64, 1932

In the Privy Council.

No. 34 of 1932.

ON APPEAL FROM THE SECOND DIVISIONAL COURT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN

J. P. STEEDMAN ... ... (*Defendant*) *Appellant*,

AND

FRIGIDAIRE CORPORATION ... ... (*Plaintiff*) *Respondent*.

CASE FOR THE APPELLANT.

1. This is an appeal by the Defendant from the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario pronounced on the 17th day of April, 1931, allowing an appeal from and directing certain variations in the judgment pronounced by the Honourable Mr. Justice Raney at the trial in the Supreme Court of Ontario on the 14th day of April, 1930, dismissing the action of the Plaintiff as against the Defendant and adjudging that the Defendant do recover from the Plaintiff on the counterclaim of the Defendant the sum of $2,630.00, and further providing for the removal by the Plaintiff of certain refrigerators and equipment in question in this action. Record. p. 48. p. 43.

2. This action, which was brought by the Respondent by a writ issued in the Supreme Court of Ontario on the 12th day of June, 1929, against the Appellant arises out of a contract, dated the 3rd day of May, 1928, for the supply by the Respondent to the Appellant of certain refrigerators, counters and other refrigeration equipment for the purpose of equipping a market building in the City of Hamilton, in the County of Wentworth. Ex. 1, p. 51. Ex. 2, p. 55.

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p. 10, ll. 11 to 14. p. 33, ll. 15 to 24.

3. The market building (known as the East End Market or B. and O. Market) at the corner of Barton and Ottawa Streets in the City of Hamilton had originally been built by one W. J. Lord, a butcher, who with some associates was originally the owner. The Respondent had been carrying on negotiations with and dealing with Lord for two or three years before the Respondent began to deal with the Appellant.

p. 10, ll. 19 to 23. p. 10, ll. 24 to 28.

p. 31, l. 8; ll. 29, 30 and p. 30, ll. 23 to 45. p. 37, ll. 3 to 7. p. 31, ll. 1 to 4.

4. The Appellant, who is not a butcher, acquired the market building on December 15, 1927, by auction at a sale by the first mortgagee, The Canada Permanent Mortgage Corporation, and since that date has been the owner of the market building. The Appellant went into possession of the property when be bought it in December, 1927, and has since remained in possession.

p. 37, ll. 12 to 25. p. 33, ll. 27 to 43. p. 16, ll. 31 to 35.

5. After the Appellant purchased the market building he gave Lord and his associates an option to purchase the property. The option afterwards lapsed.

p. 31, ll. 5 to 18. p. 37, ll. 12 to 29.

6. In the meantime, in January or February of 1928, the Appellant employed Lord at a salary of $50.00 a week to look after the equipment of the market and to obtain tenants if possible, and Lord was at the time of the execution of the contract sued upon still an employee of the Appellant. It was known to Mr. Howard, the Hamilton manager of the Respondent and the representative of the Respondent who had charge of the negotiations leading up to the making of the contract in question that Lord, at the time of signing of the contract, no longer owned the market (although he had an option to repurchase it), that the Appellant had acquired the market and that Lord was then an employee of the Appellant entrusted with the duty of seeing that it was properly equipped.

p. 10, ll. 26 to 43; p. 11, ll. 1 to 11. p. 16, ll. 23 to 45.

p. 17, ll. 4 to 46; p. 18, ll. 1 to 46; p. 19, ll. 1 to 7.

7. The Respondent had had an agreement with Lord and his associates prior to the time when the Appellant acquired the property that Lord would be paid a commission or discount of 10 per cent. on the net value of the Frigidaire equipment installed in the market. When the contract with the Appellant was under discussion this arrangement, whereby Lord was to receive a commission of 10 per cent., was confirmed by Mr. Howard, but was not communicated to the Appellant who was unaware of it. Mr. Howard knew that Lord was a trusted employee of the Appellant and that the Appellant did not know that Lord had been promised a commission by the Respondent. The Appellant had been negotiating with a competitor of the Respondent, the Kelvinator Company, whose figures for the supply of the equipment were considerably lower, but when the Appellant's solicitor, Mr. Counsell informed Mr. Howard of this, Mr. Howard told Mr. Counsell that "it could not be done for that amount of money with the right equipment." Subsequently, on Lord's advice, the Appellant signed the contract upon which the Respondent is suing.

p. 19, ll. 8 and 9; p. 31, ll. 17 to 25; p. 37, ll. 29 to 36. p. 20, ll. 19 to 32; p. 19, ll. 3 to 9. p. 19, ll. 9 to 23. p. 20, ll. 19 to 26; p. 13, ll. 1 to 8.

