Citation: Read v. ICBC
2002 BCSC 1607

Date: 20021122
Docket: S013767
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RICHARD WILLIAM READ

PLAINTIFF

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE GOEPEL

Counsel for Plaintiff: M. Blaxland

Counsel for Defendant: T.H. Pettit

Date and Place of Hearing/Trial: November 6, 2002
Vancouver, BC

INTRODUCTION

[1] This appeal, from interlocutory orders made by a Master, raises the contentious issue of when discovery is to take place in an insurance action when the plaintiff in addition to bringing a claim under the insurance contract, also alleges bad faith on the part of the insurer.

BACKGROUND

[2] The plaintiff owned a 1965 Chevy Impala that was insured by the defendant, Insurance Corporation of British Columbia ("ICBC"). The plaintiff alleges that the vehicle was stolen and has brought this action under the policy for the value of the vehicle (the "insurance claim"). The plaintiff also seeks damages for bad faith by ICBC in its handling of the insurance claim. The pleadings in relation to bad faith commence at paragraph 13 of the Amended Statement of Claim and are as follows:

> 13. Despite making a claim and having replacement insurance for theft and vandalism, the Defendant has refused to pay for the damage and falsely accused the Plaintiff or implied that the Plaintiff was making a fraudulent claim.
>
> 14. The Plaintiff claims the Defendant, ICBC, has engaged in bad faith insurance dealings in not recognizing their insurance obligations to provide full replacement insurance monies for an insured vehicle that was stolen. Despite a claim from Plaintiff, no claim has been recognized.
>
> 15. The Plaintiff has made demands for the stolen automobile benefits due and owing under the automobile insurance policy and the Defendant, ICBC, has neglected or refused to pay them.

16. The Plaintiff says that at all material times, the Defendant, ICBC, was obliged to act with the utmost good faith in dealing with the Plaintiff's claim for stolen automobile benefits and had a separate duty to act fairly and to ensure the Plaintiff would not suffer increased distress due to refusal to provide timely payment of no-fault benefits.

17. Given the nature of the contact between the parties and the nature of the stolen automobile benefits to be provided, the Plaintiff's peace of mind and freedom from distress, related to timely payment of stolen automobile benefits, were implied terms of the automobile insurance policy.

18. The Plaintiff says that the Defendant, ICBC, through its servants, agents and employees, knew or ought to have known that the Plaintiff was entitled to stolen automobile benefits and that the Plaintiff would likely suffer emotional stress due to the Defendant's refusal to provide stolen automobile benefits.

19. The Defendant wrongfully, arbitrarily and maliciously withheld stolen automobile benefits from the Plaintiff and has acted in a harsh, vindictive and high-handed manner.

20. The Defendant, ICBC, has acted in a high handed manner, disregarding the interest of the insured Plaintiff in favour of a policy of denying compensation to the young Plaintiff and/or the owners of 1965-1945 low rider or muscle type automobiles.

WHEREFORE the Plaintiff claims against the Defendant as follows:

a) Damages for replacement of the value of his 1965 Chevy Impala of more than $20,000;

b) General damages for bad faith insurance dealings;

c) Loss of revenue, damages and inconvenience of losing the use of the car;

d) Court of Order Interest pursuant to the *Court Order Interest Act*;

e) Punitive damages for falsely accusing the Plaintiff of fraud;

f) Costs; and

g) Such further relief as to this Honourable Court seems just.

[3] The plaintiff brought an application in chambers seeking the following orders:

1. that the Respondent provide to the Applicant the following information and documents:

b) For calendar year 1998, 1999, 2000 and 2001 the number of claims for stolen vehicles that have been made and rejected by ICBC;

c) The number of investigations assigned to the Special Investigation Unit in each of those years to investigate the special circumstances concerning stolen vehicles claims;

d) The amount of money the Applicant paid for his stolen loss coverage as part of his ICBC insurance so as to obtain the cost of coverage for stolen vehicle protection;

e) The amount of money received by ICBC in each of those calendar years for stolen automobile protection;

f) The amount of money in each calendar year that ICBC has paid out in claims made for stolen vehicle claims;

g) Any internal policies, directions, documents, papers or letters advising ICBC Adjusters how to react to a stolen vehicle claim made pursuant to ICBC insurance policy in effect from 1995 to 2001;

h) Any internal policy, direction, memos, notations in regards to how to react to the claim made by Richard Read in regard to his claim for insurance coverage due to the loss of his vehicle.

