

**THE DUTIES OF THE SELLER UNDER THE CIVIL CODE
AND UNDER THE HIRE PURCHASE AND CREDIT SALE
ACT - AN UNNECESSARY DUPLICATION ?**

by

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ABSTRACT

This paper examines the duties of the seller under the Hire Purchase and Credit Sale Act 1964 ('the Act') and under the Civil Code respectively as to the quiet enjoyment of the goods purchased, the right of the seller to sell them and the duty of the seller as to their merchantable quality. A comparison is made between these legislative provisions and we shall establish that there is an overlap between them if not complete correspondence. Our submission is that the provisions in the Act may be redundant.

Keywords : Contract of sale, hire purchase, duties of seller, merchantability, hidden defects, duty as to title, quiet possession.

INTRODUCTION

The Hire Purchase and Credit Sale Act 1964¹ regulates hire purchase and credit sales and imposes upon the seller a number of duties. Among these are to be found the duty of the seller as to quiet enjoyment of the goods purchased by the buyer, the right of the seller to sell the goods at the time when the property is to pass to the buyer and the duty as to merchantable quality of the goods². These provisions were modeled on the English Hire Purchase Act 1938³. To readers of the Civil Code⁴, these provisions have a ring of familiarity. One way or the other these duties are indeed already provided for by the Code and one may be excused for asking why the legislature deemed it fit to enact them.

The overlap between the Act and the Code in that respect did not escape the attention of the legislature. It was in fact intended. This is how the issue was addressed at the Committee stage:

“A member of the Crown law Office and myself (i.e. Mr Koenig) were tempted to refer purely and simply to the article of the Civil Code dealing with this matter and do away completely with the warranties which we have been referring to in Clause 9 because we have got a series of principles in the Civil Code dealing with these warranties which either the bailer or the vendor have to give to the hirer or to the purchaser as the case may be, when dealing with either leases or sales. But we have considered carefully the provisions of this clause and have come to the conclusion that it gives more guarantees to the hirer than the corresponding articles in the Civil Code. According to the Civil Code the parties can contract out of all these guarantees which are prescribed by that law whereas the parties cannot contract out of the provisions of this law. That is why, although we have retained the principle of the original draft, yet there are certain nice secondary points which must be provided for, we have added this new paragraph (4) ‘The warranties and conditions set out in subsection (1) shall be governed by the same principles as those governing warranties and conditions of similar nature provided for by the Code Napoléon in the matter of sales of movables’.”⁵

A number of points may be made with regard to these comments of Mr. Koenig. Subsection (4) was deemed to be necessary in order to harmonise the provisions of the Act with those of the Civil Code. The reference to “warranties and conditions of similar nature provided for by the Code Napoleon in the matter of sales of movables” is, however, rather unfortunate. Firstly there are no provisions in the Civil Code relating solely to sales of movables. Those relating to contract of sale apply to all sales whether it be sale of a movable or sale of an immovable. Secondly the Civil Code does not know the distinction between warranties and conditions and it is rather confusing to refer to “warranties and conditions of similar nature provided for by the Code Napoleon”. Further Mr Koenig considered these implied conditions and warranties to be important as

the Act prevents the parties from contracting out of these guarantees, as would be the case for those provided for by the Civil Code. In fact Mr Koenig did not need to have such fears. With regard to the guarantee for hidden defects the Civil Code only allows the seller to exclude liability for hidden defects where he is unaware of their existence⁶. As far as the professional seller is concerned, there is an irrebutable presumption that he is aware of them⁷ so that even where the contract contains an exclusion clause, such clauses will be deemed to be void. And there is not much doubt that the seller in the case of a hire purchase or credit sale agreement will usually be a professional. In any case nothing prevented the legislature from simply providing in the Act that the parties cannot contract out of the Civil Code guarantees without expressly providing for the implied conditions and warranties.

These are, however, minor points. The suggestion that was really being made by Mr Koenig but which was not expressly stated was that the English type conditions and warranties generally afforded more guarantees to the hirer than the corresponding articles in the Civil Code. We propose to examine in this article the extent to which this is true with regard to the three implied conditions and warranties provided for by the Act, namely the duty of the seller as to quality, his duty as to title and thirdly his duty as to the quiet possession by the buyer.

