LAKE ONTARIO PORTLAND CEMENT COMPANY LIMITED (*Defendant*) ..... APPELLANT;

1961
*Feb. 23, 24, 27
June 12

AND

JOHN A. GRONER (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Master and servant—Contract containing termination of employment clause—Contract altered by oral agreement—Terms of oral agreement subsequently set out in undated letter—Employee inserting false date—Whether termination clause consistent with altered contract—Dismissal justified by employee's deceitful conduct—Whether fees payable in Canadian or United States funds.

The plaintiff, a mechanical engineer, was employed in a substitute capacity to supervise construction of a cement manufacturing project. The contract contained a clause for termination of employment on ten days' notice. About three months after his engagement the plaintiff resigned, but following negotiations with the president of the defendant company he entered into an agreement on September 27, 1956, as a result of which he withdrew his resignation. In July 1957, an undated letter, setting out the terms of the oral agreement, was typed by the plaintiff and signed by the president. The plaintiff later filled in the date as October 15, 1956, without telling the president he was doing so, and in the course of the subsequent proceedings he perjured himself with respect to the circumstances under which this letter was written.

In September 1957, a new president advised the plaintiff that his services were no longer desired and gave him ten days' notice under the original contract. The plaintiff's claim for wrongful dismissal was dismissed at trial; his appeal was allowed by the Court of Appeal. The defendant appealed to this Court, and the plaintiff cross-appealed against the disallowance of his claim for the difference in exchange between Canadian dollars to which he claimed to be entitled and the American dollars with which he was paid for his services.

Held: The appeal should be allowed and the cross-appeal dismissed.

*PRESENT: Locke, Fauteux, Martland, Judson and Ritchie JJ.

1961

LAKE ONT. PORTLAND CEMENT CO. LTD. v. GRONER

The agreement evidenced by the letter dated October 15, 1956, was to be read with the original agreement because it was expressly stated to be supplementary thereto, and the nature of the work to which it related was described as being outlined in the earlier agreement. The ten-day termination clause was just as consistent with a contract engaging the plaintiff's services full time until the acceptance date of the plants as it was with the original contract which engaged them in substitution for those of the engineer in charge of construction "until the project . . . is completed and in production". Accordingly, the letter of dismissal written by the new president, giving ten days' notice, was effective to terminate the plaintiff's contract of employment.

Also, the defendant was justified in dismissing the plaintiff without notice by reason of his deceitful conduct with respect to the document dated October 15, 1956. The fact that the defendant did not know of the plaintiff's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial did not detract from its validity as a ground for dispensing with his services. *Federal Supply & Cold Storage Co. of South Africa v. Angehrn and Piel* (1910), 103 L.T. 150; *Aspinal v. Mid West Collieries,* [1926] 3 D.L.R. 362, referred to.

The plaintiff had agreed to an arrangement whereby his disbursements were to be paid in Canadian funds and his fees in United States funds. Accordingly, his claim for the equivalent of Canadian dollar value for his fees was disallowed. The plaintiff's claim for his car allowance was allowed.

APPEAL and cross-appeal from a judgment of the Court of Appeal for Ontario[1], allowing an appeal and allowing in part a cross-appeal from a judgment of McRuer C.J.O. Appeal allowed and cross-appeal dismissed.

W. B. Williston, Q.C. and *R. L. Shirriff,* for the defendant, appellant.

D. A. Keith, Q.C., and *D. H. Carruthers,* for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] allowing the appeal of the respondent from a judgment of Chief Justice McRuer and awarding him the sum of $15,000 as damages for wrongful dismissal in breach of his contract of employment with the appellant and $814.50 for out-of-pocket expenses in the use of his car. The respondent cross-appeals against the disallowance by the Court of Appeal of his claim for reimbursement for the difference in exchange between Canadian dollars to which he claims to be entitled and the American dollars with which he was paid for his services.

[1] [1960] O.W.N. 292, 23 D.L.R. (2d) 602.

The appellant company was incorporated in the spring of 1956 at the instance of the H. J. McFarland Construction Company Limited (an Ontario company) and Johnson, Drake and Piper, Incorporated (a Minnesota corporation) for the purpose of financing the construction of a cement manufacturing plant at Picton, Ontario, to be built by the last-named companies who became joint venturers in this undertaking under the name of "Cement Plant Constructors".

