TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/012

BETWEEN:

GERARD KRAAKMAN
(dba The Woodshop)

Appellant

and

DONNA STERLING

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Ian Donaldson Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Gerard St. Clair Farara QC and Ms. Tamara Cameron of Farara Kerins for the Appellant
Mr. Lewis S. Hunte QC and Mr. Richard W. Arthur of Hunte & Co. for the Respondent

---

2011: January 12;
March 28.

Civil appeal – Sale of Goods Act, Cap. 298 Revised Laws of the Virgin Islands 1991 – Whether goods conformed with contract description – Poor workmanship – Whether goods were reasonably fit for the purpose for which they were intended – What constitutes acceptance of goods sold – Entitlement of a buyer to reject goods as a whole – Severable contract – Treatment of a condition of a contract of sale as a warranty – Exclusion of expert evidence because of non-compliance with the provisions of CPR 32.6(1)

The appellant, Mr. Gerard Kraakman, is the owner of a well established wood shop, known as "The Woodshop" at Baughers Bay, Tortola, in the Territory of the Virgin Islands. The respondent, Mrs. Donna Sterling, along with her husband Mr. Wayne Sterling, were at the relevant time building a luxury home in Long Bay, Tortola. The couple contracted with Mr.

Kraakman to manufacture the doors and windows for their new home, after Mrs. Sterling had had many meetings with him. It was an implied term of the contract that the fixtures and fittings required would be of a high standard. From her negotiations with Mr. Kraakman, as well as after having observed work that he had done for other clients, Mrs. Sterling was confident that he would be capable of carrying out the work to the required standard. After the doors and windows had been manufactured, Mrs. Sterling completed payment for the items but later discovered that the quality of the work was rather poor and the goods had not been manufactured to the required standard. She ultimately demanded that Mr. Kraakman repay her in full and brought a claim against him in the court below when he refused to do so.

Held: dismissing the appeal, confirming the judgment of the learned trial judge and awarding costs to the respondent limited to two-thirds of the amount that would otherwise be allowed pursuant to CPR 65.13 that:

1. Contracts for the sale of goods are not to be found only in the express written and oral terms and implied terms and conditions agreed to by the parties. Some of the terms and conditions of such a contract are implied by the Sale of Goods Act[1] ("the Act").

2. Even if the respondent's case was not based on contract measurements, the learned judge's finding that Mr. Kraakman had failed in his obligation to supply goods reasonably fit for the purpose as required by section 16(a) of the Act, remain unchallenged.

3. The trial judge found that having regard to the nature of the goods, property in them was not intended to pass on payment of the purchase price but only after the respondent had had a reasonable opportunity of inspecting them after taking delivery, and that such an inspection could only take place when the items were taken to her home and an attempt was made to put them in place. She found little merit in the suggestion that Mrs. Sterling had inspected the goods prior to payment. This seems to be a reasonable finding.

4. The judge's finding that the appellant being allowed to take the doors away to repair them did not amount to the respondent carrying out an act which was inconsistent with the appellant's ownership of the items was reasonable in light of sections 19, 20 Rule 2, and 35 of the Act.

5. It was the breach of the implied condition in section 16(a) of the Act, that the goods should be reasonably fit for the purpose, that entitled the respondent to repudiate the contract. The question whether the contract is severable or not is decided on the facts of the case in question, and the terms of the contract and the evidence accepted by the judge admit the conclusion that the contract

[1] Cap. 298, Revised Laws of the Virgin Islands 1991.

was indivisible. Thus, I am of the view that the parties intended the contract not to be severable. The respondent by her conduct, clearly did not elect to waive the implied condition, or to treat the breach of the implied condition as a breach of warranty, and having regard to prior findings, the respondent did not accept any of the goods or any portion of the goods thereby causing property to pass to her. Consequently, she would not lose her right to reject all of the goods according to the law.

Jackson v Rotax Motor and Cycle Co. [1910] 2 K.B. 937 cited.

6. Having regard to the construction of the contract, and the conduct of the parties, the respondent's right to repudiate would not be negatived by the express warranty in the contract. The respondent was entitled to repudiate, in light of her pleadings, the law, evidence and the extent of the unfitness of the items which led the respondent to refuse to accept them.

