CITATION: The Manufacturers Life Insurance Company v. Ward, 2007 ONCA 881
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COURT OF APPEAL FOR ONTARIO

WEILER, ROSENBERG and ROULEAU JJ.A.

BETWEEN:

THE MANUFACTURERS LIFE INSURANCE COMPANY

Defendant
(Appellant)

and

REGINALD WARD, SR. and REG WARD INSURANCE SERVICES INC.

Plaintiffs
(Respondents)

AND BETWEEN:

THE MANUFACTURERS LIFE INSURANCE COMPANY

Plaintiff by Counterclaim
(Appellant)

and

REGINALD WARD, SR. and REG WARD INSURANCE SERVICES INC. and STEVE WARD

Defendants by Counterclaim
(Respondents)

Jeffrey S. Leon and Richard B. Swan for the appellant

Eric R. Williams and Jaye E. Hooper for the respondents

Heard: September 5 and 6, 2007

On appeal from the orders of Justice Denis J. Power of the Superior Court of Justice dated June 5, 2006, with reasons reported at (2006) 19 B.L.R. (4th) 68; dated September 1, 2006, with reasons reported at [2006] O.J. No. 3491; and, dated January 4, 2007, with reasons reported at [2007] O.J. No.37.

WEILER J.A.:

[1] For thirty years, the respondent, Reg Ward Sr. ("Ward") sold life insurance as an agent for Manufacturer's Life Insurance Company (Manulife) and its predecessors, North American Life (NAL) and Monarch Life. Pursuant to the agreement allowing it to do so, Manulife terminated Ward on July 16, 1997, giving him thirty days' notice and reassigning his clients to other agents. Following a five-week trial, the respondent, his son Steve Ward, and his company, Reg Ward Insurance Services Inc. (Ward Inc.), obtained the following orders, which Manulife now appeals:

- Payment to Ward Inc. of all commissions on policies owing up to May 4, 2005 (the date of the trial), a total of $267,000 plus interest.

- Payment of a vested commission of five per cent on all premiums on policies sold by Ward or Ward Inc. from 1967 to December 31, 1995, the date that NAL merged with Manulife.

- Payment of a vested commission of five per cent on all premiums on policies sold by Steve Ward from July, 1988 to May 1, 1995, the date Steve Ward's licence to sell life insurance was revoked.

- Payment of all amounts to which Ward Inc. might be entitled in accordance with a Producer's Agreement executed with Manulife on or about December 31, 1995.

- Payment to Ward of $150,000 in damages for breach of fiduciary duty.

- Punitive damages in the amount of $250,000.

[2] In addition, Manulife appeals the dismissal of its counterclaim against Ward, Ward Inc. and Steve Ward.

[3] This is a fact-driven appeal. Rather than providing all of the facts at the outset, in addressing each issue I will summarize the evidence and findings of the trial judge sufficient to give context to that issue.

[4] The issues are:

1. Did the trial judge err in finding that commissions payable to Ward were vested from 1967 to 1995 and that they continued to be payable?

2. Did the trial judge err in holding that Manulife owed Ward a fiduciary duty or in awarding $150,000 in damages for breach of that duty?

3. Did the trial judge err in awarding punitive damages in the amount of $250,000 to Ward?

4. Did the trial judge err in dismissing Manulife's set-off defence and counterclaim?

5. Did the trial judge err in awarding a risk premium on costs?

[5] I will deal with each in turn.

1. Did the trial judge err in finding that commissions payable to Ward were vested from 1967 to 1995 and that they continued to be payable?

[6] Ward sold life insurance for Monarch Life from 1967 until 1983, when Monarch's assets were purchased by NAL. That same year, he incorporated Ward Inc. Beginning in 1983, pursuant to an assignment by Ward in favour of Ward Inc., all commissions he earned were paid to his company. Ward divided the overhead and direct expenses of Ward Inc. with his two sons, Steve Ward and Reg Ward Jr. who – unlike Ward – sold a variety of insurance products rather than just life insurance.

