CITATION: Luknowski v. Aviva Canada Inc. et al.,
2024 ONSC 6094
COURT FILE NO.: CV-15-00065711-0000
DATE: November 1, 2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SHANNON LUKNOWSKY, in her capacity as Executrix for the Estate of BARBARA LYNN CARROLL, deceased, Plaintiff

AND:

AVIVA CANADA INC. and PILOT INSURANCE COMPANY, Defendants

BEFORE: Associate Justice M. Fortier

COUNSEL: Joseph Obagi, for the Plaintiffs in Court File Nos. CV-15-00065711-0000 and CV-17-00073740-0000

Brian G. Sunohara, for the Defendants Aviva Canada Inc. and Pilot Insurance Company (moving parties)

Alan Rachlin, for the Defendant Traders General Insurance Company of Canada in Court File No. CV-17-00073740-0000

HEARD: July 18, 2024

ENDORSEMENT

Introduction

[1] This is a motion brought by the defendants Aviva Canada Inc. and Pilot Insurance Company seeking an order to have actions CV-15-00065711-0000 and CV-17-00073740-0000 heard together or one immediately after the other without a jury. The defendant in action CV-17-73740-0000, Traders General Insurance Company of Canada, consents to the relief sought. The plaintiffs to both actions oppose the motion.

[2] Both CV-15-00065711-0000 and CV-17-00073740-0000 are bad faith actions against entities of Aviva Canada Inc. and arise from the defendants' handling of a personal injury action commenced by Barbara Lynn Carroll.

[3] Pilot Insurance Company and Traders General Insurance Company of Canada are insurance companies that are owned by Aviva Canada Inc.

Background

a) The Personal Injury/MVA Action

[4] On March 28, 2009, Barbara Lynn Carroll, a pedestrian, was catastrophically injured when she was struck by a car driven by Robert McEwen and owned by his wife, Caroline McEwen. As a result of the accident, Ms. Carroll and members of her family sued the McEwens. They also sued Aviva Canada Inc. ("Aviva Canada") and Pilot Insurance Company ("Pilot"), for uninsured and underinsured coverage included in the OPCF-44R Family Protection Coverage endorsement of Ms. Carroll's own automobile insurance policy with Pilot, which was acquired by Aviva Canada (the "MVA Action").

[5] The McEwens were insured under an automobile insurance policy with Aviva Canada with liability insurance limits of $1,000,000.00.

[6] The OPCF-44R Family Protection Endorsement coverage under Ms. Carroll's insurance policy had limits of $2,000,000.00.

[7] The MVA Action did not settle, and ultimately proceeded to a seven-week jury trial in September 2015. The plaintiffs were awarded $2,610,774.32 as well as costs of $375,000.

[8] During the course of the MVA litigation, the McEwens declared bankruptcy.

[9] As indicated previously, arising out of the MVA Action were the two separate bad faith actions, CV-15-00065711-0000 (the "Carroll Action") and CV-17-00073740-0000 (the "McEwen Action").

b) The Carroll Action

[10] Ms. Carroll commenced an action against Aviva Canada and Pilot in September 2015 alleging a breach of the duty of good faith. The statement of claim along with a jury notice were served in September 2015.

[11] In the statement of claim, the plaintiff pleads that both she and the McEwens were insured by Aviva Canada and that Aviva Canada was involved in providing insurance services in various capacities, including as Ms. Carroll's OPCF-44R insurer and as the McEwens' liability insurer.

[12] Ms. Carroll alleges that Aviva Canada appeared to be adjusting the file jointly in its capacity as Ms. Carroll's insurer and as the McEwens' insurer, without consideration to its obligations of good faith to Ms. Carroll. Joint offers to settle were made through counsel for the McEwens and no disclosure was made as to which policy was contributing towards settlement and in what amount. The plaintiff claims that despite repeated requests, Aviva Canada, as OPCF 44R insurer refused to negotiate individually in accordance with its obligations of good faith.

