Privy Council Appeal No. 34 *of* 1932.

J. P. Steedman - - - - - - - - *Appellant*

v.

Frigidaire Corporation - - - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST OCTOBER, 1932.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD MACMILLAN.]

The appellant was, in 1928, the owner in possession of premises known as the East End Market in the City of Hamilton. He proposed to equip stalls in the market with refrigerating plant, with a view to letting them to tenants. With that object, the appellant communicated through one Lord, then an assistant in his employment, with the respondents who manufacture and deal in refrigerators, as well as various accessory fittings. The respondents are a subsidiary of the General Motors Corporation, and according to the evidence their practice in disposing of their goods on the instalment system is in each case to enter into a contract for purposes of finance with another subsidiary of the General Motors Corporation, called the General Motors Acceptance Corporation, hereinafter referred to as G.M.A.C. The usual mode in which such transactions are carried out is embodied in a standard form used for this class of products, prints of which in blank were in evidence in the case. The standard form is headed " G.M.A.C. Form T200, Conditional Sale Contract," and

is expressed to be between " the Seller," normally the respondents, and " the Buyer," who, it would appear, would normally be the person purchasing the plant for his own use. It sets out the sale and purchase of the goods between the parties at a total price payable in part in cash and the remainder by stated instalments to be paid at the office of G.M.A.C., subject to provisions as to interest and with a clause stipulating that the whole balance shall forthwith be due if default is made. The form further provides that title in the property is not to pass to the purchaser until all payments are made in full. The money due is to be evidenced by a concurrent promissory note by the purchaser; the plant is to remain personal property notwithstanding that it is affixed to the freehold; and provision is made for entry and repossession in the event of default. On the same form there is printed an undertaking to be signed by the sellers headed " Dealer's Recommendation, Assignment and Agreement to General Motors Acceptance Corporation," declaring the genuineness of the transaction, assigning to G.M.A.C. all rights in the contract between sellers and purchaser, and guaranteeing performance thereof, the recited purpose being to induce G.M.A.C. to purchase the note signed by the purchaser and endorsed by the sellers. A form of promissory note for signature by the purchaser is appended, detachable by a perforation. It sets out the total amount due and also the amounts of the instalments and the periods at which they fall due and contains an undertaking to make payment at the office of G.M.A.C.

As between the appellant and the respondents the transaction began with a document of tender dated the 3rd May, 1928, signed by the respondents, headed " Specifications and Price Quotations," which specified certain refrigerating equipment for 15 stalls at an aggregate price of $24,562·91. In response to this quotation, the appellant, on the same date, addressed to the respondents a letter in the following terms :—

" Dear Sirs,

" I accept your contract as per your tender of this date for $24,000.00, payable $2,400.00 cash and for the balance I agree to furnish notes of the tenants payable according to the usual terms and conditions of the paper discounted by The General Motors Acceptance Corporation, fifty per cent. of the cash payment made by the tenants of the stalls enumerated in the tender to be repaid to me until I have been reimbursed the $2,400.00.

" Yours very truly,

" J. P. Steedman."

On this letter was written " Accepted May 3/28. Frigidaire Corporation C. R. Howard."

The document just quoted forms the contract in question in the present appeal. Certain changes, not material for the present purpose, were subsequently made in the contract and the sum finally agreed in July, 1928, was $32,436·51 for the equipment of 22 stalls. The stipulated cash payment of $2,400 was made by the appellant to the respondents on the 15th May, 1928,

