



CAVEAT EMPTOR OR CAVEAT VENDITOR ?

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The Supreme Court of Canada rendered a landmark decision on November 22, 2007,¹ which affects all manufacturers and professional vendors who sell products in Quebec, as well as contractors who furnish goods under a construction contract.

Domtar purchased from Combustion Engineering («C.E.») a chemical recovery boiler for a new pulp and paper plant. 18 months after startup, Domtar had to interrupt its operations as a result of leaks and cracks in the tubes of the superheater of the boiler. Domtar performed temporary repairs and later replaced the equipment.

Domtar instituted an action in damages against C.E. alleging that the superheater was defective. C.E. argued that the cracking was caused by Domtar's operations and it invoked the contractual clauses which limited its warranty to 1 year and which excluded certain damages, such as the profit Domtar lost during the time required to perform the repairs.

Domtar's claim was granted in the Superior Court, the Court of Appeal and

the Supreme Court. According to the Supreme Court, a clause which limits or excludes the liability of a seller for latent defects cannot be invoked against a purchaser if at the time of the sale the seller was aware of the defects. Manufacturers and other professional vendors are legally presumed to be aware of the latent defects affecting the products they sell. A vendor who is presumed to know the existence of a defect is in the same position as the vendor who has actual knowledge of that defect.

The presumption of knowledge by a professional vendor can only be rebutted if he succeeds in proving that the defect could not have been discovered by the most diligent and competent professional vendor in the same circumstances.

The manufacturer can only rebut the presumption by establishing that the defect affecting the product could not be discovered given the state of scientific and technical knowledge at the time the product was put on the market.

The presumption of knowledge of the defect by a professional vendor applies

irrespective of the level of sophistication of the purchaser. The knowledge and sophistication of the purchaser is relevant solely for the determination of whether the defect is latent or apparent.

It must be noted that the presumption of knowledge of latent defects only applies to manufacturers and professional vendors, that is those who sell works of the trade that is their profession.

The incorporation of limitation or exclusion of liability clauses in contracts of sale is a common practice. Purchasers, manufacturers and professional vendors should be aware that in light of this Supreme Court decision, such clauses will only rarely be effective to exclude or limit the liability of a manufacturer or a professional vendor for damages suffered by a purchaser due to a latent defect.

Since a contractor who furnishes goods under a construction contract is bound by the same warranties as the seller in respect of the products he supplies, this decision also applies to the obligations of contractors towards their clients in respect of those products.



¹ *ABB Inc. c. Domtar Inc.*, 2007 SCC 50.