Supreme Court of Canada
Hart-Parr Co. v. Wells, (1918) 57 S.C.R. 344
Date: 1918-11-18

Hart-Parr Company (Plaintiff) Appellant;

and

A. E. Wells (Defendant) Respondent.

1918: October 23; 1918: November 18.

Present: Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN.

Sale—Sale of goods—Farm machinery—Warranty—Notice of defects.

The provisions of a warranty clause requiring notice to be given to the vendor of an engine in case of defect in "workmanship or material" do not apply to a warranty that the engine would develop a stipulated horse-power, but only to a warranty that the engine was well made and of good material

Judgment of the Court of Appeal of Saskatchewan (11 Sask. L.R. 132; 40 D.L.R. 169), affirmed.

APPEAL from a decision of the Court of Appeal of Saskatchewan[1], affirming the judgment of Haultain C.J. at the trial in favour of the defendant.

This is an action for the purchase price of an engine sold by the plaintiff to the defendant under an agreement in writing. Under the heading of "warranty," the plaintiff warranted

the said tractor to be well made of good material and if properly operated will develop its rated brake horse-power.

It was also provided that

the purchaser shall not be entitled to rely upon any breach of above warranty, unless notice of the defect complained of, whether such defect be in workmanship or material, containing a description of the same and setting out the time at which the same was discovered is given to the vendor * * *

The plaintiff claimed the balance of the purchase price of the engine and the defendant fyled a counterclaim. The trial judge gave judgment for the plaintiff on its claim and judgment for the defendant for the

[Page 345]

amount equivalent to the purchase price for breach of warranty.

[1] 11 Sask. L.R. 132; 40 D.L.R. 169; [1918] 2 W.W.R. 239.

Bastedo for the appellant.

Gregory K.C. for the respondent.

THE CHIEF JUSTICE.—This action was one brought by plaintiff to recover the balance of the purchase price of an engine sold by it to defendant under an agreement in writing made between the parties in April, 1913.

Chief Justice Haultain, who tried the case, held, I think, properly, that the defence of misrepresentation had not been proved, but he also found that the engine

> was sent to the defendant in a very bad shape

and that

> the evidence that it practically never did satisfactorily work was overwhelming.

He also held that the plaintiff company had waived the conditions in the clauses of the contract requiring notices to be sent to the company with respect to the engine in case it was found defective and did not comply with the warranty given. He found as a result that the evidence as a whole

> established the fact that the engine did not comply with the warranty and failed to do work to any reasonable amount,

and awarded defendant as damages an amount equal to the price agreed to be paid for it and a return to defendant of the $500 paid by him on account of the purchase money.

An appeal to the Appeal Court of Saskatchewan was dismissed. Mr. Justice Newlands held that defendant was entitled to recover damages on his counterclaim by virtue of the breach of the warranty that the engine would develop its rated brake horse-power and that the clause in the contract that the purchaser should

[Page 346]

not be entitled to rely on any breach of the above warranty unless certain notices were given applied only to the warranty that the engine was well made and of good material and not to the warranty that it would develop a stipulated horse-power. Mr. Justice Lamont agreed with Chief Justice Haultain that the plaintiff company had in the letter of defendant of 9th August received and answered by it got the necessary notices called for by the

contract and had failed to remedy the defect. In the result the judgment of Chief Justice Haultain was confirmed.

With regard to the questions raised by counsel for the plaintiff company that the pleadings did not warrant the judgment appealed from, I am of the opinion that the controversy between the parties alike as to the right of the plaintiff to recover for the price of the engine and the right of the defendant to damages for non-compliance with the warranty as to the development of its rated horse-power was fully thrashed out at the trial between the parties and that under these circumstances any necessary amendments to these pleadings can and should be made even now.

As to the meaning of the warranty clause requiring certain notices to be given the company in case of defects in

> workmanship or material containing a description of the same,

I agree with Mr. Justice Newlands that the provisions in clause 9 of the contract prohibiting the purchaser from relying upon any breach of warranty therein given unless these notices were given does not apply to the warranty that the engine would develop certain horsepower but only to the warranty that the engine was well made and of good material.

The nature and particulars required to be given in these notices convince me that they do not cover the

[Page 347]

case of any engine failing to develop the warranted horse-power from some cause not known to the purchaser and which he was unable to specify.

The construction that if defects of material or workmanship were complained of, notices should be given as the contract required or the defendant precluded from afterwards setting up breach of warranty may be held to be not unreasonable. These defects were capable of being known and the vendors informed of them so that they might have the opportunity of remedying them; not so if there were no apparent defects in workmanship or material, but nevertheless the engine failed to develop the rated horse-power contracted for. To construe the contract as applying to such a case would be unjust and unreasonable.

Having reached these conclusions on the construction of the notice clauses of the warranty in question and on the findings of fact of the trial judge of the failure of the engine to develop its rated horse-power, I am of the opinion that the appeal should be dismissed with costs and that in this court we should not interfere with the amount of damages awarded by the trial judge and confirmed by the Court of Appeal.

IDINGTON J.—It may be possible in law to so frame a contract that the vendor may be enabled thereby to acquire the right to use the courts to get all he desires from the vendee and retain same yet give him nothing, and at the same time so bind him that he cannot complain aloud or attempt to secure that he bargained for unless and, so far only, as graciously permitted by the vendor; and also forever debar his vendee from acquiring by mutual contract between them any relief or right thereto.

