SUPREME COURT OF NOVA SCOTIA

Citation: Raymond v. Royal & Sun Alliance Insurance Company of Canada, 2013 NSSC 53

Date: 20130208
Docket: Hfx No. 334975
Registry: Halifax

Between:

Logan Llewellyn Raymond

Plaintiff

v.

Royal & Sun Alliance Insurance Company of Canada, a body corporate

Defendant

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: October 11, 2012

Counsel: Ansley C. Simpson, for plaintiff
Lisa Richards, for defendant

Moir J.:

Introduction

[1] According to his statement of claim, Mr. Raymond suffered from personal injuries when the car in which he was a passenger got into an accident. He says that Royal & Sun Alliance insured the owner and the Section B coverage extended to passengers.

[2] Mr. Raymond claims a declaration that he is entitled to payment of his ongoing medical and rehabilitation expenses related to the injury. Counsel explains that such a declaration would be restricted to the period up until the trial, that no declaration is sought about obligations after trial.

[3] Mr. Raymond also claims judgment for medical and rehabilitation expenses and for weekly income benefits "as are payable", which I take to mean as are outstanding as of the date of trial. He claims further for "general and aggravated damages for breach of contract" and "punitive damages for the tort of bad faith".

[4] The notice of action includes a statement that brings it within Rule 57 - Action for Damages Under $100,000, which is in Part 12 - Actions Under $100,000.

[5] The insurer takes issue with the applicability of Rule 57. It moves "for an order that the Plaintiff's Action does not fall within Rule 57".

Position of Royal & Sun Alliance

[6] The insurer points out that Rules 57.04(1)(a) and (c) require a plaintiff to "determine whether the claim is for damages only" and "estimate whether the total of all claims, except costs and future interest, is less than $100,000".

[7] Mr. Raymond is twenty-three. If he proves his claim, he will be entitled to $250 a week in disability income payments. Adding what he would receive at trial to what he could collect later if he remains disabled, the weekly benefits alone would be worth over $100,000.

[8] The insurer says that Rule 57 is not intended to apply in such a situation. It submits that the Rule should be given an interpretation similar to the interpretation of the *Small Claims Court Act* in *Paul Revere Life Insurance Co. v. Herbin*, [1996] N.S.J. 88 (S.C.) and *Imperial Life Financial v. Langille*, [1997] N.S.J. 550 (S.C.).

[9] The insurer also points out that a claim for a declaration is not a claim for damages. It is impossible for Mr. Raymond to have determined that "the claim is for damages only", as is required by Rule 57.04(1)(a).

Response of Mr. Raymond

[10] For Mr. Raymond, it is pointed out that, on a reasonable estimate of when the case can be tried, the disability income benefits claim would amount to about $40,000. Allowing a little under $10,000 for unpaid medical expenses and $15,000 for the aggravated and punitive damages, the judgment could not exceed $65,000. The policy does not permit acceleration. Mr. Raymond cannot get judgment for income payments accruing after trial.

[11] It is submitted that Rule 57 differs from the *Small Claims Court Act*. The plaintiff has followed the Rule in a way that ensures its application, unless the insurer establishes that justice cannot be done by following the Rule:

> Rule 57.03 clearly state that Rule 57 procedures apply to an action in which the Plaintiff, acting in accordance with Rule 57.04, states that "the notice of action...is within this rule." The Plaintiff has followed Rule 57.04 in determining the claim is for damages only and that the estimate of the claim is less than $100,000. As a result, Rule 57 should apply to this action, unless and until the Defendant RSA, pursuant to Rule 57.03(5) establishes to the satisfaction of the Court that "... Justice cannot be done by applying this rule".

[12] Mr. Raymond cites *Keddy v. Clarica Life Insurance Co.*, [2002] O.J. 4984 (S.C.J.) leave to appeal to the Divisional Court refused [2002] O.J. 5109 (S.C.J.) and *Antunes v. Great-West Life Assurance Co.*, [2005] O.T.C. 1093 (S.C.J. Master), in which the Ontario Superior Court of Justice refused to transfer disability insurance claims from the simplified procedures in Ontario Rule 76, which is akin to our Part 12 - Actions Under $100,000.

[13] As to the requirement that the claims be for damages only, it is said that "there is no 'implied' claim for declaratory relief for future ID benefits" and "No declaration as to future entitlement of ID benefits is sought." If sought, it would

be refused: *Andersen v. Great-West Life Assurance Co.*, [1988] O.J. 987 (S.C.J.) at para. 43.

Estimate of Damages Under $100,000

[14] For two reasons, this court should not require that Mr. Raymond's claim be determined outside Rule 57. First, the plaintiff is the one who determines whether the Rule applies and the Rule provides its own mechanisms for overriding the plaintiff's choice. Second, the estimate required by Rule 57.04(1)(c) is an estimate of the total value of the causes of action sued for and, in a disability policy of this kind, any liability to make future payments is a separate cause recoverable only if the disability persists.

[15] *Plaintiff's Choice*. Part 12 - Actions Under $100,000 channels all actions into the ordinary Rules for disclosure, discovery, and trial or into Rules for economized procedures. It is one way in which the Rules pursue the principle of proportionality.

[16] Unlike Rule 58 - Action for Claim Valued Under $100,00, Rule 57 - Action for Damages Under $100,000 requires that the plaintiff do the channelling, not the defendant and not the court: Rule 57.03(1). The plaintiff must follow the three steps in Rule 57.04, but the third step requires the plaintiff to exercise judgment and to undertake some risk.

