NOVA SCOTIA COURT OF APPEAL

Citation: *Royal and Sun Alliance Insurance Company v. Stuart Estate*, 2005 NSCA 6

Date: 20050107
Docket: CA 221099
Registry: Halifax

Between:

Royal and Sun Alliance Insurance Company of Canada

Appellant

v.

John T. Stuart, as Executor of the Will of Audrey E. Stuart, and The Audrey E. Stuart Trust

Respondents

Judges:	Bateman, Cromwell and Saunders, JJ.A.
Appeal Heard:	December 8, 2004, in Halifax, Nova Scotia
Held:	**Appeal dismissed per reasons for judgment of Bateman, J.A.; Cromwell and Saunders, JJ.A. concurring.**
Counsel:	W. Augustus Richardson, for the appellant John Kulik and Tracy Bastow, for the respondents

Reasons for judgment:

[1] This is an appeal by Royal and Sun Alliance Insurance from the order of Associate Chief Justice Michael MacDonald (as he then was) of the Supreme Court of Nova Scotia requiring that the insurer pay the costs of remediating the contaminated soil on the respondents' property. The decision on appeal is reported as **Stuart Estate v. Royal and Sun Alliance Insurance Co. of Canada** at (2004), 221 N.S.R. (2d) 331; N.S.J. No. 87(Q.L.).

BACKGROUND:

[2] Audrey E. Stuart and her husband purchased 1560 Larch Street in Halifax in 1967. The heating system for the house was oil-fired hot water fed from a 1,000 gallon oil storage tank buried under the floor of the detached garage. After her husband's death in 1981 Mrs. Stuart continued to live in the house. Throughout this time, Mrs. Stuart had a home insurance policy with Royal and Sun Alliance ("RSA"). Her home heating oil was supplied by Cunards which company also serviced the furnace.

[3] In December, 1984, the furnace boiler was replaced by Cunards. The old boiler was cut in half to facilitate its removal which left quite a mess on the basement floor. Mrs. Stuart's son, John, and his son spent two days cleaning the basement.

[4] Notwithstanding this cleanup there was a lingering smell of oil in the basement which the Stuarts attributed to the boiler removal. After consulting with Cunards about the odour, John Stuart washed the floor with bleach and applied three coats of paint in hopes of ridding the basement of the smell. Despite these efforts the oil smell remained. The Stuarts urged Cunards to deal with the problem, however, the company took no responsibility.

[5] In 1986, Cunards recommended Mrs. Stuart replace the fuel tank. John Stuart testified at trial that he does not know whether Mrs. Stuart was advised by Cunards that the existing tank had a leak, that the tank was defective or simply that the tank needed replacement.

[6] During the October-December period of 1986 Cunards installed a new above-ground oil tank, pumping the oil from the existing buried tank which was

left where it was, underground. Mr. Stuart had the access pipe to the old tank capped off to ensure no new oil was delivered to it. The smell of oil in the basement persisted.

[7] In September, 1992, the Stuart Trust was set up with title to the Larch Street property transferred to the trust early the next year. Mrs. Stuart remained in the house. Mr. Stuart continued to pursue Cunards about the oil smell. In a letter written on October 20, 1993, expressing their dissatisfaction with Cunards' service, he noted the original oil tank had sprung a leak in 1986.

[8] On August 31, 1998, Mrs. Stuart collapsed at home and was taken to the hospital. When it became clear that she would not be returning home a decision was made to sell the house. The real estate agent who prepared a valuation of the house noticed the oil smell in the basement and advised that it would have to be looked into before sale. The company retained to investigate found the soil and groundwater around the home and under the foundation were contaminated by fuel oil and would require cleanup.

[9] On October 15, 1998, Mr. Stuart notified RSA of the need to clean up the soil. RSA's adjuster, concluding that the oil leak had been noticed sometime in 1986, declined coverage relying upon the policy's one year limit for a claim.

[10] In order to proceed with the sale of the house John Stuart retained a company to carry out the remediation work which included digging up and removing the old underground tank. That tank was found to be empty and corroded with many holes.

[11] The fuel-contaminated soil under the house was removed and replaced at a cost of $143,346.84. John Stuart, as executor of Mrs. Stuart's Estate, successfully sued at trial for reimbursement from RSA under the policy (subject to the policy limits). RSA was ordered to pay $109,200, plus pre-judgment interest of $22,113 and party and party costs of $13,661.50 plus disbursements. It is from that judgment that RSA appeals.

