

Runnymede Iron & Steel vs. Rossen Engineering & Construction Co. Ltd.

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Commentary

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RUNNYMEDE IRON & STEEL VS. ROSSEN ENGINEERING & CONSTRUCTION CO. LTD.—SALE OF GOODS—MIXED SHIPMENTS OF GOODS OF A DIFFERENT DESCRIPTION—SECTION 29(3) ONTARIO SALE OF GOODS ACT—The purpose of this comment is to consider the effect of the recent decision of the Supreme Court of Canada in *Runnymede Iron & Steel Ltd. v. Rossen Engineering & Construction Co. Ltd.*¹ on the law in relation to the sale of goods in Ontario. The facts were that Runnymede Iron made a contract with Rossen whereby the former was to purchase all the “relaying rail” obtained from a salvage operation being carried out by the latter at Hawk Lake. It is of some importance that it was conceded that the contract was one for the sale of goods by description and that the description was “relaying rails.” After

¹⁶It is to be noted that no appeal was taken from this decision, as a settlement was made out of court.

*Mr. Ball is in the third year at Osgoode Hall Law School.

¹ (1962), 30 D.L.R. (2d) 410 (S.C.C.), revg. [1954] O.R. 153 (Ont. C.A.).

a long delay Rossen shipped the goods by rail to Toronto where Runnymede rejected them on the ground that the "rail shipped was not of relaying grade." Runnymede then sued for the return of a \$6000 deposit it had made.

Schroeder, J., (the trial judge), as he then was,² accepted the evidence of one Merrilees, who purchased the rejected goods from Rossen and held that 80% of the rails in the first car and 75% of the rails in the remaining two cars could be classified as "siding quality relaying rails." A fourth car was not in dispute. As for the remaining rails in each car, he later remarked, they "could only qualify as scrap material."

The learned trial judge also accepted the evidence of Merrilees that "relaying rail" means any rail which can be relaid on any track.

The plaintiff argued that they were entitled to the return of their deposit in that they had a right to reject the whole of the goods by virtue of sec. 29(3) of the Sale of Goods Act³ which reads:

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

The plaintiff's argument was that 20 to 25% of the goods delivered were scrap and as such were "goods of a different description" within the meaning of sec. 29(3). Schroeder J. rejected this contention and was unanimously affirmed by three members of the Ontario Court of Appeal.⁴ Gibson, J.A., delivering the judgment of the Court of Appeal said:

Because some of the rails for one reason or another failed to come up to standard required for relay rails and were therefore classified as scrap, they do not become "goods of a different description." They are goods of the same description but inferior in quality.⁵

The principal case relied on by both the trial Judge and the Court of Appeal was a decision of the Scottish Court of Session, *Aitken, Campbell & Co. v. Boulton & Gatenby*.⁶ The contract there was for the sale of "maroon twills" by sample. It was found that 64 of the 133 pieces delivered while answering the description "maroon twills" were of quality inferior to that of the sample, in that they were too "tender", that is to say, they could only stand so small a strain without breaking, as to be unmerchantable. The ratio of the case was put by Lord Low in these words:

I am of opinion that this is not a case to which sec. 30(3) of the Sale of Goods Act 1893 [the equivalent of the current Ontario sec. 29(3)] applies. That enactment deals with the case of a seller delivering to a buyer the goods he contracted to sell mixed with goods of a different descrip-

² [1953] O.W.N. 772, affd. [1954] O.R. 153 (Ont. C.A.).

³ R.S.O. 1960, c. 358.

⁴ *Supra*, footnote 2.

⁵ *Ibid.*, (Ont. C.A.) at p. 164.

⁶ [1908] S.C. 490.

tion not included in the contract. I think that the word "description" is there plainly used to denote the kind of goods contracted for, and that the right of partial rejection conferred upon the buyer applies only to cases where goods of the *kind* contracted for, are mixed with goods of a different kind, and not to cases where all the goods are of the kind contracted for, but part of them is not of such good quality as the seller was bound to supply.⁷

In the Supreme Court of Canada the decisions of Schroeder, J., and the Court of Appeal were reversed by a majority of three to two. Kerwin, C.J.C., with whom Judson, J. concurred, adopted, in a dissenting judgment, the views expressed by the lower courts and held the above quotation from Lord Low's judgment in the *Aitken* case "to be a correct statement applicable to the present case so far as concerns the point to be determined."⁸

The judgment of the majority, consisting of Cartwright, Locke and Ritchie, J.J., was delivered by Cartwright, J. who said:

The goods sold were described in the contract as "relaying rail" not as used rail with a representation or warranty they would be of the quality of "relaying rail" or of any particular quality. The appellant purchased "relaying rail" he did not purchase potential relaying rail or scrap that might be transformed into "relaying rail."

It appears to me to be a contradiction in terms to say that some of the rails shipped failed to come up to the standard required for relaying rails and were therefore classified as scrap and at the same time to say that they do not thereby become goods of a different description. This amounts to saying that the description "scrap" is the same as the description "relaying rails".

