Court of Queen's Bench of Alberta

Citation: Abbas v Esurance Insurance Company of Canada, 2021 ABQB 303

Date: 20210421
Docket: 1701 04565
Registry: Calgary

Between:

Ali Alreda Abbas

Plaintiff/Respondent

- and -

Esurance Insurance Company of Canada

Defendant/Appellant

Reasons for Judgment
of the
Honourable Madam Justice B.B. Johnston

Appeal from the Oral Decision of
B. Summers, Master in Chambers
Dated the 4th day of August, 2020

[1] The Plaintiff, Mr. Ali Abbas advances a claim against the Defendant, Esurance Insurance Company of Canada, for coverage under a Standard Endorsement Form ("SEF") 44 endorsement under his policy of insurance. Esurance claims Mr. Abbas forfeited his right to recover indemnity pursuant to sections 554(1) (b) & (c) of the *Insurance Act*, RSA 2000, c I-3 . Esurance seeks summary dismissal of Mr. Abbas' claim.

[2] On August 4, 2020, the Master declined to summarily dismiss Mr. Abbas' action.

[3] Esurance appeals the Master's decision.

Background

[4] The parties filed an agreed statement of facts. None of the facts are in dispute.

[5] On November 17, 2016, Mr. Abbas was a passenger in the backseat of a motor vehicle driven by Mr. Sheldon Vijay. The motor vehicle was in an accident. Mr. Abbas was thrown from the vehicle. He sustained injuries.

[6] Mr. Abbas filed a statement of claim against Mr. Vijay on March 28, 2017. Mr. Vijay was uninsured and was noted in default. The Administrator of the Motor Vehicle Accident Claims Act filed a statement of defence on Mr. Vijay's behalf.

[7] Mr. Abbas had an Alberta Standard Automobile Policy SPF No. 1 that included an SEF 44 endorsement provided by Esurance.

[8] On May 11, 2017, Mr. Abbas filed a claim for disability benefits under Section B of his SPF No. 1 and sought coverage under his SEF 44 endorsement. Esurance appointed separate adjusters to adjust the Section B claim and the SEF 44 claim.

[9] Mr. Abbas was required to complete a form to access Section B benefits under the policy. In the form, he lied about his employment situation to qualify for benefits. He subsequently lied to the adjuster and provided a false employer's certificate and hiring letter. He had his uncle perpetuate the lie by suggesting falsely that Mr. Abbas worked for his business under the table.

[10] Mr. Abbas was denied Section B benefits because he did not qualify. He was also denied SEF 44 coverage on the basis of his false statements.

[11] This action relates only to the SEF 44 endorsement.

The Master's Decision

[12] The Master dismissed Esurance's application for summary dismissal under Rules 7.2 and 7.3 of the Alberta *Rules of Court*, AR 124/2010.

[13] In his analysis, the Master applied the principles in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,*** 2019 ABCA 49. He noted this was a pure question of law as no facts were in dispute.

[14] The Master stated that "a claim" was not defined in the *Insurance Act*, but an analysis of the principles of statutory interpretation did not follow in the decision.

[15] The Master was concerned with a fair and balanced approach in interpreting the *Insurance Act*. He opined that a determination that Mr. Abbas had forfeited all of his rights under the contract by virtue of the fraud, dishonesty and lack of good faith, would be "draconian". He found that the false statements and fraud related to Section B benefits only and that the misrepresentations related to employment were immaterial to the SEF 44 coverage. Given an overriding principle of the *Insurance Act* was to produce fairness between the insurer and insured, the Master held that it would be patently unfair to deny Mr. Abbas his SEF 44 coverage based upon misrepresentations made in his Section B benefit application.

[16] The Master concluded that the forfeiture under section 554 of the *Insurance Act,* only relates to a claim that is materially connected to the fraud or dishonesty. As the SEF 44 claim was not materially connected to fraud or dishonesty, the Master declined to summarily dismiss the SEF 44 claim.

Standard of Review

[17] The standard of review for an appeal under Rule 6.14 of the *Rules of Court* is correctness. An appeal from a Master is *de novo.* No deference is owed: ***McGowan v Lang***, 2015 ABCA 217 at para 32.

Issue

[18] Should the action be summarily dismissed under Rules 7.2 and 7.3 of the *Rules of Court* ? Specifically, did Mr. Abbas' actions invalidate his SEF 44 claim and thereby forfeit his right to claim indemnity under sections 554(1)(b) and (c) of the *Insurance Act*?

