JOE J. BONNIE (PLAINTIFF) .....APPELLANT; 1951 *Nov. 22, 23

AND

AERO TOOL WORKS LTD. (DEFENDANT) ..... } RESPONDENT. 1952 *Feb. 5

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Principal and agent—Principal to pay commission on purchases effected by agent on its behalf subject to terms of written agreement—Agent having fulfilled the terms, principal refused to complete purchase—Measure of Damages.

Under a written agreement the respondent undertook to pay the appellant a ten per cent commission on ignition transformers to be purchased by the appellant and laid down in Canada at a price not to exceed $15, and by a further document authorized the appellant to act as its representative in the purchase of transformers. The appellant, as representative of the respondent, entered into an agreement with an English firm for the purchase of 20,000 transformers at a price of £2.5.0d, ten per cent of the purchase price to be paid with the official order. The respondent ultimately refused to proceed with the purchase. In an action brought by the appellant for payment of commission.

Held: An agreement to purchase implies a covenant to pay the purchase price. *Grieve McClory Ltd.* v. *Dome Lumber Co.* [1923] 2 D.L.R. 154 at 164; *Inland Revenue Commissioners* v. *Gribble* [1913] 3 K.B. 212. Where as here, the express agreement to buy is followed only by "terms of payment" including a first payment of ten per cent with "official order" and no time is fixed, the law implies a reasonable time but not a condition that it will not be fulfilled except at the buyer's option, therefore the appellant brought about a binding contract of purchase and sale. Since the appellant did all he agreed to do, and the conduct of the respondent was the cause of there being no deliveries, the former was entitled to damages in the amount he would otherwise have been paid as commission. *Whyte* v. *National Paper Co.* 51 Can. S.C.R., followed, *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming the judgment of Ferguson J. (2) dismissing the action.

R. A. McMurtry K.C. and *D. A. Keith* for the appellant. It must be conceded that the appellant earned his commission and is entitled to judgment if he completed a binding contract with the Runbaken Co. with respect to the sale and purchase of 20,000 transformers. It is submitted that the contract entered into by the appellant on Jan. 29, 1947 with the Runbaken Co. is a binding executory

*PRESENT: Kerwin, Kellock, Estey, Cartwright and Fauteux JJ.

(1) [1951] O.W.N. 315. (2) [1950] O.W.N. 427.

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contract between the respondent and the Runbaken Co. The trial judge erred in holding that the said contract was not effective or binding unless and until the respondent should sign a further document referred to as an "official order". He erred and misdirected himself on the evidence when he purported to make the said finding on the following grounds:

(*a*) That the only evidence of what was meant by "official order" was that given by Lome, the president of the respondent company.

(*b*) That such a finding was in accordance with the interpretation put on the contract by the appellant himself in his letter to the respondent (Exhibit 9) and subsequent correspondence and

(*c*) On the wording of the agreement itself.

The above grounds on which the trial judge based his findings are not valid for the following reasons:

1. As to (*a*)—Both the appellant and Lome gave evidence which was entirely inconsistent with the finding of the trial judge as to the meaning of the term "official order".

2. As to (*b*)—The appellant considered that he had effected a binding contract and this is borne out by the correspondence in the light of the evidence adduced.

3. As to (*c*)—The agreement itself is not fairly open to the interpretation adopted by the trial judge. The term "official order" as used in the contract was only referable to an administrative act on the part of the respondent company which it was bound to perform in order to fix the time for delivery under the contract and the instalments of payments. It is obvious that from the inception of this action down to a few days before the trial the defendant company itself considered that the plaintiff had effected a binding contract with the Runbaken Co. to the extent of entitling him to the payment of his commission. It is significant that the original Statement of Defence raised no real issue or suggestion that the plaintiff had not earned his commission but relied solely on a plea of accord and satisfaction. On the basis of the reasoning of the trial judge the interpretation placed on this contract by the

