Citation: 3746292 Manitoba Ltd et al v Intact Insurance Company et al, 2018 MBCA 59

Date: 20180517
Docket: AI17-30-08928

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

3746292 MANITOBA LTD, CITYSCAPE RESIDENCE CORPORATION and VINCENZO BARRASSO	
(Plaintiffs) Respondents	***M. G. Finlayson*** *for the Appellant*
- and -	
INTACT INSURANCE COMPANY	***W. M. Onchulenko** and **N. Masi***
(Defendant) Appellant	*for the Respondents*
AND BETWEEN:	
3746292 MANITOBA LTD and CITYSCAPE RESIDENCE CORPORATION	***No appearance*** *for the Defendant University of Manitoba*
(Plaintiffs) Respondents	
- and -	*Appeal heard:*
INTACT INSURANCE COMPANY	***March 6, 2018***
(Defendant) Appellant	
- and -	*Judgment delivered:*
UNIVERSITY OF MANITOBA	***May 17, 2018***
(Defendant)	

On appeal from 2016 MBQB 210

MAINELLA JA

Introduction

[1] The backdrop to this appeal is an allegation that, during the claims-handling process, the defendant insurance company (the insurer) acted in bad faith by attempting to take advantage of the plaintiffs by offering to settle a valid claim for an amount substantially lower than what the insurer reasonably believed it to be worth, a practice known in the vernacular as "lowballing". As a result, the plaintiffs sued for punitive damages.

[2] The insurer unsuccessfully moved for summary judgment to dismiss the lawsuit. In its appeal, it argues that the motion judge's decision, that there was a genuine issue for trial as to it acting in bad faith in the claims-handling process, was the result of misdirection or is a conclusion so clearly wrong as to amount an injustice. It says that, if a good hard look is taken at the record, there is no evidence that could establish bad faith on its part. It submits that the delay and acrimony related to settling the claim was the result of: (i) underinsurance of the property by the plaintiffs; (ii) unreasonable claims of loss and cost of repairs by the plaintiffs; and (iii) failure by the plaintiffs to provide it with a timely proof of loss as required by the insurance contract.

[3] For the following reasons, I would dismiss the appeal.

Background

[4] The plaintiff, 3746292 Manitoba Ltd. (292), owns a mixed-use property in downtown Winnipeg consisting of residential apartments and commercial space. The plaintiff, Cityscape Residence Corporation

(Cityscape), leased the property from 292 and managed it for residential and commercial rental. The plaintiff, Vincenzo Barrasso (Mr. Barrasso), is the sole shareholder and directing mind of both 292 and Cityscape.

[5] The insurer provided a policy of insurance for the property with a limit of $28,668,000. The policy contained a co-insurance provision such that, if the property was not insured to at least 90 per cent of its value, the insured (Cityscape o/a 292) would be self-insured for a proportion of any loss. In the spring of 2010, the insurer caused the property to be valued. That valuation showed the property was underinsured by over $40 million, meaning any loss would result in a substantial co-insurance penalty for the plaintiffs. The plaintiffs were aware of the property's underinsurance.

[6] On August 24, 2010, an accidental fire occurred at the property which resulted in significant damage. The insurer hired an independent adjusting firm, ClaimsPro (ClaimsPro), to investigate and adjust the plaintiffs' claim. The insurer also engaged MKA Canada Inc. (MKA) as a consultant on the scope and cost of the repairs.

[7] One of the commercial tenants affected by the fire was the University of Manitoba (the university). The university had separate insurance for loss suffered to tenant improvements to its rented space. A contentious issue arose between the university and the plaintiffs as to how much of the loss to the university's space should be allocated between the university's policy and the policy issued by the insurer. For the purposes of this appeal, it is unnecessary to address this dispute.

[8] On November 16, 2010, MKA provided a "preliminary conceptual estimate" to ClaimsPro that the loss suffered to the property was

approximately $2.5 million with $850,000 of that amount attributable to the university's space. MKA used six estimators, plus support services, to prepare the estimate. To produce the estimate, MKA staff worked over 275 hours and billed $44,549.13 for its advice.

[9] ClaimsPro relied on MKA's opinion. On November 17, 2010, ClaimsPro reported to the insurer. It advised that the cost to restore the property would be "in the vicinity of 2.5 million dollars" but with approximately $600,000 to $700,000 of the repairs relating to the university's space.

[10] Les Entreprises de Renovation SRGM Inc. ("SRGM") was hired by the plaintiffs as a consultant to assist in the insurance claim. On December 6, 2010, ClaimsPro provided SRGM with an estimate of $755,031.36 (exclusive of the university's space) for the cost of repairs.

