S.C.A. No. 02569

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Chipman and Freeman, JJ.A.

BETWEEN:

CANADIAN GENERAL INSURANCE COMPANY, a body corporate Appellant - and - ART LAFFORD, JUDY LAFFORD LOUIS MORRISEY, and BEV MORRISEY Respondents	David Farrar for the Appellant W. Dale Dunlop for the Respondent Appeal Heard: June 3, 1992 Judgment Delivered: June 26, 1992

THE COURT: Appeal dismissed with costs in the amount of $1200.00 to the respondent per reasons for judgment of Hallett J.A.; Chipman and Freeman JJ.A. concurring.

HALLETT J.A.

This is an appeal from a decision of Mr. Justice Gruchy dismissing the appellant's claim that the respondent Judy Lafford conspired with Myrna and Michael Nicholson to have the seasonal dwelling owned by the four respondents intentionally burned. The appellant had paid the fire loss of $20,000.00 before learning of facts which led to the allegation of conspiracy. The appellant asserted in its statement of claim that the fire loss occurred as a result of a wilful act, neglect, procurement means or connivance of the respondents or any of them and as a result the respondents were not entitled to recover under the insurance policy. The appellant pleaded and relied on the provisions of the insurance policy and on the Insurance Act, R.S.N.S. 1989, Chapter 231 and in particular the statutory conditions to Part VII. The appellant claimed payment of the sum of $20,000.00 plus expenses associated with investigating and adjusting the loss.

The learned trial judge stated there were two issues before him which he described in his decision as follows:

> " 1. Did Mrs. Lafford conspire with her sister and brother-in-law, Myrna and Michael Nicholson, to burn the cottage? and
>
> 2. Did Mrs. Lafford breach the statutory conditions of the policy by making false statements?"

Counsel for both parties advise us that at the pre-trial conference it was agreed that the appellant could raise the second issue identified by the trial judge notwithstanding it was not pleaded in the statement of claim.

The learned trial judge found as a fact that Mrs. Lafford did not conspire to burn

the cottage. That finding is not appealed. The learned trial judge found that Mrs. Lafford did not make false statements to the appellant respecting the cause of the fire and therefore did not breach the statutory conditions. That finding of the learned trial judge is under appeal.

The parties have agreed on the consequences which will flow from liability being found against Mrs. Lafford.

The cottage was insured with the appellant against fire loss for the sum of $20,000.00. The cottage had been broken into and vandalized on a number of occasions, the last act of vandalism having occurred a short time prior to the fire on July 6, 1989. Approximately two weeks before the fire Mrs. Lafford had made a lighthearted comment at a social occasion, when discussing the fact that the cottage had been vandalized, that they would have been better off if the vandals had burned it down; it would be worth a thousand or two. Her sister Myrna Nicholson was present. A few days after the fire Myrna Nicholson told Mrs. Lafford she wanted a thousand dollars for herself and her husband Michael Nicholson for making arrangements to have the cottage burned. She indicated to Mrs. Lafford that if she did not pay she would tell her mother that Mrs. Lafford had the cottage burned. On July 12, 1989, Mr. Lynds, the appellant's adjuster, took a statement from Mrs. Lafford's husband in her presence. Mr. Lafford knew nothing of the conversation his wife had with Myrna Nicholson. Mr. Lynds did not take a statement from Mrs. Lafford. She did not mention the conversation with her sister to Mr. Lynds. Mr. Lynds did not inquire of her if she knew how the fire originated. Mr. Lynds concluded the fire was caused by vandals.

The loss was paid by the appellant on August 18, 1989, at which time the

appellant's adjuster provided the respondents with a proof of loss to be signed and returned. Upon getting the settlement cheque from the appellant Mrs. Lafford attended at the bank, deposited $10,000.00 and withdrew a thousand dollars in cash. She went to her sister's home and paid Myrna Nicholson the $1,000.00. At that time Mr. Nicholson was present and said that he required an additional one thousand dollars. He implied there could be problems for her husband from the 13th Tribe (a motor cycle gang) which he inferred set the fire. He stated to Mrs. Lafford that he was required to pay them $1,000.00. Mrs. Lafford wrote out a cheque for another one thousand dollars. Mrs. Lafford testified at trial that she was fearful of her brother-in-law based on past experiences. The learned trial judge accepted her evidence.

