

Shubaly et al. v. Coachman Insurance et al.

[Indexed as: Shubaly v. Coachman Insurance]

112 O.R. (3d) 620

2012 ONSC 5455

Ontario Superior Court of Justice,

Shaw J.

September 27, 2012

Limitations -- Insurance -- Plaintiffs suing defendant insurer for damages for breach of contract and negligence arising from fuel oil spill at their home in 2005 -- Plaintiffs subsequently moving to amend statement of claim to advance claim that defendant breached its duty of good faith and to add claim for punitive, aggravated and exemplary damages -- Motion granted -- Claim not statute-barred as all facts relating to alleged breach of good faith were pleaded before expiry of limitation period.

The plaintiffs brought an action against the defendant insurer for damages for breach of contract and negligence arising from a fuel oil spill at their home in 2005. They subsequently brought a motion to amend the statement of claim to advance a claim for breach of the defendant's duty to act fairly and in good faith and to add a claim for punitive, aggravated and exemplary damages. The defendant submitted that the motion should be dismissed on the basis that the claim was barred by virtue of s. 4 of the Limitations Act, 2002, S.O. 2002, c. 24, Sch. B and that the defendant would, in any event, incur non-compensable prejudice.

Held, the motion should be granted. [page621]

An insurer's breach of its duty to act fairly and in good faith gives rise to a cause of action that is distinct from the cause of action founded on the express terms of the relevant insurance policy. However, all the facts relating to the alleged breach of good faith were pleaded before the expiry of the limitation period. The facts as pleaded were not limited to the express terms of the policy, but also included, in some detail, allegations as to how the defendant handled the claim. In pleading breach of good faith based on the defendant's handling of the claim, the plaintiffs sought to plead an alternative claim for relief or to draw a different legal conclusion, based on the same set of facts as previously pleaded. The claim was not statute-barred. The defendant failed to establish that it would suffer non-compensable prejudice if the amendments were allowed.

Cases referred to

Ascent Inc. v. Fox 40 International Inc., [2009] O.J. No. 2964, 2009 CarswellOnt 4118 (S.C.J. -- Master); Atlantic International Trade Inc. v. Georgian College of Applied Arts and Technology, [2008] O.J. No. 2385, 168 A.C.W.S. (3d) 38 (S.C.J.); Bazkur v. Coore, [2012] O.J. No. 2654, 2012 ONSC 3468, 292 O.A.C. 391 (Div. Ct.); Dee Ferraro Ltd. v. Pellizzari, [2012] O.J. No. 355, 2012 ONCA 55, 346 D.L.R. (4th) 624, 211 A.C.W.S. (3d) 296; Dimartino v. Gacek, [2010] O.J. No. 1453, 2010 ONSC 2124, 83 C.C.L.I. (4th) 311 (S.C.J.); Dundas v. Zurich Canada (2012), 109 O.R. (3d) 521, [2012] O.J. No. 1321, 2012 ONCA 181, 290 O.A.C. 370, [2012] I.L.R. I-5272, 31 M.V.R. (6th) 177, 7 C.C.L.I. (5th) 1, 215 A.C.W.S. (3d) 202; Joseph v. Paramount Canada's Wonderland (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 166 A.C.W.S. (3d) 762, 241 O.A.C. 29; Letang v. Cooper, [1964] 2 All E.R. 929, [1965] 1 Q.B. 232 (C.A.); Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, 209 D.L.R. (4th) 257, 283 N.R. 1, J.E. 2002-405, 156 O.A.C. 201, 20 B.L.R. (3d) 165, 35 C.C.L.I. (3d) 1, [2002] I.L.R. I-4048, REJB 2002-28036

Statutes referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, s. 4

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 26.01

Authorities referred to

Perell, Paul M., and John W. Morden, *The Law of Civil Procedure in Ontario* (Markham, Ont.: LexisNexis, 2010)

MOTION to amend a statement of claim.

Tina Petrick, for plaintiff.

Justin Robinson, for defendant Coachman Insurance.

No one appearing for Thunder Bay Insurance Services Limited.

[1] SHAW J.: -- This is an action arising from a fuel oil spill in November 2005 at the plaintiffs' home in the District of Thunder Bay. The home was insured under a homeowner's policy of insurance issued by the defendant, Coachman Insurance Company.

