NOVA SCOTIA COURT OF APPEAL

Citation: Thorburn Wharf Fisheries Ltd. v. ING Insurance Company, 2010 NSCA 96

Date: 20101130
Docket: CA 326134
Registry: Halifax

Between:

Thorburn Wharf Fisheries Limited

Appellant

v.

ING Insurance Company of Canada and
Aviva Canada Inc.

Respondents

Judges:	Saunders, Fichaud and Bryson, JJ.A.
Appeal Heard:	November 23, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	Andrew S. Nickerson, Q.C., for the appellant Scott C. Norton, Q.C., for the respondents

Reasons for judgment:

[1] After hearing submissions from counsel, we recessed and then returned to court to announce our unanimous decision that the appeal was dismissed, with reasons to follow. These are our reasons.

[2] The unusual facts surrounding this claim are fully canvassed in the decision of Nova Scotia Supreme Court Justice John D. Murphy, now reported as **Thorburn v. ING**, 2010 NSSC 181.

[3] For the purposes of this appeal, we need only recite the facts summarily. The appellant owns a wharf in Shelburne. The respondent ING issued a "Named Perils" policy of insurance insuring the wharf for the perils described therein. On June 15, 2006, a motor vessel named "Ragin Cajun" was berthed at the wharf without the appellant's knowledge or consent. That afternoon and early evening high winds caused large waves to batter the vessel against the wharf, repeatedly.

[4] A crowd gathered. An unidentified group of people decided to move the vessel to the other side of the wharf which was more sheltered from the wind. Those persons proceeded to untie the vessel and drag it. But as the vessel came around the front of the wharf it was swamped and sank. When it resurfaced, the stern came up under the wharf and tore off the front section of the structure.

[5] The appellant filed a proof of loss claiming damage to the wharf as an insured peril. The respondent denied the claim on the basis that the nature of the loss was an excluded peril.

[6] The parties applied in Chambers pursuant to **Civil Procedure Rules** 12 and 23, seeking an order determining:

> ...whether the damage to a wharf is excluded from insurance coverage in accordance with the policy of insurance which is the subject of this action by reason of the policy wording based on the facts agreed by the parties.

The only evidence filed was an agreed statement of facts.

[7] At the conclusion of the hearing, Murphy J. accepted the respondents' submissions, declaring that based on his interpretation of the policy, no liability lay

with the insurer for damage caused to the wharf by this vessel in such circumstances.

[8] On the motion before him, the judge was asked to interpret the exclusions sections of the policy, specifically the following provision which excluded liability for loss or damage:

> ... 2(i) directly or indirectly caused by any of the following whether driven by wind or due to wind storm or not:
>
> ... tidal wave, high water, ...flood, waterborne objects, waves...

[9] The judge reasoned that "waterborne object" was a very broad term, and that the intention he gleaned from the policy was that any object borne on the water was to be included in the term "waterborne object". He concluded that there was no ambiguity or limitation in the words of the exclusion which might trigger an application of the principle of *contra proferentem*. On the facts before him he was satisfied that the exclusion described by such a sweeping phrase as "waterborne object" was intended to effectively include vessels such as the boat involved in this mishap.

[10] As to the appropriate standard of review on appeal, we agree with the respondent. While it is true that the judge was discerning the meaning of certain words within an insurance contract and in that sense was required to employ correct legal principles of interpretation, in doing so he was applying those principles to a particular set of facts. The exercise was really a question of mixed fact and law to which deference is owed. Absent palpable and overriding error, this court will not intervene. **Housen v. Nikolaisen**, 2002 SCC 33; **Ken Murphy Enterprises Ltd. v. Commercial Union Assurance Co. of Canada**, 2005 NSCA 53. We see no such error by the judge in this case.

[11] The wharf was insured on a "Named Perils" basis, subject to the exclusion in issue. The parties conceded and the judge recognized that had the appellant insured its wharf on an "All Risks" basis (as it did with the other buildings insured by the policy) there would not have been an exclusion of coverage. With respect, the appellants' claim for relief appears to be an attempt to extend coverage in the absence of any contract with the respondents to provide such protection.

[12] A plain and ordinary reading of the language in the policy led Justice Murphy to the conclusion that the "Ragin Cajun" was a waterborne object that, directly or indirectly, whether driven by wind or due to windstorm or not, caused the damage to the wharf. In his view, there was no ambiguity, and therefore *contra proferentem* did not apply. His analysis and conclusion did not result from any palpable and overriding error.

[13] One might whimsically ask: if the "Ragin Cajun" were not waterborne, then what conceivably bore it?

[14] In conclusion we see no error on the part of the Chambers judge in his identification of the correct legal principles of interpretation, or in his application of those principles to the circumstances before him. Accordingly we would dismiss the appeal with costs of $750, exclusive of disbursements (agreed or taxed) to the respondents.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.