On or about October 13, 1989, the insurance adjuster not having received the proof of loss form that he had provided to the respondents sent out another proof of loss form. Numerous phone calls were made by the adjuster in late November and early December. The proof of loss was received by the appellant in early January, 1990. Shortly thereafter the fire incident was featured on the television programme "Crime Stoppers". As a result an anonymous message was received by the Royal Canadian Mounted Police resulting in an investigation of the respondents in relation to the intentional burning of the cottage. Mrs. Lafford gave the following statement to the R.C.M.P. upon being questioned about this matter. It is recited in the trial judge's decision as follows:

> " We owned a cottage with Bev and Louis Morrisey and it was being broken into a lot. We stopped going back because it was unknown what shape you would find it in. Lots of times we talked and made comments that we would be better off if they recked (sic) it or burnt it down. Sometime in June 1989 I was having a baby shower and we

got talking and my sister Myrna Nicklsen (sic) was there. It was said by myself 'the cottage would be better off if it was burnt down'. I believe that I said something about a $1,000.00 being worth it. There were other women who would have heard me say this.

On 6 July 1989 Bev Morrisey called me to say that the cottage was burnt down. I didn't make any arrangements to have the cottage burnt. About two days later I was driving down the road. My sister Myrna stopped me and said the camp burnt down. She said you know who did it. I said no I didn't know. She said you would pay if it burnt down. Don't be so crazy. She said that they had it done. Mike had it done.

I still said don't be so foolish. In a couple of weeks Myrna called and asked if I got the insurance money. I told her no. She said you better hurry up and get it they want their money. I said when I get some money I will give you some.

After about two weeks I got the insurance money. I went to Myrna Nickerson (sic) house with $1,000 in cash that I took from the bank. It was the Toronto Dominion in Clayton Park next to MacDonalds.

Myrna and Mike were in the house. Mike was on the chesterfield and Myrna was standing in the livingroom. I gave the $1,000.00 and this is all I can give you. Mike said that we are dealing with the 13th tribe and if they don't get the second $1,000.00 they will beat Lou and Bill up. I told them that Louis and Bev and Bill knew nothing about that. I couldn't ask them for a $1,000.00. Mike said O.K. you only get $8,000 instead of $10,000.00. Bev and Lou get $10,000.00 as well. He told me that he had to pay the money to the 13th Tribe by 6:00 p.m. on Gottingen St. in some window for them. I didn't have time to go to the bank and I was very upset. So I wrote a cheque to Myrna and they were going to run right in and cash it and make the payment. I was very upset over this. I believed that Mike meant every word because he knows those people.

I never have told Bev, Louis and Bill about Myrna and Mike."

Mrs. Lafford, Constable LaPierre and Mr. Lynds testified at trial. The learned trial judge made the following statement with respect to Mrs. Lafford's evidence:

" Mrs. Lafford's version of the events of her dealings with Mr. and Mrs. Nicholson appears to have remained consistent from the time of her statement given to Constable LaPierre up to and including her testimony at trial. I have had portions of her discovery testimony tendered into evidence by the plaintiff. Her recounting of the events at discovery was consistent with the statement, although actually more detailed. Her testimony before me was consistent with the discovery evidence and her statement. Constable LaPierre said the evidence she gave in Provincial Court in the prosecution of Michael Nicholson was consistent with what he had understood her story to be.

Mr. Lynds, despite the police investigation, and despite the full knowledge of the transactions between Mrs. Lafford and the Nicholsons, thought the leading probable cause of the fire was vandalism."

ISSUES RAISED ON APPEAL

The appellant raises four issues on appeal, all of which are inter-related. They are set out in the appellant's factum as follows:

" 1. THAT the Learned Trial Judge erred in law in finding that Mrs. Lafford did not breach the statutory conditions of the Insurance Act by failing to make full disclosure to the Appellant;

2. THAT the Learned Trial Judge erred in failing to consider the Respondent's duty to make full disclosure under Statutory Condition 6(1)(b) of the Insurance Act;

3. THAT the Learned Trial Judge erred in the application of the doctrine of "good faith" to the facts as he found them;

4. THAT the Learned Trial Judge erred in finding that there was an extortion when there was no evidence before him on which he could make this finding."

