IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Between:

HARRY REEDER
(Plaintiff) Appellant

—and—

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

RESPONDENT'S FACTUM

MASON, FOULDS, DAVIDSON & ARNUP, *Solicitors for the Appellant.*
CAMERON, WELDON & BREWIN *Solicitors for the Respondent.*
EDMUND F. NEWCOMBE, K.C., *Ottawa Agent for the Appellant.*
BEAMENT, FYFE & AULT, *Ottawa Agents for the Respondent.*

TORONTO
HESS-TRADE TYPESETTING CO.
1949

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PART I.

STATEMENT OF FACTS

1. This is an appeal from the Judgment of the Court of Appeal of Ontario dated the 23rd day of April 1948. The Court consisted of the Chief Justice of Ontario, the Honourable Mr. Justice Hope and the Honourable Mr. Justice Aylesworth.

The judgment of the Court of Appeal allowed an appeal from the Order of the Honourable Mr. Justice Smiley dated the 30th day of October 1947 dismissing an application by the respondent to set aside on the ground of fraud or perjury or matters arising subsequent to the judg-
20 ment, 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 on appeal by Court of Appeal on the 18th day of June 1947.

The Court of Appeal by the order now appealed from, set aside the judgment for $3431.16 obtained by the appellant and directed the appellant to pay the respondent's costs throughout.

2. The action arose out of an agreement by the respondent to purchase from the appellant 2000 display stands at a price of $3.00 each. The con-
30 tract, Exhibit 1 A.C. p. 151 was in writing dated the 20th February 1946

and provided for the display stands to be "as per sample submitted to the Canadian Standards Association and approved by the Canadian Standards Association", 1000 to be delivered "immediately", 1000 "as required within the next three months," "the above are to be packed in corrugated cartons all ready for shipment."

3. The display stands so agreed to be sold were to be used as demonstrators of "polaroid visors" which are used on the windshields of motor vehicles to eliminate glare when driving. The respondent was a distributor of these visors and desired the display stands to demonstrate the effectiveness of the polaroid visor in eliminating "glare". The display stands consisted 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 could then be inserted through which a prospective purchaser would observe the glare to be eliminated when looking at the picture of the highway.

4. The first 1000 display stands were assembled and delivered over a period in April and May 1946 and were paid for. On May 28th, 1946, the appellant wrote to the respondent (Ex. 3 A.C. p. 164) stating that they were "billing" him for the balance of the polaroid displays, which "have been completed with the exception that we are now awaiting the reception of polaroid sheeting from you". It appears that the respondent had undertaken to supply the sheeting referred to although this does not appear in the written contract. On June 5th the respondent wrote to the plaintiffs informing them that the Canadian Standards Association did not approve of the electrical units in some of the first 1000 which had been delivered (Ex. 9 A.C p. 167) and cancelling the balance of the order, "pending satisfactory deposition of the first thousand." The appellant did not accept this repudiation of the contract in respect to the second 1000 but continued by correspondence and otherwise to demand payment for the balance due and purported to be ready and willing to carry out his part of the contract. The respondent refused to accept delivery or to pay for the display stands and, the appellant issued a writ of summons in this action on the 23rd of August 1946. In his statement of claim (A.C. p. 2) he alleged (in paragraph 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." He further alleged that the defendant had neglected and refused to pay for the balance of the display stands and claimed

"(a) To amount owing for 1059 Display Stands $3177.00
8% Sales Tax 254.16

$3431.16"

5. The action came on for trial and the main defences were that (a) the defendant had repudiated and was entitled to repudiate the order for the balance of 2000 stands upon discovery of the alleged defects in the first 1000 display stands which had caused the Canadian Standards Association to refuse their approval.

(b) the plaintiff had failed to deliver the stands at the time required by the contract.

6. The appellant gave evidence in chief as follows (A.C. p. 31, l. 30-35) "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."

It is this statement which the respondent alleges to have been false to the knowledge of the appellant as is more fully set out infra and upon which the respondent based his claim to have the judgment set aside.

7. The learned trial judge did not accept the contention of the respondent that he had effectively repudiated the contract nor that he was entitled to hold the appellant to the time of delivery stated in the agreement and gave judgment for the plaintiff on the 19th day of March 1947 for the amount claimed to be due for the price of the goods namely, $3431.16 "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." (A.C. p. 181.)

8. It is apparent from the said judgment and from the reasons of the learned trial judge that he was under the impression as stated by the appellant at the trial that the appellant had done his part under the contract and was ready and able to deliver the display stands in accordance with the contract (subject only to the delivery of the polaroid sheeting by the respondent).

