FRANK BAINTON AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

JOHN HALLAM, LIMITED (PLAINTIFF) ..... } RESPONDENT

1920

*Mar. 22
*Apr. 6.

ON APPEAL FROM THE APPELLANT DIVISION OF THE SUPREME COURT OF ONTARIO.

Damages—Sale of goods—Sale by sample—Breach of warranty—Measure of damag s.

Where on a sale according to sample the goods delivered are of a quality inferior to that warranted the purchaser is entitled to recover as damages the difference between the market value of the goods received and of those which should have been supplied.

The re-sale by the purchaser at a price less than this difference does not debar him from recovering the full amount; it merely affords some evidence of market value.

Per Idington J.—In this case the price at which the wool was re-sold represented its market value.

Judgment of the Appellate Division (45 Ont. L.R. 483) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment of the trial judge in favour of the plaintiff.

The Hallam Co. bought wool from the defendants which by the order was to correspond with a sample supplied. It proved to be of an inferior quality and acceptance was refused. The vendors would not take

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

(1) 45 Ont. L.R. 483.

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it back and it was re-sold at an advance of five cents a pound over the contract price. The purchasers then brought an action for damages and recovered fifteen cents on the trial which the Appellate Division affirmed. The defendants appealed to the Supreme Court of Canada.

McCarthy K.C., and Dancey for the appellants.

Tilley K.C., for the respondent.

THE CHIEF JUSTICE.—This was an action brought to recover damages for the delivery of a quantity of wool by the appellants (defendants) to the respondents (plaintiffs) of an inferior quality to that sold to them by sample.

The appellants contended that the respondents plaintiffs having accepted the goods were not entitled to recover damages, but the trial judge and the Appellate Division both held that while the acceptance of delivery of the wool which was packed in sewn up bags passed the property in the goods delivered to the plaintiffs it did not relieve the defendants from liability for damages for delivery of goods of an inferior quality to that of the sample by which they were sold, and assessed the plaintiff's damages at the sum of $7,500, being the difference between the quality of the goods warranted and sold by the sample and that actually delivered.

These questions of fact of the quality of the wool sold and that actually delivered were found in plaintiffs' favour by the trial judge and these findings were confirmed by the Appellate Division from whose jusgment this appeal has been taken. That court also maintained the assessment of damages of the

trial judge as having been made under the proper rule applicable in such cases as this.

As to the findings of fact made by both courts, this court will not interfere except of course in cases of clear error, and certainly this case is not one of that class.

As to the main question, that of the rule or measure of damages which should be applied in cases such as the one before us, I think the courts below have acted correctly. The rule, as I understand it, is that the measure of such damages in cases of the delivery of goods of an inferior quality to that warranted is the difference between the market value of the goods of the quality warranted and contracted to be delivered, and that of the quality actually delivered. Mayne on Damages, (8th ed.) p. 228; *Rodocanachi* v. *Milburn Bros.* (1); *Williams Bros.* v. *Agius, Limited* (2).

The appeal should be dismissed with costs.

IDINGTON J.—This appeal from the Appellate Division of the Supreme Court of Ontario arises out of a sale by the appellants, carrying on business at Blyth, in the Province of Ontario, to respondent, carrying on business at Toronto, of a quantity of grey shoddy wool, claimed by the latter to have been bought by sample.

A sample undoubtedly had been submitted by appellants shipping it to the respondent, and communications passed over the telephone, and by letter, in relation to latter buying about 50,000 pounds thereof at forty cents a pound. The respondent

(1) 18 Q. B. D. 67. (2) [1914] A.C. 510.

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agreed to take about that quantity, at said price, and asked appellant by letter to arrange for three cars on which to load it.

Respondent by letter said, amongst other things, that, upon that being done, "the writer will go up and have the wool weighed."

There was nothing said therein or otherwise relative to inspection.

A letter written by appellants same or next day to the respondent used the expression "you to come as usual to take over stock."

This letter never was received by the respondent and hence is of no consequence other than shewing a different point of view had been taken by each party, as to the question of inspection.

