

CANADA / JUDGMENT

Levy v. Manley

[1975] 2 SCR 70**COURT**

Supreme Court of Canada

DECIDED

27 May 1974

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Levy v. Manley Collection Supreme Court Judgments Date 1974-05-27 Report

[1975] 2 SCR 70 Judges Laskin, Bora; Martland, Ronald; Judson, Wilfred; Spence, Wishart Flett; Pigeon, Louis-Philippe On appeal from Ontario Subjects Action Appeal Decision Content Supreme Court of Canada Levy v. Manley, [1975] 2 S.C.R. 70 Date: 1974-05-27 Benjamin Levy (Defendant) Appellant; and Albert Manley (Plaintiff) Respondent; and Albert Manley (Plaintiff) Appellant; and Benjamin Levy, Mark S. Levy, Morris P. Levy, Edward Levy, Esther Mehr, Sophie Rumach, Marlevy Corporation Limited, Benlevy Corporation Limited, Peplevy Corporation Limited and Edlevy Corporation Limited (Defendants) Respondents. 1974: April 24, 25; 1974: May 27. Present: Laskin C.J. and Martland, Judson, Spence and Pigeon JJ. ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. Appeal—Supreme Court of Canada—Concurrent findings of fact—Oral judgment by Court of Appeal—Assessment of weight of concurrent findings in light of oral judgment. Interest—Calculated from date of judgment at trial—Supreme Court Act, R.S.C. 1970, c. S-19, s. 52—The Judicature Act, R.S.O. 1970, c. 228, s. 40. The issues were whether Levy, for himself and the Levy family, had contracted with Manley to arrange a contact with a prospective purchaser of the majority interest in Levy Industries Limited with remuneration to be paid to Manley if the purchase was carried out and whether the parties had in the contract, if any existed, fixed the remuneration. The trial judge made strong findings in favour of Manley's version of the transaction but found also that Levy had no authority to bind the others as he purported to do. Damages were awarded against Levy for breach of warranty of authority. The appeal against the judgment at trial was dismissed by the Court of Appeal in an oral judgment and the amount of the judgment increased from \$125,000 to \$587,000, with costs. The cross-appeal dealt only with the question of interest and whether this should run by virtue of s. 40 of The Judicature Act, R.S.O. 1970, c. 228 from the date of judgment at trial; the respondent, Manley, contending that interest should run from January 30, 1969, the date the finder's fee became payable or alternatively from the date on which the action was commenced. Held: The appeal should be dismissed with costs; the cross-appeal as to interest should be dismissed without costs. The appeal has to be considered in the light of concurrent findings of fact against the appellant, Levy, at trial and on appeal. That the Court of Appeal gave an oral judgment rather than written reasons

