 5s., which had been drawn by Mr Grover. Mr Dott declined to accept the cheque for the premium as it was sent after the loss had occurred. The plaintiffs then commenced the present action.

The most important question, which arose, was whether assuming that a valid contract of fire assurance had been made through Mr Brows with the defendant by Mr Dott on behalf of the plaintiffs, but without their authority, the plaintiffs could ratify it after the loss occurred.

Gerardus Adrianus Van Boxtel v. Rosalyn Mary Kearney (1987) ZR 63

The respondent, through her father entered into an agreement with the appellant to the effect that once the latter had purchased Falcon Air Limited, the parties would hold shares in the company in the ratio of 60 per cent for the respondent and 40 per cent for the appellant. The respondent paid the sum of K110,000 to the appellant in consideration of receiving shares amounting to 60 per cent of the equity. The High Court upheld the respondent's claim for a declaration that the sum of K110,000 was for the purchase of the shares in Falcon Air Limited, and a declaration that the plaintiff was a shareholder, and for an account of all the property and money of the company. In his appeal the appellant argued that since the litigation had been between the individuals, the Court had no jurisdiction to bind the company to implement any decision passed as to the entitlement of the respondent. Further, that the proper formalities had not been complied with and that a properly constituted Board of Directors (comprising the appellant and others) had never passed any resolution on the question of the appellant's shareholding.

Held; the Court has undoubted jurisdiction in litigation to which the company is not a party but which is between a shareholder and an alleged shareholder, to make an order for rectification under section 60 of the Companies Act which will be binding upon the company.

Shareholders enjoy, as a matter of right, overriding authority over the company's affairs. Where all the shareholders happen to be present at a meeting where an intra-vires decision is passed with the unanimous concurrence of all of them, then even if the meeting was defective directors meeting, the business transacted is valid as a members' decision.

NGULUBE, D.C.J.: . . . The issue is whether the defendant as sole shareholder and managing director, could bind the company to transactions when decisions were made without reference to the other director, a non-shareholder. In our considered opinion, there can be no doubt whatsoever that shareholders enjoy, as a matter of right, overriding authority over the company's affairs. In this regard, the articles of association of Falcon Air Limited are instructive. . . . Again, if the defendant entered into the contract allegedly in his capacity as director and if such contract would have been invalid for lack of a quorum for director's meeting, then nonetheless such contract would be capable of ratification by the members and would become a valid contract of the company. See *Grant v. United Kingdom Switch Back Railway Co*. (1889) 40 Ch D 135 . . . .

(iv) The act must be ratifiable

The act performed by the agent which the principal seeks to ratify must be ratifiable. An act which is illegal or contrary to public policy, for example, cannot be ratified.

Williams v. Moor (1843) 11 M & W 256; 152 ER 798

The defendant who, at the material time was an infant, and therefore without legal capacity to contract, entered into contracts for work and materials and goods were supplied and delivered to him. When the defendant reached the age of majority, he confirmed the contracts. This action was brought by the plaintiff to recover monies due upon those contracts. The defendant argued that as the contracts were entered into when the defendant was an infant incapable of contracting, the contracts were void and therefore incapable of ratification.

Held; that on principle, an infant, upon reaching the age of majority, may ratify, and thereby make himself liable on contracts made during infancy.

Brook v. Hook (1871) LR 6 Exch 89; 24 LT 34

An agent forged the signature of his brother-in-law on a promissory note which had been made out in favour of the plaintiff. Before the date of maturity of the promissory note, the plaintiff met the brother-in-law and, having discovered the truth, threatened legal action. In an attempt to protect the agent, the brother-in-law purported to ratify the agent's act.

Held; that a forgery is an illegal act which is void. It accordingly could not be ratified. The court drew a distinction between an act which was void and one which was voidable. The latter was ratifiable.

Ashbury Railway Carriage & Iron Co. v. Richie (1875) LR 7HL 653

A company's memorandum of association gave the company power to make and sell railway carriages. The directors of the company entered into a contract to purchase a concession for the construction of a railway in Belgium. An issue arose as to whether this contract was valid or, if not, whether the shareholders could ratify it.

Held; that if a company exercises powers not conferred on it by the memorandum of association or exercises the powers conferred on it for objects not authorised by its memorandum, its acts are null and void as being beyond its powers – *ultra vires.* The shareholders could therefore not ratify an *ultra vires* contract

LORD CAIRNS: . . . A contract of this kind was not within the memorandum of association. In point of fact it was not a contract in which, as the memorandum of association implies, the limited company was to be employed, they were the employers. They purchased the concession of a railway, an object not at all within the memorandum of association; and having purchased that, they employed, or they contracted to pay, as persons employing, the plaintiff in the present action, as the persons who were to construct it. That was reversing entirely the whole hypothesis of the memorandum of association, and was the making of a contract not included within, but foreign to, the words of the memorandum of association . . . .

The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders could make such regulation as for their own government as they think fit. . . .

The question is not as to the legality of the contract; the question is as to the competence and power of the company to make the contract. Now, I am clearly of the opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so it was thereby placed beyond the power of the company to make the contract. If so, my Lords, it is not a question whether the contract was ratified or was not ratified. If it was a contract void from its beginning, it was void because the company

could not make the contract. If the shareholders of the company had been in the room, and every shareholder of the company had said 'That is the contract which we desire to make, which we authorise the directors to make, to which we sanction the placing of the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

But my Lords, if the shareholders of this company could not *ab ante* have authorised a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made? . . . It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then, the shareholders finding out what had been done, could sanction subsequently, what they could not antecedently have authorised. . . .

This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation. . . .

Note: *The current Companies Act in Zambia makes no provision for a memorandum of association. This invariably restricts the applicability of the ultra vires doctrine in relation to companies' power to conduct certain forms of lawful business. There still, however, is a requirement under the law for the objects of a company to be given?*

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Bedford Insurance Co v. Instituto D Resseguros Do Brasil **(1985) 1 QB 966; 3All ER 766**

The insurance company, Bedford Insurance, authorised brokers to issue marine insurance subject to certain limits. The Insurance Companies Act 1974 provided that no person could carry out marine insurance business without authority. By the Insurance Companies Act 1984, it is an offence to carry on an unauthorised marine insurance business. In the years 1981 and 1982, the brokers issued insurance policies beyond the limits imposed by their principal. Upon discovering this position in 1983, Bedford Insurance purported to ratify the broker's acts so that they could recover from their indemnifiers.

Held; the effect of the statute was to render the policies void *ab initio*. Being illegal the broker's acts could not be ratified by Bedford Insurance.

Note: *The Insurance Acts referred to in this case are inapplicable to Zambia. The case is relevant only for the principle that it sets out.*

(c) Agency by estoppel

An agency relationship may arise by operation of the doctrine of estoppel where a person holds out another as having authority to represent him.

A principal who arms or knowingly permits an agent to arm himself with indicia of title to goods is precluded from denying the agent's authority to deal with the goods in the manner that the agent so deals.

Vallabdas Hirji Kapadia v.Thakesby Laxmidas (1964) EALR 378 (Court of Appeal of Mombasa)

The appellant purchased 450 drums of coconut oil from Zanzibar. He instructed one Jethalal to have the oil shipped to Mombasa. The oil was duly shipped and the bills of lading handed to the appellant. Jethalal sent a number of invoices to the respondent in respect of the oil. The appellant was aware that Jethalal had invoiced the drums to the respondent, and that the respondent was Jethalal's agent for the sale of oil in Mombasa, and that according to the custom of Old Port Mombasa, delivery of the drums would be given to the respondent on presentment of the invoices. He however believed that by being in possession of the bills of lading, he retained ownership and control of the drums of oil. The respondent, unaware that the oil belonged to anyone but Jethalal, obtained delivery of the drums and sold them. Subsequently, Jethalal fraudulently drew up bills of lading in respect of the 420 drums of oil and attached bills of exchange drawn on the respondent. These documents were presented to the respondent who accepted the bills of exchange. Jethalal obtained payment and absconded. Later, the appellant sent identical documents to the respondent, who refused to accept the bills of exchange, claiming that he had already paid for the goods. The appellant brought this action, claiming general damages based on conversion of the said goods.

By allowing Jethalal to send the invoices, while being fully cognisant of their consequence, the appellant armed or knowingly permitted him to arm himself with indicia of title to the goods. Since

he knew that the goods were being sent to the respondent, he was under a duty to inform the latter of his (appellant's) own interest in the goods. He failed to do so, and the respondent thereby acted to his detriment in paying Jethalal. The appellant was thus precluded from denying Jethalal's authority to deal with the goods in the way that he did, so that the respondent could not be said to have dealt unlawfully with the goods

NEWBOLD, J.A. at pp. 382 - 3: 'The general rule is that when a person wrongfully deals with goods with the intention of asserting a right inconsistent with the rights of the true owner of the goods, then that person is liable to the true owner of the goods for conversion, and it makes no difference whether that person was or was not aware of the rights of the true owner. To this general rule there are certain very limited exceptions which arise either under common law or by statute, and all of which require bona fides on the part of the person claiming to come within the exception.'… One exception is that where the true owner of the goods, in breach of his duty to a third party, arms his agent or knowingly permits his agent to arm himself with some indicia of title to the goods, and allows his agent to deal with the goods as though they were his own, then the true owner is precluded as against this third party (and any subsequent dealers) who deals honestly with the goods, and without knowledge of the rights of the true owner of the goods, from denying the authority of the agent to deal with the goods in the manner in which they were dealt with. In such a case, it is unnecessary that the agent should have possession of the goods'.

Bowmaker (Central Africa) (Pvt) Ltd v. Benn **(1960) NRLR 363 (High Court of Southern Rhodesia)**

The appellant sued the respondent in the Magistrates Court for 18 Pounds, the balance owing on a hire purchase agreement in respect of a motor car. The appellant carried on business as a hire purchase discount house. A third party called Kirby, arranged such hire purchase agreements direct with the customers, and then discounted them with the appellant, at the same time acting as surety for the appellant for any sums unpaid by the customer on the discounted agreements. The respondents under such an arrangement had been in the habit of paying their instalments to the appellant through Kirby. The appellant had alleged that one such instalment of 18

Pounds had not been paid, and the respondent's plea before the Magistrate was that it had been so paid to Kirby, whom he alleged was the appellant's agent. The Magistrate held that there was a representation by Kirby of agency, to be found in the general course of dealing over the transaction, and granted judgment for the defendant, the respondent in this matter. The appellant then appealed to the High Court.

Held; (1) There was on the evidence no express authority in Kirby to receive payments of the instalments, nor was there in the circumstances an implied authority. The theory of tacit agency seemed equally ill-founded.

(2) For the plea of estoppel to succeed, the defendant (respondent) had to show he paid money to Kirby on the faith of a representation by the plaintiff (appellant) that Kirby was authorised to receive payment of instalment. Nothing in the plaintiff's conduct suggested that it permitted Kirby to receive the earlier payments on its behalf. The plaintiff's conduct was clearly as consistent with the proposition that Kirby was agent for the defendant. The defendant therefore failed to establish agency by estoppel.

YOUNG, J.: the plea in this case was simply one of payment to Kirby. To give it formal effect this plea must be expanded, and this might be done in several ways. Of course, the plea as it stood was defective and inadequate; but Mr Davies, for the plaintiff, made no point of this. The defendant was not represented at this appeal, but looking at the evidence, the possible contentions which might have been advanced by the defendant seem to be:

(1) Actual authority, express or tacit in Kirby to receive payment;
(2) Release;
(3) The *exceptio doli*, or as it is sometimes called, estoppel by negligence: *(Durban Corporation v. Campbell,*1949 3 SA 1068).

As to (1): there was clearly no express authority in Kirby to receive payments of instalments, and I do not think anything more need to be said about express authority. Any inference that Kirby had implied authority to receive the money must rest on some general rule of common law that, in the circumstances, an agency would be implied, on the analogy of the implied authority in an agent to do an act incidental to the authorised act or the implied authority of the wife to act on behalf of the husband in certain circumstances or in cases of agency from necessity. But there is obviously no room for application of this principal here; there is no rule of common

law which can be prayed in aid, and I do not think it is necessary to say more on the subject. The theory of tacit agency seems to me to be equally ill-founded. It is true that the plaintiff did not object to receiving the instalment from Kirby; but this conduct is quite consistent with the view that Kirby was acting for the defendant. After all the defendant was originally Kirby's client, and Kirby was guarantor for him; the authority in Kirby to receive payment on behalf of the plaintiff was not fundamental to the arrangement; and I cannot for a moment think that officious bystander would have taken Kirby's agency as a matter of course. Moreover, the defendant had specific instructions to pay the instalments to the plaintiff in Bulawayo, and it is probable that Kirby was aware of this. The plaintiff gave Kirby no reason to think that he was their agent to receive instalments; and for the present purposes it is Kirby's state of mind which is relevant, not Benn's.

As to (2) for the plea of estoppel to succeed, the defendant had to show that he had paid money to Kirby on the faith of the truth of a representation by the plaintiff that Kirby was authorised to receive payment of the instalments. But the evidence appears to fall far too short of establishing any such proposition. In the first place, Mrs Benn never said that she made the payment because she relied on any representation by the plaintiff; and in the second place no such representation was proved. . . . The fact that several earlier payments had been made to Kirby without objection could not, in my view, be relied on that Kirby had authority to receive payment. As Mr Shaw, the plaintiff's Bulawayo Manager, pointed out, the plaintiff could do little about it if people chose to send money via a third party. The plaintiff acknowledged receipt of the instalments on the day they reached the plaintiff and not as on the day they were paid to Kirby. The Magistrate concluded that there was a representation to be found in the course of dealing, and relied on the passage in Wille's *Principles of South African Law* (4th ed.) p. 439 . This passage reads:

> . . if A on a number of occasions allows B to receive money for him from C, if on a subsequent occasion B again receives the money from C but fails to pay it over to A, A cannot claim the amount from C, for A is deemed to have been duly paid, since he is estopped from denying that money was paid to his agent.
>
> But I think, with respect, that the Magistrate has not attached the necessary importance to the words 'for him' in the first sentence of the above passage. Although Wille

> may have framed his statement of the law in too categorical a form (as Mr Davies contended), it may well be that in certain circumstances the course of conduct postulated would give rise to an estoppel. However, the passage cannot be applied in this case, for there is nothing to show that the plaintiff allowed Kirby to receive payments for the plaintiff. Nothing in the plaintiff's conduct suggested that it permitted Kirby to receive the earlier payments on its behalf. The plaintiff's conduct was clearly consistent with the proposition that Kirby was agent of the defendant. In my opinion, the defendant failed to establish agency by estoppel.
> . . . .Finally, there is the matter of *exceptio doli.* Suffice it to say here that there does not appear to be anything in the evidence which would suggest that the plaintiff's conduct in claiming the missing instalment from the defendant is in any way unconscionable. This defence must also be rejected. . . .

A third party seeking to rely on the ostensible authority of an agent must take reasonable steps to ascertain the authority of that agent.

Salem Ahmed Hasson Zaidi v. Faud Hussein Hameidan (1960) EALR 92 (Court of Appeal, Uganda)

The respondent was the owner of certain premises. The premises formerly constituted part of the estate of one Hussein Mohammed, since deceased. The premises were acquired by the respondent on the partitioning of the deceased's property. Before partitioning, the premises were managed by one Awad Bin Awad, by virtue of a power of attorney purportedly given by all the heirs to the estate. The respondent's alleged signature on the power of attorney, which he disclaimed, was impressed by means of a rubber stamp. Not being previously aware of the partitioning, Awad granted a tenancy to the appellant. The respondent averred that Awad had no authority to do so, so that the appellant was a trespasser on his land.

Held; (by Forbes, V. at p. 94) that

> It is apparent on the face of the power of attorney that Awad Bin Awad was appointed attorney of the heirs of the deceased jointly; that even if the alleged signature of the respondent were genuine, it would not authorise Awad Bin Awad to manage the suit

premises after they became the sole property of the respondent; that, in order to succeed, the appellant must rely on the ostensible authority of Awad Bin Awad; and that though I have little doubt that the appellant acted in good faith, yet I am unable to say that the learned Chief Justice was wrong in holding that the appellant had failed to take reasonable care to ascertain that Awad Bin Awad had power to grant the tenancy.

(d) Agency by cohabitation

A wife cohabiting with her husband is regarded as having authority to pledge her husband's credit for necessaries. The true position however is that cohabitation as such does not give rise to authority on the part of the wife as such. Cohabitation merely gives rise to a rebuttable presumption that the husband has given his wife authority to pledge his credit. Further more this presumption will only arise if the parties are cohabiting as such in a domestic setting.

***Debenham v. Mellon* (1880) 6 AC 24**

A man and his wife were manager and manageress respectively of the hotel in which they cohabited. The husband gave his wife an allowance for clothes but expressly forbade her from purchasing goods on his behalf as an agent. The wife ordinarily purchased clothes from the plaintiff in her own name. On one occasion, however, she purchased clothes and pledged her husband's credit.

Held; that there was no agency in this case as the husband had expressly forbidden it. No agency could be implied from cohabitation either as the couple was not cohabiting in a domestic situation. As the plaintiff well knew, the couple lived in a hotel as manager and manageress, not as a family. The husband was consequently not liable for the debt incurred.

The presumption is rebuttable by the husband showing that his wife is adequately supplied with necessaries or that the goods supplied are not necessaries.

***Phillipson v. Hayter* (1870) LR 6 CP 38**

A woman purchased from a supplier, a luxurious gold pen and pencil case, a fancy seal skin cigar case, a seal skin tobacco pouch, a guitar and a Russian purse made of leather and birch bark oil. She pledged her husband's credit for all this.

Held; that no presumption of authority could arise from cohabitation in these circumstances. Such presumption arises only with regard to necessaries suitable for the husband's station in life. This was not the case here. The husband was accordingly not liable.

(e) Agency arising under other common law principles

In some instances, the common law implies the existence of an agency relationship between parties by reason of the nature of the relationship subsisting between them.

Magnum (Zambia) Ltd v. Basit Quadri (Receiver/Manager) & Grindlays Bank International (Zambia) Ltd (1981) ZR 141

A preliminary issue was raised in this case as to whether it would be in order for the Court to allow the proceedings to continue on the basis that the plaintiff should be Magnum (Zambia) Limited when in fact this company was already under receivership and the receiver/manager appointed under a debenture was the first defendant.

The learned counsel for the plaintiff argued that the principles of agency should apply in this case and that the assets of the company should not be interfered with simply because it could maintain an action against the receiver if it was found that the receiver had acted unlawfully or had misconducted himself in anyway.

The defendant on the other hand, contended that the plaintiffs could not properly bring an action in the present form against the defendants when it was apparent that the plaintiff was a company under receivership and that the first defendant was the receiver/manger of the said plaintiff company appointed by the second defendant, under the terms of a debenture entered into between the second defendant and the plaintiff.

Held; (1) A receiver who is an agent of the company under receivership is there to secure the interest of the debenture holder and in those circumstances the company concerned is debarred from instituting legal proceedings against its receiver/manager.

(2) A company under receivership has no *locus standi* independent of its receiver. As long as a company continues to be subjected to receivership, it is the receiver alone who can sue or defend in the name of the company.

MOODLEY, J.: I have considered the arguments in this matter and I have looked at the authorities cited in support of the rival arguments. I must say that none of these authorities cited bear any direct relevance to the preliminary issue. Paragraph 885 of *Halsbury's Laws of England* (4th ed.) reads as follows:

> Where the receiver is appointed under a document which provides that the person appointed receiver is to be the agent of the company, and that the company is alone to be answerable for his acts, contracts, and defaults, neither the trustees nor the debenture holders are personally liable in respect of contracts entered into by him, even in respect of contract entered into after the company has gone into liquidation. When a receiver is declared to be the agent of the company he has power to sue in its name…

In Kerr on Receivers (14th ed.) at page 174 it is stated:

> A receiver acquires no right of action by virtue of his appointment: he cannot sue in his own name as receiver e.g. for debts to a company, or to parties over whose assets he has been appointed receiver; nor can the Court authorise him to do so. In such a case he must maintain the action in the name of the person or persons who would be entitled to sue from his appointment. A receiver may however, acquire a right of action to sue in his own name for instance, as the holder of a bill of exchange; etc.

At p. 308 it is stated that debentures and debenture trust deeds usually provide in express terms that the receiver was to be agent for the company, as in the case of the statutory power, but that the omission to state in the debenture in express term that the receiver was to be the agent of the company did not necessarily prevent him from doing so. The question was of construction in each case. It goes on to say that the receiver's agency for the company was one with very peculiar incidents. "Thus the principal may not dismiss the agent, and his possession of his principal's assets is really that of the mortgagee who appointed him. He owes no higher duty to the principal than that of a mortgagee in possession." *Halsbury's Law of England* (3rd ed.) paragraph 723 reads: "The

party having the conduct of the action which the receiver has been appointed is the proper person to apply to the Court. A receiver should not make application in his own name, unless the parties to the action have refused to do so or have no *locus standi*."

In the case of *Re B. Johnson & Co. Limited (*3) Sir Raymond Evershed, M.R., at p. 779 states as follows:

> It has long been recognized and established that a receiver and manager so appointed is, by the effect of the statute law, or of the terms of the debenture, or both treated as the agent of the company, in order that he may be able to deal effectively with third parties while in possession of the company's assets and exercising the various powers conferred on him. In such a case as the present, at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgage bank, to realise the security, that is the whole purpose of his appointment: and the powers which are conferred on him …are … really ancillary to the main purpose of the appointment which is the realization by the mortgagee of the security… by the sale of assets. This case dealt with the winding-up of a company, namely, B. Johnson & Co. Ltd. The bank had appointed A as receiver and manager. A immediately terminated the active operations of the company and subsequently the unsecured creditors of the company presented a petition for the compulsory winding-up of the company. A contributory of the company issued a summons in the winding-up under the Companies Act, 1948, to have examined the conduct of A. While acting as receiver and manager until the winding-up order was made. Now it should be observed that the company under liquidation was not cited as the plaintiff in this mater. The plaintiff in that case was a contributory of the company and the defendant was the receiver whereas in the instant case the plaintiff company is described as a company which was under receivership and the defendant was its own receiver.
>
> A receiver who was an agent of the company under receivership was there to secure the interest of the debenture holder and in those circumstances the company concerned was debarred from instituting legal proceedings

> against its receiver/manager. It would be an absurd proposition to suggest otherwise. Apart from principles of law, mere common sense would dictate against the argument put forward by Mr Mumba. If the action was allowed to proceed in its present form, it would be tantamount to suggesting that the receiver can institute proceedings against himself. Quite clearly a company under receivership has no *locus standi* independent of its receiver. As long as a company continues to be subjected to receivership, it is the receiver alone who can sue or defend in the name of the company. Thus on the preliminary issue, I hold that legal proceedings in the instant case have been irregularly commenced because, in law, the plaintiff company which is precluded from suing its receiver/manger. Accordingly, the action in its present form is dismissed.

(f) Agency under statutory provisions

Provisions of certain Acts of Parliament provide for the existence of an agency relationship between parties by virtue of certain arrangements between them.

(a) The Partnership Act, 1890

The Partnership Act of England of 1890 applies in Zambia by virtue of the English Law (Extent of Application) Act. Section 5 of the Partnership Act provides that:

.

> Every partner is an agent of the firm and his other partners for purposes of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

(b) The Sheriffs Act, Chapter 37 of the Laws of Zambia

Under the Sheriffs Act, the Sheriff of Zambia and his bailiffs are obliged to execute writs of *fifa* filed in court in the normal course of judicial proceedings. In doing so however, the Sheriff acts not as agent of his employer, i.e., the Judicial Service Commission, but of the party at whose instance the writ is issued. Section 14 provides that:

> (1) The Sheriff shall not be liable to be sued for any act or omission of any Sheriff's officer, police officer or other person in the service of any writ or the execution of any process which shall have been done or omitted to have been done, or which may have occurred either through disobedience to or neglect of the orders or instructions given by the Sheriff.
> (2) In every case of execution, all steps which may legally be taken therein shall be taken on demand of the party who issued such execution, and such party shall be liable for any damage arising from any irregular proceeding taken at his instance.

This provision was interpreted by the Zambian Supreme Court to mean that the Sheriff and his officers act as agents of the party who issues execution process.

***Attorney General v. EB Jones Machinists Ltd* (Supreme Court of Zambia) 2000 ZR 114**

(The facts appear from the judgment of the court delivered by Chirwa, J.S.)

> This matter arose as result of a writ of execution issued in cause number 1994/HN/1253 between Zambia State Insurance Corporation Limited and E.B. Jones Machinist Limited, the respondent in this appeal. In executing the said judgment, a court bailiff evicted an employee of the respondent from Flat No. 13 Lubambe Centre. The respondent refused to pay the rent arrears and court fees. The court bailiff instead seized the respondent's motor vehicle. The respondent then applied to the court below for judicial review, to review the bailiff's decision to hold on to the vehicle. The learned trial Judge ordered that the bailiff releases the vehicle plus all costs of the damages to the vehicle. The respondent then applied to the court below for review of the

Judgment under Order 39 of the High Court Rules. The learned trial Judge declined to review the earlier Judgment. It is this refusal to review the Judgment that the Attorney-General appealed against.

Held; (i) section 14 of the Sheriffs Act gives immunity to the Sheriff and his officers from being sued in their performance of their work.

(ii) In every case of execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution and such party shall be liable for any damages arising from any irregular proceeding taken at his instance.

(iii) The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute or to oust the court's statutory jurisdiction under enactment which preludes the parties form contracting out of its provisions.

(iv) Where a statute enacted for the benefit of a section of the public imposes a duty of a positive kind the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers.

CHIRWA, J.S.: . . . As the learned trial Judge found, section 14 of the Sheriff's Act gave immunity to the Sheriff and his officers from being sued in the performance of their work. That is the correct position of the law. However the learned Judge misdirected herself when she held that they were agents of the State. Sub-section 2 of section 14 is very clear that the execution of court process by the Sheriff and his officers is done on the demand of the party issuing the process. The sub section reads as follows:

> 2. In every execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution and such party shall be liable in damages arising from any irregular proceedings taken at his instance.
>
> It follows from this sub-section that the Sheriff and his officers in executing court process are agents of the party issuing the process notwithstanding how or by which institution the Sheriff and his officers are appointed. . . .

(c) The Income Tax Act, Chapter 323 of the Laws of Zambia

The Income Tax Act contains provisions which allow tax authorities to declare a person an agent for purposes of facilitating the collection of tax. Section 84 of the Act provides that:

> (1) Any person or partnership may be declared by the Commissioner General to be an agent for the payment of tax due by another person or partnership.
> (2) Any person or partnership declared to be an agent in pursuance of subsection (1) shall apply to the payment of the tax due so much of any kind of property whatsoever held by him or coming into his hands on behalf of the person or partnership from whom the tax is due as is sufficient to pay such tax, and such agent is hereby indemnified against any person or partnership whatsoever in respect of all payments so made by him.
> (5) Notwithstanding the other provisions of this section, where a shareholder of a company is absent from Zambia the company shall be deemed to have been declared an agent for the payment of tax due by the shareholder under subsection (1). . .

Although therefore agency in the context of the Income Tax Act will arise after a person is declared or deemed to be declared, the bottom line is that the agency that arises is sanctioned by statute.

(d) The Bank of Zambia Act No. 43 of 1996

The bank of Zambia Act specifically states that the Bank of Zambia is an agent of the Government of the Republic of Zambia in certain matters. It provides in sections 45 and 48 respectively as follows:

> 45. The Bank shall-
> (a) Be the banker and fiscal agent of the Government
> . . .
> 48. The Bank shall act as agent for the Government for such purposes and on such terms and conditions as the Minister may determine.

(e) The Companies Act, Chapter 388 of the Laws of Zambia

The Companies Act recognises that a company, being a legal entity without any physical existence, must necessarily act through its human agents. Section 215 of the Act provides as follows:

> Subject to this Act, the business of a company shall be managed by directors, who may pay all expenses incurred in promoting and forming the company, and may exercise all such powers of the company as are not, by this Act or the articles, required to be exercised by the company by resolution.

Associated Chemicals Ltd v. Hill & Delamain Zambia Ltd & Ellis & Co. (As a Law Firm) SCZ Judgment No. 2 of 1998

(The facts appear from the judgment of the court delivered by NGULUBE, C.J.)

> The respondent company took out a writ to recover money owed for services rendered at the instance and request of the appellant company. The claim was that between October 1992 and November 1993, the respondent cleared and forwarded the appellant's goods from Dar-es-Salaam in Tanzania to Ndola. The defence at the time was simply a denial that the appellant had entered into any such transaction with the respondent. When the trial opened, the witnesses for the respondent testified how they had been verbally instructed and also given some documents concerning the shipment of the goods and how the cargo was cleared and forwarded to Ndola. The appellant's lawyers of record at the time sought adjournments, one of which was for the purpose of attempting an out-of-court settlement. As the learned trial judge observed, the then advocates; the proposed third parties; even wrote to their opponents accepting liability on behalf of their client.
>
> Meanwhile, the appellants changed lawyers. Their present lawyers came across a share agreement dated 3 November 1993 drawn by Messrs Ellis and Company under which the previous shareholders (two parties) sold all the issued shares in the appellant company to a new shareholder (Mr Kilasa). There were clauses in the share purchase agreement whereby the vendors undertook to indemnify the purchaser and the appellant company against outstanding financial liabilities incurred prior to the sale of the shares.

On the basis of this agreement Counsel for the appellant applied to the learned trial Judge to join Messrs Ellis and Company as third party to indemnify the appellant and meet the respondent's claim. He also applied to amend the defence so as to claim in effect that, because of the indemnity clauses, the new shareholder and the new management of the appellant company were not liable for this old debt and that management of the appellant company were not liable for this old debt and that the former lawyers should be made liable as third party for their alleged negligence in not resisting the claim on the basis of the indemnity clauses in the share purchase agreement.

The attempt to implead the former lawyers did not impress the learned trial Judge who saw no connection between the debt owed by one company to another for services rendered and the indemnity in the share purchase agreement. He did not see why the respondent should be denied the enjoyment of judgment in their favour on account of matters that had nothing to do with the respondent company when the appellant could bring separate proceedings if they thought they had a claim against their lawyers.

We agree with the learned trial Judge. In seeking to distinguish between old and new shareholders and between new and old management, indeed in seeking to treat the business transaction giving rise to the respondent's claim as one essentially between individuals, Mr Mbushi fell into grave error. A principle of law which is now too entrenched to require elaboration is the corporate existence of a company as a distinct legal person: see *Salomon v. Salomon and Company* (1897) AC 22 and also the Companies Act, Cap 388 of the 1995 Edition of the Laws of Zambia. Upon the issue of the certificate of incorporation, the company becomes a corporate body. As the learned authors of *Palmer's Company Law* (22nd ed.) suggest in chapter 18, a company is

> …… not like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law it is a person distinct from its members or shareholders a metaphysical entity or a fraction of law' with legal but no physical existence.

There are occasions when it may become necessary to look at who are the shareholders or the managers. An action to recover money for services rendered by one company at the instance and request of another and for the latter's obvious benefit is decidedly

not one of the occasions to consider shareholders and managers. The argument based on old and new shareholders and managers or on the share purchase agreement must fail.

It was for the foregoing reasons that we dismissed this appeal.

BP Zambia Plc v. Interland Motors Ltd (2001) ZR 37 (SCZ)

(The facts appear from the Judgment of the Court delivered by Ngulube, C.J.).

The salient facts of the case may be stated quite briefly. The parties signed a licence agreement under which the respondent (the plaintiff) was licenced to run a service station belonging to the appellant (the defendant) and at which the defendant's products would be sold to the motoring public. The licence agreement required the plaintiff to purchase and resale stocks of the defendant's products and to, among other things, meet set minimum targets in terms of volumes or quantities sold (in the agreement call 'volumetric targets'). The license agreement was for one year from 1 May 1997 to 30 June 1998 and there was a permissive clause that it may be renewed if certain conditions which were set out were met. Apparently, the defendant tried to terminate the agreement after few months because in December 1997, the Plaintiff launched proceedings in the High Court under cause number 1997/HP/2877. In that action (despite this being a licence agreement and not a lease agreement), the plaintiff claimed for a declaration that there was a protected tenancy under the Landlord and Tenant (Business Premises) Act and also for an injunction to restrain the defendant from evicting the plaintiff. The matter came up before Phiri, J. who made the following order:

> UPON hearing both Counsel for the plaintiff and defendants and upon Counsel for the defendants giving an undertaking that his client BP Zambia Plc and its workers, agents and whosoever shall not evict the plaintiff company from the premises known as 6400 Burma Road, Libala, Lusaka and shall not interfere with its smooth running of the business on the said premises until 30th June, 1998 when the current licence expires, this Court hereby discharges the Interim Injunction and Cost in the cause.

In a move obviously calculated to obtain a tactical advantage of sorts and to avoid the consequence of the expiry of the protection given by the order which Phiri, J., had made in February 1998 the plaintiff launched fresh proceedings on 2 June 1998 under cause number 1998/HP/1201; this time claiming a declaration that the plaintiff was entitled to the renewal of the licence to run the service station also asking for an injunction to restrain the defendant from evicting the plaintiff until trial of the action. There was a counterclaim in this case for the unpaid piece of certain products said to have been sold and delivered apparently not at the request of the plaintiff but at the defendant's own initiative. Trial of this action took place before Mutale, J., and it is against his decision that this appeal is brought.

The fresh action prevented the defendant from proceeding under the order of Phiri, J., after the expiry of the licence. In response to an objection by the defendant to this multiplicity of actions, the learned Judge distinguished the case at hand from that of *Development Bank of Zambia and Another v. Sunvest Limited and Another* (1995-97) ZR 187 in which this court said courts should frown upon such multiplicity.

At the conclusion of the trial, the learned Judge held to the effect that the plaintiff had performed its part of the agreement and was entitled to renewal of the licence. He found that the problem that had arisen was that of a bad personal and working relationship involving the defendant's retail manager and the plaintiff's Managing Director; the judge holding the view that the retail manager (who had granted the licence) did not show that he has the approval of his board of directors to the termination of the licence agreement. He rejected the counterclaim. The judge then ordered renewal of the licence agreement or in the alternative compensation of K20 million in respect of fuel which was in the underground tanks when the defendants uprooted the pumps. No doubt on the strength of the order by Phiri, J. All these formed the basis for the various grounds of appeal.

The very first ground of appeal criticised the award of a judgment in the alternative, that is to say, for either the licence to be renewed or for compensation to be paid. Counsel for the defendant submitted that it was not possible for the parties to force one remedy or the other upon the opponent and that it was wrong for the court below to leave the matter this way. On the other hand, counsel on the other side argued that the judge was not wrong to say that the licence be renewed or compensation be paid and suggested that, rather than come on appeal, the defendant could have applied to

the learned trial judge for clarification. We wish to state that there is basically nothing wrong in principle in the award of remedies in the alternative where the one is in default of the other provided that, in the circumstances of the particular case, this does not leave room for further controversy and litigation. In some cases, it is possible to put one of the parties to her/his election so that the selection of a remedy will be at the party's option while in other cases this would not be workable. The Court should have regard to the facts and circumstances disclosed in the individual case. In the case at hand where the parties have even sued each other, the defendant has been trying to terminate the relationship while the plaintiff has tried to keep it going. It is impossible to force the unwilling owner of a service station to retain a licencee and keep on supplying goods for resale on the basis of a non-consensual contractual relationship to be forced upon one of the parties by the Court. This was undoubtedly not a suitable case in which to leave it to the parties to settle for one of the two remedies. The grounds succeed; the plaintiff will only have the compensation awarded in respect of the fuel that was left in the tanks, to be assessed by a deputy registrar if not agreed.

In view of the foregoing conclusion of the first ground, there is very little point in dealing at any great length with the remainder of the grounds apart from the one relating to the unsuccessful counterclaim. Thus, the second ground complained about the way the Court dismissed the retail manager's evidence, even describing him as being without the board's authority in his actions and not representative of the company. The point was well taken that a company can only act through its human agents when counsel cited our remarks to this effect in *Associated Chemicals Ltd v. Hill and Delamain Zambia Ltd and Another,* SCZ Judgment No. 2 of 1998.

As a metaphysical entity of fiction of law which only has legal but no physical existence, a company (though being a separate and distinct legal person from its members or shareholders) can only act through the humans charged with its management and the conduct of its affairs. Mr Banda quite properly conceded that it was misdirection for the Court to have said in effect that because the retail manager was not the company, what he did could not bind the company. This ground too had to succeed.

The third ground alleged misdirection when the learned trial Judge allegedly failed to take heed of the licence agreement which did not have an automatic right to renewal. The learned trial judge in fact found that the plaintiff did not breach the volumetric targets requirement nor was it a breach when once they used a third party's

cheque to buy products, despite protests from the defendant. It was submitted that having been given notice of termination, the agreement ought to have been held to have come to an end. Counsel for the plaintiff's response was that the licence agreement provided for conditions for renewal. Furthermore the judge disbelieved the Defendant's evidence of breaches. Mr Nchito's reply to this was that the licence agreement not ever having been renewed in fact, it was wrong for the plaintiff to keep rushing to the Court and for business bargains to be conducted by the Court instead of the business community themselves.

All we can say is that there can be no such thing as an interminable licence agreement. As with any other contract, it can be terminated whether for good cause or for bad cause; whether in keeping with the termination clauses (if any) or even in breach in which event damages would be payable. In this case, there was no evidence that the defendant was in any way in breach when they terminated the agreement by notice. The plaintiff rushed to Court in the first action where an order was made which allowed the agreement to run its full term when it expired by effluxion of time. Twenty-eight days before the expiry and the end of the protection ordered by Phiri, J., the plaintiff again launched fresh litigation; prompting the fourth ground of appeal which criticised the Court's refusal to consider the second action to be an abuse of the process of the Court. For our part, we are satisfied that, as a general rule, it will be regarded as an abuse of process if the same parties relitigate the same subject mater from one action to another or from judge to judge. This will be so especially when the issues would have become *res judicata* or when they are issues which should have been resolved once and for all by the first Court as enjoined by section 13 of the High Court Act which reads:

> S.13. In every civil cause or mater which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such case or matter, so that, as far as

> possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

In terms of section 13 and in conformity with the Court's inherent power to prevent abuses of its processes, a party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermined each other from two or more different judges over the same subject matter. This is what happened here when the defendant who was entitled to possession after the end of June 1998 under Phiri, J.'s order ended up being found liable by Mutale, J. to compensate the plaintiff for loss of business when the defendant took such possession and uprooted their pumps. In principle, our decision in the *Sunvest* case was not distinguishable. This ground also succeeds. We reverse the finding of liability for loss of business. The only compensation was already stated will be for the petrol left in the tanks. This leaves the fifth ground which related to the counterclaim. The evidence before the learned trial Judge was hotly contested and having reviewed the same, we are unable to say that the judge had misdirected himself.

In sum, the appeal succeeds only to the extent indicated. Costs follow the event.

Note: *The two Supreme Court of Zambia authorities also illustrate the concept of corporate personality. A limited company is distinct and separate from the members comprising it.*

Where a contract is entered into by a third party with an agent whom the third party knows is acting on behalf of a principal, the onus is on the third party to show that the agent was not contracting as such.

Rudnap (Zambia) Ltd v. Spyron Enterprises Ltd (Supreme Court of Zambia) Judgment No. 55 of 1976.

The defendants counterclaimed money due for the supply of goods and for services rendered. The plaintiff admitted the supply of goods but claimed that the cost thereof had been included in a cheque for a larger sum which had been paid to the defendant upon which various moneys were paid from time to time. There was no specific evidence that the large sum paid by the plaintiff to the defendant included the amount claimed in the counterclaim. The plaintiff was a limited company renting premises from another limited company. The defendant carried out building works to the premises at the request of a man who was alleged to be an agent for the plaintiff company. The plaintiff denied that the man who entered into the contract was its agent. The alleged agent was not called to give evidence.

Held; the onus was on the debtor to prove whatever moneys had been paid were specifically in respect of the amount claimed. It was not enough for the debtors' witness to say that a cheque for a far larger amount had been paid to the creditor.

When a contract is made with an alleged agent of a company the onus is on the claimant to prove that the agreement was made with an employee or agent of that company who was held out to be authorised to enter into such an agreement.

GARDNER, J.S.: ... So far as the claim in respect of the ablution blocks is concerned the onus lies in a different quarter. The defendant has pleaded that the ablution blocks were built for the plaintiff at an agreed price of K1,600 in accordance with an agreement between the plaintiff company and the defendant. The onus is therefore on the defendant to prove that the agreement was made not only with the plaintiff but with an employee or agent of that company who was held out to be authorised to enter into such an agreement. Paragraph 3 of the defence which sets out the agreement alleges that it was made between Mr Pavcov, the managing director of the plaintiff company, and the defendant. Further and better particulars delivered on request do not elaborate on the agreement except to say that it was oral and, in his Affidavit dated the 16th June, 1973 in answer to a summons for judgment under Order XIII, the witness Spyron deposed that the agreement was made between himself and Mr Pavoc, the managing director of the plaintiff company. In evidence before the trial Court, Spyron

for the first time said that the agreement was made between himself and Mr Bogunovic and, although he said that the plaintiff company had a business in premises adjoining the defendant's own in Dar-es-Salaam and Mr Bogunovic was the general manager thereof, he gave no evidence nor was there any independent evidence adduced that Mr Bogunovic was authorised by the plaintiff company to enter into such an agreement. Spyron in cross-examination specifically agreed that there might be a different company which owed the buildings in Dar-es-Salaam.

The learned trial Judge held that he could not believe Pavcov without supporting evidence to prove that the Zambia company was merely the tenant of premises in Dar-es-Salaam which belonged to a different company. In so doing he misdirected himself by shifting to the plaintiff the onus of proof as to whether the contract had been made with the plaintiff company when it was at all times the duty of the defendant to discharge the onus of proving that the contract had been made with the plaintiff company though its authorised agents.

It is unfortunate that the learned trial Judge did not accede to a request for an adjournment so that Mr Bogunovic could be called. In all cases all relevant evidence should be taken into account by the Court and if one party is at fault by delaying the production of such evidence an order can always be made for costs against the defaulting party. However, in the event, the pleadings and the affidavit of Spyron wrongly set out that the agreement was made with Pavocov of the plaintiff company and it was quite clear from Spyron's evidence that the pleadings could not be supported.

I find that the defendant failed to discharge the onus of proving that the agreement was made with the plaintiff company in consequence this ground of appeal must succeed and that part of the judgment ordering payment of K1,600 by the plaintiff to the defendant for the ablution blocks should be set aside and the appeal allowed in respect thereof.

In the result therefore I would hold that the defendant succeeded in establishing that K1,032 was due in respect of the springs and this should be set off against the amount of K2,000 due to the plaintiff on the cheque. Judgment should be entered in favour of the Plaintiff in the sum of K968 with costs in this Court and the court below.

Judgment to the plaintiff with costs.

2.7 Authority of an Agent

One of the key features of any agency relationship is the power of the agent to affect the principal's legal position *vis a vis* third parties. The basis of the principal-agent relationship is consent. The principal will have consented to the agent having power to bind him. It should be pointed out that there are two relationships that come about as a result of the creation of the agency relationship. There is what is referred to as the external relationship between the principal and the third party. There is also what may be termed as the internal relationship between the principal and the agent. The former relationship depends on the agent's power while the latter relationship depends on the principal's consent.

The law recognises that an agent has power to act on the principal's behalf when the principal has given consent to the agent to have such power, and in such a case the agent is said to have 'authority' to act on behalf of the principal. We have already seen in the part dealing with the creation of the agency relationship that an agent may also have power in law to act on the principal's behalf even though the principal has not expressly allowed the agent to act. This is the case when the concept of agency of necessity can be invoked, or where agency arises by operation of the law. In four different situations, the law will recognise an agent as having power and therefore authority to bind the principal. These can be summarised as follows:

(a) Where the principal gives prior consent to the agent's action. The agent in this instance has actual authority.
(b) Where an agent acts without authority but the principal gives retrospective consent, by ratification. The agent will be said to have had power and authority to bind the principal.
(c) Where the agent acts without the principal's consent but the law deems the principal to have consented (as agency of necessity).
(d) Where the agent acts without the principal's consent but the principal is estopped from denying the agent's authority, the agent is said to have apparent authority.

In situation (a) and (b) the principal consents to the agent's actions. The principal does not consent in situation (c) but is deemed in law to do so. In situation (d) the agent has power to bind the principal without consent, e.g. where the agent appears to have greater authority than he actually has, for instance, where the principal imposes a limit on the agent's authority, or where agent's authority has been terminated.

In modern law of agency, the distinction between 'actual' and apparent authority is fundamental. The distinction was explained by Diplock, L.J. in the landmark case of *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd*[4] in the following words:

[4] (1964) 2 QB 480 at p. 504.

> An actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. To this agreement the (third party) is a stranger: he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the actual authority it does separate contractual rights and liabilities between the principal and third party. An 'apparent' authority on the other hand, is a legal relationship between the principal and the third party created by a representation made by the principal to the third party, intended to be and in fact acted on by the third party, that the agent has authority… To the relationship so created the agent is a stranger.

In the normal course of business third parties normally rely, not on the agent's actual authority but on his apparent authority. Where the agent has only apparent authority he acts without the principal's consent but nevertheless has power to bind the latter, and the relationship between principal and the third party, depends solely on the agents power to bind the principal. On the other hand, the relationship between the principal and the agent depends on the principal's consent to agent's actions. Thus as between the principal and the agent, actual authority is of paramount importance. If the agent acts without actual authority he clearly acts without the principal's consent and, regardless of his power to affect the principal's external relationship, may incur liability for acting in breach of the terms of their internal relationship.

Types of Authority

Perhaps one of the greatest difficulties of the law of agency is the inconsistent use of terminology by judges or textbook writers. However, since the decision in *Freeman & Lockyer (supra)* the distinction between actual and apparent authority has now come to be generally accepted. Actual authority may be express or implied. Textbooks and cases sometimes speak of 'usual' and 'customary' authority. As Steyn, L.J. in *First Energy (UK) Ltd v. Hungarian International Bank Ltd*,[5] pointed out, usual and customary authority appear to be a type of implied (actual) authority, sometimes a form of apparent authority. It is probably better to consider usual and customary authority not as separate heads of authority but as a way of defining the scope of the agent's actual or apparent authority.

[5] (1993) 2 Lloyds Rep. 194 at 201.

Examples

> Ifosi Banda is appointed as managing director of Mizozi Limited. His authority is not expressly defined. He will therefore be deemed (implied) to have all the authority which is usual for a managing director to have (implied usual authority).
>
> Careful Habenzu is appointed to be managing director of Break Point Limited. His authority is expressly limited so that he cannot enter into contracts worth more than K20,000,000 without the approval of the full board of directors of Break Point Limited. His actual authority is subject to express limitation, but if he makes a contract with Tambeni, who unaware of the limitation, his apparent authority will be unlimited and will appear to have such authority as a managing director usually has (apparent authority).
>
> Imasiku Mundia is not expressly appointed as managing director of Twalijoba Limited, but is allowed by the company to act as if he had been appointed as such. If he deals with a third party, Mwanangwa, who is unaware of the true position, Imasiku Mundia will have apparent authority as if he were managing director. His authority is apparent because he was not actually appointed to the position of managing director. The scope of that authority will be determined by what is usual for managing directors. Alternatively the situation might be interpreted as one where Imasiku Mundia has been impliedly appointed to the post of managing director. His authority will then be implied actual authority, but its scope will be what is usual for a managing director.

A difficulty that arises is that the same situation may be interpreted in more than one way. Take the case of *Hely Huchinson v. Baryhead Ltd*[6], for example. 'A', who had been allowed to act as if he were the managing director of a company, although he had never been expressly appointed, concluded a contract on behalf of the company with a third party. When the third party sought to enforce the contract, the company denied that 'A' had authority to act on its behalf. Roskill, J., held that the company was bound on the basis that it had held 'A' out as managing director and so he had apparent authority as if he occupied that position. The Court of Appeal upheld the decision but on grounds that, by allowing 'A' to act in this way, the company had given him implied actual authority to act as managing director. In any event the company was of course

[6] (1968) 1QB 549.

bound to the third party; but as between principal and the agent the difference between the two interpretations would be crucial, for if agent had only apparent authority, he would be liable to the principal for acting without the latter's consent.

Farquharson Bros v. King (1920) AC 325

> The clerk (agent) of the plaintiff timber company (principal) was given limited power to sell to certain customers and general written authority to sing delivery orders on the plaintiff's behalf (which enabled the warehouse to release timber to the delivery note holders). By abusing his authority, the clerk had timber delivered to himself in the false name of 'Brown.' In that name he sold the timber to the defendants who knew nothing of the fraud. When the fraud was discovered the plaintiff sued for recovery of the timber or its value. The defendants argued that the plaintiff had represented that the clerk had (apparent) authority to sell the timber to them.
>
> *Held;* there was no representation that the clerk had authority so to act. The defendant knew nothing of the plaintiff timber company and the clerk sold in his own false name.

Re Selective Limited (1995) 1 All ER 531

> Selectmove (third party) owed the Inland Revenue (principle) some £24,000. They met a tax collector, Mr Pollard (agent) and offered to pay off the debt at £1,000 per month. Pollard stated that he had no authority to accept the offer that low, but he would consult a superior and if Selectmove did not hear from him, they could presume that the offer had been accepted. Selectmove did not hear from Pollard and started making monthly payments. Presently, the Inland Revenue sought the entire debt. Selectmove argued that they had an agreement with the Inland Revenue to pay off the debt in instalments; and that that agreement was made by their agent, Pollard, who has apparent authority to accept the offer.
> *Held* (i) silence can amount to an acceptance of an offer, where this is not imposed on the offeree (cases such *Felthouse v. Bindley* were distinguished). (ii) there was nothing to suggest that the Inland Revenue made a representation to Selectmove that Pollard had authority to convey the Inland Revenue's acceptance by silence.

A lawyer acting on behalf of a client has ostensible authority to negotiate a settlement or a compromise.

Lusaka West Development Company Ltd & B.S.K. Chiti (Receiver) & Zambia State Insurance Corporation v. Turnkey Properties Ltd (Supreme Court of Zambia) (1990/1992) ZR 1

(The relevant facts appear from the judgment of the court delivered by Ngulube, D.C.J.)

This is an appeal against a High Court ruling in which a Consent Order had been made and in which the learned trial Judge refused to entertain the withdrawal of consent given by the appellant to the said judgment. For the record, it should be noted that the only appellant with substantial interest in this case and who has been represented is the third appellant, although the consent order related to the second appellant as well. It was not in dispute that, during an adjournment of the trial of the action in which the order was made for the express purpose of attempting a settlement out of court, the advocates for both sides held discussions and exchanged correspondence, some of which was marked 'without prejudice'. Finally the advocates reached an agreement which was embodied in consent summons for an order to be made by consent for the payment of a sum of money in full and final settlement of the cause of action between the parties.

Contemporaneously with the entering by parties both the consent agreement referred to or just prior to the formalities of such an order, the advocates for the third appellant repented the agreement and sought to withdraw their consent. . .

The main issue is whether counsel for the appellant could withdraw the consent of his client when it had already been communicated to the other side and when it had already been signified by their signature on the consent summons. We have listened to the submissions . . . and it transpires that counsel had, initially and right down to the signing of consent agreement, full instructions and authority from the appellant concerned.

Although, quite clearly, the authority of counsel conducting litigation cannot be regarded as limitless when it comes to negotiating a compromise or a settlement, and although counsel would, in the ordinary course, take instructions from the client, we are satisfied that in this case counsel did have the authority of the managing director of the third appellant who equally had ostensible authority on behalf of the third appellant to give instruction to counsel. In turn, counsel had ostensible authority to enter into the consent agreement insofar as his dealings affected the litigation with the other side. A consent agreement reached in circumstances such as in this case could possibly only have been allowed to be

withdrawn if there were proper grounds upon which the validity of any contract could be impugned such as fraud or mistake. No such factors existed in this case and the whole of the third appellant's argument hinged on some internal regulations of the third appellant which set out limits of financial expenditure which can be committed on the authority of the various officers or authorities in the organisation. Such internal document which was never brought to the attention of the other side can, of course, not affect the validity of the dealings entered into by counsel acting with ostensible authority . . . it is so clear that the appeal, to the extent that it was designed to set aside the judgment entered below, cannot be entertained.

This appeal is dismissed and the costs will follow this event.

It is within the ostensible authority of a managing director of a company to negotiate employment contracts with employees.

Emco Plastics International Ltd v. Freeberne (1971) EALR 432 (Court of Appeal at Nairobi)

The respondent was appointed secretary of the appellant company at the first meeting of the stockholders. Nothing was decided at that meeting as regards the respondent's emoluments and terms of service. A few days later, a Mr Dhanali, Chairman of the Board and Managing Director of the appellant company, sent a letter to the respondent, stipulating the terms and conditions of his employment, signed by the Managing Director on behalf of the company. In fact, the Board had not sat to approve the terms of the contract, nor were they even aware that the letter existed. The Managing Director did not have express authority to enter into contracts of employment of the kind in question. Upon termination of his employment, the respondent sought to rely upon the terms and conditions set out in the contract. The appellant company asserted that this contract was not binding upon them because Mr Dhanali had no authority to enter into it.

Held; by Lutta, J.A. that it could not have been intended that the responded work without remuneration. Since the board itself did not draw up a contract of employment, the person charged with the day to day running of the company; the Managing Director, was clothed with ostensible authority to enter into the contract. 'It is clearly within the ostensible authority of a Managing Director to negotiate a contract of service with an employee'.

A broker possesses, as incidental to his employment, implied authority to receive payment for his principal, where such principal is undisclosed, but has no such authority where the existence of the principal is disclosed, even though his name is not disclosed.

Tanganyika Farmers Association v. Unyamwezi Development Corporation Ltd (1960) EALR 620 (Court of Appeal of Dar-es-Salaam)

The Rungwe African Cooperative Society inquired of the appellants if they had groundnuts to supply. Having none, the cooperative society sourced ten tons of groundnuts from a firm of brokers and commission agents called Colonial Brokers. In fact, Colonial Brokers had themselves sourced the groundnuts from the respondent, their principal. The appellants were aware that Colonial Brokers were acting on behalf of a principal but did not know who that principal was. Colonial Brokers dispatched the groundnuts to the Rungwa Union. The appellants then paid the price for the groundnuts to Colonial Brokers, who failed to account for the money to their principals, the respondent. The respondent commenced suit, claiming that payment to the agents had not discharged the appellants from their original obligation towards them as principal.

To support a holding that payment to the agent discharges a third party from the obligation owed to the principal, it is necessary to show that the agent had authority, actual, implied or ostensible, to receive such payment. On the facts, Colonial Brokers had neither actual nor ostensible authority to receive payment. On the question of the implied authority of a broker, in situations of undisclosed principal, to receive payment on the principal's behalf, the learned Justice had this to say at p. 635:

> GOULD, V.: I do not feel justified in accepting *Campbell v. Hassell* [(1816) 1 Stark 233; 171 ER 457] as authority for the sweeping statement that every broker has authority to receive payment for an unnamed principal even if his existence is disclosed, and prefer to accept what is stated in BOWSTEAD ON AGENCY; that a broker has implied authority, as incidental to his employment, to receive payment if the existence of the principal is undisclosed, but not where it is disclosed, even if the name be not. He may of course have additional authority, either actual or by holding out, by the custom of a particular trade or by course of dealing.

Since the existence of the principal (respondent) was known to the appellant, albeit not by name, the agent had no authority to receive payment, so that the payment made to him did not discharge the appellant from liability to the respondent.

Judgment for the respondent.

An agent for sell, though generally having no implied authority to receive payment, may have ostensible authority so to do.

Edmund Schulter & Co. (Uganda) Ltd v. Patel **(1969) EALR 239 (Court of Appeal of Kampala)**

This was an appeal from the judgment and award of the High Court of Uganda. The appellant company bought a piece of land from the respondent. The sale had been negotiated, on behalf of the respondent, by one Ghanshyani. The appellants paid a deposit of Shs 50,000 to Ghanshyani, who then handed over duplicate certificate of title which he had possession of. The appellant later paid the balance of the purchase price to the respondent. Ghanshyani failed to account to the respondent for the deposit received by him. The respondent sought to recover the balance of the purchase price from the appellant, averring that Ghanshyani had no authority, actual or implied, to receive the deposit.

SPRY, J.A. : . . .In my opinion, there is no hard and fast rule of law that an agent employed to sell has power to receive the price….In an action by the seller of goods against the buyer for the price, it is open to the buyer who has paid the seller's agent to show, and in the absence of any reason to the contrary he would be entitled to succeed on showing, that the agent either had actual authority to receive or that he had ostensible authority to receive payment, or that he had a customary authority by reason of the fact that the payment was made to him in the ordinary course of the business or the agency of the kind in question . . .

I think the matter should be looked at in the light of general principles. The test of ostensible authority, as I understand it, is what an ordinary person dealing with the agent, can reasonably assume, in the absence of any notice to the contrary, to be his authority….I think a purchaser dealing with an agent for a named

> principal, who purported to have unfettered discretion to conclude a binding contract and was prepared to hand over the duplicate certificates of title against payment of a deposit, was entitled to assume that the agent had authority to receive the deposit. I would hold therefore that the receipt of the deposit was within the ostensible authority of Ghanshyani.

Where the agent acts outside his actual authority but has apparent authority, the principal is liable on the contract but cannot enforce on the basis of apparent authority alone because apparent authority is based on estoppel and it can be used only as 'a shield and not a sword'. However, as a disclosed principal he should be able to ratify provided the conditions for ratification are fulfilled.

If A concludes a contract without, but claiming to have P's authority, T can enforce the contract against P if the conditions for A having apparent authority are fulfilled. T may also hold A personally liable in tort (deceit – or alternatively in negligence under the ruling in *Hedley Byrne & Co. v. Heller & Partners*) or for breach of warranty of authority.

A managing director has authority to negotiate a contract on behalf of his company. In some instances the decision of a sole director will bind the company as a director is clothed with authority to bind the company.

Pharbu Dullabh & Moc Farms Ltd v. Kabwe Motors **(SCZ Appeal No. 26 of 1996)**

> The brief facts of the case were that an offer of a Mitsubishi truck was made by the Kabwe Farms Cooperative Union to the first appellant. The purchase price was about K2,000,000. The first appellant was a shareholder in the second appellant's company and was a Managing Director of the company. The first appellant approached the respondent for financial assistance. The respondent through their bank, Zambia National Commercial Bank loaned the appellants K2,000,000 on condition that he would pay financial charges and commissions in favour of Kabwe Motors Limited and the total amount came to K3,340,000.00 to be paid in twenty-four equal monthly instalments. The witness for the respondent company told the lower court that he discussed the term with the first appellant before funds were disbursed and terms and conditions were fully accepted by the first appellant. Those terms were later reduced in an agreement dated 16 April 1991. The vehicle was collected and was given to Kabwe Motors Limited for safe keeping and use in

accordance with the agreement. The evidence further showed that the appellant did not pay the instalments as required by the agreement but the vehicle was being used by the respondent company to ferry goods for Kabwe Motors Limited and other sister companies. The evidence showed that Kabwe Motors Limited and other companies were not paying for the use of the vehicle.

Counsel for the appellants advanced eight grounds of appeal and these are including the ground that the learned Judge in the court below erred in law and fact when he held that the first appellant was the Managing Director and that since he was Managing Director he was acting on behalf of the second appellant company when he signed the agreement with the respondent and that the said agreement is binding on the second appellant. . .

