SUPREME COURT OF NOVA SCOTIA

Citation: *Halifax (Regional Municipality) v. Zurich Insurance Company,* 2015 NSSC 373

Date: 20151230
Docket: Hfx No. 435745
Registry: Halifax

Between:

Halifax Regional Municipality

Applicant

v.

Zurich Insurance Company Ltd.,
Royal & Sun Alliance Insurance Company of Canada,
and Arch Insurance Canada Ltd.

Respondents

Judge: The Honourable Justice M. Heather Robertson

Heard: October 29, 2015, in Halifax, Nova Scotia

Counsel: Martin C. Ward, Q.C. and Guy Harfouche, for the applicant
D. Geoffrey Machum, Q.C. and Christopher W. Madill, for the respondents

Robertson, J.:

Introduction

[1] In this proceeding, the applicant seeks a declaration that the respondents are obligated to indemnify the applicant pursuant to a policy of insurance for the costs associated with remediating a release of 200,000 liters (+/-) of diesel fuel which appears to have occurred over the course of several months at the Metro Transit bus depot located at 200 Ilsley Avenue in the Burnside Industrial Park in Dartmouth, Nova Scotia.

[2] The respondents have denied any liability to the applicant on the basis that the loss is not covered under the policy between the parties. More particularly, the respondents take the position that the release of fuel was not "sudden and accidental" and therefore falls outside the scope of coverage under the policy.

[3] The respondents have made this motion to convert the application in court to an action pursuant to Rule 6.

[4] The motion is accompanied by the affidavits of D. Geoffrey Machum, Q.C., counsel for Zurich Insurance Company Ltd., Royal & Sun Alliance Insurance Company of Canada and Arch Insurance Canada Ltd., and Joel C. Plater of the Halifax Regional Municipality.

Statement of Fact

[5] The applicant HRM has summarized the known facts as follows:

> Halifax Regional Municipality (the "Applicant") maintained filling stations for its buses at its garage in the Burnside Industrial Park, which were fed by underground storage tanks. The Applicant installed above ground storage tanks but left an interconnection between both sets of tanks with a ball valve which isolated the two systems. Subsequently, the underground tanks were removed without capping the associated piping, leaving the ball valve to isolate the piping. Following the discovery of diesel fuel oil contamination downstream from the Applicant's garage, various parties, including the Respondent Insures, conducted investigations which identified the source of the leak as being caused by the ball valve. The ball valve had been inadvertently opened which resulted in the release of fuel underground through the remnant piping when the filling system was pressurized. This release of fuel continued each time the system was pressurized over a period of months.

[6] The respondents say as to the interpretation of "sudden and accidental" that sudden should be given the meaning of lasting over a short time as contrasted with gradual leakage occurring over a lengthy period of time, in access of three months. They also say that the human act inadvertently opening the ball valve would not meet the definition of "accidental."

[7] The respondents argue that the matter should be converted to an action under Rule 6, because the matter involves considerable legal and factual complexity and fluidity making it unsuitable to the application process.

Civil Procedure Rules

[8] The rules governing this motion to convert the proceeding into an action.

Rule 6.02 (1)(2)(3)(4)(5)(6)

6.02 (1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an

action.

(2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.

(3) An application is presumed to be preferable to an action if either of the following is established:

(a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;

(b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.

(4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:

(a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

(b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a

witness that may be withheld if the witness is to be called only to impeach credibility.

(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

(a) the parties can quickly ascertain who their important witnesses will be;

(b) the parties can be ready to be heard in months, rather than years;

(c) the hearing is of predictable length and content;

(d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

(6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

Authorities

[9] A three stage analysis must be applied on a motion to convert.

[10] In *Jeffrie v. Hendriksen*, 2011 NSSC 292, Pickup, J. stated:

> 13 Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:
>
> a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);
>
> b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);
>
> c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

[11] Other cases upon which the respondent has relied are: *Guest v. MacDonald*, 2012 NSSC 452; *Milburn v. Growthworks Canadian Fund Ltd.,* 2012 NSSC 106; *Monk v. Wallace,* 2009 NSSC 425; *Murphy Oil Co. Ltd. v. Continental Insurance Co.*(1981) 33 O.R. (2d) 853, 1981 CarswellOnt 1238 (Co Ct); *Roué v. Nova Scotia*, 2013 NSSC 45; aff'd on appeal *Nova Scotia v. Roué,* 2013 NSCA 94; and *Dr. Robert Hatheway Professional Corporation v. Smith,* 2015 NSSC 68.

Analysis

[12] There is a presumption in our Rules in favour of applications. The onus on rebutting the presumption is on the respondent as the moving party under Rule 60.2(2).