after a reservation of judgment does not, in the absence either of evident misapprehension by that Court of what the issues were or of some misstatement of the findings of fact, justify the Supreme Court in departing from the normal rule that it will not interfere with concurrent findings of fact in two provincial courts. In the matter of the cross-appeal interest was not claimed in the writ or statement of claim but was claimed in the notice of appeal to the Court of Appeal. There is no basis for enlarging the period from which interest runs beyond the period prescribed by s. 40 of The Judicature Act, R.S.O. 1970, c. 228; on the other hand s. 52 of the Supreme Court Act, R.S.C. 1970, c. S-19, does not require this Court to refuse to recognise the prescriptions of s. 40 of The Judicature Act; s. 52 is designed to preserve a right to interest not to diminish it. APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of Donohue J. at trial. CROSS-APPEAL as to interest only. Appeal dismissed with costs; cross-appeal dismissed without costs. P.B.C. Pepper, Q.C., R.K. Laishley, Q.C., and D.H. Jack, for the appellant, Benjamin Levy. J.G. Weir, Q.C., for the respondent, Albert Manley. R. Baker, for the other respondents. The judgment of the Court was delivered by THE CHIEF JUSTICE—In this case, the respondent Manley was the successful plaintiff before Donohue J. and before the Ontario Court of Appeal in an action brought by him against Benjamin Levy, the appellant in this Court, against five members of the Levy family other than the appellant, against four Levy family corporations and against Seaway Multi-Corp. Limited. At the trial, Seaway succeeded in a motion for non-suit and was not further involved in the proceedings either in the Court of Appeal or in this Court. Manley succeeded at trial against the appellant only and, before the Court of Appeal, succeeded in his cross-appeal against the appellant only, his cross-appeal to engage the liability of the other defendants being dismissed. In this Court, Manley as respondent has cross-appealed against the exoneration of these other defendants, seeking to involve them in liability if this Court should decrease the amount of the judgment in his favour against Benjamin Levy decreed in the Court of Appeal, which increased the award of \$125,000 by the trial judge to the sum of \$587,400. There is also a cross-appeal as to interest, to which I will refer later in these reasons. No argument of substance was addressed to the Court as to the liability of the defendants other than Benjamin Levy, their retention as parties being merely by way of caution pending the eventual judgment of this Court on the main appeal. I would dismiss the cross-appeal as to them with costs. The issue in the main appeal falls to be considered in this Court in the light of concurrent findings of fact against the appellant by the trial judge (whose findings involved assessments of credibility) and by the Court of Appeal. I would not draw any distinction as to the strength of those concurrent findings between a case where the Court of Appeal has in reasons following upon a reservation of judgement made as meticulous a canvass of the facts as did the trial judge and a case where, as here, the Court of Appeal has announced its confirmatory decision in an oral judgment in which the facts are briefly stated in relation to the findings, there being no evident misapprehension by the appellate Court of what the issues were and no misstatement of the findings of fact. What was in issue between the appellant and the respondent was (1) whether the appellant had contracted with the respondent on behalf of the Levy family (including himself) to

remunerate the respondent for arranging a contract with a prospective purchaser of the Levy family's majority interest in a company with diversified interests known as Levy Industries Limited, the remuneration to be payable if a sale and purchase was carried out, and (2) whether the appellant and the respondent had fixed the remuneration in that contract. What is common ground is that the appellant did enter into an arrangement in October, 1968 with the respondent for the latter to act as a "finder" of a purchaser of the Levy shares, a deal which if consummated as it was, would be for a purchase price of a sum between twenty-five and thirty million dollars. The respondent's position was that an agreement had been made with the appellant whereby the Levy group would pay a finder's fee of two per cent of the purchase price of the shares if sold to a purchaser who was put in touch with the Levy group through Manley. It was the appellant's position that his arrangement with Manley was to have the latter act as a "finder" who would obtain his finder's fee from the purchaser with the appellant's assistance and that the fee would be in a reasonable amount, such as \$100,000 or thereabouts. At that very time, the Levy group was negotiating with an American corporation for the sale of their shares, and their American finder had agreed to take a fee of \$110,000 if a sale and purchase resulted. Manley was able to get Seaway into negotiation with the Levy group through the offices of one Sherman, and in the result a contract of sale for \$29,370,000 was entered into on October 26, 1968 and was carried out in a closing on January 30, 1969. The price obtained by the Levy group was much more favourable than that for which the American firm had been negotiating. The trial judge made strong findings in favour of Manley's version of the transaction but found that the appellant had no authority to bind the Levy group for whom he purported to speak. There was thus a breach of warranty of authority, but the trial judge proceeded to award damages on the basis of deceit on the appellant's part which induced the respondent to forgo an opportunity to bargain with Seaway for a favourable fee. I should say that the trial judge also found that the appellant had got Seaway to agree to pay some part of the finder's fee. Indeed, in the filing statement required by the Toronto Stock Exchange there is a notation of a finder's fee of \$100,000 payable to Manley and to Sherman. This, *inter alia*, was relied upon by the appellant in support of his version of the arrangement with Manley. On the basis of a finding of breach of warranty of authority, the Court of Appeal in supporting that finding felt impelled to assess the damages according to what Manley would have recovered if the appellant had the authority that he represented. This view of the matter, once the findings below were accepted, was not contested and, accordingly, damages were fixed at two per cent of the purchase price, namely \$587,400. In asking this Court to allow the appeal outright, or, at least, to vary the judgment in appeal by restoring the trial judge's award as a quantum meruit recovery, the appellant urged the improbability of a transaction of the magnitude put forward by respondent, which was said to have been entered into in the shower room on the third floor of a private members' social club to which the parties repaired for a shower and then a talk, without any previous intimation by the appellant to the respondent of the reason for going up to the third floor shower room. There is no scrap of writing to support the arrangement alleged by the respondent, which rested throughout, without corroboration by other testimony, on his

