Houweling Nurseries Ltd. v. Fisons Western Corp. (B.C.C.A.), [1988] B.C.J. No. 306

British Columbia and Yukon Judgments

British Columbia Court of Appeal
Hinkson, Esson and McLachlin JJ.A.
February 23, 1988
Vancouver Registry: CA006909

[1988] B.C.J. No. 306 | 49 D.L.R. (4th) 205 | 37 B.C.L.R. (2d) 2 | 29 C.P.C. (2d) 168 | 9 A.C.W.S. (3d) 302 | 1988 CanLII 186 | [1988] CarswellBC 471

Between Houweling Nurseries Ltd., Plaintiff, (Respondent), and Fisons Western Corporation, Defendant, (Appellant)

Case Summary

Breach of contract — Assessment of damages — Damages for lost profits — Moderate damages for conjectural lost profits — Doctrine of remoteness — Whether provable losses reasonably foreseeable.

This was an appeal by the defendant from a judgment awarding damages for the supply of a defective product to the plaintiff. The plaintiff purchased potting soil from the defendant and bedding plants died in the gardens of its ultimate customers. Many of the plaintiff's commercial customers cancelled their contracts with the plaintiff for bedding and tropical plants and refused to deal with the plaintiff thereafter. At trial, the plaintiff was awarded $2 million dollars in damages. The defendant was found to have breached the implied warranty or condition as to quality or fitness for the purpose for which the goods were required and the implied condition that the goods were of merchantable quality contrary to ss. 18(a) and (b) of the Sale of Goods Act. The trial judge found that the evidence led by both parties' accountants was unacceptable and he therefore assessed the damages globally.

HELD: The appeal was allowed.

The method of proceeding adopted by the trial judge in assessing damages was in error. It was up to the court to estimate lost profits and not the accountants. Insofar as the defendant's accountant was successful in spoiling the estimate of the plaintiff's accountant, that estimate should have been disregarded. Rejection of the accountant's evidence erroneously led the trial judge to conclude that there was no basis in the evidence for calculating loss of profits with any degree of certainty, and thus to apply the global approach. The trial judge properly rejected the two sets of assumptions adopted by the parties' accountants which led to their wildly different assessments of loss. But it was not right to ignore the evidence put forward on those issues and the framework for assessment offered by the parties. The trial judge should have reviewed that evidence in detail in order to find the facts which could be used within the framework in place of the rejected assumptions. The trial judge made no findings on the critical issues of amount of lost sales and the appropriate rate of profit. The absence of such findings deprived the award of the foundation fundamental to its validity. The plaintiff was entitled to damages for sales which it had established it lost with reasonable certainty, as well as a moderate sum for loss of other sales which, while they could not individually be proven on a balance of probabilities, were likely to have materialized to some extent had the breach of contract not occurred. Based on these principles the Court assessed the plaintiff's damages at $400,000.

Counsel for the Appellant: H. Grey, Q.C. and G. Hilliker. Counsel for the Respondent: G.B. Longpre, C.G. Edwards and B.F. Screiber.

McLACHLIN J.A. (for the Court, allowing the appeal):— The plaintiff Houweling Nurseries Ltd. operates a nursery in which it grows plants for sale to retail outlets. In 1983, as a result of a defective potting soil mix supplied to it by the defendant, Fisons Western Corporation, many of the bedding plants which the plaintiff supplied to its customers withered and died. The plaintiff's customers complained. Many cancelled the balance of their 1983 contracts with the plaintiff for bedding and tropical plants and refused to deal with the plaintiff thereafter.

The plaintiff sued the defendant for breach of contract, alleging a breach of ss. 18A and 18B of the Sale of Goods Act, R.S.B.C. 1979, c. 370. After a lengthy trial, the defendant was found to have breached the implied warranty or condition as to quality or fitness for the purpose for which the goods were required (s. 18A and the implied condition that the goods would be of merchantable quality (s. 18B The defendant was also found in breach of contract by inducing a sale through misrepresenting the product as being virtually identical with the mix Houweling was using prior to Fisons' mix and as being one which could be used without altering any of Houweling's horticultural practices. Finally Fisons was found negligent for failing to test adequately the product for its suitability in local use prior to sale and for failing to provide special instructions to explain the qualities of the product and the proper ways to use it.

The trial judge concluded that the defendant was liable to compensate the plaintiff for losses due to the deficient soil mixture. Without going into the details of the accounting evidence and without making specific findings as to the amount of sales lost or the proper rate of profit, the trial judge assessed the plaintiff's damages at $2,000,000 plus $35,000 for bad debts and sales returns. Later, in response to a request to divide the award between pre-trial and post-trial losses for purposes of the Court Order Interest Act, the trial judge in supplementary reasons set the pre-trial loss at $559,320 - the full amount claimed - and allocated the balance of the $2,000,000 award to post-trial losses.

The defendant appeals from the award of $2,000,000 on two main grounds. First, it submits that it was not open to the judge to fix a sum based on his overall impression of the evidence. Second, it submits that the award in any event constitutes an entirely erroneous estimate of the loss suffered by the plaintiff and is not justified in law.

There is a subsidiary issue as to costs.

A. DAMAGES

As noted, the defendant attacks both the method used by the trial judge to assess damages and the amount in which the damages were assessed. I will deal with each of these issues in turn.

1. Method of Assessment

The trial judge assessed damages globally, without making findings as to the amount of lost sales or the applicable rate of profit. He began his reasons on damages with a complaint about the disparity in the opinions of accountants called for the plaintiff and the defendant, commenting that each accountant had "concentrated on spoiling the other's position and each

was successful to a high degree". Concluding he could accept the evidence of neither accountant, the trial judge confined himself to certain general findings - some of which favoured the plaintiff and some of which favoured the defendant - and fixed the global sum of $2,000,000 to embrace all the plaintiff's claims except bad debts and returns.

