CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JAMES KARAS, MARY KARAS AND JOHN PEARL (DEFENDANTS)..... APPELLANTS;

AND

CHARLES ROWLETT (PLAINTIFF).... RESPONDENT.

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*Oct. 19, 20, 21.

*Dec. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Damages—Quantum—False representation to deprive lessee of benefit of contractual right to renew lease—Measure of damages—Special damages—Loss of profits—Questions as to mitigation of loss—Matters for consideration in assessing loss—General damages not recoverable.

Plaintiff bought as a going concern from defendant K. a store business, which he called the "Oasis", in the city of Halifax, and took a lease from K. of the store premises for five years with right of renewal for a like term, subject only to sale of the premises by K., and with a first option to purchase. During the term of the lease K. represented to plaintiff that he had decided to sell the premises and had an offer of $25,000, which was beyond what plaintiff was willing to pay. Plaintiff, being told that the property was sold, and pursuant to notice to quit, and failing to get a renewal, which he was anxious to have, vacated the premises by the end of the term and moved the business to another store (called the "Rendezvous") operated by him. He later sued K. and the other defendants (K.'s wife and her brother) for damages, claiming that the representation of such sale was false and that defendants conspired to defraud him. At trial, the jury found that the alleged sale was not a *bona fide* sale, and found for plaintiff special damages of $18,000 and general damages of $2,000, for which amounts plaintiff recovered judgment, which was sustained by the Supreme Court of Nova Scotia *en banc*, that Court, however, dividing equally as to sustaining the assessment of damages (17 M.P.R. 124). Defendants appealed to this Court as to the assessment of damages.

The special damages awarded were (as assumed in this Court from items claimed and the charge to the jury) mainly on account of loss of profits which plaintiff would have made in a renewal term; other items being moving expenses, loss on forced sale of fixtures, etc., and loss by closing business for moving.

PRESENT:—Duff C.J. and Davis, Kerwin, Taschereau and Rand JJ.

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After receiving notice to quit but while the lease was running, plaintiff acquired another business, called the "White Cross", his purpose being, so he said, to try to recoup the loss to be suffered by losing the "Oasis". He operated all said stores (the three at one time before vacating the "Oasis") successfully. Some time after he vacated the premises held under said lease, they were reopened under management of K. or his wife.

Defendants contended, *inter alia*, that the trial Judge's instructions to the jury on the question of plaintiff's loss of profits through losing the "Oasis" for a renewal term should have included a direction to take into account in mitigation of damages the probable profits of plaintiff's "White Cross" business during the same period.

Held: The judgment at trial should stand as to the amount awarded for special damages, but no general damages should be allowed. Davis J., dissenting, would order a new trial as to damages.

Per the Chief Justice and Rand J.: (1) The damages from the deceit in this case were the same as the consequences of a breach of the obligations from which plaintiff's rights and interests arose, and were to be determined on the rules applicable to contractual defaults. The person who has suffered from such a wrong is entitled, so far as money can do it, to be placed in as good a position as if the contract had been performed. With this there is the parallel duty on his part to take all reasonable measures to mitigate the loss consequent upon the breach. Any steps required by such duty must arise out of the consequences of the default and be within the scope of what would be considered reasonable and prudent action. The duty is limited by considerations of class of venture and risks; but where there has been an actual performance within those consequences, whether or not within the duty, the benefit derived may be taken into account. But the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, a substitute for the other; or, stated from another point of view, by the default or wrong there is released a capacity to work or to earn; that capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach. In the present case the question was whether or not the "White Cross" business could be looked upon as incompatible with that closed by the fraud; or, in the other sense, whether the capacity to be released to plaintiff by the result of the fraud was necessary to the continuance of the "White Cross" business. The facts did not admit of any such conclusion; and there was no evidence on the basis of which a jury should have been instructed to take account of the "White Cross" earnings. Also there was no evidence that the trading situation in Halifax was such as to offer to plaintiff the conditions and inducement of still another successful business venture; and this was sufficiently decisive, as once a *prima facie* case for damages is presented, the onus at least for proceeding with the evidence is then cast upon the party asserting a claim for mitigation. It may be that, as in the ordinary case of dismissal from employment, the facts raising a *prima facie* case for damages do themselves contain evidence of potential earning power and raise a presumption that the capacity to work has a calculable value; but in the present case there was no evidence from which a necessary or reasonable transfer of earning capacity from the one store to another could be inferred, and that was decisive on the point.

(2) It was not a case where the damages should be limited to the value of the leasehold interest of which plaintiff was deprived (*Re Schulte-United Ltd.*, [1934] O.R. 453, distinguished).

