Alberta Court of Queen's Bench
Fjellstrom v. Cooperators General Insurance Co.
Date: 1995-05-01

K. Tarrabain, for plaintiff Charles DeBona.

P.B. Michalyshyn, for defendant.

(Edmonton 9003-12943)

May 1, 1995.

[1] Master FUNDUK:– This is an application by the Defendant for summary judgment dismissing the action of the Plaintiff DeBona.

Basic facts

[2] For many years the Plaintiff Fjellstrom has been the registered owner of a 1981 GMC van. In 1985 she got a motor vehicle policy from the Defendant. She is the named insured.

[3] The policy was renewed from time to time and was in force in October 1988 when the accident happened.

[4] Fjellstrom told the insurer that the van would be used 90% of the time for business. The insurer knew that other people would be driving the van.

[5] Fjellstrom, or her husband, or both together, delivered newspapers for the Edmonton Journal. The deliveries would be to various retailers.

[6] For the purpose of this application it does not matter what the exact relationship between Fjellstrom, her husband and the Journal was. It does not matter who had the contract with the Journal. It also does not matter if there was a business relationship between Fjellstrom and her husband and if so what it was.

[7] DeBona was hired by Fjellstrom or her husband or both (it does not matter which) to do some of the deliveries. His evidence is that:

> 8. The terms of my employment were that I would drive a motor vehicle owned by the Fjellstroms and would deliver newspapers to a number of rural communities in accordance with their directions and instructions.

[8] In October 1988 while in the course of that employment DeBona was in an accident.

[9] DeBona sues for a declaration that he is entitled to "indemnification" under the S.E.F. No. 44 endorsement.

[10] DeBona is not a family member. Clause 1(c) of the endorsement provides in part:

> (c) The term "eligible claimant" means
>
> (i) the insured person sustaining bodily injury.

[11] Clause 1(f) then gives an exclusive definition of "insured person". The only part of the definition that could apply to DeBona is as follows:

> (f) The words "insured person" mean:
>
> (ii) if the named insured is a corporation, an unincorporated association or partnership, any officer, employee or partner of the named insured for whose regular use the described automobile is provided (which individual shall be considered the "named insured" for the purposes of Definition 1(b)), and his or her spouse if residing in the same dwelling premises, and any dependant relative of either, while.

Argument

[12] On this application the Defendant stakes its position on the simple ground that DeBona cannot fit himself within (f)(ii) as an "insured person" because the named insured in the policy is not a corporation, nor an unincorporated association nor a partnership. The Defendant says that whether DeBona was an employee of an unincorporated association or a partnership (Fjellstrom and her husband) is irrelevant because the named insured is not an unincorporated association or a partnership.

[13] DeBona's counsel went into a treatise about what constitutes an employer-employee relationship. That is just not responsive to the Defendant's position on this application. Definitions in the *Labour Relations Act* are irrelevant as are cases dealing with what an employee is.

[14] The fact that DeBona was driving the van with Fjellstrom's consent is also not responsive to the issue before me. The relevant definition does not make someone an "insured person" just because he is driving the van with Fjellstrom's consent.

[15] The business relationship, if any, between Fjellstrom and her husband, is also irrelevant because it is not responsive to the issue before me. The first hurdle that DeBona must get over is that the "named insured" must be:

(a) a corporation, or

(b) an unincorporated association, or

(c) a partnership.

[16] There is also no point in getting into a treatise on what an unincorporated association is or what a partnership is. That also is not responsive to the narrow ground relied on by the Defendant in this application.

[17] DeBona's counsel also says that the Defendant knew that the van would be used for business purposes and that non-family people would be driving it. That is correct but it is also not responsive to the narrow issue on this application.

[18] DeBona's counsel also submits that Fjellstrom got the policy on behalf of an unincorporated association. Where is that in the evidence? The documents show that Fjellstrom is the named insured in her own right. Submissions of counsel are not evidence. The policy was issued showing Fjellstrom as the named insured.

[19] DeBona's counsel also relies on the following passage from *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), 112 D.L.R. (3d) 49 (S.C.C.), pp. 58-59:

> Even apart from the doctrine of *contra preferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a Court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the Courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

Of course I would not disagree with that but it is not at all helpful in this case. This is not a case of an ambiguity or a startling result or a case where the Defendant avoids the policy. The policy is there and the endorsement is there. It is just that in this case DeBona cannot get a benefit under the endorsement.

[20] The simple question in this case, on the facts alleged by DeBona, is whether he *might* be an "insured person" within the definition in cl. 1(f)(ii). If the named insured in the policy is not a corporation nor an unincorporated association nor a partnership the first hurdle cannot be successfully overcome.

[21] In this case the named insured is not a corporation. The named insured is not an unincorporated association. The named insured is not a partnership. The named insured is a natural person, Fjellstrom. The endorsement does not make an employee of somebody an "insured person" where the named insured is a natural person. Even if DeBona was an employee of Fjellstrom the endorsement does not cover him.

[22] I find that DeBona does not fit within cl. 1(f)(ii).

Decision

[23] There will be summary judgment dismissing DeBona's action, with costs to the Defendant on col. 3.

Application allowed.