Gershman v. Manitoba (Vegetable Producers' Marketing Board), [1976] M.J. No. 129

Manitoba Judgments

Manitoba Court of Appeal
Freedman C.J.M., Guy, Hall, Matas and O'Sullivan JJ.A.
Heard: April 28, 1976.
Judgment: May 11, 1976.

[1976] M.J. No. 129 | 69 D.L.R. (3d) 114 | [1976] 4 W.W.R. 406

Between Lewis Gershman, (plaintiff) respondent, and Manitoba Vegetable Producers' Marketing Board, (defendant) appellant

(65 paras.)

Counsel

V. Simonsen, for the (defendant) appellant. K.A. Filkow, for the (plaintiff) respondent.

The judgment of the Court was delivered by

O'SULLIVAN J.A.

1 This is an appeal from a judgment of Solomon, J. of the Court of Queen's Bench awarding to the plaintiff $35,000 and costs in a damage action for the tort of unlawful interference by the defendant with the plaintiff's contractual relationship with Stella Produce Co. Ltd. (herein referred to as Stella Company) and its shareholders.

2 The defendant is a producers' marketing board established pursuant to the Natural Products Marketing Act of Manitoba, R.S.M. 1970, Cap. N20 and has been given very wide powers, amounting to monopolistic powers, over the marketing of certain vegetables including potatoes and carrots.

3 The enforcement of regulations made by the producers' board is entrusted to the Manitoba Marketing Board, a separate and distinct entity from the producers' marketing boards.

4 On August 26, 1974, the defendant adopted the following motion:

> " Be it resolved that until such time as our account is paid in full, we not provide credit to any customer of the Board who employs a principal of the Gershman Produce Co. Ltd. in a responsible capacity, but that all sales be on a cash or c.o.d. basis."

5 The minutes of the meeting of the Board on August 26th add to the record of the adoption of

this motion the following:

> " It was understood that this motion could affect Stella Produce Co. Ltd. and Jobbers Fruit; also that all shipments would be required to be shipped from the Board warehouse in order to control c.o.d. deliveries."

6 The resolution of the Board was on the same day communicated by the Board's secretary to Harry Rubenfeld, the principal owner of Stella Company. Rubenfeld disputed that the plaintiff was employed in a responsible capacity since he was warehouse manager and had no control over financial matters; the Board immediately thereupon suspended its normal credit arrangements with the Stella Company which proceeded forthwith to dismiss the plaintiff from his employment and thereafter the Board restored normal credit to the Stella Company.

7 The learned trial judge found that the resolution of the Board was passed and implemented not because the Board was concerned about the credit worthiness of the Stella Company, but because it knew that this action would force Stella Company to terminate plaintiff's contractual relationship with it.

8 In my opinion, the findings of the learned trial judge are amply justified by the evidence and lead inevitably to his decision that the defendant was liable to the plaintiff for the tort of knowingly procuring a breach by the Stella Company of its contractual relationship with the plaintiff.

9 The learned trial judge in his reasons for judgment has reviewed the circumstances which led up to the resolution. It is unnecessary for me to repeat his findings in detail. The plaintiff and his sister were among the principals in a company called Gershman Produce Co. Ltd. which had been active in the wholesale vegetable, market in Winnipeg for over 20 years. The Gershman Company had engaged in some litigation disputing on constitutional grounds the validity of the Natural Products Marketing Act. It had then been subjected to harassment by a number of prosecutions, one of which was dismissed for want of prosecution and one of which was stayed by the Crown after a complaint had been made that it was vexatious.

10 The Gershman Company had had a fire in March, 1974 and subsequently found itself in difficulties. The defendant proceeded on two occasions to petition for its bankruptcy and each time made arrangements to have the petitions dismissed. After the fire, the plaintiff went to work for the Stella Company for $250 per week with an understanding that he would become a part owner through the purchase of the shares of Mr. Rubenfeld, Sr. at a price which had not been fully settled at the time of the defendant's interference.

11 The learned trial judge has found, on evidence which clearly supports his findings, that the action of the defendant Board on August 26, 1974, forced the Stella Company to discharge the plaintiff without adequate notice and forced the cancellation of the proven arrangement they had regarding selling shares to the plaintiff.

12 The plaintiff's sister had gone to work for Jobbers' Fruit; she, too, was the object of the Board's resolution of August 26, 1974, but she is not a plaintiff in these proceedings.

