1919
*Mar. 20, 21,
*May 19.

JOHN FINDLAY (DEFENDANT).....APPELLANT;

AND

SYDNEY P HOWARD (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Evidence—Admissibility—Breach of contract—Action in damages—Facts posterior to institution of action.

In an action for damages for loss of future profits arising out of a wrongful breach of partnership contract, events which happened between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach. Brodeur J. dissenting.

APPEAL from a judgment of the Court of King's Bench, appeal side (1), Province of Quebec, varying a judgment of the Superior Court, sitting in review, at Montreal (2), and maintaining the plaintiff's action.

The plaintiff sued to recover damages from the defendant for a breach of a five year partnership contract in a real estate business in Montreal, about twenty-one months before it would have terminated by effluxion of time. The plaintiff's claim was for $350 000. The trial judge assessed his damages at $80,000; the Court of Review reduced them to $22,000 and the Court of King's Bench gave judgment for $40,000. The appellant seeks the restoration of the judgment of the Court of Review; and the respondent, by way of cross-appeal, demands the restoration of the judgment of the trial judge.

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

(1) 27 Que. K.B. 5.5.

(2) Q.R. 51 S.C. 385.

An important question of law was in issue: Is the court, in assessing damages for wrongful termination by a partner of a partnership, entitled to consider facts subsequent to the action, or must it ignore them and assess the damages according to conditions existing at the date of the action? The trial judge adopted the second alternative and the Court of Review the first; the Court of King's Bench did not expressly pass upon the question, although appearing to have proceeded on the principle laid down by the Court of Review.

Eug. Lafleur K.C., *Aimé Geoffrion K.C.* and *G. H. Montgomery K.C.* for the appellant.

W. N. Tilley K.C., *J. L. Perron K.C.* and *Cook K.C.* for the respondent.

THE CHIEF JUSTICE.—I agree with the principles stated by Mr. Justice Lamothe (now Chief Justice of the Court of Appeal of Quebec) in delivering his reasons for judgment in this case in the Court of Review (1), as to the proper method of estimating and assessing damages in such a case as the present. I would myself, however, in applying those principles have increased the amount of the damages somewhat, but I will not dissent on that ground alone and I concur n a lowing the appeal with costs and restoring the judgment of the Court of Review.

IDINGTON J.—The appellant had established a real estate business in Montreal. On the 26th May, 1910, there was incorporated a company to carry on said business under the name of "Findlay & Howard." On the 22nd of August, 1910, an agreement was entered into between the parties hereto who were in fact the substantial members of the aid incorporation, wherein it was stated

(1) Q.R. 51 S.C. 385.

1919
FINDLAY
v.
HOWARD.
Idington J.

that in reality the said company was formed by the said parties hereto for the sake of enabling them to more conveniently carry on their business, but as between themselves they intend to operate the said company in somewhat the same manner as if they were co-partners carrying on business under the name of "Findlay & Howard" and not merely officers of the company.

This agreement was to have continued in force for five years.

They carried on business under said name accordingly until the 11th of September, 1913, when appellant requested a termination of same.

There ensued a correspondence between them which terminated on the 12th December, 1913, by the forcible ejection of respondent by appellant from the premises wherein the business was carried on.

Immediately thereupon the respondent instituted this action for damages for breach of the said agreement.

Meantime, on the 7th October, 1913, a company was incorporated under the name of "John Findlay, Limited," to carry on the business of dealing in real estate and under cover of that name appellant took possession gradually of the entire business which the parties hereto had carried on as aforesaid and continued thereafter to exclude the respondent from any interference therewith, save and except such rights as conceded to him by a partial settlement of their difficulties.

All the pretensions of appellant in way of justification for his conduct have been decisively rejected and are not now in question. All that is in question herein is the amount of damages which respondent is entitled to.

The last clause of the respondent's declaration which, I think, for reasons I am about to state, seems to have been overlooked, reads as follows:—

41. The plaintiff expressly reserves his right to recover his share and proportion of the assets of Findlay & Howard, Limited, and further expressly reserves his right to take such other proceedings in the premises as may be necessary or advisable for the protection of his interests.

Inasmuch as the business carried on by the parties hereto was carried on in the name of "Findlay & Howard, Limited," and the fruits thereof passed to it, though the subsidiary agreement, on which in a technical sense their action rests, provided for the term of five years' control, and distribution of profits of said corporate business, we should not have to concern ourselves with anything but such loss of profits as the respondent suffered by his exclusion.

Yet I suspect there has, by a confusion of thought, entered into the estimate thereof much that should not have done so.

All the profits made by the carrying on of the business of "Findlay & Howard, Limited," became part of the assets thereof and should not enter into consideration in determining the problem of how much the respondent's share of its profits has been impaired by the wrongful conduct of the appellant.

It is that problem and nothing else that we have to solve.

The remarkable diversity of judicial opinion which this litigation has developed impresses me with the need of emphasizing this proposition which I have laid down for my guide.

It sometimes happens that when partners disagree and one excludes the other, the community in which they live take sides and thus the business is seriously impaired.

The respondent seems to have possessed so much strong common sense that he did not lend himself to anything necessarily productive of such results. He

1919
FINDLAY
v.
HOWARD.
Idington J.

relied upon this action properly taken, if he could not have obtained an injunction, to preserve his rights and recover his share of whatever loss of profits the business sustained by his exclusion.

The learned trial judge finds the business though carried on, after the exclusion, under the name of "John Findlay, Limited," was the same business, only the name being changed.

The same staff (substituting one Parker for respondent), the same kind of business and the same prestige, and admittedly the same clientele should, under a continuation of same circumstances, have produced same results in way of profits. But everyone knows the circumstances had changed so remarkably that to estimate the profits on the basis of former years must be illusory.

If the trial had been postponed for nine months and appellant then had been forced to produce his books a nearly absolutely correct assessment of damages could have been arrived at.

The misfortune is that the trial was too early for that and hence necessarily the result had to be determined by evidence which, in any such like case, must be more or less of a speculative character.

Added to this was the view of the law taken by the learned trial judge which has not been shared in by any of the other judges who have had to consider the case. Hence his judgment for $80,000 has been set aside

The Court of Review reduced that to $22,000 upon an entirely different view of the law which has been given expression to by Mr. Justice Lamothe, with whose main point of view I agree.

In the details thereof I cannot say that I entirely agree.

There was before the court an account of the business of "John Findlay, Limited," for the year from the 4th November, 1913, to 30th October, 1914, which was audited by same accountant as had been employed in former years by the parties hereto.

The net profits were shewn thereby to have been $13,353.86 which, if presumed to have continued for the balance of the five years' partnership now in question, would have produced to respondent a great deal less than the Court of Review awarded him.

