



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 89

**Equitable Rules in Contracts
for the Sale of Goods**

DISCUSSION PAPER

OCTOBER 1995

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Preface

The Commission has been asked to review the *Sale of Goods Act 1895*.

The Commission has not formed a final view on the issues raised in this Discussion Paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by 31 January 1996.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them in its final report. Since the process of law reform is essentially public, copies of submissions made to the Commission will usually be made available on request to any person or organisation. However, if you would like all or any part of your submission or comment to be treated as confidential, please indicate this in your submission or comments. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act 1992*.

The research material on which this Discussion Paper is based can be studied at the Commission's office by anyone wishing to do so.

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Abbreviations

Benjamin	<i>Benjamin's Sale of Goods</i> (4th ed 1992)
Bridge	M G Bridge <i>Sale of Goods</i> (1988)
CA	<i>Credit Act 1984</i> (WA)
Carter & Harland	JW Carter & DJ Harland <i>Contract Law in Australia</i> (2nd ed 1991)
Cheshire & Fifoot	JG Starke, NE Seddon & MP Ellinghaus, <i>Cheshire & Fifoot's Law of Contract</i> (6th Aust. ed 1992)
CL	Corporations Law
FTA	<i>Fair Trading Act 1987</i> (WA)
Greig & Davis	DW Greig & JLR Davis <i>The Law of Contract</i> (1987)
LRC 10th Report	Tenth Report (<i>Innocent Misrepresentation</i>) Cmnd 1782 (1962)
LRCWA DPI	Law Reform Commission of Western Australia <i>Discussion Paper on Implied Terms in the Sale of Goods Act 1895</i> (Project No 89, August 1995)
Meagher	RP Meagher, WMC Gummow & JRF Lehane <i>Equity Doctrines and Remedies</i> (3rd ed 1992)
NSWLRC	New South Wales Law Reform Commission
NSWLRC Second Report (1987)	New South Wales Law Reform Commission <i>Sale of Goods: Second Report</i> (LRC 51, 1987)
NZCCLRC	Contracts and Commercial Law Reform Committee of New Zealand
<i>Personal Property Securities</i> (1992)	Australian Law Reform Commission (Discussion Paper 52) and Law Reform Commission of New South Wales (Discussion Paper 28) <i>Personal Property Securities</i> (August 1992)
<i>Personal Property Securities</i> (1993)	Australian Law Reform Commission (Report No 64) <i>Personal Property Securities</i> (August 1993)
Senate Committee	Senate Standing Committee on Constitutional and Legal Affairs
SGA	<i>Sale of Goods Act 1895</i> (WA)
Sheridan	LA Sheridan <i>Fraud in Equity</i> (1957)

Sutton	K C T Sutton <i>Sales and Consumer Law in Australia and New Zealand</i> (1983)
TPA	<i>Trade Practices Act 1974</i> (Cth)
UCC	Uniform Commercial Code (US)
Vienna Convention	United Nations <i>Convention on Contracts for the International Sale of Goods</i> , Vienna 1980

Glossary

Some difficulty in discussing the whole area covered by this Discussion Paper arises from terminology. For convenience in further discussion, and unless otherwise indicated, the following words and phrases will be used consistently in the meaning assigned.

common law	law administered (historically) by courts exercising common law as opposed to equity jurisdiction
condition	a term the breach of which gives rise to a right to elect to terminate the contract
contract damages	the common law remedy of damages for breach of a term
damages	the remedy of monetary compensation for a civil wrong
equity (equitable)	law administered (historically) by courts exercising equity as opposed to common law jurisdiction
general law	the whole of the non-statutory law
innominate term	a term which cannot at the time of contracting be classified as a condition or a warranty, but which may be treated as either, depending on the extent of the breach
misrepresentation	a statement made before a contract is concluded which, under the rules of equity, is capable of giving rise to the equitable remedy of rescission
misstatement	a statement made before a contract is concluded which is untrue
repudiation (repudiated)	conduct by one party to a contract, including breach of a condition, which entitles the other party to elect to terminate the contract

rescission	the equitable remedy for misrepresentation whereby parties to a contract are restored so far as possible to the position as if no contract had been made
"term"	any stipulation of a contract, being a condition, warranty or innominate term, the breach of which will give rise to a right to damages
terminate (termination)	the common law right of one party to a contract to end the obligations of both parties further to perform the contract
the rule in <i>Seddon's</i> case	a rule derived from the case of <i>Seddon v North Eastern Salt Co Ltd</i> [1905] 1 Ch 326 under which a right to rescind for non-fraudulent misrepresentation may be barred after a contract has been executed
warranty	a term the breach of which does not give rise to a right to elect to terminate the contract

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Terms of Reference of this Project (Project No 89) are: "To review the *Sale of Goods Act 1895*". The Commission has decided to deal with the reference in parts. In this Discussion Paper the Commission deals with the operation of the rules of equity in the context of contracts for the sale of goods. The Commission has already published its *Discussion Paper on Implied Terms in the Sale of Goods Act 1895* (LRCWA DP1) dealing with implied terms in sales of goods, and will publish another or others dealing with further issues relating to reform of the *Sale of Goods Act 1895* (SGA).

2. GENERAL APPROACH TO REFORM

(a) Sale of goods legislation

1.2 The SGA exactly reproduces the substantive provisions of the *Sale of Goods Act 1893* (UK).¹ That Act in turn gave statutory form to the general law then governing contracts for the sale of goods as modified by statute.²

1.3 The provisions of the United Kingdom 1893 Act also found their way, with little or no alteration, into the legislation of all the other Australian States and the Australian Capital Territory and Northern Territory.³ In the result by 1967 when the *Misrepresentation Act 1967* (UK) was passed, there was almost complete uniformity between the sale of goods legislation in the United Kingdom and throughout Australia.⁴ Since that year a degree of uniformity within Australia has been lost in that some but not all Australian jurisdictions have introduced reforms based on the

¹ Now consolidated with amendments and replaced by the *Sale of Goods Act 1979* (UK).

² The bulk of the law was to be found in the cases, but there were a few limited enactments, which were repealed. The Schedule lists Acts repealed by the *Sale of Goods Act 1893* (UK). With one exception (an Act relating to Scotland) the Schedule to the SGA repeats that list.

³ *Sale of Goods Act 1895* (SA); *Goods Act 1896* (Vic); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1896* (Tas); *Sale of Goods Act 1923* (NSW); *Sale of Goods Ordinance 1954* (ACT); *Sale of Goods Ordinance 1972* (NT).

⁴ An important difference was that the United Kingdom had repealed the requirement of writing in s 4 of the *Sale of Goods Act 1893* (UK) by s 2 of the *Law Reform (Enforcement of Contracts) Act 1954* (UK). The Commission expects to consider the question whether the equivalent section in the SGA should be repealed in a later Discussion Paper.

Misrepresentation Act 1967 (UK)⁵ and in some there has been reform, particularly in relation to implied terms, designed to aid consumers.⁶ Nevertheless it remains true that in basic design, and in many details, there is recognizably similar sale of goods legislation throughout Australia.

(b) Models for reform

1.4 The Commission is of the view that, unless there are strong opposing reasons, the Commission should not take a path of reform which would lead to the sale of goods legislation in Western Australia being markedly different in basic approach and design from legislation in the other Australian jurisdictions. In the Commission's view, that path should only be taken together with the other Australian jurisdictions, in the expectation of achieving uniformity in reform. For that reason alone the Commission has not given detailed consideration to proposals for reform in Canada over the last 25 years, which have in the main been directed to the adoption, with or without modification, of Article 2 of the Uniform Commercial Code (UCC). The UCC is a comprehensive codification of commercial law and is in force virtually throughout the whole of the United States of America. Article 2 ("Sales") is the equivalent of the SGA, and derives from the *Sale of Goods Act 1893* (UK) through the *Uniform Sales Act 1906* (US), but is more extensive and has significant differences in approach. In particular, it has provisions about contract formation, and places a different emphasis on title and the passing of property. General adoption of Article 2 of the UCC would place Western Australia well out of line with other Australian jurisdictions as regards the law of sale of goods.

1.5 A model for reform closer to home is the United Nations *Convention on Contracts for the International Sale of Goods* adopted at Vienna in 1980 (Vienna Convention), which forms part of the law of Western Australia through the *Sale of Goods (Vienna Convention) Act 1986* (WA). The Vienna Convention applies to

"contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

⁵ New South Wales, South Australia and Australian Capital Territory, and to a limited extent Victoria. For discussion of these reforms see paras 2.33-2.44 below.

⁶ See reforms introduced in New South Wales by the *Commercial Transactions (Miscellaneous Provisions) Act 1974* (NSW) s 7 and in Victoria by the *Goods (Sales and Leases) Act 1981* (Vic). These reforms are referred to in LRCWA DPI para 1.15.

- (b) when the rules of private international law lead to the application of the law of a contracting State".⁷

Its application can however be excluded by the parties.⁸

1.6 There could be advantages in making the domestic law for sales in Western Australia conform to the Vienna Convention. There are, however, important matters not covered by the Vienna Convention, such as the validity of the contract and its effect on property,⁹ and some of its provisions diverge from the general rules of contract law applicable to all contracts governed by the domestic law of Western Australia, including contracts for the sale of goods. Adoption of the Vienna Convention into the domestic law would therefore require further legislation to deal with lacunae, and create disconformity between contract rules for sales and for other contracts. Moreover, a much wider spectrum of the commercial, legal and even general community would have to abandon familiar principles of sale of goods law and adapt to new principles.¹⁰ For these reasons the Commission has not given detailed consideration to the Vienna Convention as a possible model for reform.

(c) Uniformity between Australian jurisdictions

1.7 In deciding not to investigate in detail Article 2 of the UCC, or the Vienna Convention, as possible models for reform, the Commission has been actuated in part by a desire if possible to retain a degree of uniformity between the law in Western Australia and the law in other Australian jurisdictions. The Commission sees uniformity, both in basic design of the sale of goods legislation and where possible in its details, as an important objective of reform. While the law remains relatively uniform, decisions of the High Court on appeal from other Australian jurisdictions will be binding precedents for Western Australia, and decisions of the courts of those jurisdictions will provide valuable persuasive authority. Commentary on the law in other Australian jurisdictions will remain relevant for Western Australia. Of more importance, people trading between jurisdictions in Australia will do so in a legal context which they share in common, and potential problems of

⁷ Vienna Convention Article 1.

⁸ Id Article 6.

⁹ Id Article 4.

¹⁰ The new principles are themselves products of a long history of negotiation at international level to achieve a text acceptable to govern international trade between buyers and sellers from different legal backgrounds. See also Vienna Convention Article 7(1): "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade".

conflict of laws will be diminished. People who move between jurisdictions will not need to adjust to a radically different regime for the law of sale of goods.

(d) Conformity with the law for contracts generally

1.8 The Commission also sees it as important that legislation governing contracts for the sale of goods conforms with the law for contracts generally, unless there is good reason for the divergence. Conformity here reduces complexity in the law¹¹ and makes for a single body of precedent. Where achieved, it eliminates the incentive for one party to argue that a contract is or is not one for the sale of goods, rather than of a different category, in order to take advantage of or avoid a statutory rule which has no counterpart in the law of contracts generally.¹²

(e) Keeping pace with developments

1.9 The SGA, when passed, accurately reflected the existing case-law on contracts for the sale of goods, and consolidated specific enactments,¹³ but was otherwise intended to operate within the context of the general law.¹⁴ In some instances the cases had created a body of law having particular reference to contracts for the sale of goods,¹⁵ and even in these instances the case-law often deferred to the intention of the parties in consonance with a general ethos of freedom of contract,¹⁶ or itself formed part of a broader body of case-law applicable to contracts for the sale of goods and other like contracts.¹⁷ In other instances the case-law merely reflected the application, in the particular

¹¹ There are situations where the law for contracts for the sale of goods may at present be less complex than the law for contracts generally. If for instance the equitable rules relating to misrepresentation or other invalidating causes do not apply to contracts for the sale of goods, the law is simpler. Discussion of the applicability of the equitable rules forms a substantial part of this Discussion Paper.

¹² A notorious example is the incentive provided by s 4 of the SGA and its equivalent in other jurisdictions. That section requires certain contracts for the sale of goods to be in writing. In several decided cases the issue has been whether the contract (for example for the making of dentures, or the painting and supply of a portrait) was one for sale of goods (hence unenforceable for lack of writing) or for the provision of work and materials (hence enforceable despite lack of writing, under the general law rule for contracts). See further para 2.22 n 82 below.

¹³ The original enactments were repealed -see s 58 and the Schedule to the SGA.

¹⁴ See s 2 of the SGA, which preserves "the general law governing capacity to contract". A more general preservation is found in s 59. The particular problems raised by s 59(2), which can be read as excluding the rules of equity, are dealt with below -see paras 1.12-1.18, 2.5-2.11.

¹⁵ The effect of the contract on property in the goods, and the terms to be implied (unless excluded), were initially established by case-law.

¹⁶ See ss 17, 18 and 20 (passing of property and risk) and 28, 29 and 31 (delivery and payment). See also s 54 (implied right, duty or liability may be negated or varied by express agreement).

¹⁷ See counterparts, in the case-law for contracts for the hiring of goods or the supply of work and materials, of the statutorily implied terms as to quality in contracts for the sale of goods.

context of contracts for the sale of goods, of a general law rule thought to be applicable to all contracts.¹⁸

1.10 In the course of years since 1893, some problems with the law for contracts for the sale of goods have emerged as a result of interpretation of the legislation.¹⁹ Others have arisen because the law for contracts generally has been developed or refined through the cases, while the law for contracts for the sale of goods has remained fixed, like a bee in amber, in the setting of the sale of goods legislation.²⁰ Even in these instances, the new ideas have sometimes been found capable of co-existing with the legislation.²¹ The Commission sees it as an important objective of reform that specific problems with the law governing contracts for the sale of goods, as revealed in the case-law or otherwise, be addressed. At the same time, the Commission is concerned to preserve the flexibility which derives from interaction between the SGA and the general law, so that future case-law developments of the law for contracts generally may in some cases flow to contracts for the sale of goods.

(f) Summary of approach

1.11 In summary, the Commission is of the view that it should approach the task of recommending reform of the SGA along the following broad lines:

- * Reform should not cause the SGA to depart substantially from its present basic approach and design, unless strong reasons can be found for departure.
- * Reform should achieve uniformity where possible with other jurisdictions in Australia.

¹⁸ Examples are s 3 (how a contract of sale may be made); s 6 (widely regarded as reflecting a rule about mistake derived from *Couturier v Hastie* (1853) 9 Exch 102 (Ex Ch), affirmed (1856) 5 HLC 673, 10 ER 1065 (HL)); ss 8 and 9 (ascertainment of price); s 11(2) (classification of terms as either conditions or warranties).

¹⁹ For one example see *Hardy & Co v Hillerns and Fowler* [1923] 2 KB 490, which holds that s 35 of the *Sale of Goods Act 1893* (UK) is not limited by s 34. This issue is discussed in LRCWA DP1 paras 3.13-3.14.

²⁰ An example may be the development of the rules of equity in relation to misrepresentation and other invalidating causes, if these equitable doctrines are excluded by the operation of s 59(2) of the SGA.

²¹ An example is the emergence of the 'innominate term' theory in *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26, and its adaptation to express terms in contracts for the sale of goods in *Cehave NV v Bremer Handelsgesellschaft m b H (The "Hansa Nord")* [1976] QB 44. The statutory language relating to implied terms is at present intractably fixed in a dichotomy into the two categories of terms, conditions and warranties. For discussion of possible reform in Western Australia see LRCWA DPI paras 3.2-3.9.

- * The law for contracts for the sale of goods should conform to the law for contracts generally, unless there are specific reasons for divergence.
- * The SGA should retain sufficient flexibility to accommodate such further developments of the law for contracts generally as are equally relevant to contracts for the sale of goods.
- * Specific identified weaknesses in the SGA should be corrected.

Adherence to this approach is likely to result in modest, rather than radical, reform of the SGA.

1. *Does the summary in paragraph 1.11 represent an appropriate approach to reform of the SGA?*

3. THE APPLICABILITY OF RULES OF EQUITY

1.12 A persistent theme in literature discussing reform of sale of goods legislation in the United Kingdom and Australia has been the extent to which rules of equity do or should apply to contracts for the sale of goods. Most of the issues relating to the operation of the rules of equity arise from doubts about the effect of subsection 59(2) of the SGA (or its equivalent in other jurisdictions). That subsection provides

"The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress, or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods".

1.13 The SGA, as its title shows,²² codifies the law relating to sale of goods. It is not, however, a complete code, and a clear purpose of section 59, including subsection 59(2), is to preserve the operation of the general law in areas untouched by specific enactment.

1.14 Subsection 59(2) does however raise two questions relevant to this Discussion Paper:

- (a) Does the phrase "the rules of the common law" refer to

²² "AN ACT for codifying the Law relating to the Sale of Goods".

- (i) the whole non-statutory law; or
 - (ii) that part of the non-statutory law which, as a matter of history, was originally developed in courts having common law rather than equity jurisdiction?
- (b) If the former, is there any inconsistency between the rules so preserved (and in particular rules from the equity jurisdiction) and the express provisions of the SGA?

1.15 These questions arise in two contexts in particular:

- (a) the law relating to misstatements;
- (b) the law relating to property interests.

Misstatements

Prior to the passing of legislation providing for the administration of both within a single judicature system, the common law and equity jurisdictions each had rules about the effect of a misstatement on contracts generally. If only the former were preserved and continued by subsection 59(2) of the SGA, the more liberal equity rules would have no application. If however the equity rules were also retained, there are potential anomalies having regard to some express provisions of the SGA. It has been held in New Zealand²³ and Victoria²⁴ that only the common law rules for misrepresentation apply in contracts for the sale of goods, whereas more recent cases in South Australia²⁵ and New South Wales²⁶ hold that the equity rules also apply. Until some case establishes a binding precedent, the matter remains in doubt for Western Australia.

Property

The SGA contains detailed provisions which regulate the passing of property. Other provisions give an unpaid seller certain rights against the property. It is clear that the 'property' here dealt with is a common law concept. What is not clear is whether there is room for the operation of equitable

²³ *Riddiford v Warren* [1901] 20 NZLR 572, further discussed in paras 2.7-2.9 below.

²⁴ *Watt v Westhoven* [1933] VLR 458, further discussed in paras 2.7-2.9 below.

²⁵ *Graham v Freer* (1980) 35 SASR 424.

²⁶ *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381.

concepts relating to property. There have been strong expressions of the view that there is no room. Thus in an important decision in the United Kingdom²⁷ Atkin LJ said:

"The total sum of legal relations (meaning by the word "legal" existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code. It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code.

The rules for transfer of property as between seller and buyer, performance of the contract, rights of the unpaid seller against the goods, unpaid seller's lien, remedies of the seller, remedies of the buyer, appear to be complete and exclusive statements of the legal relations both in law and equity. They have, of course, no relevance when one is considering rights, legal or equitable, which may come into existence before the contract for sale. A seller or a purchaser may, of course, create any equity he pleases by way of charge, equitable assignment or any other dealing with or disposition of goods, the subject-matter of sale; and he may, of course, create such an equity as one of the terms expressed in the contract of sale. But the mere sale or agreement to sell or the acts in pursuance of such a contract mentioned in the Code will only produce the legal effects which the Code states."

This view has received more recent support. In *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* (The "Aliakmon")²⁸ Lord Brandon of Oakbrook said:

"It seems to me, however, extremely doubtful whether equitable interests in goods can be created or exist within the confines of an ordinary contract of sale. The Sale of Goods Act 1893, which must be taken to apply to the c. and f. contract of sale in the present case, is a complete code of law in respect of contracts for the sale of goods. The passing of the property in goods the subject matter of such a contract is fully dealt with in sections 16 to 19 of the Act. Those sections draw no distinction between the legal and the equitable property in goods, but appear to have been framed on the basis that the expression "property", as used in them, is intended to comprise both the legal and the equitable title. In this connection I consider that there is much force in the observations of Atkin L.J. in *In re Wait* [1927] 1 Ch. 606, 635-636".

If the views of Atkin LJ and Lord Brandon of Oakbrook are accepted, important and far-reaching equitable concepts, applicable in sales of other property, have no place in contracts for the sale of goods.

1.16 Other contexts in which issues arise as to the operation of the rules of equity are:

²⁷ *In re Wait* [1927] 1 Ch 606, Atkin U at 635-636.

²⁸ [1986] 2 WLR 902, Lord Brandon of Oakbrook at 910-911.

- (a) the areas of law (additional to "misrepresentation") specifically mentioned in subsection 59(2), being "the law of principal and agent and the effect of fraud, ...duress, or coercion, mistake, or other invalidating cause"; and
- (b) areas of law not so mentioned, being the law relating to
 - (i) specific performance;
 - (ii) injunction;
 - (iii) penalties;
 - (iv) forfeitures; and
 - (v) rectification.

1.17 It is possible to take the view, simply on existing case law and as a technical matter of construction of the SGA, that subsection 59(2) was never intended to and should not be construed as excluding equitable principles from contracts for the sale of goods. That is indeed the Commission's tentative view. On this basis, it may be thought unnecessary to review the existing law in any detail, prior to recommending that the SGA remain unchanged on this matter, or perhaps that subsection 59(2) be amended so as clearly to make applicable to contracts for the sale of goods all equitable rules, unless inconsistent with express provisions of the SGA.

1.18 The Commission sees some dangers in taking quite so simple an approach. First, there is a body of case-law that needs to be taken into account and which suggests, in some areas, that if equitable principles are to apply, there may be further reforms that ought to be made, so that the statutory, common law and equity rules work in relative harmony. This is particularly true in the area of misstatements,²⁹ and may be true of other invalidating causes recognized in equity.³⁰ Second, before accepting that all equitable principles should apply, it would seem sensible to gain some idea of the possible impact that such acceptance would have throughout the whole of the law for sales of goods. This is of particular importance with respect to interests in property:³¹ consistent application of the proposition that equitable interests arise from sales of goods, in the same way as they arise for instance from sales of land, might turn up some unexpected results. Third (and allied to the second point) there may be strong reasons of policy or practice for not admitting equitable principles into the law for contracts for the sale of goods, or for admitting some but not others, or for admitting some only if qualified by statute. This may be the case, for instance, with respect to

²⁹ Misstatements are discussed in paras 2.5-2.19 below.

³⁰ Invalidating causes other than misrepresentation are discussed in ch 3 below.

³¹ Equitable property interests arising from sales of goods are discussed in ch 4 below.

purchasers'³² and vendors'³³ equitable liens, where the law has expressly been left open by the High Court,³⁴ and where there are competing commercial interests for and against their recognition in contracts for the sale of goods.

1.19 In the discussion that follows, the Commission has attempted to give a picture of the consequences which follow from a general recognition of equitable principles in contracts for the sale of goods. The Commission has also attempted to give some of the arguments, both legal and practical, for and against the recognition of equitable principles in particular instances. It may be that, at the end of the day, a general recognition would do no harm, or do more good than harm. Before reaching that conclusion, potential good and harm must both be assessed. The Commission discusses these matters under the general headings:

Misrepresentation

Other Invalidating Causes

Equitable Property Interests

Equitable Remedies.

³² Purchasers' equitable liens are discussed in paras 4.28-4.34 below.

³³ Vendors' equitable liens are discussed in paras 4.42-4.47 below.

³⁴ *Hewett v Court* (1983) 149 CLR 639.

Chapter 2

MISREPRESENTATION

1. OUTLINE OF DIFFICULTIES

2.1 The legal difficulties relating to the operation of equity in sales of goods can be seen through a discussion of the law concerning misrepresentation. These difficulties, and an outline of the law, can be set out schematically (as in the paragraph following), though the difficulties do interact and are not insulated from each other as such an outline tends to suggest.

2.2 The first and overriding question is whether the equitable rules for misstatements apply in contracts for the sale of goods.

A If the equitable rules do not apply, only the common law rules will. These provide

- 1 The misstatement may become a term of the contract when formed, giving rise to common law remedies relating to contractual terms.¹
- 2 Whether or not the misstatement becomes a term, it may have been made fraudulently or negligently.
 - (a) The common law has a remedy for fraudulent misstatements similar to that of rescission,² but has more limited machinery for restoring the parties to their pre-contractual positions than has equity.
 - (b) The common law also gives damages for loss caused by fraud and negligence.

¹ This assumes an untrue statement made in the course of negotiations leading to a contract, which induces a party to enter the contract, where the contract when formed includes the statement as one of the contractual promises. An example is an untrue statement that goods have a particular quality, where the statement can also be seen as a promise that the goods have the quality.

² It is convenient to refer to a common law 'remedy of rescission'. More accurately, at common law fraud and certain kinds of misrepresentation and mistake enabled one party to refuse to proceed with the contract. In contracts for the sale of goods that refusal resulted in the reversion of property in the goods. Termination of the contract and reversion of property in the goods then opened the way for other common law remedies directed at recovery of money or property, such as conversion or detinue for property, or recovery of money paid on a consideration that had totally failed.

3 If the misstatement is neither a term, nor made fraudulently, the common law nevertheless permits its remedy of rescission if the misstatement "is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration".³

4 A misstatement falling outside (1) to (3) has no effect and gives rise to no remedy at common law, even although it may have induced the making of the contract. Any remedy would have to be in equity.

B If the equitable rules do apply, they potentially operate to provide the remedy of rescission for all misrepresentations. There are however questions about the interaction of equitable and common law remedies.

1 One point is whether, if the misrepresentation becomes a term, the equitable remedy is superseded by (or 'merged' in) the common law remedies for breach of a term.

(a) If so, the equitable remedy is confined in scope to misrepresentations which are not also terms;

(b) If not, both common law and equitable remedies are available for the same misstatement.

2 A second, allied, but broader problem is the potential anomalies that arise because of the resemblance between the remedy of rescission and the consequences of termination of contract for breach of a term. The two are distinct but, in the context of contracts for the sale of goods, as a practical matter they both produce much the same result. On rescission the goods will be restored and the price repaid. On termination a buyer can reject goods and recover the price as on a total failure of consideration. The anomalies are that

(a) even if the equitable remedy is confined in scope to misrepresentations which are not also terms, rescission may be available where rejection of the goods and termination would not be possible;

³ *Kennedy v The Panama, New Zealand, and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580 at 587.

- (b) if both common law and equitable remedies are available for a misrepresentation which is also a term
- (i) where the term is a warranty,⁴ rescission will be available even although rejection and termination is not;
 - (ii) where the term is a condition,⁵ rescission may remain available even although the right to reject and terminate has been lost.

3 The anomaly referred to in (ii) arises because of differences between the circumstances in which the right to terminate, and the right to rescind, may be lost. The right to terminate is lost in circumstances set out in subsection 11(3) of the Act. That subsection provides:

"Where a contract of sale is not 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 be a term of the contract express or implied to that effect."

At the earliest, the right to terminate can be lost simultaneously with the making of the contract; at the latest (unless otherwise agreed) it is lost when the goods are accepted, which may be done without knowledge that there has been a misrepresentation. By contrast, the right to rescind persists until barred. Two bars in particular are relevant, affirmation of the contract and (possibly) the rule in *Seddon's* case.⁶ As for affirmation, although acts constituting acceptance often also evidence affirmation, acceptance can occur by conduct, without the accepting party advertent to the issue of acceptance, or the legal consequences of the conduct. On the other hand, affirmation is an election not to rescind, and requires at least knowledge that there has been a misrepresentation, and possibly also knowledge of the legal right to rescind. This means that there can be acceptance without affirmation, so that the right to rescind might thus survive loss of the right to terminate.

⁴ A warranty is a term the breach of which does not give rise to a right to elect to terminate the contract.

⁵ A condition is a term the breach of which gives rise to a right to elect to terminate the contract.

⁶ This is a rule derived from the case of *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326 under which a right to rescind for non-fraudulent misrepresentation may be barred after a contract has been 'executed'.

There is an argument that the right to rescind should not in any circumstances be available after the right to terminate has been lost, because the right to rescind is less 'potent' than the right to terminate.

4 If equity does apply, there is doubt as to whether the rule in *Seddon's* case applies to contracts for the sale of goods.

(a) If it does not, the only potential anomaly regarding rights of rescission and of termination is as in (3).

(b) If it does, there is further doubt as to what constitutes 'execution' for purposes of that rule. There are various possibilities: among others

(i) passing of property in the goods;

(ii) delivery (and payment);

(iii) loss of the right to reject.

Unless (iii) represents the law, again there is potential anomaly.

2.3 The difficulties can be summarised in a series of questions:

* Do the equity rules for misrepresentation apply? ("misrepresentation issue") (The next questions arise only if the answer to the first is "Yes".)

* If a misrepresentation becomes a term, is the remedy of rescission superseded? ("merger issue")

* If a misrepresentation is also a condition, how (if at all) are the rights of rescission and termination to be reconciled? ("potency issue")

* Does the rule in *Seddon's* case apply? ("*Seddon* rule")

2.4 Before commencing discussion of the questions posed in the preceding paragraph, the Commission notes that the practical importance of these difficulties is greatly reduced by statutory provisions, capable of application to all kinds of contracts (including contracts for the sale of goods), contained in the *Trade Practices Act 1974* (Cth) (TPA) and the *Fair Trading Act 1987* (WA) (FTA). These provisions give civil remedies, including a remedy very like rescission,⁷ against one who has engaged in "misleading or deceptive conduct".⁸ This phrase embraces at least the making of misrepresentations. The provisions apply only to contracts made "in trade or commerce",⁹ and therefore may not affect private sales.¹⁰ Where they apply, the TPA and FTA provisions relating to misleading and deceptive conduct have virtually supplanted the general law rules (common law and equitable) concerning misrepresentation in contracts made "in trade or commerce". In the result, assuming the FTA remains unamended, introduction of equitable rules for misrepresentation in contracts for the sale of goods would materially affect only contracts outside "trade or commerce".

As a practical matter, therefore, the major effects of the application of equitable rules for misrepresentation in contracts for the sale of goods would be the availability, in private contracts of sale, of

- * a remedy (rescission) where none presently exists for non-fraudulent, non-promissory misrepresentation;
- * an additional remedy (rescission) for non-fraudulent but promissory misrepresentation.

⁷ See TPA s 87(2)(a); FTA s 77(3)(a).

⁸ See TPA s 52(1); FTA s 10(1).

⁹ In *O'Brien v Smolonogov* (1983) 53 ALR 107 no remedy was available under s 53A(1)(b) of the TPA for conduct in the course of a private sale of land. See also *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; *Franich v Sewell* (1993) 10 WAR 459. The exact scope of the phrase "in trade or commerce" is the subject of debate.

¹⁰ It is probable that trade sales considerably outweigh private sales, both in frequency and in value. Nevertheless problems of misrepresentation can certainly arise in private sales.

2. LEGAL POSITION

(a) Misrepresentation issue

2.5 This question essentially concerns the scope of the phrase "the rules of the common law" in subsection 59(2) of the SGA. The question can be put simply: does "common law" in that phrase mean general law, or common law as distinct from equity?

2.6 Prior to the passing of the SGA in 1895 the common law had developed rules for the invalidation of contracts induced by misstatement. These rules were however activated only by fraud or mistake as to substance¹¹. Equity had by then¹² developed its different doctrine of rescission for misrepresentation, which did not require fraud or error as to substance, and in which a remedy was significantly easier to obtain than at common law.

2.7 In 1901 the Court of Appeal in New Zealand in *Riddiford v Warren*¹³ expressed the view¹⁴ that "the rules of the common law" in the New Zealand equivalent of subsection 59(2) referred, so far as misrepresentation was concerned, to the common law and not the equity doctrine. Central to the reasoning of both Williams J and Denniston J¹⁵ was the proposition that the equity rule for misrepresentation had never applied to contracts for the sale of goods. Although there was legislative provision that in the event of "conflict between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail"¹⁶ that provision was held not to apply if as in this instance, there was no conflict. Thus the phrase "the rules of the common law" in the *Sale of Goods Act 1895* (NZ) was held to have the same meaning as in the *Law Amendment Act 1882* (NZ) (where it is juxtaposed with the phrase "the rules of equity"). In the view of Williams J, the result was that the *Sale of Goods Act 1895* (NZ) provision stated that the rules of

¹¹ A well-known statement on the law relating to misrepresentation and mistake is to be found in *Kennedy v The Panama, New Zealand, and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, Blackburn J (for the Court) at 587: "where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration".

¹² The equity doctrine only clearly emerged with the decision in *Redgrave v Hurd* (1881) 20 Ch D 1.
¹³ (1901) 20 NZLR 572.

¹⁴ Observations on the point were by way of obiter dicta, given that all members of the Court held that no misrepresentation had been made.

¹⁵ Connolly, Edwards and Cooper JJ agreed with Williams and Denniston JJ on this point.

¹⁶ *Law Amendment Act 1882* (NZ) s 11: for the present equivalent in Western Australia see *Supreme Court Act 1935* (WA) s 24(12). The section is part of a general reform whereby equity and common law rules are administered within a unified court structure: the result is sometimes referred to as the "Judicature system", so named after the *Supreme Court of Judicature Act 1873* (UK) which introduced the system in the United Kingdom.

equity did not apply at all to contracts for the sale of goods, and enacted that this should continue.¹⁷ This reasoning was supported by references to texts¹⁸ showing uncertainty as to the state of the law in England before the enactment of the *Sale of Goods Act 1893* (UK), and by noting the absence of case law applying equity misrepresentation rules to sales of goods.

2.8 The reasoning in *Riddiford v Warren*¹⁹ on this point was also applied in the Victorian case of *Watt v Westhoven*,²⁰ and strengthened by reference in the judgments to *The Picturesque Atlas Publishing Co Ltd v Phillipson*,²¹ decided before the *Goods Act 1928* (Vic) was enacted but after the introduction into Victoria of the Judicature system.²² In *Watt v Westhoven*²³ the Full Court decided the issue of whether mistake or misrepresentation as to terms prevented contract formation by applying the rule of the common law as stated in *Kennedy v The Panama, New Zealand, and Australian Royal Mail Co Ltd*.²⁴

2.9 Because of the decision that equity did not apply, it was unnecessary in either *Riddiford v Warren*²⁵ or *Watt v Westhoven*²⁶ to address questions of the interaction of equity and common law rules as to remedy. Nevertheless the potential difficulties were referred to in some of the judgments, in part to bolster the argument that the rules of equity did not apply. Thus in *Riddiford v Warren* Denniston J²⁷ noted and accepted the view that, if equity applied, "the previously existing law as to the effect of warranty would be altered, and breach of warranty would justify rescission",²⁸ and in *Watt v Westhoven* Lowe and Gavan Duffy JJ refer²⁹ to argument addressed to the possible operation of the rule in *Seddon's* case.

¹⁷ *Riddiford v Warren* (1901) 20 NZLR 572, Williams J at 576-577. Denniston J rather more circumspectly noted that there had never been an equity rule for misrepresentation in contracts for the sale of goods, and confined his judgment to that context.

¹⁸ *Benjamin on Sales* (4th ed) 394; *Encyclopaedia of the Laws of England* (Vol iii) 345; *Ker and Pearson-Gee on the Sale of Goods Act* 306.

¹⁹ (1901) 20 NZLR 572.

²⁰ [1933] VLR 458.

²¹ (1890) 16 VLR 675.

²² First introduced by the *Judicature Act 1883* (Vic).

²³ [1933] VLR 458, Mann ACJ at 462-463; Lowe J at 465, 466; Gavan Duffy J at 468.

²⁴ See *Kennedy v The Panama, New Zealand, and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580 at 587, as quoted in para 2.6 n 11 above.

²⁵ (1901) 20 NZLR 572. A further reason in this case was that no misrepresentation had in fact been made.

²⁶ [1933] VLR 458, Lowe J at 466.

²⁷ (1901) 20 NZLR 572 at 582. Denniston J was there commenting on the uncertainty expressed in *Ker and Pearson-Gee on the Sale of Goods Act 306*.

²⁸ See also *Watt v Westhoven* [1933] VLR 458, Mann ACJ at 463.

²⁹ [1933] VLR 458 at 466 and 467 respectively.

