Sales by Sample in the Province of Quebec

Introduction

Inferring contractual intent is undoubtedly one of the most difficult and delicate of judicial tasks. Faced with *ad hoc* and frequently conflicting testimony, the courts are forced to assess the credibility of opposing witnesses, draw the relevant factual conclusions, and impute an intent in relation to a contingency which the parties may never have even considered when transacting the bargain in question. What the litigants said, or what they did, or what they said in conjunction with what they did, is only relevant to the extent that the behaviour in question illuminates a reciprocal intention. It is not surprising to find, therefore, that judicial inferences of the prior intention of the parties are frequently speculative and unpredictable.

The judicial assessment of conduct precedent to the formation of the contract of sale is not immune from the vagaries of the fact-finding process. As a result, the legal consequences which attach to behavioural patterns frequently associated with the contract remain largely uncharted: witness, for example, the hopeless morass surrounding the controversy relating to the promise of sale. In view of the seemingly endless judicial and doctrinal debate concerning the meaning of article 1476 C.C., which has persisted and even escalated over the last century, I will spare the reader further exposure to this deadly controversy. Rather, it is my purpose to discuss the legal implications of a different preliminary arrangement which, although less often relied upon, is nevertheless of equal analytical significance, and, in this observer's view, poses equally thorny analytical difficulties.

Quebec courts have on more than one occasion invoked common law authorities [1] when resolving disputes involving sample sales, a practice subsequently criticized by the Court of Appeal.[2] Hence, although there is one decision holding that a sale will merely be one by description unless the contract expressly describes the transaction as being a sale by sample,[3] the Court relied upon English

[1] See the authorities cited in: *Kayser & Co. Ltd.* v. *C. & G. Lingerie Co. Ltd.*, [1963] C.S. 504, at pp. 505-506.

[2] *Monsanto Oakville Ltd.* v. *Dominion Textile Co. Ltd.*, [1965] B.R. 449, at pp. 450-451.

[3] *Kayser & Co. Ltd.* v. *C. & G. Lingerie Co. Ltd., op. cit.*, at pp. 505-506.

authorities having little relevance in this jurisdiction. As a result, it would appear fair to say that a sale by sample is a sale embodying an unambiguous arrangement, either verbal or written, express or implied, that the object of the contract will correspond precisely with sample merchandise which the buyer has seen, examined, and, presumably, found satisfactory for his purposes.[4] In assessing the intent of the parties, there has been a pronounced judicial tendency to examine the conduct of the buyer when accepting the merchandise in question. It is clear that the purchaser who receives merchandise without manifesting any concern as to whether it conforms to the sample will have difficulty in subsequently contending that the transaction was in fact a sale by sample.[5]

What legal consequences should result from an agreement of this nature? Does it constitute a conventional guarantee in addition to the legal warranty of the vendor against latently defective merchandise? Does any disparity between the sample and the merchandise ultimately delivered automatically engage the vendor's responsibility, regardless of its nature or materiality? If so, is the basis of the buyer's remedy founded in article 1065 C.C. or 1526 C.C.? Do any legal consequences result from the buyer's approval of the sample and from his instructions to the seller to deliver merchandise in accordance with it? Does the arrangement in any way exonerate the seller from the liability to which he would otherwise be subject? For example, does it confine the latter's responsibility to warrant the purchaser against latent defects to the delivery of merchandise which complies with the sample? In responding to questions such as these, the courts appear to have established two distinct sources of vendor's liability. We will examine and assess each in turn.

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[4] In *Walker & Co. Ltd.* v. *Wiselberg*, (1924) 36 B.R. 105, Allard, J., at p. 108, endorses the following definition proposed by Baudry-Lacantinerie, 3e éd., *Volume de la vente*, at p. 179:

> L'échantillon est une petite quantité de marchandise qui est prélevée sur une quantité plus grande de marchandise semblable offerte en vente et que le vendeur remet à l'acheteur pour lui faire connaître les qualités de l'ensemble.

