No. 13 of 1950

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA

BETWEEN:

HARRY REEDER

(Plaintiff) *Appellant*

—and—

GEORGE E. SHNIER & COMPANY

(Defendant) *Respondent.*

Case

FOR THE RESPONDENT

RECORD

1. This is an appeal from the Judgment of the Supreme Court of Canada delivered on the 2nd day of June 1949 dismissing an appeal from the Judgment of the Court of Appeal of Ontario dated the 23rd day of April 1948.

The Judgment of the Court of Appeal allowed an appeal from the Order of the Honourable Mr. Justice Smily dated the 30th day of October 1947, dismissing an application by the Respondent to set aside on the ground of fraud or perjury, matters arising subsequent to the Judgment, a Judgment obtained by the Appellant for $3431.16, the price of certain goods sold by the Appellant to the Respondent.

The Judgment sought to be set aside was delivered on the 19th day of March 1947 by the Honourable Mr. Justice Smily after trial of the action and was affirmed by the Court of Appeal on the 18th day of June 1947. The Supreme Court of Canada in the Judgment now appealed from affirms the Judgment of the Court of Appeal which set aside the original Judgment of $3431.16 obtained by the Appellant and directed the Appellant to pay the Respondent's costs throughout.

2. The Rule of Practice of the Supreme Court of Ontario under which the motion to set aside the Judgment was made, reads as follows:

Rule 523.

"A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matters 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."

p. 151, 152. 3. The action arose out of an agreement by the Respondent to purchase from the Appellant, 2000 display stands at the price of $3.00. The agreement of sale which was in writing dated the 20th of February 1946 provided that the display stands were to be "as per sample submitted to the Canadian Standards Association and approved by the Canadian Standards Association, 1000 to be delivered "immediately" and 1000 "as required within the next three months." The agreement contained a provision that "the above are to be packed in corrugated cartons all ready for shipment."

4. The purpose of the display stands was to demonstrate the use of "polaroid visors". These visors which the respondent sells in Canada are used on the windshields of motor vehicles to eliminate glare from the sun on highways.

The Respondent required the display stands to demonstrate the effectiveness of the polaroid visor in eliminating glare. The sale of the visors is seasonal in character.

5. The display stands consist of a paperboard construction with lettering imposed on the paperboard by a silk screen process with an electrical unit inside so that an electric light bulb shone from within the stand upon a photograph of a highway, causing glare. A polaroid sheet is inserted through which a prospective purchaser would observe the glare to be eliminated while looking at a picture of the highway.

To complete the contract the Appellant would have to secure a number of different parts, including the cardboard stands which would have to be silk screened, the electrical assemblies, the electric light bulbs, the visors and labels indicating approval of the Canadian Standards Association, and a number of minor parts.

The various parts would then require to be assembled and packed in corrugated cartons ready for delivery.

p. 18, l. 20-22. 6. The first 1000 stands (approximately) were assembled and delivered over a period in April and May in 1946 and were paid for. On
p. 164. the 28th of May 1946 the Appellant wrote to the Respondent that they were "billing" him for the balance of the polaroid displays which he stated "have been completed with the exception that we are now waiting the re-
p. 144, l. 20. ception of polaroid sheeting from you." This statement was not true.

7. Some difficulties arose in respect to the electrical assemblies in-
p. 167. stalled in the first 1000 display stands which had been delivered and caused the intervention of the Canadian Standards Association. The Respondent then wrote to the Appellant on June 5th, 1946 purporting to cancel the balance of the order. The Appellant did not accept this repudiation of the contract but continued to demand payment of the bal-

ance due and purported to be ready and willing to carry out his part of the contract. The Respondent refused to pay for the second 1000 display stands and the Appellant issued a writ of summons on the 23rd of August 1946. p. 2.

8. In the Statement of Claim delivered on the 10th of January 1947 the Plaintiff alleged, p. 2, 3.

"4. The Plaintiff manufactured 2059 display stands and delivered 1000 to the Defendant which were accepted by the Defendant and paid for by the Defendant."

5. The Defendant has neglected and refused to pay for the balance of the display stands ordered by the Defendant.

The Plaintiff therefore claims:

To amount owing for 1059 display stands	$3177.00
8% Sales Tax	254.16
	$3431.16"

9. The action was tried by Mr. Justice Smily on the 18th and 19th days of March 1947.

At the trial the main issues turned on the Respondent's defence (a) that the Defendant was entitled to repudiate the order for the second 1000 display stands upon discovery of the alleged defects in the first 1000 display stands.

(b) That the Plaintiff had failed to deliver the stands within the time called for by the Agreement.

10. The Appellant was called as a witness on his own behalf and gave evidence in chief as follows: p. 31, l. 31.

"Q. Your Statement of Claim says you have 1059 on hand? A. Yes.

"Q. Are they available to be delivered on request? A. We can deliver at once, yes, provided the visor is supplied to us."

The Respondent claims that this statement which indicated that the Appellant had fully carried out his part of the bargain and was ready and willing to deliver the goods was assumed by him to be true, but later turned out to be false to the knowledge of the Appellant.