The learned trial judge found that Mrs. Lafford did not really believe that the Nicholsons had arranged the fire and therefore her failure to report the conversation with the Nicholsons to the adjuster did not amount to fraud or a wilful false statement. The

appellant asserts the trial judge's finding on this issue is inconsistent with the evidence. Statutory Conditions 6 and 7 are relevant:

> " 6 (1) Requirements after loss - Upon the occurrence of any loss of or damage to the insured property, the insured shall, if such loss or damage is covered by the contract, in addition to observing the requirements of Condition 9, 10 and 11,
>
> (a) forthwith give notice thereof in writing to the insurer;
>
> (b) deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration, . . .
>
> (ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,
>
> (iii) stating that the loss did not
>
> occur through any wilful act or neglect or the procurement, means or connivance of the insured, . . .
>
> 7. Fraud - Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, shall vitiate the claim of the person making the declaration."

I have reviewed the evidence of Mrs. Lafford and in particular those passages relied on by the appellant as proof that Mrs. Lafford believed the Nicholsons arranged the fire. In my opinion Mrs. Lafford's evidence does not indicate she believed the Nicholsons arranged the fire. It seems to me the evidence indicates that Mrs. Lafford did not know what to believe or what to do. Her sister was apparently involved in either arranging the fire or extorting money from her. The learned trial judge found that Mrs. Lafford was an

unsophisticated person. He found that she had every reason to be afraid of her brother-in-law and accordingly afraid for her family situation. The evidence supports this finding.

Mrs. Lafford's discovery evidence was introduced at trial by the appellant. She was asked about the circumstances surrounding the payment to the Nicholsons. The following extract from the discovery tendered is relevant.

> " Q. At the time that you gave them the cheque, you knew at that time that they has had something to do with the burning of the cottage?
>
> A. I wasn't - - - I wasn't - - - like, I wasn't sure, like. I was - - like, are they just getting money out of me or did they really do it. I didn't know. But I was just - - if I had to give them all of what I had, I would've gave it to them just to get rid of them.
>
> Q. When you were receiving the insurance money, did you give any thought to telling the insurance company about these circumstances?
>
> A. I thought about telling Bill. I thought about telling Lou. I thought about telling the insurance company. I thought about telling the Police.
>
> . . .
>
> Q. When Mr. Lynds was talking to you during those times and asked you to sign the Proof of Loss, did you think to tell him about the —
>
> A. Yes.
>
> Q. —. conversation with Myrna?
>
> A. I certainly did. I thought to tell him. I thought to tell Billy every night we went to bed. I thought to tell everybody . . . Probably if it would have been a stranger, I would've not even have hesitated . . .
>
> Q. You say that you wouldn't have had much trouble

going to the Police or to the insurance company if it had've been a stranger but because it was your sister, you had concerns?

A. Yeah . . ."

The crucial part of the cross-examination at trial which is relied on by the appellant is the following:

" Q. I believe Mrs. Lafford that you think this is something . . . the burning of this cottage is something which Mike is capable of?

A. Yes, I do and I shouldn't answer that way because I am judging him. I know his character what he has done . . . some things he would . . .

Q. And, when Myrna told you that it was they had arranged for the cottage to be burned? It was certainly something that was not beyond the realm of possibility that they had arranged for it to be burned?

A. She didn't say they had arranged to have it done. She said, "We had it done". Those were her words.

Q. And its something that they could have done?

A. Oh, gosh, I don't know, yes, they could have. I don't know."

In my opinion, particularly the last answer, shows a state of mind that Mrs. Lafford really did not know whether to believe that her brother-in-law had arranged the fire or not. The learned trial judge was justified on the evidence in making the finding that Mrs. Lafford had not formed the belief that the Nicholsons had arranged to set the fire.