I am satisfied that this method of proceeding was in error.

The judge seems to have taken the view that it was up to one or other of the accountants to come up with a package estimate of damages which he could 4 accept. This approach, which no doubt resulted quite naturally from the way in which the case was presented, discloses a basic fallacy. It was not for the accountants to estimate the lost profits, but the court. Furthermore, in so far as the defendant's accountant was successful in spoiling the estimate of the plaintiff's accountant, that estimate must be disregarded.

Rejection of the accountants' evidence erroneously led the trial judge to conclude that there was no basis in the evidence for calculating loss of profits with any degree of certainty, and thus to apply a global approach. Where the evidence offers no basis for assessment, the court may, as in Williams v. Stephenson (1903), 33 S.C.R. 323 and Cotter v. General Petroleum, [1951] S.C.R. 154, refuse to allow any amount. That can be the result of applying the onus of proof which, on the issue of damages, always rests on the plaintiff. This was not such a case. It was common ground that there was some loss and there was a fair degree of agreement on the method which should be used to arrive at the amount of that loss. The astonishing disparity between the end figures proposed by the two accountants was attributable to the radically different factual assumptions, on which their calculations were based. Primarily, those assumptions were as to:

(1) the amount of sales lost as a result of the breach of contract;

(2) the capacity of the plaintiff to supply the lost sales; and

(3) the rate of profit on the lost sales.

The trial judge properly rejected both sets of assumptions. But it was not right to ignore the evidence put forward on those issues and the framework for assessment offered by the parties. What then had to be done was to review that evidence in detail in order to find the facts which could be used within the framework in place of the rejected assumptions. On the issue of capacity, the judge made certain findings in the plaintiff's favour but made no findings on the critical issues of the amount of lost sales and the appropriate rate of profit. In the circumstances of this case, the absence of such findings deprives the award of the foundation fundamental to its validity.

Assessment of damages for lost profits caused by breach of contract is, in this respect, analogous to assessment of damages for personal injury resulting from a tortious act. In so far as mathematical figures and calculations can aid in arriving at a fair and realistic estimate of damages, they should be used. At the same time, it must be recognized that aspects of the claim may not be capable of precise mathematical calculation; this is particularly true of claims for losses in the future. Even when this is the case, however, mathematical calculations may serve as a useful guide. In this case, the parties having based their cases on precise mathematical calculations, it was essential that the trial judge consider the validity of the factual assumptions on which those calculations were based.

For these reasons, I find the trial judge's method of assessing damages to be erroneous. In so far as he failed to make findings on the issues basic to the assessment of damages, this Court

may do so if it can, failing which, there must be a new trial.

2. Whether the Award is Excessive: Applicable Principles

For a number of reasons, the award of $2,000,000 seems, without looking at details, to be "surprising". It exceeds the amount of the plaintiff's gross sales in any year up to trial. It amounts to about five times the annual profit which the plaintiff had enjoyed in any of the years up to trial. It seems to be over 20 times the dollar amount of the reduction in sales increase in 1984. And it appears to be over double the value of the equity of the plaintiff as estimated by the defendant's accountant. While there may be merit in the plaintiff's suggestion that its equity would have been higher but for the events of 1983, the award nevertheless, at first blush, seems disproportionately high.

Surprising as the size of the award may be, this does not afford a basis for setting it aside if it is justified on the evidence and the applicable principles of law.

In order to recover damages for breach of contract, a plaintiff must establish two things. First, he must prove on a balance of probabilities that the defendant's breach of contract resulted in the damages claimed. Second, he must establish that the damages are not too remote - that is, that they represent a type of loss which was reasonably foreseeable to the defendant when the contract was made. The defendant submits that the trial judge failed to heed either of these principles.

What constitutes proof of loss of profits on a balance of probabilities? The defendant says the elements of the loss must be established with reasonable certainty, and must not be speculative or conjectural. It goes so far as to contend that damages for loss of future business must be confined to contracts existing at the time of breach and cannot be awarded for future contracts, relying on 7 American authority: Douglass Fertilizers & Chemical, Inc. v. McClung Landscaping Inc., 459 So. 2d 335 (Fla. App. 5 Dist. 1984).

That proposition is not in accord with the general tenor of English and Canadian authority, which has long recognized the right to recover damages for the loss of future business which have not been established with specific certitude. For example, in Victoria Laundry (Windsor) Ltd. v. Newman Industries Ld. etc., [1949] K.B. 528 (C.A.) at p. 543, Asquith L.J. stated:

> Here, no doubt, the learned judge had in mind the particularly lucrative dyeing contracts to which the plaintiffs looked forward and which they mention in para. 10 of the statement of claim. We agree that in order that the plaintiffs should recover specifically and as such the profits expected on these contracts, the defendants would have had to know, at the time of their agreement with the plaintiffs, of the prospect and terms of such contracts. We also agree that they did not in fact know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhapS conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected.
>
> (emphasis added)

The proposition that damages need not be confined to losses proved by reference to specific contracts or customers was also adopted in GKN Centrax Gears Ltd. v. Matbro Ltd., [1976] Lloyd's L.R. 555 (C.A.). The plaintiff, a manufacturer of vehicles, had over a period of seven years installed in its vehicles axle assemblies supplied by the defendant, many of which failed, striking a permanent blow to the reputation of the plaintiff's products. The Court of Appeal rejected the view of the chambers judge (who was called on to set aside an arbitration award)

that there had to be "specific proof of each and every source of loss." At p. 578 Stephenson L.J. stated:

> The Court can and should draw inferences from the evidence called as to the probable extent of the total loss of business resulting from the original seller's breach of contract and must make its own moderate estimate without attempting perfect compensation.