[7] In the spring of 1984, Ward Inc. signed an agreement with NAL which provided that no commissions would be paid subsequent to the termination of their agreement. In

[8] On October 16, 1990, NAL sent a memo to Ward Inc. offering to change their agreement to an "88-A" Agent's Agreement effective January, 1991. The relevant portion of the memo states, "agents who change to the 88-A at January, 1991 will receive 5% lifetime renewals or service fees on their existing business which is past the commission – paying period." Under the heading Vesting Clause, the memo stated:

> Clause 9 of the 88-A contract, "Commissions After Termination of Agreement" was amended in November, 1988 and December, 1988 to provide for vesting of individual renewal commissions. A copy of the revised Clause 9 is included.

[9] Ward's evidence was that the memo meant if he agreed to the 88-A, his commissions would vest and he would receive 5% commission on the premiums paid for all renewal business of life insurance policies from 1967 forward. Manulife, on the other hand, argued at trial that any vested commissions applied only to renewals from 1991, when the 88-A was offered, until 1995, when a further agreement was entered into. In addition, Manulife submitted that there was a distinction between the vested renewals referred to in the memo and the renewals which Ward was claiming. No one was called by Manulife to explain the distinction.

[10] Although Ward Inc. did not sign an actual contract at that time, the trial judge accepted Ward's evidence that he concluded he did not need to do so. The trial judge found support for his conclusion in an internal NAL memo dated April 30, 1991 which confirmed an agreement to "Provide the vesting of his (Ward's) renewals through the 84AC and assign renewals to his corporation." An NAL official wrote on the memo "treat as Special 88A Member". Ward began to receive commissions on policies that were renewed from 1967 onward.

[11] The trial judge accepted Ward's argument that all of these renewal commissions were vested from 1967 onward. He found that Ward gave up the more lucrative bonus structure on renewals that he had previously received over a five year period in exchange for the lesser 5% commission that vested.

[12] The 1991 agreement was terminated in 1995, and Ward was asked to sign another 88A contract by his then manager, John Martin. This contract was silent as to whether

commissions were vested, stating that they would be paid pursuant to the "Rules of the Company". Ward's evidence was that prior to executing the 1995 agreement, he understood that the commission-vesting provisions contained in his 1991 agreement would continue to apply although that agreement was terminated. Manulife called no witness from the relevant time to contradict him. The trial judge accepted Ward's evidence. He stated at para. 47 of his reasons:

> On examination for discovery, NAL's representative agreed that the vesting arrangement meant that the insurer would continue to pay commissions to the agent even after the agreement had been terminated provided the policyholders continued to pay premiums, the agent was licenced to sell life insurance, and there were no contractual provisions to the contrary.

[13] On January 1, 1996, NAL merged with Manulife. NAL wrote to Ward Inc. and others on November 30, 1995, announcing the forthcoming merger and terminating its agency agreement with Ward Inc. Among other things, the letter said, "[p]rovided that a Manulife agreement is signed and returned to the Company by January 15, 1996, holders of non-vested NAL Agreements will continue to receive their renewal commissions as long as their Manulife Agreement remains in effect. (Holders of vested NAL Agreements will, of course, continue to receive their renewals.)"

[14] On December 29, 1995, having accepted assurances from Farley, Manulife's Cobourg Manager, that he would be "grandfathered" under his new Manulife Producer's Agreement, Ward caused Ward Inc. to enter into a non-exclusive Producer's Agreement with Manulife. The trial judge observed that on discovery, an NAL agent agreed that, "…the subsequent Producer's Agreement with Manulife provided for the payment by Manulife of any commissions that were required to be made in the agreement between the agent and NAL."

[15] The trial judge rejected Manulife's submission that the starting date for the payment of the 5% renewal was 1991 and that that right ended in 1995. He held:

> The evidence persuades me that there should be a finding in favour of the Plaintiffs that the commissions on renewals were vested and that the start date is 1967 rather than 1991 as argued by Manulife. I can find no compelling reason why I should find that the right to receive renewal commissions existed only during the life of the 1995 88-A contract. As aforesaid the evidence is to the contrary.

