

Inglis v. The Great West Life Assurance Co.

[1941] O.R. 305-312

ONTARIO
[COURT OF APPEAL]

GREENE J.
20th AUGUST 1941.

Contracts -- Insurance agents -- Commissions -- Renewal
premiums -- Restraint of trade -- Penalties.

An agreement between a life insurance company and an agent of the company contained the following clause: "Either party may at any time with or without cause terminate this agreement by giving notice ... provided that if this agreement shall be terminated after having remained in force for not less than three full years and if the agent shall have fully complied with all the terms hereof, and if the agent shall have fully complied with all the terms hereof, the company shall continue to pay to the agent (during a period equal to that for which this agreement may have been in force) the commissions on business written during the continuance of this agreement to which the agent would have been entitled if this agreement had remained in force. Should the agent become connected with or do business directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claim to commissions under this paragraph".

Held, that the last sentence of the above quoted clause of the agreement is not in the nature of a penalty from which the agent is entitled to be relieved as inequitable nor is it void as being in restraint of trade. If the agent chose to join another life insurance company his right to payment of commissions would cease in pursuance of the agreement by which

the agent voluntarily bound himself in the beginning.

AN action on a contract between a life insurance company and an agent of the company.

The action was tried by GREENE J. without a jury at Toronto.

H. Freshman, for the plaintiff.

J.R. Cartwright, K.C., for the defendant.

August 20th, 1941. GREENE J:-- The action arises out of a written contract made between the parties hereto in March, 1927, whereby the defendant appointed the plaintiff its agent to solicit insurance in the City of Windsor and the surrounding district. The agreement was terminated by the defendant in November, 1935, and the defendant company continued to credit the plaintiff's account with commissions on renewal premiums of policies obtained by him until June, 1936, when the plaintiff became connected with another life insurance company.

The plaintiff sues for (a) damages for wrongful dismissal, (b) payment to him to date of all commissions on renewal business, and (c) a declaration that he is entitled to commissions on such renewal business in the future. In November, 1935, when the contract was terminated by the defendant, the plaintiff was indebted to the defendant for advances made, and the commissions on renewal business between then and June, 1936, were credited to the plaintiff's account, leaving a balance standing against him in the books of the defendant company of \$1,441.26. The defendant counterclaims for this amount.

The action really turns upon the effect of the following clauses in the contract:

"4. Renewal Commissions. If the Agent shall produce in any contract year personal paid for business of \$50,000 or over, the company shall pay him during the continuance of this

contract, renewal commissions as follows on the premiums received on such business:

.....

"17. Either party may at any time with or without cause terminate this agreement by giving notice to that effect, the company to be addressed to its Head Office at Winnipeg, Manitoba, or the Agent to Windsor, Ont., provided that if this agreement shall be terminated after having remained in force for not less than three full years and if the Agent shall have fully complied with all the terms hereof, the Company shall continue to pay to the Agent, (during a period equal to that for which this Agreement may have been in force) the commissions on business written during the continuance of this agreement to which the Agent would have been entitled if this agreement had remained in force. Should the Agent become connected with or do business directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claim to commissions under this paragraph. Any commissions which after the termination of this agreement the company shall continue to pay in accordance with the terms of clause 17 hereof shall be reduced by a collection fee of 1% of the premiums on which such commissions are to be paid."

The plaintiff did become entitled to renewal commissions as provided for in clause 4.

As regards the claim for wrongful dismissal, the words of clause 17 are perfectly clear. The agreement may be terminated by either party at any time with or without cause. It is quite irrelevant as to whether there existed good ground for the termination or not.

the plaintiff's main claim is for relief against forfeiture of renewal commissions after he became connected with another

to any portion of the world. It could be argued with great force that the wording of the clause would apply if the

plaintiff took a position as watchman of a vacant building in a wilderness for another insurance company. As a matter of fact while it does not affect the principle involved, the plaintiff took a position as agent for another company in the City of London, where it is extremely unlikely that connections made by him in Windsor could be used by him to the disadvantage of his previous employers.

