CITATION: Temple Insurance Company v. Novex Insurance Company, 2020 ONSC 1677
COURT FILE NO.: CV-19-612163
DATE: 20200318

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: TEMPLE INSURANCE COMPANY, AVIVA INSURANCE COMPANY OF CANADA, CHUBB INSURANCE COMPANY OF CANADA F/K/A ACE INA INSURANCE, XL REINSURANCE and EVEREST INSURANCE COMPANY OF CANADA

Applicants

AND:

NOVEX INSURANCE COMPANY

Respondents

BEFORE: GILLIAN ROBERTS J.

COUNSEL: *Adam Patenaude* and *Julia Boddy*, for the Applicants

Jason Mangano and *Anthony Gatensby*, for the Respondent

HEARD: March 4, 2020

ENDORSEMENT

[1] Temple Insurance Company, Aviva Insurance Company of Canada, Chubb Insurance Company of Canada f/k/a ACE INA Insurance, XL Reinsurance, and Everest Insurance Company of Canada subscribed to an insurance policy provided by the ENCON Group Inc., a managing general agent that issues insurance policies and handles claims on behalf of subscribing insurers (referred to collectively as ENCON). ENCON brings this application to obtain a contribution from Novex Insurance Company (Novex) in relation to sums paid to settle a class action lawsuit on behalf of their insured KMH (described below).

[2] On March 22, 2016, a class action was filed in Florida against two Ontario-based entities, KMH Cardiology Centres Incorporated and KMH MRI & Healthcare Centres, as well as SRA Ventures Inc. d/b/a WestCoast Radiology, an affiliated Florida-based corporation (all three entities will be referred to collectively as KMH). All three entities are involved in healthcare diagnostics and imaging. The class action related to "junk faxes" sent by KMH in violation of the *Telephone*

Consumer Protection Act of 1991, 47 USC §227 et seq., as amended, and the regulations thereunder (*TCPA*) on four days in 2016: February 10 and 11, 2016 (2,186 faxes or 39% of 5,596 total), and March 4, and 16, 2016 (3,410 or 61% of 5,596 total).

[3] The *TCPA* provides for a private right of action in damages in the event of a violation. The plaintiffs sought compensatory damages arising out of the invasion of their privacy, wasted time spent dealing with the unauthorized fax transmissions, and the loss of use of their fax machines. The *TCPA* provided for damages of up to $500 per fax transmission; multiplied across the 5,596 fax transmissions at issue meant a total potential exposure of US$2,798,000.

[4] The ENCON policy was a "Directors and Officers" (D&O) policy: coverage was triggered by a "claim" in relation to a "wrongful act" where the claim was made during the time frame of the policy (October 11, 2015 to June 15, 2017). Third-party liability limits were $2M per claim and per policy period. The policy had an "other insurance" clause (section IV J), declaring it to be "excess coverage" where other insurance coverage applied.

[5] The Novex policy was a "Commercial General Liability" (CGL) policy: coverage was triggered by an event occurring during the time frame of the policy (February 27, 2015 to February 27, 2016) for which insurance was provided. Third-party liability limits were $10M per occurrence. The policy did not contain an "other insurance" clause.

[6] At the time of the February faxes, KHM was insured by both ENCON and Novex. At the time of the March faxes, the Novex policy had expired. Only the ENCON policy applied.

[7] On October 28, 2016, not long after being notified about the class action, ENCON concluded that KMH was entitled to coverage under the ENCON policy, and ENCON would provide a defence. Novex took the position that the junk faxes, and the class action they gave rise to, did not fall within the coverage it provided and refused to defend.

[8] ENCON was left to respond to the law suit on its own, which it did, negotiating a settlement of $909,230.84 ($316,283.23 indemnity paid to class members; $592,947.61 legal fees for class counsel.) ENCON also incurred costs of $77,983.78 defending the class action on behalf of KMH. The settlement was subsequently approved by a court in Florida on November 17, 2017. Novex agrees both that the settlement negotiated, and the legal fees incurred by ENCON, were reasonable.

[9] ENCON brought an action seeking a contribution from Novex. Prior to hearing, Novex acknowledged that the February junk faxes did come within the coverage it provided, and reached an agreed statement of facts with ENCON which included that acknowledgment. During the hearing, counsel for Novex explained that the junk faxes fell within the definition of "personal injury" in the Novex policy, which included "oral or written publication, in any manner, of material that violates a person's right of privacy".

[10] The parties still could not agree on their respective share of the sums paid to settle the lawsuit, hence the need for this application to determine the apportionment of those sums between the ENCON and the Novex policies, together with how to share the cost of defending the class action.

