IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Allen v. Security National Insurance Company*, 2017 NSSM 99

Claim No: SCCH 462013

BETWEEN:

John Gordon Allen

Claimant

-and –

Security National Insurance Company and
TD Direct Agency Inc.

Defendants

J. Gordon Allen appeared on his own behalf;

Ryan Lebans appeared for the Defendants;

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

(1) This claim arises from damage to a motor vehicle, owned by the Claimant, J. Gordon Allen and insured by the Defendants, Security National Insurance Company and adjusted through TD Direct Agency Inc. (collectively referred to as “TD”).

(2) Mr. Allen and Mr. Lebans both submitted a significant amount of documentary evidence. In addition, both filed helpful briefs with accompanying authorities. I am indebted for their thorough and well presented submissions. Additionally, it is important to note that I have read and considered all documents in evidence and submissions from both parties. Even though it is not all specifically referenced, it has all been considered.

(3) This decision was filed beyond the time prescribed under the *Small Claims Court Act*. The timelines under the *Act* have been held to be directory rather than mandatory. Nevertheless, I appreciate the parties have been waiting for this decision.

Background

(4) Most of the facts are proven and not seriously in dispute. While much time was spent in evidence establishing the background for the claim, the facts can be summarized fairly succinctly.

(5) On May 5, 2015, Mr. Allen went to Mic Mac Mall to take clothes to the tailor. He parked his vehicle, a 2013 Hyundai Santa Fe ("the vehicle"), near the entrance closest to what was then a Nova Scotia Liquour Corporation store, and entered the mall. He returned a short time later to find his car was gone. In the several minutes he was inside, someone took his car for a joyride across the parking lot and left it by a pole down a bank across Mic Mac Boulevard. The vehicle sustained considerable damage. Mr. Allen reported the incident to the police and notified his insurer.

(6) At the time, the vehicle was insured under a policy of automobile insurance with the Defendants. The Defendants considered the case one of theft and found the damage covered under the policy.

(7) The insurance policy contained a rider known as a "5-Year Replacement Cost Solution". It provides as follows:

"In the event of a total loss to the insured automobile the insurer shall be liable for the replacement cost of the automobile by another new automobile having the same specifications and equipment or if no such automobile is available by another new automobile of like kind and quality, with similar equipment.

If not replaced, we will pay the purchase price paid by the insured was the actual owner of the said automobile, not exceeding the current price is your original date of purchase of the mobile, or the price for which the insurer may purchase a new automobile of like kind and quality with similar equipment on the date of the accident."

(8) In effect, the Replacement Cost Solution provides that when an insured vehicle is a total loss, the owner of the automobile will receive the cost of a replacement vehicle having the same specifications and equipment or the amount of the original purchase price, instead of the actual cash value, which is normally paid under a policy. There are qualifications to receive the coverage, but they were not raised in this matter.

(9) Following the accident on May 5, Mr. Allen contacted his insurer, the Defendants, who advised him to take his vehicle to Steele Chevrolet Buick GMC Cadillac ("Steele" or "the dealer"). The policy had a $250 deductible. Mr. Allen has dealt primarily with Jennifer Warner, a claims analyst at TD. The insurer agreed to pay for the necessary repairs. The total amount for the first round of repairs was $13,044.40 which was paid to Steele on May 28, 2015. Documentation and photographs surrounding this claim were submitted as evidence by both parties.

(10) Between the time of the first and final repairs, Mr. Allen had been involved in subsequent incidents with the vehicle, due to its breaking down. Further damage was not sustained but the incidents served to identify further repairs that were required.

(11) A further payment of $2456.22 was made on June 29, 2015. An additional payment of $762.22 was made on August 19, 2015. An amount of $15.88 was advanced on September 21, 2015 for a total amount advanced at $16,338.72 on that date. The records from the mechanic showed an additional amount expended on repairs $358.92. The insurer's records show a grand total paid by them on Mr. Allen's

behalf as $18,692.88.