It would be well in such attempts for the vendor

[Page 348]

to steadfastly ignore any and all importunities of the deluded vendee, looking for rectification of the wrong done him, lest by listening thereto a new contract based on conduct may be inferred by some court applied to for the purpose of enforcing the original contract.

At all events the vendor framing (as appellant did that in question), such a contract of sale designed to accomplish such a comprehensive purpose, should make its meaning so clear and its purpose so beyond doubt and dispute, that the vendee can have no rights thereunder and that he alone is under any obligation arising therefrom.

The contract in question herein falls far short of accomplishing such purpose. Indeed, having given its ambiguous nature much consideration, I am of the opinion that Mr. Justice Newlands' construction thereof is correct. Though the failure of the machine to develop its rated horse-power does fall within the covenant and is thereby expressly provided for, yet a breach of that part does not seem to fit into and fall within the verbal subsidiary provisions which are relied upon by appellant to nullify its operation and should, if read as applicable to such a breach as failure to develop rated brake horse-power, render it an absurdity, unless and until demonstrated that the failure is in fact attributable to defect of material or workmanship. That has not been done. I agree that want of a specific rate of

horse-power may exist with first-class material and workmanship. It may have been so designed.

The alternative view of the learned Chief Justice who tried the case, that the appellant waived these provisions, is also, I think, tenable, though to my mind more difficult.

The finding he makes of the overwhelming character

[Page 349]

of the evidence relative to the worthlessness of the machine seems well founded.

The argument of appellant's counsel that a test of the actual horse-power it was capable of developing, could only be determined by a scientific test, might have been well taken if only a narrow margin of the measure of power had been in question. No such doubtful question can exist on the evidence, and such machines are only of value to a farmer if, by use thereof, he can economise in way of horse or man power he has to employ in ploughing or other operations on the farm.

When representations as to its capacity fall so far short of realising the reasonable expectations of such a purchaser as this one seems to have done, there is not much need for further test.

The representations made in the first attempted contract beyond doubt operated as intended on the mind of the respondent as an inducement to purchase the machine in question and he was entitled to rely thereupon, though not in the sense of misrepresentation presented to the mind of the learned trial judge.

Much was said in the argument by the counsel for appellant as to the pleadings and the effect thereof, which might have been effective if it had not chosen to fight the case out on the lines on which it was fought and decided.

This is one of the many cases in which we should regard what the parties in fact have tried out regardless of the form of pleading.

It becomes too late after such a trial, and appeal therefrom, to fall back here upon the form of pleading.

The appeal should be dismissed with costs.

DUFF J.—I am of the opinion that this appeal should be dismissed with costs.

[Page 350]

ANGLIN J.—The material facts of this case sufficiently appear in the judgments of the learned Appellate Judges[2]. The evidence, in my opinion, abundantly warranted the conclusion of the learned Chief Justice who tried the action that the tractor delivered to the defendant did not fulfil the warranty in the contract of sale, that it

> will develop its rated (60) brake horse-power.

I agree with Mr. Justice Newlands that the provision for notice in clause 9 does not apply to this warranty but is confined to

> defects in workmanship and material.

It is, in my opinion, likewise the proper construction of clause 11 to restrict its application to "defects" within clause 9.

It may be that the plaintiff was rightly held not entitled to rescission because of his user of the engine with knowledge of its incapability to develop the rated horse-power. But I find nothing which debars him either on the ground of estoppel or on that of abandonment from setting up the breach of warranty relied upon as the basis of a claim for damages.

As to the alleged insufficiency of the pleadings, so much relied upon by counsel for the appellant, I agree with, the view expressed by Mr. Justice Lamont, to which I would merely add that evidence on the issue of breach of warranty was fully gone into at the trial and the observations of the Chief Justice and of counsel during the course of it make it clear that it was well understood that this issue was one with which the court intended to deal. There was no surprise of which the appellant can complain. While it would probably have been better had the pleadings been

[Page 351]

formally amended at the trial, any amendment necessary to make them fit the issues actually tried and disposed of may be made even now. "Supreme Court Act," section 54.

Having found upon evidence warranting that conclusion, that the engine was

[2] 11 Sask L.R. 132; 40 D.L.R. 169; [1918] 2 W.W.R. 239.

useless to the defendant

by reason of its failure to fulfil the warranty as to horse-power, the Chief Justice was justified in assessing the damages for breach of that warranty at the price agreed to be paid. With that assessment, affirmed by the provincial Appellate Court, we should not interfere.

BRODEUR J.—The appellant contends that no issue has been raised as to breach of warranty and that the damages awarded by the trial judge to the respondent as a result of that breach could not be granted.

The allegations in the defence and counterclaim are sufficient to support a claim for damages for breach of warranty. This is a question of practice and procedure on which the courts below have passed judgment, and that decision should not be interfered with by this court, whatever the view which we might have taken, had we had to deal originally with it on the merits. I am of opinion that the judgment below is well founded. The facts of this case and the provisions of the contract are much less favourable than those in issue in the case decided this term of *Schofield* v. *Emerson Co.*[3].

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Mackenzie, Thom, McMorran, Bastedo & Jackson.

Solicitors for the respondent: Seaborn, Pope & Gregory.

[3] 57 Can. S.C.R. 203, 43 D.L.R. 509.