13 Furthermore, the learned trial judge has found, on evidence which clearly supports his findings, that there are only 7 or 8 fruit and vegetable wholesalers in Winnipeg: they are a closely knit group, each member knowing everything about his competitors. He found that the

action of the defendant 'Board not only induced a breach by Stella and its shareholders of their contractual relationship with the plaintiff, but went further and succeeded in ostracizing the plaintiff from a business in which he grew up from childhood with his father. The learned trial judge found that the secretary of the defendant Board knew that the actions of the Board would force the discharge of the plaintiff from employment and would ostracize the plaintiff from the fruit and vegetable business in Winnipeg.

14 On these findings, the learned trial judge followed the principles set out in Lumley v. Gye (1843-60) All E.R. 208. In doing so he said that the tort of interfering in contractual relationships covers not only interference with an existing contractual relationship but also interference where "there was an agreement to enter into a contract".

15 His language suggests that the tort of unlawfully interfering in contractual relationships extends to interference with the formation of such relationships.

16 The learned trial judge referred to the dicta of Lord Esher, M.R. in Temperton v. Russell (1893) 1 Q.B. 715 at 728:

> " It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable."

17 That language has to be assessed in light of the decisions in the subsequent cases of Allen v. Flood (1898) A.C. 1 and the Crofter's case (1992) A. C. 435. It is said by Clerk and Lindsell on Torts (14th ed.) at page 395:

> " ... the later decisions make it clear that it is not tortious merely to induct one person not to contract with another. There is a 'chasm' between the legality of that action and the unlawfulness of procuring breach of an existing contract.",

and at p. 427:

> " ... it is now recognised to be a 'leading heresy' to believe that spiteful interference with another's trade is in itself actionable when no unlawful means have been threatened or employed."

18 They say that a decision to depart from the principles of Allen v. Flood, supra, would "put the legality of trade competition completely into the discretion of the judiciary".

19 It might have been error, in my view, if the learned trial judge had asserted as a general proposition that the tort of unlawfully interfering in contractual relationship extends to interference with the formation of such relationship. But the language of the learned judge was geared to the factual situation confronting him and must be so appraised.

20 On the evidence in this case, there was one relationship with Stella and its shareholders. Here a contractual relationship already existed in respect of the employment. An incident or aspect of that relationship was the likelihood or prospect of the plaintiff acquiring a share interest in the company. What the plaintiff lost by the defendant's wrongful interference was not the

opportunity for the formation of a contract but rather the opportunity to extend his already existing contractual relationship of employment into one that would include acquisition of shares. In that respect this case differs from Allen v. Flood and the Crofter's case, supra. The case before us is, therefore, not one in which it is necessary to hold that a defendant is liable for interfering with an agreement to agree.

21 The judgment is on sound ground in holding that damages for the tort of unlawfully procuring a breach of contract are not limited to those damages which would have been given in an action in contract between the parties to the contract. Counsel for the defendant Board argued that the plaintiff should not have been awarded more than, say, two weeks or a month's pay, even if the defendant Board were liable for procuring a breach of contract, since on the hypothesis that the plaintiff's contract was unlawfully terminated all that an employee can get for lawful termination of employment is wages in lieu of notice.

22 In my opinion, this submission ignores the fact that damages are given in tort not for the breach of contract but for the wrongful act of procuring its breach, and hence the plaintiff is entitled to be compensated for all the damage that flows from the tortious act.

23 The authorities in this connection have been reviewed by Hinkson, J. of the B.C. Supreme Court in Jones v. Fabbi et al. (1973), 37 D.L.R. (3d) 27.

24 It is apt, in this connection, to refer to what was said by Lord Lindley in Quinn v. Leathem (1901) A.C. 495 at 537:

> " ... This violation of duty by the defendants resulted in damage to the plaintiff - not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage."

25 And Hinkson, J. referred to what was said in Salmond on Torts, 14th ed. (1965) at p. 707:

> "The defendant is held responsible for all those consequences which he actually desired and intended to inflict upon the plaintiff, however-remote may be the chain of causation by which he effected his purpose."

26 It follows, in my opinion, that by reason of its tortious conduct in unlawfully procuring a breach of the contractual relationship between the Stella Company and the plaintiff, the defendant Board was liable for general damages not limited to those which would have been recoverable by the plaintiff in contract but taking into account that as a result of the defendant's tortious conduct the plaintiff lost a valuable position, the plaintiff lost a valuable opportunity to become re-established in the fruit and vegetable marketing business through the purchase of shares in Stella Company, and the plaintiff lost access to participation in the other companies which ostracized the plaintiff as a result of the Board's attitude and conduct.

