1935 *Present :* **Macdonell C.J. and Poyser J.**

ASSOCIATED NEWSPAPERS OF CEYLON LTD. *v.* HENDRICK.

314—D. C. Colombo, 46,067.

Liquidated damages—Contract for inserting advertisements—Agreement to pay higher rate if the space contracted for is not taken—Liquidated damages and not a penalty.

The plaintiff company, who are newspaper proprietors, contracted with the defendant to insert advertisements on his account in their newspapers at a special rate, it being agreed that the defendant would insert not less than a stated number of column inches of advertising matter during the period of agreement.

It was also provided in the agreement that " when the space or number of insertions under the contract is less than originally agreed upon the higher rate for the lesser space must be paid ". The defendant sent in advertisements during the period and paid for them at the special contract rate.

It was found at the end of the period, that the defendant had inserted much less than the space contracted for.

Held (in an action by the plaintiffs to recover the difference between the contract rate and the higher rate), that the provision for the payment of a higher rate must be regarded as an agreement to pay liquidated damages and not as a penalty.

APPEAL from a judgment of the District Judge of Colombo.

N. Nadarajah (with him *H. N. G. Fernando*), for defendant, appellant.

H. V. Perera (with him *J. R. Jayewardene*), for plaintiff, respondent.

Cur. adv. vult.

January 29, 1935. MACDONELL C.J.—

In this case the plaintiffs are the proprietors of three newspapers, and they made with the defendant on February 5, 1929, three written contracts as to the insertion in each of their papers of advertisements by the defendant in the following terms:—

"Subject to your confirmation and to the tariff and terms and conditions overleaf, I have pleasure in requesting you to insert my advertisements as per under-noted contract.

"Space .. 1000 column inches minimum.
"Price .. Re. 1 per column inch.
"Period .. One year.
"Position.. Unspecified.
"Insertions as required, provided space is evenly distributed over the contract period.
"To commence in February 1929.
"Remarks..Deposit of Rs. 100 in advance as security for prompt payment of accounts and for due fulfilment of terms and conditions."

The two other contracts were identical in terms save that in one of them the contract rate per column inch was 75 cents instead of Re. 1. Each of the three written contracts is stated to be subject "to the tariff and terms and conditions overleaf". The tariff overleaf specifies what the particular paper charges per 100 column inches as its ordinary price for advertisements where there is no special contract as there was in the present case. The prices are on a sliding scale. Thus for one of these three newspapers the tariff names Rs. 4 per column inch if the advertiser takes less than a 100 column inches, whereas if he takes between 250 and 500 he gets each inch of advertisement at Re. 1.87½. But the tariff is quite definite, and if the advertiser knows what space his advertisements will take, he knows from the tariff exactly what he will have to pay for them. The conditions referred to in the contract, also printed overleaf, contain the following: No. 8, "All the space contracted for must be used within the specified period, and excess space, whether used during or after the specified period, must be paid for at the contract rate. When the space or the number of insertions under the contract is less than originally agreed upon, the higher rate for the lesser space must be paid", the 'higher rate' clearly meaning the tariff rate as set out above.

It was argued that under such a contract the advertiser need not send in any advertisements at all, but this argument fails to give effect to the phrase '1,000 column inches *minimum*' or to the requirement of a deposit of Rs. 100; if the advertiser sent in no advertisements at all, he would at any rate forfeit the Rs. 100 deposit.

The three contracts therefore said in effect this. If you the advertiser will supply advertisements during the coming twelve months filling the space of a 1,000 column inches in the particular newspaper for advertisements in which you are contracting, then you can have that service at

the contract rate, but if during those twelve months you supply advertisements to that newspaper totalling less than a 1,000 column inches, you must pay for those advertisements at the ordinary tariff rate set out at the back of the contract.

The defendant sent in certain advertisements and made certain payments under these contracts during the twelve months following February 5, 1929, the date when they were entered into, but at the end of that year he had supplied advertisements totalling very much less than the 1,000 column inches for each paper which he had undertaken by his contract to supply. Thus to one paper he had supplied advertisements totalling only 250 inches, to another 280 inches, and to the third of them 288. As each of these totals fell very far short of the 1,000 column inches that he had undertaken to supply to each of these papers, the plaintiffs while crediting him under each contract with the sums that they had received from him from time to time in payment for advertisements sent by him for insertion in the newspaper named in that contract, debited him with the difference between the contract price and the ordinary tariff, for advertising space in column inches which he had actually taken, and sued him for that difference. The learned District Judge gave judgment for the plaintiffs as prayed, and it is from that judgment that the present appeal is brought.

Two points were raised to us in argument. It was urged—and I hope I understood the argument put to us—that as the plaintiffs had received monies from time to time from the defendant in payment of the advertisements actually sent in by him and actually published in each of the three papers, these monies were payments in full to the plaintiffs for such advertisements, that their acknowledgment of them was final as affecting the particular advertisement or advertisements covered by those payments at contract rates, and that the plaintiffs could not now say that there was still due to them something more for these advertisements inserted and paid for. The fallacy of this argument seems to me so obvious that I hope I have grasped it properly. The payments made from time to time by the defendant were payments under his contracts of February 5, 1929, and could not be payments under anything else; indeed it was not suggested that they were. Then each one of those payments was conditioned by the contract under which it was made and was subject to its terms. For the defendant to say, I am entitled to pay at the lower rates which the contract gave me and at the same time to break the contract with impunity, retaining the benefits it confers but claiming to be free from the obligations it imposes, would be a very good instance of approbation and reprobation in regard to the same agreement. If one wish to put it in common parlance, it is an argument 'heads I win, tails you lose'. I do not think that this objection can be sustained.

