COURT OF APPEAL FOR ONTARIO

CITATION: Lin v. Weng, 2022 ONCA 367
DATE: 20220509
DOCKET: C68921

Feldman, van Rensburg and Coroza JJ.A.

BETWEEN

Jian Lin

Plaintiff (Appellant)

and

Qi An Weng, Xiuqin Weng, Aviva General Insurance Company, and RBC General Insurance Company

Defendants (Respondents)

Paul H. Starkman and Calvin Zhang, for the appellant

Frank Csathy, for the respondents

Heard: November 1, 2021 by video conference

On appeal from the order of Justice Andrew Pinto of the Superior Court of Justice, dated December 1, 2020, with reasons reported at 2020 ONSC 7137, 9 C.C.L.I. (6th) 224.

Feldman J.A.:

[1] The appellant's tenants burned down his property on the last day of their tenancy. They caused a fire and explosion in the basement by using a butane lighter, a stove, and propane gas to extract marijuana resin. The appellant had asked the tenants to leave on account of the non-payment of rent, expected them to move out that day, and did not know they were doing anything in the basement.

[2] At the time of the fire, the appellant had a home insurance policy with Aviva General Insurance Company, a respondent on this appeal. Aviva denied coverage based on two exclusion clauses in the policy: a marijuana production exclusion clause and an illegal activity exclusion clause.

[3] After the fire and while the appellant's claim was outstanding, the legislature amended the *Insurance Act*, R.S.O. 1990, c. I.8, by adding a provision that limits the application of criminal and intentional activity exclusion clauses to the claim of a person who caused the loss or who knew about or consented to the activity that caused the loss.

[4] The key issues on the appeal are the extent and timing of the application of the amendment to the marijuana exclusion clause in the policy.[1]

[5] For the reasons that follow, I would dismiss the appeal.

Facts

[6] The appellant purchased the property, a home, on December 12, 2014, with a mortgage to CIBC. He insured it with the respondent, RBC General Insurance Company, later succeeded by the respondent Aviva. Qi An and Xiuqin Weng rented the master bedroom from the appellant in mid-2015. The Wengs shared the kitchen, used the main floor washroom, and stored some personal belongings in

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[1] On the motion below and on this appeal, Aviva relied only on the marijuana exclusion clause. The respondents have confirmed that the applicability of the illegal activity exclusion clause is not at issue.

the basement. They were not permitted to use the basement for any other purpose. By December 2015, the Wengs had defaulted on their rent. In February 2016, the appellant asked them to move out. They were scheduled to move out on March 15, 2016.

[7] On March 15, while the appellant was at work, the Wengs caused an explosion by attempting to extract resin from marijuana, using a butane lighter, a stove, and propane gas, in the basement of the house. The explosion destroyed the house.

[8] Charges were laid against the Wengs and the appellant. The Wengs eventually pleaded guilty, but the charges against the appellant were withdrawn, as he had no knowledge of the Wengs' activity.

[9] Aviva denied coverage for the loss based on the following two exclusion clauses in the policy:

> We do not insure:
>
> …
>
> 21. Your criminal acts, your intentional acts, your wilful acts, your failure to act, or the criminal acts, intentional acts, wilful acts or failure to act by any person under your direction. This exclusion applies to all persons insured under this Policy even though the criminal act, or intentional act, or wilful act, or failure to act is by only one or more of the other persons insured under this Policy;
>
> …

> 28. Growing, cultivation, harvesting, processing, manufacturing, distribution, storage or sale of marijuana or any product derived from or containing marijuana or any other drug, narcotic or illegal substance falling within the Schedules of the Controlled Drugs and Substances Act. This includes loss or damage to buildings or structures or Personal Property contained in them, used in whole or in part, including any alteration to the premises to facilitate such activity whether or not the insured is aware of such activity or use of the property. [Emphasis omitted.]

[10] Given that Aviva had denied coverage, the appellant commenced this action on March 9, 2018. Aviva and RBC filed a joint statement of defence.

[11] On April 30, 2018, the newly-enacted s. 129.1 of the *Insurance Act* came into force. Section 129.1 provides:

> **Recovery by innocent persons**
>
> **129.1** (1) if a contract contains a term or condition excluding coverage for loss or damage to property caused by a criminal or intentional act or omission of an insured or any other person, the exclusion applies only to the claim of a person,
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> (a) whose act or omission caused the loss or damage;
>
> (b) who abetted or colluded in the act or omission;
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> (c) who,
>
> (i) consented to the act or omission, and
>
> (ii) who knew or ought to have known that the act or omission would cause the loss or damage; or
>
> (d) who is in a class prescribed by the regulations.

