
<div style="text-align: center;">1947</div> <div style="text-align: center;">{</div> <div style="text-align: center;">Nov. 18</div> <div style="text-align: center;">—</div> <div style="text-align: center;">1948</div> <div style="text-align: center;">{</div> <div style="text-align: center;">Feb. 3</div> <div style="text-align: center;">—</div>	<p>COMMERCIAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANT)</p> <p style="text-align: center;">AND</p> <p>RANDOLPH H. DREVER (PLAINTIFF) RESPONDENT.</p>	<p>} APPELLANT;</p>
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ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME
COURT OF ALBERTA

Contract—Illegality—Whether payment of fee for new real estate agent's licence extends date of expired licence so as to constitute the latter a "subsisting licence" to date of such payment—Whether statutory prohibitions apply to period between date of expiration of old licence and date of issue of new licence and render real estate agent's claim for remuneration illegal—The Real Estate Agents' Licensing Act, R.S.A. 1942, chapter 318, ss. 2 (d), 4 (1), 7, 14 and 15.

PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

(1) 20 Q.B.D. 494.

(3) 37 N.J.L.R. 372 at 379.

(2) 2 M. & S. 408.

In the latter part of July or early August 1943, the respondent inquired of the appellant's managing director if the appellant wished to sell a certain property it owned in Edmonton. Following this conversation respondent sought to interest the local manager of D'Allaird's Ltd. in the purchase and was referred to its Montreal office. On August 24th respondent forwarded the Montreal office particulars of the property and the purchase price. On August 26th he renewed his real estate agent's licence, which pursuant to *The Real Estate Agents' Licensing Act*, R.S.A. 1942, ch. 318, sec. 7, had expired on June 30th. On Sept. 2nd the Montreal office wrote its local manager to advise respondent it might be interested in making an offer and to secure further information from him. These instructions having been complied with, D'Allaird's Ltd. then wrote the appellant it had been in communication with the respondent with regard to its Edmonton property and thereupon entered into direct negotiations with appellant, and completed purchase of the property in Oct. 1943.

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Held: The respondent held himself out as a real estate agent and accepted employment as such in the face of the statutory prohibition. He relied upon a contract to render services which he was prohibited by law from undertaking. The contract was therefore illegal and the assistance of the court will not be given to enforce it. (*Barlett v. Vinor* Carth. 252; *Cope v. Rowlands* 2 M. & W. 149; *Langton v. Hughes* 1 M. & S. 593; *Holman v. Johnson* 4 Cowp. 341, applied.)

Per Rand J.: In the presence of the Statute, the entire exchange between the parties up to the moment of the issue of the licence must be treated as void or non-existent.

Held: also, the licence which the respondent obtained dated August 26th, 1943, did not on its face purport to be a renewal of the licence which expired on June 30th, 1943, nor in any other sense to extend the terms of that licence. It was simply a new licence effective as of its date and for the term stated.

Per Rand J.: The word "renewed" (as used in sec. 7) cannot be given a retroactive implication. After the expiration of a licence and until another is obtained the prohibitions of the Statute apply.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1) affirming, Macdonald J.A. dissenting, the judgment at the trial (2) in favour of the respondent.

S. H. McCuaig K.C. for the appellant.

G. H. Steer K.C. and *R. Martland K.C.* for the respondent.

The judgment of the Chief Justice and Taschereau, Estey and Locke, JJ. was delivered by

LOCKE J.:—This is an appeal from the Appellate Division of the Supreme Court of Alberta which by a decision of the

(1) [1947] 1 W.W.R. 390;

(2) [1946] 3 W.W.R. 119.

[1947] 2 D.L.R. 30.

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majority of the court dismissed an appeal from the judgment of Ford J. who had awarded to the respondent \$2,650 as commission on the sale of a property of the appellant in Edmonton: Macdonald J.A. dissented and would have allowed the appeal and dismissed the action.