DUTY AS TO QUALITY

The scheme provided by the Act with regard to the duty of the seller as to the quality of the goods is that the seller undertakes that the goods shall be of merchantable quality⁸. This duty does not apply where the hirer has examined the goods or a sample of them, as regards defects which the examination ought to have revealed. On the other hand, it is increased where the buyer makes known to the seller, expressly or by implication, the particular purpose for which the good is intended. In such cases the seller undertakes that the goods shall be fit for such purpose.

The Civil Code, for its part, provides that “the seller is held to a guarantee against hidden defects in the thing sold, that renders it unsuitable to the use for which it was intended, or which so diminish that use that the buyer would not have purchased it, or would only have paid a lesser price, had he known of them”⁹.

The liability of the seller under the Act depends upon two basic conditions; firstly that the goods do not meet the standard of merchantability and secondly that any matter relating to the quality of the goods has or has not been drawn to the attention of the buyer or conversely that the buyer has or has not requested for any specific quality. Under the Code there are also two basic conditions; firstly that the good contains a defect which renders the thing unsuitable to the use for which it is intended or which so diminishes such use that the buyer would not have purchased it, or would only have paid a lesser price, had he known of it and secondly that the defect be hidden. These conditions appear to be different. Nonetheless it will be submitted that from the point of view of these substantive conditions there is remarkable similarity between the two provisions. However there are differences with regard to the conditions that must be satisfied before a law suit may be brought.

The substantive conditions

The substantive conditions will be examined under two headings: (A) The concept of quality/defect and (B) the hidden character of the defect.

A : The concept of quality/defect

The Civil Code approach consists in guaranteeing the buyer against defects. The Act, for its part, addresses the problem from a positive angle and imposes on the seller a duty to supply goods of a merchantable quality. Whether under the Code or under the Act, two issues are involved; firstly what is meant by the notion of quality or, its converse that of a defect (§ 1) and secondly its degree (§ 2).

§ 1: THE DEFINITION OF THE CONCEPT OF QUALITY/DEFECT

Under the Civil Code, the liability of the seller depends on the proof of two conditions, firstly the existence of a defect and secondly that this defects renders the thing unsuitable to the use for which it is intended or so diminishes that use that the buyer would not have purchased it, or would only have paid a lesser price, had he known of it. In spite of the clear text of the law, the tendency had been to give priority to the second condition only so that once the thing is unsuitable for the use for which it was intended it is said to contain a defect. This is what is known as a functional approach. However, the Cour de cassation now insists, rightly, on proof of a defect as being the cause of the unsuitability of the thing¹⁰ so that both conditions must be present before the seller can be liable.

The Act does not define what is meant by merchantable quality and there is no Mauritian case-law on this aspect of the Act. Guidance will have to be sought from English case-law, more particularly from English case-law dealing with that concept in the context of the sale of goods from which in any case it was borrowed. We shall try to determine to what extent the concept of merchantability also requires the presence of the two conditions required under the Code, namely proof of a defect and the unsuitability of the thing for its purpose. There is unfortunately no easy definition of what is meant by merchantable quality. None of the cases dealing with this issue has actually defined it. For a proper understanding of this concept, it is submitted that we need to go back to the scheme of the original Sale of Goods Act, that of 1893, where it was first used.

Under the Sale of Goods Act 1893, the issue of fitness of purpose was a general rule applicable to all types of contract, including, therefore, sale of specific goods, whereas the criterion of merchantability, was only relevant to sale by description. In order to extend the application of the criterion of merchantability to sale of specific goods as well, the distinction between sale of specific goods and sale by description was blurred¹¹. This also led to a blurring of the distinction between merchantability itself and fitness for purpose. It is said that there were two approaches to determine the merchantability of the goods¹². The first test was the “acceptability test” as expounded in *Australian Knitting Mills Ltd v Grant*¹³ : “ [the goods] should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms”. The second was the “usability test” in that the merchantability of the goods was determined in accordance as to whether it was of “use for any purpose for which goods which complied with the description under which these goods were sold would normally be used”¹⁴.

