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* April 29.
* June 29.

GENERAL SECURITIES LIMITED (DEFENDANT) ..... APPELLANT;

AND

DON INGRAM LIMITED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Loan of money—Damages for breach—Contract between automobile dealer and finance company—Breach by latter—Right to substantial or nominal damages—Measure of damages.

The respondent company, engaged in the selling of automobiles, brought an action for damages for breach of a contract whereby the appellant company agreed to finance the respondent's purchases of cars. The

* PRESENT:—Duff C.J. and Davis, Kerwin, Hudson and Taschereau JJ.

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trial judge held that the contract alleged had been proven, that the appellant had broken it and the respondent was entitled to substantial damages, and that, having found that the appellant company had full knowledge of the circumstances under which the contract was made and that the loss by the respondent of its franchise granted it by the car manufacturers and the consequent destruction of its business and its loss on the sale of the assets were natural and probable results which must have been within the contemplation of the appellant, the trial judge held that the damages should be assessed accordingly. This judgment was affirmed by the appellate court.

Held that the appeal should be dismissed and that the respondent was entitled to the damages awarded by the trial judge.

Hadley v. *Baxendale* (9 Ex. 341); *Mennie* v. *Leitch* (8 O.R. 397); *The South African Territories Limited* v. *Wallington* ([1898] A.C. 309); *Prehn* v. *Royal Bank of Liverpool* (L.R. 5 Ex. 92); *Manchester and Oldham Bank Ltd.* v. *Cook* (49 L.T.R. 674); *Wilson* v. *United Counties Bank* ([1920] A.C. 102) discussed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Fisher J. (2) and maintaining the respondent's action for damages for breach of contract.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Alfred Bull K.C. for the appellant.

M. A. Manson for the respondent.

THE CHIEF JUSTICE—The facts in this case are stated in the careful judgment of the learned trial judge, Mr. Justice Fisher (2).

In October, 1937, and for something like four years before that, the respondents were, under an agreement of November, 1933, the retail distributors, and for some time the wholesale distributors, for the Studebaker Corporation of Canada, who manufacture and sell automobiles. In February, 1934, the appellants and the respondents entered into an agreement by which the appellants undertook to furnish such credit and advance such moneys as might be required from time to time to finance exclusively the

(1) [1940] 2 W.W.R. 350.
(2) (1939) 54 B.C.R. 123; [1939] 2 W.W.R. 34.

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respondent's purchases of automobiles and to supply working capital for the respondents' business. Pursuant to this agreement the appellants, during the years 1934, 1935, 1936 and 1937, furnished the respondents with credit and made advances. In the autumn of 1937 the respondents were contemplating the purchase of twenty-six automobiles from the Studebaker Corporation and the appellants agreed unconditionally with the respondents, as the learned trial judge finds, to finance the purchase of these automobiles, and in October of that year the respondents, relying upon this agreement with the appellants, contracted with the Studebaker Corporation to purchase these automobiles and made an agreement with the Vancouver-St. Lawrence Line for the transport of the same to Vancouver by water. In December the automobiles reached Vancouver and the bills of lading, with draft attached, were presented to the respondents for acceptance and payment. The appellants, on being requested to furnish funds for this purpose, pursuant to the agreements of 1934 and October, 1937, refused to do so. The respondents having endeavoured unsuccessfully to arrange elsewhere for funds to meet the draft, the Studebaker Corporation terminated its agreement with the respondents on the 10th of January, 1938, and sold most of the automobiles to persons appointed by the corporation as agents for British Columbia in place of the respondents. The learned trial judge finds that as a result the respondents were obliged to discontinue their business and that its assets had to be sold at a loss. The learned trial judge further finds as follows:

> In the present case I find that at the time the contract was made as aforesaid in or about the month of October, 1937, the defendant had full knowledge of the circumstances under which the contract was made. The evidence conclusively proves that. The defendant kept in close touch with the plaintiff's business and had actual knowledge of the probable consequences of the breach. In my opinion loss of profits on the automobiles and loss of the plaintiff's franchise with the consequent loss of its business and loss on realization of its assets were under the circumstances natural and probable results which must have been and were within the contemplation of the defendant. The defendant is therefore liable to pay damages to the plaintiff accordingly.

