1923
*Oct. 10, 11.
*Dec. 4.

CLARENCE CUNNINGHAM (DEFENDANT) ..... APPELLANT;

AND

ROBERT INSINGER (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Sale—Option—Mine—Extension of time for payment—Condition—Damages.

The respondent, a mine owner, gave the appellant, a mine operator, an option to purchase a mine for a sum payable by instalments. On the first instalment falling due, the appellant negotiated for an extension of time for payment which was granted by the respondent, on condition that the appellant should do certain development work not mentioned in the option. The appellant failed to pay; he subsequently relinquished possession of the mine and surrendered the option, but without having done the work. The respondent sued for an account and for damages amounting to the cost of the work.

Held, Idington J. dissenting, that the respondent was entitled to recover.

Per Duff and Anglin JJ.—Upon the assumption of a finding by the trial judge that the work was part of a scheme the execution of which the respondent regarded as essential to the proper development of the mine, the respondent had the right to ask as damages resulting from the breach of agreement the cost of performing the development work which the appellant had agreed to do and the measure of damages ought not, as is usual, to be restricted to the pecuniary value of the advantage the respondent would have obtained by performance of the agreement.

Per Idington J., dissenting.—The undertaking to do the work in question and consideration therefor were not a collateral independent contract but by the express terms thereof declared to be a mere "modification of the terms and conditions" of the optional agreement for purchase, and should therefore be construed as if same had conditionally formed a clause therein, and thus subject to the effect to be given the pivotal and predominant provision thereof which entitled appellant at any time to terminate the whole agreements by the relinquishment, as

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

happened, of his option, involving therewith the surrender to respondent of all machinery, implements and equipment by and with which it was contemplated the work in question was to have been done and thus creating such a situation as basis for estimating damages as never could be properly held to be the actual cost of the work, and thus within the reasonable contemplation of the parties which must ever form, according to our long settled rule of law, the basis for awarding damages for breach of such like contracts.

APPEAL from a decision of the Court of Appeal for British Columbia, affirming the judgment of the trial judge and maintaining the respondent's action.

The respondent, a banker owning a group of mines called Hewitt (which had previously been operated) gave the appellant an option to purchase it for the sum of $175,000 payable in two instalments of $87,500 each in one and two years respectively. The appellant had the right to mine and ship ore but was obliged to pay 15 per cent of the net smelter returns to the credit of the respondent at the Bank of Montreal to be applied on account of the purchase price. The appellant was also required to do certain development work in no. 7 tunnel. When the first instalment of $87,500 became due, the appellant negotiated for an extension of time for payment of part of it, $37,500. This was granted in consideration of the appellant agreeing, besides paying interest on the deferred payment, to do certain further development work not mentioned in the option, viz., to drive no. 8 tunnel ahead and continue same without interruption until reaching the ore shoot then being mined in no. 7 tunnel, an estimated distance of 1,200 feet and then constructing a raise from no. 8 to no. 7 level, a distance of 350 feet. This no. 8 tunnel had been driven as a drift on the vein by the former operators, and the further development agreed to be done by the appellant was for the purpose of continuing this tunnel and thus developing the downward continuation of the ore theretofore being mined in the no. 7 tunnel above and making a connection therewith. The appellant did not do more than 25 feet of this work, and ten days prior to the due date for payment of $37,500, he requested a further extension of time. The respondent notified the appellant that his proposals were not acceptable and demanded possession of the premises, declaring the option at an end. The appellant relinquished possession of the mines and surrendered his option without doing the development work above referred

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to. The respondent took action for an account of ore mined, milled, shipped or treated by the appellant, and for damages for failure to do the development work. The trial judge gave judgment for the respondent for an account; and as to the action for damages, he directed a reference to ascertain the quantum of such damages at the rate of $15 per foot for all work not done by the appellant, thus involving a determination that the proper measure of damages was what it would cost the respondent to do the work the appellant failed to perform. This judgment was affirmed by the Court of Appeal.

Lafleur K.C. and *Hamilton K.C.* for the appellant. The damages which the respondent ought to receive, in accordance with the settled rule, are those which may fairly and reasonably be considered to arise from the breach, according to the usual course of things. Applying this rule, the respondent is only entitled to recover the pecuniary value of the advantage he would have obtained by a performance of the agreement which would in this case be the equivalent of any increase in the value of the mine to arise therefrom.

Tilley K.C. for the respondent. The respondent has the right to recover as damages the cost of doing the work, as this work formed a necessary part of a plan of exploration or development requisite, from a miner's point of view, for developing the property as a working mine.

THE CHIEF JUSTICE.—After reading as much of the evidence as I considered material and giving much consideration to the arguments at bar and the judgments in the courts below, I would dismiss this appeal with costs.

