[HIGH COURT OF AUSTRALIA.]

KING . . . . . APPELLANT;
PLAINTIFF,

AND

IVANHOE GOLD CORPORATION LIMITED RESPONDENT.
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Nov.* 16, 17.

Griffith C.J., Barton and O'Connor JJ.

New trial—Breach of contract—Amount of damages left at large to jury — Admissibility of evidence.

The plaintiff was engaged by the manager of the defendant company's mine to improve the poor extraction of gold. According to his evidence no amount was fixed as payment for the work, but as the extraction improved the manager of the mine said that the results were a long way better than he could ever hope for, and that ordinary payment was out of the question, and said "If the extraction is still the same at the end of July, the Ivanhoe Company will pay you handsomely, but you will have to take the risk of the extraction being all right then, and payment will depend on results." The plaintiff's efforts were successful, and he brought an action for £5,000. The presiding Judge directed the jury that the reward was to be commensurate with the result, and they brought in a verdict for £3,600, the amount which plaintiff first claimed when the company failed to pay him anything. This amount was apparently arrived at at 10 per centum on £36,000, which amount was alleged to be annually saved by reason of plaintiff's success.

Held, that in an action for damages for breach of contract there must be some measure of damages capable of being laid down to the jury, and that the question cannot be left at large to them. Under the circumstances of the present case the proper rule would be to ascertain what would under ordinary circumstances be fair remuneration for the actual services rendered, and to increase that amount by what is reasonable to make it "handsome payment."

Decision of the Supreme Court affirmed.

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THE plaintiff, a metallurgist, brought an action for £5,000 for services rendered to the defendant company. The jury awarded him £3,600. The facts appear fully in the judgment of *Griffith* C.J. The defendant company appealed to the Full Court of Western Australia, and the judgment was set aside and a new trial ordered. From this decision the plaintiff now appealed to the High Court.

Pilkington K.C. and *Stow*, for the appellant. This was not a case where plaintiff was to be rewarded with the ordinary remuneration for a metallurgist, but he was to be paid handsomely. This case is analogous to that of salvage, and the jury in assessing the amount of damages to be awarded were entitled to look to the large saving to the company that the plaintiff's efforts resulted in.

If a new trial is now granted the only point to go to the jury should be that of the amount of damages: See English Rules, Order XXXIX., r. 7; Western Australian Rules, Order XXXVII., r. 6. [The following cases were referred to:—*Johnston* v. *Great Western Railway Co.* (1); *Mutual Life Insurance Co. of New York* v. *Moss* (2).]

Keenan, A.-G. for Western Australia, and *Draper*, for the respondent company. The proper basis for assessing the damages was that laid down by the Full Court of Western Australia, namely, the sum payable in ordinary circumstances for the services rendered, bearing in mind that he was to receive no remuneration unless his work proved a success. The plaintiff had been using the same bromo-cyanide process at the Oroya Brown Hill Company's mine, where he was metallurgist, and he merely transferred his operations to the defendant company's mine. [Counsel referred to *Miles* v. *Commercial Banking Co. of Sydney* (3); *Knight* v. *Egerton* (4); *Praed* v. *Graham* (5).]

GRIFFITH C.J. The plaintiff's statement of claim alleges that at the request of the defendants' manager he made an examina-

(1) (1904) 2 K.B., 250, at p. 258.
(2) 4 C.L.R., 311.
(3) 1 C.L.R., 470, at p. 473.
(4) 7 Ex., 407.
(5) 24 Q.B.D., 53.

