S.C.A. No. 02763

NOVA SCOTIA COURT OF APPEAL

Jones, Hallett and Freeman, JJ.A.

Cite as: Canadian Lawyers Insurance Association. v. Moore, 1993 NSCA 142

BETWEEN:

CANADIAN LAWYERS INSURANCE ASSOCIATION	)	Colin D. Bryson for the Appellant
Appellant	)	W. Dale Dunlop for the Respondent
- and -	)	
MICHAEL C. MOORE	)	Philip Chapman for the Intervenor
Respondent	)	Appeal Heard: March 30, 1993
- and -	)	
CENTRAL GUARANTY TRUST COMPANY	)	Judgment Delivered: July 20, 1993
Intervenor	)	

THE COURT: Appeal allowed with costs to appellant on the application to Justice Goodfellow in the amount of $1,500.00 plus disbursements and costs of this appeal to the appellant in the amount of $1,000.00 plus disbursements per reasons for judgment of Hallett, J.A.; Jones and Freeman, JJ.A. concurring.

HALLETT, J.A.

This is an appeal from a decision of Mr. Justice Goodfellow granting a declaration that the respondent, a practicing lawyer, is entitled to insurance coverage from the appellant with respect

to a claim being advanced against him by the intervenor. The claim arises from the admitted negligence of the respondent in providing legal services to the intervenor with respect to a mortgage transaction.

The issue on the application before Mr. Justice Goodfellow was whether the respondent had complied with the claims procedure provisions of the policy. The appellant had taken the position that the respondent was not covered because he breached the condition of the policy that required him to give notice of a probable claim:

> " Claims Procedure
>
> The Insured, as soon as practicable after learning of a claim or of a circumstance which would likely give rise to a claim hereunder, shall give notice or cause notice to be given to W.L. Jollimore Adjusters Ltd., 560 Spring Garden Road, Suite 404, P.O. Box 3368, South Postal Station, Halifax, Nova Scotia, B3J 3J1 as a condition precedent to the Insured's right to the protection afforded by this Part A of the Policy in respect of such claim or circumstance. The Insured shall furnish promptly thereafter to such person such information as the Insurer may reasonably require and is in the Insured's power to give and shall forward to such person every demand, notice, summons or other process received by the Insured." [Emphasis Added]

The respondent had been engaged by the intervenor to perform the necessary legal services to ensure that the intervenor obtained a valid first mortgage on real property purportedly owned by the wife of the respondent's law partner, Rockwell, to secure a loan being made to Rockwell by the intervenor. A title search disclosed to the respondent that the property was in the name of Rockwell's infant son. On February 8, 1988, the respondent took a mortgage signed by Rockwell and his wife without obtaining court authorization as required by law to permit Rockwell to mortgage the infant's real property. The money, supposedly secured by a valid mortgage, was advanced by the respondent to Rockwell for his own purposes rather than for the benefit of the infant. The mortgage was clearly invalid. The respondent was not aware that court authorization was required to mortgage the infant's real property. The respondent certified to the intervenor that it had obtained a valid charge against the property.

On December 9, 1988, a legal officer of the intervenor, upon reviewing the file, wrote

to the respondent that he had concerns that the mortgage in question was invalid and that he was looking to the respondent to rectify the problem. The respondent hoped he could obtain retroactive approval of the mortgage by the court; however, it was not until the late summer of 1990 when Rockwell refused to sign an affidavit in support of such an application that the respondent began to consider that he ought to report the matter to the appellant.

The detailed facts are set out in Mr. Justice Goodfellow's decision reported in (1993), 115 N.S.R. (2d) 345. The respondent did not give notice to the appellant until October 17, 1990, almost two years after having become aware of his client's concerns.

After reviewing the law Justice Goodfellow concluded at p. 352:

> " ...the question becomes, would a reasonably prudent solicitor have given notice to the Insurer, in this case prior to October 17, 1990? My answer is, on a balance of probabilities, "no". Circumstances govern what is reasonable and prudent and what a reasonably prudent solicitor would do in a particular case. Mr. Moore was the junior partner of his client, Mr. Rockwell, and accommodated his client on a mortgage collateral to personal indebtedness of Mr. and Mrs. Rockwell. When the error came to light, not only did Mr. Moore believe that it could be rectified, but that was the professional view of Mr. Rockwell and of Mr. Fraser, the solicitor for Central. The representations of Mr. Rockwell to Mr. Moore in the absence of any knowledge by the latter of any default and the continuing patience of the mortgage company, coupled with the outward appearance of financial stability on the part of Mr. Rockwell, were all circumstances which, when taken cumulatively, support the reasonableness of Mr. Moore's behaviour. On a balance of probabilities, a reasonably prudent solicitor would not conclude that the claim was likely until the time arrived where Mr. Rockwell refused to facilitate the application. One gets the impression from the material on file that at or prior to Rockwell's refusal, which I find more than likely to have taken place in the late summer of 1990, Mr. Rockwell may well have concluded that an opportunity existed to preserve the property.
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> In reaching the conclusion that a reasonably prudent solicitor would not likely conclude that a claim would be advanced until approximately October 17, 1990, I have considered the overall length of time, from the time of the error being discovered, December 9, 1988, until the time of notice; however, I would not want barristers to take comfort from my decision that the clock could tick forever before a reasonably prudent solicitor is required to force the issue. In these particular circumstances, time had all but run out by the 17th of October, 1990 and I have no doubt that if the matter had not been brought to a head, the solicitor for Central, Mr. Fraser, being a reasonably prudent solicitor, would have concluded about this time

that the matter could not go on any longer."

This case raises the murky issue of whether the insurer, to successfully deny coverage for failure of the insured to report as required by the policy in the absence of a claim having been made, must prove that the insured had subjective knowledge that a claim was likely or merely prove that the insured ought to have known that a claim was likely - the objective test. By notice of contention counsel for the respondent asserts that the test is subjective and that the respondent did not believe a claim was likely until late summer or the fall of 1990. The learned trial judge applied an objective test.

In my opinion, having received the December 9th, 1988 letter the insured had learned of a circumstance that would likely give rise to a claim if he could not rectify the problem. Having become aware of the requirement for court authorization he had actual knowledge that he had breached the duty owed to his client to only advance funds against the security of a valid mortgage. This was not a situation where the lawyer, although he knew of the circumstances giving rise to the claim (having participated in the event), did not know that under the circumstances he had likely been negligent. It is one thing for a lawyer to make a mistake and not be aware that it was a mistake nor aware of its consequences; but it is quite another to have it brought to his attention that he had made an obvious error that would likely lead to a claim if not remedied. In the former situation you would not say the lawyer had an obligation to report on the basis that a reasonably prudent solicitor would have known of the mistake and reported to the insurer; that would be absurd as it would negate the coverage in the very circumstances it was intended to apply. In the latter situation, however, the lawyer ought to meet the standard of a reasonably prudent solicitor in reporting; otherwise a solicitor who has breached a duty to his client that has damaging consequences could ignore with impunity the notice requirement by stating that he did not understand that his apparent breach of duty, of which he had been made aware, would likely give rise to a claim.

To prove a breach of the reporting requirement of this policy, where a claim has not been made, the insurer must prove three things. First that the insured lawyer had actually become aware

that he had likely breached a duty to his client in the performance of legal services. Otherwise, it could not be said that he had "learned" of such a circumstance. A court could infer such knowledge from the evidence. Secondly, after learning of his probable breach of duty, a lawyer must measure up to the standard of a reasonably prudent lawyer in assessing whether his deficient conduct will likely give rise to a claim; at this stage an objective test applies. The insurer must adduce evidence from which a court could conclude that the lawyer did not meet this test. The lawyer cannot be absolved from the contractual responsibility of reporting as soon as practicable simply because, although he had learned of his probable breach of duty to his client, he did not believe a claim was likely; such a belief must be a belief that would be reasonably held by a prudent solicitor under the circumstances. Thirdly, the insurer must prove the insured failed to report as soon as practicable. If the delay in reporting, after learning of an apparent breach of duty is lengthy, as in this case, the lawyer, as a rule, must adduce some evidence that would support a finding that he acted as a reasonably prudent solicitor would have under the circumstances.

The issue before Mr. Justice Goodfellow was whether the appellant had proven that the respondent, having learned on December 8, 1988, that the mortgage was likely invalid and that the mortgagee was looking to him to fix it, did not act as a reasonable and prudent solicitor in failing to give notice to the insurer until October 17, 1990.

The proceeds of the mortgage on the infant's real property were used by Rockwell for his own purposes and not for the benefit of the infant. Mr. Justice Goodfellow found that the respondent believed the error could be rectified and that "a reasonably prudent solicitor would not conclude that the claim was likely until the time arrived when Rockwell refused to facilitate the application" to court; that was in the late summer of 1990. The respondent had hoped such an application would result in the court validating the mortgage.