It is submitted that as far as quality is concerned the only useful test is the usability one. If under the “acceptability test” the seller was not liable, it was not so much because the goods were merchantable but because the buyer obtained what he bargained for. Indeed if a buyer, with full knowledge of all the facts, accepted to take the goods, it was because they fell within the contractual terms. The acceptability test thus does not deal at all with the issue of merchantability but merely determines what was the object of the contract. Indeed if merchantability is to be defined in terms of the acceptability test, the result would be that two different issues, the implied term as to quality and

that as to correspondence with description would in fact be run together. There may indeed be an overlap between these two categories but they are certainly not the same thing.

But then the usability test has been criticised as being too narrow as it covers only those defects which interfere with the use of the article and the example of a new car delivered with an oil stain on the carpet is given¹⁵. As submitted above the acceptability test has nothing to do with merchantability as such, and the stained carpet as well has nothing to do with merchantability. It is merely a question of delivery of non-conforming goods, since no one when he purchases a new car expects to receive one with a stained carpet. The difficulty stems from a failure to determine the real legal category within which the problem falls.

The other criticism of the usability test is that it is uncertain whether it would cover minor defects¹⁶. It is submitted that the issue here merely relates to a question of degree. There is no doubt that there are different degrees of usability. It is up to the legislature to specify the range of degrees that would be acceptable. From that angle there is thus nothing wrong with the test itself.

The 1893 Act was amended by the Supply of Goods (Implied Terms) Act 1973 and merchantability was then made the main criterion. What is, however, interesting is that merchantability was defined by that Act in terms of fitness for purpose. S.14(6) indeed provided that “goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are fit for the purpose or purposes for which goods of that kind are commonly bought ...”. S.14(3) then provided for fitness for a particular purpose. The overriding criterion was clearly that of fitness for purpose. The 1973 amendment, therefore, confirms our reading of the 1893 Act.

But then unfitness *per se* as a cause of unsatisfactory quality is a notion that is impossible to comprehend. It is submitted that before a seller can become liable on grounds of merchantable quality the goods must have some form of structural or pathological problem. Interestingly this is how the warranty of merchantability in American law is presented in *Corpus Juris Secundum*¹⁷: “The warranty of merchantability is based on a buyer’s reasonable expectation that goods purchased from a merchant with respect to goods of that kind will be free of significant defects and will perform in the way goods of that kind should perform” (Emphasis added). Indeed the unfitness must have some cause and this in the context of the implied terms as to quality, can only be a defect. If it were to be otherwise then the case does not fall to be considered under the

provision as to merchantability at all but probably under that dealing with correspondence of the goods with their description. Goods that are unfit, not because of any defects, can only be so because they fail to meet certain requirements and, therefore, fail to correspond with the description. If the provision as to correspondence to description still does not apply, then the rule of *caveat emptor* should be applied. We would argue that in those cases that were decided under the heading of fitness for purpose, the presence or not of a defect was crucial.

In *Henry Kendall & Sons v William Lillico & Sons Ltd*¹⁸ the animal feed was merchantable not so much because of fitness of purpose *per se* but because the ground nut extraction did not contain any defect, being a perfectly natural substance. The provision as to correspondence with description not being applicable as well, the rule of *caveat emptor* clearly applied.

On the other hand, it is submitted that goods containing defects can only be considered to be of unmerchantable quality in relation to the purpose for which the goods were intended. There is indeed no such thing as an absolute notion of quality, however defined.

We only need to examine a few cases to establish that point. In the case of *Rogers v Parish (Scarborough) Ltd*¹⁹ it was held that a new Range Rover costing more than £16,000 was unmerchantable because it had many minor defects in the engine, gear box and in the body work. The Court correctly held that these defects rendered the car unmerchantable because of the “buyer’s purpose of driving the car from one place to another... with the appropriate degree of comfort, ease of handling and reliability and of pride in the vehicle’s outward and interior appearance”²⁰.

Let us now take a case that is usually cited in the context of durability, the case of *Mash and Murrell v Joseph I Emmanuel*²¹. Sellers sold potatoes c & f Liverpool. The potatoes were sound on shipment but arrived in a rotten state. Was it the ‘undurable’ state of the goods which rendered them unmerchantable? The answer is no. What rendered them unmerchantable was that they were intended to be shipped to Liverpool and it was thus within the contemplation of the parties that the potatoes should be able to endure the voyage. This is put very clearly by Lord Diplock; the goods must be loaded in “such a state that they could endure the normal journey and be in a merchantable condition on arrival”²². Once more it was the purpose of the buyer that clinched the case not the issue of the durability of the goods *per se*.