tion of the methods of ore treatment employed at their mine, and pointed out how the defects in the treatment could be remedied, and afterwards supervised the work of remedying the defects, the result being a great reduction in the cost of treatment, and a saving of about £40,000 per annum; that as regards that work the defendants' manager agreed that the plaintiff should be paid nothing for the work if it were a failure, but that he should be paid handsomely if it were a success; and that a fair and reasonable remuneration for his services is, under the circumstances, £5,000. His evidence as to the agreement is as follows:— "There was no agreement to pay any fixed sum for the work. When he (defendants' manager) first spoke to me he mentioned payment. He said if I could bring about better extraction the Ivanhoe Company would pay me handsomely, and that it would depend on results what payment the company would make me. At the end of June he told me the results were a long way better than he could ever hope for and that ordinary payment was out of the question, and 'If the extraction is still the same at the end of July, the Ivanhoe Company will pay you handsomely but you will have to take the risk of the extraction being all right then, and payment will depend on results'." The words "on results" are, perhaps, ambiguous, but it is clear that it was a condition of the contract, whatever that was, that if the plaintiff's work was of no benefit to the company, if he did not succeed in doing what he was employed to do, he was to get nothing, while if he accomplished his purpose he was to be paid handsomely. That is all the evidence in support of the alleged contract, which was altogether denied by the defendants, but must be taken to have been established to the satisfaction of the jury. The first subject for inquiry is as to the nature of the services which the plaintiff was asked to perform. He was a metallurgist employed on a mine at Kalgoorlie, known as the Oroya Brown Hill, where the process called the bromo-cyanide process was used for the extraction of gold from the ore. The same process was used on the defendants' mine. The plaintiff received a salary on the Oroya Brown Hill, which, including allowances, residence, &c., he said was equivalent to about £1,000 a year. It was part of his duty to study the working of the bromo-cyanide process, and he

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said that at that mine he was able, by improvements which he made in the treatment, to reduce the loss of gold in the residues from 10s. 10d. to 5s. 10d. per ton. At the time when the defendants' manager asked him to do whatever it was that he asked him to do, the defendants were losing in their residues more gold than was desirable, and they wished the plaintiff to do for them what he did in the ordinary course of his employment for his own employers. They asked the permission of his employers to employ him for this purpose, and that permission was given. The work he was engaged to do was thus a sort of overtime work. What interpretation then is to be put upon the promise to pay him handsomely for work of that kind? In an action for damages for breach of contract there must be some measure of damages capable of being laid down to the jury; the question of damages cannot be left at large, as in an action for a personal wrong, such as defamation or assault. The learned Judges in the Full Court thought that the first step in ascertaining the proper basis of computation of the remuneration would be to ascertain what sum would be payable in ordinary circumstances for services of that kind. That is, of course, only the first step in the calculation. Having ascertained that sum, some effect should be given to the defendants' promise that if the plaintiff were successful he should be paid "handsomely." The plaintiff, having waited for some time, and not having received any remuneration, his right to which was disputed—apparently *bonâ fide*—sent in a claim for £3,600, which he described as his fee or commission on the estimated increased profits of savings effected by him for the defendants by the services which he had rendered. These he estimated at between £35,000 and £40,000, and his claim is admittedly for 10 per cent. on this amount. The evidence of any such saving having been made as the result of his services is very shadowy, if there is any at all; but even if it had, that is not the true basis of the measure of his remuneration. Indeed, his counsel disclaimed any such argument.

The case was put to us as one of salvage, or as a case of remuneration to be given to a man for making an invention—solving a difficult problem. The learned Judge in effect so left it to the jury. He said, and he used the expression two or three

times, "The reward was to be commensurate with the result." With great respect to the learned Judge, that is not what the plaintiff said in his evidence. He also told the jury, "You would be entitled to give the party who has carried out the contract any consideration you think is adequate consideration;" thus leaving the question of compensation absolutely at large to the jury. He then went on to compare the agreement to a gamble, or to a prospecting venture, where one man finds a rich mine and another finds nothing. It seems to me that the jury were invited to do exactly as they thought fit, and to give the plaintiff for his services in respect of the breach of the alleged contract a sum estimated on any basis they thought proper. In my opinion, as I have already said, in the case of a contract some definite basis must be laid down, and I think the basis laid down by the Full Court is the correct one. First ascertain what would be the sum which, under ordinary circumstances, would have been fair remuneration for services, such as he was rendering to his own employers, and which, for the time being, he was allowed to render to the defendants. Then, having arrived at what would be adequate remuneration under ordinary circumstances, increase that by what is reasonable to make it "handsome payment." All the evidence given at the Court on this point agreed in fixing about £100 as ordinary remuneration for such services. But any reasonable sum that can be named will come very far short of £3,600. It is clear, I think—to use the words of *Vaughan Williams* L.J., quoted by *Rooth* J., in *Johnston* v. *Great Western Railway Co.* (1), that "the jury . . . measured the damages by a measure which ought not to have been applied." There must therefore be a new trial.

