

REVIEW ARTICLE*

Sales and Consumer Law by KCT SUTTON (LBC Information Services, 1995) softcover recommended retail price \$95.00 (ISBN 0455 212988).

Twelve generations of law students (and their teachers) have eagerly awaited this new edition of Sutton. They will not be disappointed. Earlier editions of the book were sometimes hard to follow: "It's a great book but too detailed for my purposes", said one distinction student. In this new edition, all paragraphs are numbered and most have a subheading. Sutton may still be too detailed for some purposes but it is certainly no longer hard to follow.

The sale of goods is at the heart of commercial and daily domestic life. The rules are so well established that many transactions occur with little conscious regard for the legal principles underlying the exchange. Further, the detail and subtlety of sales law may be critical to some transactions: consider the transfer of property and risk in the sale of unascertained goods ex bulk, ineffective reservation of title, or the interplay of acceptance and the time allowed for examination.

This book is primarily an exposition of the *Sale of Goods Act 1923* (NSW), the *Trade Practices Act* and the *Fair Trading Act 1974* (Cth) as they relate to the sale of goods. The bulk of the book is concerned with the *Sale of Goods Act 1923* (NSW). The book's template is the New South Wales legislation- although the useful comparative table of other Australian jurisdictions and the UK is reproduced in this edition, and the differences in these jurisdictions are drawn out in the text.

Sutton adopts the interesting approach of providing an overview of the specific provisions of Part V of the *Trade Practices Act 1974* (Cth), along with the criminal sanction of a fine and civil remedies. This serves as an introduction to these topics but a reader requiring a more detailed discussion would be advised to turn to another text.

Sutton's fourth edition canvasses a number of new and interesting areas. Sutton discusses the repeal (in most jurisdictions) of the requirement that an enforceable

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contract for the sale of goods be in writing, or partly performed or that there be part payment. Interestingly, Sutton also supports the view that human blood and software may be goods. Whether human body parts or tissue are goods, particularly in the context of biotechnological research, will be important questions for the future.

Representations and Conduct

As in earlier editions, Sutton's Introduction deals with the intriguing question of the applicability of equity to contracts for the sale of goods. Sutton looks at the question of the availability in equity of rescission of a contract for the sale of goods for an innocent misrepresentation. The issue is of some moment, for despite the incursion (some might say triumph) of the *Trade Practices Act* 1974 (Cth), s 52, and attendant state legislation in this area, rescission for innocent misrepresentation may still be an important remedy for those whose conduct is not in "trade or commerce". In NSW and the ACT, and to a lesser extent in Victoria, the matter has been resolved in equity's favour by legislation - which assumes, as Sutton points out, that in the case of a sale of goods equity does provide for rescission for an innocent misrepresentation.

Sutton's discussion of s 52 makes it clear that "conduct" is wider than some forms of representation, that it is not necessary for a person to be misled in his or her capacity as a consumer, and that a person may mislead even if he or she did not intend to do so. In assessing whether conduct is misleading, Sutton prefers the approach of identifying the relevant section of the public who may be exposed to the conduct and assessing the impact of the conduct on all who fall within that section other than the extraordinarily stupid. He regards as too stringent the test of Gibbs CJ in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*¹ involving the effect of conduct on reasonable persons within the class of consumers likely to be affected.

Sutton also discusses the issue of whether s 51A(1) of the *Trade Practices Act* 1974 (Cth) is applicable to the breaking of a contractual promise and the usual view that the mere non fulfilment of such a promise will not amount to misleading conduct. I would have liked more discussion on what constitutes reasonable grounds for making a contractual promise.

Two recent High Court decisions on damages for misleading conduct could also have been considered. Both cases affirm the application of the tort measure of damages. The advantages of establishing misleading and deceptive conduct for its attendant remedies (particularly rescission) available under s 87 of the *Trade Practices Act* 1974 (Cth) are now well established.²

1 (1982) 149 CLR 191.

2 In *Poseidon Ltd v Adelaide Petroleum NL* (1994) 120 ALR 16 the Court upheld compensation for loss of a commercial opportunity. In *Kizbeau Pty Ltd v WG&B Pty Ltd* (1995) 131 ALR 363 matters to be taken into account in assessing the value of the business sold (for comparison with the price paid) included subsequent events that affected the value of the business - in this case conduct of the business in contravention of an undisclosed planning permit and subsequent amendment of that permit.

