SHERIFF APPEAL COURT

[2019] SAC (Civ) 1
LIV-SG781-17

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in appeal by

CHRISTINA TENANT JOHNSTON and PETER JOHNSTON

Claimants and Respondents

against

R&J LEATHER (SCOTLAND) LIMITED

Defenders and Appellants

Claimants and Respondents: Party
Defenders and Appellants: Young; BTO Solicitors LLP

14 December 2018

Background

[1] In March 2017 Mr and Mrs Johnston decided to buy a new leather living room suite. They went to R&J Leather (Scotland) Limited's ("R&J") showroom in Uddingston. They chose a custom made suite. They paid a deposit with the full balance paid in April 2017.

[2] The suite arrived on 30 June 2017; it did not match their expectations. It was not of satisfactory quality. On 1 July they attended the Uddingston showroom to complain and intimated rejection. They were told to telephone R&J's head office. They could not do so until Monday 3 July 2017. They emailed on 2 July 2017 rejecting the suite and seeking

repayment. On 3 July a representative of R&J telephoned to say that a driver would be sent to the Johnstons which they took to mean the suite would be uplifted.

[3] On 6 July three employees attended and corrected the mechanism in the recliner seat (one of many complaints). The Johnstons asked that the suite be removed; they were asked to phone the head office by those attending. While Mrs Johnston was on the phone and without her knowledge, the employees left, despite knowing that the suite had been rejected and that the Johnstons wished its removal.

[4] So the Johnstons took advice from a consumer protection organisation. They followed that advice; they wrote to R&J on 6 July by recorded delivery intimating rejection and seeking repayment. R&J refused to accept that letter. Seven times. On 17 July, naturally frustrated by the lack of response, they asked their local Member of Parliament to intervene; he fared no better. He wrote to R&J once by recorded delivery and emailed twice, without receiving an acknowledgment.

[5] On 22 August the Johnstons wrote again by recorded delivery offering alternative dispute resolution. Again R&J declined to accept delivery.

[6] Faced with that approach, Mrs Johnston raised a simple procedure claim in September 2017; R&J were technically wrongly designed, but service of the claim form was effected and prompted a telephone call later that month to Mrs Johnston from R&J, indicating that the managing director would like to speak to the Johnstons. He was away but would phone back. Perhaps inevitably, given the history, there was no call back.

[7] The claim was not defended. Mrs Johnston sought a decision on 29 November and on 14 December received an order for payment. She had asked the court to order R&J to remove the suite. No such order was made.

[8] Believing that the matter had at last ended in their favour, the Johnstons decided to give away the suite, which they had not used and which was taking up room which they needed. They instructed service of a charge to implement the order in their favour in January 2018. But the matter was not at an end. R&J lodged an application to recall the order. The order was recalled. R&J were correctly designed. Mr Johnston became a joint claimant. There was a subsequent hearing, at which evidence was led over two days in June and then July 2018. The sheriff preferred the Johnstons' version of events; he granted an order for payment. He excused the failure to be able to return the suite.

Appeal

[9] R&J have now appealed against the order for payment. Although the question is a general question ("On the foregoing facts did the sheriff err in law when making said decision?"), the appeal is effectively about one thing. In circumstances where the Johnstons no longer have the suite and cannot return it, can they recover the sum awarded?

[10] R&J argue that the obligation to make the rejected goods available applies without limit of time and applies irrespective of any intervening developments and applies irrespective of the actions of the defenders.

Appeal hearing

[11] R&J were represented by Mr Young solicitor; Mrs Johnston appeared for both claimants, Mr Johnston being unfit to attend.

[12] Mr Young submitted that it was clear from the claim form and the evidence that the Johnstons had unequivocally elected to deal with this matter by way of short term rejection.

The remedies are circumscribed by the statute. The sheriff had gone too far in determining that other remedies were open in the face of the unequivocal rejection.

[13] R&J accepted that the sheriff has made a finding that the short term rejection was justified; however on their submission, that remedy is only available if the rejected item is still available for uplift and return to them. It is not available. Essentially R&J's position is that the obligation to make the rejected item available is without limit of time or otherwise qualified.

[14] In Mr Young's submission, the determination about fault was only made when the case was decided by the court, at which point the appellants sought return of the suite. It was regrettable that R&J had not challenged the simple procedure claim at the first opportunity. But there was no mention of the sofa having been given away until January 2018. In his submission the Johnstons cannot succeed in receiving a refund absent the rejected goods to be returned. Whatever the equities, R&J were entitled to return of the goods.

