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*Oct. 22, 23, 24
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FAIRBANKS SOAP COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

MEL SHEPPARD (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Agreement to construct machine—Work not completed—Abandonment of Contract—Right to recover.

The defendant, a mechanical engineer, contracted with the plaintiff, a manufacturer of soap, to construct in the plaintiff's plant a machine for making and drying soap chips for a price of $9,800, payable $4,000 in cash on completion and the balance to be secured by promissory notes. When the work was nearly completed the defendant, who had been paid $1,000 on account, refused to do anything more until paid a further $3,000.

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Held: On the view of the evidence most favourable to the defendant, he deliberately abandoned the contract at a stage when the machine would not perform the work for which it had been ordered and when what remained to be done required the exercise of engineering skill and knowledge. Under such circumstances it could not be said that he had substantially completed his contract. *Appelby* v. *Myers* L.R. 2 C.P. 651; *Sumpter* v. *Hedges* [1898] 1 Q.B. 673 at 674; *Dakin* v. *Lee* [1916] 1 K.B. 566, applied.

Decision of the Court of Appeal for Ontario [1951] O.R. 860, reversed.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Genest J. at the trial dismissing the plaintiff's action and awarding judgment to the defendant on his counterclaim.

W. B. Williston for the appellant.

J. D. Arnup, Q.C. and *J. S. Boeckh* for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—The appellant is a manufacturer of soap and the respondent is a mechanical engineer. This action arises out of an agreement between the parties for the construction by the respondent in the plant of the appellant of a machine for making and drying soap chips. There is also a claim made by the respondent for $1,000 for the "installation" of the machine in question and of certain pulleys, hangers and shafting to be supplied by the appellant which requires consideration but it will be convenient first to dispose of the questions relating to the contract for the construction of the machine itself. It was a term of the contract that the type of design of the machine and the products produced by it should be "of the standard generally used and produced by all the large soap producers on this continent." It is now common ground that this was an entire contract to construct the machine for a price of $9,800 payable $4,000 in cash on completion and the balance to be secured by promissory notes. For the reasons given by Roach J.A. I agree with his conclusion, which was also that of the learned trial judge, that the contract was not one for the sale of goods but for work to be done and materials supplied.

The contract was made in September 1945. No date for completion was fixed. For reasons with which we are not now concerned there were numerous and lengthy delays

(1) [1951] O.R. 860.

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in building the machine. By March 1, 1949, according to the evidence of the respondent, the work had progressed to a point where the supplying of a small number of parts and the performance of a few days work would have resulted in the completion of the machine. At this point the respondent took the position that he would do nothing more unless and until he was paid $3,000, which, added to $1,000 which had been paid to him in November 1946, would make up the payment of $4,000 which was due on completion. The explanation of this given by the respondent at the trial was that he was afraid that if he completed the machine so that the appellant no longer required his services in connection with it he would not be paid. The appellant offered to deposit the sum mentioned in escrow to be paid to the respondent on completion of the machine but the respondent refused to proceed unless payment was made to him. By letter dated March 25, 1949 the appellant required the respondent to complete his contract by April 30, 1949 stating in part that unless he did so:—

> . . . we shall cancel the contract and require you to remove this machine from our premises, and request you to return the $1,000 paid to you, and further reimburse us for the time our employees worked on this machine with your employees, at your request, and for materials supplied at your request.

The letter concluded with the following paragraph:—

> If for any reason the time limit fixed by us for completion of the machine is unreasonable or insufficient, we would ask you to kindly advise us at once, otherwise we shall presume that we have given you reasonable time for so doing, and will act accordingly.

Counsel for the respondent does not suggest that the date fixed by this letter for completion was unreasonable. His submission is that the contract was already substantially completed. The respondent did nothing further and on May 11, 1949 the appellant commenced this action. The Statement of Claim recites the contract, alleges that the machine had never been constructed or completed and claims:—

(*a*) A declaration of this court that the contract between the parties hereto and dated the 21st of September, 1945, has been cancelled.

(*b*) The sum of $1,000 paid to the defendant.

(*c*) The sum of $700, value of floor space in the plaintiff's factory, used by the defendant.

(*d*) The sum of $137.11 the value of materials supplied by the plaintiff to the defendant at his request.

(*e*) The sum of $355.77 being value of materials purchased by the plaintiff as aforesaid less their salvage values and wasted by reason of the failure of the defendant to complete such machine.

