Golic v. ING Insurance Company of Canada

[Indexed as: Golic v. ING Insurance Co. of Canada]

98 O.R. (3d) 394

Court of Appeal for Ontario,
O'Connor A.C.J.O., Goudge and LaForme JJ.A.
November 27, 2009

Insurance -- Actions against insurer -- Limitations -- Insurer informing insured by letter that it was not required to pay any further weekly income replacement benefits and advising him that he was entitled to dispute decision by applying for mediation and taking other steps subsequent to mediation pursuant to ss. 279 to 283 of Insurance Act -- Insurer enclosing copies of relevant statutory provisions and noting that insured had already participated in two mediations and could be assumed to be aware of his rights and obligations with respect to dispute resolution process and that he could contact counsel or insurer if he had any specific questions -- Letter constituting proper notice of refusal to pay weekly disability benefits so as to trigger two-year limitation period in s. 281(5) of Insurance Act -- Insurance Act, R.S.O. 1990, c. I.8, ss. 279-283.

In January 2000, the insurer wrote to the insured advising that it was not obliged to provide him with any further weekly benefit payments and, in particular, that it was not required to pay him weekly income replacement benefits. The letter stated that the insured was entitled to dispute the decision by applying for mediation and, if necessary, taking other steps subsequent to mediation pursuant to ss. 279 to 283 of the Insurance Act. The insurer enclosed copies of the relevant statutory provisions, and also noted that the insured had

already participated in two mediations and could be assumed to be aware of his rights and obligations with respect to the dispute resolution process and that he could contact counsel or the insurer if he had any further questions. The insured commenced an action in March 2007 seeking certain payments from the insurer. In December 2007, he moved to amend his statement of claim to include a claim for income replacement benefits and/or caregiver benefits and/or other d isability benefits. The motion [page395] was dismissed on the ground that the claims being asserted in the amended statement of claim were barred by the two-year limitation period in s. 281(5) of the Act. The insured appealed.

Held, the appeal should be dismissed.

The letter of January 2000 constituted proper notice of the insurer's refusal to pay weekly disability benefits so as to trigger the two-year limitation period in s. 281(5) of the Act. It specifically referred to the dispute resolution process and enclosed copies of the relevant sections of the Act. It was reasonable for the insurer to assume that as a result of the insured having previously been involved in two mediations under the Act, he would be aware of the follow-up dispute resolution process and the relevant time limits. Special circumstances did not exist which warranted relief against the operation of the limitation period.

Cases referred to

Smith v. Co-operators General Insurance Co., [2002] 2 S.C.R. 129, [2002] S.C.J. No. 34, 2002 SCC 30, 210 D.L.R. (4th) 443, 286 N.R. 178, J.E. 2002-663, 158 O.A.C. 1, 36 C.C.L.I. (3d) 1, [2002] I.L.R. I-4071, 112 A.C.W.S. (3d) 950, distd

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8, ss. 279-283, 281(5)[rep.], 281.1(1)

Rules and regulations referred to

Statutory Accident Benefits Schedule -- Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/

93, s. 71

APPEAL from the order of Quigley J. (2008), 94 O.R. (3d) 446, [2008] O.J. No. 5408 (S.C.J.) dismissing the motion to amend a statement of claim.

David B. Hayward, for appellant.

Eric K. Grossman, for respondent.

The judgment of the court was delivered by

[1] O'CONNOR A.C.J.O.: -- The issue in this appeal is whether the respondent insurer gave proper notice of its refusal to pay weekly disability benefits so as to trigger the two-year limitation period in s. 281(5) (replaced by s. 281.1(1)) of the Insurance Act, R.S.O. 1990, c. I.8 (the "Act").

Background

[2] On August 26, 1995, the appellant was injured in a motor vehicle accident. The respondent's corporate predecessor paid the appellant "other disability benefits" pursuant to the Statutory Accident Benefits Schedule -- Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/93 (the "SABS"). Those benefits were paid to the end of January 1997.

[3] On January 23, 2000, the respondent wrote to the appellant advising that it was "not obliged to provide [the appellant] [page396] with any further weekly benefit payments at this point in time, and in particular [was] not required to pay [the appellant] weekly 'income replacement benefits' for any interval of time through to the present".

[4] The letter went on to indicate that the appellant was entitled to dispute a decision of the insurer by applying for mediation and, if necessary, taking other steps subsequent to mediation pursuant to ss. 279 to 283 of the Act (the dispute

resolution process). In its letter, the respondent enclosed copies of the noted sections of the Act, as well as a complete copy of the SABS, [See Note 1 below] and asked to be advised if the appellant required the insurer to provide him with any forms. The letter then stated:

> Given that you have already participated in two mediations about your accident benefits claim, we trust you are adequately aware of your rights and obligations with respect to the dispute resolution process outlined in the Insurance Act. However, if you require any further information or guidance, please contact your counsel, or in the event you have no counsel, please write to us with any specific questions you may have.

