

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thornitt v. ICBC*,
2023 BCSC 828

Date: 20230517
Docket: S112711
Registry: Kelowna

Between:

Jeffery Thornitt and JST Custom Timber Ltd.

Plaintiffs

And

Insurance Corporation of British Columbia

Defendant

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Counsel for the Plaintiffs:

J. Kennedy

Counsel for the Defendant:

M. Prah

Place and Date of Hearing:

Kelowna, B.C.
May 1, 2023

Place and Date of Judgment:

Kelowna, B.C.
May 17, 2023

Introduction

[1] This is an application by the defendant for leave to amend its response to civil claim.

[2] The plaintiffs seek to recover indemnity for the loss of a pick-up truck pursuant to a policy of insurance issued by the defendant. The pick-up truck was damaged beyond repair by a fire that occurred on or about September 28, 2015. The fire occurred in a rural area on a road not heavily travelled.

[3] The notice of civil claim alleges that the plaintiffs were the lessees of the pick-up truck and insured the truck with the defendant.

[4] The plaintiff, Jeffery Thornitt, had parked the pick-up truck on the side of the road and had hiked into the adjacent bush to scout for moose. A Jerry can of gasoline was in the back of the pick-up truck. Mr. Thornitt used the gasoline as part of his work as a contractor to refuel generators.

[5] When Mr. Thornitt returned to the pick-up truck from the bush, he found that it was on fire.

[6] The defendant denied coverage for the loss of the pick-up truck under its policy. Therefore, the plaintiffs commenced this action to seek both indemnity under the policy, as well as damages for breach of the defendant's duty of good faith and fair dealing.

[7] An order dated November 15, 2017, bifurcated this action into separate trials. The first trial is to determine the issue of the alleged breach of contract and the issue of indemnity under the policy. The second trial is to determine the issues of bad faith and fair dealing. The order of November 15, 2017, also provided that the bad faith claim be held in abeyance until judgment has been rendered on the indemnity claim.

[8] When the indemnity trial was set, the defence issued a notice requiring trial by jury.

[9] The response to the plaintiffs' notice of civil claim currently denies coverage for the plaintiffs' loss alleging:

- a. That the fire was intentionally set by Mr. Thornitt; and
- b. That Mr. Thornitt made a false statement with respect to the claim.

[10] The defendant applies in this application for an order granting it leave to amend its response to civil claim by alleging that the plaintiffs committed a fraud against the defendant. The amendment also seeks to plead particulars of the fraud by referencing two previous fire loss claims made by the plaintiffs under policies of insurance issued by the defendant.

Analysis

[11] The defendant brings this application late in the process. The parties had arranged a trial date for the indemnity trial for May 1, 2023. The defendant scheduled this application for hearing on March 7, 2023. The defendant was unable to proceed on that date because plaintiffs' counsel was unavailable. Therefore, I adjourned the trial and scheduled this application for May 1, 2023.

[12] The defence of fraud in the proposed amended response is based on the allegation that the plaintiffs made two previous claims for the loss of vehicles by fire. It is of significance that the proposed amendment seeks to allege that the RCMP and the defendant investigated both previous fire loss claims, after which the losses were paid to the plaintiffs. There is no allegation in the proposed amended response that the two previous fire loss claims were fraudulent or even suspicious.

[13] The defendant submits that it does not allege the two previous fire losses to support the inference that the plaintiffs committed fraud or intentionally set fire to the vehicle that is the subject of this action. The defendant submits that it relies on the two previous fire loss allegations to support the defence of fraud by establishing that the plaintiffs had first-hand knowledge and experience with respect to:

- a. The insurance process for a theft and fire loss claim;

- b. How they may obtain a pay-out for their losses; and
- c. The investigations that the RCMP and that the insurer would engage in.

[14] The defendant submits that the knowledge gained by the plaintiffs in the first two fire loss claims armed them with the knowledge of how to effectively facilitate a fraud and navigate the RCMP and insurance company investigations.

[15] Justice Wilson, in *Beruschi v. British Columbia*, 2020 BCSC 1531, summarized the legal principles applicable to applications to amend pleadings at para. 56:

[56] The legal test on an application to amend pleadings is not controversial. The general principles governing amendments were summarized in *Peterson v. 446690 B.C. Ltd.*, 2014 BCSC 1531 at para. 37 as follows:

[37] Finally, the general principles arising on an application to amend pleading can be summarized as follows:

(a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence: *McNaughton v. Baker*, [1988] 24 B.C.L.R. (2nd) 17 [(C.A.)].

