JOHN MACDONALD & COMPANY LIMITED (PLAINTIFF) .. .. } APPELLANT;

AND

THE PRINCESS MANUFACTURING COMPANY, LIMITED (DEFENDANT) } RESPONDENT.

1925
*Nov. 20.
1926
*Feb. 2.

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

Sale of goods—Sale by description and sample—Implied warranty that goods are merchantable.

Held, at common law, on a sale by description and by sample of goods (such as "black Italian cloth"), the ordinary use of which goods is well established, and the description being the usual commercial

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

description well known in the trade, although the purpose for which they are bought is not communicated to the vendor, and although the vendor is not the manufacturer of the goods, and does not know of any defect, there is an implied warranty that the goods will answer such description and be merchantable under that description for the ordinary and usual purpose for which they are used. Neither inspection of the sample nor of the bulk, so far as concerns defects not discoverable on reasonable inspection, excludes such implied warranty.

The court, applying above principle, reversed the judgment of the Appellate Division of the Supreme Court of Ontario (56 Ont. L.R. 418) and restored the judgment of Middleton J.,

Held that the appellant, purchaser of goods from the respondent, was entitled to damages for defect in the goods.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of Middleton J. in favour of the appellant in an action for damages claimed on the ground that certain cloth sold and delivered by the respondent (which was not itself the manufacturer thereof) to the appellant and paid for, was so defective that it was not of merchantable quality. The transaction took place before the *Sale of Goods Act* of Ontario came into operation.

G. W. Mason K.C. and *R. L. Kellock* for the appellant.

G. L. Smith for the respondent.

The judgment of the court was delivered by

RINFRET J.—John Macdonald and Company Limited, wholesale dry goods merchants, purchased on or about the 29th April 1920, from The Princess Manufacturing Company Limited, manufacturer of ladies garments, sixty-six webs of black Italian cloth.

The Princess company were not themselves the manufacturers of these goods. They had bought them for use in their business, but finding that they had a surplus of them, they were willing to dispose of it.

Nothing was said as to the purpose for which the Macdonald Company purchased the cloth. However it is used chiefly as a "coat lining—either men's or women's wear"; and Mr. Carson, factory manager of the Princess Company, stated in his evidence that it

is a well-known description of goods on the market * * * in trade it means black cotton lining suitable for garments.

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There was contradictory evidence as to how the sale was made. Brown for the appellant deposed that he concluded the purchase with Mr. Gibson, president of the Princess Company, after having examined a whole piece (or web) brought in by Mr. Gibson. The latter wanted $1.10 per yard, Brown offered $1; they compromised at $1.05. Gibson left the web with Brown after he bought the goods. The other 65 webs were delivered later.

Gibson at first testified that he was in Macdonald's warehouse and was asked if they could dispose of any black Italian. He telephoned to Mr. Carson and asked him. Carson answered he would look into the matter and get in touch with Mr. Brown. He added: "I did not make any bargain for the goods at all". Carson "transacted the rest of the transaction". But when re-examined, Mr. Gibson is put the following question:

And Mr. Brown says the bargain was made with you for the goods—would you agree with him, on that interview a bargain was made?

He replies: "Yes".

The importance of this answer is that it comes from the president of the Princess company, and admittedly the interview referred to is the only one where the price was discussed and agreed upon. According to Mr. Gibson, this interview took place before the piece of cloth was sent over to the Macdonald Company, and his story is inconsistent with his having himself taken the web to the latter's warehouse and shown it to Brown.

In this he is corroborated by Mr. Carson, who says that, after having received the telephone from Mr. Gibson, he requested the shipper of the Princess company to take down a sample piece and leave it for Mr. Brown. The next day, Carson "went down to see Mr. Brown". He goes on to say:

I asked Mr. Brown if he had looked at the material sent in and he said he had. I asked him if he cared to have it, and he asked me if they were in good condition. I said they were new goods in from Pullan's of Bradford, and that we could send them down to him to see. He told me to send them in, and we sent them in that same day, that is the remaining 64 pieces.

Q. And you have a receipt for them?—A. We have a receipt for them.

Q. Did you see Mr. Brown again about the matter?—A. No, I did not see Mr. Brown again.

Q. What happened after that?—A. The goods were accepted and paid for in due course.

Q. When were they—have you a memorandum when they were paid for?—A. I have.

Q. And the price Mr. Brown has told us was $1.05?—A. They were paid by John Macdonald cheque on May 4th, 1920.

The shipper, F. W. Green, gave evidence that he delivered the sample piece of cloth to Mr. Brown on April 28, 1920, and he produced a book showing the receipt for it. This accords with the invoice sent on the 29th April by the Princess Company to the Macdonald Company.

On this evidence, the trial judge found that "the sale was both by description and by sample".