2.10 More recently, in other jurisdictions the equitable rules relating to misrepresentation have been assumed to apply or actually applied to a contract for the sale of goods,³⁰ although attention has not always been addressed to the argument put forward in *Riddiford v Warren*³¹ and *Watt v Westhoven*.³² In *Goldsmith v Rodger*³³ the English Court of Appeal affirmed a County Court judgment holding that a vendor could rescind a contract for the sale of a fishing vessel on the ground of non-fraudulent misrepresentation by a buyer. The equivalent of subsection 59(2) of the Act was not referred to in *Goldsmith v Rodger*,³⁴ but its proper interpretation was extensively considered in *Graham v Freer*,³⁵ particularly by Zelling J (with whom Mohr J agreed). Both Bray CJ and Zelling J held that the rules of equity relating to misrepresentation did apply to contracts for the sale of goods, and Zelling J expressly preferred *Goldsmith v Rodger*³⁶ to *Riddiford v Warren*³⁷ and *Watt v Westhoven*.³⁸ In *Leason Pty Ltd v Princes Farm Pty Ltd*³⁹ Helsham CJ in Eq made no reference to the equivalent of subsection 59(2), but dealt with issues which could only arise on the assumption that the rules of equity concerning misrepresentation did apply, and ultimately held that a contract for the sale of a horse had been properly rescinded for innocent misrepresentation.

2.11 There being an absence of direct authority in Western Australia, it remains doubtful whether a Western Australian court would follow, for example, *Graham v Freer*⁴⁰ in preference to *Riddiford v Warren*⁴¹ and *Watt v Westhoven*⁴² as to the correct interpretation of subsection 59(2). If the former, further issues arise.

(b) Merger issue

2.12 If the rules of equity apply to contracts for the sale of goods, it follows that rescission is available for a misrepresentation which is not a term. That was the decision in *Goldsmith v*

³⁰ *Leaf v International Galleries* [1950] 2 KB 86, particularly Denning LJ at 90 (Jenkins LJ and Lord Evershed MR not denying that the equity rules might apply in appropriate circumstances); *Long v Lloyd* [1958] 1 WLR 753.

³¹ (1901) 20 NZLR 572.

³² [1933] VLR 458.

³³ [1962] 2L1 L R 249.

³⁴ *Ibid.*

³⁵ (1980) 35 SASR 424.

³⁶ [1962] 2 L1 L R 249.

³⁷ (1901) 20 NZLR 572.

³⁸ [1933] VLR 458.

³⁹ [1983] 2 NSWLR 381.

⁴⁰ (1980) 35 SASR 424.

⁴¹ (1901) 20 NZLR 572.

⁴² [1933] VLR 458.

*Rodger*⁴³ and *Graham v Freer*,⁴⁴ and possibly also in *Leason Pty Ltd v Princes Farm Pty Ltd*.⁴⁵ These cases therefore provide no direct authority as to the position where the misrepresentation is a term. In contracts other than for the sale of goods, rescission is available for a misrepresentation which is also a term where there has been fraud,⁴⁶ and probably the same applies where the misrepresentation is non-fraudulent.⁴⁷ Unless there is something intrinsic to contracts for the sale of goods, there seems no reason why the rescission remedy should be affected by the misrepresentation having become a term of the contract.

2.13 Contracts for the sale of goods might be regarded in this matter as being outside the rules for contracts generally, on the basis that the SGA is a code and provides an exclusive set of rights dealing with return of goods and recovery of price. This merely answers (in the negative) the earlier question: do the rules of equity apply? Unless the remedy of rescission cannot survive the existence of other remedies⁴⁸ (as it can in contracts other than for the sale of goods) the fact that anomalies arise⁴⁹ from there being more than one remedy potentially available for the same misstatement is only an argument, not determinative, on the construction of subsection 59(2) of the SGA. In *Leason Pty Ltd v Princes Farm Pty Ltd*⁵⁰ Helsham CJ in Eq adopted the broad view that a misrepresentation which was also a term could give rise to rescission, and indeed considered that it would itself be

" a strange anomaly if the law in relation to innocent misrepresentation differed depending upon whether the subject matter of the misrepresentation was also a condition of the contract".⁵¹

⁴³ [1962] 2 Ll L R 249. The representation in that case was in no sense promissory: Donovan LJ (with whom Pearson and Ormerod LJJ agreed) noted at 251 that "one could hardly have a more classic case of innocent misrepresentation".

⁴⁴ (1980) 35 SASR 424. The trial Judge found there was no term express or implied -see *Graham v Freer* (1980) 35 SASR 424, Zelling J at 430.

⁴⁵ [1983] 2 NSWLR 381. The auction catalogue in that case provided "14 No condition or warranty is given or implied with any lot offered" - see also *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381, Helsham CJ in Eq at 387.

⁴⁶ *Alati v Kruger* (1955) 94 CLR 216.

⁴⁷ *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254, Crockett J at 264-266; *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30, Holland J at 36; but see *Pennsylvania Shipping Co v Cie Nationale de Navigation* [1936] 2 All ER 1167, which has not been followed in Australia.

⁴⁸ It may be that rescission is not available in addition to remedies for breach of a term, because these two types of remedy are inconsistent, but that does not mean that they cannot be alternative remedies.

⁴⁹ For discussion of these anomalies see para 2.56 below.

⁵⁰ [1983] 2 NSWLR 381.

⁵¹ Id Helsham CJ in Eq at 388. His comments may have been by way of obiter dicta -see n 45 above.

Likewise in *Graham v Freer*⁵² Zelling J was of opinion that

"there is nothing inherent in the contract of sale of goods which takes such contracts outside the general rule that contracts obtained by innocent misrepresentation are voidable in equity and can be rescinded".⁵³

Despite these statements, the position in Western Australia cannot be said to be clear.

(c) Potency issue

2.14 If a misrepresentation has become a condition, and assuming no 'merger', both termination and rescission are potentially available.⁵⁴ A view was expressed by Denning LJ in *Leaf v International Galleries*⁵⁵ that the right to rescind could not survive loss of the right to terminate. This view was based on the proposition that an innocent misrepresentation (giving rise to the equitable right to rescind) was "much less potent"⁵⁶ than a breach of condition (giving rise to the common law right to terminate), and may have been by way of obiter dictum.⁵⁷ The Court of Appeal in *Long v Lloyd*⁵⁸ may have decided that case on this basis, but its judgment⁵⁹ is capable of being read as turning on affirmation by the buyer with knowledge of the deficiencies in the goods⁶⁰ rather than on loss of the right to terminate.

2.15 The view that loss of the right to terminate precludes the right to rescind was expressly rejected⁶¹ by Helsham CJ in Eq in *Leason Pty Ltd v Princes Farm Pty Ltd*.⁶² His Honour there pointed out that affirmation (relevant to rescission) may sometimes be inferred from acceptance (relevant to termination), but expressed the view that equity "looks beyond acceptance as such" to affirmation "or other conduct by the party seeking relief...that would make it inequitable" for the

⁵² (1980) 35 SASR 424.

⁵³ Id at 436. The cases cited in support of this statement, particularly *Senanayake v Cheng* [1966] AC 63 and *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254 suggest that Zelling J had in mind the questions of whether the rule in *Seddon's* case applies in contracts for the sale of goods, and whether rescission and remedies for breach of a term can both potentially be available for a misrepresentation.

⁵⁴ These remedies are available in the alternative, not concurrently.

⁵⁵ [1950] 2 KB 86, Denning LJ at 90-91. See also *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, Denning LJ at 461 for the proposition (by way of obiter dictum) that rescission in equity for mistake was not available after the goods had been accepted.

⁵⁶ *Leaf v International Galleries* [1950] 2 KB 86, Denning LJ at 91.

⁵⁷ In this case the goods had been kept for five years before the buyer attempted to exercise a right to rescind. Denning LJ may have decided that the right to rescind was lost through delay. Certainly Jenkins LJ and Lord Evershed MR so decided: neither expressly subscribed to Denning LJ's 'potency' proposition.

⁵⁸ [1958] 1 WLR 753, Jenkins, Parker and Pearce LJJ.

⁵⁹ Delivered by Pearce LJ.

⁶⁰ Affirmation is a recognised 'bar' to rescission.

⁶¹ Also by way of obiter dictum.

⁶² [1983] 2 NSWLR 381, Helsham CJ in Eq at 387-388.

court to grant relief. It follows that concepts relating to termination of contract should be kept separate from bars to rescission. The case is authority for New South Wales, but not necessarily for Western Australia.

(d) *Seddon* rule

2.16 If the right to rescind for a misrepresentation which has become a condition can survive acceptance of the goods, by the same token misrepresentations which become warranties, or which never become terms, can similarly survive. The right to rescind will however be lost once one of the 'bars' to rescission operates, such as delay⁶³ or affirmation.⁶⁴ A difficult question is whether the rule in *Seddon's* case constitutes a bar in contracts for the sale of goods.

2.17 There is debate about the correctness and applicability of the rule in *Seddon's* case in the law of contract generally. Assuming it applies to some classes of contracts,⁶⁵ it has been held not to apply to others, particularly those of a continuing character.⁶⁶ In *Leaf v International Galleries* Denning LJ expressed the view that the rule in *Seddon's* case did not apply to contracts for the sale of goods,⁶⁷ but he and other members of the Court of Appeal left the point open, as did the Court of Appeal in *Long v Lloyd*⁶⁸ and *Goldsmith v Rodger*.⁶⁹

2.18 The applicability of the rule in *Seddon's* case to contracts for the sale of goods was extensively considered by Helsham CJ in Eq in *Leason Pty Ltd v Princes Farm Pty Ltd*.⁷⁰ His Honour concluded that the rule did not apply.

2.19 If, contrary to the decision in *Leason Pty Ltd v Princes Farm Pty Ltd*,⁷¹ the rule in *Seddon's* case does apply to contracts for the sale of goods, there is a further difficulty as to its application.

⁶³ This apparently was the 'bar' relied upon by Jenkins LJ and Lord Evershed MR in *Leaf v International Galleries* [1950] 2 KB 86.

⁶⁴ *Long v Lloyd* [1958] 1 WLR 753.

⁶⁵ For example, contracts for the sale or lease of land or the sale of a business - see *Svanosio v McNamara* (1956) 96 CLR 186 (sale of land); *Angel v Jay* [1911] 1 KB 666 (lease of land); *Vimig Pty Ltd v Contract Tooling Pty Ltd* (1986) 9 NSWLR 731 (sale of business).

⁶⁶ Examples are contracts of partnership (*Senanayake v Cheng* [1966] AC 63), hire purchase (*Mihaljevic v Eiffel Tower Motors Pty Ltd* [1973] VR 546, Gillard J at 564-565), allotment of shares (*Grogan v "The Astor" Ltd* (1925) 25 SR (NSW) 409, Long Innes J at 411). In *Grogan v "The Astor" Ltd* (1925) 25 SR (NSW) 409, Long Innes J held that the allotment of shares creates a continuing contractual relation between allottee and company, and distinguished *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326 itself as being concerned with a sale, not an allotment, of shares.

⁶⁷ *Leaf v International Galleries* [1950] 2 KB 86, Denning LJ at 90.

⁶⁸ [1958] 1 WLR 753.

⁶⁹ [1962] 2 Ll L R 249.

⁷⁰ [1983] 2 NSWLR 381 at 387.

The rule is that the right to rescind is lost (for non-fraudulent misrepresentation) once the contract is 'executed'. Given the paucity of case law on the applicability of the rule, it is not surprising that there is no detailed discussion of the meaning of 'executed' in contracts for the sale of goods. Candidates are loss of the right to terminate,⁷² acceptance of the goods,⁷³ passing of property,⁷⁴ delivery of the goods or possibly delivery or payment, whichever occurs later.⁷⁵ Each of these, if treated as an exclusive rule for 'execution', could result in loss of the right to rescind at an early point in time, and often before the party seeking rescission⁷⁶ has had an opportunity to discover the untruth of the misrepresentation.

3. DEFICIENCIES IN THE LAW

2.20 The law relating to misrepresentation in contracts for the sale of goods could be regarded as deficient simply because of uncertainty as to whether rules of equity apply. If they do, there is further uncertainty as to how they would apply, particularly in their interaction with common law and statutory rules concerning conditions, warranties, termination of contract and acceptance of the goods. The present state of uncertainty may deter people from seeking a remedy.

2.21 If the uncertainty were to be overcome by statutory reform, it need not be by enactment that the rules of equity are to apply. The common law and present statutory rules have the virtue of being relatively clear and certain, although they might be improved in some respects.⁷⁷ They provide for a remedy⁷⁸ where the misrepresentation has become a term, and also where there has

⁷¹ [1983] 2 NSWLR 381.

⁷² This matter is governed by s 11(3) of the SGA. That subsection refers to two distinct situations in which the right to reject goods and terminate the contract is lost.

⁷³ Acceptance is one of the two situations referred to in s 11(3). S 35 sets out the circumstances in which a buyer is deemed to have accepted the goods, and s 34(1) refers to a particular situation in which a buyer is deemed not to have accepted. There is some doubt as to the interaction of s 34(1) and s 35, which has in some jurisdictions been resolved by legislation. This issue is discussed in LRCWA DP1 paras 3.13-3.14.

⁷⁴ In circumstances there narrowly defined, passing of property is the other situation referred to in s 11(3) in which the right to reject is lost. Ss 16-20 deal with passing of property (and risk).

⁷⁵ S 28 provides:

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

⁷⁶ As *Goldsmith v Rodger* [1962] 2 Ll L R 249 shows, that party is not necessarily the buyer. A rule which took acceptance as the point of 'execution' of the contract, on the basis that the buyer would by then often have had an opportunity to inspect the goods to ascertain their condition, would be buyer-oriented, and even then be directed to representations the truth of which is ascertainable by inspection of the goods.

⁷⁷ For example, s 11(3) might be made to operate only where there has been acceptance; s 35 could specifically be made subject to s 34(1). These possible reforms are discussed in LRCWA DP1 paras 3.10-3.17.

⁷⁸ Including the remedy of termination in some circumstances.

been common law fraud.⁷⁹ The law is more simple if these rules are not overlaid by rules permitting another (equitable) remedy, triggered by the same facts as give rise to the common law remedies.

2.22 The common law and present statutory rules are however deficient in at least one significant respect: they give no remedy at all for a non-fraudulent misrepresentation which does not become a term of the contract.⁸⁰ In this, contracts for the sale of goods (assuming the rules of equity do not apply) are out of step with all other kinds of contract. It is possible that this deficiency has, or will if left uncorrected, lead to decisions in which the common law rules are manipulated to achieve a fair result,⁸¹ which decisions could feed back to and distort the mainstream of contract law. It could also lead to decisions where fine distinctions are drawn between contracts for the sale of goods and other types of contract. This has occurred where the applicability of section 4 of the SGA has been an issue⁸² and in relation to equitable liens in favour of purchasers.⁸³

2.23 If the deficiency is corrected by providing that rules of equity shall apply to contracts for the sale of goods, consequential reforms will be needed to clarify the interaction between common law and equity.⁸⁴ The legal uncertainty will have been removed, but the law will be more complex and there will be greater factual uncertainty in transactions, the parties being unsure whether something said in the course of negotiation might not prove to be false, giving rise to rescission. If the rule in

⁷⁹ *Kennedy v The Panama, New Zealand, and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580. That case also shows that there can be rescission for misrepresentation at common law, but cases satisfying the test there laid down are rare: the test was not for instance satisfied in *Leaf v International Galleries* [1950] 2 KB 86.

⁸⁰ This is part of the more general deficiency arising from the common law having no adequate rescission remedy. Where the misrepresentation becomes a term, there is at least some remedy at common law, but not rescission.

⁸¹ An example may be the judgment of Lord Denning MR in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623 at 627-628, which virtually equates the definition of term with that of misrepresentation according to the rules of equity in order to find that a statement was a term, and to give the common law remedy of damages for its breach. This particular development was given no encouragement by the High Court in *JJ Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435, the Court at 442.

⁸² The distinction is often sought to be made between a sale of goods and a contract for work and materials (even if leading to the production of a chattel which may thereafter be the subject of a contract for the sale of goods). For examples see *Lee v Griffin* (1861) 1 B & S 272, 121 ER 716; *Wansborough v Edwards* [1941] Tas LR 1; *Samuels v Davis* [1943] KB 526 (dentures - goods); *Robinson v Graves* [1935] 1 KB 579 (portrait - work and materials). For trenchant criticism of this last case see *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167, Fullagar J at 181-186. The Commission expects to consider reform relating to s 4 in a later Discussion Paper.

⁸³ *Hewett v Court* (1983) 149 CLR 639, recognising an equitable lien in the context of a contract for work and materials, but without deciding whether such a lien could exist in favour of a purchaser under a contract for the sale of goods - see Gibbs CJ at 646-647; Murphy J at 650; Wilson and Dawson JJ (dissenting) at 654-655; Deane J at 662-663.

⁸⁴ See paras 2.12-2.13 (merger); 2.14-2.15 (potency); 2.16-2.19 (*Seddon*) above.

Seddon's case is or is rendered inapplicable, that uncertainty could persist for some time after the transaction is apparently concluded, until one of the bars to rescission comes into operation.⁸⁵

2.24 It may however be that any deficiency is of little practical importance. Deficiencies in the general law must be viewed in the light of the flexibility inherent in the legal process. Where there is a danger that a meritorious misrepresentee may go without remedy judges can, without propounding new rules,⁸⁶ still find promises to have been made, leading to a remedy at least in damages.⁸⁷

4. REFORM

2.25 In a number of jurisdictions, including Western Australia, reforms have been proposed or implemented, capable of or directed at resolving some of the difficulties discussed in the preceding section of this Discussion Paper. Broadly, the proposed or actual reforms can be placed in two groups: in the first, reform is directed at issues relating to misrepresentation (or to terms and representations) in the general law and not specifically in contracts for the sale of goods; in the second, reform is directed specifically at sales of goods. The following paragraphs deal with

- * reform of the general law relating to misrepresentation;
- * reform of the law of sale of goods in relation to misrepresentation;
- * proposed reform in Western Australia.

(a) Reform of the general law relating to misrepresentation

(i) United Kingdom

2.26 All of the impetus for reform of the law relating to misrepresentation, and much of the detail of actual reform implemented in Australia, stems from the Tenth Report (*Innocent Misrepresentation*) (1962) of the English Law Reform Committee (LRC 10th Report). The Committee noted extensive criticism of three aspects of the law:

⁸⁵ Bars to rescission with particular relevance to contracts for the sale of goods are inability to restore (if the goods are consumed, perish or sufficiently deteriorate), intervention of third party rights (by resale or gift), lapse of time and (after discovery of the untruth of the statement) affirmation of the contract.

⁸⁶ See for example the reformulation of the test for a term of the contract (as opposed to a mere representation) by Lord Denning MR in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623 at 627-628.

⁸⁷ This point has less force where rescission would be the remedy of choice, and damages would be regarded by the plaintiff as an inadequate remedy.

- * restrictions on the right to rescind;
- * absence of a remedy in damages for misrepresentation;
- * contractual freedom to evade liability for misrepresentation.

In response, the Committee recommended:

- * abolition of the rule in *Seddon's* case except in contracts concerning land (other than contracts for leases not exceeding three years);
- * introduction of a (discretionary) remedy of damages in lieu of rescission;
- * abolition of the merger rule;
- * introduction of a remedy of damages for untrue representations (subject to defences);
- * reform directed at representations made by dealers in the course of arranging hire-purchase contracts;
- * prevention of the evasion of liability for misrepresentation (subject to exceptions).

The Committee recognised that its recommendations (especially the first two listed above) would create or accentuate anomalies in contracts for the sale of goods. Although consideration of the *Sale of Goods Act 1893* (UK) was outside its terms of reference, the Committee recommended that consideration be given to two specific reforms of that Act⁸⁸ to take account of this.

2.27 The recommendations of the Committee were substantially put into effect by the *Misrepresentation Act 1967* (UK). The Act did not, however, retain the rule in *Seddon's* case for contracts concerning land, and no provision was made relating to dealers' representations.

2.28 The *Misrepresentation Act 1967* (UK) directly and indirectly addresses some of the issues previously discussed in this Discussion Paper. The Act does not deal directly with the question of

⁸⁸ For these two reforms, see para 2.30 below.

the applicability of rules of equity to contracts for the sale of goods.⁸⁹ It does, however, abolish the merger rule and the rule in *Seddon's* case for all contracts, and hence (if previously applicable) for contracts for the sale of goods, thereby enhancing the ability of an injured party, on the assumption that the remedy is available, to obtain rescission of the contract in equity for misrepresentation.

2.29 So far as the merger rule is concerned, the Committee had recognised that anomalous situations could arise in which a representation had become also a term of the contract, rejection and termination was not an available remedy because the term was a warranty only, but rescission on the ground of misrepresentation remained open. The anomaly lay in a plaintiff, aggrieved by a relatively trivial misstatement, which was also a term, being able to escape the contract altogether by pleading the case in misrepresentation, and thus bypassing the legislative provision⁹⁰ which would restrict the plaintiff to a damages claim only. The Committee was of the view that this anomaly would be largely met by the reform (introduced by the Act) which gives the Court a discretion to declare a contract subsisting and award damages in lieu of rescission. Courts would thereby be enabled to refuse rescission if the misrepresentation (and term) were relatively trivial.

2.30 The *Misrepresentation Act 1967* (UK) does not directly address the potency issue. The Committee had recognised that further anomalies could arise where a misrepresentation was also a condition, rejection of the goods and termination of the contract for breach of condition had become impossible through the operation of the *Sale of Goods Act 1893* (UK), but rescission on the ground of misrepresentation remained open. Again the anomaly was that a party could escape the *Sale of Goods Act 1893* (UK) rules about termination of contract,⁹¹ by pleading that the condition was also a misrepresentation. In combination with abolition of the rule in *Seddon's* case, the effect was that a party might be able to rescind long after the right to terminate had been lost. The *Misrepresentation Act 1967* (UK) (following the recommendations of the Committee) met this anomaly by amending two sections of the *Sale of Goods Act 1893* (UK) so as to reduce the scope of the provisions which restrict the right of a party to reject goods and terminate for breach. These two amendments were:

- (a) amendment to paragraph 11(1)(c) of the *Sale of Goods Act 1893* (UK) (the equivalent in Western Australia is subsection 11(3) of the SGA) to remove the provision whereby the right to reject specific goods might be lost when property

⁸⁹ Possibly because this was not part of the reference, possibly because the Committee and Parliament assumed or considered that the equity rules did apply.

⁹⁰ The relevant provision in the SGA is s 11(2).

⁹¹ The relevant provision in the SGA is s 11(3).

passed (which could occur at the time of contracting), leaving the provision whereby the right to reject was lost on acceptance of the goods;

- (b) amendment to section 35 to ensure that acts which might amount, under section 35, to acceptance, should not do so unless the buyer had had a reasonable opportunity to inspect the goods, as contemplated by section 34.⁹²

The effect of these reforms was to create closer correlation between circumstances in which a party lost the right to terminate, and in which a party lost the right to rescind.

(ii) *New Zealand*

2.31 In 1967 the Contracts and Commercial Law Reform Committee of New Zealand (NZCCLRC) issued its Report on *Misrepresentation and Breach of Contract*. The NZCCLRC was unanimously of the view that radical reform, going well beyond the recommendations of the LRC 10th Report, was needed of the law relating to statements and promises made in the course of and at the time of contracting. In its view, the distinction between representations and terms should be made largely irrelevant through simplification and reform of the remedies available if a statement were untrue or a promise broken. It proposed that in these situations the remedies of damages for the torts of negligence or deceit, or rescission for misrepresentation, and of termination for breach, should be replaced by two remedies:

- * damages for breaches of contract and all misrepresentations (to be awarded for an untrue representation as if it were a term of the contract which had been broken); and
- * a new remedy of "cancellation" of a contract to assimilate both the remedy of rescission for misrepresentation and the remedy of termination for breach, available at the election of the injured party, but only if the effect of the misrepresentation or breach was substantially to deprive the injured party of the benefit of the contract.

It seems (by implication) that the NZCCLRC did not intend that these general reforms should extend to contracts for the sale of goods.⁹³ The NZCCLRC did however express unanimous support

⁹² Possible reform in Western Australia along these lines is discussed in LRCWA DP1 paras 3.10-3.17.

⁹³ At that time the NZCCLRC also had a reference relating to sale of goods.

for the two reforms to the sale of goods legislation recommended in the LRC 10th Report⁹⁴ but left these for further consideration in a review of the law of sale of goods.

2.32 In 1978 the NZCCLRC again reported on *Misrepresentation and Breach of Contract* in a Report which reproduced the Report of 1967 and included further comment. The NZCCLRC in 1978 adhered to the views expressed in 1967 and recommended enactment of a Contractual Remedies Act in terms of a draft Bill attached to its further Report. Following that Report the *Contractual Remedies Act 1979* (NZ) was passed. With some small changes, that Act followed closely the draft Bill but unlike the draft Bill, also extended to contracts for the sale of goods two of the general reforms effected by the Act. In the result however, the impact of the *Contractual Remedies Act 1979* (NZ) on the *Sale of Goods Act 1908* (NZ) is relatively modest. In addition to the two specific reforms to the *Sale of Goods Act 1908* (NZ) recommended by the NZCCLRC,⁹⁵ in the context of contracts for the sale of goods the *Contractual Remedies Act 1979* (NZ):

- * precludes an action for damages for the torts of deceit and negligence, but permits an action for damages for misrepresentation as if the representation were a term of the contract which had been broken;
- .
- * inhibits contractual provisions designed to preclude the Court from inquiring into questions concerning statements made in the course of negotiations.

(iii) *South Australia*

2.33 In 1972 the *Misrepresentation Act 1972* (SA) was passed in South Australia.⁹⁶ Part II of the Act introduced criminal sanctions (subject to a defence) for misrepresentations made by persons in the course of trade or commerce. Part III of the Act introduced, with minor clarifications and extensions,⁹⁷ the reforms to the general law concerning misrepresentation which had been

⁹⁴ For these two reforms see para 2.30 above.

⁹⁵ For these two reforms see para 2.30 above.

⁹⁶ The reform implemented by the *Misrepresentation Act 1972* (SA) may have been preceded by a Report of the SALRC - see references in Victorian Law Reform Commissioner, *Innocent Misrepresentation* (Report 7, 1978) 28 and Senate Standing Committee on Constitutional and Legal Affairs, Report (December 1976) 20. The Commission does not have available to it a copy of this Report.

⁹⁷ For instance, the *Misrepresentation Act 1972* (SA), in abolishing the rule in *Seddon's case*, made it clear that a contract could be rescinded notwithstanding registration, pursuant to the contract, of any conveyance, transfer or other document in any public registry, but confirmed that rescission was subject to the bar of acquisition by a third party of an interest in the subject matter of the contract in good faith and for valuable consideration. The Act also extended the remedy of damages for untrue representations to make it available against representors who are not parties to the contract.

implemented in the United Kingdom by the *Misrepresentation Act 1967* (UK). Reforms to the *Sale of Goods Act 1895* (SA), in almost identical terms to the reforms in the United Kingdom, were made by Part IV of the South Australian Act.

(iv) *Australian Capital Territory*

2.34 In the Australian Capital Territory reform was implemented by two Acts, one directed to the general law of misrepresentation, the other specifically to contracts for the sale of goods. Reform of the general law of misrepresentation⁹⁸ was first introduced by the *Misrepresentation Act 1975* (ACT). That Act followed quite closely the provisions of Parts II and III of the *Misrepresentation Act 1972* (SA).⁹⁹

2.35 The provisions contained in the *Misrepresentation Act 1975* (ACT) concerning penal sanctions for misrepresentations in the course of trade or commerce¹⁰⁰ were repealed by the *Misrepresentation Act 1976* (ACT), and the whole of the 1975 Act was repealed by the *Misrepresentation Act (Repeal) Act 1976* (ACT). In May 1976 the issue of the alterations to the law made by these various Acts was referred to the Senate Standing Committee on Constitutional and Legal Affairs (Senate Committee), and in its Report dated December of that year the Senate Committee recommended the reintroduction into the Australian Capital Territory of the *Misrepresentation Act 1975* (ACT), subject to minor modifications.¹⁰¹ The recommendations of the Senate Committee were implemented by the Law Reform (*Misrepresentation*) Act 1977 (ACT).

(b) Reform of the law of sale of goods in relation to misrepresentation

2.36 Reference has previously been made¹⁰² to amendments to sale of goods legislation introduced in the United Kingdom through the *Misrepresentation Act 1967* (UK) and implemented (with minor differences in wording) through misrepresentation legislation in South Australia¹⁰³ and

⁹⁸ Reform directed to sales of goods is dealt with in paras 2.37-2.38 below.

⁹⁹ The *Misrepresentation Act 1975* (ACT) did not confirm the bar to rescission relating to the acquisition of interests by third parties. It also diverged somewhat from the defences available to an action for damages for an untrue representation.

¹⁰⁰ The *Misrepresentation Act 1975* (ACT) refers to "commence" - a plain slip.

¹⁰¹ The Senate Committee had concerns about the defences to an action for damages for an untrue representation, the measure of damages awarded in lieu of rescission, and the defences to vicarious criminal liability under the penal provisions.

¹⁰² See para 2.30 above.

¹⁰³ See para 2.33 above.

the Australian Capital Territory.¹⁰⁴ In some jurisdictions there has been further or other reform of the sale of goods legislation, directed to the misrepresentation issue and related issues.

(i) *Australian Capital Territory*

2.37 In the same year as the *Misrepresentation Act 1975* (ACT), the *Sale of Goods Act 1975* (ACT) was also passed. That Act implemented the two reforms to sale of goods legislation¹⁰⁵ derived from the *Misrepresentation Act 1967* (UK). It also repealed the section of the *Sale of Goods Act 1954* (ACT) equivalent to section 4 of the SGA, which required certain contracts for the sale of goods to be in or evidenced by writing.¹⁰⁶ Further, it attempted to address the misrepresentation issue by inserting, in the equivalent to section 59 of the SGA, the following subsection:

"(1A) Nothing in this Act affects, or shall be deemed at any time to have affected, any remedy in equity of the buyer or the seller in respect of a misrepresentation".

2.38 This amendment was clearly intended to overcome the effect of the decisions in *Riddiford v Warren*¹⁰⁷ and *Watt v Westhoven*,¹⁰⁸ assuming they represented the law in the Australian Capital Territory. It has been pointed out, however,¹⁰⁹ that the amendment as worded may not have achieved that effect. Part of the reasoning in *Riddiford v Warren*¹¹⁰ and *Watt v Westhoven*¹¹¹ is that the rules of equity relating to misrepresentation have never applied to contracts for the sale of goods. If this is so, the Australian Capital Territory amendment does not alter the position.¹¹²

(ii) *Victoria*

2.39 The Victorian Law Reform Commissioner reported on the law of misrepresentation in 1978.¹¹³ The Report made recommendations concerning the law of misrepresentation generally,

¹⁰⁴ See para 2.37 below.

¹⁰⁵ For these two reforms see para 2.30 above.

¹⁰⁶ The Commission expects to consider this matter in detail in a later Discussion Paper.

¹⁰⁷ (1901) 20 NZLR 572.

¹⁰⁸ [1933] VLR 458.

¹⁰⁹ Cheshire & Fifoot 366; Greig & Davis 880.

¹¹⁰ (1901) 20 NZLR 572.

¹¹¹ [1933] VLR 458. For discussion of the reasoning in these cases see paras 2.7-2.9 above.

¹¹² The Australian Capital Territory provision could have some effect if it be assumed that the rules of equity concerning misrepresentation did apply to contracts for the sale of goods prior to the passing of the *Sale of Goods Act 1954* (ACT). On that basis, the amendment could be read as stating that any inconsistency between the statute and the rules of equity must be resolved in favour of the latter. One effect of this reading would be to resolve the 'potency issue' (as to which see paras 2.14-2.15 above) in favour of the equity rule, in that the statutory rules concerning termination could not be construed as ousting the equity rules about rescission.

¹¹³ Victorian Law Reform Commissioner *Innocent Misrepresentation* Report No 7 (1978).

including a recommendation to abolish the merger doctrine and the rule in *Seddon's* case for all contracts. In addition, the Report recommended separate legislation to amend the *Goods Act 1958* (Vic), by introducing the two reforms to sale of goods legislation derived from the *Misrepresentation Act 1967* (UK),¹¹⁴ and by inserting a section in terms similar to those of subsection 62(1A) of the *Sale of Goods Act 1975*. (ACT)¹¹⁵

2.40 No general reform of the law for misrepresentation has been introduced in Victoria, but in 1981 the *Goods (Sales and Leases) Act 1981* (Vic) was passed. That Act introduced, for all contracts for the sale of goods, one of the two reforms to sale of goods legislation derived from the *Misrepresentation Act 1967* (UK).¹¹⁶ As to other reforms, the Act applies only to consumer transactions.¹¹⁷ With respect to consumer contracts for the sale of goods,¹¹⁸ it effected extensive reform relating to implied terms,¹¹⁹ and in relation to the law of misrepresentation it introduced the effect of the other of the two reforms to sale of goods legislation derived from the *Misrepresentation Act 1967* (UK).¹²⁰ Further to this, the Act introduced a new provision¹²¹ relating to acceptance, which operates notwithstanding the equivalent of section 35 of the SGA. This provision also has the effect of extending the time within which a buyer may reject goods, in two ways.

- * The first operates where goods are defective in breach of a condition implied in favour of a consumer, the defect is apparent at the time of delivery or becomes apparent within a reasonable period after that time, and the buyer has done nothing which precludes the goods from being returned to the seller in substantially the same state as they were in when they were delivered to the buyer. In those circumstances the buyer is not deemed to have accepted the goods by reason only that, during a reasonable period after the defect became apparent, the buyer retained or used the goods, or did not inform the seller that the goods were rejected.

¹¹⁴ For these two reforms see para 2.30 above.

¹¹⁵ See para 2.37 above.

¹¹⁶ See s 3 of the *Goods (Sales and Leases) Act 1981* (Vic), which makes the equivalent of s 35 of the SGA subject to the equivalent of s 34, and see further para 2.30 above.

¹¹⁷ See s 85 of the *Goods Act 1958* (Vic).

¹¹⁸ The Act deals also with sales of services and leases of goods, and also with guarantees and securities given to secure the obligations of buyers of goods and services and lessees of goods. No further reference will be made to reform in Victoria of these kinds of contract.

¹¹⁹ This reform is referred to in LRCWA DP1 para 1.15.

¹²⁰ See s 118(1) of the *Goods (Sales and Leases) Act 1981* (Vic) which makes the equivalent of s 11(3) of the SGA inapplicable to consumer sales, and s 99(1) which reintroduces it, without the branch relating to specific goods property in which has passed to the buyer.

¹²¹ *Goods Act 1958* (Vic) s 99(2).

- * The second way in which time is extended operates where goods have been delivered and before accepting them the buyer, by agreement with the seller, delivers them to the seller or a person nominated by the seller for repair or replacement. In those circumstances the buyer is not deemed to have accepted the goods until acceptance after the repair or replacement and redelivery to the buyer.¹²²

2.41 The Act also abolished the rule in *Seddon's* case, and partially negated the effect of the potency doctrine by permitting the buyer to rescind before, or within a reasonable period after, acceptance of the goods. The merger rule was also abolished, and specific provision was made governing the effect of termination or rescission, and the rights of buyer and seller thereafter. Finally, the Act introduced provisions relating to representations made by dealers or persons acting on behalf of the seller.

(iii) *New South Wales*

2.42 In 1987 the New South Wales Law Reform Commission (NSWLRC) issued the NSWLRC Second Report (1987), in which it considered "specific (and largely uncontroversial) defects" in the sale of goods legislation¹²³ which had been corrected in some jurisdictions. Defects referred to included the requirement of writing¹²⁴ and the doubt concerning the applicability to the sale of goods legislation of the theory of innominate terms,¹²⁵ as well as matters relating to misrepresentation in contracts for the sale of goods.

2.43 After careful analysis of the issues, the NSWLRC concluded that in contracts for the sale of goods, the rules of equity relating to rescission for misrepresentation should be preserved, the rule in *Seddon's* case and the merger rule and the potency doctrine should be abolished, and the two reforms to sale of goods legislation¹²⁶ deriving from the *Misrepresentation Act 1967* (UK) should be implemented.

¹²² As pointed out in Sutton 629, the effect is that a buyer can agree to give the seller a chance to "cure" a defective performance, but preserve the right to reject if the cure does not eventuate. The Commission expects to consider this matter in detail in a later Discussion Paper.

¹²³ NSWLRC Second Report 1987 at 6.

¹²⁴ The Commission expects to consider reform of the writing requirement imposed by s 4 of the SGA in a later Discussion Paper.

¹²⁵ An innominate term is a term which cannot at the time of contracting be classified as a condition or a warranty, but which may be treated as either, depending on the extent of the breach. Matters relating to innominate terms are addressed in LRCW A DP1 paras 3.2-3.9.

¹²⁶ For these two reforms see para 2.30 above.

