1963
*Oct. 22, 23
Dec. 16

WILLIAM JOHN FIELD, FIELD'S INDUSTRIAL RESEARCH LTD., FIELD'S WHOLESALE DISTRIBUTORS LTD. AND FIELD'S ENTERPRISES LTD. (*Defendants*) ..... APPELLANTS;

AND

BRUCE ZIEN AND FIELD'S WELDING SUPPLIES LTD. (*Plaintiffs*) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Breach—Right to rescind claimed—Seriousness of defective performance—Case one for damages and not rescission.

The defendant F had a business for the sale and distribution of welding supplies which he sold to the plaintiff Z. One of the terms of the agreement of sale was that at the time of closing, the cash, accounts receivable and inventory would exceed the accounts payable by at least $109,865. At the closing date, the balance was less than this sum by approximately $14,000. The plaintiff, after being in possession of the business for eleven weeks, claimed the right to rescind. He secured this relief at trial and held it on appeal, one member of the Court dissenting. The defendant appealed to this Court.

Held: The appeal should be allowed.

In deciding whether the remedy is rescission, with all its consequences or damages, the emphasis should be on the seriousness of the defective performance in the particular contract. While not saying that the breach in the present case was trivial it was necessary to weigh its commercial importance and, having regard to the amount of the shortage, the ascertainable probability of its occurrence at the time of the formation of the contract, the amount involved in the contract and the holdback of the final payment of $50,000 for four months,

*PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

this was a case for damages and not rescission. To follow this course was not to compel the plaintiff to accept something which differed in an important way from that which he contracted to buy. If the $14,000 were put into the company or if the plaintiff paid $14,000 less, he would be fully compensated.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Brown J. Appeal allowed.

V. R. Butts, for the defendants, appellants.

M. M. Grossman, Q.C., and *D. R. Sheppard,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

JUDSON J.:—I will refer to the parties to this litigation as Field, on the one hand, and Zien, on the other. Field had a business for the sale and distribution of welding supplies which he sold to Zien. One of the terms of the agreement of sale was that at the time of closing, the cash, accounts receivable and inventory would exceed the accounts payable by at least $109,865. At the closing date, the balance was less than this sum by 14,000 odd dollars. Zien, after being in possession of the business for eleven weeks, claimed the right to rescind. He secured this relief at trial and held it on appeal[1], Davey J.A. dissenting. Field now appeals to this Court.

The case was pleaded as one of misrepresentation on five grounds, all of which the trial judge rejected. He did, however, find another misrepresentation that was not pleaded. This, in turn, was rejected by the Court of Appeal. We are, therefore, in this position at this stage, that no misrepresentations have been proved and the argument addressed to us fails to persuade me that there was any error on this point.

The Court of Appeal was asked to dismiss the action on this ground alone but all the judges held, correctly in my opinion, that it was still open to the trial judge and to them to consider the effect of clause 5.3 of the contract which I have summarized above. Clause 5.3 of the contract reads:

As at the closing hour the aggregate of cash on hand and at bank valued at par, trade accounts receivable at book value before allowance for doubtful accounts and inventory at lower of cost or market will

[1] (1963), 43 W.W.R. 577.

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exceed the accounts payable, the principal amounts owing on the contracts described in paragraphs 5.8.1 and 5.8.2 and the amount payable by you under paragraph 4.6.5 and accrued liabilities of the companies by at least $109,865.00.

The contract took the form of a letter from Field to Zien giving him an option to buy. It is dated February 7, 1961, and recites the payment on that date of $1,000 for the option. Zien was to exercise the option before February 26, 1961, by written notice, together with a certified cheque for $24,000. He did this. On the exercise of the option a binding contract for sale and purchase was to come into existence. The price was $175,000, of which $25,000 had already been paid, and a further $100,000 was to be paid at the closing hour (8.30 a.m. March 1, 1961) and the balance of $50,000 four months after the closing hour. Zien paid the $100,000 on the due date and Field transferred the assets of the business. In mid May 1961 the parties discovered that the balance of current assets over current liabilities was approximately $14,000 short of the figure stated in paragraph 5.3. On May 19, 1961, Zien gave notice of rescission of the contract and tendered the business and assets back to the appellants. When the tender was rejected he issued his writ claiming rescission on the ground of misrepresentation, the return of his $125,000 and damages and indemnity and, in the alternative, damages for breach of contract.

