Date: 2012 03 02
Docket: CV 2009000094

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE PERSONAL INSURANCE COMPANY

Plaintiff

- and -

LISA M. RICHINGER, as Executrix of the Estate of CALVIN GLENN KEITH ALEXANDER (Deceased) and DUANE OSMOND and the CO-OPERATORS GENERAL INSURANCE COMPANY

Defendants

Application by Plaintiff insurer for a declaration that it has no obligation to defend or indemnify an estate under an insurance policy.

Heard at Yellowknife, NT on January 12, 2012.

Reasons filed: March 2, 2012

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant/Plaintiff: Gary Holan

Counsel for Lisa M. Richinger: Bruce Comba

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Counsel for The Co-operators
General Insurance Company: Damian Shepherd

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REASONS FOR JUDGMENT

This application arises out of tragic circumstances. On June 21, 2004, Calvin Glenn Keith Alexander was driving his vehicle with his two young daughters inside. He was estranged from their mother, Lisa Richinger. The Alexander vehicle collided with a truck driven by Duane Osmond. Mr. Alexander's daughters survived the collision, as did Mr. Osmond, but Mr. Alexander did not. There is evidence that Mr. Alexander deliberately caused the collision so as to commit suicide and kill his daughters.

At the time of the collision, Mr. Alexander was insured under an automobile policy issued by The Personal Insurance Company ("the Personal") with a third party liability limit of $1,000,000.00 ("the Policy").

The Personal seeks a declaration that it has no obligation to defend or indemnify Mr. Alexander's estate ("the Estate"), in respect of a personal injury action commenced by the truck driver, Mr. Osmond, personal injury claims by the daughters, and a property damage claim by the owner of the truck, Volker Stevin NWT (92) Ltd. ("Volker Stevin"). I will refer to these claims collectively as the "Tort Claims".

The Personal bases its argument on s. 35 of the *Insurance Act*, R.S.N.W.T. 1988, c. I-4, which provides that a claim for indemnity under an insurance contract is unenforceable in certain circumstances.

The Personal also seeks a declaration that its obligation to pay insurance money to satisfy any claims or judgments arising out of the Tort Claims shall not exceed the minimum statutory limits in s. 151 of the *Insurance Act* of $200,000.00 plus costs.

Ms. Richinger, who is the executrix of the Estate, Mr. Osmond and the Co-operators General Insurance Company, which is Mr. Osmond's insurer, all oppose the relief sought by the Personal. They take the position that because it has already undertaken the defence of actions based on the Tort Claims, the Personal has waived its right to deny coverage or, alternatively, is estopped from asserting that right.

Facts

The parties filed an Agreed Statement of Facts with a number of documents attached to it. I will summarize the most relevant parts.

The Personal first learned of the collision on or about June 28, 2004. At that time, it received information from its adjusters that Mr. Alexander was involved in a domestic dispute with his estranged wife, Ms. Richinger, and that he had kidnapped the two children and was being pursued by the police. The information included that Mr. Alexander was traveling north on a highway when he made a U-turn and veered across the road into Mr. Osmond's truck, which was traveling south. On collision, the Alexander vehicle burst into flames.

On June 30, 2004, an employee of the Personal made a note in the file that referred to a discussion about suicide.

On or about July 8, 2004, the Personal received information that the mechanical inspection reports for Mr. Alexander's vehicle and the truck disclosed no mechanical reason that would have contributed to the collision. The Personal also learned that the police had said their report would "leave no doubt" as to whether the collision was a suicide or not.

On or about July 22, 2004, the Personal's adjuster provided information from the adjusters for another party that it was suspected that Mr. Alexander had telephoned

his estranged wife shortly before the accident and told her that he was going to kill himself and the children. The Personal's adjuster also reported that he had spoken with Ms. Richinger, who told him she was convinced that Mr. Alexander was trying to kill himself and the children, although she would not disclose why she thought that. She also said that she felt suicide would mean the insured was not entitled to coverage, but she was told the insurer would like to make the determination as to whether it was suicide or not.

