In the Privy Council.

No. 13 of 1950.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

HARRY REEDER — *Appellant*

AND

GEORGE E. SHNIER & COMPANY — *Respondent.*

CASE FOR THE APPELLANT.

Record.

10 **1.** This is an appeal from a judgment of the Supreme Court of Canada dated the 2nd June, 1949, which by a majority (Kerwin, Taschereau and Locke JJ., Rinfret C.J.C. and Rand J. dissenting) dismissed the Appellant's appeal from a judgment of the Court of Appeal of Ontario (Robertson C.J.O., Hope and Aylesworth JJ.A.) dated the 23rd April, 1948, which (i) had set aside an order in the Appellant's favour of Smily J. dated the 30th October, 1947, (ii) had set aside a judgment in the Appellant's favour in an action by the Appellant against the Respondent, (iii) had restrained the Appellant from enforcing a previous order of the Court of Appeal, and (iv) had ordered the Appellant to pay costs.

p. 208. p. 193. p. 189. p. 181. p. 186.

20 **2.** The dispute between the parties arose from a contract dated the 20th February, 1946, but not signed until about the 26th February, 1946, for the supply by the Appellant to the Respondent of 2,000 (10 per cent. more or less at the Appellant's option) display stands according to sample submitted to and approved by the Canadian Standards Association, 1,000 immediately and 1,000 as required within the next three months, packed in cartons ready for shipment, at a price of $3 each plus sales tax, the Appellant not being responsible for delays caused by failure to get material, strikes, fires or other causes not fully within the Appellant's power or control.

p. 151.

30 **3.** Polaroid visors to be incorporated in the first 1,000 display stands were duly supplied by the Respondent. In April the Appellant delivered 1,000 display stands for which the Respondent eventually, under pressure, paid.

p. 18, ll. 20–29; p. 20, ll. 3–38; p. 58, l. 41–p. 59, l. 33. p. 172, l. 39–p. 173, l. 2.

S.L.S.S.—WL2612-13203.

Record.

p. 166. p. 167. p. 165. p. 24, l. 21–p. 31, l. 8.

4. On the 5th June, 1946 (after written complaint by the Appellant that the Respondent was not calling for delivery of the balance within three months as provided in the contract) the Respondent purported, by reason of an alleged non-conformity to sample in the display stands delivered, to cancel the balance of the order " pending satisfactory deposition of the first thousand." The Appellant had undertaken to put right any defects in the first 1,000, but had difficulty in obtaining inspection of those alleged to be defective.

p. 2, l. 2. p. 2.

5. On the 23rd August, 1946, the Appellant issued a writ against the Respondent and by his statement of claim alleged the contract dated the 20th February, 1946, asserted that he had manufactured 2,059 display stands of which 1,000 had been delivered and paid for, alleged that the Respondent had neglected and refused to pay for the balance, and claimed $3,431.16 (being the price of 1,059 display stands plus sales tax thereon), and such further or other relief as the nature of the case might require.

p. 4.

6. The Respondent's defence admitted the contract and the delivery of 1,000 display stands, but alleged that they did not comply with the specifications required by the Canadian Standards Association and were not approved by the Association. Failure to deliver within the contract time was also alleged, and the rescission of the contract was justified on the ground of the Appellant's alleged default.

p. 6.

7. By his reply the Appellant set up the Respondent's failure to supply polaroid visors necessary to complete the remaining display stands, and the Respondent's failure to permit inspection of those alleged to be defective, and joined issue with the Respondent on the defence.

pp. 15–44. p. 31, ll. 31–35. p. 67, l. 23–p. 68, l. 44. p. 69, ll. 43–45.

8. At the trial the Appellant gave evidence at length of the matters in dispute and, in answer to a question by his counsel whether the 1,059 display stands not yet delivered were available to be delivered on request, said : " We can deliver at once, yes, provided the visor is supplied to us." The Respondent called evidence seeking to set up in answer to the claim various matters not pleaded and quite inconsistent with the documents. Thus Mr. George E. Shnier giving evidence alleged that in June there was an agreement to cancel the contract for the second 1,000 display stands on the terms that the Respondent should pay for the bulbs used in the first 1,000 display stands and to be used in the second 1,000 display stands. Mr. Shnier said that under the contract he had expected to get delivery of the 1,000 display stands which were to be delivered " immediately " within two or three weeks of placing the order.

p. 15, l. 10. p. 181. pp. 182–185.

