In the Court of Appeal of Alberta

Citation: Lafferty v Co-operators General Insurance Co, 2021 ABCA 359

Date: 20211026
Docket: 1901-0393AC
Registry: Calgary

Between:

Justin Lafferty and Verna Lafferty

Appellants

- and -

Co-operators General Insurance Co

Respondent

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice L. Bernette Ho
The Honourable Justice Anne Kirker

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice K.M. Horner
Dated the 6th day of November, 2019
Filed on the 29th day of November, 2019
(Docket: 1701-01917)

Memorandum of Judgment

The Court:

I. Overview

[1] Justin Lafferty and his mother Verna Lafferty appeal a chambers judge's decision upholding a Master's decision dismissing their claim on the basis that their Co-operators insurance policy excluded coverage for loss or damage caused by illegal drug operations, and that their claim was filed more than four years out of time under the *Limitations Act*, RSA 2000, c L-12.

[2] For the reasons below, the appeal is dismissed.

II. Facts

[3] The Laffertys owned a house on which they held a home insurance policy. In 2010 they rented it to tenants. The insurance broker was informally advised of this change of use, but did not advise the Laffertys to obtain different coverage as a result of the rental. The tenants used the house for a marijuana grow operation. On December 1, 2010, Alberta Health Services issued an order deeming the property unsuitable for habitation. Significant rehabilitation work to the house was required. The Laffertys advised their insurer of the loss on December 6, 2010.

[4] Over the following weeks, the claim was investigated and the Laffertys met with their adjuster on January 6, 2011. In their Statement of Claim filed February 7, 2017, they allege that while the adjuster advised them there was no coverage on the basis of an exclusionary clause in the policy related to illegal drug operations, she also:

> ... stressed the "hopelessness" of the situation to the Plaintiffs; that even without the exclusion clause, the Plaintiffs would not be covered in any event because they did not have the proper insurance in place after the home became a rental unit, and that the claim could therefore *also* be denied on that basis if necessary. Or in other words, that the renter would constitute a material change in risk, allowing the insurer to avoid their obligations under the policy. [emphasis in original]

[5] By January 27, 2011, Mr Lafferty had spoken to a lawyer about the claim.

[6] On February 1, 2011, the Laffertys received a letter from Co-operators formally denying their claim on the basis that the grow operation fell within the illegal drug operations exclusion clause, as well as an exclusion for loss and damage caused by vandalism. The letter also advised that any action or proceeding against the insurer would be barred "unless commenced within two years next after the loss or damage occurs." Notwithstanding that may suggest the limitation period had begun to run on December 6, 2010, the insurer agrees the limitation period did not begin to

run until coverage was denied on February 1, 2011. There was no statement in the letter that the insurer sought to avoid payment under the policy on the basis of improper coverage or material change of risk.

[7] The insurer subsequently advised the Laffertys it would consider covering the loss of a washer and dryer stolen from the house, and the policy was renewed in May 2011, which belies reliance on material change in risk.

[8] The Laffertys did not pursue the matter at the time. They could not afford the repairs and let the house fall into foreclosure.

[9] Several years later, Mr Lafferty attended law school and took an insurance class. On February 7, 2015 he learned about a statutory provision, s 541(1) of the *Insurance Act*, RSA 2000, c I-3, that may be relied upon by an innocent insured to avoid the consequences of an exclusion for loss or damage to property "caused by a criminal or intentional act or omission of an insured or any other person". Mr Lafferty's affidavit evidence is that this was when he "first suspected the Co-operators of bad faith, and sharp, deceptive practices in their handling of" the claim. He later learned this statutory provision only came into effect on July 1, 2012.

[10] Mr Lafferty said bad faith in his circumstances was "what I view to be dishonesty, what I view to be a lack of ... proper investigation" into his advice to the insurance broker of his intention to rent the property. He also felt the insurer was wrong not to consider the amendments yet to be proclaimed with respect to innocent insureds.