[11] To the credit of both parties, they continued to work on the problem of apportionment, and managed to narrow what was in dispute even further by the time the application was argued before me, and indeed, even in the course of the argument. By the time each side completed argument, the positions of ENCON and Novex regarding their respective responsibility for the sums paid to settle the lawsuit, and defence costs, were as follows:

The ENCON Position				
	Indemnity **$316,283.23**	**Defence Costs** **$77,983.78**	**Plaintiffs' Costs** **$592,947.61**	**TOTAL** **$987,214.62**
ENCON	$192,932.77 (61%)	$38,991.89 (50%)	$361,698.04 (61%)	$593,622.70
Novex	$123,350.46 (39%)	$38,991.89 (50%)	$231,249.57 (39%)	$393,591.92

The Novex Position				
	Indemnity **$316,283.23**	**Defence Costs** **$77,983.78**	**Plaintiffs' Costs** **$592,947.61**	**TOTAL** **$987,214.62**
ENCON	$254,608.00 (80.5%)	$62,776.94 (80.5%)	$477,322.83 (80.5%)	$794,707.77
Novex	$61,675.23 (19.5%)	$15,206.84 (19.5%)	$115,624.79 (19.5%)	$192,506.85

[12] Central to resolving the dispute over apportionment is the meaning of section IV J of the ENCON policy. Section IV sets out "Exclusions", providing "This insurance does not apply to," among other things:

> J. Other Insurance. CLAIMS covered under another valid and collectible insurance policy. Any coverage provided by this policy shall be specifically excess of and shall not act in contribution with such other insurance policy.

[13] It is ENCON's position that regardless of how this paragraph is described (a "condition" or an "exclusion"), its meaning is clear: if another policy applies, the ENCON policy does not apply, unless the coverage under the other policy is exhausted, in which case the ENCON policy will cover the "excess" amount of the claim over and above what was covered under the other policy. There is no condition or exclusion in the Novex policy that would make it excess to, require *pro rata* allocation with, or extinguish liability for, the ENCON policy. Rather, Novex now acknowledges that its policy applied to the February faxes. And the related damages did not exhaust the coverage provided by the Novex policy.

[14] In short, it is ENCON's position that section IV J expresses a clear and unequivocal intention to limit liability, which should be enforced. This is not a case where there are competing exclusion clauses, or irreconcilable policies, requiring a court to decide what is equitable in the circumstances. As a result, ENCON argues that Section IV J applies, and ENCON is not liable with respect to the damages caused by the February faxes.

[15] Novex takes the position that Section IV J is ambiguous, and therefore must be interpreted in favour of the insured, and against the insurer, and the interpreting court must do what is equitable in all the circumstances. Novex says what is equitable is for Novex and ENCON to share liability in relation to the February junk faxes. These represent 39% of the offending junk faxes; and ENCON's half share of 39% amounts to 19.5% of each category of the sums paid to settle to lawsuit (indemnity, plaintiff's costs, and the cost of defending the law suit).

[16] Novex explains that Section IV J is ambiguous because the meaning of "CLAIMS" is the class-action lawsuit as a whole, which covers events over four days, two of which occur during a time when another insurance policy was in place, while the other two days occur at a time when there was no other policy in place. Novex argues that the exclusion in Section IV J can only apply if another policy covers the claim *in its entirety*. Where part of the claim triggering liability is covered under another policy and part is not, the meaning of Section IV J is ambiguous, and the court must intervene to do what is equitable in all the circumstances.

[17] Novex also argues that the language of section IV J of the ENCON policy is customized, and the underwriters who drafted it were contemplating another valid and collectible D&O policy.

[18] The Supreme Court considered the proper approach to reconciling overlapping insurance coverage in *Family Insurance Corporation v. Lombard Canada Ltd.*, 2002 SCC 48. The unanimous court held that the respective liabilities of each insurer must be determined by considering the wording of each policy in order to determine "the intention of the insurers vis-à-vis the insured". Where the words and intentions are clear and unequivocal, they must be given effect, unless the two policies are irreconcilable, such as where both have sought to limit liability where another insurer covers the same loss. Where the two policies are clear, but *truly*

irreconcilable, "principles of equitable contribution demand that parties under a coordinate obligation to make good the loss must share that burden equally."

[19] In this case, there is no problem of irreconcilable policies. ENCON contains a clause excluding coverage where another insurance policy applies, until that other policy is exhausted. Novex contains no such clause. The question then is whether the ENCON clause limiting coverage is clear and unambiguous. If it is, I must give effect to it: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 at para.22. Only in the event of ambiguity is it necessary to resort to general rules of contract construction, such as construing the policy against the insurer, and interpreting coverage provisions broadly, and exclusion clauses narrowly.

[20] I also note that once the interest of the insured is no longer at stake, and the interpretive "contest" is between insurers "there is simply no basis for looking outside the policy. In the absence of privity of contract between the parties, the unilateral and subjective intentions of the insurers, unaware of one another at the time the contracts were made, are simply irrelevant:" *Family Ins. v. Lombard Canada*, at para.19. In this case, counsel for Novex submitted that the ENCON exclusion clause was drafted with another D&O policy in mind, but there is no evidence of this before me. And even if there was, it is not relevant to the interpretive exercise. I must look at what the policy says and determine whether it is clear and unequivocal.

