CITATION: Intact Insurance Company v. Virdi, 2014 ONSC 2322
COURT FILE NO.: CV-13-2732-00
DATE: 20140414

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Intact Insurance Company,

Applicant

AND:

Harjit Virdi, Multilamps Shades Co., American Industrial Machines Inc., Satinder Pal Singh, Sahid Ismail Shaikh and Fandeep Patel

Respondents

BEFORE: **Ricchetti, J.**

COUNSEL: J. Mangano, for the Applicant

M. Rotman, for Multilamps Shades Co.

HEARD: April 9, 2014

ENDORSEMENT

THE APPLICATION

[1] This application was brought by Intact Insurance Company (Intact) seeking a declaration that its two policies described below do not respond to the claims in the action brought against Multilamps Shades Co. (Multilamps).

[2] The law and the facts are not seriously disputed. It is the application of the law to the specific facts which determines the court's decision in this case.

THE FACTS

[3] Intact is an insurance company.

[4] Mr. Virdi is the principal of Multilamps and American Industrial Machines Inc. (AIM).

[5] Multilamps is a manufacturer and importer of shades. Multilamps operates its business from 108 Arrow Road, Toronto (Property).

[6] In 2010, Mr. Virdi sought insurance coverage for his Multilamps business operations.

[7] The summary of Multilamps' application described its business as "Manufacturing and Importing of Lamp Shades". The "Occupancies" in the Intact's summary showed no other businesses and only the Multilamps' shade business at the Property.

[8] On February 10, 2010, Intact inspected the Property and determined that 85% of Multilamps' business was importing shades from China while 15% were manufactured by Multilamps. The inspection also discovered that very little manufacturing of shades took place at the Property, it was mostly warehousing of shades. There is no evidence suggesting that any other business or types of business were being operated at the Property when the inspection took place. Multlilamps supplied shades to Walmart, Zellers, Home Hardware and Home Depot.

[9] An insurance policy was issued by Intact insuring Multilamps commencing March 7, 2010 which ended March 7, 2011 (Policy).

[10] The Policy's Declaration states that the "Insured's Business Operations" were described as "Manufacturing and Importing of Lamp Shades". The Declaration formed part of the Policy and the Policy Conditions. The only additional insured's appear to be Multilamps' customers but "only with respect to liability arising out of the operations of Multilamps".

[11] The Policy insured Multilamps for Commercial General Liability which included any bodily injury claims.

[12] Mr. Virdi has another business – AIM. AIM was not an additional insured under the Policy. AIM's business is the buying and selling of heavy machinery including lathes. None of AIM, AIM's business or AIM's operations are referred to or described as covered in the Policy.

[13] On or about February 14, 2011 Jason Lafnear was delivering a number of heavy lathes to AIM to the Property. Several employees at the Property attempted to use a forklift truck to remove the heavy lathes. Unfortunately, a lathe fell from the forklift truck and landed on Jason Lafnear causing serious injuries. A Statement of Claim was issued by Mr. Lafnear on September 19, 2011 against Mr. Virdi, AIM and the unknown employees using the forklift truck at the time (the First Action). Multilamps was not named as a defendant in the First Action.

[14] On November 3, 2011, AIM sought insurance coverage for its business operations at the Property – 108 Arrow Road. Intact issued a new policy covering the period November 11, 2011 to November 11, 2012 (AIM Policy). It was conceded at the motion that there is no coverage under the AIM Policy for the claims made by Mr. Lafnear.

[15] It was also conceded at the motion that the lathes were for AIM's business and not Multilamps' business. There was expert report in the record (which was not objected to) that the lathes were for use in the automotive industry (i.e. not the shade business). Mr. Virdi in his statement to Intact, during Intact's investigation, attempted to suggest the lathes had been purchased by Multilamps. However, in his affidavit on this application,

Mr. Virdi did not take this position or produce any documentation consistent with the lathes being purchased for or had anything to do with Multilamps' business. It is clear that AIM operated its business out of the same Property and the lathes were solely relating to AIM's business (buying and selling heavy equipment).

[16] Intact was advised of the First Action on December 8, 2011. Intact had Multilamps sign a non-waiver agreement. Intact investigated the incident. Multilamps suggests that the non-waiver agreement is some evidence of coverage. I disagree. Intact was entirely within its rights to have Multilamps sign a non-waiver agreement and subsequently deny coverage. That is the purpose of having a non-waiver agreement because if there had not been a non-waiver agreement, Multilamps would now be arguing that Multilamps is estopped from denying coverage under the Policy.