As the transaction took place before the Sale of Goods Act of Ontario came into operation, our decision must rest upon the common law.

However, before we come to the consideration of the state of the common law as applied to the particular circumstances of this litigation, a further set of facts, as to which there is no dispute, must be adverted to.

Brown says he made the ordinary inspection of the sample by feeling the cloth and examining it ocularly, to estimate from the appearance the quality of the goods in respect of weight, fineness of texture and colour. He did not "unroll the piece so as to try it for tenderness" nor "pull it apart for strength". He apparently made the test customary in ordinary commercial practice. (See Lord Macnaghten at p. 297 in *Drummond* v. *Van Ingen* (1). He was not expected to send the piece to a tester and have it shrunk "unless he had doubt of the goods," and he had none; he found them " perfect goods".

When the sixty-five remaining webs were delivered, Brown merely opened one piece, "to see if it compared with the sample piece," and was satisfied that it did. He "did not test it for strength". He did not unroll the goods. His reason was that

it is rather a difficult matter to open up a roll of Italian cloth,

and

you would never get them back into the same condition again.

He admits "it could be done"; but (to use the words of Mr. Almas, manager of a department in the Macdonald Company)

it is not customary for wholesalers to examine linings when they receive them from the mill

(1) 12 App. Cas. 284.

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because you cannot

put them in the same shape as before they were opened and the customers think the bundles were tampered with.

The Macdonald Company began to resell the cloth. They got complaints from their customers that the goods were so inferior as not to be merchantable. Upon investigation, they came to the conclusion that this was the fact and that the cloth lacked in tensile strength, because, as they assumed,

the fabric was rotted by the dyes used in the course of the manufacture.

At the trial, the experts first heard disagreed; but the parties afterwards collaborated on certain tests, as a result of which the goods were found utterly inadequate in strength, the defect being "attributed to the unduly short fibre". The presiding judge accordingly held it to be established "that the goods were not in fact merchantable" and that their defect would not be "discernible on ordinary examination" or "apparent upon reasonable examination of the samples * * * or of the goods".

Mr. Justice Smith delivered the judgment of the Appellate Division. Commenting upon this feature of the case, he said:

> There was some discussion on the argument as to whether the very superficial examination that Mr. Brown says he gave the sample was sufficient. It was urged that, if he had availed himself of the opportunity of a fuller examination which he had, the lack of strength would have been disclosed. Mr. Carson, the appellant's manager, testified that when the goods arrived from England he opened and unrolled two webs, and examined them by all ordinary means, including testing for strength by pulling with his fingers and found no defect, and accepted the goods. In face of this evidence the appellant cannot complain that respondents did not discover the defect because of lack of proper inspection, and the learned judge's finding on that point is quite warranted.

The action is for damage due to the fact that the material sold, delivered and paid for, was so defective that it was not of merchantable quality.

The trial judge stated that

throughout both parties acted in perfect good faith, and the question is where the loss is to be borne, neither of the parties litigant being in any way at fault from the moral standpoint.

He was of opinion that the case was governed by the decision in *Mody* v. *Gregson* (1), and awarded judgment for the recovery of the amount claimed. The Court of Appeal reversed this judgment, but, in reaching this result, appears

(1) L.R. 4 Ex. 49.

to have been to no slight extent influenced by the impression, no doubt unwittingly left upon their minds, that, after the long adjournment to have an examination made of the goods by another expert, judgment had been given on the report of the latter without any further hearing. Due to "lack of any argument," the court thought that, on the question as to how the sale was made, counsel before the trial judge had no opportunity of pointing to Brown's "lapse of memory" and "the evidence the other way". Mr. Justice Smith, in fact, expressly states:

> It is because I think that matter was not before his mind and was not considered that I venture to think, on the evidence, that there was a sale of specific goods after inspection by Brown. * * * If the learned trial judge had reached his conclusions on a consideration of the evidence on that point, and the conduct of the witnesses, I would accept his finding without question.

While the trial centred on the question whether the goods were merchantable and was adjourned to permit of the supplementary examination already mentioned, the case was fully argued by counsel for both parties before the learned trial judge after completion of the further tests; and, under the circumstances, we see no reason, and none was pointed out to us at bar, why his findings that the sale was by description and by sample should not be accepted. The question is therefore: Upon that finding in an ordinary commercial transaction, how would the common law deal with the case?

As early as *Gardiner* v. *Gray* (1), where twelve bags of waste silk had been sold, after inspection of samples, but were later discovered to be unmerchantable under the description of waste silk and could not be used for any of the usual purposes for which waste silk was used, Lord Ellenborough (p. 145) laid down the rule of law as follows:

> I am of opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is whether the commodity purchased by the plaintiff be of such a quality as can be reason-

(1) 4 Camp. 144.

