

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Matthews and Chipman, JJ.A.

BETWEEN:

NEWFOUNDLAND VENTILATION SYSTEMS)	C.D. Bryson
LIMITED)	for the appellant
)	
Appellant)	respondent in person
)	(Earl Caldwell)
)	
- and -)	Appeal Heard:
)	December 10, 1990
)	
FUTURE ENERGY PRODUCTS LIMITED)	Judgment Delivered:
and ERLAND CALDWELL, a.k.a. EARL)	December 10, 1990
CALDWELL)	
)	
Respondent)	

THE COURT: Appeal dismissed per oral reasons for
judgment of Matthews, J.A.; Clarke, C.J.N.S.
and Chipman, J.A. concurring

The reasons for judgment were delivered orally by:

MATTHEWS, J.A.:

After a trial on July 11, 1990, the Honourable Constance R. Glube, C.J.T.D. allowed the claims of the appellant against the defendant, Future Energy Products Limited, finding that there was a fundamental breach of contract. She dismissed the counterclaims of that defendant and as well dismissed the appellant's claims against the respondent, Erland Caldwell finding that the appellant had not proven that there was fraud on his part. This appeal concerns that latter ruling only.

The defendants were not represented by counsel at trial. On appeal, Mr. Caldwell appeared on his own behalf.

At trial, appellant's counsel argued, and the trial judge accepted, that the law respecting that which must be proven in a claim under contract induced by fraudulent representation was as set out by Jones, J. as he then was, in *Charpentier v. Slauenwhite* (1972), 3 N.S.R. (2d) 42 at pp. 45 and 46:

"The leading case on deceit is *Derry v. Peek* (1889), 14 App. Cas. 337. The law was stated by Lord Herschell at p. 374,

First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.

The basis for establishing such a claim is set out in the text, Canadian Law of Vendor and Purchaser by DiCastrì at p. 201,

In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) That the representations complained of were made to him by the defendant; (2) That they were false in fact; (3) That when made, they were known to be false or were recklessly made, without knowing whether they were false or true; (4) That by reason of the complained of representations the plaintiff was induced to enter into the contract; (5) That within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudiated it.

The burden of proof in establishing fraud is clearly on the plaintiffs. I refer in this regard to *Parna v. G. & S. Properties Limited* 1971 S.C.R. 306."

Thus, it was necessary for the trial judge to find in fact proof of the stated requisites or the claim in fraud will fail. This, the trial judge refused to do. She clearly said that she was "not

satisfied that any of those conditions have been shown to the court".

Findings of fact must stand on appeal unless it can be established that the trial judge made some palpable and overriding error which affected her assessment of the facts. *Stein v. The Ship "Kathy K"*, (1976), 2 S.C.R. 802.

After reviewing the record, considering the arguments both written and oral, and as well mindful of the function of an appellate court in such matters, we find no error on the part of the trial judge respecting her assessment of the facts or application of the law.

In consequence, we are unanimously of the opinion that the appeal is dismissed. The respondent informed us that he is not seeking costs: accordingly none are awarded.

Kenneth M. MacLennan
J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.

Yes.
OKC.

1989

S.H. 67688

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

NEWFOUNDLAND VENTILATION SYSTEMS LIMITED

- and -

FUTURE ENERGY PRODUCTS LIMITED and
ERLAND CALDWELL, a.k.a. EARL CALDWELL

GLUBE, C.J.T.D., (Orally at conclusion of hearing)

I must say that based on the evidence that I have heard that I don't have any difficulty with there being a fundamental breach of the contract. Clearly they were supposed to supply C.S.A. approved machines. From the evidence I heard, there was the understanding that they would be getting C.S.A.