NOVA SCOTIA COURT OF APPEAL

Citation: *Canada (Attorney General) v. Borgo Upholestry Ltd.*, 2004 NSCA 5

Date: 20040113
Docket: CA198623
Registry: Halifax

Between:

Attorney General of Canada

Appellant

v.

Borgo Upholstery Ltd. and Neil John Funnell

Respondents

Judges:	Roscoe, Freeman and Bateman, JJ.A.
Appeal Heard:	November 24, 2003, in Halifax, Nova Scotia
Held:	Cross-appeal is dismissed without costs and the appeal is dismissed with costs as per reasons for judgment of Freeman, J.A.; Roscoe and Bateman, JJ.A. concurring.
Counsel:	G. Michael Owen, for the appellant Kevin C. MacDonald, for the respondents

Reasons for judgment:

[1] The appellant, the Attorney General of Canada representing the Departments of National Defence and Public Works, Supply and Services, Canada, has appealed from a judgment of the Supreme Court of Nova Scotia finding it liable for $62,821.61 to the seller and manufacturer for rejecting and refusing to pay for 806 classroom chairs because of their tendency to tip forward.

[2] The trial judge, the Honourable Arthur J. LeBlanc, found the matter fell entirely within the provisions of the **Sale of Goods Act**, R.S.N.S. 1984 c. 408. He found the chairs were unfit for their intended purpose, and unsafe. However Justice LeBlanc found the purchaser had failed to prove it relied on the seller's skill and judgment. It therefore could not establish that fitness of the chairs for their intended purpose was an implied warranty or condition of the contract pursuant to s. 17(a) of the **Act**. Neither could the purchaser invoke an implied condition of merchantability pursuant to s. 17(b) of the **Act** because it had examined the chairs itself before accepting them and ought to have discovered the instability, which was a patent defect.

[3] The appellant submits on the appeal that the trial judge erred in finding that the inspection carried out by the appellant ousted the application of s. 17(a). The appellant also submits that findings of fact made by the trial judge support a conclusion of fundamental breach of contract, entitling it to repudiate the contract and refuse payment.

[4] The respondents had pleaded the **Sale of Goods Act** in their statement of claim and the appellants had relied on it in their defence. The appellants also raised the issue of fundamental breach in their defence. They also pleaded a provision of the written contract which contained a warranty of quality free from any defect in material and workmanship which applied to "commercially available off-the-shelf goods, " available for 90 days after delivery "notwithstanding prior acceptance".

[5] The chairs were ordered to refurbish classrooms at the Canadian Forces Naval Operations School in Halifax as part of the mandate of the Commandant, Commander D.J.Gallina. Captain Mark Tijssen headed a committee which drew up specifications for the chairs. These were based on a chair in a model classroom and drawn up for the committee by Petty Officer 2nd Class Ellis. In compliance with federal procurement policies, the chairs had to be acquired through Public Works

and Government Services Canada. Maritime Forces Atlantic, Formation Logistics, acted as go-between for the School and Public Works. Formation Logistics sent the specifications to Public Works, which incorporated them in a request for proposals issued on December 20, 1996, calling for a closing date of February 7, later amended to February 11, 1997. It called for delivery, F.O.B. Destination, by March 15, 1997, later amended to March 27, 1997.

[6] The successful bidder was the respondent Neil Funnell, carrying on business under the name Canuck Office Furnishings. He agreed on March 10, 1997, to provide 787 chairs, later increased to 806, and eventually assigned the order to the respondent Borgo Upholstery, an Ontario manufacturer of office chairs. The contract for the purchase and sale of the chairs was drawn up in accordance with the Public Works Standard Acquisition Clauses and Conditions Manual and included the specifications, which provided:

> Chairs, Classroom Chair, Complete with the Following Specifications:
>
> a. Armchair, Sled Base, 19.5 to 23 Inches Between Armrests;
>
> b. Oval Tube Frame, 1.5 inch–16 Gauge Steel, Tube Endcaps Installed, Chair Frame Colour: Black
>
> c. Fabric Upholstery, Polypropylene or Comparable Highest Durability–Fabric: Select by Elite Canada; Colour: Silver (#60)
>
> d. Hard Urethane Capped Arms–8.75 Inches Long ; Colour: Black
>
> e. Molded Polyurethane Foam Padding: Back, 3 Inches Thick–1.5 Lb/psi Density and Seat, 3.5 Inches Thick–2.2 Lb/psi Density;
>
> f. Floor Protective Pads on Skids.

