SINGLETON
LEGAL COUNSEL
URQUHART

Singleton Urquhart LLP
1200 – 925 West Georgia Street
Vancouver, BC V6C 3L2
T 604. 682 7474
F 604. 682 1283
su@singleton.com
www.singleton.com

Ian Jones

DON'T SHOOT THE MESSENGER: BAD FAITH CLAIMS, TORT LAW & THE LIABILITY OF THE INSURER'S EMPLOYEES

8 2008 Singleton Urquhart LLP

DON'T SHOOT THE MESSENGER: BAD FAITH CLAIMS, TORT LAW & THE LIABILITY OF THE INSURER'S EMPLOYEES

Ian Jones

TABLE OF CONTENTS

I. INTRODUCTION 3

II. EMPLOYEES' LIABILITY FOR BAD FAITH 3

III. EMPLOYEES' LIABILITY IN TORT 5

© 2008 Singleton Urquhart LLP

DON'T SHOOT THE MESSENGER: BAD FAITH CLAIMS, TORT LAW & THE LIABILITY OF THE INSURER'S EMPLOYEES

Ian Jones

I. Introduction

In recent years, Canadian insurers have observed a significant growth in the number of bad faith claims advanced, although few such claims have succeeded. In rare cases, claims have been made not only against the insurance company, but also against its employees. Personal claims of that nature, usually advanced for misguided strategic reasons, have no prospect of success except in the most unusual cases. Despite that fact, such claims are often very stressful for the named employees and must be defended.

II. Employees' Liability for Bad Faith

Insurance companies are corporations. Corporations cannot act but through their employees and agents. Insurance claims are handled and investigated by the insurer's employees and agents. If an insured can claim for bad faith in the handling of his or her insurance claim, then those same allegations of bad faith must also lie against the employees and agents who handled that claim.

That is the reasoning behind the cases that we occasionally see in which adjusters, investigators or other insurance company employees or agents find themselves as personal defendants in a claim alleging bad faith. That reasoning is also wrong.

Employees and agents of insurance companies cannot be held liable for a breach of the duty of good faith in insurance dealings. That is because only parties to a contract can be held liable for its breach and because the Supreme Court of Canada has recently described the duty of good faith and fair dealing in insurance as a "contractual duty".

Over the last decade, the lower courts in some other provinces (notably Ontario) have been inconsistent in their consideration of the nature of claims of bad faith as a contractual duty or a claim in tort. The significance being that, if a claim for bad faith were a claim in tort, employees could be held personally liable in law.

However, such a characterization of the duty of good faith as a duty in tort is inconsistent with the comments of the Supreme Court of Canada since 2002 – a sentiment recently confirmed by the B.C. Supreme Court.

© 2008 Singleton Urquhart LLP

In *Fidler v. Sun Life Assurance Co. of Canada*,[1] while discussing the situations in which a claim for punitive damages for bad faith is available, the Supreme Court of Canada stated:

> In *Whiten*, this Court set out the principles that govern the award of punitive damages and affirmed that in breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, it must be independently actionable. Where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement. The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit, but also the independent contractual obligation to deal with the respondent's claim in good faith.

This description of the duty of contractual good faith echoed the Court's earlier discussion in *Whiten v. Pilot Insurance Co.*[2] of the nature of the availability of punitive damages for bad faith following breach of an insurance contract. Previously, the Court had held that punitive damages were only available following a breach of contract where the defendant commits another "independent actionable wrong". Many people assumed that "independent actionable wrong had to be a tort as opposed to another claim under a contract.

In *Whiten*, Mr. Justice Cory discoursed for several paragraphs in an effort to emphasize that an independent actionable wrong could be a further breach of contract. He then stated that "a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an 'actionable wrong' … which does not require an independent tort."

Thus, it is clear that the Supreme Court of Canada considers the breach of the duty of good faith to be a "contractual duty". If one proceeds from that legal fact, then only a party to the contract from which that contractual duty arises can be held liable for the breach of that contractual duty. In the typical insurance relationship, the insured is only in a contractual bond with the insurer – the insurer's employees and agents have no contractual relationship with the insured. In that context, the employees/agents only contractual duties are to the insurer.

Recently, in September 2007, this reasoning was expressed by the B.C. Supreme Court in *Pearlman v. Manufacturer's Life Insurance Company*.[3] In that case, citing more recent case law from Ontario, Mr. Justice Williamson held that, where coverage is wrongfully terminated tat constitutes "a breach of the contract or a breach of the implied duty of good faith" and would not "warrant the extension of the responsibility … to the employees" since they "have no contractual relationship with the [insured]." Thus, it appears that courts are beginning to come to terms with the legal characterization of the duty of good faith as a contractual

---

[1] 2006 SCC 30, varying 2004 BCCA 273 [*Fidler*].