[16] The evidentiary basis supporting the trial judge's factual conclusion includes Ward's evidence that he entered the original 88A agreement in 1991 on the understanding that he was going to have a "pension" from commission renewals; the fact that he gave up a more lucrative bonus structure; the April 30, 1991, NAL memo and the conduct of NAL in paying commissions on renewal business back to 1967, including after the 1991 agreement ended and the 1995 agreement was signed; and Manulife's conduct in continuing to pay these commissions after the merger. The trial judge also noted and took into consideration, as he was entitled to do, the absence of evidence from Manulife to contradict Ward's evidence.[1] The appellant has not shown that the trial judge made any palpable and overriding error in relation to whether commissions on renewals respecting business from 1967 to December 31, 1995 had vested. The trial judge was entitled to find that the parties did not change the vesting structure to which they had previously agreed.

[17] On May 1, 1997, Ward was assured by his manager that his vested rights would continue. However, on August 18, 1997 – after the termination – a Manulife official sent an internal memo to another official indicating that, "commissions on all policies settled prior to April 1, 1991 are not vested and the policy areas must shut off the commissions owing on pre 1991 policies". The trial judge found that this step was taken without a proper investigation into the relevant history, and was made in bad faith.

[18] Relying on the wording of clause 14 of the Producer's agreement, Manulife argues that Ward was not entitled after termination to receive vested commissions on policies purchased between 1967 and 1991. Titled "Effect of Termination on Commissions and Other Compensation", that clause begins, "Upon termination of this Agreement the Producer shall not be entitled to any further compensation from the Principal…"[2]

[19] Although the Producer's Agreement, on its face, permits Manulife to terminate the relationship on thirty days notice without cause, the agreement must be viewed in context. It was not the only agreement between the parties. It had nothing to do with the payment of vested commissions. As mentioned by the trial judge at para. 189 of his reasons, there were collateral representations "…and collateral agreements concerning the vesting of commissions which induced the Plaintiffs to enter into the [Producer's] agreement." He further held, at para. 196 of his reasons, that Ward's right to receive lifetime renewals, subject to sufficient levels of "persistency" (a measure of the renewal rate of policies), was in the nature of a pension and not conditional on a continuation of the Producer's agreement.

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[1] At trial, Manulife submitted that there was a distinction between vested policies and lifetime renewals, but called no evidence as to the distinction. The plaintiff submitted that he understood the 5% commission on renewals would continue for the rest of his life and that lifetime renewals and vested meant the same thing.

[2] While the clause contains an exception, that exception is not relevant to this appeal.

[20] The trial judge's reasons on this issue demonstrate a strong command of the trial record and contain a detailed analysis of the evidence. The appellant has not demonstrated any errors in the trial judge's consideration of the evidence on this point. Having regard to the whole of the evidence, as opposed to considering only the Producer's agreement in isolation as the appellant would have us do, I cannot say that the trial judge committed any palpable an overriding error in his finding that Ward continued to be entitled to receive his vested renewal commissions after his termination. I would dismiss this ground of appeal.

[21] The same reasoning applies to the payment of a vested commission on all premiums on policies sold by Steve Ward, from July, 1988 to May 1, 1995, the date Steve Ward's licence to sell life insurance was revoked. Thus, I would also dismiss this ground of appeal.

[22] On appeal, Manulife also argued that the trial judge erred in finding that Manulife owed Ward a duty of good faith governing how it could exercise the termination rights under their contract. Given that the collateral agreement respecting the vested commissions was not subject to the termination clause, it is not necessary to decide this issue.

2. Did the trial judge err in holding that Manulife owed Ward a fiduciary duty or in awarding $150,000 in damages for breach of that duty?

[23] The trial judge found that Ward was at the mercy of Manulife when he signed the Producer's Agreement. If he did not sign it, he would lose the block of business that he had worked for over 30 years to acquire. Manulife also knew or should have known that Ward was dependent on Manulife for his livelihood. Manulife represented to him that it would continue to honour the prior arrangement he had with NAL respecting his vested commissions. Ward trusted Manulife to act in his best interests in this regard. As indicated, for over a year after it took over NAL, Manulife paid Ward's renewal commissions from 1967 onwards to Ward Inc. Manulife gave no reason for terminating Ward in July, 1997.