(emphasis added)

While these passages from Victoria Laundry and GKN Centrax indicate that damages for loss of future business may be awarded in the absence of precise proof of specific contracts, they also suggest that the amount of such damages must be discounted to reflect the contingencies involved. Thus Asquith L.J. refers to "some general (and perhaps conjectural) sum ..." and Stephenson L.J. insists that such damages must be "moderate".

In my view, the law may be summarized as follows. The basic rule is that damages for lost profits, like all damages for breach of contract, must be proven on a balance of probabilities. Where it is shown with some degree of certainty that a specific contract was lost as a result of the breach, with a consequent loss of profit, that sum should be awarded. However, damages may also be awarded for loss of more conjectural profits, where the evidence demonstrates the possibility that contracts have been lost because of the breach, and also establishes that it is probable that some of these possible contracts would have materialized, had the breach not occurred. In such a case, the court should make a moderate award, recognizing that some of the contracts may not have materialized had there been no breach.

The matter may be put another way. Even though the plaintiff may not be able to prove with certainty that it would have obtained specific contracts but for the breach, it may be able to establish that the defendant's breach of contract deprived it of the opportunity to obtain such business. The plaintiff is entitled to compensation for the loss of that opportunity. But it would be wrong to assess the damages for that lost opportunity as though it were a certainty.

I turn to the other principle upon which the defendant relies - the doctrine of remoteness. This doctrine is sometimes expressed as consisting of two rules, one dealing with imputed knowledge and one with actual knowledge of special circumstances: Victoria Laundry, supra, per Asquith L.J. at p. 539. However, for our purposes it may be conveniently be stated as one rule - that the defendant is liable for such losses as, in all the circumstances, he ought reasonably to have contemplated at the time the contract was made.

The effect of the doctrine of remoteness is to exclude losses which it is established were caused by the breach of contract, but which were not reasonably foreseeable when the contract was made. The rationale for this exclusion is that it would be unfair to require the defendant to pay such damages, when, if he had been aware of them, be might have declined the risk or made other arrangements: Hadley v. Baxendale (1854), 156 E.R. 145 at 151.

The defendant contends that the plaintiff's claim goes beyond what was in the reasonable contemplation of the parties at the time of contracting in two respects. First, it submits that since tropical plants were not grown in the mix supplied by the defendant, loss of contracts for tropical plants was not within the reasonable contemplation of the parties. I cannot accept this contention. It was reasonably foreseeable that purchasers who received defective bedding plants from the plaintiff would prefer to buy all their plants - bedding and otherwise - from a supplier they perceived as more reliable.

Second, the defendant says that the claims for sales to new customers, namely, Woolco Edmonton, The Bay, McLeod's, and Renate Horstmann, were "particularly lucrative" and hence

not within the reasonable contemplation of the parties when the contract was made. The evidence, however, does not support the submission that these contracts were special or in any way different from the type of contracts the plaintiff might normally be expected to enter into with purchasers.

Nor does the fact these contracts were with customers who may have been unknown to the plaintiff in 1983 make them too remote. This argument relates to the fact the plaintiff, on the basis of supplying the Centennial Woolco store in Edmonton with plants in 1983, claims that but for the defendant's breach of contract in 1983, it would have supplied all the plants sold by all five Woolco stores in Edmonton in 1984 and on into the indefinite future. The doctrine of remoteness is concerned with excluding losses which are of a type which was neither known to the defendant nor reasonably foreseeable. Thus in Victoria Laundry, supra, the doctrine focussed on particularly lucrative dyeing contracts, and in H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd., [1978] 1 All E.R. 525 (C.A.) the inquiry was as to whether the illness of pigs resulting from the failure to properly vent a silo could have been considered a serious possibility. The court in Parsons concluded that the doctrine of remoteness is satisfied if the loss which in fact occurred was of a type which could reasonably be supposed to have been in the contemplation of the parties as a serious possibility in the event the breach of contract occurred.

Applying that test to the example of the Edmonton Woolco stores it is my view that the alleged loss which occurred - the loss of sales in 1984 and following years to stores other than Centennial - were losses of a type which might be supposed to have been in the contemplation of the parties as a serious possibility in the event of the breach of contract which occurred. The fact that the actual amount of lost sales may have exceeded the parties' expectations does not, on the reasoning in Parsons, appear to render the damages too remote. Nor does the fact that the losses may relate to business with customers about whom the defendant may have been unaware at the time of contracting. To put it another way, while the defendant may not have known or had reason to know of the particular business opportunities which the plaintiff had in Alberta, the existence of some such opportunities wato be reasonably expected", justifying an award of damages.

I conclude that the plaintiff is entitled to damages for sales which it has established it lost with reasonable certainty, as well as a moderate sum for loss of other sales which, while they cannot individually be proven on a balance of probabilities, were likely to have materialized to some extent had the breach of contract not occurred.

3. Computation of Damages

a) The Trial Judge's Findings

At trial, the plaintiff presented two schedules setting out the amounts claimed by Houweling.

Schedule "A" reflected losses claimed for customers who testified in support of Houweling at trial. The trial judge accepted the Schedule "A" analysis of damages in its entirety for pre-trial losses, despite findings of fact which established that Schedule "A" claims could not be accepted in that way.

Schedule "B", representing losses claimed for other customers, was premised on a method of calculation rejected by the trial judge. In any event, the losses claimed in Schedule "B" appear to have been negated by the testimony of certain of the customers involved. Accordingly, no losses claimed for Schedule "B" customers have been made out, and consideration of damages can be confined to Schedule "A".

Neither Schedule "A" nor Schedule "B" distinguished between lost sales of bedding plants and lost sales of tropical plants.

In order to properly assess damages, it is necessary to arrive at a conclusion on three factors:

(1) The amount of the lost sales;

(2) The capacity of the plaintiff to fill the lost sales; and

(3) The rate of profit.

