GOSSE-MILLERD LIMITED (PLAINTIFF)..APELLANT; 1927

*Oct. 11, 12.
*Dec. 16.

AND

ANDREW C. DEVINE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Lease—Action for rent—Counterclaim—Misrepresentation—Damages—Several claims based upon distinct alleged causes of action—Jury—General verdict—New trial.

The appellant company, a canning concern, leased a sawmill and equipment to the respondents and brought action under the lease to recover rent. The respondents, by the lease, covenanted to "take up" the appellant's logging contracts, and in particular one with the Clayton Logging Company. The respondents' counterclaim was based upon three distinct alleged causes of action: first, a claim based upon the allegation that the appellant had induced the respondents to enter into the agreement by falsely and fraudulently representing the contract with the Clayton Logging Company to be a subsisting contract at the date of the lease; second, a claim for damages for breach of a contract to take and pay for box shooks which the respondents by the terms of the lease agreed to manufacture from the box lumber in the yard of the mill at the time of the lease; and third, a claim for damages arising from a series of malicious acts on the part of the appellant. A general verdict was given by the jury for the respondents for $19,460. The respondents admit in their factum that they failed to establish either the second or the third of these causes of action.

Held that, under the circumstances of this case, there must be a new trial. The charge of the trial judge was calculated to lead the jury to think that they might properly hold the appellant company responsible as for breach of the agreement to take and pay for the box shooks and, moreover, from some of the judge's observations, they may have received the impression that the respondents were entitled to reparation in respect of the alleged malicious acts. The jury did not disclose by their verdict how much (if any) of the damages awarded should be attributed to these alleged causes of action now admitted to be without substance; and *prima facie*, therefore, the observations in the charge cannot be overlooked as innocuous, and they may have led the jury into substantial error. As the verdict was a general one, and as the trial judge gave the jury no guidance concerning the method by which damages should be measured, it is impossible to determine how far they may have deviated from the appropriate rule.

Held, also, assuming the charge of fraud established as to the misrepresentations by the appellant company touching the Clayton Co.'s contract, the respondents would be entitled to recover compensation for

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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the loss arising naturally and directly from their assumption of the obligations of the lease and the contracts; but they were not entitled to be compensated for loss of profits which they might or would have made if the representations had been true, and which they did not realize because the facts stated to them were non-existent. The question for the jury was not, "How much would the respondents have gained in profits if the representations had been true," but, "What loss expressed in pecuniary terms, did the respondents suffer, that is directly ascribable to the transactions into which they were induced to enter?" *McConnell* v. *Wright* [1903] 1 Ch. 546; *Johnston* v. *Braham* [1917] 1 K.B. 586.

Held, further, that the respondents, if their allegations are well founded, were, on learning the true facts, entitled to repudiate the lease and the contracts, but they were not bound to do so; and, having elected against repudiation, they were entitled to maintain an action for deceit, if the elements of such a cause of action were disclosed by the facts in evidence.

Held, further, that the damages recoverable would include not only sums paid in execution of the obligations entered into, but also all loss reasonably incurred in carrying out those obligations or in measures reasonably taken for that purpose, allowance being made, of course, for moneys received and the pecuniary value of advantages gained.

Held, further, that the present case is one in which effect must be given to the British Columbia Statute, R.S.B.C., c. 58, s. 55.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of Macdonald J. and maintaining the respondents' counterclaim for $19,460, upon a verdict by a jury.

The material facts of the case are fully stated in the above head-note and in the judgment now reported.

C. W. Craig K.C. and *R. L. Reid K.C.* for the appellant.

A. Geoffrion K.C. and *J. A. Prud'homme K.C.* for the respondents.

The judgment of the court was delivered by

DUFF J.—We have come to the conclusion that there must be a new trial; and consequently all unnecessary discussion of the facts will be avoided.

By an instrument of the 15th of March, 1925, the respondents, the Devines, leased a sawmill at Namu from the appellant company (a canning concern), and by agreements of the same date the Devines and the company

(1) (1927) 38 B.C. Rep. 499.

mutually agreed, first, that the Devines were to manufacture all the box lumber in the yard of the mill into box shooks and to provide any additional lumber which might be necessary for that purpose, for which the appellant company was to pay at certain nominated rates; and, second that the Devines were to supply power for lighting and pumping, and steam for the cannery.

By the lease, the Devines covenanted to "take up" the appellant company's logging contracts, and in particular two specified contracts, of which one was with the Clayton Logging Company.

Three claims, based upon distinct alleged causes of action, were set forth in the statement of the counterclaim by the respondents: first, a claim based upon the allegation that the appellant company had induced the respondents to enter into the transactions mentioned, by falsely and fraudulently representing the contract with the Clayton Logging Company to be a subsisting contract at the date of the lease; second, a claim for damages for breach of the contract to take and pay for box shooks; third, a claim for damages arising from a series of malicious acts on the part of the appellant company, aimed, it is alleged, at compassing the ruin of the respondents.

