

**THE LAW COMMISSION AND  
THE SCOTTISH LAW COMMISSION**

**SUPPLEMENTARY CONSULTATION PAPER**

**SALE OF GOODS FORMING PART OF A BULK**

**INSOLVENCY ASPECTS**

**The Law Commission and the Scottish Law Commission  
Supplementary Consultation Paper**

**Sale of Goods Forming Part of a Bulk  
Insolvency Aspects**

1. **Section 16.** The Law Commission and the Scottish Law Commission are jointly considering possible recommendations for reform of section 16 of the Sale of Goods Act 1979 which provides that:

"Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

2. **The defect in the existing law.** The Commissions, after consultation,<sup>1</sup> are provisionally of the view that this rule gives rise to an unjustifiable anomaly in the case where the goods sold form part of an identified bulk, such as the cargo of a particular ship or the contents of a particular store. The anomaly is that a purchaser, who would have become owner of the goods if he had purchased the whole bulk, obtains no rights of ownership - not even rights of ownership in common with others - if he purchases part. In this respect United Kingdom law differs from the law in the United States,

---

<sup>1</sup>Law Commission Working Paper No 112 on Rights to Goods in Bulk (1989); Scottish Law Commission Discussion Paper No 83 on Bulk Goods: Section 16 of the Sale of Goods Act 1979 and section 1 of the Bills of Lading Act 1855 (1989).

where the Uniform Sales Act and, later, the Uniform Commercial Code have for many years permitted the purchaser in such circumstances to become an owner in common of the bulk. The effects of the existing United Kingdom rule can be illustrated by these examples.

1. A purchaser buys 99 bottles of wine out of an identified store containing 100 bottles. The seller becomes bankrupt before appropriating bottles to the contract.<sup>1</sup> The purchaser does not acquire ownership of a single bottle. However, if he had bought 100, or even if one bottle had broken before the seller became bankrupt, he would have acquired ownership in the full contract quantity.<sup>2</sup>
2. A feedstuffs manufacturer buys grain from a farmer, paying 90% of the price at the time of the purchase. The grain is to be collected, and the balance of the price paid, some months later. If the manufacturer has bought all the grain in a particular silo then property will normally pass immediately. If some remains the farmer's then property will not pass until collection. If, in the meantime, the farmer has become bankrupt the purchaser who has bought, say, all except 1 tonne of the grain

---

<sup>1</sup>Rule 5(1) of section 18 of the Sale of Goods Act 1979 provides that

"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 then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made."

<sup>2</sup>Cf. Re London Wine Co (Shippers) Ltd (1986) PCC 121.

will be in a worse position than if he had bought all the grain. Because of the lack of weighing facilities on many farms it is difficult for a purchaser to be sure that he has bought the whole of a bulk.

3. A seller sells the whole of a bulk by five separate contracts to five separate purchasers. Under the existing law the property in the whole remains with the seller until appropriation. If the seller had sold the whole of the bulk by one contract to a consortium of five purchasers, property would normally have passed to the purchasers immediately. The sale would have been a single sale of specific goods.

3. **The proposed solution.** The two Law Commissions are considering whether to recommend that a purchaser of a specified quantity of goods out of an identified bulk should, unless the contract provides otherwise, acquire an undivided share in the bulk, corresponding to the quantity purchased, at such time as the property in the goods would have passed had the goods been the whole of the bulk.<sup>1</sup> This undivided share would last only until the purchaser obtained property in the actual goods purchased (for example, on delivery of the goods to him), at which point the purchaser would become sole owner of the quantity purchased and would be free of any claims by other purchasers out of the bulk, even if there was not enough left in the bulk to satisfy all the

---

<sup>1</sup>The general rule under the Sale of Goods Act 1979 is that the property in specific or ascertained goods "is transferred to the buyer at such time as the parties to the contract intend it to be transferred". (Section 17(1)). In the absence of any indication of a different intention property in specific goods in a deliverable state passes to the buyer when the contract for sale is made. (Section 18, Rule 1).

other purchasers. There would, however, be a special provision to cover the situation where during the period of co-ownership the total quantities sold exceeded the quantity in the bulk or part of the bulk had deteriorated so that it was insufficient to satisfy all the buyers' contractual rights: in such cases each purchaser's undivided share would be proportionally reduced. This would not affect each purchaser's ability, before the bulk was exhausted, to take delivery of his contractual entitlement free of any claims by other co-owners.

4. **Normal trading not to be affected.** Normally one co-owner cannot dispose of any part of the co-owned goods without the consent of the others. This rule would be inappropriate in a trading situation. A seller who has sold 100 tonnes out of a 1000 tonne bulk should be able to sell all or part of the rest without obtaining the consent of the first purchaser, and so on. It is proposed therefore that any new legislation on this subject would provide that a buyer acquiring an undivided share in bulk goods under the new rules would be deemed to have consented to (a) dealings in the normal course of trade in goods forming part of the bulk and (b) delivery out of the bulk, to any other co-owner, of the quantity of conforming goods due to that co-owner. This would enable normal trading to take place, as at present, notwithstanding the buyers' new rights in undivided shares of the bulk.

