1968

*Feb. 26, 27
Apr. 29

LEON EVERETT CHAPMAN and ROBERT JORDAN KEEN (*Defendants*) ..... APPELLANTS;

AND

BENJAMIN GEORGE GINTER (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Wrongful attempt by one party to repudiate agreement—Failure of other party to elect to accept repudiation and communicate acceptance within reasonable time—Agreement abandoned by both parties.

By an agreement dated September 17, 1959, the appellants agreed to purchase shares in A Co. from the respondent for the sum of $190,000 payable in monthly instalments and subject to certain terms and conditions. At the date of the agreement A Co. was indebted to G Co. (a company controlled by the respondent) in an amount exceeding $200,000. In accordance with a term of the agreement, A Co. executed and delivered to G Co. a chattel mortgage to secure payment of this indebtedness in monthly instalments. The agreement contained provisions respecting the termination of the purchasers' rights thereunder in the event of default of payments both in respect of the main agreement and the chattel mortgage. By a letter dated January 2, 1962, the respondent notified the appellants that A Co. having made default in the payment of an instalment under its chattel mortgage, he was electing, pursuant to the agreement, to declare the balance of the purchase price of the shares due and payable, and by a further letter dated January 23, 1962, he notified the appellants that all their rights under the said agreement had ceased and been determined. The evidence established that the respondent had no reasonable grounds for believing that he was entitled to give the notices of January 2 and January 23, 1962. However, the appellants did not accept these notices as constituting a repudiation of the contract. Negotiations looking to the formation of a new agreement were entered into but did not succeed.

The respondent sued the appellants for the amount outstanding under the agreement of September 17, 1959. The appellants filed a defence to the action and counterclaimed for return of payments that they had made to the respondent under the agreement and for return of certain shares held in escrow. Some months later the appellants amended their defence and counterclaim and, for the first time, alleged that the respondent had wrongfully revoked and terminated the agreement of September 17, 1959, and they elected to treat the

*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Spence JJ.

notice of January 23, 1962, as wrongfully and unlawfully terminating the said agreement and they claimed damages. The respondent in his reply to the appellants' amended pleadings abandoned his original claim and alleged instead that the agreement of September 17, 1959, had been justifiably terminated.

The trial judge gave judgment for the respondent, declaring the agreement of September 17, 1959, a valid and subsisting agreement and dismissing the appellants' counterclaim. On appeal, the Court of Appeal allowed the appeal and varied the judgment of the trial judge by striking out the declaration that the agreement of September 17, 1959, was a valid and subsisting agreement and substituting the direction that the respondent's action and claims in the action be dismissed. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be dismissed.

The Court agreed with the Court of Appeal that the respondent wrongfully attempted to repudiate the agreement and also that the appellants failed to elect to accept the repudiation and communicate their acceptance to the respondent within a reasonable time. Both parties "walked away from the agreement and abandoned it".

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of McFarlane J. Appeal dismissed.

K. F. Arkell and *L. Lewin,* for the defendants, appellants.

W. J. Wallace, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Court of Appeal for British Columbia.[1] The litigation originated out of an agreement dated September 17, 1959, under which the appellants agreed to purchase from the respondent 325 shares of the capital stock of Arctic Construction Company Limited for the sum of $190,000 payable in monthly instalments and subject to certain terms and conditions. At the date of the agreement Arctic Construction was indebted to Ben Ginter Construction Company Limited (a company controlled by the respondent) in an amount exceeding $200,000. In accordance with a term of the agreement, Arctic Construction executed and delivered to the Ginter Company a chattel mortgage to secure payment

[1] (1967), 60 W.W.R. 385.

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of this indebtedness in monthly instalments. Prior to entering into this agreement, the appellant Keen had a construction business doing oil field construction work in the Fort Nelson area of northern British Columbia, and requiring more equipment he approached the respondent who had a business at Prince George, British Columbia. The parties arrived at a point where they were ready to do business, and as a means of doing so an inactive company, Neals Lake Logging Limited, which the respondent controlled was reactivated and renamed "Arctic Construction Company Limited". 175 shares of Arctic were acquired by the appellants and 325 allotted to the respondent. It was these 325 shares of Arctic which the appellants agreed to purchase. The appellant Chapman, who was at this time General Manager of Ben Ginter Construction Company Limited, was to leave that company on January 1, 1959, and become Manager of Arctic Construction with the appellant Keen as Field Manager.