At the opening of the trial the following claim was added by amendment, (*e*) (1) the sum of $1,191.80 the cost of labour referred to in paragraph 9 of the Statement of Claim. The relevant sentence in paragraph 9 is as follows:

> The plaintiff further supplied labour at the request of the defendant in the construction of such machine, such labour costing the plaintiff the sum of $1,191.80.

There was an alternative claim for $15,000 damages, presumably to cover the contingency of its being held that the appellant had to accept and pay for the machine.

Paragraph 5 of the Statement of Defence reads as follows:—

> The defendant says and the fact is that he has manufactured upon the premises of the plaintiff a machine as specified in the said agreement referred to in paragraph 3 of the statement of claim and that the plaintiff is now obliged to accept and pay for the same.

The respondent asked that the action be dismissed and counterclaimed (*a*) $9,584 being the contract price of $9,800 plus $784 sales tax less $1,000 paid on account, (*b*) $1,000 for "installation" as mentioned above and (*c*) $500 paid by the respondent for labour which he claimed should have been supplied by the appellant.

The learned trial judge held that "there was a substantial compliance with the contract" by the respondent, that there was no abandonment of the work by him, and no total failure of consideration, and that the respondent was entitled to be paid the contract price "less the cost of completing the machine, etc. and putting it in working order," which last mentioned cost he fixed at $600. He allowed the respondent's claim on the separate contract at $1,000 and on his claim of $500 he allowed him $200. Judgment was accordingly given for the respondent on his counterclaim for these amounts totalling $10,184, with costs, and the action was dismissed with costs. This judgment was affirmed by the Court of Appeal and the plaintiff now appeals to this Court.

I did not understand counsel to differ as to the present state of the law in Ontario but rather as to its application to the facts of the case at bar. In *Appleby* v. *Myers* (1),

(1) (1867) L.R. 2 C.P. 651.

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a decision of the Exchequer Chamber in which the unanimous judgment of the Court, Martin B., Blackburn J., Bramwell B., Shee and Lush JJ., was delivered by Blackburn J., that learned judge stated the general rule at page 661, as follows:—

> . . . the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

The judgment in *Appleby* v. *Myers* was approved and acted upon by the Judicial Committee in *Forman & Co. Proprietary Ltd.* v. *The Ship "Liddesdale"* (1), particularly at page 202. In *Sumpter* v. *Hedges* (2), A. L. Smith L.J. said:—

> The law is that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered.

This rule was recognized by the Court of Appeal in *H. Dakin and Co. Ltd.* v. *Lee* (3), but it was pointed out that the word "completed" as used in the rule is, in certain circumstances, equivalent to "substantially completed". The judgments in *Dakin* v. *Lee* have been repeatedly approved and followed in Ontario, *vide* e.g. *Taylor Hardware Co.* v. *Hunt* (4), and in my respectful opinion they correctly state the law.

The real question on this appeal is whether the respondent substantially completed his contract to construct the machine. With the greatest respect for the contrary view held by the learned trial judge and the Court of Appeal, I have reached the conclusion that he did not. From a perusal of the written record I would have inclined to the view that the evidence of the appellant's expert witness Mitchell, who was of opinion that the machine when completed would not be capable of producing soap chips of commercial quality should be preferred to that of the experts called by the respondent not only because of his admittedly high qualifications but because he appeared to have based his opinion on a much more thorough examination of the machine than was made by the other witnesses; but I do not rest my judgment on this view. In my opinion

(1) [1900] A.C. 190.
(2) [1898] 1 Q.B. 673 at 674.
(3) [1916] 1 K.B. 566.
(4) (1917) 39 O.L.R. 85 at 88.

on the evidence of the respondent himself and of the witnesses called on his behalf there was no substantial completion of the contract. At the time when the respondent definitely refused to proceed further with the construction of the machine it was incomplete in the following respects: the "knife" and "flange" were missing, baffles were required for the canvas apron screening of the dryer, further work was required on the fans and the speed of the machine had to be changed, being about six times as fast as was proper. It is urged on behalf of the respondent that these are comparatively unimportant details and that the allowance of $600 for the completion of the machine made by the learned trial judge is a generous one. But it appears from the evidence of the respondent and his witnesses that what remained to be done required engineering skill and knowledge. The record is silent as to whether the services of an engineer other than the respondent possessing the necessary skills were available to the appellant. The situation was, I think, accurately summed up in the following answer made in re-examination by the expert witness Stokes called for the respondent:—

> I think I know what both you gentlemen are trying to get at, and let me put it this way, it may not be legal or it may not be orthodox, but I am going to say this, if Fairbanks and Sheppard do not get together that machine will never run, it has to depend on the co-operation of two individuals just the same as ours at Guelph. If we had sat on the sidelines looking at it, it would never run. We had to co-operate with Sheppard and he had to co-operate with us. Everyone has to co-operate to operate the machine.

