Cons
Hollingsworth v Comr of Police (1999) 47 NSWLR 151

[HIGH COURT OF AUSTRALIA.]

GORDON & GOTCH (AUSTRALASIA) LIMITED . APPELLANT; DEFENDANT,

AND

FREDERICK JOHN COX . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1923.

MELBOURNE, *Feb.* 15, 16.

Isaacs, Higgins and Starke JJ.

Contract—Master and servant—Wrongful dismissal—Grounds for dismissal—Unfitness to discharge contractual duties—Evidence—Misconduct before contract of service—Practice—Pleading—Particulars of misconduct.

In an action to recover damages for wrongful dismissal it is not, *ipso facto*, a justification for the dismissal that the plaintiff, in a previous employment by another person, was guilty of acts of misconduct. But evidence of such previous acts of misconduct may be admissible, as being relevant in the circumstances as they may appear at the trial, on the issue of the fitness of the plaintiff to fulfil the contractual obligations imposed on him by his contract of service.

Decision of the Supreme Court of Victoria affirmed.

APPEAL from the Supreme Court of Victoria.

The plaintiff, Frederick John Cox, on 17th February 1921, brought an action in the Supreme Court of Victoria against the defendant, Gordon & Gotch (Australasia) Ltd., claiming £15,000 damages for wrongful dismissal from the defendant's service. The statement of claim set forth that, by an agreement under seal made on 20th August 1919 between the defendant and the plaintiff, the defendant had appointed the plaintiff its managing director to hold such office for the term of five years from 1st April 1919, and had covenanted

with the plaintiff to pay him as such managing director, and in consideration of his due performance of the agreement, the salary of £1,750 per annum, and that in addition to such salary the plaintiff should be entitled to a certain bonus or allowance. The statement of claim then alleged that on or about 21st May 1920 the defendant wrongfully dismissed the plaintiff from the office of managing director of the defendant company, and repudiated the obligations of the agreement. To this claim the defendant originally delivered a defence and counterclaim. The original defence consisted of twelve paragraphs, whereof pars. 1 to 4 remained unaltered throughout all the proceedings in the Supreme Court, whereas the remainder of the paragraphs were replaced by other paragraphs, as appears below. Those original pars. 1 to 4 contained an admission that the defendant had, on or about 21st May 1920, dismissed the plaintiff from the office of managing director of the defendant company, and set forth several covenants contained in the agreement binding the plaintiff to well and faithfully serve the defendant company, &c., and rendering the agreement terminable in the event of the plaintiff wilfully neglecting or refusing to perform his duties under the agreement. Pars. 5 to 12 of the original defence were (on the appeal to the Full Court of Victoria referred to below) replaced by other paragraphs numbered 5 to 14. So far as this report is concerned, it is material to state only that those original eight paragraphs principally related to acts of misconduct alleged against the plaintiff, of which some were alleged to have been committed before, and some after, 20th August 1919, the date of the making of the agreement sued upon. Particulars of the acts of misconduct were given in particulars, which, so far as here material, were distinguished as A and B. These particulars were retained substantially unaltered throughout all the proceedings in the Supreme Court.

On 3rd May 1921 the plaintiff took out a summons in which he sought to strike out pars. 7 to 12 of the defence, the particulars delivered thereunder and relating thereto and the counterclaim so far as it repeated the said paragraphs of the defence. This summons came before *Cussen* J., who made an order the terms of which are not here material, and allowed the plaintiff liberty to appeal.

H. C. OF A. 1923. GORDON & GOTCH (AUSTRAL-ASIA) LTD. v. COX.

Pursuant to that leave, the plaintiff appealed to the Full Court of Victoria from the order of *Cussen* J., and sought an order that pars. 7 to 12 of the defence and pars. A, B and C of the particulars under the defence should be struck out.

The appeal was heard before *Irvine* C.J., *Mann* and *McArthur* JJ. on 10th and 11th of November 1921, and the Court on 11th November 1921 ordered (subject to the Court making such order as to costs as it should think fit) that the respondent company should have leave to amend its defence, and to recast the paragraphs thereof which were the subject matter of the summons before *Cussen* J.; and that the appellant plaintiff should have leave to deliver a reply to the said amended paragraphs of the defence objecting in point of law to the defences thus raised; and reserved the plaintiff's right to contend that all or any of such paragraphs and the particulars thereunder should be struck out.

