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Present: Dalton and Lyall Grant JJ.

WIJEWARDENE *v.* NOORBHAI.

334—D. C. Colombo, 18,402.

Liquidated damages—Contract for advertisements—Termination before expiration of period—Higher rates—Penalty.

Where the defendant entered into a contract with plaintiff for the insertion of advertisements in a newspaper during the course of one year at a fixed rate, and where it was further stipulated that if the defendant terminated the contract before the expiration of the period, the plaintiff was at liberty to charge for the advertisements at casual rates.

Held, that the stipulation to charge the defendant at the higher rate was merely a penalty, and that the plaintiff was entitled to claim only the actual damage sustained.

PLAINTIFF, who is a newspaper proprietor, sued the defendant, who was the owner of a theatre to recover damages for breach of contract. Two contracts were entered into between the parties whereby the plaintiff undertook to publish advertisements of the theatre in his two newspapers for a period of one year from May 4, 1924, at rates set out in the contracts. In the event of the contracts being terminated before the expiration of the period through any default of the defendant, it was provided by clause 6 of the conditions that the plaintiff should be at liberty to charge for all the advertisements published under the contract at the casual rates, which should not exceed Rs. 2.50 per column inch. About the end of January, 1925, defendant transferred his theatre and after that sent no more advertisements for insertion in the plaintiff's newspapers. Plaintiff claimed in the action for payment of the advertisements actually inserted at the casual rates. The learned District Judge gave judgment for the plaintiff.

Garvin, for defendant, appellant.

H. H. Bartholomeusz, for plaintiff, respondent.

February 10, 1927. DALTON J.—

Plaintiff is a newspaper proprietor and defendant is or was the owner of a theatre. Two contracts were entered into between the parties whereby the plaintiff was to publish advertisements of the theatre in his two newspapers for a period of one year at rates set out in the contracts. In the first contract plaintiff's quotation of 80 cents per inch per insertion for the first month, and Re. 1 per inch thereafter, three inches single column advertisement daily,

in his English newspaper was accepted by defendant for one year from May 28, 1924. In the second contract, for insertion in a Sinhalese newspaper, the price was 65 cents per inch, for three inches single column advertisement daily for a period of one year from June 3, 1924. In the event of the contracts being terminated before the expiration of the contract period through any default of the advertiser, it was provided by clause 6 of the conditions that the newspaper proprietor should be at liberty to charge for all advertisements published under the contract at the casual rates which should not exceed Rs. 2.50 per column inch.

About the end of January, 1925, defendant transferred his theatre business by lease to one Fernando, but nothing appears to have been arranged between them about the advertisement contracts. After that lease defendant sent no more advertisements for insertion in plaintiff's papers, but Fernando entered into two contracts with plaintiff in February (P 5 and P 6) to advertise the theatre in the two newspapers for a period of three months. The evidence does not show when those advertisements began, but there is no doubt that the three months were part of the twelve months during which defendant's contract was to run.

Plaintiff's claim in this action is against the defendant for payment of the actual advertisements made by the defendant, in the English paper between May 28, 1924, and February 3, 1925, and in the Sinhalese paper between June 30, 1924, and January 31, 1925, at the casual rates, which are claimed to be 50 cents and Re. 1 respectively per column inch, owing to defendant's termination of the contracts. On the first contract defendant had paid Rs. 721.60. At casual rates on default this would amount to Rs. 1,135.50. The sum of Rs. 413.90 was therefore claimed. On the second contract Rs. 396.50 was paid, and at casual rates on default this would amount to Rs. 616. The balance of Rs. 219.50 was therefore claimed on the second contract. The total amount of the claim is Rs. 633.40, and plaintiff has been awarded this sum by the trial Judge. The defendant now appeals.

The first point referred to by counsel for the appellant was that Fernando was the agent of the defendant in entering into the three months' contracts for advertisements and therefore plaintiff suffered no damage at the hands of defendant whilst those contracts were in existence. There is no evidence of such agency, and this particular ground of appeal upon which a claim for reduction of the damages is based cannot be sustained. In the result, however, this contract must be taken into consideration in estimating the damages suffered by plaintiff.

The principal ground of appeal was that, inasmuch as plaintiff had not suffered the amount of damages claimed as the result of defendant's breach, he could not recover that sum, but the actual

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damages suffered had still to be assessed. Mr. Garvin argued that the contract fixed something in the nature of a penalty, should there be any breach on the part of the defendant. It was urged for the respondent (plaintiff) on the other hand that clause 6 of the conditions of the contract contracted for something in the nature of liquidated damages to be paid upon defendant's breach. Mr. Bartholomeusz further argued that in fact the Roman-Dutch law does not distinguish between penalty and liquidated damages, and all that was necessary to ascertain was whether the amount stipulated to be paid was excessive or disproportionate to the circumstances of the case. He argued it could not be so said here.

