

CASE OF THE FORGED PAINTING

*Harlingdon & Lienster Enterprises Ltd. v.
Christopher Hull Fine Art Ltd.*¹

WHEN is there a sale of goods by description such that the goods must conform to the description under section 13 of the (U.K.) Sale of Goods Act 1979?² Does a forged painting sold by one dealer to another meet the condition of merchantable quality under section 14(2) of the same Act? Both these questions were addressed by the Court of Appeal in the recent English case of *Harlingdon & Lienster Enterprises Ltd. v. Christopher Hull Fine Art Ltd.*

Mr. Hull, who owned the defendant firm of art dealers, was asked to sell two paintings, described in an auction catalogue as being by Gabrielle Minter, an artist of the German expressionist school. Mr. Hull had no expertise in such paintings and contacted the plaintiffs, who were dealers in German art, telling them that he had two paintings by Gabrielle Minter. The plaintiffs sent their employee, Mr. Runkel, to look at the paintings. During Mr. Runkel's visit, Mr. Hull made it clear that he was not an expert in the paintings. Later, one of these paintings was sold to the plaintiffs for £6,000. The plaintiffs in turn sold the painting to their customer, who sent it for expert examination and found that it was a forgery. The plaintiffs refunded the purchase price to their customer and brought an action against the defendants.

The painting was described as being by Minter, and since it turned out to be otherwise, it was argued for the plaintiffs that section 13(1) of the Sale of Goods Act was contravened. This argument was rejected by both the trial judge and a majority of the Court of Appeal. Section 13(1) states: "Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond to the description." It is clear that the mere fact that a description is applied to goods does not bring the situation within section 13(1). Before the implied condition under section 13 is imposed, the sale of goods must be a sale "by description".

¹ [1990] 3 W.L.R. 13.

² 1979, c. 54. For the applicability of this statute in Singapore, see section 5(1) Civil Law Act (Cap. 43, 1988 Rev. Ed.).

At first instance, the judge regarded the element of reliance as crucial to a finding of a sale by description. He found that the description by Mr. Hull that the painting was by Gabrielle Minter was not relied on by Mr. Runkel when he made his offer to purchase the painting and that such non-reliance precluded the sale from being one by description under section 13(1). Although not the subject of English judicial discussion in recent years, the element of reliance has been identified before. An example is in the case of *Joseph Trovers & Son Ltd. v. Longel Ltd* where Sellers J. accepted a passage from *Benjamin on Sale* stating that sales by description included sales of specific goods, "bought by the buyer in reliance, at least in part, upon the description given, or to be tacitly inferred from the circumstances, and which identifies the goods."⁴

In dealing with the argument that the trial judge had placed too much significance on the buyer's non-reliance on the description, all three members of the Court of Appeal appeared to agree on one general principle: whether there is a sale by description depends ultimately on whether the parties to the contract intended that the correctness of the description should be a term of the contract. Although the judges did not emphasise this principle but merely took it as settled law based on cases like *Varley v. Whipp*⁵ and *Gill & Duffus SA v. Berger & Co. Inc.*⁶, their agreement on this point is significant. Such agreement emphasises that the real question is whether the description is a term of the contract.

How important is reliance in establishing the intention of the parties that the description should be a term of the contract? Of the judges in the Court of Appeal, Nourse L.J. gave the greatest weight to reliance. He accepted the theoretical possibility that a description of goods which was not relied on by the buyer could become an essential term of the contract. From a practical point of view, however, he felt that there could not be a sale by description where it was not within the reasonable contemplation of the parties that the buyer was relying on the description. Slade L.J. felt that reliance was not necessarily crucial but it was useful as evidence of the intentions of the parties at the time of the contract regarding whether the description of the goods should be a term of the contract. Based on an application of each of these principles, both Nourse and Slade L.JJ. agreed with the trial judge that there was no reliance by the buyer on the seller's statement and that there was no sale by description under section 13.

³ (1947) 64 T.L.R. 150.

⁴ *Supra*, note 3 at p. 153. This extract is also quoted in A.G. Guest *et al.* (eds.), *Benjamin's Sale of Goods* (3rd ed., 1987), pp. 438-9.

⁵ [1900] 1 Q.B. 513.

⁶ [1984] 1 All E.R. 438.

Stuart-Smith L.J., in his dissenting judgment, found it difficult to understand how the concept of reliance fitted into a sale by description. He felt that reliance was not necessary as long as the description was a term of the contract. This view may sound opposed to the views of the two majority judges but it must be pointed out that in so far as Stuart-Smith L.J.' was merely stating a theoretical point, the judges in the majority did in fact agree with him. A seeming divergence of views is seen only in relation to the practical importance of reliance in establishing a sale by description. As discussed above, the two majority judges acknowledged to different degrees the practical value of reliance, with Nourse L.J. giving prime importance to it and Slade L.J. regarding it as being of evidentiary importance. Although Stuart-Smith L.J. did not extol the practical importance of reliance, this does not necessarily indicate that he regarded reliance as irrelevant in helping to decide whether there was a sale by description. He found that there was reliance by the buyer on the seller and that the description was a term of the contract. This leaves open the possibility that even under Stuart-Smith L.J.'s approach, a finding of reliance and a finding that the description was a term of the contract would often go together as a matter of practice.

