1917

*June 5.
*June 22.

A. A. COCKBURN (PLAINTIFF).....APPELLANT;

AND

THE TRUSTS AND GUARANTEE COMPANY (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Suretyship—Employee—Guarantee of payment of salary—Mitigation of damages.

C., by contract with a manufacturing company, was employed for five years and payment of his salary was guaranteed by a director. In three years thereafter the company went into liquidation and he was unemployed for the balance of the term. Shortly after the liquidation of the company he and an associate purchased most of its assets by the sale of which he made a profit of $11,000. In an action on the guarantee for $9,000, salary for the two years of his engagement with the company,

Held, affirming the judgment of the Appellate Division (38 Ont. L.R. 396, which reversed that at the trial (37 Ont. L.R. 488, that the action taken by C. which realized a profit exceeding the amount he is claiming arose out of his relations with his employers and the diminution of his loss thereby must be taken into account though he was under no obligation to take it. *British Westinghouse Electric and Mfg. Co.* v. *Underground Electric Railways Co.* ([1912] A.C. 673) applied.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2), in favour of the plaintiff.

The appellant (plaintiff) was employed by the Dominion Linen Mfg. Co., as sales manager, under a

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 38 Ont.L.R. 396. (2) 37 Ont.L.R. 488.

contract for five years at a salary of $5,000 a year; payment of which was guaranteed by one Kloepfer, a director of the company. The action in this case was brought against the administrator of Kloepfer's Estate (the respondent) to recover two years' salary the company having gone into liquidation after three years of the term had passed. The appellant purchased the assets of the insolvent company and made a profit of $11,000 by their sale. The only question on the appeal was whether or not he could recover from the guarantor the amount claimed without regard to this profit.

Hamilton Cassels K.C. for the appellant referred to Sedgwick on Damages (9 ed.) vol. 2, par. 667 et seq.

Sir George Gibbons K.C. and *Boland* for the respondents.

THE CHIEF JUSTICE.—It is claimed by the respondent that it was merely a surety. I have had some doubts whether this was really so, but the case has proceeded on this assumption and if it is so I suppose, according to the usual rule, the measure of the respondent's liability as a surety is the loss of the appellant under his contract of employment.

If the contract had been carried out and the appellant, continuing his employment, had been paid his salary of $5,000 a year for two years it is clear he could not have earned the $11,000 which he did from other sources. He has therefore not only sustained no loss, but is better off than if the contract had been fulfilled. I think this consideration of whether he could have made his profit from other sources if the contract had been fulfilled may be some test of whether such profits are to be taken into account in ascertaining the loss sustained by the breach of the contract.

1917

COCKBURN v. TRUSTS AND GUARANTEE CO.

The Chief Justice.

The judgment of the Divisional Court gives as instances of what cannot be taken into account:—

> If, for instance, immediately after dismissal, the appellant had fallen heir to an estate producing $5,000 a year or had by a lucky chance speculated in stocks and made a large amount or if he spent the time which was not previously occupied in his employment so profitably as to bring him a good income.

In each of these three examples the gain to the appellant would have equally accrued if he had not lost his employment, it would therefore have nothing to do with his loss through the breach of the contract. In the actual case, however, the gain is directly dependent on the breach of the contract and would not have been made if it had not occurred. I do not suggest that this is an absolute test of what ought to be taken into account but I think it is sufficient to dispose of the claim in the present case.

The appeal should be dismissed with costs.

DAVIES J.—I concur with Anglin J.

IDINGTON J.—Without committing myself to the entire reasoning adopted in support of the judgment appealed from herein I think the conclusion reached is right and that the appeal should be dismissed with costs.

DUFF J.—The point presented for consideration in this appeal is by no means free from difficulty, but I am convinced that the actual decision of the First Appellate Division is right and that the appeal must be dismissed with costs.

The principle upon which the appeal ought to be decided is expounded at length in the judgment of Lord Haldane in *British Westinghouse Electric Co.* v. *Under-*

ground Electric Railways Co. (1), at pp. 689 and 690. After stating the general principle that when a contract is broken the injured party is entitled generally to receive such a sum by way of damages, as will, so far as possible, put him in the same position as if the contract had been performed—the damages being limited to those that are the natural and direct consequences of the breach—his Lordship proceeded as follows:—

> But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* (2), at p. 25: "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."
>
> As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

Illustrating this last observation, his Lordship refers to *Staniforth* v. *Lyall* (3), and commenting upon that decision, he proceeds:—

> I think that this decision illustrates a principle which has been recognized in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damages.

A little further on, he adds:—

> The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business.

(1) [1912] A.C. 673. (2) 9 Ch.D. 20.
(3) 7 Bing. 169.