[7] The contract provided for a standard model Borgo chair, the 7002SB, to be modified to meet the requirements of the specifications. The chairs had to be manufactured to comply with that description; none of that description existed while the parties negotiated the contract. The trial judge noted that, "as Funnell pointed out in cross examination, nothing in the specifications stated the size or configuration of the frame, nor the location of the seat on the frame." He found it significant that the specifications included the thickness of the padding for the

backs and seats. The padding on the back and seats was thicker than on the standard Borgo model but there was no evidence that this influenced how far forward the seat was placed on the frame.

[8] Borgo 7002SB sled chairs are built between continuous tubular side frames which are roughly “D” shaped. The ends of the tubes meet on the floor at the back. The tube slopes up from that point as a riser serving as the back leg, bends forward to form the arm rest supports, then down to serve as the front leg before curving back to become the flat floor skid which goes back to meet the other end of the tube. The arm rest support is shorter than the floor skid and parallel to it. Two side frames are connected by crossbars which support the seats. Separate frame assemblies attached to the rear risers support the back.

[9] Four of the chairs in question were entered as exhibits. An obvious feature is that the seats extend some six inches forward of the point where the front legs curve back into the floor skids. Two of the four had had plastic wedges attached to the curve between the front legs and the floor skids to improve stability.

[10] No one from the School or Public Works viewed a sample chair before the contract was awarded. Tijssen said it would have held up the process because Borgo would have had to manufacture it, as it was not an off-the-shelf model, and did not press to see a sample. Funnell said there was an offer to make a chair available for viewing, although one would have had to be manufactured.

[11] Timing was a concern because Gallina could not be certain funds would be available after the end of the fiscal year on March 31, 1997. Delivery shown as “F.O.B. Destination” on the contract was amended to “F.O.B. Plant.” The delivery date was scheduled for March 27, 1997. When it became clear to the School and Formation Logistics that all the chairs would not be ready by that date, it was decided to go ahead anyway. Allan Keith, representing Public Works, testified that the chairs should have been rejected if they were not ready by March 31. Counsel agreed the date of delivery was not a key issue on the appeal, and it would appear that the delivery date requirement was waived.

[12] Section 31(2) of the **Act** provides:

> (2) Where, pursuant to the contract of sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

[13] Tijssen and Ellis were assigned to travel to the Borgo plant at Mississauga, Ontario, on March 27, 1997, to inspect and accept the chairs. They spent about two hours at the plant, where they counted 266 chairs boxed and ready for shipment. They opened three to five of the boxes and inspected the chairs during a period estimated variously at ten to 20 minutes. Presumably this was intended as an examination of the chairs pursuant to s. 36(1) of the Act, although the trial judge did not make a specific finding on this point. Section 36(1) provides:

> 36(1) Where goods are delivered to the buyer that the buyer has not previously examined, the buyer is not deemed to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

[14] The trial judge summarized their account of the inspection:

> Tijssen said he tested at least two chairs and described his method. Sitting in a chair, he leaned back and rocked it left to right, though not forward. He also measured the chair to confirm that it met the specifications. Tijssen said he "walked" the chairs back and forth. He said he never thought of sitting on the front edge of the chair, although on cross-examination he agreed that he could have done so. He agreed on cross-examination that there was no rush to complete the inspection. He noticed no difficulty with the chairs at the plant. He found the chairs to be solid and well made and said they fit his back. He was concerned about the large number of chairs that had not yet been assembled. Ellis also tested at least one chair, sitting in the back of the chair and moving from side to side. Tijssen and Ellis also saw the parts for other chairs waiting to be assembled.

[15] Tijssen phoned Formation Logistics and reported how many chairs were ready and said he was satisfied with the chairs.

[16] He agreed in his evidence that he had accepted all the chairs at the plant on March 27 in order to preserve the funding. This was intimated to Alessandro Spassiani, the manager of Borgo. Mr. Spassiani said that before Tijssen and Ellis left the plant they asked for an invoice, which he gave them. Tijssen said he asked

for an invoice for all of the chairs ordered. This was to hurry the payment of the invoice. He said he did not comment on the condition or quality of the chairs.

[17] Section 37 of the **Act** provides that the buyer is deemed to have accepted the goods when the buyer intimates to the seller that he has accepted them.

