1949

MINISTER OF PENSIONS v. HORSEY.

Ormerod J.

unless the tribunal is unanimous in rejecting it. It was argued on behalf of the respondent that this rule should not apply to a case where the tribunal was not unanimous in allowing a claim as the onus of proof is on the Minister, and that if the Minister had satisfied only a minority of the members of the tribunal that a claim should be rejected, it must be allowed. I cannot accept that argument. A majority verdict in a criminal trial cannot be accepted whether the majority is in favour of conviction or acquittal, and it matters not for that purpose that the burden of proof is on the prosecution. Accepting as I do, and, indeed, as I think I must, the decision of Denning J. that a claim to a pension cannot be rejected by a majority, I am satisfied, too, that a claim should not be allowed except by the unanimous decision of the members of the tribunal. Denning J. pointed out in *Brain* v. *Minister of Pensions* (1) the serious risk of error in a decision of a majority. That risk is, of course, equally great whether the decision be in favour of one party or the other. There is no express statutory provision that the decision of the majority shall be effective, and in those circumstances I have come to the conclusion that a claim cannot be allowed except by a unanimous decision of the tribunal.

Under these circumstances it follows, of course, that the appeal must be allowed and that the case must be sent back to be dealt with by another tribunal.

Appeal allowed.

Solicitor for Minister: *Treasury Solicitor.*
Solicitors for respondent: *Fowler, Legg & Co.*

(1) [1947] K. B. 625.

R. P. C.

C. A.

1949

Mar. 21, 22, 23; *Apr.* 12.

Tucker, Asquith and Singleton L.JJ.

VICTORIA LAUNDRY (WINDSOR) LD. *v.* NEWMAN INDUSTRIES LD.; COULSON & CO. LD. (THIRD PARTIES).

Sale of goods—Purchase of boiler by laundry company—Part of profit-making plant—Delay in delivery—Measure of damages—Loss of business profits.

The plaintiffs, launderers and dyers, wishing to extend their business, and having in view (inter alia) the prospect of certain profitable dyeing contracts, required a larger boiler. They therefore on April 26, 1946 concluded a contract with the defendants, an

engineering firm, to purchase a boiler, then installed on the defendants' premises, for 2,150*l.*, and delivery was arranged to be taken on June 5. Owing to a mishap while the boiler was being dismantled by the third parties, under contract with the defendants, it rolled over and sustained damage, and delivery to the plaintiffs was delayed until November 8, 1946. The defendants were aware of the nature of the plaintiffs' business, and by letter had been informed that the plaintiffs intended to put the boiler in use in the shortest possible space of time. In an action for breach of contract the plaintiffs claimed to include in their damages their loss of business profits. The trial judge allowed the plaintiffs a sum for damages under certain minor heads but disallowed the claim for loss of profits on the ground that it was based on special circumstances which had not been drawn to the attention of the defendants, and therefore came within the second rule in *Hadley* v. *Baxendale* (1854) 9 Exch. 341. On appeal :—

Held, that the defendants, an engineering company, with knowledge of the nature of the plaintiffs' business, having promised delivery by a particular date of a large and expensive plant, could not reasonably contend that they could not foresee that loss of business profit would be liable to result to the purchaser from a long delay in delivery ; that although the defendants had no knowledge of the dyeing contracts which the plaintiffs had in prospect, it did not follow that the plaintiffs were precluded from recovering some general, and perhaps conjectural, sum for loss of business in respect of contracts reasonably to be expected ; and therefore the appeal must be allowed and the damages referred to an Official Referee for assessment in consonance with those findings of the court.

Decision of Streatfeild J. [1948] W. N. 397, reversed.

Accuracy of the headnote in *Hadley* v. *Baxendale* questioned.

APPEAL from Streatfeild J.

