DE LA BERE V PEARSON, LIMITED

[IN THE COURT OF APPEAL.]

[1908] 1 KB 280

HEARING-DATES: 22, 23 November 1907

23 November 1907

CATCHWORDS:

Contract - Consideration - Breach of Duty to take care - Damages - Remoteness - Intervening Criminal Act of Third Party causing Loss.

HEADNOTE:

The defendants, who were newspaper proprietors, advertised in their newspaper that their city editor would answer inquiries from readers of the paper desiring financial advice. The plaintiff, a reader of the paper, wrote to the defendants' city editor asking for a safe investment for 800l., and also for the name of a "good stockbroker." The editor recommended a person who, as he well knew, was an "outside broker," that is, a person who transacted Stock Exchange business, but was not a member of the Stock Exchange. The outside broker had for some months been employed by the editor to advise him on matters connected with the financial correspondence in the defendants' newspaper, and there was no evidence that the editor had any reason to suspect his honesty. The outside broker was, in fact, an undischarged bankrupt, a fact which was unknown to the editor, who might, however, easily have ascertained his financial position if he had made inquiries. The plaintiff, in reliance on the editor's recommendation, sent sums of 1300l. and 100l. for investment to the outside broker, who immediately misappropriated them:-

Held, that there was a contract between the plaintiff and the defendants by which the defendants undertook to use reasonable care that the person recommended as a broker should answer the description of a good stockbroker; that the defendants' city editor, in recommending the outside broker without making reasonable inquiries about him, had committed a breach of that contract; and that the plaintiff's loss naturally flowed from the defendants' breach of contract, even if the misappropriation of the money by the broker amounted to a criminal offence.

Held, also, by Vaughan Williams L.J. and Sir Gorell Barnes, President (Bigham J. doubting), that the measure of damages wad not limited to the 800l., but that the plaintiff was entitled to recover the actual amount of his loss.

INTRODUCTION:

APPEAL from a decision of Lord Alverstone C.J., reported [1907] 1 K. B. 483.

The following statement of the facts is taken from the judgment of the Lord Chief Justice:-

The defendants are the proprietors of a paper called M.A.P. This paper, which has a very considerable circulation, has for many years been in the habit of publishing in each issue

paragraphs under the head of "M.A.P. in the City," followed by the words "Spare Cash and Advice. - Readers of M.A.P. desiring financial advice in these columns should address their queries (with full name and address) to the City Editor, 17 Henrietta Street, Covent Garden, W.C." The plaintiff, who was a reader of the paper, and had, according to his evidence, been in the habit of reading it for a considerable time, wrote to the city editor a letter in the following terms: "Bishop's Stortford, March 6, 1905. Dear Sir, - I should feel greatly obliged if you will kindly advise me how I can best invest 800l. in two or three fairly safe securities to pay not less than 5 per cent. I see in your last issue you recommend Chelsea Electric, which pays nearly 5. Can you suggest any other better than this, some home industries? and oblige, Yours faithfully, K. B. Baghot de la Bere. Please also name good stockbroker. If you only reply in M.A.P., please do so under 'Rex,' not my full name." This letter was handed by the city editor to a person of the name of Thompson, who traded as an outside broker under the name H. Hughes & Co. at 16, Royal Exchange, and who on March 20 wrote to the plaintiff in the following terms: "Dear Sir, - The editor of M.A.P. regrets that his reply to yours of the 6th inst. has been crowded out of the paper, and so requests us to write to you. We may state that we transact most of his business for him, and upon his recommendation shall be very pleased to do what we can in your interests. - Yours truly, H. Hughes

& Co." The plaintiff replied to this letter, but his reply has not been preserved, and he kept no copy. On March 24 Thompson, under the name of Hughes & Co., wrote the following letter: "Dear Sir, - We are in receipt of yours of yesterday's date and thank you. We do not think you could have a much better list than that sent you the other day; there were nine different shares mentioned, and if you were to buy twenty-five Aux Classes Laborieuses, and twenty-five Waring & Gillow, and 100 of each of the others the cost would work out at about 1100l. If you should then have any little sum over for speculative purposes you might put it into Nile River Syndicate, which we consider likely to go much higher in price. The present quotation is

