*Privy Council Appeal No.* 49 *of* 1926.

**The Toronto Hockey Club, Limited** - - - - - *Appellants*

*v.*

**The Arena Gardens of Toronto, Limited** - - - - *Respondents*

FROM

## THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1926.

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*Present at the Hearing:*

VISCOUNT HALDANE.
LORD ATKINSON.
LORD DARLING.
LORD JUSTICE WARRINGTON.
CHIEF JUSTICE ANGLIN.

[*Delivered by* LORD JUSTICE WARRINGTON.]

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In this appeal the only question is as to the amount of the damages to be awarded to the plaintiffs in respect of the breach of a certain contract, the subject-matter of two actions to be presently mentioned. The question of damages was referred to a Master for assessment. He fixed them at $100,000. Orde J. reduced this assessment to $10,000 and his decision was affirmed by the Court of Appeal. The plaintiffs appeal to His Majesty in Council, submitting that "the amount awarded by the Referee was not excessive and should be restored."

The facts of the case are so fully, and with one exception noted hereafter, so accurately stated by Orde J. in his elaborate judgment, that it is unnecessary to do more than give a short summary sufficient to explain what follows.

The plaintiffs are a Hockey Club which for some time prior to and including the season 1916 to 1917 had enjoyed the "franchise" or privilege of playing matches under the auspices

of The National Hockey Association, Ltd., of which they were members.

In the autumn of 1917 the plaintiffs were the owners of a professional hockey team in the sense that they had entered into contracts with certain players under which they were entitled to the exclusive services of those players for the following season, 1917-18. The season extends from December to April inclusive. Each contract contained a clause in the following terms :—

> " 10. The player will, at the option of the Club, enter into a contract for the succeeding season upon all the terms and conditions of this contract save as to clauses 1 and 10 and the salary to be paid to the player in the event of such renewal shall be the same as the total compensation provided for the player in clause One hereof, unless it be increased or decreased by mutual agreement."

Under the management of Mr. Livingstone, the plaintiffs' team had, by the autumn of 1917, become a highly efficient team, though its operations in previous seasons had resulted in loss.

In 1917 for reasons into which it is unnecessary to enter, the Association determined to suspend operations and a new League was formed to take its place, of which the plaintiffs' Club was not a member. In the new League, Toronto was represented by the defendants, the Arena Gardens of Toronto.

Under these circumstances, in order that the services of the team might not be lost in the ensuing season, 1917-18, the agreement in question was made between the plaintiffs and the Arena Gardens. The agreement was dated the 9th November, 1917, though it was not executed till some time later, after the arrangements for the formation of the League had been made. In the Courts below the matter was treated as if the references to the " Association " had been references to the " League."

The general effect of the contract was that for the season 1917-1918 the " franchise " should be operated by the " Arena " in place of the plaintiffs and that the players' contracts should be transferred to the Arena " to be held in trust " and that the contracts to be so transferred should include any to be afterwards acquired by either party. It was also provided that on the termination of the agreement all contracts of players should be transferred to the plaintiffs. The agreement was to continue in force for the season 1917-18. The agreement also provided for the division of profits between the two parties.

The operations for the season 1917-18 were successful. The team won the championship and the profits were considerable.

At the termination of the season the " Arena " reserved the services of the players, viz., they exercised the option given by clause 10 of the contracts for the season 1918-19. The new contracts contained clauses corresponding with clause 10, so that they obtained an option for a further season, 1919-20.

The " Arena," however, refused to transfer any of the contracts to the plaintiffs. This is the breach which in effect, gives rise to the present question. The first action was brought by the

plaintiffs against the Arena alone, and in it the plaintiffs claimed payment of their share of the profits (a matter not now in question) and a return of the players' contracts.

