Hickey and Company Ltd v Roches Stores (Dublin) Ltd (No 1)

HIGH COURT (1975 No 1007P)
FINLAY P
14 July 1976

Restitution - breach of contract - exceptions to the rule that damages in contract and tort only remedy loss - appropriate basis for calculating damages for breach of contract - whether damages to deprive a wrongdoer of profits from breach - nature of exemplary damages - whether Irish law recognises a principle against unjust enrichment.

Hickeys imported fashion fabrics. Roches Stores were a large department store, who leased space in their store to Hickeys, so that Hickeys could retail their fabrics. The agreement of March 1969 provided for termination, inter alia, by Roches Stores, without the payment of compensation, provided that they gave six months notice of their intent to terminate to Hickeys, and undertook not to engage in the sale of fashion fabrics for a year thereafter. At various stages in 1971 Roches Stores sought to terminate the agreement, and on 17 December 1971 served a notice terminating the agreement on 2 February 1972. Hickeys protested, but left the store on this date. From that date, Roches Stores sold such fabrics. Hickeys entered into a similar but less profitable arrangement with another department store, Pennys. An arbitrator found that Roches had no justification for termination, and were thus in breach of contract. The parties applied for a determination of the proper measure of damages for this breach.

Held: (1) The general rule is that the assessment of damages in tort and in breach of contract should be referable to the loss suffered by the injured party. (2) To this general rule there are exceptions. Thus, where a wrongdoer has calculated and intended by his wrongdoing to achieve a gain or profit which he could not otherwise achieve and has in that way acted mala fide, then, irrespective of whether the form of his wrongdoing constitutes a tort or a breach of contract, the Court should in assessing damages look not only to the loss suffered by the injured party but also to the profit or gain unjustly or wrongly obtained by the wrongdoer. If the assessment of damages confined to the loss of the injured party should still leave the wrongdoer profiting from his calculated breach of the law, damages should be assessed so as to deprive him of that profit (at p.208). If the breach of contract is not mala fide, damages are confined to the amount of the loss suffered by the injured party. (3) In assessing damages for loss incurred by an injured party either in tort or by

reason of breach of contract, the Court should not by reason of difficulty in proof of the amount of that loss be deterred from assessing compensation for it, and should in this context be both alert and ingenious in assessing a general sum for damages, even though it may involve some element of speculation. (4) Since Roches were not mala fides, the damages should not be assessed upon the basis of the profit derived by Roches from the ownership of that goodwill in so far as it exceeded the loss sustained by Hickeys.

Damages were awarded for:

(i) the loss which Hickeys suffered by not being permitted to continue their operation for a period of six months from December, when the notice of termination was served; (ii) the loss which they suffered by not having been given from that date onwards a further period of 12 months without competition in the fashion fabric market from Roches Stores; and (iii) because, after the period of 12 months had elapsed, Hickeys were still selling fashion fabrics in the area closely adjoining Roches Stores against a competition which consisted of Roches Stores with the benefit of the goodwill which had been built during the period of the joint enterprise, Hickeys suffered a further loss for which damages should be assessed by ascertaining the amount, adjusted for inflation, of the differential between profits made when trading in Roches Stores and the lower profits made when trading from Pennys, and then multiplying it by a factor which, on the appropriate accountancy or commercial evidence, would be a reasonable assessment of the loss to Hickeys of trading under the conditions in which they have been trading since the termination of the 12 month period compared with trading in the situation in which they should have been trading had a gap of one year's operation by Roches Stores occurred.

Per curiam: The basis of exemplary damages in the need to teach wrongdoers that tort does not pay would appear to be applied primarily if not exclusively to damages in cases of tort (*Rookes v Barnard* [1964] AC 1129 considered).

Semble: the proposition that the principle against unjust enrichment does not form part of Irish law was neither accepted nor rejected (*Reading* v *Attorney-General* [1951] AC 507 considered).

