SUPREME COURT OF NOVA SCOTIA
Citation: Nassim v. Perth Insurance Company, 2007 NSSC 391

Date: 20071017
Docket: SH 241552
Registry: Halifax

Between:

Afif Nassim

Respondent/Plaintiff

and

Perth Insurance Company, a body corporate, duly incorporated pursuant to the laws of Canada, having an office at Suite 300, 200 Waterfront Drive, in the Town of Bedford, in the County of Halifax and Province of Nova Scotia

Applicant/Defendant

Editorial Notice

Identifying information has been removed from this unofficial electronic version of the judgment.

Judge:	The Honourable Justice John D. Murphy
Heard:	October 17, 2007, in Halifax, Nova Scotia
Written Decision:	September 5, 2008 (Oral Decision delivered October 17, 2007)
Counsel:	Philip M. Chapman, on behalf of the applicant Charles Lienaux, on behalf of the respondent

By the Court:

[1] This application by the defendant is to strike the jury notice. The principles that govern its determination are not really disputed by the parties. I refer to counsels' briefs, which were very helpful. The applicable principles are clearly set out in the respondent's submission beginning at page 3, where various authorities are cited which establish that parties to litigation in Nova Scotia have a presumptive right to have their litigation tried with a jury unless circumstances exist such as:

> (i) the matters involve mainly questions of law which do not require any significant findings of fact;
>
> (ii) the matters involve complex scientific or technological questions which would tend to be beyond the intellectual capability of a jury;
>
> (iii) circumstances exist which would prevent a proper cross section of society from serving on the jury.

[2] The general rule that a jury notice is not to be lightly interfered with is echoed in the applicant's brief at pages 3 and 4. Parties in Nova Scotia have a substantive right to have matters determined by a jury. It is a right which must be respected and which the Court should not interfere with except where there are clear circumstances indicating that a jury trial is not appropriate. It has been described as a right which should be jealously guarded, and I agree.

[3] This issue in context of this case is stated as follows at page 3 of the applicant's brief:

> The basic assertion of Perth Insurance Company is that this case involves so many legal principals [sic]of insurance law that the matter should not be heard before a jury and that the trial is more appropriately to be heard before a judge alone.

[4] What I need to decide is whether the matters to be determined at trial of this case will involve mainly questions of law which do not require making significant findings of fact.

[5] The basic facts are not in dispute. The parties agree that there was an insurance policy, there was a flood, and resulting from that flood structural damage to the property and damage to possessions.

[6] The issue to be determined at trial is whether the policy responds, and the question to be answered in that context is whether the policy should be vitiated because a misrepresentation was made with respect to residency of the applicant for the policy.

[7] The applicant in this motion says that several issues develop in the context of that question, and they are set out at pages 5, 6 and 7 of the applicant's brief. In oral submission, the applicant's counsel summarized the issues to be determined resulting from the alleged misrepresentation and subsequent developments. He indicated the issues include:

(1) Resolving matters between the plaintiff (insured) and the broker with respect to allegations of negligence.

(2) Determining if the broker had certain duties to make further inquiries.

(3) Assessing the legal relationship between the broker and the insurer.

(4) The affect on the insurer of any broker negligence, ie. whether the insurer may still be liable directly to the plaintiff if the broker was negligent.

(5) In the particular circumstances of this case, the duties of the insurer under the policy, ie. with respect to ownership and valuation of the property, were there misrepresentations which vitiate the policy?

[8] The applicant suggests that the case involves interpretation of the insurance policy and its technical clauses. It says that the claim raises complex and technical insurance interpretation issues, matters involving insurable interest, principal and agent, waiver and estoppel, whether there were material misrepresentations and any resulting consequence, as well as questions concerning duties of good faith, interpretation of statutory conditions, and whether rights and responsibilities arise as a result of the adjuster's representations or actions.

[9] I agree with the applicant, with the insurer, that those issues are likely to arise in this case. Most if not all of them arise from the pleadings, and in my view, their determination will be central to resolving the questions that the Court has to address at trial. Those issues are primarily matters of law or matters of mixed fact and law.

The legal issues and any factual questions which are mixed cannot practically or reasonably be separated by a judge in order to properly instruct a jury. The judge will not be able to isolate the factual determinations to be made by the jury from the legal issues which in my view are pervasive. This is a case where the principal facts are not in dispute, and the matters which remain in issue are, with some minor exceptions, either inseparably mixed questions of fact and law, or questions of pure law.

[10] In making this determination, I have considered the authorities including those cited by the applicant at page 4 of the brief. I adopt the principles which were applied by the Courts in **A.D. Smith Lumber Ltd.** v. **General Home Systems Ltd.**, [1986] N.S.J. No. 26, where it was found that the issues of fact were too interwoven with questions of law to be able to be separated, and in **Roby Estate** v. **Buley**, [1989] N.S.J. No. 413, where there were questions of law identified and the Court concluded that the real work at trial would involve deciding matters of law and not matters of fact, and that the case was not appropriate for a jury. Perhaps closest to the facts of this case is **Nelson Marketing International Inc.** v. **Royal & Sun Alliance Insurance Co. of Canada**, [2003] B.C.J. No. 634 where the main question was related to the construction of the policy, and the Court found that was a question of law which ought to be determined by judge alone.

[11] For those reasons I have concluded that the defendant's application should succeed and that the jury notice should be set aside and the matter determined by judge alone.

[12] The plaintiff shall pay the defendant costs of this application, which are hereby set at $500.00, and which costs shall be payable at the end of these proceedings in any event of the cause.

Murphy, J.