version of an oral conversation with the appellant who, in turn, denied the shower room events, although admitting or alleging a different version of the arrangement (as already recited) and on a different and earlier date in October, 1968 than that of October 15 to which the respondent swore. Although counsel for the appellant in this Court submitted that the trial judge was guilty of a number of errors of law, as, for example, in allegedly allowing the discovery evidence of an officer of Seaway to operate against the appellant (an allegation which, in my view, was not made out), the case involved in essence only a contest for the favourable decision of the trial judge on the credibility of the one or the other of the two parties, Manley and Benjamin Levy. They were represented by competent counsel who left no area of the events to which those parties testified unexamined, and who brought into play (as the nature of the case demanded) every aspect of the conduct and movements of the two parties during the periods in which the events allegedly occurred. There were inconsistencies in the evidence of each, and some of the events on which testimony was given may have stretched credulity; but, in the end, the question at issue was uniquely one for a trial judge before whom the parties and their witnesses appeared, with all their virtues and their blemishes. His reasons canvass the evidence in considerable detail, and no purpose would be served in recounting it here. In coming down squarely in favour of the respondent on what the arrangement was, the trial judge had necessarily to consider the probabilities as part of his function to weigh the evidence and, of course, as part of his function to determine what evidence to accept as a result of hearing and seeing the witnesses. It cannot be doubted that the record, looked at coldly, as it must be by an appellate Court, could equally support a finding in favour of the appellant. The Court of Appeal did not, however, find in the case any ground for rejecting the trial judge's findings in favour of the respondent on the main issue of the nature of the arrangement. However doubtful I may be whether I would have made the same findings as did the trial judge, I, too, can see no basis in the record for second-guessing him in a situation which called especially for the exercise of judgment which only a trial judge can provide. I would accordingly dismiss the appeal with costs. There remains the question of interest on which the respondent has cross-appealed. What he has now is a judgment for \$587,400 on which interest runs, by virtue of s. 40 of the Judicature Act, R.S.O. 1970, c. 228, from March 20, 1972, the date of judgment at trial. The respondent's contention is that interest should be allowed as from January 30, 1969, the date on which Manley's finder's fee became payable or, alternatively, from February 19, 1969, the date on which action was commenced. The appellant, as respondent on the cross-appeal, urged that interest should be denied or, alternatively, that it should run only from December 22, 1972, being the date on which execution of the judgment as directed by the Ontario Court of Appeal was stayed, this being allegedly in conformity with s. 52 of the Supreme Court Act, R.S.C. 1970, c. S-19. It is a fact that interest was not claimed in the writ or in the statement of claim, and a demand therefor was first made in the notice of appeal to the Court of Appeal. I am unable to appreciate how, in such a case as this, there can be any ground for enlarging the period from which interest runs beyond the period prescribed by s. 40 of the Ontario Judicature Act. Correlatively, it would be novel indeed to deny interest to the successful plaintiff from

the date of the judgment at trial when, in my opinion, there is no disentitling circumstance. The amount of the recovery cannot of itself affect the right to interest under s. 40. I do not read s. 52 of the Supreme Court Act as requiring this Court to refuse to recognize the prescriptions of s. 40 of the Ontario Judicature Act; it is addressed to an entirely different situation and is designed to preserve a right to interest rather than to diminish it. I find it unnecessary, in the circumstances present here, to consider the applicability of s. 38 of the Ontario Judicature Act. I would dismiss the cross-appeal as to interest without costs. Appeal dismissed with costs; Cross-appeal as to interest dismissed without costs. Solicitors for the appellant, Benjamin Levy: Hughes, Laishley, Mullen, Touhey & Sigouin, Ottawa. Solicitors for the respondent, Albert Manley: Weir & Faulds, Toronto. Solicitors for the other respondents: Rosenfeld, Schwarz, Malcolmson & Milrad, Toronto.

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