Canlin Ltd. v. Thiokol Fibres Canada Ltd., (1983) 40 O.R. (2d) 687

Ontario Reports

ONTARIO
Court of Appeal
Lacourciere, Thorson and Cory JJ.A.
January 12, 1983.

(1983) 40 O.R. (2d) 687

Case Summary

Contracts — Breach of warranty — Damages may include an amount for estimated loss of future profits if such a loss is foreseeable.

Damages — Breach of warranty — Damages may include an amount for estimated loss of future profits if such a loss is foreseeable.

The plaintiff proposed to sell pool covers to customers in the United States. It approached the defendant to determine if the defendant would supply the necessary fabric. The plaintiff made clear to the defendant the required quality of the fabric. The defendant agreed to supply the fabric. It was completely unsatisfactory. The plaintiff brought an action for damages for loss of future profits. The defendant counter-claimed for the price of the goods supplied. The claim was rejected. The defendant appealed.

Held, the appeal should be dismissed.

There is no rule that damages for lost future profits cannot be awarded in an action for breach of warranty. It is only necessary that such losses be losses directly and naturally resulting in the ordinary course of events from a breach of warranty. There is no difference between the result that would flow whether the issue is phrased as a classical contracts or a classical torts question. The reasonable man could contemplate or foresee such losses. The mere fact that such losses are hard to estimate is no reason for not awarding them.

[H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd., [1978] Q.B. 791, [1978] 1 All E.R. 525, apld; Simon v. Pawsons & Leafs, Ltd. (1932), 38 Com. Cas. 151, distd; Richmond Wineries Western Ltd. et al. v. Simpson et al., [1940] S.C.R. 1, [1940] 2 D.L.R. 481; Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd., 27 D.L.R. (3d) 434, [1972] 4 W.W.R. 420; affd 33 D.L.R. (3d) 384, [1973] 3 W.W.R. 288, folld; Kienzle v. Stringer (1981), 35 O.R. (2d) 85, 130 D.L.R. (3d) 272, 21 R.P.R. 44 [leave to appeal to S.C.C. refused 38 O.R. (2d) 159n, 130 D.L.R. (3d) 272n, 42 N.R. 352n]; Robert Simpson Co. Ltd. et al. v. Foundation Co. of Canada Ltd. et al. (1982), 36 O.R. (2d) 97, 134 D.L.R. (3d) 459, 26 C.P.C. 51, refd to]

Appeal by defendant from a judgment for plaintiff in an action for damages for breach of warranty.

A. Riswick, for appellant.

B.S. Wortzman, and L. R. Rothstein, for respondent.

The judgment of the Court was delivered by

Cory J.A.: Can a plaintiff recover damages for the estimated loss of future profits caused by the defendant's breach of warranty? That is the question that must be determined on this appeal.

Factual background

The trial judge gave extensive and careful reasons on the issue of liability which favoured the plaintiff, respondent ("Canadian Tarpoly"). Although the finding of liability is not challenged by the defendant, appellant ("Thiokol"), something must be said of the nature of the contract between the parties in order to understand the problem which arises in the award of damages.

Canadian Tarpoly has been in the business of manufacturing and sale of various plastic products since 1968. In 1971, this company began to manufacture and sell solid swimming pool covers which kept out debris, dirt and water. In 1974, Canadian Tarpoly was satisfied that there was a ready market in the U.S.A. for the sale of mesh pool covers. These covers would keep debris and dirt out of a pool but water could pass through them. A competitor of Canadian Tarpoly was meeting this demand and Canadian Tarpoly was anxious to enter this market and share in the profits to be derived from it.