That court, however, eliminated certain items of expense from that amount and seems to have assumed that the war conditions pending would have resulted in no profit. I am not quite satisfied with the details by which the award thus reached was fixed at $22,000. I think they are open to some criticism yet the substantial result reached is one I should not if in the place of the Court of Appeal have disturbed.

The basis taken was a much more satisfactory one than that taken by the Court of Appeal which took the year ending 30th November, 1913. And apart from other considerations it included many questionable items which should not have entered into a basic computation of the probable profits from current earnings in the following period. Indeed, it seems to me far from furnishing a safe basis for computation.

Had its record been sifted in such a way as to eliminate items in respect of which there could be nothing analogous in the later period now in question and the case threshed out at the trial on some such basis, it might have been made useful, but I hardly think would have justified the result reached by the Court of Appeal.

Again, the Court of Appeal took into consideration the goodwill of the business and in a way that I can find nothing in law or fact to uphold.

1919
FINDLAY
v.
HOWARD.
Idington J.

Goodwill is sometimes a valuable asset of an old partnership. That, however, was the asset of the corporate company and hence excluded by the pleading.

If you choose to imagine a valuable asset in a five year term I much doubt its existence.

I quite agree that the possibility of a more satisfactory result in an amicable dissolution might have been reached, but I cannot say that respondent would have reaped much from that factor in this instance even if the partnership had run its full term.

A man might, by misconduct, so wreck a firm as to give rise to such a claim, but here it is something intangible.

The field was just as open for the respondent at the expiration of the term from all that appears as it ever would have been I imagine.

As an outside man, as it were, he never had the same chance of securing a share of the clientele in the end as the inside man who had founded the business as appellant had.

As to the respondent not seeking some other occupation or business this was not a case in which any such rule or principle as relied upon can be properly applied.

If nothing else, his position as outside man had become such that when the stage of decline in business had been reached he would have been, if staying on in that event, almost in the condition of a gentleman of leisure, as his active occupation would have been gone, and he was entitled to reap that reward with other earnings which his energetic efforts in the outside field had helped to make so successful.

I would allow the appeal and restore the judgment of the Court of Review, but I should hesitate to give costs.

The cross-appeal should be dismissed.

ANGLIN J.—The plaintiff Howard sues to recover damages from the defendant Findlay for what the latter now admits to have been an unwarranted breach by him of a five year partnership contract on the 30th November, 1913, about twenty-one months before it would have terminated by effluxion of time. The plaintiff's claim was for $350,000, and he expressly excepted from this action, and reserved his right to recover, his share and proportion of the assets of the partnership, and to take such other proceedings as might be necessary or advisable for the protection of his interests. The trial judge assessed his damages at $80,000; the Court of Review, on an appeal by the defendant, at $22,000; and the Court of Appeal, on appeal by the plaintiff, at $40,000. From the latter assessment the defendant appeals to this court seeking a restoration of the judgment of the Court of Review, from which he had not appealed. By a cross-appeal the plaintiff demands the restoration of the judgment of the trial judge.

Although "Findlay & Howard, Limited," was an incorporated company, by an agreement between the plaintiff and the defendant it was arranged that they should

> operate the said business in somewhat the same manner as if they were co-partners carrying on business under the name of "Findlay & Howard" and not merely as officers of the company.

This action has, therefore, been treated as a claim made by one partner against his co-partner; and I shall so deal with it. Although the defendant's notice of termination of partnership was given on the 11th of September, 1913, to take immediate effect, for convenience the date of breach has been treated as the 30th of November, 1913—the actual date of the closing of the books of the partnership.

While it does not formulate a definite basis for the assessment of the damages, the Court of Appeal

1919
FINDLAY
v.
HOWARD.
Anglin J.

appears to have proceeded on the principle laid down by the Court of Review and to have differed merely in its application to the facts in evidence. On the other hand, the difference in principle between the Court of Review and the learned trial judge is fundamental.

A *considérant* in the judgment of the trial judge reads in part as follows:—

Considérant que le juge doit, quand il rend sa sentence, se rapporter à l'état de chose existant, au moment de la demande, et placer les parties, dans la situation où elles se seraient trouvées respectivement, s'il avait pu statuer immédiatement, les plaideurs ne devant pas souffrir des lenteurs de la justice, qui ne leur sont pas imputables, et que de même que des dommages réclamés par suite d'une rupture illégale de contrat, ne sauraient recevoir d'augmentation, par suite de circonstances subséquentes, comme une législation nouvelle, ou de récentes découvertes de la science apportant de nouveaux moyens d'exploitation, de même qu'ils ne sauraient recevoir de diminution, par suite de circonstances subséquentes et d'une nature temporaire, comme le relachement des affaires ou une guerre soudaine, et que si la rupture du contrat que le défendeur a voulu dissoudre, malgré les protestations de son associé, n'a pas été aussi fructueuse qu'il se l'était imaginé, par suite d'évènements qu'il n'a pas su ou n'a pas pu prévoir, il ne saurait en avoir le bénéfice, et que le demandeur a droit aux dommages causés par le défendeur et existant, autant qu'il est possible de les constater, à la date du 11 septembre 1913, jour de la rupture violente par le défendeur du contrat de société.

Very early in the course of the trial the learned judge said:—

We have to decide the right of the parties at the date of the pleadings, so that what happens subsequently to that we have nothing to do with.

He accordingly assessed the plaintiff's damages on the assumption that but for the defendant's breach the partnership would have endured for nineteen months longer (the learned judge was somewhat in error in this computation of time), and that its profits during that period would have been proportionate to the $104,000 earned by it during the twelve months immediately preceding the breach; and on that footing he valued the plaintiff's loss of his share of the profits of the partnership business at $80,000.

The following passages from the formal judgment of the Court of Review, on the other hand, indicate the basis on which it proceeded:—

Considérant que dans l'estimation des dommages-intérêts réclamés par le demandeur, la cour doit tenir compte du passé de la dite société, des profits qu'elle avait faits jusqu'à la dissolution et des profits qu'elle devait rapporter aux associés, et cela en prenant en considération non seulement les faits qui existaient lors de la dissolution, mais encore les faits survenus depuis la dite dissolution, qu'il était possible d'établir au moment où s'est faite l'enquête;

Considérant qu'il est établi par la preuve que depuis 1911 jusque vers le printemps de 1913, le commerce d'immeubles que faisait la société a été très prospère, mais que depuis cette époque le commerce a subi une dépression graduelle jusqu'à la déclaration de guerre qui a eu lieu au commencement d'août 1914;

* * * * *

Considérant que les tribunaux sont censés connaître l'existence de l'état de guerre et sa continuation;

Mr. Justice (now Chief Justice) Lamothe, in his opinion, thus states the view of the court:—

L'action a été intentée en décembre 1913; et la Cour Supérieure a posé en principe qu'elle ne devait pas prendre connaissance des faits postérieurs à cette date. Ce principe existe; il doit recevoir son application dans toutes les causes où la réclamation est basée purement sur des faits arrivés ayant fixé d'une manière définite la responsabilité des parties. Mais dans les cas où la réclamation est faite pour des dommages futurs, dommages basés sur des faits futurs et probables (savoir sur la continuation présumée d'une certaine série de faits et de circonstances), la cour doit s'éclairer à la lumière des faits survenus subséquement, et, alors, au lieu de simples probabilités, la cour a devant elle des faits certains.