Cases referred to in judgment

Bell v *Midland Railway Co.* (1861) 10 CB (NS) 287; 142 ER 462
Crouch v *Great Northern Railway Co.* (1856) 11 Ex 742; 156 ER 1031
Hadley v *Baxendale* (1854) 9 Ex 341; 156 ER 145
Haviland v *Long* [1952] 2 QB 81
The Heron II [1969] AC 350; [1967] 3 All ER 686

Lavender v *Betts* [1942] 2 All ER 72
Liesbosch Dredger (Owners) v *Edison SS (Owners)* [1933] AC 449
The Mediana [1900] AC 113
Perera v *Vandiyar* [1953] 1 All ER 1109
Reading v *Attorney-General* [1948] 2 KB 268 (Denning J), [1951] AC 507 (HL)
Rookes v *Barnard* [1964] AC 1129
Slater v *Hoyle & Smith Ltd* [1920] 2 KB 11
Smiley v *Townshend* [1950] 1 KB 311
Strand Electric & Engineering Co. Ltd v *Brisford Entertainments Ltd* [1952] 2 QB 246
Williams v *Currie* (1845) 1 CB 841; 135 ER 774

Plenary summons

TK Liston SC for the plaintiffs

RJ O'Hanlon SC for the defendants

Cur adv vult

14 July 1976. The following judgment was delivered.

FINLAY P. This matter came before me as an issue of law only by agreement of the parties heard without oral evidence and on the basis of certain documents which were put in evidence by consent.

The facts out of which the issue arises may be summarised as follows. Hickey and Company Limited, the plaintiffs, (Hickeys) are a company carrying on business in a very large way as importers of what are known as fashion fabrics and in addition to dealing as wholesale importers and suppliers of these fabrics have a number of retail outlets in the city of Dublin. Roches Stores (Dublin) Limited (Roches Stores) are the proprietors of a large drapery shop in Henry Street, Dublin and are associated with other Roches Stores situated in Limerick and Cork.

In March 1969 Hickeys and Roches Stores entered into an agreement witnessed by a memorandum signed on behalf of each of the parties. Broadly speaking the terms of that agreement were that space was to be provided by Roches Stores in their shop in Henry Street for the sale of Hickey's fashion fabrics and detailed clauses provided for the staffing and equipping of this area. Agreements then were made for the sharing of the profits resulting from these sales. With none of these details of the agreement am I concerned in this issue.

The provisions for termination of the agreement which are relevant in the issue were as follows.

(a) An unacceptable or significant change occurring in the ownership or control of the other party entitled either party to terminate without notice and without compensation.

(b) In the event of any situation occurring in which either party had reasonable grounds for not wishing to continue the agreement it could terminate without notice and without compensation. If a dispute arose in connection with the question as to whether a party had reasonable grounds for not wishing to continue, it should be referred to a panel of arbitrators made up of a representative of each side under a neutral chairman.

(c) If either party should unilaterally decide to terminate the agreement, when the department was performing satisfactorily, it was recognised that compensation would be payable and again in the absence of agreement the compensation was to be decided by arbitration.

Then occurred a proviso which is the vital proviso in this issue, which gave to Roches Stores only, a right to terminate the agreement in circumstances in which compensation would normally be payable but to do so at its option without payment of any compensation provided (1) it gave six months notice of its intention to Hickeys and (2) it undertook not to engage in the selling of fashion fabrics by the yard excluding household furnishings for a further period of 12 months following the expiration of the notice. A further clause of some relevance to the issue was that Hickeys undertook during the existence of the agreement not to enter into any similar arrangement with any other store north of the Liffey and also not to enter into any such arrangement with any other store within a radius of 3 miles from any suburban store which Roches Stores might open and to which the agreement would extend. Hickeys were not however to be prevented from opening shops of their own at any time within the areas to which that restriction applied.

Immediately after the reaching of this agreement in March of 1969 the department was set up and went into operation and was at all material times successful and profitable to both parties. On the 7th of May 1971 Roches Stores wrote to Hickeys a letter which stated that further to discussions which had taken place recently they formally gave six months notice of the termination of the agreement effective from the date of the letter. The notice was stated to be given without prejudice to the company's rights under the provisions of clause B on page 2 of the agreement. That notice does not appear to have been a strict compliance with any of the provisions for termination under the agreement. It did not of course contain any undertaking not to trade for 12 months in fashion fabrics after the termination of the notice. If it purported to be a direct exercise

of the right of either party under clause 9 to terminate for reasonable grounds then no period of notice was necessary. To that letter the solicitors then acting on behalf of Hickeys replied on the 21st of July 1971 making precisely this point and calling upon Roches Stores either to (l) serve an appropriate notice to terminate in six months with the undertaking provided in the agreement or (2) terminate under paragraph B of the agreement and proceed to arbitration as to their reasonable grounds or (3) indicate that the agreement was to continue as before. The effective reply of Roches Stores to that letter was to serve a formal notice which is undated but which was apparently served on the 30th of July and which gave six months notice of intention to terminate the agreement to take effect on the 30th of January 1972; which contained an assertion that Roches Stores claimed to be entitled to terminate the agreement at the present time without notice and without compensation by reason of the occurrence of a situation in which they had reasonable grounds for not wishing to continue and without prejudice to that claim gave an undertaking not to trade for 12 months after the termination of the six months notice.