ISSUES ON APPEAL:

[12] RSA raises the following issues:

1. Was the claim for the cost of removing the contaminated soil a claim that was covered under the terms of the 1985 policy?
2. If it was covered, was the claim barred by contract or statute because it was made more than one year after the loss or damage occurred?
3. Alternatively, was time stayed until the investigation in the fall of 1998 because the Stuarts did not know, and could not reasonably have been expected to know, of the contaminated soil before that time?

STANDARD OF REVIEW:

[13] Trial judgments are insulated from review, save for palpable and overriding error of fact. The standard of review for questions of law is correctness. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness (**Housen v. Nikolaisen**, [2002] 2 S.C.R. 235).

[14] Counsel for RSA submits that inferences of fact are not afforded the same high level of deference as are primary factual findings. That submission is expressly rejected by the majority in **Housen**, **supra**. Iacobucci and Major, JJ., writing for the majority, said:

> 19 We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.
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> . . .
>
> 21 . . . the standard of review is not to verify that the inference can be *reasonably supported* by the findings of fact of the trial judge, but whether the trial judge made a *palpable and overriding* error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

> 22 . . . drawing an analytical distinction between factual findings and factual inferences . . . may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
>
> 23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.
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> (Emphasis added)

[15] Factual conclusions are accorded the same high level of deference as are findings of primary facts.

Analysis:

(a) Coverage:

[16] An issue at trial was which of three insurance policies applied to this loss - 1985, 1986 or 1998. The judge concluded that, if there was coverage for the loss, the applicable policy was that in force in 1985. This finding is not on appeal.

[17] On the issue of coverage under the policy the judge said:

> [43] This policy is known as the *Select Homeshield Policy*. Its terms are set out in *Exhibit 1, Tab 9*. I refer specifically to page 2, under the heading "Your Home". It provides that coverage includes more than just the building. It includes the "property surrounding your home". This would, therefore, include the contaminated soil and ground water.
>
> [44] Turning to the alleged exclusion for *deterioration, rust, corrosion, or contamination* I note at the outset, that at page 4, "damage caused by bursting...of your...fuel tank" is covered. In this part of the policy at least, there is no specific exclusion for *deterioration, rust, corrosion, or contamination*. In this regard, I accept Plaintiffs counsel's submission that if any such exclusion did exist, applying the *Simcoe and Erie, (supra)* principles, only the actual thing *deteriorated*, etc. would be excluded i.e. the old worthless oil tank. I find, therefore, that this loss was a covered peril.
>
> (Emphasis added)

[18] RSA submits that in finding there was coverage for this loss, the judge erred in his interpretation of the policy. RSA says this error was borne of the judge's confusion over the different types of coverage offered in the 1985 and 1986 policies.

[19] In effect in 1985 was a "named peril" policy. The applicable section provided:

> Hazards You're Protected Against
>
> Your home and other property insured under this policy are protected against direct losses and damage caused by any of the hazards described below.
>
> . . .
>
> Fuel Tanks. We cover loss or damage caused by the bursting or overflowing of your domestic fuel tank, apparatus or pipes in your home.

[20] In contrast, the 1986 policy provided “all risks” coverage, subject to specified exclusions. There were submissions at trial about whether a clause contained in the 1986 policy excluding coverage for “ inherent vice, latent defect, mechanical breakdown, rust or corrosion . . .” applied.

[21] Under all policies, the onus of establishing coverage lies with the insured while the onus of proving the loss is excluded rests with the insurer. RSA says the judge failed to turn his mind to the question of whether the contamination of the soil due to the corrosion of the fuel tank was within the coverage under the 1985 policy, that is whether it was “...damage caused by the bursting or overflowing of your domestic fuel tank”. . . . It is RSA’s submission that, rather than requiring the claimants to discharge the onus of proving that the grant of coverage within the 1985 policy covered this particular loss, the judge assumed coverage and looked to the insurer to establish that the loss fell within an exclusion. He wrongly focussed on whether there was an exclusion of coverage. This occurred because he confused RSA’s submissions about the exclusion clause in the 1986 policy with its submissions on coverage under the 1985 policy, which latter policy did not contain an exclusion clause.

