COURT OF APPEAL FOR ONTARIO

CITATION: Bradfield v. Royal Sun Alliance Insurance Company of Canada, 2019 ONCA 800
DATE: 20191007
DOCKET: C65787

Doherty, Harvison Young and Thorburn JJ.A.

BETWEEN

Jeffrey Bradfield

Plaintiff (Respondent)

and

Royal Sun Alliance Insurance Company of Canada

Defendant (Appellant)

Derek V. Abreu and Mark A. Borgo, for the appellants

Todd J. McCarthy and Samuel A. Davies, for the respondent

Heard: September 19, 2019

On appeal from the order of Justice Alexander Sosna of the Superior Court of Justice, dated July 25, 2019, with reasons reported at 2018 ONSC 4477.

Thorburn J.A.:

OVERVIEW

[1] This is an appeal by Royal and Sun Alliance Insurance Company of Canada ("RSA") from the trial judge's decision that RSA was responsible to provide insurance coverage to its insured, Steven Devecseri's estate.

[2] On May 29, 2006, the plaintiff/respondent Jeffrey Bradfield, Paul Latanski and the late Steven Devecseri were riding their motorcycles. Devecseri was in front. He drove onto the wrong side of the road and collided with Jeremy Caton's automobile. Bradfield did not hit Caton's automobile. Devecseri was killed and Caton was injured.

[3] Devecseri was insured by RSA under a standard motor vehicle policy with a $1 million limit. He had an M2 driver's licence, which prohibited him from operating a motorcycle with any alcohol in his bloodstream. To do so, constituted a policy violation.

[4] In the first action brought by Caton, Devecseri and Bradfield were found liable for damages resulting from the motor vehicle accident. The issue of whether RSA was required to provide insurance coverage to Devecseri was not determined.

[5] In the second action, the trial judge was asked to determine whether RSA was entitled to take an off-coverage position and reduce the estate's policy limit from $1 million to $200,000 after it learned that Devecseri had been drinking before the accident, contrary to the terms of his insurance policy.

[6] The trial judge held that RSA waived its right to rely on Devecseri's policy breach because RSA had taken its off-coverage position too late. He

held that Bradfield was entitled to recover judgment in the amount of $800,000 against RSA. The trial judge drew his conclusions for the following reasons:

1. RSA did not obtain the coroner's report after Devecseri's fatal accident in 2006, which stated that Devecseri had alcohol in his system at the time of death;
2. Having alcohol in his system was contrary to the terms of Devecseri's M2 licence and his insurance policy;
3. "[S]ecuring a copy of the Coroner's report would not be a non-mandatory item on a list of suggested areas to investigate";
4. Knowledge of the policy breach was imputed as of the time the coroner's report was available to RSA in 2006; and
5. "RSA's failure to take an off-coverage position after June 2006, its defence of the claim in 2008, and continuing until discovery in 2009, amounted to a waiver by conduct of Devecseri's breach.... Having found waiver, the issue of estoppel is rendered moot."

[7] RSA appeals the trial judge's finding that RSA waived its right to deny coverage.

[8] RSA claims that waiver requires actual knowledge of the breach and there was no actual knowledge of the breach in this case. Moreover, there

was no clear waiver of the breach in writing as provided in s. 131(1) of the *Insurance Act*, R.S.O. 1990, c. I.8.

[9] RSA further claims there can be no estoppel, as there was no knowledge of the breach until 2009 and there is no evidence the defence would have been conducted any differently had RSA taken an off-coverage position in 2006. As such, there was no detrimental reliance.

[10] For the reasons that follow, I find that RSA did not waive and is not estopped from denying coverage. The appeal is therefore granted.

BACKGROUND FACTS

[11] There is no dispute as to the facts.

RSA's investigation

[12] On June 6, 2006, RSA engaged an adjuster to investigate the circumstances surrounding the accident. RSA instructed its adjuster to obtain "any and all information with regard to this accident from the investigating police service and the coroner (death certificate)". According to the adjuster, this form was a "list of non-mandatory, suggested areas to investigate."

[13] The adjuster obtained the police report which concluded that "excessive speed was a major contributing factor in the collision" but made no mention of alcohol. The RSA adjuster testified that he believed that if alcohol was involved, it would have been disclosed in the police report.

[14] None of the parties obtained a copy of the coroner's report.

[15] Before 2009, Bradfield's insurer received hearsay information that drinking was involved in the accident but did not disclose that information to RSA's adjuster.

