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The Better View?

Johnston v R&J Leather (Scotland) Ltd^o

When discussing disputed points relating to the law governing corporeal moveables in Scotland, the late David Carey Miller frequently weighed up opposing arguments and interpretations based on the authorities and a range of policy considerations, and ultimately came to what he termed “the better view”.¹ For example, the “better view” relating to reform of the law relating to moveable securities was “that while the system of property may need to adapt to accommodate the needs of commerce, for it to retain its structural integrity and coherence any development should come from within and show sufficient respect for, and consideration of, the traditions of the system.”² One thing Carey Miller consistently resisted was the idea that what he labelled as “policy” or “equitable” considerations should undermine the structural integrity and coherence of the law of corporeal moveables.³

The present analysis piece considers the recent case of *Johnston v R&J Leather (Scotland) Ltd*.⁴ While the decision can be praised for a number of reasons,⁵ it will be suggested that it is difficult to take what Carey Miller might have termed the “better view” of the decision – a view that allows it to be read consistently with the underlying principles and structure of the law.

A. THE DISPUTE IN *JOHNSTON*

The facts of *Johnston* were relatively straightforward.⁶ In March 2017, Mr and Mrs Johnston decided to buy a custom-made leather suite from R&J Leather (Scotland). They paid a deposit, and the full balance was paid in April 2017. The suite arrived on 30th June 2017, but the Johnstons found it unsatisfactory. They intimated rejection of the suite the following day in person at R&J’s showroom in Uddingston. They made clear that they wanted to reject the suite and recover the price. R&J simply ignored repeated demands from the Johnstons to have the

^o I am grateful to Professor Roddy Paisley, Dr Douglas Bain and Dr Alisdair MacPherson for comments on an earlier draft of this analysis piece. Any errors remain my own.

¹ See, to name some examples, D L Carey Miller and D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (2005) paras 1.19, 4.06, 6.07, 8.32, 11.18.

² Carey Miller with Irvine, *Corporeal Moveables* (n 1) para 11.18.

³ See, for example, Carey Miller with Irvine, *Corporeal Moveables* (n 1) para 4.06.

⁴ [2019] SAC (Civ) 1; 2019 SLT (Sh Ct) 118.

⁵ See T Lauterbatch, “*Johnston v R&J Leather (Scotland)*” 2019 SLT (News) 51-52.

⁶ *Johnston* at paras 1-8.

suite removed. Ultimately in December Mrs Johnston secured a court order for repayment of the money owed to her.⁷

At some point in December 2017 or January 2018, the Johnstons then decided to give the suite away. The Sheriff found that “they had not used” the suite and that it was “taking up room which they needed”. The Johnstons then sought to enforce the order in their favour to recover the money paid for the suite. R&J refused to make payment, and the dispute came back to court. In July 2018, the Sheriff granted an order for payment, and “excused the [Johnstons’] failure to be able to return the suite.”⁸

R&J appealed to the Sheriff Appeal Court, and the appeal turned on the following question: “[i]n circumstances where the Johnstons no longer have the suite and cannot return it, can they recover the sum awarded?” R&J accepted that short-term rejection of the goods had been justified; but it argued that the remedy of rejection and so repayment was only available where the rejected item was still available for uplift. Its position was that “the obligation to make the rejected goods available applies without limit of time”.⁹

The core statutory provisions governing the matter were identified by Mr Young,¹⁰ acting for R&J, as being s.20 of the Consumer Rights Act 2015. Under s.20(7)(b), it is provided that from the time when the right of rejection is exercised, “the consumer has a duty to make the goods available for collection by the trader”. Subsequently, Mr Young looked at older case-law to support the idea that the buyer rejecting goods can only secure the remedy of rejection if he makes the goods available, and in the interim holds them as if a custodian.¹¹

Delivering the opinion of the Court, Appeal Sheriff Cubie acknowledged that “[t]he argument that there is an unqualified duty, without limit of time to retain the goods has a superficial attraction, given the wording of the Act.”¹² Nonetheless, he continued:¹³

whatever the wording in section 20(7)... an interpretation which leaves the duty as open-ended, unqualified and indefinite is an unattractive proposition which is not supported by the authorities cited or statutory interpretation in general. Such an interpretation has the

⁷ Paras 1-7.

