

CITATION: The Dominion of Canada General Insurance Company v. Bay of Quinte Mutual Insurance Company, 2024 ONSC 1499
COURT FILE NO.: CV-23-00000214-0000
DATE: 2024Mar14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
The Dominion of Canada General Insurance)
Company) A. Gatensby, for the Applicant
)
Applicant)
)
- and -)
)
Bay of Quinte Mutual Insurance Company) R. Steven Baldwin, for the Respondent
)
Respondent)
)
) **HEARD:** January 15, 2024

TRANMER J.

DECISION ON APPLICATION

[1] This Application is brought by The Dominion of Canada General Insurance Company (Dominion) for contribution to defending underlying claims against parties insured by these two insurers under different policies, in force during different time frames and covering different risks.

[2] For the reasons set out below, the Application is dismissed.

The Dominion Policy of Insurance

[3] Dominion insured 1437141 Ontario Inc o/a M.Y.Home and its principal Michael Sean O’Leary from September 23, 2010 until September 23, 2013. Between August 2010 and the spring of 2011, Mr. O’Leary built a residence on property in Pakenham, Ontario. Tamara O’Leary was added to the title of the property on June 15, 2011.

[4] The underlying claim is brought against the O’Learys by people who purchased the house, closing and taking possession on October 30, 2020.

[5] In the underlying claim, it is alleged that in May 2021 the purchasers discovered a number of deficiencies causing ongoing property damage including inadequate water drainage management system, cracks in the property foundation, the use of unsuitable materials and the displacement of foundation walls. The purchasers claim against the O'Learys for negligent construction.

[6] The purchasers also claim against Mr. and Mrs. O'Leary for negligently misrepresenting the condition of the property prior to and at the time of sale. This occurred allegedly in the lead up to the house sale in the summer and fall of 2020.

[7] The purchasers claim that the property damage that they have incurred and will continue to incur in respect of the construction claims, on a joint and several basis, includes investigative costs, remediation and repair costs, cost to repair resulting damage, cost to mitigate their loss of the reasonable enjoyment of the property, loss of rental income, additional living expenses, moving expenses and other out-of-pocket expenses. In their action commenced October 20, 2022, the plaintiffs plead that they have spent over \$193,000 and anticipate spending a further \$75,000 to remediate the damages and losses arising from the negligent construction. They also claim nonpecuniary damages resulting from extreme financial pressures, mental anguish, inconvenience and loss of enjoyment of the property. They plead that they have attempted to mitigate their losses.

[8] Dominion has undertaken the duty to defend Mr. O'Leary in respect of the negligent construction claims. In respect of the O'Learys, as the vendors of the property, Dominion refers to the claims for breach of contract, negligence and negligent misrepresentation for failing to disclose defects in the property as vendor related allegations. It takes the position that because the vendor related allegations occurred after the construction of the home and after M.Y.Home ceased operations in 2013 to 2014, there is no coverage for these vendor related allegations under its policy. It wrote to Mr. O'Leary

“Costs incurred solely towards the defence of the vendor related allegations are not covered. There is also no coverage for damages awarded for the vendor related allegations, should liability be found on that basis.”

[9] Dominion also states that the claim can be read as alleging property damage that took place during the timeframe of its policy in 2010 and into 2011. It states however that there are allegations of deficiencies that resulted in property damage later on or that got worse over time. It states:

“The policy does not respond to property damage that took place outside of the policy period.”

[10] Dominion has also offered a gratuitous defence to Mrs. O'Leary. In a separate letter to Mrs. O'Leary, Dominion wrote:

“... The Plaintiffs plead that Mr. O'Leary and the excavation contractor were negligent in the construction of the home, such that property damage was occurring on an ongoing basis until the discovery of said deficiencies post sale.

The Plaintiffs plead that both O’Learys, as vendors of the property, are liable for breach of contract, negligence and negligent misrepresentation for failing to disclose the defects. These allegations are referred to below as the vendor related allegations.

The Plaintiffs seek \$300,000 in damages for the deficiencies and an unspecified amount of damages for the loss of quiet enjoyment of the home, together with interest and costs....

The vendor related allegations take place after the construction of the home and after M.Y.Home had ceased its business operations. There is no coverage under the policy for the vendor related allegations.

... Travelers previously recognized, by way of letter dated March 31, 2023, that Mr. O’Leary is an insured under the Policy. As such, Travelers agreed to provide Mr. O’Leary with legal representation and cover the costs associated with defending him against the allegations made by the Plaintiffs... To be clear, the Policy does not obligate Travelers to provide you with those same benefits as you are not an insured.

However, Travelers recognizes that you may face potentially significant prejudice should you not be provided a defence in relation to the claim. Travelers also recognizes that you and Mr. O’Leary are unified in interest, such that your defence and that of Mr. O’Leary may overlap significantly in certain respects.

... Travelers is willing to offer you a gratuitous defence in relation to the lawsuit brought against you. This means the Travelers will provide you with a defence despite no obligation to do so. Travelers sees no conflict of interest between you and Mr. O’Leary such that it is both appropriate and preferred that Travelers appoint a single lawyer counsel to represent both of you.”

[11] In the letter to Mrs. O’Leary, Travelers makes it clear that they will not indemnify her in respect of any damages for which she is found liable.

The BOQM Policy of Insurance

[12] Bay of Quinte Mutual Insurance Company (BOQM) insured Mr. and Mrs. O’Leary under a homeowner’s liability policy from July 17, 2020 to July 17, 2021. It is alleged that the negligent misrepresentations were made by them while this policy of insurance was in force, that is prior to and at the time of closing the sale in October 2020. BOQM has denied a duty to defend these claims. It informed Mr. and Mrs. O’Leary that:

“...The allegation in the action of your misrepresenting or concealing construction defects to the plaintiffs is alleged to have occurred in September/October 2020 and this falls within the term dates of the policy, but the alleged misrepresentations or concealment of the condition of the property did not cause bodily injury or property damage.