I turn first to the amount of lost sales. The trial judge made no specific finding on this issue, leaving it open to this Court to draw the appropriate inferences from such evidence as the trial judge appears to have accepted.

His general findings relevant to the amount of lost sales include the following:

1. The plaintiff's annual rate of increase in sales took a severe downward jolt in 1983 which is reasonably attributable to the 1983 crop misfortune in that many customers turned shy of reordering in 1984;

2. Except for 1983, Houweling has been a successful and knowledgeable grower and merchandiser who has steadily increased production and earnings;

3. The growth in earnings which Houweling would otherwise have enjoyed with a good crop in 1983 was curbed to some degree by the reaction of customers to the 1983 experience; and

4. The downward turn in the general economy did not affect the market for bedding plants.

On the other hand, the trial judge concluded that:

1. The projection of sales based on the linear regression analysis is a highly doubtful method. (That analysis was put forward in support of the Schedule "B" losses (customers who did not testify));

2. The information supplied by Houweling to its accountant, including such matters as the company's relations with each customer and its estimate of sales which could have been made, leans heavily toward optimism. (These are the figures carried forward in Schedule "A", (representing losses of customers who testified));

3. The customers' estimates of future increases in bedding plant sales require discounting (also carried forward in Schedule "A"); and

4. The 1983 experience would soon be forgotten and there would not be a permanent erosion of profitability and thus of goodwill.

With respect to the second factor, capacity to supply the alleged lost sales, the trial judge's findings are conclusive; the plaintiff had the ability to supply the projected growth in sales. Specifically, the trial judge found:

1. Houweling could respond reasonably quickly within any season to increases in demand should such demand exceed current greenhouse capacity; and

2. Growth was not limited by the capacity of fixed assets.

As for the third factor, rate of profit, the trial judge's general findings indicate that he was of the view that but for the problems encountered in 1983, the plaintiff would have continued to enjoy a high rate of profit. His finding that the plaintiff was a successful and knowledgeable grower who

had steadily increased his earnings supports this inference, as does his conclusion that the plaintiff would have benefitted from economies of scale with respect to the lost sales.

The trial judge, however, did not address himself to the serious issue as to what that rate of profit would have been. The plaintiff's claim was based on a profit rate of 30.7% which was reasonably attainable on additional sales of bedding plants if those additional sales could be achieved without increased capital expenditure. The defendant assumed a rate of 16.2% which was very close to the historical rate of profit for the company. The reasons advanced in support of, and contrary to, the view that additional sales could have been achieved without increased expenditure raised a factual issue which had to be resolved in order to determine whether the applicable profit rate was 30.7% or 16.2% or some other rate. As it is a question which can be answered for the most part by drawing inferences from evidence not greatly in dispute, it is an issue which this Court can resolve in order to avoid the expense and delay of a new trial.

Having concluded that it is open to this Court to draw its own conclusions as to the amount of lost sales and profitability, I go on to consider these questions in greater detail. In so doing, I bear in mind that notwithstanding the lack of findings on critical matters, the generous award of the trial judge indicates that he viewed the plaintiff's case favourably I therefore propose to reject only those claims which are not supported by the evidence or which are clearly too speculative to justify an award of damages.

b) Amount of Lost Sales

I approach the question of computation of the amount of lost sales on the basis of the principles I have set out above. This means I must consider whether the plaintiff's claims for lost profits are: (1) established with reasonable certainty and precision on a balance of probabilities, in which case damages are fully recoverable; or (2) established only as a reasonable possibility which to some extent would probably have materialized, in which case a reduced or "moderate" sum may be awarded; or (3) so conjectural that it would be wrong to award any damages for them.

The plaintiff's computation of lost sales is based on the following assumptions:

(a) That all of the stores referred to in Schedule "A" would have purchased all of their requirements from Houweling in 1984 and subsequent years;

(b) That the 1983 incident caused those stores not to do business with the plaintiff and that the consequent loss of business would continue into infinity;

(c) That the business done by those stores would have increased at the rate postulated by the witnesses called.

However, the evidence and the findings of fact made by the trial judge clearly reveals that these assumptions, which on their face are improbable, cannot be accepted as a proper basis for fixing damages for loss of future sales.

Accordingly, in order to employ Schedule "A" at all, it is necessary to assess the amount of lost sales upon a number of factors, including:

(a) which of the customers named in Schedule "A" would have become regular customers of the plaintiff, but for the breach of contract;

(b) how long the 1983 incident prevented these customers from resuming purchases with the plaintiff;

(c) How much these customers would have bought from the plaintiff during the relevant time period;

(d) How much of the lost sales were replaced by new business which would not otherwise have been obtained.

I turn first to gross pre-trial loss of sales. It is necessary to examine the claim advanced for each customer set out in Schedule "A".

Woolco Edmonton

There are five stores in this category. The claims with respect to all five are based on the fact that in 1983, the Centennial store contracted to purchase its bedding plants from the plaintiffs on a trial basis and cancelled the contract when the poor quality stock was received in the spring of 1983.

The claims for the Centennial store for the years 1983 to 1985 are supported by the evidence. Mr. Lee, divisional manager in 1983, testified that but for the problems of 1983, he would have stayed with the plaintiff as supplier of plants. The amounts of sales claimed lost for those years are verified by the evidence, being $52,266 in 1983, $74,500 in 1984, and $63,400 in 1985.

The claim for 1985 and any period thereafter is more difficult. On the one hand, Mr. Frith testified that had the plaintiff been the established supplier in 1985 when he took over from Mr. Lee, he would have continued with the plaintiff. There is also evidence that while each store manger had the power to buy from whom he wishes, in practice they coordinated their buying so that all tend to use the same suppliers. These factors suggest that the failure to continue with the plaintiff may have been causally connected with the problems of 1983.