In a situation where there is a sale by description only when the correctness of the description is a term of the contract, it can be pointed out that non-correspondence with the description would give rise to a breach of a term of the contract even without section 13. This might lead one to wonder about the object of section 13. Section 13 has been acknowledged as conceptually troublesome⁷ and there are no easy answers. In *Harlingdon*, however, Slade L.J. appeared to have little difficulty with this question. He expressed the view that the practical effect of section 13 is to make it plain, where the parties intended it to be a term of the contract that the goods would correspond with the description, that "the relevant term of the contract will be a condition rather than a warranty." Critics who feel that this is too narrow a function may obtain cold comfort from the fact that the position in the case of unascertained goods is arguably worse. There, it has been said that cases such as *Reardon Smith Lines Ltd. v. Hansen Tangen** and *Ashington Piggeries v. Christopher Hill Ltd*? have made it such that it is only where the seller uses words of description which would otherwise amount to a condition that there would be an implied condition that the goods should correspond to the description.¹⁰ This view would mean that section 13 is totally redundant as far as unascertained goods are concerned!

⁷ See A.O. Guest *et al.* (eds.), *Benjamin's Sale of Goods* (3rd ed., 1987), p.435.

⁸ [1976] 1 W.L.R. 989.

⁹ [1972] A.C. 441.

¹⁰ See P.S. Atiyah, *The Sale of Goods* (8th ed., 1990), pp. 133-4. This view is based on the conclusion that the cases of *Reardon Smith* and *Ashington Piggeries* required that the only descriptive words which are to be treated as the subject of section 13 are words which identify the subject matter of the contract.

The trial judge in *Harlingdon* found that the forged painting satisfied the condition of merchantable quality imposed by section 14(2). Under section 14(6) of the Act, goods are of merchantable quality "if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances." Applying this definition to the facts of the case, the trial judge felt that paintings were commonly bought for the purpose of aesthetic appreciation and that the painting in question was of merchantable quality.

As the sale was quite clearly from one dealer to another for the purpose of resale, this focus on aesthetic appreciation was, not surprisingly, attacked on appeal. Dealing with this, Nourse L.J. felt that even if the purpose or purposes under section 14(6) were resale and aesthetic appreciation together, the painting would still have been of merchantable quality. To him, the fact that it was not painted by Miinter did not render it unsaleable as it could still be sold, albeit at a much reduced price. He also felt that the painting was not unfit for aesthetic appreciation because it could still have been hung up and appreciated for what it was, even if not what it might have been. The degree of fitness required under section 14(6) is the result of a delicate balancing of the various factors listed in that section and such a finding is not to be lightly criticised. However, one might be more inclined to agree with Stuart-Smith L.J.'s dissenting view. Having regard to the description of the painting as being a "Miinter", the price, and the fact that both parties knew that the purpose of the sale was resale, it is difficult to see how the fake painting could be fit for the purpose of being sold as a painting by Miinter at the price of £6,000!

The other judge in the majority, Slade L.J., felt for different reasons that the painting did not breach the condition of merchantable quality. He ruled out the application of section 14(2) altogether as he felt that if the plaintiffs failed to establish a breach of contract through the "front door" of section 13(1), they could not succeed through the "back door" of section 14(2). This is difficult to understand, given that under the Sale of Goods Act 1979, the condition of merchantability in section 14(2) is independent of a sale by description under section 13. There is no reason why one section should be regarded as a "front door" and the other a "back door". Stuart-Smith L.J.'s dissenting judgment seems more in keeping with the law. He expressed the view that even if the sale was not technically a sale by description, the court was, nevertheless, entitled and required to consider questions of merchantable quality. Some support for this was provided by Nourse L.J. Although he did not expressly address the relationship between sections 13 and 14(2), his finding that the painting was in fact merchantable under sections 14 (2) and (6) indicates that he did not agree with Slade L.J.'s approach that section 14(2) could not apply to the present case.

A point which was not pursued in depth in the Court of Appeal concerned the limits to the meaning of the term "merchantable quality". The trial judge thought that the meaning of this term could not relate to anything beyond the physical qualities of the goods sold, and that such physical qualities would not include the fact that the painting was by a particular artist. In the Court of Appeal, neither Nourse L.J. nor Slade L.J. expressed a view on this. Stuart-Smith L.J. disagreed with the trial judge as he felt that there was no need to confine quality to "physical quality". It would have been interesting to see if the other members of the Court of Appeal would have agreed with Stuart-Smith L.J. that the question of whether something was fake or genuine related to a quality of the goods themselves as opposed to something that was external to them, and should therefore be considered in determining merchantable quality.

The most radical element of the decision in *Harlingdon* is probably Nourse L.J.'s finding that a fake painting sold by one dealer to another for £6,000 is of merchantable quality, thereby leaving the buyer stripped of any rights under section 14(2) and (6). Nevertheless, as this finding is very much dependent on the circumstances of each individual case, art buyers need not necessarily despair: despite *Harlingdon*, a Van Gogh sold for US\$82.5 million which turns out to be a forgery might well be considered unmerchantable under section 14(6) yet!¹¹

DORA S.S. NEO*

¹¹ Vincent Van Gogh's painting entitled *Portrait of Dr. Cachet* was reportedly sold in 1990 for a record price of US\$82.5 million. See *Straits Times*, 15 April 1991. One does not doubt that this was the real thing, but if it had been a forgery, it would have been unlikely to satisfy the requirement of merchantable quality.

* M.A. (Oxon.), LL.M. (Harv.), Barrister (G.I.), Advocate & Solicitor, Supreme Court of Singapore, Lecturer, Faculty of Law, National University of Singapore.