COURT OF APPEAL FOR ONTARIO

CITATION: Lindsay v. Verge Insurance Brokers Ltd., 2023 ONCA 263
DATE: 20230417
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Fairburn A.C.J.O., MacPherson and Miller JJ.A.

BETWEEN

Ryan Lindsay

Plaintiff/Defendant by Counterclaim
(Respondent)

and

Verge Insurance Brokers Ltd. and Mark Sherk

Defendants/Plaintiffs by Counterclaim
(Appellants)

Stephen F. Gleave and Katelyn Ellins, for the appellants

Eric C. Nanayakkara and Noah Aresta, for the respondent

Heard: April 4, 2023

On appeal from the judgment of Justice Robert J. Nightingale of the Superior Court of Justice, dated July 12, 2022.

REASONS FOR DECISION

[1] In 2004, Ryan Lindsay ("Lindsay") began working as an insurance producer (i.e. seller) for Verge Insurance Brokers Limited ("Verge") in St. Catharines. Mark Sherk ("Sherk") was the President of Verge. Verge sells personal and commercial insurance products.

[2] The employment contract that governed the relationship between Verge and Lindsay included terms relating to the potential purchase by Lindsay of his book of business if he left Verge.

[3] Lindsay worked at Verge for nine years. He was a successful producer. By 2013, his annual commission income was $181,000.

[4] Starting in 2012, the relationship between Lindsay and Verge soured. On April 15, 2013, Lindsay gave his required 60 days' written notice to Verge of his intention to resign from his employment on June 14, 2013. He also signalled that he wanted to purchase his book of business at the contractual price of twice his annual commissions in the preceding policy term. Verge accepted that Lindsay had the right to purchase his book of business except for accounts that, pursuant to the contract, Verge could retain if they were of "particular importance".

[5] On April 16, Verge and Lindsay began to communicate about Lindsay's potential purchase of his book of business. Starting on May 6, lawyers became involved in the negotiations for both parties.

[6] The key provision structuring the negotiations was s. 5.02(ii)(e) of the contract:

> (ii) The right to purchase as provided in paragraph 5.02(i) above shall be subject to the following conditions and limitations:
>
> (e) within sixty (60) days following receipt of the Producer's notice to purchase as referred to above the Company shall notify the Producer in writing as to the accounts to be sold to the Producer together with the purchase price for any such account as provided for in paragraph 5.02(i) above. The Producer is obligated to purchase all of the accounts identified by the Company. The purchase price shall be paid in full by the Producer to the Company within fourteen (14) days thereafter failing which the Producer is deemed to have waived or relinquished any right to purchase as provided for herein;

[7] The negotiations did not go well. Verge was slow in providing a client list, finally doing so on May 14, but without names or policy numbers, thus making it difficult for Lindsay to determine if the list was accurate. On the same day Verge stated a purchase price of $481,167 and demanded closing on May 29.

[8] On May 17, Lindsay advised Verge through his lawyer that he could not vet the list and stated that the 14-day period could not run until he had accurate account information.

[9] In a series of letters and emails between May 22 and June 5 dealing with the information Verge was providing to Lindsay, Verge made corrections to the list and lowered the purchase price of Lindsay's book of business accordingly from the

initial $481,167 to $389,136 to $362,977. In its final letter on June 5, Verge insisted on closing at 5 p.m. that day.

[10] Lindsay decided not to close the transaction on the terms demanded by Verge. His counsel informed Verge's counsel that Lindsay was not prepared to close with yet another new price in play coupled with no time to review the relevant documentation.

[11] Lindsay commenced an action alleging that Verge had breached the terms of the producer agreement. Verge defended and made a counterclaim that Lindsay had improperly refused to buy his book of business.

[12] After a trial lasting 43 days, the trial judge rendered a 371-paragraph judgment in favour of Lindsay. He awarded Lindsay damages of $185,000. The trial judge's central conclusion was:

> In conclusion, Verge breached section 5 of the producer agreement when it refused to allow Ryan to close the transaction within 14 days after June 5, 2013. The accounts that Ryan were to purchase were identified and the price were only finally confirmed and agreed to by the parties on June 5, 2013. Verge demanded the closing take place the same day contrary to section 5 and the parties' clear understanding that the 14-day period for the closing date only started on June 5, 2013. Verge's actions made it impossible for Ryan to complete the purchase at any time.

