Original

Reasons for Judgment

Full Court

of High Court

Goldman & Anor

v

Sowden

9 September 1958.

(22)

GOLDMAN AND ANOTHER

v.

SOWDEN

ORDER

Appeal dismissed with costs.

GOLDMAN AND ANOTHER

v.

SOWDEN

JUDGMENT

DIXON C.J.
KITTO J.
MENZIES J.

GOLDMAN AND ANOTHER

v.

SOWDEN

This is an appeal against a judgment of Virtue J. by which the plaintiff respondent recovered the sum of £3440.7.2 against the defendants appellant. The action which was tried at Broome was one for breach of contract. The plaintiff is a contract drover who carried on his work from Mount Isa, Queensland. The defendants, husband and wife, own a cattle station in north-west Australia. It is called Moola Bulla and is in the Kimberley district. The cattle station is of great extent, covering some one and one-third million acres. The contract sued on was made by correspondence between the parties, beginning with a letter on 19th December 1955 and ending with an acceptance by the plaintiff by telegram on 22nd February 1956. It is unnecessary to examine the correspondence in detail; it is enough to give its effect. The plaintiff began it by putting forward his qualifications as a contract drover and his experience and inquiring of the defendants whether they wanted his services. Having explained the stocking of the run and other factors the defendants offered to give the plaintiff "the branding and while branding muster (sic) the bullocks into the bullock paddock". He was to contract to brand the calves for ten shillings a head and he was to be paid another ten shillings a head for all bullocks he mustered into the bullock paddock. The contract was to be for five years, as the defendants said "so it would be a profitable contract for you". The defendants added that when the plaintiff had mustered sufficient bullocks they were prepared to give him droving at the usual price to Wyndham Meat Works, and also the droving of any bullocks to be driven to Queensland in mobs of 1250 or 1500 at 4/6d per head per hundred miles, that is if the plaintiff had the time to do the work in between

the brandings. The correspondence shewed that there had been branded up to 10,000 head in a year and that the defendants without going over the run had mustered 4,000 bullocks and sent away 3,300 of them, letting the rest go. It was necessary for the plaintiff to bring horses, plant and some native labour with him. This was discussed in the letters. According to his evidence the plaintiff had two droving plants including forty-five horses, nine packs, seven riding saddles, certain camp gear, tarpaulin, cooking gear and four-ton truck. He set off by truck, carrying a white cook and a half caste, sixteen saddles and eighteen or more packs. He arrived at Moola Bulla in the beginning of May 1956. At the end of May there also arrived four men, half castes and native labour, with a number of horses. They travelled about one thousand miles from Queensland. It had taken them three months to accomplish the journey with the horses and the journey with the truck had occupied five or six weeks. During the first week after his arrival the plaintiff camped near the station proper. The defendant Allan W. Goldman told him that the bullocks were useless to him, Goldman, in the bullock paddock as they had to be put on the road and he had no plant to do it. He asked the plaintiff for what price he would muster them and hand them over to a drover on the road, putting a good class of beast there and accompanying them for two nights on the road. After inspecting part of the property the plaintiff quoted the price of four shillings per head and Goldman accepted this, saying that there would be three mobs of seven hundred bullocks to be sent to Wyndham. The plaintiff left the station homestead on 12th May, and between that date and 26th July he says he branded 2,410 calves and put two mobs of seven hundred bullocks on the road and mustered 350 more. He had native labour told off to watch

the bullocks. On 26th July he was at a camp at a place called Robin's Soak where cattle were mustered. The Goldmans came into the camp while branding was going on. They called away the native boys. According to Goldman the reason was that ropes had been lost and they wished to send for more ropes. Whatever was the reason a dispute arose. The plaintiff was informed by one of the native boys that Goldman had instructed the boys to go and attend elsewhere. The plaintiff asked Goldman why he did not take the rest of the boys and brand the calves as it appeared as if he, Goldman, were running the camp and not the plaintiff. Goldman replied that he could do that and told the plaintiff that he, the plaintiff Sowden, could "finish right now". He told the native boys to separate the station gear out from Sowden's and the contract was treated as at an end. There followed negotiations between the defendants and the plaintiff for the sale to the defendants of the plaintiff's plant. This resulted in a purchase by the defendants at a price which the plaintiff said was £2,400 and the defendants £2,200. On this question Virtue J. accepted the plaintiff's version as he did on nearly all other matters. His Honour said that he was satisfied that the defendants wrongly repudiated the contract and accordingly that the plaintiff was entitled to damages. Upon this appeal it was urged for the defendants that his Honour's conclusion on the question of repudiation was erroneous. It was said that there was no wrongful repudiation in the incident that has been briefly recounted above. Two grounds were relied upon for the contention that it was erroneous. It was said in the first place that the only direct evidence of the instructions to the native boys to go to another part of the cattle station depended on witnesses whose testimony the learned judge had rejected generally as unreliable, and that the evidence upon which he

