

1961
 *Jan. 30
 Apr. 25

THE VANCOUVER REAL ESTATE }
 BOARD (*Defendant*) } APPELLANT;

AND

MOSCROP REALTY LIMITED (*Plaintiff*) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR
 BRITISH COLUMBIA

Associations—Expulsion of member from real estate board—Employee taking secret commissions—Member not advised of remedial measures—Action to recover damages for wrongful expulsion and to have membership restored.

The plaintiff real estate company was expelled from membership of the defendant board, a voluntary society incorporated for the purposes of promoting the interests of real estate agents in the city of Vancouver and establishing proper standards of conduct of its members. Without the company's knowledge one of its employees had taken secret commissions in respect of two mortgage transactions. Following a hearing before a committee of the board, the company was informed that the committee had recommended its expulsion, but it was not advised that this recommendation might be waived if corrective action were taken nor was it informed of the kind of corrective action contemplated by the directors. An appeal to an appeal board of directors and a further appeal to the membership as a whole were without success. The company then brought an action to recover damages for wrongful expulsion and to obtain an order restoring it to membership in the board. The trial judge found in favour of the defendant; the Court of Appeal reversed this decision and directed that the action be referred back to the Court below for a new trial confined solely to the assessment of damages. By leave of this Court the defendant appealed from the judgment of the Court of Appeal.

Held: The appeal should be dismissed.

- (1) The company, having been elected to active membership in the defendant board, remained a member at all times relevant to the action. Steps had not been taken to terminate the company's membership on the ground that it had no individual representative as a member of the board, and as the by-laws made no provision for automatic expulsion of a corporation on this ground, the validity of the membership to which it was initially admitted remained undisturbed.
- (2) As the plaintiff had already been elected to membership at the time when the by-law providing that persons seeking election sign an "irrevocable Waiver of Claim against the Society" came into effect, it could not be construed as being in any way bound by that provision.
- (3) The defendant's contention that the plaintiff's pleadings had been designedly limited to a claim for "general damages" and that only nominal damages are recoverable under this heading in an action for

*PRESENT: Locke, Cartwright, Fauteux, Martland and Ritchie JJ.

breach of contract was rejected. *Wyman and Moscrop Realty Limited v. Vancouver Real Estate Board* (No. 4) (1959), 27 W.W.R. 476, followed.

- (4) The question of whether or not the company suffered damage must await the outcome of the new trial directed by the Court of Appeal to be confined to the question of damages only.

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APPEAL from a decision of the Court of Appeal for British Columbia¹, reversing a judgment of Maclean J. Appeal dismissed.

W. J. Wallace, for the defendant, appellant.

T. R. Berger, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Court of Appeal of British Columbia¹ allowing the appeal of Moscrop Realty Limited (hereinafter referred to as “Moscrop”) from the judgment of Maclean J., and directing that the action be referred back to the Court below for a new trial confined solely to the assessment of damages. This action was originally brought by both Moscrop and E. C. Wyman claiming damages for wrongful expulsion from the appellant Board and for loss of business and profits arising therefrom, and also for an order restoring them to membership in the Board, but Wyman’s membership was not alleged in the pleadings, and his appeal having been dismissed by the Court of Appeal on the assumption that he was not a member, he is not a party to this appeal.

The appellant Board is a society incorporated under the *Societies Act*, R.S.B.C. 1948, c. 311, for the purposes of promoting the interests of real estate agents in the city of Vancouver and establishing and maintaining proper standards of conduct by its members. Real estate agents in the city of Vancouver are not obliged to be members of the Board but it is apparent that such membership enhances an agent’s prestige and, in particular, that it makes available to him a system of multiple listings maintained by the Board which is considered to be of value in the conduct of the real estate business.

¹(1960), 23 D.L.R. (2d) 21.

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Moscrop was duly admitted to membership on November 22, 1951, on the application of G. Gamble, its then manager-owner, and from that date until the expulsion complained of it paid all membership dues and subscriptions for group insurance, was listed on the official list of members and treated in every respect by the Board as an active member in good standing.

In January 1953 Gamble, who was then Moscrop's representative on the Board, sold his interest in that company to Wyman who, as it must be assumed, did not become a member of the Board although his name appears to have been entered in the Board's register as the Moscrop representative. The change of ownership was communicated orally to the secretary of the Board but no new application for membership was made when Wyman acquired his interest.

In January and February 1956 the Board received two letters of complaint from former clients of Moscrop, alleging that an employee of that company had taken secret commissions in respect of two mortgage transactions. There followed a hearing before the Complaints and Discipline Committee of the Board at which the employee admitted taking the commissions, but stated that this was done without the knowledge of either Moscrop or Wyman. The decision of this Committee having been communicated to the Board of Directors, the latter body recorded a resolution in its minutes of March 1, 1956, which read in part as follows:

After much discussion, it was on motion resolved that Secretary be instructed to inform Mr. Wyman of a recommendation of the Complaints and Discipline Committee that he be expelled and also that the directors had considered this matter and instructed the Secretary to advise him that he may file notice of appeal within seven days of receipt of this letter and further that this recommendation for expulsion may be waived if necessary corrective action is taken by him. It was further resolved that until the seven day period for appeal has elapsed, services should not be discontinued to Moscrop Realty Ltd. and the membership at large are not to be informed of the proposed action.