We now turn to the question of authority to the Managing Director of the second appellant. It is trite law having regard to the decision of *Turquand's* case, heavily relied upon by the learned trial Judge that the third person is not bound to enquire into the internal regulations of the company. The facts revealed that the first appellant was the Managing Director of the second appellant's company. The truck was offered to the second appellant but the first appellant in his capacity as Managing Director looked for funds to pay for the truck. The respondent was not therefore expected to inquire as to whether or not the first appellant had authority to negotiate for the second appellant. The facts show that this was a private company. It is trite law that the decision of sole director in a company where other directors are silent or quiet or not in existence the decision of the sole director is binding. Mr Simeza did not verbally advance strong argument on this issue. He mainly relied on his written argument. We agree with the finding of the learned trial Judge that the first appellant in signing the agreement had full authority to do so and his actions bound the second appellant.

***Zambia Revenue Authority v. Hitech Trading Company Ltd* (Supreme Court of Zambia) (2000) ZR 80**

The original appeal in this matter was against a judgment of the High Court awarding the respondent the sum of US$441,410.85 and US$553,930.69 and K2,808,813.05. In the judgment the High Court had also ordered that a sum of K49,193,885.66 being money already paid, be deducted from the total judgment debt. In making these awards, the court accepted that the case, as pleaded by the respondent, was not in dispute.

On 29 December 2000, the Supreme Court granted an application by the appellant to adduce fresh evidence and refused the appellant's other application to reverse a single judge's order directing the sum of K948,301,742.71 be paid into court. Following upon that ruling the respondent's advocates also applied for leave to adduce fresh evidence which application was granted without objection. Before the appeal itself was argued, the parties by consent, agreed and settled part of the judgment debt. Thus when the appeal was finally argued, the arguments and submission centred on the unpaid cheque in the sum of K948,301,741.71, made payable to the appellant by the First Merchant Bank Zambia Limited as reflected in the fresh evidence. Although the memorandum of appeal contained ten grounds of appeal the same were not argued because in the words of counsel for the appellant 'this appeal was concerned with the unpaid cheque of K948,301,714.71.'

Held; the agent bank was solvent at the time the unpaid cheque was issued.

Since the cheque is still unpaid when the respondent's account was debited obviously at the instructions of the appellant, only the agent can explain where the money was taken to, as the balances in both respondents account read zero.

SAKALA, S.J.: In arguing the appeal, Mr Wood submitted that the appeal should be viewed in the context of an agent who had been appointed to carry out an act on behalf of a principal but which agent has been prevented from carrying out its agency by a supervening act of insolvency on the part of the agent. He pointed out that it could not be denied that there was a statutory appointment of the First Merchant Bank Zambia Limited, now in liquidation, as agent by the appellant pursuant to section 84 of the Income Tax Act, and that the Bank then undertook certain acts towards carrying out its agency. According to Mr Wood, there were three issues to be addressed. First how sufficient must the acts of an agent be to commit its principal to legal liability? Second what is the effect of the agent's insolvency on the liability of the principal, if any? Third, does the authority given to an agent to receive money from a third party absorb the agent of its obligations to the third party, in this case the respondent?

We heard arguments and submissions on behalf of the appellant that the mere appointment of an agent is not sufficient to commit the principal to liability; that it is trite law that agency is based on the rule that the acts of an agent must be reasonably performed or sufficient to the benefits of the principal before the principal can be

called upon to answer for the acts of his agent. We also heard arguments and submissions that, even if First Merchant Bank was appointed agent, in view of the new evidence, it was quite clear that the appellant never received the sum of K948,301,741.71 as reflected by the unpaid Manager's cheque. It was contended and submitted that the fact that the appellant did not receive the money was confirmed and supported by the correspondence from the Liquidation Manager. Mr Wood pointed out that, although book entries were made recrediting the respondent's account with the sum of K948,301,741.71, these were merely book entries unsupported by cash. Mr Wood further submitted that even if there was need to indemnify the agent the First Merchant Bank Zambia Limited by the Zambia Revenue Authority in terms of section 84 (2) of the Income Tax as amended, the respondent could not benefit from the indemnity because no money was paid. He finally submitted that the appellant seeks the protection of section 84 (2) of the Income Tax Act.

Mr Banda on behalf of the respondent, reacted to the submissions on behalf of the appellant under four heads. The first head was whether there was an agency relationship between the appellant and the First Merchant Bank in liquidation and that if there was, when was it created? We heard arguments and submissions on this first head that the agency relationship between the appellant and the First Merchant Bank Zambia Limited, as per documentary evidence, was created on the 22 January 1998, that the documentary evidence stated the amounts for which the agent Bank was asked to collect from the two accounts of the respondent which two accounts were at the agent Bank. Mr Banda argued that at the time the Bank was appointed agent, it was liquid and therefore operating normally. He submitted that the agency relationship between the appellant and the First Merchant Bark Zambia Limited commenced on 22 January 1998 when the Bank was solvent.

The second head argued by Mr Banda was the question of when exactly did the First Merchant Bank Zambia Limited receive the money from the respondent in settlement of the tax due? The arguments and submissions on this head were that from the documentary evidence, as at 6 January 1998 the agent Bank had K896,700,000 in the respondent's account to which instructions to transfer related. This money was already with the agent Bank. Thus, according to counsel, by 16 January 1998, the Bank was solvent. Mr Banda pointed to various Kwacha transactions on record, carried out by the Bank in relation to the respondent's two accounts between the 16 and 2l January 1998. The Kwacha

amounts from the two accounts when converted to Dollars at the time amounted to US $610,000. This was the money sent by telegraphic transfer to Gift Investments PVT Limited at the instructions of the respondent. Mr Banda again pointed to the documentary evidence on record showing that as on l6 January l998, one account of the respondent at the agent Bank had an amount of K51,566,741.06 and that on 21 January 1998, the Bank made reverse entries in the sum of K642,876,390 and K253,858,610.65. Mr Banda submitted that in short the sum of US $610,000.00 had been recalled on 21 January 1998. Mr Banda asked the question: at whose instructions did the First Merchant Bank Zambia Limited recall the sum of US $610,000 which had been sent to Gift Investments Pvt at the instructions of the respondent? He submitted that since the respondent had no control of its accounts, the recall of the money in Dollars must have been at the instructions of the appellant. According to Mr Banda, as if the recall was not enough, on 22 January l998 the appellant appointed the Bank when the money was with the Bank, as agent to collect the respondent's money which was at the time with the Bank. Mr Banda submitted that these were not remarkable coincidences one does not know what they could be, because the letters of appointing the Bank as agent indicate the amounts of money in the respondent's accounts which meant that the appellant knew the amount of money in the respondent's accounts with the Bank before the Bank was appointed agent. Mr Banda contended that one does not otherwise appoint an agent Bank with a zero account in the Bank.

Mr Banda's third head was whether the First Merchant Bank Zambia Limited acted on instructions given to them by their principal, the appellant? He submitted that the answer to the question was in the affirmative as supported by the documentary evidence on record showing the respondent's accounts with the agent Bank reflecting sums of K694,448,181.06 and K253,858,610. Mr Banda pointed out that on 28 January I998 both the respondent's two accounts were debited with the sums of K694,448,181.06 and K253,858,610 respectively leaving zero balances in both accounts. He submitted that the agent Bank acted on the principal's instructions to collect the tax from the respondent's accounts. Mr Banda further submitted that from this scenario, the appellant was aware that the agent Bank had acted on instructions as given by it. To support this submission. Mr Banda referred the court to the refund claims on the record filed by the respondent with the appellant and subsequently accepted by the appellant in which the amounts debited to the

respondent's accounts on 28 January are indicated and accepted by the appellant. Mr Banda submitted that the appellant cannot claim not to be aware of the agent Bank acting on their instructions; contending that it was clear that it was an afterthought by the liquidation manager to claim that he was not aware of the cheque which had an original date of 27 January 1998 but altered to 30 January 1998. Mr Banda vehemently submitted that on the evidence on record, it is strange and inconceivable for the appellant to deny that they were not bound by the acts of their agent Bank. He also submitted that assuming that money was not transferred to the principal by the agent Bank, the remedy available to the principal could not be against the respondent: but against the Bank, for breach of duty to its principal. Mr Banda further submitted that assuming the appellant was to argue that the agent Bank did not remit the money until it went into receivership, the agent Bank should have kept the money for the principal. Mr Banda contended that the appellant had no basis to involve the respondent for the failure of its agent Bank to comply with its principal's obligations: contending that the most plausible thing for the appellant was to claim money from its agent Bank as failure by an agent to pay the principal renders the agent liable in a money action for money had and received. Mr Banda also submitted that the principal in the instant case is liable for the actions of the agent Bank as they cannot escape liability as they failed to persuade the court that the unpaid cheque was issued on Friday, 30 January 1998 when the truth is that cheque was issued on 27 January 1998. It was Mr Banda's final contention that the collection of a cheque by an agent is as good as collecting the money by the principal. In the instant case, Mr Banda submitted that the respondent's two accounts showed zero balances showing that transactions were conducted by the agent Bank.

In his short reply to Mr Banda's detailed arguments and submissions, Mr Wood urged the court to look beyond mere documentary evidence of entries in the transaction. According to Mr Wood, the case resolved around the issue of insolvency.

It must be pointed out that both learned counsel cited very useful authorities on the law of agency. We have very anxiously examined the pleadings, the detailed documentary and oral evidence on record. We have also considered the judgment of the learned trial Judge as well as the submissions by both learned counsel. From the documentary evidence it appears to us to have been common cause that on 22 January 1998, First Merchant bank was appointed an

agent for the appellant for the payment of Income Tax. The trial court found this to be a fact which was not denied in defence as pleaded. Indeed, even in this court, we do not understand the submissions on behalf of the appellant to be suggesting that there was no agency relationship between the appellant and First Merchant Bank.

In our considered view, the appellant wants, by these arguments, to 'have one's cake and eat it' that is to say, they want to enjoy both of the two mutually exclusive positions. An examination of the record, the pleadings in particular, clearly shows that at no time was the defence of insolvency raised. However, both arguments of insolvency and that no money was paid or received by the appellant fly in the teeth of the pleadings, the documentary evidence and the facts not in dispute. Above all, these arguments beg the question and overlook the sequence of events and the transactions between the appellant and the agent Bank on one hand and the respondent and the agent Bank on the other hand. As we see it, the agency relationship between the appellant and the bank was created long before 2 February l998 when the bank is purported to have been placed under receivership as per the fresh evidence of a letter dated l2 April 2000 from the liquidation co-ordinator.

According to the transactions as evidenced by the documentary evidence on record, it is quite clear to us and we agree with the submissions by Mr Banda that at the time the Bank was appointed agent by the appellant on 22 January 1998, the Bank was liquid, operating normally and solvent. This is confirmed by several transactions involving the respondent's accounts at the agent Bank. We also agree with Mr Banda that as a matter of prudence one does not appoint an agent for an account which has zero balance. Indeed, if the money debited to the account of the agent Bank was not transferred to the appellant by the agent Bank, the remedy available to the appellant cannot be against the respondent, but against the agent Bank for breach of duty to its principal. In addition if the agent Bank did not remit the money until placed under receivership, the agent Bank had a duty to have kept that money for the appellant. Indeed, the unpaid Manager's cheque, payable to the appellant, was issued by the agent Bank. This cheque was unpaid and is still unpaid. In our view, there is more to the conduct of the appellant and their agent Bank than meets the eye. Be that as it may, the appellant cannot succeed on the arguments of insolvency and non-receipt of the money. The glaring truth was that the agent Bank was solvent at the time the unpaid cheque was

issued. Since the cheque is still unpaid when the respondent accounts were debited, obviously at the instructions of the appellant, only the agent Bank can explain where the money was taken to as the balances in both respondent's accounts read zero.

A half hearted argument was advanced attacking the documentary evidence as mere book entries unsupported by cash. If these were mere book entries and there was no cash it was not for the respondent to explain why these transactions were mere book entries unsupported by cash. But on our part we do not accept the arguments that there were only book entries unsupported by cash. The appellant seeks protection of section 84 (2) of the Income Tax Act, Cap 323.

Section 84 (2) reads-

> (2) Any person or partnership declared to be an agent in pursuance of subsection (1) shall apply to the payment of the tax due so much of any kind of property whatsoever held by him or coming into his hands on behalf of the person or partnership from whom the tax is due as is sufficient to pay such agent is hereby indemnified against any person or person or partnership whatsoever in respect of all payments so made by him.

The argument in relation to this subsection was that an agent can only be indemnified in respect of payments made to the appellant. In the instant case, the submission was that since the agent Bank did not pay any money to the appellant, it is the appellant who should be indemnified. From what we have already said, this submission is untenable. We are satisfied that the agent Bank, while still solvent and operational debited the respondent's accounts at the instructions of the appellant. Thereafter the respondent's accounts reflected zero balances. Whatever happened to the money is an issue to be sorted out between the appellant and the agent Bank.

On the facts found and held this appeal must fail. It is dismissed with costs to be taxed in default of agreement.

On the question of interest we take note that there was an order of a single judge upheld by the full court to pay the amount in issue into court. This being the case, that money did not earn any interest from the time it was paid into court. However, from the time of the writ to the date it was paid into court it earned interest.

Accordingly, we order that interest at the average short term bank deposit rate be paid on the sum of K948,301,742.71 from the date of the writ to the date the same was paid into court.

Appeal dismissed.

Republic v. International Trading & Credit Corporation of Tanganyika Ltd **(1969) EALR 314 (High Court of Tanganyika)**

The respondent company was charged with selling food unfit for human consumption, contrary to the Food and Drugs Ordinance. They were alleged to have sold to three merchants, separately, unwholesome quantities of cassava. The cassava in question belonged to the Kigoma Co-operative Union, the respondents being collectors of money for cassava sold on behalf of the union. The cassava was purchased directly from the respondents and they issued invoices on their own stationery. No mention was made of the Kigoma Union to whom the cassava belonged. The respondent argued that the transaction was not a sale within s. 12 (1) of the Ordinance, since they were merely marketing agents, the sellers being the Kigoma Co-operative Union, their principal.

DUFF, J.: ... the leading case on the subject of what constitutes a seller appears to be *Hotchin v. Hindmarsh* (1891) 2 QB 181 … It was held that a person who takes an article in his hands and performs the physical act of transferring the adulterated thing to the purchaser, is the seller. The intention of the legislature was interpreted to mean that the person who does the physical act is the seller, and this could either be the principal or the agent.

Conviction upheld.

Where an agent has authority to act for his principal in a particular matter, and where such authority is restricted or cancelled by the principal subsequently, but such restriction or cancellation is not communicated to a third party having notice of the original authority, the agent, though having no actual authority, has apparent authority to bind the principal in respect of contracts with such third party.

McConnell & Another v. Kimani (1967) EALR 702

The appellants were owners of a farm which they agreed to sell to the respondent. The agreement was subject to the respondent obtaining a loan from the Land Bank. At the time of the agreement, the appellants were preparing to leave Nairobi for South Africa. They appointed a Mr Place as their agent, and executed a general power of attorney in his favour, empowering him, *inter alia*, to negotiate and complete the sale when they finally left. The respondent had notice of the power of attorney. Upon the bank refusing to grant the loan, the initial agreement fell through. The respondents made a fresh offer to Mr Place who communicated it to the appellants. They instructed Place to accept the offer subject to confirmation by them. The respondents, unaware of these fresh instructions, entered into an unconditional contract for the sale of the farm, with Place. The appellants refused to execute the formal agreement, and the respondent brought an action for specific performance.

Held; Mr Place was granted a power of attorney which authorised him to enter into a sale agreement. This power of attorney though granted by deed was gratuitous and could thus be validly altered whether orally or by letter. Such alteration could not, however, affect a third party dealing with the agent and aware of the power of attorney, unless it was specifically brought to his notice. As such although Mr Place had no actual authority to enter into a binding contract without confirmation, the respondent was entitled to rely on the apparent authority granted Mr Place by the power of attorney.

DUFFUS, J.A.: .... The principle is that private instructions given to an agent would not bind a person negotiating with the agent who has been held out as having the necessary authority to conclude an agreement….I am therefore of the opinion that the learned trial Judge was justified in his conclusion that Place was apparently duly authorised by the appellants to conclude the agreement for sale, and that the agreement entered into with the respondent was a binding and legal contract.

2.8 Agent's Relationship with Third Parties General

The general rule is that where an agent makes a contract on behalf of his principal, the contract is between the principal and the third party and *prima facie* at common law, the only person who can sue and be sued

on the contract is the principal. The agent acquires no rights under the contract, nor does he incur any obligation. Having performed his task by bringing about a contract between his principal and a third party, the agent drops out of the picture subject to any outstanding matters between him and principal.

The onus is on the person alleging that he entered into a contract with another person through an agent to prove that in fact the agent was acting as such.

Agents of the state can never be personally liable for the State's failure to perform a contractual obligation.

Stickrose (Pty) Ltd v. The Permanent Secretary Ministry of Finance **(1999) ZR 155**

(The facts appear from the judgment of the court delivered by Sakala, C.J.)

> On 2 August 1996 the appellant obtained a judgment against the respondent in the sum of United States Dollars five hundred and thirty thousand, five hundred with interest at 10 per cent per annum from 10 February 1987, the date of the writ of summons to 2 August 1996, or the Kwacha equivalent according to the exchange rate ruling on the date of payment. In terms of section 21 (1) of the State Proceeding Act, a certificate of judgment against the Government of the Republic of Zambia was prepared certifying the debt to be in the sum of United States Dollars one million, three hundred and thirty thousand, five hundred and forty-eight, thirty-six cents (US $1,330,548.36) excluding post judgment interest.
>
> The state was prepared to liquidate the judgment debt by way of monthly instalments of Kwacha two hundred million (K200,000,000.00). The first of such instalment was paid in August, 1997; the next instalment was paid in December 1997; and the third installment in the sum of Kwacha one hundred and forty million (K140,000,000.00) was paid on 13 May 1998. Subsequently, the appellant decided to enforce execution of the balance of the judgment debt by way of judicial review for an order of mandamus. Later, the appellant commenced committal proceedings against the respondent. The learned trial Judge refused to grant the order of committal but instead varied the consent order by extending the period for the payment of the outstanding debt.
>
> The respondent appealed.
>
> *Held;* (i) Order 45 of the White Book 1999 edition, classifies the methods for enforcement of judgment and orders of the court. Order 45 does not include judicial review as one of those methods for the enforcement of judgments and orders of court.

(ii) In Zambia, the law governing satisfaction of Judgment against the state is specifically provided in Part IV of the State Proceedings Act. Section 21 (1) of the State Proceedings Act, makes provision for the issuance on application of a certificate containing particulars of an order made against the state. (iii) Public officers need protection of the law. They are not to be individually harassed by way of civil actions as a means of enforcing judgments against the state.

SAKALA, C.J.: . . . The learned trial Judge considered the affidavit evidence and the submissions from both learned counsel. He found that the respondent did not dispute its indebtness to the appellant nor did the respondent refuse to pay the judgment sum as by consent order.

According to the learned Judge the crux of the matter was whether the government had the money to liquidate the debt. He noted that a Permanent Secretary is only an agent who executed his duties within the confines of the budgetary allocation and if government had no money the Permanent Secretary cannot be expected to mint the money. The learned Judge found that it is too far fetched to hold the Permanent Secretary responsible personally for the Government's failure to comply with the consent order. The learned Judge refused to grant the order of committal but varied the consent order by ordering that the outstanding judgment debt be paid by the end of December 1998. The appellant appealed against the entire ruling.

The memorandum of appeal contained two grounds that the learned Judge misdirected himself on a point of law by varying the Consent Order for Mandamus made between the parties, to the effect that the debt be paid by end of December 1998, and that the learned Judge misdirected himself on a point of law by refusing to commit to prison James M'tonga, Permanent Secretary, Ministry of Finance for disobeying the Consent Order for Mandamus . . . . We have considered the facts not in dispute, the judgment of the trial court as well as the submissions by both learned counsel. This appeal, as we see it, raises the issue of enforcement and satisfaction of judgments and orders against the State. . .

In the circumstances of the present appeal, the trial court had no jurisdiction in the first place to make an order of Mandamus in judicial review proceedings as a means of enforcing a judgment against the State. Equally under the State Proceedings Act, the court was not competent to issue a Committal Order against Mr James M'tonga as an individual.

We must make the point that public officers need protection of the law. They are not to be individually harassed by way of civil actions as a means of enforcing judgments against the State. Indeed, judicial review has never been a means of enforcing any judgment.

For the foregoing reasons this appeal is dismissed with costs to be taxed in default of agreement. But this conclusion does not in any way absolve the State from its obligations to pay the sum indicated in the certificate lawfully issued.

Effect of Personal Element: Disclosed and Undisclosed Agency

In some instances, however, the agent may incur personal liability on the contract. The rights and liabilities of principal and agent against third parties may differ according to whether the agency is disclosed or undisclosed.

Agency is disclosed where the agent reveals that he is acting as an agent; if the agency is disclosed it is of no legal significance that the principal is not named.

The distinction between disclosed and undisclosed agency is important as it affects the principal's ability to ratify the agent's actions. Further more, the agent's liability to third parties may depend on whether the agency was disclosed or not.

Disclosed Agency

Where an agent makes a contract disclosing the agency, the normal rule is that a direct contractual relationship is created between the principal and the third party and either party can sue the other on the contract.

If an agent acts without the principal's actual authority the principal can ratify the agent's actions provided that the agent purported to act on the principal's behalf.

Only a disclosed principal can ratify an unauthorised contract. (See *Keighley Maxted v. Durant, (supra*)).

Where the principal is disclosed, he and not the agent is liable on the contract and may be sued.

C.A. Blanke v. Hansing & Co. (1912) Kenya Law Reports (High Court for Kenya)

The appellant bought, in Nairobi, a passage from Mombasa to Dar-es-Salaam on a particular steamer owned by the D.O.A. line. He proceeded to Mombasa, where he learnt from the respondents,

agents of the D.O.A. line, that the steamer in question would not call at Dar-es-Salaam. He was, in consequence, compelled to abandon his voyage, and he sued the respondents for the expenses of his journey to Mombasa.

Held; by Barth, J., that the question of the peculiar liability of common carriers is not involved in this case, but the breach of a contract entered into by an agent with the plaintiff, for a passage in one of the principal's ships. The Indian Contract Act deals with the liability of the agent, and I am therefore of the opinion that by s. 230 of that Act, where the principals are disclosed, as they were in this case, such principal must be sued if possible….

For the said reason, it was held that the pleadings revealed no cause of action against the respondent agents, and the action was dismissed.

Where an agent indicates that he is contracting as such, he is not liable on the contract.

Gadd v. Houghton & Co. (1876) 35 LT 222

Houghton and Co sold to the buyers Gadd, a quantity of oranges under a 'sold note' which stated, *inter alia*, that 'we have this day sold to you on account of James Morand & Co. . . .' and signed 'Houghton & Co.'. The seller having failed to deliver the oranges, the buyer sued Houghton & Co. for damages for non-delivery.

Held; that the action failed, since by the words of the sold note, Houghton & Co. had clearly indicated that they were not to be personally liable.

MELLISH, L.J.: . . . The question is whether, upon the true construction of this contract, Houghton & Co., who sold the goods, are themselves liable, or whether they have entered into a contract on behalf of James Morand and Co. This question is to be decided by interpreting the language which has been used according to the plain natural interpretation of the words. I agree with what was said by Lord CAMPELL in *Parker v. Winlow* (1857) 7 E & B 942, and in the note to *Thomson v. Davenport* (1829) 9 B & C 78 in Smith's Leading Cases (6th ed., vol. 2, 343), that *prima facie* where a man signs a contract in his own name, he is a contracting party, and there must be something very strong on the face of the instrument to prevent that liability attaching to him. But I cannot understand why, under the circumstances of this case, where there

are plain words to that effect in the contract, we are not to say that he is contracting on behalf of somebody else. I am of the opinion that there is no difference between a person saying "I, as agent for C.D. have sold to you", and saying "I have sold to you", and signing that in his own name "for C.D." Where you find a person in the body of the instrument treating himself as the seller or character, no doubt it is different, and you can say that he intended to bind himself; but where there is nothing of that kind, and all that appears is that he has been making a contract on behalf of somebody else, it seems to necessarily follow that that somebody else is the person liable. Here they say, "We have this day sold to you on account of J. Morand & Co." How can the words 'on account of' be inserted merely as a description? They do not describe who Houghton & Co. were at all, but they say on whose account the contract had been entered into. It is "Houghton & Co. on account of J. Morand and Co." Meaning that J. Morand and Co. are really the people who have sold. It follows that the person who signed the contract were merely brokers, and were not liable.

Parkers Music & Sports House v. Motorex Ltd (1959) EALR 534 (Supreme Court of Kenya)

The defendants were manufacturers' representatives and were the local agents for a Belgian firm which manufactured Tudor wireless batteries. They approached the plaintiff company with a view to getting an order. After examining a sample, the plaintiffs were satisfied with the quality of the batteries, and on account of this, signed two indents for the supply of the same batteries, on the defendant company's headed paper. The indents contained a provision to the effect that an irrevocable contract would only come about through the acceptance of the indents by the suppliers or the shippers. On receipt of the order, the plaintiff alleged that the batteries were not compatible with the sample. They sought to recover damages from the defendant.

Held; that the defendant's duty, according to the terms of the indents, was to forward orders to the suppliers for acceptance by them. It was not an offer that was to be accepted by the defendants. On the contrary, it was an offer meant to be transmitted to the suppliers for acceptance. The defendants cannot be regarded as a party to the contract. Since the principals were disclosed, recourse was to be had to them and not the agent.

Sui Yin Kwan v. Eastern Insurance (1994) 2 AC 199

A company called Axelson owned the ship Osprey. They asked their shipping agents, Richstone, to insure the ship, including personal injury to the crew. Richstone did ensure the ship in their own name which was normal. The Osprey, while moored at a Bay in Hong Kong was hit by a typhoon resulting in the loss of many of the crew. Relatives of two of the crew sued Axelson for negligence and got judgment. They were awarded $HK1 million. Axelson had however already gone into liquidation, so the relatives stepped in the shoes of Axelson and sued the insurance company. The insurance company argued that they had only dealt with Richstone and knew nothing of Axelson, the undisclosed principal.

Held; that the doctrine of undisclosed principal applied. Where an agent acts within his actual authority the undisclosed principal may intervene and acquire the rights/liabilities of the agent. Here, the agents acted within their actual authority and therefore, the relatives could recover from the insurance company.

Undisclosed Agency and the Third Party's Right of Election

If an agent contracts with a third party without disclosing that he is acting as an agent the agency is undisclosed. The contract is initially between agent and the third party and each may enforce the contract against the other. However if the third party later discovers the principal's existence, he may enforce the contract against either the agent or the principal; moreover, provided that agent acted with his actual authority, the principal can intervene and enforce the contract against the third party.

Even where the undisclosed principal's existence is discovered, the agent remains liable on the contract and the third party may choose to enforce the contract against either principal or the agent but not both. This is known as the right of election.

A third party has an elective right to sue either the agent or the principal, where the agent does not disclose the principal.

Boyter v. Thomson (1995) 3 All ER 135

The respondent, a private seller, sold a cabin cruise to the appellant, a third party through a commercial agent. The agency between the owner of the cabin cruise and the commercial agent was undisclosed to the buyer. The cabin cruise proved to be unfit for use. When the appellant discovered the agency, he brought an action against the

agent under the Sale of Goods Act, claiming that the cabin cruise was not of merchantable quality. The action against the respondent was under section 14 (5) of the Sale of Goods Act which provides that where an agent sells goods on behalf of a principal, the principal will be liable under section 14 (2) and (3) of the Act, provided the principal sells in the course of business, or if he does not, the buyer knows this or reasonable steps have been taken to bring to his attention. Since this was an undisclosed principal, the third party had no way of knowing that the principal was a private vendor. The principal argued that section 14 (5) did not apply to cases where the agency was undisclosed.

Held; that section 14 (5) applied to cases of undisclosed principal and the principal was, therefore, liable to the third party for breach of contract.

Victoria Shipchandlers v. Leslie & Underson Ltd (1972) EALR 42 (High Court of Kenya)

The plaintiffs, a firm of ship chandlers were requested by the defendant company to provide supplies to the crew and passengers of a specified ship. From previous dealings, the plaintiffs were aware that the defendants were acting on behalf of a principal, but the principals always remained undisclosed. The supplies were duly delivered and signed for by the captain of the ship. Upon demanding for payment, the defendant referred the plaintiff to one Eustace, the principal. He failed to settle the debt. The plaintiffs had earlier written to the defendants; 'It is as a result of your order we supplied these goods. Help us recover payment from these people. We still look to you for payment'. It was the defendant's contention that they were no longer liable to pay, since the plaintiffs had elected to seek payment from Eustace.

Held; third party dealing with an agent for an undisclosed principal has the right to sue either the agent or the principal. This right is an elective one; that is, he may claim from one or the other, but not both. To be deemed to have made an election, the third party must intimate unequivocally, by conduct or express words that he wishes to pursue one and not the other. From the correspondence sent to the defendants, it is evident that the plaintiffs made no such election.

Judgment for the plaintiff.

Yabu v. Nyasaland Garage Ltd (1967 - 8) African Law Report (Malawi)

The respondents were the original owners of a Bedford lorry. They sold it to a Mr Motola. Subsequently, the truck began to give Motola problems. He parked it at the respondent's garage and instructed them to find a buyer for it, on his behalf. The appellant approached the respondent and offered to purchase the lorry. Without revealing that they were acting for Motola, the respondents sold the lorry to the appellant who paid a deposit and agreed to pay the balance in instalments. The respondent failed to account to Motola for the proceeds of sale. Motola repossessed the lorry from the appellant, who commenced this action for delivery up of the lorry or recovery of the purchase price.

CRAM, J: . . . The plaintiff could not sue both the principal and agent; he had the right to elect whom to sue, but he could not sue both nor could he elect until he became aware of two persons whose liability he could choose. The company contracted without revealing that it was an agent. The plaintiff, upon discovering this could treat either the agent or the principal as liable. The plaintiff is assumed to rely on the credit of the company. He might be prejudiced if his only rights were against the principal, whose credit may be worthy nothing, but the principal would also be liable since he had authorised the agent to bind him, and is considered a party with whom the contract is made. . . .

A disclosed principal is not discharged, nor is the right of recourse to him affected by the circumstance that he has paid, or settled or otherwise dealt to his prejudice with the agent, unless he has been induced by the conduct of the creditor, reasonably to believe either, that the agent has paid or otherwise discharged the obligation, or that the creditor had elected to look to the agent alone for payment or discharge.

Achabya Travel Agencies (Uganda) Ltd v. Arua Bus Syndicate Ltd (1966) EALR 511 (High Court of Uganda)

The plaintiffs were travel agents. The defendant had given Bhatt, an agent, a general authority to book overseas passages on their behalf. The plaintiffs, knowing that Bhatt was acting on the defendant's behalf, supplied him with five tickets. The plaintiffs

permitted Bhatt credit and debited the account he kept with them, with the price of the tickets. Three days later, Bhatt handed the tickets over to the defendants, who paid him for them. He was not heard of after that. Two months later, the plaintiffs demanded payment from the defendants, who refused to pay. This was an action for the price of the tickets.

Held by BENNET, J., (citing article 95 of *Bowstead on Agency,* 12th ed. at p. 213)

> Where a debt or obligation has been incurred through an agent, and the principal is induced by the conduct of the creditor reasonably to believe that the agent has paid the debt or discharge the obligation, or that the creditor has elected to look to the agent alone for the payment or discharge thereof, and in consequence of such belief pays, or settles, or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny, as between himself and the principal, that the debt has been paid, or the obligation discharged or that he has elected to give exclusive credit to the agent so as to discharge the principal. But mere delay by the creditor in enforcing his claim or in making application to the principal for payment of the debt or discharge of the obligation is not sufficient inducement for this purpose, unless there are special circumstances rendering the delay misleading.
>
> Except as in this article provided, a disclosed principal is not discharged, nor is the right of recourse to him affected by the circumstance that he has paid or settled or otherwise dealt to his prejudice with the agent.

There was nothing in the facts to support any claim that the defendant was induced by the conduct of the plaintiff, reasonably to believe that Bhatt had paid for the passage when it paid the passage money to Bhatt. Further, the fact that the plaintiff had debited Bhatt with the price of the tickets could not amount to a representation that the plaintiff looked to Bhatt alone for payment. There being no evidence that the defendant knew of the fact that the plaintiff had debited Bhatt's account, he could hardly claim to have been induced by a fact he did not even know. *Irvine v. Watson* (1880) 5 QBD 102 is authority for the proposition that the fact that

credit is given to an agent, known at the time to be an agent for a disclosed agent, and does not preclude the creditor from having recourse to the principal.

Judgment for the plaintiffs.

Once the third party elects to sue one party, his option to sue the other is extinguished. However, not any action by the third party suggesting action against one party in preference for another will be construed as the exercise of the right of election.

Curtis v. Williamson (1874) LR 10 QB 57

One Boulton appearing to act on his own behalf purchased some gunpowder from the plaintiff. Later, the plaintiff discovered that Boulton was acting on behalf of an undisclosed principal, the defendant mine owners. Boulton then filed a petition of liquidation and the plaintiff filed an affidavit in those proceedings in an attempt to recover the debt owed for the gunpowder. However, the plaintiff changed their mind and sued the defendant principal.

Held; once an undisclosed principal is discovered the third party may elect to sue that principal. Secondly, the filing of the affidavit against the agent did not prevent the action against the principal.

The third party will not be bound by an election unless he has unequivocally indicated his intention to hold one party liable and release the other.

Clarkson Booker Ltd v. Andjel (1964) 3 All ER 260

An agent failed to pay for an airline ticket which he had purchased from a third party on behalf of an undisclosed principal. Having discovered the existence of the principal, the third party wrote to both the principal and the agent requesting payment. In due course the third party issued, then served a writ on the principal. However, the principal was insolvent and the third party then sought payment from the agent.

Held; by the Court of Appeal while stating that this was a borderline case, that serving a writ did not amount to an unequivocal election. The third party had never withdrawn the threats to sue the agent and was free to pursue the action against the agent.

Liability of an agent on the contract

Where the principal is disclosed, recourse is to be had to that principal, and not the agent, unless the terms of the agreement disclose an intention to make the agent a party to the contract.

2.9 The Relation Between Principal and Agent

The nature of the relationship between principal and agent entails certain rights and duties between the parties. An appreciation of the rights and duties is very significant since they often are not a matter purely of contract only.

Duties of an agent

An agent stands in a fiduciary position with his principal and as such owes his principal a number of duties. Breach by the agent of any of his duties to the principal will entitle the principal to certain rights as against the agent. The principal may, for example, sue the agent for damages for breach of the agency contract. He may also withhold the agent's commission or remuneration.

(a) The duty to obey instructions

An agent owes a duty to his principal to obey instructions. Such instructions must however be clear and unambiguous. The courts will be reluctant to impute a duty on the agent to obey instructions which are unclear.

Ireland v. Livingstone (1872) 27 LT 79

> The principal, Livingstone, wrote to the agent, Ireland, in Mauritius authorising them to purchase and send some 500 tons of sugar adding: '50 tons more or less of no moment, if it enables you to get a suitable vessel.'
>
> The instructions to the agent were clearly ambiguous as they were capable of lending themselves to two interpretations, namely either one bulk was required to be sent in one ship or two or more bulks could be sent in two or more ships. The agent understood the instructions in the second sense and sent the first consignment of 400 tons with an intention of shipping a further 60 tons when available at a later date. The principal refused to take delivery of the shipment and wrote to cancel any further order. The agent thereupon sued for breach of contract.

Held; that as the instructions given were capable of bearing two meanings, it was not unreasonable for the agent to take one of those two meanings. All circumstances considered the agent acted reasonably and the principal was bound to take the cargo.

CHELMSFORD, L.J.: . . Now, it appears to me that, if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent bona fide adopts of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense, of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority, to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms.

Where the principal gives an agent express instructions to perform an act, and the agent fails to perform such an act, the onus is on the principal to show that the agent was in fact instructed. The court will not readily assume that the agent was instructed to do things in respect of which the principal cannot provide proof of instruction.

Ernest Mubanga v. Barclays Bank of Zambia Limited, **SCZ Appeal No. 109/96 (Supreme Court of Zambia)**

(The facts appear from the judgment of the court delivered by Sakala, C.J.)

For convenience, we shall refer to the appellant as the plaintiff and the respondent as the defendant which designations they were at trial in the court below.

This is an appeal against a judgment of the High Court dismissing the plaintiff's claims for damages for breach by the defendant of duty owed to the plaintiff as the plaintiff's banker and agent in the execution of the plaintiff's instructions; indemnification by the defendant from the expenses incurred by the plaintiff as a result of the defendant's alleged failure to perform their duties as bankers and agent; and for damages for time wasted.

The salient facts are and were not in dispute. The plaintiff was at the material time a customer of the defendant bank. Sometime in the year 1987, the plaintiff wanted to do a diploma course in

Electronic Technology at Cleveland Institute of Electronics in the United States of America as a correspondent student. In order to meet the requirements of paying school fees in Dollars, the plaintiff wrote two letters to the defendant. The first letter dated 27 March 1987 was an application for foreign exchange. The second letter dated 4 May 1987 was an instruction to the defendant to commence remittances of study fees by way of instalments to the Institute.

The plaintiff testified that in May 1987 he received a Bank of Zambia approval for foreign exchange. He then wrote the defendant in the same month instructing them to remit, on his behalf, a sum of $70 per month to run for a period of 12 months. He wrote this letter while in the bank. On the same day, he filled in an enrolment agreement form indicating course number 1A as the choice of programme and also left his address. According to the plaintiff, the defendant did not remit the first instalment but remitted a total sum of US $360 from the months of May to September 1987. The plaintiff explained that when he noticed that there was no correspondence from the Institute, he approached the defendant to inquire whether the remittances had been sent. He was assured that the same had been done. In August 1987, he went back to the defendant as he had not received any correspondence from the Institute and asked them for the acknowledgement of the money which the defendant had claimed to have sent. According to the plaintiff, the defendant did not give him any acknowledgement but promised him to write to the Institute. In October 1987 he went back to the defendant. He was then told that the defendant had received some correspondence from the Institute acknowledging a sum of $280 and requesting to be advised of the student number and signature. According to the plaintiff, the defendant had copies of the enrolment form number and sent it to the Institute on his behalf but without notifying him. He contended in this evidence that this was wrong because he did not have a student number. He explained that when a bank clerk pulled out the file and showed him where they got the student number; it was at this point that he noticed that the defendant did not send the enrolment agreement form. The plaintiff contended that the defendant did not furnish correct information to the Institute in that they provided wrong details in relation to the plaintiff's course number and as a result of this misinformation, according to the plaintiff, the letters from the Institute were being sent to a wrong address. It was also the evidence of the plaintiff that as a result of the misinformation, he missed the whole course and the Institute refused to reimburse him the money. The plaintiff complained that had the defendant

carried out his instructions without negligence he could not have missed out.

In cross examination the defendant explained that he did not give the bank written instruction in relation to the enrolment agreement form. According to him, the first remittance and the enrolment form were supposed to be sent to the Institute together.

On behalf of the defendant, evidence was adduced from records kept by the bank. According to the evidence, it confirmed that the bank had received instructions from the plaintiff requesting them to submit an application form for foreign exchange to Bank of Zambia. The application was submitted and approval obtained. The plaintiff subsequently gave instructions to the defendant to remit the funds by a standing order of $70 per month. The witness explained that despite the scarcity of foreign exchange at the material time, the defendant still made the remittances but not on due dates. The witness explained that the defendant had no duty to send the enrolment form. The witness maintained that in the letter of instructions, there was nothing instructing the bank to send the enrolment form to the Institute. The witness explained that she was not aware of the instructions requesting the defendant to send the enrolment form to the Institute. She was also not aware of the Institute requesting for the enrolment form from the defendant.

The learned trial High Court Commissioner reviewed the documentary as well as the oral evidence on record. After considering the evidence the learned High Court Commissioner considered the duties of the defendant as a bank towards its customers. The Court found that from the letter dated 4th May 1987, it was clear that the instructions by the plaintiff to the defendant were to commence remitting the instalments of $70. The court further found that in that letter, there was nothing said suggesting the defendant was also instructed to send enrolment agreement form. The Court further found, from the bundle of documents, that there were no documents that indicated that the plaintiff gave instructions to the defendant to send the enrolment agreement form to the Institute. The Court also found that the letter of instruction did not indicate that the plaintiff had imposed an obligation on the defendant to send the enrolment agreement form to the Institute. It was the view of the trial Court that the situation would have been different if the plaintiff had written to the defendant instructing them to send the first instalment together with the enrolment agreement form and if the defendant had agreed to act on such instructions. The Court examined a document on record purportedly

sent by the defendant but expressed surprise that the Institute could have acted on a document not completed by the plaintiff. The trial Court found no evidence of how the document in issue came into being and concluded that, on the evidence on record, it could not be said that that document was sent by the defendant. On the claim of indemnification for the expenses incurred due to the change and transfer costs, the Court found that on the evidence the plaintiff had completed the course and was therefore liable to pay for it. The Court, however, found that on the basis that the wrong form was not sent by the defendant, the defendant could not be liable for any omission. The Court concluded that the plaintiff was entitled to be indemnified by the defendant in the sum of $100 transfer fees as the same as not caused by the defendant. All the other claims failed, hence the appeal to this Court.

On behalf of the plaintiff, written heads of argument were filed and oral submissions were made based on six grounds of appeal. The first ground was that the trial commissioner erred in law in not making specific findings on the various issues raised in the pleadings and evidence. The second ground was that the trial Commissioner erred both in fact and in law in not holding that the defendant had committed breach of duty which it owed to the plaintiff as his banker and agent in carrying out his instructions and further erred in not awarding damages to the plaintiff for breach of the said duty. The third ground was that the trial Commissioner erred in holding that the plaintiff did not give any instruction to the defendant to send the enrolment form to the Institute.

The fourth ground was that the trial Commissioner erred in holding that the bank did not send an enrolment form to the Institute which bore a course number different from what the plaintiff had taken. The fifth ground was that the trial Commissioner erred both in fact and law in rejecting the claim for indemnification by the plaintiff for the expenses incurred by the plaintiff as a result of the defendant's failure to perform its duty as a banker and agent and further erred in not awarding the plaintiff damages for time wasted. The sixth ground was that the trial Commissioner's judgment was against law and the weight of evidence on record.

The first and sixth grounds were argued together. We heard oral arguments and received heads of argument on these grounds that the court having made a finding that the defendant was not under a specific duty to send the enrolment form to Cleveland Institute of Electronics on behalf of the plaintiff; it should have considered the effect of sending to the institute the student numbers as contended

in the Statement of Claim. It was argued that the court never considered this fact and never considered the consequences of the defendant sending a wrong enrolment form to the Institute, regardless of whether or not the defendant was under a duty to do so, in the oral arguments it was contended on these two grounds that if the defendant was under no duty to send the enrolment form as found by the court, it then had a duty not to send wrong forms or information at all. It was further contended that it is either the defendant did not send anything in the form of information on the plaintiff to the Institute or if it did, as it opted to do so, a duty emerged to send correct information. It was submitted on behalf of the plaintiff that had the trial Commissioner made specific findings on these matters, he would definitely have not come to the decision that he did.

Grounds two and three were also argued together. We received written heads of argument on these grounds that the defendant admitted being responsible for remittances of instalments to the Institute but not the enrolment form. It was contended that the evidence on record clearly showed that an enrolment form was received together with a cheque for US $70 by the Institute from the defendant. According to counsel for the plaintiff, the defendant admitted having sent to the Institute what it perceived as the plaintiff's student number which appeared on the enrolment form. It was submitted that this evidence, reinforced by the plaintiff's oral evidence at trial, was not challenged by the defendant and therefore the court, as a matter of strict logic, should have found as a fact that the defendant sent the enrolment form to the institute whether instructed or not, and should in consequence have held that by so doing the defendant assumed an obligation to send correct forms and correct details on behalf of the plaintiff. It was also submitted that failure to do so amounted to breach of duty. It was pointed out on these grounds that after the Court considered the failure by the defendant to remit instalments on due time, the court should have made a finding whether foreign exchange shortage was a sufficiently good reason to absolve the defendant of any legal blame for failure to execute their duty as agent or whether it was a mitigating factor in considering breach of duty.

On the fourth ground the argument was that the Court took into account the fact that the enrolment form, bearing course number 1B, was not signed by the plaintiff and therefore could not understand how the Institute could have acted on it. It was submitted that by so doing, the court approached a critical issue under wrong premises.

It was contended that the plaintiff produced cogent evidence in the form of letters from the Institute confirming that the enrolment form indicating course 1B was received by the Institute on 20 October 1987 which was accompanied by the cheque. It was contended that on the admission by the defendant that they sent the cheque but not the enrolment form, that they sent a wrong student number to the Institute copied from the plaintiff's original enrolment form the only logical and reasonable inference to make was that the defendant sent a wrong enrolment form together with the first instalment.

On the fifth ground for indemnification, the arguments were that the basic principle, where there is a breach of an obligation, is that there ought to be a duty to make reparations; and that an agent, by law, had the obligation to indemnify the principal for loss incurred by the principal as a result of the agent's failure to execute instructions. It was submitted that in the instance case, the plaintiff's claim for indemnification was clearly supported by law and should have been upheld.

On behalf of the defendant, Mr Chashi filed written heads of argument and made oral submissions. It was contended on behalf of the defendant that the issue of sending the student number to the institute was inconsequential and was not the basis of the plaintiff's claim. It was submitted that from the letters of instruction on record from the plaintiff, there were no instructions at all that the defendant should send an enrolment form to the Institute. It was submitted that the plaintiff's position that he gave verbal instructions regarding the enrolment form, when he had the opportunity to give those instructions specifically in writing, was untenable. It was contended that there was no evidence on record to suggest that the defendant sent an enrolment form to the Institute. It was pointed out, on behalf of the defendant, that the trial court addressed the issue of the enrolment form but found no evidence on record of how the form came into existence but that the Court was satisfied that it was not sent by the defendant. Counsel submitted that the court having found that the defendant did not send the enrolment form, it was only logical not to deal or make findings of the consequences the enrolment form had. On grounds two and three, it was contended that the court did not err in fact and in law in not holding that the defendant had committed a breach of duty as the defendant did not owe the plaintiff any duty and neither was the defendant an agent of the plaintiff. It was also contended that there was no basis for the court to find that the defendant had sent the enrolment form as the letter on record talked only of a student number and not an enrolment form.

On the indemnification for expenses incurred, it was submitted that the claim could only have been entertained had the court found that the defendant owed a duty or an obligation to the plaintiff.

We have very anxiously addressed our minds to the oral and documentary evidence on record and to the judgment of the trial court. We have also considered the spirited arguments by both learned counsel. The fact that the plaintiff was the defendant's customer was common cause. The salient facts as earlier indicated were not in dispute. The determination of this case, as we see it, depended on the interpretation of the letter of instructions given to the defendant by the plaintiff.

The case for the plaintiff, as pleaded, was that sometime in May, 1987, he wrote the defendant Bank instructing it to remit US $70 per month for 12 months. According to the plaintiff he left with the defendant a completed Enrolment Agreement Form for transmission to the Institute with the first instalment. The enrolment form indicated that he was applying for Course No. 1A. The plaintiff further pleased that contrary to the instructions the defendant did not transmit the Enrolment Form.

The case for the defendant as pleaded was that it received written remittance instructions but without any Enrolment Form and without any instructions to transmit any Enrolment Form.

The relevant document concerning the instructions given by the plaintiff was couched as follows:

> Dear Sirs
>
> I have the honour to authorize commencement of study fee to Cleveland Institute of Electronics by installments.
>
> The amount is seventy dollars per month for 12 months plus an additional forty-two dollars for the thirteenth month. My account number is 04:260 and I would like the money to be on the 11th of every month commencing with the month of May which is this month.
>
> I would be very grateful if assistance rendered to me.
>
> I am Sir your obedient servant.
>
> ERNEST MUBANGA.

The trial Court found that there was no suggestion in the letter that the defendant was supposed to send the enrolment agreement as well. We agree with the finding. This finding is also supported by the plaintiff's own evidence in cross-examination when he said, "What was supposed to be done was to send the enrolment agreement with the US $70 fee. I did not give the Bank written instructions." We are therefore satisfied that the written instructions did not include the sending of the enrolment form.

In the circumstances, we totally agree with the submissions on behalf of the defendant Bank that in the circumstances of this case, the position of the plaintiff that he gave verbal instructions to send the enrolment form when he had the opportunity to give written instructions, is untenable. Having found that no instructions, written or verbal were given to the defendant Bank by the plaintiff to send the Enrolment Agreement Form to the Institute, this appeal based on the arguments relating to breach of duty and indemnification cannot succeed.

The whole appeal fails. It is dismissed. The court below having ordered that each party bears its own costs on account of the nature of the claim and the correspondence which was exchanged, we too, make the same order for the same reasons. This means that each party will bear its own costs.

(b) The duty to show proper skill and care

***Keppel v. Wheeler* (1927) 136 LT 203**

The principal (Keppel) instructed the agent (Wheeler), an estate agent to find a purchaser for his block of flats. A prospective purchaser made an offer to purchase the property at £6,150. The agent duly communicated this offer to the principal, who accepted it 'subject to contract'. A few days later the agent received an offer of £6,750 but did not pass on this information to the principal.

Held; that this failure to communicate was a breach of duty to show proper skill and care, and the agent was liable in damages.

ATKIN, L.J.: it appears to me to be a complete mistake to suppose that when agents are employed to sell a property, their duty ends when they introduce a purchaser ready able and willing to buy the property. It is true that if the transaction goes through, that is all they need to do, but up to the time at which there is in fact a concluded agreement between the purchaser and the vendor, it

appears to me that the agent still owe a duty to their principal. For instance, supposing after they have introduced a purchaser ready and willing to purchase, but the person so introduced was a person who was either insolvent, or a person of bad character, or a person who intended to employ the premises for some purpose contrary to law, or perhaps contrary to the conditions in the vendor's agreement, then it appears to me to be plain that it would be their duty to their principal to disclose those facts to him. . . .

Armstrong v. Jackson (1916 - 17) ER 1117

A stockbroker was instructed by a client to buy 600 shares in a company known as Champion Gold Reefs of West Africa Limited. The stockbroker did not buy the shares from the open market but instead sold his own 600 shares in the company.

Held; that the sale could be set aside since the broker, in selling his own shares to the client, had allowed his interest to conflict with his duty.

McCARDIE, J.: . . . First, as to the claim to avoid the transaction. It is obvious that the defendant gravely failed in his duty to the plaintiff. He was instructed to buy shares, but he never carried out his mandate. A broker who is employed to buy shares cannot sell his own shares unless he makes full disclosure of the fact to his principal, and the principal, with a full knowledge of such facts, gives his assent to the changed position of the broker. This rule is not merely of law, but of obvious morality. As was said by my Lord,

CAIRNS, L.C.: in *Parker v. McKenna* (1874) LR 10 Ch. App. 96 at p. 118), 'No man can in this court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict'.

A broker who secretly sells his own shares is in a wholly false position. As vendor it is to his interest to sell shares, and, moreover to sell at the highest price. As broker it is his clear duty to the principal to buy at the lowest price, and to give unbiased and independent advice (if such be asked) as to the time when, and the price at which, shares shall be bought, or whether they shall be bought at all. The law ever required a high measure of good faith from an agent. He departs from good faith when he secretly sells his own property to his principal. . . . It matters not that

the broker sells at market price, or that he acts without intent to defraud. . . . The prohibition of the law is absolute. . . .

(c) The duty not to allow conflict of interest

An agent that makes a secret profit must account to his principal for it, and the offending transaction cannot bind the principal.

Shah v. Attorney General (1969) 261 (High Court of Uganda)

> The plaintiff, under an agreement between the Kabaka's Government and himself, undertook to introduce a financier to enter into an agreement with the Buganda Government to finance development projects. The plaintiff was to receive a sum of 6,500 Pound Sterling as commission, to be paid in two instalments. He duly introduced a financier in the shape of a company in which he was a shareholder. The agreement later fell through on account of change in regimes. Having paid the first instalment, the government refused to pay the second and last, claiming, *inter alia*, that the plaintiff, being a shareholder in the financier company had made a secret profit to which he was not entitled.
>
> SHERRIDAN, J.: . . It is trite law that an agent that makes a secret profit must account to his principal for it, and that the offending transaction cannot bind the principal *(Bentley v. Craven* (1853) 52 ER 52). if therefore the plaintiff as agent for the Kabaka's government was acting in a fiduciary capacity, he is not entitled to receive any other commission which he may have received from the financier company. However, the plaintiff was not an agent for the Government, except in a descriptive sense, and it was not his principal. He entered into a contract with it, but his acts were not binding on it. The plaintiff was thus not in breach of any covenant with the government. . . .

(d) The duty not to delegate

De Bussche v. Alt (1878) LT 370; 8 ChD 286

> De Bussche, owner of a ship, engaged an agent to sell the ship at a minimum price of $90,000, at any of the ports where it happened to be in its travels. With the consent of the owner of the ship, the agent engaged the defendant, Alt (sub-agent), in Japan to sell the ship. After spirited efforts to find a buyer, Alt bought the ship himself

for $90,000. He later resold the ship in Japan for $160,000. De Bussche then sued Alt arguing that Alt was his agent and was therefore under a duty to account for any secret profits made.

Held; that an agent cannot as a general rule delegate his duties to a sub-agent. In certain instances, however, a right to delegate may be implied from the circumstances surrounding the transactions such as usage of the trade, the conduct of the parties or in the event of unanticipated emergencies. In this case, since the ship was expected to move from one port to another, it was in the contemplation of both parties that a sub-agent would be appointed in any of those ports. When Alt sold the ship there existed a relationship of principal and agent between De Bussche and Alt. Alt was therefore obliged to account for the secret profit that he made.

Carlico Printers v. Barclays Bank (1931) 145 LT 51

The plaintiffs instructed Barclays Bank to insure their goods in Beirut. At the time of the engagement, Barclays Bank had no office in Beirut, but determined to carry out the instruction, Barclays, with the consent of the plaintiff, engaged a sub-agent, the Anglo-Palestine Bank, to insure the goods. Unfortunately, the sub-agent failed to insure the goods. When the goods were subsequently destroyed by fire, the plaintiff sued, among others, the sub-agent for breach of contract.

Held; that when an agent is engaged by a principal, he undertakes responsibility for the whole task. Where he engages a sub-agent who breaches his duty, the principal must have recourse to the agent and not the sub-agent. In turn, the agent would look to the sub-agent. There is generally no privity of contract between the principal and the sub-agent. Where the principal desires to have privity between him and the sub-agent he must clearly instruct the agent to create such privity.

(e) The duty not to disclose confidential information

Lamb v. Evans (1893) 68 LT 131

Canvassers, who had been employed by the plaintiff, the registered proprietor of the trades directory, under agreements which bound them to devote themselves in a particular district exclusively to obtaining advertisements from traders for the plaintiff's directory,

and also to supply him with the blocks and materials necessary for producing such advertisement, proposed at the expiration of their agreements with the plaintiff to assist a rival publication in procuring similar advertisement.

Held; that they were not entitled to use the materials so obtained for the purposes of any publication other than the plaintiff's.

2.10 Rights of an Agent

Although the law imposes on the agent a number of duties it confers relatively few rights on the agent. Generally the agent's rights depend on the contract, if any, between him and the principal.

Apart from any particular rights conferred on the agent by the contract of agency, the common law recognises three general rights namely the right to remuneration, to indemnity and a *lien.*

(a) The Right to Remuneration

An agent will only be entitled to remuneration if that has been agreed with the principal. However, even if there is no express agreement that the agent should be paid for his services, the court may imply a term giving him a right to remuneration. Such a right will probably be implied where the agent is acting in the course of a profession or business and will be more readily implied where the agent has performed his services. It is rare that an agent acting in a commercial context will agree to act gratuitously.

The right to payment will be implied on the same basis on which terms are generally implied into contracts. Thus, no term can be implied where that would contradict the express terms of the contract.

Where it is agreed that the agent should be paid but the amount of remuneration is not agreed, or where a right of payment is implied, the agent will be entitled to a reasonable sum for his services assessed on a *quantum meruit* basis.

Way v. Latilla (1937) 3 All ER 759

The appellant alleged that he had made an agreement with the respondent that the appellant should obtain and send to the respondent information relating to the gold mines and concessions in West Africa, and that the appellant should introduce concessions for acquisition by the respondent, and that the respondent would protect the appellant's interests in respect of concessions acquired,

and give to the appellant the customary, or a reasonable share in the same, and should pay to the appellant a reasonable sum in respect of information and reports. The appellant claimed damages and other relief on the ground that the respondent had broken the agreement in that he failed to give the appellant a share in respect of certain concessions obtained by the appellant, the profits on the sale whereof amounted to about £1,000,000. The appellant also contended that, if he was entitled to be paid by the respondent only upon *quantum meruit*, the court, in ascertaining the amount to be paid, was entitled, and bound, to have regard to such matters as the parties themselves considered reasonable and usual, namely, what profit was in fact made on the sale, and was not limited to fixing a fee. The respondent contended that there was no evidence of any contract, that there was no agreement sufficiently certain or definite to be enforceable, and that the amount of profit made on the resale was not a proper basis for assessing the amount due:

Held; (i) there was no concluded contract between the parties as to the amount of the share or interest that the appellant was to receive, and it was impossible for the court to complete the contract for them. (ii) there was, however, a contract of employment between the parties, which clearly indicated that the work was not to be done gratuitously, and the appellant was therefore entitled to a reasonable remuneration on the implied contract to pay him a *quantum meruit.* (iii) on the evidence of the parties themselves, the basis of remuneration by fee should be rejected. (iv) in fixing remuneration for services, the court was entitled to pay regard to the previous conversation of the parties, and, in the circumstances, the appellant was entitled to the sum of £5,000 as reasonable remuneration, calculated on the basis of some reasonable participation.

Koffi Sunkersette Obu v. A. Strauss & Co. Ltd **(1951) AC 243**

By an agreement signed by the appellant, who was the agent in West Africa of the respondent company for the purchase and shipment of rubber to the company in London, it was provided, *inter alia,* that the company has agreed to remunerate my services with 'a monthly sum of fifty pounds' subsequently reduced to 20*l.* "to cover my personal and traveling expenses… A commission 'is also to be paid to me by the company which I have agreed to leave to the discretion of the company."

The respondents, after the termination of the appellant's employment, having instituted proceedings against him, claiming money alleged to be due from him as their agent, he entered a counterclaim for an account to be taken between them of all the rubber shipped by him between specified dates, and for commission on all the rubber purchased by him for the respondents. On appeal against the dismissal of his counterclaim:

Held; that the relief which the appellant claimed by his counterclaim was beyond the competence of any court to grant. The court could not determine the basis and the rate of commission. To do so would involve not only making a new agreement for the parties, but also varying the existing agreement by transferring to the court the exercise of a discretion vested in the respondents**.**

Attorney General v. Fidelity Consultancy Services Ltd **(Supreme Court of Zambia) Appeal No. 45A/2001**

(The facts appear from the judgment of the Court delivered by Chibesakunda, J.S.)

This is an appeal against the High Court Judgment in favour of the respondents (who were the plaintiffs at the lower court). The claim before the High Court was for damages for breach of a debt collection and management agreement between the respondents and the appellants. In breach of this debt and management agreement between the respondent and the appellants, the respondents claimed that they suffered damages. These were quantified as:

1. K2,271,187,417.53 being 30% commission inclusive 17.5% VAT due on the sum of K64,430,848,724.00;
2. K78,624,421.10 being 3% commission inclusive 17.5% VAT due on the sum of K2,230,480.031.00;
3. interest at the bank ruling rate on the sums of K2,271,187,417.53 and K78,624,421.10 as from 31 October 1997 to date of full settlement; and
4. Costs.

The brief evidence before the High Court given by the Chief Executive of the respondent was that on 18 December 1996 the appellants, through Zambia National Tender Board, did award the respondents on a tender number SP 043/96 a contract for collection and management of debt owed to the appellants which consisted of:

IBRD/IDA Debt Service Payment; Japanese Non-Project Aid 1992195; and Fertiliser loans to Credit Union and Savings Association of Zambia (CUSA) Limited, Northern Province Cooperative Union Limited and the Western Province Cooperative Union Limited.