did depend for the finding was the plaintiff's statement and that was hearsay. It is a fact that his Honour had dismissed from his consideration the evidence of certain half caste and native witnesses on the ground that he was unable to regard them as testifying from their unaided recollection. The direct evidence of the defendant's sending away the native labour was given by one or more of these witnesses. But to treat his Honour as therefore making a finding on hearsay appears to be too literal an interpretation of what his Honour said in his judgment. It is plain that his Honour accepted the view of the facts on this particular point supported as it is by the direct evidence of these witnesses and by the testimony of the plaintiff which shewed that the defendant ordered the native labour away before the dispute occurred. In the second place it was said that what Goldman did and said did not amount to a renunciation of the contract and that what occurred really meant a termination of the contract by mutual consent. There can be no doubt that Virtue J. was entirely justified by the evidence in interpreting the defendant's words and conduct on 26th July as a repudiation of the contract without any sufficient ground.

The real question upon which the appeal depends concerns the damages which his Honour assessed. The amount of £3440.7.2 which was finally awarded was a residue of £6760 remaining after deducting certain amounts totalling £3319.12.10 for wages paid or payable to native labour, for stores and for other outgoings including the amount for a tarpaulin included in the sale to which, however, the plaintiff was shewn to have no title. The amount of £6760 consisted in part of a sum of £2310 made up of the amount due for branding calves and mustering and putting 1400 bullocks on the road. About this sum of £2310 no question was raised upon the hearing of this

appeal. To the sum of £2310 were added certain other amounts. First there was £2400 representing the purchase price of the plant. The correctness of that amount is not disputed on this appeal. Finally, there is a sum of £2050 described as general damages. The question whether these damages were properly found is the chief question that was argued in support of the appeal. The statement of claim alleged the contract and the breach by repudiation and in the claims at the end of that pleading the plaintiff in reference to the paragraphs containing these allegations claimed in general terms "damages", without giving any particulars or stating any amount. At the trial the plaintiff's counsel opened a claim to damages under this heading. His opening was briefly noted by the learned judge and the note shews that the claim was for damages for wrongful termination of the contract. The arguments of counsel in summing up the case at the conclusion of the evidence were also briefly noted. It again appears that general damages were claimed and discussed and the discussion included the subject of mitigation of damages. The measure of damages for the plaintiff's loss of the contract by reason of the defendants' repudiation of the contract cannot be in doubt. It consists of the estimated anticipated gain from the contract ascertained by deducting from the estimated future receipts the estimated future expenditure which would be incurred in gaining them. In the course of the evidence both the plaintiff and the defendant Allan Goldman referred to the net profit in general terms and they gave evidence on the subject without objection. The plaintiff said that he did not expect to clear less than £2500 a year on Goldman's contract. That would be clear after the deduction of expenses and before paying income tax. He stated that it cost £800 to bring his plant over from Queensland. He further said that in Queensland

he estimated that he could clear for one year by droving about £1400 to £1500. This means clearly enough if he had not undertaken Goldman's contract or, presumably, if he were liberated from further concern with it. He said, however, that having been unable to effect a settlement with Goldman he had gone down to Perth and found it necessary to remain in Western Australia in order to be on hand to attend to matters arising out of his attempt to obtain damages from Goldman, including the present litigation. When Goldman was giving evidence he was questioned on the same subject and again without objection he said that if the plaintiff Sowden worked well there was no reason why he could not have earned £2500 a year but he, the defendant, did not think that the plaintiff could handle cattle or men very well. He did not work as well as others had done. He could not have made much profit out of the work at that date because he was too slow with branding. The learned judge must be taken to have found, in effect, that the plaintiff had adopted a reasonable course in not going back to Queensland. Goldman had at first entered into negotiations over the claims and then had failed to respond to further attempts to conclude a settlement. It seems too that his Honour took into account the fact that the plaintiff had to build up new plant in Queensland. In the result the learned judge assessed the damages for the plaintiff's loss of the contract at £2050. It is, however, by no means clear that the learned judge computed these damages in the simple way that the general evidence by the plaintiff concerning his anticipated profits might be enough to justify, given as it was without objection. Clearly the learned judge did not accept Goldman's low estimate of the plaintiff's capabilities. There seems to be no reason why he should not adopt the view that the plaintiff might have earned £1500 per annum if he had