(3) It could not be said that the jury, acting as reasonable men, could not have found special damages in the amount awarded.

(4) As to general damages: Where actual damages themselves are the gist of the remedy, the causing of those damages being itself the wrong done, the rule of general damages has no application. As to allowance of "general damages" in the sense in which that expression is, for instance, applied to allowance for pain and suffering in the case of personal injury through negligence: It is not clear in the present case how any such matters (referred to in the trial Judge's charge as "general worry, upset of business, being subjected to what he regards as illegal action") could be treated as natural and direct consequences of the fraudulent representations, but, in any event, there was no attempt made to prove them.

Per Kerwin J.: The jury were entitled to award as damages such amount of profits as they considered plaintiff would have secured under a renewal lease for five years (taking into consideration profits previously made and all the vicissitudes of business enterprises) subject always to sooner determination in the event of a *bona fide* sale; such profits were neither too remote nor too uncertain to serve as the basis of estimate of the amount of damages. There was no basis for a deduction from such amount of an annual sum, such as a yearly salary at one time earned, as the value of plaintiff's yearly earning ability. Nor should there be any deduction of the amount of profits made or likely to be made at plaintiff's other stores; the starting or acquiring of them could not, under the circumstances, be said to have arisen "out of the consequences of the breach" (applying the rule in breach of contract cases). The amount awarded for special damages was such as a jury, doing their duty, could award. On plaintiff's cause of action, he was not entitled to anything beyond what he proved in the way of special damages.

Per Taschereau J.: Though the amount awarded as special damages seemed high, this Court would not be justified in interfering. The case was not one where general damages might be awarded.

Per Davis J., dissenting: What plaintiff was illegally deprived of was his right to obtain the renewal term—an estate in land. Where one is deprived of a right to acquire a freehold or a leasehold interest in land, whether the deprivation arose out of contract or in tort, his damage is the difference between the price at which he was entitled to obtain the property, and the value of the interest in the property to him. In the present case, based on his rental under the contract for renewal and a rental representing what the renewal would be worth to him, it would be the present value of the probable and reasonable difference, subject to the ordinary contingencies, which should determine the loss. The estimated profits or earnings that might be made on the property in the conduct of a particular business by a particular person, when other business premises more or less advantageous are available, is not the proper test of the loss suffered; in other words, the personal element in the management and conduct of the business is the determining factor in whether profits, large or small, may be reasonably anticipated and is too remote a test to be regarded as the basis for the calculation of damages for the loss of a right to acquire leasehold (or freehold) interest

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in real property (*Re Schulte-United Ltd.*, [1934] O.R. 453, referred to). But the present action was fought out on the footing that the profits which might reasonably be expected on a renewal term were the measure of damages, and the jury were charged along that line without objection; and that might cause a disposition to let the assessment stand. But the total amount awarded was grossly excessive on the evidence. The jury were in effect told, contrary to defendants' contention, that nothing should be allowed by way of deduction from gross profits for the cost of the management of the store, which was the personal labour of plaintiff himself; and, even on the basis of estimated profits of a business, something substantial should be deducted from gross earnings for the personal management of the business. There should be directed a re-assessment of the damages.

APPEAL by the defendants from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing their appeal from the judgment given on trial of the action before Chisholm C.J. with a jury.

The defendant James Karas, on March 15, 1937, sold to the plaintiff as a going concern the good-will, stock-in-trade, fixtures, effects and equipment of the trade or business of a fruit, magazine and confectionery store then being carried on by Karas at premises in the city of Halifax, and also leased to the plaintiff for five years from March 15, 1937, the premises in which the business was carried on; with an option of renewal for a further term of five years at the same rental, subject only to the sale of the said premises by the landlord; and it was agreed that, in the event that the landlord decided to sell the premises, the plaintiff should have the first option to purchase.

During the term of the lease the said Karas represented to the plaintiff that he had decided to sell the premises and had an offer of $25,000, which was beyond what the plaintiff was willing to pay, and the plaintiff, being told that the property was sold and pursuant to notice to quit, and failing to get a renewal, which he was anxious to have, vacated the premises on or about March 15, 1942, the date of expiration of the lease. The plaintiff later sued the defendants (the said Karas and his wife and her brother) for damages, claiming that the representation to him of such sale was false, such sale not being a *bona fide* sale, and that the defendants conspired with each other to defraud him by carrying out a feigned or pretended sale of the premises by said Karas to the defendant Pearl and falsely represented or caused to be represented to the plaintiff that a sale had taken place.