5. **The position on insolvency.** It would seem, however, to be inappropriate to apply this deemed consent rule once insolvency has supervened. A buyer in that situation would not wish deliveries to be made to others out of the co-owned bulk if the result would be a shortfall which would leave him with only a claim

against the seller for breach of contract. The Commissions therefore are considering whether to recommend that the deemed consent should not extend to any dealing with, or delivery out of, the co-owned goods after the commencement of a winding up or similar triggering event (see below) at a time when the person dealing with, or delivering, the goods knew, or could reasonably be expected to have known, that the bulk was insufficient (or would become insufficient as a result of the transaction in question) to meet existing contracts relating to it.

**Example 1.** A store contains 1000 bags of fertiliser. The seller has sold 900 bags to a purchaser, but these bags have not been set aside or appropriated to the contract in any way. The seller becomes insolvent. A petition for the appointment of a liquidator is presented and a liquidator is appointed. The liquidator could sell the 100 unsold bags but he could not sell the 900 sold bags to someone else. The position would be essentially the same as if the 900 sold bags had been set aside and appropriated to the contract before the petition was presented.

**Example 2.** The whole of an identified bulk of oil has been sold, by separate contracts, to 10 purchasers but not delivered. The seller becomes insolvent and a winding up is commenced. The liquidator would not acquire the property in the oil and could not dispose of it to anyone other than the co-owners of it.

**Example 3.** A silo contains 500 tonnes of grain, all of which has been sold, under separate contracts, to 5 purchasers. 100 tonnes of the grain have deteriorated leaving only 400 tonnes of grain of merchantable quality. A petition for the appointment of a receiver is presented and a

receiver is appointed. As in example 2, the receiver may only dispose of the grain to the co-owners. If the deterioration is obvious, the receiver must, in the absence of agreement by all the co-owners to some other course of action, apportion both the deteriorated and sound grain between the co-owners in proportion to their shares in the bulk. The bulk will be frozen until such time as this is possible. If the deterioration is not obvious, the receiver will be able, until such time as it becomes obvious, to make delivery to any co-owner of his full share of sound grain. The co-owner will take free of any claims by his fellow co-owners and the receiver will be protected by the "could reasonably be expected to have known" formula.

6. **The triggering event.** On the one hand it is desirable to enable normal trading to continue whenever possible. On the other it is desirable to minimise the risks of a "race to the silo" once insolvency is apparent. Would it strike a reasonable balance if the triggering event, which cancelled the deemed consent to dealings and deliveries liable to create a shortfall, were to be the earliest of the following?

- (a) The appointment out of court of an administrative receiver (within the meaning of section 29(2) of the Insolvency Act 1986) or receiver.
- (b) The passing of a resolution for the voluntary winding up of a company.
- (c) The presentation of a petition for the appointment of an administrator, receiver or liquidator.
- (d) The presentation of a petition for a bankruptcy order (England and Wales) or sequestration (Scotland).

7. **Power to sell or dispose.** There may be cases where it would be advantageous for an administrator, receiver liquidator or trustee in a bankruptcy or sequestration to be able to sell or otherwise dispose of property in which a purchaser or purchasers had an undivided share. For example, one small lot may have been sold out of an identified bulk. An administrator (or receiver etc) may be able to get an exceptionally good price for the bulk if, but only if, it can be sold as a whole. If, in such circumstances, he could not obtain the consent of the purchaser to a sale of the whole there would seem to be a good argument for allowing him to apply to the court for authority to sell or dispose of the whole property without such consent, subject to the purchaser's right to receive the cash equivalent of the value of his share in the goods. Provisions to achieve this result could be on the lines of sections 15 and 16 of the Insolvency Act 1986 as they apply to goods in the possession of a company under a hire purchase agreement.

8. **Summary and invitation for views.** The purpose of this supplementary consultation document is to ask insolvency practitioners whether in their view a scheme on the above lines would be workable. In theory it ought to be because administrators etc may already be faced with the situation where a particular asset or the whole of a bulk has been sold in such a way that property has passed to the purchaser or purchasers although the goods remain in the possession of the seller. Under the present law, too, there could be situations where it is necessary to decide whether the subjects of a sale extend to the whole of a bulk or only to part of it. It is appreciated that in some cases it would be difficult or impossible to quantify precisely the amount in a bulk. The expression "could reasonably be expected to have known" is intended to provide some leeway in such



cases. An application for power to sell notwithstanding the interest of a purchaser or purchasers in an undivided share of the bulk goods might also be useful in some such cases. However, there may be practical considerations which the Commissions ought to take into account before finalising recommendations. The Commissions would therefore be grateful for responses to the following questions.

1. Would an amendment of the Sale of Goods Act of the type referred to in paragraph 3 of this paper (i.e. an amendment which enabled a purchaser of a specified quantity of goods out of an identified bulk to acquire an undivided share in the bulk) give rise to practical problems in insolvency of a type not already occurring when goods in the possession of the insolvent have been sold in such a way that property in them has already passed to a purchaser or purchasers?
2. Would the proposed subsidiary rules referred to in paragraphs 4 and 5 of the paper (rules designed to facilitate normal trading while protecting purchasers with undivided shares in a bulk on insolvency) be likely to give rise to practical problems?
3. Would a definition of the triggering event (i.e. an event which terminated deemed consent to dealings or deliveries liable to create a shortfall) on the lines set out in paragraph 6 of the paper be satisfactory?
4. Would a power to apply for authority to sell or dispose of goods subject to the co-ownership interests of one or more purchasers, on the lines set out in paragraph 7 of the paper, be useful?
5. If you foresee practical problems in any of

the above provisional proposals, how serious would they be and can you suggest any way of meeting them or minimising them?

6. Have you any other comments?