[4] ICBC resisted the application and filed a motion pursuant to Rule 18 seeking the dismissal of the plaintiff's bad faith claim. In support of its application ICBC filed several affidavits that set out the manner in which the claim was handled and denying any bad faith. The plaintiff filed no material to support the substance of his bad faith allegation nor did he apply to cross-examine on the affidavits.

THE MASTER'S DECISION

[5] The competing motions came on before a Master on September 17, 2002. In regard to the plaintiff's application the Master noted that items l (b) through (f) sought not documents, but specific information. He also noted that obtaining that information may require a representative of ICBC to examine data in order to prepare an answer. He noted there had been no examinations for discovery of a representative of ICBC, nor had the plaintiff sought the requested information by way of interrogatories. He held that an examination for discovery was the proper form to seek the information requested and he accordingly dismissed the plaintiff's application for the relief sought in paragraphs 1(b)-1(f) of the notice of motion. The plaintiff was granted liberty to reapply following the examination for discovery of a representative of ICBC.

[6] In regard to the documents sought in paragraph 1(g) of the motion the Master held that ICBC should produce any policy document in effect concerning stolen vehicles for the period October 1, 2000, to September 11, 2001, which period covered the time from the alleged loss to the filing of the proof of loss.

[7] With respect of paragraph 1(h) the Master held that the documents sought were either covered by the order he had made to produce the policy documents or had already been disclosed in the normal course. Accordingly, he dismissed the request for documentation under paragraph 1(h).

[8] In respect to the ICBC motion for summary judgment under Rule 18(6) the Master held that the case in bad faith was not at this stage bound to fail. He concluded that there might be evidence that arises on discovery that may show bad faith, malice or vindictiveness. In the result, he adjourned the Rule 18(6) application and held it could be brought on again by the defendant after examinations for discovery are complete. The Master gave no directions in regards to the timing of future discoveries.

[9] The Master did dismiss outright the plaintiff's allegation that he suffered emotional stress due to the defendant's action. The Master found there was no evidence that the plaintiff had suffered any emotional distress.

ISSUES ON APPEAL

[10] The plaintiff now appeals from all orders of the Master. The stated grounds of appeal are that the Master erred in a) acting contrary to the practice directive by accepting jurisdiction over Rule 18 matters involving triable issues; b) not ordering production consistent with ***Tobin v. Insurance Corporation of British Columbia*** (26 April 2002), Vancouver S001916 (B.C.S.C.), prior to the examination for discovery; and c) allowing the defendant to reapply for a Rule 18 determination without first producing documents relevant to bad faith.

[11] As these are interlocutory matters, for the plaintiff to succeed he must establish that the Master was clearly wrong. See: ***Abermin Corp. v. Granges Explor. Ltd*** (1990), 45 B.C.L.R (2d) 188 (S.C.).

[12] Underlying these applications is the tension between the plaintiff's right to full discovery and ICBC's right to maintain privilege over its file material until the insurance claim has been resolved. This issue is highlighted by ICBC's application to have the plaintiff's bad faith claim summarily dismissed on the grounds that the plaintiff has no evidence to support such allegations. The plaintiff says in response that it cannot provide particulars of bad faith unless it obtains access to the claim file. ICBC resists production because the file material contains documents protected by privilege and their disclosure at this time would prejudice its defence of the insurance claim. It submits it is entitled to have its Rule 18 application determined before any production of such confidential information is ordered.