On May 4, 1956, a contract was entered into whereby Cement Plant Constructors agreed to build the necessary plant for the appellant company and arrangements were made by the appellant for public financing to defray the cost of construction.

Before any offering of shares was made to the public, Senator W. A. Fraser was secured as the president of the appellant company with H. J. McFarland and D. P. Jesson as vice-presidents representing the constituent companies of Cement Plant Constructors.

The respondent who is a mechanical engineer, although not a member of the Association of Professional Engineers of the Province of Ontario, was employed on this project by means of a letter from Cement Plant Constructors confirming an arrangement with him whereby he was *"engaged to render services as we designate until the project mentioned below is completed and in production in the absence of Mr. A. J. Anderson."* (The italics are mine.) This letter which is hereafter set forth in full includes the following paragraphs:

> If at any time your services are no longer desired, this agreement may be terminated upon ten (10) days written notice by us.
>
> At any time, this agreement may be assigned by us to the owner of the above mentioned plants, written notice of the assignment to be given to you.
>
> It is assumed that inasmuch as you are acting in a substitute capacity for A. J. Anderson, that any decisions that have been made by him will not be altered unless definite mistakes are found, and then only after these have been called to our attention and approved for change by us.

A. J. Anderson, who was also a mechanical engineer, had been engaged to act as the *appellant's* engineer in charge of construction, but previous commitments prevented him from being on the job with any regularity, and the respondent's contract of employment which was duly assigned to

1961

LAKE ONT. PORTLAND CEMENT CO. LTD. v. GRONER

Ritchie J.

the appellant on June 26, 1956, as I interpret it, constitutes an agreement engaging the respondent's services as a substitute for and in the absence of Mr. A. J. Anderson "until the project . . . is completed and in production . . . .".

About three months after his engagement, the respondent tendered his resignation in a letter to Senator Fraser in which he complained that the original agreement was not possible of fulfilment as he was not being given the necessary full responsibility and authority and, amongst other things, that everything was required to be approved by an engineering firm in the employ of Cement Plant Constructors so that responsibility was divided and his position made untenable.

Senator Fraser was greatly upset by this letter as he felt that in the interests of the shareholders it was necessary that an engineer should represent the appellant on the job, and he, accordingly, arranged to meet with the respondent in Toronto on September 27, 1956, for the purpose of inducing him to reconsider his resignation.

There is no doubt in my mind that the respondent and Senator Fraser reached an agreement at this time, as a result of which the respondent withdrew his resignation, but the nature and effect of the understanding arrived at between them is the subject of what can only be described as a bitter dispute between the respondent and the appellant. No memorandum of the terms of that agreement was made at the time by either Senator Fraser or the respondent, but in July 1957, at a time when his relations with many members of the board of directors had gravely deteriorated and his dismissal had been seriously considered, the respondent typed a letter addressed to himself on the appellant's notepaper, setting out what he now says those terms were, and including a provision whereby he was to be employed on a full-time basis instead of being a substitute for A. J. Anderson. Leaving this letter undated, he obtained Senator Fraser's signature to it and thereafter, without telling the Senator that he was doing so, he filled in the date as October 15, 1956. This underhand action was compounded by the respondent perjuring himself on more than one occasion in the course of these proceedings with respect to the circumstances under which the letter was written, and it must be borne in mind that in changing the date on the letter and

in lying on the witness stand the respondent was acting deliberately and for the purpose of furthering his own interest. It was not until after the respondent had given his evidence that the appellant's counsel felt in a position to apply for an amendment to his defence to set up the predating of the letter as a ground for dismissal. Leave to amend having been granted, the following paragraph was then added to the defence:

> The Defendant was justified in dismissing the Plaintiff from its employment by virtue of the misconduct of the Plaintiff in predating a letter purporting to amend his contract of employment dated June 1st, 1956 and thereafter concealing from and misrepresenting to the Defendant the fact of such predating in order to deceive the Defendant.

