[HIGH COURT OF AUSTRALIA.]

BURKARD AND COMPANY LIMITED . . APPELLANT;
PLAINTIFF,

AND

WAHLEN AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 22; *Dec.* 10.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Powers JJ.

Contract—Sale of goods—Breach—Non-delivery—Indemnity—Self-elected measure of damages—Misdirection—Evidence—Conduct of parties—Principal or agent—Correspondence rejected at trial considered on appeal.

The appellant contracted to purchase a specified quantity of goods from the respondents. The terms of the contract were contained in a letter from the appellant to the respondents, in which the former stated:—"We have accepted and bought from you" the goods above referred to, "basis delivered weight (Works Europe) . . . Due date of payment to be the day when the Works in Europe have paid us or our firm in Europe. . . . All charges in connection with the business, cables, &c., to be charged to you . . . and the price to be" a certain price "per ton c.i.f. Antwerp, which price is to include a net commission of 5 per cent. for ourselves. The above quantity has been sold by our firm . . . in Bremen. . . . Any difficulties arising out of this business to be settled out of Court by friendly arbitration, provided, of course, you must keep us indemnified if you should not fulfil your contract and our buyers on the other side succeed in a claim against us, when you will have to pay whatever we shall have to pay to satisfy" them. After delivering a portion of the goods the respondents refused to supply the remainder. The appellant sued them for breach of contract, claiming as damages the difference between the contract price of the goods and the price of such goods in the local market at the time of the breach. At the trial of the action there was tendered in evidence by the respondents, and rejected by the Judge, certain correspondence between the solicitors for the

parties which disclosed the fact that the respondents' request for the appellant's consent to a commission to take evidence in Germany was refused by the appellant on the ground that such commission was unnecessary as the appellant was making no claim in respect of the connection of the firm in Bremen with the contract and that the only measure of damages the appellant intended to rely on was that above mentioned. In his summing-up the trial Judge directed the jury that the measure of damages was as claimed by the appellant. The jury assessed the appellant's damages accordingly. On appeal, the Full Court of the Supreme Court, which looked at the rejected correspondence, decided that the appellant had, both before and at the trial, elected to abandon its claim to damages under the indemnity and, in lieu thereof, to rely upon a claim that was legally untenable, and that the appellant was bound by such election; and the Court ordered the verdict to be set aside and judgment to be entered for the respondents. On appeal to the High Court,

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Powers* JJ. (*Higgins* J. dissenting), that the appeal should be dismissed:

By *Knox* C.J., *Isaacs* and *Powers* JJ., on the ground that, having regard to the terms of the contract and the circumstances connected therewith, the application of the measure of damages usually adopted in an action for breach of a contract for the sale of goods was excluded by the stipulation for indemnity contained in the contract;

By *Isaacs* and *Powers* JJ., also on the ground that the rejected correspondence furnished an additional reason why any damage through the appellant having an obligation to a buyer was not recoverable.

Decision of the Supreme Court of New South Wales (Full Court): *Burkard & Co. Ltd.* v. *Wahlen*, (1928) 28 S.R. (N.S.W.) 607, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Burkard & Co. Ltd. of Sydney against Rudolph Wahlen and Alfred Kienzle, trading as the Australian Pacific Trading Co. of Sydney, upon a contract for the sale by the defendants to the plaintiff of a quantity of tin clippings.

The contract of sale was embodied in a letter dated 20th April 1926 written by the plaintiff to the defendants, and was in these terms:—"We beg to confirm our conversation of this morning, and our various letters exchanged. We have accepted and bought from you 200 to 250 tons per month a total of 2,500 to 3,000 tons of clean, non-rusty, new tin clippings, packed and pressed in bundles, for shipment in parcels of not less than 200 tons, in one bottom, basis delivered weight (Works Europe). You guarantee

