Neutral Citation Number: [1972] EWCA Civ 8
Case No.:

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
ON APPEAL FROM THE JUDGMENT OF
HIS HONOUR JUDGE CORLEY
2nd March, 1972.

Royal Courts of Justice.
16th October 1972.

B e f o r e :

THE MASTER OF THE ROLLS (Lord Denning)
LORD JUSTICE EDMUND DAVIES
LORD JUSTICE STEPHENSON

JAMES WALTER JOHN JARVIS **(Appellant-Plaintiff)**

v

SWANS TOURS LIMITED **(Defendants-Respondents)**

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd., Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, W.C.2.)

MR. S.N. PARRISH, instructed by Messrs. Maples Teesdale & Co., appeared for the Appellant (Plaintiff).
MR. P. THOMPSON, instructed by Messrs. Paisner & Co., appeared for the Respondents (Defendants).

HTML VERSION OF JUDGMENT

THE MASTER OF THE ROLLS:

Mr. Jarvis is a solicitor, employed by a local authority at Barking. In 1969 he was minded to go for Christmas to Switzerland. He was looking forward to a ski-ing holiday. It is his one fortnights holiday in the year. He prefers it in the winter rather than in the summer, Mr. Jarvis read a brochure issued by Swan Tours Limited. He was much attracted by the description of Morlialp, Giswil, Central Switzerland. I will not read the whole of it, but just pick out some of the principal attractions:

> "House Party Centre with special resident host .... Morlialp is a most wonderful little resort on a sunny plateau ... Up there you will find yourself in the midst of beautiful alpine scenery, which in winter becomes a wonderland of sun, snow and ice, with a wide variety of fine ski-runs, a skating rink and exhilarating toboggan run ... Why did we choose the Hotel Krone ... mainly and most of all because of the 'Gemutlichkeit' and friendly welcome you will receive from Herr and Frau Weibel ... The Hotel Krone has its own Alphutte Bar which will be open several evenings a week ... No doubt you will be in for a great time, when you book this house-party holiday... Mr. Weibel, the charming owner, speaks English".

On the same page, in a special yellow box, it was said:

> "Swans Houseparty in Morlialp. All these Houseparty arrangements are included in the price of your holiday. Welcome party on arrival. Afternoon tea and cake for seven days. Swiss dinner by candlelight. Fondue party. Yodler evening. Chali farewell party in the 'Alaphutte Bar'. Service of representative".

Alongside on the sane page there was a special note about ski-packs.

> "Hire of Skis, Stocks and Boots - 12 days -£11.10"

In August, 1969; on the faith of that brochure, Mr. Jarvis booked a 15-day holiday, with ski-pack. The total charge was £63.90, including Christmas supplement. He was to fly from Gatwick to Zurich on 20th December, 1969, and return on 3rd January, 1970.

The plaintiff went on the holiday, but he was very disappointed. He was a man of about 35 and he expected to be one of a house-party of some 30 or so people. Instead, he found there were only 13 during the first week. In the second week there was no house-party at all. He was the only person there. Mr. Weibel could not speak English. So there was Mr. Jarvis, in the second week, in this hotel with no house-party at all, and no one could speak English, except himself. He was very disappointed, too, with the ski-ing. It was some distance away at Giswil. There were no ordinary length skis. There were only mini-skis, about 3 ft° long. So he did not get his ski-ing as he wanted to. In the second week he did get some longer skis for a couple of days, but then, because of the boots, his feet got rubbed and he could not continue even with the long skis. So his ski-ing holiday, from his point of view, was pretty well ruined.

There were many other matters, too. They appear trivial when they are set down in writing, but I have no doubt they loomed large in Mr. Jarvis's mind, when coupled with the other disappointments. He did not have the nice Swiss cakes which he was hoping for. The only cakes for tea were potato crisps and little dry nutcakes. The yodler evening consisted of one man from the locality who came in his working clothes for a little while, and sang four or five songs very quickly. The "Alphutte Bar"was an unoccupied annexe which was only open one evening. There was a representative, Mrs. Storr, there during the first week, but she was not there during the second week.

The matter was summed up by the learned judge:

> "During the first week he got a holiday in Switzerland which was to some extent inferior .... and, as to the second week, he got a holiday which was very largely inferior"

to what he was led to expect.

What is the legal position? I think that the statements in the brochure were representations of warranties. The breaches of then give Mr. Jarvis a right to damages. It is not necessary to decide whether they were representations or warranties: because since the Misrepresentation Act, 1967; there is a remedy in damages for misrepresentation as well as for breach of warranty.

The one question in the case is: What is the amount of damages? The judge seems to have taken the difference in value between what he paid for and what he got. He said:

> "I intend to give the difference between the two values and no other damages under any other head".

He thought that Mr. Jarvis had got half of what he paid for. So the judge gave him half the amount which he had paid, namely, £31.72. Mr. Jarvis appeals to this court. He says that the damages ought to have been much more.