[17] Intact terminated the AIM Policy.

[18] Intact denied coverage for the claims described in the First Action.

[19] Mr. Lafnear then issued a second statement of claim on May 1, 2012 relating to the same accident. However, this time Multilamps was added as a defendant to this new claim (Second Action). Mr. Lafnear's claim advanced against Multilamps is based on vicarious liability (the employee driving the forklift were a Multilamps employee) and Occupier's liability (Multilamps was an occupier of the Property).

THE POSITION OF THE PARTIES

[20] Intact submits that the Policy does not respond to the claims in the Second Action because the claim did not arise out of the Multilamps operations at the Property but rather

the operations of AIM and Intact did not insure the operations of AIM at the Property or elsewhere.

[21] Multilamps submits there is a possibility that Intact's Policy responds to the claim in the Second Action. Multilamps points to the general liability provisions of the Policy which would clearly cover occupier's liability or liability to third parties.

THE ANALYSIS

[22] There is no dispute that I am to accept the allegations in the Second Action as proven for the purpose of this application. If there is a "mere possibility" that the claim will fall within the Policy coverage, then Intact has a duty to defend Multilamps in the Second Action. In *Nichols v. American Home Assurance Co.* [1990] 1 S.C.R. 801 at paras. 116 and 17 the Supreme Court described the applicable law in the following manner:

> Thus far, I have proceeded only by reference to the actual wording of the policy. However, general principles relating to the construction of insurance contracts support the conclusion that the duty to defend arises only where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract. Courts have frequently stated that "[t]he pleadings govern the duty to defend": *Bacon v. McBride* (1984), 6 D.L.R. (4th) 96 (B.C.S.C.), at p. 99. Where it is clear from the pleadings that the suit falls outside of the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise: *Opron Maritimes Construction Ltd. v. Canadian Indemnity Co.* (1986), 19 C.C.L.I. 168 (N.B.C.A.), leave to appeal refused by this Court, [1987] 1 S.C.R. xi.
>
> At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices. In this sense, as noted earlier, the duty to defend is broader than the duty to indemnify. O'Sullivan J.A. wrote in *Prudential Life Insurance Co. v. Manitoba Public Insurance Corp.* (1976), 67 D.L.R. (3d) 521 (Man. C.A.), at p. 524:
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> Furthermore, the duty to indemnify against the costs of an action and to defend does not depend on the judgment obtained in the action. The existence of the duty to defend depends on the nature of the claim made, not on the judgment that results from the claim. The duty to defend is normally much broader than the duty to indemnify against a judgment. [Emphasis added.]

See also *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 at para 28.

[23] In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 at para. 19 the Supreme Court stated:

> Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend.

[24] The principles of contract interpretation to be brought to bear as to whether the claim falls with the insurance policy were recently set out by the Supreme Court in *Progressive Homes*, *supra* at paras. 22-24:

> The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).
>
> Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> When these rules of construction fail to resolve the ambiguity, courts will construe the policy contra proferentem - against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the contra proferentem rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

Is there a possibility the claim in the Second Action falls within the Policy coverage?

[25] Whether the Second Action raises a mere possibility that the claim might be covered under the Policy is the question to be decided in this application.

[26] While this court is required to accept the facts alleged in the Second Action, it is the true nature of the claim that governs rather than the wording in the Statement of Claim. See

Saskatchewan Government Insurance v. Patricia Hotel (1973) Ltd., 2011 SKCA 70 at para. 16.

[27] Where the insurance policy is issued and specified to be for certain business operations of the insured, where the business operations undertaken by the insured or a third party giving rise to the claim are entirely different and unrelated to the insured or the insured operations, then the policy will not provide coverage.

[28] This was the basis for a denial of coverage in *Harvey v. Leger* [2006] O.J. No. 2203 (Div. Ct.) where at para. 2 the court stated:

> The plaintiff's allegations against IBML are found in paragraphs 21 and 22 of the statement of claim. I do not accept the appellant IBML's argument that these allegations are capable of applying to IBML's activities as building material wholesalers so as to invoke the policy coverage. Rather, they clearly relate to IBML's activities as a contractor/builder. There is no allegation of defective or unfit materials. The allegations relate to the manner in which the construction was carried out and the adequacy of the soil conditions.