[2] The plaintiffs bring a motion to amend their statement of claim to increase the damages claimed in the prayer for relief for [page622] breach of contract and negligence, from \$250,000 to \$500,000, and to add to the prayer for relief a claim for punitive, aggravated and exemplary damages in the amount of \$250,000. The plaintiffs also seek to add the following paragraph to the statement of claim:

37.1 The plaintiffs state that the failure by the Defendant Coachman to honour its obligations under the contract constitute (sic) a wanton and reckless disregard for the rights of its insureds and that the Defendant Coachman put its own financial interests ahead of the rights of its insureds. The plaintiffs therefore claim punitive aggravated, and exemplary damages against the Defendant Coachman for the breach of duty of good faith and for the aggravation and anxiety suffered by its insureds.

[3] Coachman submits that the motion to amend should be dismissed on the basis that (a) the plaintiffs' claim for punitive, aggravated and exemplary damages for breach of good faith is barred by virtue of s. 4 of the Limitations Act, 2002, S.O. 2002, c. 24, Sch. B; and (b) the defendant will, in any event, incur prejudice that cannot be compensated for by costs or by an adjournment.

[4] The amendment of pleadings is governed by rule 26.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which provides:

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[5] It is a well-established rule that amendments such as those sought by the plaintiffs should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment. However, amendments have to comply with the usual rules of pleadings. Amendments to a statement of claim may be rejected if they seek to advance a new claim after a limitation period has expired.

Are the Plaintiffs' Proposed Amendments Barred by the Limitations Act?

[6] The Limitations Act, 2002 came into force on January 1, 2004, before the fuel oil spill that gives rise to this action. The Limitations Act instituted a basic two-year limitation period of general application to all litigants in Ontario. Section 4 of the Limitations Act, 2002 provides:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

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[7] The Court of Appeal held in *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469 that the Limitations Act did not preserve the court's

common law discretion to extend limitation periods by applying the doctrine of special circumstances.

[8] The defendant submits that the proposed amendment constitutes a new cause of action.

[9] The defendant refers to *Dundas v. Zurich Canada* (2012), 109 O.R. (3d) 521, [2012] O.J. No. 1321, 2012 ONCA 181 (C.A.). In that case, the Court of Appeal held that the alleged breach of duty of good faith which an insurer owes to its insured gave rise to a cause of action separate from a claim for indemnity under the insurance contract. The claim for breach of good faith was therefore not subject to the one-year limitation period contained in statutory conditions 6(2) and 6(3) of the former Ontario Standard Automobile Policy (SPF No. 1). The Court of Appeal cited *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, at para. 79, where Binnie J. described the insurer's duty of utmost good faith as "independent of and in addition to the breach of contractual duty to pay the loss".

[10] The defendant submits that more than two years have passed since the plaintiffs knew or ought to have known of the defendant's alleged bad faith conduct and therefore an amendment to add a bad faith claim, as a new and separate cause of action, is statute-barred.

[11] The plaintiffs do not contest that the limitation period has passed. However, the plaintiffs submit that the proposed amendments do not add a new cause of action, but rather are an alternative claim for relief or plead a different legal conclusion arising out of facts previously pleaded.

#### Discussion

[12] In my view, the proposed amendments do not constitute a new cause of action that is barred by the Limitations Act.

[13] The plaintiffs do not seek to allege a new set of facts. They are content to rely on the facts that have already been pleaded. As observed in *Morden and Perell, The Law of Civil Procedure in Ontario* (Markham, Ont.: LexisNexis, 2010), at pp.

It is quite common that the same transaction or occurrence will provide more than one cause of action, and this is commonly called concurrent liability. It arises if the same set of facts constitutes a claim under more than one substantive area of law. A common example is a breach of contract that is also a negligent misrepresentation.

[14] The statement of claim, as presently drafted, pleads facts to support not only the existing claims of breach of contract and [page624] negligence, but also provides a base for the claim of breach of good faith. All the facts relating to the alleged breach of good faith were pleaded before the expiry of the limitation period.

[15] As stated by Diplock L.J. in *Letang v. Cooper*, [1964] 2 All E.R. 929, [1965] 1 Q.B. 232 (C.A.), at p. 934 All E.R.:

A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

See, also, *Morden and Perell*, *supra*, at p. 306.

[16] In *Ascent Inc. v. Fox 40 International Inc.*, [2009] O.J. No. 2964, 2009 CarswellOnt 4118 (S.C.J. -- Master), at para. 3, Master Dash quoted the above passage from Lord Diplock and then observed:

The key is whether substantially all of the material facts giving rise to the "new cause of action" have previously been pleaded or whether new facts are sought to be added that are relied upon to support a new cause of action. A new cause of action is not asserted if the amendments simply plead an alternative claim for relief arising out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.

