Supreme Court of British Columbia
Day v. C.H. Heist Ltd.
Date: 1987-05-20

F.G. Potts and R.C. Mottus, for plaintiff.

P.W. Butler, Q.C., for defendant.

(Vancouver No. C845122)

[1] May 20, 1987. MURRAY J.:– On 15th October 1984 the plaintiff commenced this action against the defendant, claiming damages for wrongful dismissal and other relief. All of the issues in the action have been settled except the following:

1. Should the plaintiff be compensated by the defendant for the capital loss he incurred on the sale of the house he and his wife purchased in North Vancouver when he moved to Vancouver to commence his employment with the defendant? That loss amounts to $92,080.51.

2. Should the plaintiff be compensated for mortgage interest payments and other residential expenses he was put to with respect to the house? The sum claimed is $30,800.19.

[2] The plaintiff's primary argument is that he had an express verbal contract with respect to both of the above issues. He testified that the contract was entered into at a meeting he had with officials representing the defendant in Florida on 2nd November 1981. My notes of his evidence in chief are as follows:

> We discussed my buying a house. Crowe (President of the Canadian Company) said I had a problem and they were going to do something. I outlined my problems. I left the room. I was called back in and told they would pay the interest portion of my mortgage. I was told by Heist II (Chairman of the Board) that they would pay the interest portion of the mortgage – over $125,000.00 up to a maximum of $225,000.00. If I did move and took a loss I was told there was no way I would lake a loss. A relocation allowance for two years was discussed for tax purposes – but in any case I would be looked after after the two years. I was satisfied with the assurances I got.

[3] In re-examination the plaintiff testified according to my notes:

> Heist's comments were not qualified. The subsidy would be continued in some different form after two years. In some way my mortgage payments would be made in full as long as I was in Vancouver but I wouldn't be here very long. It would not be paid in the form of a relocation allowance.

[4] The only written reference to the alleged agreement is contained in the following letter written by the defendant to the plaintiff on 9th February 1982.

> Mr. Jim Day

5556 Swordfern Place

North Vancouver, British Columbia

CANADA V7R 4T1

Dear Jim:

In recap of our agreement, C.H. Heist, Ltd. will pay as relocation expense during your employment the interest on $200,000 for a two-year period in accordance with the following schedule:

	C$ Principal	C$ Interest
January 1982		1,177.12 paid
February 1982	37.14	2,821.67 paid
March 1982	37.68	2,821.13
April 1982	38.23	2,820.58
May 1982	38.79	2,020.02
June 1982	39.36	3,819.45
July 1982	39.93	2,818.88
August 1982	40.51	2,818.30
September 1982	41.10	2,817.71
October 1982	41.60	2,817.11
November 1982	42.31	2,816.50
December 1982	42.93	2,815.88
January 1983	43.55	2,815.26
February 1983	44.19	2,814.62
March 1983	44.83	2,813.98
April 1983	44.49	2,813.32
May 1983	46.15	2,812.66
June 1983	46.82	2,811.99
July 1983	47.51	2,811.30
August 1983	48.20	2,810.61
September 1983	48.90	2,809.99
October 1983	49.62	2,809.19
November 1983	50.34	2,808.47
December 1983	51.07	2,807.74
January 1984	50.82	2,806.99

> By copy of this letter, I'm asking John Rowley our Treasurer to forward each monthly interest payment to you about 15 days prior to the beginning of the month.
>
> Cordially,
>
> C.H. Heist Corp.
>
> Richard J. O'Neil
> Vice President-Finance
>
> RJO:kd
>
> cc: A.R. Crowe, Sr.
> John Rowley

[5] This letter is notable in that it makes no reference to payments being continued after the expiration of the two-year period. It also qualities the payment period by the use of the words "during your employment". The letter is further notable because it contains no reference whatsoever to an agreement to indemnify the plaintiff against a capital loss. It is also important to note that the plaintiff did not reply to the letter complaining about the omission from the letter of the two important facets of the agreement on which he relies.

[6] Four officers of the defendant testified at the trial. There was some difference among them on various details but they all testified that there never was an agreement to compensate the plaintiff for any capital loss and they all testified that there was no agreement reached as to any payments of mortgage interest after the expiration of the two-year period. I accept this evidence particularly in light of the contents of the letter of 9th February 1982 which I have quoted above. I accordingly conclude that the plaintiff has failed to prove an express contract with respect to both of the issues in this case.