The appellant alleges in argument that by reason of a former misunderstanding and adjustment thereof there had grown up a well understood course of dealing between them by which the respondent was to make such inspection at the point of shipment, as it saw fit, of any goods sold to it by them, and default that, could not be heard to complain.

Certainly the adoption of such a rule and its observance would have been a most satisfactory and businesslike method. But it was not pleaded as a matter of fact in such express terms as now urged.

The pleading alleged that the goods were

> sold to the plaintiff by the defendants subject to the examinations inspect on and approval of the plaintiff' messenger

etc., at Blyth.

In the particular bargain made herein there was no allusion made to such terms.

And when counsel for appellant at the trial approached the subject he failed to press upon the

attention of the learned trial judge, who ruled out a question as to reasons, all that is now urged upon us as set forth above, and, I understand, was urged below.

I cannot say that under such a pleading and such circumstances the learned trial judge erred in his ruling.

Hence we must rely upon the actual facts proven which disclose that the business as transacted at Blyth consisted only of a weighing and loading of the goods then on the cars.

There really was no actual inspection such as any one would have expected to find if the bargain had been made as pleaded or in accord with an alleged established course of dealing.

Then also it became known to appellants that the shipment was to be made to Carleton Place instead of to Toronto.

Why did they not then suggest inspection by way of an adherence to the alleged course of dealing?

On the other hand it may well be asked, why the manager of respondent was sent up to Blyth for the mere minor, menial or clerical purpose, of weighing, or checking weight of goods.

I cannot help suspecting that it was the confidence reposed in appellants which induced the manager to have thus appeared to waive inspection.

It became the duty of appellants, or at least the part of prudence, on the alleged basis of dealing, to have seen that it was observed and that no cause of complaint could be possible. Instead of that course being pursued they passed in silence an obvious non-observance of the alleged course of dealing.

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I am unable to say that as matter of law, under all the foregoing circumstances, that the respondent was not entitled to rely upon the implied warranty the courts below have proceeded upon.

I am unable, however, to agree, after reading all the evidence adduced in support of respondent's claim, with the assessment of damages adopted by the learned trial judge and upheld by the majority of the Appellate Division.

Whether we adopt the rule for assessing damages as laid down in "Benjamin on Sales" as to the difference in value between the article as delivered and the article as warranted, or that in the English "Sale of Goods Act, 1895", which I incline to think is but another way of expressing the common law rule when it provides that

> the loss directly and naturally resulting in the ordinary course of events from the breach

shall be the measure of damages, the evidence does not justify the said assessment of damages.

We find the utmost profit expected (by respondent conversant with the market price) from a re-sale, based upon the identical samples delivered by appellants, was an advance of five cents a pound; for immediately respondent got possession of the samples, they were submitted to a firm in Carleton Place and a bargain made for a re-sale at forty-five cents a pound. It seems to me idle, in face of such a contract made by respondent at the very time when that in question was expected to be, and was being, carried out, to contend that it can properly be held to have suffered any greater damages in the way of loss of profit than this five cents per pound of profit which it failed to reap, or indeed any other damages, unless

so far as the quality of the goods fell below the sample as to be unsaleable at the price agreed upon.

The respondent is not to be treated as a child ignorant of the conditions of the market, but as being possessed of all the information relative to the market, and the possibilities of re-selling such goods as the sample indicated might be reasonably expected to produce.

I think, bearing that in mind, that forty-five cents must be conclusively taken herein as the basis for the estimated damages.

A perusal of the evidence adduced on behalf of the respondent produces in my mind a clear conviction that there was not a settled market price such as can often be appealed to as a sure and safe basis upon which to estimate damages.

The market for the class of goods in question seems to have been in an unsettled state and subject to a purely chance sort of speculative condition, furnishing no better basis upon which to proceed than the re-sale at an advance of five cents a pound.

A letter of the firm of Cram & Co. to whom the respondent had re-sold, tells that if the goods had been up to the sample, they could have re-sold at a profit of $7,500. Yet we do not find any claim made by that firm for damages of any kind for the breach of contract it has made with respondent. That firm instead seems to have been glad to receive back its cheque without a murmur.

