THE IMPERIAL LIFE ASSURANCE COMPANY OF CANADA (*Defendant*) — APPELLANT;

AND

SEGUNDO CASTELEIRO Y COLMENARES (*Plaintiff*) — RESPONDENT.

1966 *Oct. 14, 17, 18

1967 May 23

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of laws—Contract—Insurance—Proper law of contract—Factors considered in determination thereof.

Two policies of insurance on the life of the plaintiff were issued through the defendant's branch office in Havana, Cuba, in 1942 and 1947 at a time when the plaintiff was resident and domiciled in that country. The plaintiff had applied for the policies in Cuba and in his applications he agreed, *inter alia,* that the policies should take effect upon delivery. The offers in the applications were irrevocable and the plaintiff specifically agreed to accept the policies if any when they were issued. The applications were addressed to the head office of the company at Toronto and were prepared at that office, where the policies were also prepared. The policies, although written in Spanish, were in the standard Ontario form. Their cash surrender value was payable in American dollars and it was required that the request for such payment be made in writing to the head office.

The plaintiff later became a resident of the United States and in 1961 he applied for payment of the cash surrender value of his policies. Payment of the cash surrender value in dollars to a person resident in the United States was an offence contrary to the Foreign Exchange Contraband Law of Cuba, unless permission was given by the National Bank of Cuba. The question at issue was whether the proper law of the insurance contracts was the law of Ontario or the law of Cuba. The claim was allowed by the trial judge and an appeal by the defendant was dismissed by the Court of Appeal, one member of the Court dissenting. The defendant, with leave, further appealed to this Court.

Held: The appeal should be dismissed.

The contracts were made when the initial irrevocable offers contained in the plaintiff's applications were accepted by the mailing of the policies from the defendant's head office in Toronto. The fact that the parties agreed that the policies were not to become effective until certain conditions were fulfilled in Cuba did not alter the place where that agreement was made. However, the place where the contract was made was not decisive in determining the proper law of a contract. That problem was to be solved by considering the contract as a whole in light of all the circumstances which surrounded it and applying the law with which it appeared to have the closest and most substantial connection.

While it was doubtful as to whether the proper law of a contract of life insurance is necessarily the country in which the head office of the

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Spence JJ.

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insurer is situated, in the present case it was significant that the actual decision to "go on the risk" was made at the head office in Toronto and could not have been made in Havana.

The fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of that Province, was of preponderating importance in determining the law governing the contracts. It was a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies would be governed by the law of Ontario. Furthermore, the form of the policies which were issued in the present case evidenced the fact that the insurer intended to be governed by that law.

North American Life Assurance Co. v. Elson (1903), 33 S.C.R. 383; *Milinkovich v. Canadian Mercantile Insurance Co.*, [1960] S.C.R. 830; *Household Fire & Carriage Accident Insurance Co. v. Grant* (1879), 4 Ex. D. 216; *Bonython v. Commonwealth of Australia*, [1951] A.C. 201; *Tomkinson v. First Pennsylvania Banking and Trust Co.*, [1961] A.C. 1007, applied; *Pick v. Manufacturers' Life Insurance Co.*, [1958] 2 Lloyd's Rep. 93; *Rossano v. Manufacturers' Life Insurance Co.*, [1963] 2 Q.B. 352, considered.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Stewart J. Appeal dismissed.

B. J. MacKinnon, Q.C., and *B. A. Kelsey*, for the defendant, appellant.

Joseph Sedgwick, Q.C., and *G. Langille*, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario[1], (Porter C.J., dissenting) dismissing an appeal from a judgment of Mr. Justice Stewart whereby he awarded the respondent the sum of $8,744.22, being the equivalent in Canadian currency of the cash surrender value, payable in American dollars, of two policies of insurance on the life of the respondent which were issued through the appellant's branch office in Havana, Cuba, in 1942 and 1947 at a time when the respondent was resident and domiciled in that country.

The sole question at issue in this appeal is whether the proper law of the contracts of life insurance is the law of Ontario or the law of Cuba. In this regard the parties are

[1] [1966] 1 O.R. 553, 54 D.L.R. (2d) 386.

agreed that if the proper law of the contracts is found to be that of Ontario, the respondent is entitled to succeed, but that if the law of Cuba applies, unless permission has been granted by the National Bank of Cuba, the payment of the cash surrender value in dollars to a person resident in the United States, as the respondent is and was in September 1961 when he surrendered the policies, would be an offence contrary to the Foreign Exchange Contraband Law of Cuba.