I substantially concur with the reasons for judgment of Mr. Justice Galliher in the court below.

IDINGTON J. (dissenting).—The respondent covenanting with the appellant that he, the respondent, was entitled to certain mining properties in British Columbia, agreed to give the appellant an option to buy same, for the sum of $175,000 of which one half was to be paid by the 15th of August, 1918, one year after the date of the said agreement.

The agreement further provided that the appellant should be given possession of the said mining properties and certain appliances theretofore used in developing same.

and be entitled to enter into said possession immediately and operate same on a basis of making no payments, save only the payment for certain taxes, insurance, etc., not now in dispute, and for so-called royalties, if any, out of the proceeds of the shipments of ore or concentrates from the said mineral claims of which 15 per cent was to go to the credit of the respondent and the balance to the credit of the appellant.

As the 15th of August, 1918, when the due date of the first instalment of purchase price was to fall due, was approaching, the appellant seems to have had some conversation with the respondent upon the rather discouraging situation presented to appellant as a possibly intending purchaser.

He had already, in development, spent far more than expected, having regard to the results, which would fall far short of making up the first payment.

That was followed by a correspondence drawn out till November, and the object of it all was a negotiation for an extension of six months for the payment of the balance of the first instalment of the optional purchase price which the royalties did not cover.

The basis of the result of that correspondence appears in a letter from appellant to respondent, quoted in full by Mr. Justice McPhillips in his opinion dissenting from the judgment now being appealed from.

The respondent's letter of acceptance dated 26th October, 1918, begins thus

> I received your letter of October 19, proposing the following as modifications to the terms and conditions of our agreement for the purchase by you of the Hewitt group of mining claims in the Slocan District,

and after reciting the proposed modifications, adds one or two minor suggestions which he couples with his assent.

And thereupon by the letter of appellant dated 2nd November, 1918, he accepts same and adds, however, a warning note as to the mine not proving as promising as at one time, and the effect the Spanish influenza epidemic was having upon the available man power.

The appellant seems, therefore, to have done his best, and, long before the 5th of February, had paid the sum of $50,000, applicable on account of the first option, and, in course of development work throughout, was already very largely out of pocket.

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Idington J.

It was clearly evident to both at the time of this modification that he would be by the expiration of the extension granted, getting nothing but three and a half months' time to pay, at the utmost, the sum of $37,500, and probably less. In other words, for that extension of time of payment, he would (by the construction put by the courts below upon "the modification of the terms and conditions" of the agreement, as respondent aptly phrased what was agreed upon) be paying, or practically be made to pay, from $20,000 to $30,000 for such privilege.

It is sworn by appellant that it would take seven or eight months to a year to do the tunnelling provided for by said modification, and admitted by a witness for respondent seven or eight months.

The learned trial judge held that notwithstanding the appellant's absolute relinquishment in June, 1919, of his said option, and the acquisition by respondent, as the result of appellant's expenses, of not only the said $50,000 but about $25,000 more, the appellant was bound to go on and complete the tunnelling contemplated by the modification in November of the original agreement.

In other words, though the respondent had cancelled, in April, 1919, so far as he could, the contract, and the appellant relinquished all right to exercise his option, the modifying clause had to be specifically performed by appellant, or the cost thereof paid by the appellant, and, in short, be treated as an independent document instead of a mere modification of the original agreement and thus part thereof.

I entirely dissent from any view that entertains any such consequences as within the reasonable contemplation of the parties.

It is quite clear to my mind that the modification contained in the correspondence must be read merely as a modification, and as if the same had, conditionally and in anticipation formed a clause therein and hence subject to the operation of all the rest of the contract or any other of its many provisions, and harmonized therewith.

I agree so entirely with the judgment of Mr. Justice McPhillips in the court below that I need not repeat, but adopt, what he has said therein.

Indeed but for the purpose of bringing prominently forward the express view of the respondent, in his letter above referred to, as to the nature of what was agreed to be done and the rule of law applicable to the basis of, and measure of, damages, being what the parties can be held to have had within reasonable contemplation, I would not have felt impelled to add anything.

The appeal herein should, therefore, in my opinion, be allowed with costs, and the second, third and fourth clauses of the judgment of the learned trial judge be stricken out.

The best consideration I have been able to give to the conduct of the parties relative to the respondent's cancellation, claimed by the respondent, is that there should be no costs allowed to either in regard thereto, or to the counter-claim herein.

The formal judgment of the learned trial judge when thus amended will, I assume, cover an account of what the appellant got during the period between the respondent's claim to cancel, and the appellant's relinquishment, which is to me rather in doubt on the evidence and treated on the same basis as the result of operations prior to the attempted cancellation.