The learned judge proceeds:

> I now come therefore to assess the damages and before doing so I pause here to say that I have noted paragraph 25 of the said franchise agreements providing for termination without cause on ten days' notice and I have tried to keep in mind the many contingencies that might

have affected the matter. I am satisfied however that substantial damages have been caused to the plaintiff by the defendant's breach of contract as aforesaid and that they can and should be assessed under the headings as hereinafter set out after making allowances, as I have tried to do for contingencies to an extent reasonable in all the circumstances. After careful consideration of the evidence and the argument of counsel I think a fair assessment of the damages is as follows:

I estimate the damages arising from the loss of profits on twenty-six automobiles at $2,000, the damages arising from the loss of the franchise and the consequent loss of the business at $5,000 and the damages arising from the loss on realization of the assets at $1,000. Judgment accordingly in favour of the plaintiff against the defendant for the total damages of $8,000 and costs.

The Court of Appeal (1) concurs in the findings and conclusions of the learned trial judge.

I have no doubt that the law is correctly applied to the facts of this case in this judgment and in that of the Court of Appeal. I think the rule with regard to damages for breach of a contract to advance money is accurately stated in the treatise on damages in Halsbury, 2nd edition, Vol. 10, p. 121, article 153:—

But upon breach of a contract to lend money, the additional expense incurred in obtaining the loan elsewhere is a natural result of the breach and may be recovered, or such other substantial damage as was within the contemplation of the parties.

This case presents none of the difficulties that sometimes arise, touching the application of the second branch of the rule in *Hadley* v. *Baxendale* (2).

The appellants were fully aware of the material circumstances. In October when they agreed to finance the proposed purchase, pursuant to the existing agreement of 1934, they must have realized with the knowledge they had, if they gave a thought to the matter, that, if they refused to make the necessary advance on the arrival of the goods in Vancouver and the presentation of the draft, the respondents would be unable to take it up and that the Studebaker Corporation would (probably, if not certainly) sever their relations with the respondents, and that in consequence of such a severance it was highly probable that the respondents would be forced out of business and would suffer the pecuniary loss naturally resulting therefrom. The appeal is hardly an arguable one and should be dismissed with costs.

(1) [1940] 2 W.W.R. 350. (2) (1853) 9 Ex. 341; 23 L.J. Ex. 179

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DAVIS J.—The respondent company carried on business in the city of Vancouver as wholesale and retail automobile dealers and distributors; in particular as a distributor for the Studebaker Corporation of Canada, selling and distributing in British Columbia automobiles manufactured by that company under what is commercially called "a franchise."

The appellant company carries on a financial business in the city of Vancouver, and in particular the business of financing motor car dealers.

The appellant provided the respondent with all moneys required for the financing of the respondent's business from February, 1934, until the events occurred which are complained of in this action. It is admitted by the respondent that the appellant's approval was necessary before it purchased cars which it expected the appellant to finance. The contract set up in the statement of claim was made verbally in October, 1937, between Don Ingram, the president of the respondent company, and J. W. MacDougall, the manager of the appellant company. MacDougall died a few days after the writ was issued and consequently his evidence was not available. The appellant denied that there was any contract to finance the 27 automobiles referred to in the statement of claim, but owing to the death of MacDougall was unable to offer any evidence to contradict that of Ingram to the effect that such a contract had been made. There was evidence, therefore, upon which the learned trial judge could find as he did that the appellant agreed with the respondent unconditionally to finance the purchase of 27 automobiles. The learned trial judge (1) awarded damages for the breach of this contract at the sum of $8,000. The appellant appealed to the Court of Appeal for British Columbia but its appeal was dismissed (2). The appellant then appealed to this Court but only in respect of the amount of damages.

The evidence is that Ingram between the 13th and 18th days of October, 1937, interviewed MacDougall and asked him if the appellant would finance the purchase of the cars. The reason the respondent wished to purchase so many cars at once was the imminence of an increase in

(1) (1939) 54 B.C.R. 123; [1939] 2 W.W.R. 34.
(2) [1940] 2 W.W.R. 350.

railway freight rates which was expected on the 1st November, 1937, and the respondent then had an opportunity of bringing the cars by water through the Panama Canal at a rate much lower than the rail rate. Ingram says that MacDougall told him to go ahead and bring the cars in.

The cars were shipped in two lots by vessels leaving Montreal on October 30, and November 15, respectively. Ingram says that about the 20th November MacDougall called him on the 'phone and asked him to cancel the shipment of the cars; and that he, Ingram, explained that they could not be shipped back to the factory as the boats were on their way. About a week later MacDougall asked him to call at his office, which he did. He found MacDougall worried; MacDougall thought there was going to be a depression as things were very bad in the East; money was tightening up and the finance companies were very much loaded up with wholesale paper; the dealers had overstocked, and he did not know whether he could finance the cars. He painted a very blue picture, from the information he had acquired in Eastern Canada and the United States. Ingram says that at the conclusion of this interview he consulted his banker, and on his advice he went back to MacDougall and told him that "we would lose our franchise and be put out of business."