11. Mr. Justice Smily gave Judgment for the Plaintiff on the 19th of March 1947 for the amount claimed to be due for the price of the goods, namely $3431.16, with the addition of the following words in the formal Judgment: "payable however upon delivery of the 1059 display stands referred to in the pleadings herein by the Plaintiff to the Defendant fully completed, if the Defendant shall within 15 days from the date hereof deliver to the Plaintiff the polaroid sheeting required to complete the visor or screen of the said stands, or upon delivery of the said 1059 stands completed without the polaroid visors or screens if the Defendant shall fail to deliver the polaroid sheeting therefore within the said period of 15 days from the date hereof." p. 181.

12. This Judgment was upheld on appeal by the Court of Appeal of Ontario consisting of the Honourable Mr. Justice Fisher, the Honourable
p. 187. Mr. Justice Hope, and the Honourable Mr. Justice Hogg on the 18th of June 1947. This Judgment dealt with the defences put forward by the Respondent, namely his alleged repudiation and the failure of the Appellant to deliver within the time required by the Agreement.

13. The Respondent will contend that the Court of Appeal must have assumed, as the Appellant had sworn, that the Appellant was ready and able to deliver the display stands in accordance with the contract, subject only to the delivery of the polaroid sheeting (visors) by the Defendant.

14. On the 23rd of June 1947 the Respondent delivered to the Appellant the polaroid sheeting (visors) referred to in the Judgment of the Honourable Mr. Justice Smily (although there is some question as to the number of sheets delivered) and on the 26th of June 1947 the solici-
p. 135. tors for the Appellant wrote to the solicitors for the Respondent, a letter in which they stated that their clients would not be able to get the necessary "containers" for "several months". The implication from this letter again is that the difficulty in obtaining containers was the only cause for
p. 134. further delay in delivery. This was untrue.

15. The Respondent then endeavoured to obtain inspection of the display stands which the Appellant had at the time of the trial claimed to have on hand, but was refused permission to do so by the Appellant. Upon this and upon further information indicating to the Respondent that the Plaintiff was not in a position to deliver the display stands, the Respondent launched a Notice of Motion dated September 8, 1947 under the provisions of Rule 523 of the Rules of Practice of the Supreme Court of Ontario, to set aside the Judgment.

16. The material on the motion consisted of the previous proceedings and evidence and an affidavit of the Respondent, an affidavit of one John Frederick Cameron and the cross-examination of the Appellant upon his affidavit filed, dated the 12th of September 1947.

p. 129-131. 17. The affidavit of John Frederick Cameron indicated that he was the manager of Schaefer-Ross (Canada) Limited and that his company had been employed by the Appellant on the 1st of March 1946 to silk screen, die cut and completely assemble 2000 polaroid displays, the Appellant undertaking to supply the components other than the cardboard parts; that the cardboard parts were completed and enough parts to complete 950 stands were delivered by the Appellants and that 950 of the completed stands were shipped during the month of April 1948 to the Respondent; that the Schaefer-Ross Company Limited were requested by the Appellant by letter of August 16th 1946 to return to the Appellant all of the material which they then had on hand which consisted of 1010 complete cardboard parts, 49 polaroid visors, enough acetate for 1010 display, 500 labels, 5 hydro decals and one bale waste packing, that this was done, and at no time before the return of this material were the Company in a position to assemble the component parts required in the

display as they were not on hand and that if all the material other than the polaroid visors had been on hand they could have completed the assembly without the visors; that they received no further instructions in regard to the order until June 25th 1947 when the Appellant requested the Schaefer-Ross Company to proceed with the assembly of the balance of the order and purported to return all of the necessary component parts and endeavoured to secure a receipt from the Company for the parts, said to be in good order and condition in the receipt. The Schaefer - Ross Company refused to sign the receipt as a cursory examination revealed p. 134.
10 that a substantial number of the cardboard parts were damaged by water and would be unfit to assemble. Further that the Appellant advised the Company that they would have the work done elsewhere and that all parts were returned on or about the 5th of September 1947 to the Appellant and that at no time up to the making of the affidavit, Oct. 3, 1947 had the Company been in a position to assemble and deliver the balance of 1050 display stands in accordance with the original order.

18. The Appellant in his cross-examination on his affidavit filed, indicated that the electrical assemblies were not available until September p. 144, 145.
1946; that on or about the 7th or 8th of December 1946 some of the card-
20 board parts which had been returned by the Schaefer-Ross (Canada) p. 145, l. 13-32.
Limited and were in the Appellant's warehouse were damaged by water p. 145, l. 34.
which damage was reported to the Appellant; that the Appellant had 500 p. 146, l. 20.
of the cardboard parts remade by an employee between the 2nd and 11th of September 1947; that at the time he was cross-examined (16th September 1947) the demonstrators had not been finally approved by the Canadian Standards Association and that the assembly and obtaining of p. 148, l. 46.
the approval of the Canadian Standards Association were "under way at the present moment."