The plaintiffs, a limited company, carrying on a business as launderers and dyers at Windsor, were in January, 1946, minded to expand their business, and to that end required a boiler of much greater capacity than the one they then possessed, which was of a capacity of 1,500-1,600 lbs. evaporation per hour. Seeing an advertisement by the defendants on January 17, 1946, of two " vertical Cochran boilers of " 8,000 lb. per hour capacity heavy steaming," the plaintiffs negotiated for the purchase of one of them, and by April 26 had concluded a contract for its purchase at a price of 2,150*l.*, loaded free on transport at Harpenden, where it was installed in the premises of the defendants. The defendants knew that the plaintiffs were launderers and dyers, and wanted the boiler for use in their business. Also, during the negotiations

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

the plaintiffs by letter expressed their intention to "put it "into use in the shortest possible space of time." Arrangements were made by the plaintiffs with the defendants to take delivery at Harpenden on June 5, and the plaintiffs on that date sent a lorry to Harpenden to take delivery, but it was then ascertained that four days earlier the third parties, who had been employed by the defendants to dismantle the boiler, had allowed it to fall on its side and sustain damage. The plaintiffs refused to take delivery unless the damage was made good and ultimately the defendants agreed to arrange for the necessary repairs. The plaintiffs did not receive delivery of the boiler until November 8, 1946, and in the present action they claimed damages for breach of contract and sought to include in the damages loss of business profits during the period from June 5 to November 8, 1946.

Streatfeild J. gave judgment for the plaintiffs against the defendants for 110*l.* damages under certain minor heads, but held that they were not entitled to include in their measure of damages loss of business profits during the period of delay. The boiler, he said, was not a whole plant capable of being used by itself as a profit-making machine. Only the entire plant, including the vats, was a profit-making machine. The defendants were supplying the plaintiffs with only a part, the function of which they did not know, of that plant. The case fell, in his opinion, within the second rule in *Hadley* v. *Baxendale* (1) and the defendants were not liable for the loss of profits because the special object for which the plaintiffs were acquiring the boiler had not been drawn to the defendants' attention.

The plaintiffs appealed.

Beney K.C. and John Davidson for plaintiffs: The learned judge it is submitted came to a wrong decision. The speeches of their Lordships in *A/B. Karlshamns Oljefabriker* v. *Monarch Steamship Co. Ld* (2) contain the latest pronouncement on the meaning of the rules in *Hadley* v. *Baxendale* (1). Lord Wright said: "The ruling of Baron Alderson has consistently been "followed, and the only difficulty, as Lord Sankey observed in "*Banco de Portugal* v. *Waterlow & Sons* (3), has been in applying it. The distinction there drawn is between damages "arising naturally (which means in the normal course of things)

(1) (1854) 9 Exch. 341.
(2) [1948] A. C. 196.
(3) [1932] A. C. 452.

" and cases where there are special and extraordinary circum-
" stances beyond the reasonable prevision of the parties. The
" distinction between these types is usually described in
" English law as that between general and special damages ;
" the latter are such that if they are not communicated it
" would not be fair or reasonable to hold the defendant respon-
" sible for losses which he could not be taken to contemplate
" as likely to result from the breach of contract." He continued : " It appears that if the respondents had been claiming
" special and peculiar loss due to interference with their
" business such damages might, prima facie, be too remote
" and not proper to be recovered in the absence of notice when
" the contract was entered into . . . . But the respondents
" are claiming only for their loss directly due to the failure
" of the appellants to fulfil their promise to deliver the beans
" at Karlshamn. Their claim is not based on any extra-
" ordinary or peculiar matter, but is only what might be
" claimed by any party which suffers injury in the general
" circumstances of that business and at that time and place."
If the defendants in this case had considered in April, 1946, the probable effects of a delay of five months, with due regard to what might reasonably be expected to occur, they could not have failed to foresee that some financial loss to the plaintiffs was a serious possibility. That, however, is not the test which the learned judge below appears to have applied. The defendants describe themselves as electrical engineers and manufacturers, and from the fact that they were asked if they would do the erection and fitting of the boiler they must have known that the boiler was to be put into operation and was not being purchased merely as a spare. Also the fact that by letter the plaintiffs had intimated their intention to put the boiler into use as speedily as possible justified the inference being drawn that speed was necessary. It must have been reasonably conveyed to the defendants that the boiler was wanted for use promptly. Although the facts in *Cory* v. *Thames Ironworks Co.* (1) were different from those in the present case, the test laid down to see into what category the case fell is of assistance in this case. The dividing line is not between a whole profit-earning plant and a part. It is a matter of degree. The test is what a reasonable hypothetical man would contemplate was the profitable use to which the article was to be put. It does not depend on actual know-

(1) (1868) L. R. 3 Q. B. 181.

