[HIGH COURT OF AUSTRALIA.]

GULL AND OTHERS . . . . APPELLANTS;
PLAINTIFFS,

AND

SAUNDERS & STUART . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 29, 30 *Nov.* 3.

Barton A.C.J., Gavan Duffy and Rich JJ.

Sale of goods—Contract—Warranty—Action for breach—Damages—Finding as to damages by jury—Admission without objection of irrelevant evidence—Assessment of damages on mistaken basis—Remoteness of damage—Reduction by Judge.

At the trial of an action before a jury evidence for the plaintiffs was admitted without objection by the defendants which they afterwards contended to be irrelevant, and counsel in addressing the jury, the presiding Judge in summing up, and the jury in assessing damages, were allowed to follow a mistaken course :

Held, that after the jury had performed their function the Judge was right in refusing to ignore their finding and to review the damages awarded to the plaintiffs.

Semble, that the only remedy (if any) open to the defendants was to apply for a new trial, and that such an application should not be made to, and could not be granted by, the Judge who tried the case, on a motion for judgment on the findings of the jury.

Where an engine which was purchased by the plaintiffs, who had no knowledge of engines, on a warranty given by the defendants of its efficiency for a stated purpose, was, although in fact inefficient for that purpose, continued in use for a considerable period in reliance upon assurances given by or on behalf of the defendants that the engine could and would be made efficient,

Held, that the plaintiffs having, as could properly be found by the jury, acted reasonably and prudently in the circumstances, and the jury having awarded them damages for the loss sustained by them during the period in question, the Judge had erred in eliminating such damages on the ground of remoteness.

Order of the Supreme Court of Western Australia (*McMillan* J.), varied.

APPEAL from the Supreme Court of Western Australia.

The plaintiffs in the Supreme Court, Arthur Courthope Gull, Wilfred Eckford Gull and Harold Ernest Gull, trading as Gull Brothers, purchased from the defendants, Saunders & Stuart, an engine and pump for the purpose of irrigating their farm lands. The plaintiffs, having no knowledge of engines, left it to the defendants to supply an engine of sufficient power to do the work required, and accepted their assurance that the engine supplied was of such power. The engine turned out to be inefficient, but on the assurances of the defendants' experts the plaintiffs continued to use it for a period of three years, and suffered loss to their crops throughout the whole of that period. They thereupon brought an action for damages, which came on for trial before *McMillan* J. and a jury. The jury found in the plaintiffs' favour, and awarded them £111 as damages in respect of the engine, and £575 as damages for the loss of crops. On the motion for judgment *McMillan* J. reduced the damages by disallowing those for loss of crops as being too remote. Other material facts sufficiently appear from the judgment hereunder.

The plaintiffs now appealed against the reduction of the damages by his Honor in respect of the loss of crops, and the defendants, by cross appeal, appealed on the ground that the damages in respect of the engine had been assessed on a wrong basis and should be nominal only.

Sir *Walter James* K.C. and *Cowan*, for appellants. In this case the facts were such that the jury were the proper tribunal to find the damages, and there was no reason in law why the Judge should have taken the matter away from them.

Where there is an implied condition, and the property passes, the purchaser is bound when measuring his damages to treat the failure of any implied condition as a breach of warranty: *Wallis*,

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Son & Wells v. *Pratt & Haynes* (1). There *Fletcher Moulton* L.J. gave a dissenting judgment which was adopted by the House of Lords (2). Appellants relied on the respondents' assurance, which they were, as reasonable and prudent men, entitled to do: *Halsbury's Laws of England*, vol. x., par. 569, p. 309.

The plaintiffs were justified in taking time to bring their action: *Frost* v. *Knight* (3), approved in *Roper* v. *Johnson* (4); *Brown* v. *Muller* (5); *Bank of China, Japan and the Straits* v. *American Trading Co.* (6); *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co.* (7). If an article be bought protected by a warranty, the purchaser is relieved from the duty of inspection: *Mowbray* v. *Merryweather* (8); *Scott* v. *Foley* (9); *Commissioner of Railways* v. *Leahy* (10).

[RICH J. referred to *Michael* v. *Hart & Co.* (11).]

The only negligence proved in the case was shown to be on the part of the defendants.

Moss K.C. and *John Moss*, for the respondents. As to the cross appeal with respect to the £111 given by the jury with regard to the engine, it is submitted that the damages should be reduced to a nominal sum.