It was also the case for the respondents that pursuant to the award of the Tender to the respondent on 13 March 1997 a Debt Collection and Management agreement was executed by the appellants Secretary to the Treasury, Ministry of Finance and Economic Development. Contrary to this agreement and despite the fact that the respondent discharged it's obligations under the said agreement, the appellant in October 1997, through the Ministry of Finance and Economic Development unilaterally and without notice withdrew this debt collection and management agreement on some debts.

It was also their case that contrary to the said debt collection and management and despite the fact that the respondent had already discharged some of its obligation under the agreement the appellants unilaterally cancelled the respondent's collection and management of debts involving the following:

(a) Mosali Agro-Food Processes Limited K145,534,500.00;
(b) High Protein Foods Limited K555,221,880.00;
(c) International Investments and Financing K522,049,975.00 (Lusaka Soap Industries Limited);
(d) Agro Supplies Limited K78,999,079.00;
(e) Agro fuel Investments Limited K218,416,720.00;
(f) Cross Road Car Hire Limited K419,049,979.00;
(h) Makumbi Products Limited K291.210.000.00.

Total K2,230,490,031.00

———————————————

The appellants failed to summon their witnesses to court on two occasions. So at the end of the respondent's evidence judgment was given in favour of the respondents.

Learned counsel for the appellant, has advanced the following grounds of appeal in writing:

(l) That the learned trial Judge erred in law and in fact when he held that the respondents were entitled to damages on *quantum meruit* basis when the respondents did not adduce any evidence to prove the loss.

In his written head of argument, he referred the court to the case of *Attorney General v. Mpundu, Mhango v. Ngulube* and *Industrial Gases Limited v. Marat Transport Limited and Mussah Mogeehaid*, arguing that it is trite law that special damages or loss has to be specifically proved.

He further submitted that the level of proof required for a claim to succeed for special damages is evidence, which brings certainty in order for the court to arrive at a fair assessment. He argued that no evidence, for instance, was adduced to prove phone bills, incidental or costs of advice. So his submission was that the court ought to have only granted nominal damages.

(2) That the lower court erred in law and fact when it held that the respondents were entitled to damages when the contract for debt collection clearly stated that the respondents were only able to claim three per cent when the money was collected.

He referred to the case of *Luxor (Eastbourne) Limited v. Cooper* (1941)AC 108 (English case). He argued that it is trite law that an agent can only recover his commission upon fulfilment of the stipulated condition in the agency agreement which entitles him to the commission. It matters not whether or not he spends money, time or effort if he does not comply with the term he is not entitled to anything. Quoting the Lord Russell's words:

> The chances are that an agent of this type will reap substantial profit for comparatively little effort, and the possibility that he may lose the fruits of his labour at the caprice of the principal is a business risk that in practice is recognized and accepted.

He submitted that the fact that the respondents' claim that they spent much money, time and energy, was not a proper basis for the lower court to grant them damages. He referred to the evidence of the chief executive and argued that they collected no Ngwee on all the public portfolios that were listed. So they did not fulfil any stipulated condition. He went on to argue that the respondent did not base the evidence on the work they carried out clearly.

(3) That the learned trial Judge erred in law and fact when he held that the agency agreement was wrongly terminated when adequate notice was given to the respondents.

According to him an agency agreement such as the one before this court can be terminated by either party upon notice. He referred to the English case of *Martin - Baker Aircraft Company v. Canadian Flight Equipment* (1955) 2QB 556 Mc Nair, J., where it was held that a party to an agency agreement could terminate the agreement by serving the other reasonable notice even where it is not provided for in the agreement.

In response counsel for the respondent and also in arguing his cross appeal supported the learned trial Judge's findings that there was a breach of contract and that the respondents were entitled to damages on *quantum meruit* basis. He argued that in fact having established and found that there was a breach of contract the court should have awarded damages whose measure should have been in consonance with the principles of restitution. He referred to the case of *Livingstone v. Railways Coal Company* (l880) 5 App. Cas. 25 and cited Lord Blackburn:

> Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

He argued that the court was on firm ground in holding that the respondents be awarded damages on a *quantum meruit* basis in the sum of K193,529,920.00. But he went on to submit that the court below omitted to apply the well established principle of ten per cent of three per cent on the sum of K78,624,421.09. He submitted also that the respondents was further entitled to the sum of K235,874.00 being ten per cent of three per cent on the principle sum of K28,624,421.09.

He argued that as it could be seen from the evidence from pages 31 to 53 respondents established that they performed part of their obligations.

These were arguments before us. We have looked at the record and pondered over the arguments before us. We have looked at the authorities. However, we feel that these authorities are irrelevant as we are of the considered view that:

1. There was no provision for *quantum meruit* damages in the agreement;
2. There was only the provision of three per cent commission award; and
3. There was evidence that the commission was paid to the respondents.

The appeal therefore has merit. We therefore allow the appeal. We quash the lower court's order.

Costs follow the event.

The agent is only entitled to remuneration if he acts within the scope of his authority. If he acts outside his authority, or without authority, for instance by selling property at a lower price than instructed, he is not entitled to commission even though the principal may be bound by the transaction.

An agent is only entitled to receive remuneration in accordance with the terms of the agency contract. The contract may entitle the agent to receive a retainer. Alternatively the agent may be employed to achieve a specified task. In that case the agent only becomes entitled to remuneration when the specified event occurs. The agent in such a case is only entitled to remuneration if he is the effective cause of the event he was employed to bring about unless the contract provides otherwise. Although there are a number of cases in which the question whether the agent has been the 'effective cause' of an event has been considered, there is no judicial definition of the concept 'effective cause' and it will be a question of fact in each case whether the agent has earned his commission.

Jamshed Dinshaw Byramjee v. H.C.V. Hormasjee (1944) EALR 10

The respondent, a land and estate agent, attempted to sale, on behalf of the appellant, six shops and the plots on which they were located. The appellant had bought the properties from the executors of the estate of one Abdul Wahid, for the purposes of resale. Shirley was the occupant of two of the shops in question and had attempted unsuccessfully, on numerous occasions, to purchase the premises from Wahid before he died. After the appellant acquired the property, the respondent, his agent, attempted to sell all six shops to Shirley, but the negotiations fell through. Later, Shirley acting anonymously through an agent bought four of the shops. The respondent claimed to be entitled to the commission for having been the *causa causens* of the sale.

Held; the respondent was not the *causa causens*, or an efficient cause of the sale of the four shops to Shirley.

SIR JOSEPH SHERIDAN (President) at p. 12:

> It seems to me that on the facts, the eventual sale was due to the determination of Shirley to obtain the property from whosoever had purchased it from the executors of Abdul Wahid.

SIR NORMAN WHITLET, C.J. (Affirming) at p. 13:

> In further support of the reasons given by the learned President, with which I am in complete agreement, I would refer to the case of *In re Beale, Ex Parte Durrant* (5 Morrel 38) at p. 39, Cave, J. stated; 'The question is, the hotel being sold, has the benefit to the estate been traced to the introduction of Durant? It is clear to me that it is so traced. It cannot be suggested that sunders would have heard of the place but for Durrant….' The position in the present case was the exact opposite. Shirley was fully cognizant of the premises and had intended to procure them long before the respondent came onto the scene.

BARTLEY, J. (Affirming) at page 14:

> It is not sufficient to show that the introduction was a *causa sine qua non*. It is necessary to show that the introduction was an efficient cause in bringing about the sale.

Coles v. Enoch **(1939) 3 All ER 327**

An agent was employed to find a tenant for the principal's premises. While he was describing the premises to an interested party, the third party overheard him and enquired about the premises. The agent gave the third party only a general description of location of the premises, but the third party found the premises himself and made an offer directly to the principal which the latter accepted. The agent then claimed his commission.

Held; the agent's claim for commission must fail as he was not the direct cause of the third party taking a lease of the premises.

It seems the agent will lose his right to commission if some event breaks the chain of causation between his actions and the event on which payment of commission depends. In *Coles* the agent's withholding of the full address broke the chain.

Toulmin v. Millar **(1887) 3 TLR 836**

T, being in 1880 tenant for life of a settled estate near London, applied to M to let it, and received from him a scale of charges for both selling and letting estates, which contained a note that when property was let to a tenant who afterwards became the purchaser

the commission on selling would be charged, less the amount of commission paid for letting. T put the paper in his pocket without reading it. M being aware that X desired to purchase an estate near London, ascertained from T that the settlement trustee might sell for £84,000. X, through M, then took the estate as tenant to see how he liked it. In 1884 T, who had acquired the power to sell the estate by the effect of the Settled Land Act, 1882, sold the estate without the intervention of M to X for £70,000. In an action by M for commission as on a sale (less the previous commission paid), the judge, at the trial, directed the jury that the defendant was not bound by the terms of the scale of charges unless he had read them, and also that if the sale had not been brought about by M he could not recover, and the jury found that the sale had not been so brought about.

The Court of Appeal held that the first direction to the jury was wrong, and that the verdict was against the weight of evidence, and must be set aside.

Held; by the House of Lords, that the plaintiff was simply employed to let, and that he was not entitled to commission on the subsequent sale.

Millar v. Radford (1903) 197 LR 575

An agent was introduced to find a tenant or purchaser for a property; the agent found a tenant and was paid his commission. Some fifteen months later the tenant purchased the property. The agent claimed a further commission on the basis that he had found a purchaser.

Held; that it was not enough for the agent to be a cause in the sequence of events leading up to the sale (the cause *sine qua non*). The agent had to show that he was the effective cause of the sale (the *cause causans*). Here the agent's involvement ceased when the tenant entered the property. He did not bring about the sale and so was not entitled to commission on that sale.

The principal and the agent may agree on the manner of computation of the commission or remuneration due to the agent. Where this is the case, neither party will be allowed to employ any other formula for computation of the agent's commission.

***Kelvin Macwani v. Industrial Credit Company* (Supreme Court of Zambia) Appeal No. 31 of 1999**

(Facts appear from the judgment of the court delivered by Sakala, J.S.)

This is an appeal against a judgment of the High Court awarding the appellant K1,470,932.60n representing ten per cent commission on repossession of the bus as *quantum meruit*. On both awards, interest at 20 per cent from the date of the writ was awarded with six per cent post judgment interest.

The brief facts of the case were that the appellant was sometime in 1993, contracted by the respondent on agency basis to recover debts on its behalf at an agreed ten per cent on every recovery. On several transactions the contract was honoured by both parties except on two transactions which gave rise to this action. The first of these transactions related to the computers. The circumstances of the computers' transactions were that, Standard Chartered Bank Ltd had a leasing division of which the respondent was the Managing Agent. The bank leased a number of computers to KPM Computers. This company fell into arrears which amounted to K14,709,326.00. The appellant was instructed by the respondent to repossess these computers. The appellant recovered these computers. The appellant, on the recovery of the computers was entitled to his ten per cent commission on the arrears of K14,709,326.00 which worked out to be K1,470,932.60. The court rejected the appellant's claim of K2,522,725 as ten per cent commission based on the appellant's value of the computers at K23 million.

The second transaction related to the recovery of the bus by the appellant. The bank leased a bus to Vincent Taxis. Vincent Taxis fell into arrears which the court accepted to have been K2,227,250. The respondent instructed the appellant to repossess the bus. He towed the bus from Vincent Taxis to some point in Lusaka but had difficulties in taking it to its intended destination. The court found that since the bus was not taken to its intended destination the appellant was not entitled to a full commission of ten per cent. According to the trial court Judge the job was partially executed in that the appellant repossessed the bus. The court awarded the appellant K2,272 representing one per cent of the commission. The court rejected the appellant's claim of the full ten per cent commission of the amount of K2,727,250.00 which the respondent had been claiming from Vincent Taxis as arrears. The appellant appealed to this court against the whole judgment.

Before delving into the appeal proper, we wish to make certain observations. The first observation is that the actual contract between the parties and its items under which the appellant was employed is not part of the record. The court proceeded to accept the contract and some of its terms on the basis of the pleadings and the evidence. The second observation is that the plaintiff's claim for ten per cent commission was based in relation to computers on the estimated value of computers, while in the case of the bus the claim for the ten per cent commission was based on the arrears. The third observation is that the court accepted there was ample evidence that the appellant was employed as a debt collector and that the agreed ten per cent commission was to be calculated on the actual debt recovered. These observations are pertinent in determining the whole appeal. These observations clearly support the proposition that had the appellant recovered the actual debts as arrears on the computers and the bus, the ten per cent commission would have been calculated on the basis of the outstanding arrears recovered.

(After setting out the arguments of counsel, the court continued)

. . . We have considered the evidence and the pleadings on as well as the judgment of trial court and the submissions by both learned counsel. Despite the absence of the actual contract that existed between the parties, our understanding of the findings on the evidence on record as per our earlier observations is that the arrangement was for the appellant to recover debts due to the respondent under the lease agreement to their respective clients. Where this was not possible the appellant was to repossess the items in question. We are satisfied that whether the appellant recovered the arrears or the actual item, in this case the computers and the bus, his entitlement was ten per cent commission of the arrears and not the value of the computers or the bus. The arrears on the computers were accepted to be K14,709,326, the award of K1,470,932.60 representing ten per cent commission cannot be faulted.

As regards the recovery of the bus it was common cause that the arrears stood at K2,522,725.00. This is the sum the appellant had to recover. He did not recover this sum but instead repossessed the bus. If he had recovered the arrears he would have been entitled to ten per cent commission of that sum, in terms of the agreement. We are satisfied that having repossessed the bus the issue of whether the bus was delivered to its intended destination was totally irrelevant. But from what it was abandoned, they would have been

entitled to his full ten per cent commission on the arrears on bus. The issue of whether the bus was delivered to its intended destination was totally irrelevant. But had the respondent established the costs of towing the bus from where it was abandoned, they would have been entitled. The award of one per cent commission for repossessing the bus was therefore misdirection. It is set aside. We award ten per cent commission on repossession of bus. This works out to be K222,725.

On damages for breach of contract we agree with Mr Chonta that the appellant did not prove these damages. The effective date of interest award was as pleaded. We see no justification for criticizing the trial court. This appeal has succeeded on one ground but has failed on the other grounds. The appeal is allowed to that extent but we make no order as to costs.

The law allows an agent who has earned his commission to employ any lawful means to recover the commission.

Clement Chuuya & Hilda Chuuya v. J.J. Hankwenda (2002) ZR 11

This was to have been a simple case where the respondent, an agent sued the appellants to recover the sum of K5 million being agent fee or commission for finding a buyer. Judgment was entered for the respondent for the said K5 million, plus interest at the average Bank of Zambia lending rate from April 1996, up to the date of payment, plus costs. This was after the learned Judge accepted the respondents claim that it was through his agency that the appellant found the purchaser at K50 million, for the house at stand number 684 Olympia Park Extension, Lusaka. The case became complicated after the respondent tried to execute a writ of *fieri facias* to which there was a *nulla bona* return since the appellants were abroad and only a tenant was in their other property in Makeni, which strangely enough was the address endorsed for execution. The case followed a strange path when the plaintiff decided that he would recover his money by proceeding against the judgment debtors, Makeni property and that he would enforce some of the orders himself.

Held; where a judgment creditor in possession of the debtors property from which an income could be derived, willfully defaults by failing to realise any income from the property, the debtor can

apply to court for an inquiry of the income which would reasonably have been realised and sum found should be credited to the judgment debtor.

Indeco Estates Development Company Ltd v. Marshall Chambers (2002) ZR 16 (Supreme Court of Zambia)

(The facts appear from the judgment of the court delivered by Ngulube, C.J.)

The respondents are a firm of lawyers who had been retained by the appellants to do some professional work. They had to do the needful to procure the issuance of 140 separate title deeds to a number of houses belonging to Zambia Clay Industries Limited which were previously held on block title deeds. The action was launched by the lawyers to recover the sum of Kl82 million as the amount due for professional services rendered.

When the Zambia Privatisations Agency came on the scene, they took over the responsibilities previously exercised over the Zambia Clay Properties by the appellant. They even tried to renegotiate the fees with the lawyers. The lawyers sued both the appellants and the Zambia Privatisation Agency.

The issues before the learned Judge were whether the lawyers had truly been instructed to procure the 140 title deeds and if they had successfully done so; also whether the lawyers were entitled to be paid fees and if so by whom. After hearing the evidence, the Judge found as a fact that the work required of the lawyers had been done as it had been carried up to the stage where all that remained for the separate title deeds already applied for to be uplifted from the Lands and Deeds Registry. It was the finding of the Court that both defendants were liable to the plaintiff lawyers who had earned their fees and who could not be deprived of them just because the Zambia Privatisation Agency had appointed a new firm of lawyers who would simply uplift the documents based on the work already done by the plaintiffs.

There was a ground of appeal complaining that the Judge had prematurely closed the trial and turned down an adjournment for the defendant to call one more vital witness. It was argued that a retrial should be ordered since the trial was closed on account of the absence of counsel for the defendants who had gone to attend a funeral. The record shows that counsel for the defendants had tried to explain his absence to his opponent on an untrue story that

he was appearing before the Industrial Relations Court when that court was not even sitting that morning. When contacted by telephone, that is when he told his opponent that he was going to a funeral. This was narrated to the court. The court (before whom nobody applied for any adjournment) was not impressed and decided to treat the absence as unexplained and the defense case as closed.

The truth of the matter is that counsel is not entitled to inconvenience the court with untrue stories. The truth is further that the witnesses who had already testified had covered all the issues that fell to be considered. The vital unspecified evidence of the further witness allegedly not called would not have taken the matter any further. The position of the appellants and their co-defendants had been that the lawyers had acted without instructions; and that in any case they had not earned the fees because they had not delivered the separate title deeds. The learned trial Judge had more than ample oral and documentary evidence already before him to come to the conclusions already discussed. No retrial can be warranted or necessary in this case.

There was a ground of appeal complaining about the size of the bill. When Mr Ndhlovu, counsel for the lawyers pointed out that having regard to the value of the property (which was some K2 billion) the bill was well within the range of 5% to l0% scale fees fixed for conveyancing matters, Mr Ng'onga conceded that at the very least the 5% minimum scale fee would have been payable in any event and he would have advised his clients to pay this. In truth, there is no justification for interfering with the amount of the professional bill in this case.

The major ground of appeal by the appellant was quite novel. The gist of the argument was that when the Zambia Privatisation Agency stepped into the picture and took over the conduct of winding up the affairs of the Zambia Clay Industries, any instructions which the appellant gave to the lawyers were superceded and the direct relationship of lawyer and client overreached. That being the case, it was argued, the appellant's role was reduced to that of a mere manager on behalf of the Zambia Privatisation Agency (ZPA) and so simply an agent of the latter. Because the ZPA had taken over instructions and began to deal directly with the lawyers, judgment should have been entered against the ZPA only since they became the appellant's principals and the direct clients of the lawyers. It was Mr Ng'onga's submission that the relationship between the appellants and the respondents ceased so that automatically any liability was extinguished.

Only ZPA should be liable. He likened the situation to that in *Drew v. Nunn* (1879) 4 QB 661, where a husband held out his wife as having authority to pledge his credit. Unbeknown to the tradesman who was supplying the goods, the husband became insane (so that her authority terminated) but she continued to take goods and to pledge his credit. On recovery, the husband was sued for the price of the goods supplied during his insanity and it was held that he was liable.

We admit to having great difficulty to see the parallel between that case and the case at hand; between husband and the ZPA and between any one else. In any event, even if the ZPA had taken over the instructions as contended, that in our view may entitle the appellant to an indemnity but this has nothing to do with the respondent lawyers whom they had instructed. We have no doubt in our minds - and this has long been the accepted position - that the instructing client is the one primarily liable to pay the lawyer's fees as the person who retained the lawyer's services. This is frequently so even if the beneficial client, that is the person to actually benefit from the services (e.g. to be represented in a case) is a different person.

We uphold the learned trial Judge and dismiss this appeal, with costs to be taxed if not agreed.

Where however the agency agreement provides for the agent to be paid a sum to be fixed at the principals discretion, the court cannot imply a right to be paid a reasonable sum: to do so would be to usurp the principal's rights under the contract and would substitute the court's discretion for the agreed term.

Kofi Sunkersette Obu v. Struass **(1951) AC 253 (PC)**

An express term in an agent's contract provided that he would be paid £50 expenses per month. Commission would be paid at the principal's discretion. The agent claimed that he was entitled to a reasonable commission on a *quantum meruit* basis.

Held; that it would not interfere with the express term of the contract which provided that commission was payable only at the principal's discretion. (*Way v. Latilla* distinguished)

Can a principal do an act which would prevent the agent earning his commission?

Where the agent is to be remunerated by commission it may be necessary to consider whether the principal may prevent him from earning his commission, for instance by refusing to perform a contract negotiated by the agent. The agent may be able to claim damages if there is an express or implied term of the contract that the principal may not prevent or hinder him earning his commission, but the courts will generally be reluctant to imply such a term, particularly where its effect would be to restrict the principal's right to deal with his own property.[7]

Luxor v. Cooper (1941) 1 All ER 33

Cooper, an estate agent, was engaged to find a buyer for four of the principal's cinemas. The principal owners agreed to pay Cooper a commission of £10,000 if the cinemas were sold for £185,000 or more. Cooper found and introduced a purchaser who offered to buy the cinemas for £185,000. The principal, however, refused the offer and no sale took place. Cooper then sued the principal arguing that the principal was in breach of the implied term of the contract, that the principal would not so act as to prevent the agent from earning his commission.

Held; by the House of Lords that no such term could be implied in the agency agreement. A term can only be implied to give business efficacy to the contract; here no such term was necessary.

In the more recent case *Alpha Trading Ltd v. Dunnshaw Patterns*[8] the court, however implied a term. The agents were employed to arrange a contract for the sale of a quantity of cement. A contract was concluded and the principals deliberately breached the contract in order to take advantage of a rising market. The price was never paid and no commission was paid to the agent. The Court of Appeal was of the view that a rising market was a risk which the agent had not agreed to bear. The court felt that it was commercially necessary to imply such a term to prevent the principal playing a dirty trick on the agent. Without such a term, the court opined, commercial agency arrangements would be unworkable.

Where a principal has employed an agent for a fixed term, it will depend on the circumstances whether the principal is entitled to terminate the contract by ceasing to carry on business without having to pay further commission.

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[7] See *Bentall v. Vicary* (1931) 1 KB 253.
[8] (1981) QB 290.

L. French & Co. Ltd v. Lees Shipping Co. Ltd [1922] All ER Rep. 314

A firm of shipbrokers effected a time charter-party for eighteen months between the ship owners and the charters. One of its clauses provided that the shipbroker should be paid a commission of 2.5 per cent. 'hire paid and earned under it'. After four months of the period had expired, the ship owners sold the vessel concerned to the charters, and refused to pay any further commission to the shipbrokers as the charter-party was terminated by the sale.

Held; by the House of Lords, that no further commission was payable. No term could be implied that the ship owners would not terminate the charter-party by sale of vessel.

LORD BUCKMASTER (at p. 315):

> I agree that it is always a dangerous matter to introduce into a contract by implication provisions which are not contained in express words, and it is never done by the courts except under the pressure of conditions which compel the introduction of such terms for the purposes of giving what Lord BOWEN once described as 'business efficacy' to the bargain between the parties. There is no need whatever in the present case for the introduction of any such term. The contract works perfectly well without any such words being implied, and, if it were intended on the part of the shipbroker to provide for the cessation of the commission which he earned owing to the avoidance of the charter-party, he ought to have arranged for that in express terms between himself and the ship-owner.

Rhodes v. Forward (1874-80) All ER Rep. 476

A colliery owner appointed an agent to act for him on which basis for seven years in respect of all coal sent by the owner to Liverpool for sale. Four years later the owner sold the colliery, and refused to pay the agent any further commission.

Held; by the House of Lords, that no further commission was payable. No term could be implied into contract the owner would not sell the colliery and so disable him from supplying coal to the agent.

LORD CAIRNS, L.C. (at p. 481):

> If all the coal after it was got out of the colliery might have been sold elsewhere, if the colliery might not have worked at all, if the prices required to be fetched at Liverpool might have been such that the coal could not have been sold even after it went to Liverpool, if all that was in the power of the colliery owner and it could not be contented that there was any provision in this contract against any of those risks, why is it to be assumed with regard to the risk of the colliery owner to purchaser, that there is an implied undertaking against that one risk? An agreement of this kind is obviously made upon the chances of risks of the sort I have referred to, none of which is expressed in the agreement. That which is in the mind of the parties, the principal, on the one hand, and the agents, on the other, is, supposing it to be convenient that the business should go on, and the coal find its way to the port of Liverpool, all that we require to stipulate for is that, on the one hand, the principal should have the security that his will be sufficiently energetic to sell a certain quantity of coal in the year, and, and, on the other hand, that the agents should be able, if a sufficient quantity of coal is not put into their hands for sale, to terminate the engagement….
>
> The simple point here appears to me to be, as it is admitted that there is no express contract which has been violated: Can your Lordships say that there is any implied contract which has been violated? I can find none. I cannot find any implied contract that the colliery owner would not sell his colliery.

(b) The Right to Indemnity and Set-off

All agents, whether acting under a contract of agency or not are entitled to be reimbursed and indemnified against expenses incurred in the course of performing the duties. Where the agency is contractual the indemnity will be an express or implied term of the contract. Where there is no contract, the agent will still be entitled to indemnity, but the basis will be restitutionary. A non-contractual agent is only entitled to be indemnified against expenditure necessarily incurred on the principal's behalf, and cannot claim reimbursement for payments the principal would not have been obliged to make.

Generally indemnity covers expenses incurred while the agent was acting within the scope of authority. An unauthorised agent will be entitled to indemnity if his actions are ratified or where the requirements for agency of necessity are satisfied.

Where agency is contractual, the contract may extend or restrict the agent's right to indemnity. Alternatively the agent's right to indemnity may be restricted by customary implied term. Thus, for example, in the absence of an express right in the agency contract, an estate agent is not entitled to reimbursement of any advertising costs.[9]

In *Adam v. Morgan*[10] the agent incurred super tax in carrying out his principal's instructions and sought to claim indemnity. The court held that in absence of term to the contrary, a term will be implied that the agent is entitled to indemnity against the super tax incurred.

In *Read v. Anderson*[11] the agent was authorised to place bets and settle if they were lost. The agent placed bets and settled because they were lost. The principal tried to revoke the agency without indemnifying the agent for his expenses. It was held as the agent had incurred personal liability carrying out his principal's authority. The agency was therefore not revocable. On the other hand, in *Barron v. Fitzgerald*[12] an agent was instructed to take out life insurance in the names of the principals or in his own name. The agent took out insurance in the name of himself and another and claimed indemnity. It was held that as the agent had exceeded his actual authority he was not entitled to indemnity.

In *Bayliffe v. Butterworth*[13] a broker in Liverpool was instructed by his principal to sale shares. He did so to a second broker but failed to deliver them. The second broker sued for his loss and the first broker claimed an indemnity from his principal on the basis that it was a custom among Liverpool brokers to be responsible to each other for such breaches. The principal argued that by failing to deliver the shares, their agent exceeded his authority, and secondly that the custom was unreasonable and therefore, not a matter for the principal. It was held that the principals are bound by a reasonable trade custom. However, if they are aware of a custom, it matters not if it is reasonable or unreasonably. They are bound by it and liable to their agent.[14]

An agent acting reasonably, lawfully and within the scope of the agency is entitled to indemnity from the principal, and any countermand issued after the agent has incurred a liability to a third party will not prejudice this right though the agent refuse to obey it.

[9] See *Morris v. Cleasby* (1816) 4 M & S 566.
[10] (1924) 1 KB 751.
[11] (1884) 13 QB 779.
[12] (1940) 133 ER 79.
[13] (1847) 1 Exch. 425.
[14] See also *Rhodes v. Fielder, Jones and Harrison* (1991) 89 LJKB 15.

An agent who makes a reasonable settlement on a claim made on account of loss suffered owing to his principal's default is entitled to be indemnified by his principal.

Dalgety & Co. Ltd v R.E.D. Cluer (1961) EALR 178 (High Court of Tanganyika)

A contract for the sale of 100 bags of 'fresh' coconuts was entered into between the appellant company and an English company called Walkin Ltd. In fact, the appellants sold as agents for the respondents in respect of the same bags of coconuts, though no mention of the fact that the appellants were acting for the respondents, or that they were agents, was made to Watkin Ltd. On the same day the contract was made, the appellant sent a memorandum of the contract of sale to the respondent, which the responded signed and returned a copy to the appellant, effectively ratifying the transaction. The contract contained an arbitration clause, stipulating that any dispute arising out of the contract was to be resolved by an arbitrator in London. On arrival in London, the coconuts were rejected by Watkin Ltd, for not conforming to the contract description of 'fresh' coconuts.

The respondent repudiated this claim and instructed the appellant not to take any further action. The appellant, however, agreed to arbitration as under the contractual terms, and went on to pay the arbitration award to Watkin Ltd. The appellant then went on to debit the respondent's trading account, which the latter kept with them in respect of all their business transactions, with the amount paid to Watkin Ltd. In an action by the respondent for the balance on their trading account, the appellant counter claimed to be entitled to set-off what they otherwise owed the respondent, the amount paid to Watkin Ltd.

Held; by Sir Ralph Windham, C.J. (at 181). . .

> When one contracts with a third party for an undisclosed principal, one contracts with that party as an apparent principal and renders oneself primarily liable to him as principal, while at the same time as between oneself and the undisclosed principal whom one is screening from the third party, one enters that contract as agent of the undisclosed principal and can indemnify oneself and recover from the latter any sum that one has lawfully and reasonably paid in connection with the contract while acting within the scope of that agency. . . .

On the question whether the appellant was acting within the scope of the agency when he agreed to arbitration and paid the award thereunder, contrary to the express instructions of the respondent, Windham, C.J., stated the effect of such a purported revocation of authority upon the agent's right to indemnity, to be as follows:

(Citing *Lindley on Partnership*, 11th edition at p. 454):

> The position of an agent who has already acted upon his instructions and has thereby incurred a legal obligation to third parties is different. The better opinion is that in this case, he is not bound on the command of his principal to stop short and refuse to perform the obligation incurred. There is no doubt that as between him and his principal, an agent is entitled to obey the contrary orders, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry the instructions on which he has began to act as may be necessary to relieve himself from all the legal liabilities incurred before notice of the countermand, and having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions.

As to an agent's right of set-off, Windham, C.J., held as follows (citing the Indian Contract Act).

> An Agent may retain, out of any sums received on account of the principal in the business of the agency, all amounts due to him in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent**.**

On the facts, Windham, C.J., held that the appellants, in paying upon the award, were acting within the scope of their concealed agency and that their right to be indemnified by the respondent was not forfeited by reason of any non-compliance with the countermand which had been issued after the appellant had already incurred liability to Watkin Ltd as apparent principal. Further, the respondent's balance on the trading account amounted to monies received 'in the business of the agency' and was thus susceptible to set-off.

Judgment for the appellant.

Humphreys v. Moynagh (1913 - 14) Kenya Law Reports 44 High Court for the East African Protectorate (Kenya)

The plaintiff in this case was a farmer in Nairobi, who appointed the defendant as agent to dispose of some coffee in London, from his farm, and agreed to supply five tons for September delivery. The defendant was entitled to commission and reimbursement for costs. The plaintiff in fact failed to supply the five tons in time for the defendant to implement his contract with a London buyer, and as the London buyer had sold the coffee forward to a French firm, he deducted, from monies of the defendant in his hands, a sum equivalent to the indemnity he had paid to the French firm, and his costs. The defendant in turn retained monies of the plaintiff in his hands, claiming to be entitled to indemnity, commission and costs. The plaintiff brought this action for the return of his money.

Held by Hamilton, C.J. at p. 45, that

> It is clear that the defendant was the plaintiff's agent for the sale of the coffee, but that in relation to the London buyer, he was acting as agent for an undisclosed principal. The London buyer therefore had the right to sue the defendant, and the defendant had the right to be indemnified by the plaintiff, his principal, against the consequences of lawful acts done by him in the exercise of the authority conferred upon him.

Having found that the defendant was acting lawfully and within the scope of the authority conferred upon him in settling with the London buyer, the learned trial Judge held the defendant entitled to reimbursement of the sum paid to the London buyer and costs, and to his commission.

An agent is entitled to set-off, from monies of the principal received by him in the business of the agency, all sums properly due to him.

Graphic Africa Ltd v. Barclays Bank of Zambia Ltd & RDS Investment Ltd & Ronald Penza (Supreme Court) (SCZ Judgment No. 17 of 1995)

The appellant was an agent for an external company for the sale of goods on commission on their behalf and applied for approval to externalise the sum of £44,217,25 in respect of goods sold. The external company purported to cancel the agency agreement and

as a result of this the appellant was then concerned that the amount of damages might exceed the amount of its principal's assets in the country and accordingly gave instructions to the first respondent (the bank) to suspend payment of the money and to hold it as security for any future damages which might be payable to him. The first respondent contravened this instruction and paid the money through what was known as the exchange pipeline. The appellant instructed action in the High Court which granted damages only in the nominal amount of K10,000, holding that the money was in fact owing by the appellant to the recipient. On appeal there were two matters before the Court: the appeal from the decision of the High Court against the award of nominal damages only and the appeal on the merits of the appellant's action against the principal for breach of the agency agreement. The Court had recourse to the merits of the latter dispute and held that the total sum awarded after the appeal would be in excess of the amount wrongly paid out by the respondent.

Held; (1) that the appellant, as a successful party, was entitled to set-off the amount of such damages which he originally owed to the principal. The principal did not have assets in the country sufficient to meet the claim for damages awarded in the second appeal and the judge in the court below was unaware in any event that the appellant had any prospects of success in his action against the principal.

(2) Even if it was true, as suggested by the first respondent, that the money could only be released by it as a result of agreement between the parties and, in default of that, by the Court, had the money not already been paid out to the principal, it would have been appropriate for the trial Judge to have made an order for its refund to the appellant.

(3) That the first respondent was liable to indemnify the appellant in respect of any damages which the appellant was unable to recover from its former principal to meet the award of damages in the other case limited to the amount of £44,217.

Appeal Allowed.

GARDNER, Ag C.J.; We are satisfied that, as a successful party, the Appellant was and is entitled to set-off the amount of such damages against the amount which he originally owed to Xerox. It has not shown that Xerox, the first defendant in the second appeal,

has assets in this country sufficient to meet the claim for damages awarded in the second appeal, and we fully appreciate that at the time of the first trial the learned trial Judge was unaware even that the appellant had any prospect of success in his action against Xerox. The learned trial Judge found that because of the evidence of the first respondent's first witness that, under the exchange control regulations, the money could not be taken out of the pipeline by anyone except the beneficiary, the money had to remain in the pipeline, although the order not to pay it to Xerox had been obeyed by the respondent. Having regard to the fact that the learned trial Judge fount that DW1 had not given accurate evidence when he said that the letter of credit in this particular case was drawn by Xerox, who was both the drawer and the beneficiary, we would have thought that there was some doubt as to whether there existed such a strange regulation which provided that, although the appellant could stop payment of the money to Xerox, he could not have access to his own money which was in the pipeline. However, despite diligent cross-examination by Mr Chongwe in the court below, the witness was adamant about this evidence and it would appear that if, it is true, the money could only be released as a result of agreement between parties and, in default of that, by an order of the court. In the circumstances, had the money not already been paid out to Xerox, it would have been appropriate for the learned trial Judge to make an order for its refund to the appellant.

In the event there is no doubt that the appellant should be protected in case Xerox, the first respondent in the second appeal, had insufficient money in Zambia to meet the award of damages in that case. For that reason and in spite of the fact that the learned trial Judge in this case was not aware of what would be the result of that appellant's claim, the proper order to have been made was a declaration that the first respondent in this appeal was liable to indemnify the appellant in respect of any damages which the appellant is unable to recover from Xerox as a result of their having insufficient funds in this country to meet the award of damages in Appeal No. 71 of 1994. Such indemnity should be limited to the Kwacha equivalent of £44,217,25, plus interest at the average short-term deposit rate since the date of wrongful payment to the date of this judgment.

For the reasons we have given the appeal is allowed. The order for payment of nominal damages of K10,000,00 is set aside, and in its place we make a declaration in favour of the appellant in the above terms which shall stand as a judgment in favour of the

appellant for any sum up to the aforesaid limit which may be required to settle the damages in Appeal No. 71 of 1994.

Set-off and the undisclosed principal

Rabone v. Williams (1785) 7 Term Rep. 360

An agent who was acting for undisclosed principal sold some goods to the defendant. The defendant was in an unrelated transaction, owed money by the agent. Subsequently, the principal intervened on the contract and sought to recover from defendant for the price of the goods. The defendant argued that he was entitled to set off the debt owed by the agent against his liability to the principal.

Held; that where the agent delivers his principal's goods in his own name without disclosing the agency, the purchaser contracts with the agent and enjoys the right of set-off against the agent. If the real principal intervenes on the contract, the purchaser's right of set-off on the contract still remains. The defendant may have his set-off against the real principal.

Cooke v. Eskelby (1887) 12 AC 271

The agents, a firm of brokers owed money to a third party, Cooke. In the course of normal duties, the agents sold goods on behalf of a principal and sometimes sold on their own behalf. The third party was aware of this state of affairs. On one occasion the agent sold some cotton to the third party. The principal for whom the brokers were acting in this instance was undisclosed. The real principal then intervened on the contract and sought to recover the purchase price from the defendant. The third party contended that he was entitled to set-off the debt owed by the agent against the real principal.

Held; that the right of set-off could not on the facts of this case be effective against the real principal. The doctrine which allows a set-off against an agent to be effective against his (undisclosed) principal is based upon estoppel. Consequently, it only operates where the principal has represented to the third party that the agent is the principal. That was not the case here because the third party, Cooke was not concerned if the brokers were acting as agent or as principal.

(c) The Right to a Lien

In order to protect his right to remuneration or indemnity, an agent may be entitled to a lien over property belonging to the principal which is in his possession. A lien is a right to retain property by way of security until some debt is paid.

There are two types of lien; a general lien and a particular lien. A person entitled to a general lien is entitled to retain any property belonging to the debtor until the debt is discharged; a particular lien only entitles the beneficiary to retain an item of property until debts relating to that property or related transaction are discharged.

The law is reluctant to recognise rights to general lien and most agents are only entitled to a particular lien. Bankers, factors, solicitors and stock brokers are amongst the agents entitled to a general lien.

An agent may exercise a lien over property belonging to his principal which comes into his possession in his capacity as agent by lawful means so long as it remains in his lawful possession. Generally, the right to a lien depends on possession so that it is lost if the agent voluntarily parts with the property. The lien is not lost if principal recovers the goods by trick.

The law recognises constructive possession for purposes of the agent exercising a lien over goods held by a bailee if the bailee atones to the agent. Thus in *Bryans v. Nix*[15] a principal employed a carrier to transport goods to his agent in Dublin. He delivered the cargo to the carrier together with documents which indicated clearly that the carrier held the goods for the agent. It was held for an agent to have a lien on the goods he must be in possession of them. However constructive possession is enough. For this purpose, the agent had possession enough for purposes of exercising his lien.

The agent's possession of his principal's goods must be lawful if he is to legitimately exercise his lien over them.[16]

An agent will lose his lien if his conduct indicates an intention to waive. It may also be excluded expressly in the agency contract. Thus in *Re Bowes, Earl of Strathmore v. Vane*[17] a life insurance policy was deposited with a banker with instructions that it should be used as security on overdrafts over £4,000. Against the background that a banker normally enjoys a customary general lien on its customer's property against any debts on the account, the bank sought to exercise a lien over the policy. The court held that the terms of the agreement may expressly or impliedly exclude a lien. In this particular agreement, the terms impliedly excluded the banker's customary general lien.

Apart from voluntary loss of possession and waiver, the lien will also be lost when the principal tenders the sum due.

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[15] (1839) 4 M&W 775, 150 ER 1630.

[16] See for example *Taylor v. Robinson* (1818) 125 ER 536 where the agent was not in lawful possession of the principal's staves.

[17] (1886) 33 Ch D 586.

Forth v. Simpson (1849) 13 QBD 680

Forth was a race horse trainer who kept stables. Worley sent horses to him to be kept and trained, but could retake possession of them at anytime for the purpose of putting them in a race. Forth claimed a lien on the horses against unpaid stabling charges.

Held; where the owner can remove the horses at any time the trainer has no right of continuing possession and so has no lien.

Note: *Although this is not a case of agency, the principle is of general application.*

An agent is entitled to set-off, from monies of the principal received by him in the business of the agency, all sums properly due to him.

In *Graphics Africa Limited v. Barclays Bank of Zambia Limited and RDS Investments Limited and Penza*[18], the court held that an agent was entitled to set-off amounts owed him by the principal against monies held on behalf of the principal by such agent. The court in essence suggested that the agent was entitled to hold on to the principal's money until the set-off had been done.

2.11 Termination of the Relation of Principal and Agent

The relationship of principal and agent may be terminated by an act of the party to it or by the operation of the law. The following are the ways in which the relationship may be brought to an end:

(a) Notice - A notice of revocation given by the principal to the agent effectively terminates the relationship. Likewise, a notice of renunciation may be given by the agent to the principal terminating the relationship. Where no notice period is stipulated, either party may terminate by giving reasonable notice.

(b Completion of the assignment - Where the agency is created for a specific transaction, it will terminate when the transaction has been completed. Authority in such an instance will have been given for that transaction only, i.e., in the case of a special agency.

(c) Mutual agreement - The principal and the agent may by mutual agreement terminate the relationship which they created by mutual consent in the first place. The principal discharges the agent from further liability and duty under the agency in consideration for a reciprocal discharge from the agent.

(d) Lunacy death or bankruptcy - Generally the death, lunacy, or bankruptcy of the principal or the agent will bring the relationship to an end.

[18] (1995-97) ZR 102.

(e) Illegality - When the agency becomes unlawful by reason of transgressing a positive law, or being contrary to public policy, the agency will terminate.

(f) Dissolution - Where the principal is a corporation, and probably also where the agent is a corporation, its dissolution will bring the relationship to an end.

(g) Destruction of the subject matter - Where the subject matter of the agency is destroyed the agency will terminate. The principle regarding the common law doctrine of frustration will no doubt have a role to play here.

(h) Expiration of time - Where the agency is for a fixed period of time, it will come to an end at the expiration of that time.

Rhodes v. Forward **(1874-80) All ER Rep. 476**

(The facts are given in the part dealing with an agent's commission)

> LORD CHELMSFORD (at p. 482): . . . But what is there in the agreement to prevent its coming positively to a premature end, either by the agents giving up business, or the owner giving up the colliery? The mere agreement for seven years, or the provisions for the determination of it on either side, will not be sufficient, and if it had been intended that the relations of the parties should absolutely continue for seven years, it ought to have been provided for. Not having been provided for, it cannot, in my own opinion, be taken to have been intended. It was conceded that the appellant was not bound to send his coals to Liverpool. By sending them elsewhere he would voluntarily disable the agreement itself; what difference of point of fact can there be in disabling himself from performing it by parting with the colliery?

Where a principal has employed an agent for a fixed term, it will depend on the circumstances whether the principal is entitled to terminate the contract by ceasing to carry on business without having to pay further commission.

Reigate v. Union Manufacturing Co. **(Ramsbottom), Ltd (1918) 118 LT 479**

> SCRUTTON, L.J. (at p. 483): This case adds another to the long line of cases in which the courts have had to consider whether, with a contract made with a business firm or company, it is possible to terminate the carrying on of the business by the firm or company and so terminating the contract. A very large number of cases have been decided and a great amount of time has been taken up

in endeavouring to see whether any principle can be extracted from these cases which will guide the courts in future cases… Before you consider what has been decided in other cases, the first thing is to see what the parties have agreed to in the case under consideration; and, secondly, before troubling about seeing what you are to imply into the contract, the first thing is to see what the parties have understood by what the parties have expressed in the words there used, you are not to add implications because you think it would have been a reasonable thing to have put into the contract, or because you think you would have insisted on such a term being in the contract. You must only imply a term if it is necessary in business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case"?, they would have both replied, Of course, so-and-so. We did not trouble to say that; "it is too clear". Unless you can come to some such conclusion as that, we ought not to imply a term which the parties themselves have not when they have expressed other terms.

Turner v. Goldsmith (1891), 64 LT 301

Goldsmith, a shirt manufacturer, employed Turner for a period of five years, on commission as a traveller. By a clause in the contract Turner stated that he was to do his utmost to sell 'any shirts or other goods manufactured or sold' by Goldsmith. In due course, Goldsmith's factory was burnt down, and Goldsmith went out of business. Turner then sued him for breach of the agreement, and claimed damages for loss of commission.

Held; by Court of Appeal that the action succeeded. The agreement to pay commission was not conditional on the continued existence of the factory, for there was no proof that it was impossible for Goldsmith to have continued his business elsewhere. Turner's employment was not confined to articles manufactured by Goldsmith. It applied to all goods sold by him.

LANDLEY, L.J. (at p. 302): Then it was said that there is no undertaking by the company to go on manufacturing. It is true that there is no express, nor, so far as I see, any implied undertaking by the company to manufacture even a single shirt; they might buy the articles in the market. The plaintiff then says, 'I am

entitled to damages for your breach of agreement to employ me for five years'. The defendant pleads that the agreement was conditional on the continued existence of his business. On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell. How then can such a condition as the defendant contends for be implied?

The contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, as I have already observed, the plaintiff's employment was not confined to articles manufactured by the defendant. The action, therefore, in my opinion, is maintainable.

KAY, L.J. (at p. 303): If it had been shown that not only the manufactory but the business of the defendant had been destroyed by *vis major* without any default of the defendant, I think that the plaintiff could not recover. But there is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement. The contract is peculiar; it is to employ the plaintiff for five years certain, with either party to determine the employment at the end of that time by notice. The defendant has ceased to employ the plaintiff within the five years, and contends that a condition is to be implied that the manufactory must continue to exist. The plaintiff is not seeking to import anything into the contract; the defendant seeks to import the implied condition I have proved mentioned. I cannot import any such condition. If it had been proved that the defendant's power to carry on business had been taken away by something for which he was not responsible, I should say that there was no breach of agreement; but here it was not taken away, and our decision is quite consistent with the class where the parties have been excused from the performance of a contract because it was considered to be subject to an implied condition.

Chapter Three

The Law of Sale of Goods in Zambia

3.1 Introduction

The contract for the sale of goods is one of the oldest, one of the most necessary and probably the most common type of commercial transaction. Millions of such contracts are concluded each single day and the majority of them do not give rise to any problem at all. Food, clothing, televisions, toys, motor vehicles, bicycles, etc., used by the family will normally have been acquired under contracts of sale of one form or another. That contracts of sale are an important part of everyday life in Zambia, therefore, is beyond debate.

This chapter deals with contracts of sale of goods in Zambia. It was pointed out in chapter one that Zambian commercial law borrows heavily from English law. This inevitably means that English case law on sale of goods is very much a part of the law on sale of goods in Zambia. A good number of English cases on sale of goods are, therefore, considered in this chapter. For purposes of the chapter, reference to the Act, unless the context indicates otherwise, means reference to the Sale of Goods Act of England of 1893.

3.2 The Sale of Goods in the Zambian context

The law governing the Sale of Goods in Zambia is contained in the English Sale of Goods Act 1893 and supplemented by the common law principles where these have not been expressly altered by statute. In addition, various Acts, such as the Factors Act, 1889, apply. The principal Act, however, is the Sale of Goods Act of 1893, which has been amended in the United Kingdom through the Misrepresentation Act and the 1979 Sale of Goods Act (consolidating). The Sale of Goods Act 1893 was received in the Zambian legal system as an English Act of general application through the English Law (Extent of Application) Act.[1] Reference in this chapter to the Sale of Goods Act will be to the English Sale of Goods Act of 1893, unless otherwise stated.

In considering the law pertaining to the sale of goods in Zambia, a number of factors have to be taken into account. Firstly, the Zambians society is not very sophisticated. A considerable number of Zambian are semi-literate and do not particularly take keen interest in entering into complex sale of goods transactions. Understanding Acts of Parliament is

[1] Cap 11 of the Laws of Zambia.

not of primary interest to many people, even to the educated. Further more, consumer protection law in Zambia is not well developed, nor is it even well understood. To most Zambians, therefore, the provisions of the Sale of Goods Act remain irrelevant. Secondly, the majority of sales take place in open local markets such as Kamwala, Soweto and Chisokone markets or in shops across the country, where individual buyers and sellers openly strike oral bargains, examine the goods, and payment and delivery effected simultaneously. The process is simplified. The main concern is whether one has got a good bargain at that point. In many cases in fact, especially where goods are sold by entrepreneurs now sadly referred to as street vendors, neither party could truly identify and locate the other should either party be unhappy with the bargain. Even where the sale takes place in a shop which can easily be identified, the primary concern of the parties is to conclude the deal and move on. There is hardly any contemplation of the consequences of breach or possible breach of any sale condition or warranty. Thirdly, in many sales transactions, sales are concluded on the basis of personal connections and should the goods bought and sold be unsatisfactory in any way, this will be made good in one way or another when the buyer next calls. Fourthly, Zambian people are generally not very litigious. Courts are the last places many people would like to go to if they can avoid it. Litigation is costly and considerably inconveniencing and many people find it truly worth avoiding.

A pertinent question is whether the interpretation of the Sale of Goods Act of England of 1893 should take cognisance of the local circumstances. Many sales transactions in Zambia involve small sums of money, the kind of money that would not justify full scale litigation. Local courts would aptly handle such small claims if they were familiar with the provisions of the Sale of Goods Act. Perhaps the Small Claims Courts for which the law is already in place, but which have not become functional yet, would fill this vacuum.

The Sale of Goods Act 1893 codified the common law on sale as developed through mercantile practice. The Act is not fully comprehensive because common law rules such as those pertaining to the principal and agent relationship, fraud, misrepresentation, duress, mistake, etc., are made applicable to sales contracts, provided such rules are not inconsistent with the express provisions of the Act.[2]

The Sale of Goods Act preserves freedom of contract for it was not intended to make a contract for the parties. The parties remain free to expressly conclude a contract on terms that they please.

The rule for constructing a codifying statute such as the Sale of Goods Act was discussed at length by the House of Lords in *Bank of England v. Vagliano Brothers*[3] where Lord Hershell stated that:

[2] See section 61 (2) of the Sale of Goods Act.
[3] (1891) AC 107 at p. 145.

> The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the laws and not to start with inquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

However, although this approach is established, it is often ignored and cases decided before the 1893 Act are examined for guidance as to the meaning of the Act. In the 1987 case of *Aswan Engineering Establishment v. Lupdine Limited*,[4] for example, the Court of Appeal had to consider the meaning of merchantable quality in the light of a statutory definition inserted in the 1973 Act, which required goods to be reasonably fit for the purpose for which such goods are ordinarily supplied. The Court held that notwithstanding the clear words of the 1973 Act the new definition in the Act made no difference to the law as laid down in old cases.

In any case, reference to the law before the Sale of Goods Act is justified if provisions of the Sale of Goods Act are ambiguous or doubtful or silent on any aspect.

3.3 The Nature of a Contract of Sale

(a) What is a Contract of Sale?

A contract for the sale of goods is defined in the Sale of Goods Act. Section 1 (1) of the Act provides that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price.

It quite obviously includes two distinct transactions: a sale and an agreement to sell. Where ownership (called 'property') is transferred immediately from the seller to the buyer, the contract is called a 'sale'. Where ownership of the goods is to be transferred at a future time or subject to some condition to be fulfilled, the contract is called an agreement to sell.

The distinction between a sale and an agreement to sell is important because several consequences flow from the passing of property. It is, therefore, important to understand at what point in the transaction the property passed. The following considerations are relevant in this regard:

[4] (1987) 1 All ER 135.

(a) Unless otherwise agreed, the risk of accidental loss or damage passes with property.
(b) Once the property has passed from seller to buyer, the seller can sue for the price even if there has not been delivery i.e., no transfer of possession.
(c) If property has passed to the buyer he may claim the goods if the seller becomes bankrupt or goes into liquidation.
(d) If the seller resells the goods after the property in them has passed to the buyer, the second buyer acquires no title to the goods unless he is protected by one of the exception to the *nemo dat* rule.

The statutory definition of a contract of sale recognises four basic ingredients in any contract of sale:

1. It is first and foremost a contract between a seller and a buyer
2. The subject matter of that contract is goods.
3. The purpose of the contract is to transfer property in the goods.
4. The transfer of the property in the goods is for a money consideration called the price.

The essential elements of a contract of sale are now examined below.

A contract between a seller and a buyer

Like any other contract a contract of sale of goods must satisfy certain minimum requirements if it is to be recognised as a contract and enforced as such. There must be an offer and an acceptance, sufficient consideration and an intention to enter into legal relations. The contract must not fail any of the tests set for a valid contract such as not being unlawful or contrary to public policy. Vitiating factors such as duress, mistake and misrepresentation, apply to contracts of sale to the same extent as they do to other contracts.

Section 3 of the Act states that a contract of sale may be made in writing with or without seal or orally or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. There is, therefore, generally no formality that must be satisfied in concluding a contract of sale.

The Sale of Goods Act does not contain any provisions as regards offer and acceptance relating to the actual formation of the contract. An exception, however, is in section 58 of the Act which describes sales by auction. In the absence of any provision as to offer and acceptance, the general law of contract applies in the formation of a contract of sale.

The terms of the contract must be certain and depending on the facts of each particular case the court may imply terms into the contract.

Acceptance of an offer must be communicated (see *Entores v. Far East Corporation*[5]).

(b) Terms of a Contract of Sale

The normal principles of contract law determine the contents of a contract of sale. A statement will become a term of a sale of goods contract if the maker warrants it to be true and the maker intends it to be binding. Mere representations may not be contractual terms.

Oscar Chess Ltd v. William (1957) 1 WLR 370

A seller of a second hand car in part exchange for another innocently represented, relying on the log book, that the car was a 1948 Morris 10 saloon. The car turned out in fact to be a 1939 model although it had the same outward appearance.

Held; that the statement was a mere innocent representation and was not intended to be a term of the contract.

Contractual terms may be classified as warranties or conditions. The Sale of Goods Act distinguishes between conditions and warranties not so much by reference to their intrinsic nature but rather by reference to the buyer's remedies. The Act clearly recognises that a condition is a more vital term the breach of which usually entitles the innocent party to treat the contract as repudiated. A warranty is a subsidiary term, the breach of which only entitles the innocent party to damages. In accordance with section 11 of the Act, where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as breach of warranty, and not as a ground for treating the contract as repudiated.

Norman v. Overseas Motor Transport (Tanganyika) Ltd (1959) EALR 131 (Court of Appeal of East Africa)

The appellant bought a car from the respondent. The contract provided that the respondents liability would end upon delivery of the car, or soon thereafter, in a road-worthy condition. The car was found to have various defects on delivery. The appellant complained, and the defects were rectified. He then shipped the car to Cape Town from England and drove it to Tanganyika. On the journey there, the car's carburetor developed a fault and it began to overheat. The plaintiff, fed up at this point, delivered up

[5] (1955) 2 KB 357.

the car and demanded the purchase price. He averred that the car had not been in a road-worthy condition at the time of delivery.

Held; that the appellant must be deemed to have treated all breaches of condition as breaches of warranty under section 13 of the Tanganyika Sale of Goods Ordinance, similar to section 11 of the English Sale of Goods Act, 1893. He could thus not repudiate, but could merely claim damages for breach of warranty.

As to the overheating, it had only occurred long after delivery so that the respondents had validly exempted liability with regard to it.

McKISACK, C.J.: . . . In the circumstances, I think that the appellant must be held to have treated any breach of condition arising from the defects other than overheating as a breach of warranty under s. 13 of the Ordinance. Since the defects were all remedied and he continued to use the car, I do not think he can now rely on them to repudiate the contract. . . .

The terms of the contract of sale may be express or implied. Sections 12 to 15 set out the most important terms that are implied by the Act. Whether or not the implied terms will apply in any given circumstances will depend on the precise terms of the contract. It is, therefore, necessary to distinguish statements that form part of the contract from those which do not.

(c) The subject matter of the contract

As already stated, the subject matter of a contract of sale is goods. This is a distinguishing characteristic of a contract of sale from other forms of contract.

Goods are defined in section 62 of the Act as including

> all chattels, personal other than things in action and money…. The term includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed under the contract of sale.

This definition, therefore, excludes such things as land and things (choses) in action such as shares, trade marks, debts and negotiable instruments.

It has been held that goods include ships, crops, minerals, energy and generally things forming part of the land but not land itself.[6]

[6] See, *Behnke v. Bede Shipping Co*. (1927) 1 KB, *Bentley Bros. v. Metcalfe* (1906) 2 KB 548, *Morgan v. Russel* (1909) 1 KB 357.

***Settlement Trustees v. Nuran* (1970) EALR 570 (Court of Appeal of Nairobi)**

The respondent bought from an owner of land, which owner was the predecessor in title to the appellant, the barks of certain trees growing on the land. The respondent was obliged to remove the trees from the land within a limited period of time. The question arose as to whether the sale was one of an interest in land, void for non-registration, or a simple sale of goods contract not requiring registration. The issue was the interpretation of section 2 of the Kenyan Sale of Goods Act.

COLLERIDGE, C.J.: Where the contract of sale contemplates that the buyer should derive an interest from the further growing of the thing sold, from the nutriment to be afforded by the land, the contract is to be considered as one for an interest in land, but where the process is over or where the parties agree that the thing should be removed from the land immediately or within a limited period of time, the land is to be considered as a mere warehouse for the thing sold, and the contract as one of sale of goods simpliciter. The one exception to this rule is with regard to emblements such as corn, which are produced from labour and industry, rather than grow spontaneously. A contract for the sale of these is always one of sale of goods whether they have reached maturity or have still to derive nutriment from the land. On the facts, it was held that the contract was one of sale of goods. *Marshal v. Green (1875)*[7] applied.

(d) Transfer of property

The transfer of property in goods is the very essence of a contract of sale. The Act deliberately uses the term property to signify ownership rather the physical chattel subject of the contract of sale. A section is devoted to discussing passage of property

(e) Money consideration

From the definition of a contract of sale in section 1 of the Act, it is obvious that the consideration must be money and a barter transaction is not within the scope of the Act. This aspect is considered in more detail below in the section dealing with the price.

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[7] (1875) 1 CPD 35.

3.4 Contract of Sale contrasted with similar Contracts and Transactions

There are many contracts which are not governed by the Sale of Goods Act but whose features may resemble those of a contract of sale. Examples of these are set out below.

(i) Sale and Gift

Provisions of the Sale of Goods Act do not normally apply to a gift. A gift involves a transfer of property in goods without any consideration. Unless the transfer is by deed, it does not bind the parties to it. Where 'free gifts' are offered by a retailer or manufacturer as part of a sales promotion there may be a contract, but the contract will generally not be one of sale. In *Esso Petroleum Limited v. Customs & Excise Commissioners*[8] a petrol company offered free coins to drivers who bought four gallons of their petrol as a sales promotion. Each coin bore the likeness of a member of the 1970 England football World Cup squad. Motorists were encouraged to collect the full set of coins. The House of Lords had to decide whether the coins were supplied for retail sale in order to determine whether the company was liable to pay purchase tax on their value. It was held that there was no contract of sale.

(ii) Sale and Exchange

A contract of sale is one for the transfer of property for a money consideration called the price. The price is definitely money; section 61 excludes money in its definition of goods. It follows that a transaction of barter cannot be treated as a sale. The Sale of Goods Act is not applicable to barter arrangements. Problems have, however, emerged where transactions are partly money and partly goods.

Nchanga Farms & Mulungushi Investments Ltd v. Misundu Agricultural Supplies Ltd (Supreme Court of Zambia) Appeal No. 62 of 1995

(The facts of the case appear from the judgment of the Court delivered by Chaila, J.S.)