[21] I find the wording of section IV J of the ENCON policy clear and unequivocal: the "[ENCON] insurance does not apply to CLAIMS covered under another valid and collectible insurance policy." I do not accept the Novex argument that section IV J does not apply, or becomes ambiguous in the context of this case where only part of the overall claim (the claim being the lawsuit), that part relating to the February junk faxes, is covered under another policy. I find that to be a tortured reading of Section IV J inconsistent with its plain wording, particularly in the context of this case where each individual junk fax transmission could have given rise to its own right of action, or its own "claim". The fact that all the offending fax transmissions were collected together into a class-action law suit does not negate the clear language and intent of the ENCON policy not to apply where another insurance policy applies, except to the extent coverage under the other policy was exhausted.

[22] The Novex policy is occurrence based. It was in place and it is acknowledged that it applied to each of the February fax transmissions. It was not exhausted by those February faxes. It contains no limitation where other insurance applies.

[23] The ENCON policy does not apply to claims covered by other insurance, in whole or in contribution, unless that other insurance is exhausted.

[24] In sum, I conclude that to the extent that some of the occurrences (i.e. the February fax transmissions) giving rise to the claim (the lawsuit) are covered under another policy, ENCON does not cover that part of the claim. In other words, Novex is responsible for the damage caused by the February faxes. ENCON is responsible for the damage caused by the March faxes. No other valid and collectible insurance policy applied to the claim respecting the March faxes.

[25] With the interpretation and application of section IV J of the ENCON policy decided, the remaining issues between the parties are relatively straightforward. Beginning with defence costs, both parties acknowledge that where two or more insurance companies are at risk on a claim, and under a duty to defend, a judge has discretion to apportion the cost of defending the claim in a manner that is fair and reasonable in the circumstances: *Broadhurst & Ball v. American Home Assurance Co.*, [1990] O.J. NO.2317 (Ont.C.A); *Alie v. Bertrand & Frère Construction Co.* (2002), 62 O.R. (3d) 345 (C.A.).

[26] ENCON argues that a 50/50 split is fair and reasonable in the circumstances of this case, where ENCON bore the entire burden of defending the claim and negotiating a settlement, notwithstanding that Novex was under a duty to defend.

[27] Novex argues that the trial judge's discretion in apportioning defence costs is generally guided by the share of liability borne by each insurer, as precisely as that can be determined: *St. Paul Fire and Marine Insurance Company v. AIG Insurance Company of Canada et al.*, 2019 ONSC 6489 at para.91. Novex urges that this should guide the apportionment of defence costs in this case, particularly as it is possible to determine exactly what part of the damage is covered by which insurer.

[28] I agree with Novex that where it is possible to determine the share of liability borne by each insurer, this should be the main factor in determining how defence costs are apportioned. There is no suggestion that Novex's incorrect decision not to defend increased the costs of defending. In these circumstances, I find that ENCON is liable for 61% of the defence costs claim (the March junk faxes), and Novex is liable for 39% (the February junk faxes).

[29] Moving to the plaintiff's costs, both parties agree that these should mirror the share of liability reflected in the other heads of damages, though for different reasons. By the time of the hearing, ENCON agreed that the plaintiff's costs should be divided in the same manner as the share of indemnity: 61% ENCON; 39 % Novex. For its part, by the time of the hearing, Novex agreed that the plainfiff's costs should be divided in the same manner as defence costs: 61% ENCON; 39% Novex (though Novex argued it was only responsible for half of the 39%, or 19.5%, on the basis that section IV J of the ENCON policy did not apply). This split is the same whichever rationale I choose, and I agree that it is the appropriate split in the circumstances of this case.

[30] In conclusion, for the above reasons, I apportion the sums paid to settle the class action law suit in the following manner:

Apportionment				
	Indemnity **$316,283.23**	**Defence Costs** **$77,983.78**	**Plaintiffs' Costs** **$592,947.61**	**TOTAL** **$987,241.62**
ENCON	$192,932.77 (61%)	$47,570.11 (61%)	$361,698.04 (61%)	$602,200.92
Novex	$123,350.46 (39%)	$30,413.67 (39%)	$231,249.57 (39%)	$385,013.70

[31] To the extent that ENCON has paid more than its share of the sums paid to settle the lawsuit, Novex is to reimburse ENCON so that the amount each pays accords with the above chart.

[32] I strongly encourage the parties to agree on costs, particularly in the current environment of rationing judicial resources. However, if the parties are unable to agree on costs, they shall make their costs submissions in writing as follows: the defendant/respondent's submissions shall be delivered by April 15, 2020, and the plaintiff's submissions shall be delivered by April 29, 2020. Each side's written submissions shall be five pages or less in total, double-spaced, plus any costs outline.

GILLIAN ROBERTS J.

Date: March 18, 2020