[11] There was no evidence before the motion judge explaining the reason why the insurer's agent, ClaimsPro, advised SRGM that the amount of the claim, not including the university's space, was approximately 55 per cent lower than what MKA had estimated it to be about three weeks earlier. The plaintiffs only learned about MKA's preliminary estimate of the cost of repairs during the discovery phase of the litigation.

[12] In the 14 months following the ClaimsPro initial estimate to SRGM, the parties traded differing positions as to the cost of the repairs and the amount of the co-insurance penalty. It is unnecessary to delve into the figures for my purposes; rather, it is sufficient to say that the motion judge's description that there were "significant differences" (at para 8) between the costs and penalty estimates of MKA and SRGM is accurate. During this

period, the insurer advanced monies on the claim without a proof of loss being submitted despite it being requested and it being a condition of the contract for the payment of monies.

[13] ClaimsPro, on behalf of the insurer, made two offers to settle the claim in the summer of 2011, both of which were refused. The first offer was based on a cost of repairs to the property, exclusive of the space covered by the university's insurance, of $1,414,278.52. The second offer was based on a cost of repairs of $1,501,973.85. Both offers used a co-insurance penalty based on a rate of recovery of 64 per cent.

[14] On November 7, 2011, Mr. Barrasso signed and subsequently provided the insurer with a proof of loss for the fire in the amount of $1,264,406.23. That calculation was based on a lower co-insurance penalty than proposed by the insurer and also SRGM's higher estimate of the cost of repairs for the property (exclusive of the space covered by the university's insurance) than the ClaimsPro suggestions of $1,414,278.52 to $1,501,973.85. The insurer initially rejected the proof of loss. On December 21, 2011, it attempted to settle the claim for a lower amount than what Mr. Barrasso had requested based on compromise figures as to the cost of repairs and the amount of the co-insurance penalty.

[15] The plaintiffs did not respond to the insurer's counteroffer with enthusiasm. In his letter of December 23, 2011, Mr. Barrasso stated that he was prepared to settle the claim for $1,264,406.25 as "compensation for damages to my building under the policy of insurance". In his letter, he alleged that he had suffered further losses due to the insurer/ClaimsPro's delays in administering the claim. He stated that, if the matter could not be

settled for what he was requesting, he would sue for damages not limited to the amount he was requesting for the fire loss.

[16] After further discussions, the insurer offered to pay $1,407,837 (an additional $143,430.75 more than what Mr. Barrasso requested) to settle the claim. On February 27, 2012, Mr. Barrasso accepted that offer and signed a proof of loss. Part of that document is a release of the insurer whereby it is "discharged forever from all further claims by reason of the said loss or damage."

[17] The record on the motion for summary judgment is silent as to the parties' motivations for settling the claim for more than Mr. Barrasso demanded or the intended effect of the release. On its appeal, the insurer takes the position that the release and its legal effect is not an issue that this Court should consider regarding whether the plaintiffs demonstrated a genuine issue to resist the motion for summary judgment. The plaintiffs agree with that position.

[18] The motion judge dealt with two aspects of the litigation the plaintiffs commenced over the events arising after the fire to the property. He granted MKA summary judgment dismissing the plaintiffs' claim against it on the basis that MKA owed no legal duty to the plaintiffs. That order has not been appealed.

[19] In terms of the summary judgment motion brought by the insurer, in his reasons, the motion judge reviewed the law of summary judgment in Manitoba in light of the wording of r 20 of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, and the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, and ultimately concluded that there was

a genuine issue for trial against the insurer. According to the motion judge, a "reliable decision" (at para 21) could not be made as to the allegation of bad faith, based solely on the affidavit material, without a trial. He stated (at para 48):

> Most cases in which allegations of bad faith are made will not be accompanied by acknowledgements on the part of the insurer that it intentionally attempted to grind an insured by delaying or confusing matters. In most cases, a court will be faced with the task of making proper inferences from the evidence placed before it. I am not convinced in this case that I can make a conclusive enough inference about the intentions of Intact without seeing and hearing representatives from Intact or its consultants. Further, it is difficult to assess the complaints of the plaintiffs without actually listening to them. Under the circumstances, I am convinced that there is a genuine issue for trial in the case against Intact. This is not a mainly legal issue as was the case concerning MKA.

Discussion

The Standard of Review

[20] Absent an error of fact or law, the standard of review on an appeal from an order made in a summary judgment motion is deferential. Questions of law are reviewed on a standard of correctness. Questions of fact or mixed fact and law are reviewed on a standard of palpable and overriding error. Questions of whether a moving party has a prima facie case that the claim or defence should fail and, if so, whether the responding party has demonstrated a genuine issue for trial, involve the exercise of discretion. Exercises of discretion will not be disturbed unless there has been a misdirection or the decision is so clearly wrong as to amount to an injustice (see *Perth Services*

Ltd v Quinton et al, 2009 MBCA 81 at paras 22-28; and *Hryniak* at paras 80-84).

