#6.00

Date: 20040423
Docket: CI 04-01-36413
Indexed as: Casey v. Federated Insurance
Cited as: 2004 MBQB 99
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	
JAMIE CASEY,	)	Michael G. Finlayson
	)	for the Applicant
Applicant,	)	
- and -	)	Ross A. McFadyen
	)	for the Respondent
FEDERATED INSURANCE,	)	
	)	Judgment delivered:
Respondent.	)	April 23, 2004

Apr 23 2004 12:17
130 313389 1 CI 04-01-36413 134
CHARGE/FEE PAID: 6.00

McCAWLEY, J.

[1] The applicant applies for leave pursuant to ss. 14(1) of ***The Limitation of Actions Act***, R.S.M. c. L50, as amended, to begin an action against the respondent for breach of contract. The issues to be decided are whether ss. 14(1) of ***The Limitation of Actions Act*** applies and if so, whether the applicant has met the necessary pre-conditions.

BACKGROUND

[2] The applicant's residence was insured by the respondent pursuant to a homeowner's insurance policy which ran from May 15, 1996 to May 15, 1997. At

the time the applicant was employed by the respondent as its Western Canadian Claims Manager, a position he held until sometime in 2000. On July 16, 1996 a serious hailstorm occurred following which the applicant inspected his roof and observed no damage. He did make a claim with respect to some windows which were smashed which claim was paid by the respondent. Sometime later he observed many of his neighbours having their roofs replaced and so contacted the respondent who sent out an in-house adjuster to inspect the roof. The adjuster also did not see any damage and so no claim was made. The uncontradicted evidence was that there was no intervening storm of significance or other reason for the applicant to inspect the roof until August 2003 when the roof began to leak. The applicant contacted Leo Emond of Emond Siding & Roofing Co. Inc. who, in September of that year inspected the roof and determined that the leaking was caused by deterioration to the shingles as a result of hail damage some years earlier. Mr. Emond also observed damage to the metal chimneys.

[3] The evidence disclosed that the damage to the roof and chimneys had occurred as a result of the hailstorm on July 16, 1996. The applicant made a claim under the policy which was rejected. On January 26, 2004 the applicant commenced these proceedings seeking leave of the court pursuant to ss. 14(1) of ***The Limitation of Actions Act*** to commence an action against the respondent alleging a breach of the policy.

DOES SS. 14(1) OF *THE LIMITATION OF ACTIONS ACT* APPLY?

[4] The policy of insurance includes a limitation clause under the heading "Statutory Conditions" in ss. 14 as follows:

> **Action**
> 14. Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contact is absolutely barred unless commenced within one year next after the loss or damage occurs.

[5] The applicant says that ss. 14 of the policy is unenforceable by virtue of ss. 142(1) of ***The Insurance Act***, R.S.M. 1987 c . I40, which provides:

> **Effect of Statutory Conditions**
> 142(2) The conditions set forth in this section shall be deemed to be part of every contract in force in Manitoba and shall be printed on every policy with the heading "Statutory Conditions" and no variation or omission of or addition to any statutory condition shall be binding on the insured.

[6] Subsection 14 of ***The Insurance Act*** establishes a two year limitation period:

> **Action**
> 14. Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract shall be absolutely barred unless commenced within two years next after the loss or damage occurs.

[7] Relying on the decision of this court in ***Heath-Ranger Estate v. Canada Life Assurance Co.*** (1998), 132 Man.R. (2d) 73, 6 C.C.L.I. (3d) 80, 27 C.P.C. (4th) 57, which held that where a conflict between the statutory provision and the policy exists the statutory provision in ***The Insurance Act*** governs, the applicant argues that the limitation period is therefore subject to Part II of ***The Limitation of Actions Act***. The relevant provisions are:

PART II
EXTENSION OF LIMITATION PERIOD

Extension of time in certain cases
14(1) Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between

(a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
(b) the date on which the application was made to the court for leave.

.....