[24] Manulife submits that it owed no fiduciary duty to Ward, nor is he entitled to any damages for breach of fiduciary duty. The Producer's Agreement was a standard contract in a commercial relationship not falling within the traditional categories of fiduciary relationships recognized at law. There is no evidence of a mutual understanding that Manulife relinquished its own self interest and agreed to act solely on behalf of Ward, nor are the indicia for finding a fiduciary relationship in the circumstances present. Ward was not particularly vulnerable. He could have had no expectation that Manulife would act solely on his behalf.

[25] Counsel for the respondents agrees that the Producer's Agreement signed by Ward did not give rise to a fiduciary relationship between the parties. He submits the agreement respecting vested commissions was independent of and operated outside the agency agreement. Thus, the termination provision of the Producer's Agreement had nothing to do with the NAL vested commissions. Ward relies on the NAL November 1995 memo which stated, "The Holders of vested NAL Agreements will, of course, continue to receive their renewals." Ward submits that the word "vested" means the right to renewal commissions exists irrespective of any contract and does not end when the contract is terminated. Manulife's only involvement with these vested premiums is as the collector and remitter of money. The end result of the legal relationship respecting the vested renewal commission account was that Manulife was a bare trustee. It had no interest in the account.

[26] I agree with the respondents' submissions and I also agree that the Producer's Agreement did not give rise to a fiduciary relationship between the parties. The trial judge found that, despite Ward's termination, Manulife was obligated to continue paying vested commissions in that block of business. We have upheld that finding. Manulife's role in relation to the vested renewal commissions was akin to that of a trustee and in this narrow respect a fiduciary duty existed. Manulife's sole obligation in relation to the renewal commissions on the policies sold by Ward from 1967 to 1995 was to transmit his 5% vested commissions. It had no self interest respecting these commissions as it had no interest in them. Manulife breached its fiduciary duty to Ward in freezing his vested commission account.

[27] Although the trial judge did not itemize his award of damages for breach of fiduciary duty or specify exactly how he came to the figure, his reasons took into consideration that because Manulife froze his vested commission account, Ward was unable to retire at age 65 as planned but had to continue working; that he felt his honour had been questioned and that, as a result, he suffered from situational depression; that Ward's social life had severely deteriorated to the point where he and his wife went to their cottage on an infrequent basis; and that basically their only social activity was attending church.[3] The trial judge saw and heard all of the evidence and was in the best position to assess the damages that resulted from Manulife's breach of fiduciary duty. I would not interfere with his exercise of discretion respecting the amount of his award.

[3] These findings are at paras. 98, 99, 204, 205, and 210 of the trial judge's reasons.

3. Did the trial judge err in awarding punitive damages in the amount of $250,000 to Ward?

[28] The trial judge's award of punitive damages arises out of Manulife's conduct surrounding and following Ward's termination. To put that conduct in perspective it is necessary to briefly review some of the evidence relating to Steve Ward's conduct.

[29] In the spring of 1995, NAL discovered that Steve Ward had been involved in a number of improper selling and servicing issues with clients dating back at least three years, including forging signatures and paying premiums on behalf of clients. As a result, NAL withdrew its sponsorship of his level one life insurance licence, which was then revoked. Notwithstanding the revocation of his licence, Steve Ward – with NAL's knowledge – continued to work as an employee of Ward Insurance. The bulk of his income was earned in the general insurance area.

[30] In July 1995, Steve applied for a level two insurance licence and paid the required licence fee. He was under the impression that, having paid the fee, he could continue to sell general insurance products and did not tell his father that he had encountered delays in having his licence issued.

[31] In early 1997, Manulife was involved in a class action. Its in-house legal counsel, Blair Anderson, discovered some complaints from policy holders concerning offset premium policies with respect to the Wards. I will discuss these complaints in greater detail in dealing with the issue of whether the trial judge erred in dismissing Manulife's counterclaim.