At that time, the Personal was also provided with statements of Mr. Osmond, the truck driver, and Mr. Alty, a witness to the collision. Mr. Osmond estimated that the Alexander vehicle was going over the speed limit and said that it suddenly crossed the center line and traveled straight toward him with no attempt to swerve or brake. Mr. Alty said that the Alexander vehicle passed him going very fast and then traveled straight toward the truck with no attempt to avoid the collision or apply the brakes. Both said that the driver's action looked deliberate; Mr. Alty stated that what he witnessed was a suicide/attempted murder.

The adjuster also reported at that time that the police report should be completed in approximately a month.

On August 9, 2004 an employee of the Personal noted in the file that the issue of suicide had been raised several times with the Personal's Claims Specialists and "the conclusion was that there did not appear to be any restriction to bodily injury tort claims regardless of whether suicide was proven or not because the accidental loss wording was not in the Policy".

In November 2005, the Personal retained counsel to defend the Estate in any actions arising from the collision. In March 2006, counsel advised Ms. Richinger that they had been retained and requested that she tell them as soon as she was served with a statement of claim by Osmond. In fact, she was never personally served with Mr. Osmond's or Volker Stevin's statements of claim.

Mr. Osmond's statement of claim was filed in May 2006 and counsel retained by the Personal filed a statement of defence on behalf of the Estate in June 2006. Examinations for discovery in that action were held in October 2006.

In June 2006, counsel for the Personal was advised that personal injury claims are being advanced by the daughters against the Estate, although no pleadings had been

filed by the time of argument on this application. In addition, a property damage claim was filed by Volker Stevin in May 2007. The Personal paid some amounts related to that claim but there is still a claim outstanding.

In December 2007 the Personal's file on this matter was reviewed internally. What exactly prompted a review of the coverage issue is not specified. The Personal asked the adjusters to re-open their file and obtain a copy of the coroner's report into the death of Mr. Alexander. That report, dated August 11, 2005, was provided to the Personal on December 14, 2007. The Coroner's Report classified the death as suicide and referred to a suicide note in which Mr. Alexander said he was planning a collision.

At that point, the Personal sought legal advice as to whether the Estate is entitled to a defence and indemnity under the Policy with regard to the Tort Claims. Although the adjusters had tried unsuccessfully to get a copy of the police file early on in their inquiries, as of December 2007, the Personal had not pursued that and had neither a copy of the file nor the suicide note. In March 2008 attempts to obtain the police file were made, but ultimately a court order had to be obtained and the file with the suicide note was produced in March 2009, confirming that Mr. Alexander had intentionally caused the collision in order to kill himself and his daughters.

In June 2009 the Personal filed this action seeking the declaratory relief referred to earlier in these reasons.

Section 35 of the *Insurance Act*

The Personal's application is based on section 35 of the *Insurance Act*:

> 35. Unless the contract otherwise provides, a contravention of any criminal or other law in force in the Territories or elsewhere does not of itself render unenforceable a claim for indemnity under a contract of insurance except where the contravention is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage but in the case of a contract of life insurance this section applies only to disability insurance undertaken as part of the contract.

The Personal takes the position that s. 35 relieves it of the obligation to indemnify or defend Mr. Alexander's estate in respect of the Tort Claims.

In *ING Insurance Company of Canada v. Harder*, 2007 ABQB 63 (appeal allowed on other grounds: 2008 ABCA 201) and *Buchanan v. GAN Canada Insurance Co.* (2000), 50 O.R. (3d) 89 (Ont. C.A.), it was held that such an exclusion clause applies where the insured committed a deliberate act which was the dominant cause of the plaintiff's injuries where injury was foreseeable. The act must also be a contravention of a criminal or other law in force.

None of the responding parties disputes that s. 35 applies in the circumstances of this case. Based on the facts admitted, the only logical inference is that Mr. Alexander intended to commit suicide (not a criminal act) and also kill his daughters (a criminal act). The evidence also supports an inference that he committed the criminal act of dangerous driving, resulting in harm to his daughters. Therefore, subject to the issues of waiver and estoppel, s. 35 would apply to the circumstances of this case.