The agreement of September 17, 1959, contained the following clauses:

> 5. The time for payment of the said purchase price of said shares and interest thereon is material and of the essence of this agreement and if any payment is not made upon its due date and such default continues for 60 days the whole of the balance of the purchase price for the Vendor's Shares (and interest hereon) shall immediately become due and payable without notice and in default of immediate payment all the rights of the Purchasers hereunder shall immediately cease and be determined at the option of the Vendor, any rule of law or equity to the contrary notwithstanding, and any payments theretofore made by the Purchasers to the Vendor shall be then retained by the Vendor as liquidated damages for the failure of the Purchasers to complete the purchase of the Vendor's Shares and to pay the purchase price thereof but the Purchasers shall not be relieved of liability for any breach of any of the other covenants herein set forth.
>
> 6. In the event that the Arctic Company shall be in default for sixty days in the payment of any instalment of the principal and interest secured by said Chattel Mortgage to the Ginter Company the Vendor may elect to declare the balance of the purchase price of the Vendor's shares due and payable and in default of payment thereof by the Purchasers to the Vendor within ten (10) days of notice thereof in writing all the rights of the Purchasers hereunder shall immediately cease and be determined at the option of the Vendor in the same manner and with the like effect as in Clause 5 hereof preceding.

The agreement also provided that the appellants' 175 shares in Arctic should be held as collateral security for the due payment of the mortgage debt by Arctic to the Ginter Company.

Under the said agreement the appellants continued to operate Arctic from this date until November 3, 1961. There were some minor modifications in the arrangements, but these are of no consequence in this appeal. On November 3, 1961, Arctic's mortgage payments to Ben Ginter Construction Limited were up to date as of October 31, 1961, with the November 1, 1961, payment then due and payable. Ben Ginter Construction Limited held Arctic's postdated cheques for the mortgage payments of November 1, 1961, and December 1, 1961. The payments by the appellants on their share purchase agreement were in arrears for September, October and November, being three payments totalling $11,250.

The respondent Ginter on November 3, 1961, wrote the appellants and proposed an arrangement whereby Ben Ginter Construction Limited would withhold and not deposit Arctic's mortgage cheques until "such time as I consider you can adequately handle both commitments". By 'both commitments' Ginter meant Arctic's mortgage payments to Ben Ginter Construction Limited and the appellants' payments to the respondent on the share purchase agreement of September 17, 1959. Ginter's letter of November 3, 1961, contained a new schedule of the payments from the appellants to the respondent pursuant to the share purchase agreement whereby the three payments in arrears would be paid on November 15, 1961, and the monthly payments by the appellants thereafter increased to $4,000 per month for December 1, 1961, and January 1, 1962, and then to $4,200 per month. The $11,250 which was in arrears on November 3, 1961, and the December 1, 1961, payment were made, bringing the agreement of September 17, 1959, in good standing to December 31, 1961.

Meanwhile, on December 21, 1961, the respondent deposited Arctic's cheques dated November 1, 1961, and December 1, 1961, referred to in respondent's letter of November 3, 1961, and because Arctic did not have sufficient funds in its bank account to meet them, these cheques were returned N.S.F. on December 27, 1961.

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The respondent, then purporting to act under clause 6 of the agreement of September 17, 1959, sent notices to the appellants as follows:

Prince George, B.C.
January 2, 1962

Messrs. Chapman & Keen
Box 55,
Dawson Creek, B.C.

Dear Sirs:

You are hereby given notice that Arctic Construction Co. Ltd. having made default for sixty days in the payment of an instalment of principal and interest under its chattel mortgage to Ben Ginter Construction Company Ltd. of Prince George, B.C., I do hereby, pursuant to Clause 6 of our agreement dated September 1959, elect to declare the balance of the purchase price of the shares in Arctic Construction Co. Ltd. which, by the said agreement dated September 17th 1959, I agreed to sell to you, due and payable, the said balance which is now due and payable in the sum of $101,293.88.

Yours truly,

Benjamin George Ginter.

and he followed this notice with a further letter dated January 23, 1962, as follows:

Messrs. Chapman & Keen,
Box 55,
Dawson Creek, B.C.

Dear Sirs:

Since the period of ten days has elapsed since I gave you notice under Clause 6 of our agreement dated November* 17, 1959, concerning your purchase from me of shares in Arctic Construction Company Limited, that I had elected to declare the balance of the purchase price of those shares due and payable and since you have not paid said balance to me, I hereby give you notice that all your rights under said agreement have ceased and been determined.

Yours truly,

Benjamin George Ginter.

*(The reference to November is obviously an error for September.)