[32] Following these complaints, Anderson learned from the Ontario Insurance Commission that Steve Ward was not currently licenced to sell insurance. Manulife began an internal investigation, which consisted of an informal telephone "audit" of policy holders. Eleven policy holders said they considered Steve Ward to be their representative. Manulife concluded that Steve Ward was "fronting", which occurs when a person who is not an agent acts as one and splits the commission with the true agent.

[33] Manulife was aware that Steve was involved in the business and that Ward wanted to leave the business to Steve. Under the Producer's Agreement, Ward was listed under Schedule B as the representative of Manulife. Thus, any business written on behalf of Manulife was required to be seen and signed by Ward personally. Ward's alleged omission to comply with this requirement is at the heart of his termination.

[34] Ward testified that if Steve met with a client and took an application, Ward would review the responses, speak to the client and sign the application. Anderson agreed that this conduct was appropriate and would not constitute fronting. Based on Anderson's acknowledgment and Ward's evidence, the trial judge found that the results of the "audit" were unreliable and that Steve Ward was not engaged in fronting.

[35] By mid-April, 1997, Manulife concluded that both Wards were "unsuitable". Manulife filed a complaint against both Ward and Steve Ward with the Ontario Insurance Commission. In May, 1997, Manulife informed Ward that Steve Ward did not have his Level II licence.

[36] As indicated, in July, 1997, Manulife terminated Ward Inc.'s Producer's Agreement on thirty days notice. After the notice period, Manulife reassigned Ward's clients to five other agents, denied Ward access to his commission account, and took the position that the commissions from 1967 to 1991 were not vested.

[37] In September, 1997, unknown to Ward, a Manulife sales manager promised Alex Rutherford, one of the agents taking over a portion of Ward's business, that Ward would not be in business much longer and that when Ward's license was revoked, Rutherford would receive the renewal commissions. At trial a Manulife representative admitted that it was "inappropriate to promise the transfer of renewal commissions". The trial judge agreed.

[38] In early fall, Ward corresponded with his clients and asked if they wished him to continue as their life insurance agent. Ninety-five percent responded favourably. Manulife was concerned that Ward's clients were "rallying around him". An internal memo proposed that if Ward continued to contact his clients Manulife should invoke a clause in the Producer's agreement allowing it to hold back commissions he was otherwise owed for 36 months in case there were "chargebacks". The memo continued:

> We should be writing to the OSC and [pursuing] the OIC vigorously to get his licence suspended. We should [also] be putting together a package and contacting the police to see if they are prepared to investigate.

Manulife then wrote to Ward warning that "If you do not stop attempting to service any Manulife policies immediately, we will freeze your commission account."

[39] At trial, Manulife's representative, John Fessenden, agreed that by the fall of 1997, there was no basis for Manulife to suggest that a freeze be re-imposed. There was no deterioration in the level of "persistency" of policy renewals. Accordingly he took no

action in this regard. He did, however, draft a letter dated December 18, 1997, instructing the branch administrator to tell Ward's clients that the reasons why Ward was terminated were "a long history of complaints by policy holders" respecting policies sold by Steve, Ward, and Ward Inc. The trial judge found the reference to complaints to be a gross overstatement, noting that since 1996 only one complaint had been made in relation to Ward – a premium offset complaint – and that there were four complaints relating to Steve.

[40] The letter also alleged that Steve Ward held himself out as an insurance agent without a licence to the knowledge of Ward, a statement the trial judge found (at para.115 of his reasons) was not accurate. In relation to a third reason given in the letter, payment of a premium on behalf of a policy holder on one occasion, the trial judge found that Ward had never been given an opportunity to explain his position. All of this was in contrast to their stated position when they terminated him that they were not doing it for cause. As a whole, the trial judge found the letter to be evidence of bad faith on the part of Manulife.