(12) The actual cash value determined by the insurer was $20,300. Mr. Allen subsequently traded in the vehicle and was advised its cash value was approximately $19,000.

Positions of Parties

(13) The Claimant submits the vehicle was a total loss. He bases this on two calculations, the industry practice of writing off a vehicle when repairs are estimated to cost 80% or more of its value prior to the accident. Secondly, he submits that certain expenses such as rentals and taxi fares for which he did not have receipts, ought to have been included in the calculation. In addition, he submits that the value of the vehicle was less than the total amount of the claim inclusive of automobile repairs, rental car expenses and towing. In addition, the O2 sensor and the backup camera were also damaged in the accident but were subject to recall or warranty replacement. He believes they should be included in that calculation. In addition, he alleges his insurer acted in bad faith through negligent adjustment of the claim and omission of certain elements of it.

(14) Mr. Lebans submits that the Small Claims Court may not have jurisdiction over this matter as the provisions of the *Insurance Act* and its regulations impose a procedure which one must follow in order to challenge an appraisal. These steps were not taken, and consequently the Claimant must accept the appraisal of $20,300. In addition, the Defendants deny there was any bad faith and submits the insurance claim was adjusted correctly.

The Evidence

(15) Gordon Allen gave evidence on his own behalf. Mr. Allen is a member of the Nova Scotia Barristers Society, and the owner of the vehicle involved in this matter.

(16) Mr. Allen met with the adjuster for TD, Ken Vallaincourt. Mr. Allen identified for Mr. Vallaincourt a number of scratches that were not present previously. He acknowledged there was a previous claim from an accident that took place in August 2013. The adjuster advised the Claimant that the vehicle was approved for an 18 day repair. The vehicle was not repaired in 18 days and, indeed, it was not repaired by June 16, so Mr. Allen contacted Jennifer Warner to complain the repair had taken too long.

(17) Mr. Allen advised the mechanics he was planning a trip to Saint John, New Brunswick, and needed the vehicle to tow his trailer. He was advised the vehicle was mechanically sound and, thus, they allowed him to take the vehicle and bring it back to be repaired at a later time. Unfortunately the car broke down approximately one kilometre from his house.

(18) On June 17, 2015, after the work had been partially completed, Mr. Allen and his family were returning from a vacation in PEI when the vehicle broke down outside of Amherst, Nova Scotia. They attempted to tow the car to a repair shop in Amherst but there were none available on the weekend, so they had the vehicle towed to Dartmouth.

(19) When he returned the vehicle to the car dealer, he indicated to them that his trailer hitch was bent and there remained a number of scratches. They also fixed the front end of the vehicle. During this time, Mr. Allen required another rental car. The work was completed in September 2015. According to TD's records, Steele advised them in July that the O2 sensor and rear camera were subject to recall or warranty. Steele does not believe the problem with those items was the result of the accident. Mr. Allen disagrees.

(20) In all, he submits the insurance claims totaled $18,693, which is over 80% of $20,300. (It is just over 92%)

(21) Under cross-examination, Mr. Allen acknowledged that he was initially in favor of having the vehicle fixed in June 2015, as TD proposed, as everyone believed that the vehicle could be repaired sooner. When asked about his positive comments about the personnel at Steele and TD, he advised that he found them to be polite and attentive but he was not pleased with the turnaround of the work or the appraisal itself.

(22) Ian Gionet is a Claims Analyst at TD. At the time of the hearing, he had been employed as such for one and a half months. Prior to this position, he spent two years selling auto and home insurance. He described his training to obtain the licensing to become a claims analyst at TD.

(23) His duties at TD include reviewing the claim to assess liability (i.e. fault and coverage), obtain appraisals of the vehicle and an estimate of repair costs. He estimates he adjusts approximately 7 to 10 new claims daily, although he was not involved in this claim. The representative normally assigned to this matter has been Jennifer Warner, who is on maternity leave.

(24) Neither Ms. Warner nor Ken Vallaincourt gave evidence.