Ex. 1. p. 51. Ex. 2. p. 55.

8. The contract consists of two documents—the tender, Exhibit 1, and the acceptance, contained in the form of a letter, Exhibit 2. The tender

provides for a total price of $24,562.91, but the parties agreed upon a price of $24,000.00, and the letter of acceptance, Exhibit 2, provides for a price of $24,000.00. Record. p. 19, ll. 24 to 29.

9. The tender provides for the supply of certain specified refrigerators and counters and "Frigidaire equipment" for certain stalls that are particularly designated in the tender, Exhibit 1. On or about the 11th day of July, 1928, certain changes and additions were made in the said contract and the contract was finally accepted by the Defendant on that day, the total contract price for the said equipment being $32,436.51. The total number of stalls, as finally agreed upon, was to be 22. Ex. 4. p. 56; p. 13, ll. 25 to 44; p. 14, ll. 1 to 45; p. 15, ll. 1 to 4; p. 35, ll. 35 to 38.

10. The contract provided for the payment of $2,400.00 cash. The said sum of $2,400.00 cash was paid by the Appellant on the 15th day of May, 1928. The Appellant has paid nothing further in respect of the contract. Ex. 3. p. 55.

11. The said equipment was delivered by the Respondent to the Appellant on or before the 31st day of July, 1928. p. 1, ll. 29 to 35; p. 15, ll. 5 to 7.

12. The contract refers to the usual terms and conditions of the General Motors Acceptance Corporation. The usual terms and conditions of the paper discounted by The General Motors Acceptance Corporation are explained by the evidence of the Respondent's witness, Mr. Hughes Robbins. Mr. Robbins produced the blank form of paper that embodies the usual terms and conditions of The General Motors Acceptance Corporation (Exhibit 7). Ex. 2. p. 55. p. 24, ll. 42 to 45; p. 25 to p. 30, l. 12. Ex. 7. p. 65.

13. The General Motors Acceptance Corporation is a company that does the "financing" for the Respondent. It uses certain forms of conditional sale agreements (by which the title to the property is reserved to the vendor) commonly called "lien notes" . . . the reservation of title to the seller being called a "lien" . . . of which Exhibit 7 is the required form in the case of Frigidaire equipment. The General Motors Acceptance Corporation "discount" a conditional sale contract and a promissory note, both of which are executed by the buyer. p. 25, ll. 6 to 45. Ex. 7. p. 65.

14. The form of conditional sale agreement of The General Motors Acceptance Corporation contains clauses (among many others) providing as follows (summarising the provisions without setting them out verbatim):— p. 25, ll. 43 to 45; p. 26, ll. 1 to 45; p. 27, ll. 1 to 2.

(A) Title to the property shall not pass to the purchaser until the entire purchase price and interest (and all costs and expenses) are fully paid in cash, that is to include the payment of any notes given and any judgments secured. Ex. 7. p. 67, ll. 1 to 4.

(B) The amount due is to be evidenced by a concurrent promissory note given by the purchaser. p. 67, ll. 9 to 19.

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p. 67, ll. 20 to 26. (C) An acceleration clause.

p. 67, ll. 32 to 37. (D) The property covered by the agreement shall remain strictly personal property notwithstanding affixation to the freehold.

p. 68, ll. 17 to 27. (E) Upon default the seller may take immediate possession of the property and may break and enter therefor; and upon repossession all rights of the purchaser in the property terminate absolutely.

p. 68, ll. 28 to 40. (F) The seller may resell the property so taken upon default and, after deducting the expenses, shall pay any surplus to the purchaser.

p. 68, ll. 41 to 45. (G) The purchaser is liable in full for payment of the purchase money notwithstanding any such repossession or sale by the seller.

Ex. 7; p. 66; pp. 70 and 71. p. 26, ll. 17 to 27; p. 29, ll. 21 to 44; p. 30, ll. 1 to 12. **15.** The form of conditional sale contract contains a schedule of payments to be made by the buyer. The payments are to be made monthly. It is a matter of arrangement between the buyer and the seller as to how many monthly payments are to be made and as to the length of the period over which payment is to be distributed. The buyer pays for the goods in instalments, but the number of instalments to be paid and the proportion of the total purchase price to be included in each monthly instalment is not definitely settled until the buyer and seller (usually through the seller's agent) have arrived at terms of repayment. The terms of repayment vary and are not inflexible. It was understood by Mr. Howard that the terms of the notes would be arranged by the appellant with the prospective tenants of the stalls in the market.

p. 22, ll. 5 to 14.