Protest was again made by Hickeys as to the form of that notice and in particular as to the qualification attached to the undertaking and as a result of further correspondence Roches Stores eventually served a notice on the 17th of December 1971 terminating the agreement on the 2nd of February 1972 without compensation and without any undertaking on the grounds of having good reason. Neither the correspondence nor any of the notices served up to that time indicated what the reason of Roches Stores was but subsequent proceedings before the arbitrator indicated that their reason was that their associated companies in Cork and Limerick were now joining together in a general scheme for the purchase and sale of fashion fabrics which made a separate agreement between Hickeys and Roches Stores in Henry Street inappropriate.

Hickeys though protesting complied with this notice and left the premises and ceased the working arrangement on the 2nd of February 1972. Eventually after considerable further correspondence and claims on each side the matter of the reasonable grounds for the termination by Roches Stores was submitted to the arbitration of a single arbitrator Mr. Hederman Senior Counsel and by his award dated the 12th of July 1973 he found that a situation had not occurred which gave Roches Stores reasonable grounds for not wishing to continue the agreement.

Roches Stores had of course ever since February 1972 when, in compliance with their notice, Hickeys had terminated their arrangement and left their premises, carried on the business of selling fashion fabrics by the yard though in a different area of the store. As a result of the award of the arbitrator Roches Stores conceded that they were liable to pay a sum of money to Hickeys whether as compensation or damages and conceded that they were so liable

upon the grounds that the result of the determination by the arbitrator was that they should have given six months notice to Hickeys and should have given and fulfilled an undertaking not to sell fashion fabrics by the yard for a period of 12 months from the termination of that notice. Roches Stores therefore conceded that the damages or compensation which they were liable to pay to Hickeys consisted (a) of the loss of profits sustained by them by reason of the fact that they had to give up trading in Roches Stores from the 2nd of February 1972 when they were entitled to have gone on trading until the 17th of June 1972, and secondly any loss caused to Hickeys by the fact that Roches Stores continued to trade in fashion fabrics from the 2nd February to the 16th June 1973. They asserted however that credit was to be given against those two sums for any mitigation in their loss or damage effected by Hickeys by trading in alternative premises or in any other way.

Hickeys on the other hand contended that the damages to which they were entitled consisted of firstly damage for loss of trading at the defendants' premises from the 2nd of February 1972 to the 17th June 1972 calculated by reference to their profits in the premises for 1971 less profit made by them during the same period in Pennys at 47 Mary Street Dublin where they had entered into a similar arrangement on the termination in February 1972 of the association with Roches Stores. Secondly, Hickeys claimed that they were entitled to the value of the trade carried on by Roches Stores in fashion fabrics from the 17th of June 1972 to the 16th of June 1973 and, thirdly, they claimed that they were entitled to the value of the goodwill of the trade in fashion fabrics on Roches Stores premises on the 17th of June 1973 calculated on the basis of three years profits.

The issue before me is as to which of these two methods of calculating the compensation and damages payable to Hickeys is correct and if neither of them is correct what is the proper legal basis for the calculation of the damages. I am not at this stage concerned with an actual calculation of damages or with any enquiry as to the amounts which might arise as a result of any decision I give.

The question of law involved in this issue which is novel was most ably argued before me by Mr Liston on behalf of Hickeys and Mr O'Hanlon on behalf of Roches Stores.

The submission on behalf of Hickeys may be thus summarised. Whilst they do not assert that Roches Stores acted with any lack of good faith or with any worked out scheme purposely designed to break the agreement so as to create for them an unjust profit it is asserted that by June of 1973 Roches Stores had acquired a goodwill in the joint enterprise of selling fashion fabrics which had commenced in March of 1969, which they could not have acquired other than by firstly entering into and then breaking the agreement of March of 1969. It is submitted that the plain and obvious purpose of the provision for an undertaking on the part of Roches Stores if they were terminating under the

proviso to Clause C not to trade for one year was to prevent the acquisition by them of the goodwill which would have been built up at the time of termination and which it is contended the parties intended under their agreement should in the event of a termination by Roches Stores under the proviso to clause C have been allowed to lapse or die. On this interpretation of the facts it is submitted that it would be unjust to permit Roches Stores to retain without payment or compensation a valuable asset which they acquired by a wrongful act and that accordingly this constitutes a case in which the Court should look beyond the loss to the injured party Hickeys in the assessment of damages and should look instead to the profit obtained by the wrongdoer.