He also points out certain misleading elements included in the statement of earnings for the twelve months' period before the breach relied on by the learned trial judge. The formal judgment discloses the method of calculation by which the court reached its assessment of $22,000. Of this I shall have something further to say when discussing the *quantum* of the damages.

The Court of King's Bench, without disapproving of the basis of assessment in the Court of Review, finds:

Que le cour de première instance lui a accordé un montant trop élevé et que la cour de révision a accordé un montant insuffisant;

1919
FINDLAY
v.
HOWARD.
Anglin J.

and after alluding to certain alleged oversights in the estimate made by the Court of Review continues:—

Considérant que le montant le plus probable et le plus équitable, devrait être un juste milieu entre le montant accordé par la Cour Supérieure et celui alloué par la cour de révision, ce qui ferait une somme d'à peu-près $50,000; mais que, à tout événement, il est certain, vu la preuve, que le demandeur appelant droit à un chiffre minimum de $40,000;

While claiming by his cross-appeal the restoration of the judgment of the trial court, counsel for the respondent in his factum appears partially to admit the soundness of the basis of assessment adopted by the Court of Review in this passage:—

It is not pretended that the past profits must be taken as a fixed and settled basis for settling the amount of future profits, for naturally all business is subject alike to periods of prosperity and depression and revenue from business in hand must necessarily be considered as subject to the ordinary trade contingencies, but the earnings of the firm in the past, especially if such earnings cover a period of years, are a good criterion of probable earnings in the future and deserve most serious consideration.

Citing the case of *Wakeman* v. *Wheeler & Wilson Manufacturing Co.* (1), he quotes these two sentences from the judgment:—

When the contract is repudiated the compensation of the party complaining of its repudiation should be the value of the contract. * * * His damages are what he lost by being deprived of his chance of profits.

The same principle is enunciated by the Judicial Committee in *Wertheim* v. *Chicoutimi Pulp Co.* (2):—

The general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position he would have been in if the contract had been performed.

An apt illustration of the application of these principles is afforded by the House of Lords in *British Westinghouse Electric & Manufacturing Co.* v. *Underground Electric Railways Co. of London* (3), the head note of which is as follows:—

(1) 101 N.Y. 205.
(2) [1911] A.C. 301, at p. 307.
(3) [1912] A.C. 673.

Held, that the pecuniary advantage which the railway company derived from the superiority of the substituted turbines (*i.e.*, substituted for turbines supplied by the defendant which were deficient in value), was relevant matter for the consideration of the arbitrator in assessing damages.

In Mayne on Damages, 8th ed., at p. 141, the author says:—

> Where the action is to recover damages for some loss arising from the defendant's acts, evidence is admissible to shew that the injury is not so great as would at first appear.

In Arnold on Damages, at p. 23, after referring to the authorities, the learned author says:—

> The conclusion to be arrived at is that where a contract is broken the cause of action at once accrues. The plaintiff may immediately sue for damages, and the measure of damages must be assessed as being the loss or injury sustained at the date of the breach of contract. But for the purpose of estimating the present loss, probable future events must be considered, and if the bringing of the action be delayed, evidence as to actual subsequent consequential damage or subsequent relevant facts in mitigation of damage may be given.

In *Batten* v. *Wedgwood Coal & Iron Co.* (1) where a solicitor acting for a receiver failed to fulfil a duty to have money invested in consols he was held liable for loss of interest which would have been earned by the investment, but he was allowed to set off a gain to the client resulting from a fall in the price of consols between the date that the investment should have been made and the date of hearing. The receiver is only entitled to be recouped what he has actually lost.

In *Laishley* v. *Goold Bicyle Co.* (2), in allowing an appeal from Ferguson J., Garrow J.A., speaking for the Ontario Court of Appeal, thus discusses, at p. 324, the proper basis for the computation of damages analogous to those here claimed:—

> The breach is clear and admitted, and the only reason, apparently, for not permitting the ordinary consequences of adequate damages being adjudged to the plaintiff, is because such damages are, it is said, too vague and conjectural, which is the question to be determined on

(1) 31 Ch.D. 346.

(2) 6 Ont. L.R. 319.

1919
FINDLAY
v.
HOWARD.
Anglin J.

this appeal. Damages are very seldom capable of exact calculation, and yet I think many cases can be found in which damages have been awarded where the basis for a calculation was less certain than in this case. To begin with, there is the undisputed fact of the plaintiff's past earnings from commissions in 1898 and 1899; certainly some evidence of what he would probably have earned in 1900 and, indeed, in my opinion, strong evidence, unless affected by counter evidence on the part of the defendants to shew that these past earnings were abnormal, or that the business had depreciated or come to an end. But we have here not merely the past earnings but the fact that the bicycle business was continued under the new company after the plaintiff's dismissal, during the year 1900, but with, it is said, a diminished market. The manager for the new company puts this depreciation at about 40% of the previous year's demand; and another witness called by the defendants at about 50%. Giving credit to these witnesses, it appears to me that there is proper and even sufficient material for a reasonably correct calculation of the amount of the damages in question to which the plaintiff is entitled, having regard, of course, to what the situation and outlook were at the time of the breach in November, 1899.

The decision of this court in *Cockburn* v. *Trusts & Guarantee Co* (1), proceeds on the same view of the aw as does also our decision in *Wood* v. *Grand Valley Railway Co.* (2).

I have cited the foregoing authorities decided upon English law because many of them are relied on by the parties and because there appears to be a dearth of French authority on the matter under consideration. The principles under which damages are awarded under the law of Quebec in a case such as this are to be found in the following passages from the Civil Code:—

Art. 1065.—Every obligation renders the debtor liable in damages in case of a breach of it on his part * * *

Art. 1073.—The damages due to the creditor are in general the amount of the loss which he has sustained and of the profit of which he has been deprived * * *

Art. 1074.—The debtor is liable for the damages which have been foreseen, or might have been foreseen, at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

(1) 55 Can. S.C.R. 264; 37 D.L.R. 701.

(2) 51 Can. S.C.R. 283; 22 D.L.R. 614.

Art. 1075.—In the case even in which the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution.