7. The warranty in the contract did not purport to exclude the respondent's right under the Act and it was not inconsistent with the provision under the Act. Consequently, the respondent was not precluded by the contractual warranty in relying on her rights under the Act. She was entitled to reject the goods as being in breach of a fundamental term that they should meet the required quality and be fit for purpose. Those seem to have been findings justified by the evidence and the law.

8. The learned judge was reasonable in accepting the value claimed for the hinges, especially as the respondent's evidence on price had not been challenged.

9. The learned judge's decision on the exclusion of the expert opinion evidence appears justified by CPR 32.6(1), and the costs order made appears to be proportionate.

JUDGMENT

[1] MITCHELL, J.A. [AG.]: This is an appeal from the judgment of Joseph-Olivetti J delivered on 5th March 2010. It is a Sale of Goods Act case. The appellant, Mr. Gerard Kraakman, is the owner of a well established wood shop, known as "The Woodshop", at Baughers Bay, on the island of Tortola in the Territory of the Virgin Islands. The respondent, Mrs. Donna Sterling, and her husband Wayne, were at the relevant time in the year 2007, building a luxury home in Long Bay on the island of Tortola. The judge found that Mrs. Sterling's home was in the true

tradition of the Territory's wealthy inhabitants "whose grandiose homes can be seen sprawled on the forbidding hillsides and shorelines of these islands". Indeed, on Mrs. Sterling's own evidence her home is valued at some US$6 million.

[2] Mrs. Sterling had many meetings with Mr. Kraakman. She was confident from her negotiations that he could manufacture the doors and windows for her home to the standard she expected. These are implied terms and conditions of the contract. She contracted with Mr. Kraakman to perform the work. The implication is that the fittings and fixtures required would be of a high standard. The written part of the contract was made up of two documents. The first was a "quotation" dated 1st February 2007, from Mr. Kraakman to Mr. and Mrs. Sterling. It listed a number of doors and windows which Mr. Kraakman was to manufacture, together with their cost. Mrs. Sterling subsequently, on a number of occasions, requested changes to the dimensions of the doors and windows, and Mr. Kraakman produced revised quotations. The final quotation consisted of two emails, the first dated 10th April 2007, and the second dated 7th May 2007, with a new schedule of the dimensions and costs of the exterior doors and windows. The judge found that these two emails constituted "the contract". I understand her to mean "the written part of the contract". Contracts for sale of goods are seldom contained in their entirety in a written document. Many of the terms and conditions of such a contract are either oral or are implied by conduct or by statute.

[3] As the judge found, included in the contract in this case was an express one year warranty in the following terms:

> "All our woodwork is warranted for one year. This warrantee [sic] does not cover damage caused by transport, installation, neglect, misuse, insects (including termites) or moisture."

Mr. Farara QC, contends that this warranty was an important provision as it would cover any defects which were discovered. There was a payment schedule. Mr. Kraakman would be paid two deposits, then he would do the manufacturing and then the balance would be paid. Thereafter, Mrs. Sterling was to collect the

manufactured items from The Woodshop and Mr. Kraakman became entitled to charge a storage fee to the extent any items remained at The Woodshop. Mr. Farara QC, contends that the consequence of this provision is that the parties had agreed that title to the items would pass on payment of the balance of the purchase price.

[4] Mr. Kraakman manufactured the doors and windows required by the amended quotation. Mrs. Sterling completed payment for the items and had five of the doors delivered to the site initially. She inspected them and she found that they were not acceptable. She immediately called Mr. Kraakman on the telephone. He attended at the premises with two of his employees, examined the items, apologised, and admitted that he had not checked the items thoroughly before they were collected. He tried to fix the defects on the spot, but was unable to do so. He took them away either to repair or to remake them. He never returned them. After some correspondence, the suit followed.

Whether the goods conformed with the contract description

[5] This was the first question for the judge. Questions arose concerning the measurements, conformity to a template or templates, poor workmanship, and whether the goods were fit for purpose. These issues arise under the Sale of Goods Act[2] ("the Act"). Contracts for sale of goods are not to be found only in the express written and oral and implied terms and conditions agreed to by the parties. Some of the terms and conditions of such a contract are implied by the Act. The relevant sections are:

> "15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the good[s] corresponds with the sample if the goods do not also correspond with the description."