The circumstances giving rise to this litigation have been thoroughly reviewed in the Courts below and they are not in dispute, but a brief résumé of the essential facts is, in my opinion, necessary to any intelligible discussion of the law applicable thereto.

The two policies here in question were in identical terms and they were both written in Spanish, which is the language of Cuba, for delivery by the appellant's Cuban agent to the respondent who was then a Cuban national and who had made application for the policies in Cuba pursuant to an application form by which he agreed, *inter alia:*

> That any policy granted pursuant hereto shall take effect only upon its delivery and upon payment of the first premium thereon in full, to be vouched for by the Company's printed official receipt duly countersigned and provided that upon such delivery and payment there shall have been no material change in my health or insurability since the completion of part 2 of my application.

The respondent's offers as contained in his applications for these policies were by their terms irrevocable and he specifically agreed to accept the policies if any when they were issued. Before delivery the policies were duly authenticated before a Notary in accordance with the law of Cuba.

It is contended on behalf of the appellant, on the basis of these facts, that the contracts were made in Cuba and are governed by the law of that country.

On the other hand, it is pointed out by the respondent that the applications were addressed to "The Imperial Life Assurance Company of Canada, Head Office, Toronto, Canada" and were prepared at that office, where the policies were also prepared and that, although these policies were written in Spanish, they were drawn in the common, standard form as used in the Province of Ontario and in conformity with the laws of that Province. These policies stipulated that they could not be varied except by writing

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thereon signed at the head office of the company by two of its executive officers and that any interlineations, additions or alterations had to be attested by two of the said officers. It is also to be noted that all payments under the policies, whether to or by the company, were required to be made "by bank draft drawn on New York payable in legal currency of the United States of America" and although it is true that many of the premiums were paid in pesos in Cuba, I think it to be apparent that at the time when the contracts were made it was contemplated that the cash surrender value would be payable in American dollars and it is made clear in the policies themselves that the request for such payment was required to be made in writing to the head office of the company at Toronto.

It is submitted on behalf of the appellant that the determination of the proper law applicable to these contracts is governed by the fact that they were made in Cuba, but I am by no means satisfied that they were so made. I am, on the other hand, of opinion that the time of the making of the contracts was when the initial irrevocable offers contained in the respondent's applications were accepted by the mailing of the policies from the appellant's head office in Toronto. (*See North American Life Assurance Co. v. Elson*[1], *per* Davies J. at p. 392 and *Milinkovich v. Canadian Mercantile Insurance Co.*[2], *per* Fauteux J. at pp. 835 and 836).

The respondent's applications by their terms provided that they were not to be effective until fulfilment of certain conditions which I have set out above and which are almost identical with those required of all contracts of life insurance in Ontario unless the application otherwise expressly provides to the contrary. This appears from the provisions of s. 139(1) of *The Insurance Act,* R.S.O. 1937, c. 256, which reads as follows:

> 139. (1) Unless the contract or the application otherwise expressly provides, the contract shall not take effect or be binding on either party until the policy is delivered to the insured, his assign, or agent, or the beneficiary named therein and payment of the first premium is made to the insurer or its duly authorized agent, no change having taken place in the insurability of the life about to be insured subsequent to the completion of the application.

[1] (1903), 33 S.C.R. 383.

[2] [1960] S.C.R. 830.

The policies here in question both contain the following provision:

> This policy and the applications herefor, a copy of which is attached hereto, taken together shall constitute the entire contract between the parties.

It is thus apparent that although the policies did not become effective until the conditions above referred to were fulfilled, which in fact occurred in Cuba, these conditions were themselves a part of "the entire contract between the parties" which in my opinion was concluded when the policies were mailed in Toronto. The fact that the parties agreed that the policies were not to become effective until conditions were fulfilled in Cuba did not alter the place where that agreement was made. It has long been recognized that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. As was said by Thesiger L.J. in *Household Fire & Carriage Accident Insurance Company v. Grant*[1]:

> ... as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance.

In the course of his dissenting reasons for judgment in the Court of Appeal, the Chief Justice of Ontario advanced the view that because the policies themselves contained certain restrictive provisions relating to war and air travel which were not mentioned in the applications, it followed that the contracts were not concluded by the mailing of these policies. This ground was not relied on by the appellant and with the greatest respect I do not think that under the circumstances the additions to the policies to which the learned Chief Justice refers have the effect of changing the place where the contract was made from the place of acceptance to that of delivery.

I am, however, in agreement with Mr. Justice MacKay who observed in the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal that:

> The place where the contract was made is not by any means decisive in determining the question of what law is applicable to the contract.