Before proceeding to consider the quantum of damages justified by an application of these principles to the facts in evidence, I shall say a word on the merits, merely to indicate how far they influence me in the assessment. The trial judge found that

la société qui a été en existence entre les parties pendant environ trois ans et demi, avec un succès phénoménal, a été dissoute par le defendeur, illégalement, sans raison ni cause, d'une façon brutale, injuste, déloyale et malhonnête, que le défendeur, volontairement et délibérément, a renversé le superbe édifice élevé par l'activité, le zèle, l'industrie et l'habilité des associés, afin d'en faire sortir le demandeur, qui en était le propriétaire conjoint, et en devenir le seul maître et propriétaire, etc.

The Court of Review held

que le demandeur a prouvé l'allégation essentielle de sa demande, à savoir; que le défendeur a mis fin, sans cause légitime, au dit contrat de société, et que le défendeur n'a pas établi ses allégations sur ce point.

The Court of Appeal expressed its view in these terms:—

Considérant que l'intimé a mis fin au contrat de société existant entre lui et l'appelant et cela 21 mois avant l'expiration du terme convenu;

Considérant que la conduite de l'intimé sous ce rapport était arbitraire, injustifiable et inexplicable.

Considérant qu'aucune raison n'a été donnée par l'intimé pour justifier sa conduite, lorsqu'il a prétendu mettre fin à la dite société.

Having declined to hear argument by his counsel on the question how far the defendant's conduct should be deemed morally reprehensible, we should not, in my opinion, treat him as deserving of censure more severe than that pronounced by the judgment of the Court of Review in which he acquiesced.

But however gross the violation of the plaintiff's right, however discreditable the defendant's motives, the damages cannot be other than

compensation for pecuniary loss naturally flowing from the breach.

1919
FINDLAY
v.
HOWARD.
Anglin J.

No punitive or vindictive consideration may enter into the assessment. Art. 1075 C.C. must be obeyed. In the case of fraudulent breach of contract actual damages sustained, though unforeseen at the date of the contract, must be made good. Where the breach is not accompanied by fraud damage which could not have been foreseen cannot be recovered. Whatever may have been the motive that induced the defendant to break the partnership contract, he took that step freely and deliberately and it must be ascribed to a determination to serve some purpose of his own. In the absence of proof of justification, such a breach should, I think, be regarded as falling within art. 1075 C.C. rather than within art. 1074.

Assuming the conduct of the defendant to merit no more emphatic denunciation than that pronounced by the Court of Review, in regard to such elements of damage as cannot be measured with mathematical exactitude but must be determined on such probabilities as a jury is justified in proceeding upon, he is not entitled to expect that the amount of the plaintiff's compensation shall be weighed in golden scales or to have the sum allowed interfered with on appeal merely because of some trifling error in its computation. On the other hand, he would be entitled to complain of any palpable substantial excess in the award, even were his conduct properly characterized by the vigorous terms employed by the learned trial judge.

Under art. 1075 C.C. the plaintiff would have been entitled to any unforeseen damages which were an immediate and direct consequence of the breach although they would not have arisen but for the happening of some events which could not have been anticipated when the contract was entered into. I have no doubt whatever that events which happened after the breach and would have adversely affected the

profits that the plaintiff would have made had the contract been carried out until the end of the five year term must likewise be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach.

The purpose of awarding damages being to compensate for a loss sustained by the plaintiff, it seems to me, with great respect for those who take the contrary view, to be repugnant to common sense that he should be permitted to recover for loss which facts within the cognizance of the court at the time of the trial shew he did not suffer merely because upon the facts as they stood at the date of the commission of the wrong which subjected the defendant to liability, or even at the time the action was begun, it seemed probable that such loss would be sustained.

If there had not been any clear error in the basis of computation in the judgment of the Court of King's Bench, although it increased the amount of the damages allowed by the Court of Review by $18,000, I should have been loath to disturb it on a mere question of quantum, in a case where it is so obviously impossible to ascertain with anything approaching exactitude the amount of the damage actually sustained. But unfortunately for the plaintiff that court, as appears from the opinion of Mr. Justice Pelletier, made the mistake of taking the $104,000 of earnings (which represented $67,000 of profits proper to be taken into account in the opinion of that learned judge) for the year ending the 3rd of November, 1913, the period immediately preceding the breach, as having been received during the year which followed the breach, *i.e.*, the year ending on November 30th, 1914. Pro-

1919
FINDLAY
v.
HOWARD.
Anglin J.

ceeding on this erroneous footing the learned appellate judge estimated that the net profits for the latter period, had the plaintiff Howard continued to act as a member of the partnership during it, would have been not the $67,000 actually earned by the defendant, as he understood, but $33 000 more, *i.e.*, $100,000. It was by adding one-hal of this additional amount, $16,500, to the estimated earnings for the twelve months following the breach (November 30, 1913, to November 30, 1914) and a further sum of $9,000 ($750 per month), to cover what would have been Howard's probable share of the earnings for the last year of the partnership term (August, 1914, to August, 1915), for which the Court of Review had allowed nothing, to the $22,000 allowed by that court that Mr. Justice Pelletier reached a sum approximating $60,000 as the amount of the plaintiff's damages which, in order to be "*bien sûr de ne pas commettre d'erreur*," he fixed at $40,000. The learned appellate judge apparently quite overlooked the fact that the allowance for profits in the $22,000 and $16,500 was based on figures carried down to the 30th of November, 1914, and that the $750 a month, if a proper addition, should, therefore, have been for nine months and not for twelve months. Of course a judgment based on such a manifest and fundamental error as that in regard to the year in which the $104,000 was earned cannot be sustained. There is nothing to shew that had it not been for this mistake the Court of King's Bench would have disturbed the assessment of the damages made by the Court of Review.

But it does not follow that the amount allowed as damages by the Court of King's Bench was clearly wrong or that the assessment of the Court of Review ought to be restored. The judgment of the latter court has been set aside and before we can restore it

we must be satisfied that the respondent is not entitled to a larger sum than it awards. We are simply left without the assistance of the opinion either of the trial court or of the Court of King's Bench as to the quantum of the damages, the assessment of the former having been based on an erroneous conception of the law, and that of the latter on a mistaken view of the facts. Under these circumstances we must determine for ourselves, proceeding largely as a jury, what is a fair amount to compensate the plaintiff for the loss of the profits that he would have received had the partnership business been continued until the 22nd of August, 1915, as the contract of the parties contemplated.