9. This judgment was upheld on appeal by the Court of Appeal consisting of the Honourable Mr. Justice Fisher, the Honourable Mr. Justice Hope and the Honourable Mr. Justice Hogg. The judgment of the Court of Appeal was dated the 18th of June 1947 and the reasons therefor (which dealt with the defences put forward by the respondent, the alleged repudiation and the appellant's failure to deliver within the time set out in the contract) were delivered by the Honourable Mr. Justice Hogg.

10. On the 23rd of June 1947 the respondent delivered to the appellant the balance of the polaroid sheeting referred to in the judgment of the Honourable Mr. Justice Smily and on the 26th of June 1947 the solicitors for the appellant wrote to the solicitors for the respondent a letter (A.C. p. 127) in which they stated, inter alia that their clients would not be able to get the necessary 'containers' "for several months."

11. The respondent then proceeded to make further inquiries which satisfied him that the appellant had not been at the time of the trial and was not then ready and able to deliver the display stands in accordance with the contract and he therefore launched a motion to have the judgment of Mr. Justice Smily set aside on the ground of perjury or because of matters arising subsequent to the making thereof.

12. The material on the said motion consisted of the previous proceedings and evidence, an affidavit of the respondent (A.C. p. 113, 114) in which he says that he had made inquiries from the appellant with a view to obtaining inspection of the display stands on the 28th of August 1947 but without success, and that he had learned from Schaefer-Ross (Canada) Ltd. who were subcontractors employed by the appellant to manufacture parts for the display stands and assemble them, that none of the display stands had at that date September 9th, 1947, been assembled and that at least 500 were in a damaged condition rendering them unusable, and also filed was an affidavit of John Frederick Cameron (A.C. p. 129) manager of Schaefer-Ross (Canada) Ltd. to the effect that his company had been employed by the appellant on the 1st of March 1946 to silkscreen, dyecut and completely assemble 2000 polaroid displays, the appellant to supply the components other than the cardboard parts, that these latter were completed, and enough parts to complete 950 stands were delivered by the appellant and that 950 displays were shipped on April 1948 directly to the respondent, that the Schaefer-Ross Company were requested by the appellant in a letter of August 16th 1946 to return to the appellant all the material on hand which consisted of 1010 complete cardboard parts, 49 polaroid visors, enough acetate for 1010 displays, 500 labels, 5 hydro decals and 1 bale waste for packing which was done; that 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 on June 25th, 1947, the appellant requested the company to proceed with the assembly of the balance of the order and purported to return the component parts and endeavoured to secure a receipt (A.C. p. 134) from the company for parts said to be in good order and condition as set out in the receipt, that the company refused to sign the receipt, as a cursory examination revealed that a substantial number of the cardboard parts were damaged by water and would not be fit to assemble, and that

after some correspondence the appellant advised the company that they would have the work done elsewhere and all parts were returned on or about the 5th of September 1947 to the appellant, and that at no time up to making 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.

13. The appellant was cross-examined on his affidavit filed and from this cross-examination it appeared that the electrical assemblies were not all available until September 1946; that on the 7th or 8th of December 1946 some of the cardboard parts which had been returned by the Schaefer-Ross (Canada) Ltd. to the appellant, and were stored in the appellant's warehouse, were damaged by water which was reported to the appellant, and that the appellant had 500 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 at Q. 93 he said (A.C. p. 148) "Q. Have all been assembled and these requirements of the Canadian Standards Association have been carried out in all 1059 demonstrators? A. They are under way at the present moment".

14. From the evidence referred to above it would appear that when, at the trial on March 18th 1947 the appellant told the Court that the 1059 demonstrators were on hand (as set out in the statement of claim) and that they were available to be delivered on request at once, provided the visor was supplied, the true facts, all within the knowledge of the appellant, were that

(a) The displays had not been assembled.

(b) That between 350 and 500 of the cardboard parts had been so damaged by water at his own premises about 3 months before as to be useless.

(c) That he had not got the required approval of the Canadian Standards Association or the labels to be attached indicating such approval.

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

(e) That in order to make delivery he would have to employ a sub-contractor who might not be able to assemble the displays promptly.

In other words when the appellant at the date of the trial gave the impression that he had done everything on his part to complete the contract and was therefore entitled to the price of the goods, he had not in fact manufactured nor assembled the goods in question, and had not even available the parts necessary to make delivery in accordance with the contract.

15. The Honourable Mr. Justice Smily dismissed the motion to set aside the judgment without costs (A.C. p. 189). He was of the opinion that certain statements made 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 in any event he could not say with certainty that if he had known of the facts now alleged, he would have rendered a judgment more favourable to the respondent.

