WOOD v. GRAND VALLEY R. CO.

22 D.L.R. 614
Affirming 16 D.L.R. 361
Varying 10 D.L.R. 726
Varying 5 D.L.R. 428

Supreme Court of Canada
Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin, and Brodeur, JJ.
March 15, 1915

1. CONTRACTS (§ VI A -- 410) -- LIABILITIES ON -- PERSONAL LIABILITY OF RAILWAY PRESIDENT -- FAILURE TO COMPLETE BRANCH LINE -- RIGHTS OF BONDHOLDERS.

An agreement whereby a railway president undertakes on behalf of himself and the company to build an extension line in order to secure a township the benefit of competitive freight rates, in consideration that the manufacturers and citizens of the township purchase the railway bonds, renders the president personally liable with the company to the purchasers of the bonds upon their failure to complete the line.

[16 D.L.R. 361, 30 O.L.R. 44, affirmed.]

2. DAMAGES (§ III A 1 -- 44) -- CONSTRUCTION OF BRANCH LINE -- FAILURE TO COMPLETE -- LIABILITY TO BOND PURCHASERS.

Substantial damages, in an amount determinable from the evidence as to the loss sustained, may be awarded to purchasers of railway bonds, for the breach of an agreement by a railway company to build a branch line which, if completed, would secure their township better freight facilities, and on the strength of which agreement the bonds were purchased.

[16 D.L.R. 361, 30 O.L.R. 44, affirmed.]

3. APPEAL (§ I A -- 1) -- RIGHT TO -- SUBSTANTIVE RIGHTS -- JUDGMENT FOR REFERENCE -- NON-VARIANCE OF DAMAGES -- FINALITY.

The judgment of a Provincial Supreme Court which does not determine adversely the quantum of damages, but merely orders the case back for a further reference, constitutes no deprivation of a "substan-

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rive right in controversy in the action" within the meaning of secs. 2(e) and 36 of the Supreme Court Act, R.S.C., 1906, ch. 139, as amended by Act, 1913, from which an appeal will lie.

[16 D.L.R. 361, 30 O.L.R. 44, affirmed.]

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (16 D.L.R. 361, 30 O.L.R. 44), setting aside the judgment of the Divisional Court (10 D.L.R.

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726, 27 O.L.R. 556), and that of the trial Judge (5 D.L.R. 452, 26 O.L.R. 441).

The text of the agreement on which the action was based is as follows:--

> In consideration of the purchase of the bonds of the Grand Valley Railway Co. by certain manufacturers and other citizens of St. George, Ont., and the sum of one dollar ($1) now in hand paid, Mr. A. J. Pattison, president of the Grand Valley Co., hereby undertakes and agrees on his own behalf and on behalf of the said Grand Valley R. Co., that he will make or cause to be made a through traffic arrangement with the Canadian Pacific Railway Co. making direct connection with the C.P.R. at Galt, in terms of the Railway Act of Canada in such a way that the current competitive freight rates will apply continuously from St. George on precisely the same basis as from Galt and other points in this railway district, to all points east and west in Canada.
>
> While not undertaking anything on behalf of the C.P.R. Co. it is distinctly provided by this agreement that the said A. J. Pattison will do all things lawful to secure the agreement above mentioned, and further that should it be necessary to do so he will bring the matter before the Railway Commission of Canada with a view to the creation and enforcement of the through traffic arrangement herein mentioned.
>
> It is further agreed that the extension of the Grand Valley Railway to St. George and the securing of the above mentioned agreement with the C.P.R. Co. will proceed with at once and with the greatest possible dispatch.
>
> It is further agreed that the Grand Valley R. Co. will build and construct in a substantial way for the handling of heavy freight, the necessary switches and sidings connecting their system with the various mills and factories of St. George upon such terms as may be agreed upon between the respective parties.
>
> Provided always that the terms, conditions and covenants of this agreement shall be binding upon the heirs, executors and assigns of the said A. J. Pattison and the said Grand Valley Railway Co.
>
> Dated at St. George, Ont., June 29, 1906.
>
> (Sgd.) THE GRAND VALLEY RY. CO.,
>
> *A. J. Pattison, Pres't.*

Shepley, K.C., and *Sweet*, for appellants.