The Personal concedes that even if it can rely on s. 35, the Tort Claimants have a right of action for direct compensation from the Personal pursuant to s. 151(1) of the *Insurance Act*. By application of s. 151(11), however, that compensation is limited to $200,000.00 total.

Waiver

Although the Personal now seeks to rely on s. 35, in 2005 it retained counsel to defend and otherwise address the Tort Claims. The other parties say that as a result of that, the Personal has waived its right to rely on s. 35. In reply, the Personal says that it did not have full knowledge of the facts that would permit it to rely on s. 35 until at the earliest 2007, when it received the coroner's report. And it did not have objective documented evidence until it received the police file in 2009, at which time it commenced this application.

The elements of waiver have been described as follows:

> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

> *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490; *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.*, [2008] O.J. No. 3717, affirmed 2009 ONCA 252 (at paragraph 19).

[1] In the *Logel* case, the insurer filed a statement of defence on behalf of an estate. The trial judge held that was the equivalent of an election to defend. By that time, the insurer had an accident report and a pathology report and, the judge held, must have had knowledge of the facts that gave rise to the exclusion of coverage in the policy based on the status of the insured's licence and the presence of alcohol in her blood. The trial judge said, "If they did not appreciate the significance of these facts they should have before they elected to defend", and held that the insurer's conduct in defending the case through discovery and into settlement negotiations constituted "a continuing election that amounted to a waiver by conduct" of the insured's breach of the policy.

The Personal submits that *Logel* should be distinguished from the case at bar. The Personal says that it did not have full knowledge of its rights when it filed the statement of defence in Mr. Osmond's action because it did not have full knowledge of a criminal contravention with the requisite intent. It points out that suicide is not a criminal contravention. However, focusing solely on suicide ignores the fact that all the evidence indicates that in committing suicide, Mr. Alexander also intended to kill his daughters or at least cause them bodily harm.

What did the Personal know before it said that it would defend the Estate against the Tort Claims? Not long after the collision it began to receive information that its insured was involved in a domestic dispute with his estranged wife; that he had taken the children and while driving on the highway had made a U-turn and veered across the road into a truck. It received information that the insured's wife had received a telephone call before the collision and that she believed he was trying to commit suicide and to kill the children. Within a month after the collision, it knew that inspections of the vehicles involved had revealed no contributing mechanical cause for the collision. It received statements from the driver of the truck and an eyewitness that the insured was driving at a high rate of speed and made no attempt to swerve or brake, but deliberately drove directly at the truck just before the collision.

Although not referred to in the Agreed Statement of Facts, also part of the record is an affidavit of Ms. Richinger in which she says that shortly after the collision the

Personal's adjuster told her that he had heard that Mr. Alexander left a suicide note and she told him she had not seen it but believed that the police had it and he should get it from them. This seems somewhat at odds with the adjuster's assertion to the Personal that she would not tell him the basis for her belief that her estranged husband had caused the collision so as to commit suicide and kill the children, however even without reference to the affidavit, it is clear that she told the adjuster she believed that is what happened.

Everything the Personal knew or received pointed to a suicide and an attempt to kill or harm the children. Nothing was identified in the Agreed Statement of Facts or the other documents put before me on this application that pointed away from, or cast doubt on, that scenario. There is a reference in the record to Ms. Richinger having told the police that her estranged husband had talked about harming himself prior to the date in question, without doing anything to carry out that intention. However, that information does not appear to have been made available to the Personal until it got the police file in 2009, so it is irrelevant to what the Personal knew before it elected to defend. In any event, in the context of what the Personal knew, that information would have supported, not cast doubt on, the suicide and murder scenario.

The issue of suicide was discussed with the Personal's Claims Specialists and it was decided that the Policy did not exclude bodily injury tort claims by third parties in the event of suicide by the insured. Whether any consideration was given to s. 35 of the *Insurance Act* before the Personal undertook the defence of the Tort Claims is unknown. However, an insurer should be presumed to know both its policy and the law that governs its business.