Evidence required on application.
15(2) Where an application is made under section 14 to begin or continue an action, the court shall not grant leave in respect of the action unless, on evidence adduced by or on behalf of the claimant, it appears to the court that, if the action were brought forthwith or were continued, that evidence would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action.

[8] The applicant says that he has satisfied the pre-conditions of Part II of ***The Limitation of Actions Act*** and accordingly leave should be granted to permit him to commence an action against the respondent for breach of contract.

[9] The respondent argues that the statutory conditions in s. 142 of ***The Insurance Act*** do not apply because the policy in question is an all-risks policy of insurance and Part IV relates to fire insurance. Part IV of the ***Act*** is entitled "Fire Insurance". Subsection 137(1) states that Part IV applies to insurance against "loss of or damage to property arising from the peril of fire". The

applicant's policy of insurance insures against property damage and liability of the homeowner. In support of its argument, the respondent relies on the decision of the Supreme Court of Canada in ***KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada***, [2003] S.C.J. No. 24 (S.C.C.).

[10] In that case, the insured claimed for loss by fire under its all-risks insurance policy more than one year after the loss occurred but within one year of filing the proof of loss. The insurer argued that the claim could not proceed because under Part 5 (Fire Insurance) of the British Columbia ***Insurance Act***, R.S.B.C. 1996, Chap. 226, the applicable limitation period was one year from the date of loss. The insured argued that the all-risks policy fell under the general provision of Part 2 so that the applicable limitation period was one year from filing the proof of loss. In holding that the limitation period in Part 2 was applicable and the insured's claim was not statute-barred, the court stated that neither the language nor the history of the applicable provision (s. 119) supported the conclusion that the Legislature intended a multi-risk policy to fall within Part 5 (Fire Insurance) and that, since the insured's policy did not fit into a specific category of insurance policy, it was governed by Part 2 (the General Provisions). The court also found that, although the contract of insurance specified a one-year limitation period from the loss, the longer limitation period in Part 2 applied because s. 3(a) of ***The Insurance Act*** did not permit the insurer to substitute contractually harsher terms than those found in Part 2.

[11] The court also commented on the fact that modern "all-risks" or "multi-peril" policies of insurance do not fit into the outmoded category-based British Columbia ***Insurance Act*** which it noted had remained essentially unchanged for more than 75 years. The Supreme Court of Canada called upon the B.C. Legislature to revisit the provisions and indicate its intent with respect to all-risks and multi-peril policies. The court was clearly discomforted by the difficulties it encountered in applying the legislation in a situation it was not designed to meet.

[12] It is also clear that in doing so the Supreme Court of Canada had to decide between the applicability of Part 2 and Part 5 of the B.C. legislation, i.e. between the general insurance part and the fire insurance part. It found that the general insurance part applied to the homeowner's policy so that the plaintiff was saved.

[13] Although some of the provisions of the B.C. and Manitoba legislation are comparable, there are material differences between Part 2 - General Provisions in the B.C. ***Act*** and Part III - Insurance Contracts in Manitoba in the Manitoba ***Act*** which is the only logical one to compare. In addition, and not insignificantly, ss. 119(1) in Part III of the Manitoba ***Act*** states:

> **Contracts generally**
> 119(1) No insurer shall make a contract of insurance inconsistent with this Act.

[14] Whereas the Manitoba legislation leaves much to be desired and, like the B.C. legislation, does not address the fact of modern all-risks policies, to accept the respondent's argument would be to ignore the material differences between

the two ***Acts*** and disregard entirely ss. 119(1). In my view the ***KP Pacific*** decision is distinguishable on this basis and the preferable approach is that found in ***Chiasson v. Century Insurance Co. of Canada*** (1978), 86 D.L.R. (3d) 342, a decision of the New Brunswick Supreme Court, Appeal Division.

