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essential for any commercial law student."*

Dr Clare Chambers-Jones, Associate Professor,  
University of the West of England

Second edition

# Commercial Law

EDITED BY

**Michael Furmston AND Jason Chuah**

# Commercial Law

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# Commercial Law

## Second Edition

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# Guided tour

## 2 Aspects of property, security and guarantees

By James Devenney\*

**Chapter outline**

- > 2.1 Aspects of property
- > 2.2 Possessory security
- > 2.3 Non-possessory security
- > 2.4 Contracts of guarantee
- > Further reading

**Chapter outlines** are located at the start of each chapter and highlight the main topics that will be explored in the chapter.

**DEBATE BOX**

P owes Q money. Unknown to P, R tenders payment to Q as a favour to P.

Is there a good tender of performance? Must R's act be ratified by P? What are the legal implications?

**ISSUE BOX**

**Understanding the different 'hats' that the parties will wear**

In *The Alakmon*, the shipment terms were of the 'C' type, that is, C&F, which is to say that the seller was responsible for the 'cost and freight' of the goods. So, when goods are sold on C&F terms, the buyer knows that the price he is going to pay includes the cost of the goods themselves and the carriage of the goods from the port of shipment to the discharge port (it being incumbent on the buyer to insure the goods for their transit).

It is essential that we grasp that a party's 'hat' as seller or buyer will involve him in quite different liabilities from his 'hat' in any role he might have under a contract of carriage.

**5.2.1.2 The passing of the risk in the goods**

**Debate and issues boxes** highlight particularly contentious areas of the law and help you refine your critical analysis skills necessary for gaining those top marks in exams.

**CASES**

***Perry v Barnett***<sup>25</sup>

In *Perry v Barnett*, an agent was employed to buy shares in a bank. An Act (now repealed) required the number of shares to be stated on the certificate, otherwise such contracts were void. The agent knew that the custom of the Stock Exchange was to ignore the Act, so he did not state the number of shares in the contract note. The court held that the principal was not bound, because he was entitled to a valid contract, not a void one.

***Robinson v Mollett***<sup>26</sup>

Another example, *Robinson v Mollett*, involved the London tallow market. It was a custom of that market that brokers could sell their own goods to a principal. The court held that the principal was not bound because the custom contradicted the principal's express instructions. Where an agent is employed as a principal's buyer, the custom of the market cannot convert the agent into the principal's seller. There would be a conflict of interest.

**Case boxes** provide summaries of the facts and key legal principles from the essential cases that you will need to refer to in your studies.

**POINT OF INTEREST**

The law of agency is based on the Latin maxim '*Qui facit per alium, facit per se*', which means 'he who acts through another is deemed in law to do it himself'.

An agency agreement is usually established with consent, that is, the principal agrees to the agent acting on his behalf and the agent agrees to do so. However, an agency agreement does not necessarily arise under contract. The agency can be gratuitous. For example, in *Chaudhry v Prabhakar*,<sup>27</sup> a woman had just passed her driving test. She wanted to buy a secondhand car and asked her friend to find one for her. She told her friend that the car must not have been the subject of an accident. Her friend found a car offered for sale by a car repairer. He noticed that the bonnet had been repaired but did not ask the repairer for information. When her friend recommended her to buy the car, she asked if the car had been in an accident before. He answered in the negative. After buying the car, the woman discovered that the car had been involved in an accident and proved unroadworthy. The woman sued her friend for breach of his duty of care. The Court of Appeal held that a gratuitous agent owes a duty of care and there was a breach here.

**Point of interest boxes** highlight interesting facts surrounding the subject.

**LEGISLATIVE PROVISION****Regulation 2(1)**

'commercial agent' means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the 'principal'), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal . . .

Note that an agent must be self-employed in order to fall within the Regulations. This means he cannot be an employee or a company officer, although a company or partnership can be a commercial agent as long as it acts as an independent contractor. Where an agent buys and

**Further reading**

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**Cresswell, Blair, Hill, Wood, et al.**, *Encyclopaedia of Banking Law* (Looseleaf from 1996) (Butterworths Lexisnexis, London).