On behalf of Roches Stores it was contended that any assessment of damages over and above the loss incurred by the injured party is unknown in law in cases of breach of contract or to put the matter in a more positive way that the assessment of damages in breach of contract is as a result of a long established line of authority confined to the loss incurred by the plaintiff and that what Hickeys are really contending for is the introduction into the assessment of damages in a breach of contract case of a principle of unjust enrichment which is unknown to the law of Ireland.

In support of his submission on behalf of Hickeys, Mr Liston made two broad propositions. The first was that the law had already acknowledged under various circumstances and in various types of cases an assessment of damages for an injured party which went beyond and above any loss directly suffered by him. Secondly, he submitted that once such exceptions are permissible in law then the justice of the case requires that this particular claim should be included amongst the exceptions and that to confine the damages payable to Hickeys to the loss actually suffered by them would permit Roches Stores to obtain a profit from a wrongful act and would be unjust.

Mr. O'Hanlon on behalf of Roches Stores in answer made submissions which can thus be very briefly summarised.

Firstly, he contended that the exceptions to the general rule that the assessment of damages for an injured party should be confined to the loss directly suffered by him did not apply to breach of contract but applied to torts only. Secondly, and in the alternative, he submitted that even if such exception should or could be applied as a matter of principle to damages for breach of contract it should only be done in cases where the defendant had been shown to have acted mala fides.

While conceding that the precise point arising on his submission had not been the subject of any decided authority, Mr Liston relied, before me, upon the following cases: *Strand Electric & Engineering Co. Ltd* v *Brisford Entertainments Ltd* [1952] 2 QB 246; *Reading* v *Attorney-General* [1951] AC 507; *The Mediana* [1900] AC 113; and *Rookes* v *Barnard* [1964] AC 1129.

The case of *Strand Electrical & Engineering Company Ltd* v *Brisford*

Entertainments Ltd was a case of damages for detinue. The plaintiff company were the owners of lighting equipment for theatres which they hired out for profit to users and owners of theatres. The defendants were a company who owned a theatre and who were held wrongfully to have detained certain lighting equipment, the property of the plaintiffs. The trial Judge assessed damages upon the basis of the loss which the plaintiffs had suffered during the period of the wrongful detention, that involving a calculation of the probability of their having some periods of non-hiring of the particular equipment and some periods of gratuitous lending or hiring. He thus assessed damages at a figure less than the appropriate hiring rate for the period of detention. On appeal by the plaintiffs to the Court of Appeal it was decided that the appropriate measure of damages was the reasonable hiring rate for the period during which the defendants wrongfully detained the equipment and that the defendant was not entitled to any deduction for the probability that if during the entire of that period the equipment had been in the possession of the plaintiffs some idle and non-earning period would have been experienced. There were three judgments of the Court, those of Somervell LJ, Denning LJ and Romer LJ. Although the reasoning of the three Judges is somewhat different the decision of the Court was unanimous.

The strongest support contained in that case and indeed in any of the other authorities for the first broad submission made by Mr Liston is to be found in the judgment of Denning LJ at page 253 where he says as follows:

> "In assessing damages whether for a breach of contract or for a tort the general rule is that the plaintiff recovers the loss he has suffered no more and no less. This rule is however often departed from. Thus in cases where the damage claimed is too remote in law the plaintiff recovers less than his real loss: *Liesbosch Dredger (Owners)* v *Edison SS (Owners)* [1933] AC 449. In other cases the plaintiff may get more than his real loss. Thus, where the damage suffered by the plaintiff is recouped or lessened owing to some reason with which the defendant is not concerned, the plaintiff gets full damages without any deduction on that account: *Slater* v *Hoyle & Smith Ltd* [1920] 2 KB 11; *Smiley* v *Townshend* [1950] 2 KB 311; *Haviland* v *Long* [1952] 2 QB 81. Again in cases where the defendant has obtained a benefit from his wrongdoing he is often made liable to account for it even though the plaintiff has lost nothing and suffered no damage: *Reading* v *Attorney-General* [1951] AC 507."