[13] The plaintiff alleges that Aviva Canada breached its duty of good faith and fair dealings as the plaintiff's first party insurer by placing its own interest in priority to those of its insured.

[14] For reasons outlined later in this decision, the Carroll Action remains at the pleadings stage.

c) The McEwen Action

[15] The McEwen Action was commenced on August 25, 2017, against Traders General Insurance Company of Canada ("Traders") and Aviva Canada. The claim was issued in the name of the Carrolls in their capacities as assignees of the Trustee in Bankruptcy of the McEwens.

[16] In the McEwen Action, the plaintiffs contend that Aviva Canada was aware that the value of the claims of the Carroll family against its' insureds, the McEwens, exceeded the liability insurance policy limits of the McEwens. The plaintiffs claim that Aviva Canada owed duties of good faith to settle the action reasonably and within the liability insurance policy limits of the McEwens. According to the plaintiffs, Aviva Canada as insurer for the McEwens, refused to settle the action against the McEwens – rather joint offers to settle were made by Aviva Canada on behalf of the McEwens as well as Aviva Canada as OPCF 44 R insurer under Ms. Carroll's insurance policy. The plaintiffs claim that Aviva Canada improperly withheld the policy limits of the McEwens in an effort to leverage the settlement position and litigation strategy of Aviva Canada in its capacity as OPCF 44R insurer of Ms. Carroll.

[17] The plaintiffs allege that Aviva Canada breached its obligations of good faith to the McEwens by adjusting the claims of the McEwens jointly with claims against Aviva Canada as OPCF 44R insurer and by placing its own interest in priority to the interest of the McEwens.

[18] At Trial Management Court on October 18, 2023, the McEwen Action was assigned a fixed trial date commencing on April 22, 2025, for three weeks. A pre-trial conference is also scheduled for April 3, 2025. The matter is ready to proceed to trial in April 2025.

[19] Ms. Carroll has passed away, and plaintiffs' counsel obtained an Order to Continue in both bad faith actions.

Position of the parties

[20] The defendants argue that the actions should be ordered to be tried together or one after the other as the issues in the actions are clearly connected. Both actions raise the question as to whether there was bad faith conduct by the insurers through the alleged joint handling of Ms. Carroll's personal injury action.

[21] The plaintiffs oppose the motion to have the matters heard together or one after the other, arguing that granting the relief sought by the defendants would be prejudicial to the plaintiffs in the McEwen Action as it would significantly delay the hearing of this action. Further, it is the plaintiffs' position that, while the underlying event that triggered these two actions is the same, the actions involve two separate insurance policies, issued by two separate companies, each of which owe duties of good faith to two separate groups of insureds.

Disposition

[22] For the reasons that follow, the defendants' motion is dismissed.

The Law

[23] Rule 6.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 sets out the statutory basis upon which two or more actions may be consolidated, heard at the same time or one immediately after the other. Rule 6.01 reads as follows:

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;
(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
(c) for any other reason an order ought to be made under this rule,

the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
(e) any of the proceedings be,
    (i) stayed until after the determination of any other of them, or
    (ii) asserted by way of counterclaim in any other of them.

[24] The court must first ascertain whether the moving party has satisfied one or more of the three "gateway" criteria set out in r. 6.01(1) before making an order consolidating the proceedings or having the proceedings tried together or one after the other.[1] Those criteria are:

(a) The proceedings have a question of law or fact in common;
(b) The relief claimed in the proceedings arises out of the same transaction or occurrence or series of transactions or occurrences; or
(c) For any other reason an order ought to be made under this rule.

[25] If the moving party has satisfied one of more of the "gateway" criteria, the jurisprudence under r. 6.01(1) has provided a non-exhaustive list of possible factors that a court may consider when deciding whether to grant a motion under this rule, including:

(a) the extent to which the issues in each action are interwoven;
(b) whether the same damages are sought in both actions, in whole or in part;
(c) whether damages overlap and whether a global assessment of damages is required;

[1] *1014864 Ontario Limited v. 1721789 Ontario Inc*., 2010 ONSC 3306, at para. 17 [*1014864 Ontario*].

