

Privy Council Appeal No. 13 of 1950

Harry Reeder - - - - - *Appellant*

v.

George E. Shnier & Company - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 9TH OCTOBER, 1950

Present at the Hearing :

LORD PORTER
LORD NORMAND
LORD MORTON OF HENRYTON
LORD REID
LORD RADCLIFFE

[*Delivered by* LORD REID]

This is an appeal from a judgment of the Supreme Court of Canada dismissing an appeal from the Court of Appeal of Ontario. On 23rd August, 1946, the appellant raised an action against the respondent in the Supreme Court of Ontario: he was successful before Smily J. and on 18th June, 1947, the Court of Appeal of Ontario dismissed an appeal by the respondent. Then on 8th September, 1947, the respondent moved under Rule 523 of the Rules of the Supreme Court of Ontario for an order reversing this judgment on the grounds that it was "obtained by the fraud and/or perjury of the plaintiff and/or because of matter arising subsequent to the making of the said judgment." On 30th October, 1947, this motion was dismissed by Smily J. The respondent appealed and on 23rd April, 1948, the Court of Appeal of Ontario allowed the appeal and ordered that the judgment in favour of the present appellant be set aside. The appellant then appealed to the Supreme Court of Canada and on 2nd June, 1949, this appeal was dismissed by a majority (Kerwin Taschereau and Locke J.J.; Rinfret C.J. and Rand J. dissenting). The present appeal is an appeal from that judgment.

The main issue in the case now is whether during the trial before Smily J. on 18th March, 1947, the appellant gave evidence which he knew to be false and thereby procured a judgment in his favour. Smily J. has held that he did not: the Court of Appeal of Ontario and the Supreme Court of Canada have held that he did. It is therefore necessary for their Lordships to consider the facts in some detail. The respondent company carries on business as a manufacturers' agent and in 1946 it held an agency for certain polaroid products including visors. These contained transparent panels of a substance which is said to cut off harmful rays from strong sunlight or glare and they were designed for the use of motorists. Retailers in the United States of America had been supplied with display stands or demonstrators which were intended to show the advantages of this device to prospective purchasers. But it was found that these display stands were

not suitable for use in Canada as they did not comply in certain respects with the safety requirements of the Canadian Standards Association. The respondent required display stands which could be distributed to store keepers and other retailers in Canada and got in touch with the appellant, who was trading under the name of The Colorgraphic Company. After some negotiation a contract was made dated 20th February, 1946. This contract provided for the supply by the appellant to the respondent of "2,000 display stands as per sample submitted to Canadian Standards Association and approved by the Canadian Standards Association at \$300 each. One thousand immediately, 1,000 as required within the next three months. The above are to be packed in corrugated cartons all ready for shipment." There was a provision that the seller might deliver within a margin of 10 per cent. over or under the amount ordered and there were other conditions which need not be particularly referred to.

The display stand may be described as a box made of cardboard. There was fitted inside the stand a picture of what a motorist could be supposed to see and this was illuminated by an electric light to simulate glare. At the top there was a flap containing a piece of the polaroid material so that the customer by moving the flap could look at the illuminated scene first directly and then through the material and so appreciate its effect. To fulfil the order the appellant had to get cardboard, cut it to shape, and put on each piece coloured designs and wording. Then he had to get electric light bulbs and suitable bulb holders and electric fittings. He had also to get the polaroid material and no doubt certain other things. The materials had then to be assembled and a label issued by the Canadian Standards Association put on each stand. Each stand had then to be packed in a corrugated carton. So the word "immediately" in the contract could not have been intended to be taken literally, but it appears that the respondent expected delivery in about three weeks. In fact there was some delay and the first 1,000 were delivered at various dates during April.

The appellant did not manufacture any of the parts required but sub-contracted with various firms. Schaefer-Ross (Canada) Ltd. made sufficient of the cardboard parts for about 2,000 stands, then the other parts necessary for the first 1,000 were supplied to them and they assembled and delivered these stands. The appellant obtained the electric fittings from another firm. But the electric light bulbs, the polaroid material, the Canadian Standards Association labels and the packing carton he obtained from the respondent. The respondent was a member of the Canadian Standards Association and the appellant was not, so he could not get the labels directly unless he became a member. During May there were some difficulties. The respondent received some complaints about the cardboard stands and the appellant undertook to put things right. The appellant thought that payment was being unduly delayed. The first serious difficulty arose in June. The Canadian Standards Association reported that their inspector had found that electrical fittings in display stands which had been distributed were substandard in certain respects and that unless these were rectified the Association's approval would be withdrawn. On 5th June the respondent wrote to the appellant referring to this and stating "In view of the above we are cancelling the balance of our order pending satisfactory deposition of the first thousand." The appellant made certain proposals and on 17th June the respondent after complaining of delay in delivery of the first 1,000 enquired how soon the balance could be delivered and how the demonstrators already delivered could be rectified. In reply the appellant wrote with regard to the balance to be delivered "if you will agree to pay for the same as per the contract when delivered, namely C.O.D., we shall proceed with them and give you a definite date." But nothing further appears to have been done and on 23rd August the appellant raised an action. In his statement of claim delivered on 10th January, 1947, it is stated "4. The plaintiff manufactured 2,059 display stands and delivered 1,000 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 as per the said contract." The

