Privy Council Appeal No. 96 of 1933.

Harry Oakes - - - - - - - - *Appellant*

v.

Charles S. Frankland - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JULY, 1934.

Present at the Hearing:

LORD ATKIN. LORD WRIGHT.
LORD TOMLIN. SIR LANCELOT SANDERSON.
LORD MACMILLAN.

[*Delivered by* LORD ATKIN.]

This is an appeal from the judgment of the Supreme Court of Ontario, Court of Appeal, confirming, with a variation, the judgment of the trial Judge, Mr. Justice Kelly, in favour of the plaintiff.

The action was brought by the plaintiff, Mr. Charles Frankland, against the defendant, Mr. Harry Oakes, to recover the sum of 15,000 dollars which was alleged to be due to the plaintiff on the terms of an agreement made on November 9, 1931, in settlement of an action which the plaintiff had brought against the defendant in respect of a certain joint adventure of dealings in land. The case for the plaintiff was that the defendant had not paid part of the sum contracted to be paid, a sum of 15,000 dollars. The case for the defendant was that he had duly paid that sum.

The details of the case are these: The plaintiff and the defendant had apparently had joint dealings in land, and in 1930 the plaintiff had commenced an action against the defendant for an account of the transactions and damages. Mr. Frankland, the plaintiff, had for some time before that action been in an

unsatisfactory financial position; he had an account with the Royal Bank of Canada at Bridgeburg branch; there was an overdraft on that account which was secured by a mortgage by Mr. Frankland to the bank of certain properties of his own, not connected with the partnership action, and also secured by a guarantee which Mr. Oakes had given to the Bank of 15,000 dollars to cover the account general. The Bank had in 1929 sought to sell the properties held under the mortgage but had failed to do so, and in their books they stood at a value, which had been put on them by the manager, of about 35,000 dollars. The time came when Mr. Oakes was to be examined on discovery in the partnership action, and it was then suggested by his representative, his Counsel, that the action should be settled. There was some discussion about the terms, and eventually it was agreed that the action should be settled for 25,000 dollars, 10,000 dollars to be paid forthwith and 15,000 dollars to be paid to the Bank by Mr. Oakes for Mr. Frankland's account, which would have the effect of discharging Mr. Oakes' liability upon his guarantee, but obviously with the intention that there should be no claim against Mr. Frankland by Mr. Oakes in respect of that payment of the guarantee; it was to be a sum that was to be paid in reduction of Mr. Frankland's indebtedness to the Bank.

It is desirable that the terms of that settlement should be stated at once. They are contained in a document dated 9th November 1931. It is an indenture which witnessed " that in consideration of payment of 15,000 dollars guarantee to Royal Bank and 10,000 dollars of lawful money of Canada, the said Charles S. Frankland and Harry Oakes doth release the other their heirs, executors, administrators and assigns . . . . from all sums of money . . . due up to the date of these presents."

Now, the 10,000 dollars was paid forthwith to the plaintiff's solicitors. The question arises as to the payment of the 15,000 dollars which was expressed to be a payment of 15,000 dollars guaranteed to the Royal Bank. What really happened with reference to the matter was this—and these transactions were at this time quite unknown to Mr. Frankland—in the course of November 9th, which is the date of the settlement, there had been an adjournment from the morning to the afternoon before the matter was finally settled, and during the adjournment Mr. Oakes' solicitor, together with a representative of Welland Securities Limited, which is a holding company apparently representing Mr. Oakes, had gone to the Bank and they had obtained an option from the Bank to purchase the properties which had been mortgaged to the Bank by Mr. Frankland. The option is in these terms. It is contained in a document which sets out what is said to be " Real estate acquired by foreclosure of mortgages," which is in itself a complete misstatement of the transaction because there had been no foreclosure of mortgages; the Bank were in

fact selling under a power of sale contained in the mortgage which gave them power to sell upon a month's notice, which had been given. It then sets out six lots of property. being the mortgaged property, taken from the schedule in the mortgage, and it states against each the sale price, the sale prices amounting altogether to 33,800 dollars, from which is to be deducted 600 dollars, being the amount of an existing mortgage by some prior holder of one of the properties, bringing out altogether 33,200 dollars. Then at the bottom of the document there is written this:

> "Bridgeburg, November 11, 1931. In consideration of value received the Royal Bank of Canada hereby grants Welland Securities Limited the exclusive right to purchase the above properties for 35,000 dollars with a good marketable title for a period of 30 days from date. All evidence of title to be supplied Welland Securities at once. The Oakes guarantee for 15,000 dollars to Royal Bank of Canada or Frankland to be retired out of purchase price above."

And that is signed by Mr. Steele, the branch manager of the Bank. That document, although it is given on the 9th, is dated the 11th, which appears to their Lordships to be a significant fact, made the more significant because at the time the question was raised between Mr. Oakes' representative and the Bank manager as to whether it was necessary to inform Mr. Frankland of this transaction and it was said that he really did not take any interest in these properties, and so Mr. Frankland was never informed about this transaction at that time. What happened in fact was this: This option was carried out on November 19th. It was accepted by a letter which Welland Securities—the company named in it—wrote to the Bank—

> "Dear Sir, Welland Securities Limited hereby accepts the option granted by the Royal Bank of Canada dated November 11, 1931, for the purchase of the properties therein referred to for the price of 35,000 dollars. The option calls for the supplying to the Welland Securities Limited of all evidence on title but up to date we have received nothing. It is also part of the acceptance that the guarantee by Mr. Harry Oakes for 15,000 dollars to the Royal Bank of Canada in connection with Charles Frankland is to be retired out of the purchase price above. Please supply us with your title papers and draft deed at the earliest moment as we are prepared to close upon procuring a good marketable title for the lands. It will be necessary to have two deeds, one deed for the seven acres in Stamford and the other deed covering the other property. The consideration for the Stamford seven acres will be 15,000 dollars to be deeded to Harry Oakes. We trust you will be able to let us have these draft deeds at once."