The Law—An Insurer's Duty of Good Faith in the Claims-Handling Process

[21] At different stages of the life of an insurance contract, one of the parties may be vulnerable to the other (e.g., information advantage of an insured in negotiating the contract and the economic and technical advantage of an insurer in the claims-handling process) (see Barbara Billingsley, *General Principles of Canadian Insurance Law*, 1st ed (Markham: LexisNexis, 2008) at 48). Accordingly, beyond the obligations on the parties to an insurance contract created by statute or the terms of the contract, the common law imposes a reciprocal duty of good faith. The objective of the reciprocal duty of good faith is to place the parties on an "equal footing" (*Greenhill v Federal Insurance Co* (1926), [1927] 1 KB 65 at 76 (CA (Eng)).

[22] In *Bhasin v Hrynew*, 2014 SCC 71, the Supreme Court of Canada recognised good faith as the general organising principle of the common law of contract and that the duty of honest performance of a contract was a manifestation of the general organising principle. Before *Bhasin*, the courts had accepted that there was an obligation of good faith placed on an insurer to dispose of insurance claims openly, honestly and without unreasonable delay (see *702535 Ontario Inc v Lloyd's London, Non-Marine Underwriters* (2000), 184 DLR (4th) 687 at para 27 (Ont CA), leave to appeal to SCC refused, 2000 CarswellOnt 4335).

[23] This duty of an insurer applies to both "the manner in which it investigates and assesses the claim and to the decision whether or not to pay

it" (*Bhasin* at para 55). While an insurer does not have to treat the insured's interests as paramount in the same way as a fiduciary must, an insurer is obligated in the claims-handling process to be even-handed by giving equal consideration to the interests of the insured as to its own interests (see *Usanovic v Penncorp Life Insurance Company (La Capitale Financial Security Insurance Company)*, 2017 ONCA 395 at para 27). Practically, for an insurer, even-handedness in the claims-handling process means that an insured is not an adversary; the insured is entitled to correct information, a fair interpretation of the policy, a timely and balanced assessment of the claim based on its objective merits, and prompt and full payment of a valid claim.

[24] In *702535 Ontario Inc*, O'Connor JA (as he then was) discussed an insurer's duty to promptly and fairly administer a claim in the following way (at paras 28-29):

> The first part of this duty speaks to the timeliness in which a claim is processed by the insurer. Although an insurer may be responsible to pay interest on a claim paid after delay, delay in payment may nevertheless operate to the disadvantage of an insured. The insured, having suffered a loss, will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation that underlies the claim. The duty of good faith obliges the insurer to act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or to withhold payment.
>
> 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. 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.

[25] Given the complexities that often arise in assessing an insurance claim, an insurer is permitted to fairly debate the claim, and its amount, provided it acts reasonably (see Roderick Winsor, *Good Faith in Canadian Insurance Law* (Toronto: Thomson Reuters, 2017) at 5-17 to 5-19; and Gordon G Hilliker, *Insurance Bad Faith*, 2nd ed (LexisNexis, 2009) at 68). In order to establish a breach of an insurer's duty of good faith, more must be shown than simply that errors occurred in the claims-handling process. Also, just because an insurer is ultimately wrong does not mean that it acted in bad faith. A successful action requires proof that there was no reasonable basis in law or fact to deny benefits and that the defendant knew or ought to have known that to be the case. Tell-tale signs of bad faith by an insurer are when the handling of the claim was "overwhelmingly inadequate" or there was an "introduction of improper considerations into the claims process" (*Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para 71; and *Industrial Alliance Insurance and Financial Services Inc v Brine*, 2015 NSCA 104 at para 69, leave to appeal to SCC refused, 36809 (12 May 2016)).

[26] While an insurer is not required to accept any settlement within a policy's limits, the duty of good faith requires it to take reasonable steps to protect an insured's interests in settling the claim on objectively reasonable terms. Accordingly, where an insurer unfairly attempts to lowball a settlement from an insured, it is not acting even-handedly; rather, it is acting in bad faith

because it is placing its own interests over those of its insured (see Hilliker at p 70; *Fernandes v Penncorp Life Insurance Company*, 2014 ONCA 615 at paras 70, 83; and *Zurich Life Insurance Company Limited v Branco*, 2015 SKCA 71 at para 183, leave to appeal to SCC refused, 36696 (21 April 2016)). As was explained in *702535 Ontario Inc*, an insurer cannot use its economic advantage or the insured's economic weakness to obtain a favourable settlement (see also *Bhasin* at para 65).