In my opinion, the case falls within the terms of sec. 29(3) . . .

The seller delivered to the buyer the "relaying rail" he contracted to sell, mixed with goods of a different description (i.e. "scrap").⁹

Cartwright, J. then goes on to state that the *de minimis* rule does not apply and thus the plaintiff had the right to reject the goods and could recover his deposit.

A close examination of the majority judgment reveals two possible views which can be taken. The first is the "broad" view that for the purposes of sec. 29(3) scrap materials are goods of a "different description" than the object from which they were rendered scrap. This would mean that whenever a shipment of goods under a contract of description contains a substantial percentage of goods so inferior in quality so as to be considered scrap, the buyer would be entitled to reject the whole shipment. "Substantial" percentage here is used to denote a percentage large enough so as to escape the operation of the *de minimis* rule. This view is substantiated by the last paragraph of the portion of the majority judgment quoted above.

However, the earlier portion of the passage seems to take a "narrower" view of the scope of sec. 29(3). At this point, Cartwright, J. seems to be saying that we must examine the actual description

⁷ *Ibid*, at p. 494-5.

⁸ *Supra*, footnote 1 at p. 414.

⁹ *Ibid*, at pp. 416-17.

of the goods used in the contract. If the description imparts a certain quality or standard then goods of the same generic description will not be "goods of the same description" within sec. 29(3) unless they possess the stipulated quality or come up to the standard described. In this case the description was "relaying rails." This was found to mean rails that could be relaid on any track. The description then imparted the standard i.e. that the rails be suitable for relaying on any track. In fact they were found to be not so suitable and thus were not goods of the same description as the goods described in the contract.

A simple example will serve to illuminate the distinction between the two views that have been indicated. Assume a contract for the sale by description of two truckloads of used lumber which the seller knows the buyer is going to use to build a garage. The lumber is described in the contract as "boards 12 ft. to 16 ft. in length". Upon delivery the buyer finds that about 20% of the boards are so rotted and warped as to be completely unsuitable for building. Would he be entitled to reject the whole two truckloads?

It is submitted that on the "broad" view extracted from the *Runnymede* case the buyer could say "Twenty per cent of the lumber is useless and therefore scrap. As such they are goods of a different description and being mixed with goods of contract description, I am entitled to reject the whole."

However on the second view the seller would argue "What you contracted to buy were 'boards 12 ft. to 16 ft. in length' and every board which you have received fits within that description. What you call scrap are only boards within the description but of inferior quality to what you expected to get." On the first view then the buyer could reject the whole but on the second he could not, his only remedy being in damages.¹⁰

There is of course great difficulty with the first view. In the first place it becomes necessary to determine in each case when inferior quality amounts to scrap. This would involve a difficult process of drawing lines for the question is obviously one of degree. The result would depend on which expert witness impressed the trial judge the most. This is a violation of the basic principle that in the realm of commercial law the law should be as definite as possible so as to enable businessmen to make the quick decisions they must. If this rule were adopted a buyer could never be very certain as to whether he had the right to reject the whole of the goods or not, for he could not be sure at what degree of inferior quality the court would say that it was scrap and thus goods of a different description.

¹⁰ *Supra*, footnote 3, s. 12. The possibility of the buyer fitting his case within the implied condition of sec. 15, has not been considered.

Another difficulty is that the word "scrap" as used in the *Runnymede* case is a technical term to denote rails which are no longer suitable for normal use. What about such things as rotten apples or infected animals where the defect is such as to render them unsuitable for normal use? The analogy appears to be a fair one, and the extension of the rule to cover these cases would seem logical. However, it would seem preposterous that a buyer of apples shipped from British Columbia could reject the whole shipment on the ground that 20% of the apples were rotten. It is clear also that the percentage need not be nearly as high as 20% for the only restriction on the rule would seem to be *de minimis non curat lex*. For example, Cartwright J. quotes Jenkins, L.J. in *Rapalli v. K. L. Take Ltd.*¹¹ to the effect that:

... the purchaser is entitled to have delivered to him goods complying with the contractual description and, failing that, he is entitled to reject unless the rule *de minimis* in its strict sense applies. Clearly in my view 6% to 7% is a proportion which cannot be disregarded as *de minimis*.¹²

It is submitted that the relatively "narrow" view expressed in the majority judgment is the more commendable. The test there depends on the words actually used in the description. If the description specifies some standard or quality then the goods must come up to that standard or possess that quality or they are goods of a different description within sec. 29(3). Thus if a contract describes the goods as "15 milking cows" and it turns out that on delivery three of them have tuberculosis, the buyer's only remedy would be in damages. However if the goods were described as "15 tuberculosis-free milking cows" then the buyer could reject the whole 15 by virtue of sec. 29(3) on the ground that 20% of the goods were goods of a different description.