9. Although the case had been opened as one for damages for non-acceptance, on the 19th March, 1947, Smily J. gave judgment for the Appellant with costs for $3,431.16 payable upon delivery of the 1,059 display stands to the Respondent fully completed if within fifteen days the Respondent delivered to the Appellant the polaroid sheeting required to complete the visors, or if the Respondent failed so to deliver the polaroid sheeting, upon delivery of the 1,059 display stands completed without the visors. In his reasons for judgment Smily J. pointed out

Record.

that the balance of the order could not be completed because part of the material necessary was further polaroid screening which the Respondent was to supply and had not supplied. The learned judge rejected the main defence of the defendant that the time of delivery of the balance of the order was not in keeping with the provisions of the contract that the stands were to be delivered as required within the next three months. This provision was really, in his opinion, for the benefit of the plaintiff as the defendant only wanted the balance when he could make use of them. The learned judge held that there was nothing in the evidence to indicate that the defendant considered the delivery of the balance of the order as urgent other than the suggestion in the letters when he was attempting to repudiate the contract, and, therefore, that the delay in delivery of the second 1,000—or having the stands ready for delivery—did not entitle the defendant to repudiate the contract.

p. 183, l. 43–p. 184, l. 23.

10. On whether judgment should be for damages or for the price Smily J. said :

p. 184, l. 47–p. 185, l. 6.

> So far as the right of the plaintiff to the price of the balance of the order or damages, it would not seem to make any substantial difference because the amount would be the same. At any rate, I think the plaintiff is justified in not delivering the balance of the order which in fact he could not very well do because he had not been supplied with the polaroid material by the defendants.
>
> * * * * *
>
> For these reasons the plaintiff is entitled to succeed. There will be judgment for the amount claimed but upon delivery of the completed stands to the defendant, provided the polaroid material is supplied, or if it is not supplied, then completed without the polaroid material.

p. 185, ll. 34–39

11. The Respondent appealed to the Court of Appeal and on the 18th June, 1947, the Court (Fisher, Hope and Hogg JJ.A.) dismissed the appeal with costs. The reasons for judgment were delivered by Hogg J.A. and expressed agreement with Smily J., but made no comment on the form of the judgment.

p. 186.

pp. 187–188.

12. Rule 523 of the Rules of the Supreme Court of Ontario provides :

> A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further or other relief than that originally awarded may move in the action for the relief claimed.

13. On the 8th September, 1947, the Respondent gave notice of motion for an order reversing the judgment dated the 19th March, 1947, and granting incidental relief on the grounds that the judgment was obtained by fraud and/or perjury of the Appellant and/or because of matter arising subsequent to the judgment.

p. 10.

Record.

pp. 113–150. **14.** The motion was heard by Smily J. on affidavit evidence supplemented by the shorthand-writer's notes of the cross-examination, before an examiner, of Mr. George E. Shnier and of the Appellant on their respective affidavits. The more important material evidence may be summarised as follows :

p. 129, ll. 18–26. (A) The Appellant had contracted with Schaefer-Ross (Canada) Ltd. in March, 1946, for that company to prepare the display stands and completely to assemble them (the Appellant supplying the parts which the Respondent was to supply to the Appellant) for delivery of 1,000 in three weeks and the balance within three months as instructed.

p. 129, ll. 27–p. 130, l. 2. (B) Schaefer-Ross (Canada) Ltd. during March and April duly prepared 2,000 stands and completely assembled 950 which were delivered direct to the Respondent. On the parts for the others not being supplied, at the Appellant's request the company delivered the unassembled material to the Appellant in August, 1946, an allowance being made in the price because the stands had not been assembled.

p. 130, ll. 7–11.
p. 137, ll. 24–33.

p. 140, ll. 11–15 ; p. 149, ll. 11–28. (C) In his affidavit and in cross-examination the Appellant stated his belief that if the Respondent had delivered the necessary polaroid visors in the summer of 1946, the whole of the stands could have been assembled within a few days.

p. 137, l. 38–p. 138, l. 10 ; p. 145, ll. 10–34. (D) In December, 1946, an overflow of water where the unassembled stands were stored damaged some stands to a greater or less extent. The Appellant, who was away from Toronto, was informed of the incident. The number of damaged stands was later estimated to be in the neighbourhood of 350.

p. 140, ll. 15–23.
p. 14, l. 10.
p. 145, l. 36–p. 146, l. 23. (E) The Appellant was of opinion that the damaged parts could be replaced within a few days. His evidence at trial was given on the 18th March, 1947. That this opinion was not unreasonable is shown by the manner and time in which replacement parts were subsequently made, as set out in (O) below.

p. 138, ll. 11–17. (F) On the 23rd June, 1947, the Respondent delivered to the Appellant 923 polaroid visors.

