THE BOARD OF EDUCATION FOR THE CITY OF LONDON (*Defendant*) — APPELLANT;

AND

THE EAST MIDDLESEX DISTRICT HIGH SCHOOL BOARD (*Plaintiff*) — RESPONDENT.

1966

*Oct. 27, 28
Nov. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Parol contract between school boards for education of students—Breach of contract—Contract enforceable notwithstanding absence of corporate seal—Damages—The Corporations Act, R.S.O. 1960, c. 71, s. 293.

The plaintiff district high school board brought an action for breach of contract against the defendant board of education. The breach of contract committed by the defendant was the withdrawal by it from a high school, which was under the jurisdiction of the plaintiff, of a number of students prior to the commencement of the school year 1963-1964 who under the terms of the contract should have been left to complete their secondary school education at the said school. The students concerned would, if the contract had been carried out, have continued at this school during the school years 1963-1964, 1964-1965 and 1965-1966 and the cost of their education would have been payable by the defendant.

The trial judge found that the plaintiff had suffered proven damages of $45,234 but held that the action should be dismissed on the ground that, while there was a parol contract made between the parties the breach of which by the defendant had caused the aforesaid damages, the contract could not be enforced because it was not made under seal. The Court of Appeal agreed with the views of the trial judge as to the construction of the contract and as to its having been breached by the defendant but held that it was enforceable notwithstanding the absence of the corporate seal, by virtue of the provisions of s. 293 of *The Corporations Act*, R.S.O. 1960, c. 71.

The Court of Appeal was, however, of the view that in the circumstances of this case the damages should be assessed only down to the date of the judgment at trial and that, if they were to be assessed by the Court of Appeal, they should be assessed only down to the date of the judgment of that Court. Accordingly, the Court of Appeal allowed the appeal and directed a reference to determine the damages to the end of the calendar year 1964, without prejudice to the plaintiff's right to take further proceedings to recover damages arising thereafter and accruing until the termination of the defendant's obligation.

From this judgment the defendant appealed to this Court and the plaintiff cross-appealed on the question of the assessment of damages. At the conclusion of the argument for the appellant the Court, having retired to consider the matter, stated that, except in regard to the assessment of damages, it agreed with the reasons for judgment of the Court of Appeal and that consequently it would be necessary to hear

*PRESENT: Cartwright, Fauteux, Abbott, Judson and Spence JJ.

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counsel for the respondent only on the question raised in the cross-appeal. A request that the damages should now be assessed once and for all was made by both parties.

Held: The appeal should be dismissed and the cross-appeal allowed.

The assessment of damages made by the trial judge should be accepted. The amount at which he assessed the damages was that set out in a statement prepared by a chartered accountant who had been for several years the auditor for the respondent. On the first of the two questions raised as to the accuracy of this statement, *i.e.*, as to the starting figure, being the number of students who were wrongly taken away in September 1963, the Court found that the trial judge was right in accepting the plaintiff's figure of 39 students. As to the second question, *i.e.*, as to the estimated "retention factor" used in calculating the loss for future years, the soundness of the estimates that were made was established by the evidence.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Lieff J., whereby an action for breach of contract was dismissed. Appeal dismissed and cross-appeal allowed.

C. F. MacKewn and *G. T. Mitches,* for the defendant, appellant.

W. B. Williston, Q.C., and *R. J. Rolls,* for the plaintiff, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from the judgment of Lieff J. pronounced on August 11, 1964, finding that the respondent had suffered proven damages of $45,234 but holding that the action should be dismissed.

The reasons of Lieff J. proceeded on the ground that, while there was a parol contract made between the parties the breach of which by the appellant had caused the damages mentioned above, the contract could not be enforced because it was not made under seal. The Court of Appeal agreed with the views of Lieff J. as to the construction of the contract and as to its having been breached by the appellant but held that it was enforceable notwithstanding the absence of the corporate seal, by virtue of the provisions of s. 293 of *The Corporations Act,* R.S.O. 1960, c. 71, which had not been brought to the attention of the learned trial judge.

[1] [1965] 2 O.R. 51, 49 D.L.R. (2d) 586.

The Court of Appeal was, however, of the view that in the circumstances of this case the damages should have been assessed only down to the date of the judgment at trial and that, if they were to be assessed by the Court of Appeal, they should be assessed only down to the date of the judgment of that Court. In the result the Court of Appeal gave judgment declaring "that the contract referred to in the pleadings herein is valid and binding upon the defendant and that the defendant has committed a breach thereof" and directing a reference as to damages in the following terms:

3. And this Court doth order and adjudge that the matter be referred to the Master of this Court at London to inquire into and to determine the damages sustained by the Plaintiff to the end of the calendar year 1964.