1917
COCKBURN
v.
TRUSTS AND GUARANTEE CO.
Duff J.

I do not entertain the slightest doubt that the appellant's dealings were not dealings which he was under any obligation to engage in for the purpose of mitigating damages, but that, as Lord Haldane points out, is not necessarily decisive. Even though the course taken by him was not one which would ordinarily be taken in the course of business by a reasonable and prudent man in his circumstances, still, having done what he did, the whole of the facts may properly be looked at for the purpose of estimating damages provided that what he did was what a reasonable and prudent person might do properly "in the ordinary course of business."

Whether what the appellant did falls within this description is strictly a question of fact, and I have come to the conclusion that it does.

I have not felt it necessary to pass upon the question whether or not, consistently with this view, some allowance could properly be made to the appellant as compensation for the use of his capital and for the risk. I find it unnecessary to do so because the argument of Sir George Gibbons convinces me that any reasonable allowance on that footing would be overtopped by the allowance which *strictissimo jure* should be made to the respondents in respect of probable gains by way of salary, the opportunity for earning which the appellant deliberately decided to forego.

ANGLIN J.—The facts of this case are fully stated in the report of it in the provincial courts (1).

The fundamental basis of the assessment of damages for breach of contract—compensation for pecuniary loss naturally flowing from the breach—and its quali-

(1) 38 Ont.L.R. 396; 37 Ont. L.R. 448.

fication—that the plaintiff cannot recover any part of the damages due to his own failure to take all reasonable steps to mitigate his loss—are too well settled to admit of controversy. The application of this qualified rule, however, sometimes presents difficulty. The qualification does not impose on the plaintiff claiming damages for the breach

> an obligation to take any steps which a reasonable and prudent man would not ordinarily take in the course of his business:

nevertheless,

> when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

The applicability of the principles expressed in these passages from the judgment of Lord Chancellor Haldane in *British Westinghouse Elec. & Manufacturing Co.* v. *Underground Elec. Rlys. Co. of London* (1), at p. 689, to breaches of contracts for personal services is shewn by the authorities cited by Mr. Justice Hodgins in delivering the judgment of the Appellate Division—notably in *Beckman* v. *Drake* (2).

The action of the appellant in acquiring and disposing at a profit of a considerable part of the manufactured stock of his former employers arose out of his relations with them. It involved the employment by him of time, labour and ability which he had engaged to give to them. For his loss of an opportunity to use these in earning a salary from those employers he is now asking that the respondent shall be compelled to pay by way of damages. It would seem to be manifestly unfair that, if the appellant is thus to be remunerated on a contractual basis by way of damages, he should not be held accountable in mitigation for money

(1) [1912] A.C. 673.
(2) 2 H.L. Cas. 579. 608.

1917

COCKBURN v. TRUSTS AND GUARANTEE CO.

Anglin J.

made by using for his own purposes the time, labour and ability so to be paid for. The $11,000 profit which he made, although the making of it required some assumption of risk and responsibility and also an expenditure clearly beyond anything involved in his engagement by his former employers, and likewise beyond anything which it was his duty to them, or to the respondent, to undertake, is within the rule of accountability stated by Lord Haldane. The action which produced it arose out of his former employment in the sense in which the Lord Chancellor uses the phrase "arising out of the transaction," as is shewn by his illustration from *Staniforth* v. *Lyall* (1). Again to quote his Lordship (p. 691):

> The transaction was * * * one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach.

By devoting his time, energy and skill for two years to the service of his former employers the appellant would have earned $10,000. A breakdown in his health, or other unforseen contingencies might have prevented his doing so. Excused from that service, he was enabled by a happy combination of making use of the time, labour and ability thus set free and taking advantage of the opportunity afforded by his employers' misfortune within 66 days to make a clear profit of $11,000—and he still had at his disposal, in which to add to his earnings, if so inclined, or to amuse himself if he preferred doing so, the remaining year and 299 days. Were he to be now awarded not the $10,000 claimed in his action but the $4,000 allowed him by the learned trial judge, he would, as a result of his employers' disaster, be better off by at least $5,000 than

(1) 7 Bing. 169.

he would have been had he put in his two years of service—"a somewhat grotesque result," as Lord Atkinson put it in *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1). Making due allowance for extra time and trouble expended and all other elements proper to be considered involved in the efforts which resulted in the plaintiff's securing the profit of $11,000, and taking into account the year and 299 days left at his disposal after that was accomplished, it seems reasonably clear that he did not sustain any actual damage as a result of losing his position. He was probably, on the whole, better off.

Upon the facts, when "allowed to speak for themselves," not only is the conclusion reached by the Appellate Division in conformity with legal principles and the authorities but any other would shock the common sense of justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Cassels, Brock, Kelley & Falconbridge.*

Solicitors for the respondents: *Macdonell & Boland.*

(1) [1911] A.C. 105, 115.