p. 130, l. 34–p. 131, l. 5. (G) About the 25th June, 1947, the Appellant sent the 923 visors and material for assembling the stands to Schaefer-Ross (Canada) Ltd., but that company refused to sign a receipt which stated that the goods were in good order and condition because a number of the cardboard parts were seriously damaged by water.

p. 127. (H) On the 26th June, 1947, the Appellant's solicitors wrote to the Respondent's solicitors saying that the Respondent had delivered polaroid visors but instead of 1,059 there were only 923. The letter also said that the Appellant was having difficulty in obtaining containers, and asked the Respondent to consider what steps should be taken, reminding the solicitors that the Respondent had arranged the supply of containers for the first 1,000.

p. 63, l. 33–p. 64, l. 3.

Record.

(I) On the 1st August, 1947, this letter was answered by a statement of the Respondent's intention to launch a motion under Rule 523. No further delivery of polaroid visors was ever made. p. 128. p. 138, l. 17.

(J) Trouble also arose over the labels to show the approval of the Canadian Standards Association, which issues labels only to its members. The labels for the first 1,000 display stands had been supplied by the Respondent In August, 1947, however, the Respondent instructed the Association not to deal with the Appellant in the matter, and the Respondent refused to supply labels, although Mr. Norman Shnier had promised on behalf of the Respondent to supply them. p. 138, l. 31–p. 139, l. 22. p. 48, l. 42; p. 55, l. 40. p. 118, l. 9–p. 119, l. 28. p. 138, ll. 31–39.

(K) The Appellant had obtained containers for the undelivered stands by about the middle of August, 1947. p. 138, ll. 28–31. p. 63, l. 33–p. 64, l. 3.

(L) On the 28th August, 1947, the Appellant refused to let the Respondent inspect the undelivered stands, but said they were ready for delivery except for the approval of the Association. p. 114, ll. 1–10; p. 146, l. 40–p. 147, l. 3.

(M) Thereupon the Respondent made enquiries and on the 2nd September, 1947, received information from Schaefer-Ross (Canada) Ltd. in an interview that no further stands were assembled, that at least 500 had been damaged, and that it would be some months before the whole order was completed. This evidence was shaken by cross-examination and (except that an unascertained number of stands were damaged by water) was not borne out by evidence from Schaefer-Ross (Canada) Ltd. sworn on the 3rd October, 1947, over three weeks after Mr. Shnier was cross-examined. p. 114, ll. 11–22. p. 120, l. 30–p. 123, l. 3. p. 130, l. 40–p. 131, l. 5.

(N) The Appellant had been pressing Schaefer-Ross (Canada) Ltd. for delivery in the last week of August, but after the interview with the Respondent on the 2nd September, 1947, Schaefer-Ross (Canada) Ltd., not wishing to be involved in the litigation, stated that they preferred that the Appellant take the job elsewhere. p. 131, ll. 6–22. p. 139, ll. 10–33.

(O) About the 2nd September, 1947, the Appellant instructed an employee to make 500 new cardboard parts for replacements and these were completed by the 10th September, 1947, although only one person with somewhat makeshift facilities was employed on the work. p. 145, l. 36–p. 146, l. 23.

(P) On the 5th September, 1947, the Appellant informed Schaefer-Ross (Canada) Ltd. that the Appellant would have the work done elsewhere, and all the material delivered to Schaefer-Ross (Canada) Ltd. was thereupon re-delivered to the Appellant. p. 131, ll. 17–22.

15. On the 30th October, 1947, Smily J. dismissed the motion on the grounds that the Respondent could have discovered the new evidence relied on before the trial; that, although the Appellant made inaccurate statements not amounting to fraud, the real trouble had been caused by p. 189. pp. 191–192.

the Respondent's unjustified repudiation which alone prevented the Respondent from receiving all the goods by the time he required them; and that if the facts now alleged had been known the judgment might not have been more favourable to the Respondent. As, however, Smily J. thought the Appellant partly to blame for the unsatisfactory position, he deprived the Appellant of costs.

pp. 193–194. **16.** The Respondent appealed to the Court of Appeal, which by judgment dated the 23rd April, 1948, allowed the appeal and ordered that the order of Smily J. dated the 30th October, 1947, be set aside, that the judgment in the action dated the 19th March, 1947, be set aside, and the Appellant be restrained from enforcing the order of the Court of Appeal dated the 18th June, 1947, directing the Respondent to pay to the Appellant the costs of the trial and the appeal, and that the Appellant pay the Respondent the costs of the trial, of the appeal from the judgment, of the motion, and of the appeal from the order of the motion.