There is one point I must mention first. Counsel together made a very good note of the Judge's judgment. They agreed it. It is very clear and intelligible. It shows plainly enough the ground of the judge's decision: but, by an oversight, it was not submitted to the judge, as it should nave been: see Bruen v. Bruce (1959) 2 All England Reports, page 375. In some circumstances we should send it back to the judge for his comments. But I do not think we need do so here. The judge received the notice of appeal and made notes for our consideration. I do not think he would have wished to add to them. We will, therefore, decide the case on the material before us.

What is the right way of assessing damages? It has often been said that on a breach of contract damages cannot be given for mental distress, Thus in Hamblin v. G.W.R. 1 H. & N. at page 441; Chief Baron Pollock said that damages cannot be given for the disappointment of mind occurring by the breach of a contract". And in Hobbs v. London & South Western Railway (1875) Law Reports 10 Queen's Bench, at page 122, Mr. Justice Mellor said that "for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages". The courts in those days only allowed the plaintiff to recover damages if he suffered physical inconvenience, such as, having to walk five miles home, as in Hobbs' case; or to live in an over-crowded house, Bailey v. Bullock (1950) 2 All England Reports, page 1167*

I think that those limitations are out of date. In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities. Take the present case. Mr. Jarvis has only a fortnight's holiday in the year. He books it far ahead, and looks forward to it all that tine. He ought to be compensated for the loss of it.

A good illustration was given by Lord Justice Edmund Davies in the course of the argument. He put the case of a man who has taken a ticket for Glyndbourne. It is the only night on -which he can get there. He hires a car to take him. The car does not turn up. His damages are not limited to the mere cost of the ticket. He is entitled to general damages for the disappointment he has suffered and the loss of the entertainment which he should have had. Here, Mr. Jarvis's fortnights winter holiday has been a grave disappointment. It is true that he was conveyed to Switzerland and back and had meals and bed in the hotel. But that is not what he went for. He went to enjoy himself with all the facilities which the

defendants said he would have. He is entitled to damages for the lack of those facilities, and for his loss of enjoyment.

A similar case occurred in 1951. It was Steadman v. Swans Tours, only reported in 95 Solicitors Journal, page 727-A holiday-maker was awarded damages because he did not get the bedroom and the accommodation which he was promised. The County Court Judge awarded him £3.15. This court increased it to £50.

I think the judge was in error in taking the sumpaid for the holiday £63.90 and halving it. The right measure of damages is to compensate him for the loss of entertainment and enjoyment which he was promised, and which he did not get.

Looking at the matter quite broadly, I think the damages in this case should be the sum of £125. I would allow the appeal, accordingly.

LORD JUSTICE EDMUND DAVIES: Some of the observations of Mr. Justice Mellor in the hundred-year-old case of Hobbs v. London South Western Railway (1875 (1) Queen's Bench, page 11) call today for reconsideration. I must not be taken necessarily to accept that, under modern conditions and having regard to the developments which have taken place in the law of contract since that decision was given, it is right to say, as the learned judge did, that,

> "For mere inconvenience, such as annoyance and loss of temper or vexation or for being disappointed in a particular thing which you have set your mind upon without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental and not a case where the word 'inconvenience' as I here use it would apply".

On the contrary, there is authority for saying that even inconvenience that is not strictly physical may be a proper element in the assessment of damages. In Griffiths v. Evans (1953 (1) Weekly Law Reports, page 1424), in the course of a dissenting judgment where a solicitor was being sued for negligence in wrongly advising a plaintiff as to his right to sue his employers at common law, the Master of the Rolls, then Lord Justice Denning, said that the damages should be assessed "by taking into account the inconvenience and expense to which the plaintiff will put in suing the employers, and the risk of failure".

Be that as it may, Mr. Justice Mellor was dealing with a contract of carriage and the undertaking of the railway company was entirely different from that of the defendants in the present case. These travel agents made clear by their lavishly illustrated brochure with its ecstatic text that what they were contracting to provide was not merely air travel, hotel accommodation and meals of a certain standard. To quote the assurance they gave regarding the Morlialp House Party Centre, "No doubt you will be in for a great time when you book this House Party Holiday". The result was that they did not limit themselves to the obligation to ensure that an air passage was booked, that hotel accommodation was reserved, that food was provided and that these items would measure up to the standards they themselves set up. They went further than that. They assured and undertook to provide a holiday of a certain quality, with "Gemutlichkeit" (that is to say, geniality, comfort and cosiness) as its overall characteristics, and "a great time", the enjoyable outcome which would surely result to all but the most determined misanthrope.

If in such circumstances travel agents fail to provide a holiday of the contracted quality, they are liable in damages. In assessing those damages the court is not, in my judgment, restricted by the £63.90 paid by the client for his holiday. Nor is it confined to matters of physical inconvenience and discomfort, or even to quantifying the difference between such items as the expected delicious Swiss cakes and the depressingly dedicated biscuits and crisps provided for tea, between the ski-pack ordered and the miniature skis supplied, nor between the "very good House Party arrangements assured" and the lone-wolf second week of the unfortunate plaintiff's stay. The court is entitled, and indeed bound, to contrast the overall quality of the holiday so enticingly promised with that which the defendants in fact provided.