On the other hand, Mr. Frith testified that he in fact bought plants from the plaintiff in 1985. It was problems stemming from that experience - not the 1983 incident - that led to his decision to buy nothing further from the plaintiff. He further testified that the fact that he currently purchased his bedding plants from local suppliers was in no way related to what occurred in 1983.

The claim with respect to the other Edmonton stores was founded on the evidence of Mr. Lee and the managers of those stores.

Mr. Lee testified that he was in charge of coordinating the buying policy for all five Edmonton stores and, had his experience with the plaintiff been satisfactory in 1983, the plaintiff would have supplied all those stores in 1984 and 1985. There is therefore evidence to support the claim that the plaintiff lost sales to other Edmonton Woolco stores for 1984 and 1985.

The evidence with respect to subsequent years is more problematic. The managers of those stores testified that if the plaintiff had become the established plant supplier in 1983, they would have stayed with the plaintiff in 1984 and presumably in subsequent years.

This evidence was based on continuity and loyalty to established suppliers - the fact that once a retailer establishes a relationship with a satisfactory supplier, he will tend to stay with that supplier. The evidence, however, reveals that supplier loyalty is only one factor in determining from whom to buy. If a new supplier comes along with a better idea (as the plaintiff did with its in-store greenhouses in Alberta in 1983) the buyer may switch. The same may be said for price and service. If an existing supplier proves unreliable, the retailer will change. Change in the retailer's management is another factor which may change buying patterns. The conduct of Mr. Frith in 1985, in buying from the plaintiff, suggests that notwithstanding loyalty to existing

suppliers and general uniformity in purchasing by all the Edmonton stores, other suppliers may be used.

The tendency to stay with a current supplier without more does not, in my opinion, justify the conclusion that it is probable for the indeterminate future that the plaintiff will be unable to sell to the stores in question, assuming it takes all reasonable steps to reacquire the market. As time passes and other factors intervene, the effect of supplier loyalty must diminish. Given the other factors which may be expected to intervene, we can put the claim for future losses due to the fact that another supplier is installed in the plaintiff's place no higher than a reasonable possibility.

I conclude that the case for lost sales to the Centennial store to the date of trial is established on a balance of probabilities. I would allow that claim in full. As for the other Edmonton Woolco stores, the claims for pre-trial loss of sales can be put no higher than possibilities which would probably have materialized to a significant extent. To put it another way, these claims represent the loss of an opportunity, which, while it probably would have arisen, must be discounted for the possibility that it might not have fully materialized. I would allow 75% of the pre-trial loss claimed for these stores.

After the date of trial, any link between the events of 1983 and the alleged lost contracts is much more conjectural. It must be ranked as a reasonable possibility which probably would have been realized to some extent but for the breach of contract, a lost opportunity for which a moderate amount should be awarded. Accordingly, I would allow 25% of the amounts claimed for the years 1986 to 1990, when the effect of continuity may be considered to have spent itself, and nothing thereofter.

In allowing only a portion of the amount claimed for post-trial losses, I have considered the benefit of present payment.

Woolco Lethbridge

There is evidence to support the amount claimed for 1983 for Woolco Lethbridge. Mr. Knox, manager at that store, testified that he would have stayed with the plaintiff had the service and quality been good in 1983. Because the quality was poor, he cancelled orders in the spring of 1983. The amount of these orders was $32,540.

The evidence for Woolco Lethbridge for 1984 and 1985 is more speculative. While there is evidence to support the proposition that Woolco would have stayed with the plaintiff had the service, quality and price remained good, the evidence also suggests that Mr. Knox preferred to deal with Alberta, growers because they were closer and he could get his plants on shorter notice. Mr. Houweling testified on examination for discovery that he was making no claim for Lethbridge because the route was out of the way, although by the time of trial he said that this had changed. Thus it appears probable that even if Woolco Lethbridge had wished to deal with the plaintiff in 1984, the plaintiff would have declined. This factor, combined with Mr. Knox's preference for local suppliers, leads me to conclude that the plaintiff has not discharged the onus of establishing either as a probability or a reasonable possibility that it would have supplied the Lethbridge store in 1984. In fact, this seems highly improbable. The same applies to 1985 and subsequent years, given Mr. Knox's evidence that once he finds a satisfactory supplier he sticks with that supplier, and that he found such suppliers in Alberta in 1983.

I find that the claim for lost sales to Lethbridge beyond 1983 is so conjectural that it cannot be regarded as even a reasonable possibility.

Woolco Calgary

The defendant substantially accepts the plaintiff's claim for lost sales prior to trial to the four stores in this group.

The claim for post-trial lost sales is small. Mr. Aldcroft from the Westbrook store testified that he would be going back to the plaintiff in 1986. Mr. Walker of the MacLeod Trail store testified that the majority of his business in 1986 would be going to the plaintiff although he would keep a small amount with a local supplier because of the problems of 1983. For similar reasons Mr. Baxter of the Marlborough store thought he would buy 50 to 75% - closer to 75% - of his plants from the plaintiff in 1986. As for the future, he regarded it as a case of the plaintiff proving itself with good plants. Mr. Johnson of the Deerfoot store testified that he had not made up his mind whom to buy from in 1986 but that supplier loyalty was a strong factor and he had been buying from an Alberta supplier in the past.

This evidence does not establish any loss of future sales on a balance of probabilities. However, it suggests that there is a probability of some loss of sales in the future to the McLeod Trail, Marlborough and Deerfoot stores. I would allow lost sales for the years 1986 to 1990 in 25% of the amount claimed by the plaintiff, and nothing thereafter.

Woolco Regina and Moose Jaw

The defendant agrees that the plaintiff has established lost sales for the Northgate store in 1984 of $25,464, for the Southland store of $16,234, and for Moose Jaw of $17,500. I accept these as the proper figures for lost sales. No claim was made for loss of future sales.

