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IN THE HIGH COURT OF AUSTRALIA

NOVELTY FAIR THEATRES PTY. LTD.

V.

RALPH SYMONDS LIMITED

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 6th April 1960

W. M. Houston, Govt. Print., Melb.

NOVELTY FAIR THEATRES PROPRIETARY LIMITED

v.

RALPH SYMONDS LIMITED

ORDER

Appeal dismissed with costs.

NOVELTY FAIR THEATRES PROPRIETARY LIMITED

v.

RALPH SYMONDS LIMITED

JUDGMENT

DIXON C.J.
TAYLOR J.
MENZIES J.

NOVELTY FAIR THEATRES PROPRIETARY LIMITED

v.

RALPH SYMONDS LIMITED

This appeal is concerned with the rights of the parties under a contract whereby the appellant agreed to purchase from the respondent a quantity of "Alumply" for use as a component in the erection, in a suburb of Melbourne, of an open-air moving picture screen. The name "Alumply" denotes a product manufactured by the respondent and it consists of sheets of specially brushed aluminium which are affixed to a backing consisting of plywood. Its reflective capacity is said to be high and after discussions between the parties the appellant and its advisers decided that alumply should be purchased and used as a facing for the screen in question. As erected the screen was unsatisfactory. So much is common ground. The principal defect and the only one with which we need concern ourselves was that from the moment of its erection the screen exhibited, in use, a number of dark lines. These were said to be about two inches wide and they extended vertically from the top to the bottom of the screen. In these circumstances the appellant brought an action against the respondent in the Supreme Court of Victoria in which it claimed damages for breach of contract. The claim was resisted by the respondent who also counterclaimed for the unpaid balance of the price. In substance, the appellant's claim was based upon the alleged breach of conditions, expressed and implied, relating to the suitability of the alumply for the purpose for which it had been purchased. The action was heard without a jury and, in the result, judgment was entered for the respondent both on the claim and counterclaim. This appeal is now brought in an attempt to have that judgment set aside and to have judgment entered for the appellant.

In order to appreciate the submissions made by the appellant on the appeal it is necessary that we should make more particular reference to the terms of the contract which it alleged was made and also to the precise character of the goods to which it was said to relate. First of all it should be said that it was the appellant's intention to erect a screen 44' high and 106' wide. But the respondent did not undertake to provide a sheet of alumply of these dimensions. What it undertook to provide were strips, or panels, of alumply forty-four feet long by thirty-four and seven-sixteenths inches wide and three-eighths of an inch thick. These were to be delivered from Sydney to the appellant's site in Melbourne where it proposed to attach the panels vertically to an existing framework. We mention these matters because by its statement of claim the appellant alleged that the respondent had "agreed to sell and deliver to the plaintiff at Tooronga in the State of Victoria a cinema screen facing measuring 106' x 44' of a material known as 'Alumply' for the sum of £2,664. 16. 0". Thereupon, it was alleged that it was a term and condition of the contract that "the said 'Alumply' would be so treated by the defendant that it would when used as a cinema screen facing have a high degree of reflectivity and further that (a) such reflectivity would be uniform throughout the full length and breadth of the said screen facing; (b) the said screen facing would be free from shadows or distortions and (c) the screen facing would be in every way satisfactory". The respondent by its statement of defence denied any such contract and went on to allege that the only relevant contract between the plaintiff and the defendant was a contract by the terms of which the defendant undertook to supply sheets of alumply sufficient to make a cinema screen facing 106' x 44' and to prefabricate, drill, pack and deliver the same. Needless to say, there was no such contract as was alleged by the appellant but