[41] On March 20, 1998 Manulife filed a complaint with the Commission in relation to Steve Ward and Ward Inc. The chief allegation was that Ward was permitting Steve to sell insurance despite Steve not being licenced at that time.[4] The letter further alleged that Manulife believed Ward was unsuitable to continue to hold a licence. The Wards were not copied with this complaint. The trial judge found that this complaint was, in part, motivated by Manulife's attempt to make it impossible for Ward to continue in the insurance business.

[42] Following this complaint, Manulife lobbied the Commission in a series of meetings and communications in June 1998 to revoke the "Ward licence" and indicated that "Manulife would be much appreciative of such act". The Wards were unaware of these communications.

[43] While Manulife had a duty to report misconduct on the part of the Wards, it had no reason to meet with the Superintendent of Insurance and tell him it would be pleased to have their licences revoked. The trial judge found these communications to be in bad faith and described them as "overkill to a very high level".

[44] Fessenden reinstated the freeze on Ward's retirement account in July, 1998. His stated reason was a "deterioration of persistency" which the trial judge found to be disingenuous. He further held at para. 125 of his reasons that, in calculating persistency,

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[4] The trial judge found that Ward was not aware that Steve was not licenced and immediately followed up when he became aware.

"Manulife included business that was not traditionally taken into consideration in the calculation – i.e. 'money products' or 'other business'."

[45] On October 13, 1998, the Ontario Insurance Commission charged Steve Ward with selling insurance without a licence. He pled guilty and was fined $500. The Commission and Steve Ward entered into an agreement whereby he agreed not to sell life, disability, accident and general insurance for a period of five years. On November 8, 2002, the Commission wrote to Ward and advised him that he had allowed his son Steve to take applications on nine occasions without a licence and that while this was cause for concern and constituted a breach of the *Insurance Act*, it did not intend to institute any further proceedings against him. Apart from the licensing comment, it did not issue a decision respecting the merits of the complaint by Manulife.

[46] In early 1999 Ward retained a solicitor who demanded payment of the commission account. Anderson's response was that a further reason for freezing the commission account was to set off amounts that might become payable to policy holders who had sued Manulife and its agents in a class action alleging negligent misrepresentation in relation to the premium offset policies. The Producer's Agreement only provided for setoffs for "any liability due". In the same letter Anderson stated:

> We are also planning, upon receipt of several of the current outstanding settlements, to pursue a meeting with the Commercial Fraud Unit of the RCMP to determine whether it would be appropriate to have criminal charges laid against [Reg and Steve Ward] in relation to their activities in the sale of these policies.

In his analysis of punitive damages, when referring to this statement the trial judge stated "the term 'bully' comes to mind." The letter was also found by the trial judge at paras. 216 and 218 to be evidence of a continuing course of conduct on the part of Manulife to methodically and deliberately destroy Ward's reputation within the community. He held such conduct was deserving of an award of punitive damages.

[47] At trial, Manulife advanced the alternative argument that it could hold the commission account as a setoff against possible chargebacks. There was no evidence Ward had any chargebacks and the trial judge found that the risk of there being chargebacks was "minimal".

[48] In its factum, Manulife submits that the trial judge erred in awarding punitive damages in part on the basis that the trial judge, after correctly stating that an independent actionable wrong was required, failed to properly apply the test because he failed to find

an independent actionable wrong. In oral argument before us, Manulife agreed that if the trial judge's finding that Manulife had breached its fiduciary duty to Ward was upheld, the existence of an independent actionable wrong was unnecessary: see *Waxman*, [2004] O.J. No. 1765 at para. 585. Since I have upheld the finding, it is not necessary that there be an independent actionable wrong.

[49] Manulife submits that nevertheless this was not an appropriate case for an award of punitive damages. Manulife gave Ward medical and personal insurance coverage. Although the trial judge found that Manulife did not give the Wards an opportunity to defend Manulife's allegations, they had the opportunity to do so at trial. Ward was awarded damages for breach of fiduciary duty. He ought not to be awarded punitive damages in addition.