4. And this Court doth further order and adjudge that the defendant do pay to the plaintiff such sum as the said Master may find the plaintiff entitled to as damages aforesaid forthwith after the confirmation of the said Master's Report according to the usual practice in that behalf.

5. And this Court doth further order and adjudge that this Order be without prejudice to the plaintiff's right to take such further appropriate proceedings as it may be advised to recover damages arising from the defendant's breach of contract after the end of the calendar year 1964 and accruing until the termination of the defendant's obligation.

At the conclusion of the argument of counsel for the appellant the Court, after having retired to consider the matter, stated that, except in regard to the assessment of damages, we agreed with the reasons for judgment of the Court of Appeal, delivered by Schroeder J.A., which we desired to adopt as our own and that consequently it would be necessary to hear counsel for the respondent only on the question raised in the notice of cross-appeal, that is, as to whether the direction of the Court of Appeal as to the method of assessing the damages should be set aside and judgment entered for the amount of damages assessed by the learned trial judge.

In answer to questions put by the Court before counsel for the respondent opened his argument on the cross-appeal, counsel for both parties stated that they would prefer that damages should now be assessed once and for all and requested that this be done. This relieved us from the necessity of inquiring whether or not in the absence of such a request a reference as provided in its judgment should have been directed by the Court of Appeal and I express no opinion upon that question.

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Cartwright J.

The amount at which the learned trial judge assessed the damages was that set out in a statement, ex. 16, prepared by the witness Kime, a chartered accountant who had been for several years the auditor for the respondent. It was he who had calculated the amounts due under the contract in question for the year 1961, $172,739.36, and for the year 1962, $136,521.22, both of which were accepted as correct by the appellant and duly paid.

It is not necessary to set out ex. 16 in detail. It should be explained that the breach of contract committed by the appellant was the withdrawal by it from Medway High School, which is under the jurisdiction of the respondent, of a number of students prior to the commencement of the school year 1963-1964 who under the terms of the contract should have been left to complete their secondary school education at Medway High School. The students concerned would, if the contract had been carried out, have continued at Medway during the school years 1963-1964, 1964-1965 and 1965-1966 and the cost of their education would have been payable by the appellant.

It became clear during the course of the argument before us that only two questions are raised as to the accuracy of ex. 16. The first was as to the starting figure, being the number of students who were wrongly taken away in September 1963. The figure used in the statement is 39. The appellant contends it should have been only 36. The second is as to the estimated "retention factor" used in calculating the loss for future years.

I will deal first with the second of these questions. In calculating the loss for the 1964-1965 school year it was estimated that only 85 per cent of the students who had completed the 1963-1964 year would have attended and in calculating the loss for the 1965-1966 school year it was estimated that only 60 per cent of those who had completed the 1964-1965 year would have attended. While these were of necessity estimates their soundness was established by the evidence of the witness Mr. Hoople, Principal of Medway, which was neither contradicted by other evidence nor weakened on cross-examination.

Dealing next with the question whether the starting figure should have been 39 or 36, it appears that prior to the commencement of the 1963-1964 school year the appellant obtained the transfer from Medway High School of the

records of 42 students who had been in regular attendance at Medway during the year 1962-1963. The names of these 42 students are set out in ex. 10. As to three of these Mr. Hoople, who appears to have acted throughout with exemplary fairness, said that he had reason to believe they would not have continued at Medway even if the appellant had continued to perform its part of the contract and thus the respondent's claim was reduced to 39.

At the trial counsel for the appellant claimed that in addition to the three students mentioned in the preceding paragraph three other students whose records had been transferred to it at its demand should not be included in calculating the respondent's claim, these being Jack Christianson, Jack Small and Charles Stock, but no evidence was given to show why they should not be included. No doubt on the pleadings the onus of proving its damages lay upon the plaintiff but when it had proved that the defendant had, in breach of its contract, withdrawn the records of 42 students and that those students had not returned to Medway it appears to me that the burden of adducing evidence shifted to the defendant if it sought to assert that these three named students would not in any event have returned to Medway. No such evidence was adduced and in my opinion the learned trial judge was right in accepting the plaintiff's starting figure of 39 students.

I conclude therefore that the assessment of damages made by the learned trial judge should be accepted.

I would dismiss the appeal with costs, allow the cross-appeal without costs, set aside paras. 3, 4 and 5 of the formal judgment of the Court of Appeal and that part of para. 6 thereof which deals with the costs of the Reference and direct that judgment be entered in favour of the respondent against the appellant for the sum of $45,234.

Appeal dismissed with costs; cross-appeal allowed without costs.

Solicitors for the defendant, appellant: Mitches & MacKewn, London.

Solicitors for the plaintiff, respondent: Gillies, Saint & Paddon, London.