Thiokol manufactured polypropylene, polyolefin and polyethylene fabric and had supplied material to Canadian Tarpoly since 1971. In September of 1974, representatives of Canadian Tarpoly inquired of Thiokol whether they were interested in supplying the required polypropylene fabric for the mesh pool covers. Tarpoly specifically advised Thiokol that it would be offering its customers a three-year guaranty and that the material supplied would be required to meet the following conditions:

(a) that it be similar in appearance and colour to that of Canadian Tarpoly's American competitor;

(b) that it have a minimum life of two winter seasons;

(c) that it contain sufficient ultra-violet inhibitors to avoid deterioration from prolonged exposure to sunlight; and

(d) that it be made available to Canadian Tarpoly, especially early in 1975 to enable that company to manufacture and sell the covers to its customers prior to September, a month when pool covers are traditionally installed by pool users.

Thiokol was aware of the nature of Canadian Tarpoly's business, the nature and extent of the guaranty, and with that background undertook to meet the Tarpoly requirements and supply the fabric.

With its supply of material secured the Tarpoly company undertook a promotional campaign for the sale of the mesh covers. The sale of the covers began in the spring of 1975. One complaint was received in November of 1975 but a single complaint with a new product would

hardly be considered out of the way. However, in the spring of 1976, particularly in the month of May of that year, Canadian Tarpoly was deluged with complaints. They were so voluminous and vituperative that it was necessary for Canadian Tarpoly to secure warehouse space in Buffalo to store the mesh covers returned by dissatisfied customers. It was found that the covers disintegrated so that parts of the fabric found their way into not only the pool filters but the pool heaters. The situation was aptly described by the trial judge as a "fiasco". Canadian Tarpoly ceased its manufacture of the mesh covers from the Thiokol fabric in the summer of 1976. By this time, grievous damage had been done to the reputation of Tarpoly. At a convention of the pool supply industry in 1977, distributors were advised not to use Tarpoly equipment.

The trial judge concluded that Tarpoly, as the buyer, had expressly made known to the seller, Thiokol, the particular purposes for which the goods were required and relied upon Thiokol's skill to supply the required material. There was thus an implied condition that the goods would be reasonably fit for Tarpoly's purposes. The material supplied by Thiokol was not fit for the purposes for which it was intended and Thiokol was thus in breach of its warranty.

Damages awarded at trial

In very brief reasons the trial judge then assessed the

damages against Thiokol for breach of its warranty under the

following headings:

Credit notes and write-offs converted

to Canadian dollars $

84,009.00

Other expenses

3,500.00

Replacement covers

5,500.00

Projected loss of future business

100,000.00

Total:

$193,009.00

The claim for projected loss of future profits was put forward at $482,401. This figure was based on the projected sales and increase in sales that would have been made to customers of Tarpoly, had these customers not cancelled their business with the company as a result of their disastrous experience with the disintegrating pool covers. There was evidence given on behalf of Tarpoly and apparently accepted by the trial judge that it was not reasonable for it to re-enter the pool cover business in the United States until 1980.

The trial judge recognized the difficulty Tarpoly faced in obtaining satisfactory proof of the loss of profits. It would have been required to call witnesses from its customers in the United States who in turn would need to produce records of their sales. The task would be well nigh impossible for business relations between Tarpoly and its American customers had virtually ceased to exist between 1976 and 1980. In essence, it was found at trial that there was a substantial loss which was impossible to calculate with any accuracy. Thus the figure of $100,000 represented the trial judge's estimate of this head of damage.

The appellant's position

It is the position of the appellant Thiokol that the loss of future business profits was not a foreseeable consequence of the breach of warranty. Alternatively, it is said that such a loss is not a consequence directly and naturally resulting from the breach of warranty.

Some general comments on the appellant's position

The appellant's proposition appears to me to be one that flies in the face of reason and common sense. Most commercial contracts pertaining to the sale and delivery of material or goods must, of necessity, be entered into with a view to making a profit in the future. To say otherwise amounts to a denial of the profit motive in the free enterprise system. The case at bar is a prime example. The plaintiff made known to the defendant that it wished to manufacture and sell a specific type of pool cover. It had determined that there was a profit to be made. It was to secure such a profit that it entered into the contract with Thiokol to supply the material for the manufacture of the pool covers.