(1) 17 M.P.R. 124; [1943] 2 D.L.R. 622

At the trial the jury found that the sale was not a *bona fide* sale and found that the plaintiff sustained special damages of $18,000 and general damages of $2,000; and judgment was given for recovery by the plaintiff against the defendants of the said sums. An appeal by the defendants, asking that the findings and judgment at trial be set aside and that a new trial be had, was dismissed by the Supreme Court of Nova Scotia *en banc* (1), but two of the four judges who heard the appeal held that there should be a new trial limited to the question of damages sustained; that there was misdirection in the trial judge's charge to the jury, in dealing with the question of special damages, in regard to the loss of profits; and that a loss to the extent awarded in that regard could not reasonably have been found on the evidence.

The defendants appealed to this Court, the appeal being limited to the finding of the jury as to the damages sustained and to the judgment of the said Court *en banc* in so far as it related to the dismissal of the motion for a new trial in respect of the damages awarded.

The questions involved in the appeal sufficiently appear in the reasons for judgment in this Court now reported and are indicated in the above head-note.

F. D. Smith K.C. for the appellants.

J. T. MacQuarrie and *A. S. Pattillo* for the respondent.

The judgment of the Chief Justice and Rand J. was delivered by

RAND J.—This action arises out of a lease to the respondent by the appellant, James Karas, of a building used as a store at the corner of Morris and Barrington streets, Halifax. The lease was for a term of five years from March 15, 1937, with a right of renewal for a like term "subject only to the sale of the said premises by the landlord". Upon a sale, the tenant was to be given six months' notice of termination. There was also a provision that, should the landlord decide to sell, the tenant should have "the first option to purchase".

In the summer of 1941 the landlord intimated that he was willing to sell and had received an offer of twenty-five thousand dollars, which he presented to the tenant under

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the option clause. It was not accepted and, in September, the six months' notice was given for the end of the first term of five years. In the meantime, a deed of the property had been given by the landlord to the appellant, John Pearl, and from then on the latter was treated as the owner. The respondent, as the end of the tenancy approached, became exceedingly anxious to retain the property, and from time to time importuned Pearl for its sale, but without success; and at the expiration of the term he vacated.

The business carried on by the respondent, called the "Oasis", which as a going concern he had purchased from the landlord, was the sale of fruit, confectionery, tobacco, etc., and from the beginning it had grown rapidly. In January, 1941, he had taken on another business of the same kind, called the "Rendezvous". In October of the same year, after the notice given him, he added still another to his holdings, originally, at least, for the purpose, as he expressed it, of trying to "recoup the loss" (to be) of the "Oasis". This was known as the "White Cross". In March, 1942, therefore, he was operating the three stores, and, from the returns in evidence, successfully; and it is of importance to observe that, whatever might have been his intentions in October, he was then most urgent in his endeavours to purchase the leased property from Pearl, and, so far as appears, prepared to continue indefinitely the businesses he had built up.

In April, 1942, a deed of the leased property dated September 28, 1941, from Pearl to the appellant Mary Karas, his sister and the wife of James Karas, was registered. The "Oasis", on June 22, 1942, was reopened under the management of either Karas or his wife. The suspicions of the respondent were aroused by the latter circumstance and investigation, disclosing the conveyance to Mrs. Karas, satisfied him that the sale to Pearl had been fictitious and part of a scheme to defraud him of the lease and business. He thereupon brought this action which, by election at the trial, became one for deceit.

The jury found the allegations of fraud established and awarded eighteen thousand dollars special and two thousand dollars general damages. The former consisted substantially of the loss of profits from the business of which the respondent had been defrauded. The latter

represented, in the language of the charge, "general worry, upset of business, being subjected to what he regards as illegal action". They were likened to the pain and suffering of a person injured through negligence. An appeal to the Supreme Court *en banc* against the finding of fraud was unanimously dismissed but on the damages there was an equal division, Carroll and Archibald JJ. finding nothing objectionable in the charge or the sum allowed, and Hall and Smiley JJ. being for a new assessment on the ground of misdirection in the failure to deal with mitigation; and the appeal to this Court is limited to damages.

The first question before us is, therefore, whether that failure in the charge was, having regard to the instructions given, a misdirection as to the basis upon which the special damages should be estimated. This, in turn, centres largely around the circumstance that, in October of 1941, the third business was opened, professedly for the purpose already mentioned. It is contended that the jury should have been instructed that they were to take into account, not only the loss of profits from the original business during the second term of five years, but also what they might estimate as the probable profits during that period from the third business, the "White Cross".

