

45, 1934



In the Privy Council

No. 96 of 1933

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF ONTARIO

BETWEEN :

HARRY OAKES,

(Defendant) Appellant,

—and—

CHARLES S. FRANKLAND,

(Plaintiff) Respondent.

10

APPELLANT'S CASE

1. This is an appeal from the Judgment of the Court of Appeal of the Supreme Court of Ontario dated the 9th day of January, 1933. By the said Judgment the Court dismissed the Appeal of the Appellant from the Judgment of the trial Judge, Kelly, J., dated 8th August, 1933, directing the Appellant to pay to the Respondent the sum of \$15,000, which sum the Respondent alleged the Appellant had not paid to The Royal Bank of Canada for and on behalf of the Respondent under the terms of a settlement of a prior action between the same parties.

RECORD.
p. 69
p. 44
p. 1
ll. 28-35
p. 82, Ex. 8
p. 83, Ex. 6

2. The document showing the terms of settlement of the prior action is in the form of a release dated November 9th, 1931, whereby "in consideration of payment (by Appellant) of \$15,000 guarantee to Royal Bank and \$10,000", mutual releases were given the Respondent's release extending to a company controlled by the Appellant known as Welland Securities Limited. \$10,000 was paid to the Respondent and a consent to the dismissal of the action without cost was thereupon signed by the solicitors for the Appellant and the Respondent. The question for decision on this appeal is whether the "\$15,000 guarantee" was paid to the Royal Bank and if not, whether the Appellant should be ordered to pay \$15,000.00 to the Respondent.

p. 83, l. 10
p. 82, l. 30

3. Prior to November 9th, 1931, the Respondent was largely indebted to the Royal Bank and the Bank held as security;

- (a) The Appellant's guarantee dated 4th August, 1927, limited to \$15,000.
- (b) A mortgage dated 27th March, 1929, on lands of the Respondent in the Town of Bridgeburg and in the Township of Stamford.

APPELLANT'S CASE.

RECORD.

(c) An assignment of the Respondent's interest under an agreement whereby he was to purchase a parcel of 64 acres in Stamford known as the "gravel pit".

p. 38, l. 40

4. The Bank on 8th November, 1929, offered the mortgaged lands for sale under the power of sale contained in the mortgage but there was no bid. On 30th April, 1931, the Bank, to protect its position, completed the purchase of the gravel pit, advancing the purchase money and taking the conveyance in its own name.

p. 18, l. 20

p. 12, l. 8
p. 38, l. 25
p. 31, l. 25
p. 31, l. 25
p. 31, l. 25
p. 81, l. 30
p. 82, l. 10

5. After the abortive sale, the Bank continued its efforts to realize on its securities. The ~~Respondent's~~ ^{APPELLANT'S} guarantee was at all times regarded by the Respondent and the Bank as being worth, as it was worth, its full face value. The Manager of the Bank at Bridgeburg, where the Respondent's account was kept, communicated with Mr. F. W. Griffiths of Niagara Falls, Solicitor for the ~~Respondent~~ ^{APPELLANT} and Mr. Hamilton, Secretary of Welland Securities Limited, about payment of the guarantee and on 8th October, 1931, wrote Mr. Griffiths enclosing a list of properties held as security and confirmed the fact that he had offered that day to recommend the Bank to accept \$35,000 for the properties, including the release of the ~~Respondent's~~ ^{APPELLANT'S} guarantee. Opposite each parcel in the list was an amount under the heading "Sale Value" but the Bank Manager explained to Mr. Griffiths that these figures were those reported to the Head Office when dealing with bad and doubtful debts at a previous date. He never discussed values with Mr. Griffiths.

p. 38, l. 1

p. 85, l. 20

6. On 9th November, 1931, prior to the settlement, the Bank gave Welland Securities Limited an option for "thirty days from date" to purchase the properties referred to in the list accompanying the letter of 8th October, 1931, for \$35,000, the ~~Respondent's~~ ^{APPELLANT'S} guarantee to be retired out of the purchase price. The option, though given on the 9th November, 1931, bears date 11th November, 1931.

p. 12, l. 27

p. 39, l. 35

p. 23, l. 20

7. The Respondent attended at the Bank on 14th November, 1931, when the Bank Manager informed him the \$15,000 had not been paid and explained to him the proposed sale and release of guarantee for \$35,000. He says that he had the \$10,000 with him and intended to make a payment to the Bank on account of his liability but he did not do so, because after his talk with the Manager, he decided to wait and see "how the cat jumped". He made no complaint or protest to the ~~Respondent~~ ^{APPELLANT}.

p. 87, l. 10

pp. 87 to 94

p. 94, l. 30

p. 38, l. 42

8. The option was accepted by Welland Securities Limited on 19th November, 1931, and the Bank conveyed the properties to that Company by Indentures dated 23rd November, 1931. Welland Securities Limited in taking the option and conveyances acted for the Appellant. The purchase price was paid to the Bank on 31st December, 1931, and the full amount was credited to the Respondent. The Appellant's guarantee was returned to his solicitor on 10th

February, 1932, and a receipt was taken for the document signed by the Bank and the Respondent's solicitor acknowledging that settlement of the liability had been made on 31st December, 1931, and that \$15,000, the amount of the settlement, had been credited to the Respondent's account. The Bank Manager says the Bank accepted \$15,000 on the guarantee and \$20,000 for the lands.

