

45, 1934

In the Privy Council

No. 96 of 1933.

On Appeal from The Supreme Court of Ontario, Court of Appeal

BETWEEN

HARRY OAKES,

(Defendant) Appellant,

AND

CHARLES S. FRANKLAND,

(Plaintiff) Respondent.

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CASE FOR THE RESPONDENT

1. This is an Appeal from the Judgment of the Supreme Court of Ontario, Court of Appeal, dated the 9th day of January, 1933, affirming (with a variation) the Judgment of the Trial Judge, Mr. Justice Kelly, dated the 8th day of August, 1932, in favour of the Respondent. Record

2. The action was brought by the Respondent for the sum of \$15,000.00 and for damages in respect of the settlement of a prior action between the Respondent and the Appellant; and in the alternative, that the settlement be set aside as being obtained by fraudulent and wilful misrepresentation on behalf of the Appellant, and that the prior action be continued by the Respondent, as Plaintiff, against the Appellant, as Defendant. 20

3. The Respondent and the Appellant had been jointly engaged in numerous business ventures and transactions, and on the 9th day of November, 1931, an action was pending in the Supreme Court of Ontario, brought by the Respondent, as Plaintiff, against the Appellant, as Defendant, for an accounting between them, as partners, in which the Respondent claimed damages of upwards of \$150,000.00

Record

4. The Appellant was surety for the Respondent with The Royal Bank of Canada in the sum of \$15,000.00. The Respondent at this time owed the said Bank a large amount of money, and the Bank held, under Mortgage and as Trustee, certain parcels of land of the Respondent as collateral security.

5. On the morning of the said 9th day of November, 1931, the Respondent and the Appellant, through their Solicitors, agreed to settle the said action on payment by the Appellant to the Respondent of \$25,000.00—\$10,000.00 to be paid direct in cash to the Respondent and the remaining \$15,000.00 to be paid by Appellant to The Royal Bank of Canada for the account of the Respondent, to free the Appellant from his liability as surety to the said Bank. 10

6. Without the Respondent's knowledge, Appellant's Solicitor had for some time prior to the settlement of the action been in negotiation with the Manager of the branch office of the Royal Bank, where Respondent's account was carried, regarding the purchase from the Bank of the Respondent's lands held by it as collateral security. A price of \$35,000.00 had been discussed. On November 9th, 1931, the day of the settlement, Appellant's Solicitor obtained from the Bank a thirty day option on Respondent's properties at this figure. For some reason not disclosed the Appellant's Solicitor dated the option November 11th, although the true date was the 9th. The Solicitor also requested the Bank not to tell Respondent about the option. The option was taken in the name of Welland Securities, Limited, a Company used by Appellant to handle his real estate. 20

7. Subsequently, on the same day of November, without disclosing to the Respondent the transaction between the Appellant and The Royal Bank of Canada, the Appellant and the Respondent executed a mutual Release in consideration of payment to the Respondent of \$10,000.00, and the payment of the \$15,000.00 to The Royal Bank of Canada as aforesaid.

8. On November 19th the option given by the Bank was accepted. As to one of the properties, 7 acres in Stamford, direction was given that this should be conveyed to Appellant, and \$15,000.00 of the total price of \$35,000.00 was allocated to this property. 30

9. The agreement between the Appellant and The Royal Bank of Canada for the purchase by the Appellant of the Respondent's properties was subsequently carried out, whereby the Appellant paid to the said Bank the sum of \$35,000.00 in full for the purchase price of the lands held by the said Bank as collateral security for the Respondent's indebtedness, and the Respondent's said lands were conveyed by the said Bank to the Appellant, one parcel being conveyed direct to the Appellant for the specific sum of \$15,000.00, and the other two parcels being conveyed to Welland Securities, Limited, for the specific sum of \$20,000.00, as shown by Land Transfer Tax Affidavits annexed to said Conveyances, sworn to by the Solicitor for the Appellant, pursuant to the Land Transfer Tax Act. 40

10. The Appellant never paid the Bank the sum of \$15,000.00 on Respondent's account, nor in any other manner, except as purchase money of the property bought by him from the Bank. Record

11. On the Respondent learning of the transaction between the Appellant and the Bank he objected to it strenuously, but in spite of his objections the transaction was carried out between the Appellant and the Bank on or about the 31st day of December, 1931. The Respondent thereupon wrote the Appellant on the 14th day of January, 1932, as per his letter of that date, to which letter the Appellant did not reply, and on the 4th day of February, 1932, the Respondent instituted the present action for damages and the recovery of the sum of \$15,000.00 with interest and costs, or in the alternative to set aside the said settlement of the prior action. Exhibit 13(d),
P. 95

12. The Trial Judge found as a fact that the Appellant had not paid to The Royal Bank of Canada, for the use of the Respondent, the said sum of \$15,000.00, and that the Respondent was entitled to recover this sum from the Appellant, together with interest. The Trial Judge further found that the Appellant's conduct had been fraudulent, calculated to and did deprive the Respondent of the right to redeem the lands held by The Royal Bank of Canada as collateral security, and referred it to the Local Master at Welland to determine the damages suffered by the Respondent as a result of the Appellant's deceit. The Appellant appealed to the Court of Appeal, and by unanimous Judgment of the five members of said Court of Appeal the Appellant's Appeal was dismissed with costs, the Judgment at Trial being varied by striking out the reference for further damages. P. 44
P. 46, L. 16
P. 47
PP. 50-67

13. The Respondent submits that the Judgment of the Court of Appeal, affirming (as varied) the Judgment of the Trial Judge, should be affirmed for the following, amongst other,

REASONS

1. The issue is one of fact only.
2. Under the agreement of settlement dated the 9th day of November, 1931, the Appellant did not pay the sum of \$15,000.00, as agreed, but the same remains wholly unpaid and as a debt due from the Appellant to the Respondent.
3. The purchase by the Appellant or by Welland Securities, Limited of the Respondent's lands from the Bank and payment of the consideration therefor in no way freed the Appellant from his liability to pay the said sum of \$15,000.00 for account of the Respondent.
4. The said sum of \$15,000.00 agreed to be paid was in fact the money of the Respondent, Frankland, and could not be used by Appellant to purchase Respondent's lands and at the same time form part of the consideration of the settlement between the Appellant and the Respondent. P. 24, L. 23
P. 56, L. 1
P. 68, L. 29

Record
Exhibit 10, P. 87
Exhibit 11, P. 89
Exhibit 12, P. 92
P. 32, L. 5

5. The documentary evidence and the evidence of the Bank Manager are conclusive of the fact that the sum of \$35,000.00 was the purchase price paid for the properties.

R. S. ROBERTSON,
THOS. J. DARBY.

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ONTARIO, COURT OF APPEAL

BETWEEN

HARRY OAKES (*Defendant*) *Appellant*

AND

CHARLES S. FRANKLAND

(*Plaintiff*) *Respondent*

CASE FOR THE RESPONDENT

BLAKE & REDDEN,
17, Victoria Street,
London, S.W.1,
for the Respondent.