(d) whether there is expected to be a significant overlap of evidence or of witnesses among the various action;
(e) whether the parties are the same;
(f) whether the lawyers are the same;
(g) whether there is a risk of inconsistent findings or judgment if the actions are not joined;
(h) whether the issues in one action are relatively straight forward compared to the complexity of the other actions;
(i) whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues for the other actions or significantly increase the likelihood of settlement;
(j) the litigation status of each action;
(k) whether there is a jury notice in one or more but not all of the actions;
(l) whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advance action;
(m) the timing of the motion and the possibility of delay;
(n) whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together;
(o) any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together;
(p) whether trial together of all of the actions would result in undue procedural complexities that cannot be easily dealt with by the trial judge;
(q) whether the motion is brought on consent or over the objection of one or more parties.[2]

[26] The court's power under r. 6.01(1) is entirely discretionary and confers discretion upon the court to order the various relief, including trial together, or not.[2]

[2] *1014864 Ontario*, at para. 18.
[2] *Confederation Place Hotel v. Dominion of Canada General Insurance Company*, 2014 ONSC 1454, at para. 10.

[27] Rule 6 is interpreted and applied having regard to s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which stresses that, "[a]s far as possible, multiplicity of legal proceedings shall be avoided." Fundamentally, the court must balance the competing interests of expediency along with convenience and possible prejudice to the parties.[3] As stated by Vermette J. in *Li v. Bank of Nova Scotia*,[4] "Whether there should be one proceeding or two 'turns on the particular facts of any case and the various litigation-related considerations attaching to any case.'"

Discussion and Analysis

[28] I accept that the gateway criteria defined in r. 6.01(1)(b) has been satisfied as both bad faith actions against entities of Aviva Canada arise from the defendants' handling of the personal injury action commenced by Ms. Carroll.

[29] The defendants argue that the following factors favour the granting of an order pursuant to r. 6.01:

(i) The two actions are interwoven and there is a significant overlap of the factual and legal issues to be addressed and resolved in each action; the court will have to decide whether Pilot and Traders colluded, as alleged, and, if so, whether this constitutes a breach of the duty of good faith.

(ii) The parties are similar. The plaintiffs in each of the actions include the Estate of Ms. Carroll. The defendants are all Aviva Canada entities.

(iii) The plaintiffs are represented by the same lawyer.

(iv) The actions were commenced in the same jurisdiction.

(v) The issues in both actions are of similar complexity.

(vi) Ms. Carroll has passed away, which militates against any need to urgently proceed to trial.

(vii) The service of the jury notice in the Carroll action and not in the McEwen Action should not be a barrier to the actions being ordered to be tried together. It is not necessary that this determination be made now.

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[3] *Gandara v. Aviva Canada Inc.*, 2023 ONSC 2006, at para. 21.
[4] 2023 ONSC 4235, at para. 63, citing *CN. v. Holmes*, 2011 ONSC 4837, at para. 2.

(viii) Although the actions are not at the same stage, a slight delay in the actions proceeding to trial should not be a reason to delay the relief sought.

[30] With respect to the defendant's argument that the actions are interwoven, the plaintiffs state that the claims being advanced and arising from the MVA Action are distinct and involve different considerations and the application of different principles of law. In particular, the Carroll Action involves allegations against a first party insurer for failing to negotiate with its own insured in good faith in resolution of a claim under the OPCF-44R endorsement coverage. In the McEwen Action, however, the plaintiffs argue that their insurer failed to act in good faith in exposing them to an above limits judgment when it had ample opportunity to settle the case within policy limits. The plaintiffs submit that a finding in favour of the plaintiffs in the McEwen Action does not necessarily result in a finding in favour of the plaintiffs in the Carroll Action, and vice versa. Based on the record, I am satisfied that the issues in the actions are sufficiently discrete so that the actions can proceed separately.

[31] In my view, a significant factor that militates against the granting of the relief sought by the defendants is that of delay, which is not fully addressed by the defendants.

