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F. & B. Transport v. White Truck Sales Manitoba Ltd. [1965], 49 D. L. R. (2d) 670

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F. & B. TRANSPORT v. WHITE TRUCK SALES MANITOBA LTD. (1965), 49 D.L.R. (2d) 670—CONTRACTS—RESCISSION—1956 MODEL TRUCK WITH 1958 CAB REPRESENTED TO BE 1958 TRUCK—PROMPT REPUDIATION BY PURCHASER ON DISCOVERING MISREPRESENTATION—RIGHT TO RESCISSION AFTER EXECUTION AND COMPLETION OF SALE—PURCHASER FAILING TO GET WHAT HE BARGAINED FOR—EXONERATING CLAUSE AS TO WARRANTIES ON "YEAR MODEL" NO DEFENCE—The dilemma of the dissatisfied purchaser continues unresolved. However, any failure to arrive at a solution is attributable not so much to a reluctance of the courts to recognize the existence of the problem, as to a determination to achieve results within a framework of rules and terminology that requires modification and readjustment, if not replacement.

The opportunity to deal with this problem, or at least to consider many of the issues involved, arose in *F. & B. Transport v. White Truck Sales Manitoba Ltd.*[1] a decision of the Manitoba Court of Appeal. In this case the plaintiff bought from the defendant an International diesel tractor (the truck) which was represented as a second hand, 1958 model. Extensive repairs made road testing at the time of sale impossible, and a broken speedometer prevented any accurate estimation of past mileage. A new 1958 cab, replacing the old one, had been put on the truck making any investigation into the physical condition of the truck very difficult. Also, contained in the contract, was a clause which read:

> Purchaser acknowledges that this agreement constitutes the entire contract and that there are no representations, warranties, or conditions, express or implied, statutory or otherwise, other than as contained herein. Without limiting the generality of the foregoing Purchaser agrees that there is no warranty as to the 'year model' even if stated herein.

The plaintiff took delivery of the truck and kept it for nine months. During this period the vehicle's unsatisfactory performance led to further inquiries as to its age, and it was established that the truck was in fact a 1956 model. Upon this revelation, the contract was promptly repudiated, and the plaintiff notified the defendant that he had rejected the truck.

At trial, Dickson J. considered the "misrepresentation was one going to the root of the contract",[2] and held the defendant's conduct fraudulent. He allowed the plaintiff to repudiate the contract and reject the truck. However, on appeal, Miller C.J.M. claimed that the fraud of the misrepresentation need not become an issue. "Even though the misrepresentation was innocent", he was prepared to allow the plaintiff to repudiate on the ground that "the article delivered was not the article contracted for."[3]

No doubt the defendant's stipulation as to the year model of the truck was an important element in the agreement, but, beyond that,

1 (1965), 49 D.L.R. (2d) 670 (Man. C.A.).
2 (1965), 47 D.L.R. (2d) 419, at p. 422 (Man. Q.B.).
3 *Supra*, footnote 1, at p. 671.

was it a representation,[4] a warranty,[5] a condition,[6] or, in more recent language, a fundamental term? This rigid classification appears necessary in our application of available remedies to particular situations, and it is for this purpose that the question is asked. However, the confusion of the terms that arise in each attempt to delineate these categories, and the arbitrary and unpredictable limits that are often drawn fail to provide even that certainty which one would suspect they were designed to insure.

Dickson J., in his reference to the 1956 truck received by the plaintiff said:

> The thing contracted for was substantially different from the thing delivered. There was a complete failure of consideration. The misrepresentation was going to the root of the contract.[7]

In effect, one would assume he was dealing with the fundamental obligation of the contract. And yet, this explanation does little to clarify the issue, because that is much the same terminology that the courts have used in defining a condition, or distinguishing a condition from a warranty.[8] For example, a condition has been described as "a term which, without being the fundamental obligation imposed by the contract, is still of such vital importance that it goes to the root of the transaction."[9]

Miller C.J.M. is even less precise in his classification of this particular fact situation, although the importance he attributes to the year model of the truck would seem to indicate much the same conclusions as those expressed at trial. Thus the distinction between such terms as a condition and a fundamental term remains confused and unclear.

