

IN THE COURT OF APPEAL

DOMINICA

Civil Appeal No. 1 of 1970

Between: CARIBBEAN ATLANTIC LIFE ASSURANCE Appellant/
COMPANY LIMITED Defendant

and

J. E. NASSIEF Respondent/
Plaintiff

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice P. Cecil Lewis
The Honourable Mr. Justice St. Bernard (Ag.)

E. H. Francis for the Appellant
J. Armour and B. Alleyne for the Respondent

1970, July 8, 10

JUDGMENT

CECIL LEWIS, J.A.

The respondent having been assured by an agent and by the Chairman of the Board of Directors of the appellant company (hereinafter referred to as the company) that any premiums paid by him on an insurance policy which the company's agent was endeavouring to sell to him would be deducted by the income tax authorities from his income for the purposes of taxation, took out an insurance policy on the life of one Max Karam, an employee in his business, in the sum of \$100,000.00. The policy in question was what is known as a "key man" insurance policy, and was completed on the 16th day of February, 1963, on which date the respondent paid the sum of \$1,184.00 as the first premium. He paid subsequent premiums of \$784.00 and \$984.00 on 11th February, 1964 and 11th February, 1965 respectively - a total of \$2,952.00.

The respondent was first informed by letter dated 23rd August, 1965, from the Comptroller of Inland Revenue that the premiums he had paid were not deductible for income tax purposes. Negotiations on the respondent's behalf between the company and the income tax authorities followed, and as a result a letter dated 10th February, 1966, was sent by the

/income tax

income tax authorities to the company with a copy to the respondent. In this letter the income tax authorities confirmed that they were unable to vary their previous decision to disallow the premiums paid as deductions against the respondent's income. Thereupon the respondent sought to recover the premiums from the company, but as the company refused to repay them he brought an action against the company claiming repayment of the sum of \$2,952.00 and other relief.

In his statement of claim the respondent pleaded that in the course of negotiations with the company the company's agents represented to him that he would be permitted relief by the income tax authorities for all premiums paid under the policy, that the said representation was made with the intention of inducing him to enter into the contract of insurance, that it was made by Mrs. Elaine Pringle and Mr. Pat Gonsalves who were at the material time agents of the company, that he was induced to and did purchase the said insurance policy on the faith of the said representation, that the representation made was not true, and that it was made fraudulently, knowing that it was false, or recklessly and not caring whether it was true or false. In the alternative it was pleaded that the representation was made innocently.

It was further alleged by the respondent that as soon as he discovered that the representation was untrue he repudiated the said contract of insurance first by word of mouth and subsequently by letter dated 19th November, 1965, and that the consideration for the payment of \$2,952.00 has therefore wholly failed. He claimed the return of the moneys paid with interest at 6% and damages, and in the alternative rescission of the contract.

The company in its pleadings admitted -

- (a) that it offered to sell the respondent a contract of insurance;
- (b) that the contract was completed on 16th February, 1963; and
- (c) that three premiums totalling \$2,952.00 were duly paid by the respondent on the dates and in the amounts described in paragraph 5 of the statement of claim.

The company denied that the representation was made with the intention of inducing the respondent to enter into the contract of insurance, and also denied that the respondent was induced to, and did purchase the insurance policy on the

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faith of the said representation.

In so far as the respondent claimed damages for fraud it was stated in the defence that the respondent had suffered no damage; that he was not entitled to rescission of the contract because it had been executed, and that in so far as the claim for damages for breach of contract was concerned, that the representation did not form part of the contract.

It should here be noted that the respondent did not allege in his statement of claim that the representation formed part of the contract and therefore in my view this part of the defence was unnecessary and not in issue.

At page 10 of his judgment the trial judge said as follows:

"In the closing stages of his address counsel (for the plaintiff) intimated that he was not urging too strongly the issue of fraudulent misrepresentation, and rightly so as I am satisfied that on the evidence before the Court fraud on the part of the defendant company has not been established. Indeed, under cross-examination the plaintiff had this to say - 'I think Miss Pringle genuinely sold me the policy and thought it would come off my income tax as a deduction.' "

Fraud having been rejected, the alternative issue of innocent misrepresentation fell to be decided. In Brown v. Raphael (1958) 1 Ch. D. 636, Lord Evershed, M.R. laid down the conditions which a party must satisfy if he is to succeed on this ground. He said at page 641 as follows:

"In order that he may succeed on such a ground it is, of course, necessary that three things should be established. He must, first, show that the language relied upon does import or contain the representation of some material fact. Second, he must show that the representation is untrue, and, third, he must show that the plaintiff in entering into the contract was induced so to do in reliance upon it."

In this case the judge concluded these three matters in the respondent's favour and he ordered the repayment of the sums paid as premiums with interest, but he did not make an order for rescission of the contract as in his opinion that question did not arise.

There has been no appeal from the second and third findings of the trial judge, namely that the representation is untrue and that the respondent when he entered into the contract was induced to do so in reliance upon the representation.

/The company

The company has, however, challenged the trial judge's finding that the representation made by it was a representation as to an existing fact. It was contended that the representation was merely an expression of opinion which the company's agents had reasonable grounds for believing, and that it was a representation not of fact but of law.

The circumstances connected with the making of the representation as deposed to by the parties are as follows:-

The respondent said in his examination in chief:

"Before taking it (i.e. the policy) I had several consultations with Mrs. Pringle. She first approached me to sell life insurance. I told her I was a bachelor and had no children and life insurance would not suit me. She asked me about "key man" insurance. I said I would think about it. She came a few times again and I agreed to take a "key man" insurance policy on one condition, that the premium would be deducted off my income tax as I was allowed \$1,200.00 from income tax per annum but had only about \$150.00 per annum. I told her I would take a policy from her for the balance allowed by income tax which she agreed to.".....

