

HOUSE OF LORDS.

Friday, July 19, 1912.

(Before the Lord Chancellor (Viscount Haldane), Lords Ashbourne, Macnaghten, and Atkinson.)

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY *v.* UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Contract—Breach—Sale of Goods—Measure of Damages—Subsequent Transaction Mitigating Damages.

Question, whether in estimating damages for a breach of contract, it was relevant to take into consideration subsequent transactions of the claimant, arising out of the consequences of the breach and in the ordinary course of business, whereby the loss was mitigated, *answered* in the affirmative.

Question, whether the cost of such transactions (admittedly to the pecuniary advantage of the claimant) formed part of the damages, *answered* in the negative.

The judgments from which this appeal arose are reported 1911, 1 K.B. 575, and 1912, 3 K.B. 128, respectively.

Their Lordships' considered judgment reviews the *facts* and was delivered as follows:—

LORD CHANCELLOR (HALDANE) — The question raised in this appeal relates to the measure of damages payable by the appellants to the respondents on account of a breach of contract by the appellants. The contract, which was made in 1902, bound the appellants to deliver and erect within a period and in accordance with a specification eight steam turbines of 5500 kilowatt capacity and eight turbo-alternators. Some alterations were afterwards by agreement made in the specification, but it is not necessary to refer to these. The price was to be £250,000, payable in instalments. The contract provided for reference of disputes as to its meaning or effect to arbitration, and, in the events which happened, the Right Honourable Alfred Lyttelton was appointed arbitrator. The Arbitration Act of 1889 applied to the reference.

Differences arose between the parties. The appellants at various dates during 1904, 1905, and 1906, provided the machines, but the respondents alleged that the machines provided failed to satisfy the provisions of the contract with respect to economy and steam consumption. They claimed damages for breach of contract to the extent of £280,000 and upwards, which they said was their estimate of the loss caused by the excessive coal consumption for a period of twenty years, at which they estimated the life of the machines. Alter-

natively they claimed the cost of installing eight new Parsons turbines, being machines of an improved order and of 6000 instead of 5500 kilowatt capacity, which they had purchased elsewhere when the appellants' machines proved insufficient. The cost of these machines they estimated at £78,186, 4s., and they claimed in addition £12,000 for the estimated loss caused by the excess of coal consumption during the time in which the appellants' machines were working and before the Parsons machines could be installed.

It appeared that after the appellants' machines were installed they supplied power for several years, but in a manner which was defective. The respondents, however, used them and allowed the appellants to remove one temporarily, in order to endeavour to improve it, but the respondents always reserved their right to damages on account of breach of contract. It was not until 1908 that the respondents came to the conclusion that they would replace the appellants' machines with the Parsons machines.

The arbitrator heard the parties on the dispute which had arisen between them, and on the 14th June 1910 stated a Special Case. He set out that the claim of the appellants was in substance for the unpaid balance of the price of their machines, and that as against this claim the respondents counter-claimed the larger sums to which I have already referred, as damages. The counter-claim, he said, was made originally in alternative ways. First, upon the footing of the loss and damage already caused to the respondents, and of the loss which would afterwards have been caused to them by reason of the appellants' breach of contract on the assumption that the respondents had continued to make use of the appellants' machines. Alternatively the respondents had claimed a smaller sum, composed of the damages already caused to them plus the cost to them of the installation of the Parsons machines. He stated that the damages flowing from the breaches of the contract by the respondents appeared to be measurable in the first instance by a sum representing the cost of the extra consumption of coal and the extra expenses of labour, and arising in connection with the disposal of ashes caused by the defects in the machines delivered, but subject to certain deductions by reason of defects in the condensing apparatus which the respondents themselves had undertaken to provide. He stated that in addition to this head of claim, about which there was no serious controversy, the respondents further contended that they were entitled to recover the cost of putting in the Parsons machines, alleging that by so doing further loss had been prevented which must otherwise have fallen on the appellants in respect of the prospective loss from extra consumption of coal and other matters to be caused by the use of the defective machines. He then found as a fact that the purchase of the Parsons machines by the respondents was a reason-

able and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the appellants if the respondents had continued to use the appellants' defective machines in the future.

He found further that the purchase of the Parsons machines was to the pecuniary advantage of the respondents, and that the superiority of Parsons machines in efficiency and economy over those supplied by the appellants was so great that, even if the appellants had delivered to the respondents machines in all respects complying with the conditions of the said contract, it would yet have been to the pecuniary advantage of the respondents to have replaced at their own cost the machines supplied to the respondents by Parsons machines so soon as the latter could be obtained.

Having found these facts, he set out the contentions of the parties. The case of the appellants was in substance that on the facts as stated he was entitled to draw the inference that the "commercial life" of these machines had expired at the date of the purchase by the respondents of Parsons machines, that these facts were relevant to the question of the amount of damages recoverable on the counter-claim, and that accordingly no further damages of any kind were recoverable by the respondents after the date when they could procure Parsons machines, and further that the cost of procuring and installing Parsons machines was not recoverable by the respondents.