Woolco Prince George

Mr. Sirtonski said that but for the problems in 1983 he would have purchased $25,000 worth of plants from the plaintiff. He agreed that he had purchased about $16,000 worth in that year. This establishes lost sales of $9,000 for 1983. No claim was made for other years.

The Bay

The plaintiff claims a loss of sales in 1983 of $66,679 to The Bay stores in Alberta and greater sums in subsequent years. This figure is based on stores other than those supplied by the plaintiff and hence cannot be accepted.

The Bay stores in Edmonton with whom the plaintiff had been dealing had a contract with the plaintiff in 1983 to supply $80,000 worth of plants. The contract was cancelled after supply of $42,097 worth of plants, leaving a shortfall of $38,000. This is the gross amount of lost sales for 1983.

The evidence establishes that The Bay would have purchased its stock from the the plaintiff in 1984. I accept $80,000, as conceded by the defendant, as the appropriate figure for loss of sales to The Bay for 1984.

The evidence establishes that had the plaintiff supplied The Bay satisfactorily in 1984, The Bay would probably have purchased from it in 1985. In 1985, The Bay purchased $55,000 to $60,000 worth of plants from other suppliers. Given the contingencies involved, I would allow 75% of $60,000 for lost sales to The Bay in 1985.

Beyond 1985, the evidence falls short of establishing all the alleged lost sales to The Bay on a balance of probabilities. However, given the factor of supplier loyalty, a reasonable possibility that some of these sales would have been lost is established.

Accordingly, the appropriate measure for future losses is 25% of the amount claimed for 1986 to 1990, when the intervention of other factors can be expected to have rendered supplier loyalty insignificant.

Mountainview Nursery

The defendant concedes the plaintiff lost sales to Mountainview of $27,704 in 1983. No other claim is advanced.

Westbank Nurseries

This store purchased approximately 50% of its bedding plants from the plaintiff. In 1983 it purchased slightly over 60% of its bedding plants from the plaintiff. In 1984 it purchased $7,700 worth of plants from the plaintiffs. In 1985 it switched to a Kelowna supplier of bedding plants which provided the same price as the plaintiff with better service and control.

Having reviewed the evidence on the question, I cannot conclude that it does more than support an inference that the bad product in 1983 was one factor among several that led this customer to leave the plaintiff and buy elsewhere in 1985. The evidence does not support the view that it was the determinative factor. Accordingly I find that the claim for loss of sales to Westbank is not made out.

MacLeod's

The plaintiff's records indicate that it supplied no bedding plants to MacLeod's in 1983. Nor did MacLeod's have a record of buying bedding plants from the plaintiff that year. The assessment of Mr. Houweling himself was that the loss of sales to MacLeod's was unrelated to the bedding plant problem in 1983. Notwithstanding the evidence of Mr. Kettlewell of MacLeod's that he remembers receiving a small shipment of defective plants from the plaintiff in 1983, I consider the evidentiary foundation too weak to support the conclusion that any loss of sales to MacLeod's was caused by the defendant's breach of contract.

Renata Horstmann

One of the plaintiff's customers was Nick's Garden Centre in Edmonton. An employee of Nick's Garden Centre, Renate Horstmann, testified that but for the 1983 bedding plant problem the plaintiff would have received another $60,000 to $70,000 worth of orders from Nick's Garden Centre in 1983 and $177,000 worth of orders in 1984. Additionally, in light of Mrs. Horstmann's forthcoming business, she stated that further future losses of sales would be suffered by the plaintiff.

I do not find Mrs. Horstmann's evidence credible. On examination-in-chief, Mrs. Horstmann represented herself as the person responsible for ordering plant supplies. On cross-examination, however, she conceded that she was an employee and that the owner, Nick Horstmann, had authority to place plant orders and in fact did so. Again in direct examination, Mrs. Horstmann stated that Nick's Garden Centre purchased only $1,500 worth of plants from Houweling in 1984; yet the records of Houweling indicate that purchases totalling $21,262.30 were made from the plaintiff in 1984. Moreover, Nick's Garden Centre went out of business in 1984.

Mrs. Horstmann stated that as a result of the 1983 plant supply from Houweling, her confidence in Houweling was "totally destroyed" and had there not been a problem, Houweling would be the major supplier indefinitely. She unequivocally stated she would never again purchase from Houweling, even if her preferred supplier became unavailable. Mrs. Horstmann's

evidence on this issue reflects an unbusinesslike attitude and is inherently unreasonable so as to be not credible.

The test for establishing damages in breach of contract is "ultimately a question of fact "which, after analysis of the facts" requires of the judge no more, and no less, than the application of common sense in the particular circumstances of the case" (per Scarman L.J. in Parsons v. Uttley Ingham & Co. [1978] 1 All E.R. 525 (C.A.) at p. 536). Applying Lord Justice Scarman's test to this customer, Mrs. Horstmann's evidence does not meet the common sense test.

The future losses claimed on the basis that Mrs. Horstmann was in the process of starting her own business and would not buy from the plaintiff are too speculative and conjectural to support the claim, in light of the fact that the business is not yet in operation and that Mrs. Horstmann's credibility on other aspects of her testimony has been seriously undermined.

I consider the evidentiary foundation too weak to support reasonably any claim for lost sales to this customer.

Art Knapp Stores

The defendant concedes that the plaintiff lost sales in the amount claimed to the Art Knapp stores in Prince George and Kelowna and Art's Nursery in Surrey, being: $30,000 to Prince George and $8,750 to Kelowna in 1983; $6,250 to Kelowna and $20,586 to Surrey in 1984; and $5,000 to Kelowna and $17,910 to Surrey in 1985.