[11] Through the course of his studies, Mr Lafferty later learned there were specific steps an insurer had to take if it learned of a material change of risk and wished to avoid the policy on that basis. The insurer has three options: cancel the policy and return unearned premiums, retain the premiums and treat the policy as valid and subsisting, or treat the policy as valid but cancel unilaterally in accordance with the statutory conditions for unilateral termination: ***Gill v Zurich Insurance Co*** (1999), 16 CCLI (3d) 147, para 32 (Ont SC), aff'd (2002), 156 OAC 390, para 3, 35 CCLI (3d) 239 (Ont CA); Barbara Billingsley, *General Principles of Canadian Insurance Law*, 3d ed (Toronto: LexisNexis, 2020), 118-119. Co-operators had taken none of those steps.

[12] Additionally, Mr Lafferty says an argument could be made under what was then s 552(1) of the *Insurance Act* (now s 545(1) but modified) that an "exclusion ... is not binding on the insured if it is held to be unjust or unreasonable". That provision was included in the *Act* from 1999 and available to the Laffertys at the time of denial of the claim. On this argument, see the caution in ***Funk v Wawanesa Mutual Insurance Company***, 2018 ABCA 200, para 30, [2018] 8 WWR 503; and see ***Pietrangelo v Gore Mutual Life Insurance Co***, 2010 ONSC 568, paras 101, 106-109, aff'd 2011 ONCA 162, paras 9-12, 104 OR (3d) 468, leave to appeal ref'd, 2011 CanLII 65586 (SCC); ***Carteri v Saskatchewan Mutual Insurance Company***, 2018 SKQB 150, para 102, [2018] 8 WWR 537.

[13] As noted, the Laffertys commenced an action on February 7, 2017 against Co-operators. They served their claim January 2, 2018, alleging Co-operators was estopped from claiming there was a material change in risk because it knew about the rental and did not follow the required steps to avoid coverage. Further, the Laffertys alleged the oral representation that the insurer could also deny the claim for material change in risk was misleading and made in bad faith in order to discourage them from pursuing a claim. Through this misrepresentation, they say that Co-operators was able to keep their premiums without accepting the risk. The Laffertys also alleged it was bad faith to deny the claim on the basis of the exclusionary clause when it knew that a provision would come into effect in 2012 that might be used to set aside this clause. They sought general damages of $285,800, and punitive and aggravated damages.

III. Decisions Below

[14] Co-operators applied on March 18, 2019 for summary judgment on the basis of the exclusionary clause related to illegal drug operations, and the limitation period. On July 4, 2019, the Master dismissed the Laffertys' claim on both grounds: 2019 ABQB 515.

[15] The Master found the exclusionary clause was not ambiguous and it applied in these circumstances. Further, he held the Laffertys were four years out of time to sue. The Master also concluded the insurer may have known about the rental, but it did not matter because the denial of coverage was not based on a material change in risk. While the Laffertys submitted that the misrepresentation prevented them from pursuing their claim in 2011, it was bound to fail in any event on the basis of the illegal drug operation exclusion. The Master also discussed the circumstances of the alleged discovery of the claim and that it related to a statutory provision that had not yet come into effect at the time of denial of coverage. It did not relate in any way to the material change in risk allegations. The Master stated that at best Co-operators represented it could rely on material change, but then retreated from that position less than a month later.

[16] The Laffertys appealed. The chambers judge upheld the Master's decision, issuing short oral reasons on November 6, 2019. The chambers judge held that the submissions with respect to breach of duty of good faith or actionable wrong were moot because the action was commenced more than four years after the limitation period had expired. She concluded the reasoning of the Master was correct and declined to disturb his decision. She said a reasonable person, acting reasonably in light of the circumstances known to the plaintiffs in February 2011, could have brought an action in February 2011, or within two years thereafter.

[17] The chambers judge concluded:

> In *Weir-Jones Technical Services Inc*., a May 2019 decision of our Court of Appeal, our Court of Appeal recognized the new approach by our Courts to summary judgment applications as a result of the Supreme Court of Canada decision in *Hryniak v. Mauldin* rendered in 2014. Our Court of Appeal opined that summary judgment is no longer limited to cases in which the moving party [meets] a very

> high standard of proof. The presumption that all matters ought to be referred to trial [is] unrealistic and should end. I find that here even the former high standard of proof has been met by the defendant, and the action is completely without merit.

