CANADIAN ICE MACHINE COMPANY LIMITED (*Defendant*) .... } APPELLANT;

AND

J. HORACE SINCLAIR (*Plaintiff*) .....RESPONDENT.

1955
*May 20
*Oct. 4

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Contract—For Fixed Term—Termination without cause—Damages.

The appellant company and the respondent, its general manager, entered into a written contract whereby the company agreed to the manager's retirement subject to its right to retain the benefit of his business connections and to call upon him for such engineering and business advice as was consistent with the respondent's enjoyment of a life of reasonable leisure and his right to practise his profession. The date of retirement was fixed at Dec. 31, 1946 and the respondent's services were to be available and his salary paid to Dec. 1953. The appellant having purported to cancel the agreement, the respondent rejected the repudiation and sued for a declaration that the agreement was valid and binding and for damages.

Held: That the agreement was a valid and binding contract whereby the respondent was to furnish the appellant with the described services when called upon to do so. The respondent having complied with the obligation, if any, to mitigate his loss, was entitled to damages.

Per Locke J.: The respondent's rejection of the appellant's attempted repudiation continued the contract in force (*Heyman* v. *Darwins Ltd.* [1942] A.C. 356 at 361) and since the contract was not simply one of hiring and service the respondent was entitled to recover the amounts payable under its terms up to the date of trial and to a declaration that as of that date the agreement was valid and subsisting.

*PRESENT: Kerwin C.J. and Kellock, Estey, Locke and Cartwright JJ.

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APPEAL from a judgment of the Court of Appeal for British Columbia (1) dismissing the appellant's appeal and allowing the cross-appeal of the respondent from a judgment of Coady J. (2) in an action brought by the respondent for damages for breach of contract.

R. N. Starr, Q.C. for the appellant.

G. R. Long Jr. for the respondent.

The judgment of the Chief Justice and of Estey J. was delivered by:—

THE CHIEF JUSTICE:—In my opinion the contract was one whereby the respondent was to furnish the described services when called upon so to do by the appellant. All the respondent was obliged to do was to keep himself in readiness to comply with those demands of the appellant "consistent with his enjoyment of a life of reasonable leisure and with his retirement from active business" and to accept such other engagements as might be offered to him. This he did and therefore complied with the rule that a person in that position must take all reasonable steps to mitigate his loss: *British Westinghouse Electric Co.* v. *Underground Electric Railways Co.* (3); *Cemco Electrical Mfg. Co.* v. *Van Snellenberg* (4).

The trial judge was of opinion that the appellant's breach of contract constituting a release of the respondent from his covenant in the agreement not to engage in a business competing with that of the appellant had a bearing upon the damages. In view of the clause in the contract quoted above, I am unable to agree that this is a circumstance to be taken into consideration. It is difficult to fix an amount that is fair to both parties, but I have concluded that the sum of $4,800 is not out of the way.

The appeal should be dismissed with costs.

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) in an action brought by the respondent for damages for breach of an agreement dated the 27th of November, 1946. The respond-

(1) (1954) 11 W.W.R. (N.S.) 244.
(2) (1953) 9 W.W.R. (N.S.) 399; [1953] 2 D.L.R. 371.
(3) [1912] A.C. 673.
(4) [1947] S.C.R. 121.

ent had for some years prior thereto been employed as manager of the appellant company's branch at Vancouver. The agreement recites that the respondent wished to arrange for his retirement from the position of manager and the appellant agreed thereto subject to its retaining the benefits of Mr. Sinclair's business connection and of being able to call upon him for his engineering and business advice and assistance from time to time as required.

By para. 1 it was agreed that from the date of his retirement, fixed at December 31, 1946, the appellant was to employ the respondent "as an engineering and general consultant and to promote the sale of the company's merchandise, products and service" at a salary of $200 a month for the first two years and thereafter at $150 per month until December 10, 1953, when the said employment and salary was to cease and determine. The last sentence of para. 1 is as follows:

> The condition of the said employment shall be that Mr. Sinclair will to the best of his ability assure to the Company the continued enjoyment of its business goodwill in British Columbia, and that Mr. Sinclair will be available as a consultant to assist his successor, the manager of the Company's branch in Vancouver, in the solution of engineering and business problems, but Mr. Sinclair is only to be required to devote so much of his time and energy to his said employment as are consistent with his enjoyment of a life of reasonable leisure and with his retirement from active business.

