tons. It is unclear what the effect of this would be. Commentators have usually argued that in this case the fair result would be that each of the buyers should have 75 tons, but it is unclear whether this result can be reached. A similar problem arises where a seller has a bulk cargo, say, 1,000 tons of wheat on board a known ship and sells 500 tons to A and 500 tons to B, only for it to be discovered on arrival that 100 tons of the cargo are damaged without any fault on the part of the seller.

The effect of frustration

7–14 If a frustrating event takes place, its effect is to bring the contract to an end at once and relieve both parties from any further obligation to perform the contract. This is so even though the frustrating event usually only makes it impossible for one party to perform. So, the fact that the seller is unable to deliver the goods does not mean that the buyer is unable to pay the price, but the seller's inability to deliver the goods relieves the buyer of the obligation to pay the price. This rule is easy to apply where the contract is frustrated before either party has done anything to perform it, but the contract is often frustrated after some acts of performance have taken place. This has proved a surprisingly difficult question to resolve.

At common law, it was eventually held in the leading case of *Fibrosa v Fairbairn* (1943)[20] that, if a buyer had paid in advance for the goods, he or she could recover the advance payment in full if no goods at all had been delivered before the contract was frustrated. However, that decision is based on a finding that there had been a 'total failure of consideration'; that is, that the buyer had received no part of what it expected to receive under the contract. If there was a partial failure of consideration, that is, if the buyer had received some of the goods, then it would not have been able to recover an advance payment of the price even though the advance payment was significantly greater than the value of the goods which it had received. This obviously appears unfair to the buyer. The decision in the *Fibrosa* case was also potentially unfair to the seller. Even though the seller has not delivered any goods before the contract is frustrated, it may well have incurred expenditure where the goods have to be manufactured for the buyer's requirements and some or perhaps even all of this expenditure may be wasted if the goods cannot easily be resold0 because the buyer's requirements are special. These defects in the law were largely remedied by the Law Reform (Frustrated Contracts) Act 1943, which gave the court a wide discretion to order repayment of prices which had been paid in advance or to

20 [1943] AC 32.

award compensation to a seller who had incurred wasted expenditure before the contract was frustrated.

7–15 Section 2(5)(c) of the 1943 Act provides that the Act shall not apply to:

> Any contract to which s 7 of the Sale of Goods Act…applies or…any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

So, the 1943 Act does not apply to cases where the contract is frustrated either under s 7 of the Sale of Goods Act or in other cases where it is frustrated by the goods perishing. (It should be mentioned here that it is not at all clear whether it is possible for the contract to be frustrated by perishing of the goods other than under s 7. Some commentators have strongly argued for this view, but it has been doubted by others and the question has never been tested in litigation.) On the other hand, the 1943 Act does apply where the contract is frustrated by any event other than the perishing of the goods. It is really quite unclear why Parliament drew this distinction, but the effect is that, if the contract of sale is frustrated by the destruction of the goods, then the effects of frustration are determined by the common law before the 1943 Act with the results described above.

Force majeure clauses[21]

The English law doctrine of frustration is rather narrow in its scope and the parties may often wish, therefore, to provide for unexpected contingencies which do not or may not fall within the doctrine of frustration. Such clauses in commercial contracts are very common. They are often referred to as *force majeure* clauses, *force majeure* being the equivalent, though rather wider, French doctrine akin to frustration.

There is no doubt that the parties are free to widen the effect of unexpected events in this way. Indeed, the rationale commonly put forward for the narrow scope of the doctrine of frustration is exactly that the parties can widen their provision if they choose to do so. It is not possible here to consider all the clauses which might possibly be found, which would justify a book in itself. Sometimes, clauses are found which simply say that the contract is subject to *force majeure,* but this is probably a bad practice since it is far from certain exactly what an English court will hold *force majeure* to mean. More sophisticated clauses usually, therefore, set out what is meant either by a list of events, such as strikes, lockouts, bad weather and so on, or by a general

21 See McKendrick (ed), *Force Majeure and Frustration of Contract,* 2nd edn, 1995, London: LLP, especially Chaps 1, 2, 3, 4, 5, 10 and 13; and Treitel, *Frustration and Force Majeure,* 1994, London: Sweet & Maxwell.

provision that the events must be unforeseen and outside the control of the parties, or by some combination of these. A typical clause will also frequently require the party (usually the seller) who claims that there has been *force majeure,* to give prompt notice to the buyer. Whereas the doctrine of frustration always brings the contract to an end, *force majeure* clauses often opt for less drastic consequences. So, it may be provided that, if there is a strike which affects delivery, the seller is to be given extra time, though the clause may go on to say that, if the interruption is sufficiently extended, the seller is to be relieved altogether.

