SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FORFAR

[2018] SC FORF 28

SC56/16

JUDGEMENT OF SHERIFF GREGOR MURRAY

in causa

ANGUS AND CATHERINE COMBE

Pursuers

against

PERT'S HOUSE FURNISHERS LIMITED

Defenders

Forfar, 12 March 2018

Findings in Fact

[1] The parties are designed in the instance. This court has jurisdiction.

[2] On 25 March 2015, the Pursuers visited the Defenders' premises in High Street Arbroath as they were considering purchasing two and three seat reclining leather settees. They looked at a settee in the Defenders' sale, where they met the Defenders' Director David Pert. They told him they were looking to buy high quality settees which Mrs Combe could easily sit down and rise from as she suffers from Rheumatoid Arthritis and Fibromyalgia.

[3] Mr Pert suggested the Pursuers look at the Lazeboy Georgia range, which he reasonably considered to be a high quality product. The parties did not discuss what each understood a high quality product to comprise.

[4] Mr Pert took the Pursuers to the Defenders' storeroom, where he showed them a chair from the Georgia range. The Pursuers both sat in the chair, which they liked. The Pursuers then contracted to purchase two and three seat Lazeboy Georgia leather reclining

settees from the Defenders at a price of £3,599.00. Number 5/1 of process is a sales receipt they received for their order.

[5] The Pursuers paid the contract price to the Defenders by credit card. The Defenders delivered the settees to the Pursuers' home on 27 May 2015. Certain elements of their manufacture were warranted by Lazeboy. Number 5/10 of process is a copy of Lazeboy's standard guarantee.

[6] Shortly after the settees were delivered, the Pursuers visited Tenerife on holiday for two weeks. Soon after they returned, they visited their daughter in Oxford for between two and three weeks. In September 2015, they again visited Tenerife on holiday for a week. When they were at home, the Pursuers used the settees daily. They found them suited to Mrs Combe's needs.

[7] In November 2015, the Pursuers believed the seating areas on the settees were sagging. The Pursuers contacted Mr Pert and complained about these problems. Mr Pert came to their home, viewed the settees and told the Pursuers that he would arrange for an upholsterer to look at them. He then instructed Absolutely Upholstery, Arbroath to examine the settees.

[8] On 18 November 2015, Absolutely Upholstery sent a report to the Defenders. It stated that the Pursuers had complained that the foam seating had become soft and that the topcoat from the bottom of the footrests had come off. The report stated that while the seats on the settees had softened and the footrests had become scuffed, both were a consequence of fair wear and tear. Creasing in the leather on the footrests had occurred naturally. To repair the problems, they recommended that foam padding in the seats be replaced with a higher density type and the affected footrest areas be recoated. Number 5/2 of process is a copy of their report.

[9] Having regard to Absolutely Upholstery's report, the Defenders then reasonably considered the problems experienced by the Pursuers were caused by fair wear and tear and natural creasing of leather.

[10] The Pursuers then consulted the Citizens' Advice Bureau Arbroath. Acting on advice they received, they sent a letter to the Defenders dated 20 November 2015 in which, *inter alia,* they sought a refund of the purchase price. Number 5/3 of process is a copy of their letter.

[11] The Defenders replied to the Pursuers' letter on 24 November and attached a copy of Absolutely Upholstery's report, which they had received in the intervening period. Number 5/4 of process is the Defenders' letter to the Pursuers.

[12] Thereafter, on advice from the Citizens' Advice Bureau, the Pursuers submitted a claim to their credit card company in terms of section 75 of the Consumer Credit Act 1974 by which they sought a refund of the purchase price. They did not advise the Defenders that they were doing so. They did not contact Lazeboy to ascertain whether the problems could be repaired under guarantee.

[13] The credit card company asked the Pursuers to obtain an independent report on the settees. The Pursuers instructed Roy Greig of Castlegait Upholstery, Montrose for that purpose. They did not advise the Defenders they had done so. Mr Greig visited the Pursuers' home and carried out a detailed examination of the settees.

[14] On 1 December 2015, the Pursuers sent a further letter to the Defenders in which, *inter alia*, they stated they were entitled to ask the Defenders for a part-refund, repair or a replacement of the settees and sought "an offer of reasonable settlement" from the Defenders. Number 5/5 of process is a copy of their letter. On 3 December Mr Pert replied.