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

ledge, but on what a reasonable person would contemplate. The appeal should be allowed and the matter referred to an official referee for the assessment of damages.

Paull K.C. and A. J. Hodgson for defendants. The measure of damages recoverable in any case of breach of contract must depend upon the inferences which the court is entitled to draw from the facts. The defendants here were selling a second-hand boiler. They had no special knowledge of the use of boilers generally and no knowledge of how laundries were run. There may be a great difference between a sale such as this and the sale of a chattel by manufacturers of and experts in the use of a particular chattel. The seller having no special knowledge or information that this part of machinery was essential for immediate profit-making, he is not liable for that loss of profit: *Hadley* v. *Baxendale* (1). To saddle the defendant with liability where the loss of profit is due to special circumstances the court must be able to draw the inference that those circumstances have been brought to the notice of the defendant. The authorities draw a distinction between the supply of part of a profit-making machine and the supply of the machine itself: see *Portman* v. *Middleton* (2). The fact that what is being supplied is only part of a plant negatives the idea that it is wanted for immediate use. *Gee* v. *Lancashire and Yorkshire Railway* (3) and *British Columbia Sawmills* v. *Nettleship* (4) are decisions strongly in favour of the present defendants. In the latter case it was expressly held that it was not sufficient that the defendant knew the thing supplied was going to be used in the plaintiffs' business. It must be found that the defendant had that knowledge at the time he entered into the contract and expressly or impliedly accepted liability for a breach. Special circumstances must have been brought to the knowledge of the other contracting party or else the claim comes under the second rule in *Hadley* v. *Baxendale* (1). The defendants did not know that the boiler they were supplying was a bigger boiler than the one already possessed by the plaintiffs and therefore they must not be assumed to know that delay in delivery would cause loss of profits. They did not know that everything was ready for putting the boiler in place. So far as they knew it might be required as a spare. Mere knowledge that the boiler was to be

(1) 9 Exch. 341.
(2) (1858) 4 C. B. (N. S.) 322.
(3) (1860) 6 H. & N. 211.
(4) (1868) L. R. 3 C. P. 499.

used in the plaintiffs' business is not sufficient to fix the defendants with liability.

Caplan for third parties.

Cur. adv. vult.

April 12. ASQUITH L.J. delivered the judgment of the court: This is an appeal by the plaintiffs against a judgment of Streatfeild J. in so far as that judgment limited the damages to 110*l.* in respect of an alleged breach of contract by the defendants, which is now uncontested. The breach of contract consisted in the delivery of a boiler sold by the defendants to the plaintiffs some twenty odd weeks after the time fixed by the contract for delivery. The short point is whether, in addition to the 110*l.* awarded, the plaintiffs were entitled to claim in respect of loss of profits which they say they would have made if the boiler had been delivered punctually. Seeing that the issue is as to the measure of recoverable damage and the application of the rules in *Hadley* v. *Baxendale* (1), it is important to inquire what information the defendants possessed at the time when the contract was made, as to such matters as the time at which, and the purpose for which, the plaintiffs required the boiler. The defendants knew before, and at the time of the contract, that the plaintiffs were laundrymen and dyers, and required the boiler for purposes of their business as such. They also knew that the plaintiffs wanted the boiler for immediate use. On the latter point the correspondence is important. The contract was concluded by, and is contained in, a series of letters. In the earliest phases of the correspondence—that is, in letters of January 31 and February 1, 1946—(which letters, as appears from their terms, followed a telephone call on the earlier date)—the defendants undertook to make the earliest possible arrangements for the dismantling and removal of the boiler. The natural inference from this is that in the telephone conversation referred to the plaintiffs had conveyed to the defendants that they required the boiler urgently. Again, on February 7 the plaintiffs write to the defendants: "We should appreciate your letting us know "how quickly your people can dismantle it"; and finally, on April 26, in the concluding letter of the series by which the contract was made: "We are most anxious that this" (that is, the boiler) "should be put into use in the shortest possible "space of time." Hence, up to and at the very moment

(1) 9 Exch. 341.