[12] The appellant amended his statement of claim on June 10, 2019 to plead and rely on s. 129.1. Aviva and RBC did not deliver an amended statement of defence in response.

[13] CIBC sold the property under power of sale in January 2018 and was reimbursed for the deficiency under the mortgage by Aviva.

Findings on Summary Judgment

[14] The motion judge awarded summary judgment to the respondents. He found that: 1) the respondents were entitled to deny the applicability of s. 129.1 to the appellant's claim, even though they had not filed an amended statement of defence to address the s. 129.1 issue; 2) s. 129.1 does not apply retrospectively to insurance policies entered into before the date of its enactment; and 3) s. 129.1 does not apply to the marijuana exclusion clause.

Issues on the Appeal

[15] The appellant raises three issues on the appeal:

1) Did the motion judge err in law by allowing the respondents to rely on a legal issue that they did not plead?

2) Did the motion judge err in law by finding that s. 129.1 does not apply retrospectively to a claim under the policy for a loss that occurred before the enactment of s. 129.1?

3) Did the motion judge err in law by finding that s. 129.1 does not affect or apply to the marijuana exclusion clause?

[16] If the appellant does not succeed on the first issue, he must succeed on both issues two and three in order to succeed on the appeal, i.e., the amendment must apply to a loss that occurred prior to the enactment of s. 129.1, and it must apply to the marijuana exclusion clause. In my view, the appropriate way to approach the second and third issues is to address the temporal application issue first. If the amendment does not apply to the appellant's claim because the loss occurred before s. 129.1 came into force, then the third issue does not arise, and the appeal must be dismissed.

Analysis

Standard of Review

[17] The application of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, involves a question of mixed fact and law, which attracts a deferential standard of review, subject to an extricable legal error: see, e.g., *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 81-82, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[18] The interpretation of legislation and standard form insurance policies, where there is no unique factual matrix and interpretation is of precedential value, are reviewed on a standard of correctness: *Daley v. Economical Mutual Insurance Company* (2005), 206 O.A.C. 33 (C.A.); *Ledcor Construction Limited v.*

Northbridge Indemnity Insurance, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 4, 24 and 46.

1) **Did the motion judge err in law by allowing the respondents to rely on a legal issue that they did not plead?**

[19] The appellant relies on r. 26.05(2) of the *Rules,* which provides:

> **26.05** (2) A party who has responded to a pleading that is subsequently amended and does not respond to the amended pleading within the prescribed time shall be deemed to rely on the party's original pleading in answer to the amended pleading.

[20] Although the respondents did not deliver an amended statement of defence to respond to the appellant's reliance on s. 129.1 in his amended statement of claim, they sought to raise three responses on the summary judgment motion:

a) s. 129.1 does not apply to the marijuana exclusion clause, which excludes marijuana-related use of the property, regardless of conduct;

b) s. 129.1 does not apply retrospectively; and

c) s. 129.1 was only intended to apply to an innocent co-insured of the co-insured who committed the criminal act.

[21] The motion judge rejected the appellant's argument that r. 26.05(2) limited the respondents to the defences specifically raised in their statement of defence. He also rejected the appellant's argument that this court's decision in *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), precluded the respondents from raising a new issue on the motion. He thus concluded that the respondents could advance their submissions based on s. 129.1.

[22] He gave three reasons for that decision. First, para. 22 of the respondents' statement of defence pleads and relies on the *Insurance Act* as amended, which is what occurred here. Second, the appellant raised legal issues regarding the amendment and its application in the summary judgment motion, which the respondents had to respond to. Third, there was no unfair surprise as the appellant was clearly relying on the amendment, and the factums on the motion fully canvassed the issues raised by s. 129.1.

[23] I see no basis to interfere with the motion judge's decision on this issue. This is a procedural matter where the motion judge determined the fair and appropriate application of the *Rules* and case law to the circumstances of the motion before him. The motion judge was best positioned to interpret the pleadings and to determine the extent to which the appellant was faced with any "new issues". I would not give effect to this ground of appeal.

2) Did the motion judge err in law by finding that s. 129.1 does not apply to a claim under the policy for a loss that occurred before the enactment of s. 129.1?