The *injuria* here was intended to and did bring about a fraudulent termination of the lease and loss of the business. The damages from the deceit are, therefore, the same as the consequences of a breach of the obligations from which the rights and interests of the plaintiff arose; and they are to be determined on the rules applicable to contractual defaults.

It is well settled that the person who has suffered from such a wrong is entitled, so far as money can do it, to be placed in as good a position as if the contract had been performed. With this there is the parallel duty on his part to take all reasonable measures to mitigate the loss consequent upon the breach. The latter rule has been dealt with in a number of clarifying decisions, and the considerations to be taken into account are now well settled: *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.* (1); *In re Vic Mill Ltd.* (2); *Hill and Sons* v. *Edwin Showell & Sons Ltd.* (3).

(1) [1912] A.C. 673; (2) [1913] 1 Ch. 465.
(3) (1918) 87 L.J.K.B. 1106.

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Under the rule so enunciated, the steps which ought to be taken by an injured party must arise out of the consequences of the default and be within the scope of what would be considered reasonable and prudent action. There are obviously limitations to the class of venture, for instance, in respect of which the duty would arise, but, where there has been an actual performance within those consequences, whether or not within the duty, the benefit derived may be taken into account. When, however, it is a question of future action, we must keep in mind the limitation to be put upon that duty towards undertakings involving more than ordinary risks and have regard to the fact that losses might be suffered which could not be added to the burden of the wrongdoer.

It is settled, also, that the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, a substitute for the other. Stated from another point of view, by the default or wrong there is released a capacity to work or to earn. That capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach.

In the language of Hamilton L.J., in the case of *In re Vic Mill supra* (1) at page 473:

> The fallacy of that is in supposing that the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders, and both profits. In fact, what they did, acting reasonably, and I think very likely more than reasonably in the interests of the Vic Mill, was to content themselves with earning the profit on the second contract at the cost of adapting the machines, which has been taken at £5; but they are still losers of the profit which they would have made on the Vic Mill contract, because they could, if they had been minded, have performed both the contracts, and have made the profit on both the contracts but for the breach by the Vic Mill Company of their contract.

Applying those considerations to the case in hand, the question is whether or not the business commenced in October can be looked upon as incompatible with that closed by the fraud: or, in the other sense, whether the capacity to be released to the respondent by the result of the fraud was necessary to the continuance of the business so commenced. The unquestioned facts do not admit of any such conclusion. At the time of surrendering the

(1) [1913] 1 Ch. 465.

lease, three businesses were being carried on profitably and the respondent was doing his utmost to purchase the premises of the "Oasis" in order to continue that scale of operations. There is, therefore, before the Court, no evidence on the basis of which a jury should have been instructed to take account of the earnings from the "White Cross" actually or potentially arising from a capacity set free to the respondent by the fraudulent action of the appellants. Nor is there any evidence that the trading situation in Halifax was such as to offer to the respondent the conditions and inducement of still another successful business venture. We are not called upon to decide more than that. Once a *prima facie* case for damages is presented, the onus at least for proceeding with the evidence is then cast upon the party who asserts a claim for mitigation. As Hamilton L.J., in the *Vic Mill* case (*supra*) at page 472, says:

> Certainly the case is not one in which the very nature of the undertaking shews that they could not carry on more than one contract at one time. No authority has been cited for the contention that it rests upon the maker who is claiming damages by way of lost profit, not only to prove that he was ready and willing to perform, but that he was able to utilize his time, as he did, and in addition to have taken on and carried through these particular appellants' contract. As the evidence stands, there was a *prima facie* case that the makers could have made this profit as well as the profits on all the other contracts that they had. There was not only no evidence to rebut that, but no suggestion to the contrary was made in cross-examination.

It may, of course, be that the facts raising a *prima facie* case for damages do themselves contain evidence of potential earning power as in the ordinary case of dismissal from employment. There, in the absence of evidence to the contrary, a presumption in fact may arise that the capacity to work has a calculable value. But there was no evidence here from which a necessary or reasonable transfer of earning capacity from the one store to another could be inferred, and that is decisive on the point raised.

It was urged by Mr. Smith that the damages should be limited to the value of the leasehold interest of which the respondent was deprived, and the case *Re Schulte-United Limited* (1) was cited in support. No doubt, in the situation there presented and in the ordinary case of expropriation of the residue of a term of years, the rule laid down in that decision applies. But what is the ground

(1) [1934] O.R. 453.