Legislation

Insurance Act

[19] Sections 554 (1) (b) and (c) of the *Insurance Act* state:

> 554(1) If
>
> ...
>
> (b) the insured contravenes a term of the contract or commits a fraud, or
>
> (c) the insured wilfully makes a false statement in respect of a claim under the contract,
>
> a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

Rules of Court

[20] The summary judgment rules are set out in Rules 7.2 and 7.3 of the *Rules of Court* and provide:

> 7.2 On application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when
>
> (a) admissions of fact are made in a pleading or otherwise, or
>
> (b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.
>
> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> ...
>
> (b) there is no merit to a claim or part of it;
>
> ...
>
> (3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

> (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
>
> ...

Analysis

[21] Following a motor vehicle accident on November 17, 2016, Mr. Abbas sought coverage for Section B benefits and coverage under the SEF 44 endorsement in his policy of insurance with Esurance.

[22] Section B of the policy is mandatory coverage that provides medical treatment or disability benefits to the insured and the insured's passengers. An SEF 44 endorsement provides optional insurance coverage to named insureds and their family members for injuries and damages arising from a motor vehicle accident where the wrong doer is under-insured or uninsured.

[23] Mr. Abbas advances a claim against Esurance for SEF 44 coverage.

[24] Esurance asserts that based on sections 554(1)(b) & (c) of the *Insurance Act*, they were justified in denying benefits to Mr. Abbas and his claim should be summarily dismissed. Based on Mr. Abbas' conduct, Esurance argues he has forfeited his right to claim indemnity under the policy of insurance.

[25] Esurance argues that there is an implied obligation to initiate and advance claims honestly and in good faith and that Mr. Abbas breached that duty. Esurance submits that Mr. Abbas willfully made false and misleading statements to Esurance and his conduct was fraudulent.

[26] Esurance further asserts that the claim under Section B of SPF No. 1 and the SEF 44 endorsement arose from the same motor vehicle accident and arose under the same policy. Esurance argues that there is only one claim. Regardless, Esurance asserts that the language of forfeiture under section 554(1) arises whether or not there is more than one claim.

[27] Mr. Abbas acknowledges he willfully made false and misleading statements and his conduct was fraudulent. He notes his conduct was inappropriate and regrettable. He also acknowledges that he owed Esurance a duty of good faith. However, Mr. Abbas claims that the lies that he perpetrated were with respect to his Section B benefits and not with respect to the indemnity under the SEF 44 endorsement. Specifically, he argues that the SEF 44 endorsement is not part of an SPF No. 1 policy, but is optional coverage to protect an insured against the risk of being injured by an uninsured or under-insured motorist. Therefore, only his claim for Section B benefits is affected and he should not lose his right to indemnity under the SEF 44 endorsement as it is a different claim. Additionally, he argues that his misrepresentation was materially related to his claim for Section B benefits and not to the SEF 44 claim.

[28] Mr. Abbas further submits that insurance legislation is a form of consumer protection legislation that is intended to protect insureds and that an interpretation that limits insureds' right to indemnity under the SEF 44 endorsement would be contrary to the purpose of such legislation.

Principles of Statutory Interpretation

[29] Statutes are to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Elmer Driedger, *Construction of Statutes, 2nd ed* (Toronto: Butterworths, 1983) at para 87, cited in ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 41.

[30] If the statutory text supports only one plausible or permissible meaning, the inquiry is complete: ***Alexis v Alberta (Environment and Parks)***, 2020 ABCA 188 at para 49.

[31] If there is more than one plausible meaning, the purpose of the statute should be examined. In such cases, the option that best advances the purpose of the statute should be selected: ***Alexis*** at para 52.

Plain and Ordinary Meaning

[32] In this case, the analysis begins with sections 554(1)(b) & (c) of the *Insurance Act.* This section describes the consequences of making misrepresentations when advancing claims under an automobile insurance policy.

[33] The parties disagree on the interpretation of "a claim". I note that "claim" is not defined in the *Insurance Act*.

[34] Esurance argues that " a claim" means "any claim" which means that if an insured contravenes a term of their policy or commits a fraud then any claim made under the policy is invalid and their right to recover indemnity is forfeited.

[35] Mr. Abbas argues that a plain reading of "a claim" in section 554 means that two types of coverage under a single policy are not contemplated. Therefore, the invalidation of a claim or forfeiture of the indemnity provided by the policy would be confined to the claim in which the insured perpetrated the fraud. I disagree. The analysis does not stop at the lack of definition of "a claim".

[36] A plain reading of section 554(1) confirms that if there is a violation of (b) ***"or"*** (c), a claim by the insured is invalid ***"and"*** the right of the insured to recover indemnity is forfeited.