Property

In this fourth edition, Sutton has included new sections on the distinction between specific and unascertained goods, the sale of purely generic unascertained goods and the pledge of an undivided part of a larger bulk, which appear in the chapter on Transfer of Property. Further, there is an account of decisions on the issues of co-ownership, bailment and sale and an account of the possibility of unascertained goods from a specific whole being treated as specific goods for the purpose of the application of the doctrine of frustration (but not for the transfer of property).

The status of ex bulk goods is topical, following the UK and Scottish Law Commission report on Sale of Goods Forming Part of a Bulk, the 1995 amendments to the UK Sale of Goods legislation, and the interest by the Western Australian Law Reform Commission in the question. Sutton examines two situations where property in ex bulk goods may pass without an unconditional appropriation. Sutton supports the view that the sale of a *fraction or percentage* of ex bulk goods, as opposed to the sale of a *part of the quantity* of the bulk should not be treated as the sale of unascertained goods. Ex bulk goods may also be ascertained by exhaustion, as in the case of *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)*.³ In this case, the property passed to the buyer, although the property was not unconditionally appropriated as between the four contracts held by one buyer. The property was ascertained once the only goods remaining out of the bulk were for that one buyer and there was an intention that property should pass at that point.

As Sutton points out, property in unascertained goods cannot pass to the buyer if there is a sales plus storage contract if the seller is free to fulfil the contract from any source. This was the case with the non allocated claimants in *Re Goldcorp Exchange Ltd (in rec)*,⁴ (*Re Goldcorp Exchange Ltd (in rec)*) - and also in *Re London Wine Co (Shippers) Ltd*.⁵ Sutton refers to the inability of the buyer of unascertained goods to claim an equitable interest by virtue of the contract of sale and the inability of the buyer to claim a real title by virtue of an estoppel. Both arguments were discussed in *Re Goldcorp Exchange Ltd (in rec)*.

Sutton does not deal directly with the possibility of part ownership of ex bulk goods passing to the buyer, by virtue of storage segregated from trading stock amounting to constructive delivery and ascertainment. He discusses cases where the delivery order was insufficient but does not discuss the Walker and Hall claims to gold bullion in *Re Goldcorp Exchange Ltd (in rec)*⁶ and the main claimants to bottles of wine in *In re Stapylton Fletcher Ltd*.⁷ This is a disappointing omission because the reasoning for finding ascertainment in segregated storage and the finding of co-ownership is a significant development in this area. It may be that, in light of the 1995 amendments to the *Sale of Goods Act 1979* (UK), which provide

3 [1982] 1 All ER 208.

4 [1994] 2 All ER 806.

5 [1986] PCC 121.

6 [1994] 2 All ER 986.

7 [1994] 1 WLR 1181.

for property to pass in the sale of specified quantities of a bulk, the sale of goods ex bulk should be reconsidered in Australian jurisdictions.

Title

Sutton firmly puts forward the view that the *Sale of Goods Act* 1923 (NSW) s 26(1) does no more than preserve the common law principles of estoppel, notwithstanding judicial comment in *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd (Thomas Australia)*⁸ on the law of estoppel's ill-placed fascination with the sale of goods by a non owner. Sutton comments that estoppel by negligence may not be a distinct concept but an aspect of estoppel by representation. He agrees with the *dissenting* view of Kirby J in *Thomas Australia* rejecting the requirement of a duty of care in the case of a negligent omission by an owner. Sutton supports the view that while the owner cannot be expected to be the insurer of the buyer, neither should the owner be entitled to be as careless with the goods as he or she likes and still retain title; if a duty of care is required then although that duty may not be owed to the whole world it should not be especially onerous to establish the existence of that duty.

As in the last edition, Sutton refers to the possibility of a conflict in the operation of the *Sale of Goods Act* 1923 (NSW), s 26(1) and s 28(1). This might occur where the conduct of the seller in possession precludes the seller from denying the authority of an intervening party to sell to the first buyer (thus giving that buyer title)- but remaining in physical possession, the seller can also pass good title to a second buyer by virtue of s 28(1).