claim was for the price of the goods and such further and other relief as the nature of this case might require. The defence was that the plaintiff had failed to make delivery of any stands approved by the Canadian Standards Association, that the plaintiff had failed to make delivery within the times provided for under the contract and that the defendant had rescinded the contract by giving notice to the plaintiff to that effect. These defences failed and Smily J. gave judgment for the present appellant, the order being "that the plaintiff do recover from the defendant the sum of \$3,431.16 payable upon delivery of the 1,059 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 1,059 stands completed without the polaroid visors or screens if the defendant shall fail to deliver the polaroid sheeting therefor within the said period of 15 days from the date hereof."

The reason for this unusual form of order appears from the evidence. The polaroid material necessary for the first 1,000 had been supplied free by the respondent, and although requested to supply material for the remainder the respondent had not done so. The respondent appealed: in the notice of appeal the grounds stated were that the trial Judge erred in failing to find that the contract was rescinded and that he ought to have found that the time for delivery was a condition of the contract. No reference was made to the form of the order and the matter was not dealt with by the Court of Appeal. On 23rd June a few days after the judgment of the Court of Appeal dismissing the appeal, the respondent sent a quantity of polaroid material to the appellant.

The appellant had given this evidence at the end of his examination-in-chief: "Q. Then have you received from the defendant any money in respect of the undelivered polaroid demonstrators? A. None. Q. Your statement of claim says you have 1,059 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." There was no cross-examination on this evidence. On 26th June, 1947, Mr. Arnup, the appellant's counsel at the trial, wrote to the respondent's solicitors acknowledging receipt of visors and stating "You will recall that in connection with the first 1,000 our client was unable to get containers and your client was able to arrange this. It would appear that the shortage of shipping containers is more acute now than it was a year ago and our client says he will not be able to get the necessary containers for several months. The demonstrators will of course be assembled shortly and we should be obliged if your client would consider what steps should be taken in view of the inability of our client to obtain containers." Apparently this led Mr. Shnier to think that the appellant had given false evidence and in reply to this letter the respondent's solicitors stated on 1st August that they proposed to launch a motion under the provisions of Rule 523.

Rule 523 is in the following terms:

"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."

The procedure in a motion under this Rule is that affidavits are lodged and there may be cross examination on an affidavit before a special examiner. Affidavits of Mr. Schnier and his solicitor were lodged on 9th September. Mr. Shnier was cross-examined on 11th September. The appellant's affidavit was lodged on 12th September and he was cross-examined on 16th September. Then on 3rd October the respondent lodged an affidavit of Mr. Cameron of Schaefer-Ross (Canada) Ltd.

The important question was whether the appellant was giving evidence which he knew to be false when he said "we can deliver at once provided the visor is supplied to us." It must have been obvious at the time when this evidence was given that it could not be strictly accurate. Even if everything possible had already been done it would still have been necessary to attach a visor to each article and then to pack it in its container. Moreover this evidence must be read in light of the evidence which the appellant had already given. He had referred in some detail to three letters written to the respondent dated 28th May, 3rd June, and 12th June, 1946, in which he referred to the balance of the order for display stands. In the first letter it was stated "These have been completed with the exception that we are now awaiting the reception of Polaroid sheeting from you": in the second he referred to "the balance of your order which we are holding for assembling" and in the third he again referred to "the balance of your order which we are holding for assembly" and stated "but the same cannot be completed until you supply the polaroid sheetings". These letters made it at least probable that the display stands were still unassembled at the time of the trial. There was no cross-examination about this and it is now admitted that it would not have been in accordance with ordinary practice to assemble them until all the components were available. Their Lordships cannot therefore regard the evidence complained of as a representation that the stands had already been assembled. "We can deliver at once" must have meant "we can deliver in a very short time" and their Lordships can find nothing in the evidence to indicate any other meaning. Then it is said that the appellant could not have made this statement honestly until at least he had in his possession all the components other than the visors. Their Lordships cannot draw such an inference: if a person knows that he can get delivery of a component when he wants it the position is not substantially different from what it would be if he had that component in his own possession. The real question is whether the appellant could honestly say that he could deliver in a very short time. In his affidavit of 12th September, 1947, he says "I verily believe that if the defendant had delivered the necessary polaroid screening to me during the summer of 1946 the entire 1,059 stands could have been assembled in a matter of a few days as all the material was then available". If that is true with regard to March, 1947, the time when the evidence was given, then there was no fraud.