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for that rule? Surely this, that what is taken is merely the site of a business and not the business itself. The lessee is simply forced to move to other premises but on the assumption that his business continues; into that business field no new competitive factor or influence is introduced. Conceivably, there might be a situation where no other site was available and that circumstance might, in such a case, have to be considered. But here the object and accomplishment of the fraud was not only the site but the business itself. The continuance of the latter maintained the existing competitive pressure in the class of business in which the respondent was engaged and, on the evidence, no inference in fact could be drawn that, adding another competitor to what might be a saturated field, was warranted in reasonableness or prudence.

A further question arises in the award of two thousand dollars for general damages. Strictly speaking, general damages are those which, upon the breach of a legal duty, the law itself presumes to arise, and they can be shown by general evidence of matters which are accepted as affected by such a breach. But where actual damages themselves are the gist of the remedy, in which the causing of those damages is itself the wrong done, the rule of general damages has no application: *Dixon* v. *Smith* (1); *Craft* v. *Boite* (2). The expression is at times used somewhat loosely to signify elements of special damage which, in a sense, are at large, and in the ascertainment of which the limits of estimation are indefinite. Such, for instance, is the amount allowable for pain and suffering in the case of personal injury through negligence. There, damages are actual but are lacking in precise measures or standards of determination.

In this case it is not clear how any such matters could be treated as natural and direct consequences of the fraudulent representations but, in any event, there was no attempt made to prove them. In my opinion, therefore, the item of two thousand dollars allowed under this head cannot stand.

A final point is made that the special damages are excessive. No serious complaint is raised against the directions of the charge in this aspect; in fact, at the trial, counsel for all parties, in reply to the trial judge, stated there was

(1) (1860) 29 L.J. Ex. 125.

(2) 1 Wms. Saund. at 243 (*d*).

nothing further they wished given the jury. There is no doubt that the business from which the respondent was ousted by a calculated scheme of roguery was prosperous and growing, and I find myself unable to say that the jury, acting as reasonable men, could not have found the amount awarded.

I would, therefore, allow the appeal to the extent of the item of two thousand dollars with costs to the appellant in this Court but without costs in the Court *en banc* below. Otherwise the judgment of the trial Court stands.

DAVIS J. (dissenting).—This is an appeal limited to the quantum of damages awarded by a jury and confirmed, by an equal division, on an appeal to the Supreme Court of Nova Scotia *en banc*.

The action was in tort founded upon the deceit of the appellants (defendants) in depriving the respondent (plaintiff) of his right to obtain a certain leasehold interest in business premises in the city of Halifax. The jury gave $20,000 damages.

The respondent by an agreement in writing under seal and dated March 15, 1937, had purchased from the appellant James Karas as a going concern the good-will, stock-in-trade, fixtures, effects and equipment of the fruit, magazine and confectionery business of the said James Karas and had leased from him the store premises for a period of five years from that date, at a rental of $80 per month. The agreement for purchase and sale of the business was carried out and the term of the five-year lease was had and enjoyed by the respondent. But the agreement contained an option in favour of the respondent for a renewal of the lease for a further term of five years from the expiry date of the original lease,

> at the same rental, subject only to the sale of the said premises by the landlord; and in the event of a sale of the premises herein, the said tenant shall be given six months' notice in writing to vacate the said premises.

It is important to bear in mind that, however unlawful or malicious the appellants were towards the respondent, what the respondent was deprived of was the right, which he undoubtedly intended and desired to exercise, to obtain the second term of five years of the leasehold premises, and that what the respondent was entitled to in the action was damages for the illegal deprivation of this right. It was an

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estate in land of which the respondent was deprived, and, whether an action lies in contract or in tort, the proper measure of the damages must be first determined. As has often been said, damages is a branch of the law on which one is perhaps less guided by authority laying down definite principles than on almost any other matter. I have been unable to rid myself of the proposition that when one is called upon to assess damages in respect of the loss of a right to purchase or acquire a freehold or a leasehold interest in land, whether the denial of that right arose out of contract or in tort, the damage is the difference between the price at which the aggrieved person was entitled to obtain the property and the value of the interest in the property was to the person deprived of it. In this case the respondent was suspicious that the property had in fact not been sold and thought the notice to quit was an effort to force a higher rental for the next five years. He says he then offered $125 a month instead of $80—and later in his exasperation offered up to $200 a month. On the highest figure mentioned the difference spread over the five-year period would be $7,200, and it would be the present value of the probable and reasonable difference, subject to the ordinary contingencies, which, in my opinion, should determine the loss. I fail to see that the estimated profits or earnings that might be made on the property in the conduct of a particular business by a particular person, when other business premises more or less advantageous are available, is the proper test of the loss suffered. In other words, it seems to me that the personal element in the management and conduct of the business is the determining factor in whether profits, large or small, may be reasonably anticipated and is too remote a test to be regarded as the basis for the calculation of damages for the loss of a right to acquire a freehold or leasehold interest in real property. Some observations along the same line were made by me while in the Ontario Court of Appeal in the case of *Re Schulte-United Limited* (1), and on that branch of that case were expressly concurred in by two very able and experienced Judges, Riddell and Masten JJ.A. That was a case in contract and not in tort, but I cannot see how loss of profits *qua* estimated profits is recoverable as such in either case. They are too