defendant in its original Statement of Defence may be of some importance in determining the state of mind of the parties, with respect to the contract and its true meaning. Even in its amended Statement of Defence the defendant continued to plead (and not expressed as an alternative plea) that the plaintiff and defendant agreed to a full settlement of the plaintiff's claim for commission upon payment by the defendant to the plaintiff of the further sum of $2,020. That the defendant paid the said sum and the same was accepted in full satisfaction of all claims against the defendant in respect of commissions. Although a great deal of evidence was tendered by the defendant in support of the above allegations, the trial judge rejected the evidence *in toto* on this point and accepted the plaintiff's version. The trial judge purports to hold that the contract was not a binding contract solely by reason of there being no "official order" signed by the defendant company. It is difficult to understand the validity of this reasoning in view of the fact, on the basis of the trial judge's express finding, that the plaintiff had full authority to bind the defendant company with respect to the purchase in question so that all the plaintiff had to do was to sign such an order himself, if he deemed it in any way necessary. It is well settled law that an agent is entitled to payment of his commission by his principal once he has fulfilled his obligation by effecting a binding agreement between his principal and a third party. This vested right of the agent to his commission can not be destroyed by reason of any act or default on the part of the principal or the third party. *Luxor (Eastbourne) Ltd.* v. *Cooper* (1) per Lord Russell at 41, 46; *Marshall* v. *Canada Corn Products* (2); *Whyte* v. *National Paper* (3); *Whiteside* v. *Wallace Shipyards* (4).

J. J. Robinette K.C. and *B. Grossberg K.C.* for the respondent. The claim of the plaintiff as set out in the Statement of Claim is for "commissions earned". There is no claim on *quantum meruit* or for damages nor could either of such claims be sustained in law. *Davis* v. *Trollope* (5).

(1) [1941] 1 All E.R. 33.
(2) (1925) 28 O.W.N. 320.
(3) (1915) 51 S.C.R. 162.
(4) (1919) 45 D.L.R. 434.
(5) [1943] 1 All E.R. 501.

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Under the terms of exhibit 1 (Letter from the respondent company to the appellant dated Nov. 28, 1946) the events which must happen before the plaintiff could recover commissions are (*a*) a purchase; the transformers must be laid down in Canada; the laid down price in Canada must not be in excess of $15; a purchase by the plaintiff himself. There never was a purchase. It is submitted purchase means a legally binding and completed contract of purchase and sale. Exhibit 3 (agreement between respondent and Runbaken Electrical Products signed by appellant) was simply an offer or proposal which required acceptance as therein set out, namely by an official order and a deposit. Before there could be a legal contract there was required an official order from the defendant and a deposit of £1,150 from the defendant.

No commission was payable because no transformers were laid down in Canada. This is admitted. Exhibit 3 indicates that the prices were to be reviewed every three months. One could not calculate the commissions until delivery was made. It cannot be said the price would never exceed $15. It is submitted that the words "purchased by yourself" means the plaintiff was to purchase on his own behalf and ship the transformers to Canada. The defendant could not enforce exhibit 3 against Runbaken nor could Runbaken enforce it against the defendant, nor was any effort made by Runbaken to maintain there was a contract of purchase and sale. The amount involved in Exhibit 3 was approximately $150,000 and it cannot be reasonably said that the plaintiff could bind the defendant for such an amount without the defendant having an opportunity to give its "official order". Runbaken must have realized this when it asked for an "official order" and a deposit.

There being no completed or legally binding contract of purchase and sale and no transformers having been "laid down" in Canada, the plaintiff cannot recover. *Luxor (Eastbourne) Ltd.* v. *Cooper* (1); *Jones* v. *Lowe* (2); *Murdoch* v. *Newman* (3); *Fowler* v. *Bratt* (4); *Dennis Reed Ltd.* v. *Goody* (5); *McCallum* v. *Hicks* (6); *Graham*

(1) [1941] A.C. 108; 1 All. E.R. 33.
(2) [1945] 1 All. E.R. 194.
(3) [1949] 2 All. E.R. 783.
(4) [1950] 1 All. E.R. 662.
(5) [1950] 1 All. E.R. 919 at 923.
(6) [1950] 1 All. E.R. 864.

