CITATION: 1088437 Ontario Inc. cob as Northmore Fuels v. GCAN Insurance Company *et al*, 2013 ONSC 7346
LINDSAY COURT FILE NO.: 45/13
DATE: 20131128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
1088437 Ontario Inc. carrying on business as Northmore Fuels Applicant	Mr. J.P. Mangano, for the Applicant
– and –	Ms. N.M. Leon, for the Respondents
GCAN Insurance Company, Royal & Sun Alliance Insurance Company of Canada and Aviva Insurance Company of Canada Respondents	
	HEARD: November 25, 2013

REASONS FOR DECISION ON APPLICATION

R. MACKINNON, J.

[1] The applicant seeks payment from the respondent insurers for all defence costs incurred to date to defend an underlying action and also a declaration that those insurers have an ongoing duty to defend in that action, file 6618/11, brought by Steve and Stella Scala.

Background

[2] The respondent insurers (the "Encon policy") issued a contractors' pollution liability insurance policy from November 1, 2009 to November 1, 2010. The applicant insured argues that the purpose of that policy was to protect Northmore from claims arising out of *pollution that occurred* (italics mine) during that period. The respondent insurer argues its purpose was to provide coverage to Northmore for pollution claims caused *by Northmore's covered operations* (italics mine) taking place during that period when such claims were made during the period.

[3] Encon denied coverage because:

(a) the claim related to operations performed by Northmore prior to the retroactive date (which was the same as the start (or inception) date of November 1, 2009); and

(b) the wording of the excluded operations endorsement of the policy, which in Part III(i), excludes coverage for "claims, loss or supplementary payments arising from pollution conditions resulting from covered operations existing prior to the effective date of the policy and known by an insured with authority and not disclosed in the application for the policy, or any previous policy for which the policy was a renewal."

Encon also notes that Endorsement No. 3 of the Encon policy (the excluded operations endorsement) provides that covered operations "shall not include fuel, oil and/or fuel delivery including loading and unloading."

[4] I find that, quite clearly, the *Scala* allegations in the underlying action are much broader in scope as it relates to the Northmore operations than the specific fuel, oil and/or fuel delivery loading and unloading operation excluded by the Encon endorsements. The denial in paragraph 3(b), *supra*, was incorrect and ineffective. I will accordingly focus in these reasons on Encon's denial of coverage detailed in paragraph 3(a), *supra*.

[5] The *Scala* claim asserts that on July 6th, 2009, Northmore attended their residence to relocate an existing fuel storage tank to an adjacent concrete pad. They further assert that, on or about December 4, 2009 (after the issuance of the Encon policy), they discovered that oil had escaped from one of two oil filters connected to their fuel oil heating system. They allege that the resultant spill caused damage for which they claim in tort, contract and nuisance.

[6] Encon provided a quotation to Northmore's insurance broker, Marsh, for a contractors' pollution liability insurance policy that referenced a retroactive date of November 1, 2009 - the same as the inception date in the policy. In the resultant Encon policy, PCL364258, are contained the following coverages:

(a) Coverage A is the Insuring Agreement. It provides that "the INSURER will pay on behalf of the INSURED, LOSS that the INSURED becomes legally obligated to pay as a result of a CLAIM resulting from POLLUTION CONDITIONS caused by COVERED OPERATIONS that commence on or after the Retroactive Date indicated in Item 8 of the Declaration, provided such CLAIM is first made against the INSURED and reported to ENCON in writing during the POLICY PERIOD or during the EXTENDED REPORTING PERIOD."

(b) Coverage B deals with Emergency Remediation Costs and also relates to pollution incidents caused by covered operations. The identical wording with respect to the trigger of coverage is used as in Coverage A except there is an added requirement that the Emergency Remediation Costs must be incurred within the policy period.

(c) Coverage C is for Incidental Transit Coverage. Again, the coverage is tied to the covered operations of the insured. However, more particulars are provided about the type of covered operations that trigger coverage here and so the wording could not be identical to

Coverages A and B for this provision. This provision states in part that "…the INSURER will pay on behalf of the INSURED, LOSS that the INSURED becomes legally obligated to pay as a result of a CLAIM resulting from POLLUTION CONDITIONS caused by transportation of the INSURED, of any waste, products or materials in relation to COVERED OPERATIONS…provided such COVERED OPERATIONS commence on or after the Retroactive Date indicated in Item 8 of the Declarations".

(d) The "Defence and Settlement" provision provides that "the INSURER shall have the right and duty to defend any CLAIM covered under Coverage A, B or C."

Issues to be Determined

(a) Is this application in the name of the insured the proper forum for this insurance coverage analysis?

(b) Has the applicant discharged its onus of establishing that the *Scala* action falls within the Encon policy?