In ordinary cases we might have heard, within the principles laid down in *Wallis* v. *Pratt* (1), of a claim for this $7,500 allowed by the learned trial judge, but no such pretension is set up.

(1) [1911] A.C. 394.

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If fifteen thousand dollars damages had been awarded in such a case, arising out of a twenty thousand dollar contract, from the result of which respondent had received before trial, and indeed within six months, the sum of about fourteen thousand dollars as proceeds of re-sales, I respectfully submit such a result should have so arrested the attention of the courts below as to the need of a closer examination of the evidential basis for measuring of damages than, in my view, has been given herein.

That possibility which I present is only one of the many possibilities presented by several witnesses in a rather loose sort of way.

Cram is asked the following leading question, and answers as follows:—

> Q.—You say, comparing the bulk with the sample, that it had a great deal more shoddy, and not only that but some parts were absolutely worthless and useless, that should not be there, that was not in the sample, and you say there was a difference of 25 or 30 cents a lb. in value?
>
> A.—Yes.

When I find in the letter of his firm to the respondent, rejecting the goods, the following sentence:—

> We opened up five (5) sacks of this stock promiscuously, and find it not in any sack, up to the five-pound (5-lb.) sample, on which basis we bought this wool.

I am not such impressed with the basis for this estimate.

Only five sacks examined out of a probable seventy in that car, does not seem, when we find all the witnesses testifying to a great variation in the quality of the sacks, a fair basis to found said estimate upon.

Nor is that much improved as a fair test by finding him speak as follows:—

Q.—How many of those bales would you examine? A.—Possibly I examined a couple of dozen before I notified Mr. Hallam, that is, of the first car.

I submit the formal statement made at the time in the above quotation from the letter to the respondent is more likely to be correct than this chance guess made some months later in the witness box.

The witness apparently had examined a second car and possibly his memory got confused, for he says in another place:—

Q.—You say you examined a certain number of the sacks in the first car? A.—Yes.

Q. How many sacks did you examine? A.—Off hand I would say probably a dozen or two.

Q.—How many would there be in a car? A.—If you divide the car by three, there would be about 70. They sometimes vary, according to the size of the car.

Q.—But of the 70 or 80, you examined probably a dozen bags? A.—A dozen or two.

The third car he did not examine at all.

I submit all this as a specimen of the guide we have if we depart from the lines I lay down above to be got from the actual transactions involved in the sale to and re-sale by respondent as the only reliable guiding basis to start from to estimate damages.

Mr. Logan, produced by respondent as an expert, says:—

Q.—Did you see the sample of the bulk that is in question here? A.—All I saw was the two sacks that Mr. Cram sent up to us to be tested.

This witness applied to these sacks a mechanical test, result of which he gives and then respondent's counsel properly drops him as an expert.

The result of that test, however, might have been followed up by others from which we might have got something reliable, but it was not.

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There were two other witnesses called who could speak as experts besides Mr. Hallam, respondent's president.

Of these two, one had bought at forty-two cents a considerable quantity of this shoddy wool and both speak of respective examinations made recently before the trial of a sample submitted by respondent taken from the remaining stock on hand after the re-sales made by respondent, of which I am about to speak.

Neither give what I would consider a more satisfactory basis upon which to assess damages than what I am about to submit, as result of the consideration of all the circumstances so far as available in evidence.

The respondent called the appellants' attention to the results reported by Cram, and proposed, very fairly as it appears to me, to the appellants, or one of them, to go down with a representative of respondent and see the parties concerned at Carleton Place and also the goods and try and arrange a settlement. Respondent even offered to pay expenses of doing so, but appellants refused, apparently determined to stand on what they conceived to be their legal rights.

Some weeks were lost in this sort of haggling, and finally this action was brought on the 13th March, 1918, apparently from the claim made by the indorsment on the writ, for a cancellation of the whole contract, as the claim made indicates it was for the entire price paid. When, better advised, that contention was changed in the statement of claim to a claim of $12,621.25 for damages on the much exaggerated basis of 25 cents a pound, though re-sales

had then been made of eighteen sacks at 43½ to 45c. a pound.