> The appellants' appeal in this matter is against the decision of the High Court awarding interest to the respondent and awarding

[8] (1976) 1 All ER 117.

consequential damages to the respondent. The appellants and the respondent had good business relationship. The respondent used to supply goods to the appellants and the appellants had no problem in making payments for the goods supplied. In 1993 the respondent supplied goods in form of fertiliser and empty grain bags to the first appellant. They agreed initially that the payment would be done in kind, i.e., the appellant would pay in form of maize. They further agreed that should they fail to pay maize to the respondent then the payment will be treated as credit sale. There was some correspondence on the supply of urea fertiliser and that fertiliser was never supplied. The parties failed to agree on the price of maize per 90kg bag. Some maize was delivered to respondent but when the negotiations failed the first appellant discontinued delivery of maize and the dispute then arose and the matter was treated as credit sale. The first appellant paid the principal but there remained the question of interest and from what date. The appellant also claimed from the respondent some losses on their failure to deliver urea fertiliser.

The learned trial judge considered the evidence before him and awarded interest at bank rate as from the end of June 1993. The learned trial Judge dismissed the counter claim made by the first appellant for failure by the respondent to deliver urea fertiliser. The learned trial Judge further awarded damages to the respondent for consequential losses. During the hearing of the appeal the counsel for the appellants after the submission by the counsel for the respondent on consequential losses and on counter claim conceded that they did not have sufficient evidence to prove their counter claim. We took this as an abandonment of their complaint against the judge's findings. On counter claim Mr Chitabo counsel for the respondent also conceded during his submission that the date from which interest was to run should have been 1 August 1993. The court was now faced with one issue; that is damages for consequential loss. This was contained in the third ground of appeal which was as follows:

> The learned trial Judge erred in principle when he arbitrarily awarded consequential damages as claimed by the respondent; and in any event this particular award would be excessive if assessed or calculated in accordance with the trial Judge in deciding on the issue of justifying the award in the face of cogent evidence to the contrary.

The learned counsel further in his argument argued that the consequential loss was awarded in the absence of evidence and that the only evidence available was merely a statement in the court below. The statement was to the effect that the appellants should have paid within thirty days of delivery of the goods and that they waited for nine months to get the payment. In the meantime the Kwacha had depreciated. The learned counsel in his argument complained that it was difficult to appreciate the loss since there was no documentary evidence. The loss should have been proved in writing and there should have been evidence. He concluded that the court erred in awarding damages for consequential loss. He further complained that it would be difficult for the District Registrar to compute interest.

Mr Chitabo, counsel for the respondent argued that the learned trial Judge was entitled to award damages for consequential loss and it was proper matter for the District Registrar to assess. From the proven facts the respondent was to be paid through delivery of maize and that was going to take place after harvest of maize. This was going to come after the period of thirty days. According to the facts before us some bags of maize were delivered but there was a dispute on the price of maize and this led to the cancellation of the deal and the deal or transaction became a credit sale. The learned trial judge awarded interest at bank rate. From the evidence before the lower court the respondent did not adduce any evidence to prove special or consequential loss as a result of the delay in getting paid.

They only complained of the Kwacha devaluating at a very fast rate. Mr Chitabo further argued that bank rates had risen at a very fast rate. There was no other evidence to prove the loss and the award of interest at the bank rate in our view this took into account the loss. We agree with the submissions of Chamutangi that the consequential loss was not proved. No evidence was adduced to prove how much was lost. We agree therefore that the learned trial judge misdirected himself in awarding this consequential loss. We therefore set aside the finding of the learned trial judge. We allow this appeal. Having regard to the concessions made by both counsel during the appeal we make no order as to costs.

Note: *This case is typical of the rather unfortunate manner in which counsel present issues in their client's cases before the court and the manner in which the courts deal with matters submitted to them. In this case, for example, one issue that should have been raised and addressed was whether this was a contract of sale or one of barter considering that the consideration was not wholly in money. Secondly it should have been*

considered whether section 10 of the Sale of Goods Act relating to time of payment was relevant or not. While clearly treating the contract as one of sale, neither counsel nor the court made any reference to the Sale of Goods Act.

Aldridge v. Johnson (1957) 7 E & B 885; 119 ER 1476

The contract between the parties was transfer by one party of 100 quarters of barley to the other party for £1.1s 3d per quarter in exchange for the other's transfer of 32 bullocks, valued at 6 each, plus £23 in cash.

Held; that this was a contract of sale.

Note: *In assuming that the contract was one of sale, the significant factor in that case appeared to have been that both the barley and the bullocks had been valued in monetary terms. The case was however fought on an entirely different point.*

(iii) Sale and Supply of Services

It is material to distinguish between a contract of sale and one for the supply of services for a number of reasons. For instance, issues may arise and the resolution of such issues may turn on the question whether a contract falls under any one of either, e.g., a buyer of goods pays part of the price in advance. If the contract is one of sale (subject to seller's claim for damages for the default) he may recover the goods but may not recover if the contract is one for the supply of services. Implied duties of the seller as to the quality and fitness of the goods or services supplied in sale of goods contract may not apply in a contract for the supply of goods because in contracts for the supply of goods, the supplier's duties generally are those of due care only.

The courts have applied two different tests where the contract involves the production and supply of finished goods. In *Clay v. Yates*[9] there was a contract under which a printer was to print a book with the printer supplying the paper. The court used the 'substance of the contract test' and interpreted it as a contract for work and materials. In *Lee v. Griffin,*[10] on the other hand, the court was of the view that whenever a contract ends in the production of a finished product which is then transferred under the agreement, then there is a contract of sale. The court accordingly held in that case that the contract under which a dentist was to make and supply false teeth was a contract of sale of goods.

[9] (1856) 1 H & N 73.
[10] (1861) 1 B & S 272.

Robinson v. Graves (1935) 1 KB 579

The plaintiff, William Howard Robinson, who was a portrait painter, claimed to recover from the defendant, Frederick Beresford Johnston Graves, the sum of 262*l.*10*os*. as being the agreed fee for a portrait commission given by the defendant to the plaintiff.

The plaintiff argued that by a contract made verbally on 27 July 1932, the defendant commissioned the plaintiff to paint, and agreed to pay for, a three-quarter length portrait of a lady, who had since become the defendant's wife, for the sum of 250 guineas, one-half of which was to be paid in advance, subsequently reduced to 100 guineas paid in advance. The plaintiff commenced to paint the portrait, the lady giving him a sitting for that purpose, but the defendant on 2 August 1932 wholly repudiated and put an end to the contract.

The defendant by his defence denied that he had given a commission to the plaintiff to paint the portrait or had agreed to pay the plaintiff 250 guineas therefore. He also relied upon the provisions of s. 4 of the Sale of Goods Act, 1893. (1) Action, J. accepted the evidence of the plaintiff held that a contract for the painting of the portrait had been made, but that according to the decision in *Lee v. Griffin* (2) it was an agreement for the sale of goods of the value of more than 10*l*. of which contract there was no note or memorandum in writing, and that therefore it came within s. 4 of the Sale of Goods Act, 1893, and was not enforceable by action. The plaintiff appealed.

Held; that it was a contract for work and labour and not for the sale of goods, as the substance of the contract was that skill and labour should be exercised upon the production of the portrait, and that it was only ancillary to that contract that there would pass from the artist to his customer some materials namely, the paint and the canvas, in addition to the skill and labour involved in the production of the portrait, and that therefore the plaintiff could recover notwithstanding that there was no note or memorandum in writing of the contract.

Clay v. Yates (1856) IH & N 73; 25 LJ (Ex.) 237 and *Lee v. Griffin* (1861) IB & S 272; 30 LJ (QB 278 considered. Dictum of Blackburn, J. in *Lee v. Griffin* IB & S 278; 30 LJ (QB) 254 doubted.

In *Hyundai Heavy Industries Ltd v. Papadopoulos*[11] the House of Lords held that a contract for the construction and supply of a ship was a contract of sale of goods. The court acknowledged, however, that the contract was not a pure sale and had some elements of a building contract.

(v) Sale and Hire Purchase

(See Chapter Four at page 305)

3.5 Capacity to enter into a Contract of Sale

Section 2 of the Sale of Goods Act provides that capacity to buy and sale is governed by the general law regarding capacity to contract and to transfer and acquire property.

A proviso to section 2, however, states that infants and persons with mental incapacity are obligated to pay a reasonable price for any necessaries sold and delivered to them. Necessaries are defined as goods suitable to the condition in life of such infants or other person taking into account the actual requirements at the time of the sale and delivery.

Section 1 of the Infant Relief Act, 1874 provides that contracts for goods supplied or to be supplied, other than contracts for necessaries with infants shall be void.

Stocks v. Wilson (1913) 2 KB 235

> An infant induced the plaintiff to sell him certain goods worth £300 by fraudulently stating that he was of full age. He then sold some of the goods and mortgaged the rest, obtaining a total of £130. The plaintiff sought to recover the £130.
>
> *Held;* that the plaintiff could not recover.
>
> A contract of sale of goods entered into by a person who is drunk or is insane, and thus does not understand what he is doing, is voidable at his option, provided the other party knew of his condition. In *Imperial loan Company v. Stone*[12] Lopes, L.J. stated thus:
>
> > A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound

[11] (1980) 2 All ER 29.
[12] (1892) 1 QB 599.

> mind. In order to avoid a fair contract on the ground of insanity the mental incapacity of the one must be known to the other party. A defendant must plead and prove both his insanity and the knowledge of the plaintiff: the burden of proof of both these facts lies on the defendant.

3.6 The Status of the Subject Matter of the Contract of Sale

As already noted from the definition of a contract of sale as contained in section 1 of the Sale of Goods Act, the subject matter of a contract of sale is goods. Goods may be in existence at the time of the contract or they may yet to be acquired or manufactured.

(i) Existing and Future Goods

In terms of section 5 (1) of the Act, goods subject of a contract of sale may be in existence or they may be future goods. They may be identified and agreed upon by the parties at the time the contract is made. These are also known as specific goods. Alternatively they may be goods to be manufactured or acquired by the seller after the conclusion of the contract, or they may be unascertained goods in which case they are referred to by the parties by description only, for example, two bales of salaula out of a cargo of 20 bales, or 'a sale of a tape recorder.'

(ii) Ascertained and unascertained goods

The term 'ascertained goods' is not defined in the Act but in *Re Wait*[13], Lord Atkin was of the view that the expression probably means identified in accordance with the agreement after the contract is made.

Future goods are usually unascertained, and in accordance with section 16, property in them will not pass from the seller to the buyer at the time the contract is made until such goods have been ascertained. Even after they have been ascertained the passing of property may be deferred until the fulfilment of a condition making then deliverable. During this time the buyer would not obtain specific performance of a contract (because property will not have passed).

Sections 6 and 7 of the Act which deal with perishing of goods clearly envisage specific goods (i.e., goods in existence at the time of contract).

Section 6 provides that where a contract is for the sale of specific goods and without the knowledge of the seller they perish at the time the contract is made, then contract is void. Perishing of part of the goods may bring section 6 into operation.[14]

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[13] (1927) 1 Ch 606 at 630.

[14] See *Barrow, Lane and Ballard v. Philip Philips and Co.* (1929) 1 KB 574.

3.7 The Price

By section 8 (1) of the Sale of Goods Act, the price in a contract of sale of goods may be fixed by the contract or may be left to be fixed in an agreed manner, e.g., by a third party, valuer or determined by the course of dealing between the parties. Thus, where the parties to a contract of sale have not expressly agreed on the price and have not agreed that the price would be fixed by a valuer or by arbitration, a court may be able to imply the price the parties intended should be paid in other similar transactions between the same parties. The price is determined with reference to the course of dealing between the parties. What will amount to the course of dealing between the parties may not be easy to ascertain. The courts are reluctant to allow unilateral variation of the price agreed upon by the parties.

Keembe Estates Ltd v. Galaunia Farms Ltd, Appeal No. 33 of 2003 (Supreme Court of Zambia)

(The facts appear from the judgment of the court delivered by Chitengi, J.S.)

> In this judgment we shall refer to the appellant as the defendant and the respondent as the plaintiff which were their designations in the High Court.
>
> This action arose out of a verbal agreement between the parties on 19 May 1997 whereby the plaintiff would supply to the defendant and the defendant would purchase from the plaintiff green bovine hides. On 20 May 1997 the verbal agreement was reduced into writing by a letter written by the defendant's General Manager to the plaintiff.
>
> The existence of this agreement is common cause. What is in dispute is the price at which the green bovine hides were to be purchased at the time of the transactions which gave rise to this litigation. To put the matter into clear perspective, it is necessary to reproduce the letter written by the defendant's General Manager to the plaintiff confirming the agreed terms. The letter reads:

KEMBE ESTATES LIMITED
PO BOX 32922
LUSAKA

20th May, 1997
Galaunia Farms Limited
P.O. Box 30089
Lusaka

Attn. Mr. K.C. Parakh
Re: Purchase of green bovine hides
Dear Mr. Parakh

Reference is made to our meeting at Kembe on 15-5-97. I am pleased to confirm that Kembe will buy your hides at the following agreed terms:

1. *Galaunia Farms Ltd. supplies green, well fleshed, machine pulled bovine hides.*
2. *Delivery at Kembe yard along Lumumba Rd., South end, before 17:00 hours but not on Sundays unless pre arranged.*
3. *Kembe pays for each hide weighing 25kg and above the Kwacha equivalent of USD 25.00 and USD 18.00 for each hide below 25 kg. Hides under 15 kg (calf skins) will be accepted for USD 3.00 (your letter of acceptance dated 18-12-96). The rates are exclusive of VAT. The Kwacha equivalent is based on the mid rate of Barclays Bank Zambia at date of payment.*
4. *Hides will be weighed upon delivery in presence of your driver/representative, a weigh sheet is to be signed by both parties: your diver/representative and our hides buyer.*
5. *Kembe will pay Galaunia Farms on weekly basis by cheque in advance (advance payment charge 2%). This payment initially will be based on an average weekly delivery of 200 hides against a rate of USD 20.00 per hide. The average quantity of hides and rate may be adjusted if actual figures deviate.*
6. *Galaunia Farms will send invoice for deliveries in previous week, supported by weigh sheets.*
7. *Differences between pre-payment and invoice (actual deliveries) will be subtracted from or added to our weekly payment.*
8. *Kembe warrants a minimum payment (average) of $20.00 per hide (excluding calf skins).*

Let us work for a while this way and evaluate the logistics after 4 weeks.

Thank you very much for your offer to supply.

Yours sincerely

A.de Kwaasteniet
General Manager

The evidence on behalf of the plaintiff, given by its Chief Accountant, one Mohamed Hanif Manjra, is that under the agreement the plaintiff would supply the defendant hides at the following prices:

(a) Hides weighing 25 kilogrammes @ US $25.00 per hide.
(b) Hides weighing 15 kilogrammes to 25 kilogrammes @ US $18.00 per hide.
(c) Hides weighing below 25 kilogrammes (including calf skins) (sic) @ US $3.00 per hide.

These prices were exclusive of VAT and were to be made in United States Dollars or the Kwacha equivalent converted at the Barclays Bank mid-rate of exchange prevailing on the day that the plaintiff received payment. It was also agreed that the defendant would make weekly advance payment for 200 hides at US $20.00 per hide with an upward or downward adjustment in the following week depending upon the actual number of hides delivered. As long as the defendant continued paying in advance, he was entitled to a 2 % discount. Each delivery of hides was accompanied by invoices. Up to June 1998 the defendant fully performed his part of the agreement.

After June 1998 the defendant experienced cash flow problems resulting in the defendant's failure to pay in advance and in delays in settling outstanding amounts. When the defendants resumed making payments for the outstanding amounts he now paid in Kwacha. As a result, of this and by mutual agreement of the parties, the defendant lost his entitlement to 2% discount for advance payment.

In October 1998 the defendant wrote the plaintiff a letter seeking a reduction on the price of hides as follows:

Commercial Hides

(a) Above 25 kilogrammes at US $18.00 per hide.
(b) 15 kilogrammes to 25 kilogrammes at US $14.00 per hide.
(c) Below 15 kilogrammes at US $3.00 per hide.

Traditional Hides

(a) Above 25 kilogrammes at US $12.50 per hide.
(b) 15 kilogrammes to 25 kilogrammes at US $10.50 per hide.
(c) Below 15 kilogrammes at US $3.00 per hide.

After consideration the plaintiff agreed to reduce the prices per hide as requested by the defendant and on 15 January 1999 issued two credit notes to effect price changes effective from 21 October 1999. These prices remained in force until the plaintiff stopped doing business with the defendant in April 2000. However, because of the cash flow problems the defendant was facing, the defendant continued to pay round sums in Kwacha instead of US Dollars. Thereupon, the witness reminded the defendants' Financial Manager that the defendant's liability was in US Dollars and not Kwacha. The defendant's Financial Manager agreed saying that the problem would be sorted out once reconciliation was done. The witness then prepared a reconciliation statement in accordance with the agreement which entailed the invoices to be in US Dollars using the Barclays Bank of Zambia mid-rate on the date of payment.

The reconciliation revealed that the defendant owed the plaintiff US $40,089.51. By letter dated 23 May 2000 the reconciliation was rendered to the defendant. On 7 June 2000 the defendant replied to the plaintiff's letter of 23 May 2000 disputing the plaintiff's claim and gave a statement of account showing that the extent of liability was only K12,302,957.07. When the witness scrutinised the defendant's statement of account he found that the difference between the plaintiff's statement of account and that of the defendant was due:

(a) to the fact that the defendant had converted the US Dollar invoices issued by the plaintiff at exchange rates prevailing at the date of the invoice and credited the plaintiff with the Kwacha equivalent. From this amount the defendant deducted the amount of Kwacha it had paid the plaintiff. This was not in accordance with the agreement;
(b) to the defendant altering the amounts shown on the invoices rendered between 22 February 1999 and 1 April 2000 to a lower figure than that shown on the invoices without any basis. Further, the defendant converted this lower figure into Kwacha at the exchange rate prevailing at the date of the invoice.

When the defendant was queried about the lower figure in their statements, the defendant said it had written to the plaintiff on 16 February 1998 requesting for a price reduction from 22 February onwards. No such letter was ever received by the plaintiff and a thorough search revealed that there was no record of the letter having been received by the plaintiff. The plaintiff was availed a

copy of the letter by the defendant only when the plaintiff challenged the figure of K12,302,957.07 in June 2000. However, a check of the statement of account by the defendant showed that all the invoices shown on the plaintiff's statement rendered had been accounted for by the defendant.

On 19 June 2000 the plaintiff wrote the defendant disagreeing with the figure of K12,302,957.07 and demanded payment of the amount as claimed by the plaintiff failing which legal action would be taken. The plaintiff attempted to resolve the matter out of court and avert litigation. A meeting was held. At this meeting, issues concerning the exchange rates and deduction of prices of hides from 22 February 1999 to 1 April 2000 were discussed but the parties could not agree. As the plaintiff had never agreed to reduce prices of hides from 22 February 1999 to 1 April 2000 this action was commenced to recover the amount of US $43,112.33 which is owing.

Interest was not spelt out in the letter of 20 May 1997 because according to the agreement the defendant was required to make advance payments and it was not anticipated that the defendant would default in paying and that there would be delays in settling the amount due to the plaintiff.

On invoices for the period May 1997 to September 1997 there was 5 per cent interest charged above the Barclays Bank of Zambia limited base rate. After this period 15 per cent interest above the Barclays Bank of Zambia Limited base rate was charged on invoices because of the increase in the cost of money borrowing on the local money market. Interest was charged on all invoices whether the value of the invoices was in Kwacha or foreign currency. The defendant did not at any stage challenge the interest component in the invoices.

As regards the price of the hides, the practice was that the defendant could suggest the price but the right to agree or disagree to the suggested prices was reserved by the plaintiff. The defendant could not dictate prices to the plaintiff.

The defendant called two witnesses. The first defence witness was Mr Christos Andrew Spyron, the defendant's Managing Director; and the second defence witness was Mr Gourange Chandra Debnath, the defendant's Financial Controller.

According to Mr Spyron, the plaintiff had done business with the defendant for many years but there was no written contract to govern the supply of hides by the plaintiff to the defendant. Initially, it was agreed that the defendant would pay for the hides in advance and earn 2 per cent discount. But due to declining international market for hides, the defendant experienced cash flow problems

and stopped advance payments to the plaintiff. As a result the defendant lost the 2 per cent discount. The defendant informed the plaintiff about reduction in the prices of hides and the plaintiff continued to deliver the hides. The defendant made regular payments accompanied by a statement of account showing the statement of account between the plaintiff and the defendant. This went on for three years without the plaintiff raising any complaint or issue about the statements prepared by the defendant or any discrepancies about the amount paid. There was no agreed interest on delayed payments. The invoices were printed for Kwacha transactions. The defendant's understanding was that the invoices did not constitute a contract. The penalty interest could not apply to any dollar denominated payment.

The evidence of Mr Debnath is that he has been the defendant's Financial Controller since April 1996. He testified that the plaintiff and the defendant have had hide business relationship for a long time. According to Mr Debnath, there was no contract document signed by the partners but a loose agreement. There were only letters exchanged. The agreement was verbal and in some cases confirmed in writing but there was no contract document containing all the terms for the supply of hides and payment for them. He never dealt at decision making level and the agreement was negotiated by either Mr K.C. Parakh or Mr N. Pallister. The letter the subject of this action is one of the letters evidencing some aspects of the agreement. The payment for hides was to be in United Sates Dollar. There was no agreement as to penal, compound interest or otherwise for non-payment or delayed payment. However, advance payment would entitle the defendant to 2 per cenr discount. The prices of hides were dictated by the international market, so the defendant would offer the plaintiff the best price commensurate with what was obtaining internationally. The plaintiff delivered the hides at prices suggested by the defendant.

The invoices were not signed by the defendant. He noticed that some of the invoices indicated compound interest at l5 per cent above Barclays Bank of Zambia base rate while others showed 5 per cent above Barclays Bank of Zambia base rate for overdue payment. He also noticed that the invoices were for Kwacha and it made a lot of sense to the defendant that the invoices contained 15 per cent or 5 per cent penal interest on Kwacha amounts.

When the international prices for the hides dropped, the defendant also revised their price offer for the hides downwards and informed the plaintiff. The defendant expected the plaintiff to adjust their invoicing accordingly. The hide prices offered by the defendant in the letter dated 21 October 1998 at P218 of the record of appeal is a reduction in the hide prices offered in the letter of 20

May 1997 (see p. 178 of the record of appeal). The plaintiff used to invoice the defendant on the prices indicated by the defendant but despite the defendant's letter of 21 October 1998 (see p. 218 of the record of appeal) the plaintiff continued invoicing the defendant at the old rate in the defendant's letter of 20 May 1997. When the defendant queried and disputed the price at which the hides were being invoiced after the reduction in prices, the plaintiff gave the defendant two credit notes in recognition of the defendant's price reduction. The first credit note was number 65596 for US $4,018.04 and the second credit note was number 65597 for US $2,471.11. A11 payments for the hides were accompanied by statements of account prepared by the defendant and since 1997 the plaintiff never complained about the defendant's statement which showed the outstanding balance according to the defendant's records.

The international prices for hides declined further. As a result the defendant wrote the plaintiff on 16 February 1999 informing the plaintiff of prices adjustments for hides. The letter is inadvertently dated 1999 instead of 1998 (see p. 215 of the record of appeal). This letter was faxed like any other correspondence the defendant had with the plaintiff.

But when cross examined, he said the fax machine did not confirm the receipt of this letter. After this proposed deduction the plaintiff continued delivering hides to the defendant. Every time a payment was made a statement showing the outstanding balance based on the new prices owing to the plaintiff was sent to the plaintiff. The plaintiff never raised any query about it. The defendant made it clear to the plaintiff that it was expecting further credit notes from the plaintiff but the credit notes never came. He kept on asking Mr Manjra, the plaintiff's Accountant, about the reduction and the latter kept on saying he would get back to him after contacting Mr Pallister. Although the letter of 20 May 1997 said the conversion would be based on the mid-rate of Barclays Bank at the date of payment, the conversion was in fact on the date of invoice because VAT was to be paid on each invoice calculated as at the date of the invoice. The plaintiff did not raise any complaint from 1997.

The demand by the plaintiff of US $40,089.57 contained in the plaintiffs letter of May 2000 came as a surprise to the defendant. According to the defendant the amount owing is K12,302,957.07 which the defendant offered to pay but which the plaintiff refused to accept.

On this evidence, the learned trial Judge found that the price for the hides was expressed in US Dollars payable in Kwacha equivalent; that the conversion date was the date of payment and that the conversion rate was the mid-rate of Barclays Bank of

Zambia prevailing on the date of payment and not on the date of delivery of the hides or on any other date; that the first reduction was agreed to by the plaintiff and, therefore, binding; that there was no second reduction because it was not agreed to by the plaintiff and that the defendant could not unilaterally vary the purchase price of the hides. In view of this, the learned trial Judge found that the plaintiff was entitled to receive payment for the hides at the prices stipulated in the first proposal of price reduction accepted by the plaintiff. That is those in the letter dated 21 October 1998.

As to interest, the learned trial Judge held that the plaintiff could not charge any interest for overdue payment because there was no agreement to that effect. With regard to the indication of interest on the invoices, the learned trial Judge said that it was a new term which could not be included in the contract.

In conclusion, the learned trial Judge ordered the calculation of the value of the hides based on the prices in the first letter referred to above and that the calculated sum would carry interest at the Bank of Zambia recommended lending rate with effect from the date of the commencement of this action until date of payment.

The defendant now appeals to this court against the judgment of the court below.

The appellant filed three grounds of appeal.

The first ground of appeal is that the learned trial Judge erred in holding that the second price reduction proposed by the appellant was unilateral and could, therefore, not bind the respondent.

The second ground of appeal is that the learned trial Judge failed to take into account the fact that the first price reduction was by conduct and the subsequent price reduction could likewise be by conduct and she, therefore, fell into grave error in concluding that the second price reduction proposal was not accepted without taking into account the conduct of the parties.

The third ground of appeal is that the learned trial Judge impeached the credibility of the appellant's witnesses without reducing her observations on the demeanor of the witnesses in writing on the record. The learned trial Judge ought to have indicated why she thought the appellant's witnesses not credible. Mr Malambo, SC and Mr Malila who argued the appeal on behalf of the appellant filed written heads of argument based on the three grounds of appeal and which they augmented with oral submissions.

Mr Malambo argued all the grounds of appeal and Mr Malila supplemented.

Mr Malambo argued the first and second grounds of appeal together. In his written and oral arguments Mr Malambo submitted that by section 8 of the Sale of Goods Act 1893, the price in a

contract of sale may be fixed by contract or maybe determined by the course of dealings between parties. He pointed out that in this case there was an agreement to sell future goods as opposed to a straight forward contract of sale; the contract was executory and not executed and there were to be a series of sales and deliveries. He went on to say that there was nothing in the agreement or the course of dealings to preclude dollar price fluctuations and variations and the operation of market forces, especially that both parties must have known the hides were intended largely for the international market.

It was Mr Malambo's submission that in the circumstances of this case, the finding that the unilateral variation does not operate unless accepted is an over-simplification of a commercial arrangement. He argued that as serious business people who knew that the hides were for processing into leather for foreign market, it was unrealistic to expect that the buyer would be bound to a rigid price and sustain such a price even when the international market price fell below. He pointed out that the market does not operate in the manner proposed by the plaintiff and entertained by the court below.

It was Mr Malambo's submission that it was the buyer's market and he fixed the prices. He observed that it would be an unusual contract or agreement to fix the price of a commodity for indefinite years regardless of the prevailing market conditions. Mr Malambo pointed out that up to 90 per cent of the hides were for resale overseas and the buyer was entitled to fix the price from time to time as stated by defence witness number two and admitted and confirmed by the plaintiff's witness in his statements. It was Mr Malambo's submission that the concluding part of the letter of 20 May 1997 shows that the prices fixed were to run for four weeks renewable and not rigid prices to rule at the seller's pleasure.

It was Mr Malambo's submission that by a course of dealings over time both in regard to the first variation of 21 October 1998 and earlier ones like the one on p. 204 of the record of appeal the seller (plaintiff) accepted unilateral variation of prices. Mr Malambo argued and submitted that if the plaintiff was not happy with the price reduction he should have stopped supplying the hides but the plaintiff continued supplying the hides after notice of a further reduction. Mr Malambo submitted that estoppel by conduct applies in this case because it would not be equitable to permit the plaintiff to blow hot and cold. He said the defendant could not refuse to accept the hides as argued by the plaintiff, because the defendant was entitled to assume, from previous dealings, that the plaintiff had accepted the further reduction.

Further, Mr Malambo submitted that there was abundant evidence on record to support the existence of the practice of the buyer fixing the price and adjusting it. On this issue Mr Malambo also relied on the submissions made in the court below. These submissions are to the effect that the defendant suggested the price which was linked to the world market prices and the plaintiff accepted the price.

It was also submitted that the finding by the learned trial Judge against the second reduction negates the principle of a willing seller and a willing buyer. Mr Malambo pointed out that the plaintiff had the habit of ignoring reduction. The reduction of 2l October 1998 was effected with credit notes after being queried. Mr Malambo expressed the opinion that the plaintiff appeared to have been more preoccupied with reaping huge unwarranted profits. Mr Malambo pointed out that the plaintiff's concern for reaping huge profits is shown by its claim of a general balance when each delivery accepted constituted a separate instalment by way of a complete contract of sale attracting VAT and so on.

On ground three Mr Malambo cited to us many cases laying down the principle upon which an appellate court may interfere with the findings of fact by a trial Judge, but here we only mention the case of *The Attorney-General v. Achiume* [(1983) ZR 1]. In *Attorney-General v. Achiume* quoting Wilson *Masauso Zulu v. Avonndale Housing Project Limited* [(1982) ZR 172] we said that before we can reverse findings of fact made by a trial Judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a miscomprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting properly could reasonably make.

Mr Malambo submitted that the learned trial Judge fell into error as contemplated by the case of *Attorney-General v. Achiume* and other authorities. He pointed out that the defendant's version was supported by evidence establishing a course of dealings and usage between the parties. He said that the last price reduction was communicated to Mr Pallister who was not called to rebut DW2's evidence. Further, Mr Malambo submitted that PWl was not dealing with DW2 and so the evidence of DW2 stood unrebutted and not discredited in any way. Mr Malambo submitted that the evidence of DW2 was not inherently improbable or incredible and the learned trial Judge gave reason to disbelieve DW2. It was Mr Malambo's submission that the learned trial Judge should, therefore, be taken not to have properly used the opportunity of seeing and hearing the witness at first hand. Mr Malambo pointed out that

PW1 was unable to say that Mr Pallister did not receive the reduction letter. He said DW2 faxed the letter personally and Mr Pallister subsequently discussed with DW2 personally. Further, Mr Malambo pointed out that the plaintiff never answered the question by the defendant's Financial Controller why for three years it never queried the defendant's statements accompanied with every payment. Mr Malambo's own answer to this question is that the plaintiff wanted to make huge profits out of their bovine hides.

In concluding his submissions, Mr Malambo submitted that the evidence and documents on record are more consistent with the position taken by the defendant than that taken by the plaintiff. He emphasised that there was no difference between the first and second price reductions. He submitted that the defence witnesses, especially DW2 should have been believed. Mr Malambo urged us to allow the appeal and to order a re-computation of the account at the reduced prices on which VAT was paid.

On ground three, Mr Malambo submitted that the demeanor of the defendant's witnesses was not shown on record. It was Mr Malambo's submission that the learned trial Judge fell into error. He submitted that all the evidence taken together supports the defendant's case and that to turn the case into one of credibility is an injustice to the defendant's case.

Concurring with Mr Malambo's submissions, Mr Malila emphasised that the arrangement between the plaintiff and the defendant was not wholly expressed in words. He said that the series of contracts would not pass the certainty of a contract. Consequently, Mr Malila submitted, it is necessary to take into account the course of dealings between the parties which is clear from the evidence. It was Mr Malila's submission that if the arrangement was analysed in the language of offer and acceptance in fact the defendant's letter stating prices of hides amounted to an offer which the plaintiff accepted by delivering the hides. Mr Malila argued that if conduct can be taken to be acceptance then the plaintiff cannot now resile from the agreement merely because they did not signify their acceptance in words in the second reduction.

Mr Dudhia in his written heads of argument and oral arguments submitted that the learned trial Judge was on firm ground when she found that a unilateral price variation by one party could not bind the other party. He said that the quote from *Halsbury Laws of England* that unilateral notification of one party, without any agreement, cannot be a variation supports the learned trial Judge's finding. Further, Mr Dudhia submitted that the learned trial Judge was also on firm ground when she found that the first price reduction had been accepted whereas it was clear from the conduct of the

parties that there was no second price reduction which had been accepted.

It was Mr Dudhia's submission that the first price deduction was not by conduct but by mutual agreement of the parties. While conceding that in a contract of sale the price may, under Section 8 of the Sale of Goods Act, 1893, be determined by the course of dealing between the parties, Mr Dudhia submitted that in this case the course of dealing between the Plaintiff and the defendant and the documents relating to the dealings support the learned trial Judge's finding.

Mr Dudhia pointed out that invoices from 22 February 1999 to 1 April 2000 which appear on pages 234 to 434 of the record of appeal show the agreed price. These invoices do not show a second price reduction. He said that defendant continued to accept delivery of the hides at the invoice price without rejecting the invoice or refusing to take delivery of the hides.

He submitted that the course of dealing between the plaintiff and the defendant shows that price variation needed mutual agreement. He submitted that the words 'following agreed terms' in the letter of 20 May 1997 show that there was need for agreement. Further, Mr Dudhia pointed out that the expressions in the defendants letter asking for the first reduction which appear on P. 218 of the record show that the price reductions had to be negotiated. Mr Dudhia referred us to the expressions 'Please receive herewith an improved offer for the hides' and 'have improved on our offer'. He said the whole letter shows that the price reductions were to be negotiated. It was Mr Dudhia's submission that the suggestion that the price reduction did not need mutual agreement is not sustainable because it means that the defendant could just impose a price on the plaintiff who had no choice but to accept. Mr Dudhia submitted that this argument ignores the evidence which shows that the price needed mutual agreement; that invoices were never challenged; and that the defendant continued to take delivery of the hides at the invoices prices for fourteen months.

Alternatively, Mr Dudhia submitted that if this court should hold that the defendant could unilaterally impose a price reduction on the plaintiff, then this court should find that the defendant did not propose a price reduction. He said the learned trial Judge did not believe the defendant's version of events surrounding the letter proposing a second price reduction and that learned trial Judge was not wrong to resolve the issue on the demeanor of the witnesses. Mr Dudhia submitted that the cross examination of DWl shows that he was lying about not knowing that the plaintiff said he did not receive the letter and about the fax confirmation about the letter. He said that these inconsistencies considered in the light of evasive

answers led the learned trial Judge to the conclusion that DW1 could not be believed.

About international market prices, Mr Dudhia submitted that there is no evidence to suggest that the plaintiff and the defendant agreed to link the prices of hides to international market prices as argued by the defence. He said that there is even no evidence of this international market price to which the delivery price was allegedly linked. He argued that even assuming that the international market prices had dropped, that would be a market risk and the defendant would still be bound by the agreed prices. As authority for this proposition, Mr Dudhia cited a passage from *Halsburys Laws of England* 9th Volume 4th Edition at paragraph which reads:

> 455. Contract becoming onerous. Whatever the alleged source of frustration, a contract is not discharged under this doctrine merely because it turns out to be difficult to perform or onerous. Thus are the parties will not generally be released from their bargain on account of rise or fall of prices, depreciation of currency unexpected obstacles to the execution of these contracts, for these are ordinary risks of business. . . .

The doctrine referred to in this passage is the doctrine of subsequent Impossibility and Frustration.

It was Mr Dudhia's submission that if it was uneconomic to purchase the hides the defendant should have stopped taking delivery of the hides. But, he said, the defendant continued taking delivery of the hides from February 1999 to April 2000 when the plaintiff stopped deliveries because of a big balance outstanding on the account. On the submission by Mr Malambo that according to the letter of 20 May 1997 the prices were reviewable after four weeks, Mr Dudhia submitted that none of the defendant's witnesses testified to this fact and that the contract refers to review of logistics and not prices.

On the submission that the plaintiff was trying to reap huge profits, Mr Dudhia said this was not alleged in the court below and that this assertion is scandalous and unsupported by evidence. He submitted that for the defendant to continue accepting the hides from February 1999 to April 2000 the plaintiff's prices must have been competitive. As to claiming the general balance up to 2000 Mr Dudhia said it was perfectly in order for the plaintiff to claim the outstanding balance. He pointed out that the defendant started alleging wrong prices only when it was in default.

On estoppel, Mr Dudhia submitted that the argument could not stand. First, the requirements to establish estoppel by conduct were not fulfilled. The plaintiff never presented in any way that it had agreed to any second price reduction. He said in fact the plaintiff represented that the invoice prices were the applicable prices. Second, equity demands that it is the defendant who should be estopped from recanting from the agreed prices. He submitted that the invoices were never challenged which shows that the price was agreed upon. On challenge of invoice prices in statements sent to the plaintiff, Mr Dudhia submitted that there were at least 45 cheque payments but not one of the alleged statements was produced in the court below. He said the alleged statements were a fiction. Mr Dudhia concluded his submissions on grounds one and two by saying that by their acceptance and silence over the invoices, equity will require that the defendant should be estopped from denying that the invoice prices are payable.

On ground three, Mr Dudhia submitted that the learned trial Judge's assessment of the credibility of the witnesses was legitimate and not based on any manifest mistake or misdirection. Mr Dudhia then drew a table showing pages and lines in the record of appeal, which he said show where the defendant's witnesses contradicted each other, kept quiet and lied. It was Mr Dudhia's submission that the answers given by the defendant's witnesses in cross examination do not provide justification at law to interfere with the learned trial Judge's finding about the credibility of the defendant's witnesses.

On the letter for second price reduction, Mr Dudhia submitted that Mr Pallister could not be called because he was out of the plaintiff's employment and was out of the country. He submitted that PW1 did confirm that he searched for the letter but in vain. He said that although DW2 said he faxed the letter to the plaintiff he had no proof that the fax had been sent. He went on to say that DW2 did produce a fax confirmation report like the letter on p. 217 of the record of appeal. Mr Dudhia pointed out that DW2 first said he did not keep the confirmation on the file but later said that the fax did not give confirmation. But when shown the confirmation on p. 217 of the record of appeal DW2 said it was a different machine. It was Mr Dudhia's submission that in the light of the evasive nature of the testimony it was reasonable for the learned trial Judge not to believe DW2.

On the submission that the plaintiff did not answer the defendant's letter of 7 June 2000 Mr Dudhia pointed out that the plaintiff's reply is on page 191 of the record of appeal. On the issue of the defendant's Managing Director dismissing the Zambia Revenue Authority in 'cavalier fashion' Mr Dudhia said this was irrelevant.

In reply, Mr Malambo basically highlighted some of his earlier submissions and in addition asked us to take judicial notice of the fact that some fax machines do not produce a report.

We have carefully considered the evidence that was before the learned trial Judge, the submissions by counsel and the judgment appealed against.

As the learned trial Judge rightly found, there can be no doubt that there was an agreement between the plaintiff and the defendant whereby the plaintiff would supply bovine skins to the defendant and the defendant would purchase the bovine skins from the plaintiff. The basis for this finding is the letter of 20 May 1997 written by the defendant to the plaintiff. The contents of this letter are very clear in their terms. Mr Malila's submissions that in fact the defendant's letter stating prices of hides amounted to an offer which the plaintiff accepted by delivering hides is, on the evidence, therefore, clearly contrary to the agreement. The agreement clearly states that the plaintiff will first supply the bovine skins and then the defendant will pay and not that the defendant will first propose the prices then the plaintiff would react to the price proposal by delivering the hides. In the event, we find Mr Malila's submission only ingenious but not supported by the evidence on record.

As we see it, the only critical issue in this appeal is whether there is evidence to show a course of dealing which should have entitled the court below to find that the plaintiff was obliged to sell the hides at the prices stated by the defendant in the second proposal for price reduction. The other issues raised by counsel relating to reaping of huge profits etc., are peripheral and do not go to the kernel of the appeal at hand.

The learned trial Judge decided the issue of prices on the ground that what the defendant did was a unilateral variation of the agreed price which could not bind the plaintiff without the latter's consent. The learned trial Judge found authority for this statement in a passage to that effect in paragraph 566, *Halsburys Laws of England***.** Mr Dudhia's arguments were also to that effect, and Mr Malambo in his submissions also referred to the first variation. We must say here that the learned trial Judge and counsel misapprehended the critical issue. Variation is not the critical issue in this case. The critical issue is whether on the evidence a course of dealing had arisen which obligated the plaintiff to sell its hides to the defendant at the second proposed reduced prices.

Mr Malambo argued with much eloquence and force that on the evidence a course of dealing had arisen whereby the defendant reasonably expected that the plaintiff would accept payment for the hides at the prices in the second price reduction proposal.

In respect of the first and second grounds of appeal both Mr Malambo and Mr Dudhia addressed us at length on what sort of contract there was between the parties; the nature of the market; whether the market was the sellers market and whether the defendant could dictate prices which the plaintiff was bound to accept; whether it was part of the parties agreement that the hide prices would be linked to the international market prices of hides.

As we have said above these issues are not so much critical to the determination of the appeal. All we can say, and as Mr Dudhia submitted, is that in the agreement between the plaintiff and the defendant there is no mention that the prices the plaintiff was to charge would be linked to the international market prices for hides. And we find the defendant's statements in extrication not evidence upon which we can hold that the plaintiff and the defendant agreed to link the price of the hides to international market prices for hides. These issues are only relevant to the extent that they show a course of dealing. True to his characteristic traits of fairness, Mr Malambo dwelt much on the fairness of the plaintiff charging prices that were much below the prices of the hides on the international market. But, as Mr Dudhia rightly submitted, fall in the prices on the international market is a risk just as a rise in the price on the international market would be a boom to the defendant. To support his submissions on market risk, Mr Dudhia referred us to paragraph 455 of *Halsbury's Laws of England.* But that paragraph deals with subsequent impossibility to perform, and frustration of a contract, which has no relevance to this appeal. We do not understand the defendant's case to be one of seeking to be released from the contract. The defendant's position is that he is liable to pay but only to the extent of the prices in the second reduction proposal because by course of dealing the plaintiff is obliged to accept the prices in the second reduction proposal.

As we have already said the import of Mr Malambo's submission is that the evidence taken together shows a course of dealing which obliged the plaintiff to accept the prices suggested by the defendant in the second proposal for price reduction. Mr Malambo submitted that even the letter of 20 May 1997 said that the prices were reviewable after four weeks.

Mr Dudhia's answer to these submissions was that in fact the evidence suggested that the course of dealing was that the reduction was to be mutually agreed. To fortify his submissions Mr Dudhia referred us to expressions such as 'following agreed terms' in the letter of 20 May 1997; 'Please receive herewith an imporoved offer for the hides' and 'have improved on our offer' in the letter proposing the first price reduction. It was Mr Dudhia's submission that contrary to what Mr Malambo submitted, the letter of 20 May

1997 did not say that the prices were to be reviewable in four weeks. He said that what was reviewable were the logistics and not the prices.

Counsel agreed that under section 8 of the Sale of Goods Act prices may be determined by course of dealing.

We have, therefore, to ascertain what the course of dealing critical to this appeal is. It is not the delivery and receipt of the hides but the mode of payment and the deduction of prices. It is not the series of deliveries and acceptance of the hides but how payment was made and at what prices. In the circumstances, the fact that the defendant accepted deliveries of hides at the prices indicated on the invoices by the plaintiff without question is not so much the issue. Nor is the failure by the plaintiff to stop supply of hides the critical issue.

All we observe here is that the defendant made some payments calculated at the reduced price but we have no evidence on record to show that he also sent statement of accounts with each payment. As Mr Dudhia submitted not a single statement of account to accompany payments is on the record of appeal.

'Course of dealing' means that past business between the parties raises implication as to the terms implied in a fresh contract where no express provision is made on the point at issue. *Pocahontas Fuel Co. v. Ambatielos* [27 Com. Cas. 148]*; Re Marquis of Anglesey v. Gardner* [(1901) 2 Ch. 548].

The case of *Pocahontas Fuel Co.* dealt with ascertainment of the price under the section 8 of the Sale of Goods Act while the case of *Re Manquis of Anglesey* dealt with payment of interest. In these cases there were a series of payments. In *Re Marquis of Anglesey* series were in years. So what emerges from these cases is that to form a 'course of dealing' there must be a series of events and not a single event.

In the present case we have looked at the agreement between the plaintiff and the defendant and we have found no provision which obliges the plaintiff to charge prices proposed by the defendant whether or not the plaintiff consents to the proposal. If the position canvassed for by the defendant has to apply then it must be by implication from the course of dealing between the plaintiff and the defendant.

From the evidence, it is common cause that the plaintiff and the defendant have had long hide business dealing. From the evidence, it is also clear that during these long hide business dealings, the only price reduction the plaintiff gave at the request of the defendant was the one requested for by the letter of October 1998. This is a one of situation. We have, therefore, no basis upon which we find a series of events upon which the plaintiff reduced prices at the

request of the defendant without more. Consequently, there was no course of dealing where the plaintiff would reduce prices on mere request of the defendant for us to obligate the plaintiff to accept payment at the prices suggested by the defendant in the second price reduction proposal.

There was evidence as to whether or not the plaintiff received the letter requesting the second price reduction and counsel addressed us on this issue at length. But in the view we take of this appeal it would not make any difference whether the plaintiff received the letter. We have already said that during their business relations, the plaintiff and the defendant had no course of dealing where the plaintiff was obliged to accept any price charges proposed by the defendant without more. There was no basis upon which the defendant could rest reasonable expectation that the plaintiff would accept its price reduction proposal without more.

For these reasons, grounds one and two have failed. And in view of what we have said above it is not necessary for us to specifically consider ground three.

Although for different reasons, we uphold the learned trial Judge's finding that the price of the hides could not be reduced without the plaintiff agreeing to the change.

As the learned trial Judge ordered, the amount owing should be re-calculated using the prices ruling after the price reduction agreed to by the plaintiff without any penal interest. Again as the learned trial Judge found, the price of the hides should be in US Dollars paid in Kwacha equivalent converted at the rate ruling at the Barclays Bank mid-rate of exchange on the date of payment.

The learned trial Judge awarded the plaintiff interest at the Bank of Zambia recommended lending rate effective from the date of commencement of this action to the date of payment. We have to interfere with this order because in line with the cases we have decided involving foreign currency the court must fix the amount of interest. We set aside the learned trial Judge's order and substitute it with one of interest at 8 per cent from the date of the writ until final payment.

The plaintiff will have its costs in this Court and in the court below to be taxed in default of agreement.

Appeal dismissed

The court faced with questions of the exact price agreed upon by the parties may make appropriate inferences from the surrounding circumstances of the case to discover the real intention of the parties.

Newton Barton Young v. W.F. Paul (1971) HN/352 (High Court for Zambia at Ndola)

(*The facts appear from the judgment of Chomba, J.)*

> The plaintiff Mr Newton Barton Young started these proceedings in order to recover from the defendant Mr Wallace Edger Paul the sum of K2,000 being the price of a Toyota truck sold and delivered to the defendant. The facts of the case lie within short compass.
>
> On behalf of the plaintiff evidence was adduced by the plaintiff himself and Mr James Stewart Smythe and the effect of this was that sometime in March 1971 the plaintiff had a Toyota truck Registration No. EN 3950 which he was desirous of selling. At the same time the defendant was interested in buying a truck. Originally the plaintiff asked for a price of K2,200 but the defendant felt that the price was too high and discussions were suspended. The plaintiff then left the truck with Mr James Stewart-Smythe to sell it on his behalf. The plaintiff eventually authorised Mr James Stewart-Smythe to sell the truck at a reduced price. On 12 March the defendant called on Mr James Stewart-Smythe at Duly Motors where the latter worked as a motor car salesman and made enquires in connection with buying a truck. Mr Stewart-Smythe told the defendant the plaintiff's truck was still available and this time said that the plaintiff wanted K2,000 for it. It was Mr Steward-Smythe's evidence that the price was quoted in Kwacha as well as Pounds Sterling, that is K2,000 or £1,000. The defendant agreed to buy the truck there and then but promised to pay for it the following day, a Saturday. Mr Steward-Smythe's then prepared a sales form indicating that the vehicle had been sold by the plaintiff to Dulys and then by Dulys to the defendant. This, Mr Steward-Smythe stated, was done in order to facilitate the licensing and obtaining insurance for the motor vehicle. The vehicle was in fact licensed and insured in the defendant's name by Mr Steward-Smythe and on the following day the defendant handed to Mr Stewart-Smythe a cheque which the latter said he did not examine at the time but just put it into his pocket. He was going to deposit the cheque into the plaintiff's account at National and Grindlays Bank the same morning, but when he reached the bank he noticed for the first time that the cheque was in the sum of K1,000 instead of K2,000. He immediately went to the defendant and told him that the defendant had made a mistake in making the cheque in the sum of

K1,000. The defendant is reported to have replied that he thought that the price was K1,000. Mr Stewart-Smythe handed back to the defendant the cheque and asked him to issue another for K2,000 but the defendant declined to do that, although he remained in possession of the truck.

For the defence the defendant and his son Walter John Paul gave evidence. Mr Paul the father testified that the price was discussed in Kwacha at all times during the negotiations and flatly disagreed that Pounds Sterling were ever mentioned, either by the plaintiff or Mr Stewart-Smythe, the plaintiff's agent. He further stated that on 12 March after he had agreed to buy the truck he told Mr Stewart-Smythe that he would go to Mufulira to find the necessary money to pay for the truck. He subsequently obtained a cheque from Mr Paul the son and this was the cheque which on the following Saturday he presented to Mr Stewart-Smythe. He asserted that at the time of receiving the cheque Mr Stewart-Smythe examined it, made no comments about it and then put it into his pocket. However later Mr Stewart-Smythe returned to him and said that the cheque ought to have been for K2,000 but the defendant replied that as far as he was concerned the price was K1,000 and not K2,000. The defendant also testified that on the day of sale on 12 March Mr Stewart-Smythe told him that there was another gentleman, a Mr Malik, who was interested in purchasing the same truck. The defendant alleged that he saw a motor vehicle sale form in which it was stated that the price which Mr Malik was to have paid was K1,000. Mr Paul the son testified that he was the person who drew out the cheque about which reference has already been made above.

This case demonstrates the danger of inconsistency.

One often hears even to this day certain people when talking about money mentioning Pounds, Shillings and Pence and also Kwacha and Ngwee. When such a thing happens it is quite possible for one to mention Pounds when in fact he means Kwacha or vice-versa. Having listened to the evidence of all the witnesses, I am satisfied and accept the evidence of the plaintiff as supported by that of Mr Stewart-Smythe that the price was discussed in both Pound Sterling and Kwacha. I do believe the defendant's evidence that the price was stated in Kwacha only. I also find it a probability that because of mentioning Kwacha and Pounds on the day of sale Mr Stewart-Symthe might have mentioned K1,000 when in fact he meant £1,000, but in view of the discussions that took place before the sale, if Mr Stewart-Symthe did in fact make a mistake of saying K1,000 instead of £1,000, the defendant must have known that that was a mistake. I am convinced that if Mr Stewart-Symthe had intended to ask for K1,000 and no more he would not have

gone back to the defendant to ask for a cheque for K2,000 to be drawn. The fact that Mr Stewart-Symthe went back to the defendant to ask for a cheque for K2,000 demonstrates quite clearly that at all times during the negotiations for the sale of the truck, the intention on the part of the plaintiff and his agent was to sell it for K2,000 and not K1,000 and the defendant must have known this. Mr Stewart-Symthe satisfied me by his evidence that he was a man of no mean experience in the motor car trade and therefore I accept his option that at the time of the sale the vehicle was worth K2,400. That being so I think it would have been insane or excessively generous for the plaintiff to have agreed to sell the truck for K1,000 only that is less than half of its market price. Having regard to all the circumstances of this case I come to the conclusion that the plaintiff's claim is well founded and I enter judgment for him for K2,000 with costs which are to be taxed in default of agreement.

In his submission Mr Hugh Reilly, counsel for the plaintiff, asked me to order, in the event of the plaintiff being successful in the proceedings, that the defendant should pay interest on the amount of the judgment debt. I am reluctant to do this. If the plaintiff had so desired he could have taken the truck back from the plaintiff and sold it to somebody else as in fact there was another prospective buyer for it, Mr Malik aforesaid. There is no evidence before me that any demand was made by the plaintiff for the return of the vehicle nor that such demand was not acceded to by the defendant. Therefore any loss the plaintiff might have suffered by not having the K2,000 in this bank account has to be attributed, in my view, to his failure to minimise such loss as I say by re-taking possession of the truck from the defendant and selling it to some other person. I therefore in my discretion refuse to grant interest on the judgment debt.

Judgment for the plaintiff.

Section 8 (2) adds that where the price is not determined in accordance with the provisions of section 8 (1) the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. Clearly, section 8 presupposes that a contract has been concluded. There are questions one is inclined to ask from this provision. One is whether it can be legitimately claimed that the contract has been concluded. The absence of an agreement as to price may be testimony that the parties have not yet reached agreement.

Furthermore, can parties make a binding contract in which the price is yet to be fixed. Would that fact not in fact import vagueness of the contract?

In *May and Butcher v. The King*,[15] an agreement for the sale of tentage at 'prices to be agreed upon from time to time' was held by the House of Lords not to be a concluded contract but merely an agreement to agree, and that section 8 (2) could only be involked where the contract was silent about the price.

The decision in *May and Butcher* may be contrasted with that in *Foley v. Classique Coaches Ltd.*[16] In that case there was an agreement to buy petrol at a price to be agreed upon by the parties in writing from time to time and had a provision for the submission of any dispute to arbitration. The Court of Appeal held that there was a concluded contract because the price could be determined otherwise than by the parties themselves. The parties had shown a clear intention to be bound. The price to be paid was a reasonable one, presumably under section 8 of the Act, though in the judgment no reference was made to that section.

Where the parties do agree that the price is to be fixed by the valuation of a third party and such party cannot or does not make the valuation, the agreement is avoided provided that if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them.[17] Where the third party is prevented from making the valuation through the fault of the seller or the buyer, the party not in fault may maintain an action in damages against the party in fault. This would be the position where the seller refuses, for instance, to allow the valuer to examine the goods so that the latter cannot make the valuation.

Choitram v. Lazar (1959) EALR 157 (Court of Appeal of Nairobi)

> The respondents, through their employees' negligence, caused damage to the appellant's fabrics. A list of the damaged property was compiled, with their prices. The respondent endorsed the following on the list; 'Taken over only 181 pieces of various materials. Not taken over the prices mentioned'. The parties failed to come to an agreement as to price. The question arose as to whether or not there was a completed contract in the absence of such an agreement**.**
>
> *Held;* the case was within the scope of s.10 (2) of the Sale of Goods Ordinance, whereby in the absence of an agreement as to price, the price payable must be a reasonable one. Further, on the authority of *Foley v. Classique Coaches Ltd* (1934) All ER 88

[15] (1934) 2 KB 17 HL.
[16] (1934) 2 KB 1 CA.
[17] See section 9 (1) of the Act.

and *May and Butcher Ltd v. R* (1929) All ER 679, silence as to price, within the meaning of s.10 of the Sale of Goods Act includes not only non-mention of price, but also non-agreement as to the same.

Ghulam Kadir v. British Overseas Engineering Corporation Ltd (1957) EALR 131 (Court of Appeal of Nairobi)

The appellant ordered a quantity of steel from the respondent company. The order form contained a term to the effect that the agreed sale price would be subject to fluctuations. These fluctuations would only be made if there was an increase in the cost of steel from the respondent's own suppliers, and commensurate to the amount of increase.

Accordingly, the respondents increased the price of steel twice. The appellant accepted the first increase but repudiated the contract upon the second increase, claiming that there was no contract of sale on account of uncertainty as to price.

Held; that 'subject to fluctuation' under the circumstances meant that the contract was subject to the arrangements that the respondents were making with their suppliers, and if the latter increased their prices, a corresponding increase would be passed to the buyers, so that there was no element of uncertainty with regard to the stipulations as to price.

3.8 Stipulation as to time

Section 10 states that stipulation as to time of payment is not deemed to be of the essence of a contract of sale unless the terms of the contract indicate a contrary intention.

However, all other time stipulations are, normally considered to be of the essence. In *Hartley v. Hymans*[18] the court stated that:

> In ordinary commercial contract for sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery.

A failure to comply with a stipulation as to time other than time of payment will normally be considered as a breach of a condition and the buyer will be entitled to reject the goods without proof of damage.

The case of *Bowes v. Shand*[19] decided that early delivery of goods is as much a breach as late delivery. In the case the seller agreed to ship to the buyer a specified quantity of Madras rice during the months of

[18] (1920) 3 KB 475.
[19] (1877) 2 AC 455.

March and/or April. The bulk of the rice was shipped at the end of February and only about 1/9 of the rice was shipped in March. The buyers rejected the goods on grounds that the seller did not comply with the time. It was held by the House of Lord that the buyers were entitled to reject the goods.

McDougall v. Aeromarine of Emsworth Ltd (1958) 3 All ER 437

The seller, a firm of yacht builders, agreed to sell to the buyer a pleasure vessel which conformed to certain specifications. Under the contract, the seller was to deliver the yacht on the 1st of May 1957, although by another clause of the contract, 'owing to the effects of delays and shortages such delivery date cannot be guaranteed'. The seller failed to deliver the yacht on the date indicated in the contract and in September 1957, the buyer repudiated the contract as delivery had not yet been made and the yachting season was over.

Held; that the buyer was entitled to repudiate the contract for the time of delivery was a condition of the contract. The sellers had failed to deliver within a reasonable time after the delivery date stipulated in the contract, which in the circumstances, had expired by the beginning of September.

DIPLOCK, J.: . . . It thus becomes relevant to decide what the period for delivery permitted by the contract is. Clause 3 states a specific date for delivery, namely, 1 May 1957, but expressly states that such delivery cannot be guaranteed. A clause in this form, in my view, places on the seller the duty to deliver within a reasonable time from the specified date. What is a reasonable time from the specified date is a question of fact depending on all the circumstances of the case as they exist up to the sale of a pleasure yacht built in accordance with the buyer's special requirements for use by him in the 1957 yachting season, were due solely to the prior bad workmanship or the prior incorporation of defective materials by the (builders), a reasonable time had certainly expired by the beginning of September 1957, that is three months after June 3, and a time when four-fifths of the 1957 yachting season had passed. Whether this stipulation as to time of delivery is a condition or warranty depends, under section 10 of the Sale of Goods Act 1893 on the terms of the contract. In my view, the obligation to deliver within a reasonable time of 1 May 1957, is a condition. . . .

Kundan Singh Paneser v. Popat (1968) The African Law Report 164 (Kenya; Court of Appeal of East Africa)

The respondent agreed to purchase furniture from the appellant. The contract contained a stipulation as to the date of delivery. The appellant failed to deliver on the agreed date. Two further extensions were made, but the appellant still failed to deliver. The respondent then cancelled the contract. Later, the respondent made delivery but the appellant rejected the furniture. The appellant sued for the purchase price.

Held; that the initial and subsequent stipulations as to time of delivery were of the essence of the contract. Failure by the appellant to deliver at the agreed dates amounted to a repudiation, while the intimation by the respondent that he would not accept delivery served to inform the appellant that the former had accepted the repudiation and amounted to a rescission of the contract.