[37] The word "***or***" in section 554 (1) has significance. In ***Haraba v Wawanesa Co***., 2017 ABQB 190 at para 8, the court stated that a claim will be invalid and the right to recover indemnity forfeited, if among other things, the applicant:

> a. knowingly mispresents or fails to disclose any required fact;
>
> b. contravenes a term of ***the contract***;
>
> c. commits a fraud; or
>
> d. wilfully makes a false statement in respect of a claim under ***the contract***.
> [Emphasis added]

[38] Regard must also be had to what is included in a contract of insurance. Section 1 (j) of the *Insurance Act* provides clarity. A "contract of insurance" includes any policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement.

[39] Policy is then defined in section 1(uu) as “an instrument evidencing a contract of insurance.”

[40] Therefore, the reference to “contract” in section 554(1) confirms that the section is to be read as meaning a claim under the entirety of the contract of insurance and not simply under one section of the policy. Hence, “a term” of the contract includes “any term” of the contract of insurance and “a claim” means “any claim” under the contract of insurance.

[41] Applying this meaning results in the invalidation of claims and the forfeiture of an insured’s right to recover indemnity for contravention of ***any term*** of the contract or wilfully making a false claim in respect of ***any claim*** under the contract.

[42] The policy of insurance itself is consistent with the plain and ordinary interpretation of section 554 of the *Insurance Act*, in that a claim under a policy, includes a claim under the SEF 44 endorsement. I note that the SEF 44 endorsement is “attached to and forms part of the policy”: SEF 44 at section 11.

[43] Section 554(1)(b) further refers to “commits a fraud” without reference to “a claim” as an instance where a claim will be invalidated, and the right to indemnity is forfeited. This wording covers instances where the fraud is perpetrated in connection with an application for insurance and not just in respect to a claim for benefits under the insurance policy. Hence the focus on just the meaning of “a claim” in interpreting this section is not reasonable.

[44] Furthermore, section 554 provides that “a claim by the insured is invalid ***and*** the right of the insured to recover indemnity is forfeited.” The use of the word ***“and”*** is significant. The section provides that the consequence of the insured’s actions listed in (b) and (c), results in not only the invalidation of the insured’s claim but also, the forfeiture of the insured’s right to recover indemnity.

[45] A plain reading of sections 554(1)(b) & (c) confirms that a violation of (b) or (c) results in the forfeiture of the right to recover indemnity under a policy of insurance.

The Insurance Act as a Whole Supports the Forfeiture of an Indemnity in the Face of Fraud

[46] The plain reading ascribed above, is in harmony with the scheme of the *Insurance Act*, the object of the *Act* and the intention of Parliament. The obvious intention behind section 554 is in keeping with the requirement of utmost good faith between insured and insurer and to provide significant consequences for clearly improper and intentional conduct by the insured.

[47] An interpretation that results in fraudulent behaviour forfeiting indemnity under a policy, is consistent with the purpose of the *Act* and the statute as a whole and what a reasonable person would expect in such circumstances: ***Scott v Wawanesa Mutual Insurance Co.***, [1989] 1 SCR 1445, 1989 CarswellBC 105 at para 13; ***National Bank of Greece (Canada) v Katsikonouris***, [1990] 2 SCR 1029, 1990 CarswellQue 84 at para 18.

[48] Mr. Abbas argues that the *Insurance A*ct is “consumer protection legislation”. This however, is a one sided view. There is no doubt that the *Insurance Act* has built in protections to ensure insurers act in good faith. However, the legislation places similar expectations on insureds.

[49] A contract of insurance between an insurer and an insured is one of utmost good faith: ***Halpern Investments Ltd. v Sovereign General Insurance Co***., 2005 ABQB 105 at para 6.

[50] If an insured fails to put forward his claim honestly and act in good faith, the consequences of his actions include the forfeiture of indemnity under the policy: Section 554(1); ***Andrusiw v Aetna Life Insurance Co. of Canada***, [2001] A.J No 789 at para 82. I do not find such a consequence to be "draconian".

[51] Even if it could be seen to be draconian, section 554 does not stand alone. The *Insurance Act* contains provisions that provide balance. Specifically, the *Insurance Act* protects insureds from forfeiture of an indemnity due to mere inadvertence. Where there is imperfect compliance under the terms of a policy of insurance, rather than non-compliance, the court has the discretion to relieve against forfeiture: Section 520 *Insurance Act*; ***Elance Steel Fabricating Co. v Falk Brothers Industries***, [1989] 2 SCR 778 at paras 19-22; ***Andrusiw*** at paras 57 and 58.

[52] The seriousness with which insurance fraud is taken, is also reflected in the decisions of this court. In ***Andrusiw***, an insured was denied coverage under a policy of disability based on his fraudulent and wilful misrepresentations in his application. The insurer was awarded general damages for benefits improperly paid to Mr. Andrusiw and punitive damages.