The allegations of the plaintiff appear to be that they would not have purchased the property, if the true condition (as alleged) was known to them. Again, the allegations of misrepresentations or concealment of the condition of the property did not cause damage to any property nor did it cause bodily injury....

Hence, there is no coverage for claims against yourselves in the court action....”

[13] In the underlying claim against the O’Learys, the negligent construction is said to have occurred during the lifetime of the Dominion policy and continued beyond its timeframe, and the negligent misrepresentations are alleged to have been committed during the lifetime of the BOQM policy.

The Preliminary Issue

Dominion seeks Equitable Contribution from BOQM for the costs of defending the claims against the O’Learys

[14] Dominion takes the position that BOQM’s denial of its duty to defend was incorrect and that BOQM must equitably contribute to Mr. and Mrs. O’Leary’s defences in the underlying claim. Dominion takes the position that BOQM has the obligation to reimburse it for 50% of the defence costs expended for Mr. O’Leary and 100% of the defence costs expended by Dominion for Mrs. O’Leary.

[15] BOQM argues that the requisite principles for the doctrine of equitable contribution to apply are not present in this case, and that therefore Dominion has no right of action against BOQM.

Analysis

[16] At the request of counsel for BOQM, and with the agreement of counsel for Dominion, the issue of the right of Dominion to bring a claim for equitable contribution was argued as a preliminary issue to be determined before argument on the second issue raised in the Application, namely whether BOQM has a duty to defend.

[17] On the issue of equitable contribution, I have carefully considered the authorities to which I have been referred by counsel. Although some of the cases to which I have been referred deal with both of these issues in reaching a decision, on the facts of the case before me, I find that I can proceed as proposed by counsel.

[18] In my view, this Application turns on the wording used by Travelers (Dominion) in its coverage letters to Mr. and Mrs. O’Leary, which it based on the wording of its policy of insurance.

[19] In its letter dated March 31, 2023 to Mr. O’Leary, it states:

“...Travelers has determined that the Policy responds to provide a duty to defend Mr. O’Leary....

The Plaintiffs plead that both O'Learys, as vendors of the property, are liable for breach of contract, negligence and negligent misrepresentation for failing to disclose the defects. These allegations are referred to below as the vendor related allegations. ...

Under the policy, Travelers has two types of potential coverage obligations: the obligation to defend claims and, should liability be imposed, the indemnity obligation....

The vendor related allegations take place after the construction of the home and after MY Home had ceased its business operations. There is no coverage under the policy for the vendor related allegations. Costs incurred solely towards the defence of the vendor related allegations are not covered....

Travelers acknowledges that some of the deficiencies alleged can be considered "property damage" as that item is defined...

The Policy also provides that covered "property damage" must take place during the policy period. The Policy was in force from September 23, 2010 until September 23, 2013. Travelers acknowledges that the Claim can be read as alleging "property damage" that took place during this time. However, there are allegations of deficiencies that resulted in "property damage" later on, or the got worse over time. The Policy does not respond to "property damage" that took place outside of the policy period. ...

For the reasons discussed above, Travelers has determined that the Policy responds to provide a duty to defend Sean O'Leary in respect of the claim. There are a number of allegations which fall outside the scope of coverage provided by the Policy. The Policy does not cover defence costs incurred solely towards the defence of uncovered allegations. This can include the cost of hiring an expert to advise on the vendor related allegations."

[20] As I understand the position of Dominion, it is affording coverage for the defence costs incurred in respect of the negligent construction claims alleged to have occurred while its Policy was in force. It clearly states that it will not be providing a defence for property damage occurring after its policy period, "The Policy does not respond to "property damage" that took place outside of the policy period.", meaning after September 23, 2013.

[21] Dominion also clearly states that it will not be providing a defence for the vendor related allegations.

[22] The letter dated June 5, 2023 to Mrs. O'Leary quoted above is in the identical terms. It notes that the allegations against her are solely in relation to her capacity as a subsequent owner and eventual vendor of the property in 2020. It states that there is no coverage under the Policy for the vendor related allegations, and therefore it does not assume the obligation to defend or to indemnify in respect of the vendor related allegations.

[23] Therefore, bearing in mind that the BOQM coverage that is alleged to be relevant was in place in the fall of 2020, from July 17, 2020 to July 17, 2021, the only defence costs being incurred by Dominion are in respect of the negligent construction claims arising from the fall of 2010 into the spring of 2011 and not after September 23, 2013, for which BOQM would have no risk of defending or indemnifying under the BOQM policy. The only defence costs being incurred by Dominion are with respect to the negligent construction claims and property damage occurring within its policy period.

[24] In this fact scenario, on the authorities relevant to the issue, Dominion has no right to equitable contribution.

[25] I find support for my decision in *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2024 ONCA 145. This recent decision overturned the trial decision upon which Dominion relied in its submissions to me.

Decision


[26] There is no reason to go on to consider the second issue raised in the Application as to whether BOQM has the duty to defend the vendor related allegations.

[27] For these reasons, the Application is dismissed.

Costs

[28] If the parties are unable to reach an agreement as to costs of the Application, after bona fide efforts to do so, BOQM may make submissions in writing limited to 2 pages and including a costs outline and any authorities within 10 days of receipt of this decision. Dominion may respond in like manner within five days thereafter.

[29] If no cost submissions are received within that timeframe, there shall be no order as to costs.


Tranmer J.

Released: March 14, 2024

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