The agreement further provided that "in addition to and independently of Mr. Sinclair's employment as aforesaid" from retirement until death or until his seventieth birthday on the 10th of December, 1953, whichever event should first happen, the company would bear all the costs of maintaining in good standing the respondent's claims under the appellant company's pension scheme. It was further provided that the respondent would not at any time after his retirement engage in the business of refrigeration or the business of airconditioning as principal or agent anywhere in the Province of British Columbia, "except on behalf of the Company as hereinbefore provided", but nothing contained in the agreement was to prevent Mr. Sinclair "from practising his profession as a Registered Professional Engineer (Mechanical)".

By notice dated the 30th of January, 1951, the appellant "cancelled and determined" this employment as of April 30 following, and advised the respondent that his services

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would no longer be required. With the notice there was enclosed a cheque for $600, being four months' salary. The notice did not purport to affect the appellant's obligation to pay into the pension fund.

The respondent refused to acquiesce in this cancellation and this action followed, the respondent asking for judgment declaring the agreement to be subsisting and for damages for breach of contract in the amount of future salary. In its defence, the appellant set up that it was entitled to cancel the "retainer" of the respondent by reasonable notice and that, in any event, it had terminated the agreement for cause. These defences were not sustained in either court.

The learned trial judge considered the respondent was entitled to damages for wrongful dismissal, which he fixed at $3,000. In the Court of Appeal, Smith J.A., concurred with the learned trial judge. Bird J.A., however, with whom O'Halloran J.A., agreed, considered that the agreement was a "retirement" agreement rather than one of employment, and that the remedy of the respondent was not by way of damages for wrongful dismissal but on the footing that the agreement was still subsisting and could not be terminated without the concurrence of the respondent, the latter being entitled to recover the instalments of salary as such for the full unexpired term of the agreement. The appellant contends that the learned trial judge was right and that the majority in the Court of Appeal erred.

While the agreement of the 27th of November, 1946, had for one of its objects to arrange for the retirement of the respondent, that retirement was only from "the position of manager". In addition, the appellant company agreed to "employ Mr. Sinclair as an engineering and general consultant", the express condition of that employment being that the respondent would to the best of his ability assure to the appellant the continued enjoyment by the latter of its goodwill in British Columbia and that he would be available as consultant to assist his successor in the post of manager in the solution of engineering and business problems.

It is unquestionable, therefore, in my opinion, that the monthly instalments were to be made in consideration of services to be rendered by the respondent, although it was

for the appellant to require the performance of such services from time to time as it saw fit. That being so, as Mr. Starr contends, the contract was an "employment" contract for a fixed term with the usual result that upon repudiation without cause on the part of the employer, the appellant company became liable for the consequent damages with a corresponding obligation on the part of the respondent to mitigate those damages. The law is clearly settled that the remedy of a person in the position of the respondent in such case is to sue for damages. He is not entitled to wait until the termination of the period for which he was engaged and sue for the whole amount of the wages which have fallen due in the interim.

In the case at bar, however, the employment in question was not a full time employment. Not only was the respondent to serve only when called upon, but it was expressly provided that he was to be required to devote only so much of his time and energy as was "consistent with his enjoyment of a life of reasonable leisure and with his retirement from active business." The appellant expressly pleaded that it had "only dispensed with the services of the plaintiff as consulting engineer to the defendant". The respondent was free under the terms of the agreement to practise his profession as a professional engineer on his own behalf.

The only way, therefore, in which it was open to the respondent to mitigate the loss consequent upon the refusal of the appellant to continue to pay him, was to utilize the time made available to him by reason of the appellant's refusal to consult him further; *Cemco* v. *Van Snellenberg* (1), per Rand J., at 128.

In the case at bar the evidence shows that for the first year until the respondent's successor became familiar with his work, there were more calls upon the respondent's time than subsequently proved to be the case. From the nature of things, this was to be expected. The respondent introduced the new manager to existing and prospective customers and was consulted by him from time to time in connection with the business of the appellant. Upon the death of this manager at the end of approximately two years, the new manager had little recourse to the respondent and when he, in turn, was succeeded in the fall of 1950 by

(1) [1947] S.C.R. 121.

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a new appointee, the latter consulted the respondent only once. It therefore appears that the time which the respondent was called upon to devote to the discharge of his duties under his contract with the appellant was insignificant. In my opinion, his acceptance of the supervision of the Victoria Rink job did not properly fall within the terms of the contract between the parties and is not to be considered for present purposes. It was not contended otherwise.