Then it is suggested that the new trial should be limited to the question of damages. The Court has discretion on granting a new trial to limit it to certain questions. The Full Court, in their discretion, refused to exercise this discretion in favour of the plaintiff and gave reasons for their refusal. I can see no reason for interfering with this exercise of their discretion. In some cases it might be a hardship to send the whole case for a new trial, but, having regard to the nature of this case, and to the

(1) (1904) 2 K.B., 250, at p. 258.

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course of the trial and to the conflict of evidence on all points, it is clear that practically the whole matter must be gone into again, and much will depend upon the credibility of the plaintiff's and defendants' witnesses as to what result is arrived at. Moreover, when a jury has gone quite wrong on one part of the case, although technically severable from another, it is sometimes difficult to say that the mistake made on one point does not affect their views on another point. In my opinion the decision of the Supreme Court was right, and should be affirmed.

BARTON J. I am of the same opinion. This case relates to the circumstances of a contract set out in a passage of the plaintiff's evidence. In what I have to say I shall speak on the assumption that the jury entirely adopted the plaintiff's view; and when I put anything in the light thrown on it by the plaintiff's utterances, it is not, of course, to be assumed that I venture to express anything which might influence the jury on the second trial. Now, Mr. King says this :—"I often saw Nicholson; often once a week. He nearly always spoke of the poor extraction at his mine and his unsatisfactory state of things. A bad extraction consists of obtaining a low percentage and leaving a high percentage in the ore. Residues comprise slimes, sands, &c.,—dump. He spoke of the residues as containing 9s. 8d. per ton. It was so the month I went there. This had been the case for 18 months to two years. This was a bad extraction. Other mines were improving their extraction, and his was stationary. It was being talked about in England and in Western Australia. This was in April 1906. He then poured out his troubles to me about this low extraction. . . . He told me he had tried everything to improve his extraction and had failed." That is the plaintiff's story as to the state of things under which the contract was entered into, and later on in his evidence we find this:—"There was no agreement to pay any fixed sum for the work. When he first spoke to me he mentioned payment. He said if I could bring about better extraction the Ivanhoe Company would pay me handsomely, and that it would depend on results what payment the company would make me. At the end of June he told me the results were a long way better than he could ever hope for, and that ordinary

payment was out of the question, and 'If the extraction is still the same at the end of July, the Ivanhoe Company will pay you handsomely, but you will have to take the risk of the extraction being all right then, and payment will depend on results.'" As a result, says the plaintiff, there was a substantial recovery from the residues, so that the percentage of loss was reduced, by 3s. 5d. per ton, the plaintiff says; the defendants say less; but it does appear that if the jury took, as they were entitled to take, the view that the plaintiff made a correct statement, there was a substantial reduction. On that basis, dealing with the matter as it comes to us, we must act. Then comes the question—What, under those circumstances, is the measure of payment? Now, in the contract, as I have stated it from the plaintiff's evidence, there was no fixed sum to be paid; and the contention put forward on behalf of the plaintiff appears to bear but one meaning, that it was to remain at large with the jury to say what sum they would consider fair payment under the circumstances. It must be taken that the company were to pay handsomely, because, if Mr. King is right, that is the way the matter was put to him, and the way in which the contract was made, that he was to get nothing if he did not make a substantial reduction in the loss, but if he did make such a reduction then he was to be paid handsomely. As his Honor has said, there must always be some basis on which, for breach of a contract, damages must be assessed; you cannot leave a matter of this kind entirely at large; and unless there is something to that effect in the agreement you cannot base the payment on a commission, because that is not the ordinary method of calculating the remuneration for professional or scientific work. It is not expressed, and not being the usual method, it will not be implied. In my opinion the value at which the plaintiff is entitled to assess his services is the ordinary remuneration for that class of work, with a liberal addition to ordinary rates by reason of the fact that he was to get nothing if he did not succeed, and was therefore to be paid a substantial amount if he did. But it does not follow from his success that all ordinary basis of damages is destroyed, and that the jury were entitled to take the bit between their teeth, and award him