Number 5/7 of process is a copy of his letter. Having regard to the Absolutely Upholstery report, Mr Pert considered the Pursuers' claim to be unfounded.

[15] On 8 December 2015 Mr Greig sent a report to the Pursuers. It forms number 5/8 of process. In it, he *inter alia* reported that in his opinion:-

a. one seat on the two seater settee and two seats on the three seater settee had visibly lost height and shape

b. those seats offered little support when sat on

c. coil spring pockets within the affected seats had not been glued to stretch fabric covering them, causing the springs to lose rigidity and strength

d. foam boxes covering the top and sides of the coil springs within the affected areas had not been glued to the stretch fabric, causing further loss of rigidity and strength

e. the foam boxes offered poor resilience and had lost shape

f. polyester wadding laid between the foam boxes and leather covers had lost resilience

g. through factors c – f above combined, the leather seat covers in the affected areas had become stretched and thin, no longer snugly covered the seat filling and needed replaced

[16] Number 5/15 of process is a seat cushion from a Lazeboy chair, identical to those fitted in the Pursuers' settees. It exhibits similar problems to those narrated in paragraph 15 above. Mr Greig has repaired similar Lazeboy cushions exhibiting such problems for other customers.

[17] Mr Greig has worked almost continuously in the manufacture and repair of furniture and upholstery for 34 years. He is highly experienced in, and has an in depth knowledge of, all aspects of those trades. He has traded on his own account for 23 years. He regards a high quality settee as a more expensive product manufactured using traditional methods and

components which has a longer useful life. He does not regard the Lazeboy Georgia range as such a product.

[18] To upgrade the Pursuers' settees to what he regarded as a high quality product, Mr Greig recommended, as a minimum, that the following work should be carried out to them:-

a. replacement of plastic clips securing zig-zag springs to the seat frames with metal clips

b. replacement of the existing coil spring seat cushion fillings with quality block foam

c. replacement of the seat reclining mechanisms with higher quality similar products

d. stripping off the leather covering the settees to enable inspection and, if necessary, strengthening of their frames

[19] Mr Greig subsequently supplied a high, firm chair for use by Mrs Combe.

[20] The Pursuers then hand delivered a copy of Mr Greig's report to Mr Pert.

[21] On 29 December 2015, having considered Mr Greig's report, Mr Pert sent a letter to the Pursuers suggesting that the parties' dispute be referred to the Furniture Ombudsman to determine. Number 5/10 of process is a copy of his letter. The Pursuers were unwilling to do so.

[22] The Pursuers' credit card company then asked the Pursuers to obtain a second report on the settees. The Pursuers themselves then instructed a report from the Furniture Ombudsman for that purpose. They did not advise the Defenders they had done so.

[23] The Furniture Ombudsman's Technician Chris Lorimer examined the settees at the Pursuers' home on 23 February 2016. On 26 February, he sent a letter and report to the Pursuers. They respectively form numbers 5/12 and 5/14 of process.

[24] Mr Lorimer found:-

a. leather on the left side leg support and base of the three seater settee was damaged, most likely during delivery

b. the seat leather was stretched on main use seating

c. webbing support beneath the main use seating was loose

[25] To repair the settees, Mr Lorimer recommended that in his opinion the seat interiors be replaced, webbing support beneath the seats be replaced and tightened and affected leather be repaired.

[26] The Pursuers did not pass a copy of Mr Lorimer's report to the Defenders.

[27] The Defenders were unaware of Mr Lorimer's report until August 2016, when it was mentioned in correspondence with the Pursuers' agent. They then asked for and received a copy of it. Until then, the Defenders reasonably believed that a factual dispute existed between the parties on the issue of whether the problems with the settees were caused by fair wear and tear. In September 2016, in correspondence with the Pursuers' agent, after considering Mr Lorimer's report, the Defenders offered as a gesture of goodwill to carry out "like for like" repairs as suggested in Mr Lorimer's report.

[28] Neither party investigated whether Lazeboy would be prepared to remedy any defects in the settees under guarantee.

[29] The Defenders are a family run business which has sold household furniture for over 100 years. They retailed Lazeboy products for around three years. In that time, they sold about two Lazeboy suites each month. They received no complaints about them from other purchasers. At the time the parties contracted, Lazeboy furniture was manufactured in the UK. It had a longstanding good reputation. The Defenders ceased selling Lazeboy furniture after its manufacture was transferred from the UK to China, which the Defenders anticipated would lead to its quality diminishing.