The defendant accordingly delivered the paragraphs of its defence set out below and numbered 5 to 14, and the plaintiff delivered the reply set out below. By consent, the objections thus raised were treated as if set down for determination under Order XXV. of the *Rules of the Supreme Court* (Vict.) together with an application to strike out such paragraphs and particulars as aforesaid; and all further questions under the summons were by consent left to the Court.

In these circumstances, when the matter of the appeal came on for further hearing before the Full Court of Victoria, the defendant's defence contained (in addition to the pars. 1 to 4 already referred to) the following paragraphs, numbered 5 to 14 :—

5. At all times material Gordon & Gotch Proprietary Ltd., Gordon & Gotch (Sydney) Ltd. and Gordon & Gotch (Queensland) Ltd. were companies duly incorporated and carrying on business in Victoria, New South Wales and Queensland respectively, and the plaintiff was employed as manager of Gordon & Gotch Proprietary Ltd.

6. At various meetings of the duly authorized representatives of the said three companies held between September 1918 and July 1919, at which meetings the plaintiff was one of the representatives of Gordon & Gotch Proprietary Ltd., it was verbally agreed, and by

deed for amalgamation dated 3rd July 1919, made between the said three companies and the plaintiff and William Henderson Craig of Melbourne, solicitor (trustee for and on behalf of the defendant company then about to be incorporated), and divers other persons (for the full terms whereof the defendant craves leave to refer to the deed), it was agreed that the three companies mentioned in par. 5 hereof should for the consideration therein stated transfer to the defendant company certain specified assets, including all the goodwill of the said transferring companies in the businesses then being carried on by them and all the books of account, book debts and securities for same and all other property other than freehold land belonging to the said companies respectively, and that the defendant company should take over and discharge all the liabilities of the transferring companies, and that the said agreement should take effect as from 1st April 1919, and that the defendant company should appoint the plaintiff as managing director for a period of five years from 1st April 1919, under an agreement to contain all such provisions as are usual in such cases, and on the further terms therein specified. The plaintiff was by reason of the facts hereinbefore stated a promoter of the defendant company.

7. The defendant company was duly incorporated on 5th August 1919; and the plaintiff thereupon became and acted as a local director of the defendant, and on or about 5th August 1919 was appointed a member of the governing board of directors of the defendant.

8. After the said agreements and before the breach alleged in the statement of claim the plaintiff was guilty of breaches of each of the covenants set forth in par. 3 hereof, and/or wilfully neglected and/or refused to perform the duties devolving upon him under the said agreement, and the defendant by notice in writing terminated his employment, which is the breach alleged in the statement of claim.

9. Alternatively with pars. 3, 4 and 8, the plaintiff after the said contract and before the alleged breach was guilty of conduct inconsistent with the faithful discharge of the duties of his office of managing director and of such misconduct in his said office as rendered him unfit to retain the said office, and the defendant by reason thereof

H. C. OF A. 1923.

GORDON & GOTCH (AUSTRALASIA) LTD. v. COX.

dismissed him therefrom, which is the alleged breach; and the defendant will contend that apart from the express provisions of the written agreement the defendant was entitled by reason of the said facts to dismiss the plaintiff.

10. Alternatively with par. 9, by the said agreement sued upon the plaintiff was to be deemed for all purposes thereof to be the managing director of the defendant company at the salary and upon the terms therein stated as from 1st April 1919, and the plaintiff was in fact paid his salary in respect of the period between 1st April 1919 and the date of the said agreement on or about 12th August 1919 and the plaintiff, after 1st April 1919 and before the alleged breach, was guilty of conduct in his said office of managing director inconsistent with the faithful discharge of his duties of his said office, and such misconduct in his said office as rendered him unfit to retain his said office, and the defendant by reason thereof dismissed him therefrom, which is the alleged breach.

11. Alternatively with pars. 9 and 10, the plaintiff was guilty of such misconduct in his office of manager of Gordon & Gotch Proprietary Ltd. and also of such misconduct in his office of managing director of the defendant company as rendered him unfit to retain his said office of managing director of the defendant, and the defendant by reason thereof dismissed him therefrom, which is the alleged breach.

12. The agreement sued upon was subject to a condition, which is to be implied from the nature thereof and from the facts and circumstances set out in pars. 5, 6 and 7 hereof, that the plaintiff while employed as manager of Gordon & Gotch Proprietary Ltd. had not been guilty of conduct inconsistent with the faithful discharge of the duties of his office of such manager, or as would put him in a position when appointed managing director of the defendant company where his interest and his duty would conflict, whereas the plaintiff had been guilty of such conduct as aforesaid, and upon discovery thereof the defendant dismissed the plaintiff, which is the alleged breach.