(1) [1934] O.R., 453, at 462.

remote, even in tort, as the "immediate and natural" result of the wrongful act.

Considerable emphasis during the argument was laid upon the fact that the respondent had another similar business called "The White Cross", but the respondent said in evidence that he did not take that over until after he had received notice to quit the premises now in question. He described the White Cross as located "across the road a little further south". The only reason, he said, he started the White Cross was to try to recoup the loss of the other premises.

But this action was fought out by the parties on the footing that the profits which might reasonably be expected to have been made by the respondent, had he obtained and enjoyed a second term of five years, were the measure of damages, and the learned Chief Justice of Nova Scotia accordingly charged the jury along that line, without any objection from counsel. Under those circumstances I should have been disposed to let the assessment stand. But the total amount, $20,000, awarded by the jury, appears to me to be grossly excessive on the evidence. The jury were in effect told, contrary to the contention advanced by counsel for the appellants, that nothing should be allowed by way of deduction from gross profits for the cost of the management of the store, which was the personal labour of the respondent himself. The respondent had said in his evidence that the statement of profits did not take into consideration any salary for himself—he said he considered what he called the net profits to be his salary, his own earnings as manager of the business. He was asked:

> Q. What would you consider a proper salary for yourself?
> A. I did not figure that.
> Q. For the amount of work you did? If you were managing the business for someone else, what would you consider your own services worth?
> A. For running one store three thousand a year. I was making that much before I went into this business.

When the learned Chief Justice came to charge the jury, he said in part:

> If he [i.e., the respondent] was put out improperly he is entitled to the probable loss of profit for the period during which he was entitled to be a tenant. It is difficult for you to determine. There is evidence the business was growing since he took it on. The profit was $5,105 for 1941. He made that profit after paying all expenses. Mr. Walker

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[counsel at the trial for the appellants James and Mary Karas] spoke of salary. Salary has nothing to do with it. If you are carrying on business you have to pay out money to get money in. If at the end of the year you have twenty-five hundred net profit, that is your money. You are entitled to recover it back. Rowlett says he cleared five thousand odd dollars. It is contended we should subtract three thousand dollars salary. Rowlett was not working for somebody else. He had made that money by his own efforts. If he lost that money by reason of illegal action of somebody else he can surely recover the money back.

Whether you call it salary or a deduction for the value of the personal services does not much matter to a jury; even on the basis of estimated profits of a business something substantial should be deducted from gross earnings for the personal management of the business.

In my opinion, the appeal should be allowed with costs and a re-assessment of the damages directed.

KERWIN J.—This is an appeal by the three defendants, James Karas, his wife Mary Karas, and the latter's brother John Pearl, from a judgment of the Supreme Court of Nova Scotia *en banc*. The plaintiff is the respondent, Charles Rowlett, who, after the trial of the action before the Chief Justice of Nova Scotia with a jury, was given judgment for $20,000 damages against the appellants. The four members of the Court *en banc* were satisfied that the appellants were responsible in damages but they divided equally as to whether a new trial should be granted as to the quantum. In the result, the appeal was dismissed *in toto*. The appeal to us is confined solely to the question of damages and it is immaterial whether the damages are treated as having been awarded against the appellants for defrauding the respondent by a fraudulent sale from James Karas to Pearl or for conspiracy by and among the three appellants to effectuate, and accomplishing the same result.

In 1937, the respondent purchased from the appellant James Karas, the latter's fruit and confectionery business carried on at the southwest corner of Morris and Barrington streets, in the city of Halifax, in premises known as number 290 Barrington street. These premises were owned by Karas who, at the same time, entered into a lease thereof to the respondent for a period of five years from March 15, 1937. The lease contained the following clauses:

It is Further Agreed by and between the said Landlord and the said Tenant that the Tenant shall have an option for the rental of the said premises for a further term of five years from the expiry date of this Lease, at the same rental, subject only to the sale of the said premises by the Landlord; and in the event of a sale of the premises herein, the said Tenant shall be given six months' notice in writing to vacate the said premises.