[18] On April 7, 1997, the first 274 chairs were delivered to the School, followed by 42 more on April 9. Soon afterwards Tijssen reported to Gallina that an instructor who had sat on one had flipped forward, nearly striking his head on a desk. Gallina tried one and noticed the same tipping tendency. Tijssen agreed the chairs tipped forward. A number of instructors and other school personnel testified to the same problem, one describing the forward tilt as “abrupt” and “instantaneous.”

[19] Funnell went to the School in response to the complaints and examined the chairs. He did not agree they tended to tip forward but to “keep a big customer happy” he had plastic wedges attached where the front leg portion curved into the floor skid. The wedges had an effect similar to extending the front legs to make contact with the floor several inches forward of the point where the curved runner merged into the flat floor skid.

[20] Public Works issued a stop work order on April 15, 1997. Funnell wrote back stating the stability of the chairs could be improved by installing the PVC black wedges. He would arrange for that work to be done the week of April 21 for the chairs already on hand. The remaining 490 chairs would be retrofitted at the plant and shipped April 18. Public Works issued a second stop work order April 16. There appears to have been no issue as to whether the addition of the wedges was an objectionable deviation from the contract description of the chairs. Counsel suggested that everyone represented by the appellant would have been happy if they solved the problem.

[21] Only one of the witnesses who had tried the chairs before the wedges were installed testified that she also tried them afterwards. She said the wedges did not make them “a hell of a lot better.” The school had the chairs tested by Nova Scotia Innovation Corporation. The manager, Neil Richter, testifying as an expert witness, said that although the “installation of the wedges did improve the forward tipping somewhat, they are still well below the requirements of the standard and therefore

are unsafe." His evidence was accepted by the trial judge in preference to that of the expert called by the respondents.

[22] Public Works refused to pay for the chairs. They were stored by the school for some months and all but the four exhibits were returned by Funnell to Borgo. Borgo complained that some were wet and damaged and others were out of their boxes, requiring an expenditure before they could be resold, at a price substantially less than the contract price. Borgo, later joined by Funnell as a plaintiff, sued the Attorney General in the Supreme Court of Nova Scotia for the contract price and for damages for the alleged harm caused by improper storage. In its defence the appellant relied mainly on allegations of breach of the condition of fitness, the warranty of merchantability, and fundamental breach of contract. The case was heard during five days in June, 2001 and three days in December, 2001, before Justice LeBlanc. He found for the plaintiffs and the Attorney General appealed. Funnell, choosing not to proceed by notice of contention, cross-appealed, alleging error in findings by the trial judge that the chairs were unfit for their intended purpose, and that the chairs were unsafe.

[23] The trial judge reviewed the evidence and set out a number of findings of fact which include the following:

* The defendant's personnel did not view a modified Borgo chair prior to March 27, 1997 and made no effort to have one made before accepting the Borgo tender.

* The Borgo model SB 7002 chair was modified to meet the specifications, which provided for thicker cushioning on the seat and back but did not specify the location of the seat cushion on the tubular frame. "I find that Canuck was not asked or consulted about the effect of changes to the standard Borgo SB 7002 on the stability of the chairs."

* The defendant's representatives inspected the chairs by sitting at the back of the chairs and measuring them as against the specifications. They failed to sit on the front portion of the chairs to determine if they were satisfied with their forward stability.

* Once they were delivered to the defendant the chairs tipped forward when a person sat on the forward part of the seat.

* The chairs were taken out of service and the old chairs were put back into service as a result of the Borgo chairs' tendency to tip.

* I find that the efforts by Canuck's representatives in offering to attach a wedge to the front portion of the modified chairs was a recognition that the chairs as manufactured were indeed unsafe for use as classroom chairs.

* I find that the test of the chairs by Mr. Comtois (the respondents' expert) did not address the vertical stability of the chair. I accept the opinion evidence of Mr. Richter that the modified Borgo chair and the modified Borgo chair with the addition of the wedge was unsafe due to its lack of vertical stability, requiring the chairs to be taken out of service. I find that the remediation proposed by Canuck was not sufficient to make the chairs safe.

* I find that Canuck, not Borgo was a party to the contract with the defendant, and that Borgo received an assignment of the proceeds pursuant to an assignment dated November 24, 1997.

* I find that although the defendant in these proceedings is referred to as the Attorney General of Canada, this includes officials and personnel of the Department of National Defence (DND) and Public Works and Government Services Canada..

