BRIAN FARAH *(Defendant)* .....APPELLANT;

AND

MAYER A. BARKI *(Plaintiff)* .....RESPONDENT.

1954
*Dec. 15
1955
*Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Action to enforce written agreement dismissed—Whether trial judge's finding one of fraud and supported by the evidence—Duty of appellate court in dealing with finding.

The appellant signed a document in the belief that as drafted by the respondent it was in accordance with a prior discussion between the parties whereby the appellant had agreed to act for the respondent in the sale of certain stock. The document in fact recorded the sale of the stock by the respondent to the appellant. An action to recover the purchase price set out in the agreement was dismissed on the ground that it appeared to have been obtained by a trick on the part

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of the respondent. The decision was reversed by the court of appeal who found that the trial judge had not made a finding of fraud and, in any event, that there was no evidence of fraud.

Held: that the finding of the trial judge was to be interpreted as a finding of fraudulent misrepresentation which warranted the repudiation of the agreement by the appellant. *Max* v. *Platt* [1900] 1 Ch. 616 at 623; *Blay* v. *Pollard* [1930] 1 K.B. 628 at 633, referred to.

Judgment of the Court of Appeal for Ontario reversed and judgment at trial restored.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario which reversed the judgment at trial of Wilson J. who dismissed the respondent's action to recover the sum of $6,500 he alleged due him under a written agreement signed by the appellant.

J. J. Robinette, Q.C. for the appellant.

G. T. Walsh, Q.C. and *D. R. Walkinshaw, Q.C.* for the respondent.

The CHIEF JUSTICE:—The Court of Appeal for Ontario reversed the judgment at the trial which had dismissed the action of the respondent to recover the sum of $6,500 alleged to be due by the appellant to the respondent under a written document dated March 8th, 1951, for the purchase of six hundred and fifty (650) shares of Joy Heating and Equipment Co. Ltd. The judgment at the trial also ordered the appellant to assign to the respondent that contract.

The duty of an Appellate Court in dealing with the finding of a trial judge was considered by this Court in *Lawrence* v. *Tew* (1). The principles set forth by Lord Sumner in the opinion of the House of Lords in SS. *Hontestroom (Owners)* v. SS. *Sagaporack (Owners)* (2), had been reiterated by Lord Wright in *Powell* v. *Streatham Manor Nursing Home* (3), and were adopted by this Court in the *Lawrence* case. A reference was there made to a decision of the Privy Council in *Caldeira* v. *Gray* (4). In effect, the same views were subsequently expressed by the House of Lords in *Watt or Thomas* v. *Thomas* (5). The principles stated by Lord Sumner are as follows:

(1) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence?

(1) [1939] 3 D.L.R. 273.
(2) [1927] A.C. 37 at 40.
(3) [1935] A.C. 243 at 264.
(4) [1936] 1 All E.R. 540.
(5) [1947] A.C. 484.

(2) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?

(3) Is there any glaring improbability about the story accepted, sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression", or any specific misunderstanding or disregard of a material fact, or any "extreme and overwhelming pressure" that has had the same effect?

In the present case the Court of Appeal concluded that the trial judge had not made a finding of fraud on the part of the respondent. With respect, I am unable to agree, in view of the tenor of his reasons and particularly his statement:

> This contract of March the 8th looks to me to be very much like a smart trick by which he endeavoured to recompense himself for a bad investment.

and his further remarks that the appellant's "friendship and the service which he has voluntarily rendered to the plaintiff should not be taken advantage of if there is a legal ground upon which he can be excused". If, as I consider, these are findings of fraud, then none of the other questions raised in argument need be considered because I am also unable to agree with the Court of Appeal that there was no evidence of fraud.