It is Also Further Agreed that in the event the said Landlord decides to sell the premises herein, that the Tenant above mentioned shall have the first option to purchase.

The respondent entered into possession under the sale and lease and conducted the business for some years under the name of the Oasis. The net profits from this business for the remainder of the year 1937 were $1,486, and for the years 1938 to 1941 inclusive were as follows:

1938—$1,180	1940—$4,522
1939—$2,642	1941—$5,105

In August, 1940, on the instructions of James Karas, a letter was written to the respondent that an offer of $25,000 had been received for the premises. Unknown to the respondent this statement was a deliberate falsehood. In January, 1941, the respondent opened another fruit and confectionery store, which he called the Rendezvous, at 307 Barrington street, on the opposite side of the street from the Oasis and a few buildings to the north.

In July, 1941, the appellant Pearl purported to purchase the Oasis premises. A conveyance therefor was executed by James Karas and his wife on August 12, 1941, and was recorded on August 16, 1941. The respondent was advised of this conveyance. In the meantime, by a notice dated July 28, 1941, James Karas called upon the respondent to deliver up possession of the Oasis premises on the expiration of the current lease, i.e., on March 14, 1942. On September 28, 1941, Pearl executed a deed to Mary Karas of the same premises but this deed was not recorded until April, 1942 (after the respondent had left the premises), and its existence was not known to the respondent until June of that year. In October, 1941, the respondent acquired another fruit and confectionery business called the White Cross, on Barrington street practically opposite the Oasis. Until he moved out of the premises where the Oasis business was conducted, he continued to inquire if he could not buy the property, or rent it at an increased rental.

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Upon discovery of the fraud perpetrated upon him, the respondent commenced this action. He claimed general damages, and the following special damages as itemized in the statement of claim (numbers have been added for the purpose of convenience):

1.	Moving expenses from the southwest corner of Morris and Barrington streets, including damage by breakage...	$ 368.75
2.	Loss on forced sale of fixtures and stock, necessitated by moving	530.00
3.	Loss of profits sustained in closing down business for purpose of moving.....	44.00
4.	Loss of profits that would have been earned at southwest corner of Morris and Barrington streets, March 15 to June 22, 1942.....	1,219.80
5.	Additional expense in enlarging and altering 307 Barrington street	4,725.00
6	Interest on money borrowed to make such alterations....	350.00
7.	Loss of profits 307 Barrington street during period business was closed for alterations.....	600.00
8.	Fixed charges of 307 Barrington street while business was temporarily closed	550.00
9.	Depletion of profits at other Barrington street stores during period June 22, 1942, to date of Writ.....	45.00
10.	Loss of future profits at southwest corner of Morris and Barrington streets, from June 22, 1942, to March 15, 1947.	24,000.00
11.	Loss of future profits at other Barrington street stores to March 15, 1947.....	7,500.00

Items 7 and 8 were withdrawn by counsel for the respondent before the case went to the jury. No objections were taken to the charge although the Chief Justice inquired of counsel if there were any matters he had omitted and if there was anything further they wished put to the jury. The jury found $18,000 special damages.

After reading the charge, bearing in mind all that has been urged against it by counsel for the appellants, I am satisfied that the Chief Justice left to the jury, as the only items of special damage to be considered by them, numbers 1, 2, 3, 4, and 10. Counsel for the appellants stated that he was not pressing any objections as to Item 1 but, in any event, in my opinion the charge is unimpeachable as to that or as to the second and third items. The real complaint is with reference to the profits of $25,219.80 that the respondent alleged he would have earned for the five years from March 15, 1942. Whatever the jury gave under this heading is included in the sum of $18,000, and deducting therefrom the total of the first three items, $942.75,

leaves a balance of $17,057.25, allowed the respondent as damages for loss of profits suffered by him because he did not secure a lease for the five years.

The respondent had testified to the profits he had made while he was in possession of the premises. The trial judge referred to the amount so made in 1941, $5,105. It is true that shortly thereafter he stated: "The difficulty is you are left largely to guess what the loss of profits is" but he immediately continued:

> It does not follow because he made five thousand he will get the same this year or the next. It depends on so many circumstances of varying kind one cannot be certain of it. Probably the war has made it easier to get a profit, the presence of a number of people in Halifax who did not live here before, the building that is going up, all these things. That may stop this year, next year or perhaps not for ten years. You have to exercise your own good judgment. Take all events that may take place, perhaps promoting a business or helping to destroy it. You have to arrive at what you consider a reasonable figure. You may say so much and another man may say something else. You cannot prove the other was wrong.