13. Alternatively with par. 12, apart from the special circumstances mentioned in pars. 5, 6 and 7, it was an implied condition of the plaintiff's employment in the said office of managing director under

the agreement sued upon, that the plaintiff had not been guilty of such misconduct as would make it impossible for the defendant to trust or have confidence in him as its managing director, or make it unsafe for the defendant to employ him as managing director without the risk of injury to its business, whereas in fact the plaintiff as manager of Gordon & Gotch Proprietary Ltd. had been guilty of such misconduct as made it impossible for the defendant to trust or have confidence in him as managing director, and rendered it unsafe for the defendant to employ him as managing director without risk of injury to its business, and upon discovery of same the defendant dismissed the plaintiff, which is the alleged breach.

14. Defendant was induced to enter into the agreement sued upon, (1) by the fraudulent concealment by plaintiff of certain material facts being the facts and matters set out in pars. A1 to A14 inclusive and B1 to B11 inclusive of the particulars delivered herewith; (2) by the fraudulent omission by the plaintiff to disclose the said material facts. Upon discovery of the said fraud the defendant dismissed the plaintiff, as it lawfully might.

Of this defence pars. 8 to 14 were accompanied by particulars of the misconduct or other matters complained of in those paragraphs. Those particulars related (so far as is here material) to some or all of the particulars under the defence distinguished as A and B which set out at great length, and in the form of a historical narrative, various financial transactions and monetary dealings in which the plaintiff had been engaged and described certain alleged improper acts and conduct on the part of the plaintiff in respect of those transactions and dealings. Of the acts and conduct of the plaintiff so set out as particulars of misconduct, it is sufficient to say that some related to acts and conduct of the plaintiff before 20th August 1919, the date of the agreement of service; some related to acts and conduct of the plaintiff before the incorporation of the defendant company (5th August 1919); and some related to acts and conduct of the plaintiff after the date of the agreement of service.

The reply to this defence was as follows:—

As to the defence the plaintiff says:—

1. Save as to the admissions therein contained, he joins issue thereon.

H. C. OF A. 1923.

GORDON & GOTCH (AUSTRALASIA) LTD. v. COX.

2. As to par. 10 he objects that upon the proper construction of the agreement sued upon the statement in such paragraph of the effect of such agreement is bad in law, and the averments of fact made in such paragraph do not disclose or amount to an answer to the plaintiff's cause of action, and are immaterial.

3. As to par. 11, so far as it relates to misconduct in the plaintiff's office of manager of Gordon & Gotch Proprietary Ltd., he objects that the same is bad in law, and the averments of fact therein contained do not disclose or amount to an answer to the plaintiff's cause of action, and are immaterial.

4. As to pars. 5, 6, 7 and 12 thereof he objects that the averment that the condition stated in par. 12 is implied as is in such paragraph alleged is bad in law, and that the averments of fact contained in such paragraphs do not disclose or amount to an answer to the plaintiff's cause of action, and are immaterial, and he objects that pars. 5, 6 and 7 and each of them are immaterial.

5. As to pars. 5, 6, 7 and 13 thereof he objects that the averment that the condition stated in par. 13 is implied as in such paragraph alleged is bad in law, and that the averments of fact contained in such paragraph do not disclose or amount to an answer to the plaintiff's cause of action, and are immaterial, and he objects that pars. 5, 6 and 7 and each of them are immaterial.

6. As to par. 14 he objects that it does not allege any facts amounting to fraud, and the particulars thereunder limit the allegations therein made, and so limited the paragraph discloses no answer to the plaintiff's cause of action.

The judgment of the Full Court of Victoria on the appeal contained the following passages :—

"Par. 11 . . . must be divided into two parts. The first is the allegation that plaintiff was guilty of such misconduct as manager of Gordon & Gotch Proprietary Ltd. (the old company) as to render him unfit to retain his office as managing director of the defendant company; and the second is that plaintiff had been guilty of such misconduct as managing director of the defendant company as to render him unfit to retain his office of managing director of the defendant company. The second allegation is a mere repetition of an allegation already contained in par. 9 which is not the subject