Ingram says that MacDougall calmed him down somewhat and said that he thought that everything would be all right, but he wanted as much time as he could have to raise the funds, and to leave it with him.

Ingram saw MacDougall again when the first shipment arrived on or about the 7th or 8th December. MacDougall wanted to know how long he could leave the cars on the dock, and Ingram told him up until the 17th December, after which demurrage would be charged. On the 15th December Ingram took the invoice of the cars and the freight bills to MacDougall's office. After a few days MacDougall definitely refused to finance the shipments.

Ingram then endeavoured to obtain the money elsewhere, particularly from other companies in the same line of business. He finally obtained a promise from one of the finance companies (hereinafter for convenience called the new finance company) to take over all the respondent's financing provided an additional $5,000 capital was put into the respondent's business. Ingram endeavoured to

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raise $5,000, and succeeded in making tentative arrangements to this end, but the basis of the loan was to be a chattel mortgage on the respondent's equipment, and when that was made known to the new finance company a discussion arose as to the terms of repayment of the proposed $5,000 loan. Apparently the new finance company was not satisfied, so Ingram went back to the proposed lender and arranged for twelve months' time within which to pay back the money. The new finance company had to put the proposition before its head office; head office did not think it was a suitable arrangement and declined to take over the financing.

MacDougall's attitude appears to have been that Ingram should not worry about the matter as the Studebaker Company could not, in his opinion, find another local distributor, and would be forced to take care of the matter itself.

The respondent then received a letter dated January 10, 1938, from the Studebaker Corporation cancelling the franchise. After the cancellation of the respondent's franchise a new distributor was appointed, and the respondent was able to sell to him all the new unused cars at cost price, and the parts in the stock room for the exact money paid to the factory, leaving only the equipment and furnishings, which also were sold to the new distributor for $3,100.

The learned trial judge allowed damages on the following basis:

(*a*) Loss of profits on 26 automobiles.....	$2,000
(*b*) Damages arising from the loss of the franchise and consequent loss of business....	5,000
(*b*) Damages arising from loss on realization of the assets	1,000

This amount of damages was confirmed by the Court of Appeal. Before this Court counsel for the appellant admitted liability for breach of a contract to loan money but contended that the respondent was not entitled to more than nominal damages or, alternatively, that the damages should have been limited to loss of profits on a re-sale of the motor cars.

On a contract to make a loan of money the measure of damages is the loss sustained by the breach. The damages

may be merely nominal or at least not greater than the additional sum obliged to be paid for raising the money from some one else. The general rule was well stated by Armour J. in *Mennie* v. *Leitch* (1). But here the respondent couldn't get the money elsewhere and the general rule does not cover the case. The respondent was entitled under the special circumstances to general and substantial damages for the breach of the contract; and the ordinary consequence rule is the only satisfactory test of remoteness. The courts below have agreed upon the amount of the damages and we should not interfere. The appeal should be dismissed with costs.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.—This is an appeal by the defendant, General Securities Limited, from a judgment of the Court of Appeal for British Columbia (2) which affirmed the judgment of Fisher J. (3) in favour of the plaintiff, Don Ingram Limited. I take from the reasons for judgment of the trial judge the following statement:—

> The plaintiff's claim against the defendant is for damages for breach of a contract alleged to have been made in or about the month of October, 1937, between the plaintiff and the defendant for financing the purchase of twenty-six automobiles and the carrying charges thereon from Windsor, Ont., to Vancouver, B.C.
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> It is or must be common ground that in or about the month of October, 1937, and for some four years prior thereto, the plaintiff was the retail distributor, and for part of that time had been also the wholesale distributor, for the Studebaker Corporation of Canada Limited, selling and distributing in the Province of British Columbia or in certain designated portions thereof automobiles manufactured by the said Company, under what may be called franchise agreements with such Company effective upon the 29th day of November, 1933, and amended from time to time thereafter. By an agreement made in or about the month of February, 1934, the defendant agreed with the plaintiff to furnish the necessary credit and to advance such moneys as should be required from time to time to finance exclusively the plaintiff's purchases of automobiles and to supply working capital for the plaintiff's business, and pursuant to such agreement the defendant did during the years 1934, 1935, 1936 and during part of the year 1937 furnish the plaintiff with credit and advanced such moneys as were necessary for the purposes aforesaid.

