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1. INTRODUCTION

A. HOW TO USE CRAM NOTES

The Commercial Law Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

<table>
<thead>
<tr>
<th>Issue</th>
<th>State the legal issue relevant to the problem</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law</td>
<td>Identify the relevant case law and legislation</td>
</tr>
<tr>
<td>Analysis</td>
<td>Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.</td>
</tr>
<tr>
<td>Conclusion</td>
<td>Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.</td>
</tr>
</tbody>
</table>

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn’t one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS

The Commercial Law Cram Notes will refer frequently to the following legislation by using abbreviations.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Abbreviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale of Goods Act 1923 (NSW)</td>
<td>SOGA</td>
</tr>
</tbody>
</table>

Although the NSW Act is used, vastly similar legislation is used in each Australian jurisdiction.
2. SALE OF GOODS AND IMPLIED TERMS

A. THRESHOLD QUESTION – DOES THE SALE OF GOODS ACT APPLY?

i. IS IT A SALE OF GOODS?

The SOGA provisions only apply to contracts of sale for a money consideration, that is, a price (s 6(1)). In addition, the SOGA does not apply to any transaction which is intended to operate as a mortgage, pledge, charge, or other security (s 4(4)). In this way, the relevant sale of goods or services must be for a monetary sum, but must not be in the way of a loan or mortgage.

1) Definition

Under s 5(1) of the SOGA:
- Contract of sale is defined as an agreement to sell as well as a sale
- Goods include chattels personal (i.e. personal property that is not real property) but does not include an action or money. Notably, goods include things attached to or forming part of the land which are agreed to be severed.

2) Distinction between sale of goods, and provision of services

The sale of goods, as stated above, requires the sale of personal property. On the other hand, the provision of services involves the expending of work and labour. There is a fine line between the sale of goods and provision of services where services are provided on a chattel, that is agreed to be delivered to the buyer.

The test is whether, if the contract is carried out, the end result is the sale of a chattel. If the result of the contract is that the party has done work and labour on some chattel, but the chattel itself is not the subject of a sale (i.e. work and labour is subject matter of the contract, not the chattel that work and labour is applied to), then the party cannot sue for goods sold and delivered (Deta)

3) Examples

The following list provides an indicia of the sale of goods (Deta)
- The completion of the contract by delivery into the buyer’s hands of a completely new article of goods
- It is irrelevant that the value of the work and labour exceeds the value of chattel.
- A house is “goods” if it is agreed to be severed (Symes v Laurie)
- A computer system comprising of both software and hardware is a sale of goods (Toby Constructions)

The following has been held not to be goods:
- Work and labour is not “goods”, including a work of art in which the existence of the underlying chattel is a mere unavoidable incidence of the existence of the creation itself (Deta)
- A computer program itself is not a “good” (St Albans)
  o However, if the program is sold with the computer hardware, it may constitute goods (Toby Constructions)
- The supply of electricity is not a supply of goods (Telstra)
- The supply of information, such as electromagnetic waves, are not goods, but are services (Telstra)
However, note that even where the sale of goods was not the sole subject matter of the contract, SOGA still applies. For example, in *Symes v Laurie*, the sale of a house (goods, as it was severed from the land) and the included transportation (services) was the sale of goods. See also the sale of computer hardware (goods) and software in *Toby Constructions*.

**B. HAVE ANY IMPLIED TERMS BEEN EXCLUDED?**

Before considering the terms implied under the SOGA, it is useful to determine whether such implied terms and conditions have been excluded in the contract of sale. Section 57 provides that any implied terms and conditions can be negatived or varied by express agreement, thus limiting the operation of the SOGA.

**i. CONSUMER SALES**

However, if the contract is for a consumer sale, s 64 operates to prevent any terms implied by s 18 (sale by description), s 19 (fitness for purpose and merchantability) and s 20 (sale by sample) from exclusion by express agreement. The end result is that any purported agreement to exclude those terms in a consumer sale is void to that extent.

A consumer sale is defined under s 62 as a sale of goods by a seller in the course of a business where the goods:

(a) are of a kind commonly bought for private use or consumption, and  
(b) are sold to a person who does not buy them in the course of a business.

**C. IS THERE A BREACH OF IMPLIED UNDERTAKINGS?**

Section 17 implies various terms as to the title and goods being sold to the buyer. This includes:

- The implied condition that seller has a right to sell the goods (s 17(1))  
- The implied warranty that the buyer will have quiet possession of the goods (s 17(2))

**i. CONDITION – RIGHT TO SELL**

*Rowland v Divall*

- In this case, it was held that there was a total failure of consideration as the seller had no right to sell and the buyer did not get what he had bargained for, that is, good title.  
- As there is no sale of goods (because the seller had no right to sell), acceptance and use of goods in the meantime was irrelevant in considering whether the implied condition had been waived under s 16(3).  
  - Section 16(3) provides that the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty where the buyer has already accepted the goods.  
- The buyer will still be entitled to a return of the purchase price paid even if he cannot restore the goods to the seller, because the goods sold were not the seller's property and thus the seller would have no right to it.

*Butterworth v Kingsway Motors*

- The seller's defective title in goods can be subsequently cured (e.g. if the seller purchases title from the true owner, thereby giving him the chain of title)  
- The buyer can only rescind contract when title was still defective (i.e. when the seller did not have good title at time of sale, and no right to sell.). Where the seller’s defective title is cured, the buyer has not right of rescission.
Niblett
- While a seller may have the right to sell at the time of the sale, their right to sell may be lost if there is a vitiating factor (e.g. in this case, breach of a patent), thus revoking the seller’s earlier right to sell.

**ii. WARRANTY – QUIET POSSESSION**

*Microbeads v Vinhurst*
- A disturbance of the buyer’s possession by the holder of a patent granted after the sale of the goods would amount to a breach of quiet possession, even where the patent holder did not hold the relevant patent at the time of sale (i.e. the seller had a right to sell at the time).

**D. WAS THERE A SALE BY DESCRIPTION?**

Section 18 implies a condition into contracts for the sale of goods by description, that the goods shall correspond with that description.

**i. WAS THE SALE “BY” DESCRIPTION?**

A sale of goods will be “by” description where it is:
- Unascertained or future goods – being of a certain kind or class to which a description is applied; or
- Specific goods – bought by the buyer in reliance on the description which identifies the goods (*Benjamin* as approved in *Elder Smith*)

*Australian Knitting Mills*
- Goods will be sold by description as long as it is sold not merely as the specific thing, but as a thing corresponding to a description.

*Elder Smith*
- Where goods are described, there is a sale by description even if the goods are specific.
- The same applies even where the buyer has seen and selected the goods, if the deviation from the description is not apparent to the buyer.

*Harlingdon*
- For the sale to be “by” description the description had to be influential in the sale so as to become an essential term or condition of the contract.
- The buyer’s reliance on the description will show a common intention that it should be an essential term of the contract
  - Section 18 does not apply where it is not in the reasonable contemplation of the parties that the buyer is relying on the description such that the description became a term of the contract.
    - i.e. s 18 would not apply where the buyer buys goods such as they are (*Benjamin*)
- The relevant test is to construe the contract as a whole to identify the kind of goods being sold, that is, the description being agreed on.

We hope you have enjoyed this short preview of the Commercial Law Cram Notes. Don’t forget to check out the Law Study Tips we have on our website at www.UniCramNotes.com!