The respondent in his own evidence makes it clear that he decided to desist from further construction at a time when the machine was not capable of producing soap chips and to refuse to bring it to the state where it would produce them unless and until he was paid moneys to which under the contract he was not then entitled. He says in effect that he had intentionally put in sprockets of the wrong size so that the appellant could not use the machine to produce chips. After stating that one reason for putting in a small sprocket was to "run the machine in" he added that he had another reason. He was questioned as to this by the learned trial judge as follows:—

> His Lordship: You asked him what reason and he is not finished his answer. A. Will I give the other reason?
>
> Q. Yes.

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A. Because of the fact if I had gone and put the proper speeds on that dryer and I had put the knife on the dryer and operated that dryer producing chips, from my previous experience about the loan on the machine, with my dealings with Mr. Fairbanks with the machine, I had come to the firm conclusion I would have been locked out of the plant the same as Arneil, I would have been locked out and I would have had to sue him for my money. He could have fooled around for years and been making soap chips at my expense. I have $6,000 tied up in the machine and I think I have a right to get something out of it before I operate it and he could go on and operate it for years.

I can find nothing in *Dakin* v. *Lee* (*supra*) or in the numerous other authorities referred to by counsel to indicate that under all these circumstances it could be said that the respondent had substantially completed his contract. The contract was to construct a machine to produce soap chips of a certain standard. The respondent refused to do anything further at a time when on his own evidence the partially constructed machine would not produce soap chips at all. In my opinion on the view of the evidence most favourable to the respondent he abandoned the work and left it unfinished. The difference between the facts of the case at bar and those in *Dakin* v. *Lee* (*supra*) are apparent on reading all the judgments in the last mentioned case, and it will be sufficient to refer to the following passage from the judgment of Lord Cozens-Hardy M.R. at pages 578 and 579:—

> In these circumstances it has been argued before us that, in a contract of this kind to do work for a lump sum, the defect in some of the items in the specification, or the failure to do every item contained in the specification, puts an end to the whole contract, and prevents the builders from making any claim upon it; and therefore, where there is no ground for presuming any fresh contract, he cannot obtain any payment. The matter has been treated in the argument as though the omission to do every item perfectly was an abandonment of the contract. That seems to me, with great respect, to be absolutely and entirely wrong. An illustration of the abandonment of a contract which was given from one of the authorities was that of a builder who, when he had half finished his work, said to the employer "I cannot finish it, because I have no money," and left the job undone at that stage. That is an abandonment of the contract, and prevents the builder, therefore, from making any claim, unless there be some other circumstances leading to a different conclusion. But to say that a builder cannot recover from a building owner merely because some item of the work has been done negligently or inefficiently or improperly is a proposition which I should not listen to unless compelled by a decision of the House of Lords. Take a contract for a lump sum to decorate a house; the contract provides that there shall be three coats of oil paint, but in one of the rooms only two coats of paint are put on. Can anybody seriously say that under these circumstances the building owner could go and occupy the house and take the benefit of all the decorations which had been done in the other

rooms without paying a penny for all the work done by the builder, just because only two coats of paint had been put on in one room where there ought to have been three?

I regard the present case as one of negligence and bad workmanship, and not as a case where there has been an omission of any one of the items in the specification. The builders thought apparently, or so they have sworn, that they had done all that was intended to be done in reference to the contract; and I suppose the defects are due to carelessness on the part of some of the workmen or of the foreman: but the existence of these defects does not amount to a refusal by them to perform part of the contract; it simply shows negligence in the way in which they have done the work.

In the case at bar when the respondent knew the machine was not capable of producing soap chips he said to the appellant: "I will not finish it unless you pay me $3,000." In my opinion the conduct of the respondent falls within the illustration of an abandonment of a contract given by the Master of the Rolls in the above quoted passage.