& Scott (Southgate) Ltd. v. *Oxlade* (1); *Bennett, Walden & Co.* v. *Wood* (2); *Spottiswoode* v. *Doreen Appliances Ltd.* (3); *McLean* v. *Elliot* (4); *Chambers* v. *Smart* (5); *Gladstone* v. *Catena* (6). Dealing with the alternative defence that a settlement was made, the plaintiff contends that the Runbaken matter was not mentioned when he visited Lome in Toronto in July 1947. It is submitted that such contention is unreasonable and ought not to be accepted. The trial judge made no express finding that he disbelieved Lome or Brooker with respect to the settlement and having found that the words "payment in full re commissions" were on the cheque when it was received by the plaintiff and the plaintiff having signed underneath these words and cashed the cheque, the plaintiff is bound thereby. The evidence of Brooker corroborated that of Lome and the trial judge did not give proper effect to the endorsement on the cheque and should have held that the plaintiff was bound thereby.

MCMURTRY K.C. replied. The judgment of the Court was delivered by:

KELLOCK J.:—The parties to this appeal entered into an agreement on the 28th of November, 1946, as follows:

> It is hereby agreed that you (the appellant) are to receive a 10 per cent commission on ignition transformers purchased by yourself and laid down in Canada at a price not in excess of $15 and a 10 per cent commission on motors purchased by yourself at a price laid down in Canada not in excess of $20.

At the same time, the respondent executed and gave to the appellant the following document:

> TORONTO 1, CANADA.
> November 28, 1951.
>
> To Whom It May Concern
> Greetings:
>
> This is to certify that Mr. J. J. Bonnie, whose signature appears hereon, is hereby authorized to act as our representative in the purchase of oil burner ignition transformers, motors and copper wire.

The appellant was proceeding to England where the purchases mentioned above were to be made. Following a telephone conversation on January 24, 1947, between the appellant, then in England, and one Lome, president of

(1) [1950] 1 All. E.R. 856.
(2) [1950] 2 All. E.R. 134.
(3) [1942] 2 All. E.R. 65.
(4) [1941] O.W.N. 124.
(5) [1948] O.R. 165.
(6) [1948] O.R. 182.

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the respondent, in Canada, the appellant, on behalf of the respondent, entered into an agreement in writing on the 29th of January, 1947, with an English firm, Runbaken Electrical Products, for the purchase of 20,000 transformers. The following terms of that agreement are of importance:

> Messrs. Aero Tool Works as represented by Mr. J. J. Bonnie, *agrees to purchase* 20,000 Transformers as herein specified.
>
> .....
>
> Owing to the unstable situation of materials and labour it is agreed that prices will be reviewed at the end of each 3 months period after delivery commences with a view to recosting up or down.
>
> *TERMS OF PAYMENT*
>
> Price £2.5.0d (TWO POUND, FIVE SHILLINGS) each nett. F.O.B. Manchester Dock. 10 per cent of the purchase price of 5,000 Transformers to be paid with official order that is £1,150. (ELEVEN HUNDRED AND FIFTY POUNDS). Balance against documents which are to be rendered to the Canadian Bank of Commerce, 2 Lombard Street, London, E.C. 3.
>
> *DELIVERY*
>
> To be 10 weeks from date of official order at the rate of 400 per month to be stepped up to 1,600 per month within 7 months from date of official order.

On the day following the telephone conversation already mentioned, the appellant had written to Lome advising him that the agreement with Runbaken would be forwarded to him the following Tuesday. The letter adds,

> I quoted the price to you, which is 9 dollars f.o.b. Manchester—this may on final analysis run to 9 dollars and 10 cents or somewhere in that vicinity, but no more.

The appellant sent Lome the executed agreement, by letter of January 30, calling his attention to various provisions, particularly referring to the term with respect to revision of price, and pointing out that work would not commence until the official order and the first payment of the price had been received.