With the broad statement of principle contained in this part of Denning LJ's judgment I fully agree. It is however not a solution of the issue which is before me and in particular the example cited by the Learned Judge with regard to

cases where the defendant having obtained a benefit from his wrongdoing is made liable to account for it, namely the case of *Reading* v *Attorney-General*, is a case which, as I will explain later, seems to me to be based upon a principle quite inapplicable to the present case. Notwithstanding this, however, the general statement is at variance with the rigid proposition contended for on behalf of the defendants in this case that in cases of breach of contract damages must always inevitably be the loss which the plaintiff has suffered no more and no less. With the general proposition that there are exceptions in breach of contract alike as in tort to that general rule with regard to the assessment of damages I am in agreement. It is however of some significance that in the case of *Strand Electric & Engineering Co. Ltd* v *Brisford Entertainments Ltd* the Court although awarding to the plaintiff a level of damages which the evidence established as a matter of probability greater than his direct loss expressly refused to enquire into what profit the defendant might have made from his wrongdoing. Somervell LJ at page 252 of the report having decided that the proper measure was the full hiring rate went on to say

> "There are no doubt some cases in which a wrongdoer may be called on to account for profits, but in considering the measure of damages as raised here I think the actual benefit which the defendants have obtained is irrelevant. The damages could not in my view be increased by showing that a defendant had made by his use of the chattels much more than the market rate of hire. Equally they cannot be diminished by showing that he had made less."

The case of *Reading* v *Attorney-General* [1951] AC 507 was a case of tort the facts of which shortly were that a serving soldier entered into a conspiracy with certain persons who were smuggling goods through Army and Customs checkpoints from the Middle East whereby he accompanied the lorries carrying the contraband articles in the full uniform of a soldier and thus ensured clear passage through Army checkpoints which otherwise would have presumably discovered the nature of the goods being carried. For these services he was paid very considerable sums of money and upon being arrested by the Army authorities and tried for the offences which he had committed part of these sums of money was seized off him. Reading, the soldier concerned, subsequently sued the Crown for the return of the monies and the House of Lords decided that they were irrecoverable. It was contended on behalf of the appellant in that case that the judgment of Denning J from which the appeal lay had been based upon the doctrine of unjust enrichment and that that doctrine was not recognised by the law of England. Dealing with that contention and indeed confirming and accepting the reasoning of Denning J as being the appropriate reasoning to the case Lord Porter at page 513 said as follows

> "It was suggested in argument that the learned judge founded his decision solely upon the doctrine of unjust enrichment and that that doctrine was not recognised by the law of England. My Lords the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and I think of the United States, but I am content for the purpose of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated.

But indeed this doctrine is not the of essence of Denning J's judgment. Hi reasoning is to be found in the passage which succeeds that quoted. He says

> 'In my judgment, it is a principle of law that if a servant, in violation of his duty of honesty and good faith, takes advantage of his service to make a profit for himself, in this sense, that the assets of which he has control, or the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money, as distinct from being the mere opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money then he is accountable for it to the Master ([1948] 2 KB 268, 275)."

The facts of *Reading*'s case seem very far removed indeed from the facts o the case before me. Reading would appear to have been guilty of both a crime and a tort, the tort at least being that of conspiracy. Considerable requirements of public policy would seem to make essential the prevention of a situation in which the law should permit him to profit and retain the profit out of such activities. His conduct would appear to have been such that the law must apply to it in relation to any assessment of damages a punitive and deterrent principle.

The case of *The Mediana* [1900] AC 113 was a case of tort being a claim by a harbour authority for damage negligently caused to a lightship. The facts shortly were that the harbour authority having a spare lightship which was maintained out of an annual expense precisely for the purpose of such an emergency were not put to any expense in replacing the lightship during the period of its repair. The issue which arose before the House of Lords in that case was whether in those circumstances the plaintiffs were entitled not only to the cost of repair of the ship but also to substantial damages for the loss of use during the period of repair or whether they were as the defendants contended entitled to nominal or no damages only. The decision of the Court was that the plaintiffs were entitled to damages of substance in respect to the loss of use the amount having been agreed between the parties. That decision seems no more than to present another example in a case of tort of an exception to the general principle that the damages of an injured plaintiff must be confined to the loss

suffered by him but it does not assist in the more difficult task of identifying either by way of general category or particular instance the cases where such an exception should be applied.

