IN THE SUPREME COURT OF NOVA SCOTIA

Citation: SREIT (Park West Centre) Ltd. v. ING Insurance Company, 2008 NSSC 183

Date: 20080611
Docket: S.H. 290390
Registry: Halifax

Between:

SREIT (PARK WEST CENTRE) Ltd., a body corporate, and ARTRUS REALTY CORPORATION, carrying on business as O & Y Enterprises

Plaintiffs

and

ING Insurance Company of Canada

Defendant

Judge: The Honourable Justice Duncan R. Beveridge

Heard: April 8, 2008, in Halifax, Nova Scotia

Counsel: Lisa Richards, for the Plaintiffs
Wendy Johnston, Q.C., for the Defendant

By the Court:

[1] Modern liability insurance contracts require the insurer to indemnify the insured with respect to liability for damages arising out of defined risks or perils. Almost invariably the insurance contract confers the right, and a duty, on the insurer to defend claims brought against an insurer with respect to the defined perils. This application again requires the Court to resolve the frequent issue of whether a claim being advanced against an insured triggers a duty by the insurer to defend.

FACTUAL BACKGROUND

[2] SREIT (Park West Centre) Ltd. is the owner of a shopping complex commonly referred to as the Park West Centre. SREIT employed Artrus Realty Corporation, which carries on business as O & Y Enterprises, as its property manager.

[3] O & Y, acting as agents for SREIT entered into a contract dated September 8, 2003 with D & J Excavating. D & J Excavating is the business name of D. J. Day. Day agreed to be responsible for snow clearing and to salt and sand Park West Centre as necessary. The contract also required Day to have liability insurance and to add the owner as an additional insured and provide a certificate evidencing that arrangement.

[4] ING Insurance Company of Canada is Day's insurer. An additional insured page was issued by ING confirming that O & Y Enterprises and SREIT were

additional insureds, but only with respect to vicarious liability arising out of operations performed by D & J Excavating.

[5] Bruce Bowser says that on or about February 3, 2004 he was on his way to the Royal Bank located in Park West Centre. He alleges the sidewalk was covered with a patch of transparent ice. There was no salt on the ice. He says he slipped on the ice, fell and suffered injuries.

[6] Mr. Bowser commenced an action (S.H. No. 246240) against Mr. Day, operating under the business name of D & J Excavating and against Summit Realty Limited on May 9, 2005. On June 8, 2005 the Statement of Claim was amended, removing Summit Realty and naming SREIT as the defendant that owned and leased the premises at Park West Centre to the Royal Bank.

[7] Mr. Bowser alleged that his injuries and resultant damages were solely the result of the negligence of the defendants. The particulars of the allegations of negligence were set out in paragraph 10:

> 10. Furthermore, Plaintiff Bowser states that [sic] Defendants were negligent in the following ways:
>
> (a) failing to properly salt the walkway of the building, keep it clear of ice and otherwise maintain [sic]; and
>
> (b) other negligence as may appear from the evidence.

[8] ING duly provided a defence to both Day and SREIT. A defence was filed on September 12, 2005 on behalf of SREIT by Lisa Richards. Ms. Richards also

advanced a cross-claim against Day seeking indemnification for any liability that might be found against SREIT.

[9] Mr. Bowser amended his pleadings on May 2, 2007, adding defendants, including O & Y Enterprises and making further allegations of negligence. In particular the Amended Statement of Claim added O & Y Enterprises as the party responsible for the maintenance and safety of the sidewalk where the plaintiff fell. The allegations against the defendants became:

> 10. Furthermore, Plaintiff Bowser states that [sic] Defendants were negligent in the following ways:
>
> (a) failing to properly salt the walkway of the building, keep it clear of ice and otherwise maintain [sic]; and
>
> (b) other negligence as may appear from the evidence.
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> (c) Defendant SREIT failed to properly maintain the rain gutters and manage the roof water run off near the sidewalk where Plaintiff Bowser fell.
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> (d) Defendant Brookfield failed to properly notify Defendant Day and Defendant O & Y and Defendant SREIT of the icy conditions on the sidewalk where Plaintiff Bowser fell.
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> (e) Defendant O & Y failed to take corrective action to improve the icy conditions on the sidewalk where Plaintiff Bowser fell.
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> 10.a Plaintiff Bowser pleads the *Occupier's Liability Act*, 1996, c.27 and the *Tortfeasor's Act* (N.S.)

[10] ING agreed to provide a defence to O & Y. It appointed Krista M. Hellstrom of Stewart McKelvey who filed a defence on behalf of O & Y. ING refused to participate in defending SREIT and O & Y with respect to the claim that they had failed to properly maintain the rain gutter and manage roof water. Further

defences and cross-claims were then filed by Lisa Richards on behalf of SREIT and O & Y, on October 17, and November 7, 2007 in relation to the so-called leaky rain gutter allegations.

[11] SREIT and O & Y Enterprises filed an Originating Notice (*inter partes* application) for an order declaring that ING shall assume and pay for the entire defence of SREIT and O & Y to the claim brought against them by Bowser under S.H. No. 246240 and requiring ING to pay for the defence costs incurred by them to date, on a solicitor-client basis.