The action taken by the Secretary pursuant to these instructions was to write a letter to Wyman saying:

... I have been instructed to inform you that it has been recommended that Moscrop Realty Ltd. be expelled from the Vancouver Real Estate Board.

I have further been instructed to advise you that under Article 5, Part B, Section 8, Paragraph g of the Bylaws of the Board, you have seven days in which to appeal this decision.

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It does not appear that either Wyman or anybody else on behalf of Moscrop was ever advised that the recommendation of expulsion might be waived if corrective action were taken nor does the kind of corrective action contemplated by the directors appear to have been communicated to Moscrop notwithstanding the fact that the by-law authorizing the directors' action reads in part as follows:

... where the Board of Directors deems it proper to do so, they may instruct the member to take such remedial action as may be required to correct the matter of the complaint and/or to bring about a satisfactory and fair settlement of the matter of the complaint, allowing the member a reasonable period of time but not in excess of ninety days to carry out the recommended action.

It is true that the secretary did tell Wyman in a telephone conversation that he thought the Board might withdraw the expulsion if the offending employee was dismissed by Moscrop but he did not commit himself and this conversation did not constitute an instruction to the member "to take such remedial action as may be required . . .".

An appeal was taken to an appeal board composed of seven directors on the ground, *inter alia*, that the penalty of expulsion was too severe in light of the fact that neither Wyman nor Moscrop was implicated in the employee's misconduct, and upon this appeal being dismissed a further appeal was taken without success to the membership as a whole.

The present action was then brought, alleging that the proceedings before the committee, the directors and the full Board and the resultant expulsions were contrary to law, natural justice and the constitution and by-laws of the Board. The defence was threefold in that the Board denied all allegations whereby the regularity of any of its proceedings or those of its directors or committees was impugned and pleaded also that the plaintiffs were not members of the Board "at all times relevant to the proceedings or at all", and, in the alternative, that if they were such members they were barred from bringing this action by reason of a waiver of all rights of action arising out of the disciplining of members, which waiver is contained in the by-laws of the Board.

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In his decision, the learned trial judge, after a very lengthy review of the evidence, concluded that there were no irregularities in the proceedings of the Board, its directors or its committee of such a character as to invalidate the expulsion which he found to have been lawfully imposed and directed. Having reached this conclusion, the learned trial judge did not find it necessary to deal with the allegation that the plaintiffs were never properly elected to membership or the alternative defence that if they were members their right of action was barred by the by-laws.

In the course of his decision, rendered on behalf of the Court of Appeal of British Columbia, Davey J.A., having found that Moscrop was a member of the Board at all relevant times, went on to say:

But, in my opinion, this appeal must be determined against the Board upon the invalidity of the order of expulsion itself, resulting from serious violations of the bylaws in respect of the form the order took and the notice given the Company. It will not be necessary to consider the validity of the appeal proceedings, except to say that these initial violations of the bylaws vitiated all that followed.

Later in the same judgment it is said:

Thus the directors' failure to specify on March 1st, 1956, the corrective action that they recommended and upon which they might waive the expulsion, and the appellants' ignorance that the expulsion might be waived if they took the appropriate action dogged the appellants throughout all appeal proceedings and nullified them.

In my opinion, the expulsion order cannot stand against the Company and must be set aside, and the Company restored to full membership in the Board.

The Court of Appeal further held that the allegation that Moscrop was barred from bringing the action by the terms of its membership could not be supported because the requirement for members to sign a waiver of claim against the Society at the time of their election did not come into existence until the enactment of the by-laws of 1955 and was only referable to and binding upon members who were elected subsequent to that date.

Although in its pleadings Moscrop described its claim as one for "general damages", (a) for wrongful expulsion; and (b) for loss of business and profits arising out of such wrongful expulsion, the Court of Appeal nevertheless held, following its own decision on an interlocutory appeal (see

Wyman and Moscrop Realty Limited v. Vancouver Real Estate Board No. 4)¹, "that in the circumstances of this case there was a sufficient allegation of and prayer for special damages" and accordingly ordered a new trial confined solely to the question of damages which were not assessed by the learned trial judge.

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In the factum filed on behalf of the appellant, it is alleged that the Court of Appeal erred in manner following:

1. In holding that Moscrop was a member of the appellant Board at all times material to this action.
2. In failing to hold that *if* Moscrop was a member of the appellant Board and wrongfully expelled, that it had waived its claim to damages.
3. In failing to award nominal damages only in that Moscrop asked for general damages only and did not plead or prove any special damages.
4. In failing to find that Moscrop had suffered no financial loss and was therefore entitled to nominal damages only.
5. In directing that the action be referred back to the Court below for a new trial.