[32] To begin with, there has been a serious delay on the part of the defendants to bring this motion, without explanation. The defendants have been aware of the existence of these two actions for several years and have done nothing until now, shortly before the trial in the McEwen Action is to proceed, to bring this motion to have these actions tried together. In my view, the defendants' delay in bringing this motion is unacceptable and prejudicial to the plaintiffs as the order sought would delay the McEwen Action trial significantly as outlined below.

[33] The defendants' submission that that there is no urgency to proceed to trial in the McEwen Action because Ms. Carroll has passed away is not persuasive. Although the Carrolls are plaintiffs in both actions, they are plaintiffs in different capacities. The Carrolls in the McEwen Action stand in the shoes of the Trustee in Bankruptcy for the McEwens. The fact that Ms. Carroll has passed away is not relevant to the McEwen Action. Moreover, the defendants' submission that there is no urgency for an action commenced in 2017 to proceed to trial is problematic.

[34] The fact that the actions are not at the same stage is significant. The McEwen Action is scheduled for trial in April 2025, whereas the Carroll Action remains at the pleadings stage, with several interlocutory and procedural steps that remain outstanding.

[35] Granting the order sought by the defendants would delay the McEwen Action until such time as the Carroll Action is set to proceed to trial. The defendants' contention that there would be "a slight delay in the actions proceeding to trial" if the matters were to be heard together is understated. Rather, based on the record before me, it is not likely that the Carroll Action will be ready to be set down for trial before 2026. Once set down, it would probably take another two years before the actions are heard. Accordingly, the McEwan Action would likely be delayed by three years.

[36] Seven years have already elapsed since the commencement of the McEwen Action. In my opinion, such a delay would be significant and prejudicial to the plaintiff in the McEwen Action and is a sufficient basis to decline to make the order sought. As held by the Court of Appeal for Ontario in *Louis v. Poitras*,[5] "real and substantial prejudice arises simply by reason of delay."

[37] Moreover, in my view, a decision in the McEwen Action, if kept separate and tried first, may very well put an end to the Carroll Action or significantly increase the likelihood of settlement.

[38] Finally, I question why the defendants in the McEwan Action consent to the relief sought and support a motion to delay the hearing of its own action by at least three years, particularly when a fixed date for the trial, to which the defendants consented, has been set for April 2025.

[39] My concern relating to the delay in the advancement of the McEwen Action was addressed at a case conference before me on April 1, 2022. At the time, the defendant wished to schedule a motion for summary judgment after an unsuccessful and lengthy attempt to appeal the Order of Kershman J. assigning the rights of action belonging to the Trustee in Bankruptcy of Caroline and Robert McEwen. I denied the defendant's request to bring a motion for summary judgment and stated:

> In my view, allowing the defendant to bring a motion for summary judgement at this time, will slow down the proceedings and would not

[5] 2021 ONCA 49, 456 D.L.R. (4th) 164, at para. 22.

> achieve the goal of determining the matter in a just and expedited manner. As mentioned above, it is almost five years since this action was commenced and it has been delayed because of the interlocutory motions brought by the defendant. Based on the history of this proceeding, it is doubtful that the matter would end with a decision on a motion for summary judgment.

[40] As stated by Koehnen J. in *Think Research Corporation v. N & M Medical Enterprises*,[6] "As noted in *Miller,* delay begets delay. If a litigant knows that it can delay litigation by between 14 and 20 months simply by bringing a motion or by insisting on a full-blown application process, it will often have an interest in doing so" (footnote omitted).

Conclusion

[41] For the foregoing reasons, and in exercising my discretion under r. 6.01, the defendants' motion for an order to have the actions CV-15-00065711-0000 and CV-17-00073740-0000 heard at the same time or one immediately after the other is dismissed.

[42] The plaintiff is awarded her costs of this motion which I fix in the sum of $8,500 inclusive of HST and disbursements.

Date: November 1, 2024

Marie T. Fortier

Associate Justice M. Fortier

[6] 2023 ONSC 6910, at para. 21.