[13] In arguing that the underlying factual matrix in this contractual dispute is complex and technical relevant to the issue of coverage, the respondent says that justice can only be done if they have the right to examination and cross-examination and to have witnesses appear to have their conduct and testimony assessed by a judge.

[14] The applicant on the other hand seeks a speedier and more cost efficient process through an application. They argue that it is a classic case of the interpretation of a contractual term, where the facts giving rise to the claim are largely known and understood by the parties, facts upon which the respondent relied in denying coverage. See Machum's affidavit Exhibit H.

Stage 1 – Whether any of the presumptions favouring an application apply.

[15] The applicant submits that none of the presumptions under Rule 6.02(3) apply to this proceeding.

Stage 2 – Whether any presumptions favouring an action apply.

(Jury Trial)

[16] The presumptions under Rule 6.02(4)(a)(b) do not apply as neither party wishes to exercise a right to a jury trial.

(Disclosure of information and witnesses)

[17] This is not a case where it is unreasonable to require a party to disclose information about witnesses early in the proceeding as there is little or no dispute about the facts of the fuel release. Nor is credibility a significant issue.

[18] It is early on in the proceeding. A motion for directions has not yet been heard, as it was adjourned by agreement so that the parties would have ample opportunity to review the disclosed documents.

[19] The presumption in Rule 6.02(4)(b) is not established simply because one party does not currently have all the information.

[20] With respect to the witnesses, the applicant will supply its list of witnesses at the motion for directions. The application can in fact proceed where all witnesses are not immediately ascertained so long as they can be ascertained in a shorten period of time than a traditional trial.

[21] Nor is this a case where there is a necessity for a party to hold his cards close to his chest by not disclosing certain witnesses for impeachment purposes. See *Guest v. MacDonald, supra*, Moir. J. paras. 24-27.

[22] The respondents' reliance on *Milburn, supra,* to suggest the presumption under Rule 6.02(4)(b) is engaged, is not helpful as *Milburn* is easily distinguished on its facts, also observed by Rosinski, J. in *Roué v. Nova Scotia, supra,* at para. 53.

Stage 3 – The factors in favour of an application under Rule 6.02(5)

[23] I agree with the applicant that the witnesses to this application are quickly ascertained and will be sorted out at the time of the motion for directions. If one accepts the respondents' report by Cunningham Lindsay, extensive investigation of the facts of the fuel escape has already occurred.

[24] The parties to this application can therefore be ready in a matter of months rather than years and the hearing made a predictable length.

[25] Credibility should be very reasonably addressed through the cross-examination of the affiants, as the facts are well known to the parties.

[26] In addressing these factors, Moir J. in *Guest, supra,* stated at paras. 32-34:

> 32 Rule 6 is complicated. In addition to requiring us to apply a principle of proportionality and layering that with competing presumptions, it offers four factors. Rule 6.02(5) reads:
>
> > On a motion to convert a proceeding, factors in favour of an application include each of the following:
> >
> > (a) the parties can quickly ascertain who their important witnesses will be;
> >
> > (b) the parties can be ready to be heard in months, rather than years;
> >
> > (c) the hearing is of predictable length and content;

> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.
>
> 33 The first three of these factors are consistent with a distinction that seems to be emerging from the authorities. We appear to distinguish cases in which the parties need much time to complete investigative work and those in which investigation could be wrapped up in months. Despite the argument made in *Langille v. Dzierzanowski,* see para. 23, proportionality does not appear to depend on complexity or the amount involved. *Kings (County) v. Berwick (Town)* involved much complexity and a large amount. Justice Murphy in *Monk* and the Chief Justice in *Langille* were more concerned about the investigative work still to be done in those medical malpractice cases: *Monk* at para. 20 and *Langille* at para. 23.
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> 34 The last of the four factors needs to be understood in light of the proposition that cross-examination, rather than the rule against leading on direct, is the main tool for testing credibility: *Kings (County) v. Berwick (Town),* para. 40 and 42; *Jeffrie v. Hendriksen,* para. 49 and 57.

[27] The application process can also be cost effective and a subsequent motion for directions could be required if issues of hearing length or witnesses subsequently arise.

[28] In my view, the issue to be resolved in this proceeding is the interpretation of defined contractual terms, relating to the meaning of the words “sudden and accidental” and whether coverage of the loss applies. At this juncture, the application route is most appropriate and the presumptive one in accordance with Civil Procedure Rules.

[29] Accordingly, the respondents’ motion is dismissed with costs. If costs cannot be agreed between the parties, I am happy to receive written submissions.

Justice M. Heather Robertson