The purpose of sec. 29(3) appears twofold. In the first place, it respects the buyer's right to accept only the quantity ordered. If A orders 100 articles but mixed with the order are 10 articles of a different description then A has only received 90 of the articles he contracted to buy. In the second place it respects the buyer's right to reject that which he has not contracted to buy, the articles of a different description. It is submitted that the second, more restrictive view of the case is more compatible with these purposes.

Another reason for preferring the "narrower" view is found in the actual history of the case. The trial judge, three judges of the Court of Appeal and two judges of the Supreme Court of Canada held that mere inferior quality of goods does not render them "goods of a different description" for the purposes of sec. 29(3) if they are of the same "kind" as the goods described in the contract. Thus, if merely counting noses is of any relevance the majority in the Supreme Court of Canada was outvoted 6-3 on this issue during the course of the litigation. In these circumstances, the case ought probably to be

¹¹ [1958] 2 L.L.R. 469.

¹² *Ibid.*, at p. 480.

interpreted as narrowly as the explicit language and facts permit. After all, the contract description in this case did in fact impose a standard i.e. "relaying rails" and that standard was not complied with by the seller. As Cartwright, J., says:

The goods sold were described in the contract as "relaying rail" not as used rail with a representation or warranty that they would be of the quality of "relaying rail" or of any particular quality. The appellant purchased "relaying rail" he did not purchase "potential relaying rail" or scrap that might be transformed into "relaying rail."¹³

Clearly had the description been "used rail" (as it in fact was in the original negotiations until the buyer changed it)¹⁴ Cartwright, J. would not have allowed recovery of the full deposit. If however the "broad" view that "scrap rails" were goods of a different description than "used rails" is what his Lordship meant, then clearly sec. 29(3) would apply. Language which would tend to support the general view expressed can be found where Cartwright J. states,¹⁵ "The seller delivered to the buyer the relaying rail he contracted to sell mixed with goods of a different description (i.e. 'scrap')." However, it should be noted here that his Lordship still retains the word "relaying." It is submitted that in view of his Lordship's whole judgment, and the facts of the case, this statement cannot support the proposition that the "scrap" state of an article is a thing of a "different description" than the article itself within the meaning of sec. 29(3).

Cartwright, J. also based his judgment on *Arcos Ltd. v. Ronaasen & Son*.¹⁶ In this case the House of Lords held a buyer entitled to reject a shipment of ½" barrel staves on the ground that 75.3% of the staves were more than ½" but less than 9/16" thick, and 18.3% were more than 9/16" but less than 5/8". Lord Atkin pointed out that "½ inch does not mean about ½ inch" and then went on to say, in a passage quoted by Cartwright, J. that "no doubt there are microscopic deviations which business men and therefore lawyers will ignore."

In adopting this case and in quoting Lord Atkin does Cartwright, J. mean that the *de minimis* rule will only apply to save a contract for sale of goods by description where the deviation from the contract description is "microscopic"? The *Arcos* case involved a contract where the description of the goods included dimensions. Surely the same rigid test should not be used in relation to words of quality or standard in a description of goods as might be properly applicable where the description consists of dimensions.

Two further interesting points arise out of the judgments in the *Runnymede* case. In his dissent, Kerwin, C.J.C. states that:

"It is apparent from the evidence that with a little cropping and drilling at a very minor cost, the goods contained in the cars in question could all have been classified as relaying rails."¹⁷

¹³ *Supra*, footnote 1 at p. 416.

¹⁴ *Supra*, footnote 2, [1953] O.W.N. 772 at p. 772.

¹⁵ *Supra*, footnote 1 at p. 417.

¹⁶ [1933] A.C. 470, referred to *supra*, footnote 1 at p. 419.

¹⁷ *Supra*, footnote 1 at p. 413.

Reading this along with the statement of Cartwright, J., that “the appellant purchased relaying rail; he did not purchase ‘potential relaying rail’ or scrap that might be transformed into ‘relaying rail,’” can it be inferred that a buyer need not do anything to bring the goods up to contract standard, however trivial the work might be?

A final question that might be investigated in a more thorough examination of the *Runnymede* case is whether or not words of quality can ever be part of the description of goods in a contract for the purposes of the *Sale of Goods Act*? This argument was presented in the Court of Appeal but no mention was made of it in the judgments. Quality is a matter of degree. At some point a line must be drawn between the goods on one side of contract quality and the goods on the other side which are not. The location of this point may be a very difficult question of fact. Perhaps it would be more conducive to modern business for the law to take no note of words of quality in descriptions of goods in contracts where a right of rejection of the goods is involved.

It would seem that the simplest view and the one with the most certainty—so important an element in commercial law matters—is the principle enunciated by Lord Low in the *Aitken* case, that is, that goods of a “different description” in sec. 29(3) mean goods of a different “kind”. However, the highest court in the land has decided to extend this principle. Exactly how much they have extended it seems to be uncertain, but the case does seem to provide another example of the view that doubt will be resolved in favour of the buyer.