It is noteworthy that in the month of January 1957 the respondent conferred at length with two members of the board of directors and the appellant company's solicitor with a view to revising his terms of employment as set forth in the contract of June 1st. No conclusion was reached as a result of these conferences, but four separate proposals were drafted with the respondent's assistance, and the remarkable feature of the matter is that the respondent at no time during the course of these negotiations made any mention whatever of the agreement which he now claims to have been made between himself and Senator Fraser three months earlier.

Senator Fraser resigned from the board of directors on August 22, 1957, and on September 30 the new president, Mr. G. D. Wotherspoon, wrote to the respondent on behalf of the board referring to the initial contract of employment, saying:

> Your employment contract provides for termination on ten days' written notice and as your services are no longer desired by this Company we hereby, pursuant to your employment contract, give you ten days' written notice of termination of such services, effective October 12, 1957.

The respondent's case rests in large measure upon his interpretation of the agreement of September 27, 1956, as evidenced by the letter dated October 15, 1956. It is alleged on his behalf that it constituted a contract engaging his services on a full-time basis until he had accepted the plants on behalf of the appellant and that it had the effect of cancelling the provision for termination of his employment on ten days' notice which was invoked by Mr. Wotherspoon in his letter of dismissal.

1961

LAKE ONT. PORTLAND CEMENT CO. LTD. v. GRONER

Ritchie J.

In rendering his decision at the trial of this action, Chief Justice McRuer found that the letter dated October 15, 1956, accurately recorded the terms of the contract of September 27 and that the ten-day termination clause was not intended to be in effect after this later agreement was concluded, but he held also that the fraudulent conduct of the respondent constituted just cause for his dismissal, even although the appellant did not know of it at the time when the notice of dismissal was given. The learned trial judge also held that the respondent was entitled to succeed in his claim for reimbursement for the difference in exchange between the United States funds in wihch he was paid and Canadian funds, and that his claim for out-of-pocket expenses for car allowance was made out.

In allowing the respondent's appeal, Mr. Justice Morden affirmed the decision of the Chief Justice to the effect that the letter dated October 15, 1956, correctly expressed the earlier oral agreement and found that the respondent's misconduct was not incompatible with the proper discharge of the duties for which he was employed and, therefore, did not afford justification for his dismissal. Mr. Justice LeBel who was alone in expressly affirming the finding of the Chief Justice to the effect that the understanding of September 27 cancelled the ten-day termination clause of the original contract was also of opinion that the respondent's fraud was unrelated to the business in which he was engaged and did not justify his dismissal.

In a dissenting opinion in the Court of Appeal, Gibson J.A. agreed with the reasons of the Chief Justice for dismissing the action.

The Court of Appeal was unanimous in dismissing the respondent's claim for reimbursement for loss on exchange between Canadian dollars and the American dollars with which he was paid. No costs were allowed with respect to the trial, but the costs of the appeal were awarded to the plaintiff and those of the cross-appeal to the defendant.

In my view, the disposition of the present appeal depends in large measure on the effect to be given to three letters:

(1) The letter of June 1, 1956, from Cement Plant Constructors containing the initial terms of the respondent's contract of employment;

(2) The respondent's letter of resignation dated September 17, 1956; and

(3) The letter dated October 15, 1956, which purports to record the agreement reached on September 27 of that year.

The letter of June 1, 1956, reads as follows:

In confirmation of our arrangement, you are engaged to render services as we designate until the project mentioned below is completed and in production in the absence of Mr. A. J. Anderson.

It is our understanding that you are to be our technical advisor and engineer in charge of the design and construction by us of a complete operating dry process Portland cement manufacturing plant and a complete operating commercial limestone aggregate production plant at Picton, Ontario as well as bulk storage docking and bagging facilities at Picton, Ontario, Toronto, Ontario and Rochester, New York. Your duties will include but not be limited to the following.

1) Supervise the design, preparation of specifications of all equipment and machinery, preparation of plot plan layout and machinery layout, preparation of flow diagram and the structural, mechanical and electrical layouts, details, and specifications.

2) Supervise the construction so that the plants are built in accordance with the plans and specifications.

3) Set up mechanical controls and organize operating personnel.

It is our understanding that you shall be paid $100 per day for your time actually spent in connection with the aforementioned duties, plus travel, subsistence and other proper expenses.