With respect to Penticton, it is established that sales worth $6,818 were lost for 1983. The owner, Mr. King, testified that as a result of the 1983 problem he reduced his purchases from the plaintiff from 65% to 45% in 1984. His total purchases from all suppliers in previous years (1982) appears to have been in the vicinity of $30,000, suggesting a loss of approximately $6,000 a year for 1984 and 1985.

With respect to the claim for future loss for Penticton, I would place it in the realm of reasonable possibility rather than probability, taking into account the discounting factor mentioned by the trial judge, i.e. the estimates of future business losses were far too optimistic. An appropriate amount for future losses is 25% of $6,000 for 1986 to 1990, or $7,500. I would allow 75% of the claim for future loss with respect to Art's Nursery in Surrey, being $46,317.

As for Whalley, the evidence indicates that this store continued to purchase plants from the plaintiff. It does not support a claim for lost sales.

c) Summary of Gross Lost Sales

As shown on Appendix 1 to these reasons, the total lost sales before adjustment are $1,030,375.00 prior to trial and $915,217.75 for the future.

d) Adjustments to Gross Lost Sales

Given the trial judge's finding that the plaintiff was not restricted by lack of capacity, I find that no deduction for replacement sales is justified.

However, there must be a deduction for indirect sales. If the plaintiff had directly supplied Woolco and The Bay with tropical plants, then it would not have had the benefit of sales to Salisbury Greenhouse of plants which Salisbury in turn sold to these stores. The plaintiff's accountant agreed that the lost sales should be adjusted to reflect this.

I would deduct $28,941 from the gross pre-trial sales for indirect sales. This deduction should be made from the years following 1983, since it relates to those years. No deduction is made from future sales since the possibility of indirect sales in the future is not established.

The net figure for lost pre-trial sales is therefore $1,001,434.00. The figure for lost future sales remains $915,217.75.

4. Rate of Profit

The plaintiff claims that it would have made a profit of 30.7% on the sales it lost as a result of the defendant's breach of contract. This figure is based on the assumption that certain items of overhead would not have been increased and that no expansion of existing facilities would have been required to provide the extra plants represented by the lost sales.

Mr. Weldon, the defendant's accountant, gave evidence as to the appropriate rate of profit if additional facilities were required. It was his view that the profit rate for orders for bedding plants lost in 1984 and beyond was 27.8% for sales of bedding plants and 6.1% for non-bedding plants, for an unweighted average of 16.2%.

I accept that elimination of some items of overhead, economies of scale and better utilization of existing facilities might to some extent have resulted in a higher than average profit on the lost sales. The evidence, however, does not support the contention that the lost sales in subsequent years could have been met without expansion of existing facilities. The plaintiff's history during tbose years shows that it has had to buy new land and build new buildings in order to increase its capacity.

For the year 1983, which appears to have involved mostly bedding plants for which the necessary facilities and equipment were in place, I accept 30.7% as an appropriate rate of profit.

For subsequent years, it is my view that the rate of profit can most safely be predicated on the plaintiff's historical earnings, subject to appropriate adjustments. As discussed earlier, losses arising from particularly lucrative contracts may be too remote to permit recovery.

The plaintiff's profit, expressed as a percentage of sales for 1980 to 1984, averaged 14.2% based on: 12.3% in 1980; 15.3% in 1982; 15.3% in 1983; and 12.7% in 1984. Disregarding the post-1983 experience, these figures suggest an historical profit of 15.3%. This figure must be adjusted upward for two factors which, in my opinion, should reasonably have been in the contemplation of the parties at the time of contracting: (1) the fact that, as found by the trial judge, the plaintiff had a successful business with increasing earnings; and, (2) the probability that some economies of scale would have been achieved due to the greater amount of business which would have have been done but for the events of 1983.

These considerations lead me to conclude that 17.5% is an appropriate rate of profit on lost sales subsequent to 1983.

5. Illegality

The defendant argued that the trial judge erred in awarding damages for lost profits which could only be achieved through illegal means.

This argument was based on the contention that one of the greenhouses which would have had to be used to meet the lost sales was in contravention of a municipal by-law.

I see no merit in this submission.

6. Summary

The conclusions as to lost sales and profit which I have set out support an award of $211,482.97 for pre-trial losses and $160,163.10 for post-trial losses. Rounding these figures up to reflect the generally favourable view the trial judge took of the plaintiff's claim, I would allow $225,000 for pre-trial losses and $175,000 for post-trial losses.

B. COSTS

Under s. 3 of Appendix B of the Supreme Court Rules, the plaintiff's costs are limited, since no provision is made for the appropriate multiplier beyond the base sum of $50,000. In other words, an action cannot be treated as though more than $50,000 were involved for the purpose of taxing costs.

> 3(1) In a proceeding where the amount involved does not exceed $5,000, costs shall be taxed under the Basic Tariff.
>
> (2) In a proceeding where the amount involved exceeds $5,000 but does not exceed $50,000 costs shall be taxed under the Basic Tariff and there shall be added to the amount so determined 7% thereof for each $1,000 or part thereof by which the amount involved exceeds $5,000.
>
> (3) In a proceeding where the amount involved exceeds $50,000, costs shall be taxed as if the amount involved is $50,000.

Section 8 of the Appendix permits the court to order that costs be taxed at a higher rate than would otherwise be the case under s. 3.

> 8(1) Where the court determines that
>
> (a) a difficult point of law or construction is involved in a proceeding,
>
> (b) an issue in a proceeding is of importance to a class or body of persons, or is of general or public interest,
>
> (c) the result of a proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied in the proceeding, or
>
> (d) another special reason exists
>
> the court may, at any time before taxation has been completed, order that costs be taxed at a higher level than would otherwise be applicable under sections 3 to 7 of this Appendix.
>
> (2) Where the court makes a determination under subsection (1), costs shall be taxed under section 3 at an amount specified by the court for purposes of the application of that section.