Mr. Cartwright's argument as always is logical and entitled to respect. He points out that paragraph 4 contains a contract exactly similar in terms to that upheld by the Supreme Court of Canada in Confederation Life and Berry (supra) and that it cannot be disputed that paragraph 17 as a whole acts in amelioration of the harsh terms of paragraph 4. If it was the function of the Court to review the fairness of the consideration on each side of a contract, then in view of the decision in Confederation and Berry, Mr. Cartwright's contention would have to prevail. It is hardly necessary to state that such is not the function of a Court. In this case the insurance company promised certain remuneration to the agent for certain work. The work had been done and the agent was entitled to remuneration on the terms set out. The question, is, was the company entitled to deprive the agent of part of his remuneration under the terms of the proviso under discussion.

In my opinion the clause, whether viewed as a penalty or as a contract in restraint of trade, is void because it contains absolutely no limitation as to time, place, or nature of the forfeiture clause.

It is my understanding that commissions since June 3rd, 1936 (when the defendant ceased crediting the plaintiff with commissions) will more than take care of the counterclaim but if such is not the case, then the defendant will be entitled to judgment for the balance of its counterclaim but without costs.

The defendant appealed to the Court of Appeal from the judgment of Greene J. to any portion of the world. It could be argued with great force that the wording of the clause would apply if the plaintiff took a position as watchman of a vacant

building in a wilderness for another insurance company. As a matter of fact while it does not affect the principle involved, the plaintiff took a position as agent for another company in the City of London, where it is extremely unlikely that connections made by him in Windsor could be used by him to the disadvantage of his previous employers.

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In my opinion the clause, whether viewed as a penalty or as a contract in restraint of trade, is void because it contains absolutely no limitation as to time, place, or nature of the connection with another insurance company.

There will be judgment in favour of the plaintiff, with costs, declaring that he is entitled to receive all renewal commissions falling to him under the contract irrespective of the forfeiture clause.

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The defendant appealed to the Court of Appeal from the

judgment of Greene J. December 3rd, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN and FISHER JJ.A.

J.R. Cartwright, K.C., for the defendant, appellant.

H. Freshman, for the plaintiff, respondent.

December 12th, 1941. The judgment of the Court was delivered by MASTEN J.A.:-- This is an appeal by the defendant from a judgment of Greene J., dated the 20th August, 1941, whereby it was declared that the plaintiff is entitled to payment to himself of renewal commissions irrespective of the forfeiture clause contained in his contract with the defendant company, and whereby a reference was directed to the Master to take an account of the moneys so payable, and for payment of the amounts so found due; and whereby it was further ordered that the defendant recover against the plaintiff on its counterclaim such amount, if any, as remained due to the defendant after crediting all commissions due to the plaintiff.

On the hearing of the appeal all the various claims put forward by the plaintiff in the statement of claim were abandoned save one, namely, the prayers numbered 6(a) and (b) in the statement of claim, which read as follows:

"6. The plaintiff therefore claims:

(a) payment to himself of all commissions to which he is entitled as of this date in such sum as this Honourable Court may decide.

(b) a declaration that he is entitled to renewal commissions in the future."

The counterclaim of the plaintiff for which judgment was granted at the trial was not contested either as to its validity or as to the amount claimed, namely, \$1,441.26, and the sole question discussed before the Court relates to the construction and the effect in equity of paragraph 17 of the agreement between the plaintiff and the defendant (Exhibit 1) at the trial. That clause reads as follows:

"17. Either party may at any time with or without cause terminate this agreement by giving notice to that effect, the Company to be addressed to its Head Office at Winnipeg, Manitoba, or the Agent to Windsor, Ont., provided that if this agreement shall be terminated after having remained in force for not less than three full years and if the Agent shall have fully complied with all the terms hereof the Company shall continue to pay to the Agent, (during a period equal to that for which this agreement may have been in force) the commissions on business written during the continuance of this agreement to which the Agent would have been entitled if this agreement had remained in force. Should the Agent become connected with or do business directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claim to commissions under this paragraph. Any commissions which after the termination of this agreement the Company shall continue to pay in accordance with the terms of clause 17 hereof shall be reduced by a collection fee of 1% of the premiums on which such commissions are to be paid."

