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ARE WE STILL GRAPPLING WITH THE MEANING OF SPECIFIC GOODS AFTER 98 YEARS OF RE WAIT

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Abstract: *The classification of goods as specific or unascertained is crucial for determining when ownership and risk transfer from the seller to the buyer under the Sale of Goods Act 1979 of the United Kingdom. While the distinction holds significant legal consequences, the current legal framework remains ambiguous, particularly with Section 61 of the Act, which does not clearly define the degree of identification required for goods to qualify as specific. This paper examines the deficiencies in Section 61 of the Sale of Goods Act of the United Kingdom, using case law such as Ward v Bignall and Re Wait to explore how the law struggles to address complex identification scenarios, particularly in bulk or international transactions. The paper argues for a redefinition of "specific goods," proposing that goods be considered specific when they are physically identified, identified with a serial number, or sufficiently identified such that a buyer could recognize them if transferred to another party. The paper concludes by calling for legislative reform to provide clarity, reduce legal uncertainty, and mitigate the risks and disputes arising from this issue in commercial contracts.*

Keywords: *Specific Goods, Re wait, Definition*

INTRODUCTION

Classifying goods as either specific or unascertained is crucial for determining the moment when ownership of the goods transfer from the seller to the buyer.[1] If the goods are specific and unless otherwise stated by the parties, ownership pass at the point of contracting in most situations,[2]whereas if the goods are unascertained, the ownership does not transfer until the goods are ascertained.[3]Since the Sale of Goods Act 1979 of the United Kingdom, ties ownership to risk,[4]classification of goods has a significant impact on parties. For instance, if goods are destroyed while under the seller's risk, the seller cannot demand payment from the buyer and must return any payment already received.[5]However, if the risk lies with the buyer, the buyer must pay the price even if the goods are lost or damaged.[6]

Despite the perceived importance of clear classification, the law on the classification of goods needs reform, as the distinction between specific and unascertained goods remains largely unclear. This is primarily because section 61 of the Sale of Goods Act 1979 is not

[1] **Sale of Goods Act 1979,** s. 18 (U.K.).
[2] Sale of Goods Act 1979, s. 18.
[3] Sale of Goods Act 1979, s. 16.
[4] Sale of Goods Act 1979, s. 20.

[5] Roy Goode and Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th ed.; London: Penguin, 2021), 300.

[6] ibid

explicit about the degree of identification required to classify goods as specific. The article aims to address these shortcomings by first reviewing the definition of specific goods under section 61 of the Act, followed by suggestions for reforms to resolve the outlined issues.

Definition Of Specific Goods Prior To The Textual Amendment

Section 61 of the Sale of Goods Act defines specific goods as goods that are identified and agreed upon in the contract of sale.[7] The statute does not expressly refer to the degree of identification required or the manner in which the parties must agree on the contractual terms for the subject matter of the contract to qualify as specific goods. If the identification of goods occurs physically, and the nature of the goods is such that each has unique attributes, such as a serial number, classifying the goods as specific under Section 61 cannot be generally questioned.

Ward v Bignall demonstrates how section 61 should ideally operate by indicating clear identification and mutual agreement over the goods.[8] In *Ward v Bignall*, the plaintiffs advertised two vehicles, a Vanguard Estate and a Ford Zodiac.[9] The defendant examined both cars, which were located at a private house, and made an offer to purchase them. The case clearly demonstrates that both vehicles were identified and agreed upon by the parties. The defendant's visit and examination of the vehicles constituted identification of the goods. Since the offer was accepted, it shows both parties agreed on the subject matter of the contract.

However, things may not be as straightforward when the parties are located internationally, or when the nature of the item makes identification naturally cumbersome. For instance, identifying a vehicle by its serial number is more specific compared to identifying 500 tons of wheat from a bulk.

Section 61 does not require the goods to be identified with reference to a mark, number or any other feature for them to be specific.

However, some items carry serial numbers through which the item can be traced and identified.[10]Therefore, if a seller places an order to purchase thousand (1000) mobile phones, the goods will be considered specific provided the phones are identified with reference to a serial number. Section 61 does not require the parties to physically inspect the goods, making it possible to create international contracts to buy specific goods. There is no doubt that if goods are identified physically or with reference to an identified number, they should be classified under the specific category. The issue arises when the identification is neither accompanied by a physical inspection nor by a specific number. For instance, if a buyer agrees to purchase 50 apples out of bulk over the phone (without a physical inspection) and the seller places the 50 apples into a box, should these 50 apples be classified under the specific category? The answer has a significant effect on the passing of ownership and risk,

[7] Sale of Goods Act 1979, s. 61.
[8] *Ward v. Bignall*, [1967] 1 QB 534.
[9] ibid
[10] Rares Bratucu, "What Are Serial Numbers?" *RENTMAN*, last modified.

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and an even greater impact if the goods are damaged, lost, or perished. If apples are considered specific goods, the risk lies with the buyer. Accordingly, if the apples are considered specific goods in the example, the buyer will have to pay for the 50 apples even if they perish on the seller's premises. [11]

Goode and Mckendrick define Specific Goods as goods which are fully identified by either handing over or setting aside with the buyer's consent.[12] The writers illustrated specific goods with the following examples: the act of going into a shop and buying two kilos of potatoes, and the act of trying on and purchasing a suit. According to the writers, the subject matter of these two illustrations qualifies as specific goods mainly because the precise articles being purchased are well known to both parties and are not subject to later selection or change of mind. .[13]

It is noteworthy that both illustrations used in Goode and McKendrick emphasize the need to physically identify the items for goods to be specific,[14]as the first example entailed physically inspecting and buying the potatoes, whereas the second example's physical examination was more rigorous than that of the first, as the buyer not only identified the item physically but also tested its suitability. However, section 61 of the Act does not require the goods to be physically identified.[15]Although Goode and McKendrick mentioned specific goods as a category that is fully identified[16] and then went on to provide two lucid examples of specific goods that entailed physical identifications, these do not fully represent the real status of the law as the law does not specify a method of identifying specific goods.