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

when a concluded contract emerged, the plaintiffs were pressing upon the defendants the need for expedition; and the last letter was a plain intimation that the boiler was wanted for immediate use. This is none the less so because when, later, the plaintiffs encountered delays in getting the necessary permits and licences, the exhortations to speed come from the other side, who wanted their money, which in fact they were paid in advance of delivery. The defendants knew the plaintiffs needed the boiler as soon as the delays should be overcome, and they knew by the beginning of June that such delays had by then in fact been overcome. The defendants did not know at the material time the precise role for which the boiler was cast in the plaintiffs' economy, *e.g.* whether (as the fact was) it was to function in substitution for an existing boiler of inferior capacity, or in replacement of an existing boiler of equal capacity, or as an extra unit to be operated side by side with and in addition to any existing boiler. It has indeed been argued strenuously that, for all they knew, it might have been wanted as a "spare" or "stand-" by," provided in advance to replace an existing boiler when, perhaps some time hence, the latter should wear out; but such an intention to reserve it for future use seems quite inconsistent with the intention expressed in the letter of April 26, to "put it into use in the shortest possible space " of time."

In this connexion, certain admissions made in the course of the hearing are of vital importance. The defendants formally admitted what in their defence they had originally traversed, namely, the facts alleged in para. 2 of the statement of claim. That paragraph reads as follows: "At the date " of the contract hereinafter mentioned the defendants well " knew as the fact was that the plaintiffs were launderers and " dyers carrying on business at Windsor and required the " said boiler for use in their said business and the said contract " was made upon the basis that the said boiler was required " for the said purpose."

On June 5 the plaintiffs, having heard that the boiler was ready, sent a lorry to Harpenden to take delivery. Mr. Lennard, a director of the plaintiff company, preceded the lorry in a car. He discovered on arrival that four days earlier the contractors employed by the defendants to dismantle the boiler had allowed it to fall on its side, sustaining injuries. Mr. Lennard declined to take delivery of the damaged

boiler in its existing condition and insisted that the damage must be made good. He was, we think, justified in this attitude, since no similar article could be bought in the market. After a long wrangle, the defendants agreed to perform the necessary repairs and, after further delay through the difficulty of finding a contractor who was free and able to perform them, completed the repairs by October 28. Delivery was taken by the plaintiffs on November 8 and the boiler was erected and working by early December. The plaintiffs claim, as part—the disputed part—of the damages, loss of the profits they would have earned if the machine had been delivered in early June instead of November. Evidence was led for the plaintiffs with the object of establishing that if the boiler had been punctually delivered, then, during the twenty odd weeks between then and the time of actual delivery, (1.) they could have taken on a very large number of new customers in the course of their laundry business, the demand for laundry services at that time being insatiable—they did in fact take on extra staff in the expectation of its delivery—and (2.) that they could and would have accepted a number of highly lucrative dyeing contracts for the Ministry of Supply. In the statement of claim, para. 10, the loss of profits under the first of these heads was quantified at 16*l.* a week and under the second at 262*l.* a week.

The evidence, however, which promised to be voluminous, had not gone very far when Mr. Paull, for the defendants, submitted that in law no loss of profits was recoverable at all, and that to continue to hear evidence as to its quantum was merely waste of time. He suggested that the question of remoteness of damage under this head should be decided on the existing materials, including the admissions to which we have referred. The learned judge accepted Mr. Paull's submission, and on that basis awarded 110*l.* damages under certain minor heads, but nothing in respect of loss of profits, which he held to be too remote. It is from that decision that the plaintiffs now appeal. It was a necessary consequence of the course which the case took that no evidence was given on behalf of the defendants, and only part of the evidence available to the plaintiffs. It should be observed parenthetically that the defendants had added as third parties the contractors who, by dropping the boiler, and causing the injuries to it, prevented its delivery in early June and caused the defendants to break their contract. Those third-party proceedings have been

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO., LD (THIRD PARTIES).

adjourned pending the hearing of the present appeal as between the plaintiffs and the defendants. The third parties, nevertheless, were served with notice of appeal by the defendants and argument was heard for them at the hearing of the appeal.