**Ellinger, E. P., Lomnicka, E. and Hare, C.**, *Ellinger's Modern Banking Law* (5th edn, Oxford University Press, Oxford, 2010).

**Elliott, N., Odgers, R. and Phillips, J. M.**, *Bytes on Bills of Exchange and Cheques* (28th edn, Sweet and Maxwell, London, 2007).

**Enonchong, N.**, *The Independence Principle of Letters of Credit and Demand Guarantees* (Oxford University Press, Oxford, 2011).

**Legislative provision boxes** highlight the key sections of important legislation that you will need to draw upon when answering problem or essay questions.

**Further reading lists** at the end of all chapters point you to relevant academic articles enabling you to delve deeper into the academic debates surrounding the subject.



## Preface to the second edition

Much has been said already and much might yet be said about the best method of approaching the study of commercial law for students. The subject is so vast that one of the major challenges for us was ascertaining the 'right' content matter. There will be some areas which some scholars consider significant to the study of commercial law which have necessarily been omitted. The other challenge which we hope we had done rather better at overcoming is ensuring that the wide-ranging areas we have chosen to cover are given appropriate expert airing. We are therefore most grateful to our panel of specialist contributors for their help in assembling this second edition without compromising on the latest developments in the law and its readability.

We would also like to thank the reviewers of our first edition for their helpful comments. We have tried to incorporate some of these suggestions whilst ensuring that the book continues to satisfy the mainstream commercial syllabi on an undergraduate English Law programme. We have also been drawn to the fact that some schools use the book for their postgraduate students. We have therefore grown the lists of further reading to ensure that the book offers more for the student seeking to engage in wider and deeper research into English commercial law.

This second edition maintains the pedagogic features in the first edition which our readers have found useful. These features include debate boxes, issues for further thought, relevant case studies, diagrams to aid understanding, footnotes and reading lists, etc. As before, we have tried not to compromise when it comes to the intellectual facets of the law. This is not a practice manual; students are often challenged to question the rationale and logic of the law. We believe that the text makes a good balance between the practical and analytical aspects of the law.

We hope our colleagues skilled in the fine art of teaching and our discerning students will continue to find this volume useful.

Michael Furmston  
Jason Chuah  
September 2012



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# 1

## What is commercial law?

By Michael Furmston

### Chapter outline

- 1.1 What is commercial law?

### 1.1 What is commercial law?

#### 1.1.1 Introduction

The primary meaning given to the word 'commerce' in the *Oxford English Dictionary* is:

Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise, esp. as conducted on a large scale between different countries or districts; including the whole of the transactions; arrangements, etc., therein involved.

The central activity may be said to be the buying and selling of goods, particularly on a large scale.

The central meaning of 'commercial law' would, on this basis, be the rules which control and facilitate the buying and selling of goods. In this sense commercial law has existed for thousands of years, at least from soon after money was invented as a convenient means of exchange. Certainly many of the problems which we deal with today in the law of sales were familiar to the great Roman jurists of the second and third century AD: the concepts of property and risk; the extent to which the seller is liable for defects in the goods.

So any book on commercial law in any system is very likely to have at its centre an account of the law of sale of goods. There is one major qualification to this. In common law systems it is usual to write on and teach the law of contract separately. This is a matter of culture and not of logic. Many transactions involving the sale of goods are solved in common law systems by applying the rules of the general law of contract and in others by applying the law of sale of goods, but only the latter rules are discussed fully in books on commercial law.<sup>1</sup>

In the earliest sales the buyer will simply have paid in cash. Of course many buyers will still pay in cash but over the centuries many different forms of payment have evolved from

<sup>1</sup> See Chapters 4 and 5.

the early modern forms by bill of exchange to the most modern forms by electronic transfer. Study of methods of payment is clearly a central feature of commercial law.<sup>2</sup>

The various ways by which the parties can be represented are also important features. A high proportion of modern commercial contracts are made by agents on one or both sides. The law regulating agency is therefore a central part of commercial law.<sup>3</sup>

### 1.1.2 What do commercial people want from commercial law?

The traditional view is that commercial people want rules which are clear. The primary reason for this is that if the rules are clear it is possible to steer around them. So many of the rules in sale of goods are 'default rules', that is rules which apply only if the parties have not provided an answer for themselves.<sup>4</sup> Much commercial law is heavily influenced by the contracts which commercial individuals make or which are designed for them by commercial lawyers. These contracts are themselves heavily influenced by what has happened in the past and often by the desire to avoid it.