It would have been interesting to read Sutton's views on the interaction of s 28(1) and s 28(2) where a buyer in possession passes title to a new buyer through a constructive delivery, hence becoming a seller in continuous physical possession and able to pass title to another new buyer via s 28(1). The cases in this area of the law generally concern cars and 12 years on Sutton is still appealing for certificates of title for cars.

Further developments in this area since the last edition of Sutton include the decision in *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australian Pty Ltd*⁹ that the delivery by the buyer in possession to the new buyer may be met by a constructive delivery.

Also, Sutton's list of propositions on reservation of title clauses¹⁰ established by the sometimes apparently conflicting authorities sets out the issues with great coherence and will no doubt be a much read section of the book.

8 (1985) 3 NSWLR 452.

9 (1987) 163 CLR 236.

10 See sections (a) to (k).

Implied Terms, Manufacturers and Exporters

Sutton calls for a rationalisation of the three tier system- the uniform sale of goods legislation, the *Trade Practices Act 1974* (Cth) and further state legislation- which regulates contractual terms in the supply of goods.

A significant development in this area since the last edition of Sutton has been divergence in the common law notion of merchantable quality and the statutory definition of merchantable quality applicable to consumer goods in the *Trade Practices Act 1974* (Cth) and the *Sale of Goods Act 1923* (NSW).

The common law notion of merchantability (applied in the analysis of a breach of the implied term of merchantability for commercial sales under the *Sale of Goods Act 1923* (NSW) requires the goods to be saleable for at least one normal purpose for goods of that description. The statutory definition of merchantability requires goods in a consumer sale to be fit for all normal purposes for goods of that description (this is exemplified in *Cavalier Marketing (Aust) Pty Ltd v Rasell*).¹¹

As Sutton points out, the UK statutory definition requires fitness for all purposes and applies to both commercial and consumer sales. Sutton does not mention the 1994 amendment to the *Sale of Goods Act* (UK) 1979 “to abolish the outdated term “merchantable quality” and replace it with the term “satisfactory quality”. The definition of “quality” in the UK Act now explicitly includes appearance and finish, freedom from minor defects, safety, and durability, in addition to fitness for purpose. There have also been similar changes in New Zealand in the *Consumer Guarantees Act 1993* (NZ). This is the schema proposed for a new system of statutory guarantees to replace Divisions 2 and 2A of Part V of the *Trade Practices Act*. The language proposed is “acceptable quality”.¹²

In most Australian jurisdictions, acceptance of goods is now subordinated to the right to examine goods, preserving the right to reject goods for breach of an express or implied term until the buyer has had a reasonable opportunity for examination of the goods. Sutton has provided some worthwhile discussion of the period of time for examination which is a reasonable time to ‘try out’ the goods but may not extend to the time of manifestation of a latent defect.

Sutton points out that the remedy of damages where, following acceptance, a condition is treated as a warranty may not always be a satisfactory remedy. In some jurisdictions, including New South Wales, this will depend solely on acceptance, as the application of the provision to the passing of property in specific goods has been deleted.

Sutton’s new chapter- Liability of Manufacturer, draws together an analysis of the *Trade Practices Act 1974* (Cth), Div 2A, Part VA of the *Trade Practices Act*, and state legislation as illustrated by *Sale of Goods Act 1923* (NSW) ss 62-64. Sutton explores some of the difficulties in the practical application of Div 2A but is of the opinion that the pendulum may have swung too far in locating the *whole of the risk* of defective products with the manufacturer. He asks whether the

11 (1991) 2 Qd R 323.

12 Federal Bureau of Consumer Affairs, *Getting What You Pay For- New Rights and Remedies for Consumers of Goods and Services Under the Trade Practices Act 1974* (Cth), November 1995.

consumer should accept some risk in return for lower prices? While liability in domestic sales is of importance to the Australian consumer, export sales are of critical importance to the economy as a whole. Sutton has also included a chapter on export sales, but perhaps both of these chapters on manufacturers and exports could have taken product standards into account.

To be fair to Sutton, some of the developments mentioned have occurred since his Forward was written in July 1995. Sutton remains a solid text on the sale of goods. This generation of students will certainly welcome it. As many a practitioner may comment, "You never find the really sticky questions in a text book- but Sutton is good for refreshing the memory!"