SALE OF GOODS ACT; THE BUYER'S RIGHT OF REJECTION AFTER*

Bernstein v. *Pamson Motors Ltd.*[1]

"the only fault's with time" Robert Browning

Introduction

THE buyer's right of rejection[2] under the Sale of Goods Act 1979 is an important and often effective remedy against a seller who supplies him with defective goods. Although seldom invoked (which perhaps explains the dearth of case law on the subject) it allows the buyer on a successful plea to recover the full purchase price of the goods. Freed of his imprudent bargain and money in his hands, the buyer can start anew. If the case were otherwise, he would be saddled with the goods, relegated to a claim in damages[3] and plagued with the uncertain prospect that future faults might develop in the goods.[4]

But whatever rights a buyer believed he had previously has been whittled down to a point of practical insignificance in *Bernstein.*[5] It is submitted that the buyer's right of rejection after *Bernstein* is worth precious little, and perhaps capable of being invoked successfully in the rarest of circumstances.

The purpose of this article is to examine critically the legal and policy reasoning of Rougier J's judgment in *Bernstein,* to show that the law should draw a distinction between the nature of the defect, and to suggest that the question of a "reasonable time" depends on numerous factors, not least of which is the nature of the defect.

Facts

The case concerned the purchase by the plaintiff of a new Nissan Laurel from the defendant, motor dealers, at a not insubstantial price of just under £8,000. The date of delivery was 7 December 1984. Unhappily the

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1 [1987] 2 All E.R. 220.

2 The Sale of Goods Act 1979 does not expressly speak of a "Right of rejection." Instead, such a right is found in section 11(3) read together with section 35 *viz.*, when after the lapse of a reasonable time the buyer retains the goods without intimating to the seller that he has rejected them.

3 S.11(4), Sale of Goods Act 1979.

4 See Rougier J.'s discussion of the possible "knock-on" effect in *Bernstein* v. *Pamson Motors Ltd* [1987] 2 All E.R. 220, at 228 f.

5 *Supra*, note 4.

plaintiff was ill over the Christmas of 1984, so he was unable to make any use of the car. After he recovered he made one or two short trips in order to get used to the fairly sophisticated controls. It was not, however, until 3 January that the plaintiff decided to make his "first proper trip" which involved a day's shopping at Guildford. The route involved travelling on a motorway. Whilst en route, an unusual noise began to be heard from the engine. The plaintiff pulled into a hard shoulder and switched the engine off. The car had then done some 140-odd miles. After some moments the engine could not be restarted, and was in fact eventually towed away by the emergency services. The following day, the plaintiff wrote to the defendant and rejected the car, alleging it to be of unmerchantable quality. Later inspection revealed that a piece of sealant had entered the lubrication system (most likely during assembly but in any case present at the moment of delivery) and lodged itself in the restrictor, thus starving the camshaft of oil and causing the engine to seize up. The car was eventually repaired and found as good as new.[6] But the plaintiff was adamant[7] and claimed refund of his money following his rejection of 3 January 1985.

The Issues

Two questions therefore emerged for determination:

1) whether the inherent defect rendered the car of unmerchantable quality;[8]

2) if so, whether the plaintiff had properly exercised his right to reject the car. This in turn depended whether the plaintiff had had the car for a reasonable time and hence lost his right to reject the car.

The Decision

Rougier J. concluded that the car was not of merchantable quality. General guidance[9] was given by him on the type of factors which might render a car of unmerchantable quality. The fact that the car was repairable[10] (and was indeed successfully repaired) does not prevent the car from being of unmerchantable quality. Such an approach is indeed welcome.

6 Save two minor imperfections, *viz.* (i) a slight looseness of the inlet manifold and (ii) an incorrect adjustment of the pulley for the power-assisted steering, both of which Rougier J. dismisses as "no more than two of the minor teething troubles which could be expected in any new motor car." *Quaere*: How could the car be described as "good as new" if it might have potential "knock-on" effects?

7 It was the plaintiffs adamant attitude which Rougier J. described as a "touch of inflexibility": at 224f. Yet it is this attitude which a plaintiff has to adopt if he is not to run the risk of losing his right of rejection.