[30] Thirty or forty years ago, most settees were manufactured using traditional methods and durable, expensive components. They were of high quality in the sense understood by Mr Greig. Settee manufacture has since changed. Modern methods of manufacture and the use of less durable and expensive components have driven down the retail price of many models. Similar settees to the Lazeboy Georgia range manufactured in the traditional manner currently retail for several thousand pounds more than the Pursuers paid the Defenders. Lower quality comparable settees retail for over a thousand pounds less than they paid. At the date the parties contracted, and presently, retail price is a factor to which weight can generally be attached when assessing the quality of a settee. Mr Pert reasonably considered the Lazeboy Georgia range to be a high quality product in comparison to similarly priced furniture available in the retail market.

[31] By November 2105, one seat on the Pursuer's two seater settee, and two seats on the three seater settee, had visibly lost height and shape and offered little support when sat on because:- webbing below the affected seats was loose; coil spring pockets above the webbing had not been glued to their stretch fabric covering them, which in turn had not been glued sufficiently to overlying foam, causing the affected seats to suffer loss of rigidity and strength; the foam covers were insufficiently resilient and had lost shape; polyester wadding laid over the foam had lost resilience and leather covering the affected seats had stretched and become thin. Separately, leather in areas had become scuffed.

[32] To repair the faults, the affected seat covers and interiors need replaced, the webbing beneath them needs tightened and the areas of scuffed leather need recoated. If carried out, such repairs would return both settees to their original condition when manufactured.

[33] The settees supplied by the Pursuers to the Defenders were not of satisfactory quality. However, the Pursuers are deemed to have accepted them. The settees have not been used since the Pursuers purported to reject them and remain at their home.
Finds in Fact and in Law that although the settees supplied by the Defenders to the Pursuers were not of satisfactory quality, the Pursuers are deemed to have accepted them; appoints parties to be heard on damages and expenses on 21 March 2018 at 9.30 a.m.

Note:-

[34] Proof in this case was heard on 16 and 20 February 2018. Evidence was led from the First Pursuer and Mr Greig and, for the Defenders, from Mr Pert. I have since considered written submissions for both parties.

Credibility and Reliability

[35] I found Mr Combe to be a generally reliable and credible witness. However, I doubted him on two issues; on the balance of probabilities, I do not accept that he told Mr Pert that the settees needed to be either high or firm, or that Mr Pert told him "you'll never need to buy another suite". I considered his evidence on these points was influenced by (a) the passage of time (b) the inflammatory nature of the parties' dispute (c) Mr Greig's poor opinion of the quality of Lazeboy suites and (d) Mr Greig having later provided Mrs Combe with a high, firm type of chair which he believed best suited her needs. In addition, I believed Mr Pert's evidence that the Georgia range was one of the softest in stock, something he specifically recollected as his parents had owned a Georgia suite.

[36] That assessment is corroborated by other evidence. It was not suggested that the Pursuers found the Lazeboy chair they tried in the store or the settees they bought to be

uncomfortable. On the contrary, as Mr Pert said, they obviously liked the range as they bought from it. Mr Combe did not suggest in evidence that the settees were in any way unsuitable for his wife's unfortunate medical condition. The evidence was that the prime reasons for the purchase of the settees was that the chair they tried was comfortable and accessible for Mrs Combe, not that it was firm or high. In addition, as discussed below, because the Pursuers and Mr Pert did not discuss what they understood "high quality" to mean, nor did Mr Greig discuss his view with Mr Pert, no-one truly understood what was in dispute.

[37] In all other respects, Mr Combe gave me no reason to doubt what he said.

[38] I accepted Mr Greig's evidence in full. Though he had difficulty explaining the nuances of furniture manufacture and upholstery in layman's terms and, understandably as he had never been in a court before, he treated cross-examination in the manner a man might hold a crocodile, he was a patently honest witness whose experience and expertise were obvious.

[39] Mr Pert had a propensity to avoid answering straightforward questions in cross examination. For that reason, I initially thought his evidence should be treated very cautiously.

[40] However, several other points need considered. First, Mr Pert arrived late for the proof as he thought it was to be adjourned and his attendance was not required. Consequently, he was unprepared for giving evidence. Second, he was clearly surprised to have to answer questions without being able to refer to relevant paperwork. Third, as not all of the paperwork had been lodged and he was unprepared for giving evidence, what initially appeared to be prevarication on his part was actually frustration that he could not give precise answers.

[41] In addition, in retrospect, some of his views about which I was initially sceptical were in fact justified – for example, as discussed in detail below, he was quite entitled to be baffled by certain aspects of the Pursuers' conduct pre-litigation. Others are discussed below.

[42] For these reasons, Mr Pert was a better witness than I originally thought. I accepted most of what he said.

Observations on the Evidence

[43] Several aspects of the evidence led call for further comment.

[44] Most importantly, it emerged during Mr Combe and Mr Pert's evidence that more correspondence passed between the parties, either directly or through agents, than was lodged in court. This has complicated several issues, in particular whether rejection was intimated and, if so, when and whether the Pursuers are deemed to have accepted the settees. Whatever that correspondence said, I cannot speculate on its terms and have proceeded only on the evidence available.

[45] Though it is irrelevant in light of my conclusions, I accept the Defenders' submissions on the issue of high quality – though parties admit the Pursuers wanted high quality settees, there was no evidence that the witnesses commonly understood what that meant. Mr Pert's and Mr Greig's understandings were very different. Mr Combe gave no evidence of what he understood it to mean. Mr Pert and Mr Greig's reasons for their understandings, though very different, were both reasoned and logical. Their understandings are not inconsistent – "high quality" is not a term of art; it is a subjective phrase in the absence of express agreement of its meaning.

[46] Mr Pert understood it to mean a mid to upper priced, well designed product with expensive features such as leather upholstery and a reclining mechanism. Mr Greig understood it to mean something completely different – a high end product, both in quality of manufacture and price, of a type which was commonly supplied around thirty years ago which was designed to have a longer useful life. Neither view is wrong. Each is a high quality product. In the absence of common understanding of its meaning, both understandings are entitled to have weight attached to them.

[47] It is also necessary to put the dispute in context. On the evidence led, it is common ground that the Pursuers complained about the settees, that Mr Pert visited their home to view them then wished to have an upholsterer give a view on the problems.

[48] Absolutely Upholstery reported to Mr Pert on 18 November 2015 (5/6 of process). Their report clearly stated that the problems with the settees were a consequence of wear and tear and set out recommendations for their repair.

[49] Two days later Mr Combe sent Mr Pert a letter (5/3 of process) which states "the foam in the suite has collapsed" and, under reference to the 1979 Act, "as there was a problem with the goods when I bought them, I request that you provide a full refund." It is that letter the Pursuers found on as intimation of rejection.

[50] In light of the Absolutely Upholstery report he had just received, Mr Pert understandably sent a copy of it with his reply to the Pursuers (5/4 of process) four days later. When the Pursuers read that report, they must have noticed its terms, as their subsequent response sets out a materially different claim.

[51] That response was Mr Combe's letter of 1 December (5/5 of process), the terms of which bear repeating:-

> " …I would like to advise you that your response letter was unsatisfactory.

> Under the Sale of Goods Act 1979 (as amended) goods you supply must be of satisfactory quality, fit for purpose and as described. My rights have been breached because the item you sold me is faulty. I am aware that I am fully entitled to ask for a part-refund, repair or a replacement.
>
> As you have stated that the issues with the sofa are as a result of "fair wear and tear of everyday use", it is my belief that the burden is with you to prove this, given at the time of the original complaint the sofa had only had a maximum of 72 nights usage, which can be proven.
>
> I request that you contact me in writing with an offer of reasonable settlement in this matter within 2 weeks as (sic) reasonable length of time to respond, or we may pursue the matter further."

[52] It is striking that in their letter the Pursuers no longer seek a full refund; instead, under reference to statutory rights to "part-refund, repair or replacement" there is simply a request for "reasonable settlement". On the evidence led, the only reason for that change was the Absolutely report.

[53] Mr Pert replied by letter dated 3 December (number 5/7 of process). Though its terms are perhaps less clear than one would like, it clearly implies that the Defenders were unwilling to settle the dispute because of the Absolutely report.

[54] Consequently, the ball remained in the Pursuers' court to, as they put it in their letter of 1 December, "pursue the matter further". However, again on the evidence led, they might not have needed to as they were separately pursuing a refund from their credit card company and were about to instruct (or had already instructed) Mr Grieg as part of that process. If that claim succeeded, it would be unnecessary for them to continue to correspond with the Defenders.

[55] Mr Greig reported to the Pursuers three days later (number 5/8 of process), leading to the Pursuers hand delivering a copy to the Defenders. The implication of them doing so is that they maintained their claim against the Defenders.

[56] There was no evidence that Mr Pert had any idea Mr Greig's report was even in contemplation. As its conclusions were contrary to Absolutely's, and the Pursuers' claims had changed, it is hardly surprising that when he replied to the Pursuers, he sought (admittedly in a hamfisted way) to refer the dispute to the Furniture Ombudsman (number 5/10 of process). Once again, the ball lay in the Pursuers' court.

[57] Mr Combe's evidence was that Mr Pert's proposal was unacceptable. However, there was no suggestion thereafter that they told Mr Pert that or even that correspondence with the Defenders continued. Instead, for about nine months, the evidence shows that the Pursuers decided to progress their claim against their credit card company by instructing Mr Lorimer, as the company had requested them to do. There was no further communication between the parties until August 2016, when Mr Pert became aware of Mr Lorimer's report in pre-litigation correspondence with the Pursuers' agent.

Pursuers' Submissions

[58] For the Pursuers, it was submitted that the case was reasonably straightforward. The evidence of defects in the settees was essentially undisputed. Reference was made to the collapsed cushions, stretched leather cushion covers and potential further problems with, for example, the reclining mechanism.

[59] In terms of section 14, the settees did not correspond with the Defenders' admitted request for a high quality product. After around six months' light use, taking account of the Pursuers' frequent absences in that time, they displayed defects which Mr Greig regarded as major. They required significant repair. They failed the Pursuers' requirements for high, firm seating.

[60] Having regard to section 15B, any breach in a consumer contract such as this entitled the Pursuers to the remedy of rejection. That had occurred at an appropriate stage. There was no challenge to the timing of the rejection, nor any suggestion in the Defences that it had come too late.

[61] Finally, the onus of proving that the Pursuers had not relied on the Defenders' expertise lay on them – *Central Regional Council* v *Uponor* (1966) SLT 645. The Defenders had failed to discharge that onus.

Defenders' Submissions

[62] The Defenders now accepted the settees were not of satisfactory quality. However, on the evidence, it was submitted that the faults were not material and that the Pursuers were not entitled to reject the settees. The right to reject only arose by virtue of section 15(1)(b) and was only available after the goods had been accepted in accordance with section 35. The onus for proving material breach lay with the Pursuers.

[63] While it was also accepted the parties contracted that the settees were to be of high quality, section 14(2)(b) provided only that the goods required to be fit "for (the) purpose for which the(y) are commonly supplied". The Pursuers had failed to prove their understanding of high quality, an ambiguous term which ought to be construed *contra proferentem*.

[64] Further, it was submitted, the admitted breach did not go to the root of the contract. The defects identified in the Ombudsman's report were minor. Mr Greig accepted that if the Ombudsman's recommendations been implemented, the sofas would have been brought back to "showroom specification". It was the Pursuers who had told to Mr Lorimer that they wished "firmer interiors fitted". Accordingly the Pursuers were not entitled to reject.

[65] Instead, at best, the Pursuers were entitled only to damages. The Defender had offered to repair or strengthen the webbing and carry out cosmetic repairs to the scratching. The measure of damages awarded should reflect that.

Relevant Law

[66] The Sale of Goods Act 1979, as amended by the Sale and Supply of Goods Act 1994, so far as material to this case, provided at the date the parties contracted:-

> *14.*— Implied terms about quality or fitness.
>
> …(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
>
> (2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—
>
> > (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
> > (b) appearance and finish,
> > (c) freedom from minor defects,
> > (d) safety, and
> > (e) durability....
>
> (3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known
>
> > (a) to the seller…
> > any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose…
>
> 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.

(2) Where a contract of sale is a consumer contract, then, for the purposes of subsection (1)(b) above, breach by the seller of any term (express or implied)

(a) as to the quality of the goods or their fitness for a purpose…
(b) if the goods are, or are to be, sold by description, that the goods will correspond with the description…

shall be deemed to be a material breach.

35.— Acceptance.

(1) The buyer is deemed to have accepted the goods…

(b) 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

(2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose—

(a) of ascertaining whether they are in conformity with the contract...

(4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

(5) The questions that are material in determining for the purposes of subsection (4) above whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2) above.

(6) The buyer is not by virtue of this section deemed to have accepted the goods merely because—

(a) he asks for, or agrees to, their repair by or under an arrangement with the seller…

59. Reasonable time a question of fact.

Where a reference is made in this Act to a reasonable time the question what is a reasonable time is a question of fact.

Discussion

[67] The first issue is whether or not the settees were of satisfactory quality (*section 14(2)*). The Defenders now concede that they were not. In my opinion, that concession is properly made. No matter what changes have occurred in furniture manufacture in the last few decades, no new settee should exhibit problems of the sort described by Mr Greig and Mr Lorimer six months after delivery. The concession means it is unnecessary to consider other possible issues (section 14(2A), (2)(b) and (3)).

[68] As this was a consumer contract (1979 Act section 61(5) and section 25(1) Unfair Contract Terms Act 1977), the next issue is whether the Pursuers were entitled, in principle, to reject the goods (1979 Act section 15B(1)(b)). On that point, I accept the Pursuers' submissions and reject the Defenders' interpretation of the relevant provisions, which flies in the face of them. As consumers, the Pursuers retained a right to reject the settees.

[69] However, the right to reject is not unfettered. It is necessary to consider whether the Pursuers rejected the settees within a reasonable time (sections 35(4)-(5) and 59) and whether the Pursuers accepted the settees, or whether they are deemed to have done so. Either form of acceptance is fatal to any attempt to reject (section 35).

[70] On the issue of whether what the Pursuers did was intimated within a reasonable time, it is also necessary to take account of the apparently latent nature of the defects. In *Douglas* v *Glenvarigill Co Ltd* (2010) SLT 634 Lord Drummond Young fully reviewed and analysed the law in this area. I gratefully adopt his analysis and conclusions. In his judgement, he *inter alia* stated:-

> [22] It is not in dispute that, once a breach of contract is established, the pursuer is entitled to damages. What is in dispute is whether the pursuer is also entitled to reject ... The law on this matter is set out primarily in s 15B of the Sale of Goods Act 1979, a provision that applies to Scotland only…The right to reject is lost, however, if the buyer… is deemed to have accepted the goods sold…

[27] A more difficult question is when the time for rejection begins to run in the case of latent defects. For this purpose, a latent defect is one that cannot be discovered by reasonable inspection or use of the goods at or immediately following delivery…

[33] ...I was referred to *J & H Ritchie Ltd* v *Lloyd Ltd*, a case which emphasises the importance of having sufficient information to make an informed choice between acceptance and rejection…Lord Hope was of the opinion that a term should be implied into the contract of sale to the effect that the sellers would tell the buyers what was wrong ... In reaching that conclusion, Lord Hope made the following remarks (at p 95 para 16):

> 'The nature of the defect was not immediately obvious and it was not known what, if anything, could be done to correct it. But the underlying principles are the same. The effect of s 35(2)(a)… is that, as the buyer is not deemed to have accepted the goods, he retains the right to reject them. That right will, of course, be lost if, at any time, he decides to accept the goods or is deemed to have accepted them. But it is a right of election which the buyer cannot be expected to exercise until he has the information that he needs to make an informed choice. The seller, for his part, cannot refuse to give him the information that he needs to exercise it.'…

[34] On the basis of the wording of s 35 and the foregoing cases, I am of the opinion that, in the case of a latent defect, time begins to run for the purposes of s 35(4) as soon as the goods are delivered, but that some level of delay in rejection may be reasonable if the defect is not immediately apparent. In Mechans Ltd v Highland Marine Charters Ltd, supra, Lord Justice Clerk Grant stated that "in the case of goods which are not expressly accepted and which may be subject to latent defects the Courts will be generous in fixing the 'reasonable time' which must elapse before acceptance is deemed or implied" (p 63 (p 35))… Ultimately, however, the remedy of rejection becomes unavailable through "the lapse of a reasonable time", if the buyer retains the goods without intimating rejection. In my opinion that "reasonable" period cannot begin only when the defect manifests itself, for three reasons. First, the wording of s 35(4), "after the lapse of a reasonable time", seems clearly to relate to a period running from the date of delivery. That is the obvious meaning in the context in which the subsection occurs; had it been intended that the period should run from the appearance of a defect that would, I think, have called for express wording. Secondly, rejection is a relatively drastic remedy in that it involves return of the goods and the whole of the price. At a certain stage commercial closure is required to permit the seller in particular, but also the buyer to some extent, to arrange his affairs on the basis that the goods have been effectively sold. Thirdly, damages remains as an alternative remedy (as may the remedies in ss48A and 48C); thus the buyer is not left without any recourse against the seller.

[71] Clearly the defects in the Pursuers' settees could not have been discovered by reasonable inspection or use of them at, or immediately after, delivery. The defects were

latent as defined by Lord Drummond Young. As there was no evidence (a signed delivery note to that effect, for example) the Pursuers expressly accepted the goods on delivery, the remaining issues are whether rejection was intimated and if so, whether intimation took place within a reasonable time.

[72] In relation to rejection, the Pursuers found on their letter of 20 November 2015. Though Mr Combe said that letter was written after taking advice from the Citizen's Advice Bureau and while it does refer to the 1979 Act, it does not mention rejection. Neither of the necessary counterparts to rejection – an offer to return the goods or an invitation to the Defenders to uplift them – is mentioned. Instead, the Pursuers simply seek a "refund". The implication of that letter is that, having taken advice, the Pursuers sought to retain the settees and to recover damages. For these reasons, it would be possible, on the evidence led, to conclude that rejection was never intimated.

[73] However, as no submissions were made on this point and as I have concluded below that the Pursuers are deemed to have accepted the goods, it is unnecessary for me to reach a view on it. Had it been necessary to do so, I would have had no difficulty in concluding that rejection was intimated within a reasonable time – the evidence was that it took place within at most three weeks of the defects becoming patent.

[74] Assuming meantime that rejection was intimated within a reasonable time, the final hurdle facing the Pursuers is whether they are deemed to have accepted the settees. I have already summarised the relevant evidence in relation to them in paragraphs 49 - 57 above.

[75] The starting point is the Pursuers' letter of 1 December 2015, written immediately after they first saw the Absolutely Upholstery report. That letter does not even hint at rejection. It does not maintain the Pursuers' earlier demand for a full refund. Instead, it

contains demands for lesser remedies, all of which would involve the Pursuers retaining, not rejecting, the settees.

[76] It must also be noted that by the time that letter was sent, it is quite possible the Pursuers had, by instructing Mr Greig, decided to progress their claim against the credit card company at the expense of their claim against the Defenders. Though they delivered Mr Greig's report to Mr Pert a few days later, they had a clear opportunity to clarify their position at that stage or, more particularly, when Mr Pert replied suggesting a reference to the Furniture Ombudsman. However, they did not do so.

[77] Instead, no evidence was led of any further communication between the parties. The Pursuers had all relevant information before them to be able to take their claim against the Defenders to court. The Defenders had withheld nothing from them. They were in a position to make a fully informed choice about which option they wished to take. They could seek rejection or claim damages from the Defenders, depending on whether they wished to retain the settees. Alternatively, they could claim under the Lazeboy guarantee and/or maintain their claim to the credit card company. They could pursue all, or a number of combinations, of those remedies.

[78] The only evidence led was of the Pursuers choosing to progress their claim against the credit card company. There was no suggestion they claimed against the guarantee or that they restated any claim for rejection. They did not tell the Defenders to come and collect the settees. On the contrary, they ceased communicating with the Defenders entirely.

[79] Instead, the Pursuers obtained a second independent opinion from Mr Lorimer, at the credit company's request. They did not disclose that opinion to the Defenders. Both actions strongly point to the Pursuers having chosen to pursue their claim to the credit card company at the expense of any claim against the Defenders. That claim, so far as the

Defenders were concerned, went cold for six or seven months. Consequently, the Defenders were quite entitled to consider they had achieved "commercial closure", to borrow Lord Drummond Young's phrase. It is at that stage, in my opinion, the Pursuers must be deemed to have accepted the settees.

Conclusions

[80] For these reasons, the Pursuers' case for rejection cannot succeed. However, in submissions the Defenders concede liability for damages.

[81] I was not addressed on that issue and have set the case down to call to discuss it further and, as requested, on expenses.