On receipt of this letter, Lome cabled the appellant on February 5th that it would be necessary for the respondent to obtain a permit from the Foreign Exchange Control Board in order to send the £1,150, but that the money would be cabled that week. On the same day Lome wrote the appellant stating that he had been advised by the manager of the respondent's bank that the granting of this permit was "just a matter of routine."

By letter of the 10th of February, Lome advised the appellant that although a permit had been granted by the Board the previous week authorizing payment for the transformers within a period of six months, a new one had to be applied for as the transformers were to be delivered over a period of two years. The new permit had not yet come to hand. He explained the delay in receiving the permit as "apparently caused by some ruling beyond the capacity of ourselves and the bank", but asked the appellant in this letter if he would

> do everything possible to keep peace with Runbaken until this export for English funds is obtained, and just mark time until I arrive in England.

The appellant complied with these instructions and in a letter of the 25th of February, 1947, to Lome he stated that he was endeavouring to keep the English company "quiet over the question of their initial deposit," and that the latter was "playing ball with us to the extent of continuing their tooling up of the process and getting together the necessary materials for our transformers." This indicates that the appellant's statement in his letter of the 30th of January, that work would not commence until the official order had been received, meant only that actual manufacture of the transformers would not commence until that time. In the meantime, the English company was readying itself. The implication which the respondent sought to draw from the earlier statement, that the Runbaken company itself did not regard the agreement as a binding contract, is, I think, thus negatived.

For reasons of its own, the respondent never sent an order or made any payment, all the while maintaining to the appellant that difficulty was still being experienced in obtaining the permit. That such difficulty was imaginary and put forward for self-serving reasons appears from the evidence of the Toronto manager of the Control Board called by the appellant. He deposed that in February 1947, while a permit for the export of funds was necessary, the chartered banks had full authority as agents of the Board to grant permits for any amount in question under the Runbaken contract. The situation thus disclosed was left unexplained by the respondent, and the learned trial judge found that Lome was not "frank" in his dealing with the appellant.

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The evidence of the Board's manager indicates that the real fact was as Lome had himself stated in his letter of the 5th of February, 1947, that the matter of a permit was, as he had been advised by the respondent's bank manager, "just a matter of routine." Subsequent events had impelled him to change his mind with respect to the desirability of the Runbaken contract. The alleged difficulty as to a permit was merely a convenient excuse.

It appears that, about the same time as the Runbaken contract was negotiated, the respondent, without letting the appellant know, had purchased from another English firm the same quantity of transformers as that ordered from Runbaken, and subsequently the market for the respondent's product, that is, oil burning equipment, had fallen off due to domestic conditions.

If anything more were needed to indicate the hollowness of the respondent's statements with respect to difficulty in obtaining a permit, it is supplied in Lome's letter to the appellant of the 3rd of March, 1947, in which he advises the latter of the purchase of the additional 20,000 transformers, stating that "deliveries are starting now." He does not explain how the funds to make payment for these goods had been obtained apparently without difficulty, while a permit with respect to the Runbaken contract was not forthcoming. On the 12th of March the respondent finally decided it would not go through with the Runbaken purchase because of information received that day with respect to the oil situation in Canada. The appellant was accordingly instructed "to call off any deals that you may have made with Runbaken." The action here in question for commission was the result.

It was the opinion of the learned trial judge, concurred in by the Court of Appeal, that the Runbaken agreement did not constitute a concluded contract, and that as there had been no "purchase," the appellant had no right of action. In his opinion, the provision of the agreement with respect to an "official order" brought the case within the class of which *Spottiswoode* v. *Doreen* (1) (cited by the learned judge) is an example. That was the case of an offer by the defendants to take a lease accepted by the

(1) [1942] 2 All. E.R. 65.

plaintiffs "subject to the terms of a formal lease." In such cases, of course, there can be no binding contract unless a formal agreement is, in fact, executed. Under the agreement here in question the respondent in express terms "agrees to purchase," but it has been read as though it had contained the additional words, "but only if we subsequently send you 10 per cent of the purchase price and an official order." With respect, I think that so to construe the agreement is to imply something for which there is no foundation and which contradicts the actual language which the parties have used.