[1] (1879), 4 Ex. D. 216 at 221.

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It now appears to have been accepted by the highest Courts in England that the problem of determining the proper law of a contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.

This test was adopted by the Privy Council in *Bonython v. Commonwealth of Australia*[1], where Lord Simonds said at p. 219:

> ... the substance of the obligation must be determined by the proper law of the contract, *i.e.*, the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connexion.

This approach to the problem was restated in the House of Lords in *Tomkinson v. First Pennsylvania Banking and Trust Co.*[2], *per* Lord Denning at p. 1068 and Lord Morris of Borth-y-Gest at p. 1081.

The many factors which have been taken into consideration in various decided cases in determining the proper law to be applied, are described in the following passage from Cheshire on Private International Law, 7th ed., p. 190:

> The court must take into account, for instance, the following matters: the domicil and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; ...the economic connexion of the contract with some other transaction; ... the nature of the subject matter or its *situs*; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.

In referring to the location of the "head office of an insurance company whose activities range over many countries" as a factor to be taken into account in determining the proper law of a life insurance contract, the learned author cites as his authority the cases of *Pick v. Manufacturers' Life Insurance Company*[3], and *Rossano v. Manufacturers' Life Insurance Company*[4], both of which have been extensively reviewed in the Courts below, but he expresses doubts, which I share, as to whether they afford

[1] [1951] A.C. 201.
[2] [1961] A.C. 1007.
[3] [1958] 2 Lloyd's Rep. 93.
[4] [1963] 2 Q.B. 352.

justification for the general proposition that the proper law of a contract of life insurance is necessarily the country in which the head office of the insurer is situated.

In the present case, however, in my view, the significance of the location of the head office of the appellant company is underscored by the fact that the evidence makes it quite plain that the actual decision to "go on the risk" was made there and could not have been made in Havana. In this regard, in the course of his cross-examination, the appellant's general manager gave the following answers:

> Q. We are clear that when the application was made in Havana it was a head office decision whether it could go on the risk?
> A. Yes.
> Q. And that decision could not be made in Havana?
> A. No.

While it is clear that all relevant circumstances surrounding the making of a contract are to be given due weight in determining the locality with which it is most closely associated, I am of opinion that in the present case the fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of that Province, is to be regarded as of preponderating importance in determining the law governing the contracts.

I think it to be a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies which he was to receive would be governed by the law of that Province, and I think that the form of the policies which were issued in the present case evidences the fact that the insurer intended to be governed by that law.

For these reasons, as well as for those which have been so fully stated in the reasons for judgment of Mr. Justice MacKay, I am of opinion that the proper law of these contracts is the law of Ontario.

It would not be proper to leave this matter without making reference to the alternative argument advanced by Mr. Sedgwick on behalf of the respondent which was based on the case of *Varas v. Crown Life Insurance Company* (Superior Court of Pennsylvania, October term 1964) and which was to the effect that even if other parts of the policy were governed by Cuban law the option to take the

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cash surrender value of the policy was an irrevocable offer which was accepted in Ontario and that, treating this phase of the contract separately, it was to be regarded as governed by the law of that Province. It is true that the *Varas* case affords some authority for this proposition, but it appears to me that there is nothing in the circumstances of the present case to support the unprecedented proposition that the proper law of a continuing contract can shift from time to time. The proper law of these contracts is to be determined as of the date when they were made.

Mr. Sedgwick also advanced the argument that as the appellant has always admitted the validity of the contract and its liability thereunder and the sole question at issue is whether the law of Ontario or the law of Cuba applies, the appellant should not have appealed from the judgment of Stewart J. and he points out that no appeal was taken from the judgments at trial in the cases of *Pick* and *Rossano*, *supra*. In this regard, Mr. Sedgwick submitted that a judgment of the Court of Appeal or of this Court is of no more protection to the insurance company in the Republic of Cuba than the judgment of Mr. Justice Stewart and he contended that once the latter judgment was rendered, the *lis*, in so far as the insurance company was concerned, disappeared. This argument appears to me to disregard the realities of the situation. The finding that the law of Ontario applies might well result in steps being taken by the Cuban authorities which would be prejudicial to the appellant and I think that it had a very real interest in pursuing the matter. Under these circumstances, I am of opinion that the appellant clearly had a right to appeal to the Court of Appeal and to this Court.

In view of all the above, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Payton, Biggs & Graham, Toronto.

Solicitors for the plaintiff, respondent: Haines & Thomson, Toronto.