* I find that the fact that, although Borgo and the other entities involved in the disposition of the chairs were "related" companies, the losses sustained by Borgo in their disposition were compensable losses.

[24] The trial judge stated the issue as follows:

> By conducting an inspection of the chairs at F.O.B. Destination namely, Borgo's plant, and accepting the chairs as fit for the purpose, did the defendant waive its right to claim for the defects in the forward stability of the chairs once the chairs were further inspected after their actual delivery to the defendants?

[25] While this characterization of the issue appears to state it narrowly, as the trial judge progressed through his decision he makes it clear that he was aware of the necessity of weighing, and did weigh, all of the relevant evidence, and not only

the evidence of the inspection, in determining that the appellant had not proven it relied on the skill and judgment of the respondents.

Condition of Fitness for Intended Purpose (S. 17(a))

[26] Justice LeBlanc began his analysis by stating the position of the defendant Attorney General:

> The defendant says the chairs failed to meet the implied conditions of fitness for purpose and merchantability under ss. 17(a) and (b) of the **Sale of Goods Act**, R.S.N.S.1989 c. 408, as amended. Section 17 states:
>
> > **17** Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:
> >
> > (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgement and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose;
> >
> > (b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;
> >
> > (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
> >
> > (d) an express warranty or condition does not negative a warranty or condition implied by this Act, unless inconsistent therewith. R.S., c. 408, s. 17.

[27] The trial judge turned to **Sound Images Inc. v. Solar Audio and Recording Ltd.**, [1995] N.S.J. No. 91 (N.S.S.C.) at paragraph 16 to determine the elements to be proven by a complainant pursuant to s. 17(a):

> (a) that it made known to the defendants the purpose for which the goods were required;
>
> (b) it relied on the defendant's skill or judgment;
>
> (c) the goods are of a description it is in the course of the defendant's business to supply; and
>
> (d) the goods are not fit for the purpose for which they were required.

[28] The trial judge made findings that the plaintiffs were informed of the purpose for which the defendant acquired the chairs and that it was the business of Borgo to manufacture and of Funnel to supply classroom chairs. Based on the expert evidence adduced by the defendant and the evidence of witnesses who sat in the chairs, the trial judge concluded that "the chairs were indeed unfit for the purpose for which they were intended." He made a number of findings to this effect, considering the chairs to be unstable and unsafe. He then stated:

> As a result of these conclusions, the question of the buyer's reliance upon the seller's skill and judgment, and whether any such reliance was displaced by the inspection, will be the decisive issue under s. 17(a).

[29] The trial judge reviewed the case law with respect to reliance and found the appellant's defence under s. 17(a) had failed. It had not succeeded in proving that it relied on the respondents' skill and judgment within the meaning of that subsection.

[30] The appellant asserts that the trial judge placed undue emphasis on the inspection. Inspection or examination of the goods is not a factor identified in s. 17(a), and it might well be risky to decide the issue of reliance on evidence of an inspection alone, to the exclusion of other relevant evidence. If the appellant's position is that the trial judge did so in the present case, I must disagree. Inspection is highly relevant evidence to be weighed with all other relevant evidence bearing on the issue of reliance, and, as I will explain below, I am satisfied that is how the trial judge approached the matter.

Merchantability (S. 17(b))

[31] After concluding that there was no implied condition of fitness for purpose, the trial judge then turned to merchantability under s. 17(b). Again he considered the test set out in **Sound Images, supra**, at paragraph 17, holding that the complainants must prove:

> (a) the goods were bought by description;
>
> (b) from a seller who deals in goods of that description; and
>
> (c) the goods were not of marketable quality.

[32] Once these factors are proven, establishing the existence of a warranty of "marketability" or "merchantability", (both of which terms are used interchangeably in reference to quality) there is a further proviso in s. 17(b):

> . . . provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

[33] The trial judge set out the opposing positions of the defendant and the plaintiff:

> The defendant says the chairs were not of merchantable quality and the defect–lack of forward stability–was not evident from the inspection carried out by Tijssen and Ellis, since the chairs were not in a classroom setting. The inspection was not done in an environment that was representative of the purpose for which the chairs were intended. Once the chairs were in such an environment, the defect was obvious. Since the examination at the plant would not reveal the defect, and the plaintiffs did not expressly disclaim liability for a breach of the implied conditions, the plaintiffs are liable.
>
> The plaintiffs say there was no breach of the implied condition of merchantable quality because the defendant inspected and accepted the chairs at the Borgo plant. Further, the chairs were obviously of merchantable quality, as they were all resold. In the alternative, the buyer's examination of the chairs should have revealed a defect if one existed.