At that time there were certain components which the appellant did not have in his possession. All the necessary cardboard parts had been made in April, 1946, but in December, 1946, some had been damaged by water and they had not been replaced: also the appellant had no Canadian Standards Association labels and he had no cartons for packing. He may not have had all the necessary electrical fittings. After discussing with the Canadian Standards Association in June what was necessary to comply with their requirements he ordered what was necessary and had received all the parts by September, 1946. But it was discovered in August, 1947, that some of these had been stolen from his store: it is not known when they were stolen, but even if this was before the date of the trial the appellant had no reason to suspect that this had occurred and he was in no way dishonest in giving evidence on the footing that he had all the necessary electric fittings in his possession. The replacement of the damaged cardboard parts does not appear to have been either a difficult or a lengthy operation. Ultimately 500 new parts required were completed by one man in his own house in a few days so this cannot be regarded as important. With regard to the labels, as the respondent was in a position to get them and had in fact supplied labels for the first 1,000 without charge, it was not unreasonable for the appellant to suppose that the respondent must supply labels for the remainder and would do so. The most difficult matter is the packing cartons: the appellant could not reasonably suppose that the respondent was under any obligation to supply them, but he appears to have been optimistic enough to suppose that the respondent would help him as before. Neither he nor his Counsel, Mr. Arnup, who heard his evidence can have thought that that evidence was inconsistent with the fact that the appellant could

only deliver at an early date if the respondent helped him with cartons: otherwise the letter of 26th June, 1947, could never have been written by Mr. Arnup. It may be that the position with regard to cartons was such that in fact the appellant's evidence was not accurate because, having no cartons, he would not have been able to deliver without delay. But for the respondent to succeed on the ground of fraud more than this would be necessary. On this matter the appellant may have been foolishly optimistic, but their Lordships are unable to hold that he was dishonest. On this part of the case Smily J. said "It would seem that certain statements which were made with respect to the said matter were at least inaccurate, but I am of opinion that the inaccuracy does not go so far as to amount to fraud". Owing to the procedure followed in Ontario the learned judge did not have the advantage of hearing the cross-examination of the appellant on his affidavit but he did hear the appellant giving the evidence which is alleged to have been given fraudulently and their Lordships attach weight to his opinion.

The respondent submitted an alternative case on the ground that if the true facts had been brought out at the trial Smily J. could not have pronounced the judgment which he gave and that these facts could not then have been discovered by the respondent. Their Lordships do not find it necessary to consider whether or not the respondent could by reasonable diligence have discovered the true facts earlier because they are not satisfied that disclosure of these facts at the trial would have led to a different result. In their Lordships' view the position can be stated broadly in this way. From the evidence given at the trial it was clear that there was still work to be done to put the goods in a deliverable state: it now appears that more had to be done than appeared at the trial. Smily J. gave judgment for the price of the goods although he knew that they were not yet in a deliverable state. He considered whether he ought to do this. He said "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." The question is whether if he had known all the facts he would have acted differently. On this question Smily J. said in his judgment of 30th October, 1947, "I do not feel that I can say with certainty if I had known the facts now alleged that I would have rendered a judgment more favourable to the defendant." Their Lordships accept that statement. In their Lordships' view the question is not whether Smily J. ought to have pronounced a different judgment. A motion under Rule 523 cannot be used to bring under review the validity of the grounds of the first judgment of Smily J. The respondent could have submitted in the first appeal to the Court of Appeal that a judgment for the price of goods could not properly be made when it appeared that work still had to be done to put the goods in a deliverable state. But the respondent did not do so, and that cannot be done now. It must now be accepted for the purposes of this case that on the facts as then disclosed the first judgment of Smily J. was unexceptionable. So the respondent can only succeed on this ground by showing that, if Smily J. had applied to the facts as now disclosed the same grounds of judgment as those which he did apply to the facts as disclosed at the trial, he ought to have reached a different result. In their Lordships' judgment this has not been established.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of Smily J. of 30th October, 1947, be restored. The respondent will pay the costs of this appeal and in the Court of Appeal of Ontario and the Supreme Court of Canada.

In the Privy Council

HARRY REEDER

v.

GEORGE E. SHNIER & COMPANY

DELIVERED BY LORD REID

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