of objection in this appeal. As to the first allegation the word 'unfit' in this paragraph seems to us to be of doubtful meaning. Giving to the word the only meaning which we think would make it relevant, namely, incapable of properly discharging his duties, there is no doubt that misconduct prior to his contract of service may render a servant incapable of performing his duties under his contract of service, and in such a case he may be dismissed. But the real ground for dismissal is not his past misconduct, but his present unfitness to properly discharge his duties, though such unfitness may be caused, either wholly or in part, by his previous misconduct. But, on looking at the particulars given under this paragraph, we find that they are particulars not of the unfitness or incapacity alleged but of the past misconduct said to have been the cause of the unfitness or incapacity. In our opinion, such misconduct if proved would afford no evidence of the plaintiff's unfitness or incapacity to carry out his contract of service with the defendant. Certain hypothetical cases were put to us in argument in support of the proposition that knowledge, in the employer or in others, of past misconduct of the servant may in certain special employments make it impossible for the servant to carry out his contract. We do not think it necessary to express any opinion as to whether the proposition mentioned is a sound one or not, or whether a defence to an action for wrongful dismissal could in any case be founded upon it. It is sufficient to say that in our opinion it is quite impossible to apply the proposition in question to the case before us. We think, therefore, that the first part of this paragraph, read in conjunction with the particulars given under it, affords no defence to the plaintiff's claim, and the second part is mere repetition of par. 9, and that therefore the whole paragraph should be struck out."

"Par. 8 alleges that after the agreement of service and before breach the plaintiff was guilty of breaches of certain covenants contained in the said agreement, and/or wilfully neglected and/or refused to perform the duties devolving upon him under the said agreement, whereupon the defendant dismissed him. Under the head of 'particulars' it is stated that 'the particulars exceed three folios and are delivered herewith.' The particulars given are admittedly intended to be particulars of the breaches and the wilful

H. C. OF A. 1923.

GORDON & GOTCH (AUSTRALASIA) LTD. v. COX.

neglect and refusal referred to. It is quite clear on looking at the particulars A and B that many of them are not and cannot possibly be particulars of such breaches or such neglect or refusal, because many of the facts set out in such particulars occurred before the agreement was entered into. It may be—though it is unnecessary for us to decide the question—that under the defence raised by this paragraph many, if not all, of the facts set out in these particulars may turn out to be admissible in evidence. But assuming them to be admissible, the form in which the particulars are given is, we think, very objectionable. . . . It may be said that, assuming that the facts set out in these particulars are admissible in evidence as tending to prove the allegations contained in par. 8, it does not matter in what form the particulars are given. We do not agree with this. We think that the form in which particulars are given may in some cases—and in this case certainly does—lead to great confusion and embarrassment. It must be remembered that the giving of particulars is not a right or privilege granted to the party giving them for his own benefit: it is a duty imposed upon him for the benefit of the opposite party; and when particulars are given in such a form that the opposite party cannot understand them, or at best can only make a guess at what they mean, the party giving them has not performed his duty, and the particulars should be struck out."

The Full Court of Victoria, on the appeal to it, ordered pars. 10, 11, 12, 13 and 14 of the amended defence to be struck out, and the whole of the particulars A and B given under pars. 8 and 9 of the defence to be struck out. It also ordered the respondent company to give amended particulars, under par. 8, of the breaches of covenant and the wilful neglect and refusal therein referred to, and, under par. 9, of the conduct and misconduct therein referred to, and that so much of the counterclaim as repeated pars. 10 to 14 of the defence, and so much as embodied the particulars A and B, be struck out, and that the respondent company should give further and better particulars under the said pars. 8 and 9 and that the defendant company should be at liberty to amend the defence and counterclaim within forty days.

The defendant obtained leave to appeal to the High Court from

that judgment on the condition of the defendant abandoning so much of the judgment as gave it liberty to amend the defence and counterclaim, saving, however, the right of the defendant under the order to give amended particulars under pars. 8 and 9 of the defence.

The appeal now came on for hearing before the High Court.

Sir Edward Mitchell K.C. and *Walker*, for the appellant. Misconduct by a servant prior to the contract of service may, upon becoming known to the master, be a ground for dismissal. There is no rule that prior misconduct cannot be ground for dismissal (*Clouston & Co.* v. *Corry* (1)). Such misconduct may be used to show that at the time of or during his engagement he was unfit to discharge or incapable of discharging the duties of his service. In a written contract of service there may be implied a term to serve well and faithfully. On the facts, there was an implied condition that the respondent had not, before his engagement to the appellant company, been guilty of misconduct. The respondent occupied a fiduciary relation as a promoter towards the persons who were forming the new company, and when the new company was formed the respondent's previous misconduct amounted to a ground for his dismissal by the appellant company (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (2)).

[ISAACS J. How could there be any fiduciary relation between the respondent and a company not then in existence ?]

