JOHN C. CORBIN (DEFENDANT).....APPELLANT;

AND

EVAN THOMPSON, ANDREW P. HORNE AND CHARLOTTE G. MUSGRAVE (PLAINTIFFS) ..... } RESPONDENTS.

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*Nov. 20.
*Dec. 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Breach of contract—Measure of damages—Notice of special circumstances—Collateral enterprises—Loss of primary and secondary profits—Costs.

The plaintiffs sold defendant a boiler to be used in a mill to be set up in connection with his lumbering operations and guaranteed its efficiency for that purpose. When delivered, it proved inefficient, and, while necessary alterations and repairs were being made, two months elapsed during which the defendant was deprived of the use of his mill, was obliged to keep a gang of men idle and under expense for wages and board, and, in unsuccessfully attempting to carry on his operations, temporarily hired another boiler. On being sued for the price of the boiler, the defendant counterclaimed for damages and, at the trial, was awarded $427.11, being $277.11 for wages, board and expenses incurred in consequence of the failure of the boiler to satisfy the guarantee, and also $150 for damages for the "loss of the use of the mill." By the judgment appealed from the first item for wages, etc., was rejected and the item for "loss of the use of the mill" only allowed.

Held, per Fitzpatrick C.J. and Davies and Maclennan JJ., Idington J. *contra*, that, as the loss of primary profits directly resulting from the breach of the contract only should have been allowed, the item of $150 for loss of anticipated profits should be rejected as being merely secondary, speculative and uncertain; but that the item assessed by the trial judge in respect of the wages, board and other expenses should be allowed, as they were direct and immediate results of such breach.

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

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Duff J. was of the opinion that the appeal should be allowed and the judgment by the trial judge restored.

The judgment appealed from was reversed with costs and the judgment at the trial restored to the extent of $277.11, but, in the special circumstances of the case, no costs were allowed in respect of the appeal to the court below.

APPEAL from the judgment of the Supreme Court of Nova Scotia which varied the judgment at the trial and ordered judgment to be entered in favour of the plaintiffs for the balance of their claim, after setting off certain damages, with costs.

The special circumstances of the case, in so far as they are material on this appeal, are stated in the judgments now reported.

Mellish K.C. for the appellant.

W. B. A. Ritchie K.C. for the respondents.

THE CHIEF JUSTICE concurred with Davies J.

DAVIES J.—The dispute in this appeal arises out of a certain claim for damages made by the defendant. He had bought an engine and boiler from plaintiffs with a guarantee or assurance that they should be complete and in running order for the purpose of cutting lath-wood at his camp in the woods a few miles from one of the stations of the Intercolonial Railway.

It is admitted that the engine as delivered was out of repair and unfit for use when delivered, and the sole question is the measure of damages for the breach of the contract.

It seems clear that the plaintiffs knew the purposes for which the defendant wanted the engine and

boiler, and also clear that a suitable engine could at any time have been hired by defendant to take the place of the unsuitable engine delivered at from $40 to $50 a month.

About the 16th November when the engine and boiler were set up it was found that the engine would not work and some time afterwards plaintiffs were informed of the fact, and, later on, the engine was sent by plaintiffs' instructions to Truro, N.S., to be repaired. It was not returned to defendant so as to enable him to have it set up and running until the 16th January. The exact dates of these events, with the exception of the last one, are not, in the circumstances, important. Soon after the defendant found the engine would not work he temporarily hired a second-hand engine from one Crease at $20 a month. This did not work satisfactorily either, being too large for the boiler, and was returned by defendant on the 20th. When the plaintiffs instructed defendant to send the engine to Truro for repairs, they were at the same time (5th December) informed by defendant of the hiring by him of the Crease engine. Defendant says:

> I went to Halifax the next morning to tell Musgrave about it. I saw Mr. Musgrave. I told him exactly what happened, and I also told him *in order to get to work that I had hired an engine from Crease to fill my orders and to get my mill to work.* He made the remark that there will be no hurry about getting our engine in repair. I said, "Yes there is, because I have hired this engine and I want to get her returned as soon as I can."

The plaintiffs told defendant that their Truro workmen had informed them the engine would be repaired in three or four days, and the expectation of getting the engine back every few days is submitted by defendants as good grounds for their not hiring

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another engine and for keeping on the gang of men at the camp.

The trial judge allowed him "$150 for the loss of the use of his mill" owing to the non-delivery of the engine contracted for, and in addition to that $277 for wages paid by him to his men whom he retained in camp, for part of the time so retained, and board for the remainder of such time, with sundry other small expenditures, making in all $427.00.