2.44 The recommendations of the NSWLRC were put into effect by the *Sale of Goods (Amendment) Act 1988* (NSW). The effects of similar reforms in other jurisdictions have previously been referred to, but two particular points concerning the New South Wales reforms should be noted. First, the rules of equity relating to the effect of misrepresentation are specifically made applicable to contracts for the sale of goods,¹²⁷ but without affecting the rights of the parties to a contract made before the commencement of the amending Act, or the construction of the *Sale of Goods Act 1923* (NSW) in its application to such a contract. Second, the potency doctrine is specifically abolished by a provision that acceptance of the goods, as referred to in the equivalent of section 35 of the SGA, does not preclude rescission for innocent misrepresentation, unless the acts constituting acceptance amount also to affirmation.

(c) Proposed reform in Western Australia

2.45 The Law Reform Committee in May 1972 issued a Working Paper on its Project No 22 *Innocent Misrepresentation*. Its terms of reference related to all contracts, not specifically to contracts for the sale of goods. The Committee gave extensive consideration to the proposals in the LRC 10th Report and the NZCCLRC Report of 1967, and formed the provisional views that the rule in *Seddon's* case and the merger rule should be abolished, and the court given power to award damages in lieu of rescission.¹²⁸ The Committee also suggested amendment to the SGA to ensure that equitable remedies were available in contracts for the sale of goods, and to introduce the two reforms to sale of goods legislation¹²⁹ implemented by the *Misrepresentation Act 1967* (UK).

2.46 In 1972 the Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972* (WA), and in October 1973 the Commission reported on the terms of reference previously considered by the Committee. Each of the three members of the Commission took a slightly different approach to the question of reform of the law of misrepresentation generally.¹³⁰ The whole Commission, however, agreed with the tentative view of the Committee that equitable remedies should be available in contracts for the sale of goods, but did not agree that

¹²⁷ This avoids the criticism of the reform in the Australian Capital Territory, noted in para 2.38 above.

¹²⁸ In brief, the Committee thought that the reforms implemented by ss 1 and 2(2) of the *Misrepresentation Act 1967* (UK) should be introduced in Western Australia.

¹²⁹ For these two reforms see para 2.30 above.

¹³⁰ One favoured an approach similar to that of the NZCCLRC, but was prepared to support the approach of the second, a second favoured the giving of a wide discretion to the court to award rescission or damages or both (with damages being either in the tort or contract measure) and a third considered no reform was necessary other than to allow the court to award rescission or damages (in the tort measure) for negligent misrepresentation.

the SGA provisions relating to acceptance should be amended, unless in the course of revision of that Act. No legislative action was taken on the Commission's Report.

5. THE COMMISSION'S TENTATIVE VIEW

(a) Introduction

2.47 The Commission does not feel free to recommend reform of the law relating to misrepresentation generally, along the lines either of the NZCCLRC or of the *Misrepresentation Act 1967* (UK). The reforms achieved through that Act have found their way to some Australian jurisdictions, so their adoption in Western Australia would achieve a degree of uniformity. Nevertheless the Commission's view is that reform along these lines, applicable to all contracts, falls outside its terms of reference.

2.48 The Commission is, however, tentatively of the view that the SGA should be amended to make it clear that the equitable rules relating to misrepresentation¹³¹ should apply to contracts for the sale of goods. That in turn leads to the tentative view that there should also be reform, in relation to contracts for the sale of goods, of the rule in *Seddon's* case and the potency rule. The merger rule presents special problems. Each of these four matters is discussed separately.

(b) Misrepresentation issue

2.49 The misrepresentation rule, if it applies, excludes equitable rules relating to misrepresentation from contracts for the sale of goods, by virtue of a particular interpretation of subsection 59(2) of the SGA. Despite decisions to the contrary in New Zealand and Victoria,¹³² subsection 59(2) may not bear that construction in Western Australia.¹³³ If so, legislative change would confirm or restate (for the removal of doubt) what is already the law. The Commission sees no harm in this.

2.50 If however *Riddiford v Warren*¹³⁴ and *Watt v Westhoven*¹³⁵ represent the law in Western Australia, the argument for reform is that injustice may result from there being no remedy for an

¹³¹ For tentative views in relation to other equitable rules for invalidation of contracts see ch 3 below.

¹³² *Riddiford v Warren* (1901) 20 NZLR 572; *Watt v Westhoven* [1933] VLR 458.

¹³³ There is no direct authority in Western Australia, but there are cases in other jurisdictions - see para 2.10 above.

¹³⁴ (1901) 20 NZLR 572.

¹³⁵ [1933] VLR 458.

innocent misrepresentation, not being a term,¹³⁶ which induces a contract for the sale of goods.¹³⁷ As discussed earlier,¹³⁸ the practical significance of potential injustice is limited, by the impact of the TPA and FTA, to transactions which are not in trade or commerce. Even so, potential injustice to parties to a private sale appears to the Commission to remain a real possibility.

2.51 Assuming subsection 59(2) of the SGA excludes the operation of equity rules relating to misrepresentation, the result is that the law for sales of goods differs significantly from the law for all other kinds of contract.¹³⁹ The Commission is not aware of any case in which it has been argued that a contract was one for the sale of goods, rather than a contract of another kind (for example, a contract for work and materials) in order to escape the impact of the equitable rules for misrepresentation. Nevertheless, following its general approach to reform, the Commission would seek to achieve conformity between the law for contracts for the sale of goods and the law for other kinds of contract, unless there is good reason for disconformity.

2.52 There seems to the Commission to be no particular reason inherent in contracts for the sale of goods why the equitable rules for misrepresentation should be excluded. There being no case on the issue prior to 1895, there has been no judicial discussion of reasons why, in principle, equitable rules should not apply, the relevant post-1895 cases¹⁴⁰ being more concerned with statutory construction than with argument from principle. One possible argument is that rescission might reverse the passing of property.¹⁴¹ In the Commission's view this is not an objection in principle, as rescission (and the consequent reversal of the passing of property) under common law doctrines of fraud and duress are clearly preserved by subsection 59(2) of the SGA, and section 23 recognises the possibility of a "voidable title" which can be "avoided" by election. The objection may however be in essence a practical one, that there should not be too much rescinding, as this would upset the confidence that people generally have in the finality of the transaction once goods have changed

¹³⁶ The position where a misrepresentation is also a term is discussed below under the heading "Merger issue" - see paras 2.56-2.58.

¹³⁷ Indeed, it was probably the injustice of there being (in contracts generally) no remedy at all in cases such as these which prompted the intervention of equity through the granting of the remedy of rescission for innocent misrepresentation. It was here that the more general injustice, arising from the common law having no adequate rescission remedy, was at its most acute. Where the misrepresentation was also a term, there was at least some remedy at common law, but not rescission.

¹³⁸ See para 2.4 above.

¹³⁹ This may be a historical accident, the SGA having been passed at a time early in the development of equitable rules for misrepresentation, when there was no relevant case-law to be given statutory effect in that Act, which was itself essentially a statement of existing law.

¹⁴⁰ *Riddiford v Warren* (1901) 20 NZLR 572; *Watt v Westhoven* [1933] VLR 458.

¹⁴¹ Rescission would not have this effect in every case; for example, a party could still have reason to seek rescission of a contract under which property had not passed.

hands. This argument (the "finality of transaction" argument) also features in other issues later discussed in this Discussion Paper.¹⁴²

2.53 The finality of transaction argument is one which primarily favours sellers: cases involving misrepresentation by buyers are rare.¹⁴³ The finality of transaction argument is essentially therefore that the possibility of the goods being thrown back on the seller's hands should not be increased by the introduction of an equitable rule for rescission in cases of innocent misrepresentation. The argument may have added force if reform would in practice be confined to private sellers, who might be expected to be less guarded with language used in the course of negotiation, and hence more prone to innocent misrepresentation. Against this must be balanced the potential injustice, to buyers, of the unreformed law.

2.54 While the practical impact of reform may be limited,¹⁴⁴ in the Commission's tentative view the balance here favours buyers over sellers. It appears to the Commission unlikely that an increased possibility of rescission through the introduction of the equitable rules for misrepresentation into contracts for the sale of goods in Western Australia would affect patterns of buying and selling generally, let alone in private sales, to the detriment of the community.¹⁴⁵

2.55 The Commission accepts that the introduction of the equity rules for misrepresentation into sale of goods law (if they do not already form part of that law) would add further complexity to an already difficult area. It is, however, a complexity which exists for all other kinds of contract, and reform would increase the conformity of sale of goods law to the law of contract generally. There is already no uniformity of legislation on the point in the other Australian jurisdictions, so uniformity will not be lessened if Western Australia joins the Australian Capital Territory and New South Wales in having specific statutory provision. Of the two models,¹⁴⁶ the Commission prefers the wording of the New South Wales Act, as avoiding the criticism¹⁴⁷ which has been directed at the Australian Capital Territory Act.

¹⁴² The argument is itself slightly limited: it cannot be used to justify a refusal of rescission of unexecuted contracts.

¹⁴³ An example is *Goldsmith v Rodger* [1962] 2L1 L R 249.

¹⁴⁴ See paras 2.4 and 2.50 above.

¹⁴⁵ The effect of reform may be beneficial, by encouraging a more guarded use of language. The Commission believes this also to be unlikely, at least in private sales. In that context misrepresentation, when it occurs, is often inadvertent as well as innocent, and not produced or inhibited by the state of the law.

¹⁴⁶ *Sale of Goods Act 1954* (ACT) s 62(1A); *Sale of Goods Act 1923* (NSW) s 4 (2A).

¹⁴⁷ See para 2.38 above.

2. *Should there be amendment to the SGA to provide that the rules of equity relating to misrepresentation shall apply to contracts for the sale of goods?*

(c) **Merger issue**

2.56 The merger doctrine, if it operates, serves to simplify the law by eliminating one remedy (rescission) if others (damages and possibly rejection) are available. It has no relevance where a misrepresentation has not become a term of the contract, so that rescission is the only available remedy, and hence does not leave an aggrieved party without remedy.¹⁴⁸ Further, it avoids two apparent anomalies which can emerge if the remedy of rescission is seen in practical terms as being much the same as the remedy of rejection of the goods and termination of the contract.¹⁴⁹ These anomalies would arise if a misrepresentation became incorporated in the contract as a term, and:

- * rescission remained available for the misrepresentation which, if treated as a term, would have given rise to a right to damages only but not to a right to reject the goods; or
- * rescission remained available for the misrepresentation which, if treated as a term, would have given rise to a right to reject the goods, where the right to reject has been lost.¹⁵⁰

2.57 The Commission is tentatively of the view that the merger rule should not apply to contracts for the sale of goods, and is fortified in that view by reforms implemented in other jurisdictions.¹⁵¹ In this context, the Commission further notes that the effect of the merger rule has been largely negated in those contracts for the sale of goods covered by the TPA or FTA where the misrepresentation constitutes "misleading or deceptive conduct", in that the statutory remedies (including a remedy very like rescission) are concurrent with the remedies given by the general

¹⁴⁸ By contrast, the rule in *Seddon's* case could have this effect, by denying rescission for a misrepresentation which had not also become a term of the contract.

¹⁴⁹ These two remedies are structurally and legally quite distinct. In practical terms, however, a party (particularly a consumer) aggrieved by a misrepresentation often wants simply to return the goods and get back the price. Rescission and rejection (if permitted) both have this result. See further paras 2.14-2.15 above.

¹⁵⁰ The merger rule avoids these anomalies by eliminating the remedy of rescission, and confining the plaintiff to damages. Even without the merger rule, these anomalies could be avoided by permitting the potency rule to operate -see paras 2.64-2.65 below.

¹⁵¹ See *Misrepresentation Act 1967* (UK) s 1(a); *Misrepresentation Act 1972* (SA) s 6(1)(a); *Misrepresentation Act 1977* (ACT) s 3(a); *Goods Act 1981* (Vic) s 100(2); *Sale of Goods Act 1923* (NSW) s 4(2A)(a). In the United Kingdom, South Australia and the Australian Capital Territory the reform is of the law generally, not only for contracts for the sale of goods. In Victoria the reform is directed to consumer sales of goods only (there is a parallel provision for consumer leases) while in New South Wales the reform is specific to contracts for the sale of goods.

law.¹⁵² It is true that the merger rule simplifies the law, but it does so at the price of eliminating a remedy¹⁵³ which would otherwise be available. The Commission can see no particular reason why multiple remedies should not be available, unless they are contradictory, or lead to over-compensation.¹⁵⁴ The merger rule is also somewhat haphazard in its operation,¹⁵⁵ and can create the paradoxical result that a party who emphasises the importance of a pre-contractual statement, by requiring it to be incorporated in the contract as a term, may lose the very remedy (that is, rescission) that he or she hoped to secure.¹⁵⁶ Its abolition could give rise to anomalous situations,¹⁵⁷ which in Western Australia will not be mitigated by a statutory power of the court to deny rescission and grant damages in lieu,¹⁵⁸ but these are anomalous only if rescission and rejection are regarded as equivalent remedies.¹⁵⁹ The Commission notes that similar anomalies can already arise in those contracts for the sale of goods to which the TPA or FTA apply, if a court were willing to exercise a statutory power to set aside a contract because of a misleading or deceptive statement which was a misrepresentation and had become a term.¹⁶⁰

2.58 It is not clear whether the merger doctrine forms part of Western Australian law.¹⁶¹ If it does, it applies to all contracts, and not only to contracts for the sale of goods. This presents the Commission with a dilemma: to recommend abolition of the rule for all contracts would take the Commission beyond its terms of reference; to recommend abolition of the rule for contracts for the sale of goods only would be to sanction disconformity between the law for those contracts, and for

¹⁵² For comment on this point see para 2.4 above.

¹⁵³ That is, the equitable remedy of rescission. The merger rule does not do away with the need to distinguish terms from mere representations.

¹⁵⁴ Indeed, the Commission sees advantage in the flexibility created by the existence of overlapping remedies.

¹⁵⁵ The merger rule is not relevant where the misrepresentation has not become a term of the contract. In such a case, subject to the potency rule, the rule in *Seddon's* case, or any other bar, rescission might be available long after the right to reject has been lost.

¹⁵⁶ If sufficient emphasis is placed on the statement, it may become a condition of the contract when formed, permitting rejection. A party could also contract for a right to rescind. The Commission does not, however, believe that parties often have the complex niceties of the law of contract in mind when bargaining: assurances are sought usually because a party wants to 'get out of' the deal if the assurances are not fulfilled.

¹⁵⁷ See para 2.56 above.

¹⁵⁸ The power to give damages in lieu of rescission was proposed in the LRC 10th Report. It appears in the *Misrepresentation Act 1967* (UK) s 2(2), *Misrepresentation Act 1972* (SA) s 7(3) and *Misrepresentation Act 1977* (ACT) s 5(1), where it is not confined to contracts for the sale of goods. The LRC 10th Report refers at 17 to the mitigating effect of its proposal, and also to the mitigating effect of its two proposals for amendment to the *Sale of Goods Act 1893* (UK), as to which see para 2.30 above.

¹⁵⁹ They are quite different in theory, but their practical effect is often much the same: in both an aggrieved party can return or refuse to take goods, and recover prepayments. The Commission would rather accept the anomalies than commit itself to an argument based on a legal distinction that lacks practical effect.

¹⁶⁰ The potential for anomaly is lessened by the existence of discretion: the court could refuse to declare the contract void under TPA s 87(3)(a) or FTA s 77(3)(a), but give damages under TPA s 82(1) or FTA s 79(1).

¹⁶¹ See para 2.13 above.

all other contracts.¹⁶² The Commission's tentative view is that the SGA should be amended to abolish the merger rule for contracts for the sale of goods, despite the potential disconformity. The rule may not be part of Western Australian law, in which case the SGA would be performing its traditional role of stating, for sales of goods, the existing law for contracts generally, and there will be no disconformity. If the rule is part of Western Australian law, in the Commission's view its impact is already diminished for those contracts to which the TPA or FTA apply,¹⁶³ and to that extent the disconformity is lessened. Further, non-abolition of the merger rule for all other contracts, not being contracts for the sale of goods, would not make much difference to those contracts, if any, to which the rule in *Seddon's* case applies,¹⁶⁴ with the result again that disconformity is lessened. Reform of the law for sale of goods may encourage development of the law for other contracts through the cases, leading to a discarding of the merger rule by the courts. If, despite these mitigating factors, serious difficulties appear because of disconformity between the law for contracts for the sale of goods, and for contracts generally,¹⁶⁵ they can be dealt with as they arise.

3. *Should there be amendment to the SGA to provide that rescission should be possible where a person has been induced to enter a contract for the sale of goods by a misrepresentation, notwithstanding that the misrepresentation has become a term of the contract?*

(d) *Seddon* rule

2.59 If the equitable rules for misrepresentation are to apply in contracts for the sale of goods, a further question is whether the rule in *Seddon's* case is to apply. That rule serves to limit the time within which a party may claim rescission. Where it operates, a party may be denied the remedy of rescission without having discovered, or having had the opportunity to discover, the untruth of a representation which induced the contract. In essence, it is a rule directed at finality of transactions.

¹⁶² This dilemma did not arise in some jurisdictions where the merger rule was abolished, because that was done as part of reform of misrepresentation law applicable to all contracts - see *Misrepresentation Act 1967* (UK) s 1(a); *Misrepresentation Act 1972* (SA) s 6(1)(a); *Misrepresentation Act 1977* (ACT) s 3(a). But see *Goods Act 1981* (Vic) s 100(2), where the reform is directed to consumer sales of goods only (there is a parallel provision for consumer leases), and *Sale of Goods Act 1923* (NSW) s 4(2A)(a), where the reform is specific to contracts for the sale of goods.

¹⁶³ Where either applies, the court may set a contract aside for misleading or deceptive conduct, where that conduct takes the form of a misrepresentation, even if the misrepresentation has been incorporated as a term.

¹⁶⁴ For misrepresentations which are also terms, if the merger rule exists, rescission will not be available; if it were abolished, the availability of rescission would nevertheless be restricted by the rule in *Seddon's* case to the period between formation and execution of the contract.

¹⁶⁵ That is, difficulties arising if the merger rule is abolished for contracts for the sale of goods, but is and remains part of the law governing all other kinds of contract.

Such rules in general promote certainty in the law,¹⁶⁶ but at the price of denying remedies. The rule in *Seddon's* case is somewhat arbitrary, in that the event selected as terminating the right to rescind¹⁶⁷ has no definite relationship with the amount of time that might be required to discover the untruth of the representation.¹⁶⁸ In the Commission's tentative view the rule in *Seddon's* case must stand or fall with the objective (finality of transaction) it serves, that objective itself being weighed against the hardship which the rule is capable of producing.

2.60 The rule in *Seddon's* case has been criticised on technical legal grounds¹⁶⁹ as well as on the ground that it produces hardship.¹⁷⁰ Nevertheless it appears to form part of the law of Western Australia, at least in contracts for the sale of land.¹⁷¹ In the Commission's view, in considering its application to contracts for the sale of goods, two questions should be asked:

- * should there be a finality rule for rescission in contracts for the sale of goods (in addition to the bar to rescission because of lapse of time);
- * if so, what event should trigger the rule?

In exploring these questions, contracts for the sale of goods can be compared with contracts for the sale of land.

2.61 The Commission has not found it easy to say whether the case for a finality rule for rescission is stronger or weaker for goods than for land. A factor favouring such a rule for land is that a contract concerning land is often a major event for the parties, requiring (in the case of individuals) a significant reallocation of resources and involving other changes, as where an individual sells a home, and buys another. Such transactions perhaps should not lightly be undone, even if procured by a misrepresentation. Moreover, land being a durable commodity, the right to rescind is not easily lost by the operation of other bars, such as inability to restore the subject

¹⁶⁶ For reasons for having limitation periods see the Commission's Discussion Paper on *Limitation and Notice of Actions* (Project No 36 Part II, February 1992) para 1.6.

¹⁶⁷ That is, 'execution' of the contract.

¹⁶⁸ Equity never required a representee to investigate the truth of a representation before contracting - see *Redgrave v Hurd* (1881) 20 Ch D 1. The rule that rescission may be barred by lapse of time (which is also a rule promoting finality of transactions) may act as an incentive to investigate, but is again not directly a rule which requires a representee to investigate.

¹⁶⁹ Criticisms are that it was not based on precedent, and that it has been overruled.

¹⁷⁰ The criticism is that it denies relief, sometimes the only relief available. For these and other criticisms see *Cheshire & Fifoot* para 761 and the cases, articles and texts there cited.

¹⁷¹ *Svanosio v McNamara* (1956) 96 CLR 186; *Cousins and Cousins v Freeman* (1957) 58 WALR 79 - both cases of mistake.

matter, and could persist for a long time if there were no arbitrary rule promoting finality. By contrast, sales of goods¹⁷² tend to involve less outlay and can usually be reversed with less disruption. There are of course vastly more goods contracts than land contracts,¹⁷³ but other bars to rescission¹⁷⁴ also operate much more readily where the subject matter is goods, so there is less need for a finality rule. It is also true that with goods, the possibility that rescission will impact on a third party is greater than with land, but that is catered for by the specific bar which protects third party interests against the effect of rescission. On the whole, the Commission tends to the view that the case for a finality rule such as the rule in *Seddon's* case is weaker for goods than for land.

2.62 There is little authority on the operation of the rule in *Seddon's* case in contracts for the sale of goods.¹⁷⁵ If it is to apply, there is a further question as to the event which will trigger the rule.¹⁷⁶ In the Commission's view that event (or combination of events) must be one which invariably occurs in the course of performance of contracts for the sale of goods.¹⁷⁷ As mentioned before,¹⁷⁸ candidates are (among others) the passing of property, delivery, payment, or 'acceptance' of the goods. There is no particular justification for selecting anyone of these, as none of them appears to have a direct relevance to representations. The one with most relevance is 'acceptance', which is connected with an opportunity to inspect the goods, and is itself part of a rule directed at finality of transactions.¹⁷⁹ The Commission has considered, in LRCWA DP1, proposals for reform of rules relating to rejection, designed to extend the time before which a party is deemed to have accepted goods, or otherwise loses the right to reject.¹⁸⁰ These reforms would make 'acceptance' more attractive as a trigger for the rule in *Seddon's* case in contracts for the sale of goods.

2.63 On the whole, the Commission at present feels that the disadvantages of the rule in *Seddon's* case as a sale of goods rule outweighs its advantages. The Commission is tentatively of the view

¹⁷² It may again be noted that the practical impact of reform will be on private sales - see paras 2.4 and 2.50 above.

¹⁷³ This suggests that there should be a finality of transaction rule for goods, to increase certainty and reduce the number of disputes which might otherwise come before the courts.

¹⁷⁴ Particularly inability to restore: the purchased apple is quite soon eaten, or becomes apple-sauce.

¹⁷⁵ Courts have tended to assume or hold that it does not apply - see paras 2.17-2.18 above.

¹⁷⁶ The rule in *Seddon's* case is said to be activated by 'execution' of the contract, but there is little case-law on the meaning of 'executed' in the context of contracts for the sale of goods.

¹⁷⁷ The Commission tends to accept that it should be open to the parties to agree on this matter, that is, to specify an event or time after which any right to rescind for innocent misrepresentation is lost. Any legislation confirming the operation of the rule would operate, as do many of the provisions of the SGA, unless the parties otherwise agree.

¹⁷⁸ See para 2.19 above.

¹⁷⁹ S 11(3) of the SGA promotes finality by setting out events the occurrence of which prevents a party from rejecting the goods, even for breach of condition. Acceptance is one such event. By s 34(1), where goods which the buyer has not previously examined are delivered, the buyer is given a reasonable opportunity to inspect them to ascertain whether they conform to contract before being deemed to have accepted them.

¹⁸⁰ See LRCWA DP1 paras 3.10-3.17.

that the other bars to rescission provide adequate safeguards against too much rescinding. It is fortified in its view by the views of other law reform bodies which have considered the issue, and by the legislation that has resulted,¹⁸¹ and agrees with the reasons they give for not retaining the rule as part of sale of goods law. The rule in *Seddon's* case can be rendered inapplicable to contracts for the sale of goods without affecting the law for other contracts, and the Commission's tentative view is that this should be done.

4. *Should the rule in Seddon's case be rendered inapplicable to contracts for the sale of goods?*

(e) **Potency issue**

2.64 The potency rule is in part a reaction to the anomalies that arise if there is no merger rule.¹⁸² Where a misrepresentation has been incorporated into the contract as a term, the potency rule operates to ensure that rescission on the basis of misrepresentation will not be available where termination is not available.¹⁸³ Where the misrepresentation has not become a term, the potency rule operates as a sub-rule of the rule in *Seddon's* case, by selecting loss of the right to reject as the event¹⁸⁴ after which the right to rescind for innocent misrepresentation is lost.

2.65 In considering abolition of the merger rule in contracts for the sale of goods, the Commission recognised that anomalies might arise as a result of reform. It is not dissuaded by this prospect from likewise favouring abolition of the potency doctrine. So far as that doctrine is a sub-rule of the rule in *Seddon's* case, in the Commission's view it falls with that rule, and for the same reasons. While subsection 11(3) of the SGA remains unreformed,¹⁸⁵ in the Commission's view the potency rule is the more haphazard.¹⁸⁶ Even if subsection 11(3) were amended to make acceptance the only event on which the right to reject may be lost, the potency rule could arbitrarily preclude rescission for a misrepresentation the untruth of which was not discoverable until after acceptance.

¹⁸¹ See *Misrepresentation Act 1967* (UK) s 1(b); *Misrepresentation Act 1972* (SA) s 6(1)(b); *Misrepresentation Act 1977* (ACT) s 3(b); *Goods Act 1981* (Vic) s 100(1) (to a limited extent); *Sale of Goods Act 1923* (NSW) s 4(2A)(b). In the United Kingdom, South Australia and the Australian Capital Territory the reform is of the law generally, not only for contracts for the sale of goods. In Victoria the reform is directed to consumer sales of goods only (there is a parallel provision for consumer leases) while in New South Wales the reform is specific to contracts for the sale of goods

¹⁸² For these anomalies see para 2.56 above.

¹⁸³ Termination may not be available either because the misrepresentation, treated as a term, is a warranty only, or because it is a condition but the right to reject the goods and terminate the contract has been lost.

¹⁸⁴ In a generalised statement of the rule in *Seddon's* case, the event is described as 'execution' of the contract.

¹⁸⁵ The Commission has considered reform of s 11(3) of the SGA in LRCWA DP1 paras 3.10-3.12.

¹⁸⁶ This is because s 11(3) of the SGA may in some circumstances result in a party losing the right to reject the goods when the contract is made, and hence before that party has had a chance to inspect the goods or accept them. The potency rule would likewise deny the right to rescind from the time of contract.

It has been abrogated in part or whole in some Australian jurisdictions.¹⁸⁷ As before,¹⁸⁸ the Commission is at present not persuaded that potential injustice arising in this fashion is outweighed by the convenience of a rule which serves the objective of transaction finality, such as the rule in *Seddon's* case or the potency rule.

2.66 The potency rule is specific to contracts for the sale of goods,¹⁸⁹ to the extent that it turns on provisions of the SGA which prevent rejection of the goods and termination of the contract.¹⁹⁰ Its abolition would not therefore produce disconformity between the law for contracts for the sale of goods, and the law for contracts generally.

5. *Should the potency rule be abolished?*

¹⁸⁷ *Goods Act 1958* (Vic) s 100(1) (consumer sales only, and to a limited extent); *Sale of Goods Act 1923* (NSW) s 38(2). In Victoria there is a parallel provision for consumer leases.

¹⁸⁸ See para 2.63 above.

¹⁸⁹ The Commission is not aware of any other kind of contract in which something like the potency rule has been used.

¹⁹⁰ The relevant provisions are s 11(3) of the SGA, and also ss 34 and 35, which deal with acceptance.

Chapter 3

OTHER INVALIDATING CAUSES

1. INTRODUCTION

3.1 Subsection 59(2) of the SGA preserves the "rules of the common law" not only relating to the effect of misrepresentation, but also to the effect of "fraud, ...duress, or coercion, mistake or other invalidating cause". As with misrepresentation,¹ the question arises whether the rules of equity relating to other invalidating causes are excluded from the law governing contracts for the sale of goods. The same arguments for the exclusion of equity, based on the wording of the statute,² remain open. Further, the common law in 1895 had concepts of fraud, duress and mistake as invalidating causes, so even at that time the statutory words had meaning, whichever interpretation is adopted.

3.2 Equitable jurisdiction in relation to invalidating causes in contracts has taken two forms. In the first, equity has exercised a jurisdiction concurrent with that of the common law, recognising the common law invalidating causes, and where necessary giving effect to an election to rescind by the application of techniques³ available in equity only. In the second, equity supersedes the common law invalidating causes⁴ by granting relief in situations not recognised at common law as giving rise to relief, and further has created new invalidating causes⁵ not known to the common law.

3.3 It is difficult to believe that Parliament in 1895 intended to retain common law invalidating causes for contracts for the sale of goods, but not the equitable techniques in aid of rescission. It is also difficult to see any reason why Parliament should have intended to exclude equitable equivalents of existing common law invalidating causes, or specifically equitable invalidating causes, which were then capable of applying to contracts for the sale of goods.⁶ That would have meant, for instance, that undue influence⁷ as an invalidating cause became inapplicable to contracts for the sale of goods. It is possible, but unlikely, that Parliament intended that only the law as it stood in 1895 should "continue to apply" to contracts for the sale of goods, to the exclusion of developments through case-law. An interpretation of subsection 59(2) of the SGA on these lines

¹ See paras 2.5-2.11 above.

² See paras 2.5-2.7 above.

³ For example, the taking of accounts.

⁴ For example, duress and mistake.

⁵ For example, undue influence, and possibly unconscionability as a distinct invalidating cause.

⁶ There is authority from Victoria that the equitable extension of misrepresentation as an invalidating cause never applied to contracts for the sale of goods prior to 1893 - see *The Picturesque Atlas Publishing Co Ltd v Phillipson* (1890) 16 VLR 675; *Watt v Westhoven* [1933] VLR 458 and see para 2.8 above.

⁷ The equitable doctrine of undue influence was well developed by 1895.

would mean that twentieth century developments in equity, such as the emergence of equitable doctrines of mistake⁸ and the application of the equitable doctrine of pressure to situations where the threat is to economic interests,⁹ could not apply.¹⁰

3.4 Because of the interpretation given to the equivalent of subsection 59(2) of the SGA in other jurisdictions in relation to equitable rules of misrepresentation,¹¹ doubt remains as to its interpretation in relation to equitable doctrines of duress, mistake or other invalidating cause. Whatever may have been the state of the law in 1895, the Commission's task is to consider afresh the question of the applicability of equitable doctrines of invalidation to contracts for the sale of goods.

3.5 The Commission has not detected any feature, peculiar to contracts for the sale of goods, which would make equitable doctrines of invalidation not applicable to them, but applicable to all other kinds of contract. These doctrines lead to the remedy of rescission, and a possible feature is that a contract for the sale of goods results ultimately in a passing of property which should not lightly be undone.¹² Passing of property is however a feature of other kinds of contract, such as contracts for the sale of shares or land, where equitable doctrines undoubtedly apply. An argument distinguishing contracts for the sale of goods from other kinds of contract, using the feature of passing of property, must therefore rest on the proposition that there is a special need in contracts for the sale of goods to enhance the objective of finality of transactions. The Commission has referred to this objective before¹³ and is not at present persuaded that it is of sufficient importance as of itself to justify exclusion from contracts for the sale of goods of equitable doctrines which permit rescission.

⁸ Leading cases in modern times are *Solle v Butcher* [1950] 1 KB 671 in the English Court of Appeal and *Taylor v Johnson* (1983) 151 CLR 422 in the High Court. See further para 3.13 below.

⁹ As to this development of a concept of 'economic duress', see paras 3.7 and 3.9 below.

¹⁰ It would also mean that even common law developments could not apply. To the contrary, see for example *Cehave NV v Bremer Handelsgesellschaft mbH (The "Hansa Nord")* [1976] QB 44, applying to contracts for the sale of goods the concept of innominate term which emerged in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. There is a view that this theory may not represent the law in Australia - see *Cheshire & Fifoot* 735. For discussion of possible reform in Western Australia see LRCW A DP1 paras 3.2-3.9.

¹¹ See paras 2.5-2.11 above.

¹² Passing of property has never been an absolute bar to rescission: the common law gave this relief for fraud and certain kinds of misrepresentation and mistake, and the SGA itself recognises the concept of a voidable title - see s 23.

¹³ See para 2.53 above.

3.6 It is convenient to refer first to "duress, or coercion" and "mistake" as invalidating causes, before referring to "fraud". This is because "fraud", in equity, could bear a wide meaning encompassing many of the specific causes of invalidation.

2. DURESS OR COERCION

3.7 Duress as an invalidating cause of contracts¹⁴ is specifically referred to in subsection 59(2) of the SGA in preserving "the rules of the common law". The common law recognises duress as an invalidating cause in contracts, where duress means physical violence or the threat of physical violence to the person or property of the other party to the contract.¹⁵ It may be that the common law, uninfluenced by equity, requires such duress as nullifies consent, and renders the contract void.¹⁶ In equity, undue pressure¹⁷ has long been a ground for relief by way of rescission of a transaction.¹⁸ The Commission is not aware of any case where a contract for the sale of goods¹⁹ has been avoided for duress, under either the common law or the equitable doctrine.²⁰ It is possible therefore to apply, in the context of duress, the general reasoning of *Riddiford v Warren*²¹ and *Watt v Westhoven*,²² and to conclude that the common law rule only is preserved by subsection 59(2) of the SGA.

3.8 In the Commission's view it is unlikely that so restrictive an interpretation would have been given to the word "duress" in the context of subsection 59(2) of the SGA, even when first enacted. By the end of the nineteenth century the equitable doctrine of duress or pressure had proved so

¹⁴ Duress also has the effect of invalidating transactions other than sales (for example gifts) and of permitting recovery of money paid.

¹⁵ Threats directed at close relatives of a party to the contract qualify as duress.

¹⁶ See *D Lanham, Duress and Void Contracts* (1969) 29 MLR 615. But see *Barton v Armstrong* [1973] 2 NSWLR 598, where all members of the New South Wales Court of Appeal treated the common law doctrine as rendering a contract voidable not void: see Jacobs JA at 614 (dissenting in the result); Mason JA at 617; Taylor AJA at 621. A majority of the Privy Council held the deed in question void "so far as concerns" Barton, apparently applying principles of equity - see Lord Cross of Chelsea, Lord Kilbrandon and Sir Garfield Barwick at 631 and 633.

¹⁷ Also sometimes called "duress" - see (shortly before the passing of the (UK) Sale of Goods Act 1893) *Seear v Cohen* (1881) 45 LT 589, Denman J at 590: "the contract is not enforceable in equity, and the defence of duress is a good one". See also (after that Act) *Kaufman v Gerson* [1903] 2 KB 114, Wright J at 119 ("undue influence or duress") reversed [1904] 1 KB 591 (see Lord Collins MR at 599: "moral coercion").

¹⁸ That is, in equity the transaction is voidable and not void.

¹⁹ For discussion of contracts associated with sales of goods (not themselves being contracts for the sale of goods) see para 3.10 below.

²⁰ There are cases where money in addition to the agreed price, demanded as the price of delivery of goods or under threat that the seller will not perform, has been recoverable as money paid under duress - see *White Rose Flour Milling Co Pty Ltd v Australian Wheat Board* (1944) 18 ALJ 324; *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323.

²¹ (1901) 20 NZLR 572.

²² [1933] VLR 458. For the reasoning in these cases see paras 2.7-2.8 above.

effective that it is hard to find cases in modern times²³ where a specifically common law doctrine has been applied to contracts,²⁴ and modern Australian texts²⁵ regard the common law doctrine as substantially superseded by the equitable.²⁶ The apparent absence of case-law concerning duress in sales of goods is understandable,²⁷ but it seems to the Commission unlikely that, before 1895, a court having equitable jurisdiction would have refused relief in a proper case, on the ground that the contract was one for the sale of goods, to which only the common law rules could apply. By the same token, it seems unlikely that Parliament in 1895 intended to preserve an obsolescent common law rule, the effect of which²⁸ was doubtful, to the exclusion of its established equitable counterpart.