been allowed to complete his contract. For ourselves we think that there is no reason why on the state of the evidence, very general as it may appear, a tribunal of fact might not reasonably assess this head of damages at an amount of £2050. An objection was made that as a matter of pleading it was essential to give particulars of the loss and without particulars damages for loss of the contract could not be claimed. It is sufficient to say that the objection was not made at or before the trial nor was any objection taken to the very general statement given in evidence of the estimated profit which might have been obtained. Doubtless if objection had been taken the details of the estimate of profit would have been given. That is to say there is no reason to believe that the number of the bullocks to be branded might not have been gone into with more particularity; that the probable number the plaintiff could have mustered, could have branded, and could have put upon the road could not have been examined, and that the items of future expenditure could not have been estimated. It must be remembered that once the future profit of the contract was ascertained or assessed the question of how the plaintiff might and ought to have mitigated damages would be one upon which the burden of proof lay upon the defendant. In Hill & Sons v. Edwin Showell & Sons Ltd. 1918 L.J. K.B. 1106 at p. 1108 Lord Haldane speaks of the burden of proof of mitigation of damages lying on the defendant and goes on to say that the person who sues for breach of contract is entitled to be placed so far as money is concerned in as good a position as if the contract had been performed. "He could therefore prima facie claim what would have been his profit but he is none the less bound by another principle which imposes on

him the duty of taking all reasonable steps to mitigate the loss to himself consequent on the breach." But on that issue the burden of proof lies on the party in breach. The real difficulty in the appeal lies in what is said about the actual manner in which his Honour reached the sum of £2050. His reasons on this subject begin with the statement that the question of quantum is not an easy one. His Honour proceeds: "My conclusion, from the evidence, is that a reasonable estimate of the annual net return to be expected from the contract would have been £1500. However, the possibility of mitigation of damage is an important one." His Honour then refers to the plaintiff's statement that he could reasonably have anticipated getting droving contracts in Queensland for periods of a year or even upwards which would yield £1200-£1500 per year. From that his Honour passes to the subject of his being compelled to remain in Western Australia for the purpose of fighting the present case and states that the plaintiff's only remuneration in Western Australia amounted in twenty-four weeks to £384. Then his Honour refers to the expenses incurred by the plaintiff in shifting his plant to Western Australia which were thrown away. He refers also to the fact that he is clearly entitled to some compensation for the period which would be required for him to return to Queensland and build up fresh plant to secure fresh employment. His Honour then goes on: "Another consideration is the fact that he has lost a continuous contract of a profitable nature for the substantial period of five years, and some allowance should also be made for the periods of unemployment between jobs which would naturally be anticipated during the next four years. My conclusion is that a fair allowance in addition to the cost of shifting his plant would be £1250 making a total of £2050 which is the award I make against the defendants

for general damages for breach of contract." The appellants' complaint against the assessment of damages is not only that it proceeds on considerations which go outside the true measure but that upon the true measure of damages the evidence shews that the plaintiff had not made any loss. It is not completely clear that his Honour in reaching his estimate of £2050 did go outside the true measure of damages. The observations which have been quoted might be construed perhaps as directed to the difficulties in which the plaintiff found himself placed by the course that the defendants had pursued. In other words they might relate to mitigation of damages. The plaintiff could not be supposed to earn in the future enough in Queensland to reduce or extinguish the prima facie loss of anticipated net income from his contract with the Goldmans unless he first incurred various incidental losses, outgoings and expenses; these must therefore be allowed for. Perhaps that is the theory of his Honour's process of computation. But however that may be, having considered the evidence for ourselves we do not think that the sum of £2050 can be considered an over-estimate of what the plaintiff in fact lost by the repudiation of the contract measured according to strict legal principles. In such a matter it is not possible to do more than make a general estimate of the total gains and make an appropriate deduction in mitigation of damages for what it might be supposed the plaintiff could reasonably have earned when liberated from the contract, remembering that on that topic the burden of proof lies upon the defendants. During the course of the argument the plaintiff's counsel put forward reasons why the plaintiff could not be supposed to be able to reinstate himself entirely throughout the remaining four years. Doubtless it is true that on such a matter the Court may

exercise a reasonable practical judgment guided by considerations of which it may take judicial notice. In all the circumstances we think that we would not be justified in treating the amount reached by the assessment that has been made as more than the plaintiff is fairly entitled to recover under the head of damages for loss of his contract. The appeal will therefore be dismissed with costs.