and complete delivery of the plant was made by the end of July. A statement accompanied by detailed invoices was then rendered by the respondents to the appellant which, after debiting the total price of $32,436·51 and crediting the cash payment of $2,400, showed a net balance due of $30,036·51. Both the statement and invoices were addressed to the appellant but in their Lordships' opinion these were merely *pro formâ* documents. The appellant had not by this time furnished any " notes of the tenants " The evidence was that stalls could not be let, owing to the market being too large and providing accommodation for too many competitors. The scheme was accordingly altered, the equipment of ten of the stalls was dismantled, and one-third of the market was rented to Metropolitan Stores. The equipment removed from the ten stalls was stored for the appellant with the respondents, under an arrangement " without prejudice." It was stated in the evidence, which was given in November, 1929, that by then seven of the twelve remaining stalls had been let and were occupied by tenants procured by the appellant, who were using the refrigerating plant provided, but no " notes " had been obtained from these tenants and there was no evidence as to the terms on which the stalls were let by the appellant. Instructions were stated to have been given on behalf of the appellant to his agent to procure blank forms of the G.M.A.C., but nothing further had been done. The respondents presented a petition to their Lordships for special leave to adduce further evidence with regard to subsequent dealings by the appellant in connection with the market and its equipment, but their Lordships in the circumstances have not granted this application.

The statement of claim in the action brought by the respondents was dated the 12th June, 1929. It claimed payment of the sum of $30,036·51 " in cash or conditional sale notes or contracts " with interest and a declaration that the respondents had a lien on the equipment installed in the market, or in the alternative, payment of $30,036·51 as damages for breach of contract or on a *quantum meruit* basis for the price of goods sold and delivered, with, if necessary, a reference to assess the damages. The defence was originally a traverse, together with a further plea that the action was premature. The case came on for trial before Raney J. without a jury on the 26th November, 1929. At the trial the appellant was allowed to raise by an amendment formally delivered before judgment a new defence, founded on evidence elicited in the course of the case, namely, that he was entitled to have the contract rescinded on the ground that the respondents had before the execution of the contract promised to pay to Lord, whom they knew to be a servant of the appellant, a secret commission of $800, or thereabouts. Raney J. after a judicious but ineffectual attempt to induce the parties to settle, gave judgment dismissing the action, rescinding the contract, ordering repayment of $2,400 and giving the respondents leave

to enter the appellant's building and remove the installation on terms of restoring the premises. On appeal, the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario allowed the appeal. The Judges expressed their disapproval of the respondents' conduct in promising a secret commission or bribe to the appellant's servant, whom they knew to be in the appellant's employment and to be influential in the matter of bringing about the contract, but they held that rescission could not be ordered " as here the conduct of the defendant in operating the refrigerating apparatus renders it impossible to reinstate the parties, if nothing else did." The Judges went on to declare the contract " binding in its terms with such relief as the plaintiff is entitled to under such a judgment," and referred it to the Master to ascertain what damages the appellant was entitled to recover in respect of the giving of the secret commission. When the formal order was drawn up, it declared that the respondents were entitled to recover the sum of $34,109·06, less such damages as the appellant might be able to prove that he had suffered by reason of the promised payment to Lord. From this judgment the present appeal is brought. The calculation of the sum of $34,109·06. is not set out, but presumably it is the sum of $30,036.51 plus interest.

Their Lordships are of opinion that the Appellate Division were right in refusing the appellant's claim to rescind the contract. In such a case, however reprehensible may be the briber's conduct, the injured party is not entitled to the equitable remedy of rescission unless he can establish (the onus being on him) that it is possible to restore the position to what it was before the contract. He must be in a position to offer *restitutio in integrum*, and must formally tender such restitution. (*Western Bank of Scotland* v. *Addie*, 1867, L.R. 1 Sc. App. 145 ; *Boyd & Forrest* v. *Glasgow & South Western Railway Company*, 1915 S.C. (H.L.) 20.) The appellant has entirely failed to do so. The evidence, scanty as it is, is consistent only with the appellant having exercised or authorised acts of ownership and use in relation to at least a large part of the equipment installed, by letting it out to be operated by his tenants. He cannot give it back as he got it.

