CITATION: Zurich Insurance Company Ltd v. Ison T.H. Auto Sales Inc., 2011 ONCA 663
DATE: 20111025
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COURT OF APPEAL FOR ONTARIO

MacPherson, LaForme and Epstein JJ.A.

BETWEEN

Zurich Insurance Company Ltd and Chartis Insurance Company of Canada

Applicants (Appellants)

and

Ison T.H. Auto Sales Inc.

Respondent (Respondent)

Hillel David and Mark A. Mason, for the appellants

Theodore P. Charney and Michelle D. Kemper, for the respondent

Heard: October 19, 2011

On appeal from the judgment of Justice Strathy of the Superior Court of Justice dated March 25, 2011.

ENDORSEMENT

[1] The appellant insurers appeal from the judgment of Strathy J. of the Superior Court of Justice dated 25 March 2011, with reasons released on the same date and with supplementary reasons released on 21 April 2011.

[2] The respondent Ison T.H. Auto Sales Inc., by way of cross-appeal, seeks leave to appeal from one component of the application judge's supplementary judgment relating to costs dated 22 June 2011.

The appeal

[3] The appellants are insurers and the respondent is an insured under their policy. Following a large loss event, caused by a fire and explosion at an apartment building in Toronto, the appellants paid out $1.1. million to the respondent.

[4] The respondent claims that it has an additional uninsured loss of $700,000. The respondent commenced an action against the alleged wrongdoer and included in the action both its claim for its uninsured loss and the appellants' subrogated claim ("the Ison action").

[5] A dispute between the appellants and the respondent subsequently arose regarding the carriage and control of the Ison action. The appellants contend that they are entitled to have carriage and control of this action pursuant to the subrogation clause in the insurance policy. Alternatively, they submit that they are entitled to have meaningful participation in the action and full control of their subrogated claim, except on issues of liability common to both parties. Finally, the appellants argue that the respondent breached its duty of utmost good faith by barring the attendance of the appellants'

counsel at the examinations for discovery in the Ison action and by its subsequent conduct.

[6] We do not accept these submissions. On all of these issues, we agree with and adopt, in their entirety, the analysis and conclusions of the application judge which are, in a word, masterful. In particular, we agree with the application judge's careful discussion of the relationship between the decision of British Columbia Court of Appeal in *Farrell Estates Ltd. v. Canadian Indemnity Co.* (1990), 69 D.L.R. (4th) 735 and the subsequent decision of the Supreme Court of Canada in *Somersall v. Friedman*, [2002] 3 S.C.R. 109.

[7] We make one other observation. The appellants do not propose that the issue of carriage and control of the Ison action be determined solely on the basis of the interpretation of the subrogation clause in the insurance policy. Rather, their suggested test, as set out in their factum and developed in oral submissions, is: "The language of the policy provision should be considered in conjunction with the following fundamental issue: What is the fair and sensible result?"

[8] In answering this question, the appellants submit that the crucial factor to consider is the value of the claims by the insurer and the insured. In this case, the insurer's say that their claim is a "hard" $1 million whereas the insured's claim is a "soft" $700,000. Accordingly, the insurer should have carriage and control of the Ison action.

[9] Accepting, without necessarily agreeing with, the appellants' proposed test, we think that the appellants' focus on the factor of the monetary amount of the competing claims is too narrow. If considerations relating to "the fair and sensible result" come into play, then attention must be paid to the conduct of the insured and the insurer in the context of the entire legislation.

[10] In responding to this submission, the application judge said:

> Counsel for the insurers submits that if I have discretion as to which party has carriage, it should be given to the insurers who have a larger ($1 million) "hard" claim for property damage as opposed to Toronto Honda's smaller ($700,000) "soft" claim for business losses. There is no evidence before me to show that Toronto Honda's business loss claim is any less recoverable than the property claim.
>
> There are, as well, other factors, including:
>
> - the insured has been diligent in pursuing claims on behalf of itself and the insurers – this action was commenced almost two years ago and is well advanced;
>
> - the insurers delayed for over 15 months after the fire before opening up discussions about subrogation and these were prompted by the initiative of counsel for the insured;
>
> - this application was not commenced until August 4, 2010, more than two years after the fire;
>
> - a great deal of time and effort has already been expended by Toronto Honda, and its counsel, in pursuing the claim;

> - Toronto Honda, and the insurers, will benefit from the fact that Falconer Charney and Sutts Strosberg act as class counsel and have control of that litigation as well, resulting in cost-saving and other synergies; and
>
> - there is no suggestion that the insurers' position has been or will be prejudiced in any way by leaving carriage with Falconer Charney and Sutts Strosberg, who are unquestionably qualified to act as counsel.
>
> There may be cases where the insurer's interest is so vastly disproportionate to the insured's interest that it would be unreasonable to allow the latter to have control of the litigation. This is not such a case.

[11] We agree with this analysis. We also note that the application judge is case managing, and will hear next autumn, both the class action and the Ison action relating to the fire and explosion at the apartment building. He is well positioned to deal with any complaints about the insured's carriage and control of, and the insurer's participation in, the Ison action as it moves forward.

The cross-appeal

[12] The application judge awarded the respondent costs in the amount of $30,000. The respondent seeks leave to appeal on the basis that the application judge erred by not awarding full indemnity costs against the appellants due to his misinterpretation of a "costs of recovery" provision in the subrogation clause in the insurance policy.

[13] The application judge rejected the appellant's interpretation of this clause. However, in addition he said: "Standing back and considering what is fair and

reasonable, it is my view that the full indemnity claim is not only unwarranted, it is entirely out of proportion to what would be fair and reasonable for a claim of this kind." We see no error in this conclusion.

Disposition

[14] The appeal and cross-appeal are dismissed.

[15] The respondent is entitled to its costs of the appeal fixed at $18,000 inclusive of disbursements and HST. The appellants are entitled to their costs of the cross-appeal fixed at $2000 inclusive of disbursements and HST.

"J.C. MacPherson J.A."
"H.S. LaForme J.A."
"G.J. Epstein J.A."