CHAPTER 8

DEFECTIVE GOODS

INTRODUCTION

8–01 This chapter is concerned with the legal problems which arise where the goods are 'defective'. (The word defective is put in quotation marks because what we mean by that word is itself one of the central questions to be discussed.)[1] It may be safely suggested that complaints about the quality of the goods far exceed in number any of the other complaints which may be made where goods are bought, so the topic is of great practical importance. It is also of some considerable theoretical complexity because of the way in which the rules have developed.

Liability for defective goods may be contractual, tortious or criminal. The main part of this chapter will be devoted to considering the situations in which the buyer has a contractual remedy against the seller on the grounds that the goods are not as the seller contracted. However, liability for defective goods may also be based on the law of tort. Since 1932, it has been clear that in most cases there will be liability in tort where someone suffers personal injury or damage to his or her property arising from the defendant having negligently put goods into circulation. This liability does not depend on there being any contract between plaintiff and defendant, though the possibility of such a claim is not excluded by the fact that there is a contract between plaintiff and defendant. So, a buyer of a motor car might formulate the claim against the seller in this way on the basis that the seller had negligently carried out the pre-delivery inspection. In practice, the buyer would usually be better off to pursue his or her contractual rights against the seller but this will not always be so. A major development in tort liability has taken place since the adoption in 1985 by the European Community of a directive on product liability, enacted into English law by Part I of the Consumer Protection Act 1987. This Act is aimed at imposing liability for defective products on producers of products, but sellers may be producers either where their distribution is vertically integrated so that the same company is manufacturing, marketing and distributing the

1 The word will not necessarily have the same meaning throughout the chapter, nor will it necessarily bear its lay meaning. So, if a seller contracts to sell a red car and delivers a blue car, the buyer may be entitled to reject it (see para 8–18) though the man in the street would hardly call it 'defective'.

goods retail, or, where although they are not manufacturing the goods, they sell them as if they were their own (as in the case of major stores which sell 'own brand' goods).

8–02 A seller may also come under criminal liability. A typical and all too common example, is the second hand car dealer who turns back the odometer so as to make it appear that the second hand car has covered fewer miles than is in fact the case. This is a criminal offence under the Trade Descriptions Act 1968. The notion of using the criminal law to regulate the activities of dishonest sellers is very old and goes back to the medieval imposition of standard weights and measures. However, the modern development of an effective consumer lobby has greatly increased the scope of criminal law in this area. In many cases, where there is criminal liability, there would also be civil liability either in contract or in tort. So, the buyer of the second hand car with the odometer fraudulently turned back would, in virtually all cases, have a civil claim either on the basis that the seller had contracted that the mileage was genuine or on the basis that the seller had fraudulently or negligently represented that it was genuine. Many buyers, however, would find that seeking to enforce this remedy would be a forbidding task because of the expense and trauma involved. The great advantage of enforcement through criminal law is that it is in the hands of local authority officials (commonly called Trading Standards Officers) whose job it is to enforce the criminal law in this area and the cost of whose time falls upon the general body of tax payers and not upon individual victims of undesirable trading practices. (The disadvantage is that the criminal law primarily operates by punishing the guilty rather than by ordering them to compensate the victim.)

8–03 Two other preliminary points may be made. The first is that a seller may seek to exclude or limit his or her liability by inserting appropriate words into the contract of sale. Historically, this has been an extremely common practice and indeed it still is. However, the modern tendency has been to regard such clauses with considerable hostility and, particularly in consumer transactions, they are now very likely to be ineffective. The rules relating to exclusion clauses are discussed in Chapter 9. The second point is that this chapter is concerned to set out the duties of the seller and manufacturer. In practice, the duties of the seller are intimately connected with the remedies of the buyer. In particular it is of critical importance whether failure by the seller to deliver goods of the right quality entitles the buyer to reject the goods (that is to refuse to accept them) or simply to give him or her a right to damages. In practice, the rules about the seller's obligations and the buyer's remedies interact, because sometimes courts are reluctant to hold that goods are defective where the result would be to entitle the buyer to reject them even though they would be content for the buyer

to have a less drastic remedy by way of damages. The remedies of the parties are considered more fully in Chapter 10.

LIABILITY IN CONTRACT: EXPRESS TERMS

8–04 Two hundred years ago, English law in this area was more or less accurately represented by the maxim *caveat emptor* (let the buyer beware). Under this regime, the seller was only liable insofar as he or she had expressly made undertakings about the goods. As we shall see, this is quite clearly no longer the case and English law has come to impose quite extensive liabilities on the seller even where he or she makes no express undertakings by holding that the contract is subject to the implied terms discussed later. Nevertheless, the possibility of express terms is still very important. In any complex commercial contract where goods are being procured for the buyer's specific requirements, the buyer would be well advised to formulate very carefully the express undertakings which he or she wishes the seller to make. Even in commercial dealings, however, where goods have been bought 'off the shelf' not much may be said by way of express undertakings.