[50] I disagree. Although as the appellant submits, punitive damages should be awarded in commercial situations only in exceptional cases, the trial judge's award of punitive damages met the objectives for an award as set out in *Whiten v. Pilot Insurance*, [2002] 1 S.C.R. 595, namely, punishment of the misconduct, deterrence in relation to others in a similar situation in the future, denunciation and condemnation. The trial judge was alive to the considerations respecting the amount of punitive damages to be awarded. We would not interfere with the amount he awarded.

4. Did the trial judge err in dismissing Manulife's set-off defence and counterclaim?

[51] Manulife's set-off defence and counterclaim is based on the sale of premium offset policies by Ward and Steve Ward.

[52] In 1982 and 1983, insurers began to develop a concept known as premium offset or vanishing premium policies. These policies earned dividends from the insurer. At a certain point, according to the insurer's projections, the dividends earned on the policy, together with the premiums paid, created a pool of funds that would allow all future premiums to be paid out of the pool. Thus the premiums would vanish in that no further out-of-pocket payments from policy holders would be required. When a downturn in the economy took place and interest rates fell in the early to mid-1990s, the dividends on the policies failed to offset the premiums. Policy holders were called upon to pay premiums for longer periods of time than set out in the projections.

[53] In 1996 Manulife defended a class action by policy holders alleging that Manulife, NAL and Monarch had negligently and deliberately created illustrations providing an incorrect time for offset of their policies.

[54] In response to the class action and before its settlement, Manulife initiated a program attempting to diminish the effects of these policy holder complaints. This program was called a policy review process (PRP). It applied only in cases where misrepresentation was indicated. The PRP was later incorporated in the class action settlement agreement.

[55] The trial judge reviewed the documentation prepared by Manulife to assist its sales representatives in promoting the premium offset policy to customers and the documentation used by the Wards with respect to these policies and found them to be remarkably similar. At para. 36 of his reasons, he found that Manulife was aware of the selling practices of the Wards at the relevant times and at para. 232, he found Manulife and its predecessors complicit in the selling techniques used by the Wards. In addition, he held that the terminology used by the Wards, such as a statement that the premiums on the policy were paid up, while not technically accurate, was not sufficient to warrant a decision by Manulife to indemnify the policy holders: see para. 234.

[56] The trial judge then concluded that Manulife had not "demonstrated any deliberate wrongful or negligent conduct on the part of the Wards" and that "the evidence upon which Manulife relies to prove its claims of misrepresentation falls far short of satisfying the burden on it to prove such wrongdoing on a balance of probabilities."

[57] A precondition of requiring a joint tortfeasor to make contribution is that the tortfeasor is or may be liable to the complainant. The trial judge found no such liability on the part of the Wards.

[58] Manulife argues that the trial judge's findings are unreasonable and constitute palpable and overriding error. Further, Manulife maintains that the trial judge applied the wrong standard in considering the negligence claims against the Wards and points to the reference in those reasons that "Manulife's evidence falls far short of supporting its allegation or argument that '[the Wards] had made these representations with wanton disregard for their accuracy and lack of truth'". By applying this higher standard, Manulife submits that the trial judge was led into error.

[59] I would reject these submissions. The trial judge's findings were amply supported by the testimony of the Wards and Manulife representatives as well as the documents filed at trial. With respect to the reference to "wanton disregard", it is apparent from the trial judge's reasons that he was simply quoting an allegation made by Manulife to then say that this allegation had not been made out. Reading his reasons as a whole, it is clear that he applied the appropriate standard and found the evidence of negligence advanced by Manulife wanting.

[60] In view of my conclusion, it is unnecessary for me to deal with the further arguments raised by Manulife on this issue.

5. Did the trial judge err in awarding a premium on costs?

[61] Following the trial judge's decision, the respondents sought costs on a substantial indemnity scale of $745,244.24 plus a premium of 15% of the fees awarded (amounting to $111,786.64) plus disbursements and GST. Manulife submitted costs should be in the amount of $408,434.38 plus disbursements and GST.

