Cite as; Sun Alliance Insurance Company v. Judgment Recovery (N.S.) Ltd., 1990 NSCA 94

S.C.A. No. 02317

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Macdonald, Chipman and Freeman, JJ.A.

BETWEEN:	
SUN ALLIANCE INSURANCE COMPANY Appellant	S. R. Morse for the Appellant
- and -	
JUDGMENT RECOVERY (N.S.) LIMITED Respondent	R. Jackson for the Respondent
	C. D. Bryson for Raymond Steel
	Appeal Heard: November 29, 1990
	Judgment Delivered: December 11, 1990

THE COURT: The appeal is dismissed with costs to the respondent as per reasons for judgment of Chipman, J.A.; Macdonald and Freeman, JJ.A., concurring.

CHIPMAN, J.A.

This is an appeal from a decision of Mr. Justice Nunn in Chambers whereby he held, upon the application of the respondent, that the appellant had an obligation under a policy of automobile insurance to indemnify claimants in four actions arising out of a motor vehicle collision.

The collision occurred June 25, 1988, on Highway No. 101 near Springfield Lake, Halifax County. A vehicle driven by Cheryl Ann Llewellyn with three passengers was in collision with a vehicle driven by Ovila Neault. As a result, all of the occupants of the vehicles were killed. The four actions were brought by or on behalf of the estates of the deceased occupants of the Llewellyn vehicle against Dianne Judith Neault, executrix of the estate of Ovila Neault.

The respondent's application was pursuant to s. 216 of the Motor Vehicle Act, R.S.N.S. 1989, c. 293 which as far as material provides:

> "216 (1) Where
>
> (a) an application is made to Judgment Recovery (N.S.) Ltd. for payment of a claim for loss or damages occasioned by or arising out of the operation, ownership, maintenance or use of a motor vehicle, whether or not an originating notice has been issued or a judgment has been entered;
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> (b) it appears or is alleged that an insurer may be obligated under a policy of automobile insurance within the meaning of Part VI of the Insurance Act to respond to the claim; and

(c) the insurer denies that it is so obligated,

Judgment Recovery (N.S.) Ltd. shall within a reasonable period of time but not to exceed sixty days from the date of such application make an **ex parte** application to a judge of the Trial Division of the Supreme Court or a judge of a county court to set a date for a hearing to determine whether the insurer has such an obligation."

It must be kept in mind that the obligation to respond is always subject to defences which the insurer may advance against claims outside of the basic coverage. See s. 133(10) and s. 133(11) of the Insurance Act.

On the application before Mr. Justice Nunn, the parties filed an agreed statement of facts as follows:

"1. A motor vehicle accident occurred on June 25, 1988, at or near Springfield Lake, Halifax County, Nova Scotia, that involved a 1988 Audi that was driven by Ovila Neault and owned by Auto World Leasing Ltd., resulting in the complete write-off of the motor vehicle and the death of Ovila Neault.

2. At the time of the accident Mr. Neault's driver's license had been revoked because of previous convictions for refusal of breathalyzer.

3. That from October 1985 to June 1988 Ovila Neault was the Vice President Atlantic Region for Raymond Steel Ltd. and was responsible for the operation of its Atlantic Region office in Dartmouth, Nova Scotia.

4. That from October 1985 to June 1988 Ovila Neault was also the principal owner of three local companies that he operated whose names were Double (O) and Sons Ltd., Slim Holdings Ltd., and Tri-Sec Reinforcing Steel Ltd.

5. In September 1986, Ovila Neault arranged for the lease of a 1986 Audi which was sold by Carriage Lane Fine Cars Ltd. to MacPhee Pontiac Leasing, which in turn leased the motor vehicle to Slim Holdings Ltd. The vehicle was added to the existing insurance policy that had been issued to Slim Holdings Ltd. by Sun Alliance Insurance Company through the agency of Sherwood General Insurance Services. The existing policy contained a permission to rent or lease endorsement, SEF No. 5 in favour of Slim Holdings Ltd.

6. In August or September 1987, the name of the lessee in the insurance policy was changed from Slim Holdings Ltd. to Tri-Sec Reinforcing Steel Ltd. at the request of Mr. Neault.

7. In May 1988 Ovila Neault arranged for the lease of a 1988 Audi that was sold by Carriage Lane Fine Cars Ltd. to Auto World Leasing Ltd., which in turn leased the motor vehicle to Raymond Steel Limited pursuant to a motor vehicle lease agreement dated May 17, 1988, between Auto World Leasing Ltd., as owner and Raymond Steel Ltd., as lessee. Mr. Neault signed the lease agreement on behalf of Raymond Steel Ltd. Mr. Malcolm MacNeil signed the lease agreement on behalf of Auto World Leasing Limited.