[17] The first two steps in Rule 57.04(1) are easy to determine, and easy for the court to scrutinize. The plaintiff must (a) "determine whether the claim is for damages only" and (b) "if so, determine whether the claim is based only on ..." certain named causes.

[18] The third step arises only if the first two lead to positive answers:

> (c) if so, estimate whether the total of all claims, except costs and future interest, is less than $100,000.

As I said, that step requires the exercise of judgment. The consequences of misjudgment are in Rules 57.04(3) to (5). An under-estimate comes up against the cap, and an unreasonable over-estimate leads to costs against the plaintiff.

[19] It is, therefore, not surprising that Rule 57 contains no provision for the defendant to challenge, or the court to correct, the plaintiff's estimate under Rule 57.04(1)(c). The plaintiff is in control of the channelling process. The recourse for a defendant who disagrees with channelling into Rule 57 is not to attack the plaintiff's estimate. A defendant's recourse is to Rule 57.03(5), which permits review on three grounds. The primary ground is "justice cannot be done by applying this Rule".

[20] The standard in Rule 57.03(5)(a) would pit the kinds of interests alluded to in *Paul Revere* and *Imperial Life* against those in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30. It is beyond the preview of the present motion.

[21] *Rule 57: Not Small Claims*. The interpretations of the *Small Claims Court Act* in *Paul Revere* and *Imperial Life* are not helpful for interpreting Rule 57.

[22] The word "claim" in s. 9 of the *Act* was given a wide meaning (see para. 21 of *Paul Revere* and para. 11 of *Imperial Life*) to cover both the claim made in the Small Claims Court suit and future causes for disability payments not yet accrued. This interpretation was adopted in light of the lack of pretrial procedures in small

claims proceedings, the $5,000 limit that was applicable at the time, the limitations on appeals, and the legislated purpose of the *Act*.

> [T]he very rationale for the establishment of the Small Claims Court was that small claims would be quickly and inexpensively adjudicated. Naturally, such claims are heard without access to the usual pre-trial procedures, productions, discovery of discovery of parties and discovery of experts, as would be accommodated under our own Civil Procedure Rules. ... This case is anything but a small claim. Having found as I do that there is a real potential for this claim to lead to repeated and identically issue-based claims approaching half a million dollars, it seems to me that the Legislature could hardly hae intended the statute to apply to cases such as this. [*Paul Revere* at para. 20 and 21]
>
> In this case the amount at stake is not modest but very high. Its potential value far exceeds the monetary limit of the Small Claims Court. To circumvent the discovery process by allowing claims like this to go forward on a piecemeal basis in Small Claims Court would represent a potential disservice to both sides and would be contrary to the stated purpose of the *Small Claims Court Act*. [para. 12 of *Imperial Life*]

[23] The direction in Rule 57.04(1) to estimate "the total of all claims" must be read in its entire context and given its grammatical and ordinary sense harmoniously with the scheme of the Rules, their purposes, and the intention of the judges: *Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. 2. The word "claim" is given an inclusive definition in Rule 94.10: "includes a cause of action and the remedy sought". The text, in light of the definition, refers to the total value of all causes in the action, not additional causes that may arise in future. Accrued disability insurance payments constitute a separate cause of action from future payments that

may come due if the disability persists after trial: *Canada v. Tsiaprailis*, 2005 SCC 8.

[24] The ordinary meaning of "the total of all claims" refers to the causes sued for, not those that may arise in future. That meaning goes undisturbed when the phrase is put in context. The context is not at all like that of the *Small Claims Court Act*.

[25] Rule 1 provides a purpose different from that in s. 2 of the *Small Claims Court Act*. Although Rule 1 retains the original language of the American *Federal Rules of Procedure*, it is only consistent with the principle of proportionality striven for in modern rules of court.

[26] An action under Rule 57 is tried on record with full rights of appeal. The limit is twenty times the Small Claims limit when *Paul Revere* and *Imperial Life* were decided, and four times the present limit. Pretrial procedures are not extinguished: Rule 57.02(1). Rather, the Rule aims for "economical ways of making full disclosure" in Rule 57.08, economical discovery in Rule 57.09 and 57.10, and economical trial in Rule 57.11. These Rules all contain safety valves,

provisions for recourse to judicial discretion. And, Rule 57.03(5) contains the overall safety valve of a judicial discretion to except an action from the Rule.

[27] The context for Rule 57.04(1)(c) is similar to the simplified procedure Rule in Ontario. I follow *Keddy v. Clarica Life Insurance Co.* and *Antunes v. Great-West Life Assurance Co.*

[28] A plaintiff who estimates "the total of all claims" under Rule 57.04(1)(c) in an action for payments under a disability insurance policy does not include the value of payments that may accrue after trial.

Statutory Declaration

[29] A plaintiff fails to act in accordance with Rule 57.04(1)(a) when he determines that his claim "is for damages only" and claims a declaration in addition to damages. While it is usual for a plaintiff in an action for disability payments to plead for a declaration about rights at the time of trial, Rule 57.04(1)(a) does not allow for it.

[30] In light of the plaintiff's submissions, I will direct that he withdraw the claim for a declaration. As the real claim is for disability payments due at the time of trial, I will order that the plaintiff does not have to pay costs under Rule 9.06(1).

Conclusion

[31] I will grant an order dismissing the defendant's motion without costs.

J.