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the deliveries to be equally spread over 12 months. Payments cash against shipping documents. Shipping receipt, signed by the wharf of Gilchrist, Watt and Sanderson. Due date of payment to be the day when the Works in Europe have paid us, or our firm in Europe, Messrs. Lohmann & Co. All charges in connection with the business, cables, &c., to be charged to you, as per our real outlays, and the price to be £3 5s. per ton, c.i.f. Antwerp, which price is to include a net commission of 5 per cent for ourselves. The above quantity has been sold by our firm, Messrs. Lohmann & Co., in Bremen, as per cable received. We would kindly ask you to see that the deliveries are always promptly forthcoming, and keep us fully advised and posted about everything. Any difficulties arising out of this business to be settled out of Court by friendly arbitration, provided, of course, you must keep us indemnified if you should not fulfil your contract, and our buyers on the other side succeed in a claim against us, when you will have to pay whatever we shall have to pay to satisfy our friends on the other side," &c.

The plaintiff sued the defendants for breach of contract for failing to deliver more than 16 tons of tin clippings, and claimed as damages the difference between the contract price and the price at which tin clippings could be obtained in the local market at the time of the breach. In their pleadings the defendants denied the breaches alleged, and also denied knowledge of the sale of the tin clippings by the plaintiff to Lohmann & Co. A cross-action by the defendants was admitted in the sum of £129 2s. 2d. and judgment was signed for that amount. The defendants also paid the sum of £280 into Court, with a denial of liability, in full satisfaction of the plaintiff's claim.

The evidence disclosed that, after delivering 16 tons of the tin clippings, the defendants admitted that they could not carry out the balance of the contract as they would have to pay £1 more per ton to obtain the tin clippings. At the hearing the defendants tendered in evidence certain correspondence which had passed between the solicitors for the respective parties, but it was rejected as dealing with matters irrelevant to the issues to be tried.

Ferguson J., in summing up to the jury, said that the correct measure of damages was the difference between the contract price and the market price when the goods ought to have been delivered.

The jury returned a verdict for the plaintiff for £2,484, against which the defendants appealed to the Full Court of the Supreme Court.

The judgment of the Full Court was, in substance, as follows:— The parties self-elected measure of damage entirely displaced the measure of damage to which the only evidence of damage was led by the plaintiff and on which the jury were directed to assess damages for the undisputed breach. The plaintiff's express stipulation for a specific indemnity was not intended by the parties to be cumulative on the ordinary measure of damages for a breach by non-delivery under a contract of sale. The plaintiff was to get as profit out of the purchase nothing beyond its commission, and there was no evidence of any obligation incurred by the plaintiff and its European principals. The correspondence, although properly rejected at the hearing, could be looked at by the appeal Court as being matter relevant to the appeal as affecting the conduct of the parties before and at the trial. From that correspondence it was clear that the plaintiff deliberately elected to abandon its whole claim to damages under the indemnity, and in place of it to abide by the decision of the Court on the claim for damages measured by the difference between the contract price and the local market price. That claim was legally untenable, and a situation arose which was covered in principle by the statement of law in *Hoystead* v. *Commissioner of Taxation* (1). For these reasons the Court held that the plaintiff had failed in respect of the only measure of damage it had elected to rely on, and therefore the verdict for the plaintiff should be set aside and a verdict entered for the defendants:— *Burkard & Co. Ltd.* v. *Wahlen* (2).

From that judgment the plaintiff now appealed to the High Court.

Flannery K.C. (with him *J. W. Shand*), for the appellant. Damages will ordinarily flow from breach of contract, and special damages are additional to that liability. By the letter of 20th April 1926 the plaintiff provided for special damages in certain circumstances, which brings the matter within the third rule laid down in *Hadley* v. *Baxendale* (3) and as stated in *Mayne on Damages*,

(1) (1926) A.C. 155, at p. 165; 37 C.L.R. 291, at p. 299.

(2) (1928) 28 S.R. (N.S.W.) 607.

(3) (1854) 9 Exch. 341.

