Winch v. Keogh, [2006] O.J. No. 3182

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

J.M. Simmons, R.P. Armstrong and H.S. LaForme JJ.A.

Heard: June 26, 2006.

Judgment: August 4, 2006.

Docket: C44535

[2006] O.J. No. 3182 | 269 D.L.R. (4th) 396 | 82 O.R. (3d) 472 | 40 C.C.L.I. (4th) 51 | [2006] I.L.R. 4529 | 150 A.C.W.S. (3d) 470 | 2006 CarswellOnt 4792

Between Lori Winch, Plaintiff, and Francis Kedgh, Aragon Distilleries and CAA Insurance Company, Appellant (Defendants), and Royal and Sun Alliance Insurance Company Hogtown Brewing Company Inc., CGU Insurance Company of Canada, Bruce Stewart and Spriggs Insurance Brokers Limited, Respondent (Third Parties)

(18 paras.)

Case Summary

Insurance law — The insurance contract — Enforcement — Appeal by the defendant, CAA Insurance, from a motion judgeAEs determination that Royal & Sun Alliance Insurance was not obliged under s. 258(2) of the Insurance Act to compensate the plaintiff dismissed — Section 258(1) of the Insurance Act was not applicable — Motion judge was correct in holding that there could be no recovery by a third party beneficiary under s. 258(1) unless the insured could have been entitled to recover under a motor vehicle liability policy and that ss. 258(4) and (5) applied only after the possibility of indemnity to the insured had been established — Insurance Act, s. 258.

Insurance law — Actions — By third parties against insurer — Appeal by the defendant, CAA Insurance, from a motion judgeAEs determination that Royal & Sun Alliance Insurance was not obliged under s. 258(2) of the Insurance Act to compensate the plaintiff dismissed — Section 258(1) of the Insurance Act was not applicable — Motion judge was correct in holding that there could be no recovery by a third party beneficiary under s. 258(1) unless the insured could have been entitled to recover under a motor vehicle liability policy and that ss. 258(4) and (5) applied only after the possibility of indemnity to the insured had been established.

Insurance law — Automobile insurance — Statutory conditions — Appeal by the defendant, CAA Insurance, from a motion judgeAEs determination that Royal & Sun Alliance Insurance was not obliged under s. 258(2) of the Insurance Act to compensate the plaintiff dismissed — Section 258(1) of the Insurance Act was not applicable — Motion judge was correct in holding that there could be no recovery by a third party beneficiary under s. 258(1) unless the insured could have been entitled to recover under a motor vehicle liability policy and that ss. 258(4) and (5) applied only after the possibility of indemnity to the insured had been established.

Appeal by the defendant, CAA Insurance, from a motion judgeAEs determination that Royal & Sun Alliance Insurance was not obliged under s. 258(2) of the Insurance Act to compensate the plaintiff. In April 2000, the

plaintiff was involved in a motor vehicle accident with the defendant, Keogh. At the time of the accident, Keogh was not driving his own vehicle. Rather, he was driving a cube van, with a manufacturerAEs gross weight rating of more than 4,500 kilograms. Prior to the accident, Royal issued a policy of automobile insurance to Keogh. RoyalAEs policy included a provision providing coverage for other vehicles driven by the insured. However, it also contained a provision indicating that coverage did not extend to vehicles with a manufacturerAEs gross weight rating of more than 4,500 kilograms. On a motion to determine a point of law, the motion judge found that Royal was not obliged under s. 258(1) of the Insurance Act to compensate the plaintiff.

HELD: Appeal dismissed.

The motion judge was correct in holding that there could be no recovery by a third party beneficiary under s. 258(1) unless the insured could have been entitled to recover under a motor vehicle liability policy and that ss. 258(4) and (5) applied only after the possibility of indemnity to the insured had been established. Where, as in this case, the policy did not provide coverage for the claim that was advanced, there was no possibility of indemnity. Accordingly, on the plain language of s. 258(1), the section did not apply.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O. 1990, c. I-8, s. 258(1), s. 258(4), s. 258(5)

Appeal From:

On appeal from the judgment of Justice Paul M. Perell of the Superior Court of Justice dated November 4, 2005.

Counsel

James M. Regan for the appellant CAA Insurance Co.

Saiyed F. Ahmed for the respondent Royal & Sun Alliance Insurance Company

The following judgment was delivered by

THE COURT

1 The main issue on this appeal concerns the proper interpretation of s. 258(1) of the *Insurance Act*, R.S.O. 1990, c. I-8, which permits, in certain circumstances, an injured third party to enforce a motor vehicle insurance contract directly against the insurer of the person who caused a motor vehicle accident.

Background

2 On April 2, 2000, the plaintiff, Ms. Winch, was involved in a motor vehicle accident with the defendant, Mr.

Keogh. At the time of the accident, Mr. Keogh was not driving his own vehicle. Rather, he was driving a cube van, with a manufacturer's gross weight rating of more than 4,500 kilograms.

3 Prior to the accident, Royal & Sun Alliance Insurance Company issued a policy of automobile insurance to Mr. Keogh. Royal's policy included a provision providing coverage for other vehicles driven by the insured. However, it also contained a provision indicating that coverage did not extend to vehicles with a manufacturer's gross weight rating of more than 4,500 kilograms.