(25) When undertaking a claim, a claims analyst at TD receives information which is uploaded to an internal data program called, "Work Centre Dashboard". He testified that on May 14, TD received the appraisal of estimated damage, $13,044.40. Mr. Gionet testified that according to company policy, actual cash value is equal to the estimate of what the vehicle is worth at which point TD decides if it will repair the vehicle. It is TD's practice that if a repair estimate is 80% or higher than the value of a vehicle, then TD considers it a total loss and pays the insurer accordingly. However, it is considered acceptable to repair a vehicle provided the total repairs are less than the actual cash value. Later, in redirect evidence, Mr. Gionet explained that the 80% benchmark is used to provide a margin of error in case further repairs are required. Originally the vehicle was not considered to be a total loss, and thus, there was no consideration given to a possible claim under the replacement cost endorsement.

(26) If one disagrees with an appraisal, the claims analyst procures a second appraisal from a preferred dealer. If there is still disagreement on the appraisal, then the parties appoint an umpire to resolve the dispute over value. Mr. Gionet testified that he has not been involved in such a process as the valuation is usually resolved after two appraisals. The insureds are contacted to ensure they are satisfied. Such a notation appears on Mr. Allen's file.

(27) Mr. Gionet acknowledged in cross-examination that there are times when hidden damage to a vehicle is not uncovered in the first appraisal. He is aware of TD's policy to write off a vehicle when the cost of repairs is in excess of 80% of the value of the vehicle. Credit is given to the insurer for any salvage as the vehicle is usually received by the insurer.

(28) Under cross-examination, Mr. Gionet noted that he was never involved when an appraisal is alleged to have been done poorly. He acknowledged that any amount paid out is in excess of 80% of the actual cash value, namely $20,300.

The Law and Findings

(29) There were several issues raised by the parties in preparation for this matter. I have addressed each issue below with a statement of the law, a review of the respective parties' submissions and my findings.

(30) Before embarking on such an analysis, it is important to note the provision in question, 5-Year Replacement Cost Solution Endorsement, contains the following statement:

"In consideration of the premium charged in any event that loss of or damage to the insured automobile for which indemnity is provided under Section A.1 or Section C of this Policy exceeds the deductible amount specified in the policy, the Insurer agrees to waive its rights under Mandatory Condition 4(5) and in the event of total loss to the automobile the insurer agrees to waive its rights under Mandatory Conditions 4(5) and 4(6) by which its liability is limited to the actual cash value of the automobile the time of the lost or damaged with proper deduction for depreciation."

(31) The Mandatory Conditions cited above provide the calculation for actual cash value. The effect of this section is to replace the actual cash value of a new vehicle having the same specifications and equipment. The mandatory conditions are found in the *Automobile Insurance Contract Mandatory Conditions Regulations*. These are created as a result of section 112 of the *Insurance Act*, which contains the following:

"**Mandatory conditions**

"112 (1) In this Section, "policy" does not include an interim receipt or a binder.

(2) Subject to subsections (3), (4) and (5), subsection (3) of Section 108 and Section 137,

(a) the mandatory conditions are part of every contract;

(b) the mandatory conditions shall be printed in every policy under the heading “Mandatory Conditions”; and
(c) no variation from, omission of or addition to a mandatory condition is binding upon the insured.” (underlining mine).

(32) In other words, the mandatory conditions apply to every insurance policy, however if an insurer makes a change to the insurance contract it is bound by those changes but the insured is not. The remainder of the mandatory conditions apply to both parties.

Jurisdiction

(33) Mr. Lebans submitted that the Small Claims Court lacks jurisdiction because there has been no umpire appointed to deal with the appraisal.

(34) In my view this does not oust the jurisdiction of the Small Claims Court. The parties have accepted the appraisal. Accordingly, this matter is essentially one of breach of contract which falls within the jurisdiction of the *Small Claims Court Act*.

Total Loss

(35) The 5-Year Replacement Cost Solution Endorsement provides that payment for the full value of a new vehicle or its original purchase price would be paid in the event of a total loss.