The ground of the learned judge's decision, which we consider more fully later, may be summarized as follows: He took the view that the loss of profit claimed was due to special circumstances and therefore recoverable, if at all, only under the second rule in *Hadley* v. *Baxendale* and not recoverable in this case because such special circumstances were not at the time of the contract communicated to the defendants. He also attached much significance to the fact that the object supplied was not a self-sufficient profit-making article, but part of a larger profit-making whole, and cited in this connexion the cases of *Portman* v. *Middleton* (1) and *British Columbia Sawmills* v. *Nettleship* (2). Before commenting on the learned judge's reasoning, we must refer to some of the authorities.

The authorities on recovery of loss of profits as a head of damage are not easy to reconcile. At one end of the scale stand cases where there has been non-delivery or delayed delivery of what is on the face of it obviously a profit-earning chattel; for instance, a merchant or passenger ship: see *Fletcher* v. *Tayleur* (3), *In re Trent and Humber Company, ex parte Cambrian Steam Packet Company* (4); or some essential part of such a ship; for instance, a propeller, in *Wilson* v. *General Ironscrew Company* (5), or engines, *Saint Line* v. *Richardson* (6). In such cases loss of profit has rarely been refused. A second and intermediate class of case in which loss of profit has often been awarded is where ordinary mercantile goods have been sold to a merchant with knowledge by the vendor that the purchaser wanted them for resale; at all events, where there was no market in which the purchaser could buy similar goods against the contract on the seller's default, see, for instance, *Borries* v. *Hutchinson* (7). At the other end of the scale are cases where the defendant is not a vendor of the goods, but a carrier, see, for instance, *Hadley* v. *Baxendale* (8) and *Gee* v. *Lancashire and Yorkshire Railway* (9). In such cases the courts have been slow to allow loss of

(1) 4 C. B. (N. S.) 322.
(2) L. R. 3 C. P. 499.
(3) (1855) 17 C. B. 21.
(4) (1868) L. R. 6 Eq. 396.
(5) (1878) 47 L. J. (Q. B.) 23.
(6) [1940] 2 K. B. 99.
(7) (1865) 18 C. B. (N. S.) 445.
(8) 9 Exch. 341.
(9) 6 H. & N. 211.

profit as an item of damage. This was not, it would seem, because a different principle applies in such cases, but because the application of the same principle leads to different results. A carrier commonly knows less than a seller about the purposes for which the buyer or consignee needs the goods, or about other " special circumstances " which may cause exceptional loss if due delivery is withheld.

Three of the authorities call for more detailed examination. First comes *Hadley* v. *Baxendale* (1) itself. Familiar though it is, we should first recall the memorable sentence in which the main principles laid down in this case are enshrined: " Where two parties have made a contract which one of them " has broken, the damages which the other party ought to " receive in respect of such breach of contract should be such " as may fairly and reasonably be considered as either arising " naturally, *i.e.* according to the usual course of things, from " such breach of contract itself, or such as may reasonably " be supposed to have been in the contemplation of both " parties, at the time they made the contract, as the probable " result of the breach of it." The limb of this sentence prefaced by " either " embodies the so-called " first " rule; that prefaced by " or " the " second." In considering the meaning and application of these rules, it is essential to bear clearly in mind the facts on which *Hadley* v. *Baxendale* (1) proceeded. The head-note is definitely misleading in so far as it says that the defendant's clerk, who attended at the office, was told that the mill was stopped and that the shaft must be delivered immediately. The same allegation figures in the statement of facts which are said on page 344 to have " appeared " at the trial before Crompton J. If the Court of Exchequer had accepted these facts as established, the court must, one would suppose, have decided the case the other way round; must, that is, have held the damage claimed was recoverable under the second rule. But it is reasonably plain from Alderson B's judgment that the court rejected this evidence, for on page 355 he says: " We find that the only " circumstances here communicated by the plaintiffs to the " defendants at the time when the contract was made were " that the article to be carried was the broken shaft of a mill " and that the plaintiffs were the millers of that mill," and it is on this basis of fact that he proceeds to ask, " How do these " circumstances show reasonably that the profits of the mill

(1) 9 Exch. 341.