The appeal proceeded upon the footing that, as held by the learned trial judge:

. . . there had not been a default under the chattel mortgage for sixty days, of which the plaintiff may take advantage when the notices of January 2nd and January 23rd 1962 were given. These notices were premature and the plaintiff was not entitled to declare the defendants' rights under the agreement terminated when he purported to do so.

and it was conceded by the respondent that the evidence established he had no reasonable grounds for believing that he was entitled to give the notices of January 2, 1962, and January 23, 1962.

However, the evidence is clear that the appellants did not accept these notices as constituting a repudiation of the contract, but instead, the appellant Keen and the respondent entered into negotiations looking to the formation of a new agreement whereby the appellant Keen would purchase the respondent's shares in Arctic and the appellant Keen, on behalf of himself and the appellant Chapman, thereafter negotiated with the respondent with the view of entering into a new agreement. No new agreement was arrived at. Relations between the parties deteriorated, the appellant Keen being dismissed by Ginter on April 11, 1962, as an employee and officer of Arctic. The appellant Chapman had earlier resigned. The appellant Keen took action against Ben Ginter Construction Company Limited for unlawful dismissal. That litigation has no bearing on the present appeal.

On May 10, 1962, the respondent sued the appellants for $100,983.66, being the balance owing for the shares under the agreement of September 17, 1959. The appellants thereupon demanded return of the money they had paid to Ginter under the said agreement and also requested return of the certificates for their 175 shares in Arctic. On June 14, 1962, the appellants filed a defence to the respondent's action and counterclaimed for return of the payments they had made to the respondent under the agreement and for the shares. The pleadings remained in this state until February 6, 1963, when the appellants amended their defence and counterclaim and, for the first time, alleged that the respondent had wrongfully revoked and terminated the agreement of September 17, 1959, and they elected to treat the notice of January 23, 1962, as wrongfully and unlawfully terminating the said agreement and they claimed damages. The respondent Ginter in his reply to the appellants' amended pleadings of Feburary 6, 1963, abandoned his claim for $100,983.66 for which he had sued on May 10, 1962, and alleged instead that the agreement of September 17, 1959, had been justifiably terminated. Subsequent

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amendments were made to the pleadings in April 1963 and in September 1964. The action came on for trial at Vancouver on February 22, 1965.

In summary the learned trial judge, Mr. Justice McFarlane, in a judgment dated March 10, 1965, gave judgment declaring the agreement of September 17, 1959, a valid and subsisting agreement and dismissing the counterclaim with costs. An appeal was taken to the Court of Appeal for British Columbia. In a judgment dated April 17, 1967, that Court allowed the appeal of the appellants and varied the judgment of McFarlane J. by striking out the declaration that the agreement of September 17, 1959, was a valid and subsisting agreement and substituting the direction that the respondent's action and claims in the action be dismissed. The formal judgment in this respect reads as follows:

> THIS COURT DOTH ORDER AND ADJUDGE that the Appeal herein be allowed /in part/ and the Judgment aforesaid varied to the extent of striking out the declaration that the Agreement of 17th September, 1959 between the Appellants and the Respondent is a valid and subsisting contract, and substituting for the said declaration the following paragraph:—
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> "THIS COURT DOTH ORDER AND ADJUDGE that the action and claims of the Plaintiff (Respondent), Benjamin George Ginter against the Defendants (Appellants), Leon Everett Chapman and Robert Jordan Keen, be and the same are hereby dismissed in their entirety."
>
> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the aforesaid Judgment appealed from be further varied by striking out the following paragraph thereof:—
>
> "AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendants do pay to the Plaintiff the costs of this action forthwith after taxation thereof."
>
> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that all parties to this action do bear their own costs in this Court and in the Court below.

The reasons for judgment in the Court of Appeal were delivered by Tysoe J.A. He came to the conclusion that the notices of January 2 and January 23, 1962, were premature and the respondent Ginter was not entitled to declare the appellants' rights under the agreement of September 17, 1959, terminated when he purported to do so. Tysoe J.A. continued as follows:

> I am of the opinion that it cannot reasonably be inferred from the proven circumstances, including the conduct of the parties, that the appellants elected to accept the repudiation and to hold the respondent

liable in damages and that, that election was communicated to or known to the respondent within a reasonable time. It is my view that the learned trial Judge was correct in his finding that "neither defendant did so elect or communicate his election within a reasonable time"—a time which was reasonable in all the circumstances. February 1963, over a year after the repudiation, was outside the limit of any reasonable time. It appears to me that the raising, by way of amendment to the pleadings, on that late date of a claim of repudiation by the respondent and acceptance thereof by the appellants and for damages was a mere afterthought.