The respondent alleged in his Statement of Claim that he had been employed by the appellant for the purpose of effecting a sale of the property and that it had been sold in the month of October, 1943, "as a result of the services of the plaintiff": alternatively to a claim for commission the plaintiff claimed a like amount on the basis of a *quantum meruit*. The plaintiff's evidence was that during the latter part of July or early in August, 1943, he had met Mr. Glenwright, the president of the appellant company, at the site of the property in question and had asked him if the appellant wanted to sell the property then: that Glenwright had said he would consider \$80,000 very seriously and that he (the respondent) had then said that he would "look and see if I can interest a party", to which Glenwright had agreed. While Glenwright's account of this conversation did not agree with that of the respondent the trial judge found as a fact that the latter had been employed as an agent to sell the property and this finding has been upheld in the judgment of the Appellate Division. There is evidence to support the concurrent findings on this point.

The real issue in this appeal is as to whether the respondent was entitled to recover by reason of the fact that at the time when the contract of employment is alleged to have been made he was not the holder of a licence as a real estate agent, as required by the provisions of *The Real Estate Agents' Licensing Act*, cap. 318, R.S.A., 1942. Put briefly the contention of the appellant is that as the respondent was not the holder of a licence as a real estate agent at the time of the conversation with Glenwright above referred to, when the employment is said to have taken place and did not obtain a licence until August 26th, 1943, and as the statute prohibited him from either holding himself out as, or acting as, a real estate agent during this period the employment agreement was illegal, and that accordingly no right of action could arise out of it: further

it was contended that any claim for services rendered during the time when the respondent was without a licence was barred by the express terms of the Act.

While it was probably unnecessary to do so by reason of the provisions of Rule 152 of the *Consolidated Rules of the Supreme Court of Alberta* the respondent alleged in the Statement of Claim that he had been at all material times the holder of a subsisting licence as a real estate agent pursuant to the provisions of the statute. This allegation is denied in the Statement of Defence and the question for determination is sufficiently raised by the pleadings.

The respondent, in addition to giving evidence as to his employment by Glenwright, said that he had been engaged in the real estate business in Edmonton for a very long period of years and it would appear that this fact was known to Glenwright at the time of the discussion when the employment is said to have taken place. As part of his case the respondent put in evidence certain licences issued by the Superintendent of Insurance under the provisions of the Act, these showing that on April 14th, 1943, the respondent had been granted a licence as a real estate agent until the 30th day of June, 1943, and that on August 26th, 1943, a further licence had been granted to remain effective until the 30th day of June, 1944, unless it should sooner be revoked or suspended, this latter proviso being apparently a term of all licences issued under the Act. The respondent said that following his conversation with Glenwright at the property he attempted to interest D'Allaird's Ltd. by discussing the matter with Mr. Wickett, the local manager. The date of this interview was shortly prior to August 24th. Wickett asked the respondent to submit the matter to Mr. Parkes, a senior official of D'Allaird's Ltd. at Montreal, and on August 24th the respondent wrote Parkes by airmail offering the property for sale at \$80,000. On August 26th the respondent obtained the licence above referred to: on August 27th Parkes wrote from Montreal to Wickett saying that he had received a letter from Drever and asking for further particulars: Wickett replied on August 30th: on September 2nd Parkes wrote to him again asking additional information and Wickett replied on September 8th. The respondent says that he gave certain

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information about the property and the owner's name to Wickett for the purpose of being forwarded to Parkes and this undoubtedly was done after August 26th. There the respondent's active connection with the matter terminated: Parkes entered into direct negotiations with Glenwright and in the result the property was sold to D'Allaird's Ltd. at the price of \$75,000.

By sec. 4 (1) of *The Real Estate Agents' Licensing Act* it is provided that no person who is not the holder of a subsisting licence shall either act or hold himself out as a real estate agent or real estate salesman in the Province and the expression "real estate agent" is defined in sec. 2 (d) as meaning:

any person who, for others, and for compensation or profit, or promise thereof, sells, exchanges, or buys, or offers, or attempts to negotiate a sale, exchange, or purchase of real estate.