[2] Cap. 298 Revised Laws of the Virgin Islands 1991.

And, section 16 provides:

> "16. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows -
>
> (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
>
> (b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;
>
> (c) …
>
> (d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

Section 35 provides:

> "35. (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
>
> (2)..."

And, section 36 provides:

> "36. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. "

The measurements

[6] There was confused evidence about the measurements and dimensions of the doors and windows. The evidence was that there were repeated visits by Mr. Kraakman to the construction site to take measurements. Mr. Mason, Mrs. Sterling's contractor's foreman who gave evidence in support of her claim, testified that Mr. Kraakman gave him measurements for building the apertures for the windows and doors. Mr. Farara QC submits that the measurements of the apertures, if they ever took place, were not significant: the important measurements were those in the contract documents, as Mr. Kraakman's obligation was to provide goods that fit the description in the contract documents. Mr. Hunte QC for Mrs. Sterling submits that the judge's finding on the measurements was based on the evidence.

[7] There were in evidence no measurements of the goods as manufactured. The goods are in Mr. Kraakman's possession, having been returned to him shortly after they were transported to the construction site. Mr. Kraakman says he had had them built according to the agreed measurements. Mrs. Sterling says they were not. The measurements of the items as fabricated were not taken and put in evidence by either Mr. Kraakman or Mrs. Sterling. Mr. Hunte QC says it was not Mrs. Sterling's duty to do so. Mr. Farara QC says it was. It was left to the trial court to speculate as to whether or not they were built according to specifications. The burden of proving that the measurements of the items as fabricated were wrong was in any event clearly on Mrs. Sterling. The judge came to the conclusion[3] that the windows had not been fabricated in accordance with the contract measurements.

[8] The first quote in the contract was for some ten doors and eighteen windows. The amended quote was for some ten doors and nineteen windows. Eight of the windows were identified as W4 on the exhibit, but agreed to be W5. The

[3] At paragraph [17] of the judgment.

measurements of the W5 windows started in the first email as being 26" x 48", but were later altered by agreement in the second email to 26" x 61". Mrs. Sterling pleaded in her statement of claim and testified that the measurements were required to be the original measurements. In this she was clearly wrong. The express written terms of the contract as to measurements were contained in the second email. It would seem therefore that the judge was wrong in finding that the changes made by the second email did not affect the measurements. Mr. Farara QC submits on behalf of Mr. Kraakman that this error was important because it impacted a succession of findings made by the judge which, on the basis of the empirical evidence, were all wrong.

The templates

[9] The existence and use of templates did not feature in the pleadings. Mrs. Sterling testified that Mr. Kraakman had made and supplied her workmen with templates for all the doors and windows. She claimed that the windows and doors supplied did not match the templates and did not fit the apertures left for them. Mr. Kraakman testified that he had not supplied Mrs. Sterling's workmen with templates but that he had made the items according to the agreed dimensions. The evidence before the judge indicated that there was only one template for one of the window styles and one door frame which may be described as a template for one of the door styles. There were other door and window styles to which the templates would not have been applicable. The judge would therefore appear to have been wrong to have found[4] that Mr. Kraakman had made and supplied Mrs. Sterling's workmen with templates for all the windows and doors.

Poor workmanship

[10] The judge had the advantage of seeing and hearing Mr. Kraakman and Mrs. Sterling and the witnesses. The witnesses were Mr. Persaud for Mr. Kraakman and Mr. Mason, Mr. Sterling and Mr. Hayde, a cabinet maker, for Mrs. Sterling.

[4] At paragraph [13] of the judgment.

The trial judge says that she found the evidence given by Mrs. Sterling and her witnesses more credible than that of Mr. Kraakman and his witness. This is particularly important in relation to Mrs. Sterling's rejection of the goods on the grounds of poor workmanship. The judge found that Mr. Kraakman's employees were not supervised when they did this order, and that this had contributed to the poor workmanship.