Counsel for the respondent did not seek to base any claim in regard to this contract on a *quantum meruit* and I think it clear that, if, as I have held to be the case, there was no substantial completion of the contract, there was no evidence from which any new contract to accept and pay for the work done could be inferred. From the evidence it seems probable that the machine in its present state has become part of the realty which belongs to the appellant. Assuming this to be so it is clear from the reasons in *Sumpter* v. *Hedges* (1) that the mere fact of the appellant remaining in possession of his land is no evidence upon which an inference of a new contract can be founded. At page 676 Collins L.J. puts the matter as follows:—

There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a *quantum meruit* from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract.

In the case at bar the appellant has never elected to take any benefit available to him from the unfinished work and Mr. Williston stated that he was willing that, in the event of his appeal succeeding, a term should be inserted in the judgment permitting the respondent to remove the machine within a reasonable time.

(1) [1898] 1 Q.B. 673.

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For the above reasons I am of opinion that the respondent's claim based on the contract to construct the machine fails and that the appellant is entitled to a declaration that the contract was cancelled and to the return of the $1,000 paid to the respondent in November 1946.

It is next necessary to consider the appellant's claim for damages. The amount to which the appellant should be held entitled was not argued before us and the best course might be to direct a reference but in the hope of bringing the litigation to an end I have examined the evidence and have concluded that substantial justice would be done by awarding the appellant the total of items (*d*), (*e*) and (*e*) (1) claimed in the Statement of Claim amounting to $1,684.68, but as this branch of the matter was not fully argued before us, either party dissatisfied with this amount may have a reference at his own risk as to costs to the Master at Toronto to determine the amount.

It remains to consider the item of $1,000, claimed by the respondent for "installation", referred to in the opening paragraph of these reasons. This item is claimed in paragraph 2 of the counterclaim which reads as follows:—

> The defendant further says that the installation of the said machine and accessories thereto was on the basis of a separate order from the plaintiff to the defendant for which the defendant was to be separately paid and in respect of which the defendant is entitled to the sum of $1,000. The plaintiff further agreed to supply labour to assist the defendant in the installation of the said machine and failed to do so, as a result whereof the defendant had to hire extra labour and incurred expenditures in the sum of approximately $500.

In so far as these claims are for the installation of the machine they must fail. Having refused to complete the construction of the machine I can find no basis for a claim to be paid for the installation of an incomplete machine which must now be removed. There was however a separate agreement to be found in the letters marked as Exhibits 27, 28, 29, 30, 31 and 32 to install a motor and certain pulleys and hangers to be used on the ceiling counter shafts for driving the dryer. Exhibit 32, a letter from the respondent to the appellant, reads as follows:—

> We acknowledge your letter of September 26th, authorizing us to proceed with the erection of pulleys, hangers and motor for the driving members to the various sections of the dryer.
>
> We as arranged are to supply the labour and engineering in connection with the same but not materials, and for the sake of record and invoicing wish to point out that this is a separate order from the dryer proper and will be billed to you on that basis.

There is no evidence of any bill having been rendered by the respondent shewing what part of the $1,000 claimed in paragraph 2 of the counterclaim is attributable to the installation of these items and I am unable to find much assistance in the evidence. It does appear however that the work was done and the exhibits referred to indicate the amount of material installed. While I feel it is little better than a guess, I would, once more in the hope of bringing the litigation to an end, assess the amount to which the respondent is entitled for installing the equipment in question at $200 with a similar right to either party, if dissatisfied with this figure, to have a reference to the Master at Toronto.

In the result the appeal should be allowed and judgment should be entered (*a*) declaring that the contract between the parties dated the 21st of September 1945 has been cancelled, (*b*) providing that the appellant recover from the respondent the sum of $2,684.68, (*c*) providing that the respondent shall have the right to remove the incomplete machine from the premises of the appellant within sixty days from the date of the delivery of this judgment, (*d*) providing that the respondent recover from the appellant on his counterclaim the sum of $200; provided however that if either party so elects within fifteen days of the date of the delivery of this judgment in respect of either or both of items (*b*) and (*d*) above, instead of judgment being entered for the amount above set out it shall be referred to the Master at Toronto to determine the amount of damages in respect of the item or items as to which such election is made.

As the appellant has succeeded substantially both on the claim and counterclaim it should have its costs of the action and counterclaim and of the appeals to the Court of Appeal and to this Court.

Appeal allowed.

Solicitors for the appellant: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitors for the respondent: *Mason, Foulds, Arnup, Walter & Weir.*