With regard to Mr. Starr's contention that the respondent did nothing to mitigate his damage, I think the respondent's evidence considered as a whole is this. He had his own office where, throughout, he carried on practice as an engineer. While he continued to hold himself at all times prepared to perform the agreement so far as the appellant was concerned, he was at the same time trying to obtain other clients. In holding himself available as a consulting engineer to all the world, including the appellant, he did all that he was called upon to do.

The action coming to trial in October, 1952, the damages necessarily had to be assessed having regard to the fact that somewhat over a year of the contract term was unexpired with the possibility that the respondent might not survive the full period.

The learned trial judge considered that the appellant's breach of the contract between the parties effected a release of the respondent from his covenant in the agreement not to engage in a business competing with that of the appellant and that this fact had a bearing upon the damages. In my opinion, this was not a factor. Under the terms of the agreement, it was clearly provided that the respondent had retired from active business. He was therefore under no obligation to mitigate his damage by entering into any such activity. Even had he done so any profit realized would equally have been outside any question of damages; *Cockburn* v. *Trusts and Guarantee Co.* (1). In fixing the damages at $3,000, I think the learned judge took a too restricted view of the amount to which the respondent was entitled; *Yelland's* case (2). At the date of the trial the amount already past due was $2,700. I would fix the

(1) (1917) 38 O.L.R. 396; 55 Can. S.C.R. 264.

(2) (1867) L.R. 4 Eq. 350.

damages at the sum of $4,500. I do not think the reduction in damages should affect the question of costs.

With this variation, the appeal should be dismissed with costs.

LOCKE J.:—The nature and extent of the duties which the respondent agreed to perform by the agreement of November 27, 1946, are expressed in rather vague terms in that document. The language of paragraph one is to be construed together with the recital which preceded it which said that the company had agreed to the respondent's retirement:—

> subject to its retaining the benefits of Mr. Sinclair's business connection and of being able to call on Mr. Sinclair for his engineering and business advice and assistance from time to time as required.

While the language of the first sentence of paragraph one read literally would indicate that the respondent was undertaking to promote the sale of the company's merchandise, products and service throughout the province, the contrary is indicated by the following sentence which, consistently with the language quoted from the recital, provided that Sinclair would be available as a consultant to assist his successor in the solution of engineering business problems and to be only required to devote so much of his time as was consistent with his retirement from active business. The manner in which the language of the contract was understood by the parties is indicated by the fact that when Bews his successor took charge of the Vancouver branch, Sinclair helped him by introducing him to customers of the company and advising him in regard to the business until he was familiar with it and thereafter was rarely consulted. When Bews died in 1948 his successor did not seek to avail himself of Sinclair's advice except on one occasion nor did the appellant until it made the request that he should take charge of the contract for the Victoria Arena on October 21, 1949.

In addition the respondent agreed that if the company had not available on the date fixed for his retirement a suitable person to succeed him as manager such retirement might be postponed for a further maximum period of one year at the company's option, and that he would not at any time after he retired be concerned or interested in the business of refrigeration or air conditioning as principal or agent anywhere in the province of British Columbia except on behalf

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of the company as provided by the agreement provided however that this should not bar him from practising his profession as a professional engineer (mechanical).

On its part the company agreed to pay the respondent what was called a salary of $200 per month for two years from the date of his retirement and thereafter $150 a month until December 10, 1953 and to pay all the costs of maintaining his pension claim under its pension scheme in good standing until he reached his 70th birthday on December 10, 1953, an obligation which entailed its paying an annual sum of $315 into the pension fund, Sinclair being relieved of any liability to make further contributions.

On January 30, 1951, the appellant wrote to the respondent notifying him that his employment and retainer "as a consultant and for other services" as provided in the agreement was thereby "cancelled and determined as of the 30th day of April, 1951" and that his services would no longer be required after that date and further informed him that so far as it was concerned he might accept other employment or retainers after that date.

There are concurrent findings that nothing had been done by the respondent which was inconsistent with the due and faithful discharge of his obligations to the company under the agreement and these findings were not questioned in the argument before us. The only matter to be determined is the nature of the respondent's remedy in the circumstances disclosed by the evidence and the amount to be awarded.