3.9 Whatever may have been the position in 1895, the question for the Commission now is whether the equitable rules for duress or coercion should be capable of applying to contracts for the sale of goods. In the Commission's view, the only argument for their not applying is the 'finality of transaction' proposition previously referred to in discussion of the misrepresentation rules.²⁹ The equitable doctrine of undue pressure has been extended in this century to cases where the pressure is of an economic nature, often but not exclusively³⁰ by way of a threat not to perform a contract with the party threatened.³¹ Although the doctrine is therefore of potentially wide application, the

²³ "Most authorities dealing with duress [at common law] are ancient" - *Barton v Armstrong* [1973] 2 NSWLR 598, Taylor AJA at 621.

²⁴ See comments in *Barton v Armstrong* [1973] 2 NSWLR 598, Jacobs JA at 606; Taylor AJA at 621. See also the cases referred to by Mason JA at 616-617, not all of which were decided on the common law doctrine. Of those cited, *Cumming v Ince* (1848) 11 QB 112, 116 ER 418, which may have been decided under the common law rule, is the most recent. It seems that *Barton v Armstrong* [1973] 2 NSWLR 598 was decided in the New South Wales Court of Appeal on common law principles (see Jacobs JA at 605-606; Mason JA at 618; Taylor AJA at 620). If so, the case is authority that the effect of duress at common law is to render the contract voidable and not void.

²⁵ See Greig & Davis 942-943; Cheshire & Fifoot 402. See also *Barton v Armstrong* [1973] 2 NSWLR 598, Lord Cross of Chelsea, Lord Kilbrandon and Sir Garfield Barwick at 631. It may be that as a result of this decision in the Privy Council, the common law and equitable doctrines must be regarded as identical and completely fused - Greig & Davis 943. If so, at both common law and in equity, duress renders a transaction voidable and not void.

²⁶ If the effect of duress at common law were to render the contract void, it would differ significantly from the effect in equity, where the transaction is voidable. The existence of such a common law doctrine would be tested in a case where a buyer acquired goods by duress, and then sold to a third party who took without notice of the duress, so that the issue was whether the third party had acquired a voidable title, or no title at all. For the analogous situation where the invalidating cause is mistake (of identity) see para 3.13 n 60 below.

²⁷ Apart from situations in which the twentieth century concept of economic duress has been applied (as to which see para 3.9 below) it is not easy to imagine cases in which pressure, even of the kind recognised in equity, might be applied for the purpose of inducing a simple sale of goods.

²⁸ That is, whether it rendered the contract void or voidable.

²⁹ See paras 2.53 and 2.61 above.

³⁰ See *Universe Tankships of Monrovia v International Transport Workers Federation (The "Universe Sentinel")* [1983] AC 366 (threat to "black" ship). The action there was for recovery of money. See also *Dimskal Shipping Co SA v International Transport Workers Federation (The "Evia Luck")* [1992] AC 152.

³¹ For Australian examples see *Furphy v Nixon* (1925) 27 CLR 161 affirming *Nixon v Furphy* (1925) 25 SR (NSW) 151 (contract concerning land); *White Rose Flour Milling Co Pty Ltd v Australian Wheat Board* (1944) 18 ALJ 324; *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323 (contracts concerning goods).

Commission is tentatively of the view that the benefit of a rule promoting finality of transactions³² is outweighed, even more so than in the case of non-fraudulent misrepresentation, by the injustice that might arise if equitable relief against undue pressure were to be denied to buyers or sellers of goods.

3.10 Unless the equitable rules for duress were as applicable to contracts for the sale of goods as to contracts generally, courts might be driven to relying upon legalistic and insubstantial distinctions. Thus it might be necessary to say that a promise, made after a contract for the sale of goods at a fixed price,³³ to pay an additional sum for the same goods,³⁴ is not itself a 'contract for the sale of goods' within the meaning of the SGA, or to distinguish contracts for the sale of goods from contracts for the carriage of goods³⁵ or contracts for the provision of work and materials leading to the creation of goods.³⁶ In consonance with its general approach to reform of the SGA³⁷ the Commission would seek to avoid this outcome.

6. *Should the equitable doctrine of pressure or duress apply to contracts for the sale of goods?*

3. MISTAKE

3.11 The law deals with the impact of mistake on contracts generally in a variety of ways,³⁸ to the extent that it may be misleading to suggest that there is a single 'doctrine of mistake', at common law or in equity. As an 'invalidating cause',³⁹ mistake has been said to operate at common law "so as to negative or in some cases to nullify consent"⁴⁰ or (possibly) to permit rescission in the limited circumstances referred to by Blackburn J in *Kennedy v The Panama, New Zealand, and Australian Royal Mail Co Ltd*.⁴¹ It is possible to explain many or all of the common law cases on "common

³² Such a rule would tend to reduce the number of cases coming before the courts, and hence aid the administration of justice.

³³ As in *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323.

³⁴ In *White Rose Flour Milling Co Pty Ltd v Australian Wheat Board* (1944) 18 ALJ 324 the demand was for "terminal charges" (being handling and storage charges for which the seller was liable) demand for which, by the seller from the buyer, was not warranted by anything in the agreement for the supply of wheat.

³⁵ See *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833.

³⁶ See for example *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The "Atlantic Baron")* [1979] QB 705. It has been found necessary to draw this distinction in other contexts - see para 2.22 n 82 (requirement of writing) above and 4.29 (equitable lien) below.

³⁷ See para 1.8 above.

³⁸ See *Cheshire & Fifoot* 287; *Greig & Davis* 886. Even as regards contract formation, the effect of mistake may vary - see *Carter & Harland* 382. For the impact of mistake in equity see *Meagher* 365.

³⁹ See s 59(2) of the SGA, which makes specific reference to mistake.

⁴⁰ *Bell v Lever Brothers Ltd* [1932] AC 161, Lord Atkin at 217.

⁴¹ *Kennedy v The Panama, New Zealand, and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, Blackburn J at 587 as quoted at para 2.6 n 11 above.

mistake⁴² as being decided on the construction of the contract,⁴³ or because of an absence of subject matter⁴⁴ or a total failure of consideration,⁴⁵ rather than because consent has been 'nullified'.⁴⁶ On these explanations, 'invalidation' may not be the best description of the impact of this kind of mistake on contracts generally.⁴⁷ Mutual or unilateral mistake may be such that, at common law, there is no 'consent' at all, hence no agreement and no contract.⁴⁸ Even so, content can be given to the language of subsection 59(2) of the SGA concerning mistake,⁴⁹ even if the reference to "common law" is construed to exclude equity.

3.12 Whether mistake is, or was in 1895, an 'invalidating cause' in equity for contracts generally is even more problematic. Equity had long provided relief against mistakes in written contracts generally through its doctrine of rectification.⁵⁰ By 1895 it was also established that the equitable remedy of specific performance⁵¹ might be refused because one party to the contract was mistaken,⁵² but mistake as an invalidating cause⁵³ in equity was less clearly established.⁵⁴ It is possible therefore to read subsection 59(2) of the SGA when passed as referring only to the common law rules, there being then no clearly established equity doctrine of invalidation of contracts generally for mistake, let alone contracts for the sale of goods.

3.13 Whatever may have been the position in 1895, views about the effect of mistake on the validity of contracts have changed in the meanwhile. The case of *Bell v Lever Brothers Ltd*,⁵⁵ though affirming the existence of a common law doctrine under which contracts might be void for

⁴² For the distinctions between "common", "mutual" and "unilateral" mistake see Cheshire & Fifoot 289-290; Carter & Harland 381-382; Meagher 368.

⁴³ Greig & Davis 889. See also Meagher 373, adopting propositions in K O Shatwell, "The Supposed Doctrine of Mistake in Contracts: A Comedy of Errors" (1955) 33 *Can Bar Rev* 164 at 184-185.

⁴⁴ Cheshire & Fifoot 292, 299.

⁴⁵ Carter & Harland 388, 392.

⁴⁶ Mutual and unilateral mistake operate at common law, if at all, to negative consent.

⁴⁷ It should be noted however that the SGA in s 6 deals with a specific instance of mistake, and provides for the contract to be "void". The Commission expects to consider reform relating to s 6 in a later Discussion Paper.

⁴⁸ Some of the leading cases dealing with the effect of mutual and unilateral mistakes concern contracts for the sale of goods: for examples see *Cundy v Lindsay* (1878) 3 App Cas 459 (parties); *Raffles v Wichelhaus* (1864) 2 H & C 906, 159 ER 375 (subject matter); *Smith v Hughes* (1871) LR 6 QB 597 (terms).

⁴⁹ The subsection refers to the "rules of the common law...relating to...the effect of...mistake, or other invalidating cause".

⁵⁰ Rectification of contracts for the sale of goods will be dealt with in para 5.27 below.

⁵¹ Specific performance in contracts for the sale of goods will be dealt with in paras 5.2-5.7 below.

⁵² The principles were discussed in *Tamplin v James* (1880) 15 Ch D 215, where relief was refused. See also *Slee v Warke* (1949) 86 CLR 215; *Fragomeni v Fogliani* (1968) 42 ALJR 263.

⁵³ That is, mistake leading in equity to rescission of the contract.

⁵⁴ Compare Carter & Harland 397-398 and Cheshire & Fifoot 300-301 with Meagher 374-379, and see Greig & Davis 916.

⁵⁵ [1932] AC 161.

common mistake, appears to have narrowed⁵⁶ its area of application almost to the point of extinction.⁵⁷ It appears that unilateral mistake as to identity of a party may still prevent contract formation,⁵⁸ although it has been judicially asserted that this is not (perhaps should not be) so,⁵⁹ and that the true rule is that such mistake only renders contracts voidable in equity.⁶⁰ For Australia, the High Court decision in *McRae v Commonwealth Disposals Commission*⁶¹ has provided material for an argument that a common law 'doctrine' of common mistake does not exist at all,⁶² while the decision in *Taylor v Johnson*,⁶³ with its endorsement of an objective approach to the detection of contract formation, requires a re-appraisal of common law 'doctrines' of mutual and unilateral mistake as negating consent.⁶⁴ With the decline of the common law 'doctrines', equity intervention through grant of the remedy of rescission has risen to prominence. In England, a generalized doctrine of rescission in equity for common mistake has emerged⁶⁵ which, despite reservations possibly expressed in *McRae v Commonwealth Disposals Commission*⁶⁶ appears to have gained the acceptance of the High Court in *Taylor v Johnson*.⁶⁷ That case also recognises a doctrine of

⁵⁶ For comment on the width of language, but narrowness of decision, in *Bell v Lever Brothers Ltd* [1932] AC 161 itself see Cheshire & Fifoot 297.

⁵⁷ See Carter & Harland 395. For a measure of resuscitation of the common law doctrine in England see *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 (Fenton Atkinson LJ); *Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255.

⁵⁸ *Ingram v Little* [1961] 1 QB 31.

⁵⁹ *Lewis v Avery* [1972] 1 QB 198, Lord Denning MR at 207. Both *Ingram v Little* [1961] 1 QB 31 and *Lewis v Avery* [1972] 1 QB 198 are sale of goods cases, as are many of the 'mistaken identity' cases.

⁶⁰ In other areas too Lord Denning MR has shown himself a great friend of a doctrine of mistake in equity which renders contracts voidable not void - *Solle v Butcher* [1950] 1 KB 67. Part of the reason for this preference for the equitable rule is dissatisfaction with the common law rule which, by rendering a contract void and not merely voidable, affords no protection to third parties who may buy goods from a seller who (having acquired them in a 'void contract') has no title at all - *Lewis v Avery* [1972] 1 QB 198, Lord Denning MR at 207.

⁶¹ (1951) 84 CLR 377.

⁶² At least, not in Australia - see Meagher 373. See also Carter & Harland 395.

⁶³ (1983) 151 CLR 422.

⁶⁴ See Cheshire & Fifoot 312: "the High Court's decision in *Taylor v Johnson* (1983) 151 CLR 422 has shown that an equitable principle of [mutual or unilateral] mistake has probably displaced any possible common law doctrine of mistake". See also Greig & Davis 899-900, 925-926 and Carter & Harland 415-417 and compare Meagher 370-371.

⁶⁵ *Solle v Butcher* [1950] 1 KB 671; see also *Grist v Bailey* [1967] Ch 532; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 (Lord Denning MR); *Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 (further ground of decision).

⁶⁶ *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Dixon and Fullagar JJ at 407, but see also 408; see also *Svanosio v McNamara* (1956) 96 CLR 186, Dixon CJ and Fullagar J at 195. The reservations may have related more to the circumstances in which relief might be granted, than to the question of whether relief was available at all - see *Svanosio v McNamara* (1956) 96 CLR 186, Dixon CJ and Fullagar J at 199, McTiernan, Williams and Webb JJ at 208-209 and 210. The High Court in that case held that, even if relief in equity was otherwise available, it was barred in the particular case by the operation of the rule in *Seddon's* case - see para 3.15 below.

⁶⁷ The decision in *Solle v Butcher* [1950] 1 KB 671 was accepted as correct, and extended, in *Taylor v Johnson* (1983) 151 CLR 422 - see Mason ACJ, Murphy and Deane JJ at 429-431.

rescission in equity for unilateral mistake as to the terms of a contract,⁶⁸ at least in circumstances there carefully defined.⁶⁹

3.14 In the Commission's view, developments such as have occurred in the law relating to the effect of mistake on contracts generally point to the danger of a codification which is not made sufficiently flexible to adapt to changes in law which would otherwise affect the codified law. For reasons earlier given when discussing other invalidating causes,⁷⁰ the Commission can see no convincing reason for contracts for the sale of goods to be insulated by the SGA against the operation of equity doctrines of mistake now being refined and applied to other kinds of contract.

3.15 If equitable doctrines of mistake leading to the remedy of rescission do apply to other contracts, and should apply to contracts for the sale of goods, a further issue is the limits on the right to rescind, and in particular the applicability of the rule in *Seddon's* case. In *Solle v Butcher*⁷¹ the rule in *Seddon's* case was not applied in a contract for lease affected by mistake,⁷² and its applicability to contracts generally was questioned,⁷³ but this aspect of the case was given no encouragement by the High Court in *Svanosio v McNamara*.⁷⁴ There is doubt as to the operation of the rule in *Seddon's* case in contracts for the sale of goods induced by innocent misrepresentation, and in some Australian jurisdictions this doubt (and the applicability of the rule) has been removed by statute.⁷⁵ For reasons given in discussing the applicability of the rule in *Seddon's* case to contracts induced by innocent misrepresentation,⁷⁶ the Commission is tentatively of the view that it should not apply in contracts for the sale of goods induced by mistake, and likewise that the potency rule and merger rule⁷⁷ should not apply.

⁶⁸ Relief in equity for mutual mistake may be confined to refusal of specific performance in particular circumstances - see para 3.12 above.

⁶⁹ *Taylor v Johnson* (1983) 151 CLR 422, Mason ACJ, Murphy and Deane JJ at 432.

⁷⁰ See paras 2.50-2.55 (misrepresentation) and 3.9-3.10 (duress) above.

⁷¹ [1950] 1 KB 671.

⁷² Of the two judges (Bucknill and Denning LJ) who formed the majority on this point, only Denning LJ refers directly to the rule in *Seddon's* case. That rule had previously been applied in England to an executed lease induced by an innocent misrepresentation - *Angel v Jay* [1911] 1 KB 666.

⁷³ *Solle v Butcher* [1950] 1 KB 671, Denning LJ at 695-696, but see Jenkins LJ (dissenting) at 703. See also *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, Denning LJ at 461 denying (by way of obiter dictum) the applicability of the rule in *Seddon's* case in the context of a contract for the sale of goods where the buyer seeks rescission in equity for mistake, and citing *Leaf v International Galleries* [1950] 2 KB 86.

⁷⁴ *Svanosio v McNamara* (1956) 96 CLR 186, Dixon CJ and Fullagar J at 198-199, McTiernan, Williams and Webb JJ at 208-209 and 210.

⁷⁵ See para 2.63 n 181 above.

⁷⁶ See paras 2.59-2.63 above.

⁷⁷ There is little authority on the applicability of these rules in the context of mistake in contracts for the sale of goods, but see *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, Denning LJ at 461 for the proposition (by way of obiter dictum) that rescission in equity for mistake was not available after the goods had been ascertained. The merger rule may be irrelevant (or be built into the doctrine of mistake itself) in

7. *Should equitable doctrines of mistake as an invalidating cause apply to contracts for the sale of goods?*
8. *Should the rule in Seddon's case apply to contracts for the sale of goods voidable in equity for mistake?*
9. *Should the potency rule (and if applicable the merger rule) apply to contracts for the sale of goods voidable in equity for mistake?*

4. FRAUD

3.16 By the time of the passage of the SGA in 1895, the common law had developed two doctrines to deal with fraud in the course of contracting. First, an action for damages⁷⁸ lay where a contract had been induced by a false statement made without an honest belief in its truth.⁷⁹ Second, fraud provided a defence to an action on the contract, and permitted the defrauded party to recover money or property, provided that restitution could be made of property, money or other benefits received. Only the second doctrine goes to the validity of the contract,⁸⁰ and is conveniently referred to as a doctrine of rescission for fraud.⁸¹ As applied to contracts for the sale of goods, rescission for fraud permitted a defrauded buyer to refuse to accept goods,⁸² or to return goods already received,⁸³ and in either case to recover money paid.⁸⁴ A defrauded seller could, by disaffirming the contract, regain title to goods, provided the price was returned,⁸⁵ and provided also that a third party had not, before rescission, acquired an interest⁸⁶ in the goods in good faith and for value from the fraudulent buyer.⁸⁷

that there will be an operative mistake only where one or both parties make unexpressed assumptions, so that the matter about which there is a mistake will not also be the subject of an express term of the contract.

⁷⁸ Sometimes called an action for damages for deceit.

⁷⁹ The classic statement appears in *Derry v Peek* (1889) 14 App Cas 337, Lord Herschell at 374: "fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false".

⁸⁰ The damages action did not turn on the validity of the contract, and was available whether or not the contract was continued - see *Sibley v Grosvenor* (1916) 21 CLR 469, Griffith CJ at 474-475 for an early statement in the High Court of the position.

⁸¹ Rescission was the result only if both parties were returned to their pre-contractual positions, but at common law (unlike in equity) the assistance of the court was not available to achieve substantial restitution as part of the remedial process, where that did not come about through the acts of the parties themselves.

⁸² An early example is *Howard v Castle* (1796) 6 TR 642, 101 ER 748 (a case concerning a leasehold).

⁸³ To achieve restoration, it was necessary that the goods be returned in substantially the same condition as when received - *Clarke v Dickson* (1858) E1 B1 & E1 148, 120 ER 463 (a case concerning shares).

⁸⁴ For an early example see *Schneider v Heath* (1813) 3 Camp 506, 170 ER 1462. See also *Whurr v Devenish* (1904) 20 TLR 385.

⁸⁵ *Clough v London and North Western Railway Co* (1871) LR 7 Ex 26, the Court at 37 (referring to the probable position at law, as well as in equity).

⁸⁶ The interest could be as buyer - *White v Garden* (1851) 10 CB 919, 138 ER 364; *Moyce v Newington* (1878) 4 QBD 32; *Lindsay v Cundy* (1876) 1 QBD 348 (reversed, on the basis that there was no contract, in *Cundy v*

3.17 Equity has always had jurisdiction in cases of fraud.⁸⁸ Where fraud, of a nature recognized at common law,⁸⁹ occurred in a contract for the sale of goods, equity supplemented the common law doctrine of rescission so as to achieve restoration of both parties, when the common law actions to recover money or goods were inadequate to the task.⁹⁰ It does not seem likely that subsection 59(2) of the SGA was intended to, or did, remove this supplemental jurisdiction. No case decided after the passing of the *Sale of Goods Act 1893* (UK) even considers the possibility. The Commission at present sees no reason why the equitable rules should not apply where a contract for the sale of goods is rescinded for fraud. There may indeed be little need to affirm their application through legislation.

10. *Should equitable principles apply to rescission of contracts for the sale of goods for fraud?*

5. OTHER INVALIDATING CAUSES

3.18 Subsection 59(2) of the SGA continues the applicability of "the rules of the common law" to any "invalidating cause" other than those specifically noted.⁹¹ It is possible to read the subsection as referring to common law rules to the exclusion of equity. Apart from illegality⁹² (which may not properly be described as an "invalidating cause") there are no other obvious common law doctrines to which the phrase might refer, but it could have been inserted as a precautionary measure. If however the subsection is read as referring also to the rules of equity, there are at least two doctrines not specifically mentioned: unconscionable conduct⁹³ and undue influence.

Lindsay (1878) 3 App Cas 459), or as pledgee - *Babcock v Lawson* (1880) 5 QBD 284 affirming (1879) 4 QBD 394 (decided on analogy to sale of goods), or as claiming an equitable interest - *Attenborough v London and St Katharine's Dock Co* (1878) LR 3 CP 450.

⁸⁷ This proviso is given statutory effect, where the third party is a buyer, by s 23 of the SGA. The Commission expects to consider this and other exceptions to the rule *nemo dat quod non habet* (no-one may give that [a better title] which they do not have) in a later Discussion Paper.

⁸⁸ Sheridan 4-5. The author quotes a couplet ascribed by Coke to Sir Thomas More:

"Three things are to be helpt in Conscience;

"Fraud, accident, and things of Confidence".

⁸⁹ Reference is made below to a wider concept of fraud in equity.

⁹⁰ For recognition of the role of equity see *Clough v London and North Western Railway Co* (1871) LR 7 Ex 26, the Court at 32, 33 and 37. The Court in that case was able to consider whether the defendant, whose defence rested on the assertion that a contract for sale of goods had been rescinded for fraud, could succeed on any ground, at common law or in equity.

⁹¹ Those noted are fraud, misrepresentation, duress, or coercion, and mistake.

⁹² A contract for the sale of goods may be void and illegal by statute - see for example prohibition of sales of human blood or tissue by the *Human Tissue and Transplant Act 1982* (WA) s 29(1). The *Human Reproductive Technology Act 1991* (WA) s 7(1)(j) makes it an offence for any person to cause or permit human gametes, eggs in the process of fertilization or embryos to be supplied for valuable consideration.

⁹³ In this context "unconscionable conduct" refers to a specific equitable doctrine, as discussed for example in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. In a broader sense, "unconscionability" can

Unconscionable conduct as a distinct invalidating cause can be traced back to the equitable jurisdiction to grant relief against 'catching bargains',⁹⁴ but may not have been known under the name of 'unconscionable conduct' at the time of the passage of the SGA.⁹⁵ Recognition of undue influence as an invalidating cause in equity long antedates the SGA. If subsection 59(2) is to include both doctrines, the phrase "other invalidating cause" could be read as referring at least to undue influence, and also to any other equitable doctrine of invalidation. Alternatively, the word "fraud" could be read in its wide equitable sense,⁹⁶ and hence as referring to all forms of unconscionability sufficient to invalidate contracts. On this reading, "fraud" would include at least duress and misrepresentation but fraud in equity being notoriously difficult to define,⁹⁷ it might have been thought proper to have an inclusive phrase ("other invalidating cause") as well as instancing these particular doctrines.

3.19 Both unconscionable conduct and undue influence could clearly be used to procure a contract for the sale of goods, and it seems unlikely that subsection 59(2) of the SGA was framed to exclude either doctrine.⁹⁸ At all events, the question for reform is whether these equitable doctrines, and other possible developments in equity yet unknown,⁹⁹ should by statute be incapable of application to contracts for the sale of goods. The Commission can at present see no reason for their exclusion, except in pursuit of the objective of finality of transactions.¹⁰⁰ Against this should be

be seen as a general concept, justifying equitable intervention in a variety of specific circumstances - *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J at 461.

⁹⁴ Meagher ch 16.

⁹⁵ Part of the difficulty in finding an appropriate name lies in the variety of circumstances which activate the doctrine - see *Blomley v Ryan* (1956) 99 CLR 362, Fullagar J at 405: "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified". Kitto J at 419 eschews naming the doctrine ("This is a well-known head of equity") and McTiernan J at 385 refers to (one species of) "fraud, according to the criteria of equity".

⁹⁶ For the 'infinite variety' of fraud (in equity) see Sheridan 1-4. See also *Blomley v Ryan* (1956) 99 CLR 362, McTiernan J at 385.

⁹⁷ Sheridan 1-4. The author refers to propositions that 'fraud' should never be defined, lest the jurisdiction be unduly cramped, or potential perpetrators of fraud be given guide as to what they can do, as well as what they cannot.

⁹⁸ An argument for a reading of s 59(2) which excludes these doctrines is that it would have been easy enough specifically to include them. A specific inclusion of "undue influence" for instance, would also have made it clear that the equity rules in general were applicable, as undue influence as an invalidating cause in equity has no common law counterpart. It would have been less easy to refer specifically to 'unconscionable conduct' -but see perhaps the phrase used in the *Money Lenders Act 1912* (WA) s 4(1) as derived from the *Moneylenders Act 1900* (UK): "transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief". The *Money Lenders Act 1912* (WA) has now been repealed - *Acts Amendment and Repeal (Credit) Act 1984* (WA) s 15.

⁹⁹ Or known, but known in future times under other names.

¹⁰⁰ See paras 2.53 and 2.61 above.

weighed the moral turpitude of employing unconscionable conduct or undue influence¹⁰¹ to procure contracts for the sale of goods, and the loss to individuals from whom those contracts are procured.

11. Should equitable doctrines leading to rescission, not corresponding to doctrines specifically mentioned in subsection 59(2) of the SGA, apply to contracts for the sale of goods?

¹⁰¹ Not all conduct described as "unconscionable" in equity involves moral turpitude as commonly understood. Sometimes the conduct consists of attempting to retain a benefit innocently acquired. Likewise where the parties are in certain recognised relationships, use of undue influence will be presumed, and there may be cases where the presumption is not rebutted (the presumption can be rebutted for example by showing that the party said to be influenced received independent advice) yet the defendant can be acquitted of any reprehensible conduct - *Cheese v Thomas* [1994] 1 WLR 129.

Chapter 4

EQUITABLE INTERESTS

1. INTRODUCTION

(a) The issues

4.1 A complex of issues derives from the question of whether any equitable interests arise in the course of a contract for the sale of goods in favour either of the buyer or of the seller. Such interests undoubtedly arise in the course of contracts for the sale of land, and of property other than goods. Were they to arise in contracts for the sale of goods, they would have particular significance in the insolvency of one of the parties to the contract, and the Commission has directed its attention particularly to that context.

4.2 If subsection 59(2) of the SGA¹ were construed as excluding the application of all equitable rules whatsoever from contracts for the sale of goods,² then no equitable interest could be generated in the course of such a contract. If however the subsection were construed as preserving the operation of the general law rules, including the rules of equity, that preservation would operate for any particular rule, common law or equitable, only so far as it was not inconsistent with the express rules of the SGA.³ That Act contains detailed provisions governing the passing of property⁴ in goods, and the rights and remedies of buyer and seller, including rights of an unpaid seller against the goods⁵ which have particular relevance in the insolvency of the buyer. By emphasising the function of the sale of goods legislation as a code, the conclusion could be reached that rules giving rise to equitable interests in property, or rights in equity in favour of an unpaid seller, or in favour of a buyer,⁶ are inconsistent with the express provisions of the Act.

¹ This subsection is quoted in para 1.12 above and discussed in paras 1.13-1.18 and 2.5-2.11 above.

² It may be doubted whether so comprehensive an exclusion was intended.

³ Rules are preserved by s 59(2) only "save in so far as they are inconsistent with the express provisions of this Act".

⁴ That is, the passing of the common law or legal ownership of the goods.

⁵ Of particular importance in this Discussion Paper is the unpaid seller's "lien on the goods or right to retain them" - para (a) of s 39(1) - and rights in connection therewith such as "the right of stopping the goods *in transitu*" - para (b). These too can fairly be described as common law or legal rights, as they turn on the retention of possession, itself a common law concept.

⁶ The SGA gives no rights against the goods to a buyer who pays the whole or part of the price in advance, where property has not passed and the seller refuses to deliver. Such a buyer can always maintain an action for the price under s 50, but there is some doubt as to whether the remedy of specific performance of the contract could be granted under s 51. The remedy of specific performance (equitable in origin) is discussed in paras 5.2-5.7 below

4.3 The existence and extent of equitable interests associated with contracts for the sale of goods are matters of considerable importance to the community generally, and to the commercial community in particular. The Commission is tentatively of the view that these matters should not be left to turn on interpretation of the phrase "the rules of the common law" in subsection 59(2) of the SGA, or on the significance of that Act being a "code", or on whether rules which allow the creation of equitable interests in property are "inconsistent" with rules governing the passing of property and the retention of possession. In the discussion which follows, the Commission has attempted, particularly in the context of insolvency, to identify situations where the existence of an equitable interest in goods would affect the position of either buyer or seller, so as to raise the question of whether such an interest should be permitted to arise. In the insolvency context, the claims of buyer or seller to interests in the goods come into conflict with the claims of other parties, in particular unsecured creditors as represented by the liquidator of a corporation or trustee of a bankrupt, or a secured creditor whose claims are asserted through a receiver. This context requires some explanation.

(b) The insolvency context

4.4 On an insolvency, the assets of the insolvent, including goods, become available as a source of payment of the unsecured creditors of the insolvent. If, prior to insolvency, the insolvent has parted with goods by an unimpeachable transaction,⁷ or allowed the creation of an equitable interest, or acquired goods subject to an equitable interest, to that extent the goods would not be part of the assets of the insolvent available to the unsecured creditors, but would be property of the other party to the transaction. The claim of that other party to the goods or interest, and the claim of the unsecured creditors, are thus in conflict. A similar conflict arises where a debtor has given a general security, such as a floating charge, over all of its assets, or all of its assets of a specified class or classes, including goods.⁸ To the extent that a buyer or seller has an equitable interest in goods owned by the debtor, that interest may have priority⁹ over the claim of the secured creditor under the floating charge.¹⁰ Questions of priority of this nature raise difficult issues not directly relevant to the issues to be discussed. For simplicity, the Commission will concentrate on the position in insolvency.

⁷ That is, a transaction properly entered into, which cannot be challenged on any ground of invalidity either general (such as misrepresentation) or peculiar to insolvency, for example that it gives an unfair preference.

⁸ The charge may, for example, be given over all the debtor's stock-in-trade and book debts.

⁹ For example, the debtor may have acquired the goods as already subject to the equitable interest, or the interest may have arisen in the ordinary course of the debtor's business.

¹⁰ That claim is often asserted through the appointment of a receiver.

4.5 There is no doubt that equitable interests can exist in goods, an obvious example being where goods are held on trust. Equitable mortgages¹¹ or equitable charges¹² can be created over goods. Even a transaction in the form of a contract of sale, if intended to operate by way of mortgage, would result in the creation of an equitable interest¹³ in the mortgagor. Further, it is possible for parties to a contract for the sale of goods to agree that an equitable interest shall arise.¹⁴ The question is whether, and if so to what extent, equitable interests would arise from the contract, by operation of law and without express agreement.

(c) Sales of land

4.6 The extent of the question may partly be gauged by taking as a model contracts for the sale of land. In such contracts, the following paradigm situations might arise.

1. A buyer pays the whole price in advance, but the transfer of legal title is deferred.
2. A buyer pays part of the price in advance, but the transfer of legal title is deferred.
3. A buyer pays the whole or part of the price in advance, but the transfer of legal title is subject to some condition to be fulfilled.
4. A seller transfers legal title, but has not been paid any part of the price, or has been paid a part only.

Situation 1 might arise if settlement is deferred to a specified date. After payment in full, the seller would have the legal estate as bare trustee for the buyer, who would be the owner in equity. The equitable interest of the buyer would not form part of the property of the seller on the insolvency of the latter. But for that equitable interest, or other possibility of the buyer getting title,¹⁵ in the insolvency of the seller the unsecured creditors of the seller would have the land and the benefit of

¹¹ *Holroyd v Marshall* (1862) 10 HLC 191, 11 ER 999.

¹² The floating charge, as referred to in the preceding paragraph, gives the secured creditor an equitable interest in the goods by way of security, at least on crystallisation of the charge.

¹³ That is, the equity of redemption. The SGA at s 59(4) states that the provisions of the Act "do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security".

¹⁴ See *In re Wait* [1927] 1 Ch 606, Atkin LJ at 636.

¹⁵ The buyer might get the legal title through the remedy of specific performance. Availability of this remedy in contracts for the sale of goods is discussed in paras 5.2-5.7 below.

the money paid for it, and the buyer would have only a claim for damages for breach of contract, or for return of the money, in either case being only an unsecured creditor.

Situation 2 could arise from a conditional sale contract, where the price is payable by instalments but legal title is not to pass until the price has been paid in full. It could also arise in an ordinary sale pending settlement, where the buyer has paid a deposit, with the balance of the price payable on settlement. The unsecured creditors of the seller could not keep both land and sums paid, leaving the buyer as an unsecured creditor: either the buyer would obtain specific performance or, in support of a claim for sums paid, would have an equitable purchaser's lien over the land to secure repayment.

In situation 3, specific performance is not immediately available, but the buyer would have an equitable interest in the land commensurate with the relief available to the buyer in equity. Depending on the condition, the buyer may not have equitable title to the land, but will at least have an equitable lien to secure return of the money paid. The difference between situations 1 and 2 and situation 3 is that in the latter the buyer will not be entitled to the legal interest on payment, but only on fulfilment of the condition.

Situation 4 relates to a seller, rather than a buyer. In the circumstances set out, a seller of land would have an unpaid vendor's equitable lien over the land to secure payment of the price or balance unpaid, which would make the seller a secured rather than an unsecured creditor in the insolvency of the buyer.

(d) Sales of goods

4.7 The situations set out in the preceding paragraph can occur in contracts for the sale of goods, but some further factors, which in practical terms distinguish contracts for the sale of land from contracts for the sale of goods, need to be taken into account for a proper picture to emerge. First, even in a simple contract for the sale of land, there is often a gap in time between the making of the contract and the time at which legal title is passed to the buyer. Thus situation 2 commonly arises, as where a purchaser pays a deposit at the time of contract, with the balance being payable on settlement. Situation 3 is not unusual, as where a contract is subject to finance, or approval of some nature, or some other special condition. Situation 4, on the other hand, would be the exception rather than the rule. With specific goods, by way of contrast, there is seldom a gap of time between

the making of the contract and the passing of property,¹⁶ in which an equitable interest might exist in favour of the buyer. Further, goods are frequently sold on credit.

4.8 A second factor of importance is that agreements to sell future goods¹⁷ are more common than agreements to sell 'future land'. An assessment of whether equitable interests should arise in contracts for the sale of goods must have regard to the position where future goods are sold or agreed to be sold. Subsection 5(1) of the SGA recognises that "future goods" may be the subject of a contract of sale, and subsection (3) provides that "[W]here by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods".

4.9 A third factor, perhaps productive of the most difficulty, is that contracts for the sale of goods can be for unascertained goods.¹⁸ Although the passing of property in specific or ascertained goods is governed by the intention of the parties¹⁹ having regard to "the terms of the contract, the conduct of the parties, and the circumstances of the case",²⁰ as an overriding rule property cannot pass under a contract for unascertained goods "unless and until the goods are ascertained".²¹ It is axiomatic that an equitable interest cannot arise through an assignment unless the property assigned is sufficiently identified.²² Nevertheless two kinds of situation might arise in contracts for unascertained goods, where an equitable interest could arise. First, under a contract for unascertained goods, the goods might become ascertained, but without property then passing because of the contrary intention of the parties. If the price or part of the price had been paid, a situation would arise essentially similar to situation for situation 2 above. Second, and of more importance, a contract may provide for the sale of a specified (but unascertained) quantity of goods

¹⁶ See s 18 Rule 1 of the SGA.

¹⁷ "Future goods" are defined in s 60(1) of the SGA as meaning "goods to be manufactured or acquired by the seller after the making of the contract for sale".

¹⁸ There is no definition of 'ascertained' or 'unascertained' goods in the SGA, although both words are used in that Act - see ss 16, 17(1), 18 Rule 5(1) and 51. 'Ascertained' goods means goods identified and agreed upon, or appropriated to the contract, but after the time of contracting. If identified and agreed upon before the time of contracting, the goods are "specific" - see s 60(1). It seems there can be "specific" but "future" goods, as where goods identified and agreed upon at the time of contract are to be acquired by the seller after the making of the contract.

¹⁹ See s 17(1) of the SGA.

²⁰ See s 17(2) of the SGA. Of this provision, Channell J in *Varley v Whipp* [1900] 1 QB 513 at 517 said: "It is impossible to imagine a clause more vague than this".

²¹ See s 16 of the SGA.