§ 2 : THE DEGREE OF MERCHANTABILITY REQUIRED

The Civil Code requires that the defect causes a disorder of a certain gravity²³. The Act contains no indication on that aspect. It is, however, submitted that whether it be for the Act or the Code it is not all diminution in the usability of the thing purchased that would render the seller liable. Price is certainly a criterion. Other criteria would be the nature of the goods, their description, age and state of wear. Second-hand goods as compared to new ones is usually given as an example of this difference in degree of satisfactoriness. In the case of *Business Specialists Ltd v Nationwide Credit Corp Ltd*²⁴ a second-hand Mercedes, which was sold for £5,000 with 37,000 miles on the clock, was held to be of merchantable quality even though it broke down after doing only a further 500 miles because of burnt-out valves and badly worn valve seals. In the particular circumstances of the case, the car was merchantable.

For a case under the Code we can refer to that of the 18 December 1980²⁵. In that case it was held that the vibration of the floor and the air turbulence which took place when the rear windows of a car were opened only affected the degree of comfort in the use of the car and did not render it unsuitable for use. Clearly such a conclusion depends on the type of car we are talking of and what is acceptable or not does not depend on the particular purchaser. What is admissible in a second-hand middle range car, would be inadmissible in a Lexus, even a second-hand one. It all depends on the particular circumstances of each case seen objectively.

B : The hidden character of the defect

It must first be pointed out that for the seller to be liable at all under the Code, the defect must be anterior to the sale and must, at the very least, exist at the point of delivery in an embryonic state²⁶. The same principle applies under the Act: “the implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered”²⁷.

The Civil Code distinguishes between defects that are hidden and those that are not. “The seller is not liable for apparent defects that the buyer could have discovered by himself”²⁸. On the other hand the “seller is liable for hidden defects, even though he did not know of them...”²⁹. The seller is thus only held to his guarantee as far as hidden defects are concerned. This results from the principle of *caveat emptor*. The buyer clearly does not require any protection as far as those defects which a normal examination made by any reasonable person would have disclosed. A defect is considered not to be hidden where it

is specifically drawn to the attention of the buyer or where the buyer “being a professional in that field, could easily have discovered it or should have done so”³⁰. The buyer is thus assumed to have carried out an examination and what he ought to have discovered would depend upon the particular expertise or lack of it of a comparable normally diligent person.

Though the hidden aspect or not of the defect appears not to be a criterion of liability under the Act, the apparent condition of the defect will intervene in order to narrow down the duties of the seller. The duty as to quality does not apply where the defect has been disclosed either because it has been specifically drawn to the attention of the buyer or where the buyer examined the goods as far as defects which the examination of the buyer ought to have revealed to him. The idea is again that the seller can hardly be liable for something that the buyer knew about and which must, therefore, have been taken into account when determining the price of the goods. Here, however, contrary to French law, it is not a question of what he ought to know as what he actually knows.

However it appears that under the Act the converse, namely that the seller will be liable where the defect is hidden, is not necessarily true. “In deciding whether goods are of satisfactory quality, the court must ascribe to the hypothetical buyer a knowledge of any latent defects in the goods”³¹. This conclusion is arrived at on the basis of the case of *Henry Kendall & Sons v William Lillico & Sons Ltd*³². The plaintiffs in that case bought from the defendants quantities of compounded meals for feeding to pheasants and partridges and their chicks. The meal proved to be poisonous to the chicks because of the presence in it of a proportion of Brazilian groundnut extraction that, unknown to the parties, contained a toxic substance which was in fact unsuitable for inclusion in food for poultry. The House of Lords, per Lord Reid, held that “it is quite clear that some later knowledge must be brought in for otherwise it would never be possible to hold that goods were unmerchantable by reason of a latent defect”³³. Prof. Atiyah’s comment is that “where the very nature of the defect in question depends on the fact that it is hidden and unknown, it seems absurd (the word is surely not too strong) to test the question of merchantability by asking whether a buyer with full knowledge of the fact would have accepted them”³⁴. It would appear that Lord Reid’s fear was that once the latent character of the defect was admitted and that it be accepted that the buyer could not have taken it into account, the defect would have had to be ignored for all purposes and, therefore, be deemed not to exist at all. The result would have been that the seller would then always escape liability. It is respectfully submitted that the fallacy of this argument lies in the assumption that once it be accepted that the buyer could not have taken the defect into account, it will have to be ignored for all