In determining what would be proper compensation for the defendants' marked failure to fulfil their undertaking I am of the opinion that, again to use Mr. Justice Mellor's terms, "vexation" and "being disappointed in the particular thing you have set your mind upon" are relevant considerations which afford the court a guide in arriving at a proper figure.

When a man has paid for and properly expects an invigorating and amusing holiday and, through no fault of his, returns home dejected because his expectations have been largely unfulfilled, in my judgment it would be quite wrong to say that his disappointment must find no reflection in the damages to be awarded. And it is right to add that, in the course of his helpful submissions, Mr. Thompson did not go so far as to submit anything of the kind. Judge Alan Pugh took that view in Feldman v. Allways Travel Services, noted in 1957 Current Law Year at paragraph 934. That, too, was a holiday case. The highly experienced senior County Court Judge there held that the correct measure of damages was the difference between the price paid and the value of the holiday in fact furnished, "taking into account the plaintiff's feelings of annoyance and frustration".

The learned trial judge clearly failed to approach his task in this way, which in my judgment is the proper way to be adopted in the present case. He said:

> "There is no evidence of inconvenience or discomfort, other than that arising out of the breach of contract and covered by my award. There was no evidence of physical discomfort, e.g., bedroom not up to standard".

His failure is manifested, not only by these words, but also by the extremely small damages he awarded, calculated, be it noted, as "one half of the cost of the holiday". Instead of "a great time-", the plaintiff's reasonable and proper hopes were largely and lamentably unfulfilled. To arrive at a proper compensation for the defendants' failure is no easy matter. But in my judgment we should not be compensating the plaintiff excessively were we to award him the £125 damages proposed by the Master of the Rolls. I therefore concur in allowing this appeal.

LORD JUSTICE STEPHENSON: I agree. What damage has the plaintiff suffered for the loss to him which has resulted from the defendants' breaches of this winter sports holiday contract and was within the reasonable contemplation of the parties to this contract as a likely result of its being so broken? This seems to me to be the question raised by this interesting case.

The judge has, as I understand his judgment, held that the value of the plaintiff's loss was what he paid under the contract for his holiday; that as a result of the defendants' breaches of contract he has lost not the whole of what he has paid for, but broadly speaking a half of it, and what he has lost and what reduces its value by about one half includes such inconvenience as the plaintiff suffered from the holiday he got not being, by reason of the defendants' breaches, as valuable as the holiday he paid for.

I approach the judge's judgment bearing in mind the unfortunate fact that counsel's note of it has not been submitted to him for his approval in accordance with what has been said by this court about the rule which is now Order 59; Rule 19(4). I agree with the judge that the breaches were not fundamental, that the consideration for the plaintiff's payment to the defendants did not wholly fail and that, although the plaintiff was frustrated, the contract was not. In my judgment, however, the judge seems to have under-valued the loss to the plaintiff from the breaches which he found: no welcome party; no suitable cakes for afternoon tea; no yodler evening in the true sense of the words; the Alphutte Bar not open several evenings of the week; no service of the representative in the second week and no house party arrangements for the second week; no English spoken by Mr. Weibel, the owner; no full length skis until the second week; not much fun at night and no tobogganing or bowling by day or by night.

The learned judge in assessing the loss also under-estimated the inconvenience to the plaintiff, perhaps because he followed the distinction drawn by Mr. Justice Mellor in Hobbs' case and disallowed any inconvenience or discomfort that was not physical, in so far as that can be defined. I agree that, as suggested in McGregor on Damages, 13th Edition, at page 45, paragraph 66, there may be contracts in which the parties contemplate inconvenience on breach which may be described as mental: frustration, annoyance, disappointment; and, as Mr. Thompson concedes that this is such a contract, the damages for breach of it should take such wider inconvenience or discomfort into account.

I further agree with my Lords that the judge was wrong in taking, as I think he must have taken, the amount the plaintiff paid the defendants for his holiday as the value of the holiday which they agreed to provide. They ought to have contemplated, and no doubt did contemplate, that he was accepting their offer of this holiday as an offer of something which would benefit him and which he would enjoy, and that if they broke their contract and provided him with a holiday lacking in some of the things which they contracted to include in it, they would thereby reduce his enjoyment of the holiday and the benefit he would derive from it.

These considerations lead me to agree with my Lords that the judge was wrong in applying to this contract to provide a winter sports holiday the method of measuring damages for breach of warranty set out in section 53(3) of the Sale of Goods Act, as it was applied in Feldman's case, and that rather than try to put a value on the subject matter of this contract, first as promised and then as performed, and to include the inconvenience to the plaintiff in the process, we should award the plaintiff a sum of general damages for all the breaches of contract at the figure suggested by my Lord.

I would add that I think the judge was right in rejecting the plaintiff's ingenious claim, however it is put, for a fortnights salary. I agree that the appeal should be allowed and the plaintiff be awarded £125 damages.

(Appeal allowed:damages awarded of £125: costs in the Court of Appeal and in the County Court on scale 3, coupled with the general discretion)