²² "I take it to be perfectly clear that in order to create an equitable assignment, the obligation must be to deliver a particular chattel" - *Hoare v Dresser* (1859) 7 HLC 290, Lord Wensleydale at 324, 11 ER 116 at 130. See also *Tailby v The Official Receiver* (1888) 13 App Cas 523, which shows that it may suffice to identify a class of assets, including future assets which become identified when they come into existence - *Tailby v The Official Receiver* (1888) 13 App Cas 523, particularly Lord Macnaghten at 554. The particular problem that arises where there is a sale of a specified quantity to be drawn from a specified bulk is discussed below under the heading "Specified quantity, specified bulk" paras 4.35-4.40.

from a specified bulk,²³ or from a specified future bulk later acquired,²⁴ or for the sale of a specified quantity where the seller appropriates part of an existing bulk,²⁵ or later acquires and appropriates a future bulk,²⁶ for fulfilment of that contract and perhaps other contracts. In all these cases, although particular goods cannot be identified with the contract, the bulk from which the buyer will be supplied can be so identified, and it is not legally inconceivable that an equitable lien could arise in respect of the bulk, where the seller has paid all or part of the price in advance.²⁷

(e) Situations for consideration

4.10 Having regard to the further factors of which account should be taken, in contracts for the sale of goods, the following situations could occur in which it would be important to determine whether an equitable interest could arise.

- * A buyer pays the whole of the price in advance for specific goods, then owned by the seller, but the passing of property is deferred. ["Whole price - present specific goods"]
- * A buyer pays the whole of the price in advance for future specific goods. ["Whole price - future specific goods"]
- * A buyer pays part of the price in advance for specific goods then owned by the seller, or future specific goods, but the passing of property is deferred. ["Part price - specific goods"]
- * A buyer pays the whole or part of the price in advance for specific goods (being then owned by the seller, or being future goods), or for unascertained goods which are later ascertained, but the contract is conditional,²⁸ or the goods are not in a

²³ An example is a sale of 500 tonnes from a specified cargo of 1000 tonnes belonging to the seller.

²⁴ An example is a sale of 500 tonnes from a specified cargo of 1000 tonnes to be acquired by the seller.

²⁵ An example is a sale of 500 tonnes, where the seller has 2000 tonnes and later appropriates 1000 tonnes from which to satisfy that sale, or perhaps that sale and another sale to a different buyer of 500 tonnes.

²⁶ An example is a sale of 500 tonnes, where the seller later acquires 2000 tonnes and appropriates 1000 tonnes from which to satisfy that sale, or perhaps that sale and another sale to a different buyer of 500 tonnes.

²⁷ Again the position is similar to situations 1 or 2 above, but the crucial difference is that while the bulk from which the goods will be supplied is identified, the particular goods are not.

²⁸ S 18 Rule 1, under which property can pass at the time of contract, requires that there be "an *unconditional* contract for the sale of specific goods" (emphasis added).

deliverable state,²⁹ or the seller is bound to do something with reference to the goods for the purpose of ascertaining the price.³⁰ ["Sales subject to condition"]

- * A buyer pays the whole or part of the price in advance for a specified quantity of goods from a specified bulk then owned by the seller, or later to be acquired by the seller. ["Specified quantity, specified bulk"]
- * A buyer pays the whole or part of the price in advance for a specified quantity of goods, and a bulk from which the goods could be supplied is then owned or is afterwards acquired by the seller. ["Specified quantity, unspecified bulk"]
- * Property passes under a contract for the sale of goods, but the seller has not been paid. ["Unpaid seller"]

2. SITUATIONS FOR CONSIDERATION

(a) Whole price, present specific goods

(A buyer pays the whole of the price in advance for specific goods, then owned by the seller, but the passing of property is deferred.)

4.11 A situation of this nature would not frequently arise. Unless a different intention appeared, property in specific goods would pass to the buyer at the time of contract, pursuant to section 18 Rule 1 of the SGA. Hence the deferral of the passing of property must arise from the intention of the parties,³¹ either express or as ascertained from "the terms of the contract, the conduct of the parties, and the circumstances of the case".³²

4.12 No case decides that in these circumstances an equitable interest would or would not arise in favour of a buyer under a contract for the sale of goods. Arguments to deny the existence of such an interest would be built on general propositions as to the exclusion of the rules of equity from contracts for the sale of goods, the nature of the SGA as a code, observations in cases such as *In re*

²⁹ S 18 Rule 1 also requires that the goods be "in a deliverable state". If the goods are not in a deliverable state, Rule 2 becomes relevant. Under that Rule, where "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".

³⁰ In such a case, s 18 Rule 3 applies, so that "property does not pass until such act or thing be done, and the buyer has notice thereof".

³¹ See s 17(1) of the SGA.

³² See s 17(2) of the SGA.

*Wait*³³ and *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd (The "Aliakmon")*,³⁴ and the need for simplicity and certainty in contracts for the sale of goods. Such arguments could be supported by the observation that, by agreeing to defer the passing of property, the buyer knowingly took the risk of the seller's insolvency. Paradoxically, the element of knowing assumption of risk may be greater where the whole of the price is paid and the potential loss correspondingly greater, than it is where a part only of the price is paid in advance.³⁵

4.13 Against some of these arguments may be placed the apparent injustice that might arise if the buyer were regarded as having no interest in the goods unless and until legal property passed. An extreme example may illustrate the potential injustice. A buyer might contract for specific goods and pay the price in full, but agree at the seller's request that property will pass only on delivery. Unknown to the buyer, the seller is then insolvent.³⁶ Before the goods are delivered, the buyer learns that the seller is insolvent.³⁷ Within six months after delivery,³⁸ the seller, being a corporation, is placed in liquidation. The liquidator claims that the passing of property on delivery was an insolvent transaction³⁹ (being an unfair preference)⁴⁰ and hence voidable. If the liquidator is right, the buyer may be required to return the goods or their value to the corporation,⁴¹ which can also retain the price paid, although the buyer would have a claim (as an unsecured creditor) against the corporation either for damages for non-delivery⁴² or possibly for recovery of the price as money received by the seller for a consideration that had totally failed. If legal property had passed at the time of payment, the buyer would have received no preference, not being then a creditor of the seller, and if only an equitable interest then arose so that the buyer could have been regarded as owner of the goods in equity, the subsequent delivery would not have constituted a preference,

³³ [1927] 1 Ch 606. This important case is discussed in full in paras 4.36-4.37 below. The judgment of Atkin LJ contains trenchant comment to the effect that equitable interests have no place in contracts for the sale of goods - *In re Wait* [1927] 1 Ch 606 at 635-636 as quoted in para 1.15 above.

³⁴ *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd (The "Aliakmon")* [1986] 2 WLR 902, Lord Brandon of Oakbrook at 910-911 as quoted in para 1.15 above.

³⁵ A buyer who pays the price in full may be more aware of the risk of the seller's insolvency than a buyer who pays a deposit. In this respect, compare this situation with situation 3 described above and discussed below under the heading "Part price, specific goods" paras 4.19-4.23.

³⁶ For definitions of "solvent" and "insolvent" see s 95A of the CL.

³⁷ From that point the buyer would no longer have the protection of s 588FG(2) of the CL.

³⁸ Delivery would then have been within the relevant time scale - see s 588FE(2) of the CL. Since delivery passes property, it would seem to be a "transaction" within para (a) of that term as defined in s 9 of the CL.

³⁹ See s 588FC of the CL.

⁴⁰ See s 588FA of the CL.

⁴¹ See paras (b) and (c) of s 588FF(1) of the CL.

⁴² See s 50 of the SGA.

because (on analogy with a contract for the sale of land) the corporation would then have been a bare trustee of the goods for the buyer.⁴³

4.14 It may be that a complete answer to arguments based on apparent injustice is that, whether or not the law clearly is that no equitable interests arise in contracts for the sale of goods, the buyer took a risk, and lost. The buyer could have safeguarded its position, either by insisting that property pass at latest on payment of the price, or by requiring the seller to hold the money paid on trust either to be applied in payment of the price, or failing that to be returned to the buyer.⁴⁴ It may also be, however, that some buyers are unaware of, or do not fully appreciate, the risk presented by the seller's potential insolvency, when paying for goods in advance.

12. *Should an equitable property interest arise, in favour of a buyer of present specific goods, where the buyer has paid the whole of the price in advance, but property has not passed to the buyer?*

(b) Whole price, future specific goods

(A buyer pays the whole of the price in advance for future specific goods.)

4.15 This situation might arise in at least two rather different circumstances. First, it may be agreed between buyer and seller that the seller, in its own right and not as agent for the buyer, is to acquire specific goods for resale to the buyer. If for instance the seller requires finance for the initial acquisition, this could be provided through the buyer paying the price in full in advance. Neither the buyer nor the seller will have any interest in the goods, legal or equitable, until the seller acquires them.⁴⁵ Second, it may be that the seller, unknown to the buyer, does not have property in the

⁴³ In contracts for the sale of land, it can safely be said that "at least when the purchaser has paid the purchase money the vendor becomes a constructive trustee of the property sold" - *Chang v The Registrar of Titles* (1976) 137 CLR 177, Mason J at 185 and see Jacobs J at 189-190. See also *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 523 referring to *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656 at 660, where McTiernan and Taylor JJ said: "where the purchase money specified in the contract has been paid the purchaser becomes entitled in equity to the land and the vendor thereafter becomes a bare trustee".

⁴⁴ The latter strategy was used, voluntarily by the seller (a mail order firm) to the advantage of consumer buyers of future unascertained goods, in *Re Kayford Ltd* [1975] 1 WLR 279. In that case Megarry J at 282 said:

"In cases concerning the public, it seems to me that where money in advance is being paid to a company in return for the future supply of goods or services, it is an entirely proper and honourable thing for a company to do what this company did, upon skilled advice, namely, to start to pay the money into a trust account as soon as there begin to be doubts as to the company's ability to fulfil its obligations to deliver the goods or provide the services. I wish that, sitting in this court, I had heard of this occurring more frequently; and I can only hope that I shall hear more of it in the future".

For discussion of whether an equitable interest can arise from the sale of future unascertained goods, see under the heading "Specified quantity, unspecified bulk" para 4.41 below.

⁴⁵ "A man cannot in equity, any more than at law, assign what has no existence" - *Collyer v Isaacs* (1881) 19 Ch D 342, Sir George Jessel MR at 351. See also *Akron Tyre Co Ply Ltd v Kittson* (1951) 82 CLR 447, Latham CJ at 484; *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, Windeyer J at 24-25.

goods, but intends⁴⁶ to acquire property either through a subsequent transaction, or by completion of an existing contract such as a conditional sale or hire-purchase agreement, by means of which the seller is in the course of acquiring legal title to the goods.⁴⁷ In such a case the buyer would pay the whole price, in the belief that property had already passed⁴⁸ or would then pass from seller to buyer, but could not thereby acquire legal title.

4.16 In the first of the two circumstances mentioned in paragraph 4.15 above, property may not pass automatically to the buyer as soon as the seller acquires property in the goods. The common law governing the passing of property⁴⁹ requires some 'new act' of conveyance at a time when the seller has the ability to convey.⁵⁰ Possibly where (as in the circumstances now under discussion) goods are specific⁵¹ as well as future, subsection 17(1) of the SGA can be interpreted as overriding the common law rule, so as to make property pass when it is intended to pass. In ascertaining that intention, regard must be had to "the terms of the contract, the conduct of the parties, and the circumstances of the case".⁵² Even if the terms of the contract did not expressly so provide, it could readily be inferred, especially as the buyer had paid in advance, that property was to pass to the buyer as soon as acquired by the seller. This interpretation requires reading the phrase "contract for the sale of specific or ascertained goods" in subsection 17(1) as including specific but future goods. That is possible, although it is clear that the phrase "specific goods, in a deliverable state", which appears in the immediately succeeding section 18 Rule 1, cannot refer to specific future goods.⁵³

4.17 If subsection 17(1) of the SGA can be interpreted to allow the intention of the parties to override the common law rule requiring a 'new act' of conveyance in order to pass property in future goods from buyer to seller once they are acquired, there will in many cases⁵⁴ be no occasion to

⁴⁶ The seller, who would then be acting fraudulently, may not so intend. When the true position is discovered, the buyer may complete the seller's transaction in order to obtain title.

⁴⁷ Whether the seller has any equitable interest arising from an existing conditional sale is an issue referred to below under the heading "Part price, specific goods" paras 4.19-4.23.

⁴⁸ The buyer may believe that property had passed at the time of contract pursuant to s 18 Rule 1 of the SGA.

⁴⁹ This particular point is not specifically dealt with in the SGA. The Act does have a rule for unascertained future goods sold by description - see s 18 Rule 5(1) - but not for specific future goods.

⁵⁰ *Akron Tyre Co Ply Ltd v Kittson* (1951) 82 CLR 447, Latham CJ at 484; *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, Windeyer J at 25 (contrasting "future property" with "potential property", that is, property which will come from property presently owned, as wool from sheep or crops from land).

⁵¹ Goods would be both specific and future, for example, where a particular chattel is identified and agreed upon, but the seller does not then have property.

⁵² See s 17(2) of the SGA.

⁵³ S 18 Rule 1 provides for property to pass when the contract is made - a legal impossibility with specific future goods, as the seller then has no property in the goods.

⁵⁴ Even if s 17(1) is capable of overriding the common law rule, the parties may manifest the intention that property is not to pass as soon as the seller acquires property, but at some time thereafter. For practical purposes, this situation is identical to the situation earlier discussed under the heading "Whole price, present specific goods" paras 4.11- 4.14 above.

consider whether the buyer has an equitable interest at any stage. This is because the buyer will get legal property as soon as the seller gets legal property. If however subsection 17(1) does not override the common law rule, there will be a gap between the points in time when the seller acquires property in the goods, and when the seller does a 'new act' so as to pass property to the buyer. It may then be important to decide whether, in that interim period, the buyer has an equitable interest in the goods. In the absence of such an interest the goods, in the seller's hands, would not be held on trust or be subject to some equitable interest, and it would seem that any 'new act' would constitute a new disposal of the goods, and not merely a disposal in completion of a pre-existing equitable property right in the buyer. Were the seller (being a company) to become insolvent in the interim period,⁵⁵ or even after the 'new act' was done,⁵⁶ a question would arise of whether the liquidator could retain⁵⁷ the goods and any money paid in advance,⁵⁸ leaving the buyer as an unsecured creditor with a claim either for return of money paid⁵⁹ or damages.⁶⁰ If however the buyer had an equitable interest arising as from the time the seller acquired property in the goods, in the seller's hands the goods would always have been subject to the property interests of another.⁶¹ The liquidator, entitled to deal only with property of the seller, could not act so as to ignore even equitable property rights of the buyer.

4.18 The second of the two circumstances mentioned in paragraph 4.15 above envisages a situation where a buyer is unaware of the seller's lack of title. Particularly where the sale is part of a chain of sales in which the buyer in turn resells, and so on down the chain, it is settled that if and when property in the goods vests in the seller at the head of the chain, that property passes from the original seller and through intermediate sellers to the buyer at the end of the chain.⁶² This doctrine of 'feeding title'⁶³ through a chain of buyers may turn on estoppel⁶⁴ arising from each seller's

⁵⁵ Once the seller became insolvent, it would seem that any 'new act' would constitute an attempted disposition of assets by an insolvent company.

⁵⁶ The 'new act' could constitute a preference in favour of the buyer who, without the backing of an equitable interest, would only be a creditor for money paid in advance.

⁵⁷ If the goods had been delivered to the buyer, the liquidator would seek their return.

⁵⁸ The money might be held on trust by the seller, to be applied to the price, or failing that to be returned to the buyer - *Re Kayford Ltd* [1975] 1 WLR 279. The buyer would by this means receive a measure of protection through having an equitable interest, not in the goods, but in the pre-paid price.

⁵⁹ The claim would be for money paid on a consideration that had totally failed, the buyer having paid for property, but received none.

⁶⁰ SGA s 50 sets out the buyer's entitlement to damages for non-delivery. Issues relating to a buyer's claim for specific performance are dealt with in paras 5.2-5.7 below.

⁶¹ That is, the buyer.

⁶² The buyer at the end of the chain is the last buyer under a still binding contract. In *Butterworth v Kingsway Motors Ltd* [1954] 1 WLR 1286 the last buyer in point of time had terminated that contract before property vested in the original seller. When that occurred, property passed down the chain to the penultimate buyer only.

⁶³ The doctrine is sometimes referred to as a doctrine of 'feeding the estoppel' - *Lucas v Smith* [1926] VLR 400, Dixon AJ at 403-404; *Patten v Thomas Motors Ply Ltd* [1965] NSWLR 1457, Collins J (Herron CJ and McClemens J concurring) at 1459-1460.

express or implied representation that they have property.⁶⁵ There is some authority however that it turns on the creation of equitable interests arising from the agreement to sell.⁶⁶ If so, this authority strengthens the argument that an equitable interest could arise also where the buyer knows at the time of contract that the seller has no property, and property thereafter vests in the seller.⁶⁷ Be that as it may, the 'feeding title' doctrine appears to work well and to produce appropriate results, whatever the property concepts (legal or equitable) which back it. The Commission is therefore more concerned with the first of the circumstances set out in paragraph 4.15 above.

13. *Should an equitable property interest arise, in favour of a buyer who has paid the whole price in advance for future specific goods, as soon as the seller acquires property in the goods?*

(c) Part price, specific goods

(A buyer pays part of the price in advance for specific goods then owned by the seller, or future specific goods, but the passing of property is deferred.)

4.19 In this situation the buyer pays part only of the price for specific goods. For purposes of present analysis, it makes no difference whether property in the goods is in the seller at the time of contract, or whether they are future but specific goods, property in which is to be acquired by the seller after the contract. So far as the buyer is concerned,⁶⁸ no problem will arise if property passes to the buyer on or before payment of any part of the price,⁶⁹ or (in the case of future goods) by a 'new act' such as delivery, performed after the seller acquires property. A problem for the buyer will

⁶⁴ Estoppel is a general doctrine, to the development of which both common law and equity have contributed - *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *The Commonwealth v Verwayen* (1990) 170 CLR 394. As applied in the present context, estoppel would prevent a seller bringing any legal action which would involve denial of the prior representation to a buyer that the seller had property. There is authority, from a slightly different context, that estoppel operates to pass or confer a genuine title, and not merely a title good between representor and representee: see *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 (also *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242, Pearson LJ at 270; *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, Lord Edmund-Davies at 918 and 918-919) on the operation of estoppel as preserved by the equivalent of s 21(1) of the SGA.

⁶⁵ No such representation is made where a buyer is aware that a seller is agreeing to sell future goods. At common law the buyer's rights in such a situation rest in contract only.

⁶⁶ See *Denis Geary Motors Pty Ltd v Hunter Street Finance Ltd* [1989] Qd R 207, where a seller had created two chains by two independent agreements to sell made before property in the goods was acquired. D M Campbell J categorised the issue as one involving competing equitable interests derived from the two agreements to sell, and resolved it by applying an equitable 'first in time' rule. The same result could well flow from a strict application of an estoppel analysis, or from a recognition that common law interests in property also have priority in the order of their time of creation.

⁶⁷ See the first circumstance mentioned in para 4.15 above and discussed in paras 4.16-4.17 above. See also *In re Wait* [1927] 1 Ch 606, Sargant LJ (in a dissenting judgment not however contradicted on this point by the majority decision) at 645 and 647-648.

⁶⁸ For the position of the seller see under the heading "Unpaid seller" paras 4.42-4.47 below

⁶⁹ See ss 17 and 18 Rule 1 of the SGA. Where Rule 1 operates "it is immaterial whether the time of payment, or the time of delivery, or both, be postponed".

however arise where, as is likely, the passing of property is deferred until the price is paid in full.⁷⁰ In the situation under discussion, therefore, the contract will typically be one where the price is payable by a deposit and instalments, or by instalments, with property being retained by the seller until the price has been paid in full. The buyer may or may not be given possession pending final payment.

4.20 The problem for the buyer in this situation is essentially the same as that where a buyer has paid the price in full in advance. It is that, unless the buyer has an equitable interest arising from payment, on the insolvency of the seller the buyer may have no claim to the goods, and be an unsecured creditor only for the part of the price already paid, or for damages for non-delivery. The factor distinguishing part payment from payment in full is that, as the whole price has not been paid, the buyer could not be regarded even in equity as the full beneficial owner, with the seller a bare trustee of the legal property.⁷¹ If the analogy with contracts for the sale of land were applied, the buyer would have an equitable interest in the goods, commensurate with the protection afforded to the buyer by a court of equity.⁷² The equitable interest would be an interest in property, not leading merely to an unsecured money claim. In contracts for the sale of land, that equitable interest could be asserted in a number of ways. First, a buyer willing and able to pay the balance of the price could seek specific performance⁷³ so as to obtain the land. Second, a buyer seeking only the return of money paid⁷⁴ would have an equitable security interest in the land through a purchaser's lien,⁷⁵

⁷⁰ Given that the passing of property turns on intention, it could be deferred until the fulfilment of other conditions by the buyer, as well as payment of the price of the goods. This is not uncommon in retention of title clauses, commonly and hereafter called 'Romalpa' clauses (the phrase derives from *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676, where the validity of such a clause was tested in the Court of Appeal in England) if the passing of property is deferred until all debts owed by buyer to seller (and not merely the price of the particular goods) have been paid - *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339. Romalpa clauses are further discussed in paras 4.46-4.47 below.

⁷¹ See para 4.13 n 43 above.

⁷² See *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, Mason CJ, Brennan, Deane and McHugh JJ at 252-253: "commensurate with what a court of equity would decree to enforce the contract, whether by way of specific performance, injunction or otherwise". (references omitted) The judgment goes on to qualify the meaning of "specific performance" in this context. See also *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 522 ("The extent of the purchaser's interest is to be measured by the protection which equity will afford to the purchaser").

⁷³ Specific performance as a remedy available to a buyer or seller of goods is discussed in paras 5.2-5.7 below.

⁷⁴ The money would be recoverable as paid for a consideration that had totally failed.

⁷⁵ The leading case is *Rose v Watson* (1864) 10 HLC 672, 11 ER 1187. See also the general recognition of purchasers' liens in *Hewett v Court* (1983) 149 CLR 639, Gibbs CJ at 645; Murphy J at 650; Wilson and Dawson JJ (dissenting, but not on the general law) at 653-654; Deane J at 663-664.

provided the buyer was not in default.⁷⁶ Third, even a buyer in default could in some circumstances seek relief against forfeiture.⁷⁷

4.21 The common law as applied to contracts for the sale of goods does provide limited protection for buyers in some circumstances, but not in the same way as for land. Thus a seller on credit who parts with both title and possession cannot retake possession during the period allowed for credit, and will be liable in trespass and conversion for the full value of the goods, without diminution to take account of the price unpaid.⁷⁸ Even if property has not passed, but the buyer has possession pending the making of arrangements for payment of the balance of the price, the seller cannot repossess while the buyer is not in default,⁷⁹ and possibly even after the buyer is in default.⁸⁰ A seller who wrongfully retakes possession may not however be forced to surrender it, if the court will not, in its discretion, grant an equitable remedy.⁸¹ Further, a buyer could tender the balance of the price to a partly-paid seller, so as to cause property to pass from seller to buyer,⁸² but if not then in possession⁸³ would need the equitable remedy of specific performance⁸⁴ to obtain the goods themselves. In the final analysis, however, to the extent that equitable remedies or equitable interests analogous to those arising in contracts for the sale of land, and particularly the purchaser's equitable lien, do not arise in contracts for the sale of goods, the buyer stands in danger of suffering loss in a seller's insolvency.

4.22 It appears to the Commission that the danger adverted to in the previous paragraph could easily arise in practice. As between traders, deposits and instalments or part payments might well be

⁷⁶ See *Whitbread & Co Ltd v Watt* [1910] 1 Ch 911, where a purchaser cancelling a contract pursuant to an option to do so was not 'in default' and hence entitled to the lien. If in the insolvency of the seller (being a company) the liquidator chose to refuse to complete, the buyer would not be in default.

⁷⁷ See *Legione v Hateley* (1983) 152 CLR 406; also *Stern v McArthur* (1988) 165 CLR 489. Relief against forfeiture in the context of contracts for the sale of goods is discussed in paras 5.15-5.26 below.

⁷⁸ *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584. The seller can counterclaim for the price, but in the circumstances of that particular case this right was of less value as the buyer was in receivership. The seller might be justified in seizing the goods, if there is specific provision in the contract for repossession in the event of default.

⁷⁹ See *City Motors (1933) Pty Ltd v Southern Aerial Super Services Pty Ltd* (1961) 106 CLR 477.

⁸⁰ *Keetley v Quinton Pty Ltd* (1991) 4 WAR 133. On the facts of that case, the seller had no express right to repossess, and may not have had a right under the general law to terminate the contract for non-payment by the buyer.

⁸¹ In *Keetley v Quinton Pty Ltd* (1991) 4 WAR 133 the Court declined to grant the buyer a mandatory injunction requiring the seller to return goods seized, on the basis that damages was an adequate remedy. Equitable remedies of specific performance and injunction are discussed in paras 5.2-5.7 and 5.8-5.11 below.

⁸² Tender will pass property if the seller has not before then purported to repudiate the contract - see *City Motors (1933) Pty Ltd v Southern Aerial Super Services Pty Ltd* (1961) 106 CLR 477. It is not clear whether tender made after the seller has purported to repudiate will pass property - see Kitto J at 485 (property will pass); Windeyer J at 489-490 (property will not pass); Dixon CJ at 484 (point left undecided).

⁸³ A buyer in possession who also obtained property by tendering the balance of the price would have the goods themselves. If the tender were refused, the balance of the price would remain payable as a debt due to the seller.

⁸⁴ The equitable remedy of specific performance is discussed in paras 5.2-5.7 below.

made in advance of the passing of property, whether or not delivery is made in the interim.⁸⁵ Where the buyer is a consumer, the *Credit Act 1984* (WA) (CA) may operate to reduce the danger by locating property in the buyer⁸⁶ rather than in the seller. If the contract is a "regulated credit sale contract",⁸⁷ it seems the property of necessity passes to the buyer.⁸⁸ Even if the contract were to be regarded as a "contract for the hiring of goods"⁸⁹ it may be deemed to be a credit sale contract⁹⁰ with the result that property will pass to the hirer on the making of the contract or on delivery, whichever last occurs.⁹¹ Even so, there are circumstances in which property will not be located in the buyer. In particular, paragraph (b) of subsection 14(1) of the CA excludes from the meaning of "credit sale contract" all lay-by sales⁹² within the meaning of subsection 14(2) of the CA. If a lay-by sale expressly provided for property to remain in the seller until final payment⁹³ consumers could suffer serious loss in the insolvency of the seller.

⁸⁵ Delivery would be made before the passing of property where, for instance, a Romalpa clause is used to protect the seller's interest in getting the balance of the price - see paras 4.46-4.47 below. No decided case concerning a Romalpa clause settles the position of a buyer who has paid part of the price in advance, but see *Clough Mill Ltd v Martin* [1985] 1 WLR 111, particularly Robert Goff LJ at 117-119; R Bradgate "Retention of Title in the House of Lords: Unanswered Questions" (1991) 54 *MLR* 726; A Hick "Retention of Title - Latest Developments" [1992] *JBL* 398; J Mance "The operation of an "all debts" reservation of title clause" [1992] *LMCLQ* 35.

⁸⁶ A buyer who has property has no need of the protection of an equitable interest: rather, it is the seller who needs protection, by way of a security interest in the goods, against the danger of the buyer not paying the balance of the price.

⁸⁷ Both "credit sale contract" and "regulated credit sale contract" are defined in s 5(1) of the CA.

⁸⁸ The CA does not specifically deal with the passing of property under a "regulated credit sale contract". It seems clear, however, that the seller must be regarded as having a "security interest" embodied in a "mortgage" (both terms being defined in s 5(1) of the Act). A mortgage that secures an obligation under a "regulated contract" (which term includes a "regulated credit sale contract") is a "regulated mortgage", and by s 91(3) a regulated mortgage of chattels personal does not operate to pass the property in the chattels. If the mortgagee does not have property, the mortgagor must.

⁸⁹ S 5(1) of the CA defines a "contract for the hiring of goods" as including a lease of goods, a licence to use goods, and "any other contract for the bailment of goods". A contract which provides for the seller to retain property pending final payment, but for the buyer to have possession, incorporates a bailment of goods. In *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676, for example, the right to recover proceeds of sale was linked to the buyer being either agent or bailee of the seller (in either case with a fiduciary obligation to account for proceeds of sale of the principal's or bailor's goods). As a result, Romalpa clauses may now specify that the buyer is to be bailee of the goods pending the passing of property - see recently M N Connock "Retention of Title: Divining the Principles, Drafting a Clause and Some Practical Issues" (1994) 22 *ABLR* 37 at 46 and 51 (suggested clause 4(i): "The buyer shall hold the goods as fiduciary bailee and agent for the seller"). See also generally N E Palmer *Bailment* (2nd ed 1991) at 148-152.

⁹⁰ Under s 13(1) of the CA, a contract for the hiring of goods is deemed to be a credit sale contract where the price is not more than \$20,000 or the goods are or include a commercial vehicle or farm machinery in relation to which the price is more than \$20,000, and under the contract the hirer has a right, obligation or option to purchase the goods.

⁹¹ See para (e) of s 13(3) of the CA. Paragraph (f) secures the position of the seller by providing for a mortgage by hirer to supplier to secure the amount payable. By these means a hire-purchase agreement, for example, is converted into a sale in which property passes to the buyer, with a mortgage back to secure the price. It would be a strange result if a genuine credit sale agreement (as discussed in para 4.22 n 88 above) did not operate in the same way under the CA.

⁹² Lay-by sales are the subject of specific amending legislation in New South Wales, Australian Capital Territory and New Zealand: *Lay-by Sales Act 1943* (NSW); *Lay-by Sales Agreement Act 1963* (ACT); *Lay-by Sales Act 1971* (NZ). The Commission may refer further to these reforms in a later Discussion Paper.

⁹³ In the absence of express agreement, a court using ss 17 and 18 Rule 1 of the SGA could ascertain an intention that property pass when the contract is made. The seller's interests would be protected through retention of

4.23 There is no clear authority for or against the existence of equitable property interests arising from contracts for the sale of goods in the situation now under discussion (part price, specific goods). There seems to the Commission to be no legal reason or principle against their arising, in the same way as they arise from contracts for the sale of land. To an extent, their existence is bound up with the question of the availability of equitable remedies such as specific performance or injunction, or even relief from forfeiture leading to specific performance, in that application of these equitable remedies will result in the buyer obtaining the goods themselves. These remedies are discussed below.⁹⁴ The remaining issue is whether a pre-paying buyer does or should have an equitable purchaser's lien to secure repayment of money paid. Discussion of this issue is deferred to the next succeeding heading.

14. *Should an equitable property interest be capable of arising in favour of a buyer who has paid part of the price in advance for specific goods, property in which remains in the seller?*

(d) Sales subject to condition

(A buyer pays the whole or part of the price in advance for specific goods (being then owned by the seller, or being future goods), or for unascertained goods which are later ascertained, but the contract is conditional, or the goods are not in a deliverable state, or the seller is bound to do something with reference to the goods for the purpose of ascertaining the price.)

(i) Equitable interests

4.24 The situation discussed under this heading is similar to those discussed under previous headings, in that it envisages a contract for the sale of goods under which the buyer has made payment,⁹⁵ the goods are or become specific or ascertained,⁹⁶ but property has not passed to the buyer. Under this heading, the reason that property has not passed is that some event, other than

possession in assertion of the statutory 'unpaid seller's lien', although the wording of s 40 of the SGA, which confers the lien, is not entirely apt to describe the situation arising under a lay-by sale. A judicial solution of this nature, which seems fair to both sides, might not be forthcoming, and would not protect the consumer where the seller has not set aside specific goods to meet the contract, but has set aside a specified stock - see below under the heading "Specified quantity, specified bulk" paras 4.35-4.38.

⁹⁴ Issues relating to injunction, specific performance and relief from forfeiture are discussed below in paras 5.2-5.7, 5.8-5.11 and 5.15-5.26.

⁹⁵ It does not matter for present purposes whether payment has been made in full or only in part.

⁹⁶ Again, it does not matter whether the goods are specific or ascertained at the time of contract, or become ascertained thereafter.

payment in full by the buyer, must occur before property passes. The SGA envisages at least three such events:

- * the contract may be conditional;⁹⁷
- * the goods may not be in a deliverable state;⁹⁸
- * the seller may be bound to do something with the goods for the purpose of ascertaining the price.⁹⁹

4.25 There is some dispute, arising from the case of *Varley v Whipp*,¹⁰⁰ as to the kinds of condition non-fulfilment of which may affect the passing of property.¹⁰¹ Regardless of this dispute, the present issue is whether any equitable interest in property could arise in favour of the buyer prior to fulfilment of a condition of this nature. In contracts for the sale of land, the answer appears to turn on whether one of the parties themselves can control the fulfilment of the condition.¹⁰² If neither can control its fulfilment,¹⁰³ no interest can pass even in equity before the condition is fulfilled.¹⁰⁴ If however the seller is able to cause the condition not to be fulfilled, an equitable interest can arise in favour of the buyer, backed if need be by equitable remedies of injunction¹⁰⁵

⁹⁷ By s 1(2) of the SGA a contract of sale may be absolute or conditional. Where the passing of property is subject to a condition to be fulfilled, the contract is called "an agreement to sell", but becomes "a sale" when the condition is fulfilled - SGA ss 1(3) and 1(4). S 18 Rule 1, by application of which property in specific goods will pass on the making of the contract, only applies where the contract is "unconditional".

⁹⁸ S 18 Rule 1 likewise applies only where the goods are in a deliverable state. By s 18 Rule 2, where the seller is bound to put the goods in a deliverable state, property does not pass until the seller has done so, and the buyer has notice thereof.

⁹⁹ S 18 Rule 3 refers to the seller having to "weigh, measure, test, or do some other act or thing" for this purpose, and provides that "the property does not pass until such act or thing be done, and the buyer has notice thereof".
¹⁰⁰ [1900] 1 QB 513.

¹⁰¹ See *Bridge* 118-119; *Benjamin* 187-188; *Sutton* 164-167. In essence the dispute is as to whether 'condition' includes any stipulation being a "condition" for purposes of s 11(2) of the SGA. For purposes of the discussion that follows, it is assumed that the "condition" is not one which prevents the contract from arising at all. See also discussion of this point in LRCWA DPI para 3.11.

¹⁰² An obvious example is a contract under which property is to pass say three days after payment of the price, with payment to be made within a reasonable time after contract. Passing of property is conditional on payment of the price, and the buyer controls payment.

¹⁰³ A typical example is a contract of sale of land, subject to the approval of some third person - see *Kennedy v Vercoe* (1960) 105 CLR 521 (consent of landlord); *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656 (consent of Water Conservation and Irrigation Commission); *Brown v Heffer* (1967) 116 CLR 344 (consent of Minister for Lands).

¹⁰⁴ *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656, McTienan and Taylor JJ at 661: ("it could not be contended that the respondent company became entitled by force of the contract to an equitable interest in the land"); *Brown v Heffer* (1967) 116 CLR 344, Windeyer J at 351-352: ("they did not create an equitable interest in the land"). See also *Re Bosca Land Pty Ltd's Caveat* [1976] Qd R 119 (no equitable interest sufficient to support a caveat) followed with reluctance in *Re C.M. Group Pty Ltd's Caveat* [1986] 1 Qd R 381.

¹⁰⁵ See for example *Re C.M. Group Pty Ltd's Caveat* [1986] 1 Qd R 381, Dowsett J at 392 (caveat removed but injunction granted to prevent disposal of the land pending the determination of proceedings).

and specific performance.¹⁰⁶ In such a situation it would be against conscience for the seller to frustrate the passing of property by refusing to cooperate in the fulfilment of the condition. There seems no reason why the principle should not extend to sales of goods.¹⁰⁷

4.26 The situation envisaged in the preceding paragraph, of a condition for the passing of property, fulfilment of which can be controlled by the seller, appears in the two particular instances referred to in Rules 2 and 3 of section 18 of the SGA. Both Rules refer to specific goods. Rule 2 operates where the seller is bound to do something to the goods "for the purpose of putting them into a deliverable state" and Rule 3 operates where it is the seller who is "bound to weigh, measure, test, or do some other act or thing with reference to the goods". Under each Rule, legal property does not pass until the thing or act be done,¹⁰⁸ but the SGA makes no reference to the passing of property in equity to a pre-paying buyer, prior to the thing or act being done.