⁸ Paras 7-8.

⁹ Paras 9-10.

¹⁰ Paras 11-18.

¹¹ Paras 19-22.

¹² Para 27.

¹³ Para 27.

potential to lead to both unfairness and absurdity; it is trite that statutory interpretation should avoid both outcomes.

The Appeal Sheriff then proceeded to outline what he thought to be a non-exhaustive list of appropriate factors that might be taken into account when determining the “nature and extent of the duty to retain goods which have been rejected”.¹⁴ He found that the Johnstons had been “entitled to dispose of the suite” and that “having properly exercised their right of rejection” they were now entitled to recover the price paid.¹⁵

When the Appeal Sheriff said that the Johnstons had been “entitled” to dispose of the suite, this argument was evidently the logical consequence of his interpretation of the 2015 Act.¹⁶ Nonetheless, this approach does give rise to a question. On what basis in the law of Property governing derivative acquisition of corporeal movables could the Johnstons have been entitled to dispose of the suite? The answer is not immediately apparent. Obviously, this could make the decision problematic. If the Johnstons had no real right of ownership in the suite, then they could have not passed title to their donee(s).¹⁷ R&J would apparently still own the suite, and presumably be able to bring an action for delivery in respect of it against the Johnston’s donee(s)¹⁸ – even though the Johnstons had somehow been “entitled” to give the suite away. That strange result would not follow if the Johnstons had been, as a matter of Property law, “entitled” to give the suite away. This possibility will be considered next.

B. WHO OWNS THE SUITE?

The following analysis proceeds on the basis that the transfer of the suite was governed by the Sale of Goods Act 1979.¹⁹ Under that statute, different rules apply depending on whether the goods were “ascertained” or “unascertained” – or classed as “future” goods – at the time of making the contract.²⁰ “Future” goods are those goods which are “to be manufactured or

¹⁴ Paras 28-30

¹⁵ Paras 32-33.

¹⁶ Presumably he was following the rule of statutory interpretation commonly known as the Golden Rule, discussed in Lord Eassie and Hector MacQueen (eds), *Gloag and Henderson The Law of Scotland*, 14th edn (2017) para 1.39.

¹⁷ See, for example, Bankton, *Institute*, III.77-80 (R 27); Hume, *Lectures*, III, 232.

¹⁸ For this action, see K Reid, *The Law of Property in Scotland*, (1996) para 158; *Gloag and Henderson* (n 16) para 31.18.

¹⁹ In this instance, the 1979 Act continues to regulate the transfer of property, notwithstanding the enactment of the Consumer Rights Act 2015; see M Bridge et al (eds), *Benjamin’s Sale of Goods*, 10th edn (2017) para 14-047.

²⁰ See Carey Miller with Irvine, *Corporeal Moveables* (n 1) paras 9.06-9.14.

acquired by the seller after the making of the contract of sale”²¹ – an example being the suite in *Johnston*.

Unless anything to the contrary appears from the intentions of the parties, passing of ownership following on from a contract for the sale of unascertained or future goods is dealt with under Rule Five of s.18 of the 1979 Act. The first section of this provides as follows:

Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

Assuming that Rule Five is applicable, then, the question must be whether or not the suite was “unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller”. It seems difficult to dispute that the seller intended to appropriate the suite to the contract.²² Yet was the appropriation done with the assent of the Johnstons, at least as the law would define “assent”? In general, “[a]ssent to appropriation... can fairly easily be inferred in most cases, for example by the whole nature of the contract or by a lapse of a reasonable time after notice of appropriation is given.”²³ Further guidance may perhaps be found in the English authoritative text *Benjamin’s Sale of Goods*.²⁴ The editors of that text draw attention to two ways in which “assent” to the appropriation of goods can manifest itself. First, assent can be given prior to the appropriation, expressly or by implication, whereby the buyer is said to have previously authorised the seller to appropriate the goods to the contract and so pass property to him.²⁵ In that case, “[t]he assent of the buyer is in fact an authority conferred by him on the seller to pass the property in the goods by appropriation.”²⁶ For example, in the old English case of *Pletts v Beattie*, the purchaser placed an order for alcohol to be selected from a stock at a brewery, and in his written order he wrote to the seller “I assent to the appropriation by you to this order at your brewery of goods of the

²¹ Sale of Goods Act 1979 s.61(1); Carey Miller with Irvine, *Corporeal Moveables* (n 1) para 9.14.

²² Consider Reid, *Property*, (n 18) para 653 (Gamble). One relevant decision here, as cited by Gamble, is *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd’s Rep 240; see also Bridge et al (eds), *Benjamin’s Sale of Goods* (n 19) paras 5-068–5-108.

²³ Reid, *Property* (n 18) para 635 (Gamble).

²⁴ Bridge et al (eds), *Benjamin’s Sale of Goods* (n 19) paras 5-068–5-108.

²⁵ Bridge et al (eds), *Benjamin’s Sale of Goods* (n 19) para 5-070.

²⁶ Bridge et al (eds), *Benjamin’s Sale of Goods* (n 19) para 5-078.

above description and in a deliverable state.” Property passed at the brewery, when the alcohol was selected by the seller, because the purchaser was held to have assented to the seller’s choice in appropriation.²⁷ The question of whether or not advance authority to appropriate has been given by the buyer to the seller is decided on a case-by-case basis.²⁸ Second, assent can be given expressly or by implication *after* the appropriation of the goods to the contract by the seller.²⁹

The question of whether or not the Johnstons assented to the appropriation of the suite does not seem to have been asked in court, and it is difficult to answer on the facts as found. There seems to be little evidence that tends to the conclusion that assent was given *before* R&J appropriated the suite to contract. The simple fact that the Johnstons had instructed R&J to manufacture the suite does not, in itself, indicate that they agreed that whatever R&J made would be appropriated to the contract; something more is needed from the buyer than that.³⁰ Is it possible to take the view that the Johnstons assented to the transfer *after* appropriation of the goods to the contract? Express assent seems difficult to establish on the facts. As regards implied assent, some guidance may be found in the old Scottish case of *T B Seath & Company v Alexander Moore*, where Lord Watson indicated that where a buyer or his agent inspected goods, that could be relevant to determining assent; payment of installments followed by inspection might be deemed to constitute acceptance.³¹ Of course, when making these comments, Lord Watson was thinking of an inspection that was carried out in such a way as to indicate that the buyer (or his agent) *approved* of the goods in question. That he was thinking in these terms is supported by the fact that he cited³² the much older English authorities of *Clarke v Spence*³³ and *Wood v Bell*.³⁴ In those cases, involving the construction of ships, payment of installments and regular inspections that allowed the purchaser’s agent to approve or disapprove of the progress being made were relevant in determining the purchaser’s assent to the appropriation of the goods.³⁵ But in those cases, there was no reason to assume that the

²⁷ [1896] 1 QB 519 (for the passage quoted, see 520).

²⁸ Bridge et al (eds), *Benjamin’s Sale of Goods* (n 19) para 5-078.

²⁹ *National Coal Board v Gamble* [1959] 1 QB 11, [1958] 3 All ER 203, discussed in Reid, *Property* (n 18) para 635 (Gamble). See also *Edwards v Ddin* [1976] 1 WLR 942.

³⁰ See, for example, *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd’s Rep 240 at 255-256, as discussed in Carey Miller with Irvine, *Corporeal Moveables* (n 1) para 9.14.