[53] In upholding the decision of the insurer to deny coverage, the trial judge noted that there is a high onus to establish fraudulent behaviour. Because the Defendant had satisfied the onus, " the policy [was] invalidated and the Plaintiff forfeit[ed] all claims under it": ***Andrusiw*** at para 53.

[54] In reaching this conclusion, the trial judge reviewed the common law position articulated in ***Britton v Royal Insurance Co.***, [1886] 4 F. & F. 905, 176 E.R. 843 (Eng. Nisi Prius) at para 844*:*

> The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy. It would be most dangerous to permit parties to practice such frauds and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy.

[55] In ***Al-Asadi v Alberta Motor Assn. Insurance Co.***, 2003 ABQB 289, the trial judge stressed the need for both the insured and insurer to act in good faith when dealing with insurance claims. The Plaintiff filed a fraudulent insurance claim because he lied about being the victim of auto theft and vandalism. The trial judge denied the insured's claim for benefits under the policy of insurance and awarded punitive damages of $5000. In highlighting the reprehensible nature of insurance fraud, the trial judge noted that "the Courts must play their part in penalizing those insured who engage in insurance fraud in appropriate cases as equally as they must punish insurers who fail to deal with the claims advanced by an insured in good faith": ***Al-Asadi*** at para 71.

[56] Mr. Abbas argues both ***Andrusiw*** and ***Al-Asadi*** are distinguishable because they involved claims by insureds under single heads of coverage. Although I agree that these cases were based on fraudulent claims under single heads of coverage, the overarching thesis of these cases applies: insurance fraud is serious and will result in the forfeiture of coverage.

[57] In this case, I find the conduct of Mr. Abbas reprehensible. This was not a case of mere inadvertence. He lied on multiple occasions and falsified documents. The fraud was also perpetuated in multiple contexts: in the original application; over the phone; and then through fabricated records. He provided a false certificate of employer and falsified a hiring letter. He also has his uncle participate in the fraud by advising the adjuster that Mr. Abbas had worked for him under the table, when such assertion was false.

[58] Mr. Abbas asserts that the SEF 44 claim is a separate claim and his fraud in the claim for Section B benefits ought not to carry over to impact his claim under the SEF 44 endorsement.

[59] In this case there is a single policy and a single motor vehicle accident. Although there are different elements to the claim or even perhaps different claims, these claims arose out of one accident and the claims were under one policy of insurance.

[60] Mr. Abbas' argument that they are different claims still does not assist him given the clear language of section 554 which provides "**and** the right of the insured to recover indemnity is forfeited." In my view, this wording is clear and applies to all claims under the policy as opposed to just the Section B benefits.

[61] I disagree with the Master that there is a level of materiality required between the claim in which the fraud is present and other claims that may be advanced under the same policy. If this was the case, the legislation ought to have said so.

[62] I agree with the concerns raised by the Master, that courts should not lightly restrict the rights of insureds to indemnity under policies of insurance. However, in my view there are protections in place that protect insureds against insurers who fail to appropriately deal with claims advanced in good faith.

[63] In cases where fraud is alleged there is a high burden that is not displaced lightly: ***Andrusiw*** at para 51.

[64] A further protection is embedded in section 520 of the *Insurance Act*. Specifically, in cases of imperfect compliance, as distinct from non-compliance, the court has the discretion to relieve against forfeiture: Section 520 *Insurance Act; **Elance Steel*** at paras 19-22.

Summary Judgment is Appropriate

[65] Rules 7.2 and 7.3 of the *Rules of Court* provide for the summary disposition of claims.

[66] The test for summary judgement was articulated in ***Weir-Jones*** at para 47. As the Court of Appeal in ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343 at para 12, leave to appeal refused, 2021 CarswellAlta 641 noted:

> The *Weir-Jones* standard sanctions summary judgment if "the presiding judge ... [is] left with sufficient confidence in the ... record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute". More specifically, if the moving party has proved the material facts on a balance of

> probabilities and advances the law that vindicates the moving party's position, summary judgment is appropriate. The outcome does not have to be obvious

I find this case is appropriate for summary judgment. There are no facts in dispute and this matter involves a pure question of law. The fraud by Mr. Abbas is admitted. He has forfeited his right to indemnity in accordance with sections 554(1) (a) & (b) of *the Insurance Act*. His claim is without merit. There is no genuine issue requiring a trial. The action is dismissed.

Conclusion

[67] The appeal is allowed and the action is dismissed.

Heard on the 5th day of March, 2021.
Dated at the City of Calgary, Alberta this 21st day of April, 2021.

B.B. Johnston
J.C.Q.B.A.

Appearances:

David Pick
for the Defendant (Appellant)

Martin Hoornaert
for the Plaintiff (Respondent)