By the statement of claim the respondent alleged that the appellant had purported to cancel the agreement, refused to pay his salary and repudiated all further liability, and asked for a declaration that the agreement referred to was a valid and subsisting agreement, judgment for the instalments to become payable up to the date of the judgment and damages. The statement of defence alleged that the defendant had only dispensed with the services of the plaintiff as consulting engineer and was therefore under no further obligation to pay for such services but had not repudiated any liability with respect to the other provisions in the agreement. Other defences pleaded were that the defendant was entitled to dispense with the services of the

plaintiff on reasonable notice and further that as the plaintiff had acted in a manner contrary to the provisions of the agreement the defendant was entitled to cancel that part of the agreement which related to his employment as consulting engineer.

The learned trial judge being of the opinion that, as framed, the action was in effect an action for specific performance and that upon the authorities this relief could not be granted, held that the respondent's remedy was limited to damages for wrongful dismissal. Dealing with the matter on this basis he gave judgment for damages in the sum of $3,000, an amount equal to the monthly payments stipulated for by the contract which would have accrued up to the date of the trial.

The present appellant appealed to the Court of Appeal and the respondent cross-appealed. Bird J.A., with whom O'Halloran J.A. concurred, considered that the respondent was entitled to recover the full amount of the monthly payments from the end of April, 1951 to December 10, 1953 in accordance with the terms of the contract. Sidney Smith J.A. would have dismissed both the appeal and the cross-appeal. In the result judgment was entered in favour of the respondent for the sum of $4,800 and costs.

I am unable with respect to agree with the learned trial judge that the action as framed was in the nature of an action for specific performance and I do not think that the authorities relied upon dealing with contracts of hiring and service are applicable in determining the rights of the parties under the present agreement. This, as pointed out by Mr. Justice Bird, was not a mere contract of hiring. There is nothing in the evidence to indicate that the respondent might not have retired from the services of the appellant company on reasonable notice, at the time he entered into the agreement of November 27, 1946 or to suggest that if he should elect to retire he might not set up a refrigeration and air conditioning business of his own in British Columbia and have become a formidable competitor of the appellant or have entered into the service of some other employer engaged in that business to the injury of the appellant. While the contract involved at the appellant's option the performance of some services by the respondent it was not in the true sense of the word a mere

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contract of hiring or service but one defining the terms upon which the respondent would, if requested, continue as manager for a further period of time after December 31, 1946 and upon withdrawing from the appellant's employ render it further service in an advisory capacity and refrain from engaging in a competing business.

When the appellant notified the respondent on January 30, 1951 that it proposed to repudiate part of its obligations under the contract the latter promptly rejected the attempted repudiation and informed the appellant that he proposed to enforce his rights under it. As pointed out by Viscount Simons in *Heyman* v. *Darwins* (1), a repudiation of a contract by one party has in itself no legal consequences unless the other party to the contract accepts the repudiation and agrees to treat the contract as at an end. Had the contract been simply one of hiring and service without more the respondent while treating the contract as continuing might have brought an action for damages for the breach of it by discharging him (Smith on Master and Servant, 8th Edition, 121) but this was not such a contract. The notice of January 30, 1951 did no more than say that the appellant did not intend to exercise its right to consult the respondent as it was entitled to do under the contract or pay the amounts agreed upon. The contract continued in full force with the resulting consequences.

In my opinion the respondent was entitled to recover the amounts payable under the terms of the agreement up to the date of the trial and to a declaration that as of that date the agreement of November 27, 1946, was a valid and subsisting agreement. The formal judgment of the Court of Appeal which was delivered on February 10, 1954, awarded to the respondent the full amount which would have become payable up to December 10, 1953. The trial apparently concluded on January 28, 1953. There is thus a period between the last mentioned date and December 10, 1953 during which events may have occurred which would affect the right of the respondent to recover the amounts specified.

I would accordingly vary the judgment appealed from by substituting therefor a declaration that on January 28, 1953, the agreement of November 27, 1946, was a good valid

(1) [1942] A.C. 356 at 361.

and subsisting agreement and direct that the respondent recover the amounts payable under its terms up to and inclusive of that date. If nothing occurred after that date which would affect the rights of the parties the further obligation of the appellant will no doubt be discharged without the necessity of further litigation.

With this variation I would dismiss this appeal with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusions of my brother Kellock except as to the amount at which the damages should be fixed. I would assess these damages at $4,800.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *T. E. H. Ellis.*

Solicitor for the respondent: *G. R. Long Jr.*