[15] In ***Chiasson***, the plaintiff was issued a personal homeowner's insurance policy by the defendant insurance company for the period April 10, 1975 to April 10, 1976. On July 18, 1975 the plaintiff suffered damage by flooding to his residence as a result of a ruptured pipe. An action was not commenced until after the one year limitation period provided for in the so-called statutory conditions contained in the policy had elapsed. One of the issues on appeal was whether the trial judge erred in finding that the legislated statutory conditions applied to the plaintiff's homeowner's policy. The Court of Appeal upheld the trial judge and found that they did apply.

[16] Subsection 122(1) of the New Brunswick ***Insurance Act***, R.S.N.B. 1973, c. I-12, is equivalent to s. 137 of the Manitoba ***Act***. It provides:

> PART IV
> FIRE INSURANCE
>
> 122(1) This part applies to insurance against loss of or damage to property arising from the peril of fire in any contract made in the Province except,
> .....
> [the exceptions noted are not relevant to our considerations]

[17] It should also be noted that ss. 123(1) and (4) of the New Brunswick legislation is the same as ss. 138(1) and (4) of the Manitoba legislation

respectively. Similarly, ss. 127(1) of the New Brunswick ***Act*** is the same as ss. 142(1) of the Manitoba ***Act***:

> 127(1) The conditions set forth in this section shall be deemed to be part of every contract in force in the Province and shall be printed on every policy with the heading "statutory Conditions" and no variation or omission of or addition to any statutory condition shall be binding on the insured.

[18] The plaintiff in ***Chiasson*** contended that because of ss. 122(1) of the ***Act***, the provisions of Part IV of the ***Act*** did not apply to contracts that insure against fire but rather they applied to losses caused by fire which are covered by insurance. The New Brunswick Court of Appeal determined that such a construction was inconsistent with the wording of subsequent sections of Part IV which referred to "contracts" not "losses" to which Part IV applied.

[19] The Court of Appeal referred with implicit approval to the trial judge's reasons at 19 N.B.R. (2d) 57 at p. 62:

> Mr. Riordon submits that subsection 122(1) restricts the applicability of Part IV to damage from the peril of fire. The Part applies not to damage but to insurance against loss or damage arising from the peril of fire. It is the character of the insurance rather than of the damage that determines whether the contract is governed by Part IV of the Insurance Act. (emphasis mine) A Homeowners Form Policy is primarily fire insurance and clearly falls within the language used in the opening paragraph of subsection 122(2).

[20] After deciding the damage was not among the classes of extended coverage excluded from the applicability of Part IV, the court found that the plaintiff's homeowner's form policy was one to which the statutory conditions applied and dismissed that ground of appeal.

[21] The persuasiveness of this reasoning is supported by the fact that, in the case at bar, with the exception of clause 14, the statutory conditions in the policy are identical to Part IV of ***The Insurance Act***. This suggests that the respondent intended to include in its all-risks homeowner's policy the statutory conditions in Part IV. No other "statutory conditions" are found anywhere else in the policy nor are there any other statutory conditions specifically applicable to an all-risks homeowner's policy in ***The Insurance Act***. Logically then, these are the only statutory conditions to which the policy could refer. Although the policy is "made and accepted subject to the foregoing provisions ..." and provides that "no term or condition of a contract shall be deemed to be waived by the Insurer in whole or in part unless the waiver is clearly expressed in writing ...", ss. 142(1) prohibits any variation of the limitation period that binds the insured.

[22] It was also argued by the respondent that the policy is purely contractual in nature and as a consequence, ss. 14(1) of ***The Limitation of Actions Act*** is inapplicable since that ***Act*** applies only to statutory limitation periods not to those contractually agreed (***Seven Oaks School Division No. 10 v. GBR Architects Ltd.***, [2002] M.J. No. 512 (Q.B.)). Following the reasoning in ***George A. Demeyere Tobacco Farms Ltd. v. The Continental Insurance Co.*** (1984) 46 O.R. (2d) 423 (H.C.), the respondent says, in the absence of any evidence that the applicant was misled, although labelled a "statutory condition" the limitation exists by contractual agreement and ss. 14(1) of ***The Limitation of Actions Act*** does not apply.