[22] The Stuarts had pleaded that the oil contamination resulted from a “rupture” of the tank. RSA says, while there was evidence that the tank was corroded when removed from the ground in 1998, there was no evidence at trial establishing that the fuel tank had “ruptured” while containing oil (i.e. pre-1986 when the new tank was installed). Nor, says RSA, does “rupture” include corrosion. In any event, the rupture or corrosion of the tank does not constitute “bursting or overflowing”, as is required under the policy. The judge did not specifically address these issues.

[23] The respondents say that the judge did decide the threshold issue of coverage. His words “. . . I note at the outset, that at page 4 [of the 1985 policy], "damage caused by bursting...of your...fuel tank" is covered . . .” demonstrate that he equated “bursting” with the deterioration of the tank through corrosion. The fact that the judge tracked the wording of the coverage clause but omitted “overflowing”, say the respondents, illustrates that he did turn his mind to the issue and was satisfied that the loss of the oil through holes caused by corrosion was within the meaning of the policy. Further, say the respondents, it was reasonable to infer that the tank had corroded while underground and containing oil. I would agree. I am not persuaded that the judge failed to consider whether the corrosion of the tank fell within the policy requirement of “bursting”.

[24] The judge correctly noted that coverage provisions should be construed broadly and exclusion clauses narrowly, citing the Supreme Court of Canada in **Reid Crowther & Partners Ltd. v. Simcoe & Eric General Insurance Co.**, [1993] 1 S.C.R. 252. By referring to the "exclusion" clause in the passage above (at para. 17), I interpret the judge to be saying, simply, that a broad and liberal interpretation of the coverage under the 1985 policy would include, under "bursting", the rupture of the oil tank due to corrosion. If the insurer had intended not to cover such a peril it could have expressly excluded it.

(b) Limitation:

[25] RSA says that the judge further erred in finding the Stuarts had reported the loss within the time limits required by the policy. For the purpose of this case only, RSA accepts that the discoverability rule applies to this contract of indemnity.

[26] In **Central Trust Co. v. Rafuse** , [1986] 2 S.C.R. 146, LeDain, J., for the Court, described the discoverability rule as follows (at pp. 151-152):

> ". . . A cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. ...

[27] The significant issue for the trial judge was when the material facts necessary to ground a claim were known, or ought to have been known, to the Stuarts.

[28] It is helpful to look at the obligations placed on the insured by the terms of the policy:

> **Protecting Your Property** If your property is damaged we expect you to take all reasonable steps to protect it from further damage. You should make all reasonable repairs and keep accurate and complete records of your expenses. We'll reimburse you for these costs and they'll be included in figuring the total amount we'll pay for the loss.
>
> . . .
>
> **What You Must Do**

> You must tell us as soon as you learn of a situation that may give rise to a claim. You'll also notify us as soon as someone files a claim or brings a suit against you and send us any legal papers received by you or your representative.
>
> (Emphasis added)

[29] Among the statutory conditions which form part of the policy are the following:

> **Requirements after loss**
>
> **6. (1)** Upon the occurrence of any loss of or damage to the insured property, the Insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11,
>
> (a) forthwith give notice thereof in writing to the insurer;
>
> . . .
>
> **Action**
>
> **14.** Every action or proceeding against the Insurer for the recovery of any claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs.
>
> **Salvage**
>
> **9 (1)** The Insured, in the event of any loss or damage to any property insured under the contract, shall take all reasonable steps to prevent further damage to any such property so damaged and to prevent damage to other property insured hereunder including, if necessary, its removal to prevent damage or further damage thereto.

[30] RSA says the trial judge erred by requiring the claimants to know the extent of the leak or the true nature of the leak before the time limits ran. As illustrative of this alleged error the insurer refers to the following excerpt from the judge's reasons:

> [13] But what happens when the loss is insidious, and the plaintiff is unaware of its existence? It would certainly be unfair to enforce filing deadlines when the plaintiff is not even aware of the loss. What about a plaintiff who is aware of a loss, but not its extent? In other words what if, on the surface, the damage appeared trifling but, underneath, there existed very extensive damage with serious consequences (the proverbial "tip of the iceberg")?