The crucial provision of clause 17 on which the argument turns, is as follows: "Should the Agent become connected with or do business directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claim to commissions under this paragraph."

The plaintiff acted as an agent of the defendant company for some nine years and became entitled as compensation in full of his services to certain commissions of first year premiums, and to commission on renewal premiums paid during the continuance of the agreement on business secured by him, and, subsequently at the end of the nine years, the defendant company exercised its right to terminate the agreement by giving notice to that effect to the plaintiff. Thereafter, under the provisions of clause 17 commissions on renewal business were duly paid to the plaintiff up to the time when he became connected with and did business for the Monarch Life Insurance Company.

The learned trial Judge in his reasons for judgment gave effect to the contention of the plaintiff that the forfeiture of renewal commissions after the plaintiff became connected with another life insurance company was in the nature of penalty from which he was entitled to be relive as inequitable. He also held the provision void as being in restraint of trade.

A clause similar to clause 17 is said by counsel to be a customary clause in agreements by insurance companies with their agents, and its proper construction is a matter of very wide and general importance. On this ground, and also out of respect and courtesy to the very learned trial Judge whose judgment is in question and from whom we are differing, it has been thought desirable that the reasons of the Court should be stated in writing.

We are of the opinion that the provisions of clause 17 are not in the nature of a penalty. Whether it is to be considered as part of the remuneration provided by the agreement when read as a whole, or as a separate provision entered into in consideration of the right of either party to cancel on notice, appears to the Court to be immaterial. In either case it is the agreement of the parties, not a penalty. The plaintiff agreed that if he chose to join another life insurance company these payments would cease. He did so choose, and their cessation is not in the nature of a penalty but is in pursuance of the agreement by which the plaintiff voluntarily bound himself in the beginning.

The Court is also agreed that clause 17 is not in restraint of trade. The plaintiff was not thereby precluded from himself cancelling the agreement or from going anywhere and doing anything he chose to do, and there was no restraint of any kind on his activities. He voluntarily joined the staff of the Monarch Life Company with the agreement before him and with its provision definitely there stated, and he is bound by his own agreement

On the argument before us counsel for the respondent argued that the defendant had waived compliance with the penalty provisions by taking active steps to assure his association

with another insurance company. As already pointed out, we are all of opinion that the provision of clause 17 is not in the nature of a penalty provision. But even if it were, we can find nowhere in the evidence anything to indicate waiver by the defendant of the provisions of clause 17, nor any ground for the interference by way of equitable jurisdiction referred to by counsel for the plaintiff.

The view above expressed is in accordance with and supported by numerous American decisions, several of which were referred to by counsel for the appellant in his memorandum, and I quote only from the case of *McPherrin v. The Sun Life Assurance Co. of Canada* (1934), 257 N.W.R. 316, where a similar agreement was under consideration with respect to the right to commission on renewals after the agent had entered the employment of another insurance company. At page 317 it is said:

"it is next urged that paragraph 18 of the contract was void because it imposed a penalty. This contention is based on the assumption that the plaintiff had acquired a vested right in the renewal commissions, and that they had already been earned by him at the time the contract was terminated. But the only right the plaintiff had to these renewal commissions was such as he might acquire by compliance with the contract."

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"It therefore seems perfectly clear from these provisions alone that the so-called forfeiture clause states but a contingency attached to, or a limitation upon, plaintiff's right to renewal commissions, and that it is not, therefore, a provision for forfeiture of a vested right therein, which view is but strengthened by many other provisions in the contract, and by the contract considered as a whole, as well as by the cases from this and other courts on the subject."

While the views so stated are in no way binding on this Court, yet they commend themselves to us and receive our entire concurrence.

For these reasons this Court is unable to concur in the result directed by the trial Judge, and allowed the defendant's appeal with respect to commissions and awarded judgment to the defendant against the plaintiff for the full amount claimed in its counterclaim with costs here and below.