[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1919
May 6, 7, 8.
C. A.
June 26, 27.

PAYZU, LIMITED *v.* SAUNDERS.

[1918 P. 658.]

Sale of Goods—Delivery by Instalments—Failure to make punctual Payment—No Inference of Repudiation—Refusal of Seller to make further Deliveries under Contract—Mitigation of Damages—Alternative Offer by Seller—Duty of Buyer to accept.

A contract for the sale of goods by the defendant to the plaintiffs provided that delivery should be as required during a period of nine months, and that payment should be made for each instalment within one month of delivery less 2½ per cent. discount. The plaintiffs failed to make punctual payment for the first instalment, and the defendant, in the erroneous belief that the plaintiffs' failure to pay was due to their lack of means, refused to deliver any more of the goods under the contract, but offered to deliver the goods at the contract price if the plaintiffs would agree to pay cash at the time of the orders. The plaintiffs did not accept this offer, and, the market price of the goods having risen, brought an action against the defendant for breach of contract, claiming as damages the difference between the market price and the contract price:—

Held, by McCardie J., that the plaintiffs' failure to make punctual payment for the first instalment did not in the circumstances show an intention to repudiate the whole contract, and that the defendant was liable for damages; but that the plaintiffs should have mitigated their loss by accepting the defendant's offer, and that the damages recoverable were, not the difference between the market price and the contract price, but only such loss as the plaintiffs would have suffered if they had accepted that offer.

Brace v. *Calder* [1895] 2 Q. B. 253 followed and applied.

Held, by the Court of Appeal, that the question what steps a plaintiff in an action for breach of contract should take towards mitigating the damage is a question of fact and not of law; and that the Court below had come to a proper conclusion on this question.

ACTION tried by McCardie J. without a jury.

By a contract in writing dated November 9, 1917, the defendant, who was a dealer in silk, agreed to sell to the plaintiffs 200 pieces of crêpe de chine at 4*s.* 6*d.* a yard and 200 pieces at 5*s.* 11*d.* a yard, "delivery as required January to September, 1918; conditions, 2½ per cent. 1 month," which meant that payment for goods delivered up to the

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twentieth day of any month should be made on the twentieth day of the following month, subject to 2½ per cent. discount. At the request of the plaintiffs the defendant delivered, in November, 1917, a certain quantity of the goods under the contract, the price of which amounted to 76*l.*, less 2½ per cent. discount. On December 21 the plaintiffs drew a cheque in favour of the defendant in payment of these goods, but the cheque was never received by the defendant. Early in January, 1918, the defendant telephoned to the plaintiffs asking why she had not received a cheque. The plaintiffs then drew another cheque, but owing to a delay in obtaining the signature of one of the plaintiffs' directors, this cheque was not sent to the defendant until January 16. On that day the plaintiffs gave an order by telephone for further deliveries under the contract. The defendant in the belief, which was in fact erroneous, that the plaintiffs' financial position was such that they could not have met the cheque which they alleged had been drawn in December, wrote to the plaintiffs on January 16 refusing to make any further deliveries under the contract unless the plaintiffs paid cash with each order. The plaintiffs refused to do this, and after some further correspondence brought this action claiming damages for breach of contract. The damages claimed were the difference between the market prices in the middle of February, 1918, and the contract prices of the two classes of goods, the difference alleged being respectively 1*s.* 3*d.* and 1*s.* 4*d.* a yard.

Compston K.C. and *R. J. Willis* for the defendant. The failure of the plaintiffs to make punctual payment for the first instalment of the goods justified the defendant in drawing the inference that the plaintiffs were intending to repudiate the whole contract, and the defendant was therefore not bound to make any further deliveries under the contract: *Freeth* v. *Burr* (1); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) But assuming that the defendant has committed a breach of the contract, it was the duty of the plaintiffs to mitigate their loss so far as possible, and they should have

(1) (1874) L. R. 9 C. P. 208. (2) (1884) 9 App. Cas. 434.

accepted the offer of the defendant to deliver the goods against cash.

J. B. Matthews K.C. and *Turrell* for the plaintiffs. The defendant, not the plaintiffs, repudiated the contract. The doctrine of the mitigation of damages must be applied in a reasonable manner, and should not be made a fetish. It is not reasonable to expect a business man to enter into fresh contractual relations with a party who has just committed a breach of his contract. [They referred to ss. 10 and 31, sub-s. 2, of the Sale of Goods Act, 1893.]

[McCARDIE J. referred to *Brace* v. *Calder*. (1)]

Cur. adv. vult.

