COURT OF APPEAL FOR ONTARIO

CITATION: Markel Insurance Company of Canada v. ING Insurance Company of Canada, 2012 ONCA 218
DATE: 20120405
DOCKET: C54554 and C54601

Goudge, Sharpe and Blair JJ.A.

DOCKET: C54601

BETWEEN

Markel Insurance Company of Canada

Applicant (Respondent in Appeal)

and

ING Insurance Company of Canada

Respondent (Appellant)

DOCKET: C54554

AND BETWEEN

Federation Insurance Company of Canada

Applicant (Appellant)

and

Kingsway General Insurance Company

Respondent (Respondent in Appeal)

Joseph Lin and Alex Dirlis, for ING Insurance Company of Canada

Pamela A. Brownlee, for Markel Insurance Company of Canada

Daniel Strigberger, for Federation Insurance Company of Canada

Frank A. Benedetto, for Kingsway General Insurance Company

Heard: March 15, 2012

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated July 12, 2011.

Sharpe J.A.:

[1] On these appeals, we are asked to determine when the limitation period begins to run for a "loss transfer claim" made by one insurer against another for indemnification for statutory accident benefits ("SABs") paid to an insured. Loss transfer claims, brought pursuant to s. 275 of the *Insurance Act*, R.S.O. 1990, c I.8, are fault-based claims available as between insurers for different classes of vehicles as defined by regulation.

[2] In *Federation v. Kingsway*, the arbitrator held that the limitation period begins to run the day after the insurer seeking indemnification makes a demand for loss transfer. In *ING v. Markel*, the arbitrator found that the limitation period runs only from the date the second insurer definitively refuses to indemnify. The Superior Court Judge, sitting on appeal from both arbitral decisions, upheld the approach of the arbitrator in *Federation v. Kingsway* and rejected that of the arbitrator in *ING v. Markel.*

[3] For the following reasons, I would dismiss the appeals.

FACTS

Federation v. Kingsway

[4] On January 24, 2002, a car driven by Pierette Veillette and insured by Federation was involved in a collision with a tractor trailer insured by Kingsway. Veillette applied for, and began receiving, statutory accident benefits from Federation. Federation asked Kingsway (now known as Jevco) for loss transfer, and received payments from Kingsway for some of its loss transfer requests. However, Kingsway either partially paid or did not pay five of Federation's requests submitted between April 2004 and May 2006. On November 5, 2008, Federation initiated arbitration proceedings against Kingsway. Kingsway resisted the claims on the ground that they were barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

Markel v. ING

[5] On October 10, 2005, a vehicle driven by Kenneth Locey and insured by ING was involved in a collision with a tractor trailer insured by Markel. Locey applied for, and received, statutory accident benefits from his insurer, ING. Beginning on April 27, 2006, ING made a series of requests for loss transfer from Markel. Markel was apparently initially non-committal, and then refused to pay. ING delivered a Notice of Submission to Arbitrate on September 19, 2008. Markel resisted the claims at arbitration, arguing that they were barred by the *Limitations Act, 2002*.

LEGISLATION

The Insurance Act and the Loss Transfer Scheme

[6] Under s. 268 the *Insurance Act*, insurance companies, known for these purposes as “first party insurers”, must pay SABs to their insureds when the insureds are injured in a motor vehicle accident. In certain circumstances, defined by regulation, s. 275 allows a first party insurer to claim indemnification for the SABs paid to its insured from a “second party insurer” that has insured another vehicle involved in the accident. The claim for indemnification is made on the basis of the fault of the second party insurer’s insured. This fault-based loss-transfer obligation arises under the regulations when, *inter alia*, the accident involved a heavy commercial vehicle, insured by the second party insurer. The loss transfer scheme was introduced as part of the no-fault SAB regime to achieve an appropriate balance between the insurers of various classes of vehicles in meeting the cost of providing SABs to injured motorists.