8. Upon application Sun Alliance Insurance Company issued an insurance policy insuring the 1988 Audi, naming Tri-Sec Reinforcing Steel Ltd., as lessee of the vehicle, bearing policy number 1096153, having a policy period from May 17, 1988 to May 17, 1989. The policy contained a SEF No. 5 permission to lease or rent endorsement, in favour of Tri-Sec Reinforcing Steel Ltd., as lessee.

9. At time of application for insurance on the 1988 Audi Ovila Neault did not disclose that his driver's license had been revoked as a result of prior motor vehicle convictions. The lessee of the vehicle was reported as Tri-Sec Reinforcing Steel Ltd.

> 10. A cheque dated May 13, 1988 was written on the bank account of Tri-Sec Reinforcing Steel Ltd., in the amount of $1,889.00 payable to Auto World Leasing Ltd., which included the first lease payment to Auto World Leasing for the 1988 Audi."

In addition, five witnesses testified and the discovery evidence of Malcolm MacNeil was admitted by consent.

Mr. Justice Nunn found that Tri-Sec was the true lessee of the Audi from Autoworld, that the latter through MacNeil, was fully aware of that fact, and that the name of Raymond Steel as lessee was a name of convenience only, as much for Autoworld as for Neault. He therefore rejected the appellant's submission that the policy was void ab initio. Autoworld was the owner of the Audi and Tri-Sec was the lessee whom the appellant agreed to indemnify to the same extent as the owner. It followed that Neault, as an operator with Tri-Sec's consent, was an unnamed insured under the policy entitled to the same indemnity as the owner, the named insured. In each of the four actions, the only defendant named was the estate of Neault, so that a finding that Neault was insured under the policy was important in determining whether the insurer had an obligation to respond. Mr. Justice Nunn suggested that the owner and lessee should be joined in the actions.

Mr. Justice Nunn further held that the alleged misrepresentations in the application respecting Neault's license and convictions were not relevant since they could not be set up against claimants by reason of s. 133(5) of the Insurance Act,

R.S.N.S. 1989, c. 231. Thus the appellant had an obligation to respond to the claims.

The appellant advances three principal submissions:

(1) Mr. Justice Nunn was wrong in finding that Tri-Sec was the true lessee.

(2) The misrepresentation as to the identity of the lessee was as basic to the coverage in the policy as a misrepresentation as to the ownership of the insured vehicle. The policy was, therefore, void ab initio, being it was said, the stillborn product of a fraudulent sham.

(3) If the real lessee was Raymond Steel, the lessee named in the policy (Tri-Sec) was not in a position to give to Neault consent to operate the vehicle. Without the consent of the lessee Neault was not an unnamed insured under the terms of the policy.

The policy contained a permission to lease endorsement, S.E.F. No. 5, which provided in part:

> "The Insurer agrees to indemnify, in the same manner and to the same extent as if named herein as the Insured, the Lessee and every other person who with the Lessee's consent personally drives the automobile..."

In my opinion, it is not necessary to decide whether or not Mr. Justice Nunn was right in determining that Tri-Sec was the true lessee under the policy. I have concluded that any misrepresentation as to the identity of the lessee was not so basic to the coverage as to entitle the appellant to treat the policy as void.

Section 133(5) of the Insurance Act provides with respect to the position of a third party claimant against the proceeds of a motor vehicle liability policy:

> "133(5) It is not a defence to an action under this Section that an instrument issued as a motor vehicle liability policy by a person engaged in the business of an insurer, and alleged by a party to the action to be such a policy, is not a motor vehicle liability policy, and this Section applies, mutatis mutandis, to the instrument."

This provision and its equivalent in other provinces was enacted presumably to overcome the result of the decision in Bourgeois et al. v. Prudential Assurance Company Limited (1946), 1 D.L.R. 139, which was that an action brought by a third party against an insurer could be defeated if the policy was issued on the basis of misrepresentation by the insured. The editorial note in the report of the case in the Dominion Law Report reads:

> "This is a decision of great importance. It has been fairly generally assumed that when an insurer issues a motor vehicle liability policy no misrepresentation in respect to its issue would affect an injured persons' rights..."