May 8. McCARDIE J., after stating the facts, said: It has been contended on behalf of the defendant that the failure of the plaintiffs to pay on or about December 20 for the goods delivered in November constituted in the circumstances such a breach of contract as amounted to a repudiation of the whole contract, and reliance was placed on *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) It is not necessary to recapitulate the facts of that well-known case. In my opinion the decision so far from being in favour of the present defendant is distinctly against her. It is sufficient to refer to the following passage from the opinion of Lord Selborne (3): "I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (4), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at

(1) [1895] 2 Q. B. 253.
(2) 9 App. Cas. 434.
(3) Ibid. 438, 439.
(4) L. R. 9 C. P. 208.

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the conduct of the parties, and see whether anything of that kind has taken place here."

It is essential to remember in the present case that by s. 10 of the Sale of Goods Act, 1893, it is provided that unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale, and by s. 31 where there is a sale of goods to be delivered by stated instalments which are to be separately paid for, and the buyer refuses to pay for one or more instalments, " it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated." It is to be observed that in the present case the contract did not provide for delivery in any particular number of instalments. The deliveries were to be extended over the period from January to September, and it was contemplated that there would be an unspecified number of deliveries and a corresponding number of payments. I may, with diffidence, refer to my own judgment in *In re Rubel Bronze and Metal Co. and Vos* (5), where I referred to the leading authorities. I recognized that in certain circumstances a single breach of a contract may amount to a repudiation of the whole contract. I adhere to what I said in that case, but in the present case I entertain no doubt whatever that the plaintiffs' failure to make punctual payment for the November delivery did not amount to a repudiation of the contract, nor did it go to the root of the contract; on the other hand, in my opinion, the defendant's letter of January 16 did in fact and in law amount to an unjustifiable refusal by her to carry out her contractual obligations, for she announced in clear terms that she would thenceforth deliver no further goods to the plaintiffs under the contract unless the plaintiffs paid cash to cover each invoice. The market price of these goods was rising from the beginning of January and continued to rise up to the middle of February. The plaintiffs claim to

(1) [1918] 1 K. B. 315.

be entitled to damages based on the market price at that date. I find as a fact that the market prices in February were respectively 6*d.* and 7*d.* per yard in excess of the contract prices. The plaintiffs did not in fact purchase goods as against their contract with the defendant. They asserted that the market was so bare of goods as to render purchases impracticable.

Now a serious question of law arises on the question of damages. I find as a fact that the defendant was ready and willing to supply the goods to the plaintiffs at the times and prices specified in the contract, provided the plaintiffs paid cash on delivery. Mr. Matthews argued with characteristic vigour and ability that the plaintiffs were entitled to ignore that offer on the ground that a person who has repudiated a contract cannot place the other party to the contract under an obligation to diminish his loss by accepting a new offer made by the party in default.

The question is one of juristic importance. What is the rule of law as to the duty to mitigate damages? I will first refer to the judgment of Cockburn C. J. in *Frost* v. *Knight*, (1) where he said: "In assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished." This rule is strikingly exemplified in *Brace* v. *Calder*. (2) There the plaintiff claimed damages for wrongful dismissal. He had been employed as manager of a business carried on by four persons in partnership. In the course of his employment two of the partners retired, and the business continued to be carried on by the two remaining partners. The plaintiff resented his technical dismissal which resulted from the dissolution of the partnership, and declined to serve the two remaining partners; and he brought an action against the original firm claiming damages for wrongful dismissal. There was a difference of opinion in the Court of Appeal as to whether the plaintiff had been wrongly dismissed, but the members of

(1) (1872) L. R. 7 Ex. 111, 115. (2) [1895] 2 Q. B. 253.

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the Court were unanimously of opinion that the plaintiff as a prudent, reasonable man should have accepted the offer of the two remaining partners to retain him in their service, and that he was therefore entitled to nominal damages only. I think that the substance of the rule which I have indicated was also laid down by the House of Lords in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (1), where Lord Haldane said: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

The question, therefore, is what a prudent person ought reasonably to do in order to mitigate his loss arising from a breach of contract. I feel no inclination to allow in a mercantile dispute an unhappy indulgence in far-fetched resentment or an undue sensitiveness to slights or unfortunately worded letters. Business often gives rise to certain asperities. But I agree that the plaintiffs in deciding whether to accept the defendant's offer were fully entitled to consider the terms in which the offer was made, its bona fides or otherwise, its relation to their own business methods and financial position, and all the circumstances of the case; and it must be remembered that an acceptance of the offer would not preclude an action for damages for the actual loss sustained. Many illustrations might be given of the extraordinary results which would follow if the plaintiffs were entitled to reject the defendant's offer and incur a substantial measure of loss which would have been avoided by their acceptance of the offer. The plaintiffs were in fact in a position to pay cash for the goods, but instead of accepting the defendant's offer, which was made perfectly bona fide, the plaintiffs permitted themselves to sustain a large measure of loss which as prudent and reasonable people they ought to have avoided. But the fact that the plaintiffs have claimed damages on an erroneous

(1) [1912] A. C. 673, 689.

principle does not preclude me from awarding to them such damages as they have in fact suffered, calculated upon the correct basis. See *Cory* v. *Thames Ironworks and Shipbuilding Co.* (1) They have suffered serious and substantial business inconvenience, and I conceive that I am entitled to award them damages for that. The authorities are conveniently collected in Arnold on Damages at p. 13. Moreover, even if the plaintiffs had accepted the defendant's offer, they would nevertheless have lost the very useful period of credit which the contract gave them. Taking into consideration all the circumstances of the case I have come to the conclusion that the right sum to award as damages is 50*l*. I give judgment for the plaintiffs for that amount, and in view of the important points involved I give costs on the High C ourtscale.