about 6s. 3d. Our rates of commission are just the same as with ordinary brokers, and may be reckoned as about threepence for every pound in value. ... You say in your letter that you wish to act quickly, and we should have bought for you to-day, but could not quite read your letter as a definite order. Perhaps you will let us have this in course, when we shall be pleased to do our best for you. Yours truly, H. Hughes & Co." On March 27 the plaintiff sent to Hughes & Co. at 16, Royal Exchange, two cheques, one for 800l. and one for 500l., which Thompson, under the name of Hughes & Co., acknowledged. On April 1 and April 8 Hughes & Co. sent to the plaintiff contract notes for the purchase of industrial securities of a total value of 1230l., and on May 4 and May 8 further contracts for 114l. 11s. and 118l. 1s. respectively, and on May 5 the plaintiff sent to Hughes & Co. a further cheque for 100l. No complaint was made of the character of the shares in which Hughes & Co. had suggested that the plaintiff's money was to be invested; they had in fact been selected by the defendants' city editor. But Thompson was called as a witness and admitted that he had not bought any shares, and that the cheques for 800l. and 100l. were paid to his wife's account at Barclay's Bank, on which he was entitled to draw, and the cheque for 500l. was paid away to some stockbrokers to whom he owed money. Thompson was an undischarged bankrupt, and therefore could not be a member of the Stock Exchange. The evidence with regard to the employment of Thompson was as follows: Mr. Horniman, the city editor of the defendants' paper, stated that he had been for six years up to July, 1905, financial editor of M.A.P., and it was his duty to prepare the answers to correspondents, which answers were given either in the next or subsequent issues of the paper, or, not unfrequently, by direct communication. He stated that, as to a good many of the questions, he answered them himself, but as to a great many others he required advice; that in previous years he had consulted three separate firms of stockbrokers in succession, all of whom were members of the Stock Exchange and firms of repute. The terms arranged with those firms were that they should not receive any payment for such advice, but were to have the benefit of any introduction to clients who might be

obtained through the columns of M.A.P. or by answers sent in reply to their questions. He stated that the three firms of stockbrokers got tired of doing this, as it involved a great deal of work and did not lead to their obtaining many clients. He added that his practice was to recommend any one who asked for the name of a broker to the firm which was helping him. It was proved that Horniman had on several previous occasions recommended a firm of stockbrokers to correspondents, and given the names of the correspondents to the stockbrokers, with a view to their corresponding with them and so obtaining clients, as this was the only remuneration or reward which the brokers advising him obtained for their services. He stated that he had known Thompson very slightly since 1889, that he knew he was an outside broker trading under the name of Hughes & Co., and not a member of the Stock Exchange, and that for six months before March 4, 1905, Thompson had been advising him. He had shewn him the letters upon which he required advice, and had not unfrequently handed to him letters that he might reply direct to correspondents, and he had told him that he would do what he could to help him, and that he should have any clients that could be obtained through the columns of the paper. He further stated that he did, as stated by Thompson in the letter of March 20, request Thompson to reply and recommend the plaintiff to him as a client. It was established that this was a part of the regular business of the city editor, and was a business of considerable dimensions, there being in many weeks a very large number of letters which required to be dealt with. Horniman stated that he knew the importance of a broker being a member of the Stock Exchange, but he did not know that Thompson was an undischarged bankrupt, but admitted that he could have ascertained his financial position without any difficulty had he made inquiries. It was established that on many previous occasions letters had been answered direct to other correspondents by the brokers advising Horniman, and that it appeared from the columns of the newspaper that correspondents were sometimes answered direct, and that it was the practice of the city editor to recommend firms of brokers. Horniman was suspended from his position as editor in July, 1905, and on

complaint being made by other correspondents who had employed Hughes & Co. as brokers upon the recommendation of the city editor it was stated that the defendants had done what they could to get back for their correspondents the money owing from Hughes & Co., and that they had taken proceedings on behalf of several would-be investors to recover moneys paid by them to Hughes & Co. It was admitted by the defendants that it was part of the duty of the city editor to answer questions addressed to him, and to recommend brokers. Upon these facts the plaintiff brought the action to

recover damages as for breach of contract to exercise due care in giving financial advice to the plaintiff.

The Lord Chief Justice held that the plaintiff was entitled to recover the 1400l. sent by him to the broker for investment, and gave judgment for him for that amount. The defendants appealed.

COUNSEL:

McCall, K.C., and R. W. Turner (Profumo with them), for the defendants. The liability of the defendants depends upon the existence of a contract between the plaintiff and themselves, for an action would not lie for misrepresentation with regard to the character or solvency of Thompson in the absence of fraud, which is not suggested. Three questions arise for consideration. First, what were the terms of the contract (if any), or what contract ought to be implied under the circumstances? Secondly, what is the alleged breach of that contract? Thirdly, what are the damages in law attributable to the breach, or, in other words, was the breach the proximate and effective cause of the loss which occurred?

