Inns (Syndic) v. Gabriel Lucas Limitée et Dame MacDonald, mise en cause [1]

Arthur M. Sanft *

Facts and Issues

In March 1961, Mrs. MacDonald, wife of a high-ranking executive, went to Gabriel Lucas Limited with pictures of a brooch and a pair of earrings which she desired the jeweller to duplicate. Lucas subsequently sent her photographs of how the completed jewellery would appear and Mrs. MacDonald signed a confirmation of the order, acknowledging that the cost would be $10,409. The date of delivery was fixed at June 26, 1961.

On the appointed day, Mrs. MacDonald appeared with a cheque for $1000, which Lucas accepted in exchange for the jewellery, the balance to be paid the next day by Mr. MacDonald. After the cheque came back N.S.F. and no word had been received, Lucas telephoned Mr. MacDonald who informed him that his wife was ill and presently on vacation.

The matter was turned over to their respective lawyers but a stalemate ensued. On Sept. 11th Mrs. MacDonald went into bankruptcy and Inns, who was appointed trustee, refused to return the jewellery to Lucas. The Superior Court decided the issue in favour of Lucas on the grounds that the delivery had been obtained fraudulently.[2]

The issues of the appeal are twofold:

(1) In a case such as this, where there is a mixed contract, both of creation (entreprise) and sale of an object, what criterion can we establish to determine the rules to be applied to the transaction ?

(2) If, according to the chosen criterion the rules of the sale of a future indeterminate thing are to apply, when then did the sale take place ?

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* Of the Junior Board of Editors, McGill Law Journal; Second year law student.

1 [1963] K.B. 500.

2 Unreported judgment of the Superior Court, C.S. 164/1961, Bankruptcy; Ferland, J.

A) when it was delivered, in which case fraud in obtaining transfer of possession would void the sale, or

B) at the time when the object became certain and determinate and was accepted as such.

Ratio Decidendi

The majority, per Rivard, J. (Bissonnette and Taschereau, J.J. concurring), felt that since Lucas was called upon to sell an object non-existent at the time, there can be no doubt that the case concerns a contract of enterprise as well as sale.

Rivard, J. then examined the doctrine to discover what the authors had to say on the subject. Planiol and Ripert offer the following point of view:

> Dans la vente d'une chose future qui doit être fabriquée par le vendeur, ce dernier, s'il fournit la matière en même temps que le travail, est propriétaire de l'objet pendant la fabrication. Le transfert de propriété... est retardé jusqu'à la livraison faite au client.[3]

He next examined Mignault[4] and a study by François Goré[5] who both offer similar viewpoints.

On the basis of these authorities he declared that in the instance where both contracts of sale and enterprise exist, a contract *sui generis* is created. The rules of this new entity are different from either of the orginal components and require delivery for ownership to pass. Applying his ratio to the case he concluded that the sale was only completed upon delivery on June 26, 1961. Since at that time the delivery was fraudulently obtained through both an N.S.F. cheque and the misrepresentation of how the balance of payment would be made, the sale must be annulled. For these reasons the appeal was dismissed and Lucas retained ownership of the jewellery which had been awarded him in the lower court.

There is, however, a strong dissent in the case voiced by Tremblay, C.J. (Owen, J. concurring). He begins by evolving a criterion for deciding how to proceed when faced with a mixed contract of sale and enterprise. Rejecting Rivard, J.'s idea of a contract *sui generis*, he posits, along with François Goré, that we must examine the relative value of the end product and the craftmanship involved in its creation. If the former has a higher pecuniary value then the

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[3] *Traité Pratique de Droit Civil Français*, 2e éd., t. 3 (1952), n. 622, p. 631.

[4] *Droit Civil Canadien*, t. 5 (1901), p. 267.

[5] *Le moment du transfert de propriété dans les ventes à livrer*, Revue Trimestrielle de Droit Civil, 1947, at p. 164.

rules of sale apply: if *vice versa* then we conduct ourselves as though confronted with a *contrat d'entreprise.*

He then turns to none other than Planiol and Ripert, who we must bear in mind apparently supported the majority view, to strengthen his own hypothesis:

> Dans les ventes dites à livrer, c'est-à-dire les ventes dans lesquelles un industriel s'engage à livrer une chose qu'il construira avec des matériaux fournis par lui, l'opération est considérée comme une vente de choses futures. Il n'en serait autrement que si la valeur de travail était très supérieure à la valeur des choses livrées.[6]

Applying the criterion he has just established, he assumes there would be no objection to concluding that the value of the jewels certainly surpassed that of the labour involved. Consequently we have a contract for the sale of a future and indeterminate thing, rather than a contract *sui generis* as the majority suggested.