(b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action: *Levi v. Petaquilla Minerals Ltd.*, 2012 BCSC 776.

(c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment: *Jones v. Lululemon Athletica Inc.*, 2008 BCSC 719.

(d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.

(e) Courts should only disallow an amendment as a last resort: *Jones, McNaughton, Innoventure S & K Holdings Ltd. et al. v. Innoventure (Tri-Cities) Holdings Ltd. et al.*, 2006 BCSC 1567.

[16] *Dawe v. B.C. Children's Hospital*, 2003 BCSC 443, described additional considerations at para. 17:

[17] The general principles to be applied in the consideration of an application to amend are as follows:

(a) amendments should be permitted as are necessary to determine the real question in issue between the parties

The basic rule, set out expressly in the former Rules and no doubt still applicable, is that such amendments should be permitted as are necessary to determine the real question in issue between the parties. Rule 1(5) requires an interpretation of the rules which permit the just and speedy determination of the dispute on its merits. Similarly, the *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 10, requires the court to grant all such remedies as any of the parties may appear to be entitled to "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined. *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982) 30 B.C.L.R. (2d) 45 (S.C.);

(b) the court will not give its sanction to amendments which violate the rules that govern pleadings, including the prohibition of pleadings which disclose no reasonable claim. In considering this question, the court will apply the same tests and considerations as applicable on an application to strike claims already pleaded, see *Victoria Grey Metro Trust Co. supra*;

(c) a party is not required to adduce evidence in support of a pleading before trial, see *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (B.C.C.A.);

(d) on an application to amend the facts alleged are taken as established, see *Canada (Attorney General) v. Ellis-Don Ltd.*, 2000 B.C.C.A. 111;

(e) the discretion is to be exercised judicially, in accordance with the evidence adduced and the guidelines of the authorities. Factors to be considered include: the extent of delay, the reasons for delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, the extent of the connection between the existing claims and a proposed new cause of action. The over-riding consideration is what is just and convenient, see *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.).

[17] The question in this application is whether the facts alleged in the proposed amended response to civil claim disclose or support the defence of fraud. There is no requirement that the defendant adduce evidence in support of the proposed amendment. On an application to amend pleadings, the facts alleged in the proposed amended pleadings are taken as having been established.

[18] The defendant's concession that it does not seek to rely upon the two previous fire losses to infer fraud in this case amounts to an acknowledgement that the fact of the previous two losses is not the basis for the defence of fraud in this case. By alleging the two previous fire losses, the defendant seeks merely to explore whether the plaintiffs had the knowledge and means to commit a fraud. In essence, the defendant seeks to allege the two previous fire losses so that it can examine the plaintiffs on the knowledge they gained from those two previous experiences.

[19] In my view, the allegations related to the two previous fire losses cannot form the basis of the defence of fraud as there is no suggestion that the plaintiffs undertook any fraudulent activity with respect to those previous losses. In short, the allegations made with respect to the two previous fire losses, if true, do not establish fraud on the part of the plaintiffs.

[20] Therefore, the allegations related to the two previous fire losses fail to disclose or support the defence of fraud.

[21] The defendant, in its notice of application, submits that the plaintiffs' knowledge and experience with respect to prior insurance claims and how they obtained that knowledge and experience relate to matters in question. The defence submission conflates matters in question with particulars of a cause of action.

[22] Evidence is admissible if it relates to a matter in question and its probative value is not substantially outweighed by its prejudicial effects. Particulars of a cause of action or defence are facts that, if true, establish the cause of action or a defence.

[23] Whether the knowledge and experience gained by the plaintiffs from their two previous fire losses are relevant to a matter in question and/or otherwise admissible,

are questions of evidence. Those questions must be left to the trial judge to decide in a *voir dire*.

[24] Based on the foregoing, I am not prepared to grant the defendant leave to amend its response to civil claim in the form set out in its notice of application. The pleading of the two previous fire losses as particulars of the defence of fraud is not appropriate. However, there is a basis to maintain the defence of fraud based on the existing allegations in the response to civil claim that the plaintiffs intentionally set fire to the pick-up truck and thereafter made a false statement with respect to the claim to the defendant.

[25] Accordingly, if the defendant wishes to do so, I am prepared to grant leave to the defendant to amend its response to civil claim to plead the defence of fraud based on the allegation that the plaintiffs intentionally set fire to the truck and thereafter made a false statement to the defendant with respect to this claim.

“D.K. Hori J.”

HORI J.