Judgment for plaintiffs.

F. O. R.

The plaintiffs appealed on the question of damages.

June 26, 27. *J. B. Matthews K.C.* and *Turrell* for the appellants cited *Wilson* v. *Hicks* (2) and *Brace* v. *Calder*. (3) *Compston K.C.* and *R. J. Willis* for the respondent were not called on.

BANKES L.J. At the trial of this case the defendant, the present respondent, raised two points: first, that she had committed no breach of the contract of sale, and secondly that, if there was a breach, yet she had offered and was always ready and willing to supply the pieces of silk, the subject of the contract, at the contract price for cash; that it was unreasonable on the part of the appellants not to accept that offer, and that therefore they cannot claim damages beyond what they would have lost by paying cash with each order instead of having a month's credit and a discount of $2\frac{1}{2}$ per cent. We must take it that this was the offer made by the respondent. The case was fought and the learned

(1) (1868) L. R. 3 Q. B. 181. (2) (1857) 26 L. J. (Ex.) 242.
(3) [1895] 2 Q. B. 253.

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judge has given judgment upon that footing. It is true that the correspondence suggests that the respondent was at one time claiming an increased price. But in this Court it must be taken that the offer was to supply the contract goods at the contract price except that payment was to be by cash instead of being on credit.

In these circumstances the only question is whether the appellants can establish that as matter of law they were not bound to consider any offer made by the respondent because of the attitude she had taken up. Upon this point McCardie J. referred to *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (1), where Lord Haldane L.C. said: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* (2): 'What the plaintiffs are entitled to is the full amount of the damage which they have really sustained by a breach of the contract. The person who has broken the contract not being exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.'" It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer,

(1) [1912] A. C. 673, 689. (2) (1878) 9 Ch. D. 20, 25.

and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case. Mr. Matthews complained that the respondent had treated his clients so badly that it would be unreasonable to expect them to listen to any proposition she might make. I do not agree. In my view each party was ready to accuse the other of conduct unworthy of a high commercial reputation, and there was nothing to justify the appellants in refusing to consider the respondent's offer. I think the learned judge came to a proper conclusion on the facts, and that the appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. The plaintiff must take "all reasonable steps to mitigate the loss consequent on the breach," and this principle "debars him from claiming any part of the damage which is due to his neglect to take such steps": *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, per Lord Haldane L.C. (1) Mr. Matthews has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty.

EVE J. I agree. But for the difficulty introduced by the respondent's demand for a higher price than that named in

(1) [1912] A. C. 673, 689.

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the contract, I think this is a plain case. That difficulty is more apparent than real. It was not raised in the Court below, and there is not enough evidence to enable us to give effect to it, assuming it to be a matter of substance.

Appeal dismissed.

Solicitors for appellants: *W. H. Martin & Co.*
Solicitors for respondent: *S. Myers & Son.*

W. H. G.

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[IN THE COURT OF APPEAL.]

THIRKELL *v.* CAMBI.

[1919 T. 58.]

Contract—Memorandum in Writing—Sale of Goods—Letter repudiating Contract—Solicitor—"Agent in that behalf"—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

By s. 4, sub-s. 1, of the Sale of Goods Act, 1893, a contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless, failing other alternatives, "some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf":—

Held, by the Court (Bankes and Scrutton L.JJ., and Eve J.), that a letter signed by the party to be charged or his agent in that behalf, and referring to other letters as containing the terms of a contract may, although it repudiates liability on the contract, be a sufficient note or memorandum in writing; but if, while referring to other letters, it refuses to admit that they contain the terms of the contract, it is not a sufficient note or memorandum.

Bailey v. *Sweeting* (1861) 9 C. B. (N.S.) 843; *Wilkinson* v. *Evans* (1866) L. R. 1 C. P. 407; *Buxton* v. *Rust* (1871), L. R. 7 Ex. 1, distinguished.

Held, further, by Scrutton L.J., that the letters in question omitted a material term of the contract.

Held, by Bankes L.J. and Eve J., that a solicitor instructed to deny a contract with which his client is charged is not the client's agent to make or sign a note or memorandum in writing of the contract for the purposes of the statute.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.