purposes. As the Code shows, the latent character of the defect can perfectly be determined solely in relation to the knowledge of the buyer, that of the seller being irrelevant at this stage. It should indeed not be forgotten that even under the Act, it is the knowledge of the buyer that is relevant in determining whether the seller will be liable or not. That of the seller is irrelevant. It is not a question of what the buyer should hypothetically have known but what in the circumstances he should have known. If, in the circumstances, he would not have known of the defect, there is no justification in law for implying that he hypothetically knew about it. It is thus submitted that the fact that the defect is hidden is also relevant in English law.

It may appear severe to impose liability upon a seller who is of good faith. The justification of this rule is probably to be found in what the French refers to as the notion of risk. The seller is liable not because he is at fault but because it is he who brought that thing into circulation. Admittedly he does not deserve to be treated as severely as the seller of bad faith. The remedy of the buyer is thus different according to whether the seller actually knew of the defect or not. Under the Code where the seller did not know of the defect, he is liable only for the costs occasioned by the sale and at the option of the buyer either the restitution of the price or the return of part of the price, the buyer keeping the good purchased in the latter case³⁵. The objective here is merely to re-establish the equilibrium between buyer and seller. Where the seller knew of the defect, he is in addition liable for all damages incurred by the buyer³⁶. It might be thought that such a rule would encourage the seller to close his eyes. But then the courts have here implied an irrebuttable presumption that professional sellers, i.e. those selling in the course of business, and manufacturers are always deemed to be aware of the defects³⁷.

Under the Act, in the case of a breach of the duty as to quality, the buyer would have the choice between rejecting the goods or asking for damages for breach of warranty. In addition he may ask for damages for consequential losses. The seller will be liable for such losses whether he was acting in good faith or in bad faith provided causation is established. The good or bad faith of the seller will, however, make a difference as far as the quantum of damages concerned. The premise adopted here is different from that adopted under the Code. Once the seller is in breach, the normal consequences of liability follows. If justice is to be done, it is to be done at the level of the quantum of damages recovered. The good faith of the seller does not, as under the Code, close the door to a head of liability, namely the consequential loss.

The Procedural Conditions

Our analysis so far leads us to submit that there is not much difference between the concept of merchantability under the Act and that of hidden defect under the Code. If from the point of view of substance there is not much difference between the two legislation in that respect, there is admittedly a major difference from the procedural point of view. This relates to the time within which a claim against the seller concerning the quality of the goods purchased must be brought by the buyer. There is no specific rule in the Act. The Civil Code, for its part, requires that such claims be brought within a “brief delay” as from the point of discovery of the defect by the buyer³⁸. The Civil Code does not define what is meant by brief delay. It is basically a question of fact to be determined by the judge of first instance according “to the nature of the redhibitory defect and the customs of the place where the sale was made”³⁹. It may thus vary from a few weeks to a few months according to the circumstances of the case⁴⁰. One such circumstances will, for example, be negotiations entered into by the buyer with the seller in order to settle the matter⁴¹. In such cases the buyer will be justified in waiting for the outcome of such negotiations before starting court proceedings. In that respect the buyer is in a better position under the Act than under the Code.

It was precisely in order to get round the problem of the brief delay that the courts in France for some time started to analyse cases that under conventional wisdom should fall under the guarantee for hidden defects as cases of delivery of non-conforming goods⁴². Conceptually, non-conformity is a difference between the thing delivered and the one that was within the contemplation of the parties, the thing being otherwise perfectly all right. For a time the courts adopted a functional approach to the duty to deliver and interpreted it as imposing a duty on the part of the seller to deliver a thing fit for the use for which it was intended⁴³. This is precisely the domain of the duty as to quality. Protection of the consumer was the objective of this new line of case-law. Some authors believe that this was done at the expense of sound legal principle⁴⁴. The courts would often simply have recourse to the notion of non conforming delivery in order to get round the problem of brief delay or even the apparent nature of the defect⁴⁵. This extension was such that a point had been reached where “it was enough for the buyer to wave the magical wand of non-conforming delivery to win his case”⁴⁶.