4.27 Situations can easily be envisaged where injustice would appear to arise were a pre-paying buyer to have no equitable title to or other interest in specific goods prior to property passing under Rule 2 or Rule 3 of section 18 of the SGA. Suppose the following. A seller, being a company which is insolvent, agrees to sell goods not then in a deliverable state,¹⁰⁹ and is paid the price in full in advance. The seller is bound by the contract to put the goods in a deliverable state.¹¹⁰ Before the goods are put in a deliverable state the seller goes into liquidation. If equitable interests in goods cannot arise from a contract of sale, the buyer would appear to be in some difficulty. Where the seller does not put the goods in a deliverable state, no doubt the buyer could terminate the contract and seek to recover the price as money paid for a consideration that has totally failed, but would then be in the position of an unsecured creditor. Where the seller does put the goods in a deliverable

¹⁰⁶ The condition may be such that one party must take steps towards fulfilment of the condition, for example by making application for approval of a third person, although the condition itself (approval) lies in the control of the third person. In these cases an order can be made that the party take the necessary steps, and for specific performance if the condition is fulfilled - see, for a form of order, *Kennedy v Vercoe* (1960) 105 CLR 521 at 530-531.

¹⁰⁷ The principle, or something like it, was referred to in the case, decided before the *Sale of Goods Act 1893* (UK), of *Hoare v Dresser* (1859) 7 HLC 290, 11 ER 116, Lord Cranworth at 317-318, 127:

"The difference between law and equity I take to be this: that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of those cases equity will interfere, in the one case, to decree what in truth is a specific performance, or something very like a specific performance of the contract to appropriate a particular cargo; and, in the other, to give the purchaser a lien upon the larger cargo, in order to enable him to satisfy himself of the smaller demand".

¹⁰⁸ The further requirement, that the buyer have notice thereof, does not affect the present discussion, and will not be referred to again.

¹⁰⁹ The goods might be a machine bolted to and embedded by its own weight (30 tons) in a concrete floor on the seller's premises, and require dismantling before delivery, as in *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 KB 343.

¹¹⁰ It would add insult to injury if the price included a component for performance of this task.

state, so that property thereupon passes to the buyer, that would appear to constitute a disposition of property by the insolvent company, and therefore void.¹¹¹ Unless some other remedy were available, for example specific performance,¹¹² the buyer would lose both price¹¹³ and the specific goods. If however an equitable interest arose from payment, the putting of the goods in a deliverable state would be only a formal act¹¹⁴ whereby legal property passed to one who already had equitable title.

15. *Should an equitable property interest be capable of arising in favour of a buyer who has paid all or part of the price in advance for specific or ascertained goods, property in which remains in the seller pending the fulfilment of some condition to be fulfilled by the seller?*

(ii) *Equitable liens*

4.28 There seems no reason why equitable title should not pass to a pre-paying buyer before legal property passes through performance of an act¹¹⁵ which the seller is bound to perform, at least where the price is paid in full. Even if the price is not paid in full, in contracts for the sale of land a buyer would have an equitable interest commensurate with the relief available in equity,¹¹⁶ and again there seems no legal reason why the same should not apply in contracts for the sale of goods. A further question, relating to a somewhat different equitable interest, arises where the buyer seeks only return of the price¹¹⁷ so far paid. Where the seller is in default, property has not passed,¹¹⁸ and the buyer elects to reject the goods and terminate the contract, the buyer could clearly recover the pre-paid price as money paid for a consideration that has totally failed. A buyer of land in such a

¹¹¹ See s 468(1) of the CL. The Court may validate the disposition under s 468(3). The example is more extreme if it is supposed that, after the contract and payment, the buyer becomes aware of the seller's insolvency, and the act is done thereafter, but within six months of the seller going into liquidation. The passing of property in this way would appear to give the otherwise unsecured buyer an "unfair preference". For a similar example, where relevant sections of the CL are cited, see para 4.13 above.

¹¹² The availability of this equitable remedy in contracts for the sale of goods is discussed in paras 5.2-5.7 below.

¹¹³ In particular circumstances the price could be impressed with a trust - see *Re Kayford Ltd* [1975] 1 WLR 279, and see para 4.14 n 44 above.

¹¹⁴ There may be situations where, although it is an obligation of the seller, the buyer is willing to undertake the task, so that property may pass. If however the buyer had no equitable interest in the goods, or the support of an equitable remedy such as a mandatory injunction giving the buyer access to the goods, the seller (or liquidator) would be justified in refusing to permit the buyer to do the act. For the grant of an injunction in circumstances analogous to those under discussion see *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440, where an injunction was granted restraining the Earl from preventing the defendants from entering his estate for the purpose of cutting, sawing and removing timber sold to them by him.

¹¹⁵ The act may be the putting of the goods in a deliverable state, or weighing, measuring or testing them in order to ascertain the price (s 18 Rules 2 and 3) or some other act which, according to the intention of the parties (s 17) must be done by the seller before property passes.

¹¹⁶ See para 4.20 above.

¹¹⁷ The price may have been paid in full, or paid only in part.

¹¹⁸ Discussion under this heading is confined to cases of specific goods, property in which has not passed. The more difficult position where goods are unascertained is discussed under the heading "Specified quantity, specified bulk" paras 4.39-4.40 below.

position would have a purchaser's equitable lien over the vendor's title¹¹⁹ to secure repayment, and the lien is also available to purchasers of personalty other than goods.¹²⁰

4.29 No case clearly establishes that a buyer of goods has, or has not, an equitable lien in circumstances given in the preceding paragraph¹²¹ There is nothing in the SGA which could be regarded as inconsistent with the existence of such a lien,¹²² and the theoretical argument against its existence must rest on a blanket ban on equitable interests in contracts for the sale of goods. That a purchaser's lien can arise in the analogous contract for work and materials leading to the production of a chattel¹²³ is shown by the case of *Hewett v Court*.¹²⁴ All members of the Court in that case were careful to note that the contract was not one for the sale of goods,¹²⁵ although the general statement of Deane J as to circumstances sufficient (rather than essential) for a lien to arise¹²⁶ is clearly broad enough to include contracts for the sale of goods.

4.30 In his judgment in *Hewett v Court*¹²⁷ Murphy J noted the absence of any "commercial impact statement", that is, of what would be the effect in commerce generally, of charges arising in such circumstances", made available for the assistance of the Court in deciding whether an equitable lien should be recognised as arising from the circumstances of the case. The Commission is not aware of any analysis directed to the economic impact that recognition of purchasers' equitable liens would have in contracts for the sale of goods. In the most general terms, such liens could be said to favour buyers over sellers.¹²⁸ *Hewett v Court*¹²⁹ was, however, essentially a contest

¹¹⁹ *Mackreth v Symmons* (1808) 15 Ves 329, 33 ER 778. The existence of the doctrine of purchasers' equitable liens has never been challenged in cases before the High Court where matters relating to vendors' and purchasers' liens have been raised - see *Davies v Littlejohn* (1924) 34 CLR 174; *Wossidlo v Catt* (1935) 52 CLR 301; *Hewett v Court* (1983) 149 CLR 639; *Heid v Reliance Finance Co Pty Ltd* (1983) 49 ALR 229.

¹²⁰ See *Levy v Stogdon* [1898] 1 Ch 478 (contingent reversionary interest in personalty); *Hannam v Lamney* (1926) 34 WN (NSW) 68 (business). In *Barker v Cox* (1876) 9 Ch D 464 a buyer of land from a trustee agreed to pay such sum as, invested in Consols, would produce an income of £180 per annum, and was given a lien on the Consols.

¹²¹ The case of *Swainston v Clay* (1863) 3 De G J & S 558, 46 ER 752 may have concerned a contract for work and materials (completion of construction of a ship). It appears to have been so treated by Gibbs CJ in *Hewett v Court* (1983) 149 CLR 639 at 648-649, whereas Wilson and Dawson JJ (dissenting) at 657 regard the contract in *Swainston v Clay* as one for the sale of specific goods (and as possibly involving security by agreement).

¹²² There may be an inconsistency with the existence of the analogous vendor's equitable lien, discussed in paras 4.42-4.47 below.

¹²³ The case to be referred to concerned a transportable house.

¹²⁴ (1983) 149 CLR 639.

¹²⁵ Members of the Court were clearly aware of the undecided issue of the existence of equitable liens arising from contracts for the sale of goods, and did not determine it - see *Hewett v Court* (1983) 149 CLR 639, Gibbs CJ at 646; Murphy J at 650; Wilson and Dawson JJ at 654-655; Deane J at 662-663.

¹²⁶ *Hewett v Court* (1983) 149 CLR 639 at 668.

¹²⁷ (1983) 149 CLR 639, Murphy J at 651.

¹²⁸ *Hewett v Court* (1983) 149 CLR 639, Murphy J at 650-651: ("A charge such as this will often be necessary to protect consumers, who, unlike traders, cannot be expected to enquire into the solvency of the person with whom they are dealing").

between buyer and liquidator,¹³⁰ with the buyer claiming to have been a secured creditor.¹³¹ In that context the policy issue is the extent to which such securities should arise in favour of buyers by operation of law, placing them in a secured, and hence preferred, position.

4.31 In the context of liquidation and receivership,¹³² at least in relation to corporations, policy expressed in legislation has dictated that certain unsecured creditors have priority over others.¹³³ Recognition by the law of equitable liens implements a somewhat different policy,¹³⁴ but without legislation, for a range of contracts including contracts for work and materials leading to the production of chattels. Such liens work to the advantage of certain creditors, and hence necessarily to the disadvantage of others. Their recognition by the law as arising from contracts for the sale of goods could affect commercial behaviour, in that some potential creditors might not be discouraged from paying their money¹³⁵ by a 'whiff of bankruptcy' while others, for whom no equitable lien can arise,¹³⁶ or against whose interests the equitable liens work,¹³⁷ might be more chary of giving credit, or might increase prices¹³⁸ to compensate for the less favourable treatment.

16. *What are the commercial or practical reasons for or against equitable purchasers' liens arising by operation of law from contracts for the sale of specific goods?*

¹²⁹ (1983) 149 CLR 639.

¹³⁰ A similar contest could arise between a buyer and a secured creditor claiming the goods under a floating charge which became fixed after the goods became specific goods.

¹³¹ In *Hewett v Court* (1983) 149 CLR 639 the builder of a transportable house, shortly before liquidation, had made an agreement with the person acquiring the house, who at that stage had paid part of the price but had not yet become owner. If the acquirer had been an unsecured creditor for the price paid, the arrangement would have constituted a preference, and hence been voidable: if a secured creditor, the arrangement would have been only a means of satisfying the security, and hence been valid. The decision was that the acquirer was a secured creditor, through having an equitable lien analogous to a purchaser's equitable lien.

¹³² More specifically where a receiver is appointed in respect of assets originally subject to a floating charge.

¹³³ See s 556 of the CL, particularly s 556(1)(e), (g) and (h) relating to certain payments to employees. Indeed, such payments take priority over a secured creditor claiming under a floating charge - see s 561 of the CL. For reference to the policy behind these provisions see J O'Donovan (ed) McPherson *The Law of Company Liquidation* (3rd ed 1987) 401 citing *Re Parkin Elevator Co* (1916) 31 DLR 123, Meredith CJCP at 125.

¹³⁴ The lien will only arise in specified circumstances. For a statement of "what is sufficient rather than of what is essential" for an equitable lien to arise see *Hewett v Court* (1983) 149 CLR 639, Deane J at 668. In general terms and outside an insolvency context, the policy of the law seems directed against the unjust enrichment that arises from a person keeping both price and property. The lien reverses that situation by giving the claimant for the money an equitable security over the property. How far that policy should continue in insolvency, where the contest is between the claimant and other claimants, all seeking payment from a limited pool of assets, is debatable.

¹³⁵ It may be suspected that some, if not many, creditors will not be versed in the niceties of the law relating to equitable liens: for them, the discovery (possibly through consulting their lawyers) that they are secured creditors comes as a welcome surprise.

¹³⁶ An example is an unsecured lender, the value of whose proof in insolvency would be eroded to the extent that assets are subject to the security of equitable liens.

¹³⁷ An example is a lender on security of a floating charge, whose secured position is eroded to the extent that assets are subject to the security of equitable liens having priority over the floating charge.

¹³⁸ 'Price' is used here in a broad sense. A lender might increase price by charging more interest.

4.32 Unless specifically part of a legislative scheme, there is always a fear that recognition of equitable liens in particular instances may occur haphazardly, as cases come forward for decision.¹³⁹ It is beyond the Commission's terms of reference to consider whether equitable liens should arise in contracts relating to goods, not being contracts for the sale of goods within the meaning of the SGA. As the law stands, they can arise in analogous contracts,¹⁴⁰ and there seems to be no legal reason why they should not also arise in contracts for the sale of goods, other than the broad proposition that equitable interests cannot arise from contracts for the sale of goods. Indeed, the present law could give rise to inconsistent treatment of essentially like cases.¹⁴¹ Suppose that a corporation which constructs transportable houses, and also custom designed furniture, goes into liquidation. If the contracts for furniture are categorised as contracts for the sale of goods,¹⁴² some consumers who had paid in advance for identifiable houses¹⁴³ could have a lien¹⁴⁴ but consumers who had paid for furniture could not. In the Commission's tentative view, there are good reasons for considering reform in this area at least to permit introduction, into the law for contracts for the sale of goods, of equitable purchasers' liens.

4.33 One option for reform is for legislation specifically to provide for a purchaser's lien in contracts for the sale of goods,¹⁴⁵ or alternatively to provide that such a lien is capable of arising from a contract for the sale of goods. The first alternative is the more positive step, in that it will ensure the applicability of the lien and identify the circumstances in which it will arise.¹⁴⁶ In the Commission's view, this alternative should be chosen only if it is clear, on policy grounds, that the lien should exist, and that there should be no doubt of its existence. Under the second alternative it

¹³⁹ This fear may be only partly allayed by general statements of circumstances in which such liens arise, such as the statement of Deane J in *Hewett v Court* (1983) 149 CLR 639 at 668.

¹⁴⁰ See *Hewett v Court* (1983) 149 CLR 639 - contract for work and materials.

¹⁴¹ All members of the High Court in *Hewett v Court* (1983) 149 CLR 639 distinguished between contracts for the sale of goods and contracts for work and materials - see *Hewett v Court* (1983) 149 CLR 639, Gibbs CJ at 646-647; Murphy J at 650; Wilson and Dawson JJ at 655-656; Deane J at 662. The distinction is notoriously difficult to draw, particularly where the product of the contract is a chattel - see *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167 for the strongly expressed view that in such a case the contract is always one of sale, not of work

¹⁴² A contract to manufacture furniture has been treated without question as a contract governed by the sale of goods legislation - *Giles v Yuen Din* [1945] VLR 156. If the contracts in the hypothetical situation were to design, make and install the furniture, the contracts might be categorised as contracts for work and materials - *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405.

¹⁴³ It is true that other consumers will not have a lien, where construction has not progressed to the point where particular houses are allocated to their particular contracts, and will be unsecured rather than secured creditors. This was not referred to by the majority in *Hewett v Court* (1983) 149 CLR 639 as being a reason for denying a lien to those consumers who could point to particular houses as so allocated, but did carry some weight with the minority - see *Hewett v Court* (1983) 149 CLR 639, Wilson and Dawson JJ at 658.

¹⁴⁴ *Hewett v Court* (1983) 149 CLR 639.

¹⁴⁵ An analogy is s 40 of the SGA, which provides for an unpaid seller's possessory lien.

¹⁴⁶ At this point, the Commission is considering only liens over specific goods. The question of liens over a specified bulk from which a buyer is to be supplied a smaller parcel is discussed below under the heading "Specified quantity, specified bulk" paras 4.39- 4.40.

is not certain that the courts, applying equitable principles, will conclude that a purchaser's lien can arise from a contract for the sale of goods,¹⁴⁷ and the uncertainty will remain until a case arises for decision. In the Commission's tentative view, this option should be taken if the main thrust of reform is to ensure consistency between the non-statutory law governing contracts for the sale of goods, and the law governing analogous contracts and contracts generally. It is possible that, under the second alternative, a court could find that purchasers' liens do not arise in contracts for the sale of goods under the general law. Such a decision would presumably be based on principles and reasoning which maintained an internal consistency in the law relating to purchasers' liens generally. Both alternatives have the potential to put the law in Western Australia at variance with the law in other States.¹⁴⁸ What both would seek to achieve, however, is consistency of the law within Western Australia.

4.34 A different option for reform is for legislation specifically to deny the applicability of purchasers' liens to contracts for the sale of goods. Such a course should, in the Commission's tentative view, only be taken if there are clear policy reasons for distinguishing in this respect between contracts for the sale of goods and other analogous contracts involving goods. Even if policy reasons pointed to abolition of purchasers' liens in the sale of personalty generally, or limitation of the circumstances in which they arose or were effective,¹⁴⁹ in the Commission's tentative view this would be better done through general reform of the law relating to securities over personalty.¹⁵⁰

¹⁴⁷ Having regard to *Hewett v Court* (1983) 149 CLR 639, it is likely that the courts would so find, at least in relation to specific goods, if legislation clearly left the door open. There would be less difficulty in finding a lien in the context of a sale of specific goods than there was in *Hewett v Court* (1983) 149 CLR 639 itself, where the goods were not initially specific, but only became identified and irrevocably allocated to the acquirer's contract at some time after the contract had been made, when construction of the transportable house had sufficiently progressed.

¹⁴⁸ It might be decided in other jurisdictions that, irrespective of legislation similar to the SGA, equitable liens do not arise from contracts for the sale of goods, or do not arise in the circumstances set out in the Western Australian legislation (if amended), or that the equivalent of s 59(2) of the SGA negatives the existence of equitable liens in contracts for the sale of goods.

¹⁴⁹ For example it might be thought that all security interests over personalty should be ineffective in insolvency unless registered under a statutory scheme of registration.

¹⁵⁰ Such reform is beyond the scope of the present reference, but see Australian Law Reform Commission (Discussion Paper 52) and Law Reform Commission of New South Wales (Discussion Paper 28) *Personal property securities* (August 1992) (*Personal Property Securities* (1992)); Australian Law Reform Commission (Report No 64) *Personal property securities* (1993) (*Personal Property Securities* (1993)).

17. *Should an equitable purchaser's lien be capable of arising by operation of law from a contract for the sale of specific goods?*

18. *If equitable purchasers' liens should be capable of arising by operation of law from contracts for the sale of goods, should the SGA*

(a) *make specific provision for equitable purchasers' liens; or*

(b) *provide that nothing in the Act prevents such liens from arising?*

(e) Specified quantity, specified bulk

(A buyer pays the whole or part of the price in advance for a specified quantity of goods from a specified bulk then owned by the seller, or later to be acquired by the seller.)

(i) Equitable interests

4.35 In situations under this heading a purchaser contracts and pays in advance for a specified smaller quantity to be supplied from a particular bulk. An example is 'ten items from my present stock of twenty'. Such a contract when made is for unascertained goods, and regardless of the intention of the parties property cannot pass until the goods are ascertained,¹⁵¹ although often it will pass as soon as the goods are ascertained.¹⁵² In *In re Wait*¹⁵³ a majority of the Court of Appeal decided in the negative the question whether the buyer has an equitable interest in the interim.

4.36 In *In re Wait*¹⁵⁴ a seller by c.i.f. contract agreed to buy 1000 tons of wheat by description, and next day contracted to sell 500 tons c.i.f. to a buyer. Wheat answering the description was duly loaded in bulk, a bill of lading for 1000 tons was issued, and the buyer paid the price (less half the freight, payable at destination). Thereafter the seller was adjudged bankrupt. The goods arrived at destination, but there was never any appropriation of 500 tons to the buyer;¹⁵⁵ although the buyer

¹⁵¹ See s 16 of the SGA; *Jansz v G.M.B. Imports Pty Ltd* [1979] VR 581, Anderson J at 586 and 588; *In re Goldcorp Exchange Ltd (In Receivership)* [1994] 3 WLR 199, Lord Mustill (for the Court) at 208: ("It makes no difference what the parties intended if what they intend is impossible: as is the case with an immediate transfer of title to goods whose identity is not yet known").

¹⁵² See s 18 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 appropriated 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".

Ascertainment is not necessarily appropriation, but often the two coincide.

¹⁵³ [1927] 1 Ch 606.

¹⁵⁴ *Ibid.*

¹⁵⁵ By the time of the action the trustee in bankruptcy, who had made other deliveries, still had in warehouse 530 tons of wheat answering the description, being the remainder of the cargo.

was willing to pay the balance of the price.¹⁵⁶ The buyer claimed for specific performance,¹⁵⁷ alternatively to have an equitable interest in the remaining bulk to the extent of 500 tons, or a "charge" for the price paid.¹⁵⁸ A majority of the Court of Appeal (Lord Hanworth MR and Atkin LJ, Sargant LJ dissenting) held that these claims failed.

4.37 The claim in *In re Wait*¹⁵⁹ that the buyer had an equitable interest¹⁶⁰ failed, as did the claim for specific performance¹⁶¹ on the ground that the goods were never ascertained. This conclusion was not based on anything in the *Sale of Goods Act 1893* (UK)¹⁶² and must represent a general principle of equity. That said, it would seem that this principle has its most important, perhaps its only, application in the context of a sale of an unascertained portion of goods from a larger (ascertained) bulk. Its justification may be that in such a case the parties intend that the buyer will end up as individual owner of a separate parcel, but having its own physical identity. Until it is known what that parcel is, property in it can no more pass in equity than it can at law. This principle does not apply (and the suggested justification is absent) where there is an assignment of part of a chose in action such as a debt¹⁶³ which is clearly effective in equity.¹⁶⁴ The reason may be that, because a debt is not capable of physical division, assignment of part necessarily operates to create an interest in the whole¹⁶⁵ and the same continues to apply where the chose in action is in a sense already treated as divisible, as in a sale of part of a shareholding.¹⁶⁶

¹⁵⁶ That is, half the freight.

¹⁵⁷ Issues relating to specific performance in contracts for the sale of goods are dealt with in paras 5.2-5.7 below.

¹⁵⁸ There were other claims relating to the price paid, raising issues of trusts and tracing, which were not pressed in the Court of Appeal.

¹⁵⁹ [1927] 1 Ch 606.

¹⁶⁰ Atkin LJ in particular refers to this as a claim that there had been an "equitable assignment" of 500 tons.

¹⁶¹ See paras 5.5-5.6 below.

¹⁶² Atkin LJ at least thought, without deciding the point, that "much may be said" for the proposition that there was no underlying agreement (on which equity could bite) to transfer property other than in accordance with the terms of the *Sale of Goods Act 1893* (UK), and therefore no room for equitable interests arising from contracts for the sale of goods - *In re Wait* [1927] 1 Ch 606 at 635.

¹⁶³ See *Brice v Bannister* (1878) 3 QBD 569, and generally Meagher 178.

¹⁶⁴ In Western Australia there is statutory provision for an assignment of part of a debt - see *Property Law Act 1969* (WA) s 20(3).

¹⁶⁵ This is the explanation of RM Goode "Ownership and Obligation in Commercial Transactions" (1987) 103 *LQR* 433, 448. At least as regards a debt, it appears possible to assign a specified sum, for example £100 from a larger debt as in *Brice v Bannister* (1878) 3 QBD 569, rather than only a share in the whole debt in the proportion that the specified sum bears to the whole. As regards chattels, even if a specified part of a specified bulk cannot be assigned in equity, it is possible to assign a specified share in the bulk. It may be difficult, however, to construe a sale of a specified amount as being a sale of a share in the bulk, in the proportion which the amount specified bears to the amount of the bulk - see *In Re London Wine Co (Shippers) Ltd* [1986] PCC 121, Oliver J at 137-138 but compare *Re Stapylton Fletcher Ltd (in administrative receivership)* [1995] 1 All ER 192 (wine of several customers, stored in a single stack of cases or single bin of bottles, intended to be held in common).

¹⁶⁶ See *In re Wait* [1927] 1 Ch 606, Sargant LJ (dissenting, but not contradicted by the majority on this point) at 651, referring by analogy to a legacy for instance of "1000l Consols out of the Consols I now possess (or I think out of any Consols I may inherit from X.Y.)". Such a legacy would be 'specific'. See also *Hunter v Moss* [1994] 1 WLR 452, where a declaration of trust of 50 out of a total holding of 950 shares did not fail for uncertainty of subject matter. This case has however been criticised - see D Hayton "Uncertainty of Subject-Matter of Trusts"

4.38 The Commission is tentatively of the view that, if the SGA is to be amended to make it clear that in other respects equitable interests can arise from contracts for the sale of goods, no harm can be done if the amendment extends to the present context. The effect will only be to make it clear that nothing in the SGA prevents an equitable interest arising from the sale of a specified quantity of goods out of a specified bulk. If there is a distinct equitable rule preventing an equitable interest from arising in such circumstances, that rule will remain. The majority decision in *In re Wait*¹⁶⁷ that such a rule exists has been criticised by writers both at the time of the decision¹⁶⁸ and more recently,¹⁶⁹ but nevertheless appears to represent the law at present. The Commission believes that pre-paying buyers of parcels of goods from bulk can be seriously prejudiced by the absence of any rule which gives them either legal property or an equitable title or lien prior to ascertainment. The problem has been addressed by the Law Commission and the Scottish Law Commission in their Report *Sale of Goods Forming Part of a Bulk*.¹⁷⁰ In that Report the two Commissions recommend a statutory regime under which a buyer of a parcel of goods would obtain a legal interest, by way of an undivided share in the bulk, prior to ascertainment, once payment is made. These recommendations were implemented by the *Sale of Goods (Amendment) Act 1995* (UK). This Commission expects to consider this matter in detail in a later Discussion Paper when considering the passing of legal property, and to take the opportunity then to consider the implications, if any, in equity. Under the statutory regime recommended by the Law Commission and the Scottish Law Commission there would seem to be little room or need for equitable interests, as the proposed legal interest would arise at the point (that is, of payment for the goods) at which on general principles an equitable interest would arise. Introduction of a statutory scheme, but based on the creation of equitable interests in the bulk, would need to grapple with the same practical issues¹⁷¹ as are dealt with in the Report of the two Commissions. In the meantime, this Commission would welcome, in advance of any later Discussion Paper, comments, views or submissions on the issue of legal or equitable interests arising from sales of specified parcels of specified bulks.

19. *Should it be possible for an equitable interest in a specific or ascertained bulk to arise in favour of a buyer of a specified parcel from that bulk, where the buyer has paid part or all*

(1994) 110 *LQR* 335, and may not have survived the Privy Council decision in *In re Goldcorp Exchange Ltd (In Receivership)* [1994] 3 *WLR* 199 - see D Hayton "Ascertainability in Transfer and Tracing of Title" [1994] *LMCLQ* 449, 450.

¹⁶⁷ [1927] 1 *Ch* 606.

¹⁶⁸ See Sir Frederick Pollock, "Re Wait" (1927) 43 *LQR* 293, and also Sir Arthur Dean, "Equitable Assignments of Chattels" (1932) 5 *ALJ* 289 (also commenting on *King v Greig* [1931] *ALR* 309; [1931] *VLR* 413).

¹⁶⁹ See Meagher 194-197.

¹⁷⁰ Law Com. No 215, Scot. Law Com. No.145, 1993.

¹⁷¹ The Report deals with calculation of a buyer's undivided share, multiple sales, shortfalls, deliveries from bulk, oversales and other issues.

of the price, but a particular parcel has not been unconditionally appropriated to the buyer's contract?

(ii) *Equitable liens*

4.39 As an alternative to claiming to be owner in equity of part of the bulk, the buyer in *In re Wait*¹⁷² originally claimed to have "a charge upon the wheat and the bill of lading for the 59331. purchase money".¹⁷³ It seems that the buyer was claiming security for return of the price, as money paid on a consideration that had totally failed, by way of a purchaser's lien.¹⁷⁴ The argument in *In re Wait*¹⁷⁵ as reported, does not address this issue, and the judgments in the Court of Appeal say very little about it. Sargant LJ (dissenting) did not need to consider it, as he held in favour of the buyer on other grounds, finding that there had been an assignment in equity. Lord Hanworth MR in the relevant passage of his judgment¹⁷⁶ refers to the rejection by Lord Macnaghten,¹⁷⁷ as being "a measure of the rights of the parties or as essential to cases of equitable assignment or specific lien", of the test¹⁷⁸ of whether the court would decree specific performance. Assuming that rejection to be rightly made, Lord Hanworth MR in effect replaces the rejected test with a requirement that "the rights must be completely defined as between the parties to the contract as to 'the thing' in respect of which the right of one is to be enforced against the other". Since Lord Hanworth MR held against the buyer in *In re Wait*¹⁷⁹ this must be taken as the statement of an equitable rule capable of general application, that a purchaser's lien cannot arise over a completely defined bulk from which a purchaser is to be supplied, if "the thing, 'the very thing'"¹⁸⁰ is capable of further identification. No supporting reasoning is given by Lord Hanworth MR as to why, even if equitable title could not pass, equity would not give at least an equitable security over the identified bulk. Atkin LJ, the other member of the majority in *In re Wait*¹⁸¹ does distinctly deal with the "different question"¹⁸² of a purchaser's lien, and denies its existence. In essence, his reasoning on this point¹⁸³ is that the purchaser's lien is correlative to and derived from the vendor's lien,¹⁸⁴ that such a lien "does not

¹⁷² [1927] 1 Ch 606.

¹⁷³ *In re Wait* [1927] 1 Ch 606 at 608 and 615. There having been no prior agreement for security of any kind, the "charge" is more correctly called a "lien", and is so referred to hereafter.

¹⁷⁴ For discussion of purchasers' liens over specific goods see paras 4.28-4.34 above.

¹⁷⁵ [1927] 1 Ch 606.

¹⁷⁶ *Id* at 622.

¹⁷⁷ *In Tailby v Official Receiver* (1888) 13 App Cas 523 at 547.

¹⁷⁸ This supposed test in turn derives from the judgment of Lord Westbury in *Holroyd v Marshall* (1861) 10 HLC 191, 11 ER 999.

¹⁷⁹ [1927] 1 Ch 606.

¹⁸⁰ *Id* at 622.

¹⁸¹ [1927] 1 Ch 606.

¹⁸² Different, that is, from the question of equitable assignment.

¹⁸³ The critical passage is in *In re Wait* [1927] 1 Ch 606 at 639.

¹⁸⁴ For discussion of the vendor's lien see paras 4.42-4.47 below.

exist in the case of an ordinary sale of goods" (the remedies of an unpaid vendor being set out by the legislation), that neither a vendor's nor a purchaser's equitable lien has ever been claimed or given, and that such liens "would be quite inconsistent with the provisions of the Code, and do not exist". On this reasoning the *Sale of Goods Act 1893* (UK) was an insurmountable obstacle to the existence of equitable vendors' or purchasers' liens. Nothing is said by Atkin LJ as to whether or not such liens could arise by the application of general equitable principles, if not prevented by the legislation, but in the context of the judgment¹⁸⁵ there is an implication that they did not exist before the *Sale of Goods Act 1893* (UK) was passed, and behind that is a view of the law of sales of goods as resting, for business certainty and convenience, entirely on common law and not at all on equity principles.¹⁸⁶

4.40 As with the question of equitable title passing under a sale of a parcel to be drawn from a specified bulk, amendment of the SGA, so that it did not of itself prevent equitable interests arising from contracts for the sale of goods, would not necessarily settle the question of whether on general equitable principles a purchaser's lien on the bulk would arise in favour of a pre-paying buyer of a parcel. Also as with that question, the issue would become largely irrelevant if a statutory scheme were introduced whereby such a buyer obtained a legal interest as owner of an undivided share in the bulk.¹⁸⁷ Once legal title passed, on general equitable principles there would be no room for a lien, and there would seldom be any commercial reason to call it in aid.¹⁸⁸ As with equitable title¹⁸⁹ the Commission expects to consider the question of equitable liens over a bulk in a later Discussion Paper, when considering the question of whether the buyer of part of a specified bulk should obtain a legal interest in the bulk. Meanwhile, the Commission would welcome, in advance of any later Discussion Paper, comments, views or submissions on the issue of purchasers' equitable liens arising from sales of specified parcels of specified bulks.

20. *Should an equitable purchaser's lien be capable of arising by operation of law over a specific or ascertained bulk, in favour of a buyer of a specified parcel to be drawn from that bulk?*

¹⁸⁵ See also *In re Wait* [1927] 1 Ch 606 at 635-636.

¹⁸⁶ "I feel bound to repel the disastrous innovations which in my opinion the judgments under review would introduce into well settled commercial relations" - *Id* at 640-641.

¹⁸⁷ See discussion of this matter in para 4.38 above.

¹⁸⁸ A free-ranging imagination might envisage situations where there was such reason. Suppose a sale of a parcel to be supplied from bulk, prepayment, a fall in the price of the commodity, and some breach by the seller (perhaps a discovery, while the bulk was still unbroken, that the whole was not of merchantable quality) entitling the buyer to reject the goods and terminate the contract. Even if title to an undivided share in the bulk had passed under a statutory scheme, a buyer might choose to terminate the contract, revert the legal property in the seller, and recover the price. Would there be a lien on the bulk to secure the price?

¹⁸⁹ See paras 4.35-4.38 above.

(f) Specified quantity, unspecified bulk

(A buyer pays the whole or part of the price in advance for a specified quantity of goods, and a bulk from which the goods could be supplied is then owned or is afterwards acquired by the seller.)

4.41 This situation is referred to for completeness only, and as a contrast with others discussed above. In this situation a seller agrees to sell a particular quantity of goods, and is paid in advance, but the source from which the buyer will be supplied is not ascertained.¹⁹⁰ Property (that is, legal title) cannot pass until the goods are ascertained,¹⁹¹ although when goods are appropriated, property will often then pass.¹⁹² Even if at the time of the contract the seller has goods (for instance, a general stock) from which the contract could be fulfilled, no equitable title could arise in favour of the buyer, prior to appropriation of some sort, nor could the buyer claim a purchaser's lien on the entire stock to secure repayment. The same would be true if the seller did not have stock at the time of contract, but acquired stock thereafter.¹⁹³ If however the seller, without appropriating a specific parcel, nevertheless appropriates a bulk from which the parcel will be supplied,¹⁹⁴ this situation then becomes no different from the one previously discussed under the heading "Specified quantity, specified bulk".¹⁹⁵

¹⁹⁰ See generally Meagher 192-194.

¹⁹¹ See s 16 of the SGA.

¹⁹² See s 18 Rule 5(1) of the SGA, which however has other requirements additional to ascertainment, for example that the goods were sold by description, that the appropriation be unconditional, and that it be done by one party (buyer or seller) with the consent of the other.

¹⁹³ These matters are extensively dealt with in *In Re London Wine Co (Shippers) Ltd* [1986] PCC 121 and *In re Goldcorp Exchange Ltd (In Receivership)* [1994] 3 WLR 199. In the *London Wine Co (Shippers) Ltd* case the seller (of wine) never unconditionally appropriated stock to any customer or group of customers. No legal or equitable property passed under the sales, even where a single buyer contracted to buy wine exactly corresponding to the amount which the seller then had in stock, or where the quantities contracted to be sold to several buyers added up exactly to the stock held by the seller. Likewise in *In re Goldcorp Exchange Ltd (In Receivership)* [1994] 3 WLR 199 all sales (of gold, silver and platinum bullion) were of unascertained goods from no particular stock. Even where the seller 'bought in' to cover a 'short' position arising from a particularly large contract for the sale of 1000 gold maple coins, the new stock so acquired could not be regarded as unconditionally appropriated to the particular contract, so no property in these after acquired goods passed at law or in equity to the buyer. The Privy Council in *In re Goldcorp Exchange Ltd (In Receivership)* [1994] 3 WLR 199 carefully distinguished the case before it, as involving "generic" goods, from a case of "goods sold ex-bulk", where the goods are to come from a specified source, and placed *In re Wait* [1927] 1 Ch 606 in this latter category.

¹⁹⁴ To give a concrete example, a seller might contract to sell 100 tonnes by description to each of two buyers without then having any goods, then acquire 500 tonnes and unconditionally set aside 200 tonnes in a single parcel to fulfil the two contracts. Compare *Re Stapylton Fletcher Ltd (in administrative receivership)* [1995] 1 All ER 192 where the seller (of wine) created a bulk with the implied agreement of the buyers by storing the wine of several buyers in a single stack of cases or a single bin of bottles. Customers then owned the bulk in common in the proportion that their contributions held to the whole.

¹⁹⁵ See paras 4.35-4.40 above.

(g) Unpaid seller

(Property passes under a contract for the sale of goods, but the seller has not been paid.)