Inasmuch as the judgment of the Court of Review is based on a correct appreciation of the law as to the measure of the damages recoverable and has not been appealed from by the defendant, it might at first blush seem to be not unreasonable to limit the inquiry to ascertaining by what sum, if any, the $22,000 which it awards should be increased. On the whole, however, I think this would not be a satisfactory mode of dealing with the case. The basis on which the Court of Review estimated the plaintiff's profits for the eight months from November 30th, 1913, to August 1st, 1914, at $17,800 seems to me, with respect, to be too fanciful. Moreover, there is a patent mistake in its calculation. Estimating the profits of the business from November 30th, 1913, to November 30th, 1914, at $25,663 (as hereinafter indicated), the court in making its calculation took one-half of this amount, $12,800, instead of $8,500 as the plaintiff's share of them for eight months. I, therefore, incline to think it will not be advisable to take as a starting point the $22,000 assessed by it as the plaintiff's damages.

In arriving at what would probably have been the profits for the year from November 30th, 1913, to

1919
FINDLAY
v.
HOWARD.
Anglin J.

November 30th, 1914, however, the Court of Review, very properly in my opinion, added to the $13,353 profits made by the defendant during that period, as shewn by his statement, several amounts which should not have been deducted from the gross earnings as against the plaintiff, thus bringing the profits actually earned by Findlay in that year for the purpose of its calculation up to $25,633. Having regard to the evidence of the witnesses DeCary, Beausoleil, Browne and Davis that the real estate market was, if anything, better between August, 1913, and August, 1914, than it had been during the preceding twelve months and giving due weight to the testimony of Messrs. Peloquin (50% decline in eight months before the war), Short (falling off began in the summer of 1913), Kirkpatrick, Casgrain, Ogilvy and Avard, in view of the enormous earning capacity of Findlay and Howard during the three years when both partners were co-operating, and especially to the profits of at least $67,000, or $33,500 for each partner, made during the twelve months ending November 30th, 1913, I think there should have been allowed for the diminution of earning capacity due to Howard's absence during the latter twelve months over and above the $4,800 salary paid by Findlay to Parker, who replaced him, an additional sum of about $12,000, making the total probable profits for the year from November 30th, 1913, to November 30th, 1914, had Howard continued in the business, $37,633 instead of the $25,633 estimated by the Court of Review. On that basis the plaintiff's share would have been $18,800.

No doubt the sales branch of the real estate business, formerly its most profitable part, amounted to little or nothing during the first year of the war. But, according to the evidence, collections continued to be good. I incline to think that had the partnership

business of "Findlay & Howard" been conducted during that year, having regard to the volume of its outstanding business, and its very extended connections, by cutting down expenses and "carrying on" on a conservative basis some substantial profits might have been realized. Placing them at one-fifth of the earnings in the preceding period of one year (obviously the approximation of a juryman), the plaintiff's share for eight months would have been $2,500—about $300 a month in lieu of the $750 a month which Mr. Justice Pelletier was disposed to allow.

If the goodwill of the business of "Findlay & Howard" should not be regarded as one of the partnership assets as to which the plaintiff expressly reserved his rights, I am unable to find any appreciable value in it having regard to the character of the business and the events which followed the improper breaking up of the partnership.

I am not disposed to make any deduction on account of the plaintiff's receipts from assets taken over by him—the effect of that has been already allowed for in the reduced profits—or because of his failure to take steps to earn money in some other capacity than as a real estate agent.

Fully realizing that my estimate of the damages is quite as likely to be inaccurate as that of the Court of Review or of the Court of King's Bench, but discharging the functions of a juryman as best I can, I would, therefore, estimate the plaintiff's damages at $18,800 plus $2,500, or, say, $21,300 in all.

It follows that the judgment of the Court of Review for $22,000 should be restored. The appellant should have his costs here and in the Court of Appeal.

BRODEUR J. (dissenting)—Il s'agit dans cette cause de dommages-intérêts réclamés par le demandeur-

1919
FINDLAY
v.
HOWARD.
Brodeur J.

intimé, Howard, contre le défendeur appelant, Findlay, parce que ce dernier aurait illégalement mis fin à la société qui existait entr'eux.

Le 22 août 1910, par acte notarié, les parties se mettaient en société pour tenir une agence d'immeubles à Montréal. La durée de la société était fixée à cinq ans. Les trois premières années ont été des plus prospères et la société a réalisé des profits au montant d'environ $450,000.

Le 11 septembre 1913, l'appelant Findlay mettait fin à la société sans donner de raisons valables. Howard protesta naturellement contre cette dissolution prématurée. Des négociations eurent lieu pour amener une dissolution à l'amiable. On s'entendit sur le partage de l'actif; mais on ne put réussir à déterminer la quotité des dommages que Howard réclamait pour cette dissolution illégale. De là la présente action.

La Cour Supérieure a accordé $80,000 à Howard. La Cour de Revision a réduit les dommages à la somme de $22,000. Howard a alors porté sa cause en Cour d'Appel qui lui a accordé $40,000. Les deux parties appellent de ce dernier jugement. Findlay accepterait cependant le jugement de la Cour de Revision et ne voudrait être condamné qu'à $22,000; Howard voudrait avoir les $80,000 qui lui ont été accordées par la Cour Supérieure. Nous avons alors un appel de la part de Findlay et un contre-appel de la part de Howard.

La Cour Supérieure n'a pas voulu prendre en considération les faits qui ont eu lieu postérieurement à l'institution de l'action mais elle a déclaré.

que le juge doit, quand il rend sa sentence, se rapporter à l'état de choses existant au moment de la demande.

La Cour de Revision a, au contraire, décidé de prendre en considération les faits survenus depuis la

dissolution de la société et qui ont été établis au moment où s'est faite l'enquête. Voilà les deux points de vue différents auxquels ces deux cours se sont placées.

Si nous avions à disposer de cette cause d'après les principes du droit anglais, il y a de nombreuses décisions à l'effet que l'enquête peut porter sur les faits antérieurs aussi bien que postérieurs à l'institution de l'action et aux plaidoiries. *Sowdon* v. *Mills* (1); *British Westinghouse* v. *Underground Electric* (2); *Cockburn* v. *Trusts & Guarantee Co.* (3); Halsbury, vol. 18, No. 522.

Mais cette cause ayant originé dans la province de Québec, elle doit être décidée suivant les principes du droit en force dans cette province; et, par conséquent, à moins que les deux législations ne soient semblables, je ne puis accepter les nombreuses autorités anglaises citées par l'appelant dans son factum.

Il est de principe élémentaire en droit civil que les jugements ont un effet rétroactif et remontent, en général, au jour de la demande et des plaidoiries.