Planiol and Ripert, *Droit Civil Français*, 2e éd., (1956), t. 10, n. 305, at p. 379, suggest a sale by sample:

> ...est celle dans laquelle l'acheteur n'a donné son engagement que sur la présentation d'un échantillon destiné à lui faire connaître et apprécier la qualité de la marchandise.

[5] *Walker & Co. Ltd.* v. *Wiselberg, op. cit.*, at p. 108; *Guest* v. *Douglass*, (1891) 20 R.L. 20, at p. 23 (C.A.); *Loynachan* v. *Armour*, (1904) 25 C.S. 158, at p. 163; *Neiss* v. *Noiles*, [1945] R.L. 253, at p. 255 (C.S.).

The Responsibility of the Vendor Selling by Sample

a. *The merchandise must conform to the sample*

Although the courts have not characterized the undertaking by the vendor as an express guarantee, they have nevertheless consistently held that the merchandise ultimately delivered must conform strictly to the sample.[6] The buyer who seeks rescission has, understandably, the burden of demonstrating the discrepancy between the sample and the merchandise actually delivered[7] which must, however, have been unapparent at the time of the sale.[8] In order to recover, he must institute proceedings with reasonable diligence in accordance with the terms of article 1530 C.C.,[9] although there is authority that an informal tender by the buyer, if unlawfully refused by the seller, will eliminate the need for compliance with this requirement.[10] It is clear that the buyer concluding for damages or rescission here,[11] as elsewhere,[12] loses any right of action in respect of merchandise which he may have resold, although, if he has not been negligent, he is still entitled to have the sale set aside and to tender back that part of the shipment which may still remain in his hands.[13] The law remains unclear, however, as to whether the purchaser may tender back the entire shipment if only part of the merchandise is unsatisfactory.[14]

Quebec courts have been generally predisposed to treat this aspect of the vendor's liability as being subsidiarily annexed to the legal warranty against latent defects. Judicial insistence that the buyer's acceptance of merchandise which does not correspond with the

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[6] *Leduc* v. *Shaw*, (1863) 13 L.C.R. 438 (C.A.); *Guest* v. *Douglass*, *op. cit.*, at p. 23; *Joseph* v. *Morrow*, (1860) 4 L.C.J. 288 (C.S.); *Loynachan* v. *Armour*, *op. cit.*, at p. 162; *Desmarteau* v. *Harvey*, (1873) 23 R.J.R.Q. 211 (C. de Rev.). For a decision of the Cour de Cassation to the same effect, see: *Stourdza* v. *Béchoff-David et Cie*, Civ., 23 juin 1914, D.P. 1916.1.93.

[7] *Guest* v. *Douglass*, *op. cit.*, at p. 23. For French authority to the same effect, see: *Martin* v. *Borgeaud*, Req., 26 décembre 1922, D.P. 1924.1.23.

[8] *Guest* v. *Douglass*, *op. cit.*, at p. 23; *Neiss* v. *Noiles*, [1945] R.L. 253, at p. 255 (C.S.); *Cedillot* v. *Lalonde*, [1951] C.S. 379, at p. 380.

[9] *Joseph* v. *Morrow*, (1860) 4 L.C.J. 288 (C.S.); *Loynachan* v. *Armour*, *op. cit.*, at p. 162; *Cedillot* v. *Lalonde*, *op. cit.*, at p. 381.

[10] *Leduc* v. *Shaw*, (1863) 13 L.C.R. 438 (C.A.).

[11] Rescission: *Loynachan* v. *Armour*, *op. cit.*, at p. 163; damages: *Sports Togs Inc.* v. *Telio Trading Co. Inc.*, [1970] C.S. 261, at p. 273.

[12] *Rondelet* v. *Legrand*, [1972] R.L. 285, at p. 288 (Prov. Ct.); *Ménard* v. *Desloges*, [1949] R.L. (n.s.) 123, at p. 128 (C.S.).

[13] *Loynachan* v. *Armour*, *op. cit.*, at p. 163.