Persons desiring to carry on this occupation (with certain exceptions that are inapplicable) are required to make written application for licences to the Superintendent of Insurance who is empowered to issue such licences or refuse them if, for any reason, he is of the opinion after due investigation that the licence should not be granted. Sec. 7 of the Act provides that every such licence shall expire on the 30th day of June in each year but may be renewed on due application to the Superintendent on payment of the prescribed fee, unless previously revoked or suspended by the Superintendent. Power is vested in the Superintendent to investigate claims by any person who claims to have been damaged by the incompetency or dishonest dealing of a real estate agent or salesman, and to revoke the licence of any agent or salesman for incompetency or dishonest conduct, and in the case of the revocation of a licence to refuse in his discretion to renew it. Sec. 14 reads as follows:

No person shall be entitled to recover any compensation for any act done in contravention of the provisions of this Act, or to be reimbursed for any expenditure incurred by him in or in connection with the doing of any such act.

By sec. 15 monetary penalties which may be imposed upon summary conviction are provided for any violations of the Act. It is manifest that the object of this legislation is the protection of members of the public in their dealings with real estate agents. While fees are charged for the

licences issued and monetary penalties may be imposed for breaches of the statute, its object is not merely to protect the revenue, the imposition of these fees and penalties being merely collateral to the main purpose of the Act.

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The case put forward by the respondent in the Statement of Claim and supported by his evidence is that he was employed by the appellant to effect a sale of the property and the date of such employment is said to have been at the end of July or early in August, 1943, at a time when the respondent was not the holder of a licence under the Act. It was in the capacity of a real estate agent that the respondent sought employment from Glenwright and he was employed in that capacity. Thus the respondent held himself out as a real estate agent and accepted employment as such and, by his own statement, agreed to act as such in the face of the statutory prohibition. Both the first conversation between the respondent and Wickett and the letter written to Parkes on August 24th were acts on the part of the respondent prohibited by the statute. The only thing done by the respondent in connection with the matter after obtaining the licence on August 26th was to furnish certain details to Wickett for which the latter had been asked by Parkes early in September. These various acts of the respondent were done on his own showing in pursuance of the employment which he says was effected during his conversation with Glenwright.

I think the rule of law applicable to this state of facts is that stated in the maxim *ex turpi causa non oritur actio*. In *Bartlett v. Vinor* (1), Holt C.J. said in part:—

Every contract made in or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words.

The same principle was expressed by Baron Parke in *Cope v. Rowlands* (2) at 137 as follows:

It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition.

(1) (1693) Carth. 252.

(2) (1836) 2 M. & W. 149.

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In *Langton v. Hughes* (1) at 596, Lord Ellenborough said: "What is done in contravention of the provisions of an act of parliament cannot be made the subject matter of an action." The test as to whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case—*Simpson v. Bloss* (2); *Farmers' Mart, Ltd. v. Milne* (3), Lord Dunedin at 113. Here to support a claim for a commission on effecting a sale of the property, or alternatively a claim on a *quantum meruit* for services rendered, the respondent relies upon a contract to render services which he was prohibited by law from undertaking. The contract was, therefore, illegal and the assistance of the court will not be given to enforce any claim said to arise out of it. (*Cornelius v. Phillips* (4) Lord Finlay L.C. at 205). No claim was made for services rendered after the date of the issue of the licence on August 26, 1943, as distinct from the services rendered before that date and clearly, in my opinion, no such claim could be sustained since the claim for these services is based upon an illegal contract. In this view of the matter it is unnecessary to consider the effect upon the respondent's claim of sec. 14 of the Act.

It is unfortunate that the services of the respondent, which were an effective cause of the sale, should go unrewarded but, as stated by Lord Mansfield in *Holman v. Johnson* (5) at 343:—

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.

Mr. Steer, in his able argument for the respondent, contended that since sec. 7 of the Act which provides that every licence shall expire on the 30th of June of each year speaks of such licence being renewed, that the licence granted to the respondent on August 26, 1943, was really

(1) (1813) 1 M. & S. 593.