Furthermore, he explains that it is pointless to look among the French doctrine and jurisprudence on this subject as Quebec law is substantially different. Our codifiers, when drawing up Art. 1026 C.C., specifically stated that they wished to clarify the ambiguity of Art. 1138, the corresponding article of the Code Napoleon.[7]

Art. 1026 C.C. states:

> If the thing to be delivered be uncertain or indeterminate, the creditor does not become the owner of it until it is made certain and determinate, and he has been legally notified that it is so.

There is no mention in this article of the necessity for delivery to perfect the contract, and consequently none should be made in the case. On the ninth of May, 1961, when the sketches were approved and the order was confirmed, the object became certain and determinate. The contract was thus perfected and ownership transferred on that day. It is undoubtedly true that possession of the jewels was obtained through fraud but this did not affect the sale being subsequent to it.

Critique

After a careful analysis of the legal reasoning involved, one cannot come to any other conclusion than to support the dissenting justices. With all due respect the author humbly submits that the majority have either failed to realize or chosen to disregard the fact that when Planiol and Ripert, as well as François Goré, propounded the view that the manufacture and sale of a future and

[6] *Traité Pratique de Droit Civil Français*, 2e éd., t. 10 (1956), n. 5, p. 7.
[7] Premier Rapport des Codificateurs (1865), p. 14.

indeterminate object is only complete upon delivery, they do not mean that a contract *sui generis* is created necessitating delivery for perfection. They have merely applied their "relative value" criterion, as cited by Tremblay, C.J., and as a result have chosen to consider the contract as one of sale. According to the French law, a sale of this type, i.e. of a future and indeterminate object, is generally considered incomplete without delivery. Hence their statement, while a true exposition of the French law, is not applicable to Quebec law where consent alone transfers ownership.

Thus Rivard, J. reasons:

1) The authors say that delivery is necessary in a mixed contract of sale and enterprise.

2) Therefore a new type of contract *sui generis* is created in which delivery is an integral part.

Whereas Tremblay, C.J. reasons:

1) The authors say that delivery is necessary in a mixed contract of sale and enterprise.

2) They apply the criterion of adopting the rules of the contract with the higher pecuniary value, which almost always is sale.

3) It is true that under French law delivery is necessary for sale, but this is not so in Quebec.

4) Therefore we do not have a contract *sui generis* but rather one of sale in which, according to Quebec law, delivery is not necessary.

This reasoning on behalf of the dissent is justified in view of Art. 1026 and Art. 1472 of the Civil Code as well as the jurisprudence [8] and doctrine. Mignault says, "Vous deviendrez propriétaire lorsque la chose vendue se trouvera individualisée par la tradition qui vous sera faite, ou par une convention ultérieure qui déterminera l'individu qui devra vous être livré." [9]

It does not logically follow for Rivard, J. to quote this passage. The last clause unequivocably states delivery is not necessary provided the object is individualized by "une convention ultérieure". Mignault thus adds support to the dissent. Faribault, as well, voices his agreement with this position.[10]

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[8] *Auclair v. Dame Gamefort* [1948] C.S. 298; *Naud v. Dolbec* [1959] C.S. 120; *Donegani v. Molinelli* (1869) 14 L.C.J. 106; *Morgan v. Turnbull* (1888) 14 Q.L.R. 121; *Reid v. Leclaire* (1896) 5 B.R. 32.

[9] *Droit Civil Canadien*, t. 5 (1901), p. 267.

[10] *Traité de Droit Civil du Québec*, vol. 12 at p. 416.

Thus it is respectfully submitted that we must accept the criterion Tremblay, C.J. has established, namely that the rules of the contract with the higher pecuniary value shall prevail. This is suggested by the doctrine quoted by both litigants as well as the jurisprudence, and indeed is the only logical one to be found.

Once this is applied to the present case, we conclude that the contract is to be considered as one of sale wherein the Civil Code and doctrine show us that delivery is not a requirement. As a result, fraud in obtaining possession cannot viciate the sale.

Lucas had retained an N.S.F. cheque long enough to allow his right of revendication under art. 1998 C.C. to elapse before he took positive measures to remedy the situation. He was aware that Mr. MacDonald was a prominent business executive, and on this supposition, Lucas gambled that he (MacDonald) would make good his wife's debt. It is of the very essence of commerce that an entrepreneur undertakes risks, calculating that they will bear fruit in the future. Unfortunately Mr. MacDonald's unusual ploy was more than Lucas had been able to foresee.

As the decision now stands, other creditors in the bankruptcy who may have been more prudent in their affairs than Lucas, have been made to suffer for his negligence by depriving them of a sizeable portion of the estate. Therefore it is suggested that the decision should have been reversed, the jewels returned to Inns and Lucas placed in the position of nothing more than an ordinary creditor in the bankruptcy.