THE RULE 18 APPLICATION

[13] The submission that the Master erred by accepting jurisdiction over the Rule 18 application is without merit. The Master, pursuant to the practice direction of May 22, 1990, is authorized to hear applications under Rule 18 and make an order for summary judgment where no triable issue arises. The defendant sought dismissal of the plaintiff's bad faith claims on the grounds that there was no triable issue. On an application under Rule 18 the Master's function is to determine if a triable issue is raised. See:***Estaban Mgmt. Corp. v. Edelweiss Int. Hldg. Corp***. (1990), 43 B.C.L.R. (2d) 335. If there is a triable issue he must dismiss the application for judgment. If he finds that there is no triable issue he can either allow the application and dismiss the claim or alternatively, make one of the other orders contemplated in Rule 18.

[14] In regard to the ICBC's Rule 18 application the Master, after reviewing the evidence filed in support of the application, at paragraph 23 of his reasons held as follows:

> While the case on bad faith is demonstrably thin, with little or no evidence to support it, it is not at this stage bound to fail. There may be evidence that arises on discovery that may show bad faith, malice, or vindictiveness, and some of the other matters pleaded. The application, insofar as that is concerned, is adjourned and may be brought on again by the defendant after examinations for discovery are complete.

[15] The law in regard to resisting an application for summary judgment under Rule 18 is set out in ***Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.*** (1984), 55 B.C.L.R. 137 (C.A.). The Court of Appeal in ***Montroyal*** approved the decision of Esson J., as he then was, in ***Progressive Construction Ltd. v. Newton***, (1980), 25 B.C.L.R. 330 at p. 334 (S.C.). In ***Montroyal*** the court says this, beginning at the bottom of p. 138:

> …There Esson J. summarizes, in my opinion, accurately, the law in relation to establishing a defence on an application for summary judgment in these words [pp. 334-35]:
>
> > The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.
> >
> > In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[16] In ***Memphis Rogues Ltd. v. Skalbania and N.M. Skalbania Ltd.*** (1982), 38 B.C.L.R. 193 (B.C.C.A.) it was held that the purpose of Rule 18 is to reject, promptly and inexpensively, claims and defences that are bound to fail at trial. The court went on to note, however, that some meritorious claims and defences are based on discovery evidence and that such claims should not be struck down simply because the party offering them cannot tender proof.

[17] That is the conundrum faced by the plaintiff in this matter. If there has been bad faith committed by ICBC, proof of such conduct will only be found in ICBC's own files. See: ***Samoila v. Prudential of America General Insurance Co***. (***Canada)*** (2000), 50 O.R. (3d) 65 (Ont. H.C.). Absent the opportunity to examine those files the plaintiff is unable to provide the evidentiary foundation necessary to establish a *bona fide* triable issue.

[18] In his reasons the Master held that the plaintiff's claim was not bound to fail. In making that finding, I do not believe the Master was holding that a triable issue had been established, because if he had so found the appropriate order would have been to dismiss rather than adjourn the Rule 18 application. I take from his reasons that the Master was recognizing that if there is evidence to support the plaintiff's case, that evidence would be found in the documents of the defendant and in the circumstances of this case it was premature to determine the Rule 18 application on its merits.

[19] Under Rule 18 the Master has wide powers to make orders regulating the conduct of the litigation including the giving of directions in regard to discovery procedures. In the circumstances of this case I believe that the Master fell into error by simply adjourning the Rule 18 application pending discoveries. He should, in addition, have exercised his power to give directions in respect to the timing of discovery to resolve the real issue between the parties. In fairness, I should say that it is unclear on the material before me whether the Master was in fact asked specifically for such directions.

[20] Given that the Rule 18 application cannot be determined until the plaintiff has had an opportunity to examine the files of ICBC, the issue is whether or not such discovery should be permitted before the merits of the insurance claim have been resolved. As noted by plaintiff's counsel, ICBC has an ongoing obligation to act in good faith in the handling of the claim which has been brought. This duty continues through the litigation process.