(Citations omitted)

[17] Although I acknowledge that a breach by an insurer of its duty to act fairly and in good faith gives rise to a cause of action that is distinct from the cause of action founded on the express terms of the relevant insurance policy, I am satisfied that the facts as presently pleaded are not limited to the express terms of the policy but also include, in some detail, allegations as to how the defendant handled the claim. These allegations include

- failing to contain the fuel spill on a timely basis;
- denying the plaintiffs' claim for damage to their septic field after the agent for the defendant advised the plaintiffs that the septic field should be considered part of the dwelling and that the plaintiffs were covered for any damage to the septic field;
- delay in payment to the contractor brought in by the defendant's agent, without explanation, resulting in the registration of a construction lien by the contractor against the plaintiffs' property;
- failing to properly plan and supervise the work undertaken by the contractor; [page625]
- failing to retain competent agents and contractors to deal with the fuel spill.

[18] In pleading breach of good faith, based on the defendant's handling of the claim, the plaintiffs seek to plead an alternative claim for relief or to draw a different legal conclusion, based on the same set of facts as previously pleaded. As noted by the Court of Appeal in *Dee Ferraro Ltd. v. Pellizzari*, [2012] O.J. No. 355, 2012 ONCA 55, at para. 5:

The distinction between pleading a new cause of action and pleading new or alternative remedies based on the same facts is set out in one of the seminal cases, *Canadian Industries Ltd. v. Canadian National Railway Co.*, [1940] O.J. No. 266 (C.A.), affd. [1941] S.C.R. 591. The plaintiff sued for

damages following the destruction of a cargo of sodium cyanide due to a derailment on the defendant's railway line. He pleaded that the defendant was a common carrier and that the goods had been damaged. The trial judge allowed an amendment, at trial, to plead negligence. Middleton J.A., writing for the court, held at para. 18 that the amendment was properly allowed -- it was not the institution of a new cause of action, but simply an alternative claim with respect to the same cause of action: "The amendment relates to the remedy sought upon facts already pleaded."

[19] With respect to the amendments sought to claim punitive, aggravated and exemplary damages, the case law is consistent that a claim for any type of damages, including aggravated damages, is not a cause of action. It is a remedy. See *Atlantic International Trade Inc. v. Georgian College of Applied Arts and Technology*, [2008] O.J. No. 2385, 168 A.C.W.S. (3d) 38 (S.C.J.), at para. 43; *Dimartino v. Gacek*, [2010] O.J. No. 1453, 2010 ONSC 2124 (S.C.J.), at para. 19; and *Bazkur v. Coore*, [2012] O.J. No. 2654, 2012 ONSC 3468 (Div. Ct.), at para. 15.

Even If the Proposed Limitations Are Not Barred by the Limitations Act, will the Defendant Incur Prejudice that Cannot be Compensated by Costs or an Adjournment?

[20] The defendant submits that if the amendments are allowed, it will incur prejudice because it will be deprived of all effective opportunity to investigate and defend the allegation of breach of good faith. The defendant further alleges that it will suffer prejudice because its litigation strategy was dependent on what was initially pleaded and because of the effect of the amendments on issues of re-insurance, potential exposure and adequacy of reserves.

[21] With the exception of an amendment pleading a statute-barred claim, the onus of proving prejudice is on the party [page626] alleging it. See *Morden and Perell*, supra, at p. 360. I do not find that the defendant has satisfied the onus.

[22] Firstly, the affidavit of the defendant's solicitor in defence of the motion to amend makes these allegations of



prejudice as bald statements. There is, with respect, no evidence proffered to support the bald allegations.

[23] Secondly, the defendant has been put on notice by the existing pleadings that the manner in which it handled the plaintiffs' claim under its policy of insurance is a central issue. It has had full opportunity to investigate the facts alleged and to arrive at a defence to those alleged facts.

Conclusion

[24] For the reasons given, the plaintiffs' motion to amend its statement of claim is allowed. The plaintiffs shall deliver their amended, amended statement of claim, attached as Schedule "A" to its motion record, within 20 days. The defendant shall have 20 days thereafter to deliver an amended, amended statement of defence.

[25] If the parties are unable to agree on costs of this motion, they shall contact the trial coordinator within 30 days to arrange a date to speak to the matter.

Motion granted.