

Renaud v. Graham

Ontario Superior Court of Justice - Divisional Court - Ottawa, Ontario

J.D. Cunningham A.C.J.S.C.J., J.F. McCartney and P.B. Hambly JJ.

Heard: October 10, 2008

Judgment: February 13, 2009

Reasons For Judgment

The following judgment was delivered by

P.B. HAMBLY J.:--

? 1.

Overview

1 Ian Graham aspired to be a real estate agent. William Renaud and Raymond Otten were experienced real estate agents working in the City of Ottawa. Graham entered into an agreement with Raymond and Otten in which they agreed to provide him with training to qualify him as a real estate agent. They would provide him while he was being trained with a salary notwithstanding that he had no experience in the real estate industry. They would also employ him as a real estate agent when he had obtained his license. The agreement provided that if he left their employment and commenced working as a real estate agent in competition with them that he would pay Renaud and Otten a pre-estimate of the cost of training him. Ian did leave their employment and soon after leaving commenced working as a real estate agent in competition with them in the City of Ottawa. Renaud and Otten sued Graham on the agreement for the pre-estimate of damages for training him. Justice J. Mackinnon, after a three day trial in January 2007 in a judgment released on February 27, 2007, upheld the agreement. She granted Renaud and Otten a judgment in the amount of the pre-estimated damages. At trial, Graham argued that the agreement ought not to be enforced against him because it was invalid as a result of there being unequal bargaining power between him and his employers, the agreement was in restraint of trade and it provided for a penalty. He also argued that he was constructively dismissed. On appeal, he abandoned the latter argument but he renewed the same arguments that he did at trial that the employment agreement was invalid.

? 2.

The Facts

2 Graham graduated from university with a business degree in 1992. He had a variety of jobs after graduation. Before being employed by Renaud-Otten, he last worked for Nortel for four years. He lost his employment with Nortel as a result of the high tech downturn in August 2001. He was primarily unemployed, until he commenced working for Renaud-Otten in September 2003.

3 He signed an employment contract with Renaud-Otten on September 24, 2003. The agreement provided that Graham would work for Renaud-Otten for three years at a salary of \$40,000 and bonuses, depending on sales. He could not generate any sales until he was licensed as a real estate agent. The contract provided that Graham would be given time off to take three courses necessary for him to obtain his license. It also provided that he would receive hands on training from the Renaud-Otten team, including job shadowing of Renaud and Otten and regular weekly coaching sessions with them.

4 He commenced employment with them on October 14, 2003 as an "unlicensed sales assistant" at a salary of \$40,000. On March 3, 2004, he received his license to practise real estate. On June 19, 2004 his salary was increased to \$44,000. From September 8-11, 2004 he attended a training seminar called "Star Power" in Boston MA at the expense of Renaud-Otten. On February 19, 2005 he resigned, which he confirmed in writing on February 21, 2005. Approximately one month after terminating his employment with Renaud-Otten he commenced employment working as a realtor in competition with Renaud-Otten in the City of Ottawa.

5 The employment agreement contained the following clauses:

? ...

? 5.

Should the Listing Agent's employment be terminated for any reason by the Listing Agent or Renaud-Otten, whether with or without cause, the following conditions apply:

? ...

? B)

The Listing Agent shall also repay us immediately on termination any costs that we have incurred for the Listing Agent's training in the one year prior to the Listing Agent's termination in respect to course fees, airplane tickets, hotels and meals, etc. as outlined in clause #19 of the RE/MAX metro-city realty ltd. Standard Contract ICS-95-5.

? ...

? A)

If the Listing Agent voluntarily terminates his employment with Renaud-Otten and commences work as a realtor, either as his own Broker or for another Broker within one (1) year of his termination, he shall be required to return to Renaud-Otten immediately upon termination, one month of wages (but not bonuses), for which he has received from Renaud-Otten, for each full month between the date of his termination and the three year anniversary of the commencement of his employment with Renaud-Otten, provided the Listing Agent signs the Authorization to Cause Return of Wages attached to this Agreement. This is to compensate Renaud-Otten for the costs of training the Listing Agent in the first six months of employment.

? 8.

On or before your employment commences, the Listing Agent will sign ... a promissory note with Renaud-Otten ...

The amount payable under clause 5A on Graham's suggestion was limited to a maximum of \$20,000.

? 3.

The Trial Judgment

I will use the same headings as did Justice Mackinnon.

? (1)

The Bargaining Process.