[2] [2002] 1 S.C.R. 595 [*Whiten*].

[3] 2007 BCSC 1440.

© 2008 Singleton Urquhart LLP

duty owed solely by the insurer as opposed to a duty falling within the realm of tort law and shared by insurers and their employees.

III. Employees' Liability in Tort

In *Walsh v. Nicholls*,[4] the New Brunswick Court of Appeal, prior to the Supreme Court of Canada decision in *Fidler* and after its decision in *Whiten*, ruled that an employee of the insurer could be liable to the insured for the tort of intentional procurement of breach of contract and could therefore be liable to an insured for aggravated damages as well as general damages. In so ruling, the New Brunswick Court held that the common law rule that an employee cannot be liable for his or her employer's breach of contract didn't apply where the employee acted in bad faith.

However, New Brunswick is not British Columbia and the *Walsh* case is not the law in British Columbia. It has long been the law in British Columbia that an employee cannot be held liable for intentional procurement of breach of contract if he is "acting bona fide within the scope of his authority".[5]

In *Said v. Butt*, a 1920 case of the English King's Bench, the court considered a case in which the plaintiff obtained a ticket to a performance at a theatre. By order of the defendant, the managing director of the theatre, the plaintiff was refused admission to the theatre on the night in question. The plaintiff claimed damages from the defendant for maliciously procuring the proprietors of the theatre to break a contract for the admission of the plaintiff to the theatre. In holding that an employee or agent cannot be held liable for inducing his employer's breach of contract, McCardie J. distinguished situations in which a stranger to the parties to a contract procured a breach of that contract and stated:

> ... the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent ... must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. ... To hold otherwise might create at least three actions whenever a managing director or other authorized agent knowingly procured a breach of the employer's contract. First, an action based on contract against the employer for the pecuniary loss caused by the breach of contract; secondly, an action for tort against the agent who had procured the breach of contract, wherein the damages would be at large and might include every element of annoyance, inconvenience, or indignity; and thirdly, an action against the employer himself for the tortious wrong committed by his authorized agent in procuring the employer to break his contract with the plaintiff. ... If the

[4] 2004 NBCA 59.

[5] *Said v. Butt*, [1920] 3 K.B. 497 at 505-06; *Imperial Oil Ltd. v. C&G Holdings Ltd.* (1989), 62 D.L.R. (4th) 261 (Nfld. C.A.); *ADGA Systems International Ltd. v. Valcom Ltd.*, (1999), 43 O.R. (3d) 101 (C.A.)

© 2008 Singleton Urquhart LLP

> plaintiff here be right in his submission, then the flood-gates of litigation would indeed be widely opened.
>
> I hold that if a servant acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person. Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong.

Walsh says that it is not a defence to the tort of intentional procurement of breach of contract to say that an employee was acting within the scope of employment in procuring the breach of contract where that employee was acting in bad faith. However, two observations may be made regarding the *Walsh* decision on that point:

1. *Walsh*, following New Brunswick law as it existed in 2004, considered the duty of good faith and fair dealing in insurance to be a cause of action that sounded in both contract and tort.

2. *Walsh* confuses the "*bona fide*" or good faith actions of the employee expressed in the *Said v. Butt* exception with the duty of good faith and fair dealing in the insurance contract.

Walsh starts from the premise that the duty of good faith and fair dealing was a cause of action that sounded in both contract and tort. From that premise, an employee can potentially be liable for a breach a duty of good faith. However, if one starts from the premise that an employee cannot owe a duty of good faith to an insured because that duty is contractual in nature, then the reasoning in *Walsh*, that the *Said v. Butt* "defence is not in play where … the action is founded upon the proposition that the procurement was done in bad faith", is not applicable.

The reasoning in *Walsh* lets the concept of good/bad faith insurance dealings bleed into the *bona fide* or good faith actions of the employee in the *Said v. Butt* exception. However, they are distinct – the latter form of good faith is in respect of the relationship as between the employee and his or her employer whereas the former is a contractual duty owed by the parties to the insurance contract.

In *Imperial Oil Ltd. v. C&G Holdings Ltd.*, the Newfoundland Court of Appeal described the *bona fide* duty in the *Said v. Butt* exception as a "duty owed by the director [or employee] to the company". [6] The Court then reasoned that in order to prove that a director/ agent/employee is not protected from liability by the *Said v.*

---

[6] (1989), 6 D.L.R. (4th) 261 (Nfld. S.C. – C.A.) [*Imperial Oil*].

© 2008 Singleton Urquhart LLP

Butt exception, one must prove that the impugned actions of the director/agent/employee were dominantly motivated by depriving the plaintiff of the fruits of the contract with the employer. In other words, to be liable for intentional procurement of breach of contract, the employee would virtually have to be acting in a rogue manner without a mind to the interests of his or her employer or his or her duties to that employer.

