

JEWELOWSKI v. PROPP.

[KING'S BENCH DIVISION (Lewis, J.), February 8, 1944.]

Damages—Duty to minimise loss—Plaintiff not required to expend money—Plaintiff induced by fraudulent misrepresentation to advance money on debenture—Plaintiff bought assets of company on winding up and sold at profit—Profit not to be taken into account in calculating damage for misrepresentation.

A The court found that the plaintiff was induced by fraudulent misrepresentations made by the defendant to advance £1,000 to a company on a debenture. Subsequently, the company was wound up and the plaintiff received £257 16s. 2d. in respect of his debenture. Apart from this, plaintiff bought the assets of the company from the receiver for £350 and later sold them for £950. The plaintiff claimed as damages £742 3s. 10d., being £1,000 less £257 16s. 2d. On behalf of the defendant it was contended that it was the plaintiff's duty to minimise the damages and that, therefore, the £600 profit which the plaintiff made by acquiring the assets for £350 and selling them for £950 should be deducted from the damages claimed:—

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C **Held:** where a plaintiff is entitled to damages for fraudulent misrepresentation, he cannot be called upon to expend money to minimise those damages. It was not proper, therefore, to take into account the purchase and sale of the assets and the amount of the damages recoverable was £742 3s. 10d.

[EDITORIAL NOTE.] The plaintiff is always under a duty to minimise his damages, but it is said that there is no authority which goes so far as to say that he shall expend money upon a purchase which may prove a good bargain in that the goods can be resold at a substantial profit. There must be an element of risk in such a transaction and it does not seem proper that for the purpose of minimising the damages, a plaintiff ought to be bound to incur such a risk, and, where he has done so and has been fortunate enough to make a profit, the defendant is not entitled to have that profit brought into account. It would seem that the only sums which must be brought into account are those which arise from something which the plaintiff was under a duty to do, as for example, in case of wrongful dismissal, to seek further employment.

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E **AS TO DUTY OF PLAINTIFF TO MITIGATE LOSS,** see HALSBURY, Hailsham Edn., Vol. 10, pp. 113-115, paras. 143, 144; and FOR CASES, see DIGEST, Vol. 17, pp. 124-128, Nos. 324-361.]

ACTION to recover damages for fraudulent misrepresentation. The court found that the plaintiff was induced by fraudulent misrepresentations made by the defendant to advance £1,000 to a company on a debenture. Subsequently the company was wound up and the plaintiff received £257 16s. 2d. in respect of his debenture. Apart from this the plaintiff bought from the receiver the assets of the company for £350 and subsequently sold them for £950. The question arose whether the £600 profit which the plaintiff had thereby made should be taken into account in assessing the damages to which he was entitled for the fraudulent misrepresentation.

T. F. Davis for the plaintiff.

D. A. Scott Cairns for the defendant.

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H **LEWIS, J.:** The plaintiff, in his statement of claim, although he does not say so in terms, sets out the fact that he has lost his £1,000 and has only recovered £257 16s. 2d., and, therefore, he appears to be claiming as damages the difference between those two sums, which is £742 3s. 10d. But, it is said by counsel for the defendant, on the assumption that the defendant has to pay damages for fraudulent misrepresentation, the measure of damages should not be £742 3s. 10d., but something considerably less, and the reason why he says that is this. The total amount which was collected by the receiver and manager, after he had paid the expenses, only permitted the transfer to the plaintiff of the sum of £257 16s. 2d. In order to obtain that amount he had to sell the assets and he found somebody who gave him £350 for the machinery and, I think, the stock, or whatever assets he could sell, and, if the position was that the £350 had been paid by an outsider, the question which now arises as to the measure of damages would not arise, but the fact is that the person who expended the £350 in purchasing the machinery was the plaintiff, and, therefore, in order to enable the plaintiff to obtain anything on his debenture, he had to expend

further money, namely, £350, in buying the assets. The plaintiff made a very good bargain as far as the £350 is concerned, because it transpired that he was able to sell what he bought for the two sums of £400 and £650. I am not quite sure I have got in my mind, or even on my note, what the £400 and the £650 actually represented, but one sum was for the machinery and the other for the stock. Before he could get his £650 for the machinery, £100 had to be paid to the landlord, so that the net result of expending £350 was to put £950 (£400 and £650, less £100, namely, £550) in his pocket. He was able to make £950 by his investment of £350, and the position, looked at merely as a matter of arithmetic, is this : The plaintiff was induced by the fraudulent misrepresentations of the defendant to advance £1,000 to the company. After the receiver and manager was appointed the plaintiff expended a further £350, making a total expenditure of £1,350, and the money which came back to him was £257 16s. 2d. and £950, making a total of £1,207 16s. 2d. That would make on that calculation a net loss of £142 3s. 10d., and counsel for the defendant says that is the amount of damages recoverable.

It is the plaintiff's duty, says counsel for the defendant, to minimise his damages, and counsel argued and said quite properly that in a case of wrongful dismissal the injured person cannot sit down and twiddle his thumbs and claim damages from the person who has wrongfully dismissed him. He must seek employment elsewhere, and, if he obtains it elsewhere, he must reduce the damages claimed from the person who has to pay, and the duty of a person to minimise his damages is a proposition which is well known and cannot be controverted. But, says counsel for the plaintiff, that does not mean a person has to expend money.

The argument as I followed it is this : The plaintiff must be looked upon, for the purpose of the purchase of the assets, as an outsider and not at all connected with his claim for £1,000 damages for false and fraudulent misrepresentation, and because the plaintiff had the good fortune or business astuteness to realise that by the expenditure of £350 he would make a good bargain, that has not to be taken into consideration when the damages are assessed. The damages which the defendant has to pay are for fraudulent misrepresentation. I confess it is a question of some difficulty. I think I can see both sides of the question and I have to make up my mind whether the damages are to be £142 3s. 10d. or the sum of £742 3s. 10d. That is the question I have to decide, and I confess I have not been assisted by any authority—probably because there is no reported authority which would assist me on this matter. As I have already said, I have been greatly assisted by counsel in this case, and I am quite sure, if there was any authority that could help me on the matter, they would have cited it.

It seems to me it is really a question of applying the principle of the duty of the plaintiff to minimise his damages, and giving the matter the best consideration I can, it seems to me that the argument of counsel for the plaintiff is right, namely, that a person cannot be called upon, when he has a claim for damages for fraudulent misrepresentation, to expend money in order to minimise those damages. It seems to me that such a rule would be going very far beyond the rule that a plaintiff has got to minimise his damages. The position is that the only money which the plaintiff got for his investment of £1,000 was £257 16s. 2d., and, because he saw an opportunity of purchasing the assets and making something out of it, it does not seem to me that the money he made out of that transaction should be put against the damages he claims in this action.

I, therefore, think there must be judgment for the plaintiff for the sum of £742 3s. 10d., with costs.

Judgment for the plaintiff accordingly.

Solicitors : *Bulcraig & Davis* (for the plaintiff) ; *Albert M. Oppenheimer* (for the defendant).

[Reported by P. J. JOHNSON, Esq., Barrister-at-Law.]