In my opinion Justice Goodfellow properly applied an objective test but erred in two respects; first, he failed to consider material evidence in deciding that the notice was given as required by the policy. The failure of a judge of the first instance to consider material evidence warrants a court of appeal interfering with his findings (**Cimco Ltd. v. Starr Manufacturing Ltd.**,

(1977) 17 N.S.R. (2d) 381 (N.S.C.A.) at 386). The learned chambers judge failed to consider that the loan had been used by Rockwell for his own purposes and as a result it would have been unlikely, considering the provisions of **Civil Procedure Rule 47**, that a court would retro-actively validate the mortgage on the infant's real property. The conditions which will justify a court approving the mortgage of infants real property are set out in **Civil Procedure Rule 47.03**:

> " 47.03. (1) Where it appears that,
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> (a) a disposal of any property is necessary for the maintenance, support or education of a person under disability, and any infant child, wife or dependent thereof;
>
> (b) the interest of a person under disability, and any infant child, wife or dependent thereof, will be substantially promoted by the disposal because of the property being exposed to waste, dilapidation, or being wholly unproductive;
>
> (c) there is any other reasonable cause for the disposal;
>
> the court may make an order for the sale, mortgage, lease or other disposal of the property in such manner, on such terms, and with such restrictions, as it considers just.
>
> (2) The order of the court may provide,
>
> (a) for the investment, disposal, and application of the proceeds of the sale, mortgage, lease or other disposal of the property and of any capital appreciation and income arising therefrom, for the benefit of the person under disability and of any infant child, wife or dependant thereof;
>
> (b) for the maintenance, support or education of the person under disability and of any infant child, wife or dependant thereof;
>
> (c) that any sale, mortgage, lease or other disposal of the property be made by the guardian or person appointed by the court;
>
> (d) unless an enactment otherwise provides, that the guardian or person appointed by the court file a bond to be approved by the court that contains such terms and conditions as are ordered;
>
> (e) for the submission and filing of the accounts of the guardian or other person, relating to the investment and application of the proceeds of the sale, mortgage, lease or other disposal of the property, with the court for approval annually or at such times and in such manner as the court may from time to time order;
>
> (f) for the remuneration of the guardian or other person;

> (g) for such other terms or conditions as the court thinks just.
>
> (3) Unless it is necessary for the maintenance, support or education of the person under disability and any infant child, wife or dependent thereof, a sale, mortgage, lease or other disposal shall not be ordered to be made that is contrary to the provisions of any last will, transfer, or conveyance by which the property was devised, transferred or conveyed."

As a general rule a court must be satisfied the mortgage would benefit the infant. There would appear to be no evidence to support an application for court approval. Secondly, the learned chambers judge erred in that he gave too much weight to irrelevant factors in deciding that the respondent was not required to report until October 17, 1990. He erred when he concluded that the views of Rockwell and Fraser, as expressed to the respondent, that the mortgage could or might be validated by an application to court were relevant factors absolving the respondent from the responsibility to report before October, 1990. A somewhat analogous situation existed in **Central Trust v. Rafuse and Cordon** (1986), 75 N.S.R. (2d) 109 (S.C.C.), where the Supreme Court of Canada at paragraphs 64 and 65 held that it was the duty of the lawyer engaged to perform legal services in connection with a mortgage to ensure that a valid mortgage was obtained and that he could not be partially absolved from responsibility because other persons trained in the law and involved in the transaction as employees or directors of the mortgagee were not conscious that the mortgage transaction which they had approved offended certain provisions of the **Companies Act**. The Court held it is the duty of the lawyer under such circumstances to properly assess the legality of the transaction.

The respondent had a duty to determine from his own research or by consulting with an experienced solicitor whether there was a likelihood of obtaining retroactive court approval of the mortgage. The respondent appears to have assumed such an order could be obtained. He neither consulted an experienced counsel nor did he undertake reasonable research to ascertain if such approval could be obtained once the problem was discovered in December of 1988.

A reasonably prudent solicitor would have concluded right from the outset that a claim was probable as the mortgage was bad and there was little likelihood of obtaining retro-active

approval by the court of the mortgage on the infant's real property given the use of the proceeds of the loan. A reasonable and prudent solicitor would not have gained any comfort from Rockwell's opinion that the mortgage could be validated given that Rockwell had signed the mortgage in the first place nor from Fraser's off-the-cuff opinion that the situation could possibly be rectified. The respondent's belief that the mortgage could be validated by subsequent court order was an unreasonably held belief that would not have been held by a reasonable and prudent solicitor.