A series of decisions⁴⁷ has, however, been considered by Prof A. Bénadent as clarifying the situation in French law. This clarification consists in a return to the conceptual approach. There is non conforming delivery where the thing

delivered does not correspond with the specifications agreed upon by the parties. If the non conformity consists in the diminished use or unsuitability of the thing then it is the guarantee for defects that apply. This appears to be a return to orthodoxy.

There is indeed very good justification for the legislature to have provided for the condition of the brief delay. One of the conditions of the guarantee is the existence of a defect. Dealing as we are with consumable, proving or disproving such defect becomes more difficult with the passage of time. Hence the requirement that the case be brought before the court within the brief delay. The issue here is indeed not so much a question of the protection of the consumer as that of ensuring that justice be done. If in certain type of contract it is the consumer protection aspect that is to predominate, nothing prevents the legislature from varying this procedural rule, while preserving the same substantive rule for all contracts of sale.

DUTY AS TO TITLE

The Act provides that “there is an implied term on the part of the dealer that he shall have a right to sell the goods at the time when the property is to pass”⁴⁸. As pointed out by Prof. Atiyah⁴⁹ the issue here is not so much that the seller should have property in the goods so as to pass it on to the buyer but merely that he should have a right to sell the goods. It is thus quite possible for a seller to sell goods of which he is not the owner. Such was the case in *Karlhamns Oljefabriker v Eastport Navigation (The Elafi)*⁵⁰ where the buyer obtained title directly from a third party. Conversely, as in the case of *Niblett v Confectioners’ Materials Co.*⁵¹, a seller may very well be the owner of the goods and yet not have the right to sell them. Such an interpretation is quite sensible since we are here dealing with the duties of the seller and not with the quality that the goods should possess, which would have been the case had the section been interpreted as a requirement that the seller should actually be the owner of the goods.

The equivalent rule in the Civil Code appears to be Art.1599 which provides that “the contract of sale of a thing belonging to someone else is voidable”. This Article is, however, not to be found in the chapter dealing with the duties of the seller but in Chapter 3 dealing with the “things that can be sold”. The Civil Code does not approach the issue from the angle of the duty of the seller but from that of the quality that the goods must possess. But this is true only where the buyer believes that his seller is the owner of the thing sold and that

he would immediately become its owner by effect of the contract of sale. The nullity of the contract would thus depend on the undertaking made by the seller. Art. 1599 does not apply where the seller makes clear to the buyer that he is not the owner of the thing he is selling so that the contract is in fact only an undertaking on the part of the seller to make sure that the buyer eventually obtains property either by purchasing it or by having it transferred directly to the buyer⁵².

Ultimately the effects of Art. 1599 are not any different from those of S.9(1)(b). What takes effect as an implied term in the Act would do so under the Code as an express term. Such a scheme does not operate at the expense of the buyer since where there is no such express term, Art. 1599, which imposes even more stricter conditions, would find its application. It is up to the seller to make sure that he does not fall within Art. 1599.

QUIET POSSESSION

The Act provides that “there is also an implied warranty that the hirer shall have and enjoy quiet possession of the goods”⁵³. Prof. Atiyah’s comment is that “it is not easy to see what additional rights this confers on the buyer over and above those conferred by [S.9(1)(b)]”⁵⁴. In the case of *Microbeads A.G. v Vinhurst Road Markings Ltd*⁵⁵ a distinction was, however, made between the two subsections : “it is possible to have a breach of [S.9(1)(b)] without also having a breach of [S.9(1)(a)]; the two subsections are intended to cover different situations and create different rights and remedies”. The difference appears to be that [S.9(1)(a)] “in terms looked to the future” and is as such a continuing obligation whereas [S.9(1)(b)] is a once-for-all undertaking in that at the moment when property passes, the seller undertakes that he shall be able to pass good title⁵⁶. The distinction appears, therefore, to be essentially a temporal one.

