such a course would be practicable. The situation is therefore one where, if a choice must be made as to which of two innocent parties is to suffer, the preservation of recognised legal standards demands that the burden of any loss should remain where it has fallen.

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BREACH OF CONTRACT OF SERVICE

NATIONAL COAL BOARD v. *GALLEY*

The Court of Appeal[1] in *National Coal Board* v. *Galley*[2] upheld a decision of Finnemore, J. at Nottingham Assizes that the defendant, a deputy[3] employed by the Board, had been in breach of his contract of service by failing to work a "voluntary" Saturday shift, and was liable in damages, but it disagreed with him on the nature and the measure of damages, therein raising two important aspects of this question.

The defendant, in 1949, had entered into a written contract of service with the Board which provided *inter alia* that it should be regulated by "such national agreement or subsidiary agreements for the time being in force in the industry". In 1952 the National Association of Colliery Overmen and Deputies and Shotfirers (Nacods) of which the defendant's trade union was a member, reached an agreement with the Board "on revised terms and conditions of employment of deputies" this agreement containing a provision that "deputies shall work such days or part days in each week as may reasonably be required". The exigencies of the industry required that deputies, who were paid an "upstanding" weekly wage, could be and in fact were required to work a Saturday shift without payment of overtime.

In June 1956 the deputies at the plaintiff's colliery individually gave notice to the Management that they would not work on Saturdays in future and production was thereby prevented each Saturday between 16th June and 25th August, 1956, at which latter date substitute deputies were employed. Following the initial Saturday breach the plaintiffs issued a writ against the defendant claiming damages limited to £100 for breach of contract and were awarded that amount by Finnemore, J.

On the main question as to breach of contract the Court found that the defendant, by working since 1952 in the terms of the "Nacods" Agreement, had, in effect, adopted that Agreement; that its terms as to reasonableness were not too vague;[4] that the court would supply an implied condition as to reasonableness where duties are not fully defined;[5] and the fact that reasonableness is difficult to decide in a given case should not deter it from deciding what, in the circumstances, is a reasonable requirement. The Court came to the conclusion that the defendant had been reasonably required by his employers to work the Saturday shift on 16th June and, in refusing so to do, he was in breach of his contract of service.

Finnemore, J. had held that, in assessing damages for the breach, he was entitled to take into account matters occurring after the issue of the writ, and so regarded the defendant's continued abstention on succeeding Saturdays until February, 1957 as a continuing cause of action; invoking, as his authority,

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[1] Jenkins, Parker and Pearce, L.JJ.

[2] (1958) 1 W.L.R. 16, (1958) 1 All E.R. 91.

[3] These employees were responsible for safety measures in the mine, their attendance being essential to the working of the shift. They did not, however, participate in the actual winning of the coal.

[4] On the principle of *May & Butcher* v. *The King* (1934) 2 K.B. 172.

[5] *Hillas & Co. Ltd.* v. *Arcos Ltd.* (1932) 147 L.T. 503 *Foley* v. *Classique Coaches Ltd.* (1934) 2 K.B. 1.

the provisions of RSC Order 36, Rule 58.[6] His Honour had relied upon *Hole* v. *Chard Union*[7] where damages for nuisance,[8] subsequent to the writ, were assessed by virtue of that rule.[9] The Court considered it must be a "question of degree" as to whether separate acts are so "close in time and quality" as to be so described, but, as to breaches of obligation in contract, this must also depend on the nature of the particular obligation. There must in their view, "be a quality of continuance in both the breach and the obligation",[10] and, on this test a continuing cause of action is not constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation.

One must agree that convenience and common sense support a broader view of the Rule and of the principle involved and must share the Court's reluctance in its finding that the succeeding breaches of contract could not be dealt with as a continuing cause of action.[11] Admittedly, this interpretation of the term is an important contribution to the authorities on the question of damages in that it lays down those dual requirements of "continuance", but their Lordships' references to "a question of degree" and "the nature of the particular obligation" leave it open for future decisions on this question to be grounded on the facts of each particular case. In distinguishing *Hole* v. *Chard Union*[12] the Court has created an exception to what was regarded as a general principle, so that some revision and restatement of the terms of the relevant rule and any equivalent statutory provision appears desirable.

On the measure of damages, it had been proved that the loss of profit incurred by the plaintiff due to the abandonment of the Saturday shift of 16th June was £535/0/0. There was no suggestion that the impossibility of working that shift arose other than through the refusal of the deputies concerned to report for work, and one would have thought the true measure of damages to be properly a proportion of that figure based upon the number of deputies rostered for that shift. Indeed, the reasoning of the court to some extent supports that basis. If the defendant had been a face-worker actually producing coal he would have been liable in damages in proportion to his share of the work involved in obtaining that profit.[13] *Ebbw Vale Steel Iron and Coal Co.* v. *Tew*[14] was cited in support of this proposition, including the statement of Roche, L.J. therein that "a tribunal must do its best to assess the contribution of the workman in question to output and arrive at a figure representing his 'notional' output".[15] The Court, however, decided that loss of output was not the measure of liability here and reduced the damages awarded to £3/18/2, the cost of employing a substitute.[16]

This basis of assessment, it is submitted, is far from satisfactory for these reasons:

(i) It does not take into account the availability or otherwise of such substitute

[6] R.S.C., 0.36, r. 58 reads "Where damages are to be assessed in respect of any continuing cause of action they shall be assessed down to the time of the assessment."