27 Moreover, I think that the findings of the learned trial judge give rise to liability.on other heads besides that of unlawful interference in contractual relationships.

28 I think that the defendant Board was liable for the tort of intimidation and for the tort of unlawful interference with economic interests.

29 It is true that the plaintiff's Statement of Claim is framed with a view to bringing the material

facts within the tort of interference with contractual relationships, but it is well settled since the Judicature Act reforms that a plaintiff is not to be put out of court because he has asked for the wrong remedy as long as the material facts which he pleads and proves give rise to some remedy.

30 It may indeed be that the distinction between the various torts usually discussed under the general heading of "economic torts" is somewhat artificial, although a recognition of the distinctions between them may be helpful.

31 In any event, it is clear, in my opinion, that Clerk and Lindsell (op. cit.) are right when they say at para. 802:

> "A commits a tort" (that of intimidation) "if he delivers a threat to B that he will commit an act or use means unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C. The tort is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure. Doubts about the existence of this tort were set at rest by Rookes v. Barnard" (1964) A.C. 1129.

32 The editors continue at para. 803:

> "A threat" (for the purposes of this tort) "is something which puts pressure, perhaps extreme pressure, on the person to whom it is addressed to take a particular course, something by means of which that person is 'improperly coerced'. A threat is an 'intimation by one to another that unless the latter does or does not do something the former will do something which the latter will not like. The threat must be coercive; it must be of the 'or else' kind. Furthermore, the concept is not limited to express threats ..."

33 It is clear that the threatened act must itself be unlawful. As Lord Wright said in the Crofter Case (1942) A.C. 435 at p. 467:

> " ... There is nothing unlawful in giving a warning or intimation that if the party addressed pursues a certain line of conduct; others may act in a manner which he will not like and which will be prejudicial to his interests, so long as nothing unlawful is threatened or done."

34 This view was confirmed in Rookes v. Barnard, supra, where Lord Reid said at p. 1168:

> " ... So long as the defendant only threatens to do what he has a legal right to do he is on safe ground. At least if there is no conspiracy" (and conspiracy is not alleged in this appeal) "he would not be liable to anyone for doing the act, whatever his motive might be, and it would be absurd to make him liable for threatening to do it but not for doing it. But I agree with Lord Herschell (Allen v. Flood) that there is a chasm between doing what you have a legal right to do and doing what you have no legal right to do, and there seems to me to be the same chasm between threatening to do what you have a legal right to do and threatening to do what you have no legal right to do."

35 If, therefore, the means proposed by the defendant Board were unlawful, the defendant Board was liable for threatening to commit an unlawful act for the purpose of inducing Stella and

its shareholders from continuing their relationship with the plaintiff, whether that relationship was contractual or not.

36 Furthermore, to quote again from Clerk and Lindsell (op. cit.) at para. 808:

> " There (also) exists a tort of uncertain ambit which consists in one person using unlawful means with the object and effect of causing damage to another. In such cases, the plaintiff is availed of a cause of action which is different from those so far discussed."

37 This tort was described by Lord Reid in J. T. Stratford & Son Ltd. v. Lindley (1965) A.C. 269 at p. 324:

> " In addition to interfering with existing contracts the respondents' action made it practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed."

38 In the same case at pp. 328 and 329, Viscount Radcliffe said:

> " ... The defendants have inflicted injury on the plaintiffs in the conduct of their business and have resorted to unlawful means to bring this about." There were therefore "two sets of tortious ... acts which the plaintiffs can pray in aid against them."

39 To see if the defendant Board is liable under these heads of tort, in addition to its liability for direct interference with contract, it is necessary to consider the lawfulness of the action threatened by the defendant Board to interfere with the Gershman family.

40 What the defendant Board did was, to use a colloquial expression, "black-list" the Gershman family.

41 In my opinion, its action in "black-listing" the Gershman family was illegal and quite beyond the scope of its authority.