[62] Having regard to his findings, the Wards' argument as to their reasonable expectations, and the fact that the results they achieved at trial significantly exceeded their offer to Manulife to settle, the trial judge awarded costs on a substantial indemnity scale to the Wards plus a costs premium in the amount of $50,000 for an award of $624,205.01 plus disbursements and GST.

[63] Before awarding a costs premium, the trial judge discussed the decision of the Supreme Court of Canada in *Walker v. Ritchie*, [2006] 2 S.C.R. 428, in which the court held that the wording of a previous version of Rule 57 did not permit a risk premium to be awarded. He noted that the Supreme Court stressed its reasoning applied to the costs scheme then in place and that Rule 57 setting out the factors governing an award of costs had been substantially amended.

[64] The trial judge held that the respondents met each of the prerequisite criteria for the award of a risk premium: the plaintiffs lacked financial resources to fund lengthy and complex litigation; plaintiffs' counsel financed the litigation; the defendants contested liability; and plaintiffs' counsel assumed the risk of not only delayed but possible non-payment of fees.

[65] The trial judge then considered the amendments to the wording of Rule 57.01 enacted in 2005. At that time, the partial/substantial indemnity grid was revoked, and two additional factors were added to be considered by the trial judge when setting costs:

> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer of the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding in which costs are being fixed.

Rule 57.01(4) has also been amended to read as follows:

> Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*, …
>
> (d) to award costs in an amount that represents full indemnity.

[66] The trial judge held that the Supreme Court's reasoning in Walker was not applicable to the present rule, and that the amended wording allowed him to award a risk premium. Manulife argues that the new wording of the legislation does not have the effect of overturning *Walker* and that the court may not pass a risk premium on to a defendant as part of a costs award.

[67] In *Walker*, Rothstein J. reasoned that matters considered in ordering costs should have similar characteristics to the grounds enumerated in Rule 57.01. He described two common features:

- The factors are all neutral in character. That is, they apply equally to either a plaintiff or a defendant.

- The factors deal with either the nature of the case or the conduct of the parties in the litigation. Since the parties have knowledge of the case and can control their own conduct, they are capable of predicting generally how these things will factor into a costs award against them.

[68] He held that neither of these common features apply to a risk premium agreed upon between a plaintiff and his counsel. First, a risk premium can only be awarded against a defendant, and is therefore not neutral. Second, a risk premium is a private arrangement between plaintiffs and their counsel and is not a matter about which the defendant is entitled to or is likely to have knowledge.

[69] The concerns underlying the decision in *Walker* apply equally to the new language of Rule 57.01. First, the new factors, like the old ones, are neutral in character and can apply equally to plaintiffs or defendants. Second, although the new factors do not specifically relate to the nature of the case or the conduct of the parties, they serve to uphold the principles of transparency and predictability that should govern costs awards. The two new factors merely make explicit the fact that, in the absence of a costs grid,

there should be fairness and consistency in the amount that can be charged for lawyers' time across similar pieces of litigation involving similar conduct and counsel.

[70] I would note that the phrase "the principle of indemnity" in the new legislation is qualified. The listed considerations are the experience of the lawyer, the rates charged, and the hours spent. While the clause is phrased inclusively, a risk premium is not of like kind to these considerations.

[71] Clause (0.b) confirms this interpretation by insisting that costs be what the unsuccessful party could "reasonably expect to pay." This engages the other concern about risk premiums explicit in *Walker*: that the defendant is not aware of his potential cost exposure because the premium is a private agreement between the plaintiff and his counsel. As noted in *Walker*, this is particularly important where, as here, a Rule 49 offer to settle has been made, and the defendant must be aware of the risk of refusing the plaintiff's offer.

[72] Accordingly, I would allow the appeal with respect to the risk premium and set aside the amount of $50,000 imposed by the trial judge.

Disposition

[73] For the reasons given, I would dismiss the appeal and the cross-appeal. I would allow the appeal respecting the awarding of a costs premium. Costs submissions may be made.

RELEASED: December 14, 2007

"KMW"

"Karen M. Weiler J.A."
"I agree M. Rosenberg J.A."
"I agree Paul Rouleau J.A."