I conclude that the Personal had sufficient knowledge of facts that made s. 35 relevant and applicable to this case. It had that knowledge before it undertook the defence of the Estate. It knew, or must be deemed to have known, its rights, when it made that election. As the trial judge said of the insurer in *Logel*, "It is, after all, an insurer and its business is assessing claims and determining whether they are covered by the policies of insurance it has issued" (at paragraph 20).

The Personal says that until it received the coroner's report in 2007, it did not have full knowledge of the facts and until it received the police file in 2009, it did not have objective, documented evidence of the insured's intention to kill himself and his

daughters. However, in my view the report and the file just confirmed information the Personal already possessed.

Had the Personal wanted to reserve to itself the right to deny indemnity and defence, it should have taken the steps normally taken in its industry as set out in *Rosenblood Estate v. Law Society of Upper Canada*, (1989) 37 C.C.L.I. 142 at paragraph [64], appeal dismissed (1992), 16 C.C.L.I. (2d) 226:

> 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 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. In the present case the insurer finally took an off-coverage position but ... much too late.
>
> (at paragraph 64).

Similar remarks were made in *Alpine Forest & Food Market v. Axa Pacific Insurance*, 2004 BCSC 1731.

The Personal did not obtain or attempt to obtain a non-waiver agreement, nor did it provide a reservation of rights letter. It defended the Estate against Mr. Osmond's claim through examinations for discovery and in response to an undertaking given at discoveries, told his solicitors, without any qualification, that the coverage under the Policy was $1,000,000.00. It partially settled the Volker Stevin claim. In pursuing this course of conduct, while knowing its rights under the Policy and the applicable legislation, it must be taken to have waived its rights under s. 35 of the *Insurance Act*.

Estoppel

Alternatively, the respondents rely on the doctrine of estoppel.

The following factors are to be considered on the issue of estoppel: (a) that a representation is made to the representee; and (b) that such representation is made with the intention of inducing the representee on the face of the representation to alter his position to his detriment. The representee bears the burden of showing that

the representation existed and that he relied on it to his detriment: *Alpine Florist & Food Market, supra.*

For estoppel to apply there must first be knowledge on the part of the insurer of the facts which indicate a lack of coverage. There must also be a course of conduct by the insurer upon which the insured relied to his detriment: *Rosenblood, supra.* Thus, unlike waiver, estoppel requires that the insured establish prejudice.

The facts relevant to waiver are also relevant here. The Personal knew of the facts that justified it taking an off-coverage position. Nevertheless, it defended the Estate against the Tort Claims, in the course of which, without indicating there was any issue about coverage, it represented to Mr. Osmond that there was coverage in the amount of $1,000,000.00. This conduct amounted to a representation that it would defend and indemnify. The Agreed Statement of Facts does not say exactly when the Personal notified the other parties that coverage was or might be an issue, but I infer that it said nothing to them about that until 2009.

Is the Estate prejudiced if the Personal is now allowed to deny coverage? The executrix was not served with either the Osmond or the Volker Stevin statements of claim and thus the Estate was not able to investigate or control the defence of the claims.

In *Rosenblood*, there was no direct evidence of prejudice. However, the trial judge and the Court of Appeal inferred the existence of prejudice where the insurer retained counsel who represented the insured through production of documents and discoveries and then took an off-coverage position during settlement negotiations.

Ms. Richinger submits that the decision in *Rosenblood* means that the inability to control the defence of a claim amounts to prejudice. However, the Personal relies on *Bercier c. Smith*, 2010 ONCA 868 for the proposition that specific prejudice must be shown. In *Bercier*, at paragraph 6, the Ontario Court of Appeal stated that "even if it is possible under certain circumstances to infer the existence of prejudice in the absence of direct evidence of harm, this does not signal that the issue of prejudice is irrelevant. As we have noted in this case, there is not only absence of direct evidence of harm, there is direct evidence of the absence of prejudice".