the trial proceeded on the basis that the subject matter of the transaction was as alleged by the respondent and it was on this view that his Honour proceeded to consider what conditions or warranties the contract contained. In the events which have happened we feel bound to approach the questions raised on the appeal in the same way. This approach, however, involves a difficulty which is not merely formal for one of the appellant's submissions was that proof that the screen was found to be defective immediately upon its erection was sufficient to establish a breach of the express warranty which it asserted. But the express warranty alleged by the statement of claim was said to be annexed to a contract for the sale of a cinema screen facing measuring 106' x 44' and there was no such contract. Nor, in the circumstances of the case, is it possible to treat the warranty alleged in para. (4) of the statement of claim, which, in terms, related to a screen facing of the specified dimensions, as applicable to a large number of panels to be used as components in the manufacture of a screen facing. The result is that we are left without any precise allegation of the terms of the express warranty upon which the appellant relies. However, the learned trial judge found that an express warranty was given and since there is no appeal against that finding we propose to deal with the appeal on the basis that this was so and that its terms were correctly stated by him.

His Honour found that the respondent's representative, Symonds, told the appellant's architects that the alumply which he could supply would, when used as a screen facing, have a high degree of reflectivity and provide a satisfactory screen. This assurance his Honour treated as a promise by the respondent to supply materials that would provide a reasonable satisfactory screen.

But such a promise, his Honour thought, added nothing to the condition which otherwise he would have thought proper to imply pursuant to s. 19(a) of the Goods Act 1928. That, in the absence of any express condition, such a condition should be implied was, apparently, not in dispute for his Honour said that counsel for the appellant "in his final address conceded, rightly in my opinion, that it was an implied condition of the contract that the alumply to be delivered would be reasonably fit for the purpose for which the plaintiff required the same". Nor was there any dispute in the case that proof that the defects in the screen were attributable to the unsuitability of the alumply panels as a component would be sufficient to fix the respondent with liability. To quote his Honour:-

> "There can be no doubt that the presence of the lines of the face of the screen is a serious defect and if the plaintiff is right in its contention that this is due to something in the condition of the alumply sheets, present at the time of the delivery thereof, then the sheets were not reasonably fit for the purpose for which they were required, nor were they materials that would provide the plaintiff with a reasonably satisfactory screen face. It would follow if these contentions are made out that there has been a breach of the conditions of the contract".

It should be stated at this stage that the black lines previously mentioned occurred in the vicinity of the vertical edges of each panel, and upon each panel they extended approximately one inch from the edge. There was no suggestion that these lines were in any way attributable to the fact that the screen facing consisted of a number of panels placed side by side with the result that a number of vertical joints was inevitable; the complaint was that by some cause or other the reflective capacity of the strips adjacent to the longer edges of the panels had been destroyed or substantially diminished. That this was so is beyond doubt. But there was much speculation concerning the question whether this was attributable to the condition of the alumply as delivered or to its treatment thereafter while in the appellant's hands and, as a consequence the cause

of this condition became a very material matter for inquiry at the trial. The trial occupied a great many days and many experts were called in an endeavour to throw some light on the matter. A number of possible causes were suggested but in the end his Honour found that the defects in the screen were caused by corrosion. However, he went on to say that he was unable to find in any of the possibilities suggested by the parties any explanation that he was prepared to accept as a cause of the corrosion and discoloration from which the lines on the screen arose. He thought that it would be highly speculative to attribute them to any of the possibilities suggested by the plaintiff and added that if he were compelled to choose between the various alternatives placed before him, he would be disposed to think that the defendant's suggestion that the edges of the sheets supplied were damaged as a result of corrosion after they were delivered was the most probable.

Upon the hearing before us the parties were content to assume that the deficiencies in the screen were, in fact, caused by corrosion though they were seriously in dispute as to the originating cause of this condition. But before dealing with the submissions which were respectively made it is convenient to turn to the appellant's primary submission which was that proof that the screen was defective immediately after its erection was sufficient to establish a breach of the express warranty which his Honour found had been given.