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

" must be stopped by an unreasonable delay in the delivery " of the broken shaft by the carrier to the third person ? "

British Columbia Sawmills v. *Nettleship* (1) annexes to the principle laid down in *Hadley* v. *Baxendale* (2) a rider to the effect that where knowledge of special circumstances is relied on as enhancing the damage recoverable that knowledge must have been brought home to the defendant at the time of the contract and in such circumstances that the defendant impliedly undertook to bear any special loss referable to a breach in those special circumstances. The knowledge which was lacking in that case on the part of the defendant was knowledge that the particular box of machinery negligently lost by the defendants was one without which the rest of the machinery could not be put together and would therefore be useless.

Cory v. *Thames Ironworks Company* (3)—a case strongly relied on by the plaintiffs—presented the peculiarity that the parties contemplated respectively different profit-making uses of the chattel sold by the defendant to the plaintiff. It was the hull of a boom derrick, and was delivered late. The plaintiffs were coal merchants, and the obvious use, and that to which the defendants believed it was to be put, was that of a coal store. The plaintiffs, on the other hand, the buyers, in fact intended to use it for transhipping coals from colliers to barges, a quite unprecedented use for a chattel of this kind, one quite unsuspected by the sellers and one calculated to yield much higher profits. The case accordingly decides, inter alia, what is the measure of damage recoverable when the parties are not ad idem in their contemplation of the use for which the article is needed. It was decided that in such a case no loss was recoverable beyond what would have resulted if the intended use had been that reasonably within the contemplation of the defendants, which in that case was the " obvious " use. This special complicating factor, the divergence between the knowledge and contemplation of the parties respectively, has somewhat obscured the general importance of the decision, which is in effect that the facts of the case brought it within the first rule of *Hadley* v. *Baxendale* (2) and enabled the plaintiff to recover loss of such profits as would have arisen from the normal and obvious use of the article. The " natural consequence," said Blackburn J., of not delivering the derrick was that 420*l.* representing those

(1) L. R. 3 C. P. 409.
(2) 9 Exch. 341.
(3) L. R. 3 Q. B. 181, 187.

normal profits was lost. Cockburn C.J., interposing during the argument, made the significant observation: "No doubt "in order to recover damage arising from a special purpose "the buyer must have communicated the special purpose to "the seller; but there is one thing which must always be in "the knowledge of both parties, which is that the thing is "bought for the purpose of being in some way or other profit-"ably applied." This observation is apposite to the present case. These three cases have on many occasions been approved by the House of Lords without any material qualification.

What propositions applicable to the present case emerge from the authorities as a whole, including those analysed above? We think they include the following:—

(1.) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim* v. *Chicoutimi Pulp Company* (1)). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2.) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.

(3.) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4.) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley* v. *Baxendale* (2). But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

(1) [1911] A. C. 301. (2) 9 Exch. 341.

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

(5.) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *A/B Karlshamns Oljefabriker* v. *Monarch Steamship Company Limited* (1).)

(6.) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a " serious possibility " or a " real danger." For short, we have used the word " liable " to result. Possibly the colloquialism " on the cards " indicates the shade of meaning with some approach to accuracy.