Holman, K.C., for respondent Pattison.

Grayson Smith, for respondent, The Grand Valley Railway Company.

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SIR CHARLES FITZPATRICK, C.J.:--I am of opinion that the appeal and cross-appeal should be dismissed with costs.

DAVIES, J.:--The substantial questions to be determined in this appeal, beyond Pattison's

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personal liability, are what damages the plaintiffs are entitled to recover by reason of the failure of the defendant to continue the construction of the Grand Valley Railway from a point on the line called Blue Lake to the Village of St. George, as contracted for; and, secondly, whether the evidence put in at the trial of the cause was ample enough and supplied sufficient data to enable the Court to fix upon and determine the measure of these damages.

The learned trial Judge thought sufficient evidence had been given and assessed the damages at $10,000.

The Divisional Court reduced these damages to $3,880, which they divided between the two plaintiff companies, allowing to the individual plaintiffs only nominal damages.

The Appellate Division being of the opinion that there was an "entire absence of evidence to supply the data upon which the amount of loss sustained by the breach of the agreement could be ascertained," vacated both judgment and directed a reference to ascertain the amount of the damages.

I understand a majority of my colleagues are of the opinion that this was, under the circumstances, the judgment which should have been given and have agreed to dismiss the appeal and confirm that judgment. While I do not formally dissent from this judgment, I think it fair, however, to say, specially in view of the appeal made to us by counsel at bar, that if we reached a conclusion adverse to the objections against the maintenance of the action altogether we would, if possible, finally dispose of the question of damages, I was personally prepared, after considering the evidence submitted, to have now and on the evidence before us disposed of this question of damages.

The conclusion I finally reached was that the judgment of the learned trial Judge was under all the circumstances and evidence a fair and reasonable one.

The reasoning of the learned Judge in the following quotation which I make from his judgment commends itself to my

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mind not only as fair and reasonable, but as coming quite within the reasoning and the judgment of the Court of Appeal in *Chaplin v. Hicks*, [1911] 2 K.B. 786.

The learned trial Judge says:--

> In this case the plaintiffs expected to receive great benefit if they could secure the construction of the railway and competition between the Grand Trunk and the Canadian Pacific. In addition they expected great convenience in the carrying on of their business by the ready access to a railway by which incoming and outgoing freight could be handled. They expected additional profit by the increased prosperity of the municipality in which they were interested. All these considerations were present to the minds of both parties at the time of the making of the agreement.
>
> There were many elements of uncertainty. These could not be eliminated. If all that was hoped for came to pass, the advantage to the plaintiffs would far exceed the

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> $10,000 paid. The price was not given for a thing certain, but was given for the chance of obtaining the great advantage hoped for. If I were to attempt to assess damages on the basis of the plaintiffs receiving all that they contemplated, then the damages would be many times the price paid. But, endeavouring to assess in the light of all the uncertainties and contingencies pointed out by counsel, and which were, no doubt, equally present to the minds of both parties at the time the agreement was made, I think I shall not go far wrong if I place the damages at the same sum as that which Pattison and his railway company induced the plaintiffs to give for this chance.

Had it not been for the decision of the above case of *Chaplin v. Hicks*, [1911] 2 K.B. 786, and the cogent reasonings of the able Judges who constituted the Court of Appeal in explaining the grounds on which they reached their conclusion I would have felt inclined to agree with the judgment appealed from on the ground of the insufficiency of the evidence.

An attempt was made to minimize the extent and meaning of that judgment of *Chaplin v. Hicks*, [1911] 2 K.B. 786, but the weight to be attached to it not only consists in the exact point there decided, but also in the *personnel* of the Court and the reasoning by which they supported their conclusion.

The head-note or summary of the report reads as follows:--

> Where by contract a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class and is thereby deprived of all chance of obtaining the prize is a breach in respect of which he may be entitled to recover substantial, and not merely nominal, damages.
>
> The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

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It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned Judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or Judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if "the amount of the verdict is a matter of guess work."

See last paragraph of judgment of Vaughan-Williams, L.J., pages 792-3.