[15] He looked at the authorities lodged at the bar. He examined firstly the statutory predecessors to the Consumer Rights Act 2015 ("the Act");

[16] The Sale of Goods Act 1893 provides at s 11(2)

> (2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

The Sale of Goods Act 1979 provides at a15B.

> **15B.— Remedies for breach of contract as respects Scotland.**
> (1) Where in a contract of sale the seller is in breach of any term of the contract (express or implied), the buyer shall be entitled—
> (a) to claim damages, and

> (b) if the breach is material, to reject any goods delivered under the contract and treat it as repudiated.

Neither of these provisions created a duty to physically return the goods.

[17] He then looked at the Act and in particular sections 20(5) to (8), dealing with rejection;

> (5) The right is exercised if the consumer indicates to the trader that the consumer is rejecting the goods and treating the contract as at an end.
> (6) The indication may be something the consumer says or does, but it must be clear enough to be understood by the trader.
> (7) From the time when the right is exercised—
> (a) the trader has a duty to give the consumer a refund, subject to subsection (18), and
> (b) the consumer has a duty to make the goods available for collection by the trader or (if there is an agreement for the consumer to return rejected goods) to return them as agreed.
> (8) Whether or not the consumer has a duty to return the rejected goods, the trader must bear any reasonable costs of returning them, other than any costs incurred by the consumer in returning the goods in person to the place where the consumer took physical possession of them.

He submitted that the Johnstons could have returned the goods and sought the expenses of doing so.

[18] He submitted that the particular words used and the tense were important; the Act said the duty arose "From the time when the right is exercised" and not "At the time". And the consumer has a duty to "make the goods available for collection", not to "have made the goods available…,"wording which in his submission demonstrated an ongoing duty. The wording of the Act did not excuse the consumer from further performance. The obligation to refund and make available are interdependent.

[19] He referred to three cases, beginning with *Lupton & Co* v *Schulze (*1900) 2 F 1118. This case related to the supply of five pieces of tweed cloth; the purchasers accepted two pieces as conform to contract but rejected the others. However they refused to return them "until we have your distinct promise that you will do your duty to us, and attend properly to our

orders". The Inner House held (per Lord Moncrieff at p1122), that if the purchaser intended to reject goods

> "[He] was bound to return them, that he was not entitled to retain them otherwise than as a purchaser, and that having retained them he was liable in the contract price."

[19] In *The Electric Construction Company v Hurry and Young* (1897) 24 R 312, the goods provided were dynamos. The purchasers claimed they were disconform to contract and intimated rejection, but thereafter continued to use the items for three months. The Inner House held that the purchaser having elected to reject could not retain the machinery, operate it and claim compensation. Lord McLaren said at p 321-322:

> "Now, the rejection of the subject of sale by a buyer is in legal effect a rescission of the contract of sale on the ground of the seller's non-performance or imperfect performance of his obligations. But if a purchaser claims right to rescind the contract of sale, he must, of course, be prepared to make reasonable restitution, that is to say, if he cannot restore the goods altogether unimpaired by use, he must, at least, do nothing subsequent to the rescission which would injure or affect their saleable quality."

And further at p 322

> "If in this case the sellers had assented to the rejection of the dynamo, and had agreed to take it back, the contract would then have come to an end, and any subsequent detention and use of the machine by the buyer could only give rise, as I conceive, to a pecuniary claim. But the makers did not, in fact, assent to the proposed rejection of their machine, and the validity of the rejection could only be determined by subsequent agreement, or by the decision of a Court of law.
>
> Now, I consider that pending a decision as to a buyer's claim to reject, the goods must be treated as if in neutral custody, and this whether the buyer be himself the custodier (as he may be under the Act of Parliament), or whether he places them in the custody of a third party. The condition that the buyer does nothing in relation to the goods which is inconsistent with the ownership of the seller is in my opinion especially applicable to the period when the parties are at issue as to the determination of the contract, and this view receives indirect confirmation from the language of the 35th section, where the doing of an act which is inconsistent with the seller's ownership is declared to be equivalent to the acceptance of the goods."

[20] Mr Young submitted that the authority provided that the suite should have been retained in neutral custody until the Johnstons made good the rejection. The earlier decree was an administrative step, not a judicial determination. They were not relieved of their duty to make the goods available.