(36) The term “total loss” is not defined in the policy or the above endorsement. There is no definition provided with respect to automobile insurance in the *Insurance Act* or any regulations made thereunder. No definition appears in any cases cited by the parties.

(37) In his Book of Authorities, Mr. Lebans cites the case of *Cole v. Insurance Corporation of British* Columbia, 2004 BCPC 288, a decision of the BC Provincial Court sitting as a Small Claims Court. The Court was asked to consider if the loss suffered to the insured`s motor vehicle was a `total loss’ or a `constructive total loss`. It is noteworthy that the definitions of those terms were provided in the legislation in British Columbia. The terms used are quite distinct. The term ``total loss`, requires the vehicle to be stolen and not recovered or ``so severely or extensively damaged that it is not feasible to repair (the vehicle). In my view, if the insurer intended to place such a restriction on the right to recovery, it would make such a stipulation in the contract. I favour an approach close to the notion of `constructive total loss`. Mr. Lebans provided an excerpt from Barbara Billingsley`s, *General Principles of Canadian Insurance Law (2nd ed.)*. In a different portion of that text, the learned author states the following:

``A further complication in valuation may arise where the insured property is not destroyed but is

sufficiently damaged so that the cost of repair exceeds the cost of replacing the whole property. In such a circumstance , the insurer may treat the property as a `constructive total loss` or a `write off, and may compensate the insured for the whole property. (underlining mine)

(38) TD submits that a total loss is not to be considered as the actual cash value of the vehicle exceeds the total repair costs. Mr. Allen's position, as noted previously, was the vehicle costs over 80% of its actual cash value to repair. In addition, I must consider the unclaimed costs which were the result of the accident. Both parties acknowledge the Defendant would ordinarily be entitled to credit for the salvage value of the vehicle, where it has been traded in.

(39) The onus of proving a total loss is on the person asserting it, in this case, the Claimant. I find he has not discharged this onus.

(40) In reviewing the evidence, I find the actual cash value of the vehicle to be $20,300. Mr. Allen did not contest the appraised value in accordance with the regulations. I find the insurer paid $18,693 in repairs and other costs.

(41) The circumstances of this case and the marginal difference between the value of the vehicle and the amount paid ($1607) justifies the attention paid by the Claimant. I find it reasonable to be concerned that the repair costs and the actual cash value are so close. Mr. Allen argues that certain items were not considered, namely the taxi cabs and rental car bills and the O_2 sensor and rear camera.

(42) With respect to claims for transportation arising from theft, reference is made to Section C, paragraph 7(4) which provides a limit of $25 per day to a limit of $750 for transportation expenses. I do not have evidence of the insured's coverage for loss of use.

(43) No evidence has been provided that the replacement of the rear camera and O_2 sensor were anything other than resulting from the vehicle`s warranty. I find they were in a defective condition by the time of the accident and not of any value.

(44) Finally, I do not find anything in the contract which supports 80% as the test for total loss. I accept the evidence of Mr. Gionet that the insurer`s use of 80% as the benchmark to write off a vehicle arises after the first appraisal. The remaining 20% allows for a margin of error in capturing future repair costs in the event of unforeseen expenses. The Court is not bound by this formula. It is the insurer`s guideline, rather than a contractually mandated figure.

(45) I find the vehicle was not a ``total loss``, as defined in the policy.

Bad Faith

(46) Mr. Allen urges me to find the insurers acted in bad faith. The parties have each made submissions regarding the application of bad faith.

(47) It is trite law that an insurer owes its insured a duty of utmost good faith. This has been described in numerous cases across Canada. Mr. Allen has cited the case of *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104, where Justice Scanlan, writing for the Court stated as follows:

"[63] National Life cites the following passage from *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3:

> 71 ... But an insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate. In this respect, we respectfully part company with Finch, C.J.B.C. who, in awarding punitive damages, characterized Sun Life's concession that Ms. Fidler was entitled to benefits as "the civil equivalent of [a] 'guilty plea'" (para. 78). *The question instead is whether the denial was the result of the overwhelming inadequate handling of the claim, or the introduction of improper considerations into the claims process.* [Emphasis added]
>
> 72 Ultimately, each case revolves around its own facts. As O'Connor J.A. stated in *7O2535 Ontario*:
>
> > What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim. [para. 30] ...