If at any time your services are no longer desired, this agreement may be terminated upon ten (10) days written notice by us.

At any time, this agreement may be assigned by us to the owner of the above mentioned plants, written notice of the assignment to be given to you.

It is assumed that inasmuch as you are acting in a substitute capacity for A. J. Anderson, that any decisions that have been made by him will not be altered unless definite mistakes are found, and then only after these have been called to our attention and approved for change by us.

If the foregoing is satisfactory to you, please sign, date and return the duplicate original of this letter whereby it will constitute the sole agreement between us.

As the vitally important agreement of September 27, 1956, was reached for the purpose of inducing the respondent to withdraw the resignation which he had tendered in his letter of September 17, it seems to me to be very relevant to consider the reasons which prompted the respondent to write that letter. That letter reads in part as follows:

It was my understanding that I was given full charge and responsibility with the backing of the Board of Directors at the meeting which I attended on July 30, 1956 in Picton. Such has not proven to be the case. It was recently pointed out to me that approval was *either* by the contractor *or* the owner's representative according to the agreement between the contractor and the engineers.

1961

LAKE ONT. PORTLAND CEMENT CO. LTD. v. GRONER

Ritchie J.

This situation divides the responsibility thus completely nullifying our agreement . . .

The conditions which make impossible the fulfillment of my contract or agreement are as follows:

1. Schedule "F".
2. Approval required by Kennedy-Van Saun.
3. Agreement of May 4, 1956 between engineers and joint venturers. Page 9, Paragraph 6 which reads, in part, as follows:
   "All decisions and approval by *either* the Owner *or* Joint Venturers".
4. Cost estimate. Decisions are influenced and limited by said original cost estimates covering the entire project.

The above outlined conditions are part of the basic structure or contractural arrangement for the project which I do not believe can be altered to make my agreement workable.

Therefore, in conformity with my agreement to serve the Owners as engineer in charge only if I had full responsibility and authority as stipulated in the letter agreement dated June 1, 1956 quoted above and inasmuch as this agreement is not possible of fulfillment, I do hereby tender my resignation to be effective within a reasonable length of time.

The firm of Kennedy-Van Saun had been employed as engineers by the Cement Plant Constructors who are referred to as the "Joint Venturers" in the above letter, and Schedule "F", which had been prepared and was interpreted by Kennedy-Van Saun, was the document which controlled the construction of the project.

It is quite evident that it was the division of authority between himself and Kennedy-Van Saun which was the main source of the respondent's complaint, and that he was tendering his resignation because he did not have full responsibility and authority.

Further light is thrown on the agreement of September 27 by the respondent's own evidence as to his interpretation of the understanding existing between himself and Senator Fraser a few days before that agreement was reached. His words are:

The understanding at that point was that I was to continue as chief engineer, that Mr. Anderson would not replace me, and that he was coming back as general manager, and that, in order to protect the interests of the stockholders and the Senator's interest and reputation with the company I was to continue as adviser and owner's representative.

It is against this background that the terms of the agreement of September 27, as recorded in the disputed letter of October 15, must be read. These terms are:

First, you are to serve the Lake Ontario Portland Cement Co. Ltd. as the "Owners' Representative and Chief Engineer" *in complete and full charge* of design and construction of the plants being built at Picton,

Toronto, and Rochester, *all as outlined in your written agreement with Cement Plant Constructors dated June 1st, 1956,* which agreement was assigned to Lake Ontario Portland Cement Co. Ltd., on June 26th, 1956.

Secondly, you are to devote all the time possible to this work until you have completed your business on the West Coast and thereafter you are to devote full time to the Lake Ontario Portland Cement Co. Ltd., until the plants at Picton, Toronto and Rochester are completed and in full operation. *Your services are to continue until the plants are accepted by yourself in the name of the Lake Ontario Portland Cement Co. Ltd., from the contractors as being complete and fully satisfactory in every way.*

This agreement is supplementary to, but in no way limits or nullifies the agreement mentioned above other than to extend the length of your services to Lake Ontario Portland Cement Co. Ltd., to the acceptance date of the plants being built for us by the Cement Plant Constructors. (The italics are mine.)