[14] *Desmarteau* v. *Harvey*, (1873) 23 R.J.R.Q. 211 (C. de Rev.); and *Lamer* v. *Beaudoin*, [1923] S.C.R. 459.

sample precludes recovery, unless the disparity was latent, is consistent with this tendency as is the rule that the buyer must bring his action with reasonable diligence. It is submitted that this treatment of the legal relationship between the parties denies the true purpose of the arrangement, which is to establish an independent conventional source of liability irrespective of and in addition to any legal warranties to which the seller may be subject.

There are, of course, cases scattered throughout the jurisprudence of this jurisdiction which suggest that the rules delimiting the recourses of the buyer, where the seller breaches his warranty against latent defects, apply to conventional guarantees as well. By way of example, lofty authorities such as Mignault [15] and Anglin, JJ.[16] have, while participating in different judgments rendered by the Supreme Court of Canada, contended that article 1526 C.C. applies to conventional guarantees [17] and that articles 1527 and 1528 C.C. restrict the measure of damages resulting from the breach of a conventional stipulation "incident to a contract of sale";[18] and in his exhaustive treatment of the buyer's obligation to sue with diligence when taking the redhibitory action,[19] Dean Durnford has pointed to the substantial, if equivocal body of jurisprudence which holds that article 1530 C.C. applies to actions based on express guarantees as well as those premised upon the vendor's warranty against latent defects.

These judicial opinions, it is submitted, and with the greatest respect, are incorrect, for they fail to distinguish between rights of action which result from a presumptive intent enunciated in the Civil Code and a judicially inferred intent gathered from the behaviour whether written, verbal or otherwise of the parties. The distinction is significant, because a specific remedy applicable to the breach of a particular obligation is inextricably linked to that obligation, and to nothing else. Thus, the redhibitory action, for example, embodies the right to rescind the contract of sale pursuant to the breach of the vendor's warranty against latent defects; it does not arise in relation to the breach of a conventional obligation undertaken independently of the legal obligation presumptively

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[15] *Lamer* v. *Beaudoin, op. cit.*, at p. 473.

[16] *Samson & Filion* v. *The Davie Shipbuilding & Repairing Co.*, [1925] S.C.R. 202, at p. 218.

[17] *Lamer* v. *Beaudoin, op. cit.*, at p. 473.

[18] *Samson & Filion* v. *The Davie Shipbuilding & Repairing Co., op. cit.*, at p. 218.

[19] John W. Durnford, *The Redhibitory Action and the "Reasonable Diligence" of Article 1530 C.C.*, (1963) 9 McGill L.J. 16.

assumed by the vendor. To this, the remedies embodied in article 1065 C.C., with the attendant restrictions of articles 1074 and 1075 C.C., and the prescriptive limitations contemplated by article 2242 C.C., apply. The same rules, therefore, should govern the buyer's right of action against the vendor who, having agreed to a sale by sample, has nevertheless delivered merchandise which does not correspond with the sample which forms the basis of the contract.

b. *The vendor's warranty against latent defects*

Does the purchaser's approval of the sample impliedly relieve the vendor of any liability other than that of delivering merchandise which conforms to the sample? Although there are cases which suggest, either expressly [20] or by implication,[21] that the purchaser who has had the opportunity to examine and approve the sample will encounter some difficulty in pursuing an action for latent defects after he has accepted merchandise which conforms to the sample, the courts have not as yet explicitly formulated the criteria which govern the buyer's recourse. Two recent cases would, however, appear to suggest that a significant, if not controlling consideration, is the complexity of the tests which the buyer would have had to employ in order to discover that the merchandise, as represented by the sample, was not fit for the purpose for which it was intended. Thus, in one case, a defect which "could easily have been determined",[22] was held to be apparent while, in the other, it was held that "technical or chemical tests"[23] were an inappropriately onerous burden to place on a buyer's shoulders, even when he was purchasing on the basis of a sample which he had approved after having had ample time to effect the necessary tests. In this respect, therefore, there appears to be a clear analogy with the obligation of inspection which the courts have imposed upon the purchaser of immoveable property. Thus, while inexperience and naiveté will not mitigate the negligent oversight of defective immoveable property,[24] although the latter has on occasion been held to excuse the buyer of moveable property,[25] it has

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[20] *Guest* v. *Douglass*, (1891) 20 R.L. 20, at p. 23 (C.A.); *Monsanto Oakville Ltd.* v. *Dominion Textile Co. Ltd.*, [1965] B.R. 449, at pp. 450-451.