³¹ (1886) 13 R (HL) 57 at 65-66, 68. The case was decided before the promulgation of the Sale of Goods Act 1893, but for its authority as regards this point see Bridge et al (eds), *Benjamin’s Sale of Goods* (n 19) para 5-092.

³² *T B Seath & Company* at 65-66, 68.

³³ (1836) 111 ER 855.

³⁴ (1856) 119 ER 669; (1856) 119 ER 897.

³⁵ For a discussion of the point, see Bridge et al (eds), *Benjamin’s Sale of Goods* (n 19) para 5-092.

inspections gave rise to anything other than favourable judgements. By contrast, in this case, the Johnstons only had the benefit of inspecting the property at the end. Arguably, at that point they refused to assent to the appropriation of the goods to the contract. The evidence for that arises from their immediate intimation to the purchasers of their intention to reject the suite.³⁶

There is therefore a strong case to the effect that the Johnstons did not assent to the appropriation of the suite to the contract, and consequently they did not acquire ownership of it under Rule Five. Furthermore, it is difficult to maintain that their donee(s) acquired ownership anyway by virtue of the operation of the Sale of Goods Act 1979 s.25. It is true that if a buyer has possession of goods with the consent of the seller – as the Johnstons did – and the buyer delivers the goods to a third party receiving in good faith “under any sale, pledge, or other disposition thereof”, then the delivery has effect as if the buyer were a mercantile agent of the seller. However, it is thought that the reference to mercantile agency imposes a requirement that the transfer be for valuable consideration to trigger the operation of s.25.³⁷ Here, the basis of the transfer was gift, and this probably excludes the operation of the section.

C: CONCLUSION – DOES ANY OF THIS MATTER?

Arguably, the Johnstons did not assent to the appropriation of the suite to the contract under Rule Five, and consequently they did not acquire ownership of it. It follows that – as a matter of Property law – they were not “entitled” to give it away. Of course, the Appeal Sheriff was not really thinking in these terms when he gave his decision to that effect; he was thinking in terms of how to interpret s.20 of the 2015 Act so as to avoid what he saw as an absurdity, and so as to enable the Johnstons to secure a remedy without holding on to the suite indefinitely. Perhaps that approach will be approved and developed by the higher courts; indeed, from a consumer protection perspective, that might prove to be very welcome.³⁸

Nonetheless, in pursuing the goal of enhancing consumer protection, it is perhaps important not to lose sight of how developing that area of the law might interfere with the rules governing derivative acquisition. Assuming the analysis presented here is correct, it is not possible to articulate what Carey Miller might have called the “better view” of this case – namely, a reading of the decision that means it may be reconciled with the underlying principles and structure of the law governing transfer of corporeal moveables. As a result, it is more

³⁶ However, refusal to assent to appropriation should not be conflated with exercising the right to reject (see, eg, Bridge et al (eds), *Benjamin’s Sale of Goods* (n 19) para 12-048).

³⁷ Reid, *Property* (n 18) para 682 (Gamble); Carey Miller with Irvine (n 1) para 10.22.

³⁸ See Lauterbatch, “*Johnston v R&J Leather (Scotland)*” (n 5).

difficult to predict the outcomes of legal disputes – and such predictability is, arguably, increasingly valued within what may be termed Scottish legal culture.³⁹

The aim of the present analysis piece is not to resolve these problems; nor is it to criticise the Appeal Sheriff in *Johnston*. Rather, it is to provoke further academic reflection as to how such difficult problems regarding disputes over corporeal moveables might be dealt with in a manner consistent with the underlying principles and structure of the law articulated by Carey Miller and others. This may become more necessary as time goes on, given that it seems plausible to suggest that there will be an increasing need to reconcile those principles with judicial decisions giving effect to the letter and the spirit of consumer protection legislation.

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³⁹ See, for example, the discussion and sources cited in A R C Simpson, “An Introduction to Scottish Legal Culture”, in S Koch, K E Skodvin and J Ø Sunde (eds), *Comparing Legal Cultures* (2017) pp 87-130 at pp 103-111.