If these, indeed, are the principles applicable, what is the effect of their application to the facts of this case ? We have, at the beginning of this judgment, summarized the main relevant facts. The defendants were an engineering company supplying a boiler to a laundry. We reject the submission for the defendants that an engineering company knows no more than the plain man about boilers or the purposes to which they are commonly put by different classes of purchasers, including laundries. The defendant company were not, it is true, manufacturers of this boiler or dealers in boilers, but they gave a highly technical and comprehensive description of this boiler to the plaintiffs by letter of January 19, 1946, and offered both to dismantle the boiler at Harpenden and to re-erect it on the plaintiffs' premises. Of the uses or purposes to which boilers are put, they would clearly know more than the uninstructed layman. Again, they knew they were supplying the boiler to a company carrying on the business of laundrymen and dyers, for use in that business. The obvious use of a boiler, in such a business, is surely to boil water for the purpose of washing or dyeing. A laundry might conceivably buy a boiler for some other purpose ; for instance, to

(1) [1949] A. C. 196.

work radiators or warm bath water for the comfort of its employees or directors, or to use for research, or to exhibit in a museum. All these purposes are possible, but the first is the obvious purpose which, in the case of a laundry, leaps to the average eye. If the purpose then be to wash or dye, why does the company want to wash or dye, unless for purposes of business advantage, in which term we, for the purposes of the rest of this judgment, include maintenance or increase of profit, or reduction of loss? (We shall speak henceforward not of loss of profit, but of "loss of business.") No commercial concern commonly purchases for the purposes of its business a very large and expensive structure like this—a boiler 19 feet high and costing over 2,000*l.*—with any other motive, and no supplier, let alone an engineering company, which has promised delivery of such an article by a particular date, with knowledge that it was to be put into use immediately on delivery, can reasonably contend that it could not foresee that loss of business (in the sense indicated above) would be liable to result to the purchaser from a long delay in the delivery thereof. The suggestion that, for all the supplier knew, the boiler might have been needed simply as a "stand-by," to be used in a possibly distant future, is gratuitous and was plainly negatived by the terms of the letter of April 26, 1946.

Since we are differing from a carefully reasoned judgment, we think it due to the learned judge to indicate the grounds of our dissent. In that judgment, after stressing the fact that the defendants were not manufacturers of this boiler or of any boilers (a fact which is indisputable), nor (what is disputable) people possessing any special knowledge not common to the general public of boilers or laundries as possible users thereof, he goes on to say: "That is the general principle and I think "that the principle running through the cases is this—and to "this extent I agree with Mr. Beney—that if there is nothing "unusual, if it is a normal user of the plant, then it may well "be that the parties must be taken to contemplate that the "loss of profits may result from non-delivery, or the delay "in delivery, of the particular article. On the other hand, "if there are, as I think there are here, special circumstances, "I do not think that the defendants are liable for loss of "profits unless these special circumstances were drawn to their "notice. In looking at the cases, I think there is a distinction "as Mr. Paull has pointed out and insists upon, between the

C. A.

1949

VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

" supply of the part of the profit-making machine, as against " the profit-making machine itself." Then, after referring to *Portman* v. *Middleton* (1), he continues : " It is to be observed " that not only must the circumstances be known to the " supplier, but they must be such that the object must be " taken to have been within the contemplation of both parties. " I do not think that on the facts of the case as I have heard " them, and upon the admissions, it can be said that it was " within the contemplation of the supplier, namely, the " defendants, that any delay in the delivery of this boiler was " going to lead necessarily to loss of profits. There was nothing " that I know of in the evidence to indicate how it was to be " used or whether delivery of it by a particular day would " necessarily be vital to the earning of these profits. I agree " with the propositions of Mr. Paull that it was no part of the " contract, and it cannot be taken to have been the basis of " the contract, that the laundry would be unable to work if " there was a delay in the delivery of the boiler, or that the " laundry was extending its business, or that it had any special " contracts which they could fulfil only by getting delivery " of this boiler. In my view, therefore, this case falls within " the second rule of *Hadley* v. *Baxendale* (2) under which they " are not liable for the payment of damages for loss of profits " unless there is evidence before the court—which there is not " —that the special object of this boiler was drawn to their " attention and that they contracted upon the basis that delay " in the delivery of the boiler would make them liable to " payment of loss of profits."