4.42 A seller of land who parts with title has an equitable lien on the land to secure any unpaid balance of the price.¹⁹⁶ The lien may be abandoned, in particular by the seller relying entirely on covenants for repayment or provision of some other consideration¹⁹⁷ or taking or attempting to take some other form of security¹⁹⁸ for the unpaid balance. The lien clearly applies to sales of personalty¹⁹⁹ other than goods.

4.43 The strongest judicial statement,²⁰⁰ albeit by way of obiter dictum, against vendors' liens arising from contracts for the sale of goods comes from the judgment of Atkin LJ in *In re Wait*.²⁰¹ A summary of his reasoning in rejecting the existence of both vendors' and purchasers' equitable liens is given in paragraph 4.36 above. With respect to vendors' liens, the general argument that the *Sale of Goods Act 1893* (UK) is an exclusive code on this point and allows for only legal and not equitable property rights is strengthened by reference to the specific provision²⁰² for an unpaid seller' **possessory** lien. The reference can also be used to strengthen the more particular argument that subsection 59(2) of the SGA precludes the existence of vendors' equitable liens: even if that subsection is read as preserving general law (including equitable) rules, and not only common law rules to the exclusion of equity, it does so "save in so far as they are inconsistent with the express provisions of this Act". Against the argument based on inconsistency, it can be pointed out that a seller's possessory lien and a seller's equitable lien would not be inconsistent, but merely different.

¹⁹⁶ *Mackreth v Symmons* (1808) 15 Ves 329, 33 ER 778. The existence of the doctrine has never been challenged in High Court decisions where issues relating to vendors' liens have been raised - see *Davies v Littlejohn* (1924) 34 CLR 174; *Wossidlo v Catt* (1935) 52 CLR 301; *Heid v Reliance Finance Co Pty Ltd* (1983) 49 ALR 229. See also *Hewett v Court* (1983) 149 CLR 639, Gibbs CJ at 645; Deane J at 663-664.

¹⁹⁷ *Mackreth v Symmons* (1808) 15 Ves 329, 33 ER 778; *Wossidlo v Catt* (1935) 52 CLR 301.

¹⁹⁸ A seller who attempts to take security, which for some reason is ineffective, cannot fall back on the lien - *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261.

¹⁹⁹ *Davies v Thomas* [1900] 2 Ch 462; *In re Stucley* [1906] 1 Ch 67.

²⁰⁰ For other statements see *Transport and General Credit Co Ltd v Morgan* [1939] 1 Ch 531, Simonds J at 546 (in a case where there were additional reasons for holding that there was no lien) and the more general statement of Lord Brandon of Oakbrook in *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd (The "Aliakmon")* [1986] 2 WLR 902 at 910-911 as quoted in para 1.15 above. In *Evans v McLean* [1987] WAR 110 at 115 Wallace J stated that no lien could exist over goods the subject of a vendor's legal lien under the SGA, but Burt CJ (at 114 and 115) and Rowland J (at 122) expressly left the point open. By contrast, in *Electrical Enterprises Retail Ply Ltd v Rodgers* (1989) 15 NSWLR 473, Keamey J at 492-493 was of the view that an equitable vendor's lien could arise in a contract for the sale of goods. An important factor was s 56 of the *Sale of Goods Act 1923* (NSW) which provides that nothing in that Act affects "any remedy of the buyer or the seller in respect of any breach of a contract of sale or any breach of warranty".

²⁰¹ [1927] 1 Ch 606. This judgment is quoted in para 1.15 above.

²⁰² In the SGA the equivalent provision is s 40.

On the whole, the question whether an unpaid vendor's lien can arise from a contract for the sale of goods must be regarded as open.²⁰³

4.44 There is a further argument, in part derived from the SGA, against the existence of vendors' equitable liens in contracts for the sale of goods. Section 51 of the SGA permits the grant of the remedy of specific performance in favour of a buyer, and it can be argued that this remedy is not available to a seller under a contract for the sale of goods.²⁰⁴ The judgments of three of the five members of the High Court in *Hewett v Court*²⁰⁵ can be read as expressing the view²⁰⁶ that a vendor's lien could not arise unless a decree of specific performance could be granted in favour of the vendor.²⁰⁷ Conjunction of decisions against a vendor on both points²⁰⁸ would be fatal to the existence of the equitable lien.

4.45 Aside from arguments derived from the SGA itself (including the argument turning on the availability of specific performance) there appears to be nothing in legal theory to prevent vendors' equitable liens from arising in contracts for the sale of goods. They arise from sales of other personalty,²⁰⁹ and there is no reason to think they would not arise in analogous situations, for instance from a contract for work and materials leading to the passing of property in the finished product.²¹⁰ A lien has been held to arise over the whole of the subject matter transferred on the sale of a business, including goods held as stock-in-trade.²¹¹ To deny the lien only to vendors of goods

²⁰³ In *Hewett v Court* (1983) 149 CLR 639 all members of the High Court avoided comment on the question of equitable liens generally in contracts for the sale of goods - see *Hewett v Court* (1983) 149 CLR 639, Gibbs CJ at 646, Murphy J at 650, Wilson and Dawson JJ at 654-655, Deane J at 662-663. More recently see *R & H Tresize v Bilato Nominees Pty Ltd and Northern Gold NL* (1986) 83 FLR 44, O'Leary J at 46; *Evans v McLean* [1987] WAR 110, Burt CJ at 114 and 115, Rowland J at 122.

²⁰⁴ The argument is again that the SGA is a code. The question whether a seller can be granted the remedy of specific performance is discussed in para 5.7 below.

²⁰⁵ (1983) 149 CLR 639.

²⁰⁶ Any observations on this point were by way of obiter dicta, since the case concerned a lien in a contract for work and materials, analogous to the purchaser's equitable lien.

²⁰⁷ See *Hewett v Court* (1983) 149 CLR 639, Gibbs CJ at 649-650 (referring to *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261 at 278; *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] 1 Ch 499 at 514; *In re Bond Worth Ltd* [1980] Ch 228 at 251), possibly Wilson and Dawson JJ at 658. Murphy J at 651 and Deane J at 664-667 can be read as rejecting the proposition for both purchasers' and vendors' liens. For an analysis of the judgments on this point see M Christie "The Equitable Lien in a Commercial Context" (1986) 14 *ABLR* 435, 440-442. Given that, for a vendor's lien to arise, property must have been conveyed to the buyer, it is hard to see what there is left specifically to enforce. Nevertheless, in *Electrical Enterprises Retail Pty Ltd v Rodgers* (1989) 15 NSWLR 473 Kearney J held that specific performance was a requirement for an equitable vendor's lien to arise.

²⁰⁸ That is, that specific performance is not available to a vendor in a contract for the sale of goods, but is a requirement for the existence of a vendor's equitable lien.

²⁰⁹ *Davies v Thomas* [1900] 2 Ch 462; *In re Stucley* [1906] 1 Ch 67.

²¹⁰ For the distinction between contracts for the sale of goods and contracts for work and materials leading to the production of a chattel see para 2.22 n 82 above.

²¹¹ *Byland Nominees Pty Ltd (In Liq) v McLean* [1985] WAR 352 (Pidgeon J), reversed on appeal *sub nom. Evans v McLean* [1987] WAR 110 (FC) on the ground that the price was allocated by the transaction (or thereafter -

appears discriminatory, and could lead to the drawing of otherwise unnecessary distinctions between kinds of contracts. The lien itself helps prevent what appears to the Commission to be an unfairness, that a buyer (and those claiming through the buyer in insolvency, or claiming security over the buyer's assets) should retain the benefit of the property without having paid for it. In the Commission's tentative view, the equitable vendor's lien should not be denied to sellers under contracts for the sale of goods unless there are clear and strong reasons for doing so.

4.46 In his judgment in *In re Wait* Atkin LJ²¹² uses commercial certainty and the maintenance of well settled rules as a powerful reason for denying that equitable interests (including the unpaid vendor's lien) can arise from contracts for the sale of goods. The Commission would welcome evidence, or expressions of views, of disruption to business practice that would result if vendors' equitable liens could arise from contracts for the sale of goods. It seems to the Commission that the business community has not only recognised the need for something akin to the vendor's lien, but has taken its own measures in this regard, ironically enough by manipulation of the rules concerning the passing of property to be found in the SGA. In recent years, use of Romalpa clauses²¹³ has become widespread in contracts for the sale of goods. By these clauses, sellers use the freedom granted to the parties by the SGA²¹⁴ to control the passing of property in existing specific or ascertained goods, so as to retain legal title to goods until the price has been paid. A Romalpa clause is quite different in legal concept from a vendor's equitable lien,²¹⁵ and its legal effects are different and can be made to be much wider.²¹⁶ Nevertheless, in practical terms the Romalpa clause performs the function of a security for the unpaid price of goods sold.

Rowland J) as between the business and the stock. The original stock having been sold, there could be no lien for the unpaid price for that stock, over the replacement stock, or over the business, the separate price for which had been paid in full. It seems that the Full Court accepted the possibility of a vendor's lien over the business, comprising a lease and chattels.

²¹² *In re Wait* [1927] 1 Ch 606 at 635-636 and 639-640.

²¹³ See para 4.19 n 70 above.

²¹⁴ See s 17(1) of the SGA.

²¹⁵ Under a Romalpa clause the seller retains legal title to the goods, and in the event of non-payment resorts to the goods either by not terminating the contract of sale and reselling the goods pursuant to a right of resale, or by terminating the contract of sale and repossessing the goods as the seller's own - see the analysis of Robert Goff LJ in *Clough Mill Ltd v Martin* [1985] 1 WLR 111 at 117-118. A vendor's lien only arises if the seller passes legal title to the buyer, but in the event of non-payment permits the seller to have resort to the goods as property of the buyer over which the seller has security in equity.

²¹⁶ Under a properly drafted Romalpa clause a seller can sometimes claim not only goods still in the hands of the buyer, but also the proceeds of sale of goods sold in the buyer's course of business. Moreover, the Romalpa clause seller can retain title until other debts, not merely the price of the particular goods, are paid - see *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339. The equitable lien is a particular lien, in that it secures on goods only the price of those goods, and is lost if those goods are resold by the buyer in the ordinary course of business - see *Evans v McLean* [1987] WAR 110.

4.47 Although use of Romalpa clauses shows that at least some sections of the business community²¹⁷ see a need for a seller to have security over goods sold for any balance of price unpaid, Romalpa clauses may be just as disruptive of business expectations as would be unpaid vendors' equitable liens. The existence of neither, for instance, will be revealed by a search of any registry, except in the case of a Romalpa clause and possibly a lien over registrable goods under the *Chattel Securities Act 1987* (WA). Liquidators, trustees in bankruptcy and persons taking security over stock of manufacturers, distributors or retailers may have views about the desirability of Romalpa clauses, which differ from the views of people who supply materials to manufacturers or stock to distributors or retailers. In the Commission's tentative view, Romalpa clauses are now a part of commercial life, and the Commission should not seek in a reference on the SGA to deal with what is essentially (though not in form) a mechanism for taking security over personal property, for instance by recommending a change in the rules relating to the passing of property so as to prohibit or limit retention of title.²¹⁸ That should be done through a review of the law governing security over personal property,²¹⁹ which should govern all arrangements having or creating the effect of a security,²²⁰ and would cover both Romalpa clauses and vendors' equitable (and indeed possessory) liens.²²¹ The question for the Commission in this part of this reference is what should be done about vendors' equitable liens in contracts for the sale of goods.

21. *What are the commercial or practical reasons for or against equitable vendors' liens arising by operation of law from contracts for the sale of goods?*

22. *Should vendors' equitable liens be capable of arising from contracts for the sale of goods?*

4.48 In the broadest terms, the Commission can see four different options for reform.

1. The SGA could specifically negate the existence of an unpaid vendor's equitable lien arising from a contract for the sale of goods. ("Option 1")
2. The SGA could make it clear that the Act does not itself negate the existence of such a lien. ("Option 2")

²¹⁷ Essentially, sellers who supply goods to manufacturers, distributors and retailers, not to consumers.

²¹⁸ The Commission expects to consider the rules governing the passing of property in a later Discussion Paper, and may there return to issues raised by Romalpa clauses.

²¹⁹ See for example *Personal Property Securities* (1992); *Personal Property Securities* (1993).

²²⁰ See *Personal Property Securities* (1993) 7-12 for an outline of transactions having the effect of a security.

²²¹ See *Personal Property Securities* (1993) 44-60 for discussion and recommendations for a general coverage by the proposed regime of all transactions having the effect of a security, and specific inclusions and exclusions from the regime.

3. The SGA could specifically confer such a lien, but make no other provision as to its operation. ("Option 3")
4. The SGA could specifically confer such a lien, and make some attempt to govern its operation. ("Option 4")²²²

4.49 Option 1 would clarify the law by removing any doubt as to the existence of the lien by removing the lien, and would also render the law more simple and certain. It would possibly only confirm what is already the law. The price is that sellers of goods would be denied a legal protection given to sellers of other property both real and personal and possibly to providers of property under other analogous contracts. This may not be regarded as too high a price, depending on the weight given to the observation that sellers have a remedy in their own hands, and can bargain for security for the price, or for a Romalpa clause, or simply retain possession and rely on section 40 of the SGA and the seller's possessory lien. The law helps those who help themselves. The observation may be given less weight (and the price appear correspondingly high) if it is thought that some sellers do not have the knowledge, advice or economic power to bargain for security, and should be given the minimal protection of a lien (which they could, presumably, contract to surrender).

4.50 Option 2 also clarifies the law in one sense,²²³ but does not simplify it and may render it less certain. In effect Option 2 leaves development of the law to the courts. Until a case settles the point it could be regarded as undecided as to whether the lien cannot exist in contracts for the sale of goods because of some equity rule not derived from the SGA. Even if that uncertainty is overcome or ignored in favour of the lien's existence, details of its operation and effect may remain uncertain to a greater or lesser extent. It could, for instance, safely be assumed that the lien would be lost if the goods were bought by a purchaser who took bona fide, for value, and without notice of the lien. Would the seller, however, take priority over a person who already had, or later took, equitable security over the buyer's property, including the goods purchased?²²⁴ Would the lien be lost if the

²²² Option 4 represents the position with regard to the vendor's possessory lien. S 40 of the SGA confers the lien, s 41 deals with part delivery, and s 42 describes circumstances in which the lien is lost. Ss 46 and 47 refer to sales of goods subject to a possessory lien.

²²³ It removes doubt by confirming the existence of the lien.

²²⁴ One line of argument is that the lien takes priority because it is attached to the goods at the time they are acquired by the buyer, so that the other security can only be over goods already subject to the lien - see *Mercantile Credits Ltd v Jarden Morgan Australia Ltd* (1990) 1 ACSR 805, particularly Derrington J at 820 (stockbroker's possessory lien on scrip) following, on a slightly different point, *George Barker (Transport) Ltd v Eynon* [1974] 1 WLR 462 (carrier's lien on goods). Against this, it could be argued that a person who has or takes security has a better equity than an unpaid seller who surrenders possession, and expects the buyer to deal

goods were inextricably mixed by the buyer with other goods of like quality, or would it survive as a lien on the bulk?²²⁵ Under Option 2 definitive answers to these and other questions would emerge only as cases were brought to the courts for decision. The courts would not however be asked to make decisions in a vacuum, but rather in the context of development of the law relating to equitable interests generally.

4.51 Option 3 would clarify the law, but complicate it by adding another weapon to the seller's armoury, and also render it less certain. Option 3 differs from Option 2 only in that the legislation would declare the existence of the lien: as with Option 2, its incidents would be left to the courts for development, applying general principles of equity.

4.52 In Option 4 the legislation would attempt a statement of the law relating to liens, as it applies to the unpaid vendor's lien arising from a contract for the sale of goods. There could be a statement of some rules, and a catch-all provision, similar to the present subsection 59(2) of the SGA, that the rules of the general law will apply so far as they are not inconsistent with specific provisions. The problem with this Option lies in devising a suitably comprehensive statement of the law. If too much is said, the legislation becomes too intricate, and possibly too inflexible to respond to developments in the law generally. It may also have to be amended at some later date to make the SGA accord with any statutory scheme introduced for the regulation of securities over personal property. If too little is said, not much will distinguish Option 4 from Option 3. Assuming the lien is to be confirmed by statute, it may be possible, however, to identify some key issues of principle²²⁶ which should be contained in the legislation, and leave the rest to the courts. The Commission would welcome comment on what issues might be so identified and dealt with.

23. *If vendors' equitable liens are to be capable of arising from contracts for the sale of goods, should the SGA be amended to*

- (a) *make it clear that nothing in the SGA prevents such liens from arising;*
- (b) *provide specifically that such liens do arise but make no further provision; or*
- (c) *provide specifically that such liens do arise, and make further provision for rules*

with the goods (by way of sale or the grant of security) in the ordinary course of the buyer's business. This would effectively make the lien available only against the buyer, or people taking from the buyer for no value, or with notice, or through the buyer on the buyer's insolvency.

²²⁵ If the seller retained title and the goods were wrongly mixed with the buyer's goods, the seller could possibly trace an interest in the mixed bulk, and if there had been additions and subtractions could lay claim to the 'lowest balance', but not to an equitable interest in the whole of the seller's assets - see by analogy the claims of certain buyers in *In re Goldcorp Exchange Ltd (In Receivership)* [1994] 3 WLR 199 ("the Walker and Hall claims"). No case holds that if title passes to the buyer, so that any mixing is not wrongful, a vendor's lien survives over the bulk.

²²⁶ One such issue is whether the lien can survive mixture of the goods in a larger bulk - see para 4.50 above.

governing such liens?

24. *If the SGA should be amended to provide specifically that such liens do arise, and make further provision for rules governing such liens, what rules can be identified as requiring specific provision in the SGA?*

3. SUMMARY AND GENERAL ISSUES

4.53 In the preceding paragraphs of this chapter, the Commission has attempted to review basic situations in which equitable interests might arise from a contract for the sale of goods. It has done so to explore the implications of the hypothesis that such interests do not arise because of the operation of subsection 59(2) of the SGA, which on this assumption preserves the rules of the common law but excludes the rules of equity, and is a complete codification of interests that can arise from contracts for the sale of goods.²²⁷

4.54 Rules for equitable interests arising from sales of property have been developed mostly through cases concerning sales of land. Equitable interests can exist in goods, and can be created as one of the terms of a contract for the sale of goods.²²⁸ The question is whether they should arise by operation of law from a contract for the sale of goods in the same way as they arise from a contract for the sale of land, or indeed other property not being goods. There appears to the Commission to be no reason in legal principle why they should not. The Commission would welcome submissions on this matter.

25. *In general terms, are there reasons in legal principle why equitable interests should not arise from contracts for the sale of goods, by analogy with contracts for the sale of land?*

4.55 There are of course practical distinctions to be drawn between contracts for the sale of land and contracts for the sale of goods. Goods circulate more freely than does land, and it might be thought that the arising of equitable interests would inhibit trade. In land sales there is frequently a period between contract and conveyance during which equitable interests may arise for the protection of one of the parties, whereas with goods the norm is for contract and conveyance to coincide.²²⁹ With land, there are recognised techniques for preserving the priority of equitable

²²⁷ The proposition that equitable interests do not arise in contracts for the sale of goods is expressed in comprehensive form in the judgment of Atkin LJ in *In re Wait* [1927] 1 Ch 606 at 635-636 quoted in para 1.15 above.

²²⁸ See *In re Wait* [1927] 1 Ch 606, Atkin LJ at 636.

²²⁹ See SGA s 18 Rule 1.

interests²³⁰ which are not available in sales of goods. Unlike land, goods often pass along a line of distribution before reaching a more or less permanent owner, and can be the subject of security at points in the line, so that the existence of equitable interests in buyers and sellers would complicate the law and impinge on the value of the security taken. The Commission would welcome comment on these and other practical differences between contracts for the sale of land and contracts for the sale of goods, and particularly their effect on how the law should be shaped.

26. *In general terms, are there practical reasons why contracts for the sale of land are not a suitable analogy to contracts for the sale of goods, for the purpose of considering whether equitable interests should arise from contracts for the sale of goods?*

4.56 It may be that difficulties associated with equitable interests arising from contracts for the sale of goods are more apparent than real, at least where no insolvency intervenes, and that there is a lack of case law testing their existence because, in practical terms, they need seldom to be called in aid. The rules for the passing of property in the SGA are directed to ensuring that legal title passes, if not at the time of contract, then as soon as the goods are identified and ready for delivery. In those cases where there is to be a gap of time between contract and the passing of property, during which equitable interests might exist, the parties are free to make specific contractual provision. The end purchaser in a distribution line, often a consumer, is seldom troubled by earlier equitable interests, as such a buyer invariably takes legal title in good faith, for value and without notice, so as to take title clear of any prior equitable interest. Within the distribution line, securities taken at various points are usually structured²³¹ to permit the goods to be moved on down the line in the ordinary course of business, but free of the security interest.²³² The Commission would welcome views as to whether, apart from insolvency situations, a general recognition of equitable interests as arising from contracts for the sale of goods would create practical difficulties.

27. *In general terms, are there practical reasons (outside those arising in insolvency) why equitable interests should not arise from contracts for the sale of goods, by analogy with contracts for the sale of land?*

4.57 It appears to the Commission that a general recognition of equitable interests as arising from contracts for the sale of goods would have its most important aspect in the insolvency of one of the parties to the contract. At this point there would be competing claims to the goods by one party to

²³⁰ For example, a purchaser could lodge a caveat against the title of the vendor of land under the Torrens system.

²³¹ Such securities may take the form of a floating charge.

²³² Even Romalpa clauses, which depend on retention of legal title and not on an equitable interest or security, usually authorise the buyer to sell the goods in the ordinary course of business: even without that authority, the buyer who bought on resale of the goods would most likely be protected by s 25(2) of the SGA.

the contract, the representative in insolvency of the other, and possibly a secured creditor of that other party. The Commission recognises that the possibility of there being equitable interests in goods may affect the behaviour of a secured creditor in deciding to grant finance,²³³ so that the impact of there being equitable interests is not confined to an actual insolvency.

28. *In general terms, are there practical reasons arising in insolvency why equitable interests should not arise from contracts for the sale of goods, by analogy with contracts for the sale of land?*

4.58 As between one party, and the representative in insolvency of the other, it appears to the Commission that the essential issue is whether or not the one party²³⁴ should in effect be treated as a creditor having security over the goods in the insolvency of the other. It might be asked why a seller of goods on credit, for example, should be better off, in the buyer's insolvency, than an unsecured supplier of services on credit. That general question has however already been answered (in favour of the seller) in sales of land and other property not being goods. Assuming there is no reason in legal principle for not according the same advantage to sellers of goods, the question then is, assuming equitable interests do not at present arise, whether they should be introduced. Their introduction would advantage one party, for example a seller of goods on credit, who could claim an equitable lien. As a group, sellers might be encouraged to supply on credit. Others, that is the unsecured creditors of the buyer, would suffered disadvantage. Such creditors, as a group, might be discouraged from allowing credit.²³⁵ The Commission would welcome comment on these matters.

29. *In general terms, would the introduction of equitable interests in contracts for the sale of goods, and in particular purchasers' and vendors' liens, have an impact on the commercial behaviour of suppliers of goods and services on credit without security?*

4.59 As between one party to a contract for the sale of goods, and a secured creditor of the other party, the issues and questions are similar to those arising in insolvency. To the extent that there are equitable interests in goods taking priority over security over those goods, the security is less effective. A potential financier approached to lend on security would always assess the value, in the event of insolvency, of the security offered, and this assessment would include consideration of

²³³ See para 4.31 (purchasers' liens) and also paras 4.46-4.47 (vendors' liens) above.

²³⁴ Whether a buyer who has paid but not got title, or a seller who has not been paid but not kept title.

²³⁵ Considerations of this nature were presumably taken into account when the *Bills of Sale Act 1899* (WA) was amended by the *Bills of Sale Amendment Act 1987* (WA) so that its operation was effectively confined to securities over stock, crops and wool. Prior to that amendment, a potential unsecured creditor could check the Bills of Sale Register Book to ascertain if the debtor had granted security over chattels (s 18) and, prior to the *Bills of Sale Amendment Act 1986* (WA), an actual unsecured creditor could caveat (s 17G) against the granting of security by the debtor over chattels.

whether there would be other interests, including equitable interests, in the property, which would take priority over the financier's security. If there were, the financier might decline to lend, or perhaps structure the security or take other measures so as to obtain priority. Such measures could add to the cost of the loan, and ultimately to the cost of the goods to the end buyer, often a consumer. The Commission would welcome comment on these matters, particularly from lenders on the security of goods.

30. *In general terms, would the introduction of equitable interests in contracts for the sale of goods, and in particular purchasers' and vendors' liens, have an impact on the commercial behaviour of financiers lending on the security of goods?*

4.60 In the final analysis, broad choices for reform may be relatively simple. Aside from leaving the SGA as it now stands, that Act could be amended to

- * deny the existence of equitable interests generally in contracts for the sale of goods;
- * provide that nothing in the Act prevents the existence of equitable interests in contracts for the sale of goods;
- * specify the equitable interests which will arise from contracts for the sale of goods;
- * both specify and legislate further for the equitable interests which will arise from contracts for the sale of goods.

The Commission would welcome comment on these choices, and generally on any issues relating to equitable interests in contracts for the sale of goods.

31. *In general terms, should the SGA negate, permit or make specific provision for all or some kinds of equitable interests to arise from contracts for the sale of goods?*

32. *In general terms, do equitable interests have a place in the law for contracts for the sale of goods?*

Chapter 5

EQUITABLE REMEDIES

1. INTRODUCTION

5.1 In this chapter, the Commission considers the applicability of equitable doctrines in contracts for the sale of goods, other than those so far mentioned. The reason for consideration remains the same: if subsection 59(2) of the SGA is construed as referring only to rules of the common law, and by implication excluding rules of equity, it follows that equitable doctrines applicable to other kinds of contracts will not apply to contracts for the sale of goods. Doctrines to be considered are

- * Specific Performance
- * Injunction
- * Penalties
- * Relief against forfeiture
- * Rectification

The Commission would welcome suggestions of other doctrines which might be considered.¹

33. *Are there other equitable doctrines which could apply to contracts for the sale of goods and to which the Commission should give consideration?*

2. SPECIFIC PERFORMANCE

(a) Introduction

5.2 The availability of specific performance is sometimes linked to other equitable doctrines. The judgment of Lord Westbury in the leading case of *Holroyd v Marshall*² in the context of equitable security over goods contains a general observation which could be interpreted as meaning that an equitable interest will not arise unless specific performance is available.³ It is clear from the

¹ The Commission expects to consider in a later Discussion Paper the requirement of writing for certain contracts for the sale of goods imposed by s 4 of the SGA, and the associated equitable doctrine of part performance.

² (1862) 10 HLC 191, 11 ER 999.

³ "A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance...And this is true, not only of contracts relating to real estate, but also of contracts relating to

case of *Hewett v Court*⁴ that the availability of specific performance is not necessary in order for a purchaser's lien to arise, but there are differences of view as to whether it is necessary for a vendor's lien.⁵ In *Stern v McArthur*⁶ the link between specific performance and the doctrine of relief against forfeiture was discussed.⁷

5.3 Whether or not the observation of Lord Westbury can now be regarded as simply wrong,⁸ it must at least in some contexts be qualified by interpreting "specific performance" as referring, not to "specific performance in the strict or technical sense of requiring the contract to be performed in accordance with its terms" but rather as encompassing "all of those remedies available to the purchaser in equity to protect the interest which he has acquired under the contract".⁹ Put this way, to say that specific performance is required for an equitable interest to arise "is to say little more than that the equitable interest of a purchaser under a contract for the sale of land is that which equity recognises and protects".¹⁰ In asking whether equitable interests arise in favour of purchasers or vendors under contracts for the sale of goods the answer should not turn, therefore, on the availability of specific performance in the "strict or technical sense", but on whether, and what, relief is available in equity.

5.4 There remains the issue of the extent to which specific performance in the "strict and technical sense" should be available in contracts for the sale of goods. There is provision for the remedy in section 51 of the SGA, and argument based on subsection 59(2) and the interpretation of the SGA as a code would lead to the conclusion that specific performance is not available except strictly in accordance with section 51.¹¹ That section has two important limitations: it refers only to

personal property, provided that the latter are such as a Court of Equity would direct to be specifically performed" - *Holroyd v Marshall* (1862) 10 HLC 191, 11 ER 999, Lord Westbury LC at 209, 1006.

⁴ (1983) 149 CLR 639. This case is discussed above in paras 4.29-4.30 in the context of equitable liens in favour of purchasers.

⁵ On this point see para 4.44 above.

⁶ (1988) 165 CLR 489.

⁷ On this point see para 5.24 below.

⁸ "Lord Westbury's fallacy" - *Re Androma Pty Ltd* [1987] 2 Qd R 134, McPherson J at 150. See also Sir Arthur Dean "Re Wait" (1932) 5 ALJ 289 at 292 ("quite contrary to equitable principles").

⁹ *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 522. This proposition was approved in *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, Mason CJ, Brennan, Deane and McHugh JJ at 252-253.

¹⁰ *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 523, referring to *Hewett v Court* (1983) 149 CLR 639, Deane J at 665-666.

¹¹ The argument is put by Atkin LJ in *In re Wait* [1927] 1 Ch 606 at 630, where he notes that the statutory remedy may be larger than the remedy available in equity prior to the legislation from which s 51 is derived, being the *Mercantile Law Amendment Act 1856* (UK) s 2. See also the brief comment in *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com Cas 39, Wright J at 46. In *In Re London Wine Co (Shippers) Ltd* [1986] PCC 121, Oliver J at 149 referred to the point, but found it unnecessary to decide upon it.

"specific or ascertained goods", and it is available only in favour of a buyer, to obtain delivery, and not a seller.¹²

(b) Specific or ascertained goods

5.5 The phrase "specific goods" is defined in subsection 60(1) to mean "goods identified and agreed upon at the time a contract of sale is made". It would seem that "future goods"¹³ can be also "specific goods". In the context of section 51, "ascertained goods" probably means goods (whether or not "future goods") identified and agreed upon after the contract of sale is made.¹⁴ A precise application of the wording of the equivalent section enabled Lord Hanworth MR and Atkin LJ to hold that there could be no decree of specific performance in *In re Wait*,¹⁵ where at the time of judgment the seller's trustee in bankruptcy was still holding 530 tons of wheat, and the buyer was seeking specific performance of a contract for 500 tons.¹⁶ Implicit in the judgments is the proposition that the Court could not order that the goods be ascertained. The proposition that the Court could so order might also founder on the strict words of the section, in referring to an action "for breach of contract to deliver".¹⁷

5.6 The question at issue is whether the fact that the goods are not specific or ascertained should in all cases be a bar to relief by way of specific performance. If a contract for the sale of unascertained goods contained a contractual obligation, express or implied, binding the seller to appropriate goods from a specified bulk so as to render them ascertained goods for the purposes of section 51, it would seem to the Commission that an interpretation of section 51 which prevented

¹² The section is one of a group of sections under the heading "Remedies of the Buyer", and allows the Court, in "any action for breach of contract to *deliver* specific or ascertained goods" to decree specific performance "on the application of the plaintiff" (emphasis added).

¹³ Future goods are defined in s 60(1) to mean "goods to be manufactured or acquired by the seller after the making of the contract for sale".

¹⁴ This was assumed to be so by Atkin LJ in *In re Wait* [1927] 1 Ch 606 at 630; see also *Thames Sack and Bag Co Ltd v Knowles & Co Ltd* (1918) 88 LJKB 585, Sankey J at 588.

¹⁵ [1927] 1 Ch 606. This case has been discussed extensively in paras 4.36-4.37 and 4.39 above.

¹⁶ For other cases where the fact that the goods were unascertained was a bar to specific performance see *Thames Sack and Bag Co Ltd v Knowles & Co Ltd* (1918) 88 LJKB 585; *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com Cas 39 (suggesting that the limitation to "specific or ascertained" goods would apply even if specific performance were available to a seller -as to which see para 5.7 below); *In Re London Wine Co (Shippers) Ltd* [1986] PCC 121. The last two cases are perhaps distinguishable from the first (and from *In re Wait* [1927] 1 Ch 606) on the basis that in neither case was there at any time a specified bulk from which the buyers were to be supplied, although the seller did have a general stock from which the buyers might be supplied.

¹⁷ Failure to ascertain is not necessarily failure to deliver. A counter-argument is that the section empowers the Court to "direct that the contract shall be performed specifically" whereas (if only the obligation to deliver were susceptible to a decree of specific performance) the words "direct that the goods shall be delivered" might have been expected. On this counter-argument, the words "contract to deliver" refers to a type of contract, not an obligation within a contract.

the Court from considering whether or not it would exercise its discretion to grant specific performance¹⁸ would be narrow and technical indeed. The literal wording of section 51 would, for instance, permit a decree of specific performance in a contract for specific goods where the seller is bound to put them in a deliverable state,¹⁹ or weigh, measure, test or do some other act or thing with reference to them for the purpose of ascertaining the price,²⁰ where any of those acts are a necessary prerequisite to the passing of property.²¹ There seems little difference between ordering the performance of such acts, and ordering performance of an obligation to appropriate goods to a contract.²² The Commission is tentatively of the view that the wording of section 51 of the SGA should not be a bar to a decree of specific performance in this latter situation, and seeks submissions on the issue.

34. *Should it be possible for a court to order specific performance of a contract of sale of a specified parcel from a specified bulk, where at the time the order is sought the parcel has not been ascertained?*

(c) Specific performance in favour of a seller

5.7 Section 51 is confined in its terms to specific performance in favour of a buyer. There seems little reason to deny the remedy, if otherwise appropriate, to a seller.²³ A contract for the sale of a business, including goods, can be regarded as a composite sale, and for that reason placed on a

¹⁸ If it could grant specific performance, the Court might in many such cases exercise its discretion against the plaintiff. Damages would almost always be an adequate remedy for breach of a contract for unascertained goods, as like goods would usually be available, at a price, and possibly even from the seller.

¹⁹ For the passing of property in these circumstances see s 18 Rule 2 of the SGA.

²⁰ For the passing of property in these circumstances see s 18 Rule 3 of the SGA.

²¹ An analogous situation arises in contracts for the sale of land subject to a condition, for example the consent of a third party. Until consent is obtained, the Court will not order specific performance of the obligation to transfer, but it can declare that the contract should be specifically performed and (if that be the case) that there is an obligation on one party to take steps to obtain the consent, further order specific performance of the rest of the contract if the consent is obtained, and make declarations as to what should happen if the consent is not obtained - see the form of order in *Kennedy v Vercoe* (1960) 105 CLR 521 and see further para 4.25 above.

²² It could be that the requisite acts are themselves such that a court would not order specific performance of them, as being in the nature of personal services. This matter, however, again goes to the exercise of discretion, rather than to whether, in principle, specific performance can be ordered.

²³ In *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com Cas 39 at 46, Wright J adverted to the possibility of specific performance in favour of a seller, but had not been referred to any such instance. The point is more fully discussed in *Timmerman v Nervina Industries (International) Pty Ltd* [1983] 1 Qd R 1 at 6-8 by Connolly J who, while recognising the "strong argument for the view that in a case of a straight out sale of goods the remedy is not available", nevertheless granted specific performance in favour of a seller of an obligation to buy back goods and the exclusive dealership and contracts of hire that went with them. This judgment was reversed (on a different ground) in *Timmerman v Nervina Industries (International) Pty Ltd* [1983] 2 Qd R 261, the Full Court there holding that the obligation was not to buy back the dealership, but to sell it to someone else, and that this obligation was not one of which the Court would grant specific performance.

different footing, so that specific performance may be decreed in favour of a seller.²⁴ There seems no reason to distinguish these contracts (where specific performance could be granted) from contracts for the sale of goods only (where specific performance cannot be granted). No doubt in many cases of simple sales a seller will have an adequate alternative remedy and specific performance will, in the exercise of the Court's discretion, be refused. A contract for the sale of goods is one where a seller agrees to exchange goods for money. If property has passed to the buyer, the seller will have an action for the price,²⁵ an award of which is tantamount to a decree of specific performance.²⁶ If property has not passed, the seller can maintain an action for damages,²⁷ the amount of which is often measured by the difference between the contract price and the value of the goods.²⁸ Even if the goods are valueless, an award of money is usually remedy enough.

There may nevertheless be cases where specific performance should be decreed in favour of a seller where the contract is of goods only. In such cases, the Commission's tentative view is that section 51 should not be an obstacle. The Commission invites comment on the matter.