When a person agrees to purchase goods, he agrees to take and pay for them. The ordinary, commercial meaning of the words, "agrees to purchase," is "agrees to buy;" *Inland Revenue Commissioners* v. *Gribble* (1), per the Master of the Rolls and Kennedy L.J. To employ the language of Mignault J. in *Grieve McClory Ltd.* v. *Dome Lumber Company* (2), "an agreement to purchase implies a covenant to pay the purchase price." If this obligation is to be conditional only, more is required than is present in the instant case. Here, the express agreement to buy is followed only by "terms of payment" of the price including a first payment of ten per cent with "official order." As no time is fixed for this, the law would imply a reasonable time but not a condition that it would not be fulfilled at all except at the buyer's option. In my opinion, therefore, the appellant did bring about a binding contract of purchase and sale.

The respondent further contends that this purchase was not of the character described by the commission agreement, in that the Runbaken company did not undertake to lay down the goods in Canada throughout the whole period of delivery at a total cost to the respondent, after all charges, not exceeding $15. It is the respondent's contention that many things, such as ocean freight, the rate of exchange, and customs duties, might have so fluctuated within the period of two years that the cost might have risen in excess of $15. Counsel made it plain that his argument went the length that no purchase was authorized under the commission agreement except one under which a vendor in England would expressly undertake to sell at such a sum

(1) [1913] 3 K.B. 212. (2) [1923] 2 D.L.R. 154 at 164.

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from time to time as, notwithstanding future fluctuations in charges of any nature, there would never result a laid down cost to the respondent in Canada of more than $15.

In my opinion, such a contention is absurd on its face. No seller in his senses would have agreed to any such term and, therefore, it cannot be said that any two reasonable people would have contracted for the one to pay and the other to receive commissions only upon contracts of such a nature being effected. In my opinion, the agreement between the parties here meant that the price at which purchases were to be made in England would, at the time they should be made, be such that the laid down cost in Canada would not exceed $15. In the case of the Runbaken contract, the respondent was informed, as already shown, England was not more than $9.10, and it was satisfied before the contract was entered into that the price in therewith.

The respondent also points to the provision in the contract providing for revision in price, and that increased manufacturing costs might have resulted in an ultimate cost to the respondent of more than $15. This provision might have resulted in decreases in price as well as increases, and in any event, it was specifically called to the attention of the respondent in the letter with which the document was forwarded to it. Whatever might be the effect on the commission payable under the agreement in the event of the price of any of the transformers exceeding a laid down cost of $15, the presence of this term cannot, in my opinion, deprive the appellant of his right to commission.

It is next contended for the respondent that the appellant was entitled to commission only as deliveries were made in Canada, and that as no goods were delivered at all, the appellant is not entitled to anything. The law applicable is, I think, concisely laid down in the eleventh edition of Bowstead, p. 131, as follows:

> Where a principal, in breach of an express or implied contract with his agent, refuses to complete a transaction, or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover, by way of damages, the loss actually sustained by him as a natural and probable consequence of such breach of contract. The measure of damages, where nothing further remains to be done by the agent is the full amount that he would have earned if the principal had duly completed the transaction, or otherwise carried out his contract with the agent.

The author points out at p. 127 that where the remuneration of the agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has done substantially all that he undertook to do, even if the principal acquire no benefit from his services, or the transaction in respect of which the remuneration is claimed fall through, provided that does not occur through any act or default of the agent. It will be useful, at this point, to consider the judgments of the members of this court who constituted the majority in *Whyte* v. *National Paper Company* (1).

In that case the appellant sued for commission under an agreement with the respondents by which the latter agreed to give him a commission of five per cent on all "accepted" orders obtained by him in Ontario, to be payable as soon as an order was shipped. Through the instrumentality of the appellant, a contract was entered into whereby a Toronto company "agreed to purchase" from the respondent during the period of a year, a certain description of paper to the value of not less than $35,000, delivery to be made from time to time on receipt of specifications from the purchasers and directions as to destination. When paper to the value of some $5,000 had been shipped, the purchaser refused to furnish further specifications or to take further deliveries on the ground that the paper already delivered had not been satisfactory, and the contract was not further performed.