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10th ed., p. 28. Plaintiff's object in referring to the requirement for indemnity was to draw the attention of the defendants to the fact that in the event of default by them they would be liable in special damages. The fact that there was an arbitration clause in the contract showed that the intention was not to rely upon ordinary damages based on the commission allowed under the contract (*Ratcliffe* v. *Evans* (1)). There was no provision in the contract that damages should be restricted to the loss of $2\frac{1}{2}$ per cent commission. Unless excluded by the contract the ordinary rule that the measure of damages must be based on the natural consequences which flow from the breach will apply; and this is not affected by the fact that provision has been made in the contract for special damages. The measure of damages here is the difference between the contract price and the market price at the date of the breach (*Rodocanachi, Sons & Co.* v. *Milburn Bros.* (2), which was approved by the House of Lords in *Williams Bros.* v. *Ed. T. Agius Ltd.* (3)).

Brissenden K.C. (with him *Abrahams*), for the respondents. The position of the appellant in the matter was no more than that of a broker: it was at no time interested in the profit to be derived from the sale of the tin clippings, and this contention is supported by the arbitration clause. Whatever the appellant's interest in the contract was, it is clear that the Company could not receive a greater benefit under it than $2\frac{1}{2}$ per cent on the purchase price payable to the respondents. The provision in the contract as to indemnity would cover any loss suffered by non-delivery of the clippings.

Flannery K.C., in reply, referred to *Hammond & Co.* v. *Bussey* (4), *Elbinger Actien-Gesellschafft* v. *Armstrong* (5) and *Mayne on Damages*, 10th ed., p. 31.

Cur. adv. vult.

Dec. 10. The following written judgments were delivered:—

KNOX C.J. In my opinion the learned Judges of the Supreme Court were right in holding that, having regard to the nature and

(1) (1892) 2 Q.B. 524, at p. 528.
(2) (1886) 18 Q.B.D. 67.
(3) (1914) A.C. 510.
(4) (1887) 20 Q.B.D. 79.
(5) (1874) L.R. 9 Q.B. 473.

circumstances of the contract, and the situation of the parties, the application of the measure of damages usually adopted in an action for breach of a contract for the sale of goods was excluded by the stipulation for indemnity contained in the letter of 20th April 1926.

I think the appeal should be dismissed.

My brother *Gavan Duffy* J. agrees that the appeal should be dismissed.

ISAACS AND POWERS JJ. This is an appeal from a judgment of the Full Supreme Court of New South Wales setting aside a verdict for the appellant for £2,484 and entering a verdict for the respondent. The case is of a somewhat unusual nature owing to the special terms of the contract between the parties, and the communications between them relative to damages.

The contract was one of sale by the respondents to the appellant of 2,500 to 3,000 tons tin clippings, the price being £3 5s. a ton. The sum of £2,484 was awarded by the jury as representing the sum by which at the time of breach the market price exceeded the contract price and which the appellant would, in the words of the learned trial Judge, "have had to pay if they had gone into the market when the defendants made default and tried to purchase 2,500 tons in order to meet their own engagements." That treats the bargain between the parties as an ordinary contract of sale of goods, with a sufficient notice of purpose of resale to attract the sellers' liability for special damage in case of his default. And it further treats the plaintiff as unembarrassed by his conduct in relation to his ordinary right of claiming at the trial whatever damages he is entitled to. It is very necessary to regard both the claim set up by the appellant in the pleadings and the evidence given in support of it, and the communications between the parties prior to the trial. The claim as set out in the declaration was for damages for repudiating the contract. The declaration averred that the clippings were "for sale by the plaintiff to Messrs. Lohmann & Co. of Bremen as the defendants at all times well knew." It alleged the breach and continued: "whereby the plaintiff lost the benefit of the said contract and the profits it would have made

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Isaacs J. Powers J.

therefrom and became liable to the said Messrs. Lohmann & Co. for damages and suffered other damage." When the letter of 20th April 1926, which is the appellant's own statement of the contract, is read, it is perfectly plain that the allegation as to Lohmann & Co. being the purchasers from the appellant is without foundation. The basis of the contract contradicts it. The conventional basis on which the contract rests is this: Lohmann & Co. and the appellant act in conjunction as intermediary to procure tin clippings from the respondents for the "(Works Europe)." (See also the phrase "consuming works" in the letter of 11th June 1926.) The procedure adopted, according to the memorandum, is a purchase by the intermediary here, and a sale by the intermediary there. The intermediary gets a commission of 5 per cent included in the price. The intermediary is to pay against shipping receipt, but not until the "Works in Europe" have paid the intermediary. The price is £3 5s. c.i.f. Antwerp, which includes the commission. The letters referred to in the memorandum show that the commission is to be equally divided between the two branches of the intermediary, the buying branch and the selling branch.