That option having been exercised in that way, conveyances were duly made as requested in that letter by the Royal Bank of Canada on 23rd November, 1931. Before those conveyances are discussed, it is possible now to appreciate what the real question between the parties is. The plaintiff says that the effect of the transaction of settlement, the proper construction of the document, is that 15,000 dollars, which was the amount for which Mr. Oakes

had undertaken to be surety, was to be paid to the Bank in discharge *pro tanto* of Mr. Frankland's indebtedness to the Bank, and if that were so he would have to find a less sum by that amount to redeem his securities. He says that instead of that sum being paid to the Bank as stipulated for, in fact it was used by Mr. Oakes as part of the consideration price for the purchase of the mortgaged properties, and that, therefore, instead of being used for the contract purpose it was used for a different purpose, namely, to buy the mortgaged properties of which Mr. Oakes has had the benefit; and the real question in dispute is whether or not the true transaction was one by which Mr. Oakes bought the mortgaged properties from the bank for 35,000 dollars or whether, as he says, he paid the 15,000 dollars to the Bank in reduction of Mr. Frankland's indebtedness and bought the properties from the Bank for 20,000 dollars, the two sums together making 35,000 dollars which the Bank got from the transaction.

The learned Judges below have come to the conclusion that the true construction was that which the document records it to have been, namely, the purchase from the Bank of the mortgaged properties by Mr. Oakes for 35,000 dollars, and their Lordships can see no reason at all to differ from that conclusion. On the contrary, they agree with it and think it is the true view. It is in respect of that dispute that the conveyances which were granted appear to be very material. The conveyances taken were three in number. One was for a plot of land which their Lordships are told Mr. Oakes was generous enough to convey to the local authority for public purposes, and the conveyance is expressed to be to Mr. Oakes and expresses the consideration as being the sum of 15,000 dollars, and that is the property which in the schedule to which the option is attached is valued at 5,000 dollars. The next conveyance is of the same date, but is a conveyance to Welland Securities Limited, and it is a conveyance which is expressed to be in consideration of one dollar and other valuable consideration. Their Lordships do not pause to consider why the true consideration is not mentioned there. There may be reasons why in a registered document it is not desirable to disclose the full consideration. It has to be fully and adequately stated for purposes of transfer tax by an affidavit of a person acquainted with the facts, and an affidavit is made by Mr. William Herbert Waugh, solicitor for the grantee, who makes oath and says that the true consideration is moneys paid in cash, 2,400 dollars. That was for properties which stood in the Bank document as being worth on the whole 9,800 dollars. The third transaction is in respect of a property which contained a gravel pit, and apparently was the most valuable part as far as the Bank were concerned, which stood in their statement at the value of 19,000 dollars, and there the consideration expressed in the conveyance is again one dollar and other valuable consideration, but it is sworn by Mr. Waugh to have been moneys paid in cash,

17,600 dollars. It will be observed that the total amount of those sums on which it has to be remembered tax was paid—amounts that are sworn for the purpose of assessing tax—is 35,000 dollars, and the question arises why, if the transaction was not in fact, a purchase for 35,000 dollars but was a purchase for 20,000 dollars, the parties should have gone out of their way in all the documents to express the larger sum as being the purchase consideration, and not only have gone out of their way in the documents to have expressed the consideration as being 35,000 dollars, but have sworn affidavits to the effect that that was the true consideration, and have paid tax, therefore, on a sum which was larger by more than 50 per cent. than the true amount.

There is one other matter that should be mentioned and that is the actual cheque which was eventually paid on December 1st. A cheque was given for 32,134 dollars, which was the amount of 35,000 dollars less arrears of tax, and on the cheque is written " Payment in full for lands covered by option dated November 11, 1931, to Welland Securities Limited accepted by Welland Securities Limited, 32,134.77." So that there is not only the evidence of the plaintiff himself: there is also the evidence of the Bank manager, which is not quite specific either way,—he was called for the plaintiff—and there is the absence of any evidence by the gentleman who carried out this transaction for Mr. Oakes; but apart from oral evidence, there are these documents which have been referred to which appear to their Lordships to be conclusive in support of the view taken by the plaintiff that the true transaction was that Mr. Oakes had purchased this property for 35,000 dollars, and if in fact therefore this payment was only made in satisfaction of that consideration for these properties it is quite plain that he has not performed his agreement: he has not paid 15,000 dollars in relief *pro tanto* of Mr. Frankland's indebtedness to the Bank, and Mr. Frankland is in the position of having had his property sold for 35,000 dollars but not having had his indebtedness reduced quite independently of what his properties were sold for.

It is unnecessary for their Lordships to express an opinion about the manner in which this transaction was carried out, and therefore they refrain from saying what might be said about the commercial morality of the transaction. It is enough to say in this case that their Lordships are quite satisfied that the judgments below are correct on this matter and therefore they will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

In the Privy Council.

HARRY OAKES

v.

CHARLES S. FRANKLAND

DELIVERED BY LORD ATKIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1934.