When Is a Sale Made "in the Course of a Business"?

Author(s): L. S. Sealy

Source: *The Cambridge Law Journal*, Jul., 1999, Vol. 58, No. 2 (Jul., 1999), pp. 276-278

Published by: Cambridge University Press on behalf of Editorial Committee of the Cambridge Law Journal

Stable URL: https://www.jstor.org/stable/4508562

would have been unavailable. It is not for the law of restitution to subvert the contractual allocation of risk.

GRAHAM VIRGO

WHEN IS A SALE MADE "IN THE COURSE OF A BUSINESS"?

IN the days (not so long ago) when there were typewriters in solicitors' offices, there was much speculation whether the sale by a solicitor of a typewriter which was no longer required would be caught by the provisions in section 14 of the Sale of Goods Act that impose conditions as to quality and fitness upon a "business" seller. There was no real room for doubt so far as the original Act of 1893 was concerned, where the relevant subsections referred to goods "of a description which it is in the course of the seller's business to supply" (s. 14(1)) and to "a seller who deals in goods of that description" (s. 14(2)). Plainly, our solicitor was not within either subsection. But when section 14 was revised (and subsection (1) confusingly renumbered so that it became subsection (3)), these formulae were discarded and replaced by the wording: "Where the seller sells goods in the course of a business"—which is plainly wider. This reform was introduced by the Supply of Goods (Implied Terms) Act 1973 and later consolidated into the Sale of Goods Act 1979 that is currently in force. Remarkably, the scope of the new provision has not been the subject of any judicial consideration for over two decades; but the Court of Appeal has now given a firm ruling in *Stevenson* v. *Rogers* [1999] 1 All E.R. 613, with the consequence that any redundant typewriters disposed of by solicitors in the future will be deemed sold "in the course of a business".

Rogers, the defendant, was a fisherman who in 1988 sold his only boat, the *Jelle,* to the plaintiff, Stevenson, for £600,000 and replaced it with the *Marilyn Jane.* The court was asked to rule, as a preliminary issue, whether the sale of the *Jelle* was made in the course of Rogers' business as a fisherman, so rendering him potentially liable under a claim that the vessel was not of merchantable quality. ("Merchantable quality" has, of course, now given way to "satisfactory quality", following the amendments made to the Act in 1994.)

Potter L.J., who gave the leading judgment, took full advantage of the new dispensation established by the House of Lords in *Pepper* v. *Hart* [1993] A.C. 593 to explore not only statements made during the passage of the 1973 legislation through Parliament, but also the reports of the (Moloney) Committee on Consumer Protection (1962) and of the Law Commissions on Exemption Clauses in Contracts

(First Report, 1969), which led to the introduction of that legislation. He made reference also to the definition of "consumer sale" in section 4 of the 1973 Act and that of "deals as consumer" in the Unfair Contract Terms Act 1977 ("UCTA"), s. 12(1), each of which includes the expression "in the course of a business". Every one of these sources encouraged his Lordship to adopt an interpretation which would give the phrase the widest scope, so as to impose as few limitations as possible on the remedies available to a person buying goods as a consumer. It followed that even where—as is the case with section 14—the legislation extends to business buyers as well as consumers, this broader interpretation would be applicable.

Before the present case, the only decisions which could be looked to as guides to the meaning of the expression "in the course of a business" were two cases under the Trade Descriptions Act 1968, s. 1(1) (which makes it a crime to apply a false trade description to goods sold "in the course of a trade or business"), and *R. & B. Customs Brokers Co. Ltd.* v. *United Dominions Trust Ltd.* [1988] 1 W.L.R. 321, decided under UCTA, s. 12(1), where the focus was on a *buyer* and the issue was whether he had purchased a second-hand car "in the course of a business". All three cases had given the phrase in question a restricted meaning, so as to rule out a "one-off venture" (even if "in the nature of trade" and "with a view to profit"): "a degree of regularity is required before it can be said that [such a transaction is] an integral part of the business carried on and so entered into in the course of that business" ([1988] 1 W.L.R. 321, 330, *per* Dillon L.J.).

Looking at the issue apart from these precedents, Potter L.J. concluded that it was the intention of the legislators that a broad and purposive construction should be applied to section 14, so as to reflect the emphasis on consumer protection which underlies the more recent reforms and distinguishes modern sale of goods legislation from the largely merchants' code of 1893. The Trade Descriptions Act rulings could be distinguished both because that Act puts the emphasis throughout on "trade" rather than "business", and because a more restrictive approach is proper when construing penal legislation. The *R. & B.* case created a somewhat greater obstacle because it was itself a Court of Appeal decision dealing with a provision which had now, following the consolidation, become a different section of the same Sale of Goods Act. Even so, his Lordship drew attention to various features which, he considered, allowed him to take a fresh view: first, the decision of the earlier Court of Appeal predated *Pepper* v. *Hart,* and so its members had not had the advantage that a reference to *Hansard* gave the present court; secondly, the two provisions, prior to the consolidation, had

had different legislative histories; and, thirdly, it was in keeping with a purposive, pro-consumer interpretation to construe the phrase broadly with reference to a seller and narrowly in the case of a buyer.

With the first of these observations one need have no great quarrel, but the remaining two seem not a little shaky, given that the section on which the *R. & B.* decision was based uses "in the course of a business" *twice* in a single sentence, referring first to a buyer and then to a seller. If a higher court is to uphold *Stevenson* v. *Rogers*, it would seem that *R. & B.* will have to be overruled.

As a postscript, if we may return to the 1890s, the expression "redundant type-writer" would then have been spelt with a hyphen and had an entirely different meaning—namely, the individual who worked the machine and not the machine itself!—see *Pullman* v. *Hill* [1891] 1 Q.B. 524.

L.S. SEALY

COLLECTING BANKS, CONVERSION AND CONFUSION

THE collection of cheques can be a risky business. The collecting bank is exposed to the risk of liability if the person who delivers the cheque for collection has no title, or a defective title, to the instrument. A prime example is where the cheque has been stolen. The "true owner" of the cheque (usually the person who owned the cheque at the time of the theft) may claim damages from the bank for conversion of the piece of paper on which the cheque is written, when it is deemed to have a value equal to the amount for which the cheque is drawn; alternatively, he may claim recovery of the proceeds of the cheque received by the bank in an action for money had and received. In either case the collecting bank's liability is strict.

Facing liability at common law, the collecting bank invariably turns to section 4 of the Cheques Act 1957. This provides the bank with a complete defence to the true owner's claim if it can prove that it acted "in good faith and without negligence". Most cases turn on whether or not the bank was negligent. However, there is some controversy as to what is meant by "negligence" in this context. It has been interpreted by some, most notably by Diplock L.J. in *Marfani & Co. Ltd.* v. *Midland Bank Ltd.* [1968] 1 W.L.R. 956, 972, in terms of a breach of a duty of care owed by the bank to the true owner of the cheque. Others reject the notion that the statutory reference to "negligence" involves any duty of care to the true owner, and interpret the expression in terms of a failure by the bank to achieve a certain standard of conduct in its business (see, *e.g. Lloyds Bank Ltd.* v. *E.B. Savory & Co.* [1933] A.C. 201, 221, *per* Lord