The case of *Rookes* v *Barnard* [1964] AC 1129 was relied upon by Mr Liston for the definition by Lord Devlin in his judgment in that case of the category of cases in which exemplary damages are permissible. This reliance was not in furtherance of any submission that this is a case in which exemplary damages would be appropriate for he expressly concedes that they are not but rather firstly in support of his general contention that the law permits of exceptions to the assessment of damages confined to the injured party's loss and secondly to an extent for the reasoning behind the second category of cases in which exemplary damages may be allowed as referred to by Lord Devlin at page 1226 of the report where he says

> "Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Earl CJ in *Bell* v *Midland Railway Co.* 10 CB (NS) 287. Maule J in *Williams* v *Currie* 1 CB 841, 848 suggests the same thing and so does Martin B in an *obiter dictum* in *Crouch* v *Great Northern Railway Co.* (1856) 11 Ex 742, 759. It is a factor also that is taken into account in damages in libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiffs rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay."

It is clear that this portion of the judgment constitutes, as Mr Liston asserts, a clear exception to the rule that damages should be confined to the loss of the injured party. It is also clear, as he concedes, that it is confined to the cases where the wrongdoer has calculated that he will obtain a profit from his wrongdoing which it is not alleged applies to Roches Stores in this case. On the face of it and particularly with regard to the last reference contained in the quoted paragraph to teaching wrongdoers that tort does not pay it would appear to be applied primarily if not exclusively to damages in cases of tort it being of

course a case of tort with which the learned judge was dealing.

Mr O'Hanon relied firmly upon the old but still well accepted authority *Hadley* v *Baxendale* (1854) 9 Ex 341 as indicating a total restriction damages in cases of breach of contract to the loss of the injured party. A modern instances of a strict and continued adherence to this rule he cited to m the cases of *Perera* v *Vandiyar* [1953] 1 All ER 1109 and *Lavender* v *Bet* [1942] 2 All ER 72, both of which were cases of what might be described high-handed or malicious conduct on the part of the landlords towards the tenants which might attract exemplary damages pointing out that in the case *Lavender* v *Betts* where the landlord in furtherance of his intent trespassed the property such damages were considered permissible but where his condu in *Perera* v *Vandiyar* though equally malicious and possibly high-hande consisted of a breach of contract only such damages were not permissible.

It was further submitted on behalf of the defendants that the underlyin principle for this distinction between the law of the assessment of damag applicable to tort and to breach of contract was that the parties to a contra were entitled and indeed in effect by the law bound to anticipate the possibili that the other party would be in breach and that by that breach coul conceivably obtain an unjust profit and that for that and every other eventuali arising from the breach of contract they were entitled to and should make the own provisions as to damages and penalties. In the absence of such provisio the theory would continue the Court should not interfere with the agreement the parties and in effect by awarding damages over and above the loss suffere by the injured party write in a new term. To do so, Mr O'Hanlon argued, woul be to leave parties entering into a contract in a state of unreasonable and unju uncertainty as to what the consequences of the breach by them of any term terms of the contract might be and unjustly to deprive them of the opportuni at the time of the making of the contract to provide in express terms some lim or limitations with regard to the level of damages which might occur in such case. As one of the most recent reiterations of this principle flowing in the fir instance from the judgment in *Hadley* v *Baxendale*, he relied upon the decisio in *The Heron II* reported in [1967] 3 All ER 686 and especially to the judgme of Lord Morris at page 696 and the following pages in that report.

Having considered all these decisions and the able arguments presente before me I have come to the conclusion that the following principles ca properly be enunciated as dealing with the assessment of damages relevant t the issues arising in this case.

(1) The general rule is that the assessment of damages in tort and in breac of contract should have as its purpose the putting back of the injured party, i so far as money can do so, to the position in which he would have been had th wrong not been committed and thus should be referable to the loss suffered b the injured party.

(2) To this general rule there are exceptions both in cases of tort and in cases of breach of contract some of which may be different for each particular cause of action and some of which are the same.

(3) Where a wrongdoer has calculated and intended by his wrongdoing to achieve a gain or profit which he could not otherwise achieve and has in that way acted mala fide then irrespective of whether the form of his wrongdoing constitutes a tort or a breach of contract the Court should in assessing damages look not only to the loss suffered by the injured party but also to the profit or gain unjustly or wrongly obtained by the wrongdoer.

If the assessment of damages confined to the loss of the injured party should still leave the wrongdoer profiting from his calculated breach of the law damages should be assessed so as to deprive him of that profit.