[64] National Life says Justice Bourgeois did not specifically address whether its handling of Mr. Brine's case was "overwhelmingly inadequate" or whether there was an "introduction of improper considerations into the claims process".

[65] In our view, Justice Bourgeois did not mistake the test.

[66] The judge reviewed the authorities. Later she began her analysis by agreeing with National Life's caution:

> [266] As a starting point, I acknowledge and agree with the position advanced by National Life that not every breach of a "peace of mind" contract of insurance, or every mis-step shown to have occurred will constitute a breach of the duty of utmost good faith. The Court must be cautious to not peer through the critical glasses which hindsight may tempt one to wear. In assessing National Life's conduct, the Court must be concerned with why a decision was made or a position advanced, and the information upon which such was based at the time. It is further important to articulate that the duty of utmost good faith extends over the duration of the life of a policy. Although considerations such as privilege may arise once litigation is commenced, the fact that a legal claim has been filed does not serve to remove or lessen the duty to act in good faith.

[67] In *Fidler*, the Chief Justice and Justice Abella for the Court said that "the legal standard to which Sun Life and other insurers are held is correctly described" by Justice O'Connor in *7O2535 Ontario Inc. v. Lloyd's London Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at 29-30, which read:

> 29 The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage

> or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy.
>
> 30 This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

Justice Bourgeois described as "particularly helpful" Justice O'Connor's description of the duty in ¶ 27-32 of *7O2535 Ontario Inc.*

[68] Justice Bourgeois referred to the summary of the law in *Kings Mutual Insurance Co. v. Ackerman*, 2010 NSCA 39, which stated:

> ...one thing that can lead to a breach of the duty of good faith and an award of punitive damages is the denial of a claim which resulted from the overwhelmingly inadequate handling of a claim; *Fidler*, *supra*, para. 71.

[69] Importantly, the judge's reasons show that, in her view, National Life clearly did not act fairly in handling several aspects of Mr. Brine's claim. She carefully recounted the evidence and identified what gave her great difficulty. She cited the "reasonable standard", mentioned by Justice O'Connor, to dismiss aspects of Mr. Brine's submission that National Life had acted in bad faith. As we will discuss, the judge held the view that National Life introduced improper considerations into the management of Mr. Brine's claim. That responded to a component of the test in *Fidler*. The judge did not consider her conclusion – that National Life breached its duty - was a close call. Though she did not use the words "overwhelmingly inadequate", essentially she found that National Life's handling of the claim over a span of years failed that standard.

[70] The judge did not err in formulating the test.``

(48) In citing the Supreme Court of Canada case in *Fidler v. Sun Life Assurance Co. of Canada,* the Court of Appeal reiterated that the insured must show that the insurer demonstrated "overwhelming inadequate handling of the claim, or the introduction of improper considerations into the claims process".

(49) The onus is on the insured who asserts bad faith to demonstrate the test has been met. I have reviewed the evidence above. Mr. Allen`s concerns were reasonable. However, I am unable to find the evidence sufficient to show TD`s handling of the claim was overwhelmingly inadequate and based on improper considerations. TD`s evidence did not demonstrate the claim was negligent or incorrect. It did not reveal anything improper as a basis for its denying coverage under the Endorsement. Mr. Allen submits TD`s decision is based on a decision to keep the costs down. As I have stated, the circumstances perhaps justify his suspicions to be raised, but without further evidence, I am unable to find that he had proven bad faith on the part of the insurer.

Conclusion

(50) As I have found there is no basis to allow coverage under the Endorsement, the claim will be dismissed, but in the circumstances, without costs.

Dated at Halifax, NS,

on September 29, 2017;

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Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)