It seems to me that there is no doubt at the present time as to the law on this question which the Courts have to administer. Whatever the earlier or later Ceylon cases may have decided, the law as it exists to-day, has taken over the English distinction between penalties and liquidated damages. (See *Lee, Roman-Dutch Law, p. 250.*) Appeals on this question have gone from both Ceylon and South Africa to the Privy Council, and in each case have been dealt with by the Privy Council on the footing that the distinction in English law between penalty and liquidated damages is part of the law both of Ceylon and South Africa. That may be due to the fact, as pointed out by Middleton J. in *Pless Pol v. De Soysa*[1] that the Roman-Dutch authorities set forth views on the question very much in accordance with the principle prevailing in Courts of Equity in England.

The case of *Commissioner of Public Works v. Hills*[2] went to the Privy Council from the Supreme Court of the Cape of Good Hope. One of the questions raised was as to whether certain sums were liquidated damages or a penalty to cover damages if proved. To this question the Board applied the law laid down by the House of Lords in *Clydebank Engineering and Shipping Co. v. Don Jose Ramos Yzquierdo Y Castaneda.*[3] Lord Dunedin, who delivered the judgment of the Board, says:—

> "The general principle to be deduced from that judgment seems to be this, that 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.' The indicia of this question will vary according to circumstances.

[1] *12 N. L. R. 45.*

[2] *(1906) A. C. 368.*

[3] *(1905) A. C. 6.*

> Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made. ''

The judgment of the House of Lords in the above case was followed by the Privy Council in *Webster v. Bosanquet*,[1] an appeal from Ceylon, the sole question there being whether the stipulated sum was by way of liquidated damages fixing once for all the sum to be paid, or merely as a penalty covering the damages though not assessing them. After setting out the principle set out above, Lord Mersey quoted with approval opinions expressed in the following terms by Lords Halsbury and Davey:—

> '' 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

> '' 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. ''

Applying these principles to the facts of the present case it is first of all necessary to point out that clause 6 fixes no definite sum that is to be paid. Mr. Bartholomeusz argues, however, that it is easily ascertainable, but as I understand the term '' liquidated damages, '' its essential meaning is that the damages have already been fixed and assessed for very special reasons in a definite sum between the parties to the contract. The term '' penalty '' in this connection, on the other hand, would seem to be interchangeable with the term '' unliquidated damages '' (*Sparrow v. Paris* [2]). The plaintiff quoted special rates to the defendant in view of the fact that the advertisements were to continue for one year. In the event of the defendant terminating the contract he was to be free to charge casual rates, and not the contract rates. Upon the facts it seems to me that plaintiff's claim is extravagant and unreasonable, after a comparative estimation of the figures of the contract, having regard to the possible damages which one conceives to have been within the contemplation of the parties when they made the contract. Can it reasonably be said that clause 6 did more than settle the method by which the damages were to be assessed or the amount of the penalty to be paid by defendant for his default was to be arrived at? It is admitted the sum awarded is considerably,

[1] *(1912) A. C. 394; 15 N. L. R. 125.*

[2] *31 L. J. Ex. 187.*

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having regard to the nature and terms of the contract and the period it was to run, in excess of the actual damage suffered, in view of the fact that the advertisements were continued during the contract year for a period of three months by Fernando after the termination of the contract by defendant. There is not the least difficulty in arriving at the actual amount of the damage sustained. Further, according to the view of the plaintiff, the longer the contract ran, the greater would be the damages, if there was any breach. That seems to me to show clearly that the damages were unliquidated. I can find here no genuine pre-estimate or any pre-estimate at all, of the plaintiff's probable or possible interest in the due performance of the contract. There is merely a method agreed upon by which the amount of the penalty or damages to be paid by defendant was to be arrived at, should he make default in carrying out the contract. I might also point out here that there is a finding of the trial judge that the parties intended the damages should be assessed according to the casual rates set out.

The judgment of the learned judge must therefore be set aside, and the case sent back for proof by the plaintiff of the actual damages incurred by him as a result of defendant's default. This will entail further evidence being led. Judgment thereafter will be entered in the sum then found to be due.

The appellant is entitled to his costs of this appeal.

LYALL GRANT J.—

I agree. In all these cases the question is what loss has the plaintiff suffered. *Prima facie*, plaintiff is not entitled to get more from the defendant than he would have received had defendant duly completed his contract. Clause 6 affords no assistance. It is clearly unreasonable as it increases the penalty imposed on the advertiser in proportion as he approximates to fulfilling his contract. The nearer he comes to fulfilment, short of completion, the greater is the penalty in failure to complete. In my opinion no effect should be given to such a clause.

What is not clear from the evidence is the exact number of days during the currency of the contract in which no advertisement appeared in the respective papers. For that number of days the defendant should pay at the agreed rates.

Further he must pay any loss incurred by the plaintiff owing to the fact that one of Fernando's contracts provided for a lower rate of payment than the corresponding contract entered into by the defendant.

I agree that evidence must be taken to ascertain the amount of damages due on this footing.

Set aside.