No effort was made by respondent, as should have been done, to re-sell the goods till some time later, and then there were sales made at prices which lead me to the conclusion that if proper energy had been used the whole would have been re-sold at a price of more than the original cost price of forty cents a pound, and have left the assessable damages at five cents a pound.

The increased price got by this mode of proceeding evidently would have re-paid all the attendant expenses upon such a fair and common sense method, which, after all, is but the law upon the subject binding the party claiming damages for breach of a contract to do all that he reasonably can to minimize the loss.

There is no satisfactory reason or explanation given for failure to pursue this course. If chance brought a purchaser he seems to have been dealt with.

Every one knew that unless an effort was made to re-sell before Australian wool came into the market, there was no chance of doing so at prices to minimize the loss. And the only excuse I can find for such an unreasonable course of conduct is that the parties were at war by means of a law-suit.

If that attitude had ceased and a more reasonable course been pursued, I think possibly and indeed probably the respondent would still have been entitled to a judgment for $2,500 or thereabouts—whatever the five cents a pound would have produced. Roughly speaking the expenses might have eaten up the excess of price got over forty cents a pound.

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And that is the sum to which I would now reduce the judgment, instead of the $7,500 awarded.

Perhaps the plan of the learned Chief Justice of the Common Pleas Division, who suggests a reference to determine the damages, might work out a more accurate result, but I am of opinion that there had better be an end of some things even of a lawsuit.

Here we have presented the curious result of a judgment for $7,500, when a statement of respondent presents, after making every allowance to itself for claims not recognizable in law, only a balance of $6,468.62, yet a judgment stands for $7,500.

Is it by way of penalty as the learned Chief Justice of the Common Pleas suggests?

Of course this statement is headed with an incidental suggestion that the sample standard was worth 55c. per pound, but I prefer the cool judgment of the merchant selling at 45c. as a proper test of value of the sample, to that of the litigant and probably exaggerated estimates given by those who probably knew less than he.

Among the indefensible items in this statement, appears a shrinkage of weight due to delay of respondent in re-selling; a charge of 7% for interest, and insurance for a period too prolonged, and $1,398 for commission.

Mr. Hallam's evidence which seems given fairly estimates the goods on hand at 30c. after all the loss of market and possibly deteriorated condition of the goods, suggests to me that a middle line might be drawn between what I have arrived at and that of the learned trial judge.

Hence if the respondent prefers the risk and annoyance of a reference in order to demonstrate that

by proper efforts there could not have been by due energy a re-sale effected in the early part of 1918 which would have minimized the loss, I would agree thereto, the costs thereof to abide the result. And lest it be necessary for some to have a decision to prove the law as stated relative to the duty to minimize the loss, see latest decision of Court of Appeal in England in *Payzu* v. *Saunders* (1), at pages 587 *et seq.*

Meantime I think this appeal should be allowed either fixing the damages at $2,500, or a reference to reduce that already awarded on the lines I have indicated; the costs of this appeal and in the courts below to abide the result of such reference.

ANGLIN J.—On the evidence in the record it is not possible to disturb the findings that the sale in question was by sample, that there was no acceptance of the wool furnished as equal in quality to the sample and that it was in fact substantially inferior. The weight of the testimony also supports the conclusion that the difference in market value between goods of the quality of the sample and the goods actually supplied was at the date of delivery at least 15c. per pound.

The ordinary rule that the measure of the purchaser's damages in such a case is

> the difference between he value of goods of the quality contracted for at the time of delivery and the value of the goods actually delivered. *Loder* v. *Kekulé* (2), at pp. 139-40,

adopted by Mr. Mayne in his excellent Treatise on Damages, (4th ed.) at p. 228, was applied by the learned trial judge and in the Appellate Division. I find no circumstances in evidence to justify a departure

(1) [1919] 2 K.B. 581. (2) 3 C.B.N.S. 128.