[29] To suggest otherwise would be to make the insurer's evaluation of the risk meaningless if entirely different operations by the same insured or a third party at the same location would be insured.

[30] It would also make the insured's declaration of the operations covered meaningless. The Declaration which includes Multilamps' stated business operations at the Property forms an integral part of the Policy and is highly relevant to whether there is coverage under the Policy.

[31] There may be situations where there might be uncertainty as to whether the claim arises from the business operations described in the Declaration. If there is a "mere possibility" the claim relates to the described business operations in the Declaration, then the

application would have to be dismissed and the insurer would have a duty to defend. That is not the situation in this case:

a) The lathes were being delivered to AIM. AIM was in the business of buying and selling heavy equipment, including lathes. Multilamps was not;

b) The lathes had nothing to do with Multilamps' business operation. The reason the lathes were coming to the Property is unknown but, in my view, is irrelevant; and

c) There is absolutely no connection between the delivery and off-loading of the lathes with Multilamps' business. At a minimum, the lathes would be stored at the Property. This is not a part of Multilamps' business nor is it the business operations that Intact agreed to insure.

[32] It is clear from the Declaration that what Intact was insuring was Multilamps business operations. The Policy did not cover all liability claims which might arise on the Property.

[33] Even if the employees involved in the unloading with the forklift trucks were Multilamps employees, the fact they were engaged at the time in completely different and unrelated business operations would eliminate any coverage under the Policy. If Multilamps employees were used to manufacture explosives on the Property and damage ensued arising from this activity, surely this would not be a business operations covered by the Policy. In *Saskatchewan Government Insurance supra*, the Saskatchewan Court of

Appeal agreed that the declaration of hotel operations did not include unrelated activities of demolishing a nearby building to make more room for hotel parking (at para. 28):

> All of this only makes common sense. SGI would not know whether to agree to insure the Pat, or how to determine appropriate premiums or exemptions, unless it knew what sort of operations the Pat conducted. The business of underwriting a policy of insurance in relation to "Hotel, Night Club and Beer and Wine Store" operations is obviously quite different than the business of underwriting a policy in relation to, for example, sky diving or munitions manufacturing operations.

[34] The Respondent submits that Multilamps is an occupier of the Property and the claim is made under the *Occupier's Liability Act*. The emphasis is not on who the occupier of the Property is for the purpose of coverage under the Policy – that is an issue for the determination at trial. The issue before me is whether the true nature of the claim is within the activities described in the Policy as being covered. Clearly, in this case there was more than one occupier of the Property. The emphasis is and should be on what business operations were covered by the Policy and described in the Declaration. If the facts giving rise to the claim might relate to business operations described in the Declaration, then the Policy might provide coverage and the duty to defend arises. Otherwise, it does not.

[35] The cases from the United States referred to by Intact's counsel are persuasive at to significance of the Declaration an interpreting the insurance policy as to whether it covers the events which gave rise to the claim. See: *Fidelity & Deposit Company v. Charter Oak Fire Insurance Company*, 1998 66 Cal. App. 4th 1080 (California Court of Appeal); *Budget Rent a Car Systems Inc. v. The Shelby Insurance Group*, 1995 541, N. W. 2d 178 (Wisconsin Court of Appeals); *Western Heritage Insurance Company v. Harry J. Darrah, Jr. et al,* 2012 WL 1886665 (M.D. Pennsylvania District Court) and *Steadfast*

Insurance Company v. James Dobbas et al 2008 W.L. 324023 (E.D. California District Court).

[36] In this case, the off-loading of the lathes at the Property can in no way be said to be related to Multilamps business operations. The mere fact Multilamps employees might have been involved in the off-loading or the fact the giving rise to the claim occurred on the Property is not sufficient to give rise to a possible claim under the Policy.

CONCLUSION

[37] There is no possibility that the claims made in the Second Action are the subject of coverage under the Policy. A declaration is granted to this effect.

COSTS

[38] Unless settled, any party seeking costs shall serve and file written submissions on entitlement and quantum within two weeks of the release of these reasons. Written submissions shall be limited to 3 pages, with attached Costs Outline and any authorities.

[39] Any responding party shall have one week thereafter to serve and file responding submissions. Written submissions shall be limited to 3 pages with any authorities relied on attached.

[40] There shall be no reply submissions without leave.

Ricchetti, J.

Date: April 14, 2014