It was afterwards discovered that by virtue of certain arrangements made by the "Arena" an interest in the original contracts, as well as in those made under the option, was claimed by the two defendants, Querrie and Vearncombe, and the second action was commenced against the "Arena," these two defendants, and seven players, parties to the players' contracts. In this action the plaintiffs claimed damages equal to the profits which the plaintiffs had lost through being deprived of the services of the defendants players and they asked for a declaration that the "Arena" and the defendants, Querrie and Vearncombe, held the players' contracts in trust for the plaintiffs and an order for delivery thereof, including the contracts made under the option to the plaintiffs.

By the judgment in the first action as varied by the Court of Appeal, it was referred to the Master to ascertain and state what damages the plaintiffs had sustained by reason of the non-delivery of the players' contracts.

By the judgment in the second action it was, amongst other things, held that the "Arena" and the defendants, Querrie and Vearncombe held the players contracts in trust for the plaintiffs and it was ordered that it be referred to the Master to ascertain and state the damages sustained by the plaintiffs by reason of the plaintiffs being deprived of the services of the players in breach of the contract between the plaintiffs and the "Arena."

Substantially the damages to be ascertained under the two references are damages for the same breach of contract, viz., failure to return to the plaintiffs at the end of the season 1917-18 the right to require the services of the players in the succeeding seasons. The declaration in the second action was made necessary by the dealings of the "Arena" with the fresh players' contracts and really makes no difference to the rights of the plaintiffs in respect of damages.

In their Lordships opinion Orde J. was clearly right in rejecting the report of the Master and for the reasons which he gives. The Master applied a measure of damages not applicable in the case of breach of contract. In such a case the damages are the actual loss occasioned to the plaintiffs and the amount cannot properly be increased as the Master increased it by considerations, which are only applicable to actions of tort. It is only in the latter cases that exemplary or punitive damages can be awarded.

But it is contended that although the Master's award cannot stand, the award of Orde J., confirmed by the Court of Appeal, erred on the other side by being for too small a sum.

In their Lordships' opinion this contention fails. They cannot find that Orde J. or the Court of Appeal acted on any wrong principle. The amount of damages in such a case as the present cannot be ascertained by any precise means, it must be more or

less guess work. Orde J. in their Lordships' opinion, and the Court of Appeal still more clearly, based their conclusions on what they thought to be the value of the services of the team of which the plaintiffs had been deprived. They estimated this by reference to the amount for which the plaintiffs were willing in 1917 to transfer those services and the amount for which the defendants actually transferred them at a later date and they accepted a mean between those amounts. It is, in their Lordships' opinion, impossible to say that they were wrong in the course they took.

It is said and said truly that Orde J. made a slip in point of fact in not noticing that the renewed contracts contained a further option for the season 1919-20. But in their Lordships' opinion, seeing that the damages were ultimately assessed, not by reference to the profits which the plaintiffs might have made in subsequent seasons, but on the basis of the capital value of the assets of which they were deprived, and considering also the standard by which this value was ultimately fixed, the mistake in question should not affect the result.

It was contended that the damages should be arrived at by reference to the profits made by the defendants as trustees or which, but for their wilful default, they might have made. The answer is that what the Court had to deal with was not an account of profits but damages for breach of contract and in any case, wilful default is out of the question, as no such default is found by the judgment.

It was also contended that the damages should be assessed at the amount of the profits which the plaintiffs would have made if they had possessed the team in the seasons 1918-19 and 1919-20. But, in their Lordships' judgment, it would have been impossible to make a satisfactory estimate of the amount of such profits. Moreover, they had no " franchise " for those seasons and no ice unless they could obtain it from the " Arena." They might, of course, have succeeded in getting over these difficulties, but the position was much too uncertain and speculative to form a basis of assessment.

On the whole for the above reasons and for those given in the Courts below, this Board is of opinion that the appeal ought to be dismissed with costs and will humbly advise His Majesty accordingly.

In the Privy Council.

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THE TORONTO HOCKEY CLUB LIMITED

*v.*

THE ARENA GARDENS OF TORONTO, LIMITED

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DELIVERED BY LORD JUSTICE WARRINGTON.

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