[11] Mrs. Sterling's evidence was that the arches of the doors and the frames were not elliptical; the doors did not fit in the frames or in the openings; the joints of the doors and frames were open and some joints were crooked and did not fit squarely with each other; glue and wood filling were visible all over the joints of the doors and panels; the laminated glass was badly glazed and damaged from sanding; the panels of the doors were unprofessionally made and were not properly joined, neither were they in line with the corners; the hinges, all of which she purchased and supplied to Mr. Kraakman, were sanded and thus the protective coating with which they were provided by their makers was removed; the hinges were incorrectly fitted; the doors did not fit into the frames even though Mr. Kraakman made both the frames and the doors; and the frames did not fit the openings. It is to be noted that these were doors that were not to be painted, but were to be oiled or varnished and the wood exhibited in its natural state. We can well imagine that any defects would be noticeable to a casual observer.

[12] The judge next found that Mrs. Sterling visited The Woodshop shortly after the items had been returned to Mr. Kraakman. The judge accepted that Mrs. Sterling had found that the returned items were in the same condition, and she noticed defects on the other items which she detailed in her evidence. In particular, the glass on several of the doors and windows was badly scratched; many of the panes of glass in the doors and windows were cracked; the bottom edge of the main door to the house was sliced off; there were wide spaces between the joints of the doors; the panels on the doors were crooked and unprofessionally made, and Mr. Kraakman claimed that the doors had been handcrafted “Caribbean style”;

the louvers in the windows did not fit closely and were not of equal size and no allowance was made for the fitting of the mosquito screens; there were rough saw cuts on the doors and windows which were not properly sanded; and small pieces of wood as well as wood filling and glue were fitted into the crevices between the joints of the doors to fill the crevices. Mrs. Sterling told Mr. Kraakman that she would not accept the goods as they were. The argument became animated and loud, and, as Mrs. Sterling said, she was ordered off the premises and told never to come back. Mr. Kraakman's wife threatened to call the police if she did not leave.

[13] A few days later, as the judge found, Mrs. Sterling's husband and Mr. Mason visited the workshop and found the returned items in the same condition. Mr. Mason says that he saw the other items and they also were defective. The glass panels on some of the doors were sanded and cracked. Mr. Mason was of the view that they were unfit for use in any house. They took one window away with them to see if it would fit and it was too small for the aperture, even though the aperture had been built to the template provided by Mr. Kraakman. They did not return the window but informed Mr. Kraakman of this. It appears that Mrs. Sterling's husband had conversations with Mr. Kraakman about collecting the other items, but they all remained in Mr. Kraakman's possession. Mrs. Sterling made it clear that she rejected the items and demanded her money back. Mr. Farara QC submits that she should have accepted the individual items, if any, that had no defects or that had been repaired, and could not reject the whole order. It is not clear from this submission whether the proposal was that she would fit some of Mr. Kraakman's windows to the house and find another source for, presumably, different windows. If that is the suggestion, it would not appear to be a reasonable one.

Were the goods reasonably fit for the purpose for which they were intended?

[14] Mr. Farara QC submits that, in finding that the doors and windows were not fit for the purpose for which they were intended, the trial judge relied on the erroneous assumption[5] that templates had been made by Mr. Kraakman for all the windows and doors, and if the doors and windows did not fit into the resulting apertures the reasonable conclusion was that the doors and windows had not been made in conformity with the templates and so were not in accordance with the contract measurements.

[15] Even if the judge may have misunderstood the evidence about the templates, that was not, in my view an end of the argument. As Mr. Hunte QC submits, even if Mrs. Sterling's case was not based on the contract measurements, the judge's findings on the quality of the workmanship remain unchallenged. The judge found as a matter of fact that Mrs. Sterling was building a costly home and that Mr. Kraakman knew that. He also knew that Mrs. Sterling was relying on his expertise to fabricate exterior doors and windows reasonably fit for installation in that particular house. As he testified, Mrs. Sterling had visited his workshop on many occasions and had an opportunity to see the doors and windows that were being made for other clients. She had asked for a quote for the doors and windows because she had been so impressed with the quality of his workmanship. The judge found that Mr. Kraakman, as a result of the many flaws in the fabrication of the doors and windows, had failed in his obligation to supply goods reasonably fit for the purpose as required by section 16(a). This finding was supported by the evidence that she accepted.