[7] (1894) 1 Ch. 293.

[8] The defendants had claimed and exercised the right to discharge waste into a stream in contravention of the plaintiff's rights.

[9] *Per* Lindley, J. at 295: "What is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind."

[10] *Per curiam supra*, at 27.

[11] The Court instanced the separate breaches of contract involved in failure to pay two consecutive monthly instalments of an annuity as illustrative of distinct (non-continuous) causes of action.

[12] *Supra.* This case had been regarded as authority for the general principle that repetitive (tortious) acts of a continuing nature were in effect to be regarded in assessment of damages.

[13] "Where breaches of contract by A & B acting in concert each contribute to the loss it would be right to value the loss of the services of each as one-half of the loss". *Supra*, at 26.

[14] (1935) 1 L.J. N.C.C.A. 284.

[15] *Id.* at 288.

[16] *Cf. Outtrim Howitt & British Consolidated Coal Co. Ltd. (No Liab.)* v. *Gregory*

(on the analogy of an available market in breach of contract for supply of goods);[17] and (ii) if applied in a case where wages payable for working a "Saturday shift" were to be additional to the weekly wage i.e. overtime pay, the measure of damages would be *nil* because no pay would be due if no shift were worked—this is quite anomalous; (iii) damages in such event should not be nominal as, virtually, they are in the case, but substantial[18] and, it is submitted, should be related to the employer's actual loss.[19]
The Court decided, however, that it had not been shown that the defendant's breach contributed to the loss of output, and, therefore, that the loss of output was not the measure of his liability.[20]

The judgment of the Court reducing the amount of damages and its patent anxiety to restrict the liability of the defendant can be explained, although, it is submitted, not entirely justified, by the conditions applying in modern industry where a legal proceeding to uphold the rights of an employer injured by actions of his employee, whether such actions be legal or not, is out of fashion and has come to be regarded as against "public policy".[21] The dissenting judgments in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[22] seeking as they do to promote an employee to a favoured position of exoneration from the consequences of his wrongful acts are illustrative of these trends towards "insurance" protection in industrial situations. The majority judgments in that case, and the present decision, insofar as it affirms the employee's liability for breach of contract, may be regarded as indications that employees today still have individual responsibility for their defaults and omissions, despite the collective powers and immunities gained by them through labour organizations and paternal industrial legislation.[23] It is not often that a case of "breach of contract of service" of this nature arises for decision; indeed, in N.S.W., this type of matter is generally settled by industrial arbitration, often after the employer has incurred, without adequate redress, substantial loss through organized industrial action disruptive of his business operations.

Protagonists of "enlightened" industrial legislation weighted in favour of the employee and his organisations may deplore this judicial support of the

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(1903) 28 V.L.R. 586, *per* Madden, C.J. "The plaintiff is *prima facie* entitled to recover the share which (the defendant's) absence represented of all the expenses incurred by the Company which were rendered useless by (the defendant's) absence", and further (on the question of damages) "If the Justices cannot work it out on definite principle it is unquestionably the fact that there is some loss occasioned the complainant—they should give it some such reasonable sum, as would represent that loss, working it out as best they can."

[17] And here all of the deputies available had refused duty.

[18] *Bowes & Partners* v. *Press* (1894) 1 Q.B. 202, where miners refusing to descend the pit because of a dispute over non-unionists were held in breach of their contracts and liable in "substantial" damages.

[19] Also the remarks of Lord Alverstone in *Robinson* v. *Insoles Ltd.* (1910) 102 L.T. 45, where miners were held liable in damages for refusal to work hours required by their employers in accordance with the local Mines Regulation Act, 1908.

[20] As, on the authority of *Ebbw Vale* v. *Tew*, would otherwise have been the case. On this reasoning a deliberate refusal to work (in breach of his contract) of, say, one crane driver for whom no substitute is available, causing the stoppage of a whole plant with substantial loss of production would give his employers no adequate redress in damages. It is suggested, with respect, that such an interpretation denies to an employer the redress to which he should reasonably be entitled.

[21] The Court of Appeal pointed out that the defendant was not charged with the tort of inducing a breach of contract (each of the deputies concerned might conceivably have been sued for mutual inducement) or of conspiracy. This *dictum* does not affect the decision, based as it is on a matter of contract not of tort, and, accordingly, the involved questions concerning the relation of these torts to the law of master and servant do not require discussion here. The leading cases of *Crofter Harris Tweed* v. *Veitch* (1942) A.C. 435, and *D. C. Thomson Ltd.* v. *Deakin* (1952) Ch. 646, would be relevant in such a discussion and for a learned and interesting comment upon this subject see J. Stone, *The Province and Function of Law*, Ch. XXIII *passim* (esp. 620-26).

[22] (1957) 2 W.L.R. 158, and of Denning, L.J. in (1955) 3 All E.R. 460 (C.A.).

[23] The decision in *Lister's Case*, although criticized in some quarters, is an emphatic assertion of the responsibility of an employee to his employer for the proper performance of his duties.

employer's contractual rights. Yet it may be that neither judiciary nor legislature is willing to restrict such rights further, even under the threat of widespread industrial action, or in accordance with a supposed "public policy" favouring the individual worker's special immunity from legal consequences of his actions, analogous to the legislative protection afforded trade unions.

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