[34] He cited Fridman, **The Sale of Goods in Canada** (4th Edn.) at p. 213:

> ...[T]he implied condition as to merchantable quality is inoperative where the defect rendering the goods unmerchantable is patent and the buyer knows or ought to have known of it as a result of an examination made by him, thereby exonerating the seller of any liability as respects the quality of the goods. But the proviso does not apply where no examination that the buyer could or would normally have made would have revealed the defect.

[35] Again, the trial judge reviewed the case law and concluded:

> I conclude that the defendant, having had a reasonable opportunity to examine the goods, lost the ability to rely on the implied condition of merchantability. Since the defect was a patent one, there was nothing to prevent the defendant's inspection from revealing it, as per **Australian Knitting Mills [Grant v. Australian Knitting Mills Ltd.** [1936] A.C. 85 P.C.)], **Thornett** [**Thornett & Fehr v. Beers & Son**, [1919] 1 K.B. 486] and **Trencon** [**Trencon Distributors v. Domar S.A.**, (1992) 66 B.C.L.R. (2d) 395].

[36] Based on the trial judge' s findings on this issue, in the language of the **Act**, there was "no implied condition (of merchantability) as regards defects which such examination ought to have revealed." As the defects the judge found to be patent, instability and unsafeness, which ought to have been revealed by the examination, were the exact defects complained of by the appellant, the effect of this finding is to eliminate the need for any further consideration of the condition or warranty of merchantability pursuant to s. 17(b) in the determination of this appeal. The appellant objects that the defects were latent rather than patent; the trial judge rejected the assertion that they could only be discovered in a classroom setting. The question whether defects are latent or patent is one of fact, and there was ample evidence to support the trial judge's finding.

Issues on Appeal

[37] The appellant "categorized" its 13 grounds of appeal into four issues stated in its factum:

> 1. That the learned trial judge misapprehended the evidence with respect to the nature of the inspection of the chairs by the appellant and further misapprehended the evidence that the defect was not a latent defect and therefore came to a conclusion not supported by the evidence and therefore erred in law;

> 2. That the learned trial judge erred in law in finding that an inspection of the goods (chairs) by the appellant nullified or "ousted" the application of Section 17(a) **Bill of Sales Act**. RSNS, 1984, c. 408;
>
> 3. That the learned trial judge erred in law in the application of the doctrine of fundamental breach of contract in this case, given the findings of fact made by the trial judge and in particular not only did the trial judge find the chairs not fit for the purpose intended but found the chairs to be in fact unsafe and in fact misapprehended the evidence in considering the application of the doctrine of fundamental breach of contract;
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> 4. At trial, the Respondent conducted its case and did argue that the Appellant had acted in bad faith throughout the Appellant's dealings with the Respondent, and therefore, the learned trial judge erred in law in awarding the Respondents their costs at trial given the trial judge found the Appellants had acted in good faith.

Construing the Contract

[38] In my view the contract between the parties was an agreement for the sale of goods by description, to which the **Sale of Goods Act** applied. It was not a sale by sample or trade name. The fundamental duty under the **Act** is contained in s. 29:

> 29. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

[39] The contract was not for off-the-shelf stock chairs to which the express warranty set out in the contract prepared by the appellant might have applied. The description of the chairs to be supplied was for the stock model chair known as the Borgo 7002SB modified by agreement to comply with the specifications supplied by the purchaser. The intended use as classroom chairs was stated in the specifications. Both parties had a role in creating the description.

[40] Delivery was to be F.O.B. destination by March 27, 1997. This was amended by agreement of the parties to delivery F.O.B. the plant. The appellant's right to rely on the March 27th delivery date appears to have been waived. The date of delivery is not in issue. A total of 316 chairs were delivered to the School by April 9, 1997. After the tipping tendency of the chairs was discovered, Public Works issued stop work orders on April 15 and, after receipt of a proposal by Funnell to add wedges to the runners to improve stability, on April 16, 1997. All of

the chairs required to fulfil the contract had been completed by May 12, 1997; as of that time Public Works had terminated the contract. Three hundred and twelve of the 316 chairs which had been shipped were returned at Borgo's expense. Borgo alleged the chairs had been improperly stored and some were wet and damaged, for which it claimed damages.