The utmost obligation that could be imposed upon the defendants by what took place between themselves and the plaintiff was to take reasonable care to select a properly qualified person as city editor of their newspaper, and to name a good stockbroker, not necessarily a member of the Stock Exchange; they cannot be treated as having undertaken to guarantee the honesty or solvency of the broker recommended. No liability was undertaken by or imposed upon the defendants in respect of naming a stockbroker. The advertisement in the defendants' paper is merely a statement that the city editor will give financial

advice to readers, which means advice as to investments, and it is not suggested that the list of investments supplied by him was other than a good one. Even assuming that the city editor was authorized by the defendants to recommend brokers, the defendants cannot be held to have guaranteed the accuracy of the advice given by their city editor or the character of a person employed by him as his delegate. Further, there was no evidence of want of care or of mala fides on the part of the defendants' city editor in recommending Thompson; he had had dealings with him for six months and had no reason to suspect his honesty or solvency. [They cited on this point Carlill v. Carbolic Smoke Ball Co. n(1) ; Hall v. Lees. n(2)] Assuming a breach of contract on the part of the defendants, that breach cannot be regarded as the proximate or effective cause of the loss. The cause was the crime of Thompson in misappropriating the money, which cannot be considered as an effect of the defendants' breach of contract in not taking due care in selecting him for recommendation as a stockbroker. It does not necessarily follow from a broker not being a member of the Stock Exchange, or from his being impecunious, that he will misappropriate money entrusted to him. In Hobbs v. London and South Western Ry. Co. n(3) the law as to remoteness of damage was laid down by Cockburn C.J. in these terms: "I think that the nearest approach to anything like a fixed rule is this: that to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of." According to the test there laid down the loss of the plaintiff's money was too remote a consequence of the defendant's breach of contract to be recoverable as damages for that breach.

Further, between the breach of contract and the loss of the plaintiff's money there intervened action by the plaintiff which could not have been in the contemplation of the defendants at the time of the contract. The defendants must have contemplated that the ordinary course of business in dealing with such a broker would be pursued; yet the plaintiff, before any contracts for the purchase of shares had been entered into, and before he had been requested to find any money in respect of any such contracts, sent to Thompson a lump sum of 1300l., apparently for investment in the recommended securities as Thompson might think best. That is not the ordinary course of business on the Stock Exchange, and the efficient cause of the loss was rather the plaintiff's own negligence in entrusting this money to Thompson without any inquiry as to his solvency than any negligence of the defendants in making the recommendation. In any event the defendants' liability is limited to the 800l. mentioned in the plaintiff's letter; as regards anything beyond that amount the plaintiff acted on his own responsibility, and not on the advice given him by the city editor.

Spencer Bower, K.C., and Boydell Houghton, for the plaintiff. The only point really taken and argued in the Court below was as to the remoteness of damage. It was substantially admitted that there had been a breach of contract for which the defendants were responsible in not taking due care to ascertain whether Thompson was a responsible stockbroker, and a fit person to recommend in answer to the plaintiff's inquiry; and no distinction was there drawn between the 800l. and the further sums of money which the plaintiff sent to Thompson. The suggested distinction cannot be validly made. Although 800l. was mentioned by the plaintiff in his letter as the sum which he desired to invest, it is impos-

sible to contend that the liability of the defendant is limited to exactly that sum, though had the money sent to Thompson been out of all proportion to the sum of 800l., the case might have been different. Nor is there anything in the circumstances to limit the defendants' liability to consequences arising in the strict course of business with the recommended stockbroker, even assuming (though it is not

admitted) that the sending of the money by the plaintiff to Thompson before receiving advice of a contract having been made on his behalf was a deviation from the ordinary course of business in stockbroking transactions. The real question is whether the plaintiff was induced to part with his money in consequence of the recommendation of Thompson by the city editor in breach of the contract to use due care in recommending a stockbroker. It is not necessary in order that damages maybe recoverable in respect of a breach of contract that the defendant should have contemplated exactly the way in which the damages arose: Smith v. London and South Western Ry. Co. n(1) ; British Columbia Sawmill Co. v. Nettleship. n(2) On the proper construction of the plaintiff's letter the parties ware not contemplating a transaction which was to be limited to the 800l. there mentioned; the plaintiff was asking for advice as to two independent things, the investment of 800l. which he had then in hand ready for investment, and the name of a good stockbroker to whom he might entrust his investments generally. The loss naturally followed from the breach of contract, and was not the result of the plaintiff's own acts.