[7] As an alternative argument the plaintiff's counsel took the position that an employee who has been wrongfully dismissed may claim not only lost salary but also any other reasonable and foreseeable damages flowing from the breach of contract by the employer. He relied on the decision of R.E. Holland J. in *Earl v. Northern Purification Services Ltd.* (1980), 1 C.C.E.L. 267 (Ont. H.C.), and particularly the following passage at p. 272:

> Moving expenses and legal fees incurred by an employee as a result of wrongful dismissal are recoverable. See Johnston v. Northwood Pulp Ltd., [1968] 2 O.R. 521, 70 D.L.R. (2d) 15 (H.C.) and Vos v. Security Trust Co. (1969), 68 W.W.R. 310 (Alta.). I see no reason why the principle should not extend to real estate commission, carrying costs and interest which were all foreseeable damages caused by the breach. I have some concern in connection with the $9,000, being the loss on the sale. Was this loss reasonably foreseeable? I think it is certainly foreseeable that real estate will fluctuate in value – up or down. If the plaintiff had made a profit of $9,000 on this sale I am quite sure that the defendant would have required him to deduct this profit from the expenses

that he is claiming and I have come to the conclusion that it was foreseeable that the property would sell at a loss.

[8] Plaintiff's counsel also referred me to the unreported oral decision of Dohm J. in *Nyberg v. Kamloops,* Kamloops No, 2896, decided on 18th September 1980 where in a wrongful dismissal action he said at p. 8:

> In addition, I would allow special damages, if I may refer to them as such, in the sum of $4,138, being the cost of selling the plaintiff's home in Kamloops and his contribution to his superannuation plan.

[9] On the other hand, counsel for the defendant referred me to the recent judgment of Gumming J. in. *Dauphinee v. Bank of Montreal,* Vancouver No. C837089, 24th October 1985 [now reported 10 C.C.E.L. 36]. The following passages appear at pp. 19-21 [pp. 49-50 C.C.E.L.]:

> Not only is the Earl case clearly distinguishable on its facts; it has on two occasions by subsequent decisions in the same High Court of Ontario not been followed. In Hennessy v. La France Textiles Can. Ltd. [an unreported decision summarized (1981), 12 A.C.W.S. (2d) 233], Mr. Justice Osborne said of it:
>
> "What is foreseeable is a mixed question of fact, law, and general policy. In dealing with the issue of foreseeability in actions of this sort the Court is thrust into the position of attempting to import into general contractual arrangements what the Court's view of reasonableness is, not necessarily what the parties' terms at the time that the contract was entered into.
>
> "In my view, and I have this view even having regard to Mr. Justice Holland's judgment in the Earl case, I do not think that the loss on the safe of the Woodstock home was a foreseeable loss. It is, in my view, too remote. I might say as well that I do not think in the circumstances of this case that, had the plaintiff not sustained a loss but rather made a profit on the deal, the defendant could properly have brought an action in its favour, the profit on that transaction."
>
> Again, in Brisbois v. Casteel Inc. (1983), 2 C.C.E.L. 35 (Ont. H.C.), where the defendant employer sought to offset profits realized by the plaintiff on the sale of his house, an employee whom he had wrongfully dismissed, the moving and other expenses which the employer was obliged to pay, Mr. Justice Callaghan said, after expressing his agreement with the views of Mr. Justice Osborne at p. 46 of the report.
>
> "The profit on the real estate is, in my view, a result of market forces unrelated to the employment arrangement and has nothing to do with the amount of income the plaintiff would have earned had his employment not been wrongfully terminated. Had the plaintiff suffered a loss on his properties when he sold them, such loss, absent a contractual term, surely would not be chargeable against the employer defendant Such matters, in my view, cannot be considered to have been reasonably contemplated by the parties had they considered the consequences of a breach on entering the contract. While expenses would fall within that contemplation, capital gains and capital losses in real estate, in my view, do not …"

> In my opinion, this reasoning is applicable here. The fall in value of the plaintiff's house in White Rock is the result of a general decline in the real estate market; it is not the consequence of the defendant's wrongful failure to give proper notice of termination. The damage claimed is too remote to be recoverable.

[10] The decision of dimming J. is later in time than that of Dohm J. and, with the greatest respect, I prefer the reasoning of Dimming J. and hold that the plaintiff's argument on this branch of the case must fail.

[11] Counsel for the plaintiff also argued that the plaintiff was entitled to recover on the basis of damages for breach of a collateral warranty, or for negligent misrepresentation. I can find no factual or legal foundation for recovery under either of these heads.

[12] The plaintiff's claim on the issues before me is dismissed with costs to the defendant.

Order accordingly.