Let us consider the unlikely scenario wherein the executive or board of directors of Thiokol sat down and discussed what was likely to happen if they supplied defective material to Tarpoly. In my view, the result would be the same in this case and should be the same in all cases whether the question the executives of Thiokol posed was framed as it would be for a tort case or one involving breach of contract. If these executives asked the "tort" question, what can we reasonably "foresee" as likely to befall Tarpoly if we supply inadequate material, the answer of reasonable men of business would be to the effect that Tarpoly would lose the profits it might expect to make on the sale of pool covers. If the "contract" question was phrased, what can we reasonably "contemplate" as a result directly flowing from our breach of warranty, the answer would be to precisely the same effect. The Thiokol executives would have foreseen or contemplated the very effects that befell Tarpoly.

Why should not damages be awarded for the loss of that contemplated future profit? The court, I believe, would be shirking its duty if it were to say that no damages should flow because of the difficulty of calculating and assessing such damages and that they are therefore too remote. An assessment of future loss of profits must, of necessity, be an estimate. Whether such damages are awarded will depend entirely upon the court's assessment of the evidence put forward. The clearest case might base the loss of future profits upon past history of sales to the same or similar customers for same or similar items. It may be developed from evidence given by customers of a plaintiff as to what orders they would have given had the product not been defective over a period of time in the future which is deemed by the court to be reasonable and proper. The task will always be difficult but not insurmountable. It poses no greater obstacle to a court than the assessment of general damages in a serious personal injury claim.

Are there then any obstacles to the court proceeding in this way?

Authorities relied upon by the appellant

In support of its position the appellant relies upon two cases decided in the English Court of Appeal. The first of these cases is Simon v. Pawsons and Leafs, Ltd. (1932), 38 Com. Cas. 151. In that case the plaintiff carried on a small dressmaking business. By arrangement with a school she was to make uniforms for the girls attending the school. She obtained her materials from the defendant. The material was defective and the uniforms were rejected. The defendant failed to supply the proper material within the time required to make the uniforms. As a result, the school authorities cancelled the plaintiff's appointment to make the uniforms.

At trial the plaintiff's recovered damages both for the defective material and the loss of her appointment to make the uniforms for the school. On appeal it was held that the damages claimed for the loss of appointment were too remote. Scrutton L.J., at p. 157, indicated that in his considerable experience of contracts for the sale of goods he did not remember any cases wherein claims for losses of repeat orders from the customer had been allowed. He appeared to consider such losses too remote.

Later decisions of the English Court of Appeal may have varied this position but, in any event, it seems to me that the facts are such that the case is clearly distinguishable from the one presently before the Court. From the reasons of Greer L.J. it is apparent that the unfortunate dressmaker did have access to alternate material which she could have obtained in time to fulfill her obligation to make the uniforms. In any event, there are limitations to the extent to which this case should be relied upon in light of the next authority relied upon by the appellant.

In H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd., [1978] Q.B. 791, [1978] 1 All E.R. 525, the Court of Appeal again considered whether an award for future loss of profits was appropriate in a case involving a breach of warranty. All members of the court were in agreement that, generally speaking, in the absence of either special knowledge of either of the parties or of a special contractual clause, the amount of damages recoverable was the same whether the plaintiff's cause of action was the breach of the contract or tort. However, the court was divided as to the damages recoverable for loss of future profits.

Lord Denning M.R. was of the view that there is a distinction to be drawn in cases in which the plaintiff had suffered physical injury to his personal property from those cases in which the plaintiff had suffered only economic loss. He was of the opinion that in cases of physical injury, the defendant was liable for all damages which could reasonably have been foreseen at the date of the breach. In the case of economic loss, the defendant was liable only if the damages were such that at the time of the contract he could reasonably have contemplated them as a serious possibility in the event of a breach occurring.

On the other hand, the other members of the court, Orr and Scarman L.JJ., were of the view that the plaintiff could recover loss in an action for damages for breach of contract if the loss which occurred could reasonably be supposed to be in the parties' contemplation as a serious possibility in the event of a breach. They believed that it was not necessary that the parties should have had it within their contemplation that the loss which in fact occurred was likely to occur in the event of a breach. At p. 541, Scarman L.J. stated that the court should approach the question of the loss of profits by posing this question:

> Given the situation of the parties at the time of contract, was the loss of profit, or market, a serious possibility, something that would have been in their minds had they contemplated breach?

