

THE HIGH COURT

[2003 No. 466S]

BETWEEN

CANADA LIFE ASSURANCE IRELAND LIMITED

PLAINTIFF

AND
LIAM O'CONNOR

DEFENDANT

Judgment of the Hon. Mr. Justice Quirke delivered the 2nd day of October 2006.

In this case the plaintiff (hereafter called "Canada Life") employed the defendant Liam O'Connor on 28th May, 1989. Mr. O'Connor's job was to sell the Canada Life's financial products which were principally, (a) insurance policies and (b) saving and retirement accounts.

Mr. O'Connor worked for Canada Life for thirteen years until he was dismissed by his employer on 20th September, 2002. He has commenced proceedings against Canada Life claiming that his contract of employment was unlawfully terminated. These proceedings are unconnected with that claim.

It was a term of Mr. O'Connor's contract of employment that if, during the course of his employment, he was incapacitated by ill health and unable to do his job he was entitled to receive disability monthly allowances whilst so disabled under the terms of a Disability Income Benefit Scheme provided by his employer.

In order to qualify for receipt of those monthly allowances it was necessary for him to provide his employer with doctors certificates which confirmed his disability and unfitness for work.

During the ten month period between December, 2001 and September, 2002, Mr. O'Connor provided his employers with certificates from his doctors which certified that he was incapacitated during those months by ill health and was unable to do his normal job.

With the support of those certificates Mr. O'Connor claimed from Canada Life and was paid disability allowances totalling €82,929.44.

In these proceedings Canada Life seeks repayment of that sum of €82,929.44 on a number of grounds and alternatively as damages for alleged breach of contract, conversion and misrepresentation on the part of Mr. O'Connor.

In summary, Canada Life claims that it is entitled to recover the sum from Mr. O'Connor because it claims that during the ten month period during which he was paid the disability allowances Mr. O'Connor was capable of working and was in fact working at his normal job.

Relevant Facts

I am satisfied that the following facts have been proved by way of evidence in these proceedings.

1. During the course of his employment with Canada Life Mr. O'Connor was remarkably successful in selling Canada Life's products. His success was acknowledged by his employer on several occasions and by other associated organisations.

His income, arising out of his success, was substantial. His value to Canada Life was also considerable because Canada Life benefited from the very large amount of business which he sold on behalf of his employer.

2. Towards the end of the year 2000 and the beginning of the year 2001, the Irish Government introduced Special Savings Investment Accounts (hereafter "SSIA's") for the benefit of its citizens.

These savings accounts offered very attractive returns to investors who were prepared to open such accounts between May, 2001 and May, 2002.

Mr. O'Connor who, by the year 2001, had introduced more than 3000 clients to Canada Life wrote a circular letter (called a "mailshot") to all the clients whom he had earlier introduced to his employers. The mailshot encouraged the clients to open SSIA's with Canada Life and invited the clients to contact Mr. O'Connor.

The mailshot was successful. Large number of clients contacted Mr. O'Connor and opened SSIA accounts with Canada Life.

3. In early November, 2001 Mr. O'Connor was attacked by criminals who assaulted him with a car jack and beat him severely in an attempt to rob him.

As a result of the injury sustained in that attack Mr. O'Connor was unable to work and remained home.

Whilst he was at home he suffered a very severe injury when a lawnmower was pulled onto his foot which was pulverised by the blades of the lawnmower. His injuries included the amputation of one of his toes.

The injury was very severe and the surgeon who treated him recommended that he shouldn't work for a number of months.

Because a large number of clients continued to contact him and to contact Canada Life in response to his mailshot Mr. O'Connor felt under pressure and was suffering significant stress at this time. Additionally Canada Life wished to know when he would be in a position to resume work.

He began to suffer psychological symptoms which were complicated by the fact that Canada Life was, concurrently, investigating a complaint which had been made about Mr. O'Connor and which is unrelated to these proceedings.