It might be thought that it is a relatively simple task to decide whether or not a seller has made express undertakings about the goods. In fact, this is not the case, and English law has managed to make this a much more difficult question than it would appear at first sight. The problems can be illustrated by the decision of the Court of Appeal in *Oscar Chess v Williams* (1957).[2] In this case, the seller wished to trade in his existing car in part-exchange for a newer car. The buyer, who was a dealer, asked him how old the car was, and the seller described it as a 1948 Morris. In fact, the car was a 1939 Morris but the 1939 and 1948 models were identical and the log book had been altered by a previous owner so as to make the car appear to be a 1948 model. At this time, 1948 cars commanded a higher trade-in price than 1939 cars and the dealer allowed the seller a price in the 1948 range. In due course, the dealer became suspicious and checked the cylinder block number with Cowley, which showed that the car was a 1939 car. There was no doubt on the evidence that the seller had stated that the car was a 1948 model, but the majority of the Court of Appeal held that he had not contracted that it was a 1948 model.

2 [1957] 1 All ER 325; [1957] 1 WLR 370.

Why did the court reach this decision? The theoretical test is usually formulated by asking what the parties intended. How did the Court of Appeal discover what the parties had intended? Of course, if the parties had said what they intended, this test would be easy to apply, but more often than not, the parties do not say what they intend. In practice, if the parties express no intention, the court is in effect substituting its own view of what the parties, as reasonable people, probably intended. This is necessarily a vague and flexible test. Over the years a number of factors have been taken into account. One argument would be that the statement was of a trivial commendatory nature such that no one should be expected to treat it as meant to be contractually binding. Classic examples would be the house described by an estate agent as 'a desirable residence' or an obviously second hand car described by a car dealer as 'as good as new'. It is probably fair to say that modern courts are less willing to accept this classification in marginal cases, particularly where the buyer is a consumer. So, in *Andrews v Hopkinson* (1957),[3] a car dealer described a second hand car as 'it's a good little bus. I would stake my life on it'. This was held to be contractually binding and not merely a commendatory statement. (In fact, the car when sold had a badly defective steering mechanism, and a week after being delivered suddenly swerved into a lorry.)

8–05 The statement in *Oscar Chess v Williams* as to the age of the car was clearly not in the blandly commendatory category. It was clearly an important statement and affected the price that was offered for the car. In the circumstances one would normally expect such statements to be contractually binding. The most important factor in the decision was probably that the seller was a consumer and the buyer was a dealer, a kind of reverse consumerism. It is very plausible to think that if the facts had been reversed and the seller had been a dealer, the result would have been different. This analysis is supported by the later decision of the Court of Appeal in *Bentley v Harold Smith Motors* (1965).[4] In this case, the sellers, who were dealers, claimed to be experts in tracing the history of second hand Bentley motor cars and assured the prospective buyer that a particular car had only done 20,000 miles since it had been fitted with a replacement engine and gear box. It was held that this statement was contractually binding. Another factor which distinguishes the *Oscar Chess* and *Bentley* cases is that in the *Bentley* case the sellers had held themselves out as capable of discovering the truth, and probably were, whereas in the *Oscar Chess* case, the seller was clearly not at fault since he had not unreasonably relied on the

3 [1957] 1 QB 229.
4 [1965] 2 All ER 65; [1965] 1 WLR 623.

statement in the log book. It is quite clear, however, that the mere fact that a seller is not at fault does not mean that his or her statements are not contractually binding.

Another factor would be whether there was a significant time lag between the making of the statement and the completion of the contract. In *Routledge v McKay* (1954),[5] both buyer and seller were private persons and the seller stated that a motorcycle he was offering was a 1942 model, again relying on a statement in the log book which had been fraudulently altered by an earlier owner. The parties did not actually complete the contract until a week later, and it was held by the Court of Appeal that the statement as to the age of the motorcycle was not a contractual term. On the other hand, in the case of *Schawel v Reade* (1913),[6] a potential buyer who was looking at a horse which he wished to use for stud purposes, started to examine it and was told by the seller 'you need not look for anything: the horse is perfectly sound'. The buyer stopped his examination and some three weeks later bought the horse which turned out to be unfit for stud purposes. In this case it was held that the statement as to the soundness of the horse was a term of the contract.