The contention of the respondents, on the other hand, was that the cost of the purchase and installation of the Parsons machines was recoverable by them from the appellants as being the necessary cost and expense incurred by the respondents in mitigating, as from the respective dates when a Parsons machine was substituted for each of the appellants' machines, the damages which they would have been entitled to recover from the appellants.

The arbitrator then stated, under the powers conferred by the Arbitration Act 1889, two questions of law for the opinion of the Court. The first was—Whether the contention of the appellants as above set out was well founded? and the second was—Whether if that was not so the respondents were right in their contention that the cost to them of the purchase and installation of the Parsons' machines was recoverable by them from the appellants as part of their damages.

These facts came before the Lord Chief-Justice, Hamilton and Avory, JJ., sitting as a Divisional Court, and judgment was given to the effect that the contention of the appellants referred to in question 1 was not well founded, and that the contention of the respondents referred to in question 2 was right.

The judgments proceeded on the footing that advantages had accrued to the respondents from the superiority of the Parsons machines and the economy resulting thereby, but that the appellants were not en-

titled to have the pecuniary advantages so accruing taken into account. The cost of purchasing the Parsons machines was properly incurred, and was the best course which the respondents could take in the interest of the appellants as well as of themselves, and they were entitled to recover it; but what profit they had made by their subsequent use related to transactions unconnected with the contract, and the respondents could not be called upon to bring this profit into account.

On these answers by the Court to the questions submitted to them being brought before the arbitrator, he made his award on the 23rd February 1911, and, acting on the answers, awarded that the appellants were not entitled to recover anything from the respondents, but that the respondents on the other hand were entitled to succeed in their counter-claim to the extent of a sum which he ascertained on the basis of the decision of the Court at £15,394. He arrived at this balance by allowing the respondents certain sums which they had to pay during the time when they used the appellants' machines for extra coal consumption and labour due to the defects in these machines, which sums are not in dispute, and by crediting the respondents with the cost of obtaining and installing the Parsons machines.

The appellants made a motion in the King's Bench Division to set aside the award on the ground that it was bad as containing an error in law on the face of it. But the Court, considering that it was bound by the opinions previously given by the Divisional Court, dismissed the motion.

Against this order the appellants appealed to the Court of Appeal. Two questions were raised. One of these was whether it was competent to the Court of Appeal to review the opinions given by the Divisional Court to the arbitrator. . . . It is competent for this House to review the law which the arbitrator, as he was bound to do, adopted from the Divisional Court and set out in his award.

The question thus raised was decided by the majority in the Court of Appeal in favour of the respondents. They held that the law as to the measure of damages had been rightly laid down by the Divisional Court. They thought that the purchase of the Parsons machines must be taken to have been merely for the purpose of mitigating the damages, and that the appellants were not entitled to have the pecuniary advantages arising from the subsequent use of these much superior machines, and the saving of working expenses which would have been incurred even had the appellants' machines been up to the standard of efficiency contracted for, brought into account.

Vaughan Williams and Kennedy, L.JJ., held that the action of the respondents in purchasing the new machines had given them advantages in the conduct of their business subsequent to the breach, of which the appellants were not entitled to claim the benefit. Buckley, L.J., on the other hand, thought that the appellants were

entitled to have a decision from the arbitrator as to whether the purchase of the new machines was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their own pecuniary advantage and, if so, whether it was the only reasonable and prudent course which they could take to mitigate the damages, or whether, for instance, they could have bought Parsons machines, not of 6000 kilowatts as in fact they did, but of 5500 kilowatts, which was the standard of efficiency under the contract, with a length of life no greater than that of the discarded machines. On this point Buckley, L.J., considered that the appellants had had no decision from the arbitrator and were entitled to it.

Upon the question which I have stated I am unable to agree with the majority of the Court of Appeal. For reasons which will appear, I do not wholly agree with the view taken by Buckley, L.J. While dissenting from the majority he still thought that the first question raised by the special case could not be answered in the appellants' favour unless the arbitrator should first find that the purchase of the new machines was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their own pecuniary advantage. I think that the sequence of events and the facts actually found by the arbitrator obviate the necessity of his separately deciding this point. It was, in my opinion, really disposed of by his finding.

The arbitrator appears to me to have found clearly that the effect of the superiority of the Parsons machines and their efficiency in reducing working expenses was in point of fact such that all loss was extinguished and that actually the respondents made a profit by the course which they took. They were doubtless not bound to purchase machines of a greater kilowatt power than those originally contracted for, but they in fact took the wise course in the circumstances of doing so, with pecuniary advantage to themselves. They had, moreover, used the appellants' machines for several years, and had recovered compensation for the loss incurred by reason of these machines not being during these years up to the standard required by the contract. After that period the arbitrator found that it was reasonable and prudent to take the course which they actually did in purchasing the more powerful machines, and that all the remaining loss and damages was thereby wiped out.

In order to come to a conclusion on the question as to damages thus raised, it is essential to bear in mind certain propositions which I think are well established. In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonise. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum

of damage is a question of fact, and the only guidance which the law can give is to lay down general principles, which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould for the purposes of different kinds of claim the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.