Si les parties veulent faire adjuger sur des faits postérieurs à leurs plaidoiries respectives, ils doivent se pourvoir en conséquence. Ainsi le demandeur peut pendant l'instance former une demande incidente pour demander un droit échu depuis l'assignation (art. 215 C.P.C.). Il en est de même pour le défendeur qui peut faire une demande reconventionnelle pour une réclamation de deniers qu'il peut avoir résultant d'autres causes (art. 217 C.P.C.). Si certains faits sont survenus depuis la contestation, le juge peut permettre de faire valoir, par voie de plaidoyer ou de réponse *puis darrein continuance* ces faits nouveaux (art. 199 C.P.C.).

(1) 30 L.J.Q.B. 175, at pages 176 and 177.
(2) [1912], A.C. 678.
(3) 55 Can. S.C.R. 264; 37 D.L.R. 701.

1919
FINDLAY
v.
HOWARD.
Brodeur J.

Schiller v. *Daoust* (1); *Duhaut* v. *Pacaud* (2); Rapport des codificateurs sur art. 199 C.P.C.—La preuve doit ensuite se faire sur les faits mentionnés dans la demande et la défense et dans les demandes, incidentes ou reconventionnelles ou défenses ou réponses *puis darrein continuance.* (Arts. 286, 334, 339 C.P.C.)

Le jugement qui est ensuite rendu a un caractère déclaratif et a pour objet de constater un droit préexistant.

Il résulte de là, dit Dalloz, Répertoire Pratique, No. 585, vo. Jugement,

que les jugements ont un effet rétroactif et que le droit qu'ils constatent est censé avoir existé *ab initio. C'est au jour de la demande qu'il faut se placer pour apprécier la situation juridique des parties.*

Nous voyons le même principe énoncé dans Garsonnet, par. 1161; Garsonnet & Bru, No. 737; et dans les décisions suivantes; Dalloz, 1868-1-397; Dalloz, 1901-1-621.

Il résulte de cela que les droits des parties dans cette cause doivent être déterminés de la date de l'institution de l'action et non pas suivant les faits et les circonstances qui sont postérieurs. Ainsi la Cour de Revision a réduit les dommages parce que le commerce d'agence d'immeubles, dans lequel les parties étaient engagées, s'est trouvé sérieusement affecté par la guerre.

La guerre a été déclarée en août 1914. L'action avait été instituée en décembre 1913; et, suivant moi, les droits des parties doivent être déterminés et les dommages doivent être évalués de cette dernière date, c'est-à-dire du mois de décembre 1913. Si des événements postérieurs ont influé sur la prospérité ou l'insuccès du commerce des parties, nous n'avons pas à nous en préoccuper.

(1) Q.R. 12 S.C. 185. (2) 17 L.C.R. 178.

Le juge, en évaluant les dommages résultant de l'inexécution d'une obligation, doit prendre en considération les événements passés et les perspectives de l'avenir. Par exemple, dans le cas actuel, il pouvait bien examiner les profits que les associés avaient faits dans le passé, les tendances du commerce à augmenter et à diminuer, et les prévisions ordinaires qui peuvent être faites dans ces circonstances pour l'avenir. Mais il doit se placer à l'époque de l'institution de l'action et voir quels étaient les dommages que les parties pouvaient s'attendre de payer et de recevoir à raison de l'inexécution de l'obligation. Pouvait-on alors prévoir qu'une guerre mondiale éclaterait d'ici à quelques mois? Il n'y en avait aucun indice. Vouloir, maintenant que la guerre a été déclarée, prendre en considération l'effet de la guerre sur les opérations commerciales des parties, c'est violer, suivant moi, un des principes élémentaires du droit civil.

Findlay a jugé à propos, dans l'automne de 1913, de ne pas exécuter son obligation, qui était de maintenir ce contrat de société jusqu'au 22 août 1915. Alors on doit le condamner aux dommages qui pouvaient être prévus et déterminés quand il a poursuivi.

Dans le cas des expropriations où la loi détermine une date à laquelle la valeur d'une bâtisse expropriée devrait être déterminée, si une guerre survient subséquemment qui détruit cette bâtisse, on doit alors déterminer la valeur de cette bâtisse non pas au jour de la sentence arbitrale mais au jour fixé par le statut. *McCarthy* v. *City of Regina* (1); Crisp on Compensation, p. 70.

La Gazette des Tribunaux rapporte une décision de la Cour de Paris qui est à l'effet qu'il faut se placer pour calculer l'étendue du préjudice à une époque

(1) 58 Can. S.C.R. 349; 46 D.L.R. 74.

1919
FINDLAY
v.
HOWARD.
Brodeur J.

voisine du terme fixé pour l'exécution du marché. Il s'agissait dans cette cause de marchandises dont le prix avait été affecté par la guerre. (1917-2-119.)

J'en suis donc venu à la conclusion que la Cour de Revision a fait erreur en prenant en considération l'effet de la guerre sur le commerce des parties.

Maintenant quels sont les dommages auxquels le demandeur Howard a droit?

Par les articles 1073 et suivants du Code Civil, les dommages-intérêts sont le montant de la perte qu'il a faite et du gain dont il a été privé; et si le débiteur n'est pas coupable de dol, il n'est tenu que des dommages qu'on a prévus au moment du contrat; et, dans tous les cas, les dommages-intérêts ne comprennent que ce qui est une suite immédiate et directe de cette inexécution.

Findlay avait un contrat de société qui le liait pour cinq ans. Après un peu plus de trois ans il met fin à ce contrat; et, au lieu de poursuivre pour le faire résilier s'il avait des raisons valables, il se fait justice à lui-même en formant une nouvelle compagnie et en transportant ou faisant transporter à cette nouvelle compagnie toutes les affaires de l'ancienne compagnie Findlay & Howard.

Cette conduite de la part de Findlay le constitue de mauvaise foi; et alors on doit lui appliquer les règles édictées par l'article 1075 C.C. qui punit le débiteur qui se rend coupable de dol. Le dol dont parle cet article ne consiste pas dans ces manœuvres frauduleuses qui ont pour but d'amener quelqu'un à contracter et dont il est question dans l'article 993 C.C., mais c'est le fait par lequel le débiteur frustre le créancier de ses droits. Baudry-Lacantinerie, vol. 11, no. 483. Boileux sous art. 1151 C.N.

Les profits avaient été dans l'année de la dissolution de $104,000. Dans ce chiffre, se trouve le guide le plus sûr que les tribunaux doivent suivre pour déterminer la perte que Howard a subie par la dissolution de la société. On a prétendu que dans l'automne de 1913, c'est-à-dire lors de la dissolution, le commerce d'immeubles avait une tendance vers la baisse. Sur ce point la preuve est contradictoire. Je vois, entre autres témoins, M. Décary qui jouit d'une très grande réputation, qui affirme le contraire. Mais si on prend les profits faits par les associés les années précédentes et ceux faits en 1913, il est évident que le commerce d'immeubles subissait une dépression. Et alors nous devons prendre ce fait en considération.