Ex. 7. p. 69. Ex. 7. p. 70. **16.** The form of conditional sale contract (Exhibit 7) contains blanks for the signatures of the seller and purchaser respectively. It also contains a form of assignment by the seller to General Motors Acceptance Corporation of the seller's interest in the conditional sale contract and the property covered thereby, together with a guarantee by the seller of performance of the conditional sale contract. The form contains a blank for the signature of the seller. The form also contains a promise to pay to the order of the seller the total balance due with interest as specified. This is to be signed by the purchaser.

Ex. 7. p. 71.

Ex. 7. p. 71, ll. 31 to 38; p. 72. **17.** The form also contains a guarantee of the obligation of the purchaser, to be signed by the seller and an additional indorser. There is no evidence as to the circumstances in which an additional indorser is required.

p. 26, ll. 28 to 39. **18.** Mr. Robbins testified that if the purchaser desires to take advantage of the " financing arrangement " of General Motors Acceptance Corporation, the conditional sale contract and the note must be signed by the purchaser at or before delivery. Mr. Robbins further testified that the document, Exhibit 7, would be signed on the first line (*i.e.*, on the first blank for signature shown on page 69 of the Record) by the seller and that the purchaser would also sign. In this case, according to Mr. Robbins' evidence, the seller who would sign the conditional sale contract and the guarantee would be the Frigidaire Corporation. Mr. Robbins does not indicate that Mr. Steedman

p. 28, ll. 18 to 27.

would also have to sign as guarantor or indorser, and it is submitted that there is no evidence that it was the intention of the parties that Mr. Steedman was to put his signature to any document other than the acceptance of the tender (Exhibit 2) by which Mr. Steedman contracted to furnish " notes of " the tenants payable according to the usual terms and conditions of the " paper discounted by The General Motors Acceptance Corporation." In response to a question put to him on cross-examination, the Appellant swore that what he proposed to do was to have the tenants sign the notes and that he was to sign nothing. This evidence is not contradicted.

Record.
Ex. 2. p. 55.
p. 34, ll. 1 to 9.

19. By the terms of the acceptance, Exhibit 2, the Appellant agreed to pay $2,400.00 cash. This payment was made on 15th May, 1928, by cheque. The Appellant has paid nothing further. The Appellant swore that before the contract was signed, Mr. Howard told him that $2,400.00 was all he, the Appellant, was ever going to put up, and that under the contract that $2400.00 was going to be returned to him. Mr. Howard in his evidence appears to confirm this statement. This view was also suggested by the learned trial Judge at the trial.

Ex. 3. p. 55. p. 56, l. 10. p. 32, ll. 1 to 8. p. 19, ll. 30 to 38. p. 12, ll. 34 and 35.

20. The Respondent, on or about 31st July, 1928, sent the Appellant a statement showing the amount due and giving credit for the sum of $2,400.00 paid. The statement was accompanied by invoices for the various individual stalls. A specimen invoice for stall " A " is printed. The invoice provides, in part, " Terms, 20 per cent. cash. Balance, G.M.A.C. 18 months, $343.00."

Ex. 5 (part). p. 62; p. 15, ll. 5 to 13. Ex. 5 (part), p. 63.

21. After the signing of the contract the Appellant took steps to obtain tenants for the stalls which were originally 22 in number, at first employing Mr. Lord and later Mr. Chambers, a real estate agent. It was found necessary to reduce the size of the market and such difficulty was encountered in attracting tenants that the market was not opened until about a week before the trial of the action on 26th November, 1929.

p. 32, ll. 9 to 22; p. 34, ll. 26 to 45; p. 35; p. 36, ll. 1 to 25; p. 38, ll. 6 to 21. p. 34, ll. 42 to 45; p. 32, ll. 14 and 15; p. 28, l. 25.

22. The contract sued upon, contained in Exhibits 1 and 2, does not specify the time when the notes of the tenants are to be furnished. It does contain a clause providing a penalty in case of delay in installing the equipment. Mr. Howard asked the Appellant, shortly after the contract was signed, to insert in the contract a time limit within which the notes of the tenants were to be given. The Appellant refused. According to the evidence of Mr. Howard the Appellant, although refusing to put an expiry date in the agreement, said that " it would certainly be by the end of the year."

Ex. 1. p. 51. Ex. 2. p. 55. Ex. 1, p. 52. p. 31, ll. 26 to 45. p. 21, ll. 20 to 43.