> where, as in this case, it is not an express term of the contract that if a requirement of a contract is not complied with on a specified date, the contract is to cease to have effect, the court may, however, come to the conclusion that in the circumstances, such term should be implied. In a commercial contract the specified date for delivery would normally be regarded as of the essence of the contract. Such would not normally be the case in the case of goods purchased for domestic purposes. But the particular circumstances could result in the specified date for delivery being regarded as being of the essence of the contract. In this case, the fact that the plaintiff was informed that the defendant would be moving into an unfurnished house on the date specified for delivery of the furniture… were matters from which the trial judge could draw the inference which he did, that it was an implied term of the contract between the parties that the date for delivery of the furniture was of the essence of the contract.

Zambia Farmers Co-operative Society Ltd v. Soy Nutrients Ltd, SCZ Appeal No. 57 of 1996 (Supreme Court of Zambia)

(The facts appear from the judgment of the court)

The appellant was the defendant in the court below and there is no cross appeal by the respondent.

The facts of the case were that by an agreement in writing dated 14 October 1992 the respondent (which was the plaintiff in the court below) agreed to purchase 3,000 metric tons of Soya beans from the appellant (defendant in the court below) between October 1992 and April 1993.

The salient clauses of the agreement provided as follows:

1 QUANTITY AND PRICE - '*Soy* Nutrients Limited will collect the soya beans from your warehouse located in Lusaka under the time table below…'

Soy Nutrients were to collect 300 metric tons in October 1992, 300 in November, 400 in December, 500 in January 1993, 500 in March and 500 in April making a total of 3,000.

2 PAYMENT - Payment will be made weekly for the previous week's collection based on 36 per cent protein. Prices will be adjusted downwards on a pro rata basis for Soya beans containing 36% protein. . . .

STORAGE – Storage and insurance of the Soya beans up until collection by Soy Nutrients Limited will be the responsibility of Zambia Farmers Co-operative Society Limited. If Soy Nutrients is unable to collect the quantity within the above timetable, Soy Nutrients will take title of Soya beans by paying for the Soya beans at the relevant price. At the same time Soy Nutrients will pay cost of warehousing and insurance on per ton basis, until collection has occurred.

For the months of October and November 1992 the Soya beans were delivered by the appellant to the respondent's premises. The Soya beans for the months of December 1992, January 1993 and February 1993 were collected from the appellant's warehouse by the respondent and those for April and May 1993 were delivered by the appellant to the respondent. This was not withstanding the terms of the agreement whereby it was agreed that the respondents were to collect the Soya beans from the appellant's warehouse. In all 1,839 metric tones and 815 kgs of Soya beans were delivered to or collected by the respondent for the period of October 1992 to May 1993 leaving a shortfall under the agreement of 1,106 metric tons and 185 kgs. The respondent averred that to meet the shortfall, it purchased from other sources the 1,160 metric tons and 185 kgs of Soya beans at a cost of K132,158,238.12 thereby paying an extra K69,722, which was the amount the respondent, claimed from the appellant. There was also evidence on record that the respondent delayed in making payments for the Soya beans collected from or

delivered by the appellant and the appellant counterclaimed the sum of K54,630,960.00 by way of damages for delayed payments and breach of contract.

In his judgment, the trial Judge found that the appellants were in breach of contract for failure to deliver the shortfall in Soya beans where by the respondent was compelled to purchase the same at an extra cost of K69,722,129.12 and entered judgment for the respondent in that amount. The trial Judge also made a finding that the respondents had delayed in making payments but that such delay did amount to breach of contract and can be atoned for in interest and awarded the appellant interest for 695 days delay at current bank rate.

On appeal, it was argued on behalf of the appellant that the trial Judge erred in law by disregarding the provision of clause 4 of the agreement between the appellant and the respondent the contract was severable and that this was confirmed by clause 1 and 2 of the contract. That separate payments were to be made by the respondent and that the appellant was to be responsible for storage and insurance up to the date of collection. That it was agreed that if the respondent was unable to take delivery, the respondent would have title of the uncollected Soya beans and be responsible for storage and insurance on paying for uncollected stock. He said that between October 1992 and January 1993 the respondent was to take delivery of 1,500 metric tons of Soya beans. In October 1992 appellant delivered 127.291 metric tons, November 158.86 metric tons, December 64.55 metric tons, January 1993 394.09 metric tonnes. This left a shortfall of 755.156 metric tons and that in accordance with clause 4 of the contract if the respondent wanted to lay any claim to undelivered stock they were supposed to pay for it and take responsibility for warehousing charges and insurance. That the ownership of the balance of Soya beans was never transferred to the respondent. It was further argued that the respondent was aware that the appellant was not a producer of Soya beans but obtained them from members of its co-operative society and that payment for the Soya beans had to be prompt. That by failing to pay for the Soya beans the respondent was in breach of contract, and that the respondent rescinded the contract in May 1993.

It was further argued on behalf of the appellant that the appellant produced to the court figures on which the total period of the delivery was 869 days. Based upon this figure the appellant counter claim days K54,180,951.87. The judge however ruled that 64 cumulative days were unaccounted for and that no reason was advanced for such a finding. Apart from not giving reasons for his finding the trial Judge merely accepted as proved the figure of 695 days

presented by the respondent. The appellant's final argument was that there was no evidence to support the finding that the respondent was entitled to the claim of K69,722,129.12 plus interest, that the respondent's case was based on the argument that they were forced to buy Soya beans from other sources as a result of the appellant's failure to supply the same. However there was no proof of payment by the respondent and there are no invoices to support such purchases.

On behalf of the respondent, it was argued that the evidence on record clearly shows that the appellant was not ready and willing to supply the Soya beans in the quantities required under the contract, that there was no condition precedent in the contract which entitled the appellant to treat the contract as at an end that the appellant was under a contractual obligation to do all that was necessary to secure performance of the contract by supplying 3,000 metric tons of Soya beans but it did not do so. It was further contended that the appellant had a duty to deliver 3,000 metric tons of Soya beans which duty was independent from the respondent's duty to pay for them. The appellant relied on section 10 of the Sale of Goods Act, 1893, which states that the time of payment is not of essence to the contract. The appellant also argued that failure to pay on time was not a material breach of contract whilst failure to make available the required quantity of Soya beans was a material breach which went to the root of the contract, that the appellant varied a term of the contract by deciding to deliver on their own and should have continued doing so. That the respondent tried to collect Soya beans to mitigate its losses and ended up by buying on the open market, that there was no rescission of the contract by the appellant till 10 May 1993 and the appellant was under an obligation to perform its part of the bargain which was to supply 3,000 metric tons of Soya beans. It further contended that in any event the appellant would not at law be entitled to rescind the contracts due to late payment.

It was also submitted for the respondent that the trial Judge did not err in his finding that the cumulative method of adding days used by the appellant in its calculation of its counter claim was wrong. That the judge agreed with the respondent's method of calculation of interest due for overdue payments; that the respondent's calculations show the total number of days late to be 695.

LEWANIKA, J.S.: . . . We have considered the arguments advanced by counsel for the appellant and for the respondent and our first comment is that the contract between the parties was observed more in the breach than in the observance. Under the

terms of the contract the respondent was to collect specific metric tons of Soya beans between October 1992 and April 1993. The Soya beans for the months of October, November 1992 were not collected by the respondent but delivered by the appellant in quantities that were less than those specified in the contract. Neither party rescinded the contract. The clause relating to payment was also not observed by the respondent but the appellant did not rescind the contract but was content to claim interest on delayed payments. Having looked at the contract between the parties we are also satisfied that this was not an entire contract but one that is divisible or severable as the Soya beans were to be delivered or collected and paid for in instalments over a period of time. As we have stated before although there was an obligation on the part of the appellant to make available to the respondent 3,000 metric tons of Soya beans, from the outset none of the parties to the contract abided by the terms of the contract. Furthermore, in terms of clause 4 of the agreement the respondent could only lay a claim to the uncollected or undelivered stock of Soya beans if they had paid for it at relevant prices and no such payment was made by the respondent. The learned trial Judge erred when he held that the appellant was in breach of contract for failure to deliver the shortfall of 1,160 metric tons of Soya beans and that in the circumstances the respondent was entitled to purchase from other sources the shortfall at a cost of K132,158,238.12 thereby paying an extra K69,722,129.12 which he awarded to the respondent. We would therefore allow the appeal on the first ground of appeal and set aside the award of the learned trial Judge to the respondent.

In the light of what we have said we find it unnecessary to deal with the third ground of appeal save to say that we agree with the argument advanced by counsel for the appellant as the documents on which the learned trial Judge relied on were mere schedules and were not proof of purchases of Soya beans from other sources.

With regard to the appellant's second ground of appeal which deals with the appellant's counterclaim, appellant's calculations on the cumulative days delay was 869 days whilst the respondent's calculations came to 695 days. The difference between the two figures is 174 days and not 64 days as found by the learned trial judge. We would also allow the appellant's appeal on the counterclaim and order that the amount due to the appellant on the counterclaim be assessed by the Deputy Registrar . . . .

3.9 Implied Conditions and Warranties in Contracts of Sale of Goods

The Sale of Goods Act implies certain terms and conditions in every contract of sale. Sections 12 to 15 set out these terms. Case law has

over the years developed around the interpretation of these sections. In Zambia, happily, the courts have been very consistent in their interpretation of these sections.

(a) Implied condition that the seller has the right to sell

At common law, the courts, influenced by the predominant *laissez-fare* philosophy with its offshoot principle of *caveat emptor*, were reluctant to entertain buyers who discovered subsequently that the goods they had bought belonged to a third party. The Sale of Goods Act now protects the buyer against the resultant injustice. It guarantees to the buyer that the seller is the owner of the goods he is selling.

Section 12 of Sale of Goods Act 1873 provides that:

> In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is
> (1) An implied condition on the part of the sellers that in the case of a sale, he has the right to sell the goods, and in the case of an agreement to sell he will have the right to sell the goods at the time when property is to pass;
> (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods;
> (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or made known to the buyer before or at the time when the contract is made.

If a buyer buys goods from a seller who has got no good title to the goods, he acquires a defective title to the goods and must generally return the goods to the true owner.

Rowland v. Divall (1923) 2 KB 500; All ER 270

> The plaintiff purchased a car from the defendant which unknown to him had been stolen. The plaintiff subsequently sold it to a third party. Two months later it was discovered that the car was stolen property and the plaintiff had to give it up to the Police. The car was in fact stolen before it came to the defendant and both parties were innocent. Nonetheless, the defendant had no title to pass on and so the plaintiff sued the defendant to recover the full original price. This was despite the fact that he had use of the car for two months.

Held; the whole object of a sale of goods contract is to transfer the property from the seller to buyer. No property had been transferred here; there was total failure of consideration and the buyer was entitled to his money back although he had used the car for two months.

Akoshile v. Ogidan 19 NLR87 (Supreme Court of Nigeria)

The defendant sold to the plaintiff a car which he said he had bought from a European. Subsequently the European from whom the defendant had bought the car was convicted of stealing the car. The question was whether the seller had the right to sell and therefore had passed good title.

Held; by the Supreme Court that section 12 (1) of the Sale of Goods Act was applicable and enabled the plaintiff to rescind the contract and claim a refund of the money he had paid as the defendant had no right to sale the stolen car.

Note: *Nigeria applies the Sale of Goods Act of England of 1893.*

Martin Josam Sibanda v. Brunelli Construction Co. (Zambia) Ltd and Davis Nyamokwe & George Hang'andu (1978) HP/390 (High Court for Zambia)

The plaintiff claimed against the defendant, the sum of K2,544.07 being the amount paid and expended by the plaintiff for a consideration which totally failed.

The particulars of the claim were that on 25 November 1973, the plaintiff paid to the defendant the sum of K975.00 as the purchase price for a second hand motor vehicle Mazda vanette registration number ADA 1342. Upon buying the said motor vehicle, the plaintiff expended a further sum of K1569.07 on repairs effected to the said motor vehicle. The plaintiff averred that the defendant had orally warranted that it had good right and title to sell the said motor vehicle upon which warranty the plaintiff relied and paid the purchase price. After the sale it transpired that the vehicle in fact belonged to a third party to whom the plaintiff was obliged to deliver up the vehicle. The plaintiff therefore claimed that he did not enjoy quiet possession of the motor vehicle.

The defendant denied that it had warranted and represented to the plaintiff that the defendant had good right, and title to sell the

vehicle arguing the written contract of sale dated 25 November 1977 excluded any warranties whether express or implied. The defendant maintained that it did not induce the plaintiff to purchase the said motor vehicle by virtue of any representations as both parties voluntarily entered into agreement. The defendant admitted that it received the sum of K975.00 from the plaintiff as purchase price .The defendant further averred that it had bought the vehicle from third parties on 30 June 1977 bona fide and resold the vehicle to the plaintiff in good faith believing that it had sound title to pass. In the alternative, the defendant argued that if it gave a warranty, the giving of the said warranty was indeed by the above-mentioned Third Parties from whom the defendant purchased the said Mazda vanette in good faith.

Held; that the defendant was in breach of the implied warranty as contained in section 12 of the Sale of Goods Act, 1873 and the plaintiff was entitled to the relief sought.

KAKAD, J.N., COMMISSIONER: . . . . The plaintiff on 25/11/77 contracted to purchase a non-runner Mazda Venture Registration No. ADA1342 (hereinafter referred to as the vehicle), the property of the defendant. The Sale Agreement, which was in writing, reads: 'Brunelli Construction Company (Zambia) Limited agrees to sell their MAZDA 1600 VANETTE Registration No. ADA 1342, blue Book No. 235420 to Mr Martin Josam Sibanda of Box 2217, Lusaka, for the sum of K1,975.00. The Vanette is sold as it stands as non-runner and without warranty and will be collected by Mr Sibanda'.

Signed ……
For Brunelli Construction (Z) Ltd
I accept the Conditions of Sale Agreement

Signed …….
Mr Martin Josam Sibanda – Box 2572, Lusaka

On the same day, after signing the agreement, i.e., 25/11/77, the plaintiff paid K975.00, the purchase price of the vehicle to the defendant. The defendant thereafter delivered the vehicle to the plaintiff and the plaintiff took delivery and possession of the vehicle and took it away from the defendant. . . . It is not in dispute that the blue book was registered in the name of defendant. Looking at the contents of the agreement it is apparent that the defendant had

held itself out as the legal owner of the vehicle. According to the evidence of the plaintiff, the plaintiff had purchased the vehicle for his business use, and had informed the defendant at the time of the purchase that he was purchasing the vehicle for his business use. This fact was confirmed by the defendant's witness in his cross-examination.

The plaintiff after being in possession of the vehicle spent K156.07 to have the vehicle repaired and make it mobile.

On 9/1/77, after the vehicle was repaired, the plaintiff and a representative of the defendant went with the vehicle to the Road Traffic Headquarters at Lusaka, to have the ownership on the blue book changed to the plaintiff. The vehicle was in fact taken to the Road Traffic Office. This goes to establish that the vehicle which was a non-runner when sold was in fact repaired and was road-worthy. An application to transfer the vehicle to the plaintiff was made by the defendant. The Chief Inspector of Traffic, Mr J. Musokotwane (P1) dealt with the application, checked the records and found the vehicle to be stolen property. According to evidence of P1, the vehicle was originally registered as ACA 4232, in the name of Garden Centre at Ndola and it was stolen from Ndola on 28 May 1977. On finding this, P1 impounded the vehicle and the blue book. In the result the plaintiff lost the vehicle. (The Police report on the theft of the vehicle is Document 1 in the Additional Bundle of Documents). The defendant had, it appears, purchased the vehicle from H & N Used Car Sale, who are joined as Third Parties.

The plaintiff, on being deprived of the vehicle, instituted this action. . . Therefore, the provisions of the Sale of Goods Act, 1893, apply to the above contract between the defendant and the plaintiff. By s. 2(c) of the English Law (Extent of Application) Act Cap 4, the Sale of Goods Act, 1893 is applied to Zambia.

S. 12 (1) of the Sale of Goods Act, 1893 provides as under:

> In every Contract of Sale, other than to which sub section (2) of this section applies, there is an implied condition on the part of the sellers that in the case of a sale, he has a right to sell the goods, and in case of an agreement to sell he will have a right to sell the goods at the time the property is to pass; and (a) an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed

> or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

I have no difficulty in finding that, the plaintiff having paid the purchase price of the vehicle and the defendant having delivered the vehicle, the property in the vehicle had passed to the plaintiff on 25 November 1997. The fact that the ownership in the blue book was to be changed at a convenient time did not, in my consideration view, affect the passing of the vehicle to the plaintiff. Passing of the vehicle was as I see it, not conditional upon the change of ownership in the blue book.

The defendant in his defence contended that it had not warranted or represented to the plaintiff that it (the defendant) had a good right and title to the said vehicle. I cannot see how the defendant, who, as will be seen from the agreement, represented the vehicle as their property and who was registered in the blue book as the owner of the property, could claim that it had not warranted or represented a good title to the plaintiff.

In *Benjanin's Sale of Goods*, para. 262 at p.130 it is stated:

> A breach of section 12 (1) (a) is a breach of condition and gives rise to right on the part of the buyer to treat the contract as repudiated to claim damage for any loss suffered by reason of the breach. Further when the breach consists of a failure by the seller to pass a good title to the goods sold, the buyer is *prima facie* entitled to recover the whole of the purchase price as on a total failure of consideration.

This principle was established by the Court of Appeal in *Rowland v. Divall* (1923) 2 KB 500.

In that case, the defendant bought a motorcar in good faith from a thief and resold it to the plaintiff, a car dealer, for £334. The plaintiff repainted the car and exposed it for sale in his show room for two months until he sold it to a third party for £400. Two months later, the police took possession of the car on behalf of the owner. The plaintiff refunded the third party what he had been paid and brought an action to recover from the defendant £334. The Court of Appeal held that his action should succeed. Even though he had had the use of the car for four months and could not restore the car to the defendant, nevertheless as the consideration for the contract had totally failed, the buyer had not received any part of that which

he had contracted to receive - namely the property and right to possession and, that being so, there has been a total failure of consideration.

The facts in the case before this Court are more or less on all fours with the facts in *Rowland v. Divall* (1923) 2 KB 500 *(supra)*. The Plaintiff, in the case before this Court, had purchased the vehicle directly from the defendant and the vehicle turned out to be a stolen vehicle. The plaintiff had paid K975.00, being the purchase price of the vehicle and had taken delivery and possession of the vehicle from the defendant. The vehicle in the case was unfortunately impounded by the Police. The defendant in the case, it is clear was as much as unaware that the vehicle was stolen as was the defendant in *Rowland v. Divall (supra)*. On the facts of the case before this court I find no difficulty in finding that the consideration for the contract had totally failed. The plaintiff is, therefore, entitled to recover K975.00 being the purchase price of the vehicle from the defendant.

The plaintiff is further entitled to K1569.07 being the money he had expended on repairs done to the vehicle after paying the price for the vehicle and after the vehicle had passed to the plaintiff.

The vehicle, when the plaintiff took delivery, was no doubt a non- runner. However, according to the plaintiff, he at the time he contracted to purchase the vehicle from the defendant told the defendant that he was purchasing the vehicle for using in his business. That fact was confirmed by the defendant's witness D1 in cross-examination and in his re-examination. The counsel for the defendant in his submission submits that that fact should not be believed because it was unthinkable for a carpenter to have a vehicle for use in business. I, with respect, do not agree with the learned counsel. If that was the case then why should the plaintiff have bought the vehicle in any case. I have no reason to disbelieve the plaintiff that the defendant was so aware at the time the vehicle was sold to the plaintiff.

Under s.12 (1) of the Sale of Goods Act, 1893, it is an implied warranty that the buyer, after property had passed, should enjoy quiet possession of the goods. The defendant, as per agreement, in the case, had vouched no warranty. In my considered view, the warranty referred to the agreement referred to the condition of the vehicle and not to enjoying quiet possession of the vehicle. The implied warranty as to enjoy quiet possession, I consider, was not excluded in the Sale Agreement (supra) between the plaintiff and the defendant. Therefore, the warranty that the plaintiff will enjoy quiet possession of the vehicle, after the vehicle had passed to the plaintiff, in my view, applied to the contract in question.

In Benjamin's Sale of Goods para 275 at p. 140 it is stated:

> Section 12 (1) (b) also implies a warranty that the buyer will enjoy quiet possession of the goods. As a normal rule, it would seem that there is no breach of this warranty unless the buyer suffers some physical interference with his possession of the goods. But in *Niblett v. Confectioners' Materials Co. Ltd* (1921) 3 KB 387, Atkin, L.J. considered that the warranty had been broken on facts of that case, since the buyers had to strip off the labels before they could assume possession of the goods. He also commented: 'Probably this warranty resembles the covenants for quiet enjoyment of real property by a vendor who conveys as beneficial owner in being subject to certain limitations, and only purports to the purchaser against lawful acts of third persons and against breaches of the contract of sale and tortuous acts of the vendor himself.' If this analogy were followed, the warranty might be restricted to any disturbance of the buyer's possession by the acts of the seller or by the lawful acts of those claiming through the seller, and extend to disturbance by title paramount. But in *Mason v. Buringham*, Lord Green, M.R. was not prepared to introduce any such glass, and Court of Appeal held that the warranty had been broken where the buyer was compelled to return the goods bought to the true owner.

In the case of *Mason v. Burningham* (1945) 2 KB 545, the plaintiff had purchased a typewriter from the defendant for 20*l*. She subsequently spent 11*l.* 10s. on overhauling it. Unknown to the parties the typewriter was stolen and the plaintiff had to return it to the owner. The plaintiff claimed from the defendant under the warranty that she should have quiet possession implied on the contract of sale by virtue of the provisions of s.12 of the Sale of Goods Act, 1893, repayment of the sum of 20*l.*, but contended that he was not liable for the monies spent on overhaul. The Country Court judge held that, although the plaintiff had done 'the ordinary' and 'natural thing' on having the typewriter overhauled, she was not entitled to recover the cost of such overhaul from the defendant, as it was not a loss due to the fact that the defendant had sold an article to which he had no title.

On appeal to the Court of Appeal, the Court of Appeal held that there had been a breach of the warranty implied in the contract of

sale by s.12 of the Sale of Goods Act, 1893, that the buyer should enjoy quiet possession of the goods. That the plaintiff was entitled under s.15 sub. s.1 of Act 1893 to treat the breach of implied condition that the seller had a right to sell the goods as a breach of warranty. The costs of overhauling the typewriter was a loss "directly and naturally resulting in the ordinary course of events from that breach of warranty" within s. 53 sub. s. 2, which the plaintiff was entitled to recover from the defendant.

Singleton, L.J delivering the judgment of the Court of Appeal in that case stated: (see from p. 557 onwards). The only amount he had to consider was 11*l.* 10s. In the course of his judgment the learned Judge said:

> I agree that the plaintiff behaved in a common sense way. She converted a good typewriter into a first-class one. She did the ordinary and natural thing'. The only evidence as to the condition of the typewriter was that of the plaintiff herself, who said that when she tested the typewriter it was 'fairly good.

No evidence was given by the defendant at all. The learned judge went on to say;

> it is natural to assume at first sight that the defendant must pay for this, but, if so, anything which a purchaser might naturally do must be a loss for which the defendant would be responsible. Is anything which the purchaser does to the article such a loss? That cannot be. Suppose the purchaser decided to paint the typewriter with gold paint, no one would argue that the defendant was liable. Yet, if the purchaser were a dealer, gold paint might add to its price.

In those two passages the learned Judge was failing to approach the matter in the right way. The question to be considered was whether or not it was the natural and ordinary thing that the purchaser of a secondhand typewriter of this kind should have it overhauled, and the learned Judge had already said that that was the fact, because he said 'She did the ordinary and natural thing'. He went on to say: 'I hold that extra amount spent on the article by the plaintiff quite naturally is not a loss due to the fact that the defendant sold an article which he should not have sold. Although what the plaintiff did was right and proper, I must decide against her'.

Mr Leon, on behalf of the plaintiff, submitted to this Court that the judgment was wrong and ought to be reversed. His argument was based almost wholly on two sections of the Sale of Goods Act, 1893. He referred the court to two cases further back in date which is of interest. Both these cases have to do with land. The first of these was the case of *Bunny v. Hopkinson* (1). In that case 'A' sold some building land to 'B', and he covenanted for title. After some houses had been built on the land, the purchaser was evicted, not only the value of the land, but also that of those houses subsequently built thereon.' Romilly, M.R., in the course of a very short judgment, said (2) 'I am of the opinion that the measure of damages upon these convenants includes the amount expended on converting the land into the purposes for which it was sold.'

The other case was *Ralph v. Grouch* (1), in which . . . loss. These cases, though on different subject matters, are in point, but really in order to come to a decision on the matter one has to look first at s.12 and then at s. 53 of the Sale of Goods Act, 1893.

The particulars of claim in this action, claim under both heads of s.12 but in this Court Mr Leon has put forward only that there was breach of an implied warranty that the buyer should have and enjoy quiet possession of goods. Mr O'Sullivan in his submission to the Court submitted that there was and was alleged to be a breach of the implied condition in sub. S. 1 on the part of the seller that he had a right to sell the goods, and Mr O'Sullivan submitted that that would give rise only to a claim for the return of the money paid and that it would not give a general right of action for damages. It appears to me that that matter has really little to do with this case, because in any event, if there was a breach of the implied conditions, the plaintiff was entitled to treat that as a breach of warranty. . .

On the submission that the defendant had no fore-knowledge that the kind of damage might flow, we were referred to the judgment of this Court, delivered by Asquith, C.J. in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd* (1) and in particular to a passage in the judgment where Lord Justice said: 'What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or at all events, by the party who later commits the breach. For this purpose, knowledge 'possessed' is of the two kinds - one implied the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course.

In the present case the learned Country Court Judge found that the plaintiff 'behaved in a common sense way' that she did 'the ordinary and natural thing' that what she did was 'quite naturally done', and the ordinary course of events: damages have to be

assessed under sub. s. 2 of s. 53 of the Sale of Goods Act, 1893, and those damages resulting from breach of warranty on the part of the seller would have been, if there had been no payment on account, the total amount of 20*l*. which she had paid for the typewriter and the amount which he 'rightly' and 'properly' and 'naturally' expended to have it overhauled and put in proper order.

On the facts obtained in the case before me I am satisfied that there had been a breach of warranty implied in the contract of sale that the plaintiff should have and enjoy quiet possession of the vehicle in question. It is not in dispute that the vehicle was a non-runner. However, there is no evidence from the defendant that the vehicle was in such a condition that it could not have been repaired to make it mobile. In any case it is evident that it was repaired and made mobile. Having found that the plaintiff's objective to buy the vehicle was for his own use, the natural and proper thing for the plaintiff to do was, I consider, to have the vehicle repaired to make it useable. This he did is not in dispute. It is a fact that the vehicle after being repaired was driven to the Road Traffic Office, to have the blue book registration changed. The defendant did not suggest that K1,596.07 spent by the plaintiff was unreasonable or was unnecessary. The question is whether or not it was natural and ordinary thing for the plaintiff, as the purchaser of a non-runner vehicle of the kind it was, to have it repaired to make it road-worthy. I cannot see how, on the facts obtained, I can say that it was not natural and ordinary thing for the plaintiff to have spent the money to have the vehicle repaired to make it road-worthy. In my considered view it was only proper, in the circumstances, for the plaintiff to have spent the money to have the vehicle made mobile so that he could use it for his business. I find that the warranty for quiet enjoyment was breached and therefore, the plaintiff is entitled to the sum of K1,596.07 being the amount the plaintiff, I consider, had rightly and properly expended to have the motor vehicle repaired to make it road-worthy and useful.

In the results there will be judgment for the plaintiff for K2,544.07 being total amount claimed, plus costs and interest at 6% per annum from the date of action The defendant joined the parties from whom they had purchased the vehicle and claim indemnity against the plaintiff's claim. Having looked at the proceedings on the record, I am satisfied that the third parties, who after being served with a Third Party notice and having entered an appearance, had failed to file their defence. The defendant had served a Statement of Claim as ordered in the directions. The third parties, in my opinion, have

adopted a don't care attitude. I cannot see how in the circumstances, the defendant could be deprived of its claim against the third parties. In the result I find it proper to enter judgment for the defendant at against the third parties. There will thereafter be judgment for the defendant against the third parties for K2,544.07, plus costs and interest at 6% per annum from the date of the action.
. . .

Gershom Mumba v. Rajiv Dewan (Supreme Court of Zambia) SCZ Appeal No. 153 of 2001

The plaintiff entered into an agreement with the defendant for the sale of his motor vehicle namely a Mercedes Benz S320, Registration No. AAM 1604 valued at US $50,000.00. Under the agreement the plaintiff's vehicle was to be paid for partly by way of an exchange with the defendant's vehicle, a Mercedes Benz E280 Registration No. AAM 8759 valued at US $20,000.00. The diference of US $30,000.00 was to be paid in cash. After the transaction had been completed sometime in January 2000, the defendant's vehicle, which had been in possession of the plaintiff, was impounded by Zambia Police on the ground that it was a stolen motor vehicle. It was established that the said motor vehicle had been sold to the defendant by a Mr Mulanda.

In the High Court, the judge indicated that the question for determination was whether there had been a failure of consideration in the transaction; and if so whether the plaintiff was entitled to recover from the defendant the total value of his Mercedes Benz considered the provisions of section 12 of the Sale of Goods Act, 1893 on an implied condition of the right to sale goods on the part of a seller as applied in the case of *Rowland v. Divall* (1923) 2 KB 500, in which the plaintiff successfully sued to recover back the price of the vehicle that he had paid to the defendant on ground of total failure of consideration. The judge accepted that the case was on all fours with the case before him. He found that there was a total failure of consideration and entered judgment in favour of the plaintiff. The court also made an order that the third party who had sold the vehicle to the defendant, should indemnify the defendant with the full amount of the judgment and cost.

On the 20 May 2001, on his own motion, the learned Judge reviewed his own judgment of 21 March 2001. In the reviewed judgment, the learned Judge stated as follows:

I have since realised that there was an omission in the judgment. Having found that there was no contract, the order which I made in the body of the judgment should have read and will now read as follows:

> In order to put the parties back in the position they were before the contract, the defendant is required by this order to return to the plaintiff motor vehicle Registration No. AAM 1604 or pay US $20,000.00 its value to the plaintiff. The plaintiff to refund to the defendant US $30,000.00 which the defendant paid him for a consideration that has wholly failed. The order made against the third party remains unchanged.
>
> The plaintiff appealed on three grounds, namely that the trial judge erred in law to review the earlier judgment on its own motion without the attendance of the parties and without summons; that the judge further erred in law to review the judgment to put the plaintiff in a position of the defendant as the one owing to the defendant when in fact it was the defendant owing him; that the judge further erred in reviewing his judgment 62 days after it had been passed contrary to order 93 rules 1 and 2 of the High Court rules.

SAKALA, J.S.: When we heard this appeal, we allowed the appeal and indicated that we shall give our reasons later. We now give those reasons. . . . On account of the view we take of the judgment in review, we find it unnecessary to delve into the submissions of both learned counsel in detail. Suffice it to say that the reviewing of the judgment in the absence of the parties 62 days after it had been entered was highly irregular on the part of the learned trial Judge. While the court is entitled, on its own motion, to review a judgment, the circumstances of this case were such that the parties should have been afforded an opportunity to be heard. More importantly, the case before the learned trial Judge was not one of total failure of consideration as in the case of *Rowland v. Divall***.** Here was a case of the defendant's vehicle being exchanged with the plaintiff's vehicle as part payment only while the other payment was done by the defendant in cash. This was therefore a case where there was only partial failure of consideration in that the defendant's vehicle failed as part of the consideration. This cannot

be said of the cash consideration which was part of the full consideration. Thus, if the defendant had paid the whole consideration in cash only for the plaintiff's vehicle there would never have been partial failure of consideration. The learned trial Judge was therefore wrong on review to have taken a position that there was no contract between the parties. It was for that reason that we allowed the appeal with costs, quashed the judgment on review and restored the judgment entered earlier in favour of the plaintiff

Rajan Patel v. The Attorney-General **(2002) ZR 59 (Supreme Court of Zambia)**

(The facts of the case appear from the judgment of the court delivered by Sakala, J.S.)

The appellant's claim is for a declaration that he was the lawful owner of a vehicle Registration No. AAT 5552, Mercedes Benz E240.

The appellant was approached by one Humphrey Musonda and one Patrick Kangwa at his shop in Ndola on 19 July 1999. The two informed him that they had a car for sale and invited him to view it. The appellant viewed the car, a Mercedes Benz E240, and thought he liked it. He thereupon took it for a road test and immediately indicated to the duo that he wanted to buy the car. The appellant was then shown a Vehicle Registration Book, a National Registration Card and a Customs Clearance Certificate. The Registration Book showed that the registered owner of the car was Patrick Kangwa. The Registration Book was issued by the Government of Zambia. The appellant checked the engine and chassis numbers. These corresponded with what was in the Registration Book. The agreed purchase price for the car was US $28,000. Kangwa then informed the appellant that he was returning to Lusaka and that he would leave full authority and care of the car to Musonda.

The next day, the appellant and Musonda went to Ndola Police Station at the motor vehicle section for purposes of verifying the ownership status of the subject car. At the Police Station, Musonda gave the vehicle's documents to the Police who verified them. Thereafter, Musonda and the appellant went to the Officer-in-Charge where Musonda swore an affidavit on behalf of Patrick Kangwa for change of ownership. On 12 July 1999, the two went

to the Road Traffic Department where they effected change of ownership of the car into the joint names of the appellant and his wife. The following day, they proceeded to the appellant's lawyer where a contract of sale for the motor vehicle was made and signed. After signing of the contract the appellant paid to Musonda the sum of US $28,000.

It later transpired that the said car had on 15 July 1999 been hijacked from the owner in the Republic of South Africa and the matter was reported to the South African Police who opened a docket and circulated this information to Interpol.

Held both in the High Court and on appeal, citing with approval the case of *ROWLAND v. DIVALL*, and section 12 (1) of the Sale of Goods Act, 1873, that the appellant's claim must fail. The thief who store the car could not pass good title because he had none. Held further that that sale of the car in this case was not a sale in market overt.

SAKALA, J.S.: . . . A market overt is defined as an open public and legally constituted market. We cannot accept that the sale of a vehicle by people going to the plaintiff's shop was a sale at the market overt as defined. On the facts of the case the Sale of Goods Act cannot assist the plaintiff. Indeed, the whole transaction was conducted to the disadvantage of the plaintiff. But as pointed out by the learned trial Judge all is not lost. The plaintiff can still pursue the seller. For now this appeal is dismissed. . . .

Liability imposed by section 12 (1) is strict and does not depend on the fault or negligence or knowledge of the seller. Thus the provision is breached even if the seller honestly believed that he had the right to sell.

Butterworth v. Kingsway Motors Ltd (1954) 1 WLR 1286; 2 All ER 694

A took delivery of a Jowett Javelin car on hire purchase terms. Mistakenly believing that she had the right to sell the car subject to her continuing to pay the instalments under the hire purchase agreement, she purportedly sold the car to B. B, who of course had no title, sold it to C who in turn sold it to Kingsway Motors Limited, who sold it to Butterworth for the sum of £1,275. Butterworth used the car for no less than eleven and half months before he received a notification from the original hire purchase

dealers, claiming the delivery up of the car. Butterworth then wrote to Kingsway Motors, demanding the return of the entire purchase price which he had paid to them. Within a week, A completed her hire purchase payments including the option to purchase, so that the hire purchase dealer no longer had a claim to the car. Butterworth then sued Kingsway Motors for breach of the implied condition that the seller had good title to the car at the time of the sale. He claimed a refund of the purchase price. A, B and C were joined to the action and each of them claimed up the line in similar fashion for breach of contract.

Held, that Butterworth was entitled to a refund of the purchase price despite having used the car for over eleven months. *Held* further, that the other buyers were only entitled to damages for breach of warranty because when A completed her payments with the hire purchase company, title passed to her from the hire purchase dealer. This title in turn was 'fed down in line' to B, C and Kingsway. All these received title, though belatedly. This title did not, however, pass to Butterworth because he repudiated the contract before A acquired title.

Barber v. NWS Bank Ltd (1996) 1 All ER 906

The buyer agreed to acquire a car from a Finance Company under a conditional sale agreement which provides that property would pass when he had paid the price in full but that "until such time the property in the goods shall remain vested in the seller". After 18 months the buyer discovered that the car was subject to a prior hire purchase agreement and that the Finance Company had not owned it at the time the contract was made.

Held; that since this was a conditional sale agreement, the statutory implied term required that the company should have the right to sale at the time when property was to pass, there was no breach of the implied term. However, the assertion in the contract that property shall remain vested in the seller amounted to an express term that the seller had property at the time of the contract. The term was classified as a condition and on breach of it the buyer was entitled to recover all sums paid.

The 'Right to Sale' has a much wider meaning than the right to pass property. The courts in interpreting section 12 of the Act have extended it to the packaging of the goods as well.

Niblett v. Confectioners Materials Co. (1921) 3 KB 387 (Court of Appeal)

Under a contract of sale, 3,000 cases of condensed milk were to be shipped from New York to London. A consignment of the goods arrived in London bearing the labels 'Nissly' brand. This in fact infringed the trade mark of another company, Nestle. The third party company complained to customs authorities and the tins (which have been imported) were detained by Customs. The buyer was obliged to strip the cans of their labels and resold them at a lower price. The buyer then brought an action against the seller for breach of the condition implied under section 12 (1) of the Sale of Goods Act.

Held; by the Court of Appeal, that although the property had passed, the sellers were in breach of section 12 (1) because, if a buyer could be stopped by the process of the law from selling the goods for infringing a third party's trade mark, then the seller had no right to sell. (The court went further and held that the labels made the goods unmerchantable).

Ali Kassan Virani Ltd v. The United Africa Company Ltd (1958) EALR 554 (Court of Appeal of Dar-es-salaam, Tanganyika)

The appellant sold to the respondents a quantity of coffee, reasonably believing it to have been stolen. The coffee was subsequently confiscated by the police. The respondents sued for the purchase price, asserting that the respondents had breached s.14 (a) and/or 14 (b) of the Sale of Goods Ordinance which raise warranties as to the seller's right to sell and to quiet possession respectively. These provisions are a replica of s. 12 of the Sale of Goods Act of England, 1893.

Held; citing the dicta of Scrutton, L.J. in the case of *Niblet v. Confectioner's Materials Co. Ltd* (1921) 3 KB 387 that; 'If the vendor can be stopped by process of law from selling he has not the right to sell'. The appellant had breached the warranties under section 14 of the Ordinance. The respondent was entitled to recover the purchase price as money had and received for total failure of consideration.

Lakhamshi Bros Ltd v. R. Raja & Sons (1966) EALR 178 (Court of Appeal of Nairobi)

The appellant had bought 42 cases of boot polish from the respondents. It was later discovered that the goods were in fact stolen before they came into the hands of the respondent. They were later confiscated by the police. The appellant brought an action for the purchase price, averring a breach of the terms implied into

the sale contract by virtue of s.14 (a) and (b) of the Sale of Goods Act (Cap 31), namely an implied condition that he had the right to sale and, in the alternative, the right of the appellant to enjoy quite possession of the goods.

Held; the appellant succeeds because the respondent had, at the time of the sale, reasonable ground to believe the goods to have been stolen so that the act of the police was not a *novus actus terti,* there being a sufficient relationship between the seizure and the sale. The respondent was thus responsible for the appellant's inability to enjoy quiet enjoyment of the goods sold.

SPRT, J.A.: . . . in my opinion, there is evidence to indicate that the respondent had at all material times at least some doubt as to their title of the goods and I think this provides sufficient nexus with the disturbance of the appellant company's possession to exclude the argument that the action of the police was a *novus actus tertii*. . .

Microbead AG v. Vinhurst Road Markings Ltd (1975) 1 WLR 215 (Court of Appeal)

There was a contract between an English company and a Swiss company for the sale of special machinery for making lines on roads. The English company bought the machines from the Swiss company. Three years later, another English company claimed that the machinery infringed their patent. They therefore sought an injunction to prevent the use of the machines. The question was whether there was a breach of section 12 (1).

Held; by the Court of Appeal that seller will not be in breach of section 12 (1) if at the time the property is to pass to the buyer the seller has a right to sell and therefore pass good title to the buyer. The Swiss company was not in breach of this section as the patent had been granted to English company; property had already passed to the buyer. Where the seller is in breach of section 12 of the Sale of Goods Act, the buyer's claim is not limited to recovery of the price paid.

Mason v. Burningham (1949) 2 KB 545; (1949) 2 All ER 134

The plaintiff had purchased a typewriter from the defendant for 20*l*. She subsequently spent 11*l.* 10s. on overhauling it. Unknown to the parties the typewriter had been stolen and the plaintiff had to

return it to the owner. The plaintiff claimed from the defendant under the warranty that she should have quiet possession implied in the contract of sale by virtue of the provisions of s. 12 of the Sale of Goods Act, 1893, repayment first of the sum of 20*l.*, the purchase price she had paid and addition 11*l.* 10*s*. being the sum she had spent on overhaul. The defendant repaid the 20*l.*, but contended that he was not liable for the moneys spent on overhaul. The county court judge held that, although the plaintiff had done the ordinary and natural 'thing' in having the typewriter overhauled, she was not entitled to recover the costs of such overhaul from the defendant, as it was not a loss due to the fact that the defendant had sold an article to which he had no title.

The country court judge, while finding as a fact that the plaintiff had 'behaved in a commonsense way' and that she had done the 'natural and proper thing' in having the typewriter overhauled, dismissed the action. The plaintiff appealed but the defendant took the preliminary objection that, as the claim had admittedly been for less than 20*l.*, the appeal could not be brought without the leave of the country court judge, which had not been obtained.

Held; allowing the appeal, that there had been a breach of the warranty implied in the contract of sale by s. 12 of the Sale of Goods Act, 1893 that the buyer should have and enjoyed quiet possession of goods. The plaintiff was entitled under s. 53, sub-s. 1 of Act of 1893 to treat the breach of the implied condition that the seller had a right to sell the goods as breach of warranty. The costs of overhauling the typewriter was a loss directly and naturally resulting in the ordinary course of events from that breach of warranty" within s. 53, sub-s. 2, which the plaintiff was entitled to recover from the defendant. *Bunny v. Hopkinson* (1859) 27 *Beav. 565; Rolph v. Crouch* (1867) L.R. 3 Ex. 44; and *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd, Coulson & Co. Ltd, Third Party (ante),* p. 528, considered.

Empressa Exportadora de Azucar v. Industria Azucarera National SA **(The Playa Larga) (1983) 2 Llyod's Rep. 70**

The Cuban state sugar trading enterprises sold sugar to a private buyer in Chile to be dispatched by ship. After the ship had unloaded some of its cargo in Chile, there was a *coup d' etat* and a military dictatorship came into power. Cuba broke off trading links and instructed the ship to leave Chile without unloading any more sugar even though property had passed to the buyer.

Held; that this is a breach of the warranty implied by section 12 (2) that the buyer will enjoy quiet possession and the buyer was entitled to damages.

Under Section 12 (2) of the Sale of Goods Act there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. The scope and relation of this section to section 12 (1) was considered in Niblett's case *(supra)* and in *Manson v. Burningham (supra)* It has been argued that section 12 (2) creates no additional right over and above those created by section 12 (1).

Udekwu v. Abosi (1974) EC SLR 298

The goods subject of the contract of sale were unlawfully seized by customs officials for an alleged non-payment of import duty.

Held; by a Nigerian court that the seller's warranty under section 12 (2) did not include a warranty against disturbances by persons who wrongfully interfered with the goods.

Section 12 (3) of the Sale of Goods Act provides for an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

The interpretation of this subsection was made in a leading English authority.

Lloyds & Scottish Finance Ltd v. Modern Cars & Caravans (Kingstone) Ltd (1966) 1 QB 764

The defendants bought a caravan from a debtor against whom the sheriff had issued a writ of *fifa*. The defendant learnt of this situation soon afterwards, but proceeded to sell the caravan to the plaintiffs. The plaintiff then let the caravan out on hire purchase. The caravan was subsequently seized by the sheriff from the hirer.

Held; that although the defendants had obtained a good title from the debtor which they were able to transfer to the plaintiff, it was not free from the sheriff's rights and therefore they transferred it in breach of the warranty contained in section 12 (3), namely that it would be free from charge or encumbrance

(b) Correspondence with description

Section 13 of the Sale of Goods Act implies a condition in a contract of sale that the goods must comply with the description supplied. It provides as follows:

> Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods do not correspond with the sample if they correspond with the description.

A sale by description has been defined as a sale where words are used to identify the goods sold. Therefore a sale of future or unascertained goods is a sale by description.

The rule embodied in section 13 of Sale of Goods Act was clearly explained in the words of Lord Blackburn in *Bowes v. Shands*[19]*:*

> if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for and the other party is not bound to take it,

In *Pinnock Bros v. Lewis*[20], copra cake was sold to be used as cattle feed. The copra cake supplied was adulterated with caster beans, which was poisonous to cattle. It was held the feed did not correspond with the description.

In *Toepfer v. Marinco AG*[21], there was a contract for the sale of 'fine ground' Soya bean meal, the sellers supplied course ground meal. The buyer rejected it. It was held words 'fine ground' were words of description and the buyer was entitled to reject.

For section 13 to apply, the descriptive statement must be or form a term of the contract in question. The common law distinction between statements that are mere representation and statements that become terms of the contract is relevant in this context.

Beal v. Tailor (1967) 1 WLR 1193

The defendant sold a car which he advertised as 'Triumph Herald, convertible, white, 1961'. The car turned out to be the front of a 1948 Triumph Herald welded with the rear of a 1961 model. The purchaser in fact had a ride in the car, but neither he nor the seller realised the physical state of the car.

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[19] (1877) 2 AC 455.
[20] (1923) KB 690.
[21] (1978) 2 Lloyds Rep. 569.

Held; that the statement constituted a contractual description of the car and section 13 therefore applied.

***Reardon Smith Line Ltd v. Yuguar Hansen* – Tangen (1976) WLR 989**

The charter party referred to a vessel the subject matter of the contract as one to be built at Osaka with the yard or hull number 354. Eventually, however, because of its size the vessel was built at Oshima and bore the yard or hull number 004. The charterers rejected the vessel arguing that the vessel tendered did not correspond with the contractual description in that it was Oshima 004 and not Osaka 354.

Held; by the House of Lords, *inter alia* that the charterer failed to bring the case within the strict rules as to 'description' since the words 'yard 354' were not and were never intended to be part of the description of the vessel but only a means of identifying it, and the vessel tendered was the vessel that was contracted for. Lord Wilberforce distinguished between words which identify in that their 'purpose is to state an essential part of the description of the goods' and words 'which provide one party with a specific indication of the goods so that he can find them and if he wishes sub dispose of them'. Words used in the second sense, do not necessarily describe the goods. There was thus no breach of a condition and therefore the buyer could not reject the vessel.

Where the buyer has not seen the goods (unascertained) and relies on the description of the goods, there is a sale by description.

***Varley v. Whipp* (1900) 1 KB 513**

The buyer agreed to buy a second-hand reaping machine described as 'new the previous year, and only used to cut 50 or 60 acres'. The buyer had not seen the machine, but relied on the description of it as given. The reaping machine turned out to be much older and in poor condition and did not correspond to the description given. On issue was whether there could be a sale by description of a specific good.

Held; that there was here a sale by description. There was a sale by description in every case where the buyer had not seen the goods but was relying on the description alone.

CHANNEL, J.: . . . the term 'sale by description' must apply to all cases where the purchaser has not seen the goods but was relying on the description alone. . . .

Note: *Although the reaping machine was in a poor state, the buyer could not use section 14 relating to merchantable quality as the sale was not in the course of business.*

There may also be a sale by description even where the buyer has seen the goods (i.e. specific goods).

Grant v. Australian Knitting Mills (1936) AC 85

The buyer purchased some woolen underpants (a specific good) from a display on the counter of a retail shop. When he used the underpants, the buyer contracted dermatitis owing to the excess sulphur used in the manufacture of the garment. He sued for breach of an implied term that the goods would be of merchantable quality. It was necessary to consider the question whether there was in this case a sale by description.

Held; that there was a sale by description even though the buyer was buying goods displayed before him. It did not matter that what was being sold was a specific good, as long as it was sold not as a specific thing, but as thing corresponding to description.

WRIGHT, L.J.: . . . . It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing, but as a thing corresponding to a description e.g. woolen undergarments, a hot water bottle, a secondhand reaping machine, to select a few obvious illustrations. . . .

A statement made in the process of negotiation will only form part of the description if it operates to identify the goods in question.

Ashington Piggeries v. Christopher Hill Ltd (1972) AC 441

Per DIPLOCK, L.J: . . . . The description by which unascertained goods are sold is, in my view, confined to those words in the contract which were to be supplied. It is open to the parties to use a description as broad or as narrow as they choose. But ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he agreed to buy. The key to section 13 is identification . . . .

Besides considering whether statements formed part of the contract or not, it will be relevant to consider whether the buyer could reasonably be expected to rely on the statement in question.

Harlingdon & Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd (1991) 1 QB 564

The seller sold a painting described as being by the German expressionist painter Gabriel Munter. The painting had been so described in a 1980 auction catalogue and S, who specialises in other areas of fine art, relied in the catalogue. He made clear to B who did specialise in German expressionist paintings that he had no relevant expertise, and B bought the painting for British Pound 6,000. It later transpired that the painting was fake worth about British Pound 50 – 100 and B tried to reject on the grounds that the painting did not comply with its description.

Held by the Court of Appeal, that there could not be a sale by description unless the description was influential in the sale so as to become an essential term of the contract and so there could not be a sale by description where the parties could not reasonably expect the buyer to rely on the description. Section 13 did not apply.

Section 13 has been held to apply not only to the description of the goods themselves, but also to the mode of packing them.

Re Moore & Co. v. Laundaer (1921) 2 KB 519

Buyers agreed to buy 3000 tins of Australian caned fruit packed in cases of 30 tins. When the goods were delivered, it was found that about half of the cases contained 24 tins instead of 30. The total contractual quantity was however delivered. The Arbitrator found that there was no difference in value between tins packed in cases of 30 and those packed in cases of 24.

Held; by the Court of Appeal, that despite the finding by the arbitrator, the buyer was entitled to reject the whole consignment on the ground that the seller had breached section 13 of the Sale of Goods Act.

Manbre Saccharine Co. v. Corn Products Co. (1919) 2 AC 74

The contract was for the sale c.i.f. of starch in 280 lb bags. The starch shipped was partly in 280 lb bags and partly in 140 lb bags. The seller argued that the words '280 lb bags' were not a material part of the bargain, but the court rejected this argument.

Mc CARDIE, J.: (at p. 207) . . . it is clear that such words were an essential part of the contract requirements. They constituted a portion of the description of the goods. The size of bags may be important to a purchaser in view of sub-contractors or otherwise. A man may prefer to receive starch either in small or large or medium bags. If the size of the bags was immaterial I fail to see why it should have been so clearly specified in the contract. A vendor must supply goods in accordance with the contract description, and he is not entitled to say that another description of the goods will suffice for purposes of the purchaser . . .

The courts have interpreted the seller's obligation to deliver goods which comply with the contract description strictly.

Arcos Ltd v. E.A. Ronarssen & Sons (1933) AC 470

A contract for the sale of a quantity of starves to be used for making cement barrels, stipulated that the starves would be half an inch thick. Only about five per cent of the starves supplied conformed to the contract specification. The rest were nine sixteenth of an inch, although they were still suitable for making cement barrels and were of merchantable quality. The buyer rejected the goods, arguing that they did not conform to the contract description.

Held; that the buyer was entitled to reject the goods as they did not comply with the contract specifications. The sellers were in breach of section 13 of the Sale of Goods Act.

ATKIN, L.J.: If written contract specfiies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does half inch mean about an inch. If a seller wants in margin he must and in my experience does stipulate for it. . . .

When section 13 is breached by the seller, the buyer who has received goods different from those which he contracted to receive, can either claim damages or he can reject the goods.

Livio Carli & Others v. Salem & Mohamed Bashanfer & Others (1959) EALR 701 (Supreme Court of Adden)

The plaintiffs had contracted to sell 200 tons of cement described as 'Dalmation Portland Cement of Yugoslavian Origin: Two Lyons Brand'. The cement that arrived in Aden was of 'Salona Towers Brand'. The defendant refused to accept delivery.

Held; that the sale was one by description. Failure to deliver the agreed description cement entitled the defendant to refuse delivery.

The description may in some cases carry an implication of a certain quality of a certain kind.

Cotter v. Luckie (1918) NZLR 811

A bull was described as a 'pure bred polled Angus bull'. The buyer, as the seller well knew, wanted the bull for purposes of breeding. It later transpired that the bull had certain abnormalities which prevented it from breeding. On the question whether the buyer could be held liable for breach of description....

Held; that the sale was a sale by description, and further that the description implied that the bull was capable of breeding. The buyer would have no use for the animal save for servicing his cows. The bull was not sold merely as a bull, but as a pure-bred pooled Angus bull. The descriptive words would be meaningless unless they were intended to convey the impression that the animal to get this class of stock.

Goods required for a particular purpose

Where goods are bought for a particular purpose which is known to the seller, the description of those goods must conform to the use for which the goods are bought.

Abdula Ali Nathoo v. Walji Hirji (1957) EALR 207 (High Court of Zanzibar)

The appellant bought 50 bags of onions from the respondent. The onions were selected by the appellant's agent from a larger consignment of 100 bags. On further inspection after delivery had been made, it was discovered that the onions were not fit for human consumption. The appellant refused to pay the full purchase price, claiming that the onions were sold subject to a warranty that they would be fit for the purpose; in this case consumption.

Held; that since the goods were sold simply as 'onions' without any further description, the provisions of s. 113 of the Zanzibar Contract Decree, similar to s. 13 of the Sale of Goods Act, 1893 could not apply to raise a warranty.

Since the appellant's agent had an opportunity to inspect the goods, the provisions of s. 114 of the Contract Decree, which required that goods sold for a specified purpose must be fit for that purpose could not apply on account of the common law principle of *caveat emptor* which entailed that once the buyer has had an opportunity to inspect the goods, no warranty as to their quality can arise.

Appeal dismissed.

Preist v. Last **(1903) 2 KB 148; 89 LT 33**

The plaintiff bought a hot water bottle from a shop which burst when hot water was poured into it. The buyer sued under section 14 (1) of the Sale of Goods Act.

Held; that the hot water bottle was a single purpose item and so the buyer did not need to specify the purpose for which he required the bottle. In buying it he relied on the seller's skill and judgment.

COLLINS, M.R.: . . . where the description of the goods, by which they are sold, points to one particular purpose only, it seems to me that the first requirement of that subsection is satisfied, namely, that the particular purpose for which the goods are required should be made known to the seller. The fact that by the very term of the sale itself, the article sold purports to be for use for a particular purpose cannot possibly exclude the case from the rule that, where goods are sold for a particular purpose, there is an implied warranty that they are reasonably fit for that purpose. . .

Grant v. Australian Knitting Mills *(supra)*

WRIGHT, L.J: . . . there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose within the meaning of the section because it is the only purpose for which anyone would ordinarily want the goods. . .

(c) Quality and fitness – implied condition as to merchantability

Until recently the maxim *caveat emptor* or buyer beware, was the primary principle in the sphere of the sale of goods as it did and still does in the sale of land. The Sale of Goods Act still provides in section 14 that

except as provided by the Act, there is no implied condition or warranty as to quality or fitness for any particular purpose of goods supplied under a contact of sale. The section reads as follows:

> Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for the purpose, provided that in the case of a contract for the sale of a specified article under its patent or trade name, there is no implied condition as to its fitness for any particular purpose;
> (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods there shall be no implied condition as regards defects which that examination ought to have revealed;
> (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
> (4) An express warranty or condition does not negative a warrant or condition implied by this Act unless inconsistent therewith.

Example: Nasilele buys a car from Nalishebo which turns out to be a useless piece of metal incapable of self propulsion. Nalishebo does not sell the car in the course of a business.
Result: Nalishebo has no claim against Nasilele. *Caveat emptor.*

There are many exceptions to the general rule that buyer must be ware of section 14 of the Sale of Goods Act in effect implies these exceptions in contracts of sale of goods as follows:

1. An implied condition as to merchantable quality.
2. An implied condition of fitness for purpose.
3. Conditions and warranties implied by usage.
4. A condition of freedom from latent defects on a sale by sample.

Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality except that there is no such condition (a) as regards defects specifically drawn to the buyer's attention before the contract is made; or (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

For the buyer to rely on the provisions of section 14 (1) he must have made known to the seller expressly or by implication the particular purpose for which the goods are required. Where the goods are used for one purpose only or where the purpose for which the goods are required are obvious the law implies that no further indication is required. Thus in *Priest v. Last*[21] the plaintiff bought a hot water bottle from a shop. The bottle burst when hot water was poured into it. The Court of Appeal held that a hot water bottle is required for a particular purpose within the provisions of section 14 because it has one purpose only, and the buyer could, only require it for that purpose. This view of the law was approved in *Grant v. Australian Knitting Mills Ltd (supra)* where the plaintiff bought an underpant manufactured by the defendants and contracted dermatitis after wearing it. The court, upholding the decision in *Priest v. Last* held that:

> there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose within the meaning of the section because it is the only purpose for which any one would ordinarily want the goods.

Difficulties arise where the good can be used for a variety of purposes, or has a wide range of purposes. In such circumstances, the buyer would be obliged to indicate the particular one of these purposes for which he requires the goods. Thus in *D.T.C. Industries Ltd v. Jimfat Nigeria Ltd*[22], the defendant agreed orally to purchase from the plaintiffs thirteen tons of the coil wire said to be of the quality of 16 British Wire

[21] (1903) 2 KB 148.
[22] (1975) CCHJ 175.

Gauge (BWG). The defendants did not expressly indicate to the plaintiff sellers the particular purpose for which the wire coils were required. A Lagos High Court found that the wire coils supplied by the plaintiffs were capable of being used for a variety of purposes and that there was no evidence that the plaintiffs were informed of the particular purpose for which the defendants relied on their skill or judgment. The court therefore held that the provisions of the sub-section were inapplicable.

Where the buyer did not indicate the particular purpose within the known range, for which the goods may be required, the seller would be entitled to assume that the goods are suitable for all the foreseeable applications within the range. Thus in *Ashington Piggeries Ltd v. Christopher Hill Ltd*[23] the subject matter of the contract was herring meal which could be used for feeding to animals or as a fertiliser. In this instance the sellers were aware that the meal was required for feeding animals but did not know specifically that it was required for mink. The meal proved unsuitable for mink. The House of Lords considered that once the seller was aware that the meal would be used for animal feed it was reasonably foreseeable that it might be used for feeding to mink and the suppliers were therefore liable under the subsection. The requirements of the subsection were satisfied by showing that herring meal was often used as a feed for mink. Lord Diplock observed that:

> to attract the condition - the buyer must make known the purpose for which he requires the goods with sufficient particularity to enable a reasonable seller, engaged in the business of supplying goods of the kind ordered, to identify the characteristics which the goods need to possess to fit them for that purpose. If all that the buyer does make known to the seller is a range of purpose which do not all call for goods possessing identical characteristics and he does not identify the particular purpose or purposes within the range for which he in fact requires the goods, he does not give the seller sufficient information to enable him to make or select goods possessing a characteristic either is not needed to make them fit or makes them unfit for other purpose within the range.

The particular purpose may be communicated to the seller either by the buyer himself, his agent or a credit broker who sold the goods, to the seller. If the seller was aware of the particular purpose for which the goods were required either by past transactions or impliedly from the

[23] (1972) AC 441.

nature of the goods themselves or from the circumstances surrounding the negotiation of the contract, no further express intimation is necessary.

Goods are said to be of merchantable quality if they are fit for the purpose for which goods of that kind are commonly bought.