Il convient de mentionner que de cette somme de $104,000 on doit déduire certains profits que Howard devra recevoir sur la part de l'actif qui lui est échu par le partage. Ces profits ont été estimés par le Cour de Revision à environ $37,000.

En déduisant ces $37,000 des $104,000, nous arrivons à une somme de $67,000 pour l'année, ou $5,500 par mois. Du 30 novembre 1913, date à laquelle cet état a été préparé, jusqu'au 22 août 1915, date où la société se terminait, il y avait encore plus de vingt mois. En multipliant la somme de $5,500 par 20 j'arrive à un profit probable, que la société aurait fait, de la somme de $110,000, soit pour Howard une somme de $55,000. On devait présumer, comme je l'ai dit plus haut, que les profits seraient un peu moindres que cela à cause de la tendance du marché vers la baisse. Je crois donc qu'en accordant $40,000, c'est-à-dire la même somme que celle qui a été accordée par la Cour d'Appel, nous rendrions pleine et entière justice aux parties.

Je serais donc d'opinion de renvoyer l'appel et le contre-appel avec dépens.

1919
FINDLAY
v.
HOWARD.
Mignault J.

MIGNAULT J.—This case raises some important questions on which notable differences of opinion have existed between the different courts that have dealt with it, although in each court the judgment was unanimous. There is before this court an appeal and a cross-appeal shewing that neither party is satisfied with the judgment rendered by the Court of King's Bench. The main respondent and cross-appellant, Howard, would, however, accept the latter judgment if he cannot get the judgment of the Superior Court restored. On the other hand, the main appellant and cross-respondent, Findlay, is now satisfied to abide by the judgment of the Court of Review, which, moreover, is conclusive against him inasmuch as Howard alone appealed from it. The only question at issue under these circumstances is the amount of damages, the liability of Findlay to pay to Howard at least $22,000, the amount granted by the Court of Review, being conclusively established.

Findlay and Howard had entered into a partnership to carry on a real estate business in Montreal for a term of five years from the 22nd August, 1910, which business they conducted by means of a joint stock company, "Findlay & Howard, Limited." Their profits were phenomenal, especially at first, owing to the real estate boom then prevailing in Montreal and vicinity. The partnership had nearly two years to run when, on the 11th September, 1913, Findlay put an end to it without cause or reason. Howard now claims damages and these must run from a minimum of $22,000, allowed by the Court of Review, to a maxiumum of $80,000 granted by the Superior Court. The Court of King's Bench awarded $40,000.

There is, however, an important question of law on which the Superior Court and the Court of Review took opposite sides, but which was not expressly

passed upon by the Court of King's Bench. Is the court, in assessing damages for Findlay's wrongful termination of this partnership, entitled to consider facts subsequent to the action and shewing what profits the partnership would have earned had there been no dissolution? Or must it ignore all such facts, the most important of which is the European war which paralyzed the real estate business in Montreal, and assess these damages on the basis of conditions as they existed on the 11th September, 1913, date of the breach of contract? The Superior Court adopted the second alternative, the Court of Review the first.

The learned trial judge lays down the rule that damages being, in general, according to art. 1073 C.C.,

le montant de la perte faite par le créancier et du gain dont il a été privé,

the court must, in rendering its decision, go back to the conditions existing at the date of the action, and place the parties in the situation in which they would have been had the judgment been rendered immediately, and that the damages for breach of contract can neither be increased by reason of subsequent circumstances, such as new legislation or recent discoveries of science, nor diminished on account of subsequent facts of a temporary nature, such as a slackening of business or a sudden war.

I would not feel disposed to quarrel with this rule rightly applied to a proper case. But, as I construe Howard's action, he is claiming, not the value of his share in the partnership as it stood at the date of the breach, for he expressly reserves his right to recover his share and proportion of the assets of Findlay & Howard, Limited, but the value of his share of the profits the partnership would have realized had not Findlay's wrongful act brought it to an end. That is to say, Howard demands really future damages, and I cannot

1919
FINDLAY
v.
HOWARD.
Mignault J.

follow the learned trial judge when he estimates the value of the future profits of the partnership by considering only its past profits, as if they were sure to continue, and closes his eyes to events which had happened since the action, but before the trial, and which shewed that these future profits would in no wise have been comparable to those made before the date of the breach. Where future damages are claimed, future conditions must necessarily be considered, and what better evidence of conditions, which were in the future at the date of the breach, can be made than by shewing, at the date of the trial, what has actually occurred since the breach of contract?

I, therefore, think that in his estimation of the damages granted to Howard, the learned trial judge has adopted an erroneous principle, and consequently his judgment cannot be restored.

The Court of Review, on the contrary, lays down a rule which I fully accept as applied to this case, and which I quote:—

> Considérant que dans l'estimation des dommages-intérêts réclamés par le demandeur, la cour doit tenir compte du passé de la dite société, des profits qu'elle avait faits jusqu'à la dissolution et des profits qu'elle devait rapporter aux associés, et cela en prenant en considération non seulement les faits qui existaient lors de la dissolution, mais encore les faits survenus depuis la dite dissolution, qu'il était possible d'établir au moment où s'est faite l'enquête.

The judgment of the Court of King's Bench, I have said, does not expressly pass upon the question to which I have just referred, but holding that both the Superior Court and the Court of Review were in error, the former in granting too much, the latter in allowing too little, it comes to the conclusion that

> le montant le plus probable et le plus équitable devrait être un juste milieu entre le montant accordé par la cour supérieure et celui alloué par la cour de revision, ce qui ferait une somme d'à peu près $50,000, mais que, à tout événement, il est certain, vu la preuve, que le demandeur appelant a droit à un chiffre minimum de $40,000.

If I may say so, with deference, this selection of a *juste milieu* between the amounts allowed by the Superior Court and the Court of Review, is rather a too rough and ready way of determining the amount which Howard ought to receive, and I cannot feel that I should adopt it. Moreover, Mr. Justice Pelletier, who alone gave reasons for judgment, seems to take it that the partnership realized $104,000 for the year which followed the breach, whereas these profits were for the year which preceded the breach and had only a couple of months to run when Findlay broke the partnership.

I would, therefore, apply the rule adopted by the Court of Review, and consider the profits made by the partnership during the past up to the date of the breach, and those which it would have made had it continued for its full term, estimating the latter in the light of the circumstances disclosed by the evidence as having happened up to the date of the trial, some of which, like the gradual decline of the real estate boom in Montreal, could have been foreseen in September, 1913, and others, like the European war, were of such a nature that no man not versed in the secrets of diplomacy and of continental politics could have ventured to predict them.