23. The Appellant did not furnish the Respondent with any notes of the tenants. According to the Appellant's evidence he had not been furnished with any blank notes, although he had asked for them, or had given Mr. Chambers, who was managing the property for him, authority to ask for them, apparently a short time before the trial. The Respondent made several demands for payment but was, according to Mr. Howard, put off

p. 34, ll. 8 to 23; p. 36, ll. 8 to 13. p. 15, ll. 24 to 38.

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from time to time by the Appellant. The Respondent then brought this action.

24. On the 12th day of June, 1929, the Respondent issued a writ of summons in the Supreme Court of Ontario against the Appellant, and claimed in its Statement of Claim :—

p. 3.

(A) Specific performance of the agreement in question and payment to the Respondent of the sum of $30,036.51 in cash or conditional sale notes or contracts.

(B) Interest on the said sum of $30,036.51 at 5 per cent. per annum from the date of delivery of the said refrigeration equipment.

(C) A declaration that the Respondent is entitled to a lien on all the said refrigeration equipment installed in the market building.

(D) In the alternative, the sum of $30,036.51 as damages for breach of the contract or on a quantum meruit basis for the price of goods sold and delivered to the Appellant.

(E) A reference, if necessary, to ascertain the damages to which the Respondent is entitled.

(F) The costs of the action.

(G) Such further and other relief as to the Honourable Court might seem meet.

25. On the examination for discovery of Mr. Howard, which took place on November 22nd, 1929, Mr. Howard in response to a question from counsel for the Appellant admitted that he had promised a commission to Lord. There is no evidence that, at any time prior to this disclosure of the promise to pay the secret commission, the Appellant was aware of the offer of the bribe to his employee.

p. 9, l. 35.

26. The complete and absolute trust reposed by the Appellant in Lord and his entire reliance upon him is shown by the following, among other, circumstances :—

p. 42, l. 19.
p. 37, ll. 12 to 28.

(A) Lord was as the learned trial Judge said " the practical man " ; he was familiar with markets ; the Appellant was not.

p. 10, ll. 35 to 42 ;
p. 11, ll. 1 to 11.

(B) Lord had gone to Knoxville to pass judgment on the equipment.

p. 20, ll. 19 to 29 ;
p. 13, ll. 1 to 8.

(C) The Appellant signed the contract on Lord's advice.

Ex. 1, p. 51, l. 25.

(D) By the contract the refrigerators and counters " are of the " insulation and construction acceptable to Mr. Lord."

p. 13, ll. 37 to 43 ;
p. 21, ll. 11 to 13 ;
p. 22, ll. 42 to 45 ;
p. 23, ll. 1 to 6.

(E) Changes were made under Lord's instructions. Lord was seemingly given a free hand by the Appellant.

27. At the opening of the trial, the learned trial Judge, on the application of the counsel for the Appellant, gave leave to the Appellant to amend his

statement of defence by pleading that a secret commission had been promised by the Respondent to one Lord, a servant of the Appellant. The amendment as drafted appears in the learned trial Judge's Reasons for Judgment.

Record.
p. 9, l. 35 to p. 10, l. 5.
p. 42, l. 8.

28. The trial proceeded and after the conclusion of the evidence and the argument of counsel His Lordship reserved judgment.

29. Subsequently, on the 6th day of December, 1929, counsel for the Respondent moved before the learned trial Judge for leave to adduce further evidence bearing on the point raised by the amendment. After hearing argument His Lordship refused the motion.

p. 40.

30. After counsel had submitted arguments in writing, His Lordship gave judgment on the 14th day of April, 1930, dismissing the action on the ground that the promise of the secret commission by the Respondent to Lord, the Appellant's servant, was a bar to the action ; and giving leave to the Appellant to counterclaim for the return of the down payment of $2,400.00 with interest, and giving the Appellant judgment against the Respondent on the counterclaim for the sum of $2,630.00 ; and, further, the Appellant by his counsel consenting, ordering that the Respondent be at liberty to enter upon the Appellant's premises and to remove the refrigerators and equipment in question in the action, upon the Respondent undertaking to restore the premises to the condition in which they were before installation thereof.

p. 41.
p. 43.

31. From this judgment the Respondent appealed to the Appellate Division of the Supreme Court of Ontario, and on the 15th day of December, 1930, the appeal was argued before the Second Divisional Court, composed of the Chief Justice of the Second Divisional Court, Magee, Riddell and Fisher JJ.A. On the argument the counsel for the Respondent asked leave to adduce certain affidavit evidence bearing on the question of the possibility of a restoration of the refrigeration to its original condition at the time of delivery thereof to the Appellant but the motion was refused. The appeal was then argued on the evidence given at the trial and judgment was reserved.