In support of the first of these allegations, counsel for the appellant drew attention to the fact that the by-laws as revised to August 1953 contained the following provision in Art. 1(1):

In the case of firms or corporations, in order that a firm or corporation may be deemed a member of the Society, it shall be necessary that a partner of such firm, or an official of such corporation, be elected as a member of the Society

It was argued that Moscrop's compliance with the terms of this by-law at the time of its initial election only accorded it the status of being "deemed a member" and that this did not constitute active membership and in any event that it lost the status of being "deemed a member" when it ceased to have an official as its nominee on the Board and that it certainly could not be said to have continued to be "deemed a member" after the new by-laws were enacted in 1955 because those by-laws contemplate the election of individuals only to membership on the Board.

¹ (1959), 27 W.W.R. 476.

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Great stress was laid by appellant's counsel on the meaning to be attached to the word "deemed" as used in the above-quoted article of the by-law, and it was urged that it should be given the meaning attributed to it by Cave J. in *Regina v. Norfolk County Council*¹, where, in construing the phrase "the following areas shall be deemed to be highway areas . . .", he said:

Generally speaking when you talk of a thing being deemed to be something, you do not mean that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and that, notwithstanding it is not that particular thing, nevertheless for the purposes of the Act, it is deemed to be that thing.

The word "deemed" is obviously capable of more than one meaning depending upon the context in which it is used. In the present circumstances, although far from saying that the quotation is of general application, I am of opinion that the word bears the meaning assigned to it by Coleridge J. in *Wolton v. Gavin*², where he was construing the phrase "deemed to be enlisted as a soldier in Her Majesty's Service" and said:

When an Act of Parliament says that a person is deemed to be in any particular capacity, surely that must be understood to mean that he is thenceforward taken as actually the very person that he is deemed to be.

I am accordingly of opinion that Moscrop, having been duly elected to active membership in the appellant Board in 1951, remained a member at all times relevant to these proceedings. It does not appear that any steps were ever taken to terminate Moscrop's membership on the ground that it had no individual representative as a member of the Board, and as the by-laws make no provision for automatic expulsion of a corporation on this ground, the validity of the membership to which it was initially admitted remains undisturbed.

In construing these by-laws, it is to be remembered that they are the by-laws of the very Board which now seeks to invoke them against the respondent and that this same Board recognized the respondent's membership for four years and endorsed this recognition by ordering its expulsion.

¹ (1891), 60 L.J.Q.B. 379, 65 L.T. 222.

² (1850), 16 Q.B. 48 at 81, 20 L.J.Q.B. 73.

The allegation that Moscrop was barred from recovering any damages by the terms of its membership was based on the following provision of the 1955 by-laws of the appellant Board:

Article 2—Membership

Part A—Qualifications

... Section 2—Qualification for Membership ...

The Directors may elect to membership, in accordance with the terms of these By-laws, any individual who is eligible for membership in the Society . . . and signs an irrevocable Waiver of Claim against the Society, or any member or agent for any act in connection with the business of the society, and particularly as to its or their acts in electing or failing to elect or disciplining him as a member

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As Moscrop had, in my opinion, already been elected to membership at the time when this by-law came into effect, it cannot, in my view, be construed as being in any way bound by the “irrevocable Waiver of Claim against the Society” which persons seeking election after 1955 were required to sign. I agree with the Court of Appeal that Moscrop’s claim for damages is in no way affected by the terms of the by-law last referred to.

On the question of damages the appellant contends that the respondent’s pleadings have been designedly limited to a claim for “general damages” and that only nominal damages are recoverable under this heading in an action for breach of contract.

This very point was the subject of an appeal to the Court of Appeal of British Columbia from the dismissal of an application to strike out the claim for “general damages” in the respondent’s statement of claim, and in the course of delivering the reasons for judgment of that Court which have heretofore been referred to (see *Wyman and Moscrop Realty Limited v. Vancouver Real Estate Board No. 4*) *supra*, Coady J.A. read:

It is contended that this should be a claim for special damages and not general damages. I think that submission finds some support in the cases to which counsel for the appellant has referred, but in that connection the observations of Atkinson J. in *Aerial Advertising Co. v. Batchelor Peas Ltd.* [1938] 2 All E.R. 788 at 795 are to be noted. In this case, however, since particulars of what was claimed under this heading were upon demand supplied to the appellant and since counsel for the appellant admits that he is not therefore embarrassed by this pleading of general damages, if the action proceeds to trial in the form it now appears, it would therefore appear that the learned Judge below was right, in the

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exercise of his discretion, in his refusal to strike out that pleading which designated the damages claimed for loss of business and profits under a heading of general damages rather than special damages.

The pleadings were amended and the action proceeded to trial in accordance with this decision from which no appeal has been taken to this Court and which must, for the purposes of this case, be regarded as conclusive.

It was also contended on behalf of the appellant that the evidence does not disclose that Moscrop suffered any financial loss, but the Court of Appeal, acting pursuant to the powers conferred upon it by the *Court of Appeal Act*, R.S.B.C. 1948, c. 74, and the rules made thereunder has directed a new trial confined to the question of damages only and as I do not feel that this order should be interfered with, it follows that the question of whether or not Moscrop suffered damage must await the outcome of such new trial.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitors for the plaintiff, respondent: Shulman, Tupper, Gray, Worrall & Berger, Vancouver.