In accepting this letter as a correct account of the earlier oral agreement, Chief Justice McRuer said:

Both Mr. Groner and Senator Fraser say that that document correctly sets out the agreement that they had entered into on September 27th, and for the purposes of this case I am prepared to accept that statement.

This finding is endorsed by the Court of Appeal and should not, in my view, be disturbed in this Court.

The learned Chief Justice continues with respect to this letter:

It is argued by Mr. Williston that this is to be read with the original agreement, and that one is to read into this the ten-day termination clause. I think that this is quite inconsistent with that ten-day termination clause being a part of this agreement, and if there is any ambiguity, the oral evidence clearly establishes that that was not so intended. Senator Fraser says that at that time he did not even know the termination clause existed. So what he was doing was making an agreement to terminate when the plant was accepted.

With the greatest respect, it seems to me that the agreement evidenced by the letter dated October 15 must be read with the original agreement of June 1 because it is expressly stated to be supplementary thereto, and the nature of the work to which it relates is described as being "outlined in your agreement with Cement Plant Constructors dated June 1, 1956."

The following oral evidence with respect to the question of whether or not the ten-day termination clause was discussed at the time of making the agreement of September 27 is given by the two people who made that agreement:

Q. As of that time did you have any understanding with the Senator that you would not be given ten days' notice?

1961

LAKE ONT. PORTLAND CEMENT CO. LTD. v. GRONER

Ritchie J.

A. That was discussed at the time that we made the agreement in the King Edward Hotel—

By His Lordship

Q. What was discussed at the King Edward Hotel?

A. The extension date of my contract.

Q. You say it was discussed; what was said?

A. Well, that the basic change in the contract was to extend my services to the completion and acceptance dates of the plant.

* * *

Q. You were asked something about the ten days' notice, and you said that was discussed at the King Edward Hotel, and I asked you what it was—was there anything said about the ten days' notice in the King Edward Hotel?

A. Yes, that that part of the contract was no longer in effect, and that the completion date of my contract was extended to the completion date of the plant.

On the same subject, Senator Fraser had this to say:

Q. Was there any specific talk about the ten-day termination clause?

A. I did not mention it. I did not even know it was there.

* * *

Q. There was no discussion with Mr. Groner about a ten-day termination clause?

A. No, I did not discuss it with him. I do not think I knew that it was there, and I was only interested in one thing—

Q. The real point was this—you wanted to get him to come back and work full time?

A. Yes.

I agree with the learned Chief Justice when he says in an earlier part of his decision, "I would not base a judgment on Mr. Groner's evidence unless it was very substantially corroborated", and in face of Senator Fraser's denial of any mention having been made of the ten-day termination clause, I conclude that the matter was never discussed at the meeting of September 27. Accordingly, if there be any inconsistency between the agreement reached on September 27 and the continued existence of the ten-day termination clause, it must be found in the context of the letter dated October 15 itself.

The first paragraph of that letter does little more than assure the respondent that he is "to be in complete and full charge of design and construction of the plants". This assurance would appear to have been necessary in order to persuade the respondent to withdraw his letter of resignation in which the main complaint was that he was not "in

complete and full charge". There is nothing in this paragraph which can, in my view, be construed as dispensing with the ten-day termination clause.

The second paragraph appears to me to have been drawn in accordance with the respondent's understanding that he would continue as chief engineer and that Mr. Anderson would not replace him. It changes the character of his employment from that of a substitute for Mr. Anderson to that of a full-time employee, but the only change in the *length of the respondent's services* is that while the earlier contract engaged his services "until the project . . . is completed and in production . . . ." this paragraph provides that they "are to continue until the plants are accepted by yourself . . . .".

By the third paragraph of this letter it is specified that the agreement which it evidences "in no way limits or nullifies the agreement" of June 1 "other than to extend the length" of Groner's "services . . . to the acceptance date of the plants . . . .", and it seems to me that the ten-day termination clause is one of the provisions which is preserved by this stipulation unless the extension of the length of service is found to be inconsistent with it.

In my view the ten-day termination clause is just as consistent with a contract engaging the respondent's services full time until the acceptance date of the plants as it was with the original contract which engaged them in substitution for those of Mr. Anderson "until the project . . . is completed and in production."