[21] If the plaintiff, at this stage, is allowed full discovery on the bad faith claim, it will inevitably lead to the disclosure of documents that are otherwise privileged in the defence of the insurance claim. Litigation privilege exists to protect from production a communication made or a document created for the dominant purpose of assisting the client in litigation, actual or contemplated. There is no "bad faith insurance claim" exception to litigation privilege that creates a special rule for bad faith claims against insurers. See: ***Davies v. American Home Assurance Co***. (2002), 217 D.L.R. (4th) 157 (Ont. Div. Ct.). ICBC cannot be compelled to disclose documents that are relevant to the bad faith claim, if those documents are privileged in the defence of the insurance claim.

[22] To balance the competing interests the appropriate order is to sever the bad faith claim pursuant to Rule 5(6). The insurance claim shall be tried first. Pursuant to Rule 26(15) discovery of documents on the severed bad faith claim will be delayed until conclusion of the insurance claim. ICBC cannot reset its Rule 18 application until the plaintiff has had discovery on the bad faith claim.

[23] This result is consistent with the decisions of this court in ***Wonderful Ventures Ltd. v.***

Maylam (2001), 91 B.C.L.R. (3d) 319 (S.C.) and ***Lawrence v. Insurance Corporation of British Columbia*** (2001), 96 B.C.L.R. (3d) 375 (S.C.). It protects the plaintiff's right to pursue its bad faith claim while preventing the disclosure of privileged communications until the insurance claim is determined.

THE TOBIN DECISION

[24] In support of his appeal the plaintiff relies heavily on the decision in ***Tobin.*** ***Tobin*** was an oral decision. In ***Tobin*** the plaintiff sought production of information and documents similar to what is sought in this action. The application appears to have been heard and decided on a Friday, with the trial scheduled to commence the following Monday. There is no reference in the judgment as to what authorities, if any, were put before the court. The reasons do not set out the rules pursuant to which the orders were made.

[25] Generally speaking, a party is only compelled to provide information to the other side by way of examination for discovery (Rule 27), production of documents (Rule 26) or interrogatories (Rule 29). Each of those rules sets out a specific procedure by which the information is produced. If a party fails to produce the required information the Rules set out the process by which the aggrieved party may seek the assistance of the court. See: Rules 26(3),(4),(6) and (10); 27(24); and Rule 29(6).

[26] There is no reference in ***Tobin*** to any of the relevant rules. It would appear that the ***Tobin*** decision was given in circumstances where the exigencies of the upcoming trial required an immediate decision without the opportunity to fully consult authority. On the basis of the third ground in ***Re Hansard Spruce Mills Ltd***. (1954), 4 D.L.R. 590 (B.C.S.C.) I am satisfied that ***Tobin*** is not binding authority governing the case at bar. The Master did not error by failing to follow ***Tobin***.

PRODUCTION OF INFORMATION

[27] In ordering the plaintiff to proceed with its examination for discovery, before giving consideration to the plaintiff's applications for information, the Master in my opinion was not clearly wrong. Indeed, I believe the Master's decision was correct. The Rules set out the manner in which the parties are obliged to provide information. There is no obligation for a party to answer a plaintiff's request for information outside of those formal requirements. Accordingly, in the first instance the plaintiff should pursue his request for information either through an examination for discovery or interrogatories. To the extent the information sought is only relevant to the bad faith claim, ICBC will be under no obligation to respond until the insurance claim is resolved.

DOCUMENT PRODUCTION

[28] The orders in relation to document production are somewhat more problematical. Rule 26(1) requires a party to deliver a list of all documents that are or have been in the party's possession or control relating to every matter in question in the action. That would include any document relevant to the bad faith allegation.

[29] I am advised that ICBC has produced a list of documents. The list was not put before the Master, nor was it before me on this application. Rule 26(2) allows a party to claim a specific document is privileged. I understand from counsel from ICBC that it presently claims privilege over documents that might be relevant in the bad faith claim, including documents which relate to the claims investigation undertaken by ICBC after the plaintiff alleged his car was stolen. Depending upon the dominant purpose behind the creation of those documents, some or all of the documents for which litigation privilege is presently being claimed may be subject to production on the insurance claim.