Rodgers & Another v. Parish (Scarborough) Ltd & Another (1987) 2 All ER 237

A Range Rover car sold as new by the defendant car dealers for £16,000 had a defective oil seals, a noisy gearbox, a misfiring engine and rusty bodywork due to poor storage. The buyer sued the seller for breach of contract arguing that the vehicle was not merchantable. The seller argued, *inter alia*, that if the vehicle was capable of being driven from one point to another on public roads or whatever surfaces, it must necessarily be merchantable. It was argued further that as all the defects could be repaired under the manufacturer's warranty, the vehicle was merchantable

Held; that the car was not merchantable. The fact that the defects could readily be repaired did not prevent the goods from being unmerchantable.

Berstein v. Pamson Motors (Golders Green) Ltd (1987) 2 All ER 220

The plaintiff bought a new Nissan Laurel car for 7,995 Pounds. The plaintiff made two or three short trips in the following three weeks. With only one hundred and forty-two miles recorded on its odometer, the plaintiff made the first long trip with the car. The engine seized due to a fault in the lubrication system attributable to a sealant which found its way during manufacture. Lengthy and costly repairs were then carried out under the manufacturer's warranty. The plaintiff refused to take the car back after the repairs. The issue for determination was whether the car was merchantable or not.

Held; that the vehicle was not merchantable. A buyer of a new car was entitled to expect more than merely being able to drive the vehicle. Such buyer expects safety and comfort.

The implied condition as to merchantability does not apply where the buyer has examined the goods as regards defects which such examination ought to have revealed.

The implied condition as to merchantable quality is not confined only to the goods actually sold. It applies to defective packaging as was the case in *Niblett v. Confectioner's Materials Co. (supra).*

The condition as to merchantability applies equally to goods sold as to goods supplied. In *Geddling v. Mash*[24], mineral water was sold in bottles which were returnable to the manufacturer who retained ownership of them throughout. A defective bottle burst and injured the plaintiff buyer. It was held that the bottle was supplied under a contract of sale and therefore, section 14 (2) of the Act applied to the bottle as well as the water. Hence it was an implied term that bottle was of merchantable quality. Similarly, in *Wilson v. Rickett*[25] a bag of coalite sold contained an explosive detonator. When the coal was burning on the fire the detonator exploded. The buyer sued the seller. It was held that the consignment was not merchantable.

A summary of the principles applicable in relation to the protection afforded to the buyer under section 14 is as follows:

1. If goods have only one purpose, they are unmerchantable if they have defects rendering them unfit for that purpose e.g. underpants in *Grant v. Australian Knitting Mills (supra)*, or a hot water bottle as in *Priest v. Last (supra).*
2. Where goods are intended for immediate use, they must be merchantable when they are sold and delivered. It will not be a good defence to argue that they would be made merchantable by a simple process. Where however, parties contemplate that something would be done to the goods before they are used, the goods must be merchantable after that thing has been done, but not before.

   In *Heil v. Hedges*[26] a woman bought some pork chops. She only half cooked them before she ate them. She fell ill as a result. It was established that the illness was caused by a parasite worm in the pork which would have been killed had the pork been properly cooked. It was held that the sellers were not liable under section 14.
3. Where goods are sold under a contract which involves transit before use, the goods must be merchantable at the time the contract is made and must remain so for a reasonable period thereafter.

   In *Beer v. Walker*[27] rabbits were transported by railway from London to Brighton. They were putrid and useless on arrival. It was held that under ordinary transit, there was an implied condition that the rabbits would be sound on arrival.

[24] (1920) 1 KB 688.
[25] (1954) 1 QB 598.
[26] (1951) 1 TLR 512.
[27] (1877) 46 LJ KB 677.

Marsh & Murell Ltd v. Joseph Emmanuel Ltd (1961) 1 All ER 485

The sellers in Cyprus sold potatoes to the buyers in England, c.&f. Liverpool. The potatoes were sound when loaded into a ship bound for England but were rotten on arrival.

Held; that the sellers were liable under section 14 (2) on the ground that in such a contract the goods must be loaded in 'such a state that they could endure the normal journey and be in a merchantable condition on arrival'.

***Note**: The Court of Appeal reversed this decision on the ground that section 14 (2) could only apply if the transit was a normal one or was what would reasonably be expected.*

4. Where the buyer examines the goods, he will not be protected as regards defect which 'that examination' ought to have revealed.

***Thornett & Fer v. Beer & Sons* (1919) 1 KB 486**

A buyer of glue carried out an examination of the outside of the barrels of glue. The seller had given the buyer an opportunity for a more thorough examination though the buyer did not take it. Had the buyer carried out a thorough examination by looking inside the barrels, the defects complained of would have been discovered.

Held; that the proviso contained in section 14 (2) applied and no condition of merchantability applied in the circumstances. Under the proviso, it was not sufficient that the buyer had the opportunity to examine the goods, he must have examined them.

***British & Overseas Credit Ltd v. Animashwun* (1961) 1 All NLR 343 (Supreme Court of Nigeria)**

The buyer bought from the seller 700 cases of tomato paste. The buyer was fully aware that the tomato paste was part of a consignment ordered by the seller and part of which had been condemned as unfit for human consumption by the health authorities. The buyer was invited to examine the cases before buying them and he did in fact conduct an examination of them. The tomato paste later proved to be unsuitable for consumption.

The seller argued that as the buyer had seen the goods and had full opportunity to examine them, and the defects being such as

would have been revealed by an ordinary examination, the buyer must be taken to have examined them within the meaning of the proviso to section 14 (2) and therefore that the implied condition as to merchantability did not attach to the sale.

Held; that the seller had the opportunity to examine and did examine the goods and that examination ought to have revealed the defects in the goods. The seller was not liable.

DE LESTANG, C.J.:… The defendant was present when the goods were examined by the Health Authorities at Oke-Arin and 292 odd cases condemned as unfit. If after this he purchased the remainder without a thorough examination he was extremely careless and has himself to blame for the predicament in which he found himself . . . in my view since he saw the goods, was put on his enquiry, accepted them and had full opportunity of examining them within the meaning of the proviso to section14 (2). There can be no doubt that an examination, however cursory made, would have revealed the defects which the Health Authorities found, namely, leaking and blown tins. . . .

In *Wren v. Holts*[28] arsenic in beer was a defect not discoverable on examination. It was held that the seller was liable.

5. Where goods are sold by the seller in the course of a business and the buyer expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied.

Omar Saleh Audialih v. Abesse & Co. (1960) EALR 907 (Court of Appeal of Nairobi)

There was, between the parties, what was purported to be a hire purchase agreement the subject being a lorry. The appellant fell behind in making payments and the respondents repossessed the lorry. He resold it and then proceeded to claim for the unpaid instalments.

Further, the lorry was purchased for use up-country. It turned out to be unfit for that purpose. There was, however, inserted in the contract, a term to the effect that; 'No warranty was implied on the part of the owner as to the quality or state of the truck or for its fitness for any purpose'.

[28] (1903) 1 KB 610.

Held; on the facts, the agreement was not a hire purchase agreement. Rather, it was an agreement for the sale of the lorry by instalments. In the interim property was to remain in the seller. The respondent could thus not claim the purchase price but could only recover the lorry since property remained in him, or, in the alternative, sue for the purchase price.

With regard to the exclusion clause, the court construed it *contra proferentem*, so that the word 'warranty' was construed not to encompass and thus exclude the 'conditions' implied into any contract of sale by virtue of s. 16 of the Sale of Goods Ordinance (s. 14 of the Sale of Goods Act, 1893) with regard to fitness for purpose.

On the facts, it was however held that the truck was fit for the stated purpose.

Appeal dismissed.

———————————————

In *Frost v. Aylesbury Dairy Co.*[29] milk was supplied by a dairy company to a family for their consumption. Some of it contained germs of typhoid fever and this led to the death of the plaintiff's wife. An action was brought under section 14. It was held that the seller was liable.

6. The buyer must show that he relied on the seller's skill or judgment. The courts have readily implied reliance and have held that partial reliance is sufficient.

In *Bristol Tramways v. Fiat Motors*[30], the plaintiff ordered seven buses for burdensome passengers work in heavy traffic in Bristol, a hilly district. The buses proved not to be robust enough and had to be reconstructed. It was held that the buses were not fit for the particular purposes stated by the plaintiff.

In *Manchester Liners v. Rea*[31], coal was ordered for the steamship 'Manchester Importers'. The coal supplied was unsuitable for the particular ship and the buyer sued under section 14. It was held that the sellers were told expressively what ship the coal was for. Thus the buyer relied on the seller's skill and judgment. The seller was thus liable.[32]

In *Teheran – Europe Co. v. S.T. Belton (Tractors)*[33], the buyer bought a consignment of portable air compressors; they made it known to Belton, the seller, that they were for resale in Persia (now Iran). However the compressor proved unsuitable for sale in Persia and the

[29] (1905) 1KB 608.
[30] (1910) 2 KB 83.
[31] (1922) 2AC 74.
[32] See also *Cammell Laird v. Manganese Bronze & Brass Co*. (1934) AC 402, *Dixon Kirby v. Robinson* (1965) 2 Lloyds Rep. 545.
[33] (1968) 2 QB 545.

buyer sued claiming that the goods were not fit for the purpose stated. It was held the buyer did no more than make the purpose known. To come within section 14 they must do more; they must show reliance on the skill and judgment of the seller. The seller knew nothing about conditions in Persia. The buyer relied on his own skill and judgment.

7. Where the defect occurs as a result of the special or abnormal situation of the buyer which was not revealed to the seller at the time of sale, the seller will not be held liable.

Griffiths v. Peter Conway Ltd (1939) 1 All ER 685

The buyer of a Harris Tweed Coat contracted dermatitis from its use due to her unusually sensitive skin. She sued the seller under section 14 of the Sale of Goods Act, arguing that the coat was not merchantable and that it was not fit for the purpose.

Held; by the Court of Appeal, that as the coat would not have been harmful to a person with a normal skin, the seller was not liable. The buyer should have disclosed the special purpose, i.e., wearing by a person with an overly sensitive skin, if she was to succeed under her claim that the coat was not fit for the purpose.

This case was followed in *Slater v. Finning*[34] where the seller supplied a camshaft for installation in the engine of the buyer's fishing vessel known as the Aquarius II. The camshaft failed in use, as did two further identical replacement causing considerable losses to the buyer's business. The buyer claimed damages to compensate for those losses on the grounds that the camshaft supplied was not reasonably fit for the purpose indicated. Expert evidence established that the fault was caused by some defect in the Aquarius II, which resulted in excessive wear to camshaft when in use. The Aquarius engine fitted with an identical camshaft worked satisfactorily in another vessel. The buyer argued that the camshaft was unfit for the purpose indicated i.e., for instalation in the Aquarius II. The House of Lords rejected the claim. Where a person buys goods without indicating that he requires them for any special purpose the seller is entitled to assume that they are required for normal use.

[34] (1977) AC 473.

Kenyanjui v. D.T. Dobie & Co (Kenya) Ltd (1975) 176 Court of Appeal of Nairobi)

The appellant bought a Mercedes Benz Truck from the respondent. He specified that he intended to use the truck on the Mombasa-Zambia run, famously known as the 'Hell-run' for its bad state. He expressly stated that he needed a truck that would be fit for this purpose. After a few months, the truck broke down. He brought an action claiming damages for breach of warranty that the truck would be fit for the stated purpose, implied into the contract of sale by virtue of s.16 of the Sale of Goods Act (Cap 31 of the laws of that country). The respondent argued that the buyer must state that he relies on the seller's skill and judgment in order for the warranty to apply.

Held; that the mere communication by the buyer to the seller of the purpose for which the goods are required is enough to show that he relies on the seller's skill and judgment, without requiring an express or implied intimation to that effect. (*Teheren Europe Co. v. S.T. Bellton (Tractors) Ltd (supra)* followed).

On the facts, it was found that the truck was in fact fit for the purpose.

Law, J.A., citing the dictum of Lord Buckmaster in *Manchester liners v. Rea (supra)* stated that:

> If goods are ordered for a special purpose and that purpose is made known to the vendor, so that according the contract, he undertakes to supply goods which are suitable for the object required, such a contract is in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment.

Henry Kendall v. William Lillico (1969) 2 AC 31

An importer sold Brazilian groundnut extract to the plaintiff knowing that the plaintiff would use it as an ingredient to make feed for animals and birds. The plaintiff used the feed on his pheasant farm and it proved poisonous to poultry but was not harmful to cattle and pigs.

Held; that the groundnut extract was not merchantable and the seller was therefore liable.

REID, LJ.: . . . By getting the seller to undertake to use his skill and judgment the buyer gets under section 14 (1) an assurance that the goods will be reasonably fit for the purpose and that covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgment on the part of the seller would not have detected them . . . .

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8. The implied conditions as to merchantability are excluded if:
   (a) Any defects are brought specifically to the buyer's attention before or at the time the contract is made or,
   (b) The buyer examines the goods before the contract is made.

***Ital Motors Ltd v. National Transport Zambia Ltd* (1969) HP 735 (High Court for Zambia)**

(The facts appear from the judgment of Justice Bruce-Lyle)

The plaintiff claims the sum of K866.66 for goods sold and delivered at the defendant's request.

The plaintiff carries on a business as garage proprietors and the defendant conducts business as a transporter.

In December 1968, the plaintiff sold and delivered to the defendant a 10 ton Leyland motor vehicle and a 10 ton trailer at a price of K3,000.00 and K2,000.00 respectively. It was agreed between the parties that a deposit be paid and the balance paid by three equal monthly instalments. K2,600.00 was paid by the defendant as the deposit covering both the motor vehicle and trailer. This transaction was embodied in an Agreement of Sale of December 1968. Two instalments each of K866.66 were paid. In respect of the final instalment the defendant issued a cheque, but this was returned by the Bank to the plaintiff in March 1969.

It is the case of the plaintiff that before the motor vehicle was sold, a representative of the defendant who was the Managing Director and his mechanic examined the vehicle and the trailer and took them out for a test run and a road-worthy certificate was handed to the defendant. Sometime after the sale of the vehicle and trailer it was brought to the plaintiff's yard loaded with cement with the complaint that the vehicle was not pulling. The Managing Director of the plaintiff's company PW1 said he examined the vehicle and noticed that the spring of the vehicle was bent and so he concluded that it was over-loaded. The vehicle was off-loaded and it was alright.

PW1 said the defendant never complained that there was a 'jamming' noise in the engine.

The plaintiff's claim is for the balance of the purchase price which is the outstanding instalment of K866.66.

The defendant's case is that he took delivery of motor vehicle and trailer in the middle of December 1968, and paid the deposit by two post-dated cheques Exhibits D1 and D2. After delivery of the vehicle to him he issued to the plaintiff three post-dated cheque to cover the three instalments; each cheque was for K866.66. Two of these cheques were honoured and these were dated 1 February 1969 and 1 March 1969, and the last one dated 1 April 1969 was the one sent back to the plaintiff by the Bank. The defendants Managing Director DW1 said he stopped payment on the cheque because in 1969 he had heard a funny noise in the engine of the vehicle and he reported the same to the plaintiff's Managing Director, PW1, but PW1 told him that it was because it was a diesel engine. The following morning after loading the vehicle the funny noise persisted and the vehicle could not pull and he got PW1 to his workshop who put the blame on the load of cement on the vehicle saying that the vehicle was overloaded. After this the vehicle went on a trip to Chipata with a load and it got stack 47 miles from Lusaka. The defendant reported this to the plaintiff and said that the plaintiff should cause the vehicle to be repaired or have it towed to Lusaka but the plaintiff did nothing about it and so he stopped payment of the last and final cheque. The defendant repaired the vehicle at the cost of K400.00 and he is counter-claiming this amount from the plaintiff.

It is the plaintiff's contention that the vehicle sold to the defendant was in a good condition, and was road-worthy and it is the contention of the defendant that the vehicle sold to him was not fit for the purpose for which it was bought and also that the Agreement of Sale did not expressly exclude any warranty or implied condition.

The issue, therefore, to be decided in this case is whether or not the vehicle sold was fit for the purpose for which it was bought. It is the case for the plaintiff that the vehicle at the time of delivery was in good and road-worthy condition and that before delivery the defendant and a mechanic tested the vehicle on a run and were satisfied with its condition. That the defendant used the vehicle from early December 1968 to a date on or about 26 March 1969. The defendant on the other hand contends that it was in January 1969 that the vehicle got stuck on the Chipata road.

I find it very difficult to accept the evidence of the defendant DW1 that the vehicle got stuck on the Chipata road in January 1969. If this evidence is true it is surprising that the defendant would allow the cheques for 1 February and 1 March 1969 to go through. The only explanation he gave for his actions in respect to these two cheques was that he made a mistake in not stopping these cheques. I am unable to accept this reason. As a reasonable businessman if he was having trouble with the vehicle just a few weeks after delivery he would not have allowed these cheques to go through when the plaintiff had refused to have anything to do with the vehicle left on the Chipata road. I find that even if the vehicle got stuck on the Chipata road, it got stuck there in March 1969 and not in January 1969.

I also find the evidence of the defendant that the vehicle got stuck on the Chipata road unconvincing. I would have been convinced if the driver who drove that vehicle when it got stuck had given evidence and corroborated that of DW1. I therefore find it very difficult to accept the evidence of DW1 on this issue. Under cross-examination, DW1 did not remember material and important dates. He did not remember when he signed the Agreement of Sale. He did not remember the date when he took delivery of the vehicle. He was most evasive at answering questions.

I, therefore, find as a fact that the vehicle sold to the defendant was in good and road-worthy condition and also that the defendant has failed to satisfy this Court that the vehicle was not fit for the purpose for which it was bought.

The defendant said he spent K400.00 for the repairs to this vehicle. Apart from not being able to substantiate this, his evidence as to whether the vehicle suffered any defects at all has been unreliable.

The defendant kept the vehicle for over three months and paid the two of the three instalments. In the case of *Yeoman Credit Limited v. Apps* (1961) 2 All ER 281, a motor vehicle was sold to the defendant by the plaintiff on hire purchase. The defendant paid three instalments due under the agreement i.e. for May, June, and July 1969, but did not pay the instalments for August, and thereafter rejected the car. The defendant made some complaints about the vehicle but had not rejected the vehicle immediately and treated the contract as rescinded, as he was entitled to do, but had kept it for some months and approbated the contract by paying instalments, there had not been a total failure of consideration moving from the plaintiffs and accordingly the plaintiffs were entitled to recover the instalments.

I would concede that in the case quoted the transaction was one of hire-purchase and that in the instant case the transaction is an outright sale and also in this case the defendant is not rejecting the vehicle but I would hold that the principle involved is the same in both cases, that the plaintiff in this case can sue for and recover the last instalment of K866.66.

Having held that the defendant has not proved to the satisfaction of the court that the vehicle got stuck on the Chipata road and also that the vehicle was repaired, I do consider it necessary to decide the issue as to whether there was a warranty or implied condition in Agreement of Sale.

I would, therefore, allow the claim and enter judgment for the plaintiff in the sum of K866.66 and dismiss the counter-claim of the defendant with costs for the plaintiff.

Section 14 (2) of the Sale of Goods Act provides that:

> Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed.

Ashington Piggeries v. Christopher Hill (1972) AC 441

The buyers, who were expert farmers in mink farming, ordered from the sellers mink feed to be manufactured in accordance with a certain formula agreed upon by the parties.

The feed proved toxic to minks because one of the ingredients used the herring meal, reacted with its preservative and became poisonous. The buyers sued the sellers who in turn sued their suppliers.

Held; that the sellers and the suppliers were liable under section 14 of the Sale of Goods Act as they ought to have foreseen that the herring meal would be used to make animal feed, and as such, the buyer had relied on their skill and judgment.

(c) Where the buyer fails, ignores or neglects to follow the instructions on how to use the goods the seller will not be liable for loss resulting from such failure or neglect to follow instructions.

***Wormell R.H.M. Agriculture (East) Ltd* (1987) 1 WLR 1091; 3 All ER 75**

A farmer purchased a quantity of herbicides under a contract of sale which he intended to use to kill wild oats in his farm. The buyer having misunderstood the instructions applied the herbicides wrongly with the result that his crop was destroyed. The court considered among other issues, whether the herbicide was merchantable within the meaning of section 14 of the Sale of Goods Act, and whether 'goods' for purposes of that section included the container, package and instructions supplied with the goods as well as the goods themselves

Held; that if the instructions were wrong or misleading, the goods would not be of merchantable quality or fit for the purpose for which they were supplied within the meaning of section 14 of the Act. The packaging and the instructions supplied with the goods formed part of the goods within the meaning of the section

(d) Implied condition that the goods will correspond with the sample

Section 15 deals with sale by sample. It provides that:

(1) A contract is a contract of sale by sample where there is a term in the contract, express or implied, to that effect.
(2) In the case of a contract for sale by sample:
    (a) There is an implied condition that the bulk shall correspond with the sample in quality:
    (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
    (c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

A sample is simply a specimen, a model, pattern, a likeness etc. It represents a statement, albeit in non-verbal form, about the subject matter of the contract. A contract of sale is a contract of sale by sample where there is a term in the contract, express or implied to that effect. Whether or not a sale is one by sample is dependent on the intention of the parties as expressed in their contract.

Drummond v. Van Ingen (1887) 12 AC 284

The seller sold cloth under a contract of sale for the known purpose of making into clothes. The cloth delivered corresponded in every way with the sample. A latent defect however caused the garments made out of the cloth to split at the seams under moderate strain. The buyer sued arguing that the cloth was not fit for the purpose. The seller contended that as the cloth corresponded with the sample, they were not in breach of any implied term of the contract.

Held; that the fact that the cloth supplied was equal to sample did not in any way exonerate the seller from liability since the defects were not discoverable by any reasonable examination of the sample. Examination of the sample does not operate to exclude the warranty that goods will be fit for the purpose.

MaC NAUGTEN, L.J.: . . . No doubt the sample might be made to say a great deal . . . . Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way business is done. . . The office of sample is to represent to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. . . .

In the Canadian case of *Warwick v. Mackenzie Co. Limited,*[35] it was held that to constitute a sale by sample in the legal sense, the parties must have contracted with reference to a sample and with a mutual understanding that the sample furnished to the eye a description of the quality of the goods. In *East Asiatic Co. Inc v. Canada Rice Mills Limited (No. 1),*[36] the seller was to supply "extra super paddy siam rice" of the "new season crop" guaranteed "fully up to type and grade as shown by sample handed you or last season's crop". It was held that the sale was not a sale by sample and that the words used indicated that the sample was to be used as an illustration or guide and only in respect of the type and grade. The court distinguished a sale "by" sample from a sale "from" sample.

In the Nigerian case of *Ernest Friedrishchdorf and Co. v. Fuja*[37], the court emphasised that the mere fact that the parties thought a sale to be one by sample will not make a contract such a sale. The agreement must expressly or by implication say so. In

[35] (1921) 2 WLR.
[36] 2 DLR 695.
[37] (1967) TLR 695.

that case the buyer placed an order with the sellers in West Germany through their agents in Lagos for 4,000 gramophone records. For that purpose, the buyer delivered to the sellers' agents three tapes on which various songs had been recorded. When the records were pressed, eight test records were dispatched to the agents in Lagos to enable the buyer to ascertain whether or not they pressed in accordance with the tapes. A Lagos High Court held that the sale of the records was not a sale by sample. Kazeem, J. observed

> It is clear that the gramophone records were to be made in accordance with the tapes supplied by the defendant and the eight test records were merely sent in advance to enable the defendant to be satisfied …. Although the parties have variously described the test records as samples, there is evidence that they are no more than a portion of the bulk order placed by the defendant. It is therefore incorrect to regard them as samples. In my view, the whole transaction is a contract for sale of goods simpliciter and not a contract of sale of goods by sample.

The implied condition that the bulk shall correspond with the sample does in a way state the obvious. To perform the contract, the seller must deliver goods in accordance with the terms of the contract. In fact the implied condition that the bulk shall correspond with the sample is effectively equivalent of the implied condition in section 13 that the goods will correspond with their description. That correspondence must be exact, subject to *de minimis* variations.

If the goods do not correspond, it is no defence for the seller to argue that they could easily be made to correspond.

E & S Ruben v. Faire Bros & Co. Ltd **(1949) 1 All ER 215**

The sellers agreed with the buyers that the sellers would supply a quantity of 'Linatex' a kind of vulcanised rubber in 41ft. rolls, 5ft. wide, in accordance with a small sample. The sample provided was flat and soft, but the rubber delivered was crinkly and folded, though these defects could be easily remedied by warming.

Held; that the goods had been sold by description, and that the sellers were in breach of section 15 of the Sale of Goods Act, 1893, for they were not in accordance with the sample though they

could be made compliant with the description through a very simple process.

HILBERY, J.:... It is not in compliance with a contractual obligation if an article is delivered which is not in accordance with the sample, but which can, by some simple process, no matter how simple the process is, be turned into an article, which will be in accordance with the sample on which the contract was made. . .

In *Nichol v. Godts*[38] the plaintiff entered into a contract to buy from the defendant 'foreign refined rape oil warranted equal to sample'. However the sample had not been 'foreign refined rape oil' in the first place as it was a mixture of hemp and rape oil. Although therefore the bulk corresponded with the sample when delivered, it did not meet the plaintiff's described requirements. The plaintiff sued for breach of condition. It was held that the seller was in breach of the condition regarding the sample. (*Note:* this case was decided before the 1893 Sale of Goods Act).

In *Champananhac and Co. Limited v. Waller and Co. Limited*[39] goods were sold 'as sample taken away' and 'with all faults and imperfections'. It was held that the sale was one by sample but that the additional words "with all faults and imperfections" meant that provided the bulk corresponds in type and quality with the sample, it will be accepted with whatever faults and imperfections it had.

The implied condition that the buyer should be allowed a reasonable opportunity of comparing the bulk with the sample does no more than restate the buyer's general right to examine the goods sold before acceptance as provided for in section 34 of the Sale of Goods Act. The buyer will, therefore not be obliged to accept unless he has been given the opportunity to examine the goods. In this regard, the statutory provisions merely restate the pre Sale of Goods Act position.[40] Reasonable opportunity means affording the buyer all the necessary facilities and cooperation to satisfy himself.

By section 15 (2) (c) of the Sale of Goods Act, the goods must be free from any defect which might render them unmerchantable which a reasonable examination of the sample would not reveal. In *Drummond v. Van Ingen (supra)*, the cloth supplied under the contract was equal to the sample. The cloth was to be sown in garments. It was however subsequently discovered that the cloth contained defects which caused them to split at the seams when

[38] (1854) 10 Ex 191.
[39] (1948) 2 All ER 724.
[40] See *Lorymer v. Smith* (1822) 1 B & C 1.

made into garments. The court held that the fact that the cloth supplied was equal to the sample did not exonerate the supplier from liability, as the defects were not discoverable by any reasonable examination.

Godley v. Perry (1960) 1 All ER 36

A retailer bought from a wholesaler a quantity of toy catapults, the sale being by sample. One of the toy catapults was sold to a small boy who injured his eye when it broke to pieces because of some inherent defect in it. The retailer was held liable to the boy. He then sought to be indemnified by the wholesaler. The defect in the catapult would not have been apparent on reasonable examination of the sample, and had not in fact been discovered when the retailer pulled back the elastic catapult.

Held; that the wholesaler was liable for breach of section 15 (2) of the Sale of Goods Act, 1893. Pulling back the elastic was the only test that could reasonably be expected of a potential buyer.

EDMOND DAVIES, J: . . . I hold that this was indeed a sale by sample, and that the implied condition accordingly existed. . . . That in breach of such implied condition, what I may call the accident catapult was so defective as to be unmerchantable is clear. Nevertheless, learned counsel . . . submitted that a reasonable examination of the sample would have revealed its defects, and that accordingly no such condition could be implied. ... counsel demonstrated that by squeezing together the two prongs of the catapult in the hand they could be fractured, and further suggested that by holding the toy down with one's foot and then pulling on the elastic, its safety could be tested and, as I understand it, its inherent fragility would thereby inevitably be discovered. True, the potential customer could have done any of those things. He might also, I suppose, have tried biting the catapult, or hitting it with a hammer, or applying a lighted match to ensure its non-inflammability, experiments which, with all respect, are but slightly more bizarre than those suggested by learned counsel. But looking at the matter realistically, as one must, in my judgment none of these tests is called for by the process of 'reasonable examination', as that phrase would be understood by common sense standards of everyday life. All these suggested tests were reasonably practicable, but the act speaks not of a 'practicable' examination, but a "reasonable" examination. In my judgment to pull back the elastic as the retailer did . . . was all that could be reasonably expected of any potential

> customer, and such examination failed to make apparent to (him), or even to render him alive to the possibility of, such a defect as undoubtedly existed in the accident catapult. . . . Goods must be free from defects rendering them unmerchantable which a reasonable examination of the sample will not reveal.
>
> By section 15 (2) (a) of the Sale of Goods Act, 1893, in the case of a contract for sale by sample there is an implied condition that the bulk will correspond with the sample in quality. This condition will be broken even if only a simple process is required to make the bulk correspond with the sample.

3.10 Excluding the Implied Terms

The Sale of Goods Act assumes the existence as a basic principle of the law of contract that, subject to the limitations imposed by statute or by common law rules, the parties to a contract of sale of goods, have freedom of choice not only as to what each will mutually promise to do but also as to what each is willing to accept as the consequence of the performance or non-performance of those promises so far as those consequence affect any other party to the contract. Section 55 of the Act acknowledges the significance of this freedom and it provides that:

> Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage if the usage be such as to bind both parties to the contract.

By the provision of this section, it is clear that it deals with exemption clauses relating to the implied terms provided for in sections 10 (1) and 12 – 15 of the Sale of Goods Act.

The common law principles relating to the use of exemption and exclusion clauses in ordinary contracts extend to contracts of sale of goods. These include the doctrines of incorporation and fundamental breach, the *contra proferentem* rule and course of dealing.[41]

The courts generally tend to frown upon exemption clauses that seek to protect a contracting party who is guilty of fundamental breach of the contract.

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[41] See *Chapelton v. Barry UDC (*1940) 1 All ER 356, *Olley v. Malborough Court* (1949) 1 ALL ER 532, *Gillespie Bros v. Roy Bowels Transport* (1973) QB 400, *Wallis, Ben Wells v. Prat and Haynes* (1911) AC 394, *George Mitchell Ltd v. Finney Lock Seeds* (1983) 2 All ER 737, *Léstrange v. Croucob* (1934) 2 KB 394, *Photo Productions v. Securicor Transpor*t (1980) 1 All ER 556.

***Karsale (Harrow) Ltd v. Wallis* (1956) 2 All ER 866; 1 WLR 396**

Wallis inspected an American Buick car belonging to Stinton . It was in a very good condition and Wallis agreed to buy it through a hire purchase agreement if Stinton could arrange for one. Stinton arranged the credit, and one night, about one month after Wallis had inspected the car, it was towed to Wallis' house. The car was in a very poor state when it was delivered. The tires had been changed for very old ones; the radio had been removed; the chrome around the body of the car had been removed; the cylinder head was missing; the engine valves had burnt out; and two pistons were broken. The vehicle was incapable of self propulsion. The contract of sale however contained a term that 'no condition or warranty that the vehicle is in a road-worthy condition or fitness for any particular purpose is given by the owner or implied therein'. Wallis refused to accept the car and the creditors sued for payment.

Held; that Wallis was entitled to reject the car because the car delivered was not the thing contracted for.

DENNING, L.J.: . . . it is now settled that exempting clauses – no matter how widely they are expressed, only avail the party when carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. . . .

PARKER, L.J.: . . . the vehicle delivered could not be described as a motor vehicle. By that I am not saying that every defect in a car which renders it for the moment unusable on the roads amounts to a breach of a fundamental term; but where, as here, a vehicle is delivered incapable of self propulsion – it seems to me that it is abundantly clear there was a breach of a fundamental term. . . .

3.11 Transfer of property in the goods

Section 16 of the Act provides that:

> Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Ascertainment of goods may take various forms.

***Kressman & Co. v. Lekhani & Another* (1964) EALR 49 (Supreme Court of Kenya)**

The second respondent had bought goods from the plaintiff, which goods were deposited in a warehouse awaiting collection. He then instructed the warehouses to redeliver the goods to the appellant. The appellants agreed to take delivery of the goods. Subsequently, but before redelivery, the first respondent obtained an attachment order against the second respondent. The question arose as to whether the latter had either property or possession of the goods so that the attachment order could be lawfully enforced.

Held; property in the goods had passed to the appellant since what had transpired amounted to an agreement to resale.

Even if the appellant was not in actual possession of the goods, he had constructive possession in terms of s. 25 of the Sale of Goods Ordinance. As such, the attachment order was ineffective.

***Anwar v. Kenya Bearing Co.* (1973) EALR 352 (Court of Appeal of Kenya)**

The appellant entered into a contract to buy a number of second hand tractors and various spare parts. Upon taking delivery of the same, he discovered that two tractors and a number of spare parts were missing. He refused to pay the purchase price, claiming that he had repudiated the contract either for breach of condition or for total failure of consideration.

Held; (1) According to s. 20 (a) of the Kenyan Sale of Goods Act, the sale in question was an unconditional sale of specific goods in a deliverable state. As such, property had passed to the appellant when the contract was completed.

(2) After property had passed, the respondent was only obliged to preserve the property pending taking of delivery. Any breach of such term could only be a breach of warranty so that the appellant could not repudiate his liability on account of it.

(3) The appellant could not repudiate for a total failure of consideration, because he had accepted delivery of a large part of the contracted goods.

LAW, J.A.:... I have no doubt that the transaction was an unconditional contract for the sale of specific goods in deliverable state, after

inspection by the buyer. The intention of the parties appears clearly from the contract of sale: 'I have today purchased… as fully inspected…' In these circumstances, in accordance with s. 20 (a) of the Sale of Goods Act (Cap 31), the property in the goods passed to the buyer when the contract was made, and it is immaterial that payment and time of delivery were to be postponed.

East African Navigators Ltd v. Mohanlal (1968) EALR 535 (Court of Appeal of Dar-es-Salaam)

The respondent entered into a contract of carriage with the appellant, whereby the latter agreed to deliver goods to third parties. The respondent paid the carriage costs and added them to the purchase price of the goods. The goods were lost at sea. The respondent sued for the purchase price of the goods. The question arose as to whether or not the respondent was entitled since he did not have property in the goods.

Held; that property had passed to the third party buyer, at the latest, at the time of shipment so that the respondent could not sue as owner.

As a general rule, sellers of goods enter into contracts with carriers as agents of the buyer, so that they cannot sue in their own name. Where, however, there is a special contract between the shipper and the seller, the inference of agency will not arise.

On the facts, there was such a special, contract between the parties so that even though property had passed, the respondent could still sue for the purchase price.

Note: *Provisions as to passing of property under the Tanganyika Sale of Goods Ordinance (Cap 214) are similar to Sale of Goods Act 1893.*

Livio Carli v. Zompicchiati (1961) EALR 101 (Court of Appeal at Aden)

The respondent had ordered a quantity of tiles from the appellant. Upon delivery, it was discovered that a number of tiles were broken. He rejected the broken tiles, but later bought them at a reduced price. He then brought an action for the purchase price attributable to the broken tiles. The appellant claimed that the respondent was only entitled to recover the price paid for the damaged tiles.

Held; the contract was for the sale of unascertained goods, and as the place of delivery was agreed upon, property could only pass after delivery, so that the respondent was entitled to reject the damaged tiles at the time of delivery. Property in the broken tiles therefore did not pass under the original contract, but rather, passed under the new one. The fact that he bought the tiles did not thus prejudice his right to claim for the proportion of the purchase price representing the damaged tiles.

Property passes when intended to pass.

In terms of section 17 of the Act, property in goods passes at such time as the parties wish it to pass. The section reads:

> 17. (1) where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

For purposes of ascertaining the intention of the parties, the terms of the contract, the conduct of the parties and the surrounding circumstances of each case will be considered.

R v. Zimba (1965) ALR 288 (High Court of Malawi)

The accused walked into a self-service shop, selected goods from the shelves, put them in his briefcase and walked out of the shop without declaring his possession of the goods at the till near the exit where he was required to pay. The question arose whether property in the goods had passed to the accused upon picking the goods from the shelves.

Held; in a self service shop, the owner consents to a customer's taking possession of the goods before paying for them. He however intends property to pass only after the goods have been paid for. As such, property did not pass to the accused.

Dennant v. Skinner & Collom (1948) 2 KB 164; 2 All ER 29

A swindler calling himself King bought a Standard car at an auction. King procured a cheque and asked to take possession of the car immediately in return for his cheque. The auctioneer acceded to this request after getting King to sign a document in which was stated that title to the vehicle would not pass until the cheque had cleared. King sold the car to an innocent third party, the defendant. Naturally the cheque was dishonoured and King could not be traced as the address he had given turned out to be false. The auctioneer then sued the defendant for the return of the car basing his claim upon section 17 of the Act that, property passed when the parties intended it to pass. In this case the parties had intended property to pass after the cheque had been met. As the cheque had been dishonoured, no title passed to King, and likewise he had no title to pass on to the defendant.

Held; that the intention of the parties as expressed in the document was too late to prevent the passage of title since in a sale by auction title passes at the fall of the auctioneer's hammer. According to section 18, *r.1*, property passes at the time of the sale, unless a contrary intention appears.

D.T. Dobie & Co v. Commissioner General of Customs & Excise (1969) EALR 664 (High Court of Uganda)

The Sudanese embassy in Uganda ordered and signed an order form for a car from the plaintiffs. They were to be exempt from paying excise duty for any car bought abroad. The car in question was to be delivered from outside Uganda. The order form contained a condition to the effect that property in the car would not pass to the buyer until delivery and payment had been made. The plaintiffs cleared the car from bond without paying duty. The defendant later seized it as unaccustomed. The plaintiff claimed that the car was exempt from duty.

Held; property had not passed to the embassy at the time of importing, so that the plaintiffs who had reserved the property in the car were obliged to pay duty towards its importation.

Parties to a contract of sale may utilise the opportunity of expressing their intention as to the time property should pass by including retention of title clause in the contract.

Aluminum Industries Vaassen BV v. Ramalpa Aluminum **(1976) 2 All ER 552 (CA)**

The plaintiff sold to the defendant aluminum foil on terms that property in the foil would not be transferred to the buyer until the buyer had met all debts owed to the seller and that the foil would be kept in such a way that it was clearly the property of the seller. The buyer took delivery of part of the consignment of aluminum foil and resold part of it. Before full payment was made for the foil, the buyer went into liquidation. The seller then sought to enforce the provisions of the contract so as to secure payment prior to distribution by the liquidator of the buyer's assets to creditor. In this regard, the seller claimed the aluminum foil which it had delivered to the buyer worth about £50,000 and the proceeds of the sale of some of the foil under a sub-sale worth £35,000.

Held; that the buyer was merely a bailee of the unused foil until the seller had been paid in full. The property in the unsold aluminum foil had not passed to the buyer and the seller was therefore entitled to recover the same. As regards the proceeds from the sub-sale, the court held that as bailee, the buyer owed a fiduciary duty to the seller to account for the proceeds from the sub-sale.

Note: *The reservation of title clause first became known as the Ramalpa Clause following the decision of this case.*

The Ramalpa clause may present problems where the buyer has used the goods to manufacture other goods or where the goods sold are mixed with other goods in a manner that makes the goods sold lose their independent identity.

Re Bond Worth Ltd **(1980) Ch 228 (1979) 3 WLR 629**

The seller sold synthetic fibre to the buyer on terms that until the price was paid by the buyer, equitable and beneficial ownership of the fiber, or any product made there from or any proceeds of resale of the fiber would remain vested in the seller. The buyer spanned it into yarn together with other fibres and later woven in the manufacture of carpets.

Held; that this was an outright sale with a mortgage or charge back by the buyer. By reserving only equitable and beneficial ownership, there was no intention of reserving full ownership but only a security right. The *Ramalpa* case was distinguished basically on the basis that in that case there was a clause that reserved legal

title and the buyer acknowledged the relationship of bailment. In addition, the aluminum foil was stored separately as the property of the buyer. The court held further that the charge created in this particular case was registerable under the Companies Act and as it was not registered, the terms were void for want of such registration.

Borden v. Scottish Timber Products (1981) Ch 25; 3 WLR 672 (CA)

The buyer bought resin which as the seller knew was to be used in the manufacture of chipboard. A reservation of title clause in the contract provided that property in the resin would pass only when all goods supplied were paid for by the buyer in full. The buyer went into receivership while owing the seller about £300,000. Relying on the *Ramalpa* case, the seller contended that they could trace ownership of any chipboard manufactured with their resin and the proceed from the sale of any such chipboard.

Held; by the Court of Appeal that once the resin became an inseparable part of the chipboard, it ceased to exist as such and the seller no longer had title in it. It was not possible to trace the resin into the chipboard.

Re Peachdart Ltd (1984) Ch 131; (1983) 3 All ER 204

Sellers sold leather to the buyer which used the leather in the manufacture of handbags. The terms of the contract of sale provided that all unworked leather remained the property of the seller until it was paid for in full and the ownership of the goods made out of the leather sold was to vest in the sellers and further that the sellers had the right to trace the proceeds of sub-sales.

Held; that despite the language used, the parties could not have intended that the property remained with the seller after the leather was used in the making of hand bags. The seller lost their exclusive ownership in each piece of the leather as soon as work on it was started by the buyer and the seller's right at that point became rights in the nature of a mortgage or charge which was registerable, and having not been so registered, it was void.

Hendy Lennox v. Puttick (1984) 2 All ER 152

The seller sold to the buyer some diesel engines which the buyer wanted to fit into generator sets. The generator sets were then

resold. A term in the contract of sale provided that the seller was to retain property in the engines until the purchase price had been paid. Thirty days credit was given to the buyer under the contract. In the event of the buyer defaulting in making payment, the seller was entitled under the contract to repossess the engines for which no payment had been made. In due course, the buyer went into receivership. At that time, three engines were at the buyer's premises, having been fitted to generator sets. Two of the generator sets had been sold to third parties. The seller then sought to repossess the unsold engine and claimed the proceeds from the two engines that had been sold.

Held; that that the seller was entitled to the unsold engine. Although it had been mixed with other goods in the making of a generator set, it could easily be unbolted as it had not become intrinsically inseparable with the generator set. *Re Bond Worth* was distinguished. It was held further that the claim to the proceeds of the sub-sale could not succeed because there was no fiduciary relationship and the fact that the contract allowed the buyer thirty days credit and allowed repossession for default implied that the buyers were entitled to retain the proceeds of any sub-sale.

Re Andrabell, Airborne Accessories v. Goodman (1984) 2 All ER 407

The seller sold travel bags to the buyer under a contract which allowed the buyer 45 days credit. The contract of sell provided that property in the goods would not pass until the goods were paid for. The buyer went into liquidation before the goods were paid for. The seller, relying on the *Ramalpa* case, claimed the proceeds of the resale of the goods.

Held; that the *Pamalpa* case did not apply to the circumstances of this case because unlike in the *Ramalpa* case, the goods in this case were not stored separately so as to indicate the seller's ownership, neither was there any expression of a fiduciary relationship between the parties. The credit period given to the buyer implied that the buyer was entitled to keep the proceeds of any sub-sale. The parties were to be treated as mere debtor and creditor.

Clough Mill v. Martin (1985) 1 WLR 111 (1984) 3 All ER 982

Clough Mills Limited contracted to sell yarn to the buyer on its standard terms of sale which included a provision that the seller

reserved title in the goods until payment had been made and further that if the buyer defaulted, the seller could enter the buyer's premises for purposes of recovering the goods which it would then resale. The buyer became insolvent at a time when only part payment for the yarn had been made. The seller sought to enter the buyer's premises to recover the unused yarn. The seller then sued the receiver for conversion.The buyer argued, relying on *Re Bond Worth Limited* that the pupated reservation of title clause merely created a charge as security for the debt which interest would be defeated once the debt was paid.

Held; by the Court of Appeal, that the retention of title clause could not be construed as creating a charge on the unused yarn. It was not a matter for the buyer conferring an interest in the yarn as a form of security for the debt; rather it was the seller who had retained legal title in the property as a form of security for itself. *Re Bond* Worth was distinguished, and the seller's action succeeded.

Four Point Garage v. Carter (1985) 3 All ER 12

The buyer bought and paid for a Ford Escort XR3i car from the seller. The seller, in fact sourced and ordered the car from a third party, Four Point Garage, who delivered the car directly to the buyer, believing that the buyer was leasing the car. The seller then went into liquidation without paying for the vehicle. Four Point Garage then claimed the car from the buyer on the basis *inter alia* that a reservation of title clause in the contract between Four Point Garage and the seller meant that for as long as Four Point Garage remained unpaid, title in the car remained vested in Four Point Garage and therefore the seller had no title to pass on to the buyer.

Held; that the reservation of title clause was subject to the implied term that the seller was authorised to resell the car. The claim against the buyer could therefore not be sustained.

Tatung (UK) v. Galex Telesure Ltd (1989) 5 BCC 325

The seller sold to the buyer electrical video equipment which the buyer retailed by sale, rental or hire purchase. The contract of sale included a term that title in the goods would only pass after all debts due to the seller were paid and further that the proceeds of sale, rental or hire purchase should be kept in a separate account for the benefit of the seller.

Held; that a charge had been created over the proceeds of sale which charge was void for want of registration under the Companies Act. What was created were security rights rather than ownership rights. The sellers' action therefore, failed.

Pfeiffer v. Arbuthnot Factors (1988) 1 WLR 150

The seller sold wine to the buyer under a contract which provided that title in the wine would remain with the seller until it had been paid for and that the seller would enjoy an equitable assignment of all debts owed to the buyer by sub-purchasers. Under a factoring agreement concluded between the buyer and the defendant, the buyer assigned all debts owed to it by sub-purchasers. As a consequence of this arrangement, the seller and the defendant had competing claims to the debt owed to the buyer by sub-purchasers. The seller who was the plaintiff in these proceedings, claimed priority to the debts.

Held; that the assignment to the plaintiff amounted to a charge which was void for want of registration under the Companies Act. Furthermore, even if it were not a charge, the defendant would have had priority since they gave notice to the sub-purchasers earlier.

Armour v. Thyssen (1991) 2 AC 339

A contract of sale of steel made between a Germany company and a Scottish company provided that the steel remained the property of the seller until all debts outstanding under the contract were paid. The buyers went under receivership and the seller claimed the steel as being owner thereof. The buyer argued that that the reservation of title clause in the sale contract amounted to a charge under Scottish law and was void.

Held; that the property in the steel remained vested in the seller. The clause was therefore effective. A charge can only be created over property owned by the debtor in favour of the creditor. The buyer in this case never owned the property to be able to offer it as security for a debt.

(i) Rules for ascertaining intention

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in goods is to pass to the buyer.

Rule 1 – Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2 – Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3 – Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4 – When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer:

When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5 –(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appreciated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied and may be given either before or after the appropriation is made.

(2) Where in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodies (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Property will not pass under rule 1 of section 18 unless the goods are specific or ascertained goods.

***Kursell v. Timber Operators Ltd* (1927) 1 KB 298**

The defendant bought from the plaintiff all the timber in a Latvian forest which conformed to certain specifications on a particular date. The buyer had fifteen years in which to cut and remove the timber. Soon afterwards, the Lativian Assembly passed a law under which the forest was confiscated. The issue was whether or not property had passed to the defendants under rule 1.

Held; by the Court of Appeal, that property in the timber had not passed as they were not sufficiently identified since not all the timber was to pass but only that conforming to the specified measurements at the time of the contract.

SCRUTTON, L.J.: . . . specific goods are those defined and agreed upon at the time the contract is made. It appears to me that these goods were neither identified nor agreed upon. Not every tree in the forest passed, but only those complying with certain a certain measurement not then made. . .

***Livio Carli v. Zompicchiati* (1961) EALR 101 (Court of Appeal at Aden)**

The respondent had ordered a quantity of tiles from the appellant. Upon delivery, it was discovered that a number of tiles were broken. He rejected the broken tiles, but later bought them at a reduced price. He then brought an action for the purchase price attributable to the broken tiles. The appellant claimed that the respondent was only entitled to recover the price paid for the damaged tiles.

Held; the contract was for the sale of unascertained goods, and as the place of delivery was agreed upon, property could only pass after delivery, so that the respondent was entitled to reject the damaged tiles at the time of delivery. Property in the broken tiles therefore did not pass under the original contract, but rather, passed under the new one. The fact that he bought the tiles did not thus prejudice his right to claim for the proportion of the purchase price representing the damaged tiles.

See also ***Anwar v. Kenya Bearing Co.* (1973)** *(supra)*

For rule 1 under section 18 to apply, no contrary intention should have been expressed in or implied from the contract of the parties.

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Ward (RV) Ltd v. Bingnall (1967) 1 QB 534; 2 WLR 1050

The buyer agreed to buy two cars for the price of £850. He paid the sum of £525 and then went to his bank to withdraw the balance. The seller kept possession of the car. The buyer then had a second thought about the whole transaction and attempted to persuade the seller either to accept a lower price or to allow him buy only one of the cars. A dispute then ensued over one of the cars. The buyer refused to take delivery and to pay for it. The seller then gave notice that if the buyer did not pay for the car within five days, the seller would sell the car. The buyer did not make any payment during the period specified in the notice. The seller then sold one of the cars but could not sell the other. The seller then sued the buyer for the price of the unsold car and damages for loss of profit on the other car. One of the issues that arose was whether property had passed to the buyer under section 18 rule 1 so as to entitle the seller to sue for the price.

Held; that the price was not payable. The governing rule is section 17, and in modern times very little is needed to give rise to the inference that the property in specific goods is to pass only delivery or payment, as opposed to an earlier time when the contract was made.

SELLERS, L.J.: . . . the fact that the buyer agreed to buy the two vehicles – and paid £225 in cash at the time goes little way in establishing that the parties intended the vehicles then and there to become the buyers property. There was not even a payment by cheque - he had not even seen the log books or inquired of their existence. No mention was made of the removal of the vehicles. . .

Normohamed Murji Ltd v. Hussein Ali Dattu (1955) EALR 494 (Tanganyika; East African Court of Appeal)

The appellant sold a quantity of goods described as 'Black Pepper' at an auction sale, to the respondent. The latter later returned these goods on the premise that what they had acquired was not actually 'Black Pepper'.

Held; according to s. 13 (1) (c) of the Sale of Goods Ordinance of Tanganyika, where the contract of sale is one of specific goods, the title of which has passed to the buyer, the breach of a warranty to be performed by the seller is to be treated as a breach of warranty, not as a ground for repudiation.

Since s. 59 (b) of the same Ordinance provides that in a sale by auction, the contract is completed at the fall of the hammer or in any other customary manner, property in the pepper passed to the respondent at the fall of the hammer so that according to s.13 (1) (c), they had lost their right to repudiate.

For property to pass under rule 1 of section 18, goods must be in a deliverable state. Goods are said to be in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Underwood Ltd v. Burgh Castle Brick & Cement Syndicate (1921 1 KB 343; 126 LT 401

The plaintiff sold a horizontal tandem condensing engine to the defendants FOR (free on rail). The engine weighed 30 tons. At the time of the sale the engine was cemented to the floor of the seller's business premises. After being detached from the floor, the engine had to be dismantled and loaded on rail. Under the contract, the seller was obliged to do the tasks necessary to put the engine on rail. This was expected to take two weeks to complete and was to cost about 100 Pounds. During loading, the engine was accidentally damaged. The court had to decide the question at whose risk the goods were at the time of the loading. This, in turn, depended on whether property had passed or not.

Held; that at the time of the damage to the engine, property had not passed to the buyer because it was not in a deliverable state since under section 20, risk normally passes with property, the risk did not pass either.

BANKS, L.J.: A deliverable state does not depend upon the mere completeness of the subject matter in all its parts. It depends on the actual state of the goods at the date of the contract and the state in which they bare to be delivered by the terms of the contract . . . . (See also *Pitchet & Gold & Electrical Power Storage v. Currie* (1916) 2 Ch 515)

Head (Phillip) v. Showfronts (1970) 1 LLOYDS REPORT 140

A contract for the sale and fitting of a carpet was concluded between the seller and the buyer. The buyer delivered the carpet to the premises where it was to be laid according to the contract. Before the carpet was laid however, it was stolen. The issue was whether the risk in the carpet had passed to the buyer under section 20 of the Sale of Goods Act. This in turn depended on whether property in the carpet had passed to the buyer. For property to pass, the carpet had to be in a deliverable state in accordance with section 18 rule 5.

Held; as the carpet was fairly large and very heavy, and had not been laid, it was not in a deliverable state at the time it was stolen. Therefore, property and risk had not passed at that stage.

Under rule 3 of section 18, where there is a contract for the sale of specific goods and the seller is bound to weigh , measure, test or do something to the goods for the purpose of ascertaining the price, property in the goods does not pass until such thing has been done and the buyer has been given notice of it.

Hanson v. Meyer (1805) EAST 614; (1806) 102 ER 770

The buyer agreed to purchase a quantity of starch which was being kept by the seller at a warehouse belonging to a third party. Under the contract of sale, the starch had to be weighed before delivery to the buyer. Part of the starch was weighed and delivered to the buyer. However, the buyer became bankrupt soon thereafter. The assignees in bankruptcy then sued the seller claiming that property in all the starch including the unweighed starch, passed to the buyer.

Held; that property in the goods only passed to the buyer after the starch had been weighed and delivered. The unweighed starch in the warehouse therefore belonged to the seller.
(See also *Turley v. Bates* (1863) 2 H & C 200; 159 ER 83)

Note: *these cases were decided long before the Sale of Goods Act, 1893. The common law principal upon which they were decided was codified in s. 18, r. 3.*

Rule 3 under section 18 will not apply where the act or thing to be done to the goods is anything other than for the purpose of ascertaining the price and where the thing to be done is to be done by someone other than the seller.

Nanka Bruce v. Commercial Trust (1926) AC 77; 169 LT 35 (PC)

The appellants sold cocoa to Laing which cocoa was to be consigned by rail at fifty nine shillings per load of 60 lbs. Laing was to resell the cocoa to other merchants who were to check the weights and Laing was to be paid according to the weight so ascertained. The appellants consigned 160 bags of cocoa to Laing who resold it to the respondents

Held; that the arrangement for weighing and payment was not a condition which suspended the passing of property because s. 18 rule 3 only applied to acts required of the seller by the contract.

Gustav Weingut v. Leslie (1967) EALR 480 (High Court of Kenya)

The plaintiffs were German wine merchants supplying wine to a certain company in Nairobi. Under the terms of the supply contract, property in the wine supplied was only to pass to the buyers after the purchase price had been paid. The buyer was however empowered to pass good title to a sub-buyer. However, there was a prohibition against granting any charge over the wine. The buyers gave a debenture to a bank, overall its assets. In pursuance, the defendant, who was the bank's receiver, took possession of wines that were as yet unpaid for. The plaintiff claimed ownership of the same wine.

Held; the provisions of s. 26 (2) of the Kenya Sale of Goods Act, similar to s. 25 (2) of the SOGA 1893 apply. The buyers were in possession of the wines with the consent of the sellers and thus had authority to sell them in the ordinary course of their business. Further, the debenture amounted to a 'disposition' within the meaning of s. 26 (2), so that the defendant was entitled to possession of the wine, subject of the present action.

Petro v. Reginam (1957) The African Law Reports 515 (High Court of Nyasaland)

The appellant was convicted of house breaking. Prior to his conviction, he had disposed of the stolen goods so that a third party ended up in possession of them, having obtained them in market overt. The trial magistrate held that the third party had obtained good title.

Held; the Sale of Goods Act, 1893 of England applied. By s. 24 (1) of that Act property in stolen goods reverts in the owner upon conviction of the thief, notwithstanding any intermediary dealings, including, *inter alia,* a sale in market overt.

Swift Transport Services Ltd & Another v. Cooper Diesels (Pvt) Ltd & Another (1962) ALR 146 (High Court of Malawi)

The plaintiff brought an action against the first defendant and obtained judgment in his favour. In execution, he issued a *writ of fifa* against the first defendants. In pursuance, the sheriff seized and sold property in their possession. The claimant took out inter pleader summons claiming that a vehicle seized by the sheriff was their property in the possession of the defendants by reason of a Hire Purchase agreement.

Held; property in the vehicle still remained in the claimant even though they had let the defendants into possession. Upon seizure, the claimant immediately became entitled to possession. At the time of the sale therefore, the sheriff had neither property nor was entitled to possession of the vehicle. They could thus only pass on good title in a transaction that fell within the exceptions to the *nemo dat* rule under the Sale of Goods Act, 1983.

On the facts, the sheriff passed good title to a third party, and thus put an end to the plaintiff's right to retake possession of the vehicle. Since it was the act of the judgment creditor and, albeit innocently, the sheriff, which prejudiced the right of the claimant, they both became liable in tort; for conversion on the part of the sheriff and for money had and received on the part of the judgment creditor.

Chikata v. Chimwala (1968) The African Law Report (Malawi) 616 (High Court of Malawi)

The respondent agreed to buy the appellant's car. He paid a deposit and took possession of the car. Later, he returned it, being dissatisfied with its condition. The appellant left the car in the ward of a caretaker. Subsequently, the respondent falsely represented to the caretaker that he had the authority of the appellant to take possession of the car. He later sold it to a bona fide purchaser. The appellant brought an action for the price of the car.

Held; the bailee was not liable because the sell was induced by a false representation of the owners consent. The respondent was liable in tort for the purchase price of the car.

Alidina v. Globe Merchantile Corporation Ltd **(1968) The African Law Report 128 (Tanganyika)**

The appellant brought an action for loss arising out of the respondent's refusal to honour a contract for sale of sisal. There was a valid contract of sale between the parties, and the date of delivery was agreed upon. Before delivery was due, the appellant informed the respondent, on two occasions that they were ready to deliver the goods. The respondents informed them at both instances that they would not take delivery. On the date when delivery ought to have been made, the appellant again informed the respondents of their willingness to deliver, but got the same response.

Held; by intimating that they would not take delivery long before it was due, the respondents had committed an anticipatory breach of contract. However, the appellants, by offering to deliver even after the respondent had made it clear that they would not accept delivery, and by being willing to deliver on the date of delivery, preferred to ignore the breach and thus acquiesced to the continuance of the contract.

Since the contract was still in existence at the date of delivery, the appellant was under a duty to show that he was able and willing to deliver. It was not enough merely to make an offer to deliver. If, on the other hand, the appellant had relied on the anticipatory breach, there would have been no need to show willingness and ability to deliver.

(ii) Goods on approval or sale or return

Elphick v. Barnes **(1880) 5 CPD 321**

The plaintiff supplied two cars to the defendant on a sale or return basis. The plaintiff was to go on holiday at the end of August 1960 and his wish was to have the cars sold quickly to avoid the effects of depreciation. One of the cars was sold, but by October when the plaintiff returned, the other car had not been sold. The market for the car was declining. The plaintiff then made repeated telephone calls to the defendant requesting that the car be returned, but to no avail. The plaintiff then wrote a letter to the defendant stating that if the car was not returned by the 7th of November, it would be deemed to have been sold to the defendants. Some time after the deadline given, the car was returned in a very poor condition and having covered a considerable number of miles.

The plaintiff then sued for the price arguing that the property in the car had passed to the defendants because it had been retained beyond a fixed period of time, and a reasonable time had elapsed.

Held; that (a) the contract was one of delivery 'on sale or return' terms within the meaning of rule 4 and in the absence of rejection the property therefore passed to the defendants, consequently the plaintiff was entitled to the price and (b) having regard to the circumstances of the case, including the need for quick sale, the falling market, the steps taken to recover the car, the proper inference was that a reasonable time had elapsed without the car being returned within the meaning of the section.

Where a person who has received goods on sale or return terms pledges them he thereby does an act adopting the transaction within the meaning of rule 4 (a) and property in the goods accordingly passes to him and the original owner can not therefore recover them from the person to whom the goods have been pledged.

Kirkham v. Attenborough (1897) 1 QB 201; (CA)

Winter, intending to purchase some jewellery took some jeweler from the plaintiff on a sale or return basis. Winter however pledged the jewellery to Attenborough. Kirkham claimed that the jewellery was still his property.