The trial judge found that a "special reason" existed under s. 8(1)(d) and concluded that costs of $150,000 would be appropriate. He therefore ordered that costs be taxed as though the amount involved were $236,000 (rather than the $50,000 ceiling in s. 3) which resulted in costs of $150,000 (rather than $38,429 which would have been the award if the limit on the value of an action for purposes of taxation were $50,000 as specified in s. 3).

The issue is whether, when ss. 3 and 8 are read together, the court may order that the costs be taxed as though more than $50,000 is involved.

The defendant argues that s. 8, properly construed, does not authorize taxation as though more than $50,000 were involved. It cites two arguments in support of this contention. The first is that s. 8(2) provides that where an order is made for higher taxation under s. 8(1), the costs "shall be taxed under section 3 ..."

Section 3(3) stipulates that where the amount involved is over $50,000, "costs shall be taxed as if the amount involved is $50,000." It follows, the defendant submits, that notwithstanding the judge's order under s. 8(1) that the costs be taxed at a "higher level", that level is effectively limited to $50,000 by the operation of s. 3(3) which is brought into play by s. 8(2) of the Appendix.

Second, the defendant argues that to permit the judge to fix costs in any amount under s. 8 would be to give him or her too great a discretion. This would violate the principle that the recovery of costs should not be vague and uncertain, and undermine the purpose of the tariff in establishing within clearly defined limits on the amount of costs to which parties are entitled: see Royal Trust Co. v. Ford et al., [1972] 1 W.W.R. 731, per McFarlane J.A.; Litwin Construction (1973) Ltd. et al. v. Kiss (1986), 7 B.C.L.R. (2d) 97 (S.C.).

In 57134 Manitoba Ltd. v. Palmer (1985), 67 B.C.L.R. 100, 5 C.P.C. (2d) 155 (S.C.), Spencer J. was asked to order that costs be taxed on a higher scale under s. 8(1). He was not obliged to consider the issue here raised, however, since he concluded that the appropriate amount to specify in that case was $50,000.

The issue and arguments before me were, however, considered in Litwin Construction (1973) Ltd. et al. v. Kiss, supra. Macdonald J., after suggesting that the effect of s. 3 on s. 8(1) was unclear, went on to conclude that the $50,000 limit must be applied under s. 3 because to do otherwise would confer too much discretion on trial judges and introduce too great an element of uncertainty into the matter of costs. He added that the power conferred by s. 63(2) of the Supreme Court Act to refuse or award costs in civil proceedings does not override the express limits in Appendix "B" which are designed to eliminate uncertainty.

In my opinion there is no ambiguity when ss. 3 and 8 of the Appendix are read together. The result, on the plain words of the sections, is to limit the award of costs to what would be awarded in an action involving $50,000.

If ambiguity existed, I would resolve it in favour of maintaining the limit. Costs in our system of litigation serve the purpose, not only of indemnifying the successful litigant to a greater or lesser degree, but of deterring frivolous actions or defences. Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful. Moreover, there is a sound reason for keeping costs within relatively modest limits. The possibility of high costs may unduly deter a party from bringing an uncertain but meritorious claim or defence.

These considerations lead me to conclude that the trial judge erred in increasing the base amount to $236,000 in order to produce an award of costs of $150,000. In my opinion, s. 8 limited to $50,000 the basis on which costs could be taxed.

I would limit the plaintiff's costs to $38,429.

CONCLUSION

I would allow the appeal by reducing the award for lost profits from $2 million to $400,000; and by reducing the amount of costs recoverable by the plaintiff from $150,000 to $38,429.

McLACHLIN J.A.

HINKSON J.A.:— I agree.

ESSON J.A.:— I agree.

APPENDIX I - GROSS LOST SALES DUE TO DEFENDANTS BREACH OF CONTRACT

Customer	Pre-Trial Losses	Future Losses		
		1983	1984	1985 1986-1990
Woolco Edmonton	$52,266.00	$250,986.25	$239,869.75	$566,693.25
(Centennial)	(52,266.00)	(74,500.00)	(63,400.00)	(92,949.00)
(Londonderry)	(0)	(55,521.75)	(46,479.75)	(132,980.00)
(St. Albert)	(0)	(29,827.50)	(26,656.50)	(68,352.00)
(Heritage)	(0)	(34,409.25)	(48,856.50)	(142,686.50)
(Capilano)	(0)	(56,727.75)	(54,477.00)	(129,725.75)
Woolco Lethbridge	32,540.00	0	0	0
Woolco Calgary	10,209.00	50,611.00	27,677.00	27,078.75
(Westbrook)	(2,817.00)	(18,879.00)	(2,226.00)	0
(MacLeod -Trail)	(1,427.00)	(3,088.00)	(4,792.00)	(8,045.25)
(Marlborough)	(5,510.00)	(21,313.00)	(15,218.00)	(8,945.50)
(Deerfoot)	(455.00)	(7,331.00)	(5,441.00)	(10,088.00)
Woolco Regina and Moose Jaw	59,198.00	0	0	0
Woolco Prince George	9,000.00	0	0	0
The Bay	38,000.00	80,000.00	45,000.00	267,628.75
Mountainview Nursery	27,704.00	0	0	0
Westbank Nurseries	0	0	0	0
MacLeod's	0	0	0	0
Renate Horstmann	0	0	0	0
Art Knapp	45,568.00	32,836.00	28,910.00	53,817.00
(Prince George)	(30,000.00)	(0)	(0)	(0)
(Kelowna)	(8,750.00)	(6,250.00)	(5,000.00)	(0)
(Surrey)	(0)	(20,586.00)	(17,910.00)	(46,317.00)
(Penticton)	(6,818.00)	(6,000.00)	(6,000.00)	(7,500.00)
(Whalley)	(0)	(0)	(0)	(0)
TOTALS	$274,485.00	$414,433.25	$341,456.75	$915,217.75

End of Document