It was also urged to us that this claim of the plaintiffs to charge the ordinary tariff rates for the advertisements which the defendant had supplied because the amount of space taken by him for advertisements was less than the amount which he had contracted to supply, was in effect enforcing a penalty, and it was urged to us that this case was

governed by *Wijewardene v. Noorbhai* [1]. That also was an action brought by newspapers on a contract very similar to the present one. They had agreed with a would-be advertiser that if he had supplied so many advertisements within a certain time they would charge him at a lower rate, but that if within that time he had supplied a similar number of advertisements occupying a smaller space in their columns they had the right to charge for the advertisements actually inserted at a higher rate. In that case the charge made by the plaintiff newspaper was held to be a penalty and the case was sent back to the Court below for the actual damage to be assessed.

I think however that that case can easily be distinguished on the facts. There the contract stated that if advertisements totalling a smaller space were sent in by the defendant within the time given him, then the newspaper was to be entitled to charge for all advertisements published under the contract "at the casual rates, which should not exceed Rs. 2.50 per column inch". In other words the amount which the plaintiff newspaper could charge under that contract was not a fixed and ascertained sum. It was left to it to charge what it pleased, provided the sum charged did not exceed Rs. 2.50 per column inch. The facts of the present case are different. The contracts which the defendant signed make perfectly clear what plaintiffs' tariff was, a definite sum, and in their plaint they have claimed under each of the three contracts that definite sum, no more no less. The event in which the tariff price would become payable in place of the contract one, was a single event, the failure to take a 1,000 column inches of advertising space. Then the rule applicable will be found in *Law v. Local Board of Redditch* [2], where Lord Esher M.R. says, as follows:—

> "One rule which appears to be recognised in the cases as a canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the Court as liquidated damages and not a penalty . . . ."

The present is a case where one of the parties has omitted to do, not several things or one of several things (*Dunlop &c. Co. v. New Garage &c. Co.* [3]), but some one thing, namely, to supply advertisements to the amount of a 1,000 column inches within one year, and the contract says that if he omits to do that some one thing he shall pay a specific sum to the other as damages. This case then seems to be one where the parties to the contract have definitely assessed beforehand the damage which shall be payable if the contract is broken, and there is only one way in which it can be broken. The sum named then is liquidated damages and not a penalty. This rule however would not apply, if it could be shown that the sum agreed on was '*ingens*'—*see Pless Pol v. de Soysa* [4] and the Roman-Dutch authorities there cited—but it is difficult to see that the sum fixed in the present case could be called '*ingens*'. It is the ordinary

[1] *28 N. L. R. 430.*
[2] *(1892) 1 Q. B. 127, at 130.*
[3] *83 L. J. K. B. 1574.*
[4] *12 N. L. R. 45.*

tariff rate which the ordinary customer pays if he has not obtained a special contract, and if it be argued that the tariff rate is nearly 90 per cent. more than the contract rate, still this fact was perfectly clear to both parties when they made the contract. The plaintiffs said in effect, that they would remit nearly half the tariff rate if the defendant would supply a 1,000 column inches; if he did not, he would have to pay the ordinary rate. The agreement is so clear that defendant could not possibly have been misled, and this is a strong argument against the sum made payable being '*ingens*'.

It was pointed out in argument that if the defendant supplied 990 column inches of advertisements but failed to supply the remaining 10, he would then, on the plaintiffs' argument, have to pay for each of those 990 column inches at the rate of Re. 1.87½, which would mean that he would be paying far in excess of the Rs. 1,000 payable by him under the contract if he did supply the full 1,000 column inches. We were asked to say that this was a *reductio ad absurdum* of the plaintiffs' case. The defendant can avoid these consequences without any cost to himself by simply giving an order to the particular newspaper to insert 10 more column inches of advertisement—a repetition of the advertisements which he had already sent in—to enable him to obtain the full benefit of the contract rate reserved thereunder.

For the foregoing reasons I am of opinion that this appeal must be dismissed with costs.

POYSER J.—

The case of *Wijewardene v. Noorbhai*[1] was decided on the following principles:—"What the criterion of whether a sum, be it called penalty or damages, is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation' . . . ." and "it is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case" and (*Clydebank Engineering and Shipping Company v. Don Jose Ramos Yzquierdo Y Castaneda*[2];

"You are to consider whether it is extravagant, exorbitant, or unconscionable at the time when the stipulation is made, that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract." (*Webster v. Bosanquet*[3].)

Dalton J., in applying these principles, held that upon the facts the plaintiff's claim was extravagant and unreasonable, having regard to the possible damages which were in the contemplation of the parties, when

[1] 23 *N. L. R. 430.* [2] *(1905) A. C. 6.*

[3] *(1912) A. C. 394 and 15 N. L. R. 125.*

they made the contract and, further, that there was no genuine interest in the performance of the contract.

In this case the facts are very different, and there was, in my opinion, a genuine pre-estimate of the plaintiff's probable or possible interest in the due performance of the contract and that being so the plaintiff's claim was for liquidated damages which he is entitled to recover.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.