In Re Wait, the buyer contracted to buy 500 tons of white wheat out of a bulk of 1000 tons, thus the issue for the court was to determine whether a definite part of definite bulk classify as specific goods.[17]The majority of judges upheld that the goods in question are not specific as the subject matter was mentioned only as 500 tons and no attempt was made to particularly identify the 500 tons constituting part of the bulk.[18]The case will be decided differently today with the introduction of s15A of the Sale of Goods Act 1979.[19] However, if, at the time of contracting, the seller set aside the 500 tons of white wheat without informing the buyer, will the 500 tons fall within the specific goods category?

Section 61 of the Act does not define the level of identification and agreement needed for goods to be classified as specific,[20]leaving room for interpretation. In a literal sense, simple identification is not enough; an agreement is also essential. For example, if a seller sets aside 500 tons of wheat without informing the buyer, the

[11] Goode and McKendrick (n. 5) 300.
[12] Goode and McKendrick (n. 5) 262.
[13] Ibid
[14] Ibid
[15] Sale of Goods Act 1979, s. 61.
[16] Goode and McKendrick (n. 5) 262.
[17] *Re Wait* [1927] 1 Ch 606.
[18] ibid
[19] Sale of Goods Act 1979, s. 15A.
[20] Sale of Goods Act 1979, s. 61.

goods cannot be considered specific, as the buyer only knows that the contract is for a portion of bulk wheat, lacking proper identification and mutual agreement.

On the other hand, if 500 tons of wheat are set aside at the time of contracting and the buyer is informed, will it be classified as specific goods? This situation differs from the case in *Re Wait*, where the buyer only knew that the contract involved 500 tons of wheat from a defined bulk but was not told whether those 500 tons were separated from the rest. Section 61 of the statute does not provide a clear response to this issue as it does not specify the degree of identification required for goods to be considered specific.[21]The illustrations of Goode and McKendrick demonstrate that the identification should leave no doubt to either party as to the contracted goods for the goods to be considered specific.[22]Further, *Re Wait* demonstrate that the goods have to be particularly identified for them to qualify as specific goods.[23]

Contracting to buy 500 tons of wheat from an identified bulk and setting it aside with the buyer's consent at the time of contracting may not necessarily classify the goods as specific. This is because, unless the buyer has specific information about the goods, such that if the seller were to transfer them to another party, the buyer would recognize them as the contractual goods, the identification would undoubtedly be considered as a specific identification. If the seller sells 500 tons of wheat or portion of it to another buyer, and if the buyer may not know whether the resold goods are contractual goods or otherwise, it could not be told with certainty that the goods are specific.

CONCLUSION

In conclusion, section 61 of the Act does not clearly mention the degree of identification and agreement required for goods to be considered as specific goods which leads parties to difficulty in determining their ownership and consequently associated risk. According to Goode and McKendrick, the goods must be fully identified to be considered specific.[24] The case of Re Wait demonstrates a similar stance according to which the goods must be particularly identified to be considered specific.[25]

The author proposes the need to redefine the scope of section 61 of the Act in a definitive manner to resolve its ambiguities. Accordingly, if the goods are identified and agreed physically or with reference to a serial number or if the identification is such that if the seller were to transfer the goods to another party, the buyer would recognize them as the contractual goods, the goods should be considered specific goods.

If the identification of goods is done in any other way, the goods should be considered unascertained. The classification of goods is not simply a matter of fancy terminology; it has a significant impact on assessing the risks and liabilities of contractual parties in resolving their disputes. Thus, resolving the ambiguities surrounding Section 61 is

[21] ibid
[22] Goode and McKendrick (n. 5) 262.
[23] *Re Wait* [1927] 1 Ch 606.
[24] Goode and McKendrick (n. 5) 262.
[25] *Re Wait* [1927] 1 Ch 606.

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crucial to eliminating costly litigation, creating a platform for parties to identify their interests in the goods, and bringing certainty to the law.

The lack of guidance in interpreting the scope of Section 61 of the Act, along with the difficulty in determining the boundaries of specific goods, caused challenges for the justices in *Re Wait* in deciding whether the subject matter of the contract was a specific good.[26]

The case of *Re Wait*[27] was decided with reference to the Sale of Goods Act of 1893,[28] the predecessor to the Sale of Goods Act of 1979.[29] The meaning of specific goods under the predecessor statute was the same as under the current statute, which was passed nearly 100 years later. Hence, the issue the Lordships faced due to the ambiguity of the section defining specific goods remains the same.

Although Section 15A[30] has largely resolved the issues that arose in *Re Wait*,[31] it is incapable of erasing the ambiguities surrounding Section 61. Therefore, it is proposed to confine the meaning of specific goods to the following three categories: goods that are physically identified, goods identified with reference to a serial number or earmarked, and goods whose identification is clear enough that the buyer would recognize them as the contracted goods if transferred to another party.

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[26] ibid
[27] ibid
[28] *Sale of Goods Act 1893* (56 & 57 Vict. c. 71).
[29] *Sale of Goods Act 1979* (1979 c. 54).
[30] *Sale of Goods Act 1979*, s. 15A (1979 c. 54).
[31] *Re Wait* [1927] 1 Ch 606.