8 This article does not attempt to analyse the merchantability issue, but is solely confined to the issue of rejection.

9 *Supra*, note 4 at 226b, *et seq.* The Automobile Association of England, and Nissan had ranged themselves behind the plaintiff and defendants respectively, and because of the importance of the matter to the motor industry, they both invited Rougier J. to provide "specific guidance and definition as to what makes a motor car merchantable": *supra*, at 222c. Alas, Rougier J. declined.

10 On this point, see *Rogers* v. *Parish (Scarborough)* [1987] 2 All E.R. 232 (CA), decided a couple of weeks later.

On the question of rejection, however, the learned judge held that the plaintiff was deemed to have accepted the car under section 35 of the Sale of Goods Act 1979, because there had been a lapse of a reasonable time. The plaintiff therefore lost his right to reject the car and had to be content with damages.[11]

Legal Considerations

1. *Reasonable opportunity of examination and the lapse of reasonable time*

Rougier J. held that section 34(1) (which allows the buyer a reasonable opportunity of examining the goods to see if they conform to the contract) did not provide an exception to the case where there was a lapse of a reasonable time. In his view, it was irrelevant to consider whether the buyer had had a reasonable opportunity to examine the goods when determining whether there was a lapse of a reasonable time. On a literal reading of the proviso in section 35(1)[12] ("except where section 34 above otherwise provides") immediately preceding the second limb of section 35(1) (act inconsistent with the ownership of the seller), Rougier J's view seems unassailable.

Whilst it is accepted that the proviso does not apply to the first limb of section 35(1) (express intimation of acceptance) it is difficult to understand why it should not apply to the third limb. Apart from academic view to the contrary,[13] some cases[14] seem to suggest without argument that the buyer's right of rejection through lapse of a reasonable time is clearly subject to his right of reasonable examination. Thus, the buyer would not lose his right of rejection through lapse of a reasonable time unless he has had a reasonable opportunity of examining the goods. To accept otherwise would be to create an anomaly quite unintended by the Legislature.[15]

[11] The plaintiff's solicitors failed to plead the "diminution in value" damages under s. 53 (3) of the 1979 Act should his claim for rejection fail.

[12] S.35(l) comprises 3 limbs; (limb 1) when the buyer intimates to the seller that he has accepted them; (limb 2) when the buyer, after delivery of the goods to him, does any act to the goods which is inconsistent to the ownership of the seller.

[13] Atiyah & Treitel, "Misrepresentation Act 1967" (1967) 30 M.L.R. 369. Also see Atiyah, *Sale of Goods* (7th ed.) at 394 *et seq. Cf.* Benjamin's, Sale of Goods (3rd ed.) at para 925.

[14] See *Algemene Oliehandel International B. V.* v. *Bunge* S.A [1978] 2 Lloyd's Rep 207; *Manifatture Tessile* v. *Ashley* [1971] 2 Lloyd's Rep 28; *Diamond* v. *British Columbia Throughbred Breeders' Society* [1965] 52 D.L.R. (2d). Sale of a horse. Buyer's deemed acceptance of the horse through lapse of a reasonable time was subject to his right of a reasonable opportunity of examining the horse under the Canadian Sale of Goods Act section 40 (in *pari materia* with the English Sale of Goods Act).

[15] Consider the following hypothetical cases posed by the author: *Case* A — Buyer B buys a car from Seller S. Shortly after purchase, B, who does not have a reasonable opportunity of examination, sells the car to C. C then discovers the defect. In law B does not prima facie lose his right of rejection despite the sale of the car to C; he is not deemed to have accepted the car under limb 2 unless he has had a reasonable opportunity of examination.

Case B — B buys a car from S. B does not have a reasonable opportunity of examination. B retains the car beyond a reasonable time before discovering the defect. B is deemed to have accepted the car through lapse of a reasonable time even though B did not have a reasonable opportunity of examination.

