

Boreal Prop. and Cas. Ins. Co. v. The Dom. of Canada Gen. Ins. Co.

[1996] I.L.R. 1-3300

Ontario

Ontario Court (General Division), February 23, 1996.

Insurance (Automobile) No-fault recovery — Reimbursement from second-party insurer — Second party insurer claiming payment made by mistake — Action for recovery of payment governed by arbitration requirement — Court having no jurisdiction — Insurance Act, R.S.O. 1990, c. I.8, s. 275.

This was a motion by the defendant to strike the plaintiff's statement of claim on the ground that the Court had no jurisdiction to hear the matter. A driver insured by the defendant was injured in a motor vehicle accident, and was paid no-fault benefits by the defendant. Pursuant to s. 275 of the Insurance Act, the plaintiff, who was the second party insurer, reimbursed the defendant for these benefits. It claimed that it had paid \$45,000 for continued no-fault benefits which it now claimed were attributable to a second accident, and it sought to recover this amount as a payment made by mistake. The defendant argued that s. 275(4) of the Act required the dispute to be submitted to arbitration.

Held: The motion was granted. The parties disagreed as to which accident the benefits had been referable. The action was therefore not a claim for equitable recovery, but a dispute with respect to indemnification. Therefore, s. 275(4) applied to make arbitration mandatory.

Counsel: D. Jose for the plaintiff;

D. Zuber for the defendant;

Before: before Macdonald J.

Macdonald J. This motion is brought on behalf of the defendant (moving party), The Dominion Canada General Insurance Company. The moving party seeks an order striking the plaintiff's statement of claim on the basis that the court has no jurisdiction over the subject matter of the action. More specifically, the order seeking the dismissal of the plaintiff's action is sought on the grounds that s. 275(4) of the Insurance Act, R.S.O. 1990, c. I.8 (the Insurance Act), ousts the jurisdiction of this court over the subject matter of this action. Rule 21 of the Rules of Civil Procedure is also relied upon.

The determination of whether or not s. 275(4) is applicable rests on an analysis of the true nature of the action of the plaintiff. In the action, the plaintiff claims for \$44,400 for

a return of monies paid to the defendant by mistake. The claim is also for pre and post judgment interest, costs and such further and other relief as counsel may advise.

A brief factual background is necessary. On September 20, 1990, the driver of a vehicle insured under a policy of insurance maintained by the defendant was involved in a motor vehicle accident and the insured person thereafter applied for so called no-fault benefits from the defendant insurer. The defendant paid the insured person \$440 per week commencing September 27, 1990. Pursuant to the provisions of s. 275 of the Insurance Act, the plaintiff was liable to reimburse the defendant insurer for such no-fault payments made by the defendant insurer to the insured person. The plaintiff fully reimbursed the defendant in the sum of \$38,480 for the accident benefits representing the no-fault benefits paid by the defendant to the insured person between September 27, 1990 and July 2, 1992.

The plaintiff also fully reimbursed the defendant in the sum of \$45,015 for continued no-fault benefits paid to the insured person from July 3, 1992 to June 30, 1994. The defendant had requested such reimbursement. The plaintiff says that the defendant represented that all payments made to the insured person were as a result of the motor vehicle accident which occurred on September 20, 1990. It is alleged by the plaintiff that the defendant paid the insured person benefits for 101 weeks by virtue of another accident which occurred on July 21, 1992. The plaintiff claims it had no obligation to reimburse and, in respect of these benefits, the plaintiff says that no payments would have been made had the defendant made disclosure of the July 21, 1992 accident. It is claimed that the defendant insurer did not disclose the July 21, 1992 accident to the plaintiff until November 11, 1994.

A notice of the mistake was subsequently given to the defendant. Demands were made for repayment but the defendant refused and still refuses to make the payment which the plaintiff alleges was mistakenly made. The plaintiff claims, therefore, that the defendant has been unjustly enriched as a result of the mistake and the fact of the defendant's non disclosure. On this basis, the plaintiff claims that it is entitled to recover these funds paid by mistake in the amount of \$44,400.

A statement of defence was entered by the defendant on November 2, 1995. The defendant claims that all sums paid by the plaintiff were referable to the September 20, 1990 accident and were properly due and owing under s. 275 of the Insurance Act.

The moving party bases its position on the following. Section 275 of the Insurance Act sets out a legislative scheme whereby automobile insurers who pay no fault benefits may be reimbursed by the second party insurer for all or part of their claim. As part of this scheme, s. 275(4) sets out the applicable dispute resolution method. It is argued that if s. 275(4) is applicable, the jurisdiction of this court is ousted by virtue of that section. The moving party relies on s. 275 of the Insurance Act. The relevant portions read as follows:

275. (1) The insurer responsible under subsection 268(2) for the payment of no-fault benefits to such classes of persons as may be named in the

regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which responsibility to pay the no-fault benefits arose.

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(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitrations Act.