Having reached this conclusion, I am of opinion that the letter of dismissal written by Mr. Wotherspoon in his capacity as president of the appellant company on September 30, 1957, was effective to terminate the respondent's contract of employment on October 12, 1957, but I am also of opinion, as was the learned Chief Justice, that the appellant was justified in dismissing the respondent without notice by reason of the fraudulent manner in which he dealt with the document dated October 15, 1956.

The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its

1961

LAKE ONT. PORTLAND CEMENT CO. LTD. v. GRONER

Ritchie J.

validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England, 2nd ed., vol. 22, p. 155, where it is said:

> It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

It may be, as Mr. Justice Morden says in the course of his judgment in the Court of Appeal, that the respondent's misconduct "was not incompatible with the proper discharge of the duties for which he was employed", but in my view it is not so much the misconduct itself as the fact that he was capable of it which justifies the respondent's dismissal. The respondent's own evidence disclosed to the directors that they, on behalf of the shareholders, had been depending for their technical information respecting the progress of the construction of this expensive project on the reports of a man who turned out to be capable of deliberately putting a false date on a document after it had been signed by the company's president and who was afterwards prepared to lie about his actions under oath. As was said by Lord Atkinson in *Federal Supply & Cold Storage Company of South Africa v. Angehrn and Piel*[1], "it is the revelation of character which justifies the dismissal".

Aspinall v. Mid West Collieries[2], was a case which had many factors in common with the present one. In that case a mine manager had obtained from his employers an extension of his holiday for the express purpose of taking his family for a boat trip to Skagway. Having stayed away for the extra period without taking the trip at all, he wrote a letter to the secretary-treasurer of the company which employed him, saying, "Got back the other day from my trip and I am glad to say that Mrs. A. is much improved by the sea voyage. . . ." This deception was not discovered until the trial when the pleadings were amended to set it up as one of the causes for his dismissal. Speaking on behalf of the Court of Appeal for Alberta, Harvey C.J.A. said:

> We thus have 3 cases of misconduct on the part of the plaintiff, the one respecting the coal, his absence at the time of his dismissal and the matter of the Alaska trip. Whether any one of these alone would be sufficient to justify his dismissal need not be considered because no one of them

[1] (1910), 103 L.T. 150 at 151, 80 L.J.P.C. 1.

[2] [1926] 2 W.W.R. 456, 3 D.L.R. 362.

was alone and, though the knowledge of the last was not obtained by the defendant until the trial, it is quite clear that it may be relied on to justify a dismissal for misconduct and the pleadings were amended, by leave, to set it up.

These instances of disobedience and deceit combined, emphasized as they are by the deliberate perjury of the plaintiff, establish clearly the untrustworthiness of the plaintiff and bring the case well within the principles enumerated in such cases as *Beattie v. Parmenter* (1889), 5 Times L.R. 396 and *Federal Supply & Cold Storage Co. of S. Africa v. Angehrn & Piel* (*supra*) . . . .

In my view the same considerations apply to the present circumstances.

In view of all the above, I have concluded that the respondent's contract of employment was terminated in accordance with its terms by the giving of ten days' written notice, and that, in any event, the deceitful conduct to which the respondent admitted on the witness stand would have justified the appellant in dismissing him even if no notice had been given.

As to the cross-appeal, the evidence satisfies me that the respondent had agreed to an arrangement whereby his disbursements were to be paid in Canadian funds and his fees in United States funds, and I, accordingly, agree with the Court of Appeal that his claim for the equivalent of Canadian dollar value for his fees should be disallowed. The cross-appeal should, therefore, be dismissed.

I am unable to see any answer to the respondent's claim for his car allowance at the rate of ten cents per mile, and would accordingly allow this item, but in all other respects I would allow the appeal.

The appellant should have its costs of the appeal and the cross-appeal in this Court and its costs of the appeal in the Court of Appeal, but I would not disturb the order of the learned Chief Justice with respect to the costs of the trial.

Appeal allowed, cross-appeal dismissed, with costs.

Solicitors for the defendant, appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the plaintiff, respondent: Keith, Ganong, Carruthers & Rose, Toronto.