The subsequent actions of the appellant are explained by the evidence and referred to in the reasons for judgment of the trial judge. He accepted, as he was entitled to do, that explanation. Certainly he accepted the evidence of the appellant rather than that of the respondent, and his following comment as to the latter is revealing:

> In the witness box the plaintiff had to be asked simple questions a number of times before he would give a direct answer; such a question, for example, as to who called the meeting of March 8. On perfectly simple questions his answers were evasive. Only the persistence of counsel finally elicited the answer that he had called the meeting. His answers indicated that he is a man who dominates a conversation and talks other people down, rather than answering what is asked of him.

His judgment meets the tests set out above and the appeal should be allowed with costs here and in the Court of Appeal and the judgment at the trial restored.

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RAND J.:—The key to the explanation of the conduct of Farah is contained in the language of Wilson J. at the trial when he remarks upon personal characteristics of the plaintiff Barki:

> In the witness box the plaintiff had to be asked simple questions a number of times before he would give a direct answer; such a question, for example, as to who called the meeting on March 8. On perfectly simple questions his answers were evasive. Only the persistence of counsel finally elicited the answer that he had called the meeting. His answers indicated that he is a man who dominates the conversation and talks other people down, rather than answering what is asked of him.
>
> This contract of March the 8th looks to me to be very much like a smart trick by which he endeavoured to recompense himself for a bad investment.

On the other hand he indicates his conclusion that Farah was, as a friend, voluntarily undertaking services for Barki in relation to which he was induced to sign a document which meant to him something entirely different from that now asserted by Barki.

Notwithstanding that Laidlaw J.A., speaking for the Court of Appeal, declined to treat the language I have quoted, read with the rest of the reasons, and the judgment rendered, as a finding of fraud, I am unable to give them any other interpretation; and a perusal of the material evidence shows that it was amply justified. Barki's conduct implied an assurance that the document prepared and handed over by him to be signed by Farah was merely to put the latter in a position to act as his substitute, while he was out of Canada, in disposing of his shares. Both of them, for some time, had been trying to do that. But Barki knew there was no intention on the part of Farah to enter into a contract such as the document on its face purports to set out. It was the not uncommon situation of a cunning coercive personality, presuming on another's friendship, "tricking him", in the language of the court, into believing that the document related to what the other had in mind. Protesting the unique confidence between "Eastern peoples", he resorted to characteristic persuasiveness for an act seemingly innocent which the more susceptible person, vaguely hesitant and doubtful, was rushed into doing before he could bring himself to introduce the discordant note of asking for a clear understanding of what was meant. Once this deceit became evident, the way to a remedy became unobstructed.

I would allow the appeal and restore the judgment at trial with costs in this Court and in the Court of Appeal.

The judgment of Kellock, Cartwright and Fauteux JJ. was delivered by:

KELLOCK J.:—In these proceedings the respondent brought action against the appellant to recover the price of certain shares of stock pursuant to an agreement in writing between the parties dated the 8th of March, 1951.

The appellant and the respondent were friends of some years' standing. The latter had desired to assist a son-in-law to get into business and, to that end, having been introduced by the appellant to one Joy, who carried on a furnace business, arranged with Joy in December, 1949, for the latter to turn over the business to a company which the respondent caused to be incorporated, in consideration of the issue to Joy of 350 shares of a par value of $10 each. The respondent received 650 shares in consideration of his investing $6,500 in cash.

Joy carried on the active management of the business, but it did not prosper. By August, 1950, the company's funds had dwindled to some $200, whereupon the respondent refused to allow Joy to draw further salary. As a result, relations between the respondent and Joy became strained and the appellant, at the respondent's request, became the means of communication between them.

The respondent, in carrying on his own business of an importer, had to be abroad frequently for long periods and in the condition in which the business found itself, he desired to salvage what he could of his interest. Joy appears to have been the only prospective purchaser but had little or no funds. In February, 1951, however, he had arranged financing with one Petico and an agreement of sale of the respondent's shares to Joy and Petico was drawn up for $6,500, of which $3,000 was payable on the signing of the agreement but the balance was made payable out of dividends. This sale fell through.