[5] On March 8, 2007, the appellant commenced an action seeking payments for, among other things, attendant care, housekeeping and home maintenance benefits owing since 1998, as well as funding for case management services since February 2006. In December 2007, the appellant moved to amend his statement of claim to include a claim for income replacement benefits and/or caregiver benefits and/or other disability benefits owing since January 31, 1997. The motion, originally returnable in December 2007, was heard on September 10, 2008.

[6] The motion judge dismissed the appellant's motion to amend. He accepted the respondent's argument that the claims being asserted in the amended statement of claim were barred by the two-year limitation period in s. 281(5) of the Act. That section provides that a court or an arbitration proceeding in respect of statutory accident benefits must be commenced "within two years after the insurer's refusal to pay the benefit claimed or within such longer period as may be provided in the [SABS]". [page397]

Analysis

[7] The issue in this appeal is whether the motion judge erred in finding that the respondent had refused to pay the statutory accident benefits claimed in the amended statement of claim so as to trigger the limitation period in s. 281(5). This issue turns on whether the respondent gave the appellant proper notice

of its refusal to pay the benefits in accordance with s. 71 of the SABS. That section imposed a requirement on insurers when refusing to pay benefits to inform a claimant of the dispute resolution process available under the Act. [See Note 2 below] It read as follows:

> 71. If an insurer refuses to pay a benefit that a person has applied for under this Regulation or reduces the amount of a benefit that a person received under this Regulation, the insurer shall inform the person in writing of the procedure for resolving disputes relating to benefits under sections 279 to 283 of the Insurance Act.

[8] The appellant argues that the respondent did not give a valid refusal because it did not fulfill its obligations under s. 71 to explain the dispute resolution process to the appellant. He also argues that merely providing copies of the sections of the legislation relating to that process is insufficient. The appellant relies on the Supreme Court of Canada's decision in Smith v. Co-operators General Insurance Co., [2002] 2 S.C.R. 129, [2002] S.C.J. No. 34, in support of these arguments.

[9] In Smith, Gonthier J., for the majority, held that the insurer's refusal did not constitute a proper refusal to pay benefits so as to trigger the two-year limitation period because the refusal did not include an adequate description of the procedure for resolving disputes as required by s. 71 of the SABS. He pointed out that one of the main objectives of insurance law is consumer protection. Because of that, it was necessary to provide an insured with a description of the dispute resolution process in straightforward and clear language, directed towards an unsophisticated person. He said, at para. 14:

> In my opinion, the insurer is required under s. 71 to inform the person of the dispute resolution process contained in ss. 279 to 283 of the Insurance Act in straightforward and clear language, directed towards an unsophisticated person. At a minimum, this should include a description of the most important points of the process, such as the right to seek

> mediation, the right to arbitrate or litigate if mediation fails, that mediation must be attempted [page398] before resorting to arbitration or litigation and the relevant time limits that govern the entire process. Without this basic information, it cannot be said that a valid refusal has been given.

[10] Gonthier J. said, at para. 13, that it was questionable whether simply attaching to the refusal a verbatim reproduction of ss. 279 to 283 of the Act would qualify as a valid refusal because "it would surely run afoul of the consumer protection purpose of the legislation".

[11] In addition, Gonthier J. rejected an argument that the court should consider circumstances beyond the insurer's notice of refusal when determining whether the refusal was adequate. In Smith, the insured had been informed of the limitation period in s. 281(5) through a mediation report. [See Note 3 below] Gonthier J. rejected the insurer's argument that the knowledge gained from the report could be used against the insured. He reasoned, at para. 16, that because of the importance of protecting the consumers (the claimants), courts should "impose bright-line boundaries between the permissible and the impermissible without undue solicitude for particular circumstances that might operate against claimants in certain cases".

[12] I understand Gonthier J. to have said that in the context of an insurance company giving notice of its refusal to pay benefits, it must satisfy the requirements of s. 71 in its refusal. Courts should not look to circumstances beyond the insurer's notice of refusal, such as the mediator's report in Smith, to relieve the insurance company of its obligation to provide a proper refusal.