The trial judge found that the contract alleged by the plaintiff had been entered into and the appellant does

(1) (1885) 8 O.R. 397.
(2) [1940] 2 W.W.R. 350.
(3) (1939) 54 B.C.R. 123; [1939] 2 W.W.R. 34.

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not now dispute that finding. The question is as to what, if any, damages are recoverable for the undoubted breach of the contract, and as to this Mr. Justice Fisher states:—

> I come now therefore to assess the damages and before doing so I pause here to say that I have noted paragraph 25 of the said franchise agreements providing for termination without cause on ten days' notice and I have tried to keep in mind the many contingencies that might have affected the matter. I am satisfied however that substantial damages have been caused to the plaintiff by the defendant's breach of contract as aforesaid and that they can and should be assessed under the headings as hereinafter set out after making allowances, as I have tried to do, for contingencies to an extent reasonable in all the circumstances. After careful consideration of the evidence and the arguments of counsel I think a fair assessment of the damages is as follows:
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> I estimate the damages arising from the loss of profits on the twenty-six automobiles at $2,000, the damages arising from the loss of the franchise and the consequent loss of the business at $5,000 and the damages arising from the loss of realization of the assets at $1,000.

Liability is disputed by the appellant for damages under any of the heads mentioned.

It was first argued that this was a mere contract to loan money and that, therefore, the damages should be nominal in accordance with decisions such as *The South African Territories Limited* v. *Wallington* (1). However, this is not that kind of a case. Not only did the appellant know intimately the respondent's financial position but, as security for any advances that it might take, held a floating charge upon the assets of the respondent. The contract was not to advance money subject to its repayment being demanded at any time but was a special one to finance the purchase of the automobiles and to leave the money at interest until the automobiles should be sold in the usual course of business. Under these circumstances, if the damages were within the contemplation of the parties as the probable result of the breach of the contract, the principles enunciated in *Hadley* v. *Baxendale* (2) would apply. *Prehn* v. *Royal Bank of Liverpool* (3); *Manchester and Oldham Bank Limited* v. *Cook* (4).

It was next argued that a deficiency in the amount of capital employed in respondent's business was the cause of the respondent being unable to secure the necessary funds elsewhere and that the damages flowed from that lack. Assuming it to be proved that in a business sense the

(1) [1898] A.C. 309.
(2) (1854) 9 Ex. 341.
(3) (1870) L.R. 5 Ex. 92.
(4) (1883) 49 L.T.R. 674.

respondent required further capital in its undertaking, one of the main objects of the bargain between the parties was the supplying of that capital and, in any event, the short time at the disposal of the respondent to make other arrangements shows that that circumstance was the compelling factor in respondent's inability to secure funds from other sources.

The third and fourth submissions were that even if the damages did result from the breach, they were not the natural and probable consequences thereof, nor were they contemplated by the parties at the time of the making of the contract. On the evidence, both of these contentions fail. As early as 1935 the appellant knew that the respondent would lose its franchise from the Studebaker Company if cash were not paid for ordered automobiles upon their arrival in Vancouver. It follows as a matter of course that if respondent did not have the automobiles, it would lose its profit on the retail sale and, lacking a franchise, a probable result would be that respondent would have to dispose of other Studebaker cars on hand, its stock of parts for Studebaker cars, and its used cars.

Finally, to quote the words of Lord Atkinson in *Wilson* v. *United Counties Bank* (1), the damages in this case must have been

> in the contemplation of the parties when they entered into the contract as the result which would probably flow from the breach of it and that the damages therefore are not too remote.

The damages have been assessed on a proper basis and no question being raised as to the various sums, the appeal should be dismissed with costs.

HUDSON J.—The facts are fully set out in the judgment of the learned trial judge (2).

He found that when the original contract was made between the parties the defendant had full knowledge of the plaintiff's circumstances, and thereafter always kept in close touch with the plaintiff's business. He also found that the defendant knew that the probable consequences of a breach would be a loss of profits on the automobiles, a loss of the plaintiff's franchise and consequent loss of its

(1) [1920] A.C. 102, at 132.
(2) (1939) 54 B.C.R. 123; [1939] 2 W.W.R. 34.

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business, and that the loss on realization of its assets were under the circumstances natural and probable results. The learned judges in appeal agreed with him (1).

The circumstances here are far different from the breach of a simple promise to lend the money and justify a substantial verdict. While the amount awarded appears somewhat large, it has been concurred in by all the judges of the Court of Appeal and I do not think it should be disturbed here. The relevant authorities are fully discussed in the judgments in the Court below.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walsh, Bull, Housser, Tupper, Ray & Carroll.*

Solicitor for the respondent: *M. A. Manson.*