2. *Reasonable time is a question offact*

The second observation relates to the restrictive interpretation he placed on section 59 of the Sale of Goods Act. On the question of what is a reasonable time, Rougier J. felt that the Act ceased to be helpful. "By section 59," he bluntly remarked, "a reasonable time" is defined as a question of fact, no more, as if it could be anything else.[16] On the contrary, it is submitted that far from restricting the trial judge, this section gives him considerable latitude in deciding what factors may be relevant when determining what is a reasonable time under the third limb of section 35(1). Although it is impossible to provide an exhaustive list, it is suggested that the following factors are relevant:

i) *Nature of the defect*

The nature of the defect is a question of fact which is relevant when the trial judge considers the issue of a "reasonable time". The defect may either be patent or latent. In the former case the defect is obvious to the eye, or at any rate, capable of being readily discovered through a reasonable examination of goods,[17] *e.g.* a four wheeled car with only three wheels. In the latter case the defect is inherently present in the goods at the time of delivery and has yet to crystallise or manifest itself in a form which is readily discoverable.[18] The distinguishing feature of a latent defect is that the defect cannot be discovered by a reasonable examination of the goods; the defect is only discovered through use. Where the defect is patent no one would doubt that a reasonable time would be short and a buyer's right of rejection quickly lost since a reasonable opportunity for examination of the goods would readily uncover the defect. Conversely, where the defect is latent the trial judge ought to be more generous in fixing a "reasonable time" which must elapse before acceptance is deemed.[19]

With the exception of *Bernstein,* there has not been any decided case on the question of what is a reasonable time in relation to latent defects. Because of the dearth of precedent, little has been done to draw a distinction between the nature of defects, and to show how this in turn affects the question of a reasonable time.

Even as early as (1885), the Scottish Courts were apprised of the distinction between the nature of the defect. In *Carter* v. *Campbell*,[20] a patent defect case, the plaintiff had bought from the defendant a quantity of "oats clear of barley". The plaintiff did not examine the oats on arrival, but his son made a cursory examination and found nothing amiss. The

16 *Supra* note 4 at 230d.
17 See *Carter* v. *Campbell* (1885) 12 R 1075; Genuineness of painting cases are patent defects: *Hyslop* v. *Shirlaw* (1905) 7 Ct of Session 875. Compare with *Leaf* v. *International Galleries* [1950] 2 K.B. 86, particularly Denning L.J. at 91; *Diamond, supra* note 14; Compare Singapore case *of Eastern Supply Co.* v. *Keer* [1974] 1 M.L.J. 10. The defects could have been discovered by an expert.
18 *Bernstein, supra* note 4 is the *locus classicus*; Also see *Morrison & Mason Ltd* v. *Clarkson Bros.* (1898) 25 R 427; *Medians* v. *Highland Marine Charters Ltd.* [1964] S.C. 48; Bell's Commentaries (7th ed.) Vol. 1 at p. 764; and Lord Salvesen in *Mechan* v. *Bow* [1910] S.C. 758 at p. 763.
19 *Mechans* v. *Highland, supra* note 18 at 63.
20 *Supra* note 17.

oats were sown but it was found that a quantity of barley grew alongside the oats. The proportion was 4% of barley. The plaintiff sought to reject the goods on the basis that they did not conform to the contract. The Scottish Court of Sessions found the defendant in breach of contract, but refused the plaintiff his remedy because he had failed timeously to reject the goods. The court held that a reasonable examination of the goods would reveal the non-conformity to the contract. Lord Adam said, obiter:

> "It may be that the objection to the article is latent, and that no amount of examination would discover it — we have seen examples of that in such cases as that of turnip seed, or where the defect, as in the case of machinery, would not become visible until the article was used. In such cases, of course, the plaintiff would not be bound to return the goods at once."[21]

The distinction between the nature of the defect was strenuously argued by both Counsel in the post-1893 case[22] of *Hyslop* v. *Shirlaw*.[23] The plaintiff in that case sought to reject certain paintings some 18 months after he had bought it from the defendant on account that the paintings were not genuine[24]. The Court of Sessions decided that it was a patent defect because "the plaintiff could have found out all he knows now had he thought of taking reasonable diligence at that time."[25] Therefore, a lapse of 18 months could not be said to be within a reasonable time. Lord Kyllachy opined on the position of latent defects:

> "He is not ... in the position of a person who has by accident discovered, perhaps years afterwards, something justifying rescission which could only have been discovered by accident. That is, of course, a different case altogether."[26]

In the more recent case of *Medians Ltd* v. *Highland Marine Charters Ltd*,[21] a latent defect case, the Court of Sessions expressed some views regarding the distinction. The case is complicated by the fact that there had been express acceptance.[28] The defendant in that case purchased two steel water buses from the plaintiff which the defendant expressly accepted. However, major defects developed after the buses were used for a few weeks. Counsel for the defendant sought to argue that despite express acceptance, the defendant had "in the case of latent defects a *locus poni-tentiae,* as it were, until such time as the defects have fully revealed themselves, after which they can go back on their original acceptance and reject