42 The learned trial judge made findings of fact which clearly show that the Board did not act in good faith. He said:

> " As the hearing progressed and the evidence disclosed more and more acts of vindictiveness by the board against plaintiff, I found it difficult to believe that this drama was acted out in 1974 in Manitoba and was not from the pages of medieval history. Never in all my sixteen years of public life and eighteen years on the bench have I come across a more flagrant abuse of power. ... In order to demonstrate to plaintiff that his disagreements would not be tolerated, the board maliciously, with vindictiveness and under pretence that such actions were done to discharge the trust it owed the producers, harassed plaintiff until it drove him out of the wholesale fruit and vegetable business."

43 Counsel for the defendant Board disputes these findings of fact, arguing that the learned trial judge was wrong to link the Board resolution of August 26, 1974 with the prosecutions by the Manitoba Marketing Board and the petitions for bankruptcy which, he said, were launched on appropriate legal advice and which were justified by particular circumstances. He points to the fact that the Board knew that Gershman was employed by the Stella Company for many months

prior to August 26, 1974, and did not take any action against Gershman until the time when it became apparent to the defendant Board that, contrary to representations made to it by the plaintiff, the Gershman Produce Ltd. account was not going to be paid in full.

44 I am not prepared to differ from the learned trial judge on the findings of fact set out above because, in my opinion, there was evidence to support those findings, and I am not convinced that the learned trial judge was wrong in making them.

45 It is true, as counsel for the defendant points out that the Manitoba Marketing Board is an entity distinct from the defendant producers' board, but the evidence shows that on at least one occasion, when the Gershman black-listing was discussed, Mr. Craig Lee, Secretary of the Manitoba Marketing Board was in attendance with both. the Manitoba Vegetable Producers' Marketing Board (the defendant) and the Manitoba Root Crop Producers' Marketing Board. The inference can be drawn that the producer boards and the Manitoba Marketing Board, while distinct in law, were intimately linked in fact and in their course of conduct. Furthermore, it was open to the learned trial judge to find that the defendant's conduct in respect of the bankruptcies was high-handed and precipitous, suggesting not only a concern for the collection of a debt owing to the Board but also an animus against the Gershman family. The Board's conduct in respect of jobbers' Fruit, where the plaintiff's sister was employed, is a further circumstance lending weight to the learned trial judge's finding that the defendant Board was motivated by malice toward the Gershman family.

46 In any event, even if the learned trial judge went too far in linking the Board's resolution of August 26, 1974 with a course of conduct which he found to be directed at driving the Gershman family out of the wholesale market in Winnipeg (and I do not so find), I do not think that counsel for the defendant Board has shown any justification for the conduct of the defendant Board.

47 If its intention was to black-list the plaintiff in order to force the plaintiff to see to the payment of the debts of a limited company of which the plaintiff was a shareholder; its conduct was still illegal and wrong.

48 The learned trial judge put the matter eloquently when he said:

> " ... There are many government sanctioned boards in existence now having exclusive jurisdictions to administer many facets of the economic life of our country, and as our life becomes more interdependent we will have even more such boards. These governmental boards are established to administer exclusively the many different economic programs in our society. They are established with noble aims and for noble purposes. ... glaring abuse of power ... should not be allowed to pass without some assessment of ... damages against it."

49 The principle that public bodies must not use their powers for purposes incompatible with the purposes envisaged by the statutes under which they derive such powers cannot be in doubt in Canada since the landmark case of Roncarelli v. Duplessis [1959] S.C.R. 121. Since that case, it is clear that a citizen who suffers damage as a result of flagrant abuse of public power aimed at him has the right to an award of damages in a civil action in tort.

50 A succinct statement of the decision in Roncarelli, supra, is contained in the judgment rendered by Martland, J. for a unanimous Supreme Court of Canada in Roman Corp. Ltd. et al.

v. Hudson's Bay Oil & Gas Co. Ltd. et al. (1973), 36 D.L.R. (3d) 413 at p. 421:

> " ... In the Roncarelli case the defendant, who was the Prime Minister and the Attorney-General of Quebec, without legal justification and for a wrongful purpose caused the Quebec Liquor Commission to cancel the plaintiff's liquor license, resulting in substantial damage to his business. He was not acting in the exercise of any of his official powers."

51 The Roman Corp. case, supra, was distinguished from Roncarelli, supra, since in the Roman case, according to Martland, J. at p. 421:

> " In the present case, in my opinion, the respondents, as ministers of the Crown, were acting in the performance of their public duties in enunciating, in good faith, Government policy."