The procedure adopted, however, involves the risk of default in delivery, and for this a special indemnity is required and given against whatever the intermediary may have to pay, what the appellant calls, "our buyers," that is, "the Works in Europe." Nothing could be more distinct than that Lohmann & Co. were not to be the buyers, but the sellers for both branches of the intermediary. Further, it is plain that the basis of the contract is that it is not an ordinary sale of merchandise to the appellant but one in very special terms, namely, that the risk of non-performance by the sellers is met by the special provision as to indemnity. We agree in this with the Supreme Court.

The evidence given by Mr. Burkard for the appellant shows that he rested on an alleged set of circumstances altogether contrary to the bargain. He says that his firm sold to Lohmann & Co. and that Lohmann & Co. are claiming damages. He says that he does not know what Lohmann & Co. did; that his firm charged 5 per cent to the respondents; that he never heard from Lohmann & Co. to whom they sold or at what price. If that is true, he could not have had

any understandable account of damages. But the position is clear. As to any sale to Lohmann & Co., the contract shuts that out completely. As to any sale to the "(Works Europe)" there is no evidence whatever, and the verdict which was based on that contract cannot stand. The nature of the contract precludes any notion of the appellant having the right to go into the market and buy goods for their own general purposes at the risk of the seller. The purchase was for a specific purpose only, and the character assumed by the appellant in the contract would make the general rule altogether unexpected and unjust.

Now, there is an additional reason why any damage through having an obligation to a buyer is not recoverable. That is the correspondence that passed between the parties and contained in the rejected letters. *Campbell* J., with the concurrence of *Street* C.J. and *James* J., dissected those letters, and found that the solicitors for the plaintiff stated there was no intention to "lead any evidence supporting any claim for damages in respect of any liability incurred to Lohmann & Co. of Bremen or other purchasers." On this assurance, the respondents apparently abandoned their proposed commission to take evidence in Germany. We have personally examined those letters, and we agree with the interpretation so placed upon them.

In the result, the admitted claims of defendants against plaintiff exceeding the amount of commission, the only profit of the appellant possible under the contract, the Court entered a verdict for the defendant.

In our opinion that was correct and should be affirmed.

HIGGINS J. I am of opinion that, on the true construction of the letters, and on the evidence before him, the direction of the learned trial Judge (*Ferguson* J.) was right. The direction was that "the ordinary measure of damages is the difference between the contract price and the market price when the goods ought to be delivered." That is, prima facie, the method of ascertaining the measure of damages as laid down by the New South Wales *Sale of Goods Act* 1923 (No. 1 of 1923), sec. 53; and there is nothing that I can find in this case sufficient to displace this method.

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But the Full Court of New South Wales has taken the view that "the parties' self-elected measure of damages entirely displaced the measure of damages" otherwise applicable (1). This view is based on the construction of the plaintiff's letter of 20th April 1926, so far as it states: "Any difficulties arising out of the business to be settled out of Court by friendly arbitration, provided, *of course*, you must keep us indemnified if you should not fulfil your contract, and our buyers on the other side succeed in a claim against us, when you will have to pay whatever we shall have to pay to satisfy our friends on the other side." For my part, having regard to the words "of course," and to the whole context, I cannot think that these words were meant either to add to or to substract from or vary the ordinary rights of the parties: they seem rather to be a merchant layman's attempt to explain the class of difficulties that might possibly arise, and for which arbitration might be necessary; and they are merely explanatory of the desire for prompt delivery and for friendly arbitration, if necessary. The words "of course" tend to show that no new stipulation is being introduced; the word "provided" cannot be treated as making indemnification of the buyer a *condition precedent* to settlement by friendly arbitration. The word is clumsily used; but it probably means that the arbitration must be applicable to any failure of the vendor to deliver under the contract. The nature of the indemnification as stated exactly fits the ordinary rule as to measure of damages if (as is to be inferred from the letters) the Works in Europe are to pay the same price to Burkard as Burkard pays to his vendor (£3 5s. per ton). I infer this price from the words "the price to be £3 5s. per ton c.i.f. Antwerp which price is to include a net commission of 5 per cent to ourselves"; and from the words of the previous letter of 16th April, which states:—"As we are working this business only on a commission basis of $2\frac{1}{2}$ per cent for our firm, and $2\frac{1}{2}$ per cent for Messrs. Lohmann & Co., we are not able to take any risk whatever. All risks in weight and all costs of cables, exchange, &c., must be for your account." There is nothing in the fact that the plaintiff was to buy at £3 5s. and to sell at £3 5s., and was to get only a commission out of the whole transaction, that prevents the plaintiff