(c) Coverage A in the Encon policy is ambiguous, what were the reasonable expectations of the parties to the contract when they entered it which would govern the interpretation of that provision?

First Issue – Proper Forum

[7] Counsel for Encon argues that this application is not the appropriate format in which to decide claims for legal cost reimbursement and the duty to defend – citing *Family Insurance Corp. v. Lombard Canada*, 2002 SCC 48, [2002] SCR 695. Where an insured holds more than one policy of insurance that covers the *same risk* (italics mine), the insured is entitled to select the policy under which to claim indemnity and the selected insurer, in turn, is entitled to contribution from all other insurers who have covered the same risk. In the case at bar, however, the Arch and Encon policies clearly do not cover the same risks.

[8] Arch Insurance Company provided insurance to Northmore to cover its fuel loading and unloading operations and is defending Northmore in the *Scala* action. Northmore has not incurred any costs to date in defence of that action, as it is being funded by Arch. Encon's counsel suggests that a subsequent successful contribution action may be necessary to allow a court to determine the respective liabilities of the two insurers to their insured. In the case at bar Northmore has not been indemnified and this is not a subrogation situation. Rather, this is Northmore's application. There is neither equitable subrogation nor contribution obligations presently at play – two separate policies and two separate perils. Section 132 of the *Insurance Act* is no bar to Northmore's application.

[9] It is quite common in Ontario for an insurer-appointed defence counsel to advance insurance coverage-related claims on behalf of their clients. To proceed otherwise would require those duty to defend applications to become trials within trials. In determining whether both Encon and the respondent insurers have a duty to defend Northmore, it is

not necessary to hear *viva voce* evidence. Our Court of Appeal in *Cabell v. Personal Insurance Co.*, 2011 ONCA 105, held that evidence is not essential to determine the reasonable expectations of the parties. Rather, they can be determined from a perusal of the written record, as here. This application is the appropriate format.

Second Issue - Has the applicant established that the *Scala* action falls within the Encon policy? Is the policy ambiguous?

[10] Courts are instructed to 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 issued. These rules of construction are applied to resolve any ambiguity and do not operate to create any where none arose in the first place. When rules of construction fail to resolve the ambiguity, courts will construe the policy against the insurer.

[11] I now consider the plain and ordinary meaning of the insurance coverage provision. The onus, of course, is on the insured to establish the claims against it by *Scala* fall within the initial grant of coverage under the Encon policy. An insurance policy should be interpreted by giving effect to plain and ordinary language used while reading the contract as a whole. Courts must guard against any invitation to create ambiguities where none exist. Coverage provisions should be interpreted broadly, and exclusions narrowly.

[12] I find that, when read exactly as it is written, the Coverage A provision in the Encon Policy can only mean that it is the covered operations that must commence after the retroactive date to trigger coverage. The condition notes that the Insurer will pay a claim "resulting from pollution conditions caused by covered operations that commence on or after the retroactive date". The word "that" in that quoted sentence is a restrictive pronoun that defines the noun immediately preceding it: i.e. the covered operations. If the Coverage A position were meant to suggest that coverage was tied to the timing of the pollution incident (as opposed to the timing of the operation), the sentence could read otherwise – such as "resulting from pollution conditions, caused by covered operations, which commence on or after the retroactive date".

[13] The use of commas in a sentence completely alters its meaning and renders that portion of the sentence within commas as additional or parenthetical information not necessary to the meaning of the sentence. The word "that" in Coverage A to which I referred was restrictive to the covered operations.

[14] The coverage provision, as written, is only capable of the meaning attributed to it by Encon. To interpret the provision otherwise would be to ignore the plain and ordinary meaning of the words used and to strain the reading by changing the grammar and one of the words so as to create an ambiguity where none actually exists.

[15] When read in the context of the policy as a whole, it is clear that coverage is triggered by covered operations and that those operations must occur after the retroactive date. This is evident when reviewing all coverage provisions including those in Coverage B, Coverage C, and Extended Reporting Provision 4 of the Encon Policy. Coverage B uses identical

wording with respect to the triggering of the coverage as is used in Coverage A, except there is an added requirement that the emergency remediation costs must be incurred within the policy. Coverage C for incidental transit coverage provides coverage as tied to the covered operations of the insured. The extended reporting provisions provide coverage for claims made against the insured after the end of the policy term and are again tied to the coverage operations of the insured.

[16] When construed as a whole, it is abundantly clear that the overall intent of the Encon policy was to cover pollution claims arising from covered operations of Northmore Fuels when such covered operations commenced on or after the retroactive date of November 1, 2009.