[13] In my view, the respondent's refusal to pay benefits in the present case meets the consumer protection rationale that underlies the decision in Smith. It is important to note the refusal sent out by the insurer in Smith was different in significant ways from the refusal in this case. The notice of refusal in Smith stated:

> We have assessed your claim for accident benefits. This form tells you how we calculated your benefits. If you disagree with our assessment, please contact us immediately.
>
> If we cannot settle the application to your satisfaction, you have the right to ask for mediation through the Ontario Insurance Commission. You can contact them in Toronto [phone numbers were included]. [See Note 4 below]

[14] The court in Smith was very concerned that the refusal gave no indication that there was any further dispute resolution [page399] process beyond mediation. [See Note 5 below] The refusal made no mention of the complete dispute resolution process in the Act. At para. 15, Gonthier J. said:

> Given that s. 71 of the SABS imposes a requirement to inform the claimant of the dispute resolution process as discussed above, and given that the respondent only informed the appellant of the first step of this process, a proper refusal cannot be said to have been given.

(Emphasis added)

[15] In this case, the respondent's letter of January 23, 2000 was much more complete than the notice of refusal in Smith. Unlike the refusal in Smith, the letter referred to the statutory dispute resolution process and did so in two places. It specifically referred to ss. 279 to 283 of the Act, which set out the dispute resolution process and the relevant time limits. The letter enclosed copies of those sections.

[16] Importantly, the letter went on to refer to the fact that the appellant had participated in two mediations under the Act about his accident benefits claims. The letter then made the statement "we trust you are adequately aware of your rights and obligations with respect to the dispute resolution process outlined in the [Act]" (emphasis added). In my view, it was reasonable for the respondent to assume that as a result of the appellant having previously been involved in two mediations under the Act, he would be aware of the follow-up dispute resolution process and the relevant time limits. In Smith, the

claimant went to mediation after she received the refusal.

[17] In addition, in this case, the letter invited the appellant to contact his counsel or, if he did not have counsel, to write with questions if he needed further information or guidance about the dispute resolution process. In Smith, the claimant was only invited to contact the insurer if she disagreed with the assessment. She was told she had the right to ask the Ontario Insurance Commission for mediation and was provided with the Commission's contact information. The insurer did not offer to further clarify the process.

[18] Thus, in my view, there are significant differences between the refusal in this case and that in Smith. The refusal in this case specifically referred to the dispute resolution process. It enclosed copies of the relevant sections of the Act. In addition, the refusal referred to the earlier mediations. It made a reasonable assumption that the appellant knew about the dispute resolution process and it invited inquiries if he did not. [page400]

[19] I am satisfied that the refusal in this case, standing alone, is sufficient to meet the consumer protection purpose that formed the rationale for the majority decision in Smith. The underpinning of the rationale is the need to ensure that an insured is properly informed about the dispute resolution process at the time an insurer refuses to pay benefits. The refusal in this case meets that standard.

[20] In reaching this conclusion, I do not find it necessary to have regard to circumstances not contained in the respondent's letter of January 23, 2000. Importantly, it is the letter that makes what I find to be the reasonable assumption that the appellant had been informed of the dispute resolution process and the relevant time limits.

[21] I have reached the same conclusion as the motion judge, but by a slightly different path. The motion judge found that the letter, by itself, did not constitute a proper refusal to pay benefits. He went on, however, to find that the appellant should not be able to feign ignorance of the dispute resolution

process having regard to the fact that he was an experienced litigant and had been through three mediations (two under the Act and one private). The motion judge noted that it would be unfair to the respondent to have to answer the appellant's claims so many years after the accident. While I agree with the result reached by the motion judge, I am satisfied that the same conclusion is available from the letter standing alone. It is not necessary to go outside the letter in order to find that the respondent had given the appellant proper notice of its refusal to pay benefits.

[22] In the result, I am satisfied that the letter of January 23, 2000 constituted a proper refusal to pay benefits so as to trigger the running of the limitation period in s. 281(5). That period expired two years later, long before the appellant sought to amend his statement of claim to include the new statutory accident benefits claims. I agree with the motion judge that the appellant has not satisfied his onus of establishing special circumstances to relieve against the operation of the limitation period.

[23] Thus, I agree with the motion judge that the claims in the amended statement of claim were statute-barred and that the motion to amend should have been dismissed.

[24] I would dismiss the appeal. I would order the appellant to pay the respondent's cost, fixed in the amount of $4,500, inclusive of disbursements and GST.

Appeal dismissed.

Notes

Note 1: The letter refers to enclosing copies of the sections of the Act and the SABS. The motion judge proceeded on the basis that the copies were enclosed. Although the record before this court does not contain those copies, there is nothing to suggest that they were not enclosed and I proceed on the basis that they were.

Note 2: I have used the past tense when referring to the requirement in s. 71 to inform the unsured of the dispute resolution process because in 2003, the nature of the requirement for giving notice of refusal to pay benefits was amended.

Note 3: The mediation report was issued over a year after the insurer's notice.

Note 4: Notice set out at para. 2 of Smith.

Note 5: See, for example, para. 12.