[7] The Financial Services Commission of Ontario (“FSCO”), the body that regulates automobile insurance in Ontario, has issued standardized forms and procedures for loss transfer claims: Financial Services Commission of Ontario, Bulletin, Loss Transfer: Standardized Forms and Procedures, online: <http://www.fsco.gov.on.ca/en/auto/autobulletins/archives/Pages/a-11_94.aspx>. The FSCO bulletin states that the first party insurer should notify the second party

insurer “promptly” and a standard Notification of Loss Transfer form is provided. The FSCO bulletin states that once the Notification has been given, “the insurers should discuss how the loss transfer process should operate with respect to that claim”.

[8] The FSCO bulletin also provides a form for a Request for Indemnification which provides full details of the SAB payments and of the extent of the first party insurer’s claim. The Request for Indemnification includes a signed declaration from a representative of the first party insurer certifying that the amounts claimed are allowable under the loss transfer scheme. The Request for Indemnification represents a formal, certified demand for payment by the first party insurer. The FSCO bulletin states that the information it provides “should be sufficient in most cases” and that ordinarily the second party insurer is not entitled to a complete copy of the accident benefit file.

[9] With respect to when payments by second party insurers are due, paragraph 9 of the FSCO bulletin states:

> The legislation does not directly address when payments by second party insurers are due or the consequences of slow payment. It was expected that insurers would act in a business-like manner and pay each request for indemnification promptly.
>
> A loss transfer arbitration award addressed the issue (Jevco Insurance Company and Royal Insurance Company). Although the arbitration award is not binding on other parties, it is persuasive. The arbitration decision

> recognized the power of an arbitrator to award interest in respect of an arbitration proceeding. The Arbitrator was of the opinion that interest begins to run in relation to loss transfer from the time that a request for indemnification is made.

[10] Where the two insurers cannot agree on a loss transfer claim, s. 275(4) provides for arbitration proceedings:

> If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

Limitations Act, 2002

[11] Under the *Limitations Act, 1990*, R.S.O. 1990, c. L.15, the six-year limitations period for seeking loss transfer began each time a first party insurer made a statutory accident payment to its insured for which it could be entitled to loss transfer: *State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co.* (2005), 79 O.R. (3d) 78. (C.A.). However, the *Limitations Act*, 2002 has made fundamental changes. It is common ground on these appeals that the *Limitations Act, 2002* applies to loss transfer claims and under the new legislation, the limitation period does not run from the date the SAB payments are made.

[12] The *Limitations Act*, 2002, s. 4 prescribes a limitation period of two years from the date a claim is discovered unless some other period is specifically prescribed. A

"claim" is defined in s. 1 as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".

[13] All parties agree that the limitation period for loss-transfer claims is two years and that the date the two-year limitation period starts to run on the day the claim was "discovered" by the first party insurer, a question to be determined under s. 5 of the 2002 Act:

> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

DECISIONS UNDER APPEAL

Federation v. Kingsway

[14] The arbitrator concluded that under the Limitations Act, 2002, the two-year limitation period applies to loss-transfer claims and that the two-year period begins

the day after the first party insurer makes a loss-transfer request. He therefore dismissed Federaration's claims for indemnification as statute-barred.

[15] The arbitrator found that a claim for indemnity is a claim to remedy a "loss" under s. 1 and that a loss is sustained each time a Request for Indemnification is submitted. The arbitrator reasoned that a first party insurer could not discover that it had suffered a loss due to the second party insurer's omission, or that arbitration was appropriate, until it had requested indemnification. He concluded, however, that the limitation period begins the day after the first party insurer requests loss transfer, rather than when the second party insurer denies it. He reasoned that as soon as the request is made, the second party insurer has immediately made an "omission" by not paying the claim. Moreover, he concluded that this interpretation balances the first party insurer's right to seek indemnification with the second party insurer's need for certainty.

[16] Finally, the arbitrator followed the reasoning of *State Farm Mutual Automobile Insurance Co.* in concluding that the two year limitation period is a "rolling period": because the first party insurer sustains a loss each time it submits a Request for Indemnification to a second party insurer, a separate limitations period applies to each loss transfer claim. As more than two years had elapsed before arbitration proceedings were initiated for each of the five requests for indemnification, the arbitrator ruled that they were barred by the *Limitations Act, 2002*.