It was argued that this subsection is specifically designed to deal with disputes such as this between two insurers. The moving party relies on an unreported decision indexed as *Progressive Casualty Co. v. Jevco Insurance Co.*, [1994] O.J. No. 3152 (Gen. Div.) (hereafter 'Jevco').

In my view, the Jevco decision is not helpful in the present case. Jevco was an appeal from an award of an arbitrator and deals with a matter that is essentially different from this matter. The appellant in Jevco sought to set aside the findings of the arbitrator and to recover a sum of \$2,000 which it claimed it overpaid to the respondent Jevco, the first party insurer in the matter. In this regard, s. 275(3) of the Insurance Act was of particular importance. It reads as follows:

275. (3) No indemnity is available under subsection (2) in respect of the first \$2,000 of no-fault benefits paid in respect of a person described in that subsection.

The only relevance of Jevco to the present case is that it confirms the mechanism established under s. 275 of the Insurance Act. Somers J. set out in his oral reasons as follows:

This is a mechanism established under the Insurance Act by which automobile insurers who pay no-fault benefits (in this case Jevco) may be reimbursed by the second party insurer (in this case Progressive) for all or part of their claim.

In *Jevco Insurance Co. v. Canadian General Insurance Co.* (1993), 14 O.R. (3d) 545 (C.A.), the Court of Appeal discussed the scheme of s. 275 of the Insurance Act. In that case, Jevco had claimed indemnity from Canadian General Insurance Company for the no-fault benefits paid to Jevco's insured. Griffiths J.A., delivering the judgment of the Court, explained the scheme of the legislation at p. 547:

The scheme of the legislation, under s. 275 of the Insurance Act and companion regulations, is to provide for an expedient and summary method of reimbursing the first-party insurer for payment of no-fault benefits from the second-party insurer whose insured was fully or partially at fault for the accident.

Section 275(4) of the Insurance Act creates and provides a mandatory arbitration procedure. This case raises a discrete issue which gives rise to an analysis of the true nature of the plaintiff's claim. Is the nature of the claim something caught by the mandatory language of s. 275(4) of the Insurance Act 'with respect to indemnification' or is it something which gives rise to an equitable right of recovery based on unjust enrichment or money paid by mistake?

It is important to note that in this case, the plaintiff claims that the defendant paid the insured benefits for 101 weeks by virtue of the second accident occurring on July 21, 1992. With respect to payments referable to the July 21, 1992 accident, the plaintiff argues that it had no obligation to reimburse and it would not have made any payments had the defendant made disclosure of the July 21, 1992 accident. However, the defendants state at paragraph 6 of their statement of defence:

6. This Defendant states and the fact is that all the money paid by the Plaintiff were sums referable to the September 20, 1990 accident and were properly due and owing under section 275 of the Insurance Act.

Whether or not the sums paid by the plaintiff were referable to the September 20, 1990 accident is a dispute which, in my view, triggers s. 275 of the Insurance Act. In my view, the present case should not be viewed differently because the sums have already been paid by the plaintiff nor should the allegation and dispute about a second accident oust s. 275.

The essence of the matter involves a dispute with respect to indemnification under s. 275 of the Insurance Act and, therefore, the initial dispute should be resolved through arbitration under the Arbitrations Act. Having regard to the scheme of the legislation, this matter should be resolved without resort to the courts.

In this regard, I note the comments of Pitt J. in *Economical Mutual Insurance Co. v. Lott*, [1995] I.L.R. 1-3213 where he stated at p. 3556:

I am of the view that the main objective of motor vehicle insurance legislation in the nineties is the reduction in the volume and costs of litigation. The means to achieve that objective is the limitation of access to the courts. For that reason alone I would agree with the observation of Matlow J. in *Canadian General Insurance Co. v. Jevco Insurance Co.*, dated October 21, 1994, that:

the no-fault provisions of the Act were intended to constitute a comprehensive code determining the rights of insured persons against their insurers and the rights of insurers against other insurers.

I am also mindful of the comments made by Matlow J. in *Canadian General Insurance Co. v. Jevco Insurance Co.*, [1994] O.J. No. 2389 following the portion outlined above by Pitt J. Matlow J. went on to say:

This code includes a provision set out in section 275 that specifies certain limited circumstances in which an insurer which pays no-fault benefits is entitled to be indemnified by another insurer. The circumstances of the case at bar do not fall within this provision.

Matlow J. was faced with a different issue than the one before me.

In this case there is a statutory right of indemnification provided for in s. 275 of the Insurance Act. The legislation specifically contemplates that, if insurers are unable to agree with respect to indemnification, the dispute shall be resolved through arbitration.

Having regard to the circumstances of the present case, I find that this matter falls within the parameters of s. 275 of the Insurance Act. Without, in any way, deciding the issue in this case, I would add the following. If after the arbitration is completed, it is clear that an over payment has been made, the equitable jurisdiction of the court might be invoked in appropriate circumstances but this would only occur in the absence of any statutory remedy.

The moving party is therefore successful and the statement of claim is struck. If the parties are unable to agree on costs, I may be spoken to.