[24] The motion judge addressed the issue of the application of s. 129.1 on the basis that the appellant was seeking a "retrospective" application of the amendment. He found, applying the rules of interpretation of legislation that apply to the issue of retrospectivity, that the amendment does not apply retrospectively to the appellant's claim.

[25] Before considering whether the motion judge was correct in his conclusion about the temporal application of s. 129.1, it is important to clarify the distinction between the terms “retrospective” and “retroactive” and what exactly is at issue in this case.

[26] In a nutshell, a retroactive law is one that applies a new law to an event that happened in the past and to which the old law applied before the new law was enacted: see Elmer A. Driedger, “Statutes: Retroactive Retrospective Reflections” (1978), 56 Can. Bar. Rev. 264, at pp. 268-269; Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007), at p. 254.

[27] In contrast, a retrospective law is one that has an effect for the future on a set of facts that occurred in the past: Driedger, at pp. 268-69; Sullivan 2007, at p. 254. As an example, the amendment in s. 129.1 clearly applies prospectively to events that cause losses in the future under new insurance policies entered into after the date of the amendment. However, for a court to find that the amendment has retrospective effect, it would apply to existing insurance policies entered into before the amendment, but for events that happen in the future.

[28] On the facts of this case, I do not need to resolve whether the legislature intended the amendment to apply only prospectively, that is to future events under policies entered into after the amendment came into force, or also to apply retrospectively to future events under existing insurance policies. In this case,

while the insured has used the term “retrospective”, and the motion judge analyzed the issue on that basis, the insured is asking the court to apply the amendment to an existing policy in respect of an event that occurred before the amendment came into force, i.e., to apply it retroactively. Therefore, although the decision under appeal addresses the issue on the basis of the presumption against retrospectivity, and rebuttal of that presumption, the legal issue on the appeal is whether the amendment applies retroactively to the appellant’s claim.

[29] I turn, then, to the rules governing whether legislation has retroactive effect. In interpreting legislation, there is a strong presumption that the legislature does not intend its law to apply retroactively. Indeed, the presumption against retroactivity is more difficult to rebut than the presumption against retrospectivity: Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Scarborough: Carswell, 2011), at pp. 143-44. Normally, where the legislature intends a law to apply retroactively, it will say so either within the formulation of the law, or by having it take effect as of a date in the past. The question for the court is to discern the intention of the legislature: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014), at paras. 25.51-25.53.

[30] I set out the amendment again here for ease of reference:

> **129.1** (1) If a contract contains a term or condition excluding coverage for loss or damage to property

> caused by a criminal or intentional act or omission of an insured or any other person, the exclusion applies only to the claim of a person,
>
> (a) whose act or omission caused the loss or damage;
>
> (b) who abetted or colluded in the act or omission;
>
> (c) who,
>
> (i) consented to the act or omission, and
>
> (ii) knew or ought to have known that the act or omission would cause the loss or damage; or
>
> (d) who is in a class prescribed by the regulations.

[31] In this case, the amendment does not state that it will apply to claims for losses that have already occurred under existing policies, nor did it come into force as of a date in the past. Therefore, the court must answer the following question: is there any other indication, including in the wording of the amendment, that it was the intent of the legislature that s. 129.1 would apply to existing insurance policies for claims arising from losses that occurred before the amendment came into force?

[32] The appellant points to what he says are two indications of Parliament's intent regarding the temporal application of the amendment. While these two submissions both relate to a request to find retrospectivity, I am addressing them in the context of retroactivity, as that is the correct legal characterization at issue before the court.

[33] First, the appellant submits that because the amendment affects a “claim” by an insured person that remains outstanding at the date of the amendment, the amendment applies in the present, and not retroactively. In such a case, the claim is ongoing until the insurer pays it or successfully contests its obligation to pay. In other words, the appellant argues that “claim” is akin to a characteristic or status, rather than an event that is fixed in time, relying on Driedger, at p. 267: “a statute cannot be said to be retrospective if it is brought into operation by a characteristic or status that arose before it was enacted… it is retrospective if it is brought into operation by a prior event described in the statute.”

[34] The motion judge rejected this submission because the effect of that interpretation would be to remove Aviva’s vested right, “which is not permitted.” I do not agree with this reasoning. If the court were satisfied that the intent of the legislature in using the word “claim” was to have the legislation apply to outstanding claims on the date of the amendment, and not be retroactive or retrospective, then the court would give effect to that intention. The question is whether the word “claim” has the meaning contended for by the appellant.