DUFF J.—It is not necessary in the view I take of this case to decide the questions discussed as to the construction of the agreement of the 15th August, 1917. I think when the letter of the 26th October, 1918, is read with the correspondence which preceded it, it does establish a promise on the part of the appellant as a term of the extension of the option to drive tunnel no. 8 without interruption until reaching the ore chute in the no. 7 tunnel. The appellant's obligation was no doubt subject to the implied condition that the respondent should do whatever might be necessary on his part to enable the promise to be performed, and if the option had been brought to an end by the respondent, and the appellant in consequence had been excluded from working the mine, then a case would probably have arisen in which the appellant would have been relieved from his obligation. I am far from satisfied, however, that the implied condition did become operative in the circumstances which actually arose, the appellant retaining possession of the mine and insisting upon his right

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Duff J.

to do so. It is not strictly necessary to pass upon this point, although I confess the inclination of my opinion is decidedly in favour of the view that so long as the appellant remained in possession, asserting his right to be there under the contract, his obligation continued.

I have come to the conclusion that the obligation was an absolute one, and that the difficulties which arose, assuming that they would have constituted an excuse under the terms of the contract of 1917, afford no answer to the respondent's claim under the subsequent contract.

The judgment of the learned trial judge is now for the first time challenged on the ground that the rule applied for the purpose of ascertaining the damages to which the plaintiff is entitled is not the correct rule. The learned trial judge in a word held the defendant to be responsible for the cost of completing the work he had agreed to do.

Mr. Lafleur on behalf of the appellant argues that in accordance with the settled rule the damages which the plaintiff ought to receive are those which may fairly and reasonably be considered to arise from the breach, according to the usual course of things, and that applying this rule the plaintiff is entitled to recover, and only entitled to recover, the pecuniary value of the advantage he would have obtained by a performance of the contract which would, in this case, be the equivalent of any increase in the value of the mine to arise therefrom.

It would be inadvisable, I think, to attempt to lay down any general rule for ascertaining the damages to which a mine-owner is entitled for breach of a covenant to perform development work or exploratory work by a person holding an option of purchase. Cases may no doubt arise in which the test suggested by Mr. Lafleur's argument would be the only proper test, and difficult and intricate as the inquiry might be, it would be the duty of the court to enter upon an examination of the effect of doing the work upon the value of the property.

On the other hand, cases must arise in which the plaintiff's right is plainly to recover at least the cost of doing the work. If it were conclusively made out, for example, that the work to be done formed part and a necessary part of some plan of exploration or development requisite, from

the miner's point of view, for developing the property as a working mine, and necessary, from the point of view of businesslike management, so that it might fairly be presumed that in the event of the option lapsing the owner would in the ordinary course have the work completed, then the damages arising in the ordinary course would include the cost of doing the work and would accordingly be recoverable under the rule.

In the case before us I think no serious difficulty arises. The letters appear to afford abundant evidence that both parties were proceeding upon the footing that this work was necessary in the course of developing the mine according to the owner's plans and it is upon the basis of that being accepted as a fact, I think, that the learned trial judge proceeded. No suggestion appears to have been made at the trial that he was applying an erroneous rule or that he was proceeding upon an erroneous assumption of fact; his method of arriving at the damages was not impugned in the notice of appeal nor, so far as one can gather, on the argument before the Court of Appeal; indeed, it was not until the oral argument in this court that the point was raised. In the circumstances I do not think this court can be called upon to interfere on the ground that the evidence does not adequately establish the necessity of the work. An analogous rule has been applied for the purpose of ascertaining the damages recoverable for breach of a covenant to keep in good repair in a lease or a covenant in such an instrument to sink a mine shaft. As already intimated, however, I am not disposed to base my decision upon any supposed rule of law other than the general rule to which reference has been made. Having regard to the manner in which the case was conducted in the courts of British Columbia, I think the proper application of the general rule is that which I have indicated above.

ANGLIN J.—At the close of the argument I was satisfied that the construction placed by the learned trial judge (affirmed on appeal) on the contract in regard to the driving of no. 8 tunnel and the upraise work was correct. Further consideration has not changed that opinion. I also remain convinced that the excuses for non-performance

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preferred by the defendant do not afford an answer to the plaintiff's claim. The opinions of the trial judge and of Mr. Justice Galliher cover this aspect of the case. The plaintiff is therefore entitled to recover such damages as are the natural and ordinary consequence of the defendant's failure to carry out his undertaking and will compensate for the breach. *Watson* v. *Charlesworth* (1).