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—as it has been put—a small fortune. It would appear that in their view the point for consideration was not what was the market value, or the highest market value of the plaintiff's services, but what benefit the defendants derived from his services. As I understand the contract, it does not bear that interpretation, or any like interpretation. In *Leake on Contracts*, 5th ed., p. 40, it is stated:—"The debt or promise implied upon an executed consideration, whether wholly or in part executed, is measured in amount by its money value. This value is presumptively that put upon it by the parties, as in the case of a fixed charge for services, or a fixed price for goods; but if there is no agreed value, it is assessed in an action by the Court or a jury at so much as the consideration was worth at the usual rate of remuneration." This is the way in which the Chief Justice of the Supreme Court has put it. "Assuming, however, that the plaintiff successfully performed the work entrusted to him, and that it was agreed between him and the company that he should receive no remuneration for his work unless it was a success, in which event he was to be well paid, how is the remuneration for his services to be computed? This seems to me to depend on the meaning to be put on the words 'well paid.' They clearly mean that the plaintiff was to receive a larger sum than would usually be paid for his services, and may, I think, be construed as a promise to fully and adequately pay the plaintiff, bearing in mind that he was to receive no remuneration unless his work proved a success. The basis, however, of the computation must, I think, be the sum payable in ordinary circumstances for such services." Not meaning that the actual remuneration was to be the sum paid in ordinary circumstances for such services, but that that was to be the basis, that there should be some calculation based upon that; and therefore one with reference to which such an assessment of damage as we have in this case would be inordinate. The learned Judge who tried the case put it in this way:—"If you find that the parties made such a contract, no cure no pay, then the person who has carried out the work would be entitled to payment, and you would be entitled to give the party who has carried out the contract any consideration you think is handsome remuneration. What constitutes handsome

remuneration depends upon very many circumstances, and it is a matter for your consideration." That was leaving the matter to the jury quite at large. It was laid down to them without any such basis as that found in the common process of arriving at payment under a contract, that it should be considered as a question of the value of the work at the ordinary rates of remuneration. Here there was only this difference, that the remuneration was not only to be that which was merely ordinary, but was to be something which was liberal. I am distinctly of opinion that the verdict given in this case bears no relation to any such basis, but was assessed upon a wrong principle ; and the fact that his Honor left it open to the jury to act upon a wrong principle without any protest on the part of the defendants would not prevent the defendants from asserting their rights now, because, as was remarked by the Chief Justice in the case of *Miles* v. *The Commercial Banking Co. of Sydney* (1) "a Judge cannot escape doing his duty owing to the silence of counsel at the trial"—that is on the ground of no objection having been taken then—and therefore, where there is a wrong basis of damage laid down, and counsel do not object at the trial, it is nevertheless the duty of the Judge to put the matter rightly, and where it is a question of the true measure of damage, it appears to me that the Court can intervene. The rule of law applying in other cases to executed contracts applies distinctly to this, and the verdict must be considered excessive. I do not wish to express any view of the facts which might be taken as a hint to a jury on the second trial, and therefore I say nothing whatever on the merits of the case, because on this motion, for the purposes of the argument as to damages, we are bound to assume that the story told by the plaintiff is correct. I agree that we have not sufficient ground to justify us in interfering with the exercise by the Supreme Court of its discretion in ordering a new trial on the whole case, and that the appeal should be dismissed.

O'CONNOR J. I agree that the Supreme Court came to a right conclusion in directing a new trial on the ground that the damages were excessive. This is an action for damages for

(1) 1 C.L.R., 470, at p. 473.