In my view, the question of good or bad faith or of fraud, or what the French text of the Civil Code calls "dol" in articles 1073, 1074 and 1075 C.C., has little application here, for I am willing to grant that Findlay acted in bad faith in breaking his contract, and he is liable for all damages foreseen or not which Howard suffered through the breach, provided that they directly resulted therefrom. If he is liable for the unforeseen but direct consequences of his breach of contract, he should at least, in an action claiming

1919
FINDLAY
v.
HOWARD.
Mignault J.

future damages, have the benefit of unforeseen circumstances, ascertained at the trial, shewing that these future damages were not incurred, or were incurred in a less degree that seemed probable at the date of the breach. This, moreover, is not a case where I would deem myself justified in granting punitive damages, although the conduct of Findlay was very reprehensible, or anything more than real damages, for Howard, who, I repeat, claims damages for the loss of future profits, should not be placed in a better position by reason of the breach of his contract than he would have found himself had the breach not occurred.

Taking now the past profits of the partnership, they are as follows:—

For the first 18 months	$203,318.53
For the year ending on the 30th November, 1912	161,216.83
For the year ending on the 30th November, 1913	104,121.05

and from the latter sum certain amounts mentioned by the Court of Review should be deducted.

The evidence shews that the boom was at its height up to the close of 1912, that it then began to decline, and that the bubble—because, like so many other land booms, it was only a bubble—was rapidly nearing the bursting point when the war suddenly broke out to the astonishment of the whole world. The war killed it, and thenceforth, the witnesses say, the real estate business was dead.

The decline of the boom is shewn by the figures I have given as it affected Findlay & Howard, Limited. After the breach, Findlay continued the same business in the same premises, with the same subsidiary companies or syndicates formed by the parties, with also the same employees, with the exception of Edward C.

Parker whom he engaged to replace Howard, while the latter did not go in the real estate business fearing, he states, had he competed with Findlay, that he might endanger his security for his claim for damages against Findlay, and yet Findlay's profits, for the year ending on the 30th November, 1914, are shewn by his balance sheet to have been only $13,353.86.

But the Court of Review refused to take the latter figure as being a fair statement of the profits made by Findlay in the year ending on the 30th November, 1914. It deducted from the amounts indicated by Findlay's balance sheet as expenses the following items:—

Salary of Parker who replaced Howard	$4,800.00
Deduction on automobile expenses and depreciation, comparing these expenses to those mentioned during the three years and half of Findlay & Howard	2,000.00
Expenses of stationery which seemed unjustifiable when comparing 1914 with previous years	1,000.00
Travelling expenses which were, in comparison with previous years, considered too high	4,500.00
Making in all	$12,300.00
Which added to the profits declared by Findlay's first balance sheet	13,353.86
would give a real profit of	$25,653.86

Then the Court of Review compared the eight months of pre-war conditions in Findlay's first year, considering the business as having been dead during the four months of war, to the corresponding period in Findlay & Howard's last year, and found that Howard received for the latter

period about	$22,300.00
and that he would have been paid for the former period about	12,800.00
Making a total of	$35,100.00

1919
FINDLAY
v.
HOWARD.
Mignault J.

This would be, if Howard's share of profits were averaged, as the Court of Review averaged them, an amount of $17,550 for each period, so the court fixed Howard's share of profits for the year ending on the 30th November, 1914, had the partnership continued, at $17,500.

To this figure it added the sum of $4,500, which is estimated as Howard's share of the additional profits which he would have brought to the partnership had he not been excluded therefrom, and thus arrived at the total figure of $22,000 which it considered as representing Howard's loss of future profits through the breach of the contract of partnership.

I must confess that, in my opinion, the Court of Review dealt liberally with Howard. Its figures would shew that, the business having been at a standstill since the 1st of August, 1914, on account of the war, Howard would have received, for the year 1914, one-half of $25,633.86, or $12,816.93, and not its average of $17,500, which would decrease the damages it allowed by nearly $5,000. I fail to see the reason for averaging two years during which the land boom gradually and very rapidly declined, but Findlay is bound by the judgment of the Court of Review, and the amount this judgment granted to Howard cannot be decreased.

I have said that the judgment of the Superior Court cannot be restored, so the choice is between the judgment of the Court of Review and that of the Court of King's Bench.

I cannot, with deference, agree with the latter court when it endeavours to arrive at a *juste milieu* between the judgment of the Superior Court, which proceeded on an entirely wrong principle, and that of the Court of Review whose governing rule as to these

future damages I fully accept. And I fail upon due consideration to find any satisfactory reason for the figure of $40,000, allowed by the Court of King's Bench, which it merely says the evidence fully justifies. Had it referred more in detail to this evidence, which after all, is the evidence furnished by the balance sheets, I would have felt more hesitation in rejecting its estimate of Howard's loss, but, with all respect, I must say that Mr. Justice Pelletier seems to me to have been in obvious error when he stated that the Court of Review adopted as its basis $104,000 for the year following the breach of contract, and made thereto certain additions and therefrom certain subtractions, which reduced this figure of $104,000 to $67,000. Then the learned judge adopts $67,000 as the basis of his own calculation of Howard's loss of profits. The error here is that the Court of Review, with reference to the $104,000, reduced to $67,000, was dealing with the year preceding the breach for which Howard received his share of profits, and not with the year following it, and that Mr. Justice Pelletier used the figure of $67,000 as the foundation for his calculation of the profits which would have accrued during the year following the breach.

The judgment of the Court of King's Bench also criticises the judgment of the Court of Review because the latter judgment allowed nothing for the goodwill of the partnership. This is a matter of some difficulty, because by the supplementary agreement of the parties, dated the 9th January, 1913, the goodwill of "Findlay & Howard, Limited," was valued at $12,500 in the case of one of the partners dying during the partnership, and the survivor purchasing the concern. But the goodwill of "Findlay & Howard" formed a part of its assets and Howard's right to claim his share of these assets was

1919
FINDLAY
v.
HOWARD
Mignault J.

reserved by him, so I cannot look upon it as properly included in his action. It is true that Howard alleges that he has been deprived of all his right and interest in the future profits and goodwill of the partnership, which goodwill, he says, has been utterly destroyed by Findlay's wrongful acts. I am not satisfied, however, that after the beginning of the war this goodwill had any value. Moreover, the goodwill mainly consists in the name and Findlay did not use the name of "Findlay & Howard, Limited," and he agreed to give Howard the first offer of the leases of the business premises. Under these circumstances I do not feel justified in adding anything to the amount allowed by the Court of Review.

My opinion in this very difficult case is, therefore, that the appeal of Findlay should be allowed and the cross-appeal of Howard dismissed, with costs in favour of Findlay here and in the Court of King's Bench, and that the judgment of the Court of Review should be restored.

Appeal allowed with costs; Cross-appeal dismissed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Cook, Duff, Magee & Merrill.*