

NOVA SCOTIA COURT OF APPEAL

Citation: *ING Insurance Company v. SREIT (Park West Centre) Ltd.*,
2009 NSCA 38

Date: 20090415

Docket: CA 300130

Registry: Halifax

Between:

ING Insurance Company of Canada

Appellant

v.

SREIT (Park West Centre) Ltd., a body corporate, and
Artrus Realty Corporation, carrying on business as O & Y Enterprises

Respondents

Judge: The Honourable Justice Jamie W. S. Saunders

Appeal Heard: April 6, 2009

Subject: Slip and fall. Occupier's liability. Pleadings. Cause of action.
Causation. Duty to defend. Duty to indemnify. Standard of review.

Summary: A pedestrian sued for damages after falling on a sidewalk outside the respondents' premises. Until the pleadings were amended, the appellant insurer was prepared to provide a complete defence to the respondents for the acts or omissions of a contractor hired to salt and sand during the winter months. The plaintiff amended his statement of claim and alleged the respondents were negligent in maintaining a leaky rain gutter which may have caused or contributed to the ice build up leading to the mishap. The appellant insurer refused to defend the respondents against the so-called rain gutter allegations on the basis that these new assertions amounted to separate actionable claims against the owners, for which their own insurers would provide cover.

As a result, the respondents sought a declaration pursuant to **Civil**

Procedure Rule 9.02 obliging the appellant to assume and pay for their entire defence in the main action.

The Chambers judge allowed the respondents' application. The appellant insurer appealed.

Held: Appeal dismissed. The Chambers judge's decision should be reviewed on a standard of palpable and overriding error. His principal focus was not to interpret the terms of the insurance contract, but rather to assess the pleadings in order to ascertain the substance or true nature of the claim, and whether it would give rise to liability within the policy coverage. The judge's inquiry involved a question of mixed fact and law, heavily weighted towards the facts. The judge was satisfied that despite the rain gutter allegations in the amended pleadings, the true nature or substance of the action being a slip and fall on an unsalted icy sidewalk, had not changed.

The judge's analysis, reasons and disposition did not result from any palpable and overriding error. Even if a correctness standard were applied his decision would be upheld.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 10 pages.