19. From these facts it would appear that when the Appellant swore
30 at the trial of March 18th 1947 that the 1059 demonstrators were on hand as set out in the Statement of Claim, and that they were available to be delivered "at once" provided the visor was supplied, the true facts all of which were within the knowledge of the Plaintiff were:

(a) That between 350 and 500 of the coardboard parts had been damaged by water on the Appellant's own premises so as to be useless.

(b) That he had not obtained the required approval of the Canadian Standards Association.

(c) A number of miscellaneous parts were missing.

(d) That cartons had not been obtained for delivery in accordance
40 with the contract.

(e) That he had not assembled the display stands.

(f) That it would be necessary for him before the display stands could be delivered in accordance with the contract, not only to replace the damaged and missing parts, but also to secure a subcontractor who would assemble the same.

In other words the Appellant was not ready and able to deliver and had not done what lay in his power to complete his part of the contract.

p. 191, 192. 20. The Honourable Mr. Justice Smily dismissed the motion without costs. He was of the opinion that certain statements made at the trial by the Appellant were "at least inaccurate", but that the inaccuracy did not go so far as fraud, that the Respondent should have been able to discover the new evidence now relied on before the trial and that he could not say with certainty that, if he had known of the facts proved in the motion, he would have rendered a different Judgment.

21. On appeal to the Court of Appeal the decision of Mr. Justice Smily was reversed. The learned Chief Justice of Ontario delivered the unanimous opinion of the Court of Appeal consisting of himself, Mr. Justice Hope (who had been a member of the court which affirmed the original Judgment secured by the Appellant) and the Honourable Mr. Justice Aylesworth.

p. 195. 22. The learned Chief Justice carefully and fully reviewed the facts and concluded that it was impossible to believe that the Appellant did not
p. 201, l. 11. know when he gave evidence at the trial of the action in March 1947 that the display stands were not in condition for delivery and that if he had
p. 202, l. 3. told the truth about the condition of the goods at the trial, his action
p. 201, l. 26. would have had to be dismissed inasmuch as in an action for the price the seller must prove that he had done all the contract required him to
p. 202, l. 23. do to earn the price. He was of the opinion that the Plaintiff intentionally gave false evidence at the trial and that the false evidence was not only material but essential to his recovery.

23. On appeal to the Supreme Court of Canada the majority of the Court, Mr. Justice Kerwin, Mr. Justice Taschereau and Mr. Justice Locke
p. 214. accepted the reasoning and the findings of fact of the Chief Justice of Ontario. Mr. Justice Kerwin said that the Appellant's statement that he could deliver the polaroid demonstrators at once was false and read in connection with other evidence constituted fraud on the court.

24. The Chief Justice of Canada and Mr. Justice Rand dissented. Mr. Justice Rand delivered reasons in which the Chief Justice of Canada concurred. He concluded that in his evidence given at the trial in respect
p. 212, l. 23. to which he was attacked, the Appellant was speaking "in terms of business" and merely meant to imply that he was holding parts for assembly and could secure and deliver the same within a reasonable time. He did not think that the evidence justified the conclusion of perjury.

25. He did not deal with the question as to whether or not apart from any question of intentional fraud or perjury the new evidence established that an essential element of his cause of action was lacking.

26. By Rule 233 of the Supreme Court Rules of Practice the Court, on the motion under R. 523, could, if the facts were such as to leave doubt as to the proper conclusion, have directed an issue to be tried on oral evidence.

The Appellant submits that this appeal should be dismissed upon the following amongst other reasons:

1. Because the finding that the original Judgment obtained by the Appellant was obtained by fraud and presentation of false evidence by the Appellant was correct.

2. Because this finding of fact was fully justified by the admissions of the Plaintiff, the uncontradicted evidence on the motion and by the surrounding circumstances.

3. Because the reasons for Judgment of the learned Chief Justice of Ontario adopted by the majority of the Supreme Court of Canada are correct.

4. Because the Judgments of the Court of Appeal, and the Supreme Court of Canada constitute concurrent findings of fact which should not be disturbed.

5. Because even if the new evidence on the motion fell short of establishing intentional deception of the court by the Appellant, it did establish such facts as entitled the Respondent to have the original Judgment set aside.

6. Because it was an essential requirement of the Plaintiff's cause of action to show that he had done all the contract required him to do to earn the price, and the new evidence clearly demonstrated that he had not done so.

7. Because the new evidence was not such as the Respondent could have discovered by reasonable diligence at the time of the trial, as he was entitled to rely upon the Appellant's sworn evidence.

F. A. BREWIN,
Counsel for Respondent.

No. 13 of 1950

In the Privy Council

ON APPEAL

From the Supreme Court of Canada.

BETWEEN:

HARRY REEDER,
(Plaintiff) *Appellant,*

—and—

GEORGE E. SHNIER & CO.,
(Defendant) *Respondent.*

RESPONDENT'S CASE

LAWRENCE JONES & CO.,
Winchester House,
Old Broad Street,
London, E.C. 2.

Printed by HESS PRINTING COMPANY, LIMITED,
150 Jarvis Street, Toronto, Ont., Canada. 34