21 *Supra* note 17 at 1082; Lord President at 1080, and Lord Shand at 1082.
22 As far as the right of rejection is concerned, Scots Law (which also applies the Sale of Goods Act with modification) is the same as English law. Also, apart from different provisions in section 11, the statutory provisions on "acceptance" are common to both jurisdictions. Therefore, for the purposes of this article Scots law is *in pari materia* with English law.
23 *Supra* note 17.
24 *Cf. Leaf* v. *International Galleries, supra* note 17.
25 *Supra* note 17, per Lord Justice Grant at p. 880.
26 *Supra* note 17 at p. 882.
27 *Supra* note 18.
28 The defendants signed a certificate of acceptance in which they accepted each water bus as being "in accordance with specification and accepted by us on completion of final examination."

the goods."[29] Their Lordships were unanimous in dismissing the defendant's argument. However, it is submitted that the headnote incorrectly reports their Lordships as disapproving the dictum of Lord Salvesen in the earlier case of *Mechan & Sons Ltd* v. *Low, M'Lachlan & Co. Ltd*.[30] Lord Salvesen's dictum was that:

> "It may be that if the (sellers) failure to fulfil their contract had not been discoverable on delivery of the tanks, as if the tanks had been subject to some latent defects which ultimately led to their rejection, the defendants would not have been barred (*i.e.* from rejecting the goods)."[31]

There is nothing in their Lordships' opinion, apart from acknowledging that Lord Salvesen's statement was obiter,[32] to suggest disapproval. In fact Lord Justice Clerk Grant himself remarked:

> "I think that in the case of goods which are not expressly accepted and which may be subject to latent defects the Courts will be generous in fixing the "reasonable time" which must elapse before acceptance is deemed or implied."[33]

In summary, there is no legal impediment in principle or authority against drawing a distinction between the nature of the defect. The law ought to make this distinction before deciding the question whether there has been a lapse of a reasonable time.

ii) *Reasonable opportunity for examination*

It would seem unarguable that the phrase a "reasonable time" implies or includes a reasonable opportunity for the buyer to examine the goods.[34] To argue otherwise would be to deprive the phrase of any meaning. It also begs the question of the purpose for which the law allows a reasonable time. The question of a reasonable time and the opportunity for a reasonable examination are so intricately linked together that little if any sense can be made of one without the other.

iii) *Speed of discovering the defect*

The speed with which the defect is discovered or discoverable would, as we have seen, depend on the nature of the defect. In the case of a patent defect the correct approach is to find out when the defect *could* be discovered by a reasonable examination of the goods, not when the defect is *actually* discovered. This is ultimately a question of fact which in turn determines

29 *Supra* note 18 per Lord Mackintosh at p. 69.
30 *Supra* note 18.
31 *Supra* note 18 at p. 763.
32 *Supra* note 18 per Lord Justice-Clerk Grant at p. 62, per Lord Mackintosh at p. 69, and per Lord Strachan at p. 74.
33 *Supra* note 18 at p. 63.
34 The buyer's opportunity of examination is "in-built" into the need for a reasonable time. See Denning L.J. in *Leaf's* case, *supra* note 17 where he does not even mention section 34 (1); Also see *Manifatture's* case, *supra* note 14.

what is or is not a reasonable time for the purposes of section 35(1). In the case of latent defect, however, no reasonable opportunity for the examination of the goods could uncover or reveal the defect. The defect only manifests itself through use by the buyer.

Rougier J. remarked that the speed with which the defect *might* have been discovered is irrelevant to the concept of a reasonable time.[35] It is not however clear from his judgment whether this statement was made in relation to patent or latent defects.

If the learned judge had latent defects in mind, then, the issue of constructive discovery ["might have been discovered" question] is irrelevant because no reasonable examination of the goods would uncover the defect until the goods are used and the defect, manifested by such use. In any case it is difficult to understand why the buyer's right of rejection in latent defect cases should depend on the accident in time when the defect actually reveals itself.

On the other hand, if Rougier J.'s statement was directed to cases of patent defect, then, his statement goes too far.