What constitutes acceptance of goods sold

[16] Mr. Farara QC submits that immediately prior to the collecting of the five doors, Mrs. Sterling and her husband had visited the workshop and inspected the doors and windows, and within a day or two they had paid the balance of the purchase

[5] At paragraphs [13] and [16] of the judgment.

price. His point is that her inspection and payment of the balance of the purchase price amounted to acceptance of the goods sold, that title passed at that moment, and that she was liable for storage fees thereafter. Alternatively, he submitted, she lost the right to reject when she agreed for Mr. Kraakman to take the five items away and to remedy the defects.

[17] Concerning when title to the goods passed from a seller to the buyer, sections 19 and 20 of the Act apply. The sections read:

> "19. (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.
>
> 20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.
>
> *Rule* 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.
>
> *Rule* 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.
>
> *Rule* 3. …"

Section 20, Rule 1 does not seem to be applicable by virtue of the implied statutory conditions under sections 15 and 16 to which the contract was subject.

[18] There was disputed evidence as to whether Mr. and Mrs. Sterling actually inspected the items at The Woodshop prior to the final payment. The trial judge found that having regard to the nature of the goods, property in them was not intended to pass on payment of the purchase price but only after Mrs. Sterling had a reasonable opportunity of inspecting them after taking delivery. The judge was satisfied that even if Mr. and Mrs. Sterling saw the goods in the workshop that would not have amounted to an inspection or a reasonable opportunity for

inspection. Such an inspection could only take place when the items were taken to her home and an attempt was made to put them in place. She found little merit in the suggestion that Mrs. Sterling had inspected the goods prior to payment. That seems to have been a reasonable finding. Nor did the judge accept that by allowing Mr. Kraakman to take the doors away to repair them, Mrs. Sterling had done an act inconsistent with Mr. Kraakman's ownership of them and so could be deemed by virtue of section 36 above to have lost her right to reject them. She found that argument failed. These findings seem to be reasonable in light of sections 19, 20 Rule 2, and 35 of the Act.

Was Mrs. Sterling entitled to reject the goods as a whole?

[19] The judge found that Mrs. Sterling was not obliged to incur the cost of taking delivery of every item and measuring and inspecting each minutely but was entitled to reject the lot without incurring further expense as she could reasonably infer from her inspection of some of the items that they were not reasonably fit for the particular purpose and did not meet the contract description. Mr. Farara QC takes issue with that finding. He suggests that the judge was applying section 15 of the Act which deals with sale of goods by sample. However, this, he submits, was a sale by description and Mrs. Sterling was obliged to inspect each and every one of the items and find whether it did or did not conform to the description before she could lawfully reject it.

[20] Section 13 of the Act deals with when a condition of a contract of sale may be treated as a warranty. It provides:

> "13. (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.
>
> (2) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated,

> depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.
>
> (3) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

[21] The claimant in her pleadings did not directly state what express or implied term of the contract was the condition that was breached, which entitled her to reject all of the items and repudiate the contract. However, she pleaded at paragraph 3 in her Defence to Counterclaim that "she was legally entitled to reject the items and did so as a result of a breach of the Agreement", having already pleaded at paragraph 5 of her statement of claim that: "It was an implied condition of the agreement and an understanding between the parties … that the work would be performed in a professional manner and that the items would be fit for the purpose for which they were fabricated".

[22] The trial judge sought to justify the claimant's right to reject at paragraph 28 of her judgment on the basis of the variance in the description of the contract measurements and her reference to the Privy Council case of Arcos, Ltd. v E.A. Ronaasen & Son[6]. Since I have already found that the claimant failed to prove that the fabrication of the items did not conform to the contract measurements description in the last email, the question now is what condition was breached that entitled her to repudiate.

[23] In my view it is the implied condition in section 16(a), i.e., that the goods shall be reasonably fit for the purpose, that is operative. The question whether the contract is severable or not is decided on the facts of the case in question[7]. The terms of the contract and the evidence accepted by the judge, admit the

[6] [1933] A.C. 470.
[7] Chitty on Contracts Vol. 2 (Twenty Third edition) at paragraph 1479.

conclusion that the contract was indivisible, and so I am of the view that the parties intended the contract not to be severable. If the contract is severable, the buyer loses his right to reject that part of the goods which he has accepted; but he may still reject the remainder: Jackson v Rotax Motor and Cycle Co.[8]."[9] The respondent by her conduct clearly did not elect to waive this implied condition, or to treat the breach of this implied condition as a breach of warranty; and having regard to our prior findings, the respondent did not accept any of the goods or any portion of the goods thereby causing property to pass to the respondent. Consequently, she would not lose her right to reject all of the goods according to the law.