Lord Ackner in *Empresa Exportadora De Azucar v Industria Azucarera Nacional S.A., The Playa Larga* seems to have been uneasy with the notion of continuing obligation and commented that “there is force in Mr Hallgarten’s submission that some qualification to the express words of [S.9(1)(a)] is necessary, otherwise there is no limit on the time when the actionable interference may occur”.

It is submitted that these judicial fears are not justified and stem to a large extent from the fact that no attention seems to have been given to the nature of

the interference. The time limit issue is surely irrelevant where it is a legal claim that is made on the thing. So long as the limitation period has not expired, any person having a legal claim over the thing should be able to assert it and provided the claim originates before the sale, the seller will be caught by S.9(1)(a). On the other hand, where the act of the third party is not based on a legal claim at all, the seller is clearly not liable. Further where the act is that of the seller himself, he is liable whether the act is based on a legal claim or not and that irrespective of the moment when it is asserted. This would be so because such an act on the part of the seller will be in contradiction with the very object of the contract which is to transfer property right over to the buyer. The distinction is thus not so much a temporal one as one relating to the nature of the claim made on the goods sold. If the distinction was merely temporal, Prof. Atiyah would probably be right in saying that S.9(1)(a) does not add anything to S.9(1)(b) but it is submitted that this is not so.

Indeed this is how the Civil Code approaches the problem. Art.1626 provides that “the seller is obliged by law to guarantee the buyer against being dispossessed of the thing sold”. It is not a temporal issue but merely a question of how the dispossession intervenes, i.e. whether it is the seller himself or a third party and whether it is being done on the basis of a legal claim or not⁵⁷. In the case of a legal claim, someone is claiming to have a title over the thing, e.g. that he has a charge over it, or even that he has a better title, that is he is the actual owner. In other cases, though not claiming to have a title over the thing, someone is physically interfering with the quiet possession of the buyer. If the seller owes full guarantee to his buyer for his own acts, whatever be the nature of the act, as far as the acts of third parties are concerned he only guarantees the buyer against legal claims.

CONCLUSION

Having examined and compared the provisions in the Act with the corresponding ones in the Civil Code, the only conclusion we can come to is that the implied conditions and warranties are not so much more extensive as they are in fact more confusing. They indeed suffer from a major defect, that of being too cryptic. A lot needs to be read in the words of the Act and this can only be done with the help of the case-law. The chances are that a consumer reading the Civil Code will be better informed as to his rights than reading the Act. In any case as we have tried to demonstrate none of the implied conditions and warranties, save possibly for the issue of brief delay in the context of hidden defects, add anything to the rights of the buyer already provided by the Civil Code.

FOOTNOTES

¹ The title of the Act was amended by Act No.1 of 1995 to Hire Purchase and Credit Sale Act. We shall henceforth refer to the Hire Purchase and Credit Sale Act as the Act.

² S.9 of the Act.

³ These provisions are in fact similar to those to be found in the Sale of Goods Act 1893. This Act has now been repealed and replaced by the Sale of Goods Act 1979.

⁴ Henceforth referred to as the Code.

⁵ Debates 1964, Vol. 1, 21 April 1964, p.418

⁶ Art.1643.

⁷ Cass. Civ., 3ème, 3 January 1984, Bull.Civ. III, No.4.

⁸ The concept of merchantable quality has now been replaced in the 1979 English Sale of Goods Act by that of satisfactory quality.

⁹ Art.1641. Unless otherwise stated Art. refers to articles of the Civil Code. To add to the confusion a Consumer Protection Act was promulgated in 1991 in order to provide for safety norms with which goods will be required to conform. To a large extent safety requirements are in fact aspects of quality and it would have been desirable that such provision be incorporated in the Civil Code rather than be enacted separately. We shall not, however, examine this aspect in the present article.

¹⁰ See *Traité des Contrats, La Vente*, J.Ghestin & B.Desché, L.G.D.J., 1990, No.724; *Contrats Civils et Commerciaux*, F.Collart Dutilleul & P.Delebecque, *Precis Dalloz*, 1993, No. 268.

¹¹ Benjamin, *Sale of Goods*, 9th ed., Sweet & Maxwell, para.11-006.

¹² See Law Commission Report on Sale and Supply of Goods, Cm.137, 1987, para.2.7; Benjamin, *op. cit.*, para. 11-038 et seq.