In my view, the majority of the court in the above case appears to support the respondent's position on this case and not that of the appellant.

Sale of Goods Act and Canadian authorities

Section 51(2) of the Sale of Goods Act, R.S.O. 1980, c. 462, applies to this case. It is a codification of the common law and provides:

> 51(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

Whether damages for loss of profit is a "loss directly and naturally resulting in the ordinary course of events from the breach of warranty" has been considered on at least two occasions in the Supreme Court of Canada. In Richmond Wineries Western Ltd. et al. v. Simpson et al., [1940] S.C.R. 1, [1940] 2 D.L.R. 481, the Supreme Court of Canada upheld the findings of the trial judge awarding damages which included the profits that the plaintiffs might have been expected to make on sale of the wine which the defendants did not deliver to them. The trial judge found that the measure of damages was the estimated loss directly and naturally resulting, in the ordinary course of events, from the sellers' breach of contract; that the plaintiffs were entitled to recover the profits which the court considered they might have been expected to make on the sale of the gallons of wine which the defendants failed to deliver.

In a more recent case, Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd., 27 D.L.R. (3d) 434, [1972] 4 W.W.R. 420; affirmed 33 D.L.R. (3d) 384, [1973] 3 W.W.R. 288, Clement J.A., speaking for the Alberta Court of Appeal, at p. 441 27 D.L.R. stated:

> I think that the correct principle is that loss of profit (or similar loss) which is the direct and natural consequence of the breach, may be claimed for the period during which the breach is the effective cause of the loss, in addition to other heads of damage which fairly come within s. 53 [Alberta Sale of Goods Act which is the same as s. 51 of the Ontario Sale of Goods Act].

Clement J.A., on the facts of that case, determined that the loss of profit for a period of one year was appropriate compensation. The Supreme Court of Canada dismissed an appeal from this judgment and adopted the reasons given by Clement J.A. See 27 D.L.R. (3d) 434.

There is then strong and binding authority to the effect that damages for loss of future profits may, in proper cases, be awarded as damages to be included in "the estimated loss directly and naturally resulting in the ordinary course of events from a breach of warranty".

American authorities

In light of the Canadian authorities, it is not necessary to look further afield. In any event, the American texts and authorities appear to strongly support the position that damages for loss of profits occasioned by breach of contract should be awarded.

The third edition of Williston on Contracts, a treatise on the law of contracts, has two references which are particularly appropriate. The first, vol. 11, 1345, at pp. 238-39:

> Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties; and, so far as they can be properly proved, they may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical; and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to

> prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages,
>
> to determine the compensation to be awarded for the breach. . . . . But if the plaintiff has given valuable consideration for the promise of a performance which would have given him a chance to make a profit, the defendant should not be allowed to deprive him of that performance without compensation unless the difficulty of determining its value is extreme. [1346 p. 242]

It is interesting to note that Restatement of the Law Second, Contracts 2d vol. 3 (1981), seems to approach the question of damages on the basis of foreseeability. See, for example, 351 which provides as follows:

> 351. Unforeseeability and Related Limitations on Damages
>
> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the the breach
>
> (a) in the oridinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

(Emphasis Added.)