35. *Should it be possible for a court to order specific performance of a contract for the sale of goods in favour of a seller?*

3. INJUNCTION

5.8 The SGA nowhere refers to the equitable remedy of injunction. In *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd*²⁹ an argument based on the equivalent of subsection 59(2) of the SGA and *Riddiford v Warren*,³⁰ that injunctions were not available in contracts for the sale of goods, was rejected by the Court of Appeal in New Zealand. In that case the Court granted an injunction, in favour of a buyer in a long term contract to take the whole of the

²⁴ For passing reference to the *Sale of Goods Act 1893* (UK), in a case where specific performance of a contract for the sale of a business was awarded in favour of a seller, see *Elliott v Pierson* [1948] 1 All ER 939. See also *Timmerman v Nervina Industries (International) Pty Ltd* [1983] 1 Qd R 1 (reversed without comment on this point in *Timmerman v Nervina Industries (International) Pty Ltd* [1983] 2 Qd R 261); *Dougan v Ley* (1946) 71 CLR 142 (specific performance, in favour of a buyer, of a taxi-cab, of special value because licenced and registered). The latter case was decided on the general law, there being in New South Wales no equivalent of s 51 of the SGA, and apparently the High Court would have been prepared to grant specific performance at the suit of the seller.

²⁵ For this remedy of the seller see s 48 of the SGA.

²⁶ The remedies are not identical - for instance, if the seller is entitled to the price, the Court has no discretion to refuse the remedy: Benjamin 832.

²⁷ For this remedy of the seller see s 49 of the SGA.

²⁸ The prima facie rule in s 49(3) of the SGA is that, where there is an available market, the measure of damages is the difference between the contract price and the market price. The market price usually represents the value of the goods.

²⁹ [1978] 1 NZLR 538.

³⁰ (1901) 20 NZLR 572.

seller's output of processed meat for export, to enforce an implied negative covenant not to sell to anyone else. A consequence of the reasoning in *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd*³¹ is that subsection 59(2) can be used to deny the applicability of an equitable doctrine to contracts for the sale of goods only if the doctrine is inconsistent with the express provisions of the SGA.³² On this reasoning it is still possible to argue that equitable doctrines relating to misrepresentation do not apply, but that doctrines relating to injunctions do apply.³³ The Court of Appeal in New Zealand further rejected the argument that, if in the circumstances the grant of a mandatory injunction would be tantamount to the grant of specific performance, it should not be given.³⁴ In effect, therefore, the Court was willing to grant a kind of specific performance, but not by calling in aid the express provision in the sale of goods legislation concerning specific performance. It seems, therefore, that the Court was of the view that there is no inconsistency between the statutory remedy of specific performance and the equitable remedy of injunction, even where the practical effect of the injunction is to enforce the contract. It would follow from this reasoning that such an injunction could be given in favour of a seller, assuming appropriate circumstances.³⁵

5.9 As is pointed out in *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd*,³⁶ injunctions have been granted in the United Kingdom in contracts for the sale of goods both before³⁷ and after³⁸ the *Sale of Goods Act 1893* (UK), without any difficulty being raised that the contract was one of sale of goods.³⁹ The decision in *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd*⁴⁰ has been followed in Australia,⁴¹ and in *Keetley v Quintan Pty Ltd*⁴²

³¹ [1978] 1 NZLR 538.

³² "We think that s. 60(2) of the *Sale of Goods Act 1908*...was intended at least primarily to preserve rules of substantive law on matters not covered by the express provisions of the statutory code" - *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538, Cooke J (for the Court) at 545.

³³ The reasoning assumes that "common law" in the subsection means general law, not common law (as distinguished from equity). For it to apply, it is still necessary to locate something in the legislation with which the equitable rule is inconsistent. In the case of misrepresentation, this is hard to do. In truth, it is difficult to see how *Riddiford v Warren* (1901) 20 NZLR 572 can stand with *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538.

³⁴ See *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538 at 548 citing *Dougan v Ley* (1946) 71 CLR 142 as accepting "the principle that the court of equity can intervene where chattels are of a special value to a person in order to carry on his business".

³⁵ A contract might require a manufacturer seller to tool up for production of items to the buyer's design which are not readily saleable otherwise than to the buyer (perhaps because information or designs were used which were exclusive to the buyer) and for the buyer to take its whole supply from the seller for five years. Could the buyer be restrained by injunction from buying elsewhere? See also *Esso Petroleum Co Pty Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (injunctions granted in favour of a seller under a petrol 'tie' agreement). [1978] 1 NZLR 538.

³⁶ [1978] 1 NZLR 538.
³⁷ *Donnell v Bennett* (1883) 22 Ch D 835.

³⁸ *Esso Petroleum Co Pty Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269. See also *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440.

³⁹ See also *Sky Petroleum Ltd v V.I.P. Petroleum Ltd* [1974] 1 WLR 576.

⁴⁰ [1978] 1 NZLR 538.

Anderson J contemplated, but did not grant, a mandatory injunction for return of goods wrongfully seized by the seller. In the Commission's view, it is reasonably clear that, as the law stands at present, injunctive relief can be given in at least some contracts for the sale of goods.

5.10 Most of the cases referred to above⁴³ have concerned long term contracts. It might be thought that such contracts should be distinguished (as permitting injunctive relief) from simple sales of goods (as not permitting relief). In the Commission's tentative view, this distinction does and should not go to the availability of the remedy as a matter of law. No doubt relief will more frequently be granted in long term contracts, where damages may not be an adequate remedy,⁴⁴ than in a single sale of ordinary commercial goods, where damages is often adequate compensation.⁴⁵ A countervailing factor in long term contracts is that the Court may be unwilling to grant an injunction where that would be tantamount to ordering specific performance of a contract involving personal qualities. These are matters which go to the exercise of the Court's discretion.

5.11 The Commission's tentative view is that injunctive relief should be available in contracts for the sale of goods, subject to the ordinary principles governing the exercise of the Court's discretion, and that this is already the law. If the SGA were amended to provide generally that equitable doctrines are capable of applying to contracts for the sale of goods, that should put the issue of the availability of injunctions beyond doubt. On that basis, the Commission at present sees no need of a particular provision, along the lines of section 51 of the SGA,⁴⁶ to provide for the remedy of injunctive relief. It might, however, seem somewhat anomalous for a reformed SGA to have express provision for the equitable remedy of specific performance, but not for the equitable remedy of injunction. The Commission invites submissions on these and any other matters relating to the grant of an injunction by way of remedy in contracts for the sale of goods.

36. *Should relief by way of injunction be available in contracts for the sale of goods?*

37. *Should the SGA specifically provide for relief by way of injunction in contracts for the sale of goods?*

⁴¹ *Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* [1983] 1 NSWLR 513.

⁴² (1991) 4 WAR 133.

⁴³ *Donnell v Bennett* (1883) 22 Ch D 835; *Eso Petroleum Co Pty Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *Sky Petroleum Ltd v V.I.P. Petroleum Ltd* [1974] 1 WLR 576; *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538; *Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* [1983] 1 NSWLR 513.

⁴⁴ For a New Zealand instance of relief see *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538 and for a New South Wales instance see *Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* [1983] 1 NSWLR 513.

⁴⁵ See *Keetley v Quinton Pty Ltd* (1991) 4 WAR 133 (injunction refused).

⁴⁶ For discussion of s 51 see paras 5.4-5.7 above.

4. PENALTIES

5.12 The doctrine of relief from penalty clauses in contracts of all kinds derives from equity. The doctrine is that a court of equity will not permit enforcement of a clause of a contract the effect of which is to impose a penalty on one party because of breach of contract by that party. Such clauses often attempt to state an amount of damages to be paid in the event of breach disproportionate to and greater than any loss which might be expected to result from the breach. Penalty clauses must be distinguished from 'liquidated damages clauses', which represent a genuine attempt to estimate the loss, and which will be enforced by the courts.⁴⁷

5.13 Sections 49, 50 and 52 of the SGA deal with the rights of buyer and seller to damages for breach of contract.⁴⁸ Subsection (2) of each of these sections provides: "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's [or seller's, as the case may be] breach of contract". Each section also has a *prima facie* rule for ascertaining the amount of the loss. So far as the Commission is aware, it has never been doubted that parties to a contract for the sale of goods can make express provision in their agreement for the amount of damages payable in the event of breach. Provisions which seek to limit the damages payable are subject to ordinary rules of construction.⁴⁹ Likewise, there is no reason to doubt that clauses which seek to inflate damages into a penalty are subject to control through the equitable doctrine against penalties. Indeed, leading cases in the United Kingdom on the distinction between liquidated damages clauses and penalty clauses concern sales of goods.⁵⁰

5.14 The Commission is of the view that the law should be and is that the parties to a contract for the sale of goods can expressly agree as to the damages payable in the event of breach, subject to ordinary rules of construction, and to the equitable doctrine of relief from penalties. On that basis, the SGA needs no amendment in this respect. The Commission invites submissions on this matter.

⁴⁷ For general discussions of "penalty" and liquidated damages" clauses in contracts generally see Cheshire & Fifoot 809-811; Carter & Harland 758-766; Greig & Davis 1445-1466, Meagher 436-456.

⁴⁸ S 49 refers to damages for non-acceptance, s 50 to damages for non-delivery, and s 52 to damages for breach of warranty (or breach of condition which the buyer is compelled to treat as a breach of warranty).

⁴⁹ For one example among many see *Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394.

⁵⁰ See *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castenada* [1905] AC 6 (liquidated damages clause in contracts for construction and delivery of torpedo boats - possibly a contract for work and materials); *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (liquidated damages clause in support of a resale price maintenance agreement between buyer and seller). Nothing in the second case suggests that it is not authority on contracts for the sale of goods as such, but only on matters peripheral to the sale itself.

38. *Should doctrines relating to liquidated damages clauses and penalty clauses and other penalties apply to contracts for the sale of goods?*

5. RELIEF AGAINST FORFEITURE⁵¹

(a) Introduction

5.15 The phrase 'relief against forfeiture' refers to one of two somewhat different kinds of equitable relief,⁵² which may best be explained by reference to contracts for the sale of land. Such a contract may provide for payment of a deposit, and also for payment of part of the price in advance of conveyance. The contract may further provide that, in the event of termination of the contract by the seller for breach by the buyer, the seller may retain all monies so far paid. On termination, the seller will be discharged from the obligation to convey,⁵³ and may keep the deposit.⁵⁴ If the contract contained no provision for the vendor to keep monies paid, instalments other than the deposit would be recoverable by the purchaser at law⁵⁵ as money paid for a consideration⁵⁶ that had totally failed. If there is express provision for the vendor to keep monies paid (other than a deposit) equity will grant relief by refusing to permit forfeiture of instalments other than the deposit,⁵⁷ perhaps putting the purchaser on terms so as to do justice between the parties.⁵⁸ This is relief from forfeiture of money.

5.16 Assuming a contract of the general nature described in the preceding paragraph, questions relating to the second kind of relief against forfeiture will arise if the buyer seeks to escape the effects of termination of the contract. In certain limited circumstances⁵⁹ a court of equity will negate

⁵¹ The matters discussed under this heading are not relevant to contracts of sale governed by the CA. The statutory scheme of protection for buyers under that Act ensures that consumer buyers do not need the protection of equity through relief against forfeiture of either of the two kinds discussed below.

⁵² The distinction is clearly drawn in the judgment of Deane and Dawson JJ in *Stern v McArthur* (1988) 165 CLR 489 at 524.

⁵³ This proposition is subject to the buyer not having obtained relief against forfeiture of the second kind, to be discussed in paras 5.19-5.26 below.

⁵⁴ This proposition assumes that the deposit itself is reasonable in amount - *Coates v Sarich* [1964] WAR 2; *Tropical Traders Ltd v R & H Goonan* (No 2) [1965] WAR 174; *Yardley v Saunders* [1982] WAR 231 (sale of business). A reasonable deposit can be retained even if there is no express provision to that effect in the contract, but relief can be given against an unreasonable deposit - *Yardley v Saunders* [1982] WAR 231, Kennedy J at 237 (relief not granted); *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 (PC).

⁵⁵ *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, Starke J at 470, Dixon J at 477-478.

⁵⁶ The 'consideration' in this context is the land itself, not the promise to convey the land.

⁵⁷ *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, Starke J at 470, Dixon J at 478. Their Honours' observations are by way of obiter dicta, as the contract in that case contained no express provision for forfeiture of payments.

⁵⁸ *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, Dixon J at 478; *Coates v Sarich* [1964] WAR 2 (relief refused); *Tropical Traders Ltd v R & H Goonan* (No 2) [1965] WAR 174.

⁵⁹ A brief account of these circumstances is given in para 5.20 below.

the termination itself. Because on termination the buyer will lose the equitable interest arising from payment of the price (or part thereof) in advance,⁶⁰ relief of this kind is sometimes referred to as relief against forfeiture of an estate.⁶¹

(b) Forfeiture of money

5.17 Relief of the first kind ('forfeiture of money') is closely analogous to relief from a penalty.⁶² A terminating buyer may keep a deposit which is reasonable in amount, because it is in effect a provision for liquidated damages,⁶³ but retention of anything above that amount can only be regarded as "by way of punishment upon default".⁶⁴ There is little difference in substance between claiming (by way of punishment) money not yet paid, whereupon relief is from a penalty, and seeking to retain (by way of punishment) money already paid, whereupon relief is against forfeiture.

5.18 There is no doubt that, in the absence of any clause purporting to forfeit the money, a buyer under a contract for the sale of goods can recover advance payments of the price as money paid for a consideration that has totally failed,⁶⁵ even where the seller has terminated the contract for breach by the buyer.⁶⁶ The question is whether, in contracts for the sale of goods, equity should be unable to grant relief against a clause which purported to forfeit the money. As with relief from penalty clauses, the Commission can see no reason in legal principle or justice⁶⁷ why relief against forfeiture of money should not be available in contracts for the sale of goods. That view of the law was taken by a majority (Somervell and Denning LJJ) of the Court of Appeal in *Stockloser v*

⁶⁰ For discussion of the equitable interest that arises see above under the heading "Part price, specific goods" paras 4.19-4.23.

⁶¹ *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, Dixon J at 478 quoted in *Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Murphy J at 426, Mason and Deane JJ at 442 and in *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 524- 525.

⁶² For relief from penalties see paras 5.12-5.14 above.

⁶³ For liquidated damages clauses see paras 5.12-5.13 above.

⁶⁴ *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 524.

⁶⁵ In these circumstances, the 'consideration' is the goods, not the promise to sell and deliver the goods. S 53 of the SGA provides that nothing in the Act "shall affect the right of the buyer...to recover money paid where the consideration for the payment of it has failed".

⁶⁶ *Dies v British International Mining and Finance Corp Ltd* [1939] 1 KB 724. That case does not itself ascribe recovery to the doctrine of recovery of money for total failure of consideration, but rather to the intention of the parties - *id*, Stable J at 744. Recovery is however truly based on the law of restitution or unjust enrichment, and it is no longer necessary to call on any implied contract between the parties to justify recovery in such circumstances - see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

⁶⁷ Relief in this context can be regarded as based on the injustice that would arise if the seller were permitted to retain both the property and the price paid for it, and because of the close analogy between clauses forfeiting money, and penalty clauses - *Dies v British International Mining and Finance Corp Ltd* [1939] 1 KB 724, Stable J at 744-745 (goods), *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, Starke J at 470, Dixon J at 477-478; *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 524 (land).

Johnson.⁶⁸ The observations in that case have been questioned in the United Kingdom⁶⁹ but (appropriate changes being made) are consistent with High Court and Western Australian decisions concerning land.⁷⁰

(c) Forfeiture of estate

5.19 Much more difficult questions arise if an attempt is made to apply principles of 'relief against forfeiture of estate', as developed in contracts for the sale of land, to contracts for the sale of goods. This is in part because the law, even for contracts for the sale of land, appears to be in a state of development.⁷¹ Four questions may be isolated as relevant to contracts for the sale of goods:

- * What are the external circumstances which activate relief? ("External circumstances")
- * Does relief of this nature require that there be an equitable estate, which is preserved through relief? ("Equitable estate")
- * Would an equitable interest in goods, arising from a contract for the sale of goods, be an estate for purposes of this relief? ("Estate in goods")
- * Is relief of this nature necessarily connected with relief by way of specific performance? ("Specific performance")

⁶⁸ [1954] 1 QB 476. Relief there was denied, so the views expressed were strictly speaking by way of obiter dicta. As to the circumstances required for relief to be granted, Denning LJ expressed the further view that two things are necessary, first that the sum forfeited be penal in amount, and second that it be unconscionable for the seller to retain it. Somervell LJ was not so precise, and refers at different points to the sum being of a penal nature, and to unconscionability - see Bridge 270 note 172. That there are two separate requirements is debatable.

⁶⁹ *Galbraith v Mitchenall Estates Ltd* [1965] 2 QB 473 (a case of hire, not sale) referring to *Campbell Discount Co Ltd v Bridge* [1961] 1 QB 445 (CA) and *Bridge v Campbell Discount Co Ltd* [1962] AC 600 where, however, observations on equity jurisdiction based on 'unconscionability' may have been directed to a different context than relief against forfeiture.

⁷⁰ For these cases see para 5.15 above.

⁷¹ Much of what follows in this discussion draws on analyses of issues contained in the judgments, both majority and dissenting, in *Legione v Hateley* (1983) 152 CLR 406 and *Stern v McArthur* (1988) 165 CLR 489, both of which are important High Court decisions in this area of law. Both cases concern land.

(i) *External circumstances*

5.20 It is not enough to activate the doctrine of relief against forfeiture merely that a contract has been terminated; the termination must be accompanied by such circumstances as call for the intervention of equity. There is considerable discussion in the judgments in *Stern v McArthur*,⁷² and in the earlier case of *Legione v Hateley*,⁷³ as to the nature of those circumstances. In general terms, what is required is that a party should be acting against good conscience in seeking to maintain the termination of the contract, but it is possible to be somewhat more precise. In both High Court cases reference is made⁷⁴ with approval to a statement of Lord Wilberforce in *Shiloh Spinners Ltd v Harding*.⁷⁵ After referring to the "commonest instances" of mortgages and leases containing re-entry clauses, and to copyholds, Lord Wilberforce continued:⁷⁶

"There has not been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs. ..Secondly, there were the heads of fraud, accident, mistake or surprise, always a ground for equity's intervention".

This itself is not necessarily an exhaustive statement of the circumstances in which relief of this kind will be granted. *Legione v Hateley*⁷⁷ can be regarded as being in the second category ("fraud, accident, mistake or surprise")⁷⁸ and *Stern v McArthur*⁷⁹ in the first. Both cases are authority for a further important dimension of relief against forfeiture. *Legione v Hateley*⁸⁰ establishes that relief is available for failure to perform on time, notwithstanding that timeous performance has expressly been made of the essence of the contract. *Stern v McArthur*⁸¹ shows that relief can be available where delay is so great that, regardless of any clause making time of the essence, at common law the delay would be regarded as giving rise to a right to terminate.

⁷² (1988) 165 CLR 489.

⁷³ (1983) 152 CLR 406.

⁷⁴ *Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Murphy J at 424 (Mason and Deane JJ clearly have the statement in mind, but do not quote it); *Stern v McArthur* (1988) 165 CLR 489, Brennan J at 512, Deane and Dawson JJ at 527 (Mason CJ at 500 and Gaudron J at 539 both refer to a passage that follows shortly thereafter). [1973] AC 691.

⁷⁵ *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 722

⁷⁶ (1983) 152 CLR 406.

⁷⁷ There were additional circumstances giving weight to the purchaser's claim for relief against forfeiture - see particularly *Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Murphy J at 429, Mason and Deane JJ at 449.

⁷⁸ (1988) 165 CLR 489.

⁷⁹ (1983) 152 CLR 406.

⁸⁰ (1988) 165 CLR 489.

⁸¹ (1988) 165 CLR 489.

5.21 External circumstances such as those described in the preceding paragraph could occur in contracts for the sale of goods. In an instalment contract for the sale of durable goods where time of payment has expressly been made of the essence of the contract,⁸² a buyer could well miss a payment or settlement deadline in circumstances similar to those which occurred in *Legione v Hateley*.⁸³ Although Romalpa clauses⁸⁴ do not create mortgages,⁸⁵ they could well be regarded as inserted "essentially to secure the payment of money",⁸⁶ particularly where they provide that property is not to pass unless all moneys⁸⁷ owing by buyer to seller have been paid.⁸⁸

(ii) *Equitable estate*

5.22 Questions relating to the circumstances in which the general law⁸⁹ would permit termination of a contract are not necessarily bound up with questions of whether any equitable interest has arisen as a result of that contract. A party might, for instance, be estopped from terminating.⁹⁰ Even where the relevant doctrine is relief against forfeiture, the equitable rule that, for instance, a party cannot terminate where it would be unconscionable to do so, because of "fraud, accident, mistake or surprise",⁹¹ does not have to be a rule which protects an equitable interest in property.⁹² In the context of contracts for the sale of goods it could be, for example, that a buyer would wish to negate a termination (achieved through "fraud, accident, mistake or surprise") so as to be able to make a valid tender of the balance of price payable. The effect and consequences of a valid tender on the passing of property is a different matter, but unless the termination is negated, the tender cannot begin to be valid. It may be, however, that relief in this context is exclusively (as named) relief from

⁸² S 10(1) of the SGA provides: "Unless a different intention appears from the terms of the contract, stipulations as to the time of payment are not deemed to be of the essence of a contract of sale".

⁸³ (1983) 152 CLR 406.

⁸⁴ Romalpa clauses are referred to in paras 4.46-4.47 above.

⁸⁵ "I am, however, unable to regard a provision reserving title to the seller until payment of all debts due to him by the buyer as amounting to the creation by the buyer of a right of security in favour of the seller" - *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339, Lord Keith of Kinkell at 353.

⁸⁶ This is the first head of jurisdiction to relieve against forfeiture described by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722.

⁸⁷ That is, not merely the unpaid balance of the price of the particular goods sold.

⁸⁸ That such clauses are valid is clear from *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339.

⁸⁹ General law here refers to the rules both of the common law and of equity.

⁹⁰ *Legione v Hateley* (1983) 152 CLR 406. As a result of *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and more particularly *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, it is now difficult to describe the doctrine of estoppel as either "common law" or "equitable". However described, estoppel does not need for its operation that there be an equitable proprietary interest requiring preservation.

⁹¹ This is the second head of jurisdiction to relieve against forfeiture described by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722.

⁹² Other circumstances which activate equitable relief may require such an interest. For example, Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722 referred to situations "where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money". Almost of necessity, this implies some property right which is being forfeited.

forfeiture of an estate, and only activated by the unconscionability of taking advantage of " fraud, accident, mistake or surprise" so as to deprive the other party of an equitable interest in property.

(iii) *Estate in goods*

5.23 On the basis that relief against 'forfeiture of estate' operates only for the protection of an equitable interest in property,⁹³ there is a further question as to whether it would extend to equitable interests in goods. Although the boundaries have perhaps not yet been clearly drawn, and the doctrine has been restricted in England to proprietary or possessory rights,⁹⁴ nevertheless even in that jurisdiction it has been extended to personal property⁹⁵ though not to a licence⁹⁶ or to mere contractual rights.⁹⁷ If the doctrine is not necessarily confined to land, and if equitable proprietary interests can arise from contracts for the sale of goods,⁹⁸ then contracts for the sale of goods are at least candidates for the application of the doctrine.

(iv) *Specific performance*

5.24 The precise relationship between the doctrine of relief against 'forfeiture of estate' and relief by way of specific performance, or other relief in equity,⁹⁹ is not finally settled. No doubt as a practical matter a buyer seeking relief from termination of the contract does so in order also and simultaneously to obtain specific performance. Strictly speaking, however, it appears that relief against forfeiture is a preliminary step to further relief, in that its effect is only to negate the purported termination of the contract.¹⁰⁰ As pointed out by Gaudron J in *Stern v McArthur*¹⁰¹ any further remedy will depend on the nature of the entitlement that has been preserved through reversal of the purported termination of the contract.

⁹³ For a statement of a wider doctrine see *Federal Airports Corporation v Makucha Developments Pty Ltd* (1993) 115 ALR 679, Davies J at 689 ("These cases [in the High Court] demonstrate an acceptance of the general principle of equity, that a court may relieve against the detriment caused by unconscionable conduct, particularly when it is associated with fraud, accident, surprise or mistake").

⁹⁴ Sir Anthony Mason *Themes and Prospects* in P D Finn (ed) *Essays in Equity* (1985) 242-243, and see W M C Gummow *Forfeiture and Certainty: The High Court and the House of Lords* id 30.

⁹⁵ *B.I.C.C. Plc v Burndy Corporation* [1985] Ch 232 (patents and other intangible property).

⁹⁶ *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 (licence to use intellectual property).

⁹⁷ *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 (time charter); see also *Westminster Properties Pty Ltd v Comco Constructions Pty Ltd* (1991) 5 WAR 191, Malcolm CJ at 196-198, Kennedy J at 202-206 where the issue is fully discussed.

⁹⁸ For discussion of this issue see above, particularly under the heading "Part price, specific goods" paras 4.19-4.23.

⁹⁹ Gaudron J in *Stern v McArthur* (1988) 165 CLR 489 at 538 refers to "the entitlement equity regards as subsisting and the remedy necessary to give effect to that entitlement".

¹⁰⁰ *Stern v McArthur* (1988) 165 CLR 489, Brennan J (dissenting in the result) at 509-510, Deane and Dawson JJ at 525-526. The issue is more fully discussed by Gaudron J at 536-538.

¹⁰¹ (1988) 165 CLR 489, Gaudron J at 538.

(v) *Commission's tentative view*

5.25 The Commission's tentative view is that it should not attempt to address these questions, for sales of goods only, in a review of the SGA. They raise matters which go to the general nature of the doctrine of relief against forfeiture, which should be left to the courts as part of the orderly development of the law generally. The SGA should not, therefore, attempt to state the rules relating to relief against forfeiture, and make them applicable to contracts for the sale of goods. The Commission does, however, have the task of considering whether there is anything intrinsic to contracts for the sale of goods, or to the SGA, which would make it undesirable for the law relating to relief against forfeiture to be capable of application to contracts for the sale of goods. If it is undesirable, the legislation can be made to exclude such relief; if not undesirable, the legislation should contain nothing which would preclude application, to contracts for the sale of goods, of the general rules relating to relief against forfeiture.

5.26 The possibility that a court exercising equitable jurisdiction may grant relief against forfeiture renders less certain the operation of the rules relating to termination of contracts. The jurisdiction seems particularly directed to relief where one party, usually a buyer, has failed to perform on time. It may be thought that, in contracts for the sale of goods, performance on time even of payment obligations, and the accompanying certainty of the transaction, is of such importance that the equitable doctrine of relief against forfeiture should simply not be permitted to intrude. It would follow that a contract could be terminated for failure to pay, notwithstanding that the failure arose through "fraud, accident, mistake or surprise"¹⁰² or otherwise through the unconscientious conduct of the seller, but this might be a sufficiently small price to pay for contractual certainty. The Commission's tentative view, however, is that commercial certainty is not sufficient reason to exclude the doctrine of relief against forfeiture from contracts for the sale of goods, if that doctrine would otherwise apply. In other parts of this Discussion Paper the Commission has dealt with other matters which might be relevant to relief against forfeiture, such as whether equitable interests arise from sales of goods,¹⁰³ and the extent to which the remedy of specific performance is available.¹⁰⁴ Assuming these matters are addressed in any reform of the SGA, in the Commission's tentative view the applicability of the doctrine of relief against forfeiture can be left to the courts as part of the development of the law generally. The Commission invites

¹⁰² The number of occurrences in which the circumstances would warrant relief could be few indeed.

¹⁰³ See generally ch 4 above.

¹⁰⁴ See paras 5.2-5.7 above.

comment on the above, and any other matter relating to the question of whether relief against forfeiture, in any form, should be available in contracts for the sale of goods.

39. *Should relief against forfeiture of money be available in contracts for the sale of goods?*
40. *What are the commercial and practical considerations for and against relief against forfeiture of estate in contracts for the sale of goods?*
41. *Should the doctrine of relief against forfeiture of estate be capable of applying to contracts for the sale of goods?*

6. RECTIFICATION

5.27 Rectification is an equitable doctrine whereby, if a contract is made but incorrectly recorded in writing, the written record can be corrected or 'rectified' so as to accord with the contract as actually agreed.¹⁰⁵ Rectification of the document can be made to reflect the oral agreement, notwithstanding that the contract is one required to be in or to be evidenced by writing.¹⁰⁶ The doctrine has been applied in the United Kingdom to contracts for the sale of goods¹⁰⁷ without any question being raised as to whether it was excluded by operation of the equivalent of subsection 59(2) of the SGA. The Commission can see no reason why the doctrine of rectification should be excluded from contracts for the sale of goods. Particularly if the SGA were amended to make it clear that equitable doctrines were capable of application to contracts for the sale of goods, the Commission is of the view that there would be little doubt as to the applicability of the doctrine of rectification, and that no specific provision for this doctrine need appear in the legislation. The Commission invites comment on this matter.

42. *Should the doctrine of rectification be applicable to contracts for the sale of goods?*
43. *Are there any other matters relating to the applicability of the rules of equity to contracts for the sale of goods, not referred to in this Discussion Paper, to which the Commission should give consideration?*

¹⁰⁵ For general discussions of rectification see Cheshire & Fifoot 304-311, 319-320; Carter & Harland 417-424; Greig & Davis 928-938.

¹⁰⁶ *United States of America v Motor Trucks Ltd* [1924] AC 196 (land). For the writing requirement see s 4 of the SGA.

¹⁰⁷ *Caraman Rowley and May v Aperghis* (1923) 40 TLR 124 (Smyrna sultanas). It was considered for application, but not applied, in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 (horsebeans).

Chapter 6

QUESTIONS AT ISSUE

General approach to reform

1. Does the summary in paragraph 1.11 represent an appropriate approach to reform of the SGA?

Paragraphs 1.2-1.11

Misrepresentation

2. Should there be amendment to the SGA to provide that the rules of equity relating to misrepresentation shall apply to contracts for the sale of goods?

Paragraphs 2.49-2.55

3. Should there be amendment to the SGA to provide that rescission should be possible where a person has been induced to enter a contract for the sale of goods by a misrepresentation, notwithstanding that the misrepresentation has become a term of the contract?

Paragraphs 2.56-2.58

4. Should the rule in *Seddon's* case be rendered inapplicable to contracts for the sale of goods?

Paragraphs 2.59-2.63

5. Should the potency rule be abolished?

Paragraphs 2.64-2.66

Other invalidating causes

6. Should the equitable doctrine of pressure or duress apply to contracts for the sale of goods?

Paragraphs 3.7-3.10

7. Should equitable doctrines of mistake as an invalidating cause apply to contracts for the sale of goods?

Paragraphs 3.11-3.14

8. Should the rule in *Seddon's* case apply to contracts for the sale of goods voidable in equity for mistake?

Paragraph 3.15

9. Should the potency rule (and if applicable the merger rule) apply to contracts for the sale of goods voidable in equity for mistake?

Paragraph 3.15

10. Should equitable principles apply to rescission of contracts for the sale of goods for fraud?

Paragraphs 3.16-3.17

11. Should equitable doctrines leading to rescission, not corresponding to doctrines specifically mentioned in subsection 59(2) of the SGA, apply to contracts for the sale of goods?

Paragraphs 3.18-3.19

Equitable interests

12. Should an equitable property interest arise, in favour of a buyer of present specific goods, where the buyer has paid the whole of the price in advance, but property has not passed to the buyer?

Paragraphs 4.11-4.14

13. Should an equitable property interest arise, in favour of a buyer who has paid the whole price in advance for future specific goods, as soon as the seller acquires property in the goods?

Paragraphs 4.15-4.18

14. Should an equitable property interest be capable of arising in favour of a buyer who has paid part of the price in advance for specific goods, property in which remains in the seller?

Paragraphs 4.19-4.25

15. Should an equitable property interest be capable of arising in favour of a buyer who has paid all or part of the price in advance for specific or ascertained goods, property in which remains in the seller pending the fulfilment of some condition to be fulfilled by the seller?

Paragraphs 4.24-4.27

16. What are the commercial or practical reasons for or against equitable purchasers' liens arising by operation of law from contracts for the sale of specific goods?

Paragraphs 4.28-4.31

17. Should an equitable purchaser's lien be capable of arising by operation of law from a contract for the sale of specific goods?

Paragraphs 4.32-4.34

18. If equitable purchasers' liens should be capable of arising by operation of law from contracts for the sale of goods, should the SGA

- (a) make specific provision for equitable purchasers' liens; or
- (b) provide that nothing in the Act prevents such liens from arising?

Paragraphs 4.33-4.34

19. Should it be possible for an equitable interest in a specific or ascertained bulk to arise in favour of a buyer of a specified parcel from that bulk, where the buyer has paid part or all of the price, but a particular parcel has not been unconditionally appropriated to the buyer's contract?

Paragraphs 4.35-4.38

20. Should an equitable purchaser's lien be capable of arising by operation of law over a specific or ascertained bulk, in favour of a buyer of a specified parcel to be drawn from that bulk?

Paragraphs 4.39-4.40

21. What are the commercial or practical reasons for or against equitable vendors' liens arising by operation of law from contracts for the sale of goods?

Paragraphs 4.42-4.47

22. Should vendors' equitable liens be capable of arising from contracts for the sale of goods?

Paragraphs 4.42-4.47

23. If vendors' equitable liens are to be capable of arising from contracts for the sale of goods, should the SGA be amended to

- (a) make it clear that nothing in the SGA prevents such liens from arising;
- (b) provide specifically that such liens do arise but make no further provision; or
- (c) provide specifically that such liens do arise, and make further provision for rules governing such liens?

Paragraphs 4.48-4.52

24. If the SGA should be amended to provide specifically that such liens do arise, and make further provision for rules governing such liens, what rules can be identified as requiring specific provision in the SGA?

Paragraph 4.52

25. In general terms, are there reasons in legal principle why equitable interests should not arise from contracts for the sale of goods, by analogy with contracts for the sale of land?

Paragraph 4.54

26. In general terms, are there practical reasons why contracts for the sale of land are not a suitable analogy to contracts for the sale of goods, for the purpose of considering whether equitable interests should arise from contracts for the sale of goods?

Paragraph 4.55

27. In general terms, are there practical reasons (outside those arising in insolvency) why equitable interests should not arise from contracts for the sale of goods, by analogy with contracts for the sale of land?

Paragraph 4.56

28. In general terms, are there practical reasons arising in insolvency why equitable interests should not arise from contracts for the sale of goods, by analogy with contracts for the sale of land?

Paragraph 4.57

29. In general terms, would the introduction of equitable interests in contracts for the sale of goods, and in particular purchasers' and vendors' liens, have an impact on the commercial behaviour of suppliers of goods and services on credit without security?

Paragraph 4.58

30. In general terms, would the introduction of equitable interests in contracts for the sale of goods, and in particular purchasers' and vendors' liens, have an impact on the commercial behaviour of financiers lending on the security of goods?

Paragraph 4.59

31. In general terms, should the SGA negate, permit or make specific provision for all or some kinds of equitable interests to arise from contracts for the sale of goods?

Paragraph 4.60

32. In general terms, do equitable interests have a place in the law for contracts for the sale of goods?

Paragraph 4.60

Equitable remedies

33. Are there other equitable doctrines which could apply to contracts for the sale of goods and to which the Commission should give consideration?

Paragraph 5.1

34. Should it be possible for a court to order specific performance of a contract of sale of a specified parcel from a specified bulk, where at the time the order is sought the parcel has not been ascertained?

Paragraphs 5.4-5.6

35. Should it be possible for a court to order specific performance of a contract for the sale of goods in favour of a seller?

Paragraph 5.7

36. Should relief by way of injunction be available in contracts for the sale of goods?

Paragraph 5.8-5.11

37. Should the SGA specifically provide for relief by way of injunction in contracts for the sale of goods?

Paragraph 5.11

38. Should doctrines relating to liquidated damages clauses and penalty clauses and other penalties apply to contracts for the sale of goods?

Paragraphs 5.12-5.14

39. Should relief against forfeiture of money be available in contracts for the sale of goods?

Paragraphs 5.15-5.18

40. What are the commercial and practical considerations for and against relief against forfeiture of estate in contracts for the sale of goods?

Paragraphs 5.19-5.25

41. Should the doctrine of relief against forfeiture of estate be capable of applying to contracts for the sale of goods?

Paragraphs 5.19-5.26

42. Should the doctrine of rectification be applicable to contracts for the sale of goods?

Paragraph 5.27

43. Are there any other matters relating to the applicability of the rules of equity in contracts for the sale of goods, not referred to in this Discussion Paper, to which the Commission should give consideration?