6 Graham submitted a draft of the contract for review by a friend who is experienced in these matters. Justice Mackinnon noted several terms that were included at Graham's suggestion. Renaud-Otten agreed that the contract could be renegotiated after three years with respect to remuneration. In the event Graham left their employment, Renaud-Otten would receive commissions earned from clients served by Graham who originated with Renaud-Otten. However, they agreed to exclude clients which had originated with Graham provided he gave them a list of the clients. Most important, Renaud-Otten agreed at Graham's suggestion to cap the potential return of wages at \$20,000. Justice Mackinnon stated the following:

? [12] In my view, nothing tainted this bargaining process. Mr. Graham was not pressured or misled. He was not taken advantage of. He had plenty of time to review the documents, to obtain advice and to propose changes, all of which he did. He successfully negotiated changes to the contract. The mere facts that he did need a job and that the Plaintiffs were more experienced than him provide no basis upon which to set aside or decline to enforce the contract.

? (2)

The Bargain

7 The contract provided that Graham would be paid a salary of \$40,000 from the commencement of his employment with Renaud-Otten. He could not enter into a listing agreement on behalf of Renaud-Otten with a client because he did not have a license. He could not, therefore, generate any income. Justice Mackinnon accepted the evidence of Renaud and Otten, that they had never done this before and that it was unusual in the industry. The usual course was that a person would not be hired by a real estate agency until he had a license and was able to enter into listing agreements and hence generate income. They would then only be paid salary as a draw against commissions. She held that the contract provided for a "well planned, comprehensive and valuable training program for Graham" (paragraph 13) at the expense of Renaud-Otten.

8 She referred to clause 5B of the contract which provided for reimbursement to Renaud-Otten by Graham of their out-of-pocket expenses for training him within one year prior to his termination of employment. On the evidence this constituted \$3,387.14 for the cost of Graham attending the "Star Power" training session. Justice Mackinnon held the following:

? [18] In my view, there is nothing in clause 5B on the facts of this case that would warrant the court's interference.

? ...

? Nothing in this clause or its result is harsh or unconscionable. The Defendant had the benefit of the course, did not object to taking it, knew the term was in his contract, and signed the contract without raising any objection to it.

9 With respect to clause 5A, she said that it meant the following:

? [22] In my view, the clause is clear. It has four components:

? *

The Listing Agent voluntarily terminates his employment and works elsewhere as a realtor within one year,

? *

The amount to be returned is one month's wages for each month by which his employment with Renaud-Otten falls short of three years;

? *

He is not required to return more wages than he has received from Renaud-Otten.

? *

And, the amount is also subject to a \$20,000 cap.

10 Justice Mackinnon stated the following:

? [31] For these reasons I conclude that the meaning of the contract is clear and that there is nothing in its content that is harsh or unfair, such that the court ought not to enforce it. The alternative for the Defendant was to receive no income or training in the licensing period. Instead, he received both in return for a commitment to stay for three years. If he breached that commitment, he agreed to return the costs and wages as set out in Clauses 5A and 5B. There is mutuality in this consideration.

? (3)

Is Clause 5A a Clause in Restraint of Trade?

11 Graham left the employment of Renaud-Otten after 17 months, leaving 19 months remaining on the three year contract. He commenced working as a real estate agent in Ottawa within about one month of leaving. This triggered the maximum payment of \$20,000 owing by him to Renaud-Otten under clause 5A of the employment agreement.

12 Graham argued that this clause was in restraint of trade. Justice Mackinnon rejected this argument. She relied on a passage from the judgment of Lefever J. in 889946 Alberta Ltd. v. Carter, [2002] A.J. No. 218 in which he relied on the decisions of Bakony J. in Century 21 Prudential Estates Ltd. v. Chee, [1993] B.C.J. No. 2688 (B.C. Prov. Ct.) and the decision of Robinson L.J.S.C. in Block Bros. Realty Ltd. v. Phillips, [1988] B.C.J. No. 1881. These cases involved facts similar to this case in which real estate

agencies sought to recover pursuant to contracts of employment the cost of training real estate agents who had left their employment. She quoted a passage from the judgment of Robinson J. in Phillips 43 as follows at paragraph 43:

- ? [55] ... Bakony J. was of the view that it would be inequitable to allow the defendants to take the benefit of training and then work for a competitor in the real estate industry, at no cost to themselves, citing Robinson J. in Phillips as follows (Chee at para. 7):
 - ? "I conclude it not unreasonable for the plaintiff to seek compensation from a Trainee such as the defendant if, as the defendant did here, he obtains the benefit of the training program and then works for a competitor to the plaintiff in the very competitive real estate business, within a year of his receiving the relevant real estate license."
- ? Para56 A critical point arising in both Chee and Phillips is that the defendant employees, after receiving the benefit of training paid for by the employer and receiving a positive benefit in the form of a real estate license, were able after TERMINATING their respective employment contracts to immediately gain employment in the very field for which their previous employer had paid to have them qualified.