The jury undoubtedly understood from all this that they should estimate the damages on the basis of the profits previously made by the respondent, taking into account all the vicissitudes of business enterprises. Later in the charge it was made abundantly clear that during the five-year period there might be a sale of the premises at any time, whereupon the lease could be determined upon six months' notice. The Oasis was an established business and the jury were therefore entitled to award as damages such amount of profits as they considered the respondent would have secured under a lease of the Oasis premises for five years from March 15, 1942, subject always to the sooner determination of the lease in the event of a *bona fide* sale. Such profits are not either too remote or too uncertain to serve as the basis of estimate by the jury of the amount of damages suffered by the respondent.

It is said first, however, that the jury should have been instructed to deduct from any such amount an annual sum of $3,000 as being the yearly salary the respondent had received from a company for which he worked before he made the original purchase of Karas' business and as being a fair estimate of the value of his yearly earning ability during the period in question. There is no basis for any such deduction.

Secondly, it was contended that the profits the respondent made and would likely make at the Rendezvous and

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White Cross should be deducted. I am also unable to agree with this. In breach of contract cases the rule was stated in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways* (1) by Viscount Haldane with the concurrence of all the Lords present that "the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business." The same rule applies in an action such as this. The Rendezvous business was started in January, 1941, before the execution of the fraudulent conveyance of August 12, 1941, although after the respondent had been informed that an offer of $25,000 had been received for the Oasis premises. The respondent had no knowledge of the falsity of this information, and, in any event, hoped that the premises would not be sold. It is true the White Cross business was acquired after the conveyance and that the respondent stated in an unresponsive answer to his own counsel at the trial, that he had purchased it to recoup his loss, but up to the time that he moved out of the Oasis premises (about March 15, 1942) he persisted in endeavouring to purchase or lease those premises. He managed the three businesses at one time, so that it is not the case that quite often arises in an action for damages for breach of a contract of employment. Nor is it at all similar to the problem before this Court in *Cockburn* v. *Trusts and Guarantee Company* (2). The respondent did not know of the fraud until after he had opened the Rendezvous and acquired the White Cross, and these transactions, therefore, did not arise out of the consequences of the breach.

The third contention on this branch of the case is that the amount is excessive. I am clearly of opinion that the amount is such as a jury, doing their duty, could award.

The jury also awarded the respondent $2,000 general damages. With reference to general damages, the trial judge stated to the jury:

> General damages a jury is entitled to give for general worry, upset of business, being subjected to what he regards as illegal action. It cannot be determined in dollars and cents. I will illustrate it by saying take the case of a man who is injured in an accident, a motor car accident, and goes to hospital and pays out money and so forth for doctors,

(1) [1912] A.C. 673, at 690. (2) (1917) 55 Can. S.C.R. 264.

nurses, hospital, loss of business. That is "special damages". He is also entitled to general damages to pay for his pain and general suffering.

In a case like this the plaintiff might be entitled to something for worry and trouble if you regard the acts of the defendants as illegal.

This, in my opinion, was misdirection. "General damages are those which the law implies * * * in every violation of a legal right" (Halsbury, vol. 10, par. 102). Here the cause of action is the respondent's having suffered damage by acting on the false representation made to him by the appellants, or his having suffered damage in pursuance of the false representation made as a result of the conspiracy entered into by the appellants. The respondent is not entitled to anything beyond what he proved in the way of special damages. This conclusion renders it unnecessary to consider the argument of counsel for the respondent as to what is described indiscriminately as exemplary, vindictive, penal, punitive, aggravated, or retributory damages, or in some cases in the United States as "smart money". The appeal should, therefore, be allowed to the extent of reducing the judgment by the sum of $2,000.

The appellants are entitled to their costs of the appeal to this Court but there should be no costs of the appeal to the Supreme Court of Nova Scotia *en banc*.

TASCHEREAU J.—Although the amount awarded by the jury as special damages seems high, I do not think that this Court would be justified in interfering.

I am of opinion, however, that this is not a case where general damages may be awarded, and I would therefore allow the appeal as to the item of $2,000, with costs to the appellant in this Court, but without costs in the Supreme Court *in banco*.

Appeal allowed in part with costs.

Solicitor for the appellants Karas: *W. C. Dunlop.*

Solicitor for the appellant Pearl: *F. D. Smith.*

Solicitor for the respondent: *Donald McInnis.*