8–06 In the cases so far discussed, the contract was concluded by oral negotiations. Of course, the parties often render the contract into writing. Obviously, if they incorporate everything that is said in negotiations into the written contract, it will be clear that they intend it to be legally binding. But, suppose an important statement is made in negotiations and is left out of the written contract. At one time, it was believed that the so-called parol evidence rule meant that such statements did not form part of the contract. It is undoubtedly the law that the parties cannot give evidence of what was said in the negotiations for the purpose of helping the court interpret the contract they have actually made. (Of course, the history of negotiations may be relevant to decide whether there was a contract at all.) This rule often surprises laymen and at first sight seems odd. Certainly, many other legal systems do not have the same rule. However, it is clear that, if the parties have agreed on a written contract as a complete statement of what they intend, the exclusion of the earlier negotiations is perfectly rational because it is of the essence of negotiations that there is give and take and the parties change their position. Accordingly, what parties have said as a negotiating position earlier cannot be taken to be a safe guide as to what they intended in the complete written statement.

5 [1954] 1 All ER 855; [1954] 1 WLR 615.
6 [1913] 2 IR 81.

8–07 The above rule is well established but its scope is, in practice, quite seriously restricted because courts are quite willing to entertain arguments that what looks like a complete written contract is not in fact a complete contract at all, but simply a partial statement of the contract. In fact, the courts have recognised two different analyses here, though their practical effect is often the same. One analysis is to say that there is a contract partly in writing and partly oral; the other analysis is to say that there are two contracts, one in writing and one oral. The practical effect in both cases is to permit evidence to be given of oral statements which qualify, add to, or even contradict what is contained in the written contract. An excellent example of this is the case of *Evans v Andrea Merzario* (1976).[7] In this case, the plaintiff was an engineering firm which commonly imported machinery from Italy. For this purpose, it used the defendant as forwarding agent (that is, as a firm which organised the carriage of the goods, although it did not carry the goods itself). The transactions were carried out using the defendant's standard conditions which were based on the standard conditions of the forwarding trade. In 1967, the defendant decided to switch over to use of containers and a representative of the defendant called on the plaintiff to discuss this change. The plaintiff had always attached great importance to its goods being carried below deck because of the risk of corrosion by sea-spray while crossing the Channel. In conventional carriage of the kind used before 1967, goods would normally be in the hold and therefore clearly below the deck line. In a container ship, many of the goods are carried above the deck line because of the way the containers are stacked in the middle of the ship. This switch to containers therefore carried with it a greatly increased chance that the goods would be above deck and would be affected by spray. The defendant's representative assured the plaintiff that the goods would always be carried below deck. Several transactions followed, all of which were again on the defendant's standard conditions which purported to permit carriage above deck. On one particular voyage, a container carrying goods belonging to the plaintiff and being well above deck, fell overboard and was lost. The plaintiff may have had an action against the carrier but this action would probably have been subject to limitations in the carrier's standard terms. The plaintiff therefore elected to sue the defendant which claimed that it was protected by the clause in its standard conditions that it could arrange for carriage of the containers above deck. The Court of Appeal was clear, however, that the defendant was not so protected. Two members of the Court of Appeal held that there was a single contract, partly in writing, partly oral; the third member

7 [1976] 1 All ER 930; [1976] 1 WLR 1078.

held that there were in fact two contracts (this difference in analysis only seems to matter where there is some legal requirement that the contract should be in writing or where there have been attempts to transfer the rights of one of the parties and it may be arguable that the rights under the written contract may be transferred independently of a separate collateral contract).

8–08 It can be seen that the decision in the *Evans v Andrea Merzario* case is very far reaching. In effect, all the transactions between the parties were subject to the oral undertaking given by the representative in his 1967 visit, even years later when all the relevant personnel in the two companies concerned might well have changed. From the point of view of the defendants, this is not at all an attractive result. In practice, modern standard written contracts often contain clauses designed to reduce the possibility of this kind of reasoning by providing expressly that the written contract is the whole of the contract between the parties and that all previous negotiations are not binding unless expressly incorporated into the contract. Such 'merger' or 'whole contract' clauses are very common, but their legal effect is not wholly clear.[8] It would probably be imprudent of sellers to assume that the presence of such a clause in their standard written terms would always prevent them from being bound by an oral statement made by one of their sales representatives.

LIABILITY FOR MISREPRESENTATION

8–09 Where the seller has made statements about the goods but the court has held that these statements are not terms of the contract, it might be thought that this was the end of the matter. However, it is quite clear that this is not the case. Some such statements will give rise to liability in misrepresentation.

What is a misrepresentation?

8–10 Basically, a misrepresentation is a statement of a fact made by one party to the contract to the other party before the contract is made which induces that other party to enter into the contract. So, the statement in *Oscar Chess v Williams* that the car was a 1948 Morris was, even if it was not a term of the contract, undoubtedly a misrepresentation.

8 See Furmston (ed), *Butterworth's Law of Contract*, 1999, London: Butterworths, para 3.7.