RECORD.
p. 39, l. 1
p. 36, l. 36
p. 37, l. 3
p. 96, l. 14
p. 38, l. 30

9. The conveyances from the Bank to Welland Securities Limited were registered on 4th January, 1932, with affidavits under the Land Transfer Tax Act attached for the purpose of fixing the tax payable on the transfers. These affidavits were made by Mr. W. H. Waugh, describing himself as solicitor for the Grantee. Mr. Waugh had not signed the acceptance of the option or taken part in the negotiations for the option. He stated in the affidavits that the consideration for the property in the Township of Stamford was \$15,000; for the property in Bridgeburg \$2,400 and for the gravel pit \$17,600, making a total consideration of \$35,000.

p. 89
p. 91
p. 94

10. The Respondent made his first complaint to the Appellant on 14th January, 1932, when his solicitors wrote demanding damages for failure to carry out the settlement. Subsequently the Respondent commenced the action out of which this appeal arises. He claimed damages and payment of \$15,000, or in the alternative rescission of the agreement of 9th November, 1931. He did not at any time offer to return the \$10,000 paid when the release was signed.

p. 95, l. 30
p. 2, l. 31

11. The action was tried by the Hon. Mr. Justice Kelly on 25th May, 1932. He gave judgment in favour of the Respondent for \$15,000 and referred the question of damages to the Master for inquiry and report. He agreed with the Respondent's contention that the Appellant under the settlement was to pay \$15,000 to the Bank which would have the effect of releasing the Appellant's guarantee and reducing the Respondent's indebtedness to the Bank but the Appellant instead used that part of the money to purchase from the Bank the Respondent's lands.

p. 48
p. 46, l. 16
p. 47, l. 20

12. The Court of Appeal dismissed the Appellant's appeal from the trial judgment holding that the Appellant was liable to the Respondent for \$15,000 but disallowing the Respondent's claim in damages.

p. 69

13. Chief Justice Mulock said the documentary evidence and the testimony of the Bank Manager showed beyond doubt that the price paid for the properties was \$35,000 and that the \$15,000 was wholly unpaid. The release by the Bank did not in his opinion release the Appellant from his obligation to pay \$15,000. He did not, however, agree with the trial Judge that the Respondent was entitled to damages and expressed the opinion that the Appellant had an unqualified right to purchase the Respondent's lands from the Bank.

p. 50
p. 53, l. 29

14. Mr. Justice Middleton was of the opinion that the Appellant's conduct was not fraudulent and there was no fiduciary relationship existing between the parties. Everything in his opinion depended upon the effect of the purchase

p. 54

RECORD. agreement. The Appellant's payment of \$15,000 to the Bank was to be so paid as to discharge his liability without creating any corresponding liability on the part of the Respondent to indemnify him and this was his obligation at the time he made the contract with the Bank for the purchase of the securities. The Appellant's rights must be determined as though he had done that which he had contracted to do and had paid this money to the Bank at that time and had he done so, the guarantee would have been a factor of no financial moment in the purchase.

15. Mr. Justice Masten agreed with Mr. Justice Middleton with respect to the \$15,000. He was convinced that what the Appellant intended to pay was \$10,000 to the Respondent and \$35,000 to the Bank for all its securities applicable \$15,000 in discharge of the guarantee and \$20,000 as the purchase price of the lands but the manner in which the transaction was carried out exposed the Appellant to a more extended liability. He was of the opinion that the action was also maintainable on the ground of actionable non-disclosure and that the Respondent was not only entitled to \$15,000 but was also entitled to damages in consequence of his being led to settle the former action on the terms agreed and in ignorance of the option then held by the Appellant.

16. Mr. Justice Fisher agreed with Mr. Justice Middleton adding that "inclusion of the guarantee in the option was in plain language what might be termed a gross breach of faith".

17. Mr. Justice Grant agreed with the Chief Justice and Mr. Justice Middleton that there was no fiduciary relationship but said that the only benefit to be derived by the Appellant from the payment was the discharge of his guarantee to the Bank. The payment could not be made to perform the double duty of paying off the guarantee and at the same time form part of the purchase price for the lands.

18. The Appellant humbly submits that the judgments of the Ontario courts are wrong and should be reversed and the action dismissed for the following among other

REASONS

1. BECAUSE \$15,000 was paid to The Royal Bank in satisfaction of the guarantee.

2. BECAUSE \$15,000 was paid in discharge of the Respondent's liability to the Bank.

3. BECAUSE the Bank in effect realized \$20,000 on its securities apart from the guarantee.

4. BECAUSE considering matters of substance rather than of form the Appellant's obligations to the Respondent under the settlement were fully performed.

5. BECAUSE the Respondent never attacked the Bank in respect of its dealings with his securities and the Bank is not a party to these proceedings.

6. BECAUSE the Respondent with knowledge stood by and permitted the transaction with the Bank to be carried through and is estopped from maintaining the action.

7. BECAUSE if the Appellant failed to carry out any term of the settlement his liability is in damages only and no proof of damage was given and no assessment of damages was or could be made.

10 8. BECAUSE the Appellant was not in a fiduciary relationship to the Respondent or under any obligation to disclose to him the negotiations with the Bank.

9. BECAUSE \$15,000 was not to be paid to the Respondent but to the Bank to be applied on the Respondent's indebtedness and the Respondent is still indebted to the Bank.

10. BECAUSE on the facts disclosed in evidence the action should have been dismissed.

W. N. TILLEY

A. G. SLAGHT

No. 96 of 1933.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL OF THE SUPREME
COURT OF ONTARIO.

BETWEEN :

HARRY OAKES - - (Defendant)
Appellant

— AND —

CHARLES S. FRANKLAND (Plaintiff)
Respondent.

APPELLANT'S CASE.

LAWRENCE JONES & Co.,
Lloyd's Building,
Leadenhall Street,
London, E.C.3.