"When I stated my condition it was accepted by the company. Were it otherwise, I would not have taken it - I made it clear. Mrs. Pringle said clearly the premium would be taken off my income tax. I would not have taken out the policy if I had not been given that assurance."

"Mrs. Pringle first raised the question of income tax deduction and said I would get the premium off my income tax.".....

In cross-examination he said -

"Mrs. Pringle explained the policy to me and said that the premium would be taken off my income tax."....."She said the deductions were made in other islands.".....

The company's agent, Mrs. Pringle, said in examination in chief:

"He (the respondent) discussed the question of income tax deductions. I told him it was an additional benefit. I knew those deductions were allowed in other islands and saw no reason why they should not be allowed in Dominica. That was the first policy of this kind I had sold in Dominica. I sold no more since.".....

"When I offered the policy to plaintiff I told him the premiums were being allowed for income tax in the other islands. My supervisor was present - Mr. Pat Gonzalez.".....

/s/ Plaintiff

"Plaintiff considered the question to benefits re income tax important. Gonsalez and I were certain that income tax allowance would have been made. I made many efforts to sell the policy. I told Mr. Nassief I saw no reason why it should not be allowed in Dominica. This was at the time that the policy was being sold. He relied on my and Pat Gonsalez's assurance that income tax would be allowed. This was during the course of his interviews.".....

"I now say I sold one such policy to Eric's Bakery. It was sold on the basis that there would be a tax allowance.

The policy is sold as a trade expense. The essence of it is its premium allowance as a trade deduction. It is one of its important selling points.".....

The effect of this evidence is that Pat Gonsalves and Mrs. Pringle, representatives of the company, held out to the respondent the assurance in no uncertain terms that the premiums he had paid would be deductible from his income. Mrs. Pringle made it clear that the premiums paid under this type of insurance policy were deductible as a trade expense in other territories. Her letter of September 16th, 1965, to Pat Gonsalves confirms this view.

Counsel for the appellant at first contended that there was no innocent misrepresentation, but when the Court directed his attention to the evidence of Mrs. Pringle and Pat Gonsalves as quoted above he conceded that there was an innocent misrepresentation. He however contended that the contract was executed in that the respondent had received benefit under it and during the whole of the time that the premiums were being paid the company was under a risk of having to pay the insurance money if the life had dropped. In those circumstances he contended that the contract was executed.

In my view this is not so. The contract remains executory until either all the payments were made or the insured died, and as neither of these events happened in this case the respondent was able to claim rescission of the contract as it was voidable at his option.

The trial judge ordered the return of the premiums with interest at 6%. In so doing he applied the principle of restitutio in integrum. However restitution could not be ordered without consideration being given to the question whether or not the contract could be rescinded. The ability to make restitution is essential to the rescission of a contract.

/In MacGillivray

In MacGillivray on Insurance Law, 5th Edition, at page 816 it is stated as follows:

"In the case of innocent misrepresentation by the insurer the assured may, at any time, rescind the contract and claim return of premiums."

Several authorities are quoted in support of this statement, including Kettlewell v. Refuge Assurance Co. (1908) 1 K.B.545. Kettlewell's case was one of fraudulent misrepresentation, but the principle laid down by the majority of the Court applies equally to a case of innocent misrepresentation as regards an executory contract. The argument put forward by counsel is the same as that which was urged in Kettlewell's case (supra) and was rejected by the majority of the Court. In that case Lord Alverstone, C.J. said at page 549:-

".....But it is said that that does not apply to policies of life insurance, because, inasmuch as the insurance company would not be allowed in an action on the policy to set up their own agents' wrong and allege that the policy was void, they must have been under a contingent liability to pay the sum assured during the whole time that the premiums were being paid and the policy was in existence, and that consequently, as they had been at risk during the whole of that time, the contract was no longer executory, and it was too late for the defrauded party to rescind. With that contention I cannot agree. In my opinion it is not right to speak of a mere risk of that kind, which has not produced any benefit in fact to the assured, as being a part performance of the contract. I agree in the view that that is a state of things which arises in every case in which a contract is voidable, the one party being bound and the other not. I think this case is governed by the decision of the Court of Appeal in British Workman's and General Assurance Co. v. Cunliffe."

In British Workman's and General Assurance Co. v. Cunliffe (1902) 18 T.L.R. 502 - a case of innocent misrepresentation by an agent as to the validity of a contract - the facts were that the respondent effected an insurance with the appellants on a life in which he had no insurable interest, the insurance, therefore, being void. The insurance was effected through an agent of the appellants, who represented, without any fraud, to the respondent that the policy would be valid and effective in law, and the respondent, relying upon that representation, effected the policy and paid the premium. The respondent subsequently ascertained that the policy was invalid, and immediately demanded back the premium. It was

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held by the Divisional Court (18 T.L.R. 425) that, as the representation, though an innocent one, was made by a man skilled in insurance matters to a person ignorant of the law, the premium could be recovered back. The Court of Appeal affirmed this decision.

In the circumstances I am of the opinion that the premiums paid by the respondent are recoverable but without interest and that an order for rescission should have been made. The appeal is accordingly dismissed with costs and the order of the learned trial judge varied so that the second paragraph thereof now reads:-

"It is Adjudged that the contract entered into between the plaintiff and the defendant be rescinded, that the defendant do return to the plaintiff the sum of \$2,952.00 and pay the plaintiff 50% of his costs to be taxed."

(P. Cecil Lewis)
Justice of Appeal

GORDON, C.J. (Ag.)

I agree.

(K. L. Gordon)
Acting Chief Justice

ST. BERNARD, J. A. (Ag)

I agree.

(E. L. St. Bernard)
Justice of Appeal (Ag.)