It follows from what I have said that the appellants' claim that they are entitled, by reason of the wrongful repudiation of the agreement by the respondent, to damages against the respondent for breach of the agreement cannot be maintained. As the argument before this Court was directed to only this one point, in ordinary circumstances I would simply dismiss the appeal. But the circumstances here are unusual and, after all, it is the function and duty of the court to make such order as proper justice requires.

As I have earlier pointed out, this action was commenced by a specially endorsed writ and the claim was for the balance of the purchase price of shares of Arctic Construction payable under and by virtue of the agreement of September 17, 1959. The appellants' claim for damages based on the respondent's wrongful repudiation of that agreement was set up by way of counterclaim. In his reply to that counterclaim the respondent asked for a declaration that the agreement is a valid and subsisting agreement. That declaration was granted by the judgment appealed from. To set up such a cross-claim in a reply to a counterclaim is a somewhat unusual procedure. It can be so set up only if the plaintiff desires to use it merely as a shield against the counterclaim, otherwise he must amend his statement of claim. See: *Renton, Gibbs & Co. v. Neville and Co.* [1900] 2 Q.B. 181. No amendment to the statement of claim was made in the case at bar. In his opening at trial respondent's counsel drew the Court's attention to the fact that the plaintiff—respondent, in his reply to the counterclaim had expressly abandoned his claim for the balance of the purchase price of the shares as endorsed on the writ of summons. Thus the statement of claim in the action was in effect withdrawn and the trial proceeded as if the appellants were the plaintiff and the respondent was the defendant, the counterclaim was the statement of claim and the reply to the counterclaim was the statement of defence and counterclaim. In the result the appellants' counterclaim was dismissed and the respondent was given judgment declaring the agreement to be a valid and subsisting agreement. So long as that declaration stands the appellants remain liable to pay for the shares in accordance with the terms of the agreement even though the respondent had expressly abandoned his claim for the balance of the purchase price. Likewise, of course, the obligations of the respondent under the agreement remain in force. But the respondent, acting upon his wrongful repudiation took complete control of the affairs of Arctic Construction and dealt with the assets and business of the company as if they were his own. The evidence shows that at the time of trial there had been such a drastic change in the affairs of the company and in particular in its assets that

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the equity behind the shares was completely different to what it had been at the time of the respondent's repudiation. It appears to me that in these circumstances it would be inequitable to leave the appellants with no recourse against the respondent and with an obligation to accept the shares and a liability to pay for them in accordance with the terms of the agreement. I express no opinion as to whether, if all the facts were known, it would be found that the respondent did or did not manage the affairs of the company and deal with its assets in a proper and business—like manner. I simply do not know what the situation is in this regard.

What order should be made so that proper justice may be done depends, in my view, on the interpretation which ought to be placed on the conduct of the parties. The respondent wrongfully repudiated the agreement but the appellants did not elect to accept the repudiation and to communicate the election to the respondent within a reasonable time. It is my opinion that the proper inference on the evidence is that both parties walked away from the agreement and abandoned it. They attempted to negotiate a new agreement but the apellants were unable to meet the requirements of the respondent and so the negotiations came to nothing.

Having arrived at this conclusion, I would allow the appeal and vary the judgment below to the extent of striking out the declaration that the agreement is a valid and subsisting agreement and substituting a direction that the respondent's action and claims in the action be dismissed.

I am fully in agreement with Tysoe J.A. on his findings that the respondent Ginter wrongfully attempted to repudiate the agreement and also that the appellants failed to elect to accept the repudiation and communicate their acceptance to the respondent within a reasonable time. In my view, the conclusion reached by Tysoe J.A. that both parties "walked away from the agreement and abandoned it" was the proper one and I think he was correct in the disposition he made of the appeal.

The appeal to this Court should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Lewin, Arkell & Callison, Dawson Creek.

Solicitors for the plaintiff, respondent: Bull, Housser & Tupper, Vancouver.

A motion to vary the judgment pronounced in the above appeal having been heard on June 17, 1968, by the same Bench that heard the appeal, the following judgment was delivered by

THE CHIEF JUSTICE (orally for the Court):—The formal pronouncement of the judgment of the Court made on April 29, 1968, is varied to read as follows:—

It is declared that the appellants are entitled to the 175 shares of Arctic Construction Limited which were placed in escrow to collaterally secure performance of the agreement of September 17, 1959, and that the said shares are released from escrow. It is further declared that the appellants are not entitled to the return of the moneys paid by them under the agreement of September 17, 1959, towards the purchase of the respondent's shares of Arctic Construction Limited. Subject to the making of the above declarations the appeal is dismissed with costs. The cross-appeal is dismissed with costs.