[41] The contract between Public Works and Canuck, which Canuck subsequently assigned to Borgo, did not contain an exclusion, exemption or limitation clause or other clause modifying liability of either party. The **Sale of Goods Act**, which contains implied conditions and warranties, was expected to apply. Section 14 deals with the effect of conditions and warranties:

> **Treatment by buyer of breach of condition by seller**
>
> **14 (1)** Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated.
>
> **(2)** Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract and a stipulation may be a condition, though called a warranty in the contract.
>
> **(3)** Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as ground for rejecting the goods and treating the contract as repudiated unless there be a term of the contract, express or implied, to that effect.
>
> **(4)** Nothing in this Section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise. R.S., c. 408, s. 14.

[42] In the present circumstances I would consider the condition of fitness for the intended purpose, if it applied in the sense of s. 14(2) and in the absence of acceptance, to be a fundamental condition going to the root of the contract,

entitling the appellant to the entire remedy it sought, repudiation of the contract and refusal to pay the purchase price.

[43] The trial judge's conclusions were based on his construction of the contract as a relatively straightforward agreement for the sale of goods by description, to which the **Sale of Goods Act** applied. What created the difficulties was the amendment of the contract providing for delivery F.O.B. Plant, which went to the formation of the contract. This resulted in the March 27, 1997, inspection of the chairs and their acceptance at the plant in order to avoid loss of funding for them at the fiscal year end. Pursuant to s. 37 the appellant was deemed to have accepted the chairs when the buyer, in this case Tijssen and Ellis on behalf of the School, intimated to the seller that they had accepted them. Upon the waiver of the previously agreed date of delivery, the respondents presumably became bound pursuant to s. 31(2) to send them within a reasonable time, subject to a right of action for damages for non-delivery in s. 52(1).

Analysis

[44] The trial judge made a number of clear findings of fact having a profound bearing on whether a breach of condition, a breach of contract, a fundamental breach of contract, or any breach at all, occurred. Most importantly, in considering s. 17(a), he concluded as a matter of fact that the appellants had not proved they relied on the skill and judgment of the seller and manufacturer under s. 17(a).

[45] Section 17 states, subject to the exception in s. 17(a), that "there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale." Establishing the exception depends on three elements, two statutory and one evidentiary. The statute requires (a) notice to the seller of the particular purpose for which the goods are required, and (b) that the goods must be of a description that it is in the course of the seller's business to supply. The trial judge found these requirements were both fulfilled. The third provision requires that the notice be of a kind "so as to show that the buyer relies on the seller's skill and judgment, " a matter that must be determined from the whole of the evidence relevant to reliance.

[46] The trial judge considered a number of cases dealing with reliance, including **Grant v. Australian Knitting Mills Ltd.**, [1936] A.C.85 (P.C.) and **Medway Oil and Storage Company Ltd. v. Silica Gel Corporation** (1928), 33 Com. Cas. 195.

[47] In **Grant v. Australian Knitting Mills** the trial judge quoted from Lord Wright speech at p. 96 in reference to a breach of the implied condition of fitness:

> It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express; it will usually arise by implication from the circumstances.

[48] He also cited the following propositions from Lord Sumner's speech at pp. 196-197 in **Medway Oil**:

> (a) The buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase.
>
> (b) The section does not say that the reliance on the seller's skill or judgment is to be exclusive of all reliance on anything else, on the advice, for example, of the buyer's own experts or the use of his own knowledge or common sense. Indeed it would never be possible to be sure that the element of reliance on the seller entered into the matter at all unless the buyer made some statement to that effect. It follows that the reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity.
>
> (c) This warranty, though no doubt an implied one, is still contractual, and, just as a seller may refuse to contract except upon the terms of an express exclusion of it, so he cannot be supposed to consent to the liability which it involves unless the buyer's reliance on him, on which the liability rests, is shown, and shown to him. The Tribunal must decide whether the circumstances brought to his knowledge showed this to him as a reasonable man or not; but there must be evidence to bring it home to his mind before the case for the warranty can be launched against him.

