

According to the evidence, and as found by Middleton, J., there was no open market for player-pianos, in the sense in which the term is used in the cases. They are not sold, like grain or cattle or stock, upon the open market or exchange. Middleton, J., lays down the correct rule—that “the fundamental principle in all cases of breach of contract is that, so far as money can do it, the other party to the contract shall be placed in as good a situation as if the contract had been performed, this principle being subject to the qualification that the plaintiff has cast upon him the obligation of taking all reasonable steps to mitigate his loss consequent upon the breach:” *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London*, [1912] A.C. 673; *Payzu Limited v. Saunders*, [1919] 2 K.B. 581; *Leake on Contracts*, 6th ed., p. 778; *Elbinger Actien-Gesellschaft v. Armstrong* (1874), L.R. 9 Q.B. 473, 476.

The onus of proving that there was an open market for this piano at Chatham or elsewhere was upon the defendant, and he made no attempt to prove it.

The Master did not expressly state on what grounds he proceeded in assessing the damages at \$391; but it was probably because he knew that there was no open market in Chatham or vicinity for such an instrument, and because the plaintiffs had, on its rejection by the defendant, removed it to their warehouse in Toronto. Assuming that it would be or was resold by another agent for the same amount, and that the agent was paid the same commission as Glassford, who made the sale to the defendant, the proper amount would be that of the actual loss sustained by the plaintiffs according to the foregoing principles.

That amount would be \$325, and not \$391. The order of Middleton, J., and the Master's report should be varied by reducing the damages to \$325, and there should be no costs of the appeal.

Order below varied.

SECOND DIVISIONAL COURT.

JUNE 17TH, 1920.

BROWN v. MAWHINNEY.

Fraud and Misrepresentation—Sale of Business—Action for Deceit—Necessity for Proof beyond Reasonable Doubt—Evidence—Failure to Satisfy Trial Judge—Appeal—Claim for Articles not Delivered on Sale—Dismissal of Action without Prejudice to Claim.