The appellant contended that he was entitled to commission "upon all accepted orders;" that the contract in question was itself such an order; and that the failure of the respondents to supply the purchaser with the full amount of paper contracted for did not affect his right to remuneration as that failure was attributable to the default of the respondents themselves in not living up to their contract with the purchaser. The respondents, on the other hand, contended that no accepted order came into being until specifications were given by the purchaser under the contract and accepted by the respondents, and that no commission was payable unless the goods so ordered had been actually shipped. It was held by the trial judge,

(1) (1915) 51 Can. S.C.R. 162.

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Middleton J. (6 O.W.N. 83), that the parties were contracting upon the assumption that each would perform its obligations, and that the respondents could not free themselves from liability to pay commission by breach of contract with the purchaser.

This judgment was set aside on appeal (17 D.L.R. 842), but a further appeal to this court was allowed. Fitzpatrick C.J. and Idington J. accepted the view of the trial judge. The latter pointed out that if the word "shipped" meant actual shipment no matter for what reason, it would have been quite competent for the respondents to have dishonoured every order got, no matter how much labour or expense appellant might have put into obtaining it. In his view the parties could not be regarded as having contemplated any such thing and the word had therefore to be given a more reasonable meaning and not as applicable to what might, but for the default of the respondents, have been shipped. Anglin, J., with whom Davies J. agreed, thought that the better view was that the contract was not itself to be regarded as an "accepted order," but as the fact that no accepted orders were forthcoming was due to the respondents' own default, the appellant was entitled to damages in an amount equal to the commission, he having done all he had agreed to do.

In the present case, taking the view that commission was not to be payable until delivery had been made to the respondent in Canada, I think it was not in the contemplation of the parties that, where a binding contract of purchase and sale had been effected by the appellant, he would not be entitled to be remunerated if the respondent, by its own deliberate act, prevented such contract being carried out. I therefore think that as the appellant had done all that he agreed to do, and the conduct of the respondent was the cause of there being no deliveries, the former is entitled to damages in the amount he would have otherwise been entitled to be paid as commission. This action, although brought for "commission," as was the fact in *Whyte's* case, was nevertheless brought on the footing that no deliveries had been in fact made. Whether what was claimed was designated as commission or damages equal to the commission made no difference to the dispute.

Much reliance was placed by the respondent on the decision in *Luxor* v. *Cooper* (1). That case has, however, no application. There the agent was entitled to a commission only on "completion" of a sale. In fact no sale was ever made and it was held that there was no obligation as between the principal and the agent to accept any offer.

In the case at bar, however, the appellant did effect a contract of sale and purchase, and there was, as already pointed out, an obligation on the respondent under the commission agreement with the appellant to accept delivery of goods so purchased.

A point arises under the clause in the contract of purchase providing for a revision of the price in the event of changes in costs. It might have been that, had the contract been duly performed, some of the transformers might have cost the respondent more than $15. The effect of such an event upon the amount of the appellant's recovery was not discussed in argument, but taking into consideration all the circumstances, I do not think the claim can be reduced, upon the ground of such a possibility, by more than a nominal amount.

With respect to the defence that the appellant's claim had been the subject of a settlement between the parties, the learned trial judge found that the transaction referred to had no connection whatever with the claim sued upon. I see no ground upon which this finding can be disturbed. Although the point was not expressly abandoned on the argument, it was not seriously urged, and no other aspect of the transaction was argued.

In my opinion, therefore, the appeal should be allowed with costs throughout, and judgment entered in favour of the appellant for the sum of $18,121.90.

Appeal allowed with costs throughout.

Solicitors for the appellant: *Slaght, McMurtry, Ganong, Keith & Slaght.*

Solicitor for the respondent: *David Sher.*

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(1) [1941] A.C. 108; 1 All. E.R. 33.