[16] RSA's adjuster interviewed Bradfield and Latanski as part of his investigation. Neither told the adjuster that Devecseri had been drinking before the accident.

The First Trial

[17] On May 27, 2008, Caton (the automobile driver) brought a claim for damages against Bradfield, Latanski and Devecseri's estate. RSA filed a Statement of Defence on March 5, 2009.

[18] During his examination for discovery on June 24-25, 2009, Latanski advised for the first time that Devecseri and Bradfield were drinking beer shortly before the accident. Bradfield testified that he was at the bar but could not recall if Devecseri was drinking.

[19] On July 8, 2009, one year after the claim was brought and two weeks after Latanski's testimony at discovery, RSA advised the parties that it was taking an "off-coverage position" as a result of this disclosure. It did so on the basis that having a blood alcohol level above zero was contrary to Mr. Devecseri's M2 motorcycle licence and a breach of his insurance policy.

[20] At no time did RSA provide the estate notice in writing that it was waiving the policy violation, as described in s. 131(1) of the *Insurance Act.*

[21] In 2012, the jury awarded Caton $1.8 million: it held Bradfield 10% at fault and Devecseri's estate 90% at fault. Bradfield was indemnified against Devecseri's estate and obtained judgment on his crossclaim against the estate.

[22] The issue of whether RSA could deny coverage was deferred.

The Second Trial

[23] In the second trial, Bradfield sought a declaration of entitlement to recover judgment against RSA for the remaining $800,000 available in Devecseri's policy ($200,000 had already been paid out) pursuant to s. 258 of the *Insurance Act.* Bradfield took the position that RSA had waived or was estopped from denying Devecseri's estate insurance coverage because Bradfield submitted that:

1. Bradfield obtained judgment on his crossclaim against the estate;
2. RSA knew Devecseri breached the terms of the policy by having a blood alcohol level above zero, contrary to the terms of Devecseri's M2 motorcycle licence and in breach of his insurance policy. Knowing of the breach, RSA chose to defend the claim;

3. RSA's conduct from May 2006 to July 2009 amounted to a waiver of its right to assert a policy breach and deny coverage; and
4. Prejudice is presumed given the three-year delay. In any event, there was prejudice and detrimental reliance such that RSA should be estopped from denying coverage.

[24] RSA took the position that it had no knowledge of the breach until 2009, at which point it denied coverage. As such, it did not waive the policy breach. Moreover, there was no prejudice as the litigation administrator for Devecseri's estate and counsel for Caton both testified that the only difference between RSA defending the action and being added as a statutory third party was the style of cause. The litigation steps would not have been any different.

THE TRIAL JUDGE'S DECISION

[25] The trial judge awarded Bradfield $800,000 from RSA on the basis that RSA waived its right to rely on a policy breach and was therefore responsible to pay the claim against Devecseri's estate.

[26] He held that:

> [58] From a common-sense perspective and in the context of an insurer's investigation of a motor vehicle accident involving a fatality, evidence of alcohol in the deceased's bloodstream—routinely detailed in Coroner's reports—is clearly relevant in determining if a policy breach has taken place.
>
> ...

[63] Contrary to RSA's submission, I find that evidence *did* exist that Devecseri had alcohol in his bloodstream at the time of death. That evidence was available in a Coroner's report dated August 29, 2006. That report was available for release three years before the 2009 discoveries where Latanski testified that Devecseri was drinking alcohol before the accident. When RSA received the Coroner's report from Caton's counsel in 2009, it unequivocally provided evidence of a policy breach.

[64] The [adjustor] Eddy Report specifically acknowledged RSA's direction to obtain a copy of the Coroner's report. As already reviewed, for reasons not explained, RSA took no steps to obtain a copy of the Coroner's report.

[65] On August 13, 2008, Forbes delivered a notice of intent to defend. In March 2009, he filed a statement of defence and counterclaim, formally stating, as in *Logel*, "we elect to defend". That defence did not set out any reservation of rights letter or proposal of a non-waiver agreement. As held in *Rosenblood* at para 21:

> When a claim is presented to an insurer the facts giving rise to the claim should be investigated. If there is no coverage then the insured [as in the present matter, the Estate] should be told at once and the insurer should have nothing further to do with the claim if it wishes to maintain its off-coverage position. If coverage is questionable the insurer should advise the insured at once and in the absence of a non-waiver agreement or of an adequate reservation of rights letter defends the claim at its risk.