[35] There is no definition of the word “claim” in the *Insurance Act*. The word is used in a number of provisions of the *Act*. Some refer to a claim that is made against an insured by a third party for loss or damage. Some refer to a claim made by an insured against the insurer for indemnity for loss or damage for which the insured is liable to a third party. Others refer to a claim for loss or damage that the

insured has suffered. Section 129.1 is an example of the latter: a claim by the insured for indemnity for loss or damage that the insured has suffered.

[36] An insured who suffers a loss that is covered by the policy is entitled to be indemnified for that loss. That entitlement is referred to as a claim. The first definition of “adjuster” in s. 1 of the *Act* demonstrates that meaning: “‘adjuster’ means a person who, (a) on behalf of an insurer or an insured, for compensation, directly or indirectly solicits the right to negotiate the settlement of or investigate a loss or claim under a contract or a fidelity, surety or guaranty bond issued by an insurer, or investigates, adjusts or settles any such loss or claim” (emphasis added).

[37] In my view, the insured’s claim for indemnity has the same meaning and therefore the same temporal component as the insured’s entitlement to indemnity. While it is true that the insured continues to have the claim and the entitlement until the insurer either pays or successfully refutes the obligation to indemnify, that situation is not dependent on the term “claim”. “Entitlement” and “loss” are synonymous with “claim” in the context of s. 129.1. They merely delineate the right to indemnity under the insurance contract which is affected by the amendment. They do not have a temporal meaning. The relevant point in time for the application of s. 129.1 is the date when the insured became entitled to indemnity from the insurer or had a claim for loss – that is, the date of the loss. When considering the temporal application of s. 129.1, a “claim” is an event, rather than a status.

[38] If the legislature had intended the amendment to apply to entitlements or claims for losses that had already occurred, but for which the insurer had not yet paid the indemnity, i.e., outstanding entitlements or claims, it would have used clear language to so state. It did not do so and therefore the presumption against retroactivity is not rebutted. The use of the term “claim” as opposed to “entitlement” or “loss” does not demonstrate clear legislative intent to apply the amendment to a past loss. All three would have the same meaning if used in s. 129.1.

[39] The appellant’s other submission is that the presumption against retrospectivity does not apply to statutes that confer a benefit. In making this argument, the appellant relies on a statement to that effect in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, at pp. 318-20. The motion judge rejected this submission. He was correct to do so.

[40] In *R. v. Bengy*, 2015 ONCA 397, 335 O.A.C. 268, this court considered *Brosseau*, pointing out that the statement regarding beneficial statutes was *obiter* in that case, and that the decision had not been referred to in subsequent Supreme Court cases: at paras. 52, 55. More recently, in *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, Côté J. stated that this exception “is only triggered where the design of the penalty itself signals that Parliament has weighed the benefits of retrospectivity against its potential for unfairness”: at para. 50.

[41] In any event, s. 129.1 is not beneficial in the sense used in *Brosseau*. In *Brosseau*, the amending legislation involved the powers of the Securities Commission to protect the public. In that sense, the legislation was beneficial to the public. In this case, the legislation affects the rights of two parties to a contract. It is beneficial to insureds but detrimental to insurers.

[42] To the extent that there may be a special rule for beneficial legislation involving governmental bodies and the public, any such rule is not applicable in the context of the contractual rights of insureds and insurers. In addition, if such a rule may apply in certain contexts when considering retrospectivity, there is no authority to extend the rule to rebut the stronger presumption against the retroactive application of statutes, which requires clear legislative intent.

Conclusion

[43] The appellant seeks to have s. 129.1 of the *Insurance Act* apply to amend an exclusion in an existing insurance policy in respect of a loss suffered before the date on which s. 129.1 came into force. The motion judge determined this would be a retrospective application of the amendment.

[44] As stated earlier in my reasons, I find that the appellant in this case is in fact seeking to apply s. 129.1 retroactively. The presumption against retroactivity is a strong presumption. There is no basis to find that the presumption against retroactivity is rebutted in respect of the application of s. 129.1.

[45] As a result of my conclusion on the issue of the temporal application of s. 129.1, I do not need to address the third issue, whether the motion judge erred in finding that s. 129.1 does not apply to the marijuana exclusion clause in the policy.

Result

[46] I would therefore dismiss the appeal, with costs in the agreed amount of $10,000 inclusive of disbursements and HST.

Released: May 09, 2022 “K.F”

“K. Feldman J.A.”
“I agree. K. van Rensburg J.A.”
“I agree. S. Coroza J.A.”