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Forgery, fine art and the sale of goods

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Case Comment

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Cases cited

[Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd \[1991\] 1 Q.B. 564; \[1989\] 12 WLUK 226 \(CA \(Civ Div\)\)](#)

Legislation cited

[Sale of Goods Act 1979 \(c.54\) s.13](#)

***L.Q.R. 561** THE decision of the Court of Appeal in *Harlingdon & Leinster Enterprises Ltd. v. Christopher Hull Fine Art Ltd.* [1990] 1 All E.R. 737 exemplifies the recurrent difficulties of scope and interrelation of the implied terms of section 13 (description) and section 14(2) (merchantability) in the Sale of Goods Act 1979.

The defendant art dealer telephoned the plaintiff art dealer and said that he had two paintings by Gabriele Münter for sale. At the defendant's gallery, the plaintiff's employee apparently examined the relevant painting in silence but he was shown an auction catalogue which described it as bearing the monogram MU. and having a stamp of the estate of Münter. Hull did not repeat that the artist was Münter; on the contrary, he said that he knew little of the paintings, did not like them and had never heard before of the artist. It was agreed that the plaintiff would buy the painting for £6,000. Hull supplying an invoice which included the artist's name and lifespan. The picture was subsequently revealed as a forgery. The trial judge gave judgment for the defendant and the Court of Appeal dismissed the plaintiff's claim (Stuart-Smith L.J. dissenting) for breach of sections 13 and 14(2) of the Sale of Goods Act 1979. Harlingdon raises contentious issues regarding the ambit of these sections.

Section 13 was originally conceived as applicable to commercial sales of unascertained or future goods, where descriptive words would be a necessity, and strict compliance with description could be demanded. In the twentieth century the section has been applied to sales of specific goods, *Beale v. Taylor* [1967] 1 W.L.R. 1193 marking the apotheosis of this development in arguably elevating all descriptive statements to the status of conditions. In fact, the common law's ***L.Q.R. 562** extended interpretation of "description" was made largely to facilitate complaints regarding the quality of goods, as section 14(2) of the

1893 Act was confined to sales by description. That artifice became otiose when the Supply of Goods (Implied Terms) Act 1973 removed this requirement. The subsequent decisions of the House of Lords in *Ashington Piggeries Ltd. v. Christopher Hill Ltd.* [1972] A.C. 441 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 severely restricted section 13 to words which constitute a "substantial ingredient" of the identity of the thing sold. Although in *Ashington* Lord Wilberforce discouraged "metaphysical discussions as to the nature of what is delivered, in comparison with what is sold," the task proposed involves distinguishing the subject-matter of the goods from their attributes or qualities. Rather than being a comprehensive condition, as suggested by *Beale*, section 13 now seems to imply the obvious: anyone can differentiate a painting from a vase but can a buyer of a painting which is described as by Münter always be met with the argument that he has nevertheless bought a painting even when it is discovered to be a forgery?

Harlingdon narrows the scope of section 13 yet further. Nourse L.J. held that the sale was not *by* description as the plaintiff did not *rely* upon it, and thus the description was not a term of the contract. Whilst Slade L.J. doubted the overall requirement of reliance in order to prove a term, Stuart-Smith L.J. considered reliance to be immaterial. It is submitted that a sliding-scale of reliance upon the description could be postulated depending upon the nature of the goods and the width of the description, but that where there *is* a description, the buyer's reliance must be presumed unless disproved. This conclusion is aided by the minimal positive reliance upon the seller's skill and judgment which was demanded for section 14(1) (fitness for purpose) of the 1893 Act, section 14(3) of the 1979 Act making lack of reliance a factor which would negative the seller's liability and which would have to be proved by him. Under section 13, it is widely accepted that there would be an absence of reliance in the buyer in a sale "of specific goods *as such*" (see *Benjamin's Sale of Goods* (3rd ed.), para. 764) and it is arguable that for a situation to fall within this category there should be no description whatever applied to the goods. Another possibility would be a permissible exclusion of section 13. In *Harlingdon* the section was implicitly excluded by the defendant's disclaiming any expertise and knowledge of the painting and its artist thus "shrinking the core" of his liability. Slade L.J. considered that this delimitation of liability might be reasonable in a business sale; Stuart-Smith L.J. was alone in warning against such insidious practices, adding that the elusive statements of *L.Q.R. 563 the defendant as to his expertise could not nullify the implied condition in section 13. Vigilance is needed (e.g. *Hughes v. Hall* [1981] R.T.R. 430, cf. *Cavendish-Woodhouse Ltd. v. Manley* (1984) 82 L.G.R. 376) to ensure that the Unfair Contract Terms Act 1977 is not thwarted by such manoeuvres.

If metaphysics are to determine the question of the substance of the subject-matter, a rigid analysis might suggest that this substance is a painting, its artist being an attribute; a forgery is still a painting just as poisonous herring meal was nevertheless held to be herring meal in *Ashington*. However, although Nourse L.J. felt unable to resolve the conflicting views in *Leaf v. International Galleries* [1950] 2 K.B. 86 as to whether the attribution to Constable in that case could be a condition, Stuart-Smith L.J. thought it "beyond question" that "the identity of the artist ... can be a substantial ingredient in the identity of the thing sold." Although the application of the distinction between identity and attributes is notoriously unhelpful, when it is combined with the accented "reliance" test in *Harlingdon*, section 13 is circumscribed so effectively that it becomes almost superfluous.

This stark interpretation of section 13 need not be detrimental if quality and attributes are encompassed satisfactorily by section 14. However, Nourse L.J. held that although the forgery amounted to "a defect in the quality of the painting" it did not render it unmerchantable within section 14(6). Thus, it was not "unfit for aesthetic appreciation" as it "could still have been hung on a wall somewhere and been enjoyed for what it was"; also, its resale value of between £50-£100 did not render it "unsaleable." With respect, both these conclusions are questionable. The first has no regard for the expanded notion of quality as explained in *Rogers v. Parish (Scarborough) Ltd.* [1987] Q.B. 933. As *Rogers* established that a buyer of a car can demand more than a functional method of transport, then surely the purchaser's expectations of an original painting must legitimately extend beyond a physically undamaged decoration for the wall? Slade L.J. answered this question in the negative; only Stuart-Smith L.J. thought that the painting's authenticity was directly related to its quality and that a consideration of the other elements in section 14(6), viz. fitness for purpose, description and price, meant that the painting was unmerchantable. The second conclusion fails to acknowledge the *substantial* difference between contract and resale prices which might render the goods unmerchantable (see *B.S. Brown & Son Ltd. v. Craiks Ltd.* [1970] 1 W.L.R. 752). Furthermore, Nourse L.J. discounted the elements of both price and description in section 14(6). He considered that the price paid for the picture reflected the buyer's own value assessment, and, because section 13 was inapplicable, the description carried a much reduced significance. It is respectfully suggested that this latter marrying of sections 13 and 14(2) is unwarranted and unnecessarily restrictive. The inference is that "description" in section 14(6) is allowed only the scope of section 13, viz. identifying the subject-matter of the contract. Section 14 was divorced from sales by description in 1973, freeing the section from even the earlier liberal interpretation of such sales, but the definition of quality would become inconsequential if it were to be reunited with description's new limited meaning.

It is respectfully submitted that the decision in *Harlingdon* is regrettable not only because of the additional emphasis placed upon "reliance" in section 13, thus suggesting that section's redundancy, but also in the court's restricted deployment of the notion of merchantable quality within section 14(2).

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Footnotes