[23] It is conceded by the applicant that if the policy is purely contractual in nature Part II of ***The Limitation of Actions Act*** does not apply. However, accepting this argument and the respondent's view that the courts should not interfere with valid agreements between contracting parties would render the statutory provisions meaningless.

[24] In ***Copp v. Federated Insurance Co. of Canada***, [1985] B.C.J. No. 2348, the relevant insurance policy contained a statutory condition barring an action against the insurer unless commenced within one year after the occurrence of the loss giving rise to a claim. In an action against other defendants, the plaintiff obtained an order adding the insurer as a party defendant after the expiry of the one year period for bringing an action. The insurer's application for an order discharging the order obtained by the plaintiff was dismissed by the British Columbia Superior Court which found that because the ***Insurance Act*** was applicable to the statutory condition, ss. 4(1)(d) of the ***Limitation Act***, R.S.B.C. 1979, Chap. 236 allowing the addition of a new party as defendant despite the lapse of time also applied. Accordingly, a party to a defendant could be added even after the expiry of the limitation period as stated in the insurance policy.

[25] In that case, the statutory conditions in the policy of insurance existed by virtue of ss. 220(1) of the ***Insurance Act*** of British Columbia which is identical in its wording to ss. 142(1) of the Manitoba ***Insurance Act***. The defendant argued, as the respondent does here, that once the parties enter into the

contract of insurance the statutory condition becomes a term of the contract, i.e. a contractual term to which the parties have agreed. The limitation period which governs the action, therefore, exists by virtue of the contract and s. 4(1) of the ***Limitation Act*** has no effect since it applies only to limitation periods created by statute.

[26] The British Columbia court observed that by virtue of the ***Insurance Act*** there was a one year limitation period for bringing an action which is referred to in the policy as a statutory condition, i.e. one which must by statute be included in a policy of insurance. The court went on to say that regardless of whether the term exists in the policy also by agreement, the action is governed by the statutory requirement of a one year limitation. Accordingly, the ***Insurance Act*** applied to the action with the saving provision of the ***Limitation Act***. The rationale applies equally here.

[27] For these reasons I am of the view that the respondent cannot contract out of the legislation and that Part IV of ***The Insurance Act*** applies bringing into play ss. 14(1) of ***The Limitation of Actions Act***. Similarly I am unpersuaded by the argument that the wording of s. 142(1) intends the statutory conditions to operate as contractual terms with the result that s. 14(1) is not applicable.

[28] In the result I find that ss. 14(1) of ***The Limitation of Actions Act*** applies.

WHETHER THE APPLICANT HAS SATISFIED THE PRE-CONDITIONS OF SS. 14(1)

[29] Although the respondent concedes that the applicant did not know of the damage to the roof shortly after the July 16, 1996 hailstorm, the respondent says the applicant ought to have known and as a consequence has not satisfied the necessary pre-conditions of ss. 14(1).

[30] The respondent suggested that there were discussions within the insurance industry about the phenomenon of "bruising" to a roof as a result of hail damage which would not be observable at the time but would manifest itself later. However, it was unclear as to when these discussions took place and with whom although it appears they occurred after the expiration of the limitation period. In light of the applicant's clear statement that he was unaware that hail could cause damage not immediately visible, it would be unfair to attribute actual knowledge of this later known phenomenon to him. This is particularly so given that the respondent's own adjuster was equally unaware and saw no damage at the time. I am satisfied the applicant first became aware of the damage to the roof following the September 11, 2003 inspection by Mr. Emond and there is no basis on which he ought to have known at an earlier time. The same is not true with respect to the chimney damage which the applicant acknowledged would have been observable on inspection and should have been known at the time. The requirements of ss. 15(2) having also been met the applicant has complied with the pre-conditions of Part II of ***The Limitation of Actions Act*** with respect to that part of his claim regarding the roof.

[31] In the result, the applicant is granted leave to commence an action against the respondent with respect to the damage to the roof within four weeks of the date of this order.

H. J. McCawley J.