[66] At discovery on June 24-25, 2009, Latanski provided evidence that Devecseri was drinking before the accident. Forbes volunteered to bring a WAGG motion to obtain the Coroner's report. He later declined, finding that he was in a conflict of interest and did not wish to take

> any steps that could be interpreted as a waiver of rights by RSA, while at the same time being duty-bound to Devecseri—whose Estate he was appointed to defend. Caton's counsel volunteered to obtain the Coroner's report.
>
> [67] As in *Logel*, nearly three years elapsed from Eddy's investigation to when RSA announced it was taking an off-coverage position, added itself as a statutory third-party, and instructed Forbes to remove himself from the record.

[27] In short, the trial judge imputed knowledge of the breach to RSA on the basis that the evidence was available to RSA, had it obtained the coroner's report. Having decided to defend, RSA waived its right to rely on the breach of policy to deny coverage.

ANALYSIS AND CONCLUSION

The Issues

[28] The issues on this appeal are whether the trial judge erred in holding that:

1. RSA waived its right to deny coverage to Devecseri's estate; and
2. The issue of estoppel was moot.

[29] The central issue is what constitutes knowledge, which is a prerequisite for a finding of both waiver and estoppel. Determination of the appropriate legal test is a legal issue for which the standard of review is correctness.

Waiver by Conduct

[30] Waiver and promissory estoppel are closely related: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at para. 18.

[31] The principle underlying both doctrines is that a party should not be allowed to resile from a choice when it would be unfair to the other party to do so. Both require "knowledge" of the policy breach: *Economical Insurance Group v. Fleming* (2009), 89 O.R. (3d) 68, at para. 31, aff'd 2009 ONCA 112, 69 C.C.L.I. (4th) 185, and *Rosenblood Estate v. Law Society of Upper Canada* (1989), 37 C.C.L.I. 142 (Ont. H.C.) at para. 53, aff'd 16 C.C.L.I. (2d) 226 (Ont. C.A.).

[32] Waiver will be found where:

> "the party waiving had (1) full knowledge of the deficiency that might be relied upon; and (2) the unequivocal and conscious intention to relinquish the right to rely on the contract or obligation. The creation of such a stringent test reflects the fact that no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration": *Saskatchewan River Bungalows*, at para. 20, and *Economical Insurance Group,* at para. 31.

[33] Knowledge can be inferred from conduct, but "that conduct must give evidence of an unequivocal intention to abandon rights known to the party waiving the right": *Canadian Federation of Students/Fédération canadienne*

des étudiant(e)s v. Cape Breton University Students' Union, 2015 ONSC 4093, at para. 129.

[34] In *Logel Estate v. Wawanesa Mutual Insurance Company*, the insurer elected to defend the claim after receiving the accident report and the pathology report for a single car collision leading to a death: [2008] I.L.R. I-4744 (Ont. S.C.), aff'd 2009 ONCA 252, 70 C.C.L.I. (4th) 188. Those reports contained the evidence of the status of the insured's licence and her physical condition. In *Logel*, the trial judge concluded at para. 21:

> "that upon receipt they must have had knowledge of the facts including the status of Ms. Logel's licence and her physical condition, which gave rise to the exclusion of coverage. If they did not appreciate the significance of these facts they should have, before they elected to defend." [Emphasis added.]

[35] In *Logel,* all facts necessary to establish knowledge were within the possession of the insurer. The insurer simply did not appreciate the significance of the facts before it elected to defend. In the face of this information, the court held that the insurer waived the breach by obtaining all the necessary information to enable it to be aware of a policy breach and deciding to defend the claim.

[36] In this case, RSA knew Devecseri had an M2 licence and it was a breach of the policy to consume any alcohol before driving.

[37] However, it is agreed that RSA had no actual knowledge that Devecseri breached the policy by consuming alcohol before driving until 2009.

[38] Second, unlike *Logel*, knowledge of a policy breach could not be imputed, as RSA did not have all of the material facts from which to determine there was a policy breach. This was not a case where RSA failed to appreciate the significance of information; it did not have information that Devecseri had been drinking and had thereby breached the terms of the policy.