The two cases can be reconciled. Prejudice may be inferred from circumstances, such as the inability to control the defence of a claim. However, any such inference

may be rebutted as happened in *Bercier*, where the case was at a much more preliminary stage than in *Rosenblood* and there was direct evidence of the absence of any prejudice to the insured.

The Personal says that the Estate can still become involved in the actions as there is little or no basis for a defence on the issue of liability and the main issue will be quantum of damages. Even if that is so, the Estate would come into the Osmond and Volker Stevin actions after significant steps and positions have been taken in those actions.

The respondents point to more specific prejudice as well. If the Personal can now reverse its election and take an off-coverage position, Estate money of approximately $170,000.00 held in trust for the daughters may be at risk. Had the Estate, in 2004 or 2005, been able to say to the Tort Claimants that there was only $200,000.00 in insurance available to satisfy their claims, it might have been able to negotiate a settlement early on and for lesser amounts than may now be the case. That may not now be possible with the court proceedings having gone as far as they have and thus the exposure for the Estate is greater.

In *Logel*, the Court of Appeal noted about the facts of that case, "in the context of [the insurer] electing to defend the action and taking many steps with respect to its defence over a three year period, it seems obvious, as it was to Holland J. and this court in *Rosenblood Estate*, that [the insured] would be prejudiced if [the insurer] were allowed to raise a coverage issue three years into the action" (at paragraph 8).

In this case, the Personal raised the coverage issue in 2009, three years after Mr. Osmond's action was commenced and after examinations for discovery had been completed. By that time, the Personal had partially settled the Volker Stevin claim. In my view, prejudice can and should be inferred.

Although Mr. Osmond made an alternative argument based on prejudice to him, I need not deal with that as I find that estoppel applies based on prejudice to the Estate. I find that the Personal represented that it would defend and indemnify the Estate and the Estate acted on that representation in relying on the Personal to act in its best interests, as in *Rosenblood*. To allow the Personal to take an off-coverage position at this point would result in prejudice to the Estate.

Summary

To summarize, I find that although s. 35 of the *Insurance Act* would otherwise be available to the Personal in the circumstances of this case, the Personal has waived its rights under that section. It is also estopped from relying on those rights. It was agreed by all counsel that if this was my ruling, the Personal's application and the within action should be dismissed. Therefore, both this application and the action are dismissed.

Costs

Ms. Richinger seeks costs on a solicitor-client basis because the Personal defended the Estate for a significant period of time and did not communicate with or involve the Estate with respect to the Tort Claims. The Estate is a relatively small one so any costs will detrimentally affect it.

The Personal resists an award of solicitor-client costs, saying that it acted quickly once it received the police file. The Personal says that its conduct does not amount to the type of conduct that justifies solicitor-client costs.

Both the Co-operators and Mr. Osmond seek party and party costs on an enhanced basis.

In *Katlodeechee First Nation v. H.M.T.Q.*, 2004 NWTSC 12, Vertes J., citing *Young v. Young*, [1993] 4 S.C.R. 3, said that the jurisprudence is clear that solicitor-client costs should only be awarded in rare and exceptional circumstances, generally only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. This has generally been the approach taken by this Court.

In my view the Personal's conduct does not merit description as reprehensible, scandalous or outrageous. Unlike what happened in *Rosenblood*, this matter did not require a trial, but was brought on more efficiently as a special chambers application. No doubt some credit for that has to be given to the respondents and not the Personal alone. On the other hand, the significant period of time during which the Personal defended the Estate and failed to communicate to any of the parties any possibility that coverage was an issue calls for costs on an enhanced basis. I also take into account that the Estate is a relatively small one and its legal costs will be a burden to it. Costs under column 2 of the Tariff are inadequate in these circumstances.

The Personal will pay costs to the respondents in the amount of $4,500.00 each.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
2nd day of March 2012

Counsel for the Applicant/Plaintiff: Gary Holan

Counsel for Lisa M. Richinger: Bruce Comba

Counsel for Duane Osmond: Sacha Paul

Counsel for The Co-operators
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