> [14] To address these types of problems, Canadian Courts have held that a cause of action does not accrue (and the "prescription clock" does not start ticking) until the plaintiff knows (or with reasonable diligence ought to have known) the facts which comprise the cause of action. In other words the plaintiff must by applying reasonable diligence, "discover" the cause of action before the filing deadlines apply.
>
> (Emphasis added)

[31] It is accepted law that once a claimant knows that some damage has occurred the exact extent of damage need not be known for an action to accrue (**Peixeiro v. Haberman**, [1997] 3 S.C.R. 549). I do not agree with RSA's submission, however, that in posing the questions as he did in the above passage, the judge was misstating the law or had concluded that the Stuarts knew of the loss but not its extent.

[32] The discoverability principle is one of construction (see **Peixeiro**, **supra** at para. 37 and **Burt v. LeLacheur** (2000), 186 N.S.R. (2d) 109; N.S.J. No. 230 (Q.L.)(C.A.) at para. 29.) Its application depends on the particular contractual and statutory wording. Before time runs, the claimant must have sufficient knowledge of the material facts to put him or her to an inquiry. The amount of knowledge necessary to trigger the running of time must be determined by the trial judge, applying the contractual wording and the discoverability principle to the facts found. (**Burt**, **supra**, at para. 44) Here we are concerned, not with a limitation period running from an event which occurs without regard to the insured's knowledge, for example, the date of death, but one running from an event which can be construed as occurring only when the insured party has knowledge of the loss. The policy obligation and the statutory provision focus on a claim under the policy. The policy itself requires the insured to tell the insurer "... as soon as you learn of a situation that may give rise to a claim"; the statutory conditions require the insured to give notice of a "loss or damage ... if such loss or damage is covered by the contract." (for the policy wording see paras. 28 and 29, above) As applied here, the reference to a "situation", the "loss" and the "damage" must mean soil contamination giving rise to a claim. If it were otherwise, knowledge that a drop or two of oil had dripped onto the ground would require notice of loss to be given. While it is true that the fact of loss, rather than its extent, is the material fact for the purposes of the discoverability principle, there still must be knowledge of a loss claimable under the policy. Here that loss is not the escape of any unknown

amount of oil, but the contamination of the soil by the escape of oil. The analysis of the Supreme Court of Canada in **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at paras. 29 and 30, although made in the context of different contractual language, is apt here. Paraphrasing the words of Iacobucci and Bastarache, JJ.: A loss need not be conclusively determined to exist in order for discovery to occur. All that is required for discovery of a loss are sufficient facts to cause a reasonable person to assume that a loss of a type covered by the policy will be incurred. Suspicion in itself is not sufficient to constitute discovery but should be considered along with all the other facts.

[33] It was the judge's finding, supported on the evidence, that the Stuarts had no idea until 1998 that the soil and groundwater were contaminated by oil:

> [36] In approaching this question, it is clear to me that the Plaintiffs had no idea of the extent of the loss until the 1998 investigation was complete. It is the family's evidence, which I accept, that they had no idea the soil and ground water surrounding the home was contaminated. I find that, throughout, they thought it was a problem somewhere in the basement that would be categorized as a nuisance.
>
> (Emphasis added)

[34] The judge accepted that, as early as 1986 when all other efforts to rid the basement of the fuel smell failed, Mr. Stuart suspected an oil tank leak as the source of the problem. RSA says, in light of that knowledge, it would only have been reasonable for the Stuarts to assume that oil would have leaked into the soil. They were obliged, says RSA, to further investigate. The judge was alive to this issue. He said:

> [38] . . . The more difficult question is: By exercising "reasonable diligence", *should* the Plaintiffs have been aware of the claim back in the mid-1980's when the smell of oil remained persistent, despite extensive efforts to bleach and paint the basement floor. A first reaction would be "surely they must have known that they had a major leak or at least should have investigated it further". However, the situation was not that simple. I find, after carefully considering all the evidence in this matter, that the Stuart family, without the benefit of hindsight, was reasonably diligent in handling this problem. . .
>
> (Emphasis added)

[35] John Stuart acknowledged on cross-examination at trial that, in retrospect, it would have been reasonable to conclude that oil may have leaked into the soil. There was, however, no evidence that he actually considered the possibility of soil contamination before 1998. Nor was there evidence that, in the years leading up to the actual discovery of the contamination, he was aware of a "situation that would give rise to a claim", to track the policy wording. It was therefore open to the judge to make the findings he did on those issues.