(2) (1816) 7 Taunt. 246.

(3) [1915] A.C. 106.

(4) [1918] A.C. 199.

(5) (1775) 4 Cowp. 341.

an extension of the licence theretofore in existence so that the respondent was in fact duly licensed at all relevant times. I think this contention cannot be supported. The licence which the respondent obtained dated August 26, 1943, which was tendered in evidence by him certifies "that R. H. Drever of Edmonton is hereby licensed, within the Province of Alberta, as a real estate agent until the 30th day of June, 1944." This does not on its face purport to be a renewal of the licence which had expired on June 30, 1943, nor in any other sense to extend the term of that licence. It was simply a new licence effective as of its date and for the term stated.

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This appeal should be allowed and judgment entered dismissing the action with costs throughout.

RAND J.:—Although in the courts below the word "employed" has been used, I take the arrangement found to exist between the parties to be this: an offer by the owner to the agent to pay compensation for producing a person willing and able to buy the property on the terms indicated. There was no authority to bind the owner to a sale, nor did the agent obligate himself to anything. The offer could have been revoked at any time and did not restrict the sale of the property by the owner through any other agent. The word "agent" in such a case must be taken in a limited sense; at most, he was authorized to furnish information about the property and the terms of sale.

When the offer was made in late July or early August, the agent, not being in possession of a licence, was by section 4(1) of *The Real Estate Agents' Licensing Act* forbidden either to "act or hold himself out as a real estate agent or real estate salesman in the Province". On the 24th of August, he mailed a letter at Edmonton addressed to the purchaser at Montreal; on the 26th of August a licence was issued to him; on the 27th, a letter was written in Montreal in reply to his own; and although some details were later furnished by him, it can be taken that the communication of the 24th brought about the sale. For the purposes of what I consider to be the essential question, I will assume that in point of time the issue of the licence preceded the actual receipt by the purchaser of the letter.

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That question, it seems to me, is simply this: was the agent forbidden by law to receive the offer, including the limited authority, or could it be said to have continued in fact beyond the unlicensed period until the agent's act became effective by the receipt of the letter in Montreal? In the presence of the statute, we must, I think, treat the entire exchange between the parties up to the moment of the issue of the licence as void or non-existent. That seems clearly to be the purpose of the law, and to introduce the refinement suggested would go far to nullify its effects.

It was held in the courts below that from the acceptance of the work of the agent a "confirmation" or some other retroactive relation was established between the parties sufficient to support a contract. But there was no actual communication between them from the time the offer was made until long after the purchaser had been produced, and to impute such an implication would be, in effect, to treat the work as having been done at the request of the owner or in the course of performing the requirement of the offer, which under the statute is excluded; if the work was not so done, then it is as if the agent had acted voluntarily, and it would not be suggested that in that case the owner could not deal with the purchaser without regard of the agent. If the act of the agent can be said to be done on behalf of the owner which the latter by selling to the purchaser ratifies, it would mean that an officious intervention would exclude the owner from selling to conceivably the only person then willing to buy except on terms of paying commission which he never otherwise agreed to do.

Mr. Steer contended that under the statute a licence, once issued, was to be deemed to continue without interruption and if necessary retroactively, upon the payment of each year's fee. Section 7 reads:

Every licence shall expire on the 30th day of June in each year, but may be renewed on due application to the Superintendent and payment of the prescribed fee, unless previously revoked or suspended by the Superintendent.

It is on the word "renewed" that this argument is made. But the word cannot be given such an implication. It would be rather absurd to speak of revocation or suspension after a licence had expired. All that "renew" can add to

re-licensing is perhaps dispensing with the preliminary steps to the initial licence: but after the expiration of a licence and until another is obtained the prohibitions of the statute apply.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

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Appeal allowed with costs throughout.

Solicitors for the appellant: *McCuaig & Parsons.*

Solicitors for the respondent: *Cairns, Ross, Wilson & Wallbridge.*