16. The Chief Justice of Ontario delivered the unanimous opinion of the Court of Appeal allowing the appeal from the order of Mr. Justice Smily. After reviewing the facts, the learned Chief Justice concluded (A.C. p. 21 l. 11) that it was impossible to believe that the appellant did not 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 the appellant had told the truth about the condition of the goods at the trial, his action 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 do to earn the price.

He was of the opinion that the plaintiff knowingly gave false evidence at the trial and that the false evidence was not only material but essential to his recovery.

PART II

SUBMISSIONS OF THE RESPONDENT

The respondent submits that the judgment of the Court of Appeal was correct and should be affirmed in that

(1) The finding that the appellant had knowingly given false evidence at the trial and had obtained the judgment sought to set aside thereby, was correct and was fully justified by the admissions and uncontradicted affidavit evidence on the motion.

(2) That the false evidence was in respect to a matter not only material to the appellant's cause of action but essential to his success in the action.

(3) That even in the absence of a finding of fraud the new evidence discovered by the respondent for the first time after the trial was such as entitled the respondent to have the judgment set aside.

PART III

ARGUMENT

1. The fraud upon which the respondent relied as a ground for setting aside the judgment was the fraud contained in the replies given by the appellant to his counsel (A.C.p.31) to the effect that the display stands were at time of trial on hand and ready for delivery on request at once provided the visors were delivered. This statement was clearly false. It is respectfully submitted that the learned Chief Justice was right in concluding that it was intentionally false. The appellant had as the Chief Justice says, "full and personal knowledge" of the facts and what other purpose would he have had in misrepresenting them but to deceive the Court and so obtain judgment? The irresistible inference is that these statements were intentionally false. The Court of Appeal were in as good a position as Mr. Justice Smily to find fraud as the finding is based upon admissions and uncontradicted facts contained in affidavit evidence.

2. In the case of fraud it is not necessary to show that the fraud could not have been discovered at the time of trial by the exercise of reasonable diligence. The respondent accepted the plaintiff's word that he had manufactured the goods and had them on hand ready for delivery. On this branch of the case it is not relevant to consider whether or not the respondent might by diligence have discovered the appellant's fraud earlier. *McGuire vs. Hough* 1934 O.R. at p. 13.

3. It is not necessary in the case of fraud to show that the evidence was of such a character to be determining, it is sufficient to show that the Judgment is tainted and affected by fraud. *Hip Foong Hong vs. H. Neotia & Co.* 1918 A.C. 888 at 894. *McDonald vs. Pier* 1923 S.C.R. 107. In the present case the judgment was clearly tainted and affected by the appellant's fraud as the very basis of the judgment was the assumption that the appellant was ready and willing to deliver the goods in question.

4. Even if the judgment were not to be set aside on the finding of fraud it should be set aside on the ground of matter arising subsequent to the trial. To succeed on the latter ground it must be shown that the new evidence was such as could not have been adduced by reasonable diligence before the trial and that if adduced it would be practically conclusive. *Varette vs. Sainsbury* 1928 S.C.R. 72 at 76 per Rinfret, J., now C.J.C.

It is submitted that the new evidence here was exclusively within the knowledge of the appellant and his agents and that he cannot be heard to say that the respondent showed a lack of care in accepting his own, the appellant's, statements as to matters within his own knowledge as true.

He cannot complain that the respondent did not impugn his, the appellant's, veracity.

It is further submitted that the truth as to condition of the display stands, or rather as to the failure of the appellant to have them ready for delivery would or should have been conclusive.

When the respondent purported to repudiate the contract the appellant did not accept the repudiation and sue for damages. He elected to purport to perform his part of the contract. By so doing he enabled the respondent not only to perform his part of the contract notwithstanding his previous repudiation of it, but to take advantage of any supervening circumstance which would justify him in declining to perform it. Halsburys Law of England 2nd Ed. Vol. VII S. 313. In an action for the price the plaintiff must aver and show that he has done all that the contract required him to do. *Frost vs. Knight* 1872 LR. 7 Ex. III at 112 and 113. If the seller elects to hold the buyer to his bargain he must continue ready and willing to deliver the goods. Halsburys Law of England 2nd Ed. Vol. XXIX p. 193. It being therefore a condition of his recovering the price of the goods that he had done all in his power to be ready to deliver the goods, the true facts revealed subsequent to the trial that the goods were not assembled and that some of the party were not available, and that both time and money would have to be expended to make them ready for delivery, would have conclusively debarred the appellant from recovery.

The respondent therefore respectfully submits that the appeal should be dismissed and the order of the Court of Appeal setting aside the judgment of Smily, J., affirmed.

F. A. BREWIN,
of Counsel for the Respondent.