¹³ *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387.

¹⁴ *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.

¹⁵ See Law Commission Report, *op.cit.*, para.2.11

¹⁶ See Law Commission Report, *op.cit.*, para.2.13

¹⁷ Vol.77A, V° Sales, § 254

¹⁸ *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.

¹⁹ *Rogers v Parish (Scarborough) Ltd* [1987] QB 933. This case is typical of the overlap between the issue of satisfactory quality and correspondence with description.

²⁰ *per Mustill LJ*, at p.944.

²¹ *Mash and Murrell v Joseph I Emmanuel* [1961] 1 All ER 485, [1962] 1 All ER 77.

²² *per Diplock* at p.488

- ²³ See F.Collart Dutilleul & P. Delebecque, op. cit., No. 269.
- ²⁴ *Business Specialists Ltd v Nationwide Credit Corp Ltd* [1988] RTR 332.
- ²⁵ Cour d'appel de Nîmes, 18 December 1980, D.1983.29.
- ²⁶ See, for example, Cass.Com. 10 December 1973, D.1975.122, in relation to sale of tomatoes where it was held that the buyer has not proved that the defect existed at the delivery of the goods sold.
- ²⁷ Per Lord Diplock in *Lambert v Lewis* [1981] 1 All ER 1185, at p. 1191.
- ²⁸ Art.1642.
- ²⁹ Art.1643.
- ³⁰ Cass.Civ. 18 December 1962, D.63.114.
- ³¹ Goode R., Commercial Law, 2nd, Penguin, p. 329.
- ³² *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.
- ³³ [1969] 2 AC 31, at p. 75.
- ³⁴ The Sale of Goods, P.S.Atiyah, 9th Ed. by J.Adams, Pitman, p. 147.
- ³⁵ Art.1644 & Art.1646.
- ³⁶ Art.1645.
- ³⁷ Cass.Civ., 1er, 19 January 1965, D.1965.389.
- ³⁸ Art.1648.
- ³⁹ Art.1648. See *Mallet v Jamet* 1885 MR 100.
- ⁴⁰ See *Pegayamgeer v Dyrr* 1870 MR 150.
- ⁴¹ See *Heerasing v Seegobin* SCJ No. 277 of 1984.
- ⁴² Incidentally it is to be noted that the Act does not provide for this duty.
- ⁴³ Cass.Com. 28 October 1968, Bull.Cass. 1968, 4, no.295.
- ⁴⁴ See Les prétendus concours d'actions et le contrat de vente (erreur sur la substance, défaut de conformité, vice caché), O.Tournafond, D.1989.237 for whom, at p.241, this approach "takes certain dangerous liberties with the letter and spirit of the institutions of the Civil code".
- ⁴⁵ See cases given by Tournafond, Loc.cit. , at p.239.
- ⁴⁶ L'Equilibre renaissant de la vente, C.Atiyah, D.1993.1, at p.2
- ⁴⁷ Cass.civ., 1er, 16 June, 13 October, 27 October and 8 December 1993, D.1994.210.
- ⁴⁸ S.9(1)(b)
- ⁴⁹ Atiyah, op.cit. , p.77
- ⁵⁰ *Karlhamns Oljefabriker v Eastport Navigation (The Elafi)* [1982] 1 All ER 208
- ⁵¹ *Niblett v Confectioners' Materials Co.* [1921] 3 KB 387
- ⁵² See Leçons de Droit Civil, Tome II/ Premier Volume, Obligations, Théorie Générale, 8th Ed. by F.Chabas, Montchrestien, no.238
- ⁵³ S.9(1)(a).
- ⁵⁴ Atiyah, op.cit. , p.84
- ⁵⁵ *Microbeads A.G. v Vinhurst Road Markings Ltd* [1975] 1 WLR 218

⁵⁶ “S.12(1) deals with the questions of defects of title existing at the time of the sale”, per Lord Ackner, *Empresa Exportadora De Azucar v Industria Azucarera Nacional S.A., The Playa Larga* [1983] 2 Lloyd’s Rep. 180.

⁵⁷ See *La garantie d’éviction dans les ventes commerciales*, M-A. Coudert, D.1973.113