p. 202, l. 39. p. 195, l. 9–p. 197, l. 2. **17.** Hope and Aylesworth JJ.A. agreed with the reasons for judgment of Robertson C.J.O. which after noting that the claim was for the unpaid part of the contract price, due only on delivery, pointed out that the judgment showed the Appellant had not delivered or tendered the goods. p. 197, l. 2–p. 201, l. 10. The Chief Justice set out the evidence alleged to be false (mentioned in paragraph 8 of this Case) and, after giving grounds for holding it to be p. 201, l. 11–p. 202, l. 5. false, said that it was impossible to believe that the Appellant did not know the stands were not ready for delivery and, although he might have recovered damages, if he had told the truth the Appellant's action must p. 202, ll. 6–27. have been dismissed. The Chief Justice held that the Appellant knowingly concealed the facts from his counsel and knowingly gave false evidence essential to recovery of the judgment he obtained.

18. The Appellant respectfully points out that on the evidence at trial the Appellant was not strictly entitled to a judgment for the price and that, although his counsel did not ask leave to amend the pleadings, p. 15, l. 10. his counsel opened the case as in essence a claim for damages for non-acceptance.

19. The Appellant further submits that the reasons of the Chief Justice of Ontario are largely a criticism of the form of judgment in the action. It was quite clear at the trial, and the judgment recognised, that the goods were not then in a deliverable state and that assembly had to take place after polaroid visors were supplied. In those circumstances the form of order may have been an unusual and an unsatisfactory one, but the Appellant was in the hands of his legal advisers and the p. 184, l. 47–p. 185, l. 2. form was upheld on appeal. At the trial Smily J. had expressed the opinion that there would be no substantial difference whether the Appellant recovered the price of the balance of the order or damages because the amount would be the same, but the judgment of the Chief Justice of Ontario appears to be based on an essential difference between an action p. 15, ll. 10–18. for price and one for damages. Counsel for the Appellant in opening the case as a claim for damages indicated that (as was the fact) the real issues were (i) whether there were defects in the first 1,000 stands which

Record.

justified the Respondent in cancelling the balance of the contract, and (ii) whether there was in fact a cancellation. The Appellant submits that by way of damages for the wrongful repudiation of the contract the Appellant would, on the facts proved, have been entitled to damages not less in amount than the contract price; and that it is inconceivable that the Appellant should have knowingly deceived the Court into making an order under which the Appellant would be in a much less favourable position.

20. The Appellant further submits that the evidence shows that when the Appellant gave evidence he considered that he was entitled to require Schaefer-Ross (Canada) Ltd. immediately on receipt of polaroid visors to assemble the remaining stands; that any question of serious damage was not in his mind; and that in fact the damaged parts could have been so speedily replaced as not to delay the completion of the assembly.

21. That the Appellant appealed to the Supreme Court of Canada which by a majority on the 2nd June, 1949, dismissed the appeal with costs. The majority (Kerwin, Taschereau and Locke JJ.) expressed their agreement with the reasons of the Chief Justice of Ontario. Rand J. set out fully the reasons of the Chief Justice of Canada and Rand J. for considering that the facts were quite insufficient to warrant a finding of perjury against the Appellant. Rand J. therefore thought that the order of Smily J. should be restored with costs. p. 208. p. 214. pp. 209-213.

22. The Appellant submits that the reasoning of Rand J. is to be preferred to the reasoning of the Chief Justice of Ontario, and that the finding that the Appellant committed fraud and perjury is an unjust finding which the evidence does not support. The Appellant accordingly submits that this appeal should be allowed with costs and that the order of Smily J. should be restored for the following amongst other

REASONS.

1. Because the Appellant has not been guilty of fraud or perjury.
2. Because Smily J. rightly negatived the existence of any circumstances entitling the Respondent to impeach the judgment under rule 523 of the Rules of the Supreme Court of Ontario.
3. Because the Chief Justice of Ontario wrongly held that Smily J. gave judgment for the price because he had been deceived by the Appellant whereas judgment for the price instead of for the same amount as damages was for the Respondent's benefit.
4. Because of the reasons given by the Chief Justice of Canada and Rand J.

JOHN T. HACKETT.

FRANK GAHAN.

In the Privy Council.

No. 13 of 1950.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

HARRY REEDER - - *Appellant*

AND

GEORGE E. SHNIER & COMPANY *Respondent.*

CASE FOR THE APPELLANT.

BLAKE & REDDEN,
17 Victoria Street, S.W.1,
Appellant's Solicitors.