R. W. Turner, in reply.

PANEL: VAUGHAN WILLIAMS L.J., SIR GORELL BARNES, PRESIDENT, and BIGHAM J

JUDGMENTBY-1: VAUGHAN WILLIAMS L.J

JUDGMENT-1:

VAUGHAN WILLIAMS L.J: On the whole I think that the judgment of the Lord Chief Justice must be supported in its entirety, although I have had considerable doubt in the course of the argument. In the first place, I think that there was a contract as between the plaintiff and the defendants. The defendants advertised, offering to give advice with reference to investments. The plaintiff, accepting that offer, asked for advice, and asked for the name of a good stockbroker. The questions and answers were, if the defendants chose, to be inserted in their paper as published; such publication might obviously have a tendency to increase the sale of the defendants' paper. I think that this offer, when accepted, resulted in a contract for good consideration.

I also think that the word "stockbroker," as employed between the plaintiff and the defendants, meant a stockbroker who was a member of the Stock Exchange. I think the contract did not amount to a warranty of the character or conduct of the broker named, but I think it did amount to a contract to take reasonable care in the nomination of a broker, and I think there was a clear breach of this contract.

I think that the damages were not nominal. I think that the measure of damages would include all damage which would be sustained by the plaintiff through consequences arising in strict course of business with a stockbroker, a member of the Stock Exchange. I do not think that the damages are limited by the 800l. I think that the nomination requested by the plaintiff was of a broker fitted for the performance of the duties of a broker in transactions by way of investments of a moderate type. This, however, is the point on which I have had the most doubt.

The only remaining point is, Does the intervention of the crime which caused the damage make the damages too remote? This, to my mind, depends on whether the words "good stockbroker" import not only skill as a stockbroker, but also trustworthiness and honesty; and, assuming they do, Did the defendants take reasonable care in the selection of the broker? I will answer the second question first. In my opinion they did not, because their city editor consciously recommended an outside broker, though he had accepted an invitation to recommend, according to my construction of the letters, a good stockbroker - a member of the Stock Exchange; and I think the recommendation of a "good stockbroker" included the recommendation of a trustworthy, honest man fit to be entrusted with investments on a small scale. I therefore think that "good stockbroker" imports trustworthiness and honesty as well as skill as a broker. This does not mean that the defendants guaranteed the trustworthiness and honesty of the broker, only that they would take reasonable care in the selection of a broker whom they fairly expected to be trustworthy and honest. Can it be said that an outside broker cannot be recommended as honest and trustworthy? I doubt it. Then can it be said that prima facie no outside broker ought to be recommended till inquiries have been made as to his antecedents? I do not say that, for I think such inquiries should be made of debt-collecting agencies or of the

police. I do say that, if a person is recommending an outside broker, the scope of his inquiries ought to embrace a wider area than if he were recommending a member of the Stock Exchange, for in the latter case he would be recommending, not only a member of a respectable association with good traditions, but one who is subject to stringent and wholesome disciplinary rules. In this case, therefore, the inquiry made by the defendants should have been wider than it in fact was. We must, therefore, see what the defendants through their agent knew, or might have known if adequate inquiry had been made. They admittedly knew that Thompson was an outside broker; they might have known that he was an undischarged bankrupt; they did not, perhaps, know that fact, but they would have found it out had they made reasonable inquiry on the Stock Exchange, or of any dealers in stocks, as to his antecedents. If the broker who is being recommended is not a member of the Stock Exchange, a reasonably careful man in recommending him would not be content with the fact that he had employed him in business for six months, but would carry his investigations further. If that had been done in this case, the defendants' agent would in all probability have discovered matters which would have made him hesitate to recommend him. But whether that was so or not, I cannot doubt that if the plaintiff, being a man of reasonable intelligence and sense, had been informed that the man recommended was an outside broker and an undischarged bankrupt, he would have declined to entrust him with his business. Under the circumstances of the present case I think that the cases as to the intervention of a crime do not apply. The appeal must therefore be dismissed.

JUDGMENTBY-2: SIR GORELL BARNES, PRESIDENT

JUDGMENT-2:

SIR GORELL BARNES, PRESIDENT: I agree, and have little to add. On the facts I think that there was a contract for good consideration that the defendants would take reasonable care to name a good stockbroker. The plaintiff was invited to address, and did address, an inquiry as to advice to the defendants' city editor. It has been contended that the city editor had no authority to name a good stockbroker, because it is suggested that his duties were only to give financial advice; but when the

evidence of Horniman is read it is clear that in the course of his business as city editor he had been in the habit of making inquiries of members of the Stock Exchange until they became tired of answering his questions, as it was only occasionally that it resulted in business being thereby introduced to them; this practice had lasted for a considerable time. In my opinion it is clear that there was a contract. Then was there a breach of it? This point has been gone into fully by Vaughan Williams L.J., and I think it plain on the evidence that the nomination of Thompson as a good broker was not a fulfilment of the terms of the contract.