Held; by the Court of Appeal that the act of pledging the goods was an act adopting the transaction in terms of section 18 rule 4 (a) and therefore that the property passed to Attenborough.

Poole v. Smith Car Sales (1962) 1 WLR 744; 2 All ER 482 (CA)

As Poole desired to go on holiday at the end of August 1960, he sought to sell his Vauxhall Wyvern car quickly so as to avoid depreciation. He delivered the car to Smith on a sale or return basis. By the time Poole returned from holiday in October, the car had not been sold and the market was falling. On a number of occasions, Poole telephoned Smith requesting for the return of the car. Smith never obliged, prompting Poole to write to him stating that if by 7 November he would not have returned the car, he would take it that the car had been sold to him. Smith still did not heed the request. He retuned the vehicle well after 7 November. The car was in a poor state of repair, having been driven a good 1,600 miles. Poole sued for the price arguing that property had passed because Smith had retained the car beyond a fixed time; or

a reasonable time in accordance with section 18 rule 4(b) of the Sale of Goods Act.

Held; by the Court of Appeal, that the circumstances of the case made it quite plain that property had passed to the defendants, who accordingly were liable to the plaintiff for the purchase price.

Atari Corporation v. Electronic Boutique **(1988) 1 All ER 1010**

Computer games were sold by Atari on a sale or return basis. The buyer, Electronics Boutique, which was a chain or retail outlets, agreed to take games from the seller on 'full sale or return until 31 January 1996'. On or about 19 January 1996, the buyer faxed the seller indicating that the buyer was no longer willing to stock the seller's computer games and that they would submit to the seller a complete list of the goods for return. The seller argued that property in the goods had passed to the buyer as the buyer had not given a valid notice of rejection as the notice given did not identify the goods precisely enough and did not make the goods available for collection immediately.

Held; that the circumstances of the case, more specifically the fact that the buyer had many outlets and continuing sales, made it necessary to identify the stock rather than refer to it generically. A notice of rejection of goods on a sale or return basis did not have to give a right to immediate possession to be effective. In this particular case the notice was effective.

(iii) Unascertained goods and Appropriation

Appropriation

Where the seller delivers to the buyer goods still mixed with other goods, no property can pass until the goods have been unconditionally appropriated.

Healey v. Howlett **(1917) (1919) 1 KB 377; 116 LT 591**

The defendant ordered twenty boxes of bright mackerel from the plaintiff fish exporter in Ireland. The fish was to be delivered by train. The plaintiff dispatched 190 boxes, with instructions to earmark twenty boxes for the defendant and divide the remaining boxes for two other customers. The train was delayed before the defendant's boxes were designated and by the time this was done, the fish had deteriorated. The buyer refused to take delivery and the seller sued for the price. The question was whether at the time the fish went bad the property in it and with it the risk had passed.

Held; that the seller's action failed as the property in the fish had not passed to the buyer when the fish deteriorated. Property could only pass to the buyer when the 20 boxes were earmarked; until then the goods remained unascertained. Under section 16 of the Sale of Goods Act, property in unascertained goods could not pass.

Carlos Fidespiel & Co. SA v. Charles Twigg & Co. Ltd (1957) 1 Lloyd's Rep. 290 (CA)

The buyers, traders in Costa Rica, agreed to buy bicycles from the sellers who were manufacturers (fob). Under the contract, the sellers were obliged to transport the bicycles to Liverpool and load them onto a designated ship. The seller manufactured the bicycles and packed them in containers with the buyers' name and address on them. Before the goods could be shipped, the sellers became bankrupt. The buyers claimed that the property in the goods had passed to them.

Held; that usually but not always, the appropriating act is the last act to be performed by the seller. In this case the seller had yet to transport the goods to Liverpool and load them on the ship. Property had, therefore not passed.

PEARSON, J: . . . First, rule 5 of section 18 of the Act is one of the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer unless a different intention appears. Therefore the element of a common intention has always to be borne in mind. A mere setting apart or selection by the seller of the goods which he is expected to use in the performance of the contract is not enough. If that is all, he can change his mind and use those goods in the performance of some other contract and use some other goods in the performance of this contract. To constitute appropriation of the goods to the contract, the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so those goods and no others are the subject of the sale and become the property of the buyer.

Secondly, it is by agreement of the parties that the appropriation, involving a change of ownership, is made, although in some cases buyer's assent to the appropriation is conferred in advance by the contract itself or otherwise.

Thirdly, an appropriation by the seller with the assent of the buyer may be said always to involve an actual or constructive delivery. If

the seller retains possession, he does so as bailee for the buyer. There is a passage in Chalmers' Sale of Goods Act, 12th. Ed. at p. 75 where it is said-

> In the second place, if the decision be carefully examined, it will be found that in every case where the property has been held to pass, there has been an actual or constructive delivery of the goods to the buyer.
>
> I think that is right, subject only to this possible qualification, that there may be after such constructive delivery an actual delivery still to be made by the seller under the contract. Of course, that is quite possible, because delivery is the transfer of possession, whereas appropriation transfers ownership. So there may be first an appropriation, constructive delivery, whereby the seller becomes bailee for the buyer, and then a subsequent actual delivery involving actual possession, and when I say that I have in mind in particular the cases cited, namely, *Aldridge v. Johnson* (1857) 7 E & B 885 and *Langton v. Higgins* (1859) h & n 402.

Fourthly, one has to remember section 20 of the Sale of Goods Act, whereby the ownership and the risk are normally associated. Therefore, as it appears that there is reason for thinking, on the construction of the relevant documents, that the goods were, at all material times still at the seller's risk, that is *prima facie* an indication that property had not passed to the buyer.

Fifthly, usually but not necessarily, the appropriating act is the last act to be performed by the seller. For instance, if delivery is to be taken at the seller's premises and the seller has them in position to be taken by the buyer and has so informed the buyer, and if the buyer agrees to come and get them, that is the assent to appropriation. But if there is a further act to be, an important and decisive act, to be done by the seller, then there is *prima facie* evidence that probably that the property does not pass until the final act is done. . . .

(iv) Reservation of right of disposal

19. (1) where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled.

In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodies for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Warder (Imports & Exports) Ltd v. Norwood (1968) 2 QB; 663; 2 WLR 1440 (CA)

The seller and the buyer entered into a contract for the sale of 600 boxes of frozen kidneys out of 1,500 cartons of frozen ox kidneys in a cold store. Under the contract, the buyer was to send a lorry to collect the kidneys. The buyer did in fact send the lorry. When the lorry arrived at 8 a.m., 600 boxes had already been removed from the cold store for the buyer. The driver handed the delivery note to the porter and loading commenced. What the driver did not do however was to switch on the refrigeration unit of the lorry until about 10 am. At that stage, water was noticed dripping from the cartons. The loading continued under hot sunshine until about midday. When the goods arrived at their destination, they were found to be unfit for human consumption and the buyer refused to accept them. The seller sued for the price. The buyer argued that the risk did not pass until all the goods had been loaded on to the lorry and as they had defrosted before they were loaded, the seller bore the risk.

Held; that the property and the risk in unascertained goods which were in the possession of a third party passed when such party, having selected and appropriated part of the goods from the bulk for the buyer acknowledges those goods as the goods of the buyer for there is then unconditional appropriation of the goods to the contract. In this case, when the driver gave the delivery note to the porter, the goods were appropriated to the contract and the property (and so the risk) in them passed to the buyer. The kidneys defrosted after they became the property of the buyer.

Where there is a sale of specific goods, the passing of property is, under rule 3 postponed if the seller is bound to weigh, measure, test or do some other act for purposes of ascertaining the price.

***National Coal Board v. Gamble* (1959) 1 QB 11; (1958)2 All ER 203**

The appellants supplied coal as part of a bulk sale to the purchaser. The coal was loaded by means of a hopper and then driven to a weigh bridge, where the weight of the coal was ascertained and the statutory weight-ticket issued. An issue arose as to whether the property passed when the lorry was loaded, or later when it was weighed.

Held; that the property in the coal did not pass until the coal had been weighed and a ticket given. The Coal Board's employee, the weighbridge man, could insist that a lorry which had too much coal loaded on it, return to off load the excess before allowing it passage. Unconditional appropriation could therefore not happen until after the lorry had been weighed and released

(v) Assent before appropriation

***Mucklow v. Mangles (1808)* 1 Taunt 318; 127 ER 856**

The buyer agreed to buy a barge which was to be built by the seller. The whole purchase price was advanced to the seller as the works on the barge progressed. The buyer's name was inscribed on the barge. Before the barge was completed, however, the seller was declared bankrupt. The question to be determined by the court was whether property in the barge had passed to the buyer before the seller was declared bankrupt.

Held; that property could only pass after the barge was completed. Since the barge was incomplete at the time of the bankruptcy, it could not have been appropriated to the contract. The advance payment was not assent; it only had the effect of obliging the seller to complete the barge.

***Aldridge v. Johnson* (1957) 7 E & B 885; 119 ER 1476**

The buyer inspected a heap of 200 quarters of barley and agreed to purchase 100 quarters of it. The buyer then sent his own empty bags for the barley to be packed in. When only 155 bags had been filled, the seller was declared bankrupt and the trustee in bankruptcy

then claimed the barley which was in the sacks. The issue was whether property in the barley had passed to the buyer. The buyer argued that it had. The trustee in bankruptcy argued that it did not.

Held; that when the barley was separated from the heap and packed in the bags, it was unconditionally appropriated to the contract by the seller. When the buyer sent the empty bags in advance, he was thereby assenting to the appropriation in advance. Property in the 155 bags of barley therefore passed to the buyer before the seller was declared bankrupt.

***Langton v. Higgins* (1959) 157 ER 896**

The buyer agreed to buy all the oil distilled from a peppermint crop which was growing on the seller's land. The buyer sent bottles to the seller in order that the seller could fill them with oil. The seller filled the bottles with the oil, but sold some of them to the defendant. The buyer then sued the defendant in conversion arguing that property in the oil had already passed to her at the time the seller purportedly sold the same.

Held; that the act of filling the bottles amounted to appropriation which was assented to in advance by the buyer when she sent the bottles.

(vi) Ascertainment by exhaustion

Unascertained goods may become ascertained and appropriation effected through the process of exhaustion.

***Wait & James v. Midlands Bank* (1926) 31 Com Cas 172**

A quantity of wheat to be sold was kept in a warehouse by the seller. By separate contracts of sale, the seller sold various lots of the wheat to the different purchasers which lots were separated from the bulk. All the lots were taken away by their purchasers leaving only the quantity which corresponded with that required by the buyer, in terms of the contract of sale.

Held; that through the process of exhaustion, the wheat subject of the contract of sale became ascertained and property in it passed to the buyer.

***Re London Wine (Shippers) Co.* (1986) PCC 121**

The seller had contracted to sell wine which was unascertained and was stored in a warehouse, to a number of customers. The seller's bank took a charge overall of the seller's property before

any wine had been delivered. One of the customers had bought the seller's total stock of a particular wine. Another two or more customers had bought the seller's total stock of a particular wine. The court had to consider whether this property in the wine had passed to these buyers. It was contended, relying on *Wait & James v. Midlands Bank* (above) that the property in the wine had passed to the customers since, though the wine was unascertained at the time of the contract, and it became ascertained by exhaustion.

Held; that in both cases the seller was not under an obligation to fulfill the orders with wine from their own stocks; wine from other sources could have been used to fulfill the contract. Accordingly the wine subject of the contract was never ascertained.

(vii) Ascertainment by segregation

***In Re Goldcorp Exchange* (1994) 3 WLR 199 (PC)**

The seller, Goldcorp, entered into contracts of sale with two groups of persons for the sell of bullion. One of the two groups bought bullion 'for future delivery' at seven days' notice. The bullion was never appropriated to the contract. The seller, however, promised that it would store and insure the bullion. The other group had purchased bullion from a company that was later taken over by the seller. The seller mixed the bullion from that company with its own stocks and later sold bullion from the mixed stock. The seller was placed under receivership before any bullion contracted to be sold was delivered. A floating charge over the assets of the buyer crystallised in favour of the Bank of New Zealand. In this action the receivers asked the court for directions regarding the disposal of the bullion.

Held; by the Privy Council, that the bullion subject of the contracts of sale was unascertained. Property in it could therefore not pass to the purchasers. The sellers additional promises to store, insure and deliver at seven days' notice, could not remedy the deficiency. As for the bullion from the company which the seller had taken over, that had been sufficiently ascertained to pass the property to the second group and their interest could be traced to the seller's bullion although their recoveries could no exceed the lowest balance held by the seller at any time.

(viii) Reservation of right of disposal

Parties to a contract of sale may agree to have the goods transferred into the buyer's possession, yet reserve the right to dispose of the goods. Section 19 of the Act provides that:

(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.
(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.
(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

3.12 Transfer of risk in the goods

In the formation and performance of ordinary contracts of sale of goods, three incidences are usually identifiable. These constitute the critical factors as between the seller and the buyer, in relation to the goods. These three factors are; the transfer of the property in the goods, the delivery of the possession the goods; and the transfer of the risk in those goods. The object of the contract of sale is, in fact, to irrevocably transfer the property, possession and the risk in the goods from the seller, in whom all these incidences reside at the commencement of the contract of sale, to the buyer. The precise time or sequence in which each of the transfers of these incidents will take place is a matter of agreement between the contracting parties.

The Sale of Goods Act is quite clear on the obligations of the parties under a contract of sale. By section 1, the primary obligations of the seller are to transfer the property in the goods, and in terms of section 27, to deliver the goods sold to the buyer. The buyer's principal obligation, on the other hand, is to accept and pay for the goods (s. 27). Transfer of the risk in the goods, is surprisingly not dealt with in terms of rights or obligations of the parties under the Act.

The Act does not define the term 'risk'. The term is however, mentioned in four sections of the Act. It is mentioned in section 7 (which deals with goods perished before sale but after agreement to sell), section 20 (which declares that risk *prima facie* passes with property), section

32 (3) (dealing with delivery of goods to carrier) and section 33 (which deals with risk where goods are delivered at distant place. What is obvious from all these sections is that the term is used to refer to the perishing or loss or incidental damage, injury or deterioration in the state or quality of the goods resulting in the partial or total loss of the goods. As used in the Act, the term risk, is confined to the state of the goods subject of the contract and it does not cover other forms of risk that either or both parties to a contract of sale may be exposed to for example risks such as bankruptcy of a party, a falling market, technological innovation which may render the goods contracted for less useful or less competitive, death of a party, etc.

It is critical to determine at what precise moment in time the risk passes from the seller to the buyer for a variety of reasons. The financial consequences of loss or damage to goods subject of a contract of sale are obvious, and it is therefore important to know who is to bear the burden of covering the loss. Under the common law, the general rule relating to the passing of risk is basically tied to the question of passing of property. It states that whichever party has the general property in the goods sold under a contract of sale, at any given moment, bears the risk too. As Blackburn, J. explains in *Martineau & Others v. Kitching*[42]*:*

> As a general rule, res perit domino, the old civil law maxim, is a maxim of our law; and when you can show that the property passed, the risk of loss prima facie is in the person in whom the property is. If, on the other hand, you go beyond that and show that the risk attached to one person or the other, it is very strong argument for showing that property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other.

The Sale of Goods Act captures this common law rule in section 20 which states as follows:

> Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

[42] (1872) LR QB 436 at pp. 453 - 454.

> Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

It is plain from section 20 that risk and possession do not necessarily go together. Risk can pass to the buyer or remain with the seller, regardless of who has the possession or control over the goods. The risk passes to buyer with the passing of the property in the goods even if the seller still has the possession of them. Determining passage of risk therefore necessitates the examination of the rules as to passage of property, and through that whether the goods are specific or unascertained.[43]

Leslie & Underson Ltd v. Villabhdas & Co. Ltd (1950) EALR 30 (Uganda; East African Court of Appeal)

> In July of 1947, the respondents were allotted four bales of gunny by a farmers union. In August of that year, the appellants introduced themselves as the actual suppliers of the gunny. At this point, the respondent paid the purchase price. Unknown to the parties, the gunny had perished at sea long before August. The respondent sued for return of the purchase price.
>
> *Held;* that, until there was a completed contract of sale, property, and, therefore, risk remained in the seller. There was no completed contract of sale until August, such that at the time the goods perished they were the property of and at the risk of the appellant. Since the contract was void for unilateral mistake, the respondent was held entitled to return of the purchase price. (Uganda Sale of Goods Ordinance).

Exceptions Envisaged by section 20 of the Sale of Goods Act

(a) A contrary Agreement

Section 20 of the Act is self-limiting in the sense that the parties may decide whether it will apply to them or not. The words 'Unless otherwise agreed' used in the section allow the parties to conclude a contract that may allocate the risk regardless of the passage of property. Where the parties have made provision on the passage of the risk, the courts will not ignore the provision.

In *Comptoir D'Achat et de Vente du Boererbond Belge SA v. Luis de Ridder Limitada*[44], Lord Normand expressed this as follows:

> In the law of England . . . it has been found necessary to provide for the passing of the risk to the buyer before the property passes to him if the parties so agree. It

[43] *Wardars Imports & Exports Limited v. W. Norwood & Sons Ltd* (1962) 2 WLR 1440.
[44] (1972) LR 7 QB 436 at p. 454.

may be conceded that the parties can agree to some purely artificial allocation of the risk and if they express that agreement in suitable language in the contract it must somehow be given effect.

(b) Where there is interest in the goods

The party bearing the loss may have neither the property in nor possession of the goods but merely an 'intermediate and practical interest' in them.

***Sterns Ltd v. Vickers Ltd* (1923) 1 KB 78**

The defendants bought 200,000 gallons of white spirit stored in a certain tank belonging to a storage company. Out of this quantity, the defendant sold 120,000 gallons to the plaintiffs and handed to them a delivery warrant, whereby the storage company undertook to deliver that quantity of the spirit to the plaintiffs' order. After the plaintiff had accepted the warrant and before the quantity purchased had been severed from the bulk, the spirit in the tank deteriorated in quality.

Held; by the Court of Appeal, that whether the property in the undivided portion of the larger bulk had passed or not, upon the acceptance of the delivery warrant, the risk passed to the buyers and the loss must be borne by them.

Scrutton, L.J. (at p. 84-85 . . . Whether the property has passed or not, the transfer of the undivided interest carries with it the risk of loss from something happening to the goods, such as deterioration in their quality, at all events after the vendor has given the purchaser a delivery order upon the party in possession of them, and that party has assented to it. The vendor of a specified quantity out of a bulk in the possession of a third party discharges his obligation to the purchaser as soon as the third party undertakes to the purchaser to deliver him that quantity out of the bulk. In those circumstances I come clearly to the conclusion that as between the plaintiffs and the defendants the risk was on the plaintiffs, the purchasers. The vendor had done all that they undertook to do. The purchasers had the right to go to the storage company and demand delivery, and if they had done so at the time they would have got all that the defendants had undertaken to sell them. What the purchasers here are trying to do is to put the risk after acceptance of the warrant upon persons who then had no control over the goods, for it seems plain that after the acceptance of that warrant the vendor would have had no right to go to the storage company and request them to refuse delivery to the purchaser.

(c) Where there is delay in delivery of goods

Section 20 contains a proviso which states that, 'provided that where delivery has been delayed through the fault of either buyer or seller the goods are at risk of the party in fault as regards any loss which might not have occurred but for such fault.'

***Demby Hamilton & Co. Ltd v. Barden* (1949) 1 All ER 435**

> The defendant agreed to buy thirty tons of crushed apple juice from the plaintiffs to be delivered in weekly loads. The defendant took delivery of some of these loads but was late in effecting delivery of the rest of the consignment. As a result of the delay, the remaining consignment went bad and had to be thrown away.
>
> *Held;* that in terms of the proviso to section 20 of the Act the defendant buyer bore the risk of deterioration even through no property has passed to him.
>
> SELLERS, J. (at p. 437) . . . that all the facts and circumstances have to be looked at in very much the same way as a jury would look at them in order to see whether the loss can properly be attributed to the failure of the (party) to take delivery of the goods at the proper time.

(d) Bailee's Liability

The second proviso to section 20 states that 'nothing in this section' shall affect the duties or liabilities of the buyer or seller as bailee of the goods on behalf of the other party.

***Sharp v. Butt* (1930) 25 Tas LR 33**

> The buyer purchased one hundred cases of standard grape apples from the seller and instructed the latter to make ready the cases purchased, for shipment on April 22. He picked the apples in readiness for delivery on the date notified, but then was further instructed to postpone delivery until May 20. Unfortunately, before May 20, the apples developed a fungal disease which could have been prevented if the seller had wrapped the apples.
>
> *Held;* by the Supreme Court of Tasmania, *inter alia*, that although it was true that the seller was under a duty to take care of the apples, as the time for delivery had passed, he could only be liable as a gratuitous bailee, that is for gross negligence. On the

facts, although the seller had certainly been negligent, his conduct did not amount to gross negligence.

(e) Where the seller is bound to send the goods to the buyer by sea

Under section 32 (1) of the Act delivery to a carrier is *prima facie* deemed to be delivery to the buyer provided the carrier is independent of the seller. This aspect is covered in the part relating to delivery of goods. It will be seen that this provision of the Act was given judicial interpretation by Bruce-Lyle in the case of *Ndola City Council v. Colgom Industries.*[45] That interpretation is the same as that given by the court in *Dunlop v. Lambert*[46] where Lord Cottenham had the following to say:

> It is no doubt true as a general rule that the delivery by the consignor to the carrier is a delivery to the consignee and the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier the consignee directs that the goods shall be sent by the ordinary conveyance. The delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risks of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent.

3.13 Tranfer of Title by Non-Owner

In addition to the rules relating to the transfer of property in the goods from the seller to the buyer, the law has developed other rules in relation to the passing of title in the goods by a person who is not the owner of the goods he sells. These rules stem from the provisions of section 21 of the Sale of Goods Act.

Section 21(1) of the Sale of Goods Act provides as follows:

> Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded from denying the sellers to sell.

[45] (1968) ZR 182.
[46] (1839) Sol & Fin 600.

From the above provision, it is clear that a person selling property on behalf of the owner should have the authority of the owner, otherwise no good title would be passed to the purchaser. This is also referred to as the *nemo dat habeat* rule.

Competing claims to property may arise between a dispossessed owner and another person who has acquired only a limited interest in the goods, such as a buyer from a thief, pledgee or a bank to whom the goods have been charged. Such dispute may really be one between two innocent parties.

***Bishopsgate Motor Finance Corporation Ltd v. Transport Brake Ltd* (1949) 1 KB 322 (at p. 362-7).**

> A hirer, under a hire purchase arrangement, obtained possession of a car. He then took the car to Maidstone market and handed it over to an auctioneer to sell. The auctioneer tried without success to sell the car by auction. He then sold it to 'A' by private treaty. A question arose as to whether 'A' had obtained good title to the car.
>
> *Held;* that Maidstone market was a market overt and that the practice in the market of allowing sales to be conducted privately within the market after an auction had failed was sufficient to constitute usage of the market within the meaning of the provision, and consequently 'A' had obtained good title.
>
> DENNING, L.J.: . . . . In the development of our law, two principles have striven for mastery. The first is for protection of property; no one can give a better title than he himself possesses. The second one is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title. . .The common law maxim nemo *dat quod non habet* provides that a seller, or an agent acting for the seller, can give no better title to goods than the seller himself has.
>
> Where, therefore goods are sold by a person who is not the owner, the buyer acquires no better title than the seller has. . . .

Exceptions to the nemo dat rule

To the general *nemo dat* rule there are eight exceptions. Under these exceptions, a non-owner will be able to pass good title to goods even if he may have none himself, or if he only has a defective one.

1. ***Estoppel***

Section 21 (1) provides that where goods are sold by a non-owner who does not sell them under the authority of the owner the buyer acquires no

better title than seller 'unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell'.

This amounts to a sale by estoppel. In order to raise estoppel under that subsection, it must be shown that either the owner represented that the seller was entitled to sell the goods, or that the owner was negligent in allowing the seller to sell the goods.

The owner must have acted in such a way as to mislead the buyer into believing that the seller was entitled to sell the goods. The owner must have gone beyond merely allowing the non-owner to have possession of the goods in question.

Regard must be had to the conduct of the owner rather than his intention and it is the effect of his conduct that decides the question whether he is estopped or not.

Eastern Distributors Ltd v. Goldring (1957) 2 QB 600; 3 WLR 237

> Murphy, the owner of a Bedford van, desirous of raising money on it, agreed with Coker, a car dealer, that the latter should represent to the plaintiffs, a finance company that he, Murphy, wished to take the car on hire-purchase. He then signed and delivered to Coker blank hire purchase proposal forms and a memo of agreement and they pretended that Coker was selling the van to Murphy. The hire purchase company bought the van and let it out to Murphy, who then sold it to the defendant, who bought it in good faith. Murphy defaulted in making the instalment payments under the agreement. The hire purchase company traced the van and sued the defendant for conversion. By the *nemo dat* rule the plaintiff had no title to assert because they bought the van from Coker, a non-owner.
>
> *Held;* that since Coker was armed by Murphy with documents which enabled Coker to represent that he was the owner of the van with the right to sell it, Murphy was estopped by his conduct from denying the plaintiff's title. When Murphy sold the van again to the defendant, he did not have title, it being vested in the plaintiff. Judgment was accordingly entered for the plaintiff hire purchase company.

Central Newbury Car Auction Ltd v. Unity Finance (1957) 1 QB 371

> A rogue offered to purchase a car on hire purchase terms. He completed a proposal form and persuaded the plaintiffs owners who were car dealers to let him have possession of the car and the

registration book before the finance company had accepted his proposal. The finance company subsequently refused to finance the deal because the rogue had given a false address. The purported dealer sold the car to a garage which in turn sold it to the defendant, another hire purchase company. The fraud was then discovered. The plaintiff claimed the car from the second hire purchase company under the *nemo dat* rule. The defendant claimed that it was the owner of the car, stating that the plaintiff was estopped by conduct, that is, clothing the rogue with ownership.

Held; that defence of estoppel raised by the defendant failed because as the motor car registration book was not a document of title, the original owner did not invest the purported dealer with authority to sell simply by granting possession of it.

HODGSON, L.J.: ... the mere handing over of a chattel to another does not create an estoppel and there will be no estoppel unless the doctrine of ostensible ownership applies . . . .

Negligent conduct

Estoppel by conduct may be successfully pleaded when the true owner of goods acted so negligently as to induce the buyer into believing that the seller is in fact the owner of the goods

In order to establish estoppel by negligence it must be shown that:

(i) there was a duty of care;
(ii) the duty was breached;
(iii) detriment resulted to the buyer, the breach of duty being the effective cause.

Merchantile Credit Co. v. Hamblin (1965) 2 QB 242

Mrs Hamblin, wishing to raise money on the security of her cars approached a respected car dealer who suggested signing a number of documents which would enable her obtain the loan. She signed same blank forms under the impression that the dealer would use them to discover how much money might be raised. The documents turned out to be such as allowed the dealer to appear as the true owner of the cars. The dealer completed them so as to constitute an offer to sell the cars to the plaintiff hire purchase company, who accepted the offer. Mrs Hamblin then repudiated the agreement. The plaintiff argued that she was precluded by her

negligent conduct (in signing the blank forms) from asserting her title to the car.

Held; that the respondent, Mrs Hamblin, did not owe a duty of care to the appellant finance company in signing the forms. Furthermore, the respondent had not been careless because it was reasonable to have trusted a respectable car dealer.

PEARSON, L.J.: . . . In order to establish estoppel by negligence the plaintiffs must have to show (i) that the defendant owed them a duty of care to be careful, (ii) that in breach of that duty she was negligent (iii) that her negligence was the proximate cause of the plaintiff's loss. . . .

2. *Sale under the Factors Act*

Section 2 (1) of the Factors Act of 1889 provides that:

> Where a mercantile agent is, with the written consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, be as valid as if it were expressly authorised by the owner of the goods to make the same….
>
> Section 21 (2) of the Sale of Goods Act, provides that 'nothing in this Act shall affect the provisions of the Factors Act, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof'.

***Heap v. Motor Advisory Agency Ltd* (1923) 1 KB 577**

The plaintiff was desirous of selling his Citroen car for 210 Pounds. A rogue called North informed the plaintiff that he had a friend, H, who was interested to buy the car for that price. The plaintiff then allowed North to take possession of the car for the purpose of showing it and possibly selling it to H. In fact H never existed and North made the representation with the intention of obtaining the car for his own benefit. Later on, North sold the car through an intermediary to the defendant for 110 Pounds. The question was whether the defendant could set up the defence under section 21 (1) of the Sale of Goods Act.

Held; that the defendant could not set up the defense under section 21 (1) in as much as under that sub-section, the plaintiff was not by his conduct precluded from denying the seller's authority to sell the car. The buyers had notice of a defect in the title of the car and so were not afforded the protection of section 2 of the Factors Act, 1889.

In order to constitute conduct precluding him from denying the seller's authority to sell within the meaning of section 21 (1), the negligence on the part of the owner of goods which have been sold without his authority or consent, must be more than mere carelessness in the management of his own affairs and must amount to a disregard of his obligation towards the buyer.

3. *Sale under Special Common Law or Court Orders*

Section 21 (1) (b) of the Sale of Goods Act provides that nothing in the Act would affect the validity of any contract under special common law or statutory power of sale or under a court order. The question is who may exercise these special powers? These powers may be exercisable by pledgees since a pledge carries with it an implied right to sale. They may also be exercised by agents of necessity and by executors and administrators.

(a) Statutory Powers

Sellers of goods under statutory power do pass a good title even if the owners of the goods did not authorise or consent to the sale. Section 3 of the Disposal of Uncollected Goods Act[47], for example, confers a right on bailees, in certain circumstances, to sell goods held under bailment for repair or other treatment and not re-delivered.

The section states that:

> 3. (1) Where, in the course of a business, goods have been accepted and held, by any person under bailment for repair or other treatment on terms, express or implied, that the goods will be redelivered to the bailor or in accordance with his directions when the repair or other treatment has been carried out and on payment to the bailee of such charges as may be agreed between the parties or as may be reasonable, and where such goods are ready for re-delivery but the bailor fails both-

[47] Chapter 410 of the Laws of Zambia.

(a) to pay or tender to the bailee his charges in relation to the goods

The Sheriff of Zambia and his bailiffs also have the right to sell seized property and pass good title to purchasers thereof. Section 15 (1) of the Sheriffs Act[48] provides that:

> Where any goods in the possession of a judgment debtor at the time of seizure by an officer are sold by such officer without any claim having been made to the same –
> (a) the purchaser of the goods so sold acquires a good title to those goods….

Statutory powers of sale include those conferred on an unpaid seller of goods under the Act. In terms of section 25 (1) of the Act, where a person who has sold goods remains in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person of the goods or documents of title to a third party who receives the same in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer had the express authority of the owner in doing what he did.

This section reproduces with slight modification the provision of section 8 of the Factors Act of 1889.

Other persons who may have statutory power to sell are liquidators and trustees in bankruptcy, mortgagees in possession, etc.

(b) Court Order

Under the Supreme Court Rules (the White Book of England which apply to Zambia) Order 29, Rule 4, the court has power to make an order as to the sale of goods of a perishable kind or likely to deteriorate if kept or which for any other reason it is desirable to do so. The order provides that:

> (1) The Court may, on the application of any party to a cause or matter, make an order for the sale by such person, in such manner and on such terms (if any) as may be specified in the order of any property (other than land) which is the subject matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if

[48] Chapter 49 of the Laws of Zambia.

kept or which for any other good reason it is desirable to sell forthwith.

4. *Sale by Agent*

Chapter two dealt in great detail with the power and authority of an agent to bind his principal. An agent who sells goods on behalf of his principal will pass good title if the agent has authority to do so. Section 61 contains saving provision for rules of the common law. Agency law is made up of rules of common law. By virtue of section 61, these rules will apply in contracts of sale.

5. *Sale under Voidable Title*

By section 23 of the Act, where the seller of goods has a voidable title but the title has not been avoided at the time of the sale, the buyer obtains good title to the goods provided he buys the goods in good faith and without notice of the defect in title.

Section 23 protects third parties only where the sale was voidable. For example, if Mwaka owns thirty cases of Mills and Boons books and Namwandi fraudulently induces Mwaka to sell the books to her which Namwandi then resells to Chalwe, Chalwe will acquire a good title to the books provided that Mwaka had not exercised her right to avoid Namwandi's voidable title before the sale by Namwandi to Chalwe.

Mamujee Brothers Ltd v. Awadh (1969) EALR 520 (High Court of Kenya)

Shah obtained goods from the plaintiff by falsely representing that he was entitled to them. He then sold these goods to the defendant. Subsequently, he was convicted of obtaining property by false pretences. The question arose as to whether property had re-vested in the plaintiff or whether title had passed to the defendant.

Held; that according to s. 23 of the Kenyan Sale of Goods Act, a person cannot pass better title than what he himself possesses. By s. 24, however, a person who has voidable title can pass good title to a bona fide purchaser for value who acquires the goods in good faith and without notice of any impropriety in the seller's title, provided that the seller's title has not yet been avoided.

On the facts, Shah's title was voidable because he had obtained it by the plaintiff's mistake. (*Philip v. Brooke* cited) His title was only avoided upon his conviction. He could thus pass title to a bona fide purchaser before conviction. On the facts, it was found that

the defendant had notice of Shah's defective title, so that he could not obtain good title.

MOSDALE, J: . . . It was not until 1866 that it was finally decided whether the property in goods passes by a sale which the seller has fraudulently been induced to make, but there is now no room for further question, for it is established in the cases cited that whenever goods are obtained from the owner by fraud, we must distinguish whether the facts establish a sale to the party guilty of the fraud, or a mere delivery of the goods into his possession. In other words, we must ask whether the owner intended to transfer both the property and the possession of the goods, or to transfer nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes, but not in the latter case. . .

6. *Sale in market overt*

This is probably the oldest exception and merely gives statutory recognition to an old common law rule. Section 22 (1) of the Sale of Goods Act provides that:

> Where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

The Sale of Goods Act does not define 'market overt'. However in *Lee v. Bayes*[49] it was stated that the term 'market overt' applies only to an 'open' public and legally constituted market open between the hours of sunrise and sunset and where goods for sale are openly or publicly displayed.

A place may be a market overt by prescription. Prescription here means enjoyment of a right from time immemorial.

Shops are markets overt for the things which by the trade of the owner are put there for sale. Goods are exposed publicly for sale and in *Arath Tobacco v. Ocker*[50] it was held that the sale must be by the shopkeeper and not to him. In addition, such sale must be in the public part of the shop.

[49] (1856) 18 CB 601.
[50] (1930) 47 TLR 177.

In the common law case of *Hargreave v. Spink*[51], a thief stole some jewellery from an owner which he sold to a shopkeeper in his showroom just above the shop. The plaintiff then sued the shopkeeper for the recovery of the jewellery. It was held that the shopkeeper did not obtain good title to the jewellery as they had not been sold in market overt. The court further stated (as an *obiter dicta that* the protection under market overt rule would only apply where the sale was by and not to a shopkeeper.

The Attorney General v. Graham Randee (Appeal No. 1 of 1987 (Supreme Court of Zambia)

(The facts appear from the judgment of the Court delivered by Ngulube, D.C.J.)

> This appeal is brought by the Attorney-General against the judgment of a High Court Commissioner ordering the release to the respondent of a motor vehicle Mercedes Benz 500 SEC registration number AAF 8585. On 6 March 1984, the customs authorities seized the vehicle from the respondent and served on him a notice to the effect that the seizure was in terms of section 162 of the Customs and Excise Act, Cap 662 in that the car was liable to forfeiture.
>
> From the Affidavit evidence and the documents exhibited in the case, the following facts were either not in dispute or clearly not capable of dispute or challenge: On 26th September 1983, one George Gideon Huysamer, a resident of Johannesburg, South Africa, purchased for R90,000 a brand new Mercedes Benz 500 SEC and registered it in his name with registration number JCF 161T. On 4th November 1983 this car was stolen from him by a thief unknown but who was confederate of a South African called Danny. Danny gave this stolen car to one Gordon Thomas Barnard who gave this car to one Ibraham Yusuf. Yusuf claimed that he had purchased this car from Bernard and had paid the price in June and July 1983, long before the car was purchased by the true owner and long before it was stolen. The respondent's claim was that he bought this car from Yusuf.
>
> The documentary evidence shows that on 21 November 1983 Bernard (who gave his postal address as Box 35364, Lusaka, which a number of other documents showed as belonging to Yusuf) arrived at the Chirundu border post with a car and applied for permission to have it cleared through customs at Lusaka. The declaration lodged showed that he had imported a Mercedes Benz 280S

[51] (1892) 65 LTR 650.

registration number FDT 634T and bearing an engine number and a chassis number which were totally different from those of the stolen Mercedes Benz, the subject of this appeal. The documents further show that on 1 December 1983, Barnard had this 1980 Mercedes 280S valued for duty purposes. The form used for the purpose shows that the car was inspected and its condition and defects noted. It also revealed that a number of documents were furnished including an invoice dated 25 March 1983, from Messrs Sharman Motors of South Africa, the alleged suppliers. The suppliers had in fact never dealt with a stolen Mercedes and forwarded an Affidavit that their invoice was among a batch which had gone missing. On 23 December 1983, duty and sales tax amounting to K16,472.38n was paid and a receipt issued in favour of Barnard in respect of Mercedes Benz registration number FDT 634T, but for the first time giving the engine and chassis numbers for the stolen Mercedes. A customs clearance certificate was issued in the name of Barnard and the respondent successfully applied to register the stolen car in his own name.

It was not in dispute that Barnard did not clear the stolen car through customs; he did not have the car valued; nor did he pay the duty and sales tax when the particulars of the stolen car started to be endorsed on the official documents. Barnard was then not even in the country and this fact was admitted by Yusuf. It is not in dispute that it was in fact Yusuf and the respondent who continued to use Barnard's name since he was the importer who was required to clear the car. On the indisputable evidence which we have recited at fairly great length, it was thus never in dispute that the stolen Mercedes was and continues to be an uncustomed car within the meaning of that expression in the definitions section of Cap 662. It is also plain that there has been an elaborate fraud in connection with this stolen car. However, the respondent claimed that he was an innocent purchaser without notice.

The learned trial commissioner accepted that the respondent purchased the car from Yusuf without notice that the car was liable for seizure; that the respondent did not know he was buying a stolen car; that there was nothing wrong with Yusuf paying Barnard for the car in advance; that the sale of the car to the respondent had been in market overt and that, as there was no way that the respondent could have known of Yusuf's defect in title, he had acquired a good title and the stolen car should be returned to him.

The upshot of Mr Goel's submissions and argument was that, the findings by the learned trial commissioner and the conclusions

of law were all in the teeth of the evidence which we have already set out. He pointed out that, as a number of offences had been committed in relation to this car under section 141 of Cap 662 (concerning false documents, false representations and so on), it was part of the fraudulent transactions and could not have paid for the car in June and July 1983, as he claimed, when that car had not even been purchased by the true owner and certainly long before it had had even been stolen. The official documents created in Barnard's name on the basis of misrepresentations by the respondent, according to Mr Goel, all indicate that the respondent should not be heard to say that he was an innocent purchaser when he had seen the documents and he had himself made use of them. Mr Nyangulu argued that, the respondent was not party to the fraud and that, even if he had himself paid duty in someone else's name and made use of the various suspect's documents, he was an innocent purchaser. Mr Nyangulu argued that a sale by private treaty of a second-hand car should be regarded as a sale in market overt and good title should pass to an innocent purchaser. He very fairly conceded, however, that to date this car has remained uncustomed, since the documents used for its clearance related to a different car.

We have considered the arguments and find that we agree with Mr Goel that, the findings made by the learned trial commissioner cannot be supported. The position of an alleged innocent purchaser is recognised by Cap 662 itself in s.162 (3), which reads:

> (3) seizure shall be made in terms of subsection (1) where more than eighteen months have elapsed since the articles first became liable to seizure or where such articles have been acquired for their true value by a person who was unaware at the time of his acquisition that they were liable to seizure.

It should be noted that the subsection is concerned with liability to seizure under the law relating to Customs and Excise, such as in respect of uncustomed goods and infringements of such law: see section 162 (1) and (2). The subsection quoted is otherwise not concerned with the law relating to stolen goods, a matter to which we shall shortly refer. However, in the facts and subsection quoted, the respondent personally made use of documents which gave details of another car when it must have been obvious even to him that the documents he was using did not relate to this particular motor

vehicle. We agree with Mr Goel that, the fact that respondent used documents which, on their face, related to different car belies the claim that he had no knowledge of the fact that this car had no valid papers and could never be said to have been lawfully imported, let alone dealt with. In considering the possibility that a purchaser might be innocent, the court can only proceed on the basis that it is dealing with a reasonable person who is familiar with the requirements of the law and the practice of customs clearance and sale of a vehicle which has allegedly been imported into the country. The respondent himself undertook a lot of the required procedures and it was him who first transformed the Mercedes 280S into a Mercedes 500 SEC on the official documents. It would be absurd to suggest that he had no knowledge of what he was doing. The stolen car remains uncustomed to date and various false documents were utilised. This being the case, the car was certainly liable to seizure and the respondent cannot be heard to say he was unaware of this state of affairs.

It was argued that a good title had passed to the respondent because the sale was in market overt and he was an innocent purchaser from Yusuf who could pass title. This argument can be disposed of very shortly: Under section 21 (1) of the Sale of Good Act, 1893, which applies in Zambia, a person who is not the owner of the goods and who does not sell them under the authority or with consent of the owner can pass no better title than he himself had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. One of the exceptions to this *nemo dat* rule is to be found in s. 22 of the Sale of Goods Act, in relation to sales in market overt. It should be observed, for the record, that neither the thief nor Danny nor Barnard nor Yusuf acquired any title which they can hide behind or put forward in a court of law as against the true owner who is in South Africa and who did not conduct himself in any manner so as to be precluded from denying any of these gentlemen's authority to sell his car, which they undoubtedly did not have. As already stated, s. 22 contains one of the exceptions and is to the effect that, where goods are sold in market overt according to the usage of market, the buyer acquires a good title to the goods, provided he buys them in good faith and without any notice of any defect or want of title on the part of the seller. We have already found that respondent had notice of the defect or want of title on the part of the seller when he saw the irregular documents which he himself later used. It is thus unnecessary to discuss the question raised but if it were

necessary to do so, we would have no difficulty in demonstrating that the expression 'market overt' has legal definitions and it would be untenable to argue that a sale by private treaty and between associates (since the address given for Barnard by the respondent on the documents procured by him was that of Yusuf) was a sale in the open market. The finding by the learned trial commissioner that there was any sale in the open market to an innocent purchaser was in the teeth of the evidence, particularly the documentary evidence, and is one which must be immediately set aside.

The transactions herein were thoroughly fraudulent. The rule under s. 21 (1) of the Sale of Goods Act must apply so that people who steal cars could not confer any title: *See Heap v. Motorist Advisory Agency Limited* (1922) All ER 251. In our considered view, the authorities which lean in favour of innocent true owner, as against an innocent purchaser, must be supported in cases where goods are obtained fraudulently, such as by theft: See *Stadium Finance Limited v. Robbins* (1962) 2 All ER 633 and see also *National Employers Mutual General Insurance Association Limited v. Jones* (*The Times*, 6 April 1987), which was cited by Mr Geol. If the respondent bought this car, as he says he did (although he has never mentioned the price which he paid), he has his remedies against his seller, Yusuf.

In conclusion, we allow the appeal; the decision below is reversed and we find that the respondent was not an innocent purchaser without notice and that he has not acquired any title to the car. We uphold the seizure. The costs follow the event and are to be taxed in default of agreement.

***FSI Risk Management Services Ltd v. Meridien Leasing Ltd,* 1996 HP 115 (High Court for Zambia)**

(The facts appear in the judgment of Commissioner H.H. Ndhlovu)

The plaintiff's claim as appears on the Writ of Summons filed on the 4th day of March 1996 is as follows:

(a) Return of Toyota Camry to plaintiff in South Africa.
(b) Damages for detention.
(c) Costs.

The plaintiff called four witnesses in support of its case.

The first witness was Reckson Temba who informed the court that on 12 August 1993 he was robbed of his motor vehicle in

South Africa and immediately rang the police and gave his statement to the effect that his car had been stolen. On 13 August 1993 he contacted his insurance company which replaced the car after three weeks. He then told the court that between January and February 1995 a policeman informed him that the motor vehicle was found in Zambia upon which he came to Zambia on 3 January 1996 to come and identify it.

The second witness was Captain Johannes Jacbus Bothma of the South African Police who told the court that on 13 August 1993 a report of a stolen car was made to Soweto Police by PW1, then a docket was opened and was given to an investigation officer. This witness then explained the action which police take and that after 3 months if the motor vehicle is not recovered the docket is closed by the Commander. In cross-examination this witness told the court that although he was on duty he was not the one who wrote in the docket and he did not know when the vehicle crossed the border or whether or not the computers on the borders were working. The witness further told the court that the information from his Head Office and the insurance company was that the motor vehicle was found in Zambia and then received a request to attend court.

The third witness was Christopher David Muir, a representative of the plaintiff and told the court that he remembers receiving a claim from the plaintiff to the effect that this motor vehicle was hijacked. He told the court that the claim was processed as a normal claim. The witness showed the court a format of the claim form. The witness further told the court that the motor vehicle should not belong to the plaintiff. The witness further told the court that fake claims do occur in his company and that it was INTERPOL in South Africa which informed him that the vehicle was in Zambia.

The fourth witness was Donald Fluck, a Clerk at Ellis and Company, who told the court that in January 1996 he received instructions from the plaintiff with regard to the stolen Toyota Camry. He told the court that he ascertained that the vehicle in question was being held by Meridien Leasing Limited. When he wrote this to the company its advocates replied to the effect that the motor vehicle was bought from Simplex Limited in a market overt. He told the court that upon checking with the Road Traffic Commission Registry he found that the same was registered in the name of Adam Wagoy of Vubu Road, Emmasdale, Lusaka. He further told the court that when he inspected the Companies Registry there was no registration of Simplex Limited and that it was not his duty to find out if Simplex was an acronym for Somona Import and Export Limited.

After the close of the plaintiff's case the defendant opened its case and called two witnesses. The first defense witness was Somona Mohamed Kabemba, a Director in South African Consultancy and Freight and Simplex Limited. The witness informed the court that Simplex Limited was an abbreviation for Somona Import and Export Limited. The witness told the court that he remembers that on 4 November 1993 he sold a Toyota Camry to the defendant on behalf of Adam Wagoy for the sum of K15 million. He said at the time it had a blue book and was registered as AAM 964 in the name of Adam Wagoi. The witness further told the court that he went to Interpol and Civic Centre to check if the motor vehicle was properly imported and found out that everything was okay and the customs certificate was also available. The witness proceeded and said that his company deals in motor vehicles.

The second defendant was David Kayombo Kambita formerly of Meridien Leasing Limited who told the court that he told DW1 of defendant's requirements and that after the agreement was made the blue book was issued in the defendant's name from Adama Wagoi. After this witness the defence also closed its case and the parties filed in their written submissions. The plaintiff's position is that the defendant does not have good title to the motor vehicle as same was stolen from PW1. The defendant argues that it has good title in the motor vehicle as it was bought on the market overt.

I agree with the submissions of counsel for the plaintiff that the defendant has a duty to prove or show that he acted in good faith. In this country for a motor vehicle, which is being imported from outside the country, to be registered there must be clearance from Interpol, the Customs and Excise Department and the Road Traffic Commissioner should physically check the motor vehicle to ensure that it is legally right in this country for a person to sell his motor vehicle to a third party provided he follows the laid down procedures and that the vehicle has a blue book.

In the present case the defendant bought the motor vehicle through a car dealer namely Simplex Limited. Although there was some argument about the name of the company from where the motor vehicle was bought, I am satisfied that Simplex Limited is an acronym for Somona Import and Export Limited.

I have considered all the evidence before this court and I have found that there is no evidence to challenge the way Adama Wagoi imported the motor vehicle into this country and there is no evidence that the motor vehicle was not cleared by the Customs and Excise when the vehicle was imported in this country. The plaintiff has not

produced the evidence from the police from South Africa that P1 did in actual fact make a statement to the effect that his motor vehicle was stolen and the witness from the plaintiff company did not produce the statement which PW1 made to the effect that his motor vehicle was stolen. What PW3 produced in this court was a format of what victims of stolen motor vehicles fill when they make a statement at the insurance company. This being the case the court will not know what PW1 told the police and the insurance company. I have observed the manner in which the plaintiff's witnesses gave evidence to this court and I am of the view that their evidence was only to show as if the motor vehicle in question was stolen but they failed to produce the police report and the statement PW1 made to the insurance company.

The only question I have to resolve is whether or not the defendant acted in good faith and whether or not the motor vehicle was purchased in accordance with the requirements of market overt. The evidence by DW1 shows clearly that he made inquires as whether or not the motor vehicle was properly cleared and he found that there was nothing wrong and he brought the blue book to the defendant. In my mind the defendant acted innocently and there is nothing to show that it behaved in bad faith. In the case of *Randee* which was decided by the Supreme Court, the facts were different in that the motor vehicle was not properly cleared, in the present case there is no evidence to show that the motor vehicle was not properly cleared as such, I find that the defendant acted in good faith without doubting the fact that the motor vehicle in question was being transferred to them legally. There is no evidence to show that Adama Wagoi did not instruct Simplex Limited to sell his vehicle as such the said the company had the right to sell the motor vehicle.

On the totality of the evidence before me, I am convinced that the defendant acted in good faith and was an innocent purchaser and as such the exception set out in section 22 (1) of the Sale of Goods Act applies to the defendant. I find that the plaintiff has failed to prove its case on the balance of probabilities and dismiss the claim accordingly and order that the motor vehicle in question, namely, Toyota Camry registration number AAM 964 be retained by the defendant.

Judgment for the Defendant

Lonrho Cotton Zambia Ltd v. Mukuba Textiles Ltd **(2000) ZR 43**

On 20 July 1997, the appellant dispatched 120 bales of lint cotton weighing 3 tons for export to South Africa through a freight company, Wellford Meadows. This cotton did not leave the country,

but found its way to Ndola where it was sold by one Patrick Cholwe to the respondent.

Cholwe had represented himself to the respondent as a farmer from Mumbwa and sold the cotton to the respondent as his own. Cholwe was subsequently apprehended by the police and prosecuted and convicted of theft of the cotton. By the time that the theft was discovered the respondent had used up the cotton at its factory and the appellant instituted proceedings against the respondent to recover the value of the cotton. The learned trial Judge upon a consideration of sections 21, 22 and 23 of the Sale of Goods Act, 1893, found that the respondent had acquired good title to the cotton and disputed the appellants claim hence its appeal.

Held; (i) Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority of or with the consent of the owner, the buyer where goods are sold in the market overt, according to the usage of the market, obtains a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the owner.

(ii) The defendant's factory cannot be said to be an open market or market overt.

LEWANIKA, D.C.J.: . . . We have considered the submissions of counsel for the plaintiff and for the defendant and it seems to us that this matter is to be determined by sections 2l and 22 of the Sale of Goods Act, 1893 which deal with a sale by a person not the owner of the goods and a sale in market overt.

Section 2l provides as follows:

> 2 (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to self;
>
> (2) provided also that nothing in this Act shall affect:
>
> (a) the provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction;

Section 22 provides as follows:

> 22 (1) where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect, want of title on the part of the owner.

It is common cause that the lint cotton which was sold to the defendant was the property of the plaintiff. It is also common cause that the person who sold the cotton to the defendant, one named CHOLWE, was prosecuted for and convicted of the offence of theft. From the evidence on record, there can be no question of the plaintiff by its conduct having clothed CHOLWE with any authority to sell the cotton on its behalf. The defendant could only acquire title if it can be shown that it bought the cotton in good faith without notice of any defect or want of title and that the sale took place in market overt. The evidence on record is that the defendant was approached by CHOLWE at its factory where the negotiations took place and the sale was concluded. The defendant's factory cannot be said to be an open market or market overt by any stretch of the imagination. The defendant cannot therefore avail itself of the provisions of section 22 of the Sale of Goods Act. The learned trial Judge had also made a finding that CHOLWE had acquired a voidable title which he passed on to the defendant pursuant to section 23 of the Sale of Goods Act. This finding flies in the face of the evidence that CHOLWE was prosecuted and convicted of the theft of the cotton. He had no title, voidable or otherwise that he could pass on to the defendant. For these reasons, we would allow the appeal and set aside the judgment of the court below and enter judgment for the plaintiff for the amount endorsed on the writ of summons with interest at the rate of l0 per cent per annum from the date of issue of the writ till payment and costs. The costs are to be taxed in default of agreement.

Appeal allowed.

7. *Disposition by Seller in Possession*

Disposition by seller in possession occurs where a seller remains in possession of the property sold and sells the property to a third party, for example, where A sells furniture to B and agrees to deliver it to the buyer in a week's time. During the week A sells and delivers the same furniture to C who buys in good faith and without notice of the sale to B. The result is that C gets a good title as against B who is left with merely personal actions against A.

By section 25 (1) of the Act where a person who has sold goods remains in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person of the goods or documents of title to a third party who receives the same in good faith and without notice of the previous sale has the same effect as if the person making the delivery or transfer had the express authority of the owner in doing what he did.

Section 25 (1) reproduces with slight modification, the provision of section 8 of the Factors Act of 1889.

The effect of these two sections is that where a seller in possession wrongfully disposes of the goods, contrary to the terms of the contract to a second buyer, the latter acquires a title that supercedes that of the original buyer.

It was at one time regarded as settled law that section 21 (1) would only apply if the seller was in possession or continued in possession as seller and that the subsection was not applicable if the seller continues in possession in any other capacity, e.g. as bailee under a separate agreement.[52] That view was, however, rejected by the Privy Council.

Pacific Motor Auction v. Motor Credits (1965) AC 867

> Car dealers owned cars which they sold to the plaintiff. Under a separate agreement the dealers were allowed to remain in possession of the cars for purpose of displaying and they were athorised agent of the plaintiff. The dealers sold some of the cars one to the defendant. The plaintiff then sued the defendant claiming that they had not obtained good title to the goods as the dealers had sold in another capacity than that of sellers in possession. Their action was brought under the New South Wales Sale of Goods Act, 1923 – 1953 section 28 (i) of which is identical to section 25 (i) of the Sale of Goods Act.

[52] See for example, *Eastern Distributors v. Godring* (1957) 2 QB 600.

Held; that the defendants had obtained good title under that section. The decision was followed by the Court of Appeal in *Worcester Works Finance Co. v. Cooden Engineering Co.* (1972) 1 QB 210

8. ***Disposition by Buyer in Possession***

The issue of disposition by buyer in possession is dealt with in section 25 of the Sale of Goods Act. The section provides that:

> (1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.
> (2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.
> (3) In this section the term 'mercantile agent' has the same meaning as in the Factors Acts.

Section 25 (2) re-enacts with slight modification section 9 of the Factors Act, 1889. That section reads as follows:

> Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery

> or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

A couple of questions that may be asked are; what is meant by 'having bought or agreed to buy the goods?' In what circumstances can a person be said to have obtained possession of goods or documents of title to them with the consent of the seller? And what is the position if the buyer is not in fact a merchantile agent?

3.14 Performance of the Contract

Performance of a contract of sale means delivery of the goods conforming to the contract description by the seller and acceptance and payment for them by the buyer. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with terms of the contract for sale.

(a) Acceptance and Payment by buyer

The meaning of the term acceptance depends on the construction to be placed on the provisions of sections 34 and 35 of the Act. Section 35 provides that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

Under section 34 (1) on the other hand, it is provided that where goods are delivered to the buyer, which the buyer has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for purposes of ascertaining whether they are in conformity with the contract.

The two sections may pose some difficulty. Under section 35, the goods must have been delivered to the buyer and he must have done an

act of the kind specified in order to be deemed as having accepted the goods. But under section 34 he should be given a reasonable opportunity of examining the goods if he has not previously done so before he could be deemed to have accepted them. Under these situations the question may be asked as to whether section 35 could operate if all the requisites indicated in section 35 have not been fulfilled. The point may also arise as to whether section 34 limits the provisions of section 35 or whether under section 35 the buyer, not even in any of the events specified thereunder, could be deemed to have accepted the goods unless he has had reasonable time and opportunity for examining them. These issues were examined by the Court of Appeal in *Hardy & Co. v. Hillerns & Fowler.*[53] In that case wheat was sold to be shipped from Argentina to the United Kingdom. The ship arrived and the buyers took up the shipping documents on the following day. The buyers took delivery of the wheat. On the same day they resold and dispatched to sub purchasers a portion of the wheat so delivered to them. They subsequently discovered that it was not in accordance with the contract. Two days later, before a reasonable time for examination of the goods had expired; they gave the sellers notice of rejection. It was contended by the buyers that before the date of the sub-sales, ownership in the wheat had passed to them so that the sellers had no ownership with which the sub-sale could be inconsistent. The court held *inter alia* that the provision of section 35 of the Sale of Goods Act are not limited by section 34 and that the transfer of possession to the sub-purchaser put an end to the buyer's right to rejection notwithstanding that it took place before a reasonable time for examining the goods had expired.

Section 35 stipulates three conditions under which a buyer will be deemed to have accepted the goods. Firstly, if he expressly conveys his acceptance to the seller.

In the Nigerian case of *Ajayi v. Eburu*[54] the buyer having taken delivery of the gold trinkets under the contract of sale resold them to sub-purchasers. After eight months of delivery the buyer gave the seller a note acknowledging the balance of the price unpaid as a debt. It was held that this was sufficient intimation of the seller that the buyer had accepted the gold trinkets.

Secondly, if the buyer having taken delivery of the goods does an act in relation to the goods which is inconsistent with the ownership of the seller. In *Jaffco Limited v. Northern Motors Limited,*[55] the contract was for the sale to the plaintiff of a vehicle capable of transporting a John Deer Tractor 110. When the vehicle was delivered the buyer noticed

[53] (1923) 2 KB 490.
[54] (1964) MWLR 41.
[55] (1971) ZR 78.

various defects to the vehicle but agreed to take delivery provided the defects were rectified by the seller. After using the motor vehicle for some time the plaintiff returned it to the defendant for repairs to be effected on the defects noted when the vehicle was delivered. The defendant failed to repair the vehicle within a reasonable time and the plaintiff then sought to rescind the contract and sued the defendant for breach of warranty. It was held *inter alia* that the plaintiff had waived his right to reject the vehicle and chose instead to adopt a course which is called conditional acceptance. Such conditional acceptance is not a right to be exercised unilaterally by a buyer but is an additional agreement between the parties. Furthermore, the plaintiff's conduct in relation to the motor vehicle was quite inconsistent with the survival of the right of rescission.

Similarly, in *Zambia Safaris Limited v. Jackson Mbao,*[56] the court held that where a buyer does any act in relation to the goods which is inconsistent with the seller's ownership, he will be deemed to have accepted the goods within the meaning of section 35 of the Act. In that case, the buyer purchased a landrover from the seller, which was orally warranted to be in good condition and thoroughly roadworthy. The vehicle turned out to have serious defects. The buyer repudiated the contract of sale. As a result the seller offered the buyer an alternative landrover which was also orally warranted to be in perfect mechanical order. After delivery of the vehicle, the buyer noticed a discharge of black smoke and discovered major defects in the engine. The buyer then opted to spend some money effecting repairs to the vehicle. The court held that there was statutory acceptance of the vehicle in terms of section 35 of Sale of Goods Act as the buyer dealt with the goods in manner precluded restitution.

Thirdly, if the buyer having taken delivery of the goods retains them beyond a reasonable time without expressly conveying his rejection of them to the seller, he will be deemed to have accepted them.