The appellant also asserts that whether or not Mrs. Lafford believed the Nicholsons

made the arrangements to have the cottage burned, Mrs. Lafford was in breach of Statutory Condition 6(1)(b)(ii) because she did not provide the appellant insurer with particulars of how the loss occurred insofar as she knew. The appellant asserts that the only knowledge Mrs. Lafford had at the time the insurance proceeds were paid was that the fire had been arranged by the Nicholsons and she did not disclose this knowledge at the time of payment or in the proof of loss that was subsequently filed. The appellant asserts that this failure on Mrs. Lafford's part constitutes fraud or a wilful false statement and that coverage under the policy was therefore vitiated pursuant to Statutory Condition 7.

The proof of loss form provided to Mrs. Lafford by the appellant's adjuster did not contain any provisions which required the insured's to state how the fire originated so far as the insured knew or believed. In short, the language of Statutory Condition 6(1)(b)(ii) was not reproduced on the proof of loss form. The proof of loss signed by the respondents on the completed form provided by the adjuster contained the following statement:

> " TIME AND ORIGIN: A loss occurred on the 6 day of July, 1989, at m. caused by fire."

Under the heading Insurance and Loss the printed form of the proof of loss states:

> " A particular account of the loss is attached hereto and forms part of this proof."

No account of the loss was attached to the proof.

There is not a false statement in the proof of loss. It thus remains to determine if the failure to disclose the conversations with her sister was a fraud such as to vitiate the

insurance coverage. On the facts of this case Mrs. Lafford's silence in the face of her uncertainty whether or not her brother-in-law had anything to do with the fire is not fraud. Counsel for the appellant has not referred us to a single case where fraud has been found in similar circumstances. Fraud generally means the use of false representation to gain an unjust advantage. Fraud is not easily defined. The classic definition of fraud is found in the judgment of Buckley, J., in Re London And Globe Finance Corp. Ltd, [1903] 1 Ch. 728 at pp. 732-3:

> " To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

In Scott v. Metropolitan Police Commissioner (1974), 60 Cr. App. R. 124 (H.L.) it was held that this definition is not exhaustive and that to "defraud" ordinarily means: "to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled."

It is clear that even if Mrs. Lafford had told the appellant of the possibility that the Nicholsons arranged the fire the respondents would have been entitled to payment of the loss under the fire policy. The failure of Mrs. Lafford to advise Mr. Lynds of the discussions with the Nicholsons did not cause the appellant to pay the $20,000.00 which but for the failure to disclose, the appellant would not have had to pay. The respondents were not involved in the arson and made no false statements in the proof of loss or otherwise nor was there fraud. In my opinion the learned trial judge did not err in concluding that Mrs.

Lafford did not commit a fraud or make a wilfully false statement in the proof of loss. The learned trial judge was not in error in concluding her coverage was not vitiated pursuant to the statutory conditions as there was no breach of the conditions.

The appellant finally asserts the trial judge erred in the application of the doctrine of good faith to the facts as he found them. The appellant submits that regardless of whether or not there was a breach of the statutory condition, there is a duty on the insured to make full disclosure of all of the circumstances of this case. He relies on the following statement in Holland v. Marsh & McLennan Limited (1979), 29 N.S.R. (2d) 622 at pp. 624 and 625 where Mr. Justice Jones cites from Ivamy, General Principles of Insurance, Second Edition, at p. 360, which states, in part, that the claim which an insured puts forward:

> "must be honestly made, and if it is fraudulent, he will forfeit all benefit under the policy whether there is a condition to that effect or not. The insured must make full disclosure of the circumstances of the case. [Emphasis Added]"

As to whether or not Mrs. Lafford had a duty to disclose what she had been told about the possible cause of the fire pursuant to the concept of uberrima fides there are conflicting authorities. In Tumbers Video Ltd. v. INA Insurance Co. of Canada (1991), C.I.L.R. 282 Hollinrake of the British Columbia Court of Appeal stated:

> " The concept of uberrima fides comes into play in an insurance setting at the time of the formation of the contract of insurance. It plays no part when it comes to an allegation of fraud in the proof of loss."