The respondents in their factum admit that they failed to establish either the second or the third of these causes of action, and, as respects them, the counter-action should be dismissed; but we agree with the majority of the Court of Appeal that there was some evidence to go to the jury in support of the allegations of fraud, and, that accordingly the finding upon the issue raised by them cannot properly be set aside as perverse.

We are, however, constrained to the view that there was a mistrial. The charge was calculated to lead the jury to think that they might properly hold the appellant company responsible as for breach of the agreement to take and pay for box shooks under the contract of the 3rd of March; and, moreover, from some of the learned judge's observations, they may have received the impression that the respondents were entitled to reparation in respect of the alleged malicious acts, referred to above as constituting the respondents' third cause of action.

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The jury did not disclose by their verdict how much (if any) of the damages awarded should be attributed to these alleged causes of action now admitted to be without substance; and *prima facie,* therefore, the observations in the charge cannot be overlooked as innocuous. In truth, they may have led the jury into substantial error. Upon both causes of action their respondents founded a claim for compensation for loss of profits in support of which evidence was copiously received—a claim which could not be supported upon the grounds stated in the pleadings, as the respondents now admit; nor, for reasons to be outlined, could such a claim be sustained for damages arising out of the fraud, according to the respondents' present contention. Yet, as the verdict was a general one, and as the learned trial judge gave the jury no guidance concerning the method by which damages should be measured, it is impossible to determine how far they may have deviated from the appropriate rule.

As already mentioned, the respondents alleged, by their statement of claim, that they had been induced to enter into the lease and the contemporary contracts, by the appellant company's fraudulent misrepresentations touching the Clayton Company's contract. Assuming the charge of fraud established, the respondents would be entitled to recover compensation for the loss arising naturally and directly from their assumption of the obligations of the lease and the contracts; but they were not entitled to be compensated for loss of profits which they might or would have made if the representations had been true, and which they did not realize because the facts stated to them were non-existent. The question for the jury was not, "How much would the respondents have gained in profits if the representations had been true," but, "What loss expressed in pecuniary terms, did the respondents suffer, that is directly ascribable to the transactions into which they were induced to enter?" *McConnell* v. *Wright* (1); *Johnston* v. *Braham* (2).

The respondents, if their allegations are well founded, were, on learning the true facts, entitled to repudiate the

(1) [1903] 1 Ch. 546. (2) [1917] 1 K.B. 586.

lease and the contracts; but they were not bound to do so, and having elected against repudiation, they were entitled to maintain an action for deceit, if the elements of such a cause of action were disclosed by the facts in evidence. *Arnison* v. *Smith* (1); *Peek* v. *Derry* (2); *McConnell* v. *Wright* (3); *Goold* v. *Gillies* (4).

The damages recoverable would include not only sums paid in execution of the obligations entered into, but also all loss reasonably incurred in carrying out those obligations or in measures reasonably taken for that purpose, allowance being made, of course, for moneys received and the pecuniary value of advantages gained.

It must be distinctly understood that nothing which has been said implies any opinion as to the effect or the weight of the evidence adduced either to support or to repel the charges of fraud, or upon any other question of fact within the province of the jury.

We have come to the conclusion that this is a case in which effect must be given to the British Columbia statute, R.S.B.C., c. 58, s. 55.

> Nothing herein, or in any Act, or in any rules of court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues: Provided also that the said right may be enforced by appeal, as provided by the *Court of Appeal Act*, this Act, or rules of court, without any exception having been taken at the trial: Provided further that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the court.

Having regard to the conduct of the trial and to the character of the learned judge's charge, we do not think the course taken by counsel for the defence was such as to disentitle the appellant company from taking advantage of this enactment, although, in the special circumstances, there should be an exceptional order as to costs.

Therefore, as to the first of the above mentioned causes of action there will be a new trial, and as to the second and third causes of action the action will be dismissed.

(1) 41 Ch. D. 348.
(2) 37 Ch. D. 574.
(3) [1903] 1 Ch. 546.
(4) 40 Can. S.C.R. 437.

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The respondents are entitled to the costs of the appeal to the Court of Appeal, which are to be set off against the appellant company's costs of the appeal to this court, the residue, if any, of such last mentioned costs to be the appellant company's costs in the cause in any event.

The costs of the abortive trial and of the action, in so far as they are to be attributed to the alleged causes of action upon which the respondents fail, will be the appellant company's costs in the cause in any event; subject to that, the general costs of the abortive trial will abide the event of the new trial.

New trial.

Solicitors for the appellant: *Reid, Wallbridge & Gibson.*

Solicitor for the respondent: *H. Castillon.*