By reason of his injuries and ill-health a disciplinary hearing which was intended to investigate the complaint against Mr. O'Connor was postponed in December, 2001 and rescheduled for February, 2002.

With the exception of a number of days in February, 2002 Mr. O'Connor provided medical certificates from his treating doctors which

certified that he was unfit to work during the entire of the period between December, 2001 and September, 2002 when he was dismissed from his employment.

Mr. O'Connor attended the disciplinary investigative meeting in February, 2002. At that time and during the meeting he was still suffering from his physical injuries and was also suffering from stress and psychological illness.

The meeting was described by a witness on behalf of Canada Life as "*inconclusive*". Mr. O'Connor was advised not to work and not to contract clients and he agreed not to do so.

The resumed meeting was also described as "*inconclusive*" by the same witness.

Mr. O'Connor was still suffering from his physical injuries and from psychological symptoms. He was still receiving constant calls from his clients and when he attended Canada Life's premises on a number of occasions he was told to go home by his immediate superior (Mr. McGrath), and by other members of the staff.

In May, 2002 Mr. O'Connor removed 400 client files from the office of Canada Life without authorisation.

When his employers discovered that he had taken the files they contacted him and required that he return them. He did so and admitted that his actions were "*fool hardy*". He apologised stating that he "*didn't realise the serious implications of what I was doing.*"

In May, 2002 Mr. O'Connor was referred by his general practitioner to Dr. Elizabeth Cryan who is a Consultant Psychiatrist. Dr. Cryan was concerned. Her professional opinion was that Mr. O'Connor was presenting with depressive symptoms, having been in contact with the suicide of his wife's nephew. She was satisfied that Mr. O'Connor was himself suicidal at that time for a variety of reasons.

Dr. Cryan diagnosed an adjustment disorder with accompanying depressive and anxiety symptoms. She felt that Mr. O'Connor was suffering from significant stress resulting from his earlier physical injuries, his marital difficulties, and his work place problems. His condition had been exacerbated by anxiety in relation to his income.

Dr. Cryan treated Mr. O'Connor by way of combination of medication including anti-depressants. She then referred him for psychological support to a clinical psychologist who treated him on a weekly basis.

4. In early 2002, Mr O'Connor was receiving a very large number of inquiries from clients who wished to open SSIA accounts. At this time he was concerned about his income and financial circumstances. Accordingly, he made an arrangement with an insurance broker named Raymond O'Neill. This arrangement was made with the collaboration of a Mr. Gavin Glass who was then a Consultant Broker in Canada Life (i.e. he canvassed business on behalf of Canada Life from assurance brokers). The arrangement was intended primarily to accommodate the interests of Mr. O'Connor, Mr. O'Neill and, indirectly, Mr Glass. However, Canada Life benefited also.

The arrangement which was made was that, whilst he was ill, Mr. O'Connor would channel his clients to Canada Life through the brokerage of Mr. O'Neill who would receive commission from Canada Life in return for that business.

It is agreed between Mr. O'Connor and Mr. O'Neill that when Mr. O'Connor was fit to resume his employment with Canada Life, Mr. O'Neill would transfer the clients back to Mr. O'Connor who would then be entitled to receive the commission from Canada Life for that business under the terms of his contract of employment with Canada Life. That business also comprised a beneficial factor in the calculation of Mr. O'Connor's pension entitlements on retirement from Canada Life.

The benefit which Mr. Gavin Glass received from the arrangement was credit resulting from the increase in business from brokers whilst the business was being channelled through Mr. O'Neill's brokerage.

The arrangement which Mr O'Connor made with Mr. O'Neill was designed to preserve the business which he felt he had obtained on behalf of Canada life so that he could receive the appropriate commission benefits from Canada Life for that business when he was fit to resume his employment with Canada life.

5. During the 10 month period between December, 2001 and September, 2002 Mr. O'Connor received no money or benefit from Mr. O'Neill or from Canada Life or from any other source by way of commission or otherwise arising out of the business which went to Canada Life as a result of this arrangement.