The Supreme Court of Nova Scotia, Russell J. dissenting, reduced these damages to $150 for the loss of the use of the mill rejecting the $277 for wages and board of the men and other disbursements. Russell J. held that the 150 allowed for the "loss of the use of the mill" by the trial judge was recoverable if allowed on the ground that it was a

> fair estimate of the profits which would have been derived from the use of the machinery,

and that they could be added to the outlay required to produce these profits, but if it was put as a correct assessment of the damages for "the loss of the use of the mill" there could not possibly be any other damages awarded. He, however, awarded them, as fair profits, together with the outlay required to produce them and so sustained the trial judge's findings as to the amount of the damages.

All the difficulties of the case arose from the special facts. I agree fully with Russell J. that if the plaintiffs could have hired another engine at $40 or $50 a month and *should have done so* that expense would have been the full amount of the damages he should be awarded.

I think, however, the statements made to defendant by the plaintiffs justified the former in assuming that

the engine would be returned to him complete and efficient almost any day after the three or four days he was told it would take to repair, and that, therefore, he was fully entitled to keep his gang of men on awaiting such return ready to proceed with his work, instead of discharging them and leaving himself in the awkward position of being without men for his camp if and when the engine came back.

It seems under the circumstances a reasonable and proper thing to have done, and, if I am right, I can not see any ground on which the necessary expenses of doing it should be disallowed. They were reasonable and fair damages resulting directly from defendant's breach of contract and their subsequent representations as to when they would have repaired that breach. They were really the damages he actually and directly sustained from the loss of the use of his mill arising out of plaintiffs' breach of contract.

My doubts however have been as to allowing the $150 additional. I am not satisfied that this is a case where loss of anticipated profits can be allowed. If the trial judge had found under the peculiar circumstances of this case the full sum he awarded of $427 as damages for the loss of the use of the mill, I should not have been disposed, in the light of the language used by Blackburn J. in *Elbinger Actien-Gesellschafft, etc.* v. *Armstrong*(1) at page 477, to quarrel with the finding as a reasonable compensation for the loss of the use of the mill. But I am not able to follow him when he finds $150 as such compensation, and then adds to it the actual expenses of wages and board of the men. The damages whatever they were found to be for the "loss of the use of the mill" covered everything recoverable.

(1) L.R. 9 Q.B. 473.

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Nor am I able to follow Russell J. in allowing these damages as anticipated profits. Such profits are only recoverable when they can be held to be what are called primary profits, such as would have occurred and grown out of the contract itself as the direct and immediate result of its fulfilment. Then they are part and parcel of the contract itself and must have been in contemplation of the parties when the agreement was entered into. But if they are such as would have been realized from other independent and collateral undertakings although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as part of the damages occasioned by the breach of the contract in suit, unless indeed the defaulting contractor has expressly contracted to be bound for such consequences or the special circumstances are such that he may be held to have impliedly contracted to be so bound.

See per Bigelow J. in *Fox* v. *Harding* in 1851(1).

See also *British Columbia Saw Mill Co.* v. *Nettleship* in 1868(2); *Horne* v. *Midland Ry. Co.*(3).

In determining the question of liability to pay anticipated or probable profits as damages the distinction between primary and secondary profits must always be borne in mind. In Mayne on Damages (6 ed.) pages 55-56 there is a discussion of the cases and the author cites the judgment in the case of *Masterton & Smith* v. *Mayor of Brooklyn*(4) as furnishing the key to the English cases in which profits have been admitted and rejected as an element in the damages allowed.

(1) 7 Cush. 516.
(2) L.R. 3 C.P. 499.
(3) L.R. 7 C.P. 583.
(4) 7 Hill 61, at pp. 68-69.

Nelson C.J. in delivering the judgment of the court said:

> When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. * * * But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made and formed, perhaps the only inducement to the arrangement.

In all the circumstances of this case I would disallow those $150 of anticipated profits because they are secondary and not primary damages within the meaning of the rule and as being too speculative and uncertain and not in contemplation of the parties when making the contract or such as the plaintiffs may be held to have impliedly contracted to be bound for in case of breach of their contract. As I have rejected the "fair rental" rule because of the misleading character of the information given to defendant as to when the repaired engine would be furnished him, I conclude that the remaining damages, as found by the trial judge, $277.11, should be approved as the reasonable compensation for the loss of the use of the mill and judgment entered accordingly, for that amount with costs of this appeal, but, under the circumstances, neither party to have costs of the appeal to the Supreme Court of Nova Scotia; the respective judgments for the plaintiffs and defendant for debt, damages and costs to be subject to set-off and costs in the trial court to be apportioned as awarded by the trial judge.