The learned judge directed a reference to ascertain

> the quantum of such damages at the rate of $15 per foot for all work not done which was stipulated to be done by paragraph 3 of Ex. 19

the letter containing the defendant's undertaking to do the work in question. This, I take it, involves a determination that the proper measure of damages is what it will cost the plaintiff to do the work the defendant failed to perform.

I see no reason to question the learned judge's explicit finding that $15 per foot will be a fair amount to allow for the cost of that work.

We should also, I think, import findings that the work in question formed part of a scheme the execution of which the plaintiff regarded as essential to the proper development of his mine and fully intended, in any event, to carry out. There is evidence to warrant such findings. The defendant himself reported this work to the plaintiff as the first of several

> necessary essential improvements to make the mine a success.

Acting on the advice of Mr. M. S. Davys, a mining engineer, the plaintiff insisted on the promise by Cunningham to undertake and prosecute this work immediately and continuously as the basis of any extension to be given him. Davys deposes that he and Mr. Moore had agreed that the work in question should be done. The plaintiff relied upon Davys, and it is a fair inference not only that he regards the work as essential but that it is work which he will have done. It is probably necessary to reach that conclusion in order to justify the departure made by the trial judge from the ordinary rule that the measure of damages for breach by a defendant of a contract to perform work on the plaintiff's land is the actual pecuniary loss sustained by the plaintiff as a result of such breach, i.e., the difference between what would have been the value of the premises had

(1) [1905] 1 K.B. 74, 88; [1906] A.C. 14.

the work contracted for been done and their value with it unperformed. The question is by no means free from difficulty and, as presently advised, it is only because I think the learned trial judge must have dealt with it on the footing indicated and because his having done so was warranted by the evidence that I accept the measure of damages as determined.

Reference may be had to *Pell* v. *Shearman* (1); Mayne on Damages (9 ed.), pp. 237-8; Sedgwick on Damages (9 ed.), s. 619; *Wigsell* v. *School for Indigent Blind* (2); *Joyner* v. *Weeks* (3). In the last cited case the Court of Appeal (p. 43) treated the breach of a tenant's covenant to yield up premises in good repair as subject to a convenient rule of inveterate practice ordinarly applicable specially to such cases and tantamount to a rule of law that the measure of the lessor's damages should be the cost of making the omitted repairs. A recent decision of an Appellate Divisional Court in Ontario may also be averted to, *M. J. O'Brien Ltd.* v. *Freedman* (4).

The appeal on the counter-claim also fails. The defendant's failure to pay relieved the plaintiff from the obligation of depositing a deed in escrow and his title papers.

MIGNAULT J.—After carefully considering the evidence both documentary and oral, I do not think that the appellant has made out a case for disturbing the judgment of the Court of Appeal.

In my opinion, on the construction of the agreement entered into by the parties, by their letters of October 19, October 26, and November 2, 1918, the carrying on of the development work mentioned in paragraph three of the appellant's letter of October 19, was the consideration of the extension of time granted by the respondent for the payment of the balance of the first instalment under the option contract between the parties. It was in no wise a condition of the original option to be unenforceable in case the option to purchase was not exercised by the appellant. On the contrary, the only possible interest the respondent could have in view when he stipulated for this develop-

(1) [1855] 10 Ex. 766.
(2) [1882] 8 Q.B.D. 357.
(3) [1891] 2 Q.B. 31, 37-8.
(4) 25 Ont. W.N. 240.

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Mignault J.

ment work, was in case the appellant relinquished his option. If he purchased the property, and paid for it, it would be a matter of indifference to the respondent what development work had been done. Moreover, the letter stated that the work should begin immediately.

On all the other grounds urged by the appellant, I am content to express my full concurrence in the judgment of Mr. Justice Galliher in the Court of Appeal.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hamilton & Wragge.*

Solicitors for the respondent: *Lennie & Clark.*

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*Oct. 31.
*Dec. 4.

MORRIS KATZMAN (DEFENDANT) .....APPELLANT;

AND

OWNAHOME REALTY (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Statute of Frauds—Memo. in writing—Signature as owner—Evidence of agency—Admissibility.

Property was listed with a broker for sale, the listing card stating that "the owner's name is Mrs. B. Katzman." Mrs. K. who signed had no interest in the property but her husband had. A sale was effected and in an action by the broker for his commission:—

Held, that parol evidence was not admissible to contradict the statement in the document as to ownership by showing that Mrs. K. in signing it was acting as agent of her husband.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondent.

The only question for decision on this appeal is whether or not there was a memo in writing signed by the party to be charged or his agent sufficient to satisfy the addition made in 1916 to the Ontario Statute of Frauds. The trial judge allowed evidence to be admitted to show that Mrs. Katzman who signed the memo did so as agent of her husband the appellant, which would be sufficient if established. The appellant contends that such evidence should not have been received.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.