ING v. Markel

[17] The arbitrator refused to follow the decision in the *Federation v. Kingsway* arbitration. He concluded that the limitation period commences only when the second party insurer denies a loss-transfer request. The arbitrator interpreted the requirement of *Limitations Act, 2002*, s. 5(1)(a)(iv) that a claimant know that "a proceeding would be an appropriate means" in the light of s. 275(4) of the *Insurance Act*, providing that "if the insurers are unable to agree", the dispute is to be resolved by arbitration. He reasoned that whether arbitration is "appropriate" had to be determined on the basis of the tenor of the communications between the parties. He considered the course of dealing between the two insurers and concluded that they had not failed to agree on ING's requests for indemnification more than two years before the initiation of arbitration. He concluded, accordingly, that the claims advanced by ING against Markel were not statute-barred.

The Superior Court

[18] On appeal, the Superior Court judge observed that while there was much to be said in favour of both arbitral decisions, he endorsed conclusion reached in *Federation v. Kingsway* that loss-transfer claims are subject to a limitation period that commences "one day after the receipt of the loss transfer request".

ISSUE

[19] When does the first party insurer “discover” a claim loss transfer claim against the second party insurer within the meaning of s. 5 of the Limitations Act, 2002?

ANALYSIS

[20] The parties agree that the *Limitations Act, 2002* applies to loss-transfer claims. The Act precludes legal proceedings to pursue a legal right more that two years after the claim to the legal right was “discovered”. This replaces the earlier legislation which, as a general rule, precluded legal steps initiated more than six years after the “cause of action arose”.

[21] For ease of reference, I repeat here the four requirements specified in *Limitations Act, 2002*, s. 5(1)(a) defining when a claim is discovered. The party asserting the claim must know:

> (iv) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;

[22] I would observe at the outset that there is a certain element of artificiality in use of the word “discovered” in the context of these cases. A first party insurer will be fully aware of the claim for loss transfer well before it can be said that he or she

has *"discovered"* the claim within the meaning of s. 5(1). That said, it is clear that the limitation period must be determined by interpreting "discovered" as defined by the Act.

[23] The contentious issues arise under subparagraphs (ii), (iii) and (iv). I turn first to subparagraphs (ii) and (iii) which, in the present context, pose this question: when does the first party insurer know that there is a loss "caused" by an "omission" of the second party insurer?

[24] Items (ii) and (iii) require that the second party insurer must have done or omitted to do something that can be said to have caused a loss. The second party insurer cannot be said to have omitted to indemnify if there was no request for indemnification. It follows that items (ii) and (iii) cannot be satisfied until the first party insurer has asserted the loss transfer claim against the second party insurer to trigger a legally enforceable claim or obligation.

[25] Once the loss transfer claim has been asserted, when does the first party insurer know that second party insurer's "omission" to pay the claim caused a loss to the first party insurer?

[26] Once a legally valid (i.e., apart from any issue as to limitations) claim is asserted by the first party insurer's Request for Indemnification, the second party insurer is under a legal obligation to satisfy it. All the facts are present to trigger the legal obligation of the part of the second party insurer to indemnify the first party

insurer for the loss. The situation has crystallized into complete and valid legal claim that is immediately enforceable against the second party insurer. There is nothing more that must happen to create the legal obligation of the second party insurer to pay the claim.

[27] In my view, it must follow that the first party insurer suffers a loss from the moment the second party insurer can be said to have failed to satisfy its legal obligation to satisfy the loss transfer claim. I agree with the arbitrator in *Federation v. Kingsway* that the first party insurer suffers a loss caused by the second party insurer's omission in failing to satisfy the claim the day after the Request for Indemnification is made.

[28] I cannot agree with the proposition that no loss is suffered until the second party insurer unequivocally denies the claim. That argument ignores the fact that once a valid request is made, the first party insurer is legally entitled to be indemnified and therefore suffers a loss each day it is out of pocket for the SABS paid to its insured. I note here that this conclusion is supported by the passage I have quoted at para. 9 from the FSCO bulletin for loss-transfer claims stating that loss-transfer claims are to be paid "promptly" upon receipt of a Request for Indemnification and that the relevant arbitral jurisprudence holds that where a first party insurer is successful in establishing a loss transfer claim, interest is payable from the date the claim was asserted.