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breach of contract, and in such an action the defendant is not altogether at the mercy of the jury. The rights of the parties are under the contract, and the damages must be limited to the amount which will compensate the plaintiff for the defendants' breach. In other words, the defendants are to be placed, as far as damages can adjust matters, in the same position as if the contract had been kept. It therefore becomes material to see what the contract was. There cannot on this appeal be any doubt about the terms of the contract, because we must assume that the jury found it to be as the plaintiff has stated it. That is to say, the plaintiff was to be employed as metallurgist, he was to remedy certain defects in the treatment plant at the Ivanhoe, which were then causing very large loss to the company, and he was to be paid for those services on the basis of nothing if he failed and handsome remuneration if he succeeded. The defendants' contention is that the proper measure of damages in such a contract is to be ascertained by finding what was the nature of the work. The Attorney-General, it seems to me, has put his finger upon the key to the nature of the work in the few sentences he read of the evidence describing the plaintiff's work in the mine at which he was permanently employed. It appears that the plaintiff himself was a metallurgist of much skill and experience, and apparently in the two years during which he was employed on the Oroya Brown Hill had succeeded in reducing the values left in the dump from 10s. 10d. to 5s. 10d. per ton. He effected that improvement by the exercise of his skill and knowledge in the ordinary discharge of his duties as metallurgist. Having had that experience he became acquainted with the difficulties which were to be overcome in accomplishing similar work on the Ivanhoe. After he had gone through the plant of that mine, sampled the product, and made experiments and observations, he sent in a report to the manager of the Ivanhoe. It was then the manager sent for him and asked him to undertake the duty of remedying the defects in the treatment of their ore, as if he were their metallurgist. I take it therefore as clear, on the plaintiff's own showing, that he was employed as metallurgist to set right whatever was wrong with the Ivanhoe processes, so that that mine might obtain a better result. He

set to work accordingly, and the jury found he was successful. It is not suggested that he did any work other than that which a metallurgist might be expected to do. He made experiments, took samples, and observed the working of the plant—did, in fact, exactly the same work as he would have done in effecting a similar improvement in the extraction at the Oroya Brown Hill. In doing that work he spent something like two months, at an outside computation. On the aspect of the case which is now being dealt with, we must assume that he was completely succcessful. He now claims payment. According to the agreement his payment is to be handsome, liberal. Now, on what basis is payment to be estimated. The plaintiff contends that he is entitled to be paid whatever the jury may choose to award him, having regard to the fact that his work has been of immense monetary benefit to the defendant company. Mr. *Pilkington* very skilfully, it seemed to me, avoided stating directly that the basis of the computation was the amount by which the company had been benefited, but it is impossible to escape from the conclusion that that was the real basis of the view which the jury took. When the summing up of the Judge is examined it is clear that he left the question to the jury substantially in that way. It was put to them that the transaction was in the nature of a gamble in which the plaintiff and defendant company were engaged, that the plaintiff had won, and that he was entitled to be paid practically what the jury liked to award him, having regard to the benefit which the defendant company had derived from his services. We must assume that the jury in finding a verdict for £3,600 followed that line of reasoning. They gave no reasons, of course, in explanation of their verdict, but it cannot possibly be explained except on that ground. The probabilities are that the jury took the plaintiff's claim for £3,600, as put forward in his letter of 27th July 1907, and they adopted the mode in which according to his evidence he arrived at the amount—that is, 10 per cent. on £36,000. That was an altogether wrong basis, not justified by the contract. The true principle of assessment of the damages was in my opinion that laid down by the Supreme Court. The plaintiff was employed as a metallurgist, carried out the work of a metallurgist, nothing more, and

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should be paid for his services as a metallurgist. The basis of computation must therefore be what was the value of his services as a metallurgist. When that amount is ascertained a substantial sum must be added, because he undertook the risk of expending his time and his skill with no remuneration if he failed. As he was told he was to be paid handsomely, all these computations and allowances should be on a generous scale. There should be no difficulty in a jury arriving at a fair conclusion upon these definite lines. The basis of remuneration can be very well fixed by expert witnesses such as the gentlemen who have already given evidence, all of whom speak of £100 as being ample remuneration for the carrying out of such work under ordinary circumstances. The jury would then have it in their power to add to that sum such amount as would be reasonable in fulfilment of the promise that the remuneration should be liberal and generous. I should have wished, had it been possible, to separate the ground of the verdict being against evidence from the ground of excessive damages. It seems to me that there is a great deal of evidence in support of the plaintiff's claim which abundantly justified the jury's finding in everything except the amount of damages, but it is difficult to separate the facts as to damages from those bearing on the performance of the contract. Under these circumstances it seems to me that there is not sufficient ground to interfere with the discretion which the Court has exercised in not separating these two grounds. It follows that on the whole case I am of opinion that there must be a new trial, on the ground that the damages were excessive.

Appeal dismissed with costs.

Solicitors, for the appellant, *James & Darbyshire.*
Solicitors, for the respondents, *Keenan & Randall.*

H. V. J.