The constructive discovery question is irrelevant in such cases because it does not matter whether the defect was actually discovered so long as a reasonable examination might reveal the defect. The speed with which the defect is discovered or ought to have been discovered is not only relevant but *crucial* when deciding what is a reasonable time.

iv) *Complexity of the intended function*

The complexity of the intended function of the goods is a question of fact which affects the issue of a reasonable time. Rougier J. accepted this as a relevant fact in *Bernstein.* He said that "what is a reasonable time in relation to a bicycle would hardly suffice for a nuclear submarine."[36] Whilst no one would seek to doubt the good sense of this statement, it is interesting to note that this is an indirect way of saying that the buyer must be given a reasonable opportunity to examine the goods to see if it conforms to the contract. The more complex the functions, the greater the buyer's opportunity of examination; the greater his opportunity of examination, the longer would be a reasonable time. Vice versa.

v) *Conformity with the contract*

Rougier J. observed that a "reasonable time must entail a reasonable time to inspect and try out the car generally rather than with an eye to any specific defect."[37] It is submitted that the learned judge's distinction between a general inspection of the goods on the one hand, and an inspection for specific defects on the other, is perhaps unfortunate. It must be emphasised that the buyer's right of examination, whether under the Sale of

[35] *Supra* note 4 at p. 230g.
[36] *Supra* note 4 at p. 230j.
[37] *Supra* note 4 at p. 230e.

Goods Act[38] or at common law,[39] is the right to ascertain whether or not the goods *conform to the contract*, even if this means in some cases an eye for specific defects rather than defects generally. In short, the question whether the inspection is general or specific is immaterial, but what is material is that the goods conform to the contract.

The Policy Considerations

Apart from difficult questions of law and fact, *Bernstein* raises interesting issues relating to policy considerations. The "finality in commercial transactions" argument reflects the law's partiality of treating commercial transactions as complete as soon as possible so as to enable the seller to close his ledger and "get on" with business without the future uncertainty that the transaction may be re-opened and, worst still, set aside.[40]

On the other end of the scale is the buyer's need to examine the goods and assure himself that he has got what he bargained for.[41] In cases of competing interests, unfortunately, one interest has to prevail at the expense of the other. The "finality" argument prevailed in *Bernstein.* But there were other important policy considerations which were not discussed in *Bernstein.* First, the percentage of rejected cars as against the overall sale of cars would make rejection the exception rather than the rule. It is doubtful that the seller would be prejudiced by the grant of rescission to the buyer in such cases. Therefore, it would be exaggerating the predicament of the seller to insist on a blind adherence of the "finality" argument. Second, the risk that goods would be inherently defective should fall on the seller rather than the hapless buyer, particularly in cases where the buyer "deals as a consumer."[42] In any event, the loss would ultimately be transferred by the seller to the manufacturer. Third, unless the law favours the buyer in such cases, there would be little incentive for the manufacturer to improve production processes so as to eliminate latent defects altogether. These considerations are equally if not more compelling than the law's partiality in the "finality" argument on the facts in *Bernstein.*

Conclusion

The legal reasoning in *Bernstein* is far from persuasive, and the policy factors, inadequately considered. The approach of the Scottish cases in drawing a distinction between the nature of the defect comes closer to reality and fairness than the simplistic approach of Rougier J. In the case of goods such as cars and other such mechanical products, the time for rejecting the goods for latent defects should not expire until a reasonable

38 Section 34 (1).
39 See *Carter* v. *Campbell, supra* note 17; *Grimoldby* v. *Wells* (1879) L.R. 10 L.P. 381, and *Heilbutt* v. *Hickson* (1872) L.R. 7 C.P. 438.
40 *Supra* note 4 at p. 230h.
41 *Supra* note 4 at p. 230g and j.
42 As in consumer transactions under the Unfair Contract Terms Act 1977.

time *after*[43] the defects become apparent. In order to decide what is a reasonable time, the following factors should be considered: nature of the defect, complexity of the intended function, reasonable opportunity of examination to see if the goods conform to the contract, relative position of the parties (whether goods are used commercially or otherwise) and other relevant factors. For the reasons given, it is indeed doubtful if *Bernstein* will survive appellate scrutiny in future.

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[43] It is not suggested that the right of rejection in latent defect cases is indefinitely open. A possible compromise would be to relate the buyer's right of rejection to that of the warranty period of the goods. The warranty period serves as a definite "cut-off point in which to treat the transaction as final.

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