[24] Having regard to the construction of the contract, and the conduct of the parties, the respondent's right to repudiate would not be negatived by the express warranty in the contract either in my view. In light of the respondent's pleadings previously referred to, the law, evidence, and the extent of the unfitness of the items which led the respondent to refuse to accept them, I am of the view that the respondent was entitled to repudiate.

The warranty

[25] Mr. Farara QC submits that the warranty cited above covered any defects that Mrs. Sterling discovered. There was a contractual obligation, binding on both Mrs. Sterling and Mr. Kraakman, for Mr. Kraakman to remedy any defects discovered in the items within one year of acceptance. Mr. Hunte QC's response is that the warranty does not go to a breach of the implied condition of the contract that the goods must be of merchantable quality. Mrs. Sterling was entitled to examine the goods and if they were not of a merchantable quality to reject them. The judge found that there was a breach of this implied condition and the right to reject followed as a matter of course.

---

[8] [1910] 2 K.B. 937.

[9] Chitty on Contracts Vol. 2 (Twenty Third edition) at paragraph 1479 footnote 31.

[26] The question is whether by virtue of section 16(d) the warranty in the contract negatived the warranty or condition implied by the Act. The judge found that all the goods were defective, and that the defects were of such a nature that they could not be remedied at the premises by Mr. Kraakman and his workmen. Mr. Farara QC submits that Mr. Kraakman still had a year in which to remedy them. However, the judge found that this warranty did not purport to exclude Mrs. Sterling's right under the Act, and it was not inconsistent with the provision under the Act. Consequently, Mrs. Sterling was not precluded by the contractual warranty in relying on her rights under the Act. She was entitled to reject the goods as being in breach of a fundamental term that they should meet the required quality and be fit for purpose. Those seem to have been findings justified by the evidence and the law.

The hinges

[27] The trial judge awarded Mrs. Sterling not only the amount she had paid to Mr. Kraakman, but also the value of the hinges in the amount of US$910.40. Mr. Farara QC takes issue with this award as it was not based on any evidence as to the cost of the hinges. However, the judge was satisfied from the evidence, including the concession by Mr. Kraakman that some of the hinges were damaged, that they had been damaged and would not be able to be satisfactorily repaired. She accepted the value claimed as the cost of the hinges, especially as Mrs. Sterling's evidence on price had not been challenged. This seems to have been a reasonable finding.

The excluded witnesses

[28] On the second day of the trial, after the Defence had called one of its four witnesses, counsel for Mrs. Sterling took objection to two of the three remaining witnesses. The contention was that they were being called as expert witnesses, which ought not to be allowed as the proper procedure for obtaining permission to rely on such evidence under Civil Procedure Rules 2000 Rule 32.6(1) had not

been complied with and could not be complied with at this stage. The trial judge heard arguments and upheld the objection and struck out the witness statements of the two witnesses. The two witness statements are in almost identical words, and one of them reads in its material part, after the witness has given his qualifications:

> "Mr Gerard Kraakman has asked me to inspect the doors and windows, which The Woodshop made for Mr and Mrs Sterling and are still stored in The Woodshop. See attached list. I find that the woodwork is of excellent quality and is made professionally. I do not see any reason why any of these doors and windows would be rejected."

The trial judge expressed her disapproval of the late taking of the objection by allowing Mrs. Sterling only two-thirds of her prescribed costs. The witness statements had been filed far in advance of trial and counsel ought to have been aware of them and fairly ought to have made known his objections well ahead of trial to give the other side an opportunity to rectify what in reality was only a procedural matter. Mr. Hunte QC has not filed a counter appeal concerning the costs order. This was expert opinion evidence. The judge's decision on the exclusion of the evidence appears justified by the Rule, and the costs order appears proportionate.

[29] For the reasons given above, I would confirm the judgment of the learned trial judge and dismiss the appeal with costs to the respondent limited to two-thirds of the amount that would otherwise be allowed pursuant to CPR 65.13.

Ian Donaldson Mitchell
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal