
Argosy Marine Co. (*Plaintiff*), *v.* **SS "Jeannot D" et al** (*Defendants*)

Noël J. *in Admiralty*—Quebec, November 25, 26, 1969; April 2, 1970.

Admiralty—Radar and radiotelephone—Ship—Necessaries—Maritime lien—Action in rem—Jurisdiction of the Court of Admiralty—Cancellation—Contract of sale—Redhibitory action—Reasonable diligence.

The plaintiff sold the defendants a radar and a radiotelephone which were installed on the *SS Jeannot D.* Sued more than two years later for recovery of the balance of the sale price which, according to the plaintiff, represents the value of *necessaries* supplied to the ship and entails a lien on the latter, the defendants raised two defences: (a) the court's lack of jurisdiction, (b) cancellation of the contract of sale because of defects in the radar.

As a result of proof that the ship's electrical system was defective and certain repairs to the equipment were poorly done, the court allowed the action and dismissed the defence, including a counter-claim for certain alleged damages.

Held: In the modern day and age, the purchase of a radar for a ship is highly necessary and any prudent man would install one on his ship. The master who in this instance is also the owner knew when making that purchase that it was necessary for the proper navigation of the ship. The Court can therefore hear the action *in rem* brought against the ship. *The Riga* (1872) L.R. 516, at p. 522, referred to.

It is incumbent on the purchaser to prove the anteriority of the defect.

The defendants' claim is tardy because of the fact that they waited until the institution of the action before bringing the redhibitory action contained in their defence. Quebec law, like English law, stipulates that this action be brought with reasonable diligence, according to the nature of the defect and the usage of the place where the sale was made. The defendants in this case delayed longer than was reasonable in exercising their right *Houle v. Forget* [1953] R.L. 229, referred to.

ACTION in rem.

Raynold Langlois, for plaintiff.

Fernand Guérette, for defendants.

NOËL J.—The plaintiff, a firm specializing in the sale of electronic equipment, particularly radar and radiotelephone equipment, sold the defendants a radar and a radiotelephone which were installed on the ship *Jeannot D* in May 1966. On that date, the defendants handed over to the plaintiff a series of postdated cheques in the amount of $150 each which were cashed as they fell due until August 15, 1967. Since that date, the defendants have made no payments on the balance of the sale price of the radar which now amounts to $3,150 and which the plaintiff is claiming with interest at the bank rate of 7 per cent per annum from August 15, 1967. The plaintiff contends that the sum of $3,150 so claimed represents the value of necessaries supplied to the ship of the defendants, and consequently entails a lien on the ship.

The defendants admit that they purchased the radar but contend that it never functioned properly. Indeed, the owner of the ship, Captain Fernand Dugas, claims that it broke down the day after it was installed on board the ship by the plaintiff's representatives, during a trip to Sept-Îles, on the north shore of the St. Lawrence. During this trip, because of a heavy fog, the ship had to use the radar, but according to the defendants, it suddenly broke down after some fifteen minutes in operation. Captain Dugas stated that at Sept-Îles he had to call in a technician who made repairs which were subsequently paid for by the plaintiff. The ship put to sea again, heading for Wolfe Bay, and the radar allegedly broke down after a few minutes in operation. It then headed for Cornerbrook, Newfoundland, where a radar expert called in by Captain Dugas allegedly informed him that the instrument was definitely unusable, after having made a few repairs, however, which were paid for by Captain Dugas personally. The defendants allege that afterwards, they requested the plaintiff to meet its obligations, but without success, and consequently they had to stop making payments for the radar. Finally, Captain Dugas states that to his great surprise, he had learned at Cornerbook that he had acquired a 1964 model Bendix radar whereas the plaintiff's salesmen had given him to understand, when he purchased it, that it was a 1966 transistor model.

The defendants argue that, because the plaintiff did not discharge its obligations, they are entitled to seek cancellation of the contract that they concluded with the plaintiff for the purchase of the radar, and offer to put the radar at the seller's disposal.

By counterclaim, they are claiming from the plaintiff the sum of $4,500 which they contend they are entitled to claim for loss of income as a result of the defective radar, as well as the sum of $239.89 paid by Captain Dugas for repairs to the radar at Cornerbrook.

In their plea the defendants conclude in favour of the dismissal of the plaintiff's action, ask that this Court declare null and void the attachment before judgment made in this instance, grant replevin, declare and pronounce null, void and cancelled the contract of sale concluded between the parties for the said radar, restore the parties to the same state, condemn the plaintiff to pay to the defendants the sum of $4,739.89 with interest since the serving of the writ and finally, reserve all its recourses for the defendants.

Judgment in this action had been delivered by default by the Honourable Mr. Justice André Demers on September 26, 1968, condemning the defendants to pay the plaintiff the sum of $3,150 with interest at the rate of 5 per cent from August 15, 1967.

Upon a motion by the defendants, they were permitted, on November 22, 1968, to be released from the non-pleading in the action, subject however to adjudication on the question of whether the Court has competence to hear this case and also subject to payment by the defendants of the sum of $100 to cover untaxable costs. On December 3, 1968, this Court referred decision on the jurisdiction question to the judge in the proceedings.

Before examining the facts which gave rise to these proceedings, I must decide whether the plaintiff could bring the action *in rem* that it took against the ship for the price of the radar that it sold to the defendants. It could do so only if the radar can be considered as necessary provisions or "necessaries".

It seems that, as a general rule, certain very early judgments held that a captain could make his owner liable for repairs and necessaries supplied to a ship only if they were absolutely necessary. It appears to me, however, that it was later decided that such necessaries should not have been thus limited, and as early as 1872 in *The Riga*[1] Sir Robert Phillimore broadened this rule by quoting Lord Tenterden in *Webster & Seekamp*[2] who said:

> . . . I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is *absolutely* necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term 'necessary', as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable.

We therefore see that "necessaries" may include anything that a prudent owner would have ordered for his ship if he had been present at the time of the purchase.

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[1] (1872) L.R. (Admiralty and Ecclesiastical Courts) 516 at 522.
[2] 4 B & Ald. 352.

There can be no doubt that in our day and age the purchase of radar for a ship is a major necessity and that any prudent man would install such equipment on his ship. Since the master here is also the owner of the ship, it appears undeniable to me that he saw the radar he bought as equipment necessary for the proper navigation of his ship. Consequently, I must conclude that this Court is competent to hear this claim.

On May 14 and 15, 1966, at Trois-Pistoles, P.Q., the plaintiff through its president Maurice Légaré, and an electronic engineer, Delmos Alves, installed an MR4 radar on the defendant's ship. During the installation, Légaré states that he tried to use the power supply system of the *Jeannot D* but was unsuccessful because the current was not steady enough, and he says that he had to install an entirely new power line from the transformer to the wheelhouse. Since there was a 32-volt system on board the ship, he had to install this transformer to change the 32 volt current to 110 volts. The radar worked after it was installed, but Légaré states that he realized that the ship's 32-volt interior system was not steady. It was at that moment that he advised Captain Dugas, he says, to have it repaired because he did not have what he needed to do it, and besides, it was neither his job nor his responsibility since it involved the ship's internal system. Indeed, it seems that the system had not been repaired one year later since a Mr. Williams, who repaired the radar on May 30, 1967, informed Légaré by letter (exhibit P-6) that:

> The main cause of the trouble was in the ship line supply volts being low and the equipment is outside the guarantee period.

Williams does say that was the trouble and he speaks about "cut-out" or circuit-breakers which are, according to Légaré, batteries which supply the ship's system as well as the transformer. The radar equipment installed on the defendant's ship was repaired for the first time on May 21, 1966—a few days after it was installed by North Shore Electronic—and since the sale of this radar carried a one-year warranty, the plaintiff paid the North Shore Electronic invoice of May 29, 1966, in the amount of $281.25. Indeed, it was on receipt of this invoice dated May 29, 1966 that Légaré, the president of the plaintiff, was informed for the first time that the radar he had installed on the ship was not working. During the winter of 1967, Légaré met Captain Dugas and asked him for payment of an instalment on the sale price of the radar and the latter agreed to give it to him, informing him at that time, however, that the radar was still not working satisfactorily. Légaré then said that if Captain Dugas would notify him in the springtime when his ship was in the water, he would come down and examine it with his engineer. He says that he still had his doubts at that time about the condition of the ship's power system. He was informed only on these two occasions of the malfunctioning of the radar, although he admits that he subsequently found out that Captain Dugas had tried several times to communicate with him by telephone but without success since he was out of his office. He says that since Dugas never left his name, he could not call him back. In the spring of 1967—in May—Légaré again referred

Dugas to Williams and it was on this occasion that he received the letter from Williams, dated May 30, 1967, and that he noticed that the ship's power system had not been repaired. It was also on May 30, 1967 that Légaré received a letter from Dugas informing him that he was cancelling the balance of the cheques he had given in payment of the radar. Légaré states that on October 10, 1967, accompanied by engineer Emile Amir of "Aviation Electric", he went on board the *Jeannot D* where Captain Dugas had given him an appointment, but that the latter did not appear and the wheelhouse where the radar was located was locked. They waited for Captain Dugas in vain for three hours. During that time, however, by going up on the roof of the wheelhouse, they were able to examine the radar antenna and observed that it was sealed with an insulating material, a type of compound, which had been added after the radar was installed. Furthermore, when Amir went to remove the screws from the cover of the antenna motor housing, he succeeded in removing a couple of them with his fingers. When the cover of the housing was opened, they noticed, Légaré says, that there was a great deal of corrosion inside. According to Légaré, it was at this moment that a ship passed close to the *Jeannot D* which began to pitch so alarmingly that he thought it advisable, with his engineer, to jump onto the wharf.

On the other hand, Captain Dugas and his witnesses state that the plaintiff's radar was never satisfactory. The ship allegedly left for Les Escoumins the day after the radar was installed. It was on leaving Les Escoumins, Dugas says, headed towards Sept-Îles, when the ship encountered fog and rain, that the radar was put into operation. According to Dugas, it worked scarcely twenty minutes, three quarters of an hour. He says that the image became "snowy" and "they lost it completely". At Sept-Îles he asked a William Brahms to examine the radar and the burned out magnetron was replaced. The radar then worked for the ranges of eight miles and two and a half miles but stopped working on the sixteen-mile range. According to Dugas, "all we could see was snow, we were unable to make out or read a thing". The ship then headed for Wolfes Bay, Newfoundland. He said that the fog settled in once they were past Kégoska and he then put the radar in operation. He says that it worked for about twenty minutes and failed again. As soon as the ship rolled, he says, the radar failed. The ship then had to lie at anchor at Beacon Island for two days. The ship started up again but as soon as it began to roll, the radar failed. The image, according to Dugas, became white and snowy. He then went into La Tabatière where he asked one of Louis T. Blais's technicians to repair his radar; however, the man was not able to repair it. It was not until August 1967, he says, that he was next able to have his radar examined by a Mr. Beaudoin, an electronics teacher at Blanc Sabon. He then brought in a technician from Cornerbrook, a Mr. Ledrew, who suggested that they cross over to Ste-Barbe, Newfoundland. Ledrew is said to have worked a whole day without finding the defect in the radar. Dugas then brought in an English technician whose name he does not recall. He says that all these repairs cost him the

sum of $239.89. After the radar was repaired at Cornerbrook, the instrument worked well only over the 8-mile and 2½-mile ranges. The ship then headed for Pointe d'Amours and since there was fog, the radar was put in operation, but once again it failed as soon as the ship pitched. Dugas contends that he then tried to have it repaired at Rimouski but could find no one to do it.

It is clear from what the witnesses for both the plaintiff and the defence say that the radar did not work properly right from the time it was installed, and even afterwards, despite the repairs that were done to put it in operating order. Indeed, the only question is to ascertain why it did not work properly.

It seems that there were several reasons why the radar malfunctioned. The evidence discloses that the radar installed on the ship was in a good operating condition when it was installed since it had been examined and checked by Meyer Amir, senior electronics technician at Aviation Electric, when it left the plant, and according to this witness it met all the required standards. Furthermore, according to Légaré, it worked well when it was installed. However, at that time there were certain difficulties caused by the poor condition of the ship's power system which Légaré brought to the attention of the captain, telling him that this was the ship's problem and that it was none of his business. It would indeed seem from the evidence that this system had not been corrected even in 1967 since, as we have seen, Williams, in his letter of May 30, 1967 (exhibit P-6), states that the main cause of the trouble lay precisely in the fact that the voltage provided by the ship's power system was low. However, there was something else which may have affected the functioning of the radar and this is the water which may have, and must have, seeped into the antenna motor housing. Beaudoin, one of the witnesses, describes to us what he noticed when, in the summer of 1967, he opened what he calls the cut-out. He says that enough water ran out to cause a short-circuit. He also noticed that the rubber which served as insulation on the cover of the antenna motor housing was not centred and that water had seeped in since there was corrosion in the housing. He deduced therefrom that the water that got into the housing drained through the cut-out. There were sealing joints and they were well positioned in May 1966 since Williams did not find any water when he examined the equipment on that date. On the other hand, the rubber was out of position on August 9, 1967, one year later, and the only possible conclusion is that in the meantime, the rubber had been handled by someone and it cannot be an employee of the plaintiff. The evidence further discloses that the sealing joints replaced by a technician in August 1967 were no longer there when the housing and antenna were examined two months later. Consequently, this equipment was mishandled and damaged to the point where water flowed freely in it, and, if we go by technician Amir's testimony, may even have reached the radar equipment itself and prevented its functioning.

Captain Dugas, as we have seen, complained that the image always disappeared when the ship pitched, and that it became snowy. Since this ship had a strong tendency to pitch excessively, if we go by Légaré's testimony that at Lanoraie in 1967 he thought it best to jump onto the wharf after a ship passed, it would not be too surprising that the equipment did not work well in heavy seas. Amir indeed explains that the magnetic pulses which come from the antenna are beamed and that as far as the radar equipment installed on the ship is concerned, its angle of incidence was only 30 degrees. According to this witness, if there is a great deal of pitching, the beam may often strike where there is no target since at 30° it is narrow. If it were 60°, as it is for other instruments, it would be less likely to disappear when the ship pitches. The same thing happens, he says, when the ship pitches sideways since, when it rolls back to the other side, the image does not come back.

It was up to the defendant to establish and prove the anteriority of the defect about which he complains and it does not appear to me that he succeeded in doing so.[3] On the contrary, the evidence reveals that it was a new, duly inspected radar which was installed in the defendants' ship, and whose functioning was seriously affected by the defective power system of the defendants' ship. The evidence also discloses, as we have seen, that the cover on the antenna motor housing was handled since the rubber around the cover had been poorly positioned and the sealing joints had been removed. The water which seeped into the housing because of that opening is not, in my opinion, unrelated to at least a good part of the equipment's problems. That, in my view, is sufficient reason for allowing the action of the plaintiff and for dismissing the counterclaim of the defendants. However, there is something else which, to my mind, would debar the defendant from success here and that is the belatedness of their proceeding since they waited until the present action was instituted before bringing the redhibitory action contained in their defence, to wit, two years and six months. Article 1530 of the Civil Code indeed states that the redhibitory action, resulting from the obligation of warranty against latent defects, must be brought with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made. It does not appear to me under the circumstances of the present action that the defendants exercised their recourse here with reasonable diligence, when we consider the fact that Captain Dugas complained about its functioning within a few days after it was installed. It is true that if there were a defect in the radar and if Captain Dugas had reason to complain, it could be discovered only by making use of the equipment, but in the present case it appears that the defendant was in a position to exercise his redhibitory

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[3] Dalloz, *Répertoire pratique* (1926) Verbes, *Vices rédhibitoires*, n. 149, p. 795:
... it is, as we have seen *supra* n. 105 *et seq.*, incumbent on the buyer to prove the anteriority of the defect, except in the case where the action was brought in the delay fixed by law or by usage, the anteriority is presumed.

recourse and put the equipment at the seller's disposal within the few months after it was installed, but he did nothing. It would indeed be unfair to the plaintiff, at this stage, to permit the defendants to return the radar in its present condition, as Lord Ellenborough states, in a similar situation, in *Hopkins v. Appleby*:[4]

> When an objection is made to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before the commodity has been so changed as to render it impossible to ascertain, by proper tests, whether it is of the quality contracted for... It was incumbent on the defendants to give the seller an opportunity of establishing his case by the opinion and judgment of intelligent men upon the subject, and not to throw a veil of obscurity over it, and debar the party from the fair means of ascertaining the quality. By giving notice in an early stage, the plaintiffs would have been enabled to send a person of competent skill to examine the cellar in which the commodity was deposited, and to have formed an opinion to what the ultimate failure in the result was to be attributed; this must have depended both on the skill of the manufacturer and the materials which he used. The party who extinguishes the light, and precludes the other party from the means of ascertaining the truth, ought to bear the loss.

Quebec law does not seem to differ, moreover, from English law. In *Houle v. Forget*,[5] Mr. Justice A. S. Smith of the Superior Court stated that the buyer of an electric refrigerator who, after noticing that it had latent defects, continues to use it for more than three years and who has it repaired and certain parts replaced, must be considered as having accepted it and having renounced the right he had to ask for cancellation of the contract of sale. According to Mr. Justice Smith, a ten-month delay in bringing action in cancellation of a contract after the latent defect had been noted is not reasonable.

I must also conclude here that the defendants delayed longer than was reasonable in exercising their rights. It is for this reason, together with the fact that the defendants are responsible for the malfunctioning of the radar because of their ship's defective power system and the fact that the cover over the housing of the antenna had been removed and poorly replaced, that I have to allow the action of the plaintiff and dismiss the counterclaim of the defendants, the whole, however, with costs of one action only.

[4] (1816) 1 Starkie 479.
[5] [1953] R.L. 229.