The Manitoba Court of Appeal, in their judgment, never refer specifically to the idea of the breach of the fundamental obligation, and the extent of the available remedies. Miller C.J.M. refers to "a difference in substance between what was contracted for and what was delivered; the plaintiff did not get what he bargained for".[10] Nevertheless, the decision appears to follow closely the logic involved in the concept of the fundamental obligation, which was devised to

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[4] *Oscar Chess v. Williams*, [1957] 1 All E.R. 325. A second hand Morris, represented at sale as a 1948 model, in fact was a 1939 model. The court distinguished a warranty and a representation, claiming this particular situation involved the latter, but refusing the ordinary remedy of rescission for innocent misrepresentation because of the six-month time lapse between sale and discovery of the defect.

[5] *Woods v. Borstel* (1962), 34 D.L.R. (2d) 68 (Alta. C.A.). Here the discrepancy in representing a Ford Thunderbird car as a 1959 model rather than a 1958 was held to be no more than a breach of warranty. Damages were awarded.

[6] *O'Flaherty v. McKinlay* [1953] 2 D.L.R. 514 (Nfld. S.C.). A 1949 Hillman was represented as a 1950 model. "The representation was one going to the root of the contract and it was a condition of the contract that the car was a 1950 Hillman."

[7] *Supra*, footnote 2, at p. 421.

[8] *Supra*, footnote 5.

[9] P. S. Atiyah, The Sale of Goods, (2nd ed.), p. 24.

[10] *Supra*, footnote 1, at p. 671.

avoid the problems arising from an exception clause,[11] and, as will be seen, has since been further developed.[12]

Three difficulties arise in connection with this idea of the fundamental term. First, how does one define the fundamental obligation of a contract? This problem has never been very adequately discussed in a Canadian court, and one might well question whether the idea has ever been adopted in this country. Some assistance in this direction has been provided by English courts,[13] as well as academic comment.[14] However, on this basis alone, one might have expected a somewhat more extensive discussion of the concept by the Manitoba Court of Appeal.

Secondly, if one assumes the existence of the fundamental term, what relief can be sought for its breach and what are the limits of these remedies? According to Miller C.J.M., notwithstanding the execution of the agreement, the plaintiff is entitled to repudiate the contract. No mention is made of the acceptance of the goods or the effect of a lapse of time before repudiation, although these two elements were considered decisive in *Yeoman Credit Ltd. v. Apps*[15] where rescission for breach of the fundamental term of the contract was forbidden on the grounds of acceptance. In the present case the vehicle was kept for three or four months longer than the *Yeoman Credit* case.

In contrast are three Canadian decisions—*O'Flaherty v. McKinlay*,[16] *White v. Munn Motors Ltd.*,[17] and *McKenzie v. Royal Bank of Canada*.[18] Each allows rescission for breach of an executed contract, although only in the first two cases does the court refer to the fundamental obligation. In the last case the language of the court is less clear, and the authority of the decision for our purposes has been questioned.[19] Both the former cases deal with innocent misrepresentations in the sale of motor vehicles. The first is a case in which a 1949 Hillman was represented as a 1950 model. The *Munn* case involved a truck sold as a three-quarter ton, but which in fact did not meet those specifications. It would be a very thin line, by any interpretation

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11 *Karsales (Harrow) Ltd. v. Wallis*, [1956] 2 All E.R. 866, at p. 869. Denning L.J. actually refers to a breach of a fundamental contractual obligation. However, the language used to elaborate the concept can be found in earlier decisions such as *Kennedy v. Panama, New Zealand, & Australian Royal Mail* (1867), L.R. 2 Q.B. 580, at p. 587, and *Seddon v. North Eastern Salt*, [1905] 1 Ch. 326.

12 *Yeoman Credit Ltd. v. Apps*, [1961] 2 All E.R. 281, at pp. 289, 290 (C.A.).

13 *Ibid.*

14 G. H. L. Fridman, Complications of the Fundamental Term, (1961), 24 Mod. L. Rev. 648. The author, through a process of elimination, arrives at what the courts would seem to consider the 'fundamental obligation' although he suggests "the courts are introducing such subtle gradations between 'ordinary' and 'fundamental' conditions that no intelligible distinction will soon remain".

15 *Supra*, footnote 12.