Misrepresentation has now disappeared as an issue in this litigation. All the judgments of the Court of Appeal were founded upon the effect of clause 5.3. This is a term of the contract which promises that on a certain date the working capital will be not less than a certain figure. Both the trial judge and the majority of the Court of Appeal have held that Zien is automatically entitled to rescission because the working capital did not reach that figure on that date. The trial judge said:

> As to this the defendant says that he is willing to have the purchase price cut by the amount of the deficiency and submits that the clause ought to be interpreted to give him this doubtful privilege. But the predecessor of this clause in an earlier draft specifically drawn to provide for this was rejected on behalf of the plaintiff. It ought to have been evident to the accounting advisers of both the plaintiff and defendant that the so-called planned expansion of the company would make literal compliance with 5.3 impossible; nevertheless the defendant accepted this clause prefaced by he words "we warrant and represent to you and covenant with you that", and I must reluctantly hold that the defendant is thereby trapped.

In my opinion the conclusion reached by the trial judge does not follow logically from the breach. In deciding whether the remedy is rescission, with all its consequences or damages, the emphasis should be on the seriousness of the defective performance in the particular contract. Nothing in the way of clarity is gained by attaching a label to the clause. The case for Zien, once the element of misrepresentation goes, is that clause 5.3 is a promise that during the period in question the business would show a profitable operation from September 30, 1960, the date of the last balance sheet, to the date of closing. I cannot draw this inference from the clause. Zien knew that there had been material changes in the business since September 30, 1960, such as:

(a) the occupation of larger premises;

(b) the taking on of new lines and the expansion of old lines;

(c) additional personnel;

(d) reduction in cartage income;

(e) the setting up of a repair shop; and

(f) an increase in inventory.

These changes involved non-recurring capital expenses of some $11,000 which were involved in the figure stated in clause 5.3, increases in regular operating expenses and non-recurring expenses in re-organizing and moving the business. All these factors contributed to the deficiency of $14,000 and might have been foreseen by either party. Indeed, the learned trial judge says that the planned expansion ought to have made it apparent to the accountants of both parties that literal compliance with the clause would be impossible.

In these circumstances and with the last $50,000 of the purchase price made payable four months after closing, one cannot gather any intention that the parties contemplated that a breach such as the one in question here would give a right of rescission. A breach of this clause might be trivial or serious. I am not saying that this breach is trivial but one must weigh its commercial importance and, having

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regard to the amount of the shortage, the ascertainable probability of its occurrence at the time of the formation of the contract, the amount involved in the contract and the holdback of the final payment of $50,000 for four months, my conclusion is that the case is one for damages and not rescission, and that to follow this course is not to compel Zien to accept something which differs in an important way from that which he contracted to buy. If this $14,000 is put into the company or if Zien pays $14,000 less, he is fully compensated. If Zien had wanted rescission for any deficiency in this account he could have stipulated for it and it would have been enforced.

For these reasons I would follow the dissenting judgment of Davey J.A. and allow the appeal.

There is a balance of $50,000 owing to Field, less the sum of $14,134.07. This is the subject of a counter-claim. In view of the fact that the counter-claim contains other items and the appellant asks that the counter-claim as a whole be referred back to the trial judge, I would limit the judgment of this Court to the following points:

(a) The appeal is allowed and the contract declared valid and binding.

(b) Judgment for the balance of the purchase price, namely, $50,000, less the damages of $14,134.07. If this sum is not accepted, it must be dealt with on the reference back to the judge.

(c) A reference back to the trial judge to decide the other items of the counter-claim.

(d) The appellants should have their costs throughout.

Appeal allowed with costs throughout.

Solicitors for the defendants, appellants: Gowan & Butts, Vancouver.

Solicitors for the plaintiffs, respondents: Grossman & Miller, Vancouver.