Mr. O'Connor did not seek or obtain business for any other company during this time or receive any payment of any kind whatsoever for any work done on behalf of Canada life or on behalf of any other company or person during this time. His income was wholly confined to the monthly allowance which he received under the terms of Canada Life Disability Income Benefit Scheme. The weekly Disability Benefit payments which he claimed and received from the State as a result of his illness and injury were transferred to Canada Life during the material period under the terms of his contract of employment with Canada Life.

6. I am satisfied on the evidence that the arrangement which was made between Mr. O'Connor, Mr. O'Neill and Mr Glass at this time did not receive the approval of Canada Life and was an arrangement which was contrary to the policy and practices of Canada Life at that time. I am satisfied also that, as a matter of probability, Mr. O'Neill, Mr. O'Connor and Mr. Glass knew that the arrangement was contrary to the policy and practice at that time and they also probably knew that it was unlikely that Canada Life would approve of such an arrangement.

7. In evidence Ms. Oonagh O'Driscoll who is the Human Resources Manager of Canada Life stated that this matter had come to light when:

"... a number of clients claimed that they had received letters indicating that Ray O'Neill was their broker. They had never met Ray O'Neillthey wanted to know why they were hearing about Ray O'Neill in relation to their policies..."

Subsequent evidence did not bear out Ms. O'Driscoll's testimony. It is unlikely to have been correct.

Canada life received a letter dated 18th April, 2002, from New Ireland Assurance which referred to Mr. O'Connor and stated:

"The above named had applied for a Life Assurance Agency with New Ireland and as an employee of your company we would be obliged if you would oblige us as to the suitability to hold such an agency."

In evidence Mr. O'Connor stated that during the course of his employment with Canada Life several attempts had been made by other companies to "head hunt" him. He said that, for normal commercial reasons, he regularly expressed interest in such offers but had never received an offer which would have matched his terms of employment with Canada Life.

It is probable that having received the letter, Canada life were under the impression that Mr. O'Connor intended to leave Canada Life and establish his own business in competition with Canada Life or to seek employment with one of Canada Life's competitors.

8. Although he was still suffering psychological and other sequelae associated with his injury and illness Mr. O'Connor continued to contact and deal with his clients from time to time during the summer of 2002. His contact and dealings were intermittent and probably occupied less than 25% of Mr O'Connor's potential working week. He was still ill and unfit for work at this time and required treatment from his general practitioner which later gave rise to further treatment by Dr. Cryan and by the psychologists to whom he required to be referred.

Mr. O'Connor was examined on at least one occasion, on behalf of Canada Life, by their Chief Medical Officer Dr. Holland. Dr Holland did not testify in these proceedings. No medical evidence was adduced on behalf of either party which, in any way, casts doubt upon the fact that Mr. O'Connor was medically unfit for work during the time which is material to these proceedings.

After Canada Life received a medical report from Dr. Cryan confirming Mr. O'Connor's psychological illness during the summer of 2002, no attempt was made on behalf of Canada Life to have Mr. O'Connor further medically examined.

The certificates provided to Canada Life by Mr. O'Connor's doctors which certified that he was unfit to work were never challenged by Canada Life. They were not challenged during these proceedings.

9. By letter dated 28th August, 2002, Canada Life wrote to Mr. O'Connor stating that his employers had discovered that he had been "...actively selling insurance..." while on "paid sick leave" from his employment.

Identifying eleven clients who had been introduced to Canada Life by Mr. O'Connor through the brokerage of Mr. O'Neill the letter continued:

"It is clear that, if you are fit to pursue active sales work, you are fit to attend a Disciplinary Hearing.

Selling business while on sick leave and placing it through a third party agency constitutes a breach of the terms of your employment. Accordingly you are now requested to attend at a new Disciplinary Hearing... scheduled for Wednesday next 4th December, 2002."