This submission had two aspects. First of all it was said that the express warranty relied upon was more or less absolute in the sense that it involved the respondent in liability if it could be shown that the screen facing when erected was defective. According to the argument advanced it mattered nothing whether the screen was erected shortly

after delivery of the panels, or whether, or not, there had been an inordinate delay though it was conceded that if the respondent could establish that the defects had arisen from some neglect of the appellant after delivery the respondent might escape liability. This contention, it will be seen, treats the time of erection, and not the time of delivery as the critical point for an examination of the suitability of the panels. But it is sufficient to say that the warranty as found by his Honour was directed to the suitability, and in the circumstances of the case, to the condition of the panels at the time of delivery and, that being so, this branch of the contention cannot be sustained. The second aspect of the contention is really concerned with the probative force of the evidence that the screen was found to be defective immediately after its erection. Proof of this fact, it is said, established, at least prima facie, that the panels were defective at the time of delivery and, thereupon, it was for the respondent to displace the prima facie presumption. But the onus of proof in a case of this character does not shift during the course of the trial. No doubt in many cases evidence of a defect existing in goods at some stage after delivery may sufficiently establish that the goods were defective at the time of delivery. But the probative force of such evidence must always be a matter of circumstance and degree and the question at the end of the trial must always be whether, upon the evidence adduced, the plaintiff has established the breach relied upon.

In the present case much more is known than merely that the screen was defective when erected. On the hypothesis acceptable to both parties the cause of its defective conditon was corrosion and there was ample evidence to show that the corrosion might well have been caused by the manner in which the panels were treated by the respondent after delivery had been made on the 6th September 1956.

They had been packed in a special case or crate with narrow packing strips separating the longer edges of each panel from its neighbour. They had been transported from Sydney in such a way as to ensure that from side to side the panels stood vertically in the crate which contained them. The appellant was specifically informed by the respondent that the crate containing the panels would be lifted from the transporting vehicle and placed upon the ground at the appellant's site in the same upright position. But because the respondent foresaw some difficulty in opening the crate in this position it had the crate placed upon the ground in such a way that each panel lay in a horizontal plane. There, with the exception of two panels which were removed for a day or two, they were left for some five weeks subject, as his Honour said: "to the effect of wind and rain save to the extent that they were protected by the tarpaulins that were supposed to be spread over them". And his Honour had no confidence whatever that the tarpaulins were kept in position. Indeed, it seems that at some stage after the two sheets previously referred to had been removed the crate deteriorated and broke and when the sheets were finally removed for erection the site was described as being like a quagmire as the result of the rain that had fallen. When it is seen that there was abundant evidence, which is not seriously in dispute, that if moisture penetrated between the surfaces of the sheets at the edges of the packing strips "there would be created an ideal setting for corrosion by crevice action" it is obvious that proof that the screen was defective when erected was quite inadequate to establish that this resulted from defects existing in the panels at the time of delivery.

The other contention advanced by the appellant was that his Honour should have found affirmatively that the corrosion complained of resulted from the application in the

respondent's works of a chemical, known as sodium pentachlorphenate, to the edges, both side and end, of the panels. This was applied primarily as a fungicide to the edges of the plywood backing. But, it seems, its application to aluminium, or to some forms of aluminium at least, will induce corrosion and, according to the appellant, the probable cause of the corrosion on the panels which the respondent supplied was carelessness in the application of the fungicide. It is probable, it is said, that the operator employed on this task applied it not only to the edges but also to the face of each panel for a distance of one inch or so from either side. This was, however, no more than speculation, and there were good reasons why the learned trial judge should not infer that it had occurred. In the first place, there was, as we have already said, another explanation of the corrosion that appealed more to him than this speculative theory; in the second place, although the evidence was that the fungicide had been applied to the short ends as well as the long sides of all the panels, there was no sign of corrosion at the ends and there were two panels (not those temporarily removed from the crate), the sides of which were not affected at all, so that the theory did not account for all the facts. In the result we can see no reason why we should hold that his Honour should have made an affirmative finding that this was the cause of the defects of which the appellant complains and, accordingly, the appeal should be dismissed.