In *Leaf v. International Galleries*,[57] the plaintiff had purchased a picture described as "constable" in 1944. In 1949, he discovered that it was not by constable. He sought to rescind the contract on the ground of misrepresentation. The Court of Appeal rejected his claim on the basis that even though he had no idea that the picture was not genuine, he had lost his right to reject after such a long period.

As regards section 34 of the Act, the problem invariably is what amounts to a reasonable opportunity to examine the goods. When the goods are required for export to a sub-buyer and particularly when this fact is known to the seller, the question may arise as to when the goods are required to be examined, whether at the time they are delivered

[56] SCZ Judgment No. 18 of 1984.
[57] (1950) 1 All ER 693.

to the buyer or at the port of shipment or when they are received by the ultimate consumer.

In *Bernstein v. Pamson Motors (Golders Green) Ltd*[58] Rougher, J., in regard to what is a reasonable time for rejection said:

> The nature of the particular defect, discovered *ex post facto*, and the speed with which it might have been discovered are relevant to the concept of reasonable time in section 35 as drafted. That section seems to me to be directed solely to what is reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from his point of view the nature of the goods and their function and from the point of view of the seller and the commercial desirability of being able to close his ledger reasonably soon after the transaction is complete. The complexity of the intended function of the goods is clearly of prime consideration. What is a reasonable time in respect of a bicycle would hardly suffice for a nuclear machine.

Clearly, therefore, reasonableness of time will vary from goods to goods.[59]

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions.

(b) Delivery of Goods: Meaning and Method

Under section 62 (2) of the Sale of Goods Act, 'delivery' is defined as 'voluntary transfer of possession from one person to another.' Delivery may be actual or it may be constructive, the latter denoting the legal right to obtain the former. In essence it is the voluntary transfer of possession from one party to another and may take any of the following five ways:

(a) a physical transfer of possession;
(b) a physical transfer of the means of control (e.g. by giving the buyer the key to the warehouse where the goods are stored);
(c) a physical transfer of document of title (e.g. a bill of lading);
(d) atonement (i.e., by arranging that a third party who holds the goods acknowledges to the buyer that he holds them on his behalf); and
(e) alteration in the character of the seller's possession (e.g., where the seller agrees to hold until the buyer wants them).

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[58] (1987) 2 All ER 220.
[59] See also *Molling & Co. v. Dean & Sons Ltd* (1991) 187 TLR 217.

(c) Time and Place of Delivery

Section 29 of the Act sets out the rules as to delivery. It provides as follows:

> (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied between the parties. Apart from such contract, express or implied, the place of delivery is the seller's place of business, if he has one and if not, his residence: provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties, when the contract is made are in some other place, then that place is the place of delivery.
> (2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.
> (3) Where the goods at the time of sale are in the possession of a third person, there is no delivery the seller unless and until such third person acknowledges to the buyer that he holds the goods on his behalf: provided that nothing in this section shall affect the operation of the issue of transfer of any document of title to the goods.
> (4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.
> (5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be born by the seller.

Unless there is an agreed date of delivery, the seller is bound to make delivery within a reasonable time. In the absence of any agreement between the parties, the place of delivery is, by section 29 (1) the sellers place of business, if he has one, or his residence. However, that section also states that if the contract is for specific goods, which to the knowledge of the parties when the contract was made was in some other place then that place is the place of delivery.

Associated Press of Nigeria v. Phillip (W.A.) Records Ltd (CCHJ/ 9/72

The defendants agreed to buy from the plaintiffs' one of the plaintiffs' linotype machines. Under the terms of the contract, the plaintiffs were to keep the machine at their premises for the work of the defendants until such time as the defendant found a competent operator to work the machine. An issue arose as to whether the machine in these circumstances could be said to have been delivered.

Held; that the machine had been delivered to the defendant.

> ADEFARASIN, J.: . . . In my view the machine in question had been delivered to the defendants in accordance with the agreement of both the plaintiff and the defendants that the machine should be left at the premises of the plaintiff at which it would be used in carrying out the work ordered by the defendants at no cost to the defendants except for the labour charges for the staff provided by the plaintiff. . . .
>
> As regards time of delivery, it must be noted that this will depend on the stipulation of the contract between the parties. In this connection, the provisions of section 10 (1) of the Act are relevant. That section provides that whether a time stipulation other than as to payment is of the essence of the contract or not depends on the terms of the contract. In ordinary commercial transactions for the sale of goods, time stipulations as to delivery are generally regarded as of the essence of the contract. If however, the parties fail to fix the time of delivery, sub-section (2) of section 29 comes into play.

Kampala General Agents Ltd v. Mody's Ltd (1953) EALR 549 (Court of Appeal of Kampala; Uganda)

> The appellant had entered into a contract of sale with the respondent. Delivery was to be made at a specified station in Mombasa in three instalments. The first two consignments were made at the agreed station, but the third was made at a different station, though still in Mombasa. The respondent refused to take delivery. The appellant sued for the purchase price.
>
> *Held*; reversing the High court decision that the contract was for the sale of goods F.O.R. so that the failure to deliver the goods to the agreed station was merely a breach of warranty, agreement collateral to the contract of sale, as defined under s. 2 of the Sale of Goods Ordinance, and not a breach of condition.

Delivery to a specified place under sale of goods contracts only becomes a condition if the contract is one of C.I.F. Here, the seller is under an obligation to insure the goods, such that he becomes the buyer's agent, bound to comply strictly with delivery stipulations.

The effect is that under the F.O.R. contract, the seller has control over the carriage contract, while under the C.I.F. contract, the buyer has control. Since, on the facts, the contract was one of the former class, the respondent could not repudiate but could only recover damages for breach of warranty.

(d) Delivery to Carrier

Section 32 of the Act states that:

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

***City Council of Ndola v. Colgom Co-operative (Zambia) Ltd* (1968) ZR 182 (Court of Senior Magistrate)**

(The facts of the case appear from the judgment of Senior Resident Magistrate Bruce-Lyle)

This is a prosecution under section 79 (1) of the Public Health Ordinance, Cap126, instituted by the City Council of Ndola against

Colcom Products Co-operative (Zambia) Limited, hereinafter referred to as the defendant company, the particulars of the offence being that on 8 March 1968, the defendant company sold food, to wit, seven pork fillets, to Neumanns Butchers, Kansenji, Ndola, for human consumption and which was in an unwholesome state.

The case for the prosecution is that on 8 March 1968, a consignment of six pork fillets of 6 lb in weight were sent to Neumann Butchers in Kansenji, Ndola, by the defendant company operating from Lusaka; the consignment was carried by Messrs Smith and Youngson, a carrier and haulage contractors in Lusaka. At Ndola where the consignment was unloaded and unpacked, the Manager of Neumanns Butchers, Mr Allen Hurst, PW2, found the pork fillets to be green in colour with a layer of slime on them. He also found the odour was bad and in his opinion they were unfit to be in his shop. He immediately contacted Mr Hastes, the Ndola representative of the defendant company and made a report to him and further informed him that he would report the matter to the health authorities to have the meat condemned. PW2 reported the matter to Mr Bradgeman, a Health Inspector, PW4, who went to the butchery in Kansenji, inspected the meat at 10.45 a.m. and found that the pork fillets had a most offensive odour but the visual appearance was reasonably normal. This witness formed the opinion that the pork 20 fillets were not fit for human consumption. He then seized the fillets and took them to his office where they were examined at 11 a.m. by Dr Lockyer, the Medical Officer of Health, Ndola, PW1. PW1 found that the fillets had an offensive odour and appeared unwholesome and condemned them as unfit for human consumption, and issued a certificate, Exhibit A, to that effect.

The evidence of DW1, Francis Salo, is that on 7 March 1968, he worked for the defendant company as a packer and that in the course of his duties he executed an order from Neumanns Butchers, Ndola, and packed the order. He packed the pork fillets and other items in the order in two boxes at 10 a.m. and finished packing at 10.30 a.m. and delivered the boxes to Messrs Smith and Youngson, the carriers, at 11 a.m. for onward transportation to Neumanns at Adolf. According to this witness the fillets were fresh at the time of packing and after packing he kept the boxes in a freezer until they were handed over to Messrs Smith and Youngson, the carriers.

The evidence of Mr Hastes, DW2, the Ndola representative of the defendant company, is that there is no connection between the

defendant company and the carriers Messrs Smith and Youngson and that he did not know how they were paid for carrying the goods from the defendant company in Lusaka to Neumanns Butchers in Ndola. He also said that Smith and Youngson carried the goods in a refrigerated truck from Lusaka to Kitwe, where the goods were unloaded and reloaded on to smaller trucks and these smaller trucks delivered the goods to the various Copperbelt stations and that some of these smaller trucks were refrigerated, while others were not but were insulated.

From the evidence in defence it is apparent that the defendant company is not contesting the facts that the pork fillets were in an unwholesome state and unfit for human consumption at the time when they were received by Neumanns Butchers in Ndola on 8 March 1968, at about 10.30 a.m. It is, however, submitted by counsel for the defendant company that it has not been proved that the pork fillets were unwholesome and unfit for human consumption when they were sold at 11 a.m. On 7 March 1968, to Neumanns Butchers. In other words, it is the submission of counsel that the time of delivery of the pork fillets to Smith and Youngson in Lusaka should be deemed the material time at which the pork fillets were sold to Neumanns and that at the time of such sale the pork fillets were fresh, that being the uncontroverted evidence of DW1. In support of such contention counsel has relied on the recent decision of the English Courts of Appeal in *Wardar's (Import and Export) Co. Limited v. W. Norwood & Sons Limited* [1968] 2 QB 663; [1968] 2 All ER 602. In that case it was held that delivery by the seller to the carrier of unascertained goods, the property to the goods then passed to the buyers under section 18 of the Sale of Goods Act, 1893. Counsel has also relied on the case of *Badische Anilin und Soda Fabric v. Basle Chemical Works* [1898] AC 200. House of Lords Session - in which it was held that the delivery of goods to a post office in Switzerland for onward transmission passed the property to the defendant/respondent, the buyers.

Counsel for the prosecution has pointed out that, in these two cases relied upon by counsel for the defendant company, the carriers were the agents of the buyer, but in the present case under consideration the evidence is that the pork fillets were handed to the carriers, Smith and Youngson, by the defendant company and therefore the carriers were then agents of the seller, i.e., the defendant company and therefore the prosecution has discharged its onus of proving the case beyond all reasonable doubt.

In this case I hold that for the prosecution to succeed it must prove:

(1) the sale of the goods, i.e., the pork fillets, by the defendant company to Neumanns Butchers, Ndola; and
(2) that at the time of the sale to Neumanns Butchers the goods were unwholesome and unfit for human consumption.

On the evidence I find as a fact that the pork fillets which were seized at Neumanns Butchers in Kansenji, Ndola, on 8 March 1968, were found unwholesome and unfit for human consumption. With this finding of fact I further hold that the most important issue to be resolved to enable this court to decide whether or not the prosecution has proved its case is this: at what stage was the sale completed and the property in the goods passed to the buyer? Was it when the pork fillets were delivered to Smith and Youngson, the carriers at Lusaka, or was it when they were delivered by Smith and Youngson to Neumanns Butchers in Ndola?

In resolving this issue, I am unable to accept the submission of counsel to the prosecution that Smith and Youngson were the agents of the defendant company simply because the pork fillets were handed to them by the defendant company. That piece of evidence is too feeble to support or suggest a contract of agency between defendant company and the carriers, Smith and Youngson. There is no evidence as to the nature of the business between these parties to enable the Court to come to conclusion that a contract of agency existed between them. I concede to counsel for the prosecution that in the two cases relied upon by the counsel for the defendant company the carriers in both cases were agents of the buyers but I hold that in cases where the carrier is neither the agent of the seller nor of the buyer, as in the present case, the carrier is deemed in law *prima facie* agents of the buyer unless contrary intention is shown by the evidence. In *Halsbury's Laws of England*, Vol. 4, 3rd ed., p. 196, on the Sale of Goods Act, 1893, and which Act is applicable here in Zambia, it is stated:

> Where in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to carrier, whether named by the buyer or not, to be carried to the buyer is *prima facie* delivery of the goods to the buyer, and unless the seller reserves the rights of disposal, he is, by such delivery to a carrier, deemed to have unconventionally appropriated the goods to the contract.

I am therefore bound to hold, on the evidence before this court, that delivery of the pork fillets to Messrs Smith and Youngson in Lusaka is delivery to the buyers Neumanns Butchers and that the contract of sale of such pork fillets was completed and the property in the goods passed to them as soon as delivery was made to Messrs Smith and Youngson in Lusaka. This brings me to the issue as to whether at the time of sale to Neumanns Butchers, i.e., at the time of delivery to Messrs Smith and Youngson in Lusaka, the pork fillets were unwholesome and unfit for human consumption. The only evidence of assistance is that of DW1, Francis Salo, that when he packed the delivered pork fillets to the carriers Messrs Smith and Youngson in Lusaka, they were fresh and there has been no evidence to contradict this. In the circumstances I find that the pork fillets were sold to Neumanns Butchers at 10.30 a.m. on 7 March 1968, and not on 8 March, and that at the time of such sale the pork fillets were fresh and the prosecution has therefore failed to prove the charges against the defendant company. I therefore find the defendant company not guilty of the charges and order an acquittal and discharge.

Accused acquitted

East African Navigators Ltd v. Mohanlal **(1968) EALR 535 (Court of Appeal of Dar-es-Salaam)**

The respondent entered into a contract of carriage with the appellant, whereby the latter agreed to deliver goods to third parties. The respondent paid the carriage costs and added them to the purchase price of the goods. The goods were lost at sea. The respondent sued for the purchase price of the goods. The question arose as to whether or not the respondent was entitled since he did not have property in the goods.

Held; (1) Property had passed to the third party buyer, at the latest, at the time of shipment so that the respondent could not sue as owner.

(2) As a general rule, sellers of goods enter into contracts with carriers as agents of the buyer, so that they cannot sue in their own name. Where, however, there is a special contract between the shipper and the seller, the inference of agency will not arise.

On the facts, there was such a special, contract between the parties so that even though property had passed, the respondent could still sue for the purchase price. (Provisions as to passing of property under the Tanganyika Sale of Goods Ordinance (Cap 214) similar to SOGA 1893.

Cited LORD COTTENHAM, L.C. in *Dunlop v. Lambert* 17 ER 834)

> I am of the opinion that although, generally speaking, when there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action against the carrier, should the goods be lost; yet if the consignor made a special agreement with the carrier and the carrier agreed to take the goods for him and to deliver them to any particular person, at any particular place, the particular contract supercedes the necessity of showing ownership, and the consignor, the person making the contract with the carrier, may maintain the action though the goods may be the goods of the consignee.

Galbraith & Grant Ltd v. Block (1922) 2 KB 155

The defendant purchased a crate of wine from the plaintiff on terms that the wine would be delivered to the defendant's premises. The plaintiff engaged and paid a carrier who delivered the crate to the defendant's premises. The carrier left the wine with someone found at the premises who signed the delivery sheet in the name of the defendant. The defendant claimed that he never received or saw the crate and therefore refused to pay the price.

Held; that the plaintiff had performed the contract by delivering the crate of wine to the defendant's premises and the defendant was therefore liable to pay the price.

LUSH, J.: . . . A vendor who is said to deliver goods at the purchaser's premises discharges his obligation if he delivers them there without negligence to a person apparently having authority to receive them. He cannot know what authority the actual recipient has. His duty is to deliver the goods at the proper place, and of course, to take all proper care to see that no unauthorised person receives them. He is under no obligation to do more.

(e) Delivery of wrong quantity or wrong goods

Section 30 of the Act provides for delivery of wrong quality of goods in the following terms:

> (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may

reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods, included in the contract and reject the rest, or he may reject the whole. If he accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

The seller has a duty to deliver goods of the quantity specified in the contract, no more, no less. Delivery of the wrong quantity entitles the buyer to reject the goods and treat the contract as repudiated. In *Shipton, Anderson & Co. v. Weil Brothers & Co.*[60] Lush, J. explained the reasoning behind the buyer's right to repudiate the contract and reject the goods in the following terms:

> The right to reject is founded upon the hypothesis that the seller was not ready and willing to perform, or had not performed, his part of the contract. The tender of wrong quantity evidences unreadiness and unwillingness, but that must mean an excess or deficiency in quantity which is capable of influencing the mind of the buyer.

Champion v. Short (1807) 1 Camp 53; ER 874

Quantities of French plums, raw sugar and white sugar, were ordered by the buyer from a wholesaler. The wholesaler delivered the plums and the raw sugar, but did not deliver the white sugar. The buyer accepted the plums but rejected the raw sugar. The wholesaler then sued for the price of the raw sugar

Held; that this was a single contract and the buyer was entitled to reject the whole delivery or accept all of the incomplete delivery. Acceptance could not be divided by rejecting a part of the delivery. The buyer was therefore liable for the price of the raw sugar.

[60] (1912) 1 KB 574.

Beherend v. Produce Brokers Company Ltd (1920) 3 KB 530

The buyer agreed to buy a quantity of cotton seed ex Port Inglis in London. Part of the cargo was discharged in London and the ship then proceeded to Hull where it had to discharge other cargo. Two weeks later the ship returned to London where it discharged the remaining quantity of the cotton seed. The buyer indicated to the seller that he would no accept the later delivery.

Held; that in terms of section 30(1) of the Sale of Goods Act, the buyer was entitled to reject the whole consignment. Thus the buyer was obliged to pay for the first consignment of the cotton seed but was not bound to accept or pay for, the remainder.

Note: *This decision of the Court of Appeal was reversed by the House of Lords on grounds not affecting this point.*

Hart v. Mill (1846) 15 M & W 85; 153 ER 771

The buyer ordered 48 bottles of wine from the seller. The seller delivered 96 bottles instead. The buyer then opted to keep only 13 of the bottles and rejected the rest. The seller then sued the buyer on the original contract for the price of 48 bottles.

Held; that the buyer was obliged to pay only for the 13 bottles which he had retained. As the buyer was entitled to reject the whole delivery of 96 bottles, because too much was delivered, the retention of 13 bottles created a new contract for the lesser amount.

Cunliffe v. Harrison (1851) 6 Ex Ch 903; 155 ER 813

The seller contracted to sell ten hogsheads of wine to the buyer. The seller delivered fifteen hogsheads instead. The buyer protested to this, but the seller then suggested that the buyer should keep all the hogsheads delivered for a couple of months before making the decision on whether to buy all the wine delivered or not. The buyer agreed to this arrangement. After several months had elapsed, the buyer then rejected the whole consignment. The seller then sued the buyer for goods sold and delivered.

Held; that delivery of too much is not performance of the contract. It is in essence a new offer which the buyer could either accept or reject. In this case the buyer rejected the offer within the period contemplated and therefore the buyer's claim could not succeed.

***Hussein Bachoo v. The Clover Growers Association of Zanzibar* (1957) EALR 193 (High Court for Zanzibar)**

> The appellant contracted to buy 47 bags of 'fair-quality' clover. Upon delivery, it was discovered that 7 of these bags did not in fact contain clover of the contracted quality. The appellant accepted the 40 bags and rejected the 7. The respondent refused to take back the 7 bags and sued for the purchase price. In the present appeal, the respondent averred that even if there was a breach of warranty, the appellant did not have the right to reject only the 7 offending bags, but was obliged to rejected the whole, or in the alternative, accept the whole and sue for damages on the warranty.
>
> *Held;* the English Sale of Goods Act of 1893 was made applicable to Zanzibar by statute. By section 30 (3) of that statute, the appellant was entitled to accept only the compliant portion or to reject the whole. Following the dicta of Rawlatt, J., in *Re Moore* (1921) 1 KB 71 at page 76, it was held further that the expression 'mixed with' in section 30 (3) simply meant 'accompanied by'.
>
> WINDHAM, C.J.: . . it is clear that the English section (s.30) makes no distinction between cases where there is risk or trouble in separating goods ordered and the goods not ordered, and where there is not, and places both on an equal footing, giving the buyer the option, in either case of rejecting the whole or the part. . . .

3.15 Seller's Breach and Buyer's Remedies

The seller is in breach if he fails or neglects to deliver goods contracted for in accordance with the contract or he fails to comply with any term of the contract, express or implied. Where the seller is in breach the buyer has a number of remedies available to him including the following;

(1) A right to reject the goods and treat the contract as repudiated.
(2) A claim for damages.
(3) An action for specific performance.
(4) An action for money had and received.
(5) An action in tort.

(i) The buyer's right to reject the goods

This is the buyer's first and primary remedy and is available to the buyer when the seller's breach goes to the root of the contract.

Patrick Mwamba v. Wellington Lungu (2001) HB/07 (High Court for Zambia at Kabwe, appellate jurisdiction)

(The facts appear from the judgment of Hon. Justice S.S.K. Munthali)

The appellant filed two grounds of appeal at the time of filing the notice of appeal. These grounds were substituted by different grounds of appeal at the time of hearing the appeal. The additional grounds are: (1) that the lower court erred in law by taking a simplistic view of the contract in issue without identifying the type of contract before finding the appellant liable; (2) that the lower court erred in fact and law by not taking into account the documentary and oral evidence addressed before it which was in favour of the appellant

Mr Mukuka learned Counsel for the appellant submitted on the first ground that the contract between the appellant and the respondent was not an ordinary contract. It was a contract for the Sale of Goods. He argued that under the Sale of Goods Act, the goods did not qualify. He did not specify the section which governed his submission.

On the second ground learned Counsel submitted that if the lower court carefully looked at the oral and documentary evidence the appellant would not have been found liable. He said the evidence of Mr Mbolota (DW2) was very important. All the witnesses testified that the engine ceased shortly after it was fitted.

Mr Lungu who appeared in person submitted that when the engine in issue was taken it was not working. The appellant knew that it was not working. The first transaction was for an injector pump which was examined at BH and was found to be in good condition.

On the first ground the Act which Counsel for the appellant did not specify is the Sale of Goods Act, 1893. Under this Act there are a number of implied conditions. Mr Mukuka has not referred to any of these implied conditions.

It is common cause that the respondent sold a second hand engine to the appellant. It is common cause that the agreed purchase price was K3,000,000. The agreement was reduced into writing. It is not in dispute that the appellant paid K900,000 towards the purchase price. See p. 29 of the record.

I do not see how the learned trial Magistrate took a simplistic view of the contract when he held that it was enforceable. There were no warranties and guarantees made by the respondent.

As to the second ground of appeal one has to look at the letter dated 18 July 2001 at p. 27 of the record. This letter was written more than one year after the contract of sale was entered into.

The contents of the letter contradict the evidence of the appellant. The transaction over the engine was not made in August/ September 2000 as appears in the second paragraph of the letter. If the engine knocked and its performance was not satisfactory, as claimed by the appellant why did it take the appellant almost one year to complain. He should have immediately returned the engine and claimed for a refund.

The buyer's first and primary remedy for breach of contract by the seller is to repudiate the contract of sale, and to reject the goods. This was not done within a reasonable time.

From the evidence it is clear that the injector pump was in good condition. The appellant confirmed this in his evidence at page 6 of the record.

According to the respondent the price of the injector pump was K1,200,000. If the appellant was dissatisfied with the other parts of the engine he should have repudiated the contract in relation to those other parts. The breach would be said to be severable. See section 31 (2) of the Sale of Goods Act, 1893.

The learned trial Magistrate did not overlook the oral and documentary evidence when he decided against the appellant. He did not misdirect himself in any way.

This appeal cannot succeed. It is dismissed with costs to the respondent in this Court and in the court below. Costs to be calculated on an out-of-pocket expenses basis to be taxed in default of agreement.

Appeal dismissed.

Lyons (JL) & Co. v. May & Baker Ltd **(1923) 1 KB 685; 121 LT 413**

A buyer of goods having paid the purchase price decided to reject the goods. He sought to retain the goods in order to have alien for the return of the purchase price.

Held; the definition in section 38 (2) of 'seller' does not extend to the buyer. A buyer could thus not claim a lien against a refund from the seller.

***Millar's Machinery Co. Ltd v. David Way & Sons* (1935) Com CAS 204**

> Under a contract for the sale of a twenty ton gravel washing machine, the buyer paid the sum of £350 in advance. When tendered, the machine failed to work and the buyer rejected it and claimed a refund of the £350 and damages for having gone into the market to source another machine at a higher price.
>
> *Held*; that a buyer who rightfully rejected the goods was entitled to a refund of any purchase money paid and damages for any consequential loss suffered provided it was not too remote.

(ii) Loss of right to reject

The buyer may lose the right of rejection of the goods in certain circumstances even though it is established that the seller was guilty of a relevant breach. These are set out in section 11 (1) (a) of the Sale of Goods Act as follows:

> Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of a warranty, and not as a ground for treating the contract as repudiated.

Further more, section 11 (1) (c) states that:

> Where a contract is severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term in the contract express or implied to that effect.

(iii) Acceptance by act inconsistent with seller's ownership

Where the buyer has resold and delivered the goods to a sub-buyer, he will be deemed to have done an act inconsistent with the seller's ownership and will therefore lose his right to reject the goods.

Perkins v. Bell (1893)1 QB 193; 67 LT 792

The seller sold barley to the defendant. In terms of the contract of sale, the seller delivered the barley to a railway station. At the railway station the buyer could have examined the barley, but he sent it to a sub-buyer who rejected the barley as being unfit. The buyer then sought to reject the barley arguing that the first opportunity to examine the barley was at the sub-buyer's premises. The seller argued that the buyer could have examined the barley at the railway station before sending the same to the sub-buyer and that since he did not utilise this opportunity and he instead sold the barley to a third party, his actions amounted to acceptance since they were inconsistent with the seller's ownership of the barley.

Held; that the buyer could not reject the barley once they had sold the goods to a sub-buyer. It would be unjust to compel the seller to collect the goods from the sub-buyer. The place of examination of the goods was the place of delivery that is the railway station.

Jaffco Ltd v. Northern Motors Ltd (Court of Appeal for Zambia) Appeal No. 5 of 1971

The plaintiff ordered a vehicle capable of transporting a John deer Tractor 110. On delivery several defects were noticed and the plaintiff agreed to take delivery provided the defects were rectified. After having made considerable use of the vehicle the plaintiff returned it to the defendant for repairs to be carried out. On the defendant failing to repair the vehicle within a reasonable time the plaintiff purported to rescind the agreement for the purchase of the vehicle and sued the defendant for damages for breach of warranty. The defendant counter-claimed and sought damages as a result of the plaintiff's failure to collect the vehicle after the repairs had been completed. The plaintiff's claim was dismissed and damages, to be assessed, were awarded to the defendant on its counterclaim. On appeal:

Held; (i) the plaintiff had waived his right to reject the vehicle and chose instead to adopt a course which is called by certain text writers 'conditional acceptance.' (ii) Conditional acceptance is not a right to be exercised unilaterally by a buyer, but is an additional agreement between the parties. (iii) A buyer's right to reject goods because they do not comply with the terms of the contract is not the same as the right to rescind. (iv) By virtue of a conditional acceptance there comes into existence an additional agreement, and only if it could be said that rescission or refection, as the case

may be, is a remedy available to the buyer on breach of the new agreement, or on breach of the original agreement as varied by the new agreement, do such remedies or either of them continue to be available to the plaintiff; otherwise the plaintiff's rights are limited to a right to damages on breach of the agreement.

The plaintiff's conduct in relation to the vehicle was quite inconsistent with the survival of the right of rescission.

The plaintiff was obliged to collect its vehicle but it had not proved that it had suffered any loss.

Lombe Chibesakunda v. Rajan Lekhraj Mahtani (Supreme Court of Zambia) (Appeal No. 138 of 1997)

In the court below, the appellant was the defendant and the respondent was the plaintiff. The transaction-giving rise to this action started in December 1979 when the defendant agreed to sell and the plaintiff agreed to buy a Mercedes Benz car at a price of K32,500, a princely sum those days. The defendant was then a diplomat in London and the car was also there. The price was paid. The parties envisaged that this duty-free car would be shipped to Zambia where ownership would be changed either upon payment of duty by the purchaser or after lying in storage for the required period of customs exemption before it could change hands.

Things began to go wrong. The plaintiff collected the car in London in or about January 1980 and it was kept by his agent who did not ship the car to Zambia. Evidence on record showed that eight or nine months later, the plaintiff's agent attempted to register a change of ownership of the car into his name in England whereupon the authorities there took an extremely dim view and called upon the defendant to pay customs duty for selling the car to a non-privileged person. The defendant was recalled and severely censured by the appointing authorities. Meanwhile, she had in September 1980 retaken the car and in April 1981 shipped it to Zambia, duty free. When asked by the plaintiff, she refused to again deliver the car and refused to refund the price, holding the plaintiff responsible for her loss of a diplomatic job and the embarrassing recall on disciplinary grounds. The plaintiff then commenced this action claiming in for a declaration that the car was his; for its delivery up or payment of its value and damages for conversion or for the breach of the sale agreement. The plaintiff obtained an interlocutory injunction to prevent the sale of the car to another person and any use of it pending trial. As it took many

years before the matter came up for hearing, at the trial, the plaintiff no longer insisted to have the car which had since suffered much wear and tear. The defendant counterclaimed asking for a declaration that she was entitled to keep the car and for damages for the loss of a lucrative diplomatic appointment.

The High Court found that there was a breach of the agreement and that the defendant must refund the purchase price which was paid and also pay damages for the detention of the vehicle and for the breach of contract and dismissed the counterclaim. The learned trial Judge proceeded to convert the K32,500 into dollars at 1979 rates and found US $42,000 which was K54,600,000 at the rate prevailing at the time of judgment. The judge also decided that as he had "not been guided" as to what would be the damages for detention and breach of contract, he would award a similar amount, that is another K54,600,000 as damages, making a total of one hundred and nine million two hundred thousand Kwacha, with interest at the current bank deposit rate from 9 June 1982 until judgment, a period of close to fifteen years.

The defendant appealed to the Supreme Court against the finding of liability and the calculation of the quantum of damages.

NGULUBE, C.J.:. . The first substantive ground of appeal alleged a misdirection in the determination that there was a breach of contract committed by the defendant. It was argued that it was the plaintiff and not the defendant who was in breach because of the attempt to change ownership in the United Kingdom instead of shipping the vehicle to Zambia as was agreed. The learned trial Judge had determined that the plaintiff failed to ship the vehicle because the defendant did not make the necessary documents available and this was the finding relied upon by counsel for the plaintiff. Having examined the evidence on record and the circumstances of this case, it appears to us that the transaction which had otherwise been agreed became clouded with side issues arising from ill-advised attempt on the plaintiff's side to change ownership of an uncustomed car in the United Kingdom and the reaction of the defendant to apply some sort of self-help remedy of keeping the car and the price paid when recalled from the diplomatic service. We have also considered the grounds, the arguments and the submissions, the question whether the car could have been ordered to be delivered up even at this late stage; or whether there was a breach by the seller or conversion of a car the property in which it was urged must be regarded as having passed to the plaintiff.

. .

From the brief history of the facts outlined at the beginning, the evidence establishing the liability of the defendant was abundant. This was a transaction where money was paid on a consideration which had wholly failed on contract of sale of car. It follows that the right of plaintiff- respondent to this appeal - to have the purchase price refunded could not seriously be challenged on any account. It follows also that it would be unrealistic to concede to deliver up the car now, some nineteen years later or, reckoned from the issue of the writ, some sixteen years later. The defendant's position in the action had been to resist such a claim so that the concession made in the appeal to us comes rather late in the day. In a short while we will return to the award made in respect of the refund of the price and the question which arises whether it is permissible to store the value of our money in a transaction expressed in Kwacha into some foreign hard currency and then to convert it back at current rates.

There was here a failure by the seller to deliver the goods sold to the buyer within the ambit of the relevant provisions of the Sale of Goods Act, 1893, which was a sufficient guide to the learned trial Judge if he had chosen to refer to it. But before we deal with the measure of damages as directed by that Act, we wish to dispel immediately the submission or notion that the damages for breach of the contract of sale can be coupled with extra damages for conversion of the same goods. The trial court made no finding and no determination on the ownership of the car as claimed in the pleadings but instead specifically declined to consider giving the car to the plaintiff. It follows that the car remained the property of the defendant. It followed also that there could have been no wrongful detention of the car when, contrary to the misdirection by the trial court, the plaintiff obtained an injunction quite early in the action to oblige the defendant to keep the car and not try dispose of it. In any event, if there had been a conversion (which expression has in England assimilated even the former action in detinue) the normal measure of damages for conversion is market value of the goods converted: see *Hall v. Barclay* (1937) 3 All ER 620 where Greer, L.J. said

> where you are dealing with goods which can be readily bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar article in the market.

As the learned authors of McGregor on damages (15th Edition) put it in paragraphs 1306 et. seq., the time at which the value is to be taken, according to the authorities cited, is the time of conversion – *Sachs v. Miklos* (1948) 2 KB 23 is authority for saying that, to the normal measure of damages for conversion may be added as a consequential loss any market increase in value between then and the earliest time that the action should reasonably have been brought to judgment. In some cases in the past this court has taken the view that civil action could reasonably be concluded and brought to judgment within a period of months. We only refer to this to illustrate that even had there been this tort, the damages would have been assessed following well-established guidelines. They can not be randomly plucked from the air.

In the case of breach by the seller in not delivering the goods, the Sale of Goods Act, 1893, in section 51 provides that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. The measure is to be ascertained, according to subsection 3, by the difference between the contract price and the market or current price at the time the goods ought to have been delivered or at the time of the refusal to deliver. The rationale appears to have been based on the duty to mitigate whereby the buyer would be expected to go forthwith into the market and purchase a replacement. This is where the buyer had his money in his hands. Where, as in this case, the buyer had paid, it is appropriate to quote a statement from paragraph 619 of McGregor (15th Edition)

> But if the buyer of goods should pay the price in advance**,** there is some authority for the proposition that he is not required to seek a replacement in the market, as the seller has now possession of the money which the buyer should otherwise have used for a replacement, and that therefore he is entitled to claim damages in respect of any increase in the market value between the time of the breach of contract and the earliest time that the action should reasonably have been brought to judgment.

It follows that there will be judgment for the plaintiff for the refund of the price as well as for damages for the breach of contract only. It follows also that we set aside the computation of refund of the price and damages awarded below. In the case of the refund of

the price and the attempt by the court below to store it in its 1979 dollar equivalent, it is appropriate to quote rather extensively from our judgment in *Zambia Industrial and Mining Corporation Ltd (in Liquidation) v. Lishomwa Muuka*, SCZ Judgment No. 1 of 1998 (unreported) where we said . . .

> With regard to the submission that the price be translated into the day value of the Kwacha of 1975, we note that the proposal is simply to convert the K60,000 in 1975 into its dollar equivalent at that time and then to reconvert the dollars back into Kwacha at today's rate of exchange. The letter from an Assistant Director at the Bank of Zambia to Mr Ngenda advises that K60,000 in 1975 at US $1 to K0.64 was equivalent to US $93,750; therefore at today's average rate of K1,332.27 per US $1, this came to K124,900,312.50. An attempt was made and rejected, to store the value of a sum of money in the lawful currency of this country in its dollar equivalent in *Apollo Enterprises Limited v. Enock Percy Kavindele,* Appeal No. 98 of 1995 (unreported). In that case as in this case the contract expressed the relevant transaction in Kwacha terms and this is what we said
>
> > We have also given very anxious consideration to the submissions and arguments regarding the sudden and dramatic changes in the internal value of Kwacha terms and no question of any foreign currency damages or debt arise. We can find no authority for departing from the general rule that where the loss is a money loss, the award to the plaintiff should be based on the value of the money at the time of breach in the case of contract rather than at the time that the loss was determined as in the case of tort. We would borrow from the language used by Scrutton, L.J. in *The Baarn* (1933) P. 251 (CA) and Denning, L.J. in *Treseder-Griffin v. Co-operative Insurance Society* (1933) 2 QB 127 when we point out that a Kwacha in

> Zambia is a Kwacha whatever its international value; it is the constant unit of value by which we have to measure everything; prices of things may go up or down; other currencies may go up and down, but the Kwacha remains the same.

It was not suggested in the APOLLO case that the decline in the internal value of the Kwacha cannot be considered in appropriate situations. Indeed, the courts reflect this reality especially whenever general damages for non-pecuniary loses are awarded and also when guidance for an award is sought from the old case – precedents. When English precedents are referred to on the question of damages, this court has cautioned against simply converting Pounds Sterling into Kwacha at the prevailing exchange rate. To illustrate the foregoing, we refer to what was said in two cases: in *Smart Banda v. Wales Siame,* SCZ Judgment No. 30 of 1988 we said

> We would like to give guidance to counsel so that claims for damages may be more easily settled between counsels in the future. Since the 5 October 1985, there has been a devaluation of the Kwacha, and the future awards for pain and suffering must take that devaluation into account. However, as we have emphasised before in this court, this is not a simple matter of multiplying previous awards by the amount to which the Kwacha has been devalued. Courts must take into account the general cost of living in this country and the real value that will be received. In calculating damages in future, therefore, awards should be less than what would result from a simple multiplication of previous awards as compared with the devalued Kwacha.

In *Bank of Zambia v. Caroline Anderson and Another,* SCZ Judgment No. 13 of 1993 we had this to say about English awards:

> We confirm that in Zambia a simple multiplication of English awards by the current rate of exchange is not appropriate. The purchasing power of the Pound and the Kwacha and the quality of life that each currency is

expected to buy is different in the two countries, and awards in Zambia will consequently be smaller.

What is said of a Pound would equally apply to a Dollar and to any other foreign currency. There is in our considered view clearly discernible from the cases ample authority and reason for disallowing attempts in transactions expressed in Kwacha to hedge against the depreciation of the internal value of our currency by notionally storing the same in a foreign currency at an earlier and more favourable rate of exchange and the reconverting the foreign currency in that fashion. Accordingly, we do not adopt that approach.

In the result, the sum to be refunded is K32,500 plus interest from the date of payment in December 1979 to the date of refund. As to the appropriate rate of interest, we note that the amount has remained outstanding even during the days of dramatic devaluation and high interest rates. Both the money and the car were withheld by the defendant who had use of the plaintiff's cash. A fair average rate of simple interest in this case is 100 per cent per annum.

With regard to the damages under the Sale of Goods Act, 1893, as discussed herein, it will be necessary to refer the assessment to the Deputy Registry who has to ascertain the difference between the contract price and the market value of similar car at the earliest time that the action should reasonably have been brought to judgment, namely eighteen to twenty-four months after the issue of the writ. Of course, the parties are free to agree such market value, in default to be assessed by the Deputy Registrar as already indicated. The amount found will also carry simple interest at the rate already mentioned.

We revisited the counterclaim. Although the record does not show any detailed reasons, the learned trial Judge was on firm ground when he discounted it for remoteness. In sum the appeal succeeds as indicated. . . .

(iv) Payment by the Buyer

This is the other half of the buyer's obligation. It is pertinent to note that the principle of cash on delivery is implicit in all contracts for the sale of goods. This is discernable from section 28 which provides that unless otherwise, agreed delivery of the goods and payment of the price are

concurrent conditions, i.e., the seller must be ready and willing to give possession of the goods and the buyer must in return be ready and willing to pay the price in exchange for possession of the goods.

The method, place and time of payment are usually ascertainable by reference to the terms of the contract. Failing this, reference is to be made to the surrounding circumstances, the course of dealing, relevant custom of the trade, etc.

3.16 Buyer's Breach and Seller's Remedies

Where the buyer is in breach of the contract of sale, the seller has a number of remedies available to him.

Zambia Consolidated Copper Mines v. Goodward Enterprises (2000) ZR 48 (Supreme Court)

> It was in evidence that the appellant (hereinafter called the buyers) had the practice of inviting through advertisements, suppliers of goods and services to register with them when they would be given an account number. The respondent (hereinafter called the sellers) was one such supplier of goods. It was also in evidence that occasionally, the buyers purchased goods from some persons or entities without registration. The case here concerned the supply and sale of cocoa on a regular basis by the sellers to the buyers under a written contract dated 22 June 1995. The contract was to run from 26 June 1995 to June 1997 and could terminate, among other ways, by three months' notice after prior notification of a breach and to be given by the party not in breach. The sellers were required to deliver substantial quantities of drinking chocolate in accordance with delivery instruction notes or orders and they were required to hold at any one-time stocks sufficient for two months guarantee delivery. There was evidence that two months' stocks would amount to twenty-five tons of cocoa. In the event of termination, there was a term for settlement of orders which were already in the pipeline.
>
> The buyers claimed that they had uncovered some fraudulent transactions involving the seller arising from earlier supplies of other goods (not under the cocoa contract) whereby some invoice already paid would again be presented resulting in double payments; that some payment vouchers were fraudulently prepared and processed to the benefit of the sellers and loss to the buyers; while prices would at times be overstated.

According to the buyers, this resulted in a loss of some K92 million in the period of May 1996 which compelled them to deregister the sellers and to cancel the cocoa contract. The sellers launched these proceedings to recover damages for breach of contract. They included in the claim the price of 85 tons of chocolate arranged under a credit facility with their South African based supplier whom they owed US Dollars 262,000 plus interest at 10 per cent together with 85 tons of cocoa kept in a South African, warehouse at twenty rands per ton per week.

The learned trial Judge had to consider whether the validity and performance of the cocoa contract depended upon the sellers remaining registered as suppliers to the buyers. He found that the sellers had previously supplied other goods without being registered but that in 1993 the sellers for the first time registered as suppliers of groceries and foodstuffs. The judge considered that the cocoa contract stood independently of any registration and that the buyers should have followed the termination clause in the contract. He also found that the allegations of fraud were not proved against the seller. He found that the buyers were in breach of the cocoa contract and entered judgment for the sellers. With regard to the "nature of damages", the learned trial Judge took the view that the buyers must have been aware that the sellers must have had collateral arrangements outside the country and because the buyers' conduct had been high handed and aggravated, they would have to pay to the sellers: (1) K150 million as general and compensatory damages for breach of contract; (2) the cost of 50 tons of drinking chocolate from South African supplier; (3) all penalties and storage charges levied against the sellers by their South African suppliers in respect of the fifty tons of cocoa; (4) the cost of half of the 35 tons of drinking chocolate "marooned and stranded" at the sellers' warehouse in Luanshya, such award being said to have taken account of the sellers duty to mitigate the loss; (5) a refund of K35,128,051=54 wrongly deducted as alleged double payment; (6) a refund of K11,721,420 wrongly deducted as alleged overpayment; (7) the payment of K271 million profit lost which the sellers would have earned had the balance of the contract been performed over the remaining fourteen months of the agreed duration; and (8) interest.

The appeal is against the finding of liability for breach of the cocoa contract; the orders to refund monies which had been deducted from the account; and the measure and quantum of damages.

Held; the contract for the supply of cocoa was a contract in its own right which the parties had unfettered legal capacity to enter into and begin to perform.

2. Where the buyer wrongfully neglect or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
3. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.
4. Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or if no time was fixed for acceptance then at the time of refusal to accept.

NGULUBE, C.J.: . . . A surprising feature of this case was that though the whole of the subject matter of contract was the sale of cocoa, that is, the sale of some goods, there was not the slightest attempt by the parties or the court to make reference to the Sale of Goods Act, 1893 or its purport which clearly applied both as to the respective rights of the parties upon a breach and the measure of damages. . . The basic measure of damages for breach by the buyer for non-acceptance is that described in section 50 of the Sale of Goods Act, 1893, which reads:

> (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
> (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract.
> (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept.

. . . In terms of the section of Sale of Goods Act which we have quoted, there can be no question of the sellers receiving the entire combination and extent of the awards made below, so that they can have general damages, plus a refund of all the cocoa procured

and in storage in South Africa, plus penalties and storage charges; plus half the costs of cocoa in storage locally; plus on top of all - all the anticipated profit they would have earned had the contract run its course! The section does not preclude the rules in *Hadley v. Baxendale* nor the award of consequential losses which may result in the ordinary course. Furthermore, the court is authorised to make other awards by other sections, such as section 54 which deals with interest and special damages. The rule in *Hadley v. Baxendale* resulted in *Victoria Laundry v. Newman* where their Lordships rejected the notion that the purpose of an award of damages could be to provide a plaintiff with a complete indemnity for all loss de facto resulting from a breach of contract. The principle was further examined in Czarnikoe case and we regard as particularly apt Lord Reid's caution at p. 385 where he said

> I am satisfied that the court did not intend that every type of damage which was reasonably foreseeable by the parties when the contract was made should either be considered as arising naturally, i.e., in the usual course of things, or be supposed to have been in the contemplation of the parties. Indeed the decision makes it clear that a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual course of things or be supposed to have been in the contemplation of the parties: the parties are not supposed to contemplate as grounds for the recovery of damage any type of loss or damage which on the knowledge available to the defendant would appear to him as only likely to occur in a small minority of cases.
>
> In cases like *Hadley v. Baxendale* or the present case it is not enough that in fact the plaintiff's loss was directly caused by the defendant's breach of contract. It clearly was so caused in both. The crucial question is whether, on the information available to the defendant when the contract was mad, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.

The notion of a complete indemnity such as was attempted below in this case might have sat more comfortably had the learned trial Judge been dealing with a case in tort. As Lord Reid put it in Czarnikow when he went on to contrast the position in tort with that in contract at p. 385 to 386

> The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it. And there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event. But in tort there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing.

These wise words cannot be ignored so that the comprehensive and unrestrained awards in this case cannot be supported. They were based on a wrong principle of granting a complete indemnity in a case involving the breach of contract for the sale of goods agreed upon. Thus, we do not see how loss of anticipated profits and general damages which were based on a measure which is not readily apparent could be awarded in one breath. We also do not see that it was within the knowledge and contemplation of the parties that the sellers' own arrangements with a third party would be underwritten by the buyers who must therefore pay for all the procured cocoa regardless of an alternative market and reimburse any indebtedness of the sellers to a third party. . .

YB & Transport v. Supersonic Motors, SCZ Appeal No. 106 of 1999

(The facts appear from the judgment of the court delivered by Ngulube, C.J.)

In November 1995, the appellants bought from the respondents two minibuses at K25.5 million and tendered three post-dated cheques for

the balance of K25.5 million. The post-dated cheques were drawn on Commerce Bank which suffered a closure while the appellants failed to make any alternative arrangements to pay the outstanding balance. The respondents repossessed on or about 26 January 1996 minibus registered number AAN 6995 which they subsequently resold; allegedly for K20 million incurring a loss of K5.5 million, a loss the learned trial Judge rejected. In April 1996, the appellants took the other minibus registered number AAN 6996 to the respondent's garage for some repairs and paid repair charges. However, the respondents impounded this second minibus- according to their defence and counterclaim - as security for the payment of K12,431,250.00 interests at 117 per cent for five months on the outstanding balance of the purchase price, and as security for payment of K5.5 million loss on resale of bus AAN 6996 and for storage charges in respect of the impounded minibus.

The appellants were the plaintiffs in the lower court. They sued the defendants claiming the return of the impounded minibus or its value, together with damages for loss of its use. In the High Court, the plaintiffs succeeded on their basic claim but were nonetheless condemned in costs, one of the matters appealed against. At the conclusion of the trial and after considering the various contentions, the learned trial Judge held that the closure of Commerce Bank was not a frustrating event so that the plaintiffs were in breach of the contract of sale by not paying the outstanding balance or making alternative arrangement for payment. The learned trial Judge considered that as the party in breach by failure to pay, the plaintiff could get no damages from the court. It was held that the defendants were justified in impounding the second minibus as a lien for various outstanding moneys claimed until trial of action which determined the rights of the parties. The court ordered that the second minibus be returned to the plaintiffs in good condition and working order.

The learned trial judge also dismissed all the defendant's counterclaims except the claim for interest on the balance of K25.5 million which was allowed at 65% per annum from 10 November 1995 to 12 April 1996 when the sale was mutually cancelled on one minibus. On appeal

Held; 1. The Sale of Goods Act is very specific about the unpaid seller's lien. Under the Act there can be no lien pending determination of the rights of the parties at trial.

2. The lien is alien for the price only and not for such things as storage charges for keeping goods which are kept against the buyer's will.

3. The general principle is that costs should follow the event; in other words a successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it.

NGULUBE, C.J.: . . . The Sale of Goods Act is very specific about the unpaid seller's lien. Under the Act, there can be no lien pending determination of rights of the parties at a subsequent trial. The lien is a lien for the price only and not for such things as storage charges for keeping the goods which are kept against the buyer's will: See Chalmers' Sales of Goods, 16th edition from page 173 where the learned author discussed the unpaid seller's lien under section 41. Reference should also be made to the respected volume *Chitty on Contracts*, 'Specific Contracts' 26th edition especially paragraph 4883 which reads- - -

4883. Seller's right to retain possession. Section 41 (1) provides:

> Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases: (a) where the goods have been sold without any stipulation as to credit; (b) where the goods have been sold on credit but the term of credit has expired; (c) where the buyer becomes insolvent.

Apart from an express term in the contract of sale, the seller's only right of lien arises under the Act and the seller cannot rely on the equitable principle of a vendor's lien.

The gist of the unpaid seller's lien is his entitlement to retain the goods until the buyer has paid or tendered the whole of the price; his lien is, therefore, a qualification on his duty to deliver the goods to the buyer, and the seller will in practice exercise his right of lien as a first step towards exercising a right to resale. The lien arises whether the contract is a sale of specific goods or an executory contract to supply unascertained goods; the lien will arise when the goods have been ascertained. The extent of the lien is limited to the price: it does not cover the expenses of keeping the goods, since the seller is detaining them for his own benefit.

In the case at hand, the second minibus was not the subject of any paid price and the defendants could not conceivably have gone on to exercise a right of resale, since they had none over this second

minibus. There was simply no legitimate basis for the seizure and impounding of the second minibus in some kind of self-help remedy.
. . .

Zambia Safaries Ltd v. Jackson Mbao (1985) ZR 1 (Supreme Court of Zambia)

(The facts of the case appear from the judgment of the Court delivered by Ngulube, D.C.J.)

This is an appeal from the decision of the High Court which found in favour of the respondent (who was the plaintiff) in his claim against the appellant (who was the defendant) for either the return of a sum of K3,000 as money paid on a consideration which had wholly failed or for damages. The claim arose out of an oral contract of sale under which the respondent purchased from the appellant a Land Rover, then 12 years old, which had what was called a 'knock engine.'

The claim as endorsed on the writ alleged a complete failure of consideration on the sale of a Land Rover registration No. EN 6411. The Statement of Claim alleged, in paragraphs 3 to 5, that the respondent had originally purchased a Land Rover bearing registration No. AMA 123 for K2,800 out of which he paid K2,000 as deposit; that the said vehicle AMA 123 was orally warranted to be in good condition and thoroughly roadworthy; that the said vehicle had serious defects whereupon the respondent had repudiated the contract of sale. The statement of claim further alleged that, as a result of the repudiation, the appellant's Field Manager offered the respondent an alternative Land Rover registration No. EN 6411 at a price of K3,000; and that this latter vehicle (the subject of this appeal) was also orally warranted to be in perfect mechanical condition; that after delivery had been taken, the respondent noticed a discharge of black smoke and discovered major defects in the engine; and (in paragraph 8) that therefore the appellant was in breach of warranty. Paragraph 9 of the Statement of Claim alleged that the respondent had spent K600 to effect repairs. He therefore claimed the sum of K600 plus damages for breach of warranty.

It was not only the Statement of Claim which was at variance with the claim on the writ. As will be seen, the respondent's evidence did not conform to the Statement of Claim and the judgment was given allegedly on the Statement of Claim on another extension or variation of the case and without making it clear whether it was

the return of the price or only the damages to which the respondent was entitled by the said decision.

The learned trial Commissioner rejected as hearsay the evidence not by the person with whom the respondent had negotiated and concluded the transaction. Mr Patel argues that, in doing so, the learned trial Commissioner cannot be faulted. He is probably right but the respondent in his own evidence did say that he had personally made the decision to purchase the alternative Land Rover; that he had been informed that the vehicle was 'smoking'; that as he was inexperienced in these matters, he had requested the appellant to make available their own mechanic to inspect the vehicle and to advise him, but that the appellant had advised him to look for his own independent mechanic. He took delivery of the vehicle and had it examined a few days later when the major faults were explained to him by the mechanic engaged by him in this behalf. He then saw the appellant and demanded a refund of the purchase price which was said to be, not K3,000 as pleaded but K3,800. On the respondent's own evidence, therefore, it is quite clear that he had been informed of the defect on the motor vehicle.

The fact that the respondent had effected repairs costing K600 only emerged in the respondent's Statement of Claim and was not alluded to either in the evidence or in the judgment. As will appear shortly, that fact was important and ought to have been considered, as we proposed to do since this is matter on record before us.

On the evidence adduced by the respondent, the learned trial Commissioner found that the appellant's officials had kept quiet and therefore fraudulently and deceitfully concealed the condition of the vehicle, well knowing that the respondent had no knowledge of motor mechanics. It is to be observed that this finding not only ran in the teeth of the respondent's evidence but in effect meant that the claim based on positive oral representation by way of warranty (that the Land Rover was in perfect mechanic condition) was not upheld. The learned trial Commissioner in fact extended the respondent's case to some sort of fraud or deceit by silence and on that basis found this transaction to be an exception to the maxim caveat emptor. Indeed, the learned trial Commissioner went so far as to liken the alleged silence to the situation in *Schneider v. Health* (1), in which a seller fraudulently took a vessel from the slipway into the water, so as to conceal its rotten hull. We do not see any such extension to his own evidence; there was no concealment of any kind whatsoever.

What emerges from the foregoing is that this was not the happiest of cases. The writ alleged a total failure of consideration

but the fact did not, and could not, in point of law, support such a claim. The rule as to failure of consideration is certainly not designed to relieve buyers from results of a bad bargain nor can it be used to defect the maxim caveat emptor in a case where, far from exercising his right of rejection of the ancient Land Rover (in the same manner as he had rejected in terms of the Sale of Goods Act), the respondent repaired the vehicle at a cost of K600 and so dealt with the goods sold in a manner precluding restitution of the price to the buyer and the vehicle to the seller. On these facts there was a statutory acceptance of the vehicle in terms of section 35 of the Sale of Goods Act, which is to the effect that, acceptance will take effect, among other things, if the buyer deals with the goods in a manner inconsistent with the seller's rights. But even more conclusive is the fact that, far from claiming restitution, the statement of claim shifted the claim to one of damages for breach of warranty. In that event, section 53 of the Sale of Goods Act applies and limits the remedy to damages only and the question of rejecting the value and receiving the price then does not even arise.

No warranty was given and none was found. The finding that there was a fraudulent and/or deceitful connection by keeping quiet was one not supported by any evidence and was in any case in the teeth of the evidence. In any event, the extension of the respondent's case thereby effected by the learned trial Commissioner must be rejected as foisting a new cause of action which was a complete departure from the case which the respondent had but forward. In our view, such extension was neither a variation nor a modification nor a development of the case as pleaded and, following *Mumba v. Zambia Publishing Company* (2); such a radical departure from the case advanced cannot be entertained.

For the reasons which we have given, we agree with the submissions . . . that that finding below, upon which judgment was granted, cannot possibly be sustained. Contrary to what Mr Patel has submitted, the issue was not simply one of findings made in the absence of supporting evidence and against the evidence that was accepted. This was a case where the plaintiff's case ought to have fallen of its own inaction, had the learned trial Commissioner not seen it fit to find a foothold for the respondent on a case which he had not put forward or even made out. We allow the appeal and set aside the judgment complained of. We enter judgment for the appellant, with costs both here and below, to be taxed in default of agreement.

If the fraud practised by the seller is of such a nature as to render the contract between him and the owner void for mistake, he will have no title to the goods, e.g. mistake as to identity, *Ingram v. Little* (1961) 1 QB 31

The general rule is that in order to avoid the contract, true time owner must communicate his intention to rescind to the seller who obtained goods by fraud. In *Car and Universal Finance Co. v. Caldwell* (1965) 1 QB 525 the CA it was held that in exceptional circumstances the seller can rescind the contract if he evinces an intention to do e.g. by notifying the police. In that case Upjohn, L.J. stated at p. 55

> If one party, by absconding, deliberately puts it out of the power of the other to communicate his intention to rescind which he knows the other will almost certainly want to do. I do not think he can any longer insist on his right to be made aware of the election to determine the contract. In these circumstances communication is a useless formality.

Chapter Four

Hire Purchase

4.1 Introduction: Nature and General Features of Hire Purchase

Hire purchase is one of the commonest methods by which traders extend credit to their customers. Ordinary Zambians often treat this type of financing arrangement as a contract of sale in which the price is paid by instalments. The truth, however, is that hire purchase is very different from a contract of sale. The Hire Purchase Act,[1] as will be shown in this chapter, has added to this misapprehension.

The law of hire purchase in many countries has undergone tremendous changes and developments. While the growth of hire purchase has been rapid in Western countries, it has been slow in Zambia for a variety of reasons. Firstly, the system was unknown to customary commercial practices in Zambia. Under a barter system kind of trading arrangement, it is inconceivable that goods could be obtained on hire purchase arrangements. Traders would wish to reach a bargain which is concluded there and then without additional complications of calculating and paying rentals in kind for goods delivered. In an unsophisticated business environment, hire purchase would clearly have no place. Secondly, luxury goods which normally attract this form of commercial transaction such as motor vehicles, televisions, fridges, stoves executive furniture etc., were rather slow in coming into the country in appreciable quantity. Even when they did the number of people that could afford to purchase them was significantly few so that the system was unattractive to the potential hire purchase investor trader. Thirdly, when the system, eventually became known, the unscrupulous business practices of some hire purchase investor traders subjected it to abuses and deprived the customers of comprehensive protection the law ordinarily intends them to have. This, in turn, made the system unattractive to potential customers. Fourthly, when the hire purchase system became significantly appreciated by customers there was, unfortunately, a significant level of bad faith on the part of many customers, resulting in unrecoverable huge rental arrears and untraceable hired goods, made hire purchase a rather high risk kind of trade financing arrangement for the hire purchase investor.

In Zambia the present law is encompassed in the Hire Purchase Act which was originally modelled after the United Kingdom Hire Purchase Act of 1938 and the Advertisement (Hire Purchase) Act of 1957. The Act was intended to regulate possible abuse on the part of traders who

[1] Chapter 399 of the Laws of Zambia.

took advantage of a gullible market and provided poor quality goods covered by widely drawn exemption clause in agreements which made termination very difficult on the part of the hirer and empowered the owner to take back the goods if the hirer defaulted even though the hirer had paid virtually the entire price.

4.2 Definition and character of Hire Purchase

Under the common law hire purchase may be defined as an agreement for the delivery of goods by the owner to a person (the hirer) under which the latter is granted an option to purchase those goods.

Hire purchase is for the most part of recent origin having received first judicial approval in the case of *Helby v. Matthews*[2]. In that case the owner of a piano agreed to let it on hire to 'H' at a monthly rent of 10 Shillings 6 pence. The agreement gave possession of the piano to 'H' and permitted him to return it to the owner at any time subject to the payment by him of all instalments due at the date of return. It further provided that if and when the instalments paid by 'H' totalled 18 guineas, the piano would become his property, but that until such payment, it remained the property of the owner, who would be entitled to resume possession of it, if 'H' defaulted his instalment payments or failed to keep the piano at a given address. H took possession of the piano and paid some instalments. 'H' then pledged the piano with a pawn broker as security for a loan.

The owner of the piano brought this action against the pawn broker to recover the piano, arguing that H had no right to pledge the piano as it was not his property. The House of Lords found for the owner of the piano. It was held further that since H could, under the agreement return the piano before the sum of 18 guinea had been paid he was not a person who had bought or agreed to buy the piano within the meaning of section 9 of the Factors Act, 1889 (which is similarly phrased as section 25 (2) of the Sale of Goods Act). In regard to H Herschell, L.J, stated as follows:

> All that he undertook was to make the monthly payment of 10 shillings, 6 pence so long as he kept the piano. He has an option no doubt to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under those circumstances how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not upon its execution bind him to buy but left him to do so or not as he pleased.[3]

[2] (1895) AC 471.
[3] *Ibid* at p. 479.