13 Justice Mackinnon stated the following:

- ? [44] In my view, these comments are applicable here.
- ? [45] There is nothing in the circumstances surrounding the negotiation of this clause, nor in its content such as unconscientious use or abuse of power or position by one party nor a harsh departure from commercial standards that would lead the court to decline to enforce it.

14 She also stated the following:

- ? [41] The evidence is uncontradicted that this was a highly unusual contract in the real estate industry because it paid a salary and provided in house training to a prospective agent before he was licensed. In my view, the formula with the \$20,000 cap is a fair and reasonable pre-assessment of the loss the Plaintiffs would sustain if Mr. Graham received the benefits of the salary and training and left voluntarily before he completed his agreed upon three year term of employment. It was, after all, the Defendants' own number.

15 She did not refer specifically to whether clause 5A provided for a penalty. She did state, however, the following:

- ? [35] ... in my view, the clause, properly read, provides an assessment of the Plaintiffs damages in the event the Defendant voluntarily terminates his employment before the expiration of the three year contract. Both the contract and the promissory note expressly state in three different places that this is to compensate Renaud-Otten for the costs of training the Listing Agent in the first six months of employment. The purpose of the clause is not to restrain competition but to recover damages caused by early departure.
- ? (4)

Decision

16 Justice Mackinnon granted Renaud and Otten a judgment against Graham consisting of their costs pursuant to clause 5B of the contract in the amount of \$3,387.14 plus the maximum allowed under clause 5A of \$20,000 for a total of \$23,387.14.

? 4.

The Appeal and the Standard of Appellant Review

17 Graham does not question the judgment enforcing clause 5B in the amount of \$3,387.14 for Renaud-Otten's out-of-pocket expenses for sending him on the "Star Power" course in Boston. He submits that the trial judge erred in enforcing clause 5A because it was entered into as a result of unequal bargaining power. It was in restraint of trade and should be held to be invalid as being unreasonable as a result of the application of the principles in *J.C. Collins Insurance Agencies Ltd v. Elsley*, [1978] 2 S.C.R. 916 and that it was a penalty rather than a reasonable pre-estimate of damages. These issues involve either findings of fact or inferences to be drawn from findings of fact. At most they involve the application of legal standards to sets of facts and are hence questions of mixed fact and law. In any event unless the trial judge made "some extricable error in principle with respect to the character of the standard(s) or its (their) application" (Housen, *infra*. para. 37) which the appellant does not allege the same standard of appellant review applies - namely, whether the trial judge made a "palpable and overriding error". (see *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 (S.C.C.), paras. 19-37 and *Baker v. Russell*, 2008 NLCA 51 at para. 14).

? 5.

Analysis

? (1)

Unequal Bargaining Power

18 Graham argues that he was "desperate" when he entered into the employment agreement. He probably was desperate. He had a young family. He had been unemployed for four years. However, Justice Mackinnon held that the agreement was fair, changes had been made to it in the bargaining process in his favour and on his suggestion and the fact that he needed a job and that Renaud and Otten were more experienced than he was in the real estate industry were not reasons not to enforce the agreement. Renaud-Otten, in its factum note that the trial judge's reasoning is consistent with the judgment of Mackinnon A.C.J.O. for the Ontario Court of Appeal in *Mathewson v. Aiton Power Ltd.*, [1985] O.J. No. 49, 1985 CarswellOnt 881 (C.A.), where he stated the following:

? [7] ... The fact that he was unemployed and needed a job, absent other factors, is not a ground for holding that there was an inequality of "bargaining power" and setting aside the contract on that ground.

We agree with the trial judge that the same reasoning applies here.

? (2)

Is Clause 5A in Restraint of Trade ?

19 In *H.L. Staebler Company Limited v. Allan* 2008 ONCA 576, Justice Gillese for the Ontario Court of Appeal defined a restrictive covenant as follows:

- ? [38] The first such principle relates to the nature of the restrictive covenant. A restrictive covenant may restrain either competition or solicitation. A non-competition clause restrains the departing employee from conducting business with former clients and customers whereas a non-solicitation clause merely prohibits the departing employee from soliciting their business.

20 In Nortel Networks Corp. v. Jervis, [2002] O.J. No. 12, 2002 CarswellOnt 21, a decision of Rivard J., Brian Jervis was a key employee of Nortel. Between 1989 and 1998 he received stock options granted to him under the Northern Telecom Ltd: 1986 Stock Option Plan. These stock options included the following clause:

- ? [3] ... In the event that at any time during the 12 months (amended to 24 months) from the date of exercise of all or any pan of these options, you accept employment with an employer that is in competition with the Corporation or any of its subsidiaries, you shall, if the Committee in its sole discretion determines that your action is inimical to the best interest of the Corporation, pay to the Corporation an amount equal to the excess of the Market Value, on the date of exercise of these Options, of the Shares purchased as a result of the exercise of such Options over the Subscription Price for the Shares covered by such Options.