In the Tumbers Video case there was an express statement that was false. It was not a

failure to disclose that was in issue. The statement made by the British Columbia Court of Appeal in that case was contrary to a statement made by the same court in the earlier case of Anastasov v. Halifax Insurance Co., [1987] 1 L.R. 8678. In that case a proof of loss had not been filed but the insured made false statements that certain items had been replaced. The court held that the common law of fraud had not been replaced by Statutory Condition 7. McFarlane J.A. stated:

> " The fraud or wilful misstatement which will vitiate the claim is placed by statutory condition 7 on a narrow basis, but it is a statutory recognition, in my opinion, of a wider rule that the utmost good faith is fundamental to every insurance policy and that fraud on the part of the insured will vitiate the policy."

Again I would note that this case can be distinguished from the facts of the present as there was an expressed and false statement that had been made. Although the decision would render the doctrine of good faith applicable to the claim stage of an insurance contract, the court did not explicitly address the issue of a duty to disclose.

Mrs. Lafford was not questioned directly as to the cause of the fire. Her alleged failure was that she did not volunteer information she had when her husband was being questioned by Mr. Lynds. In my opinion an omission such as Mrs. Lafford's should not at common law vitiate the claim; it was not fraud. I would also note that there was no allegation in the statement of claim of lack of good faith on the insured's part such as to vitiate the coverage; nor was it identified as one of the issues by the trial judge. Counsel for the appellant has not provided us with any case law that silence not amounting in the circumstances to fraud constitutes a breach of statutory condition 6 or 7 or amounts to a

breach of the doctrine of good faith at the claims stage. I would not be prepared to go as far as the appellant's counsel urges us. It is quite apparent on the facts of this case as found by the trial judge that Mrs. Lafford had nothing to do with the setting of the fire and her silence as to what she had been told by her sister on the facts is quite understandable and does not equate with fraud.

THE EXTORTION ISSUE

The appellant asserts that the learned trial judge erred in finding that there was extortion when there was no evidence before him on which he could make this finding. I disagree; there was ample evidence from Mrs. Lafford on this issue.

There is one additional point that should be mentioned. The appellant insurer has relied in its factum on the statutory conditions as a basis for its claim. There is authority suggesting that a statutory condition which is not endorsed upon the policy cannot be relied on. (Lowry v. Eaton/Bay Insurance Co (1987), 26 C.C.L.I. 21 (Alta. C.A.)). The condition at issue in that case was a limitation period. The Alberta Insurance Act contains a provision identical to s. 167(2) of our Act which states:

> " The conditions set forth in the Schedule to this Part shall be deemed to be part of every contract and shall be printed on every policy. . . " (Emphasis Added)

The court relied on a previous decision of the Alberta Court of Appeal in North Lethbridge Garage Ltd. v. Continental Casualty Co. ,[1930] 1 W.W.R. 491, which stated that a statutory condition to be valid must be endorsed on the policy.

The copy of the policy introduced in evidence and reproduced in the Appeal Book

in the appeal we have under consideration does not include as part of the policy the Statutory Conditions.

CONCLUSION

In summary, the learned trial judge found that Mrs. Lafford did not conspire with the Nicholsons to have the cottage burned. The evidence is clear that Mrs. Lafford did not know whether or not to believe that the Nicholsons had arranged for the cottage to be burned. It is clear from a review of the proof of loss that Mrs. Lafford did not make a false statement; the proof simply states the loss was caused by fire. If the insurers expect an insured to comply with Statutory Condition 6(1)(b)(ii) with respect to advising the insurer as to the origin of a fire so far as the insureds know or believe, insurers ought to reproduce the statutory conditions in the policy and provide a question on the form of proof of loss to that effect. The appellant has failed to satisfy me that the learned trial judge erred in finding Mrs. Lafford did not breach Statutory Condition 6. The appellant did not commit a fraud in obtaining payment under the policy; she made no wilfully false statement to Mr. Lynds. By remaining silent with respect to the conversation she had with her sister she did not breach the duty of an insured to act in good faith even if that duty extends to the claim stage. The appeal is dismissed with costs of $1,200.00.

J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.