Subject to these observations, I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James, L.J., in *Dunkirk Colliery Company v. Lever* (9 Ch. Div. 25), "The person who has broken the contract" is not to be "exposed to additional cost by reason of the plaintiffs not having done what they ought to have done as reasonable men, and the plaintiffs" are not to be "under any obligation to do anything otherwise than in the ordinary course of business."

As James, L.J., indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss which he has suffered may be taken into account even though there was no duty on him to act.

Staniforth v. Lyall and Others (1830, 7 Bing. 169) illustrates this rule. In that case the defendants had chartered a ship to New Zealand, where they were to load her, or by an agent there to give the plaintiff, the owner, notice that they abandoned the adventure, in which case they were to pay £500. The ship went to New Zealand, but found neither agent nor cargo there, and the captain chose to make a circuitous voyage home by way of Batavia. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original venture to New Zealand would have been. The Court of Common Pleas decided that the action was to be viewed as one for a breach of contract to put the cargo on board the plaintiff's vessel for which the plaintiff was entitled to recover all the damages which he had incurred, but that he was bound to bring into account, in ascertaining the damages arising from the breach the advantages which had accrued to him

because of the course which he had chosen to adopt.

I think that this decision illustrates a principle which has been recognised in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage.

Recent illustrations of the way in which this principle has been applied—and the facts have been allowed to speak for themselves—are to be found in the decisions of the Judicial Committee of the Privy Council in *Erie County Natural Gas Company v. Carroll* (1911 A.C. 105) and *Wertheim v. Chicoutimi Pulp Company* (1911 A.C. 301). The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business. This distinguishes such cases from a quite different class illustrated by *Bradburn v. Great Western Railway Company* (L.R. 10 Ex. 1), where it was held that in an action for injuries caused by the defendant's negligence a sum received by the plaintiff on a policy for insurance against accident could not be taken into account in reduction of damages. The reason of the decision was that it was not the accident but a contract wholly independent of the relation between the plaintiff and the defendant which gave the plaintiff his advantage. Again, it has been held that in an action for delay in discharging a ship of the plaintiff's whereby he lost his passengers whom he had contracted to carry, the damages ought not to be reduced by reason of the same persons taking passage in another vessel belonging to the plaintiff—*Jebson v. East and West India Docks Company* (L.R. 10 C.P. 300), a case in which what was relied on as mitigation did not arise out of the transactions the subject-matter of the contract.

The cases as to the measure of damages for breach of a covenant by a lessee to deliver up the demised premises in repair illustrate yet another class of authorities in which the qualifying rule has been excluded. In *Joyner v. Weeks* (1891, 2 Q.B. 31) the lessor had made a lease to another lessee by way of anticipation, to commence from the expiration of the term of this lease, and the new lessee had made no claim to be reimbursed the cost which he had incurred in repairing after the expiration of the demised lease. Wright, J., held that the true test was the amount of diminution in value to the lessor, not exceeding the cost of doing the repairs. The Court of Appeal, including Lord Esher, M.R., and Fry, L.J., took a different view. They thought that there had been a constant practice in laying down the measure of damages as being the cost of putting into repair, and that in the particular class of cases with which they were dealing it was

a highly convenient rule which ought not to be disturbed. Any other measure appeared to involve complicated inquiries. Moreover, the arrangement between the lessor and the new lessee was *res inter alios acta*, with which the original lessee had nothing to do, and one which he was not entitled to set up.

I think that the principle which applies here is that which makes it right for the jury or arbitrator to look at what actually happened, and to balance loss and gain. The transaction was not *res inter alios acta*, but one in which the person whose contract was broken took a reasonable and prudent course arising quite naturally out of the circumstances in which he was placed by the breach. Apart from the breach of contract, the lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing which they could properly do in replacing them with new and up-to-date machines.

The arbitrator does not in his finding of fact lay any stress on the increase in kilowatt power of the new machines, and I think that the proper inference is that such increase was regarded by him as a natural and prudent course followed by those whose object was to avoid further loss, and that it formed part of a continuous dealing with the situation in which they found themselves, and was not an independent or disconnected transaction.

For the reasons which I have given, I think that the questions of law stated by the arbitrator in the special case have been wrongfully answered by the courts below. The result is that the award cannot stand and must be sent back to the arbitrator with a declaration that the contention of the appellants on the first question so far, but only so far, as they contended that the several facts relied upon by them were relevant matter to be considered by the arbitrator in assessing the damages, was right, and that of the respondents on the second question was wrong. The appellants are entitled to their costs here and in the Court of Appeal, and of the proceedings in the Divisional Court on the motion to set aside the award.

I move your Lordships accordingly.

LORD ASHBOURNE—I agree.

LORD MACNAGHTEN—I agree.

LORD ATKINSON—I concur.

Judgment of the Court below reversed. Award sent back to the arbitrator with a declaration. Respondents to pay to the appellants their costs here and in the Court of Appeal and of the proceedings in the Divisional Court on the motion to set aside the award.

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