16 [1953] 2 D.L.R. 514.

17 (1960), 45 M.P.R. 253 (Nfld. S.C.).

18 [1934] A.C. 468 (P.C.).

19 D. G. Farquharson (1935), 13 Can. Bar Rev. 244.

of the facts, that would separate these two cases from *Yeoman Credit Ltd. v. Apps*,[20] and yet the relief allowed is entirely different.

In effect, the ability to determine whether a contract for the sale of goods has proceeded too far to allow rescission must always be based on a rather arbitrary decision. If a court is going to grant the remedy, it should at least consider the entire scope of the law, not just those decisions that support the judgment.

Thirdly, reference must be made in this consideration of the fundamental obligation to the court's failure to mention the Sale of Goods Act.[21] The courts have generally been sympathetic to the change in the bargaining position of the various parties in contract negotiation. For example, in the present case, the year model of the truck might easily have been treated as a condition[22] and caught by s. 13(3) of the Act. However, it was interpreted as a basic term of the contract, breach of which is said to allow repudiation. This, in effect, excludes the operation of an important section of the Sale of Goods Act from a field of the law in which one would think it would be of prime importance.

On the other hand, if one is to understand the court's interpretation as a misrepresentation of the year model,[23] then the decision has allowed rescission for misrepresentation after there has been acceptance and a considerable lapse of time. In effect, the court is providing better relief in this event than would have been available had the court considered it a breach of condition.

Initially, it was suggested that in arriving at its decision the Manitoba Court of Appeal should have given more time and consideration to the areas of the law which must inevitably be affected by its decision, and the preceeding comments have tried to indicate the impact which *F. & B. Transport v. White Truck Sales*[24] will have on these established principles of law. However, with due respect, it is also suggested that perhaps there are one or two alternative avenues which, although they might require certain alterations in the law, could achieve the same end in a more satisfactory manner.

First we must determine what it is that the courts are trying to accomplish. Attention must be given to the policy that has attached to these kinds of transactions. The bargaining strength of the vendor has declined rapidly with the appearance of larger retail outlets. The give and take that once characterized the commercial market has been replaced by the standard form contract, and often the only choice open to a purchaser is to take what is offered or go elsewhere. Even then, he is often faced with the same offers from several different sellers, all of whom have tailored their contracts to suit their needs.

20 *Supra*, footnote 12.
21 R.S.M. 1954, c. 233.
22 See footnote 6.
23 See footnote 4.
24 *Supra*, footnote 1.

Perhaps the answer might be to forbid a vendor to contract out of the liability imposed by s. 15 and 16 of the Sale of Goods Act. When the doctrine of the fundamental term is closely scrutinized, it takes into account no more than those circumstances which a court would consider in determining whether particular goods corresponded with their description or were reasonably fit for the particular purpose for which they were intended.[25]

On the other hand, rather than do away with the fundamental obligation, it has been suggested that the idea of the fundamental term be incorporated into the statute. To the extent that it would bring the dispute back within the bounds of the Act it would be an improvement, but is this in fact what we are trying to do? We would only be deceiving ourselves in thinking a solution had been found, because again we would be involved in the same arguments and terminology.

With regard to the limits that should be afforded the remedy of rescission the recommendations of the Tenth Report of the Law Reform Committee (FN) are worthy of attention. The Committee suggests that rescission be permitted after execution, although affirmation of the contract or delay in seeking the remedy should continue to bar this right. But, more important, it leaves the final decision as to the allocation of damages or the granting of rescission to the discretion of the court. At a time when flexibility is often the tool best suited to achieving equitable results, this would seem to be a very challenging innovation, at least as an experiment, if nothing else.

In conclusion, it would appear that the opportunity for discussion, if not reform, has been bypassed. The solution to the difficulty is by no means clear, but not until it has been squarely faced by the courts will the plight of the dissatisfied buyer be resolved with any degree of certainty or authority.

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[25] U.C.C. 1957, § 2-302 provides relief against a contract or clause which the court finds unconscionable. However, its purpose is more the prevention of oppression and unfair surprise than a new allocation of risk based on superior bargaining powers. § 2-316 protects a buyer from unexpected and unfamiliar language of disclaimer and allows the exclusion of implied warranties only by conspicuous language.

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