IV. Grounds of Appeal

[18] The Laffertys allege the chambers judge erred:

a) in finding Co-operators' denial of coverage letter corrected or otherwise constituted abandonment of the false representation made by the adjuster such that a false statement may be retracted by implication or through silence;

b) by failing to identify and apply the correct legal test under s 3(1) of the *Limitations Act* or otherwise imposing an unreasonable standard of discoverability on the appellants' claim; and

c) in finding they did not rely on the misrepresentations, or that reliance is a necessary element of a breach of utmost good faith claim.

V. Standard of Review

[19] The standard of review on questions of law is correctness, on questions of fact is palpable and overriding error, and on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: ***Housen v Nikolaisen***, 2002 SCC 33, paras 7-37, [2002] 2 SCR 235.

[20] The chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49, para 10, [2019] 6 WWR 567.

VI. Analysis

[21] The injuries for which the Laffertys sought a remedial order were the loss of the value of the equity in their property, loss of rental income, and the stress over these losses. They assert that they suffered these injuries as a result of the insurer's alleged breach of its duty of good faith in denying the claim on the basis of the exclusion clause and in making an alleged "false and misleading" representation that it could, alternatively, avoid coverage by relying on material change in risk.

[22] The Laffertys have not appealed the finding that the loss suffered fell within the illegal drug operations exclusion clause. As a result, the conclusion that the claim was validly denied and

no amounts were owing under the policy remains intact. Nevertheless, the Laffertys maintain they continue to have a separate, actionable claim against Co-operators.

[23] The question on this appeal is not whether Co-operators' denial of coverage letter of February 1, 2011 corrected or constituted an abandonment of a representation in relation to a material change in risk or whether reliance is a necessary element of a claim for a breach of good faith. The question is whether the courts below erred in finding that the insurer met its burden to prove, on a balance of probabilities, that more than two years before the appellants filed their Statement of Claim, they knew, or in the circumstances ought to have known: that the alleged injury had occurred; was attributable to the conduct of the insurer; and assuming Co-operators was liable, warranted bringing a proceeding: s 3(1), *Limitations Act*.

[24] The Laffertys knew in January 2011 that coverage under the policy was an issue and their claim was going to be denied on the basis of the applicable exclusion clause. They knew the adjuster had suggested that a material change in risk could also be a basis on which to deny the claim and that they had advised the broker about the rental prior to discovering the damage and reporting the claim. They also knew in February 2011 that Co-operators had not stated in the denial letter it was relying upon a material change in risk as a ground to deny the claim. Further, more than two years before the Statement of Claim was filed, the Laffertys knew their insurer had considered a further claim against the policy for items stolen from the property, and had renewed the policy.

[25] Recently, the Supreme Court of Canada in ***Grant Thornton LLP v New Brunswick***, 2021 SCC 31, para 3, clarified the standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to trigger the commencement of a limitation period. The Supreme Court held that the well-established common law discoverability rule applies unless ousted by clear legislative language, paras 29-30. In Alberta, the provisions of s 3(1) of the *Limitations Act* codify the common law rule of discoverability, para 35; ***De Shazo v Nations Energy Co***, 2005 ABCA 241, para 26, 256 DLR (4th) 502. The common law discoverability rule provides that a cause of action arises for the purposes of a limitation period "when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": ***Grant Thornton***, para 29; ***Central Trust Co v Rafuse***, [1986] 2 SCR 147, 224, 31 DLR (4th) 481, citing ***Kamloops (City of) v Nielsen***, [1984] 2 SCR 2. See also ***Ryan v Moore***, 2005 SCC 38, paras 2, 22, [2005] 2 SCR 53; ***Hill v Alberta (Registrar of Land Agents)***, 1993 ABCA 75, para 8, 100 DLR (4th) 331; and ***Milota v Momentive Specialty Chemicals***, 2020 ABCA 413, para 22.

[26] Mr Lafferty's legal education in 2015 did not start, or restart, the limitation period clock on the breach of good faith claim as the Laffertys contend, because the material facts upon which their claim was asserted were known to them when they received the insurer's denial of coverage letter. Contrary to Mr Lafferty's assertions, there is nothing in the evidence to show he learned of

any new material fact between the date of the denial letter and February 7, 2015, when he says he became suspicious the insurer had acted in bad faith.