The appeal therefore so far fails, and the finding of the Appellate Division that the contract remains binding should be affirmed. But, for the reasons about to be given, the order appealed from should in their Lordships' judgment be varied in so far as it finds the respondents entitled to payment of the sum of $34,109.06 less such damages as may be determined to be due to the appellant in respect of the promise of a commission to Lord. For this finding there must be substituted a finding that the respondents are entitled to damages for breach of contract, less such damages as the appellant may establish on the ground just stated, and the case will be referred back to the Supreme Court of Ontario to ascertain the sum to which the respondents are entitled on this basis.

The Appellate Division do not explain the ground on which they treat the contract as justifying an order for payment of a liquidated sum of money, but they would appear to have regarded the contract as one for the sale of goods by the respondents to the appellant at a specified price. Their Lordships do not so construe the document of the 3rd May, 1928, which embodies the contract. On its true construction the effect of it is that in consideration of the respondents installing the equipment the appellant agrees to pay only $2,400 in cash and as regards the balance to furnish to the respondents " notes of the tenants ". These notes which the appellant thus impliedly undertook to obtain from the tenants were as regards their terms and conditions to comply with the standard form of the G.M.A.C., the substance of which has been summarised above. If the appellant had obtained and furnished the notes they would have been notes payable to the respondents. The appellant plainly was not to obtain any payment from the tenants for the plant because the contract expressly states that out of the cash payment made by the tenants the appellant is to be reimbursed, that is, by the respondents, the sum of $2,400 which he paid to the respondents. It follows that what was contemplated was that the G.M.A.C. form would be executed in each case as between the respondents as sellers and a tenant as purchaser, and that the respondents would be able to discount " the paper " with G.M.A.C. It is true that according to the usual G.M.A.C. form which would be used, the respondents would guarantee to G.M.A.C. performance by the tenants, but that would be subject to the various rights of " lien " and of action against any defaulting tenant.

The appellant having broken his contract is accordingly liable in damages for the loss which the respondents have suffered in consequence of that breach,—that is to say, the pecuniary difference between their present position and their position as it would have been if the appellant had furnished the notes contracted for. In their Lordships' opinion, it was not contemplated that the property in the installations would pass from the respondents to the appellant ; they were not selling the installations to the appellant. But in fact, the appellant has dealt with the installations as if he were owner, by letting them on conditions other than the G.M.A.C. terms and conditions and has disabled himself from restoring them to the respondents. The Court in assessing the damages must therefore have regard to these and any other relevant facts which may be proved before them. Due allowance must be made for any contingencies which might have prevented the full sums under the notes being realised, such as the possible insolvency of the tenants and for the possible inefficacy of the lien on the goods. Their Lordships have not evidence on these topics before them. It is however sufficiently clear that the respondents' claim must be dealt with as a claim for unliquidated damages. Against any sum found due on the reference allowance must of course be made for $2,400 paid by

the appellant and the appellant will also be entitled by way of counterclaim to whatever damages are found proper in respect of the secret commission as involving enhancement of the prices.

It was objected that the action was premature since no time for performance was specified, but their Lordships are of opinion that under the contract a reasonable time was implied for the appellant to fulfil his obligation and that a reasonable time had elapsed when action was commenced.

In the result their Lordships accordingly will humbly advise His Majesty that the order of the Appellate Division of 17th April, 1931, be varied by deleting from the first head thereof the words "and that the plaintiff is entitled to recover from the defendant the sum of $34,109·06 less" and by substituting therefor the words following, viz., "that the defendant is in breach of the said contract by reason of his failure to furnish the plaintiff with notes of the tenants in terms of the said contract and that the plaintiff is entitled to recover from the defendant such damages as it may be able to prove that it has suffered by reason of the defendant's said breach of contract less (a) the sum of $2,400 paid by the defendant to the plaintiff and (b)", and that in other respects the appeal be dismissed. Their Lordships will also refuse the respondents' petition for special leave to adduce further evidence. The respondents must bear the costs of this petition. There will be no award of costs to either party in the appeal.

In the Privy Council.

J. P. STEEDMAN

v.

FRIGIDAIRE CORPORATION.

DELIVERED BY LORD MACMILLAN.

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