[13] Verge appeals from the trial judge's decision on both liability and damages.

Liability

[14] Verge contends that the trial judge erred in five "major ways". However, all five of these submissions essentially say the same thing: (1) "did not apply the proper principles of contract interpretation"; (2) "misinterpreted the contract"; (3) "amended the producer agreement"; (4) "changed the contractual requirement"; and (5) "misinterpreted the contract".

[15] There can be no question that this appeal involves a question of mixed fact and law. The fact component is the events involving the parties between April 15 and June 5, 2013. The law component is the application of principles of contractual interpretation to the employment agreement between Verge and Lindsay.

[16] The standard of review in most contractual interpretation cases is one of substantial deference: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at paras. 50-52. A correctness standard can be applied only where there is an extricable question of law or where the contract in issue is a standard form contract: *Corner Brook (City) v. Bailey*, 2021 SCC 29, at para. 44. Neither of these exceptions exists in this appeal or in most contract case appeals. As explained recently by this court in *Cronos Group Inc. v. Assicurazioni Generali S.p.A*, 2022 ONCA 525, at para. 35:

> *… Sattva* identified certain questions that may arise in the contract interpretation exercise as constituting legal errors that attract a correctness standard. However, *Sattva* went on to emphasize that the fundamental goal

> of contractual interpretation – to ascertain the objective intentions of the parties – remains an inherently fact-specific exercise. Accordingly, the close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the contract means that the circumstances in which a question of law can be extricated from the interpretation process will be rare: *Sattva*, at para. 55

[17] We can see no error in the trial judge's careful and comprehensive contractual analysis. We agree with him that it was a reasonable interpretation of the contract to find that the list of accounts and purchase price had to be accurate and that Lindsay was entitled to a 14-day period once the accurate list and price were fixed to make his decision. Verge's conduct over a three-week period in May and June 2013 was inconsistent with both of these essential components of the contract. Verge changed the list and the initial price two times in those three weeks and gave Lindsay no time to consider the transaction after setting the final price. As found by the trial judge, Verge's conduct was unfair and not in keeping with the terms of the employment contract. Thus Lindsay's refusal to close the purchase was not a breach of the employment contract.

Damages

[18] The core of the trial judge's reasoning on damages was:

> The evidence at trial was that Ryan was an excellent producer who retained approximately 92% of his clients while at Verge. …

> Mark provided evidence that Verge also enjoyed a high retention rate but indicated that on average, commercial clients would stay at Verge for approximately 11 years.
>
> The ability of insurance clients to choose to leave at any time or remain with their insurance producer and the evidence in this case suggests that their staying with their particular producer for approximately 10 years is not unreasonable or unusual.
>
> Accordingly, it would not be unreasonable to consider loss of profits for 10 years incurred by Ryan because of his inability to purchase and have transferred to him his entire book of business by Verge in June 2013.
>
> I accept the evidence of [Lindsay's expert] that those loss of profits for that 10 year period after June 2013 are approximately $181,500.

[19] Verge submits that the trial judge erred by choosing a ten-year term for Lindsay's loss of profits. The maximum term should have been 6.6 years because that was the average length of Lindsay's policies with his clients during his nine years with Verge.

[20] We do not accept this submission. The combination of Verge's retention rate of 11 years for its commercial clients and Lindsay's 92 percent retention rate for his clients while at Verge justified the trial judge's award on this issue.

[21] With respect to Verge's other submissions, we do not agree that the trial judge erred by not reducing the award by the commissions Lindsay was able to earn in his new position. There was no evidence before the trial judge to support the conclusion that Lindsay would have been unable to service both groups of clients. Neither did the trial judge err in assigning a terminal value to the book of

business. The retention rate accepted by the trial judge did not presuppose that the book of business would have no value at the end of 10 years.

Disposition

[22] The appeal is dismissed. As agreed between the parties, Lindsay is entitled to his costs of the appeal fixed at $50,000 inclusive of disbursements and HST.

"Fairburn A.C.J.O."
"J.C. MacPherson J.A."
"B.W. Miller J.A."