[36] Since the Stuarts did not actually know they had a soil contamination problem until 1998, the question for the judge was whether, with reasonable diligence, they ought to have known so. The judge's conclusion that the claimants were reasonably diligent in their handling of the matter involved the application of a legal standard to the facts. As such, it is reviewed on the palpable and overriding error standard unless affected by some extricable legal error (para. 13, above and **Housen**, **supra**, at para. 37).

[37] In considering the hypothesis that "surely they must have known" they had a major leak and in assessing whether the steps taken by the claimants were reasonable, the judge considered John Stuart's evidence in the context of the circumstances existing from 1984 until discovery of the contamination in 1998. The judge referred to a number of factors which lead him to conclude that the Stuarts were diligent in their approach to the problem:

> They initially thought the oil smell was attributable to the mess left upon the installation of the new furnace in 1984;
>
> The smell was in the basement, not elsewhere in the house nor on the surrounding property, thus they did not make a connection between the oil tank, which was buried under the floor of the garage, and the odour in the basement;
>
> When an RSA risk inspector came to assess the property in 1994, prior to renewing coverage, he did not mention the smell of oil in the basement. Given that the odour was persistent, it was reasonable for the Stuarts to assume that the inspector had smelled the oil but thought it of no consequence;

[38] The judge noted, as well, that the claimant's actions must be assessed taking into account the general awareness of the risk posed by oil tank leaks in the 1980's, not assessed in the context of the heightened attention to such hazards as exists today.

[39] The judge concluded:

> [39] For all these reasons, and applying *Rafuse, (supra)*, I find that "the material facts on which [the claim] is based...[were not] discovered or ought to have been discovered by the Plaintiffs by the exercise of reasonable diligence" until the fall of 1998. The action was filed in June of 1999. It is, therefore, timely and not barred by contract or statute.

[40] No legal error is apparent on the judge's application of the standard to the facts. The issue, then, is whether the judge made a palpable and overriding error of fact in determining when the Stuarts were aware, or should have been aware, of the material facts.

[41] In **Royal Trust Corp. of Canada v. American Home Assurance Co.**, (1992), 112 N.S.R. (2d) 156 (S.C.); N.S.J. No. 163)(Q.L.)(T.D.) a barrister, Ruck, had been negligent in his work for Royal Trust Corporation. Royal obtained default judgment against him. The barrister was under a professional liability insurance policy taken with the insurer American Home. The insurer denied coverage on the ground that the barrister breached a condition of the policy by failing to give prompt notice of his claim. The issue of timely notice came before Roscoe, J. (as she then was). She held that the insurer failed to prove that there had been a breach of the condition because there was no proof of when the barrister knew he had a potential claim. She said at p. 170:

> [56] . . . In this case, the evidence does not establish when Mr. Ruck learned of the happening that gave rise to this claim. I am not able to infer from his correspondence at the relevant time or from the other evidence that he knew of his error.
>
> [57] Even if Mr. Ruck had knowledge of his error, the evidence does not establish that he recognized that it might give rise to a claim against him. As soon as his associate learned of the error, notice was given to the insurer. In the circumstances, I am unable to find that the defendant has met the burden of proving a breach of the notice requirements of the policy and, therefore, coverage should not have been denied by the defendant.

[42] In a brief oral judgment, this Court dismissed the appeal (decision reported at (1993), 121 N.S.R. (2d) 264; N.S.J. No. 160 (Q.L.)). Jones, J.A., speaking for the Court, said:

> We have carefully reviewed the decision of the learned trial judge and we agree with her conclusions. The insured was required to give the insurer notice "after learning of a happening which may give rise to a claim". That was a question of fact for the trial judge which included an assessment of Mr. Ruck's evidence. We see no basis to interfere with her decision on that issue. See **Jeans v. Carl B. Potter Limited** (1977), 24 N.S.R. (2d) 106. . . .

(Emphasis added)

[43] I am not persuaded that the judge's finding that the Stuarts were reasonably diligent in their handling of the matter, resting as it did on his assessment of the evidence, constitutes palpable and overriding error.

DISPOSITION

[44] I would dismiss the appeal with costs payable by the appellant to the respondents in the amount of 40% of those awarded at trial, which amount I would fix at $5465.00 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.