The answer to this reasoning has largely been anticipated in what has been said above, but we would wish to add : First, that the learned judge appears to infer that because certain " special circumstances " were, in his view, not " drawn to " the notice of " the defendants and therefore, in his view, the operation of the " second rule " was excluded, ergo nothing in respect of loss of business can be recovered under the " first " rule." This inference is, in our view, no more justified in the present case than it was in the case of *Cory* v. *Thames Ironworks Company* (3). Secondly, that while it is not wholly clear what were the " special circumstances " on the non-communication of which the learned judge relied, it would seem that they were, or included, the following :—(*a*) the

(1) 4 C. B. (N. S.) 322.
(2) 9 Exch. 341.
(3) L. R. 3 Q. B. 181.

" circumstance " that delay in delivering the boiler was going to lead " necessarily " to loss of profits. But the true criterion is surely not what was bound " necessarily " to result, but what was likely or liable to do so, and we think that it was amply conveyed to the defendants by what was communicated to them (plus what was patent without express communication) that delay in delivery was likely to lead to " loss of business " ; (*b*) the " circumstance " that the plaintiffs needed the boiler " to extend their business." It was surely not necessary for the defendants to be specifically informed of this, as a pre-condition of being liable for loss of business. Reasonable, persons in the shoes of the defendants must be taken to foresee without any express intimation, that a laundry which, at a time when there was a famine of laundry facilities, was paying 2,000*l.* odd for plant and intended at such a time to put such plant " into use " immediately, would be likely to suffer in pocket from five months' delay in delivery of the plant in question, whether they intended by means of it to extend their business, or merely to maintain it, or to reduce a loss ; (*c*) the " circumstance " that the plaintiffs had the assured expectation of special contracts, which they could only fulfil by securing punctual delivery of the boiler. 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.

Thirdly, the other point on which Streatfeild J. largely based his judgment was that there is a critical difference between the measure of damages applicable when the defendant defaults in supplying a self-contained profit-earning whole and when he defaults in supplying a part of that whole. In our view, there is no intrinsic magic, in this connexion, in the whole as against a part. The fact that a part only is involved is only significant in so far as it bears on the capacity of the

C. A.
1949
VICTORIA LAUNDRY (WINDSOR) LD. v. NEWMAN INDUSTRIES LD. COULSON & CO. LD. (THIRD PARTIES).

supplier to foresee the consequences of non-delivery. If it is clear from the nature of the part (or the supplier of it is informed) that its non-delivery will have the same effect as non-delivery of the whole, his liability will be the same as if he had defaulted in delivering the whole. The cases of *Hadley* v. *Baxendale* (1), *British Columbia Sawmills* v. *Nettleship* (2) and *Portman* v. *Middleton* (3), which were so strongly relied on for the defence and by the learned judge, were all cases in which, through want of a part, catastrophic results ensued, in that a whole concern was paralysed or sterilized; a mill stopped, a complex of machinery unable to be assembled, a threshing machine unable to be delivered in time for the harvest and therefore useless. In all three cases the defendants were absolved from liability to compensate the plaintiffs for the resulting loss of business, not because what they had failed to deliver was a part, but because there had been nothing to convey to them that want of that part would stultify the whole business of the person for whose benefit the part was contracted for. There is no resemblance between these cases and the present, in which, while there was no question of a total stoppage resulting from non-delivery, yet there was ample means of knowledge on the part of the defendants that business loss of some sort would be likely to result to the plaintiffs from the defendants' default in performing their contract.

We are therefore of opinion that the appeal should be allowed and the issue referred to an official referee as to what damage, if any, is recoverable in addition to the 110*l.* awarded by the learned trial judge. The official referee would assess those damages in consonance with the findings in this judgment as to what the defendants knew or must be taken to have known at the material time, either party to be at liberty to call evidence as to the quantum of the damage in dispute.

Appeal allowed.

Solicitors for plaintiffs: *Kenneth Brown, Baker, Baker.*

Solicitors for defendants: *Braikenridge & Edwards for Veale & Co., Bristol.*

Solicitors for third parties: *Bosman, Robinson & Co.*

(1) 9 Exch. 341.
(2) L. R. 3 C. P. 499.
(3) 4 C. B. (N. S.) 322.

A. W. G.