By further letter dated 4th September, 2002, Ms. O'Driscoll on behalf of Canada Life wrote to Mr. O'Connor in the following terms;

"Further to our letter of 29th August, and 2nd September, 2002, I note that you failed to attend the disciplinary hearing called for this morning. We are prepared to allow you a further opportunity to attend a Disciplinary Hearing on Monday next 9th September, 2002..."

Mr. O'Connor attended a disciplinary hearing on 10th September, 2002, at the offices of Canada Life. He was accompanied by his union representative Mr. Gerry White and a Mr. John Harmon who was another member of the staff of Canada Life in whom Mr. O'Connor had confidence.

Much of the hearing was taken up with the questioning of Mr. O'Connor. The hearing had to be adjourned on four occasions. On the final occasion Ms. O'Driscoll suggested that the meeting could reconvene later on the same or on another day.

However, it was indicated that Mr. O'Connor was not available later in that day as he had to see his psychiatrist. The hearing was adjourned for three days until the 13th September, 2002.

When the hearing resumed on 13th September, 2002, Mr. White on behalf of Mr. O'Connor told the participants that Mr. O'Connor had been taken into hospital on the previous evening for treatment. He provided the hearing with a certificate from the Accident and Emergency Unit of James Connolly Memorial Hospital which certified that Mr. O'Connor was suffering from a "nervous disorder" and was unfit until further notice.

Mr. White told the hearing that he felt that "the medical situation was out of hand." and was "...just adding to the stress".

10. The hearing was never reconvened. Seven days later Canada Life wrote to Mr. O'Connor summarily terminating his employment and requiring repayment of the disability allowances made by Canada life under its Disability Scheme.

In its letter of dismissal dated the 20th September, 2002, Canada Life stated that Mr. O'Connor had transacted business in respect of eleven clients through the agency of Raymond O'Neill at a time when those clients were actually dealing directly with Mr. O'Connor. It was pointed out that this work had been done whilst Mr. O'Connor was in receipt of sick benefits from Canada Life.

Stating that this constituted "gross misconduct", (including the commission of two criminal offences), the letter continued:-

"In the light of the extremely serious nature of these issues we have no alternative but to terminate your employment by summary dismissal with effect from today's date...since the sick pay of 82,929.44 has been obtained by you from Canada Life under false pretences we now require you to repay it to us in full and without delay."

The suggestion contained within the letter that criminal offences had been committed was never clarified during the course of these proceedings. The matter was apparently reported to the Financial Services Regulator who appears to have conducted a full investigation into the circumstances surrounding these events. Neither Canada Life nor Mr. O'Connor nor any other person has been prosecuted in respect of any offence arising out of these events. It is not now suggested that any action will be taken against any party as a result of anything Mr. O'Connor did or failed to do.

Decision

Canada Life, in its Statement of Claim delivered on the 17th June, 2004, claimed the sum of €82,929.44 from Mr. O'Connor (a) as damages for breach of contract, (b) alternatively on foot of an account allegedly stated and settled between the parties or, (c), in the further and final alternative as damages for deceit or misrepresentation.

Written submissions provided to the court on behalf of Canada Life appear to advance a claim that Mr. O'Connor was unjustly enriched by the sum sought at the expense of Canada Life and should be required to return it to Canada Life under the Law of Restitution. That claim is not to be found in the pleadings.

1. Damages for breach of contract.

Canada Life claims the sum of €82,929.44 from Mr. O'Connor by way of damages for breach of contract.

Mr. O'Connor's contract of employment with Canada Life provided (at paragraph 4) that Canada Life would provide him with a Disability Monthly Income Benefit "...details of which are contained in this ... contract in Appendix 1."