52 In the case before us, the facts as found by the learned trial judge and the evidence considered apart from such findings show that the defendant Board, without legal justification and for a wrongful purpose, caused the Stella Company and its shareholders to terminate their relationships with the plaintiff and caused knowingly substantial damage to the plaintiff in his business. The Board was not acting in the good faith exercise of any of its official powers.

53 Accordingly, the defendant Board was liable not only for knowingly procuring a breach of contract, but also by unlawful acts and by the threat of unlawful acts of interfering with and damaging the plaintiff in his business and trade.

54 Although the Roncarelli case was decided under Quebec civil law, the principles set out by it are applicable throughout Canada.

55 As Rand, J., for himself and Judson, J. said at p. 140:

> " The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. ..."
>
> " ... no legislative act can, without express language, he taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. ... 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."

56 In the same case, Martland, J. for himself and Locke, J. at p. 155 quoted with approval what was said by Lord Halsbury in Sharp v. Wakefield (1891) 1 A.C. 173 at p. 179:

> Discretion "is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself."

57 Martland, J. applied that dicta not only to the exercise of judicial powers, but of other public powers as well. He said at p. 156:

> " ... It is my view that the discretionary power to cancel a permit given to the Commission by the Alcoholic Liquor Act must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act."

58 In the case before us, there was no power in the defendant Board to use its authority for the purpose either of driving the Gershman family out of business or of punishing the plaintiff for his representations concerning the Gershman Company debt or of forcing the plaintiff to have the Company pay a debt for which it was liable but for which he was not.

59 In the Roncarelli case, supra, it was necessary to hold that Duplessis was acting entirely outside the scope of his public duties because in Quebec, as is set out in the dissenting judgments of Taschereau, J. and Fauteux, J., their equivalent of our Public Officers Act requires notice to be given before suit may be brought against persons exercising public duties and the required notice had not been given. In Manitoba, there is no such requirement in our Public Officers Act which by section 21(1) contemplates that actions may lie against persons even for acts done in pursuance or execution or intended execution of a statute or of a public duty or authority, provided that the action is brought within two years. A public authority has a right to tender amends on notice being given, but the penalty for failure to give notice is only to risk an award of solicitor-and-client costs in favour of a defendant, if such costs are asked for. It may be, therefore, that Manitoba law is even wider than that of Quebec in giving a remedy to citizens against abuse of power even if such abuse of power is in execution of a public duty. ,However, I am satisfied that in the case before us, on the evidence, the defendant Board acted, as Mr. Duplessis did, not in the execution of its public duty but for purposes and by means outside the scope of the statute from which it derived its powers.

60 On the question of damages, counsel for the defendant Board complained that the learned trial judge included in his award an unstated amount for "punitive" damages. He said:

> " ... I am satisfied that damages should be substantial, not only to compensate plaintiff for his losses but also to serve as punitive damages for maliciously interfering with plaintiff in his rightful pursuit of a chosen vocation."

61 There has been a good deal of discussion about the appropriateness of punitive damages as contrasted with aggravated damages since the decision of the House of Lords in Rookes v. Barnard, supra. That decision has been widely criticized; it has been held not to be applicable in the Commonwealth generally by the Judicial Committee of the Privy Council in Australian Consolidated Press Ltd. v. Uren (1969) 1 A.C. 590 and has not been followed in a number of Canadian cases, for example, in Fraser v. Wilson et al. (1969), 70 W.W.R. 134.

62 Even if Rookes v. Barnard, supra, should be followed, however, it expressly says that punitive damages are appropriate where there is "oppressive, arbitrary or unconstitutional actions by the servants of the government". In my opinion, the case before us falls exactly within that category and punitive damages would be appropriate.

63 In actions of this kind, in any event, the damages are at large. In Roncarelli, supra, Rand, J.

said:

> " ... Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which the Court should approach as a jury would, in a view of its broad features ..."

The other members of the majority concurred in that broad approach and increased the special damages which the trial judge awarded by a lump sum of $25,000.

64 In my opinion, whether the damages in this case should be characterized as aggravated, exemplary or punitive, taking into account all the circumstances, I am satisfied that the learned trial judge's assessment of $35,000 was a reasonable sum which the defendant Board ought to be called on to pay.

65 I would accordingly dismiss the appeal with costs.

O'SULLIVAN J.A.
FREEDMAN C.J.M.:— I agree.
GUY J.A.
HALL J.A.
MATAS J.A.

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