Fletcher Moulton, L.J., at page 795, says, and I quote it because of Mr. Holman's argument in this appeal as to the remoteness of the damages claimed here:--

> It has been contended in the present case that the damages are too remote; that they are not the natural consequences of a breach with regard to which the parties intended to contract. To my mind the contention that they are too remote is unsustainable. The very object and scope of the contract were to give the plaintiff the

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> chance of being selected as a prizewinner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors. In my judgment nothing more directly flowing from the contract and the intention of the parties can well be found.

Again on the same page the same learned Judge says, speaking of the difficulties of establishing and fixing the damages:--

> But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been actual less resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs.

And again at page 796, speaking of the case he was then dealing with, he says:--

> I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury.

Farwell, L.J., at page 798, says:--

> The two words "chance" and "probability" may be treated as being practically interchangeable, though it may be that the one is somewhat less

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> definite than the other. The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, the loss has accrued to the plaintiff at the time of action. It is obvious, of course, that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages, say one shilling; if they had done so in the present case, it would have been entirely a question for them, and this Court could not have interfered.

Applying this reasoning and these principles to the case before us and our own common sense acting as jurymen I would not have felt much difficulty on the evidence given in accepting the conclusion reached by the trial Judge as to the amount of the damages. But as I have said I will not formally dissent from the conclusion reached by my colleagues supporting the judgment of the Appellate Division referring the case back for further evidence.

One word in conclusion as to the personal liability of the defendant. I fully concur with all my colleagues and with all the Courts below in maintaining that liability. I think it is hardly open to argument.

IDINGTON, J., dissented.

ANGLIN, J.:--Under sec. 36 and clause (*e*) of sec. 2 of the Supreme Court Act (as

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enacted by 3 and 4 Geo. V. ch. 51, sec. 1), only those judgments of the highest provincial Courts of final resort (rendered in the provinces other than Quebec and in proceedings other than equitable) are appealable to this Court which determine adversely to the appellant, in whole or in part, a substantive right in controversy in the action or other judicial proceeding. Such determination must be effected by the judgment appealed from -- not by some former or other judgment -- and the right must be a substantive right in controversy in the action.

By the judgment now in appeal the question of the liability of the defendants is determined in the appellants' favour. A reference is directed to ascertain the quantum of damages to which they are entitled. Of that direction the appellants complain, asserting that on the evidence in the record, they were entitled to a determination of the amount of their damages by the trial Court and that the judgment of that Court which fixed

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them at $10,000 should be restored. They insist that the variation of that judgment, by substituting, for the adjudication that they should recover $10,000, a declaration of liability and a reference to ascertain the amount of their damages, deprived them of a "substantive right in controversy in the action" within the meaning of that phrase in clause (*e*). With deference I am unable to accept that view. I cannot see that it makes the slightest difference what disposition of the case was made in the Court of first instance. The question as to our jurisdiction would be precisely the same if that Court had directed a reference as to damages and its judgment had been affirmed on appeal. By the judgment in appeal the plaintiffs' claim that they had a right to damages is decided in their favour; the quantum of those damages is left to be ascertained in further proceedings. The position would be precisely the same if that had been the judgment at the trial. Can it be said that the quantum of damages to which the plaintiffs are entitled -- which is the substantive right in controversy in the action now being dealt with -- is determined adversely to the appellants by the judgment now appealed from? I think not. That right now remains undetermined and it is immaterial what disposition of it had been made by the judgment of first instance. I am, for these reasons, of the opinion that this appeal should be quashed for want of jurisdiction; and, if that course were adopted, the cross-appeals would meet a similar fate. *Lindemark v. Picard*, Feb. 9, 1914, unreported.

But, in deference to the views of my colleagues, who, I understand are of the opinion that the Court has jurisdiction to entertain this appeal, I proceed to consider it on the merits.

Dealing first with cross-appeals by both defendants against the finding of their liability, I entertain no doubt that both were properly held to be parties to the contract in question and liable for damages for its breach. As to the company there can be no question that it was intended that it should be bound. Its president, Pattison, executed the instrument on its behalf, and he gives explicit evidence of his authorization to do so by the directors and of ratification of his action by the shareholders, which is uncontradicted. Moreover, it received the

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moneys paid by the plaintiffs and it acted on the agreement which it would now

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repudiate. As to Pattison's personal liability the terms of the contract make it clear that that also was intended; and I think the proper inference from the evidence is that his signature to the document, accompanied by the descriptive word "president," which is similarly used in the body of the instrument, was intended to witness his personal obligation as well as that of the company.