A good example is the invention of the contract of hire purchase. This arose because in the 1870s and 1880s goods started for almost the first time to be sold into the homes of the increasingly affluent working class on credit. An example would be a piano. Some purchasers found it difficult to keep up payments and sold the piano for cash to a neighbour. The supplier was still entitled to payment from his customer but in the nature of things the customers often had no cash and therefore the supplier sought to recover the piano from the person who bought it. They soon discovered that even if the contract of sale provided that the goods did not belong to the buyer until all the payments had been made, the rules of sale meant that the buyer would be able to transfer ownership to someone who bought from him in good faith.<sup>5</sup>

In response to this some bright lawyer invented the contract of hire purchase. In this contract the customer hires the goods for a period of, say, three years and pays monthly for doing so. At the end of the three years he has an option to buy the goods, typically for a trivial sum. The House of Lords was persuaded that in such a transaction the customer was not a buyer unless and until he exercised the option.<sup>6</sup> The result was that if he sold before then he did not pass a good title to the person to whom he sold. So although a credit sale and a hire purchase have the same economic objectives they have substantially different legal results.

A similar development is the banker's letter of credit. This is used all over the world as a means of facilitating international sales by giving the seller adequate assurance that he will be paid, but at the same time not requiring the buyer to pay until he has adequate control of the goods.<sup>7</sup>

<sup>2</sup> See Chapter 6.

<sup>3</sup> See Chapter 3.

<sup>4</sup> A good example is the rules for the passing of property and risk, nearly all of which can be changed by the parties if they want to.

<sup>5</sup> These rules are discussed in section 4.6.4.5.

<sup>6</sup> *Helby v Mathews* [1895] AC 471.

<sup>7</sup> See discussion in Chapters 5 and 6.

### 1.1.3 How did commercial law develop?

By the early 17th century something which looks recognisably like the modern law of contract had emerged. Informal exchanges of promises were generally enforceable and the doctrine of consideration had become established.<sup>8</sup> The reader will probably have encountered a few cases from this period.<sup>9</sup>

Major steps in the development of commercial law took place during the 18th century. The judgment of Holt CJ in *Coggs v Bernard*<sup>10</sup> is still the starting point for the analysis of bailment.<sup>11</sup> In 1756 Lord Mansfield became Chief Justice of the King's Bench, a position he held until 1788. He has strong claims to be regarded as the most important English (though he was Scots) commercial law judge.<sup>12</sup> During his tenure major developments were made in the law of insurance,<sup>13</sup> of bills of exchange<sup>14</sup> and of bills of lading.<sup>15</sup> By this time, too, England had become the most important commercial nation in Europe.

From this period on commercial law developed continuously. There was interactive pressure between what was happening in commerce and the legal system. Both were also subject to increasingly rapid technological change. The development of post and the railways, followed by telegraphic communication and steamships that could carry cargo on a reliable and predictable basis, transformed communication and made new kinds of transaction possible. During the latter part of the 19th century it became, for a period, fashionable to codify areas of commercial law, that is to state the rules which had been developed through the cases in statutory form in the Bills of Exchange Act 1882, the Sale of Goods Act 1893 and the Marine Insurance Act 1906.

The codifying statutes sought to make the law more accessible. In principle it looks easier to read the statutes than to plough through lots of cases. This would not be true if the statutes were written as statutes of the UK Parliament are normally written, in a language and style from which the meaning can only be wrung out with great difficulty. The codifying statutes are undoubtedly much easier to understand than this. Compare for this purpose the Sale of Goods Act 1893 with the Consumer Credit Act 1974.

Nevertheless, codifying statutes do have difficulties of their own. One is that although they dispose of pre-Act cases, they inevitably develop a body of case law of their own concerned with their interpretation. More seriously, they slow down the pace of change. This can be seen by comparing the law of contract in 1893 and 2009 and the law of sale of goods for the same period. Undoubtedly the law of contract changed much more. It is easier for a case law system to evolve to meet changing business practice and views of what is fair and sensible than for a statute-based system.