[17] Unknown to Encon, Northmore had previously held a pollution policy issued by Federated Insurance Company. That policy was triggered by pollution incidents only and there was no requirement that those pollution incidents be caused by Northmore's covered operations. The Encon policy, by contrast, is a contractors' pollution liability policy and is clearly tied to the liability of the contractor for pollution incidents caused by the contractor's covered operations. It is those operations that are the focus of the coverage under Encon's policy. It is not a premises policy or pollution liability policy.

[18] It makes commercial sense that the retroactive date in the Encon claims - made contractors' liability policy would relate to the covered operations and would be the same as the inception or commencement date.

[19] I accordingly conclude that the applicant has not discharged its onus of establishing that the *Scala* action falls within the Encon Policy, given that Coverage A stipulates that operations that are alleged to cause pollution incidents must commence on or after the retroactive date of November 1, 2009 and the operations are alleged to have occurred July 6, 2009.

Third Issue - Reasonable Expectations of the Parties

[20] If I am wrong in finding, as I do, that the policy language is unambiguous, the Supreme Court of Canada in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 S.C.R. 245 has set out the applicable analytical framework to consider.

[21] Where there is ambiguity in a provision of an insurance policy, courts are instructed to prefer interpretations that are consistent with the reasonable expectations of the parties, so long as such interpretations can be supported by the text of the policy. The evidence is clear that Northmore Fuels had no expectations of what the Encon policy would cover, as it relied completely on its broker to arrange its insurance needs. Northmore did not know how many or which insurers provided it with coverage from the period November 1, 2009 to November 1, 2010, did not read the Encon Policy wording prior to this court application being prepared for it by counsel for Arch, and had no reason to consider what might trigger coverage under the Encon Policy. In these circumstances, Mr. Northmore's affidavit is unpersuasive.

[22] Encon arranged this coverage at the request of Northmore's broker, Marsh, which had an insurance program for members of the Canadian Oil Heating Association ("COHA"), of which Northmore was one. It is clear from the emails between Encon and Marsh as COHA broker that Marsh sought coverage for COHA members' operations that were alleged to have caused pollution incidents.

[23] The record is also clear that Encon understood and expected that it would be covering Northmore's HVAC operations and that another insurer was covering Northmore's fuel loading and unloading operations. Marsh is not a party to this action and no evidence was submitted on its behalf. Encon communicated to Marsh as broker that there would be a retroactive date, which was the same as the inception date in the policy. This was clearly the risk that Encon was prepared to accept as Northmore was a new insured for Encon and there was no suggestion to Encon by Marsh as broker that Northmore had previous and continuous claims-made liability coverage. It was, accordingly, entirely reasonable for Encon to not have assumed the risk of prior acts with a new insured. Encon's evidence is unchallenged on this motion that it is standard in the environmental insurance industry that a retroactive date related to covered operations be inserted in all policies.

[24] Encon is being asked in this application to defend a claim that arose from covered operations or prior acts of the insured prior to the date that Encon accepted the risk of insuring Northmore. The evidence is clear that such a risk was specifically not intended by Encon and the policy wording reflects that.

[25] I hold that the interpretation I have made on this unambiguous policy is also consistent with the reasonable expectations of the parties at the time the policy was issued.

Excluded Operations Endorsement

[26] The intent of the Encon endorsement was to exclude from covered operations that would trigger coverage the fuel loading and unloading operations of Northmore. Encon accepted the risk of covering Northmore's HVAC and mechanical operations as well as some coverage for leased skid tanks. Encon was aware that another insurer was providing fuel loading and unloading insurance coverage so that such coverage was not required through Encon. Exclusion endorsements should be interpreted narrowly. The intent of the exclusion was clarified between the parties at the time of arranging the insurance and the intent was reasonable in light of the fuel loading and unloading coverage provided by Arch. There is no reason to interpret the excluded operations endorsement in any manner other than the way in which it is written.

Conclusion

[27] I conclude that Coverage A should be interpreted as it is plainly written – that for coverage to be triggered the covered operations alleged to have caused a pollution incident must commence on or after the retroactive date. The *Scala* action does not allege any covered operations that occurred after the retroactive date of November 1,

2009. Coverage is accordingly not triggered under the Encon Policy. The application is dismissed.

[28] The respondents are entitled to their costs. If the parties cannot agree on the amount of costs, the respondents shall, within 20 days from the issuance of these reasons, deliver a bill of costs together with written submissions of no more than 5 pages, single spaced. The applicant shall deliver its response of no more than the same length within 15 days of receipt of materials from the respondents. Reply submissions shall be delivered, if at all, within 5 days thereafter. All costs submissions shall be forwarded to my attention in care of my secretary at Barrie.

"R. MacKinnon, J."

Released: November 28, 2013