Joy then endeavoured to make other arrangements but had not succeeded in doing so by the early part of March. The respondent was leaving on an extended trip to the Far

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East on the 10th of March and he proposed to the appellant, as the latter testified, that the shares should be transferred to the appellant and that the appellant should act for him in controlling the company and carrying out a sale to Joy if that should prove possible. This was the position of matters as found by the learned trial Judge when the appellant, at the respondent's request, went to the latter's office with Joy on the 8th of March.

The respondent testified that on that occasion Joy was still unable to buy. The respondent's proposal to the appellant, as outlined above, was discussed and the respondent then wrote out a document which he passed over to the appellant, which the latter read and signed. This document, Exhibit I, is the document sued on and is as follows:

8th March, 1951

I hereby declare having sold today to Mr. Bryan Farah 650 shares of Joy Heat and Equipment Company for the price of $6,500 payable by Mr. Farah on the 15th of December, 1951.

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The appellant testified, and his evidence throughout was accepted by the learned trial judge in preference to that of the respondent, that while he read the document, he did not appreciate that he was thereby personally becoming the purchaser of the shares but had it in mind that it was in accordance with the previous discussion, by which he was to be agent for the respondent. He considered that the document was a short form agreement in the nature of a power of attorney to sell the shares on the terms mentioned and that a subsequent formal document would have to be drawn. The appellant says there was no discussion with the respondent whatever in accord with the document as it was in fact drawn. The evidence of the respondent that the appellant had agreed to purchase the shares was not supported by Joy and was expressly rejected by the learned trial judge.

As the appellant was aware of the financial straits of the company itself and of Joy's lack of funds and his difficulty in securing finances, it would have been a matter of surprise if the appellant, a builder, who had also had an unfortunate experience as a purchaser of one of the furnaces, was willing to purchase the shares at any figure and, more especially,

at their full par value in cash. The future of the company depended entirely upon Joy and the appellant had no cause at the time to consider that the future would be any better than his experience of the past.

The respondent also testified that while the appellant and Joy were in his office, the appellant had telephoned Mr. Kilgour, his solicitor, who was also acting for the respondent in connection with the company, telling him that he had purchased the shares from the respondent and instructing him to draw minutes of a meeting covering the respondent's resignation as president and the transfer of the shares. This was denied by the appellant.

Mr. Kilgour was called on behalf of the appellant and he testified that it was the respondent who had telephoned him advising him that the respondent "had agreed to transfer his shares to the appellant" upon terms "which they had apparently agreed upon", and that the respondent instructed him to prepare the resignation, the endorsement of the share certificates and the minutes. Mr. Kilgour's letter of the 14th of March, 1951, to the respondent's solicitor expressly so states. It also states that

> I also suggested to him that it would be necessary to have a formal agreement regarding the transfer of the shares. He said that this was unnecessary at the present time as he and Farah were in agreement and they *could settle* the terms between them.

Following the meeting of the 8th of March, the appellant became concerned as to the nature of the document he had signed and on the evening of the following day, he telephoned the respondent telling him he wanted the matter clarified and a "proper" agreement drawn. The respondent agreed to attend a meeting in Mr. Kilgour's office the following morning. When that time arrived, however, the respondent did not appear but instructed his solicitor to telephone Mr. Kilgour stating that he "was taking" the stand that the appellant was the purchaser of the shares.

The learned trial judge expressly found that the shares were worthless at the time, although Joy seemed to think they were worth $2,500 and perhaps more in his hands. He was also of the view that "this contract of March 8th looks to me to be very much like a smart trick by which he (the

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respondent) endeavoured to recompense himself for a bad investment." Without further elaborating the legal considerations involved, he dismissed the action. The judgment at trial was, however, set aside in the Court of Appeal upon the view that the findings of the learned trial judge did not amount to fraud and that, in any event, there was no evidence of fraud.

The appellant expressly pleaded that he was induced to sign the agreement as the result of fraudulent misrepresentation on the part of the respondent as to the true nature of the document. It is quite clear that this was the issue at the trial as counsel for the respondent stated to the learned trial judge in opening that

> my friend alleges he signed an agreement under the fraudulent misrepresentation that it was some other document. The whole question at issue is whether it is a good contract or not.