<sup>8</sup> A good account is that by Brian Simpson in Chapter 1 of M. P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (16th edn, Oxford University Press, Oxford, 2012).

<sup>9</sup> *Pinnel's case* (1602) 5 Co Rep 117a; *Lampleigh v Braithwait* (1615) Hob 105.

<sup>10</sup> (1703) 2 Lord Raym 908.

<sup>11</sup> D. Ibbetson in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing, Oxford, 2008) Chapter 1.

<sup>12</sup> No fewer than three chapters in *Landmark Cases in the Law of Contract* (*ibid.*) are devoted to his decisions in *Pillars v Van Mierop* (1765) 3 Burr 1663 (Gerard McMeel), *Carter v Boehm* (1766) 3 Burr 1905 (Stephen Watterson) and *Da Costa v Jones* (1778) 2 Cowp 729 (Warren Swain).

<sup>13</sup> *Carter v Boehm* (see above n. 12).

<sup>14</sup> *Pierson v Dunlop* (1777) 2 Cowp 577.

<sup>15</sup> *Lickbarrow v Mason* (1787) 2 Term Rep 63.

### 1.1.4 The rise of the consumer

Both life and business practices evolved very substantially in the 20th and early years of the 21st centuries. Perhaps the most striking example in this context is the recognition of the consumer as a separate interest. As has been shown very clearly in the past two years, modern capitalist societies are heavily dependent on purchases by consumers of goods and services and of the willingness of consumers to incur substantial debts in order to make these purchases. It is not at all easy to get the balance right.

The rise of the consumer has been followed by legislation to protect the consumer by giving him special treatment in relation to the procurement of goods and services<sup>16</sup> and in relation to the provision of credit.<sup>17</sup>

### 1.1.5 Other meanings of 'commercial'

The discussion above goes far to explain the content of a book on commercial law but it should be recognised that the word 'commercial' has other shades of meaning. An English barrister who said that he had a commercial practice might well mean that he spent much of his time in the Commercial Court, a part of the Queen's Bench Division, which specialises particularly in international sales and shipping disputes. An English solicitor who said that he had a commercial practice might well be interested in a much wider range of topics.

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ON THE  
WEBSITE

<sup>16</sup> See Chapter 8.

<sup>17</sup> See Chapter 9.

# 2

## Aspects of property, security and guarantees

By James Devenney\*

### Chapter outline

- 2.1 Aspects of property
- 2.2 Possessory security
- 2.3 Non-possessory security
- 2.4 Contracts of guarantee
- Further reading

## 2.1 Aspects of property

### 2.1.1 Introduction

The concept of 'property' is fundamental to commercial law for, at least, two reasons. First, 'property' forms the subject matter of many commercial transactions.<sup>1</sup> Secondly, 'property' – or the whereabouts of property – may have some highly significant consequences in commercial law. For example, as we shall see below,<sup>2</sup> the whereabouts of property in relation to contracts of sale of goods is highly significant for the following (non-exhaustive) reasons:<sup>3</sup>

- it impacts on whether the seller or buyer bears the risk of loss of, or damage to, the goods;<sup>4</sup>
- it impacts on whether a contract of sale of goods can be frustrated;<sup>5</sup>
- it impacts on a seller's ability to claim the price of the goods;<sup>6</sup>
- it has real ramifications should either the seller or the buyer become insolvent.<sup>7</sup>

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<sup>1</sup> See, generally, E. McKendrick, *Goode on Commercial Law* (4th edn, Butterworths, London, 2010) Chapter 2.

<sup>2</sup> See Chapter 4.

<sup>3</sup> See, generally, I. Brown, *Commercial Law* (Butterworths, London, 2001) at pp. 302–304.

<sup>4</sup> See s. 20, Sale of Goods Act 1979 although note, in particular, s. 20(4), Sale of Goods Act 1979.

<sup>5</sup> Cf. s. 7, Sale of Goods Act 1979 and *Kursell v Timber Operators and Contractors* [1927] 1 KB 298.

<sup>6</sup> Cf. s. 49, Sale of Goods Act 1979.

<sup>7</sup> See, generally, R. M. Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 *LQR* 433.