Imperial Oil has been followed numerous times by B.C courts.[7] Thus, the good faith duty in the *Said v. Butt* exception is distinct from the contractual duty of good faith and fair dealing owed by the insurer and insured in respect of the insurance contract.

In recent years court in B.C. and other provinces have sought to further consider the law regarding the liability of employees to third parties for torts in general. While the law in relation to claims of intentional procurement of breach of contract[8] is settled,[9] in recent years the law has been relatively unsettled with respect to the situations in which a director/agent/employee will be immune from suit for other torts.[10]

In *Strata Plan LMS 2262 v. Stoneman Developments Ltd.*,[11] Garson J., speaking for the BCSC, wrote:

> In British Columbia there are two conflicting lines of authority relating to the independent liability of corporate employees acting within the scope of their employment.
>
> One line of authority holds that an employee is not personally liable unless his actions are themselves tortious <u>and</u> exhibit a separate identity or interest from that of the company. ...
>
> The opposite line of authority holds that an independent tort is not required, and that an employee or director may be sued personally if his actions are tortious <u>or</u> exhibit a separate identity or interest from that of the company. ...

It is likely that the courts in B.C. will follow the Ontario law on this issue. In *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, the Ontario Court of Appeal explained its reasoning in *ADGA Systems International Ltd. v. Valcom Ltd.*, a case followed many times in B.C., in which the Ontario Court of Appeal considered an

---

[7] *Jade Agencies Ltd. v. Meadow's Management Ltd.*, [1999] B.C.J. No. 214 (S.C.); *Digital.DOC Services (Canada) Inc. v. Future Shop Ltd.*, [1997] B.C.J. No. 1689 (S.C.); *Thibeault v. Canadian Airlines International Ltd.*, 2000 BCSC 1191; *MacMillan v. Kaiser*, 2003 BCSC 672.

[8] And its equivalent intentional interference with contractual relations.

[9] *Said v. Butt*, [1920] 3 K.B. 497; *Best News Enterprises Corp. v. Tai Li Enterprises Ltd. (c.o.b. Popular Video)*, [2003] B.C.J. No. 686 (S.C.); *Glenayre Manufacturing Ltd. v. Pilot Pacific Properties Inc.*, 2003 BCSC 303; *Strata Plan LMS 2262 v. Stoneman Developments Ltd.*, 2004 BCSC 828; *ADGA Systems International Ltd. v. Vlacom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.); *Meditrust Healthcare Inc. v. Shoppers Drugmart, a division of Imascoi Retail Inc.*, [1999] O.J. No. 3243 (C.A.); *Dorus v. Taylor*, 2003 BCCA 179.

[10] *Dorus v. Taylor*, 2003 BCCA 179 at para. 11; *Strata Plan LMS 2262 v. Stoneman Developments Ltd.*, 2004 BCSC 828.

[11] 2004 BCSC 828.

8 2008 Singleton Urquhart LLP

appeal from a motion by the defendant directors to have the claim against them for inducing breach of fiduciary duty summarily dismissed. Justice Labrosse concluded:

> ... a claim in tort may proceed against directors, officers and employees of corporations for acts performed in the course of their duties, provided that (1) the allegations of their personal tortious conduct are properly pleaded and (2) the limited exception in *Said v. Butt* does not apply.[12]

Thus, the law in relation to the liability of employees for tort may be stated as follows:

1. No suit for intentional procurement of breach of contract (or intentional interference with contractual relations) will lie against an employee where that employee, acting *bona fide* within the scope of his or her authority, procures or causes the breach of a contract between his employer and a third person (*Said v. Butt*).

2. An employee may be held liable for any other tort if it can be shown that his or her actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own (*ADGA; Glenayre*).

3. In order for a claim against an employee to stand, the facts giving rise to personal liability must be specifically pleaded (*ADGA; Meditrust*).

Hence, we can say that, while it is true in British Columbia that an employee of an insurer may be held liable to an insured in tort if the employee's actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own, an employee cannot be held liable for intentional procurement of breach of contract. Thus, the *Walsh* case from New Brunswick is insufficient ammunition for plaintiffs' counsel. Furthermore, the commentary from the Supreme Court of Canada and a recent decision of the B.C. Supreme Court illustrate to us that adjusters, investigators and other insurance employees cannot be held liable for breach of the contractual duty of good faith.

The old adage seems to hold water still – DON'T SHOOT THE MESSENGER! That is, unless the messenger shoots first ...

---

[12] *Meditrust Healthcare Inc. v. Shoppers Drug Mart, a division of Imasco Retail Inc.*, [1999] O.J. 3243 at paras. 12-14 (C.A.); *ADGA Systems International Ltd. v. Valcom Ltd.*, (1999), 43 O.R. (3d) 101 (C.A.).

© 2008 Singleton Urquhart LLP