(1) (1928) 28 S.R. (N.S.W.), at p. 611.

from being the true buyer of the goods; indeed, the defendants admit that the plaintiff was a buyer by their letter of the wharfingers of 19th May 1926, which states that the tin clippings "have been *sold* by us to Messrs. Burkard & Co. Ltd. and we have transferred our ownership to them." The words "bought" and "sold" are the appropriate words used in the letter of 20th April also.

No reference has been made in argument to the New South Wales *Sale of Goods Act* 1923; but secs. 53 and 57 seem to me to be conclusive: "57. Where any right, duty, or liability would arise under a contract of sale by *implication of law*, it may be *negatived* or *varied* by *express agreement*" &c. I take "implication of law" to be used in contradistinction to express agreement (see *In re Leith's Estate*; *Chambers* v. *Davidson* (1)) and as including the implication of law under sec. 53; and I take the words "express agreement" to imply that, if the ordinary implication is to be negatived or varied, there must be something in the words of the particular contract clearly indicating an express intention to negative or vary the implication (see *Metropolitan District Railway Co.* v. *Sharpe* (2)). The burden lies on the defendants here to show such an indication of intention; and that burden has not, in my opinion, been satisfied. Mere conjecture based on business probabilities is not sufficient; and if there is nothing but conjecture the ordinary implication remains applicable.

It is reassuring to find that any differences of opinion in this case relate to the construction of the language of the particular letters transmitted in this particular case, and not to any point or principle of substantive law. It is not denied that unless the implication of law be negatived or varied by express agreement, the proper measure of damages for non-delivery of goods, even if the purchaser has not resold the goods, is the difference between the contract price and the market price when the goods ought to have been delivered (*Leigh* v. *Paterson* (3), followed in *Phillpotts* v. *Evans* (4)). This is the position taken up by counsel for the plaintiff throughout; and therefore he undertook not to bring any evidence of liability incurred to Lohmann & Co. (of Bremen) "or other purchasers."

(1) (1866) L.R. 1 P.C. 296.
(2) (1880) 5 App. Cas. 425, at p. 441.
(3) (1818) 8 Taunt. 540.
(4) (1839) 5 M. & W. 475.

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Conceding that Lohmann & Co. cannot be treated as purchasing from Burkard & Co., the fact of any contract with any sub-purchaser is immaterial to the measure of damages.

In this view of the case, it is probably unnecessary to consider the correspondence, *not in evidence*, which led the Full Court to order judgment for the defendants instead of ordering a new trial. The correspondence related to an effort of the defendants, made after issue joined, to get a commission to take evidence in Europe; and, as *Campbell* J. says, it was properly rejected as dealing with matters quite irrelevant to the issues to be tried. It is not even included in the materials on which the order of the Full Court purports on its face in the recitals to be based; and I cannot see how it can be treated as supporting the order of the Full Court.

I am of opinion that the appeal should be allowed, the order of the Full Court set aside, and the verdict for the plaintiff restored.

Appeal dismissed.

Solicitors for the appellant, *Sly & Russell.*

Solicitors for the respondents, *F. A. Davenport & Mant.*

J. B.