[21] Finally he looked at *Padgett v MacNair* (1852) 15 D 76. A merchant ordered goods and on their receipt intimated rejection as disconform to the samples, but refused to return them until other goods were sent or satisfactory compensation was paid. The Inner House held that the goods must either be returned (per the Lord justice Clerk at p 79-80), or

> "if the sending them back would be greatly prejudicial to the interests, or against the wish of the seller, to hold them until he can intimate his rejection, for and on account of the seller, so as to be entirely at the disposal and orders of the seller….
>
> To take them in security of an alleged claim of damages, without the consent and against the remonstrances of the seller, and to place them at his own disposal by his own act, and at his own pleasure, is wholly repugnant to the only ground on which they were sent to him,— viz. the contract of sale, under which, if he will not take the goods at the price, he has no ground of possession whatever, but is, on the contrary, bound to return them."

[22] He submitted that as a matter of law the Johnstons could not succeed if they could not make the rejected goods available; they should have been retained in a neutral place where they acted as custodians only – they cannot intromit. They had a legal duty whether they knew it or not. There was no time limit.

[23] In response Mrs Johnston submitted that she had done everything she was supposed to do; she and her husband gave repeated opportunities for the goods to be uplifted. They were not going to risk transporting the suite to R&J's premises, given their attitude. It was given away in good faith after a court order. They could not store it any longer. Her house is and was not a storage facility. They had repeatedly asked R&J to act. She took advice and she followed it meticulously. Mrs Johnston explained that having had the suite which they

did not use and having obtained a court order, they gave the suite away in order to give themselves room and replace the suite with one which was satisfactory. She maintained that she and her husband could not have done anything more. The sheriff's decision should stay in place.

Decision

[24] R&J are correct in submitting that the sheriff has erred by considering remedies which were not sought and were not triggered by the short term rejection. However the sheriff was entitled to find that short term right to reject had been exercised, a matter not in dispute.

[25] The question is whether, having properly and justifiably exercised a right of rejection, the Johnstons have an ongoing duty, whatever the circumstances, to retain the goods rejected until relieved of them by R&J.

[26] Mr Young recognised that R&J's own conduct had not assisted, but submitted that the law was unequivocally in their favour; absent the suite there could be no refund and the sheriff had erred in excusing that.

[27] The 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. However I conclude without difficulty that whatever the wording in section 20(7) ("from the time" and "make the goods available"), 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 potential to lead to both unfairness and absurdity; it is trite that statutory interpretation should avoid such outcomes.

[28] It is clear that when a consumer exercises a right to reject faulty goods, there is no duty to return the goods to the seller. All the consumer needs to do is make the goods available to the seller. That imposes an onus on the seller to come and collect the goods if they wish to.

[29] The duty to make the goods available cannot be without limit of time or unqualified. In considering the nature and extent of the duty to retain goods which have been rejected, the court is entitled to take into account a number of factors, including but not restricted to -

- the timescale within which rejection was intimated;
- the nature of the goods;
- the practicality of providing storage;
- the nature, extent and frequency of communications sent by the consumers to the seller;
- any response, or lack of response, from the sellers;
- the length of time for which goods were retained; and
- whether proceedings have been raised.

[30] It may be necessary, or at least appropriate, in some cases for the consumer to intimate that, in the absence of removal, the goods will be otherwise disposed of. But circumstances may arise in which the actings (or inaction) of the seller are in such terms as to entitle the consumer to do as he or she wishes.

[31] The cases to which Mr Young referred all involved situations where the party who did not cooperate was the party who had received the goods, had purported to reject them and had not then facilitated their return. The court's approach in each of these cases was an inevitable response to the wrongful refusal to relinquish the goods.

[32] The circumstances in this case are very different. For months the Johnstons had been trying to elicit a response and had been consistently ignored; I am not prepared to hold that the Johnstons were under a duty to retain the goods indefinitely until R&J elected to take notice of the dispute. R&J cannot act in the way in which they did and be afforded protection by the Act. I am satisfied that, in particular circumstances of this case, the Johnstons were entitled to dispose of the suite. The rejection was made immediately and unequivocally. The Johnstons made repeated attempts directly and through their MP to make contact. R&J deliberately avoided engagement with them. The suite could not be stored indefinitely. The Johnstons legitimately considered that the court order had brought matters to an end. By their attitude, R&J effectively abandoned their right to seek recovery; there is a limit to the occasions which a party can be expected to remind sellers of the rejection. In ordinary course, the buyer should retain the goods for return; but in this case I consider that the seller's actions or inactions were in such terms as to entitle the buyer to do as they wished with the goods.

[33] The Johnstons are entitled, having properly exercised their right of rejection, to the order granted by the sheriff. That right is not undermined by the unavailability of the suite. R&J have only themselves to blame for their inability to recover the item.

[34] The appeal is refused with expenses in favour of the Johnstons.