[27] The knowledge required for the purposes of determining the limitation period under s 3(1) of the *Limitations Act* does not have to be perfect knowledge: ***Stack v Hildebrand***, 2010 ABCA 108, para 14, 477 AR 359; ***De Shazo***, para 31; ***Canadian Natural Resources Limited v Husky Oil***, 2020 ABCA 386, para 31. Rather, plaintiffs will have sufficient knowledge when they have some support for a suspicion that their injury is attributable to the conduct of the defendant, and assuming the defendant's liability, that an action is warranted: ***Grant Thornton***, para 46; ***HOOPP Realty Inc v Emery Jamieson LLP***, 2018 ABQB 276, para 213, 27 CPC (8th) 83 (M), citing ***Peixeiro v Haberman***, [1997] 3 SCR 549, para 18, 151 DLR (4th) 429. Also see ***Stack***, para 14; ***De Shazo***, para 36; ***Hill***, para 8.

[28] Put another way, the requisite knowledge exists when a plaintiff "has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn", ***Grant Thornton***, paras 42, 45. A plaintiff will have constructive knowledge when the evidence shows the plaintiff ought to have discovered the material facts by exercising reasonable diligence, para 44. This plausible inference is one which gives rise to a "permissible fact inference", para 45.

[29] The facts in this case are distinguishable from those in ***Gayton v Lacasse***, 2010 ABCA 123, 26 Alta LR (5th) 182, upon which the Laffertys rely. There were triable issues in ***Gayton*** about when the appellant first knew, or ought to have known, she had suffered a permanent brain injury as a result of the respondent's actions and whether the appellant's personal circumstances, including the effect of the injury, meant that she was not reasonably able to bring an action.

[30] In contrast, the Laffertys knew of the injuries for which they seek a remedial order and had all the facts required in February 2011 to draw a plausible inference of liability on Co-operators' part. The evidence does not show personal circumstances "so compelling that it cannot be reasonably said that [they] could bring an action within the prescribed limitation period": ***Novak v Bond***, [1999] 1 SCR 808, para 40, 172 DLR (4th) 385 [emphasis in original], quoted in ***Gayton*** at para 31.

[31] What the Laffertys did not understand, more than two years before the action was commenced, was the law and how it might apply to affect their rights in the circumstances. This is not, however, a basis upon which any limitation period is postponed: ***Hill***, para 9.

[32] As this Court stated in ***Canadian Natural Resources Ltd v Jensen Resources Ltd***, 2013 ABCA 399, para 41, [2014] 4 WWR 213, once a plaintiff has "sufficient knowledge to throw an obligation on it to make reasonable inquiries about its rights ... [t]hat will start the running of the limitation period...". See also ***Canadian Natural Resources Limited v Husky Oil***, para 32.

[33] The chambers justice made no error in finding that "[a] reasonable person, acting reasonably in light of the circumstances known to the plaintiffs in February 2011, could have brought an action in February 2011 or within the 2 years thereafter." See ***421205 Alberta Ltd (Schroeder Transport) v Lloyd's Underwriters***, 2011 ABQB 180, para 42, 45 Alta LR (5th) 251; ***Halter v Standard Life Assurance Company of Canada,*** 2014 ABCA 57, para 18, 569 AR 148.

[34] On the summary judgment criteria, there is no merit to the Laffertys' claim, and there is no genuine issue requiring a trial. The chambers judge was able, given the evidence, to make the necessary findings of fact on a balance of probabilities, apply the law to the facts, and determine that her decision was a proportionate, more expeditious, and less expensive means to achieve a just result: ***Hyrniak v Mauldin***, 2014 SCC 7, paras 49, 81-84, [2014] 1 SCR 87; ***Weir-Jones***, para 47; ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343, paras 12-13. Summary judgment was the appropriate remedy.

VII. Conclusion

[35] The appeal is dismissed. Rule 14.88(3) of the *Alberta Rules of Court*, AR 124/2010, applies to the scale of costs in the appeal.

Appeal heard on October 13, 2021

Memorandum filed at Calgary, Alberta
this 26th day of October, 2021

Feehan J.A.

Ho J.A.

Kirker J.A.

Appearances:

Appellant J.W. Lafferty
J.W. Lafferty
for the Appellant V. Lafferty

D.A. Downe, Q.C./M.G. Doerksen
for the Respondent