[GAVAN DUFFY J. The jury have awarded damages and you have not asked for a new trial. How can we assess the damages?]

Under the *Supreme Court Act* 1880 (W.A.) (44 Vict. No. 10), sec. 16, the Court has power to reduce the damages.

The damages that the plaintiffs would be entitled to would be the difference between the price of the engine that would supply the required amount of water and the price of the engine the defendants supplied when they discovered the breach. There is a breach, and for that the defendants must pay some damages, but there is no material on which that damage can be assessed.

As to the £575 awarded by the jury for the loss of crops, his Honor held that these damages were too remote. It cannot be

(1) (1910) 2 K.B., 1003.
(2) (1911) A.C., 394.
(3) L.R. 7 Ex., 111.
(4) L.R. 8 C.P., 167.
(5) L.R. 7 Ex., 319, at p. 322.
(6) (1894) A.C., 266, at 274.
(7) (1912) A.C., 673, at p. 687.
(8) (1895) 2 Q.B., 640.
(9) 16 T.L.R., 55.
(10) 2 C.L.R., 54, at p. 71.
(11) (1902) 1 K.B., 482.

suggested that these damages were to go on indefinitely. Even if the plaintiffs were entitled to any damages in respect of the loss of crops, such damages should have been restricted to the loss as to the first year's crop.

Sir *Walter James* K.C., in reply.

Cur. adv. vult.

The judgment of the Court was read by

Nov. 3.

BARTON A.C.J. At the trial *McMillan* J. rightly told the jury that if they believed the version of the plaintiffs a warranty had been given and broken by the defendants. As they did believe the plaintiffs' version and specifically found warranty and breach, and as these findings are not attacked, this appeal involves only the question of damages.

These are assessed at £111 in respect of the engine itself, and £575 for loss in the lucerne farming operations caused by the inability of the engine to do the work it was warranted to do.

To deal first with the head of damage represented by the £111, the defendants in their cross appeal urged that the damages had been assessed on a wrong basis, and that, as there was no evidence on which a correct assessment could be made, only nominal damages could be awarded, and that the amount should be reduced accordingly. If the damages have been assessed on a wrong basis, as to which it is unnecessary to pronounce our opinion, it is because the evidence which is now said to be irrelevant was admitted without objection, and because counsel in addressing the jury, the presiding Judge in summing up and the jury in assessing were allowed to follow a mistaken course. After the jury had performed their function the learned Judge was asked to ignore the finding, and to consider what damages should have been awarded had a different direction been given them. He refused to do so, and we think he was right. The only remedy open to the defendants, if any was open, was to apply for a new trial, and such an application could not properly be made to, and could not be granted by, the learned Judge who tried the case, on a motion for judgment on the findings of the jury.

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The position of the appellants, however, with regard to the £575 is different. They complain that, the jury having included this sum in the assessment of damages, the learned Judge, on their motion for judgment, set aside a part of the verdict which there was evidence to support, when he held these damages were not recoverable. They contend that his Honor erred in so far interfering with the verdict since the damages were in law such as might reasonably be considered as within the contemplation of the parties in making their contract, and the question of fact as to their proper amount within the limits of the claim depended wholly on the jury's view as to whether upon the evidence the appellants had acted reasonably and prudently in not taking steps to minimize the loss to the respondents by way of the damages to which they had exposed themselves. They say that the question of reasonable conduct in fact was peculiarly for the jury. The question as to the correctness of the course taken by his Honor is one that this Court must entertain and decide.

First, granting that the damages were not such as might fairly and reasonably be considered as arising naturally—that is, according to the ordinary course of things—from the breach of contract itself, were they "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it?"

If there were special circumstances communicated by the appellants to the respondents, and the contract was then made in view of these circumstances, the damages resulting from breach would be those which would ordinarily follow from breach of a contract made with a common knowledge of those special circumstances: See *per* Lord *Esher* M.R. in *Hammond & Co.* v. *Bussey* (1). The special circumstances and the knowledge of them by both parties being once established as facts, the question as to whether the kind of damages claimed would be the ordinary result is for the Judge.