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from it. Except as affording some evidence of market value (*Clare* v. *Maynard* (1), the prices agreed to on the re-sale by the defendant and on the subsequent re-sale by his purchaser cannot be taken into account. Neither of them conclusively determines the market value of goods of the same quality as the sample. *Rodocanachi* v. *Milburn Bros.* (2); *Williams Bros.* v. *Agius, Limited* (3).

The appeal should be dismissed with costs.

BRODEUR J.—One of the issues in this case is whether the sale of the goods in question is a sale by sample. The two courts below have come to the conclusion that it was a sale by sample. The facts disclosed by the evidence shew to me conclusively that the sale was properly described as such.

A sample of the goods for which a price was quoted was sent to the respondent company by the appellants and the letter sent by the respondent to the appellants confirming a telephone conversation as to the purchase of these goods declared "same to be up to five pound sample expressed us." Nothing could be clearer; and if the vendors were of opinion that the sale was not to be carried out according to the sample they should have called the attention of the purchaser to what they call today an erroneous statement.

They claim to have sent a letter which in some respects shews that the sale was not absolutely as alleged by the respondent. But this letter was never received by the respondent. Besides this letter does not shew that the sample which had been sent previously to the purchaser would not determine the quality of the goods.

(1) 6 A. & E. 519, 523. (2) 18 Q. B. D. 67.
(3) [1914] A.C. 510.

It is contended by the appellants that the goods were duly received by the respondent company and that their obligation as to the quality of the goods was duly fulfilled. It is true that an important officer was sent by the respondent company to attend the loading of the cars but the goods were not inspected by him and the finding of the courts below was that he went there with the purpose of having the goods properly weighed; and the evidence of this officer, though conflicting with the evidence of one of the appellants, was accepted by the trial judge. I do not feel disposed to disturb this finding.

There has been raised a question as to the amount of damages which should have been awarded. There is evidence which shews that the fifteen cents per pound which was allowed was fair and represented the damages to which the plaintiff was entitled.

For these reasons the appeal should be dismissed with costs.

MIGNAULT J.—In this case I am of opinion that the sale of the wool was a sale by sample and that the wool delivered having been inferior to the sample, there was a breach of warranty entitling the respondent to recover damages from the appellants.

The only question remaining is as to the measure of damages. The learned trial judge allowed fifteen cents per pound, which is certainly a moderate amount, for the sample was worth from 57 to 60 cents a pound and the contract price was 40 cents.

But the appellants say that inasmuch as the respondent had re-sold the wool to one Cram for 45 cents a pound, the most he would have realized out of the transaction was 5c. per pound, and that at all events his damages could not exceed the latter amount.

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This reasoning appears to me to be fallacious. The usual rule, as stated by the learned trial judge, is that the measure of damages is the difference in value between the thing contracted for and the thing delivered. Here the respondent contracted for wool which was to equal the sample and for which he was to pay 40c. per pound. That he had himself contracted to sell the wool for 45c. is not a matter which the appellants can set up to escape liability to pay, as damages, the difference between the value of the wool contracted for and its actual value as delivered. As stated by Lord Haldane in *Williams Brothers* v. *Agius, Limited* (1), at page 520:—

> The law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant as for instance a contract entered into by the plaintiff with a third party.

See also *Rodocanachi* v. *Milburn* (2), approved by the House of Lords in the case just cited.

In this case Cram who bought the wool on the same sample had re-sold it at a higher price, and the respondent may be called on to pay him damages for not having delivered goods equal to the sample, Cram having refused to accept the wool on that ground. If the respondent received only the profit he was to make on his sale to Cram and was liable to the latter for damages, he would not be compensated by receiving from the appellants only the profit he would have made on the sale to Cram.

It may be added that although the respondent had agreed to pay 40c. per pound for this wool, it does not follow that the wool delivered was worth 40c. As a matter of fact, as found by the learned trial judge, it was worth a good deal less.

(1) [1914] A.C. 510.

(2) 18 Q.B.D. 67.

My opinion therefore is that the learned trial judge adopted the true measure of damages, and that the appeal from the judgment of the Appellate Division, which affirmed the trial judge, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Loftus E. Dancey.*

Solicitor for the respondents: *J. P. White.*