Furthermore, the respondent did not act decisively as a prudent solicitor ought to have once he learned in December, 1988, that the mortgage was invalid. A prudent solicitor would have realized that unless he could rectify the problem he would be liable to the intervenor as a result of his failure to secure the loan made by the intervenor to the Rockwells. It was open to the intervenor at any time to demand that the respondent pay out the loan which he failed to secure as instructed by the intervenor; the respondent's liability was not contingent on Rockwell defaulting on the loan. From December 9, 1988, the respondent made, at best, half-hearted attempts to resolve the problem. Failure to notify the insurer within a month or so of this date deprived the insurer of the opportunity to rectify the problem. A primary purpose of the notice requirement is to allow the insurer to take some action to mitigate the loss. While an insured can be given some leeway in reporting so as to allow him to take action to correct a problem he has created through his breach of duty to his client so as to avoid a claim he must act immediately and decisively. The lengthy delay in reporting that occurred in this case was without any justification considering the nature of the error and the unlikelihood of it being corrected by court order. When an insured is at risk so is the insurer; the latter is entitled to be notified of the likelihood of a claim under the policy as soon as practicable. The respondent cannot be absolved from giving timely notice simply because he did not appreciate that urgent action was necessary to attempt to remedy the problem, either by applying to the court immediately or by having the mortgagor pay off the loan, or failing that report the likelihood of a claim under the policy. The circumstances referred to by the learned chambers judge as excusing the late reporting were largely irrelevant. A reasonably prudent solicitor would not have concluded that a claim was unlikely given that the mortgagee did not have security for the loan coupled with

the unlikelihood of obtaining retroactive approval of the mortgage given the use of the proceeds.

It is unnecessary to deal with the appellant's argument that in effect a "claim" had been made by the mortgagee in the December 9, 1988, letter. The argument was not raised at the trial. I would only say the argument is not without merit.

In summary, I am satisfied the appellant met the burden of proving the respondent failed to comply with the notice requirements of the claim's procedure in the policy. He did not give notice "as soon as practicable" after learning of a circumstance that would likely give rise to a claim under the policy. The appellant insurer was entitled to notice long before October 17, 1990. Compliance with the notice requirement of the policy was a condition of coverage.

Accordingly, the appellant is not required to provide coverage unless the respondent is entitled to relief under **Section 33** of the **Insurance Act**, R.S.N.S. 1989, c. 331. It provides:

> " 33. Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just."

The delay in reporting was very lengthy. Had appropriate action been taken by the respondent in December, 1988 or at any time in 1989, it is probable that Rockwell would have had the financial ability to pay out the mortgage. However, by October 1990, when notice was finally given to the appellant, Rockwell could not pay; his financial situation had deteriorated and he went into bankruptcy in January of 1991. Therefore, the failure to give notice as soon as practicable prejudiced the insurer's opportunity to remedy the problem. The respondent was not only negligent in the legal services performed for the intervenor but he did not exhibit a reasonable degree of care for his own well-being upon becoming aware of the problem. The fact that the chambers judge found (i) he was a junior partner of Rockwell; (ii) that Rockwell felt that the matter could be rectified; (iii) that the mortgagee appeared patient; and, (iv) that Rockwell appeared to be financially stable do not greatly assist the respondent in our consideration of whether equitable relief should be

granted to him. These four factors are of little weight in face of the extreme length of the delay in reporting to the insurer, the fact that the delay in reporting seriously prejudiced the insurer, and the respondent's failure to act decisively to remedy the problem when it was discovered in December, 1988. These factors, taken together, dictate that equitable relief against forfeiture under **Section 33** of the **Act** should not be granted.

The appeal ought to be allowed with costs to the appellant on the application to Justice Goodfellow of $1,500.00 plus disbursements and costs of this appeal in the amount of $1,000.00 plus disbursements. If the appellant had paid the costs awarded by Justice Goodfellow to both the respondent and the intervenor those funds are to be repaid to the

appellant. Both the respondent and the intervenor ought to be jointly and severally liable for the costs awarded to the appellant.

Hallett, J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.

S.C.A. No. 02763

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CANADIAN LAWYERS INSURANCE ASSOCIATION		
	Appellant	REASONS FOR JUDGMENT BY:
- and -		
		HALLETT, J.A.
MICHAEL C. MOORE		
	Respondent	
- and -		
CENTRAL GUARANTY TRUST COMPANY		