Now, the jury believed the version of these circumstances given by the appellant Arthur Gull. He says that when he and his brother Harold interviewed the respondent Stuart at his place of

(1) 20 Q.B.D., 79.

business, he told that respondent that he and his brothers were "going into an irrigation proposition." He represented that they would need an 8-inch pump, and desired to know what power they would require to drive it; that the lift against which it would have to work was about 20 feet, and that he (being undoubtedly the active partner) knew nothing about engines, and relied on Stuart. Stuart, he says, remarked that a 12½ h.p. engine would be required to do the work; and he quoted £196 and £55 as the prices of the required engine and the pump respectively. Arthur Gull then said that there would be nothing final until Stuart had seen for himself, and he insisted upon Stuart seeing the place, a small block of land on the Serpentine River near Brunswick.

Soon afterwards, that is, on 9th November 1909, Stuart came to the appellants' land, and was shown over it. He was told that in addition to 12 acres then under lucerne, another 12 would be sown in the following season. The intended sites for the engine, pump and sumph were pointed out to him, and it was shown to him that the levels taken for the appellants by a Mr. Scott, an expert, required a lift or head of 17 feet to control the 60 acres which out of the total area of 80 acres were available for irrigation. With this knowledge of the facts and the place, Stuart said that the engine proposed "would do the work comfortably," and would deliver 54,000 gallons of water an hour against the lift of 17 feet. It was not till after this visit, say the appellants, that the contract, a verbal one, was concluded. Now, these being the circumstances accepted by the jury upon sufficient evidence, it is clear to us that they differentiate the case from an ordinary one of mere failure to supply goods equal to description. If the appellants speak the truth the respondent Stuart knew in detail, not only from verbal explanation but from his own observations, that the engine was required to be of sufficient power to do work of a special kind; that it was to be used for irrigation; that the crop was to be lucerne, and therefore required either an ample rainfall, which was problematical, or plenty of applied water; that in order to serve the appellants' purpose at all effectively the engine must be able to supply the necessary power against a stated lift or head ascer-

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tained by level; and that, unless it served the purposes made known to him, Stuart, it would be worth little or nothing to the appellants, who would fail in their project of irrigation and in all probability lose their crop or most of it.

The loss which did ensue was in its kind just such as, with the knowledge they had at the time of contract, the parties would have every reason to expect as the result of breach. We think, therefore, that damage by loss of crop and the like was not in the circumstances too remote to be in law recoverable.

There is the further question, whether the conduct of the appellants after breach was such as ought to have deprived them of the whole or part of the £575 assessed. That is a pure question of fact, and it was for the jury alone to determine it. *McMillan* J. left it to the jury at the trial, but on the motion for judgment he seems to us to have taken the determination of it upon himself. He says that damages for loss of crop during the first summer would fairly have been recoverable, because the respondents in supplying the engine at the time they did so, must have known that the appellants, if it proved insufficient after reasonable use, would have no opportunity to replace it in time to prevent injury to the crop. He points out that the appellants did not claim damages in respect of the first summer (though the evidence is that they suffered loss), and the appellants knew the unfitness of the engine before the second summer came, and should have obtained a second engine of greater power.

This may have been the most reasonable view for the jury to take. But they did not take it, and we do not think it was open to the learned Judge to refuse to accept their assessment because they took a different view. The question whether the appellants could or should have obtained a new engine was fully discussed at the trial, and the jury had before them all the circumstances to enable them properly to decide that question. They contended, on the facts, that the respondents led them to believe that with some little alteration from time to time the engine could and would be made fit for its purpose, and that being without any special knowledge of engines and their use, a knowledge for which as they had told Stuart they had relied on him, it was only natural that they had followed his suggestions so as

to omit to take a course which otherwise might have been the reasonable one to adopt. It was not for Stuart, they urged, now to blame them for conduct induced by himself. It was for the jury to weigh these and all other circumstances in the case, and to say whether the appellants were rightly chargeable with omitting to take those steps in their own interest which prudent persons would have taken to mitigate the loss consequent on the breach.

The law as to the measure of damages in cases of failure to supply goods contracted for, and as to the class of circumstances which debar a plaintiff from claiming any part of the damage which is due to his own neglect to take reasonable steps to minimize the loss, has recently been the subject of comprehensive survey by the present Lord Chancellor: See *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co.* (1).

We think that *McMillan* J. should have entered judgment for the whole of the damages assessed by the jury, and that this appeal should be allowed and the judgment of the Supreme Court varied accordingly.

The respondents must pay the costs of this appeal.

Appeal allowed. Order varied by entering judgment for plaintiff for £686, *with costs.*

Solicitor, for appellants, *N. W. Cowan*, Perth.

Solicitors, for respondents, *M. L. Moss & Dwyer*, Perth.

N. McG.

(1) (1912) A.C., 673.