Here the agreement provides that the respondent should be deemed to be a servant from 1st April 1919—that is, from a date anterior to the date of the agreement for service. Misconduct on or after 1st April 1919 is good ground for dismissal (*Robb* v. *Green* (3)). In this case the facts are such that the plaintiff was under a duty to disclose his misconduct committed prior to his employment by the appellant company; and his failure to disclose that misconduct was good ground for dismissal. Misconduct prior to the contract of service tending to make it impossible for the servant to discharge his duties as such is good cause for dismissal (*Pearce* v. *Foster* (4)).

(1) (1906) A.C., 122.
(2) (1885) 39 Ch. D., 339, at pp. 369-370.
(3) (1895) 2 Q.B., 315.
(4) (1886) 17 Q.B.D., 536.

H. C. OF A. 1923.

GORDON & GOTCH (AUSTRALASIA) LTD. v. COX.

[ISAACS J. referred to *Noonan* v. *Victorian Railways Commissioners* (1) and *Harmer* v. *Cornelius* (2).]

The appellant wishes to make use of the acts of prior misconduct as evidence of the unfitness of the plaintiff while in the appellant's service to discharge the duties of his office. It is entitled to use these acts of misconduct in that way. The decision of the Full Court under appeal decides to the contrary.

[ISAACS J. There seems to be some misapprehension as to what was intended on this point by the decision of the Full Court.]

[Counsel also referred to *Gluckstein* v. *Barnes* (3); *Clouston & Co.* v. *Corry* (4); *English and Australian Copper Co.* v. *Johnson* (5); *Gill* v. *Colonial Mutual Life Assurance Society Ltd.* (6).]

Robert Menzies, for the respondent. The respondent does not challenge the passage in the judgment appealed from: "There is no doubt that misconduct prior to his contract of service may render a servant incapable," &c., "and in such a case he may be dismissed." The passage beginning, "But on looking at the particulars," &c., is not in conflict with the preceding context. The vice of the appellant's plea is that it makes the issue past misconduct, and not present unfitness. As to par. 14 of the defence, no facts are set out showing a duty to disclose, and there are no particulars of fraud. A promoter is under no duty to a newly formed company to disclose to the company acts of misconduct committed by him prior to the formation of the company.

ISAACS J. It appears that this appeal has been proceeded with under an apprehension that the Supreme Court said that the plaintiff's conduct while manager of the old company could not be admissible as showing unfitness to perform properly his duties as managing director of the new company, the present appellant. It is not clear from the judgment under appeal that the Supreme Court so intended. But it is clear to us that while misconduct in the service of the old company cannot *ipso facto* be a justification for

(1) (1907) 4 C.L.R., 1668, at p. 1685.
(2) (1858) 5 C.B. (N.S.), 236.
(3) (1900) A.C., 240.
(4) (1906) A.C., 122.
(5) (1911) 13 C.L.R., 490.
(6) (1912) V.L.R., 146; 33 A.L.T., 201.

dismissing him from the service of the new company, it may be admissible as being relevant in the circumstances as they may appear at the trial, to the issue of the fitness of the plaintiff to perform or observe his contractual obligations with the new company.

As to par. 14 of the defence, this paragraph is open to objection on the ground of the want of allegations showing a duty to disclose and showing proper particulars of fraud.

As to whether as promoter there was a duty on the plaintiff to disclose, and an omission to disclose which amounted to fraud, that may stand over for future consideration.

With these observations the appeal will be dismissed, and, by consent, the undertaking of the defendant not to amend is withdrawn and leave is given to the defendant to amend as it may be advised within fourteen days. Of course there will be the usual right of the plaintiff to amend when he gets the amended pleadings. The plaintiff is to have the costs of the appeal.

HIGGINS J. I concur with what my brother *Isaacs* has said, but I should like to add something as to the abuse of "particulars." I hope that counsel responsible for pleadings will consider more carefully what the object of particulars is. There has been growing up a practice of using particulars for stating matters of history and evidence—a practice which leads to long spun out arguments as to the meaning of the particulars. Particulars, after all, are intended to limit the scope or ambit of the pleading, as the Full Court of Victoria has pointed out. They are meant to save time, and to prevent the other party from being taken by surprise. I feel sure we are getting on to the wrong track.

STARKE J. I agree with the opinion expressed by my brother *Isaacs*.

Appeal dismissed with costs.

Solicitors for the appellant, *Williams & Matthews*.

Solicitors for the respondent, *Home & Wilkinson*.

B. L.