[29] I now turn to subparagraph (iv): when would it be “appropriate” to bring a proceeding to remedy the loss? This requires me also to consider s. 275(4) of the *Insurance Act*, providing that “[i]f the insurers are unable to agree…the dispute shall be resolved through arbitration…”

[30] I do not accept that the effect of s. 275(4) is to establish that a failure to agree is a condition precedent to the commencement of arbitral proceedings. In my view, s. 275(4) does nothing more that stipulate that any disputes that cannot be otherwise resolved by the parties are to be resolved by arbitration rather than by litigation. Section 275(4) says: if you cannot agree, your claim is to be resolved by arbitration. It does not say: you must be able to demonstrate a failure to agree or a clear denial of your claim by the other insurer in order to commence an arbitration.

[31] I accept that the loss-transfer regime assumes that virtually all claims can and should be resolved by agreement. I accept as well that as a practical matter, insurers should be encouraged to discuss and negotiate claims. Moreover, as a practical matter, no insurer would proceed with arbitration unless it was apparent that an acceptable agreement could not be reached by negotiation. But that does not mean that as a matter of law, an insurer must be able to demonstrate a failure to agree or clear denial of the claim by the other insurer as a condition precedent to commencing a proceeding to enforce a claim for indemnification.

[32] In support of the condition precedent interpretation, we were referred to *York Fire & Casualty Insurance Co. v. Co-operators*, [1999] O.J. No. 4172 (S.C.) at para. 19 where Somers J. stated:

> I regard sub-section 4 of section 275 of the *Insurance Act* as a condition precedent to an arbitration actually being commenced. The right of the insurer to an arbitration to determine the amount of loss transfer payments does not arise until there has been disagreement between it and the third party insurers. The right to reimbursement, however, arises immediately upon payment by it to its insured.

[33] The statement that s. 275(4) makes disagreement a condition precedent is at best *obiter* and, in my respectful opinion, inconsistent with the result reached. The case held that under the *Limitations Act, 1990* the limitation period began to run from the date of payment of the SAB benefits to the insured. I find it difficult to see how the limitation period could start to run before the claimant would be entitled to initiate the proceedings mandated by law to enforce the claim. Accordingly, I do not consider this decision to stand as authority for the proposition that a demonstrated disagreement is a condition precedent to the commencement of arbitration.

[34] This brings me to the question of when it would be “appropriate” to bring a proceeding within the meaning of s. 5(1)(a)(iv) of the *Limitations Act*. Here as well, I fully accept that parties should be discouraged from rushing to litigation or arbitration and encouraged to discuss and negotiate claims. In my view, when s. 5(1)(a)(iv) states that a claim is “discovered” only when “having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek

to remedy it", the word "appropriate" must mean *legally appropriate*. To give "appropriate" an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess to tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions.

[35] In my view, the decision of this court in *Hare v. Hare* (2006), 83 O.R. (3d) 766 is of limited assistance in deciding the present appeals. The issue posed in that case was whether the limitation period runs on a claim based on a demand promissory note from the date the note is delivered or from the date of the demand. Gillese J.A., for the majority, held that the *Limitations Act*, 2002 did not alter the well-established rule under the prior legislation that the limitation period runs from the date of delivery. Juriansz J.A., dissenting, held that the 2002 Act changed that law such that the limitation period only runs from the date a demand is made. The legislature subsequently amended the 2002 Act by adding s. 5(3), explicitly providing that "the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made".

[36] The conflicting views of the majority and dissent in *Hare v. Hare* do not assist us here as it is common ground that the earliest time the limitation period can start

to run is the date the first party insurer demands indemnification from the second-party insurer. I would point out, however, that although we are not dealing with a "demand obligation" within the meaning of s. 5(3), we are dealing with an obligation that is triggered by a demand and that the interpretation I suggest is consistent with that imposed by the legislature for demand obligations.

DISPOSITION

[37] I conclude, accordingly, that the appeals should be dismissed. The parties have agreed that this is not a case for costs.

"Robert J. Sharpe J.A."
"I agree S.T. Goudge J.A."
"I agree R.A. Blair J.A."

Released: April 05, 2012