[49] Before he turned his attention to the effect of the amendment to the contract, and the resulting inspection at the Borgo plant, the trial judge stated:

> The defendant maintains it relied on the plaintiffs' skill and judgment to supply a stable and safe chair. It must be remembered that the chairs were not bought "off-the-shelf", but were modified versions of a standard chair. Neither the Request for Proposals nor the contract specified the configuration of the frame. It was an implied condition that the chairs would be reasonably fit for classroom use. It was reasonable to assume, as a result, that the chairs that were

> manufactured to fulfil the contract would have a reasonably stable base. I also am mindful that, given the defendant's frequent inquiries to determine the specifications of the thickness of the cushion and the distance between the bars, the defendant was making it amply clear to Mr. Funnell it wanted a compliant chair. Though they had not provided the sled base specifications, it is clear that the competence and expertise of Funnell and the supplier (manufacturer) would be relied upon.

[50] The trial judge then explained:

> The defendant provided a set of specifications that did not describe every aspect of the chair. The plaintiffs held themselves out as being capable of manufacturing and supplying a "classroom chair". However it was not sufficient to simply meet the defendant's specifications if the chair was unstable and unsafe, as I have found that it was. While the buyer's reliance on the sellers' skill and judgment was not total, given the relatively detailed specifications contained in the contract, it was still a "substantial and effective inducement" that led the buyer to purchase the goods. The fact that the defendant specified certain features of the chairs did not oust its reliance on the plaintiffs. The buyer relied on the seller to provide a safe and stable classroom chair. However, this does not end the matter. I must go on to decide whether that reliance was displaced by the inspection by Tijssen and Ellis at the Borgo plant.

[51] In concluding that the inspection by Tijssen and Ellis established that the appellant was no longer relying on the skill and judgment of the seller and manufacturer, within the meaning of s. 17 (a), Justice LeBlanc stated:

> The question I must answer is whether the inspection indicates that the defendant was no longer relying on the plaintiffs' skill and judgment. The plaintiffs say Ellis and Tijssen carried out an "extensive inspection" and determined that the chairs met the requirements in the contract and were suitable for the intended purpose. Thus, they say, the defendant made the determination on its own, without relying on the plaintiffs. . . .
>
> ... Tijssen and Ellis stated that their inspection was not restricted in any way. It simply did not occur to them to do the one inspection–sitting on the forward edge of the chair–that would have revealed the defect. This was not a latent defect that could not have been revealed by any inspection that they could have done, as was the case with the cow's failure to milk in **Gagnon** [**Gagnon v. Geneau,** [1951] 1 D.L.R. 516 (N.B.S.C.A.D.)] or the weakness of the cloth in **MacDonald** [John **MacDonald & Co. Ltd. V. Princess Mfg. Co. Ltd.**, [1926] 1 D.L.R. 718 (S.C.C.)]. There was nothing hidden about the instability of the

> chairs. I also conclude that Tijssen and Ellis had the opportunity to consult with a technical officer, Mr. Williams, as to the manner of inspecting the chairs. The failure of the defendant to properly prepare its designated personnel to thoroughly inspect the chairs cannot fall on the plaintiffs. It is likely that a proper inspection performed by a trained or competent inspector would have revealed the defect in the chairs at the Borgo plant.

[52] These passages make it clear that the trial judge was mindful of all of the evidence bearing on reliance, and did not consider the appellant's inspection of the chairs in isolation. Rather, the addition of the evidence of the inspection to the other evidence as to reliance served as the makeweight in his deliberations, tipping the balance away from the preliminary appearance that the buyer was entitled to rely on the seller's skill and judgment. As a result the trial judge, on the basis of all the relevant evidence, came to the conclusion that the appellant had failed to prove it had relied on the skill and judgment of the seller and manufacturer.

[53] He posed the correct question to himself:

> The question I must answer is whether the inspection indicated that the defendant was no longer relying on the plaintiff's skill and judgment.

[54] It is clear his conclusion was that by examining the chairs, which was obviously tied to the intention to accept the chairs at the Borgo plant before funding expired, the appellant showed that it was not relying on the plaintiff's skill and judgment. As Lord Sumner pointed out in **Medway Oil**, the finding is one of fact, and in my view it was made upon consideration of the whole of the relevant evidence. This finding is of great consequence to the appellant, because it not only displaces the buyer's right to rely on the skill and judgment of the seller, it eliminates any implied warranty or condition of fitness for a particular purpose from the terms of the contract. It is a finding that the buyer failed to successfully invoke the implied condition as an exception to s. 17(a), and that the implied condition is nonexistent for purposes of the contract between the parties.