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ably brought into the market to be sold as *waste silk?* The witnesses describe it as unfit for the purposes of waste silk and of such a quality that it cannot be sold under that denomination.

In a later case, on a sale of oxalic acid, where the defendant was not the manufacturer, but had purchased it from the manufacturers, and, after delivery, the acid was found to contain sulphate of magnesia which was not discoverable even by experienced persons, except by analysis, the court (Willes J. delivering the judgment) held that:

> Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk, and without warranty. (*Josling* v. *Kingsford*) (1).

It was after having referred to the above rule laid down by Lord Ellenborough in *Gardiner* v. *Gray* (2), and having mentioned incidentally that it was "elaborately commented upon in the judgment of the Court of Queen's Bench, delivered by Mellor J. in *Jones* v. *Just*" (3), that Willes J., in *Mody* v. *Gregson* (4), expressed himself in the following way:

> This rule of law entitling the purchaser in an ordinary commercial bargain for the supply of goods, not specified or agreed upon at the time but described generally as of a designated sort, to receive merchantable goods of that sort, is founded upon an obvious inference from the character of the transaction, that the parties are dealing not for the mere semblance or shadow of the thing designated, but for the thing itself as commonly understood in commerce, with the essential qualities which make it worth buying to a person who wants an article of that designation; in other words, that the buyer and seller, in the absence of anything to show an intention to the contrary, must be taken as intending to buy and sell respectively a merchantable article of the designated kind.

Willes J. afterwards refers to the fact that Gregson and others were manufacturers of the goods, but only as one of the "special reasons for applying" what he expressly calls "the general rule in favour of the buyers".

He then proceeds to examine whether the fact of the sale being by sample negatives the implied term that the goods should be merchantable and points out (p. 53) that there are cases where the sample is given

(1) 32 L.J.C.P. 94.
(2) 4 Camp. 144.
(3) L.R. 3 Q.B. 197.
(4) L.R. 4 Ex. 49, at p. 52.

under circumstances which make it the only description of the thing to be supplied, and so to constitute the only touchstone of the contract,

and there are other cases where goods are

bought under a specified commercial description, either by sample or even after inspection of the bulk.

He goes on to say that, in the latter class of cases,

it is an implied term, notwithstanding the sample or inspection, that the goods shall reasonably answer the specified description in its commercial sense. The sample in such cases is looked upon as a mere expression of the quality of the article, not of its essential character, and notwithstanding the bulk be fairly shown, or agree with the sample, yet if from adulteration or other causes not appearing by the inspection or sample, though not known to the seller, the bulk does not reasonably answer the description in a commercial sense, the seller is liable.

And he cites *Josling* v. *Kingsford* (1) where, he says, "for like reasons," the seller, although he knew nothing of the adulteration, was held liable by the Court of Common Pleas.

Mody v. *Gregson* (2) was approved by the House of Lords in *Drummond* v. *Van Ingen* (3). Lord Herschell, in his speech, refers to it thus:

In the case of *Mody* v. *Gregson*, (2) in the Exchequer Chamber, the decision in *Jones* v. *Just* (4) was approved of and acted upon, and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think that the law enunciated in these cases is sound and not open to doubt.

The summary of the common law then resolves itself into this that

if the subject-matter (of the sale) be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description, that is to say shall be that article or commodity saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose.

(1) 32 L.J. C.P. 94.
(2) L.R. 4 Ex. 49.
(3) L.R. 12 App. Cas. p. 284.
(4) Q.R. 3 Q.B. 197.

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(Brett J. A. in *Randall* v. *Newson* (1), approving Best C. J. in *Jones* v. *Bright* (2). It is put thus in Benjamin on Sale, 6th ed., at p. 715:

> If the buyer's purpose be communicated to the seller, the seller's obligation is to supply goods fit for that purpose; if the goods are bought under a commercial description, his duty is to supply merchantable goods.

Under a contract of sale of an article, such as black Italian cloth, the ordinary use of which is well established and which is a "well-known description in the trade," although there is no evidence that the purpose for which it was being bought was communicated to the vendors, there was an implied warranty that the cloth would be merchantable "black cotton lining suitable for garment," this being the ordinary and usual purpose for which it was used. Neither inspection of the sample nor of the bulk, so far as concerned defects not discoverable on reasonable inspection, excluded the implied warranty that the cloth must answer its usual commercial description and be merchantable and saleable under that description. Here it was not.

We think therefore the trial judge was right and his judgment must be restored. The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Donald, Mason, White and Foulds.*

Solicitors for the respondent: *Smith, Rae and Grier.*

(1) L.R. 2 Q.B.D. 102, at p. 109. (2) 5 Bing. 533, at p. 540.