In my view, there was no escape on the evidence from this issue.

In these circumstances, I think the finding of the learned trial judge is to be interpreted as a finding of fraudulent misrepresentation on the part of the respondent as to the nature of the document which he asked the appellant to sign, and which he trusted he would sign, as he did, under the influence of the previous discussion without appreciating the real nature of the document, understanding that it was to be followed by a more formal document. The question therefore arises as to whether or not in such circumstances the appellant can successfully resist an action upon the document.

Winfield in his 13th Edition of *Pollock on Contracts*, at 384, quotes the language of Lord Chelmsford, Lord Chancellor in *Wythes* v. *Labouchere* (1) at 601, namely:

> It may be said generally that a man of business who executes "an instrument of a short and intelligible description" cannot be permitted to allege that he executed it in blind ignorance of its real character.

Winfield goes on to state that

> Strictly this may be an *inference of fact* rather than a rule of law; but under such conditions the inference is irresistible.

(1) (1858) 3 De G. & J. 593.

This puts the point too rigidly. As stated by Farwell J. in *May* v. *Platt* (1), fraud "unravels everything." The cases, however, such as that presently before the court, in which a man may escape from a short and clear document, which he admits reading before signing, must be few. But that is not impossible. Farwell J. refers, *inter alia,* to *Garrard* v. *Frankel* (2), which case he considers is to be supported only on the ground of fraud. In that case the defendant signed an agreement to take from the plaintiff a lease of a house at a rent of £230 on the terms of a lease on which the agreement was written, which, however, erroneously stated the rental to be £130. A lease was afterwards executed, in which the rent was stated to be £130. That this was due to error on the part of the lessor was proved and the court considered that the lessee must have perceived the discrepancy between the amount of rent previously stated by the plaintiff and specified in the agreement, and that reserved by the lease. It was held that the proper relief was to give to the lessee the option of taking the reformed lease or of rejecting it, paying, in the latter case, occupation rent.

In *Blay* v. *Pollard* (3), where fraud was not pleaded, Scrutton L.J., in the course of his judgment, said p. 633:

> As a general rule mistake as to the legal effect of what you are signing, when you have read the document, does not avail: see per Lord Romilly M.R., in *Powell* v. *Smith* (4). It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the absence of an express misrepresentation by the other party of that legal effect.

The learned Lord Justice continued, however, quoting from *Fry* on *Specific Performance* as follows:

> It equally follows that the mistake of one party to a contract can never be a ground for compulsory rectification, so as to impose on the second party the erroneous conception of the first. The error of the plaintiff alone may, however, where (but, it is conceived, only where) there has been fraud or conduct equivalent to fraud on the part of the defendant, be a ground for putting the defendant to elect between having the transaction annulled altogether or submitting to the rectification of the deed in accordance with the plaintiff's intention. See also per Farwell J. in *May* v. *Platt.* (1). This rests on unilateral mistake in one party, fraud or conduct equivalent to fraud in the other party.

(1) [1900] 1 Ch. 616 at 623.
(2) 30 Beav. 445.
(3) [1930] 1 K.B. 628.
(4) (1872) L.R. 14 Eq. 85.

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I think, therefore, that the judgment of the learned judge on the facts as he found them is to be supported upon the authorities. That the appellant subsequently carried out a sale of the shares to Joy which proved as abortive as the projected sale to Joy and Petico does not, in the circumstances, affect the appellant's right to have the action dismissed. Its evidentiary effect upon the question as to whether or not the writing of March 8th represented the real agreement between the parties was not overlooked by the learned trial judge.

I would therefore allow the appeal with costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Arnoldi, Parry & Campbell.*

Solicitors for the respondent: *Roebuck, Walkinshaw & Trotter.*

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*PRESENT: Cartwright J. in Chambers.