Neither can I accede to the contention that the plaintiffs, other than the Jackson Wagon Company and the Brant Milling Company, are restricted to nominal damages by the particulars delivered by them and the terms of the order under which they were delivered. All the plaintiffs claimed the return of the moneys paid by them. The damages of which particulars were ordered and given were claimed in addition to and over and above the refund of the moneys demanded. At the trial it became obvious that the claim to recover the moneys paid as on a total failure of consideration could not be maintained; and the trial Judge -- as he had the power to do -- apparently allowed the plaintiffs to substitute for that claim a demand to recover the same amount by way of damages for breach of the agreement; and the further claims for damages, of which particulars had been given, were abandoned. No formal amendment to the statement of claim was made; but the judgment of the learned trial Judge proceeds upon the assumption that the case should be dealt with as if that had been done. It cannot be otherwise intelligently explained.

On the main appeal, the case of *Chaplin v. Hicks*, [1911] 2 K.B. 786, is chiefly relied upon by the appellants. But all that that case decides is that "the existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment."

In such a case the plaintiff "may be entitled to recover substantial, and not merely nominal damages."

In that case the plaintiff had given in evidence all the material facts relative to the assessment of damages which were susceptible of proof. She had furnished to the jury all the data

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which it was in her power to supply. Having done that she was not required to render certain that which was contingent, or to furnish the means of measuring with exactness and precision something essentially indefinite. *Simpson v. London and North Western R. Co.*, 1 Q.B.D. 274; *Kennedy v. American Express Co.*, 22 Ont. App. R. 278, and *Jameson v. Midland R. Co.*, 50 L.T. 426, are other decisions similar in principle. But *Chaplin v. Hicks*, [1911] 2 K.B. 786, is not authority for the proposition -- for which an analysis of his argument makes it clear that counsel for the appellants really cited it -- that, because the realization of the plaintiff's expectations under a contract is subject to contingency, he is not bound to put the jury in possession of information in his power to enable them to appreciate what would have been the advantages to be derived by him from his expectations if realized, as a basis on which to assess the value of the chance of realization of which the breach has deprived him. It is the failure to give such information -- to supply such data as were given in *Chaplin v. Hicks*, [1911] 2 K.B. 786 -- that renders the reference ordered by the Appellate Division necessary, since that Court, in the

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exercise of its discretion, instead of dismissing the action, as it might have done, has seen fit as a matter of grace and indulgence, to allow the appellants another opportunity to adduce the evidence which they should have given at the trial as to relevant and material facts susceptible of proof, knowledge of which is necessary to enable the assessing tribunal to estimate what would have been the value to them of the performance by the defendants of their contract as a long step towards realization of their expectations. The plaintiffs are claiming special damages. No doubt the particularity of proof required varies with the circumstances. (Arnold on Damages, pp. 3, 4, and 12.) The assessing tribunal is, however, entitled to such assistance by proof of material relevant facts as the claimant may under the circumstances reasonably be expected to afford it.

But it is said that such evidence is in the present case unnecessary because we have in the consideration given and accepted *primâ facie* proof of the value placed by the parties themselves on the contractual rights acquired by the plaintiffs. That

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such a measure of damages must, in the circumstances of the case at bar, be illusory seems manifest. For divers reasons a man may be prepared to pay for a thing much more than any real pecuniary value it may have, not only to persons in general, but even to himself. Actuated by patriotic or philanthropic motives he may be willing to expend money for which he expects no return in the way of pecuniary or other material advantage. As to some of the plaintiffs there are circumstances in evidence that rather suggest that they were not pecuniarily interested. Unless in the case of a purely commercial contract, where the circumstances indicate with reasonable certainty that the price paid represents the fair value to the purchaser of the thing he bargained for, that price cannot afford a reliable basis for assessing damages for failure to deliver.