That brings me to the most difficult point in the case, the question of the measure of damages, as to which it is important to remember that many points have been argued here that were not taken before the Lord Chief Justice. The point taken before him was that the loss was occasioned by the intervening criminal act of the outside broker, and that that circumstance prevented the plaintiff from recovering damages against the defendants. I do not agree with that contention; I think that damages are recoverable by the plaintiff, although the conduct of Thompson may have been such as to bring him within the purview of the criminal law. That point has, however, only been touched upon here, and the defendants have relied upon other points. First, they say that the plaintiff sent his money to Thompson without waiting to receive any contract notes from him, and that it was, therefore, his own negligence which caused the loss. I do not assent to this argument; in my judgment there is nothing to shew that the plaintiff acted unreasonably in trusting the person named by the defendants' city editor, and the fact that he sent the money with the instructions for investment is not against the plaintiff; it does not shew that he so acted as to disentitle him to say that he trusted the broker. Then it is said that the damages, if more than nominal, were at any rate limited by the 800l. mentioned in the plaintiff's letter of March 6. I cannot regard the letter as strictly limiting the damages to that sum; I read it as being in the disjunctive, and as inquiring for a good stockbroker who might be employed by the plaintiff for a moderate kind of investment; it was undoubtedly

so treated by the defendants and by Thompson in his letter of March 20, for the city editor had not answered the plaintiff's inquiry in the defendants' paper, but had handed his letter over to Thompson to deal with; and I think the true inference is that it was so handed over for the purpose of Thompson making investments for the plaintiff of the character I have indicated. I cannot say that I am altogether free from doubt on this question of the proper measure of damages, but upon the whole I agree with the view just expressed by the Lord Justice.

JUDGMENTBY-3: BIGHAM J

JUDGMENT-3:

BIGHAM J: I agree in the result with the judgments which have been delivered, though I feel very great doubt on one question, the amount of the damages properly recoverable by the plaintiff. I agree that there was a contract for the reasons already given; but it is important to see what that contract exactly was, so as to see also what the breach was. The contract was contained in the plaintiff's letter of March 6, and in the answer to it; the former letter made this request: "I should feel greatly obliged if you will kindly advise me how I can best invest 800l. in two or three fairly safe securities, to pay not less than 5 per cent. ... Please also name good stockbroker." I am unable to read that letter in the way contended for by the plaintiff's counsel; I read it as a request for advice as to the investment of 800l., and for the name of a good stockbroker to carry out the advice given, and as being limited to the naming of a man who will be responsible to the extent of 800l. That was the question; then comes the answer of March 20. The plaintiff's letter had been handed by the city editor to Thompson, an outside broker, who wrote a letter to the plaintiff, in which the plaintiff's request for advice was complied with; the contract was then complete. That letter of March 20 not only completed the contract but also constituted the breach of it, for Thompson did not come within the character of a good stockbroker; he was not a stockbroker within the meaning of the plaintiff's request, nor was he a "good" stockbroker. The real question is, what was the consequence of this breach of contract? Can it be said that the loss of the 1400l. was a consequence of the breach? To answer this question it is necessary to look at two or three facts.

On March 27 the plaintiff sent Thompson 1300l.; no purchase of shares had then been made in the plaintiff's behalf, nor had Thompson the right to ask for any money, for he had come under no liability on behalf of the plaintiff; the plaintiff, however, voluntarily sent him the 1300l., which the Lord Chief Justice has found, and rightly found, was instantly lost, that is to say, before the broker was in a position to require payment by the plaintiff of a single penny. I think it is doubtful whether such a loss was consequent on the advice given by the city editor. The next question is whether the damages should not in any event be limited to the sum of 800l., and as to this I feel still more doubtful. In my judgment the request and answer were dealing with transactions which were to be limited to 800l., and it seems very difficult to say that the damages recoverable could exceed that sum. My doubts are, however, confined to the one question of the measure of damages, and I am not prepared to differ from the rest of this Court.

DISPOSITION:

Appeal dismissed.

SOLICITORS:

Solicitors for plaintiff: Walter Webb & Co.

Solicitors for defendants: Harrison & Davies.

W. J. B.