[55] As I suggested above, if reliance had been proved, breach of the condition of fitness as classroom chairs could have been construed as a fundamental term of the contract, giving rise to a right in the appellant to treat the contract as repudiated pursuant to s. 14 (2) and to refuse payment. This is the complete remedy sought by the appellant. No more complete remedy would be available to the appellant if the

contract itself were found to be breached, or if it were found to be fundamentally breached.

[56] As mentioned above, the trial judge also found that the appellant was not entitled to invoke the warranty or condition of merchantability pursuant to s. 17(b) interfering with it.

[57] The elimination of both of these conditions has a profound effect on how breach and performance of the contract must be considered. Breach of the implied conditions is no longer a factor. The strong findings of fact by the trial judge that the chairs were unfit for the purpose of classroom chairs were relevant only in the context of the conditions. Now to succeed the appellant must, if it could, seek a finding of breach of contract or of fundamental breach of the contract by the respondents.

[58] The trial judge rejected fundamental breach. He stated:

> In **Rivtow Equipment Ltd. v. Watt (W.J.) Construction Ltd.** (1989), 73 Sask. R. 160 Q.B. the defendant bought a used tree delimber from the plaintiff. The seller made repairs to the machine before and at the time of delivery. Two days after delivery the machine caught fire and was destroyed. The defendant stopped payment and pleaded fundamental breach. Barclay J. concluded at para. 23 that,
>
> > although the machine as delivered was defective in a minor way, the doctrine of fundamental breach should not operate in the case at bar, as it has not been established that these defects were so flagrant as to make the machine delivered to the defendant not the machine it agreed to purchase. I am of the view that if the machine is not essentially different in character from that which the parties contemplated, defects in the equipment do not amount to a fundamental breach.
>
> The Court cited G.H.L. Fridman, **Sale of Goods in Canada**, at 285-286 to the effect that, for fundamental breach to operate,
>
> > ... the goods delivered had to be more than defective in some way, shape or form; they had to suffer from such a ‘congeries of defects’ as to make the thing it delivered not the thing bought by the buyer. The breach had to be of a flagrant nature ... It had to go to the root of the contract.

> I cannot conclude that the plaintiffs fundamentally breached the contract. While the chairs were seriously defective and indeed unfit for the purpose for which they were intended, this does not automatically constitute defect so flagrant as to make the chairs "essentially different in character from that which the parties contemplated", to quote the Court's words in **Rivtow Equipment, supra**.

[59] It is clear from the foregoing that the trial judge recognized that a higher degree of defectiveness, or flagrancy, was appropriate to a fundamental breach of the contract itself than to breach of the implied condition of fitness. Now the appellant must seek the right to repudiate the contract without the assistance of conditions. It did so under the doctrine of fundamental breach. But the trial judge had found, in my view correctly, that the same defects that would have supported that remedy for a breach of condition do not necessarily constitute the serious "congeries of defects" necessary to support a finding of fundamental breach of contract. I do not consider it necessary to decide whether the doctrine of fundamental breach, which arose in the context of clauses modifying liability, is appropriate in a relatively straightforward sale of goods situation from which such clauses are absent.

[60] The trial judge did not specifically deal with simple breach of contract, presumably because it was not argued at trial. It is not an issue on appeal. However the evidence that clearly would have disposed of that issue is also relevant to fundamental breach, and I propose to deal briefly with the question. The contract, shorn of conditions of fitness for intended purpose and merchantability, was simply one for the sale of goods by description. The description was for Borgo chairs model no. 7002SB modified by the specifications in the Public Works request for proposals and contract. Chairs by that description were bargained for, and chairs by that description were delivered - at least until the appellant refused delivery. The respondents therefore fulfilled their obligation under the contract, to deliver the chairs that the contract described. If they did not breach the contract, in my opinion they cannot be held to have fundamentally breached the contract.

[61] The remaining issue is the respondents' allegation that the appellant was in bad faith because it did not want the chairs fixed and wanted out of the contract. The trial judge rejected this contention and it is not raised on the cross-appeal. However the appellant submits the trial judge erred in not punishing the respondents in costs for making the allegation. The trial judge had the ultimate

discretion with respect to costs and it would not be appropriate in these circumstances to interfere with his cost award.

[62] I would dismiss the cross-appeal without costs and the appeal with costs to the respondent which I would fix at $2,500 plus disbursements.

Freeman, J.A.

Concurring:

Roscoe, J.A.

Bateman, J.A.