[39] Third, there is no evidence to support Bradfield's assertion that RSA knew of the policy breach but chose not to take possession of the information. No legal authority was proffered to support Bradfield's assertion that an insurer must obtain the coroner's report. It is also agreed that, although information as to the blood alcohol content was in the coroner's report, there is no evidence that RSA knew that information was contained in the coroner's report and knowing that, chose not to get the coroner's report. On the contrary, had RSA obtained the report, it would not have expended monies conducting further investigation and defending the claim.

[40] Lastly, there was no written waiver of the breach on the part of RSA, as required by s. 131(1) of the *Insurance Act*, to demonstrate a clear intention to waive the policy breach.

[41] For these reasons, it was not correct to conclude that RSA waived its right to refuse coverage for breach of the terms of the insurance policy.

Estoppel

[42] The essential elements of estoppel are that:

1. As in the case of waiver, the insurer must have knowledge of the facts that support a lack of coverage; and
2. Unlike waiver, there must be "a course of conduct by the insurer upon which the insured relied to its detriment." *Rosenblood Estate,* at p. 18.

[43] In *Rosenblood Estate*, a credit union claimed its solicitor was dishonest, resulting in losses to the credit union. The credit union sued the solicitor, who was insured by the Law Society. The Law Society retained counsel to defend the claim against the solicitor. Two years later, the Law Society advised the estate that it was denying coverage on the grounds that the loss was caused by dishonesty, which was excluded from coverage, and that the insured solicitor was in breach of the policy by failing to give timely notice of possible claims.

[44] The court in *Rosenblood* held that the insurer was estopped from denying coverage, as the insurer had all of the relevant facts necessary to decide whether to defend the fraud claim but nonetheless elected to defend the claim.

[45] The insurer in *Rosenblood* should have appreciated the significance of the information in its possession that constituted a policy violation. Despite this information, it elected to defend the claim. The insured relied to its detriment on the insurer's agreement to defend the claim. As such, the insurer was estopped from relying on a policy breach and was required to defend the claim.

[46] In this case, the trial judge did not address the issue of estoppel, as he found that RSA had waived its right to rely on the policy breach.

[47] I find RSA is not estopped from asserting a breach of the policy, as, for the reasons set out above, RSA had no knowledge of the breach until 2009.

[48] Moreover, there was no evidence of detrimental reliance. The claim was issued in May 2008, the statement of defence was filed in March 2009, and the evidence as to alcohol consumption came to light in June 2009. Two weeks after discovering the evidence of alcohol consumption, RSA took an "off-coverage" position.

[49] RSA expended time, effort and money to investigate and defend the action until July 2009. There is no evidence that any of the steps taken by RSA to defend the case operated to prejudice the estate. On the contrary, the litigation administrator for the estate and Caton's counsel agreed there was no difference in the defence of the action whether RSA added itself as a

statutory third party or was a defendant in the action. Thus, even if Bradfield's submission is that prejudice is presumed was correct, that presumption has been rebutted and I find no detrimental reliance in this case.

[50] For these reasons, I find RSA is not estopped from asserting a policy breach.

SUMMARY OF CONCLUSIONS

[51] Knowledge is established where the insurer has actual knowledge of the material facts constituting a policy breach, whether or not the insurer appreciates the significance of those facts to its obligation to defend.

[52] In this case, RSA did not have actual knowledge of the policy breach that entitled RSA to deny coverage until June 2009.

[53] Nor can knowledge be imputed, as RSA was not in possession of any evidence that Devecseri had been drinking before the accident until it received Latanski's evidence. The knowledge requirement is not whether the insurer *could* obtain the material facts but whether they *did* have the material facts necessary to enable them to know of the policy breach.

[54] RSA expressed no clear intention to forego the exercise of the right to deny coverage.

[55] In any event, there is no prejudice to the insured in this case, as the only evidence at trial was even if RSA had invoked the policy breach earlier, the defence would not have been any different.

[56] Although information confirming the policy breach could have been obtained through further investigation, RSA did not have the information until 2009. Counsel for Bradfield offered no legal authority for the proposition that an insurer is required to investigate every reasonable possibility that a policy was breached.

[57] For these reasons, RSA did not waive its right to rely on the policy breach nor was it estopped from relying on the breach. The appeal is therefore granted and the decision is set aside.

[58] Costs to RSA in the amount of $15, 000 as agreed by the parties. In view of the result, trial costs are reversed.

Released: OCT 0 7 2019

J.A. Fraser J.A.

I agree D. Lauwers J.A.

I agree. Harrison Young J.A.