21 Jervis made a total profit of \$626,857.74 by exercising these stock options. On October 31, 1998, he resigned from Nortel. Nortel sued him for the profits that he had made under the Stock Option Plan, pursuant to the above clause. Justice Rivard held the following:

- ? [27] In this case, there was a benefit conferred to Mr. Jervis, at a cost to Nortel, accepted in return for a promise to comply with certain terms attached to the benefit. I conclude there was consideration.
- ? 2.
- Restraint of Trade
- ? [28] Paragraph 3 of the Instruments of Grant does not restrain an employee from going to a competitor. In fact, paragraph 3 contemplates an employee going to a competitor.
- ? [291 Where a former employee is required to forego a benefit if he or she chooses to compete, that is not a restraint of trade.
- ? ...
- ? [34] In this case, Mr. Jervis was not restrained from competing with Nortel. What paragraph 3 of the agreement states is that if he does compete within 12 or 24 months from the date he exercises the Option, he will have to repay the difference between the subscription price for the shares and their market value on the date the option is exercised.

22 In Inglis v. Great West Life Assurance Co., [1941] O.J. No. 366, [1941] CarswellOnt 190 (C.A.), an insurance agent sued an insurance company which had employed him for commissions on renewal premiums on insurance contracts that he had negotiated for the former employer. He had worked for the former employer for nine years and then worked as an insurance agent for another insurance company. The company relied on the following clause:

- ? 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 free of 1% of the premiums on which such commissions are to be paid. (emphasis added)

23 Justice Masten stated for the Ontario Court of Appeal at page 2:

- ? 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.

24 We are of the opinion that the reasoning in these cases and also in the cases of Chee and Phillips relied upon by Lefever J. in 889946 and referred to by the trial judge applies to this case. We agree with the trial judge that clause 5A is not a restrictive covenant and is not in restraint of trade.

- ? (3)

Is Clause 5A a Penalty Clause ?

25 In D.H.O. v. Patino Management Services Ltd. (1984), 5 C.C.E.L. 11 (Ont. H.C.), the plaintiff entered into an employment contract with the defendant on June 12, 1978 which contained a severance clause of one year's salary and moving expenses from England to Toronto. The defendant terminated the employment of the plaintiff without cause on March 31, 1979. The plaintiff immediately commenced employment for a company which purchased the defendant. The plaintiff sued for damages and relied on the severance clause. The defendant argued that the clause was in the nature of a penalty and ought not to be enforced. Justice Galligan stated the following:

- ? [35] Mr. McLoughlin argued that the discharge clause which I quoted above, is in the nature of a penalty and since the plaintiff has not proved actual damages, his action must fail, or he is entitled to nominal damages only. ... The law is concisely set out by Chief Justice Laskin in *Thermidaire Corp. v. H.F. Clarke Ltd.*, [1976] 1 S.C.R. 319. ...
- ? The interference of the Courts does not follow because they conclude that no attempt should have been made to predetermine the damages or their measure. It is always open to the parties to make the predetermination, but it must yield to judicial appraisal of its reasonableness in circumstances.
- ? [36] It is clear that, the determination of whether an amount in such a clause is liquidated damages or a penalty, is a matter to be considered according to the circumstances of each case.

- ? It is clear from the judgment of the House of Lords in *Dunlop Pneumatic Tyre v. New Garage & Motor Co.*, [1915] A.C. 79 at 86, [1914-15] All E.R. Rep. 739, that:
- ? The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach
- ? ...
- ? [37] Having regard to the plaintiffs age at the time the contract was entered into, his qualifications and experience in the business world, the responsibility of the position which he was assuming, and the fact that he had moved his family across the Atlantic to take the position, I think in June 1978, an agreed estimate of his damages at a year's salary plus moving expenses was entirely reasonable.
- ? [28] I think, therefore, that the clause is a legitimate and reasonable pre-estimate of the damages and that the plaintiff is entitled to recover the sums provided for in the clause. I specifically find that the clause is not a penalty clause.

26 In *Inglis*, supra, Justice Masten stated the following at page 2:

- ? This Court is 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 is 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.

27 Following the reasoning in these cases, we agree with the trial judge that clause 5A contains a genuine pre-estimate of damages and is not a penalty clause.

? 6.

Result

28 The trial judge made no palpable or overriding error. The appeal is dismissed.

29 The plaintiffs shall have their costs against the defendant fixed in the amount of \$7500.

J.D. CUNNINGHAM A.C.J.S.C.J.
J.F. McCARTNEY J.
P.B. HAMBLY