In extending this measure of damages, which heretofore has been confined to tort, to cases of breach of contract I have acted upon a conclusion that the protection of a party to a contract from uncertain or extensive damages, against which he had no opportunity to provide by the terms of the contract, should not apply where he has thus acted mala fide.

(4) In cases of damages for breach of contract, though not in tort, the necessity to create certainty as to the obligations which may arise from the contract and from a breach thereof and the just necessity for permitting the parties to provide for such obligations, make it necessary to confine, in cases where the element of mala fides has not occurred, damages to the loss suffered by the injured party even though such restriction may result in a profit to the wrongdoer.

(5) In assessing damages for loss incurred by an injured party either in tort or by reason of breach of contract the Court, if satisfied that a loss has occurred, under a particular heading, should not by reason of difficulty in proof of the amount of that loss, as distinct from failure to adduce available evidence of it, be deterred from assessing compensation for it and should in this context be both alert and ingenious in assessing a general sum for damages even though it may involve some element of speculation.

Applying these principles to the facts agreed and admitted in the issue before me the following conclusions would appear to occur. Since it is neither alleged nor established that Roches Stores designed and calculated this breach of contract so as to enable them to acquire the sole beneficial ownership of the goodwill in the joint enterprise in fashion fabrics the damages should not be assessed upon the basis of the profit derived by Roches Stores from the ownership of that goodwill in so far as it exceeds the loss sustained by Hickeys.

The fact however that Roches Stores in breach of their agreement succeeded in acquiring the continued goodwill of the joint enterprise meant also that Hickeys were deprived of what had been intended by the parties to the agreement would be a benefit to them in the event of a termination without

good reason, namely the killing or letting fall into abeyance of the particul goodwill. In addition therefore to the loss which Hickeys suffered firstly by r being permitted, as they should have been permitted, to continue their operati for a period of six months from December when the notice of termination w served and secondly the loss which they suffered by not having been giv from that date onwards a further period of 12 months without competition the fashion fabric market from Roches Stores it has been established to r satisfaction that Hickey must have suffered loss under a further headi because after the period of 12 months had elapsed they were still selling fashi fabrics particularly in the area closely adjoining Henry Street against competition which consisted of Roches Stores with the benefit of the goodw which had been built during the period of the joint enterprise.

On the facts stated by agreement to me on the hearing of this issue it wou appear that there is a method of making a calculation of a general sum damages which would be fair and appropriate to this particular heading of th loss of Hickeys. Shortly after the actual termination of the arrangeme between Hickeys and Roches Stores, Hickeys made a similar arrangement Pennys of Mary Street, a large drapery shop, situated close to the position Roches Stores in Henry Street. Had Roches Stores abided by the terms of th agreement Hickeys would have been able to make such an arrangement at th end of the period of six months due notice and would then have been in position to carry on for the first 12 months of their new arrangement wit Pennys freed from the competition in fashion fabrics of Roches Stores. At th end of that period of 12 months they would have been faced with a competitio from Roches Stores if they chose to re-enter the fashion fabric trade, but would have been a competition which by reason of the interval of a year, di not consist of an association in the minds of most of the public between th fashion fabrics department of Roches Stores and the apparently successfu Roches Stores and Hickeys joint fashion fabric department which had bee carried on since the coming into operation of this agreement.

It has been stated to me, though no figures have been proved, that th operation in Pennys of Mary Street was less profitable than had been th operation in Roches Stores immediately prior to its termination. It woul appear to me that the problem of assessing the damages payable to Hickey under this particular heading can and should be solved by ascertaining th amount of that differential making appropriate adjustment to it having regard t any drop in the value of money or inflationary trend and then multiplying it b a factor which on the appropriate accountancy or commercial evidence woul be a reasonable assessment as a matter of probability of the loss to Hickeys o trading under the conditions in which they have been trading since th termination of the 12 month period compared with trading in the situation i which they should have been trading had a gap of one year's operation b

Roches Stores occurred and the goodwill previously built up have thus been permitted to lapse.

My answer therefore to the question raised on the issue before me is that neither the precise method of assessing damages asserted on behalf of the plaintiffs nor that asserted on behalf of the defendants is correct but that the appropriate method is to calculate damages on the headings contended for by the defendants adding the particular heading with regard to the survival of the goodwill which I have outlined.

Report prepared by Eoin O'Dell
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