[27] While the plaintiffs in this case hired their own expert, SRGM, to assist them, more commonly, an insured is at a technical disadvantage in the claims-handling process and, accordingly, an insurer must avoid the temptation to take advantage of its preferential position as to the valuation of a claim in the process of settling it. The reasonable expectation of an insured making a valid claim is that an insurer will be diligent, fair and refrain from unjustified conduct that has the effect of denying or delaying the benefits of the insurance contract (see *Bhasin* at para 65).

[28] In summary, an insurer unfairly engaging in the practice of lowballing would not be performing its contractual duties "honestly and reasonably", but would be acting "capriciously or arbitrarily" (*Bhasin* at para 63).

[29] When a breach of an insurer's duty of good faith in the claims-handling process is established, damages may be awarded in accordance with normal principles. Not every breach of the duty of good faith will warrant punitive damages (see SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at para 749). Punitive damages are exceptional; they

are reserved for situations where an insurer's conduct departed "markedly from ordinary standards of decency" *(Fidler* at paras 62-63).

Analysis and Decision

[30] Given the serious consequences of a motion for summary judgment and the importance of proportionality in civil litigation, it is well recognised that litigants are required to put their best foot forward by identifying all of the material issues in dispute and also mustering the most compelling evidence they possess on those issues in an admissible form. The complexity of the case is not an excuse to depart from either of these expected standards.

[31] Central to the reciprocal duty of good faith between an insurer and insured is a mutual duty of cooperation in the claims-handling process. I therefore agree with the insurer that its conduct has to be viewed in light of the fact that it attempted to settle the claim, it advanced monies without receiving the required proof of loss and it was dealing with an insured who was significantly underinsured and, therefore, may have had an incentive to inflate the estimated cost of repairs to reduce the effect of the co-insurance penalty. However, the role of this Court is not to substitute our discretion for that of the motion judge where it has been reasonably exercised.

[32] Before the heated arguments of the parties began over the anticipated cost of the repairs and the amount of the co-insurance penalty, MKA had advised ClaimsPro, who then informed the insurer, of the expected cost of repairs. Given the ultimate cost to repair the property exclusive of the university's space was $1,873,859.99, MKA's preliminary estimate turned out to be fairly accurate. The figure estimated by MKA was withheld from the plaintiffs and discussions were commenced with SRGM by the insurer's

agent, ClaimsPro, at an amount that was approximately 55 per cent lower. There was no explanation for that discrepancy from the insurer by way of admissible evidence on the motion. There was also no expert evidence put forward on behalf of the insurer that such a practice is acceptable in the insurance industry. To the contrary, the unchallenged affidavit from the head consultant from SRGM, who had 20 years' experience, was that she had "settled many claims but [did] not verily believe that [she had] ever had a file like this one with the delays and actions of the [insurer and MKA]."

[33] While an insurer is entitled to fairly debate a claim, given the nature of the relationship established by a contract of insurance, at some point, an insurer's conduct may be so unreasonable that it amounts to bad faith. As previously mentioned, where an insurer unfairly engages in lowballing an insured to obtain an economic advantage in settling a claim, bad faith has been established.

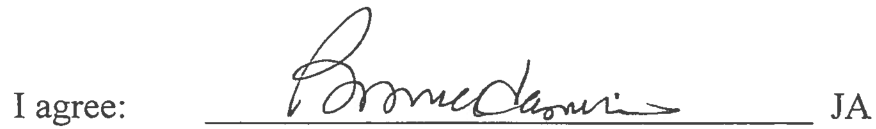
[34] I have not been persuaded that the motion judge misdirected himself or came to a conclusion that is so clearly wrong as to amount to an injustice by deciding that it was necessary to hear *viva voce* evidence at a trial as to the motivations and intentions of the insurer and its agents regarding whether the insurer acted even-handedly in the claims-handling process or, alternatively, that there was an attempt to unreasonably leverage its bargaining position to settle the claim by lowballing the cost of repairs during the lengthy claims process. Without judging the ultimate merits of the plaintiffs' lawsuit, the motion judge's exercise of discretion to require a trial is reasonably supported by the inference(s) that may be drawn from the unexplained and sizeable discrepancy at the commencement of the adjustment process between what the plaintiffs were told the expected cost of repairs would be, and what the

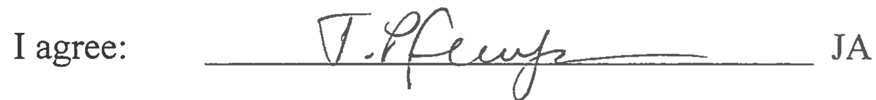
insurer and its agents actually reasonably believed it was, given the advice of MKA.

Disposition

[35] In the result, I would dismiss the appeal with costs.

JA

I agree:  JA

I agree:  JA