[30] Where privilege is claimed, the claim must be made on the list of documents with a statement of the grounds of privilege. Rule 26(4) gives the court the power to order a party to deliver an affidavit stating whether a document or class of documents is in the possession of the party delivering the affidavit. Rule 26(10) allows the court to order production of a document regardless of the claim of privilege.

[31] In this case the Master ordered that ICBC produce any policy document in effect from October 1, 2000 to September 11, 2001, concerning how the corporation deals with stolen vehicle claims. Those dates govern the time from when the vehicle was stolen to when the proof of loss was filed. I am told ICBC has complied with that order.

[32] The plaintiff seeks an extension of those time limits submitting that ICBC's obligation of good faith continues through the entire claims process. I agree with the plaintiff that the bad faith claim is continuing and production of this class of document should not be limited to the date the proof of loss was filed. To the extent that such documents are relevant only to the bad faith claim ICBC need not produce such additional documents until the insurance claim is resolved.

[33] The plaintiff's application under paragraph 1(h) for ICBC to provide all documents in

relation to the Plaintiff's claim was dismissed, the Master apparently believing that such documents would either have already been disclosed in the normal course or would be covered in his order made under paragraph 1(g). The difficulty with this disposition is that it is not clear, absent the list of documents, what documents ICBC has in fact produced. The appropriate application by the plaintiff would have put in issue the existing documentation production of ICBC and sought to either challenge the claim of privilege or seek an order whether ICBC has in its possession specific documents of the kind set out in paragraph 1(h). As I believe that this part of the application was procedurally flawed I would not set aside the Order of the Master.

[34] The plaintiff is at liberty at this time to bring such further application as he deems advisable to seek disclosure of documents relevant to the insurance claim and if so advised, challenge any claim of privilege raised. To the extent there are documents that should be produced in regard to the insurance claim, those documents are subject to production even though they may also be relevant in the bad faith claim.

EMOTIONAL STRESS CLAIMS

[35] In relation to the Master's order dismissing the plaintiff's allegation that he suffered emotional distress it is important to examine the pleadings which have been filed. Although the pleading sets out that ICBC has a duty to ensure the plaintiff would not suffer distress due to the refusal to provide timely payments of no-fault benefits, that the plaintiff's peace of mind and freedom from distress were implied terms of the automobile insurance policy, and that the defendant should have known that the plaintiff was likely to suffer emotional stress due to the defendant's refusal to provide stolen automobile benefits, the plaintiff has not in fact alleged in his pleading that he suffered from any such emotional stress. Given the pleadings filed, the Master was clearly wrong in dismissing the claim for emotional distress, such a claim not having been made.

SUMMARY

[36] In the result, therefore, the plaintiff's application for information sought in paragraphs 1(b) through (f) of the Notice of Motion is dismissed. The plaintiff's application for documents as set out in paragraphs 1(g) of the Notice of Motion is allowed, but to the extent that such documents relate only to the bad faith claim, further discovery is delayed until the conclusion of the trial on the insurance claim. The balance of the appeal in regards to the production of documents as set out in paragraph 1(h) of the Notice of Motion is dismissed, such dismissal being without prejudice to the plaintiff's present right to challenge any claim for privilege that the defendant is making in relation to those documents which are properly subject to production in the insurance claim. The bad faith claim is severed and will be tried after the insurance claim is resolved. The Rule 18 application is adjourned until the plaintiff has had the opportunity to conduct appropriate discovery on the bad faith claim. Such discovery is adjourned until the insurance claim is completed. The appeal in regards to striking out the emotional distress claim is allowed.

COSTS

[37] Insofar as costs are concerned, there has been mixed success on this application. I would order costs in the cause of the bad faith claim.

"R.B.T. Goepel, J."
The Honourable Mr. Justice R.B.T. Goepel