4 On a motion to determine a point of law, Perell J. found that Royal is not obliged under s. 258(1) of the *Insurance Act* to compensate Ms. Winch. In reaching this conclusion, the motion judge relied on *Walker v. Allstate Insurance Company of Canada*, *[1989] O.J. No. 710* (C.A). The motion judge determined that Walker stands for two points that are significant in this case: first, there can be no recovery by a third party under s. 258(1) "unless the insured could have been entitled to an indemnity under the insurance policy"; and second, ss. 258(4) and (5) of the *Insurance Act* apply only after the possibility of indemnity to the insured has been established.

5 On appeal, CAA Insurance Company submits that the motion judge erred in his interpretation of s. 258.

Relevant Statutory Provisions

6 The relevant portions of s. 258(1) of the *Insurance Act* are as follows:

> 258(1) Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, even if such person is not a party to the contract, may, upon recovering a judgment therefore in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of the person's judgment and of any other judgments or claims against the insured covered by the contract ...
>
> 258(4) The right of a person who is entitled under subsection (1) to have insurance money applied upon the person's judgment or claim is not prejudiced by,
>
> a) an assignment, waiver, surrender, cancellation or discharge of the contract, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the contract;
>
> b) any act or default of the insured before or after that event in contravention of the Part or of the terms of the contract;
>
> c) any contravention of the Criminal Code (Canada) or of a statute of any province or territory of Canada or of any state or the District of Columbia of the United States of America by the owner or driver of the automobile,
>
> and nothing mentioned in clause a, b or c is available to the insurer as a defence in an action brought under subsection 1.
>
> (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 with necessary modifications to the instrument.

Discussion

7 CAA contends that the decision in *Walker* was premised on the language of the standard form policy of motor vehicle accident insurance in effect at the time that case was decided and that there are important differences between that language and the language contained in the current standard form policy.

8 At the time *Walker* was decided, the relevant policy provided as follows:

> Consent of owner: No person shall be entitled to indemnity or payment under this policy who is an occupant of an automobile which is being used without the consent of the owner.

9 Currently, rather than speaking of entitlement to "indemnity or payment" under the policy, the standard form policy (OAP1) speaks to the issue of coverage. CAA submits that while the issue of coverage under a policy is a matter to be determined as between the insured and the insurer, that is a separate issue from the issue of whether s. 258(1) has been triggered. While, on its face, the policy in Walker precluded indemnity and therefore the application of s. 258(1), OAP1 speaks about coverage and does not expressly exclude indemnity.

10 Relying on *Campanaro v. Kim*, *[1998] O.J. No. 3518* (C.A.), *Ashton v. Tu*, *[1998] O.J. No. 2239* (C.A.) and *Joachin v. Abel*, *[2002] O.J. No. 2869* (C.A.), CAA submits that the threshold issue in determining whether s. 258(1) applies is whether the insurer issued a motor vehicle liability policy that provides an indemnity to the insured. Here, the threshold was met because Royal issued a motor vehicle policy to Mr. Keogh.

11 CAA contends that once the threshold is met, the only exceptions to the requirement under s. 258 to indemnify an innocent victim are i) where the insured did not consent to the motor vehicle being operated and ii) where a policy does not exist due to cancellation prior to the date of loss.

12 Further, CAA submits that given the legislative intent demonstrated generally under the *Insurance Act* to define liability coverage broadly, s. 258(1) should be interpreted to provide compensation to innocent third parties, even if coverage is not provided as between the insured and the insurer.

13 We do not accept CAA's submissions. In our view, the motion judge was correct in holding that there can be no recovery by a third party beneficiary under s. 258(1) unless the insured could have been entitled to recover under a motor vehicle liability policy and that s. 258(4) and (5) apply only after the possibility of indemnity to the insured has been established.

14 On a plain reading of s. 258(1), it is triggered only when a person *has a claim* against an insured *for which indemnity is provided* by a motor vehicle policy [emphasis added]. Where, as here, the policy does not provide coverage for the claim that is advanced, there is no possibility of indemnity. Accordingly, on the plain language of s. 258(1), the section does not apply. It is only once a possibility of indemnity is found to exist, because there is a claim for which indemnity is provided under a motor vehicle policy, that s. 258(1) is triggered.

15 In our view, there is nothing inconsistent in these reasons with the cases on which the appellant relies. Those cases did not address the effect of the scope of the insuring agreement, *i.e.* the coverage issue, on the operation of s. 258(1).

16 Moreover, in our view, the motion judge was correct in his interpretation of *Joachin*, in which this court said, "the word "indemnity" in s. 258(1) is used not to create a precondition but as part of a description."

17 The motion judge observed that the effect of *Joachin* is to recognize that " indemnity' in s. 258(1) is descriptive of when the third party beneficiary has a claim but the indemnity itself does not have to exist." As was stated in *Joachin*, the descriptive class of persons for whom s. 258(1) operates is persons "with claims ... for which indemnity is provided by a contract evidenced by a motor vehicle policy." In *Joachin*, the court also observed that it is unnecessary that the indemnity be enforceable for s. 258(1) to apply. In our view, the reasoning in *Joachin* is entirely consistent with our conclusion concerning the proper interpretation of s. 258(1).

Disposition

18 Based on the foregoing reasons, the appeal is dismissed. In accordance with the agreement of the parties,

costs of the appeal are to the respondent on a partial indemnity basis fixed at $5,000 inclusive of disbursements and applicable G.S.T.

J.M. SIMMONS J.A
R.P. ARMSTRONG J.A.
H.S. LaFORME J.A.

End of Document