But in the present case, in addition to the contractual rights for the breach of which this action is brought, the plaintiffs for the $9,700 paid by them obtained bonds having a face value of $10,000, on which they were subsequently paid interest for five years. The actual value of these bonds at the time they were so acquired is not shewn, although it is sufficiently apparent that they had some substantial value. It is impossible on the evidence in the record to say how much of the $9,700 was in fact given for them, and what part of it the plaintiffs paid for the advantages likely to accrue to them from the fulfilment of the contract to construct the projected line of railway and to establish through connections. The value to them of the advantages to be anticipated from the fulfilment of these undertakings may have far exceeded the amount which they paid, or, on the other hand, it may have been materially less. Of that value the payment of $9,700 made to secure such advantages plus the bonds for $10,000 does not afford any criterion.

On the evidence in the record I feel that I should find myself quite incapable of fairly estimating the damages to which the plaintiffs are entitled. The value of the chance they have lost is, without further material, not susceptible of assessment. Unless the action should be dismissed, the reference to enable the plaintiffs to supplement their evidence is necessary. I think we should not interfere with the exercise of discretion by the Appellate

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Division. In conclusion I cannot do better than quote a well-known passage from the judgment of Bowen, L.J., in *Ratcliffe v. Evans*, [1892] 2 Q.B. 524, at 532 and 533:--

> The character of the acts themselves which produce the damage, and the circumstances under which these acts were done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

I would, for these reasons, dismiss the appeal and the cross-appeals with costs.

BRODEUR, J.:--I would be of opinion that the judgment of the Appellate Division of the Supreme Court of Ontario should be confirmed.

The action was for the recovery by the appellants of a sum of ten thousand dollars ($10,000) for breach of contract.

The appellants were all interested in the welfare of a place called St. George, and were anxious that that place should be connected with the line of the Canadian Pacific Railway through the Grand Valley Railway and agreed to take over $10,000 of bonds of the latter company if the respondent Pattison and the company itself would undertake to extend the Grand Valley Railway to St. George and to secure a competitive freight rate from the C.P.R. Co.

The bonds were taken over by the appellants and the company started the construction of the branch in question; but, though they had promised that by the fall of 1906 the extension of the railway would have reached St. George, the company failed to carry out their agreement.

In 1911 they instituted the present action against respondent Pattison and the Grand Valley Railway Company for the repayment of their money and for damages for breach of contract.

Pattison denied his personal liability in connection with that agreement. The three Courts below, however, have decided against him on that point; and, as it was mostly a question of fact, it is not necessary for me to deal with that phase of the situation.

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I think myself that Pattison should be held personally liable under the agreement which was made on June 29, 1906.

The only difficulty remaining is with regard to damages. Particulars had been asked before the trial from the plaintiffs as to those damages. Some of them stated in answer to the order that was then given that they would claim only nominal damages. The others, namely, the Jackson Wagon Co. and the Brant Milling Co. gave particulars.

At the trial before Mr. Justice Middleton, in view of the opinion that was then expressed by the Judge, no evidence was adduced as to these specific damages claimed.

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The plaintiff relied upon the case of *Chaplin v. Hicks*, [1911] 2 K.B. 786, and the trial Judge proceeded to assess the damages at the same sum as Pattison and the railway company induced the plaintiffs to subscribe.

The judgment was varied by the Divisional Court and nominal damages only were given to all the plaintiffs, with the exception of the Jackson Wagon Co. and the Brant Milling Co., in whose favour judgment was entered for $3,880.

An appeal was taken from that judgment to the Appellate Division. The Court maintained that the plaintiffs were entitled to recover the damages sustained by them by reason of the breach of the agreement and they ordered that the case be referred to the Master to ascertain the amount of such damages.

In view of the expression of opinion at the trial, it is pretty evident that the claim for damages was not gone into as it should have been without that. It is very much to be regretted that the parties, after having gone before four Courts will have to go again into this question of evidence as to the extent of those damages, but we have not got sufficient material before us to deal exhaustively with the subject.

I think the judgment of the Appellate Division, which ordered a reference, should be maintained and this appeal should be dismissed with costs.

Appeal dismissed with costs.

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