Appendix 1 of the contract defined "disability" in the following terms:

"Disability means that you are unable, by reason of sickness or accident, excluding fitness or accident caused by the taking of alcohol or drugs other than under the direction of a qualified medical practitioner, to do your regular job at the company and are not following any other occupation for remuneration or profit... during the period of disability, doctor certificates must be produced and the company reserves the right to require that the disability be certified by a medical officer appointed by the Company. Certification may require access to relevant medical records..."

On the evidence adduced in these proceedings I am quite satisfied that during the ten month period between December, 2001 and December, 2002, whilst Canada Life was paying to Mr. O'Connor the Disability Monthly Income Benefit which it now seeks to recover, Mr. O'Connor was unable by reason of sickness and accident to do his regular job with Canada Life and that he was not following any other occupation for remuneration or profit.

My conclusion is based upon the evidence of Mr. O'Connor himself, which I accept, and, in particular, upon the evidence of his treating Consultant Psychiatrist Dr. Cryan. Canada Life has never sought to challenge the very large number of medical certificates provided to Canada Life by Mr. O'Connor's doctors which certified that he was unfit to work at the material. Mr. O'Connor was also examined on at least one occasion by Dr. Holland who is the Chief Medical Officer employed on behalf of Canada Life.

Dr. Holland, presumably, had access to Mr. O'Connor's doctors at all material times. Dr. Holland's professional opinion on Mr. O'Connor's condition was never disclosed to this court.

As Mr. O'Connor was in contact with and dealt with some of his clients during the material time this Court is invited to conclude that he was medically fit to work and to do his "*regular job with the company*". This Court expressly declines to do so. The Court is quite satisfied, on the evidence which was adduced in these proceedings, that Mr. O'Connor was not able to do his "*regular job with the company*" during the period in question.

It follows from that, that the Court has found that there was no breach by Mr. O'Connor of his contract of employment with Canada Life which in any way affected his claim for and receipt of the Disability Monthly Income Benefit.

No other breach of contract on the part of Mr. O'Connor is alleged in these proceedings which would give rise to the payment of damages.

Accordingly the claim on behalf of Canada Life for the sum sought by way of damages for breach of contract fails.

Account Stated and Settled

No evidence of any kind was adduced during the course of these proceedings suggesting that an account had been stated or settled between the parties at any relevant time either in the sum of €82,929.44 or any other amount.

It follows that the plaintiffs claim for payment under that heading fails.

Deceit And Misrepresentation

In order to sustain its claim in deceit and misrepresentation Canada Life was required to prove that Mr. O'Connor: (i) made a false representation of fact; (ii) with knowledge of its falsity, (iii) with the intention that it should be acted on by Canada Life and, (iv) that Canada Life acted upon the false statement and sustained damage by doing so.

It follows from the findings that I have made earlier that Canada Life has failed to discharge the onus of proving any of the elements of the deceit which would have been required in order to sustain a claim against Mr. O'Connor in deceit.

Unjust Enrichment

As I have indicated earlier no claim under this heading has been included in the pleadings in these proceedings.

It seems to me, however, that, on the evidence adduced in these proceedings, it was Canada Life (and to a small extent Mr. Raymond O'Neill) who received the benefits and profits which resulted from Mr. O'Connor's attempt to retain his clients (approximately 50 clients by his own reckoning whilst he was ill and unable to do his regular job with Canada Life).

Canada Life retained and still continues to retain, not only the profits from Mr. O'Connor's efforts, but also the commission which would otherwise have been paid to Mr. O'Connor and would still be due to Mr. O'Connor if he had not been dismissed from his employment.

No attempt has been made by or on behalf of Canada Life to return the commission payments to the individual clients or to Mr. O'Connor or to any other person. No evidence was adduced suggesting that Canada Life returned or intends to return to the State the disability payments from the State which Mr. O'Connor transferred to Canada Life under the terms of his contract of employment.

How then can it be suggested that Mr. O'Connor has been enriched by his actions at the expense of Canada Life? Surely the contrary has been the case.

It follows that the plaintiff's claim fails and must be dismissed.