[21] *Cedillot* v. *Lalonde*, [1951] C.S. 379.

[22] *Monsanto Oakville Ltd.* v. *Dominion Textile Co. Ltd., op. cit.*, at p. 452.

[23] *Sports Togs Inc.* v. *Telio Trading Co. Inc.*, [1970] C.S. 261, at p. 268.

[24] For an extensive review of the relevant authority, see: John W. Durnford, *What is an Apparent Defect in the Contract of Sale?*, (1964) 10 McGill L.J. 60.

[25] See, e.g.: *Bourget* v. *Martel*, [1955] B.R. 659.

been held that there are limits to the extent to which the buyer is expected to go when making the necessary inspection.[26] In the case of sales by sample, these limits presently dictate that the buyer will preserve his recourses by ensuring, before he accepts the merchandise in question, that a serious and careful examination has been made by an informed observer in accordance with the prevailing customs in the relevant industry.

It is significant to note that, with the exception of Mr. Justice Casey, dissenting, in *Monsanto Oakville,* none of the judges participating in these decisions made a serious effort to evaluate the intentions of the parties. Citing tenuous authority,[27] Tremblay, C.J., with whom Hyde, J. concurred, merely held that the restrictions of article 1523 C.C. applied to sales by sample, and proceeded to hold that the defect was apparent, thereby negativing liability. Mr. Justice Batshaw, on the other hand, seemed to virtually ignore the fact that a sample had been delivered to the buyer before the agreement had been consummated in *Sports Togs.* Indeed, the authority upon which he placed primary reliance — a decision of the Cour d'Appel de Paris [28] — in holding that the fabric was tainted with a latent defect, did not even involve a sale by sample.

Do these decisions properly reflect the intentions of the parties? Precisely what should a vendor reasonably infer from a purchaser's request to examine part of the merchandise to be delivered in order to determine whether it meets his specifications? Can difficulties such as those which arose in *Monsanto* and *Sports Togs* be effectively resolved within the framework of the distinction between latent and apparent defects? In my view, they cannot. It is hopelessly artificial for a court to attempt to resolve disputes such as these without adequately canvassing and implementing the intent of the parties as manifested by their behaviour. And their behaviour is, in the absence of proof to the contrary, proof clearly lacking in *Sports Togs,* presumptively consistent with

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[26] The buyer, for example, need only have or obtain, when effecting the examination, the generalized expertise of the engineer or architect; he need not consult an expert in each of the building trades: *E. & M. Holdings Inc.* v. *Besmor Investment Corp.,* [1961] B.R. 376, at p. 379; and when he purchases property newly built by the vendor himself, he need not consult an expert at all: *Rothstein* v. *Int'l Construction Inc.,* [1956] C.S. 109; *Tellier* v. *Proulx,* [1954] C.S. 180; *Laurier Vachon Ltée.* v. *Gérard,* [1968] B.R. 497, at p. 499.

[27] Planiol et Ripert, *op. cit.,* at pp. 379-380, who themselves equivocate on this issue.

[28] *Mouton* v. *Peignon,* D.H. 1924.1.250.

an intent to exonerate the vendor from the legal warranty against latent defects. The courts need only, within the parameters of public policy,[29] give effect to that intent.

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[29] There is substantial authority to the effect that public policy prohibits the manufacturer or specialized merchant vendor from contractually excluding or limiting the extent or consequences of the vendor's warranty against latent defects in relation to which he had actual or presumed knowledge. See, by way of example only: *Touchette* v. *Pizzagalli*, [1938] S.C.R. 433, at pp. 438-439; *Longpré* v. *St-Jacques Automobile Ltée*, [1961] C.S. 265, at p. 266; *Joyal* v. *Vanasse*, [1967] R.L. 467, at p. 473 (Prov. Ct.); *Roy* v. *Ostiguy*, [1956] R.L. 527, at p. 531 (C.S.).

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