Conclusions

In earlier times, the view of the courts, at least in the United Kingdom, seems to have been that damages for expected loss of profits arising out of a breach of contract could not be recovered on the ground that they were too remote or speculative. There is now binding authority that such damages are recoverable. The following principles can be gathered from the more recent authorities:

> (1) Section 51(2) of the Sale of Goods Act, R.S.O. 1980, c. 462, is a legislative codification of the common law. For ease of reference, I set out that section again:
>
> 51(2) The measure of damages for breach of warranty is the estimated loss direclty and naturally resulting in the ordinary course of events from the breach of warranty.
>
> (2) The test for determining what is a loss that directly and naturally results in the ordinary course of events from the breach of warranty may be phrased in the classical contract question, namely, are the consequences of the breach of contract such that a reasonable man at the time of the making of the contract would contemplate them as being liable to result or to be a serious possibility; or, in the classical tort question, namely, are the consequences of the act such that a reasonable man at the time the tort was committed

would foresee that damages are likely to result. The questions are in reality the same. The affirmative answer to either question should lead to the same result. There is no difference between what a reasonable man might reasonably contemplate and what a reasonable man might reasonably foresee. (See Parsons v. Uttley, supra, Williston on Contracts, Kienzle v. Stringer (1981), 35 O.R. (2d) 85 at 89, 130 D.L.R. (3d) 272, 21 R.P.R. 44 [leave to appeal to S.C.C. refused 38 O.R. (2d) 159n, 130 D.L.R. (3d) 272n, 42 N.R. 352n], Robert Simpson Co. Ltd. et al. v. Foundation Co. of Canada Ltd. et al. (1982), 36 O.R. (2d) 97 at 109-110, 134 D.L.R. (3d) 459, 26 C.P.C. 51. This conclusion would not apply if the contracting parties were specifically aware of certain conditions or if precise contractual provisions fixed the quantum of damages in case of a breach.

(3) Most commercial contracts are entered into with a view to making future profits. The loss of future profits arising from a breach of such a contract are recoverable if they should have been within the contemplation of the parties or ought reasonably to have been foreseen by the parties.

(4) The proof of the loss of the respective profits rests, of course, upon the plaintiff. The amount of future profits and the period for which they should be allowed will depend upon the facts of each individual case. Although such damages may be difficult to assess, it must be remembered that they arise as a result of the breach of the defendant and the court should make all reasonable efforts to assess those damages.

Application of principles to the present case

There can be no doubt that Thiokol could and should reasonably have contemplated that damages would flow from a breach of the contract. Those damages would include loss of future or prospective profits.

The assessment for loss of profits made by the trial judge was very reasonable in the circumstances. It was based upon the past history of Canadian Tarpoly with various customers and upon an estimate of the future business it expected to do with those customers. It was deprived not only of that business but also of good will and reputation as a result of the breach. The time over which the loss of profits was estimated was reasonable in the circumstances. Evidence before the trial judge which he could and did accept was that it was unreasonable for the plaintiff to re-enter the field until 1980. It was thus appropriate to award damages for loss of profit for the period from 1976 to 1980. That assessment should not be interfered with by this Court.

There are certain other conplaints about the assessment put forward by the appellant. It was said that the plaintiff should have stopped selling the goods earlier than it did. It will be remembered that the bulk of the complaints came in in May of 1976 and in June of 1976 Tarpoly was writing to Thiokol with regard to the problem. Ninety per cent of all its sales excepting one customer were made before the summer of 1976. Eighty per cent of the sales to the remaining customer were made before the summer of 1976. Tarpoly seems to have acted with reasonable expedition and there is no merit to this submission.

It was said, as well, that the trial judge should have taken into account the write-off of certain accounts and the fact that Tarpoly usually had a two to three per cent return of pool covers. There are two grounds for discounting these submissions. Firstly, all the returns resulted from the defective material supplied by Thiokol. Thus, there is no basis for making any deduction for the "usual" returns of pool covers. More importantly, the trial judge's conservative estimate of loss of profits would seem to take into account all contingencies, including write-offs and returns.

In the circumstances it was not necessary for the trial judge to state that he was making due allowance for these specific contingencies.

Thiokol also contends that its counterclaim should not have been dismissed. There is no merit to this submission. The goods supplied were grossly defective. They were of no value; rather they created a disastrous situation for Tarpoly. Under these circumstances, there is nothing payable to Thiokol on its counterclaim. In any event, the cost of material was taken into account in assessing the estimated loss of future profits.

In the result, I would dismiss the appeal with costs.

Appeal dismissed.

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