32. On the 17th day of April, 1931, judgment was given by the Second Divisional Court allowing the appeal. By the judgment of the Second Divisional Court (the reasons for which were delivered by the Honourable Mr. Justice Riddell) the judgment of the Honourable Mr. Justice Raney was varied by declaring that the contract in the pleadings mentioned is binding upon the Appellant and that the Respondent is entitled to recover from the Appellant the sum of $34,109.06, less the amount, if any, to which the Appellant may be entitled as damages ; and that the Appellant is entitled to such damages as he may be able to prove that he has suffered by reason of the promise of payment by the Respondent to one Lord, an employee of the Defendant, of a commission in the event of the making of the said

p. 46 ; p. 48.
p. 48.

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contract ; and by ordering that it be referred to the Local Master at Hamilton to assess the damages and determine the costs of the reference ; and that further directions and further costs be reserved.

33. The Second Divisional Court of the Appellate Division of the Supreme Court, like the trial judge, decided the case wholly on the effect of the promise of the secret commission to Lord, and did not deal with the other points argued and relied on by the Appellant as a defence to the action, and which the Appellant had also advanced before Raney J. in both the oral and written arguments presented to the Court.

p. 47.

34. The Second Divisional Court held that, although the promise of commission to Lord was a species of fraud which would enable the Appellant to rescind the contract, the conduct of the Defendant in operating the refrigerating apparatus renders it impossible to reinstate the parties, and that in consequence, the Appellant, while entitled to damages, had lost his right to recission. It is submitted that this conclusion is not supported on the facts by the evidence, and is not a correct application of the law to the facts as disclosed by the evidence.

35. The Appellant has appealed from the judgment of the Second Divisional Court to His Majesty in Council. The Appellant humbly submits that the said judgment of the Second Divisional Court is wrong, and asks that the judgment of the learned trial judge, Raney J., be restored, for the following, among other :

p. 50.
p. 48.
p. 43.

REASONS.

1. No notes or paper on the blank forms of General Motors Acceptance Corporation have been offered by the Respondent to the Appellant for the purpose of procuring the signatures of tenants of the stalls thereto.
2. The Appellant was not obligated by the contract sued upon to sign or indorse the notes of the tenants or to render himself liable for payment thereof.
3. Upon the true interpretation of the contract sued upon the intention of the parties was that the transaction was not to cost the Appellant anything ; and alternatively,, that the limit of the Appellant's liability to the Respondent was the sum of $2,400.00, which the Appellant has paid.
4. The Appellant was not the buyer of the goods in question but was an intermediary through whom the goods were to be sold to the tenants, and since the title to the goods is still in the Respondent, and was, in any event, after payment of the purchase price in full, to pass not to the Appellant but to the tenants, the Appellant cannot be sued for the price of the goods.

5. The only remedy, if any, available to the Respondent is in damages for breach of contract in not obtaining, or taking reasonable steps to obtain, notes of the tenants. Since the contract does not contain any time-limit, the Appellant had a reasonable time in which to obtain and furnish notes of the tenants, and upon the evidence a reasonable time had not elapsed at the time of the commencement of the action.

6. The promise to pay a secret commission on behalf of the Respondent to Lord, the servant of the Appellant, vitiated the contract and entitled the Appellant to rescission of the contract and to the return of the $2,400.00 paid by the Appellant to the Respondent.

7. The Appellant has not, after acquiring knowledge of the promise by the Respondent of the secret commission, done any act that disentitles him to rescission and remits him to his remedy in damages.

8. There is no physical impossibility barring the Appellant's right to rescission, and, in any event, the remedy of rescission is not barred if, as here, the acts done by the Appellant and relied upon by the Respondent as an answer to a claim for rescission were in the contemplation of the parties to the contract induced by the fraud of the Respondent, and substantial justice can be done by the taking of an account.

9. The contract sued upon having been induced by a criminal act forbidden by The Criminal Code, the Respondent's case is so tainted with illegality that the Respondent is not entitled to invoke the assistance of the Court.

W. N. TILLEY.

H. A. F. BOYDE.

In the Privy Council.

No. 34 of 1932.

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BETWEEN :

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AND

FRIGIDAIRE CORPORATION (*Plaintiff*) *Respondent.*

CASE FOR APPELLANT.

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