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IDINGTON J. (dissenting).—This is an unsatisfactory sort of case. The learned trial judge, in my opinion, erred in the amount of damages he allowed even though the principle he adopted had been right. It seems to me, moreover, that the principles of allowing for full rental of a good engine to supply the place for the full time of the one bought and sent to the shop for repairs and also the damages for men being kept idle as well as for loss of profits was quite erroneous. I cannot reconcile or harmonize the findings as Mr. Justice Russell attempts to do.

On appeal to the Supreme Court of Nova Scotia this assessment is rightly, as I view the case, set aside and only the amount of the estimated rental of a good substitute for the one in question whilst it was being repaired,—and some item for incidentals that may be properly added are allowed. But the evidence of another engine fitted for the boiler power being used, being available for appellant, is by no means as clear as I would like. There is evidence however, left unnoticed in cross-examination and I cannot see how we can discard it.

When we look further into the law and the facts we find that neither party stood upon his strict legal rights but each in a sense seemed to act in a reasonable way up to a certain point, and paradoxical as it may seem, the very doing so renders it more difficult to assess the damages.

We cannot assess them satisfactorily by a strict adherence to the usual rules that would be applicable if the respondents had ignored the complaints of the appellant entirely.

Then when we find that the respondents properly took, on hearing the complaints of the appellants that

the engine had not come up to the standard guaranteed, possession of the engine with the consent of appellant and undertook its repair, and the engine was replaced by the appellant getting one of his own choice and on his own terms we see there cannot be the usual damages assessed in the usual way for breach of a warranty.

We turn to the agreements that followed the breach and have to ask: Has there been any breach of such agreements or of any of them? They are all set out in the pleadings and the default in each also but in regard to each so set out we have not the full particulars of dates, times, and exactly what done, or might have been done that would enable us to assess in detail for breach of each of these subsidiary agreements in any satisfactory manner.

We have, covering them all, the fact that before the guaranteed engine in question was removed to be repaired, the respondents were told by the appellant on the 5th December, that in order to get to work he had hired an engine from Crease.

This substituted engine was got and set up and kept by the appellant till the 19th or 20th of December. Meantime acting on the reasonable option given them, respondents took or caused to be taken, the engine they had guaranteed, away to the repair shop.

Being told of this hired engine led them no doubt to so take the other and at the same time in giving instructions for repair to rest on the assurance the mill was going, and not make, at a possible extra expense, provision for such strenuous efforts for expeditious return of engine from repair shop, as they otherwise might have done and certainly it would not, on such a state of facts, be within the reasonable

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contemplation of the parties as to this subsidiary agreement that the Crease engine would fail, and the mill of appellant stop for want of it.

Yet there came a time when respondents were told it did fail and I incline to think somewhat greater energy induced by extra pay might have been used after that in getting it out of the repair shop. I see, however, no evidence, in this regard, on which I could, satisfactorily, assess damages.

Besides I cannot say that respondents even then neglected anything or that what happened, or the results thereof, could have been within the reasonable contemplation of the parties either at the making of the original or the subsidiary agreements.

Nor can I see that the loss of profits if any were of such a character as to render that loss a proper element to enter into the assessment of damages in this case.

And yet one cannot help feeling but that the appellant has suffered more than he has been allowed.

My difficulty is to bring that suffering within the rules by which damages must be measured and allow for it on a legal basis.

The allowances about to be made here as the result of this appeal exceed, I think, that permissible within such lines. Even if I thought them so based on principle I would not allow to that extent. Moreover, I feel that I should not disregard the finding of the court below for such absolute trifles without the clearest warrant for so doing. In short, I do not feel that, in fixing the sum of $150, the court was so clearly wrong, even if the absolutely correct rules had been followed, that I ought to interfere. The rental basis adopted, to the extent it is, does not appear

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clearly right but the gross sum allowed may after all be almost, if not altogether, so near right that it better stand. I do not think we should, unless upon the clearest ground, reverse only to change by a trifling increase or reduction of damages respecting which, even when applying correct rules of law, men might reasonably differ in their estimate of the facts. This is not the case of a fixed sum in respect of which the court has, if at all, gone wrong.

I therefore think the appeal should be dismissed.

MACLENNAN J. concurred in the opinion stated by Davies J.

DUFF J.—I agree with the views expressed in the judgment of Russell J. in the court below, and I would, consequently, allow the appeal and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitor for the appellant: *T. J. N. Meagher.*

Solicitor for the respondents: *Henry C. Borden.*