As Hallett, J. pointed out in Lawrence v. Powell et al. (1977), 28 N.S.R. (2d) 167, this section and its counterparts in other provinces have received a restrictive interpretation in a line of cases commencing with the decision in Minister of Transport et al. v. London and Midland General Insurance Company (1971), 19 D.L.R. (3d) 643 where the Ontario Court of Appeal concluded that while the legislation had the effect of overcoming the results of such decisions as Comer v. Bussell et al., [1940]

1 D.L.R. 97 and Bourgeois et al. v. Prudential Assurance Company Limited, supra, it did not take away from an insurer the defence that what was issued to the insured was not an "owner's policy" where the insured did not in fact own the vehicle. As a result, in such cases, no policy came into existence. Presumably, as Hallett, J. points out on p. 175, the rationale for this is that the policy, being void ab initio, was never "issued" within the meaning of that word as used in s. 133(5). Further, he said, the section has been interpreted restrictively because of its vagueness and possibly the assumption or the presumption that had the legislature intended to take away all the defences of an insurer it would have done so in clearer language. Moreover, where the ownership of the vehicle has been misrepresented, the real owner and people operating with such owner's permission cannot be said to have been operating the vehicle with the consent of the named insured as that person, not being an owner, is not in a position to give or withhold consent.

On these two grounds, it has been consistently held in this province that s. 133(5) does not prevent the insurer from escaping liability in such cases of misrepresented ownership; Wolfe v. Oliver (1974), 8 N.S.R. (2d) 313; Lawrence v. Powell et al., supra; Sibbins v. Atkins et al. (1982), 53 N.S.R. (2d) 599; MacNeil v. Cameron (1988), 86 N.S.R. (2d) 44. Cases in some other provinces go the other way. In MacNeil v. Cameron, supra, Burchell, J. reviewed thoroughly the two lines of authority in Canada. I concur with his conclusion that the restrictive interpretation of s. 133(5) should govern.

Filed as an exhibit before Mr. Justice Nunn was an expert report of one J. R. Millier, Superintendent of Automobile and Personal Lines of Prudential Insurance Company Limited at Halifax. His opinion was to the effect that a change in the name of the lessee alone would not effect the premium, acceptance of the risk or policy conditions in the case of a policy of automobile insurance issued to an owner with a permission to lease endorsement. The appellant's underwriter who issued the policy agreed that the premium was based not on the identity of the lessee but on the individuals who would be driving the insured vehicle.

I have given consideration whether it makes any difference if the identity of the lessee is found to be material to the risk. Materiality should not, in my opinion, be a consideration in determining whether the principle of Wolfe v. Oliver, supra, applies. The basis of that principle does not lie in materiality, but in lack of identity of the insured as an owner. Indeed, in many cases the misrepresentation as to the owner might not be at all material, whereas on the other hand many cases falling within the provisions of s. 133(5) involve misrepresentation of a very material nature.

Thus, I have considered that in the case of an owner's policy with permission to lease under the S.E.F. No. 5 endorsement, the identity of the lessee is not basic to the coverage in the same way as is the identity of the owner of the vehicle. In this case the owner named in the policy -

Autoworld - is in fact the owner of the vehicle. I think it would be undesirable to interpret s. 133(5) even more restrictively by extending the reasoning in Wolfe v. Oliver, supra, to apply to the identity of the lessee as contended for by the appellant. The appellant has issued the policy to the owner and misrepresentation as to the lessee, even if material, is certainly no more material than other misrepresentations such as accidents and convictions. The case law makes clear that these are excluded by virtue of s. 133(5) from affording a defence to the insurer to a claim by third party claimants. The misrepresentations with respect to Neault's driving record, which cannot be successfully relied on, are certainly more material than misrepresentation as to the lessee. If fraud was involved in connection with such latter misrepresentation, it was probably done more for the purpose of deceiving the bank which financed the loan for Autoworld and Neault's employers than for the purpose of deceiving the insurer.

The last point is whether Neault is a person insured under the policy. In my view, whether the lessee is Tri-Sec or Raymond Steel, the result is the same. The policy on its face insures Autoworld, and apart altogether from S.E.F. No. 5, by virtue of s. 114(1) of the Insurance Act:

> "114(1) Every contract evidenced by an owner's policy insures the person named therein, and every other person who with his consent personally drives an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage
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> (a) arising from the ownership, use or operation of any such automobile; and
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> (b) resulting from bodily injury to or the death of any person, and damage to property."

Endorsement S.E.F. No. 5 cannot and does not purport to reduce the scope of this coverage. It enlarges it by adding to the class of insured persons the lessee and those who operate the vehicle with the lessee's consent.

There can be no question but that Autoworld consented to the operation of the Audi at all material times by Neault. Neault and his wife were named in the application as the persons who would be operators. Autoworld, through MacNeil, must be taken to have consented to the operation of the vehicle by Neault and his wife, if not by virtue of their being named in the application as operators then as persons operating with the consent of the party taking possession of the vehicle as lessee whether it be Raymond Steel or Tri-Sec.

In the result, therefore, I would dismiss the appeal with costs to the respondent. There should be no costs in favour of Raymond Steel whose counsel participated briefly in this appeal.

J.A.

Concurred in:

Macdonald, J.A.

Freeman, J.A.