ISSUE

[12] Does the amended claim advanced by the plaintiff Bowser trigger a duty by ING to defend the entire claim?

ANALYSIS

[13] Whether or not an insurer has a duty to defend is an issue that has been frequently litigated. The principles are well established. Not surprisingly the parties have little dispute on what the principles are. It is the application of those principles to these particular circumstances that cause the parties to differ.

[14] In *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 the Supreme Court of Canada articulated the relevant principles with respect to the duty to defend. These include:

1. The insurers duty to defend and duty to indemnify are separate duties owed to the insured;

2. The duty to defend may exist even if ultimately there is no obligation by the insurer to indemnify the insured;

3. The duty to defend is to be determined, not on the evidence that may be available or on ultimate findings of fact, but on the allegations that are pleaded, usually in the form of a Statement of Claim;

4. The mere possibility that a claim within the policy may succeed triggers the duty to defend;

5. Although the widest latitude should be given to allegations in pleadings determining whether they raise a claim within the policy, no duty to defend is triggered for a claim that is clearly outside the coverage of the insurance policy.

[15] These principles were reaffirmed by the Supreme Court of Canada in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, *Sansalon v. Wawanesa Mutual Insurance Co.*, [2000] 1 S.C.R. 551 and in *Monenco Ltd. v. Commonwealth Insurance Co.*, [2001] 2 S.C.R. 699.

[16] In *Monenco Ltd. v. Commonwealth Insurance Co.,* Iacobucci J. wrote:

> 35 Based on this line of authority, it follows that the proper basis for determining whether a duty to defend exists in any given situation requires an assessment of the pleadings to ascertain the "substance" and "true nature" of the claims. More specifically, the factual allegations set out therein must be considered in their entirety to determine whether they could possibly support the plaintiff's legal claims.
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> 36 While these principles are instructive for the purposes of the present case, one important question arising in this appeal has been left open by the jurisprudence to date. That is, whether, in seeking to determine the "substance" and "true nature" of a claim, a court is entitled to go beyond the pleadings and

> consider extrinsic evidence. Without wishing to decide the extent to which extrinsic evidence can be considered, I am of the view that extrinsic evidence that has been explicitly referred to within the pleadings may be considered to determine the substance and true nature of the allegations, and thus, to appreciate the nature and scope of an insurer's duty to defend. I now turn to that question.

[17] The respondent ING admits that part of the claim advanced against SREIT and O & Y does trigger a duty to defend. However, it contends that the allegation against SREIT or O & Y with respect to rain gutters is outside the coverage of the insurance policy. The policy provides coverage for "vicarious liability arising out of operations performed by the named insured". The named insured is D & J Excavating. It says there is no way that D & J Excavating could be held liable for any negligence in relation to the rain gutter. Hence there is no possibility of coverage and therefore no duty to defend.

[18] It also seeks to justify its position of refusing to defend on the basis that there will be a conflict of interest. If liability is found for the failure to properly maintain the rain gutters, the insurer will not have to indemnify for such a claim. If liability is found for a failure to properly clear and salt the sidewalk it may have to indemnify. It will therefore be in the insurer's best interest for the defendants to be found liable, if at all, for the alleged failure to properly maintain the rain gutters.

[19] SREIT and O & Y takes the position that the substance of the claim is a slip and fall that was alleged to have occurred by reason of the presence of unsalted ice. It was the responsibility of D & J Excavating to salt and sand the property as necessary. Hence the claim is arguably within the insurance coverage.

[20] Alternatively it argues that the Amended Statement of Claim presents a situation of “mixed claims” - that is claims that clearly come within and those that are arguably outside the coverage. In these situations they say the insurer is required to show a rational and practical basis for distinguishing costs related to covered and non covered claims.

[21] What then is the “true nature of the claim” or the “substance” of the allegations?

[22] The plaintiff Bowser initially alleged that he slipped and fell on a patch of ice that was unsalted. Although the Statement of Claim did not refer to the *Occupier’s Liability Act* S.N.S. 1996 c.27, the claim against SREIT and subsequently against O & Y is based on the defined duty of care to see that each person being on the premises is reasonably safe.

[23] The Amended Statement of Claim by Bowser alleges a particular theory of how the ice may have come into existence. It does not, in my view, change the substance of the allegation being made. The plaintiff Bowser is not seeking to establish liability for the gutter falling from the roof and striking him. He does not allege that a failure to properly maintain the gutter lead to the formation of an icicle which struck him. Nor does he allege that he slipped on a puddle of water. The true nature of the claim is that the premises were not reasonably safe because there was an icy sidewalk that was unsalted.

[24] If the ice patch in fact existed, how and when it came to form will be subject to a final determination at a trial. For purposes of disposing with this question I need only consider whether or not it is possible that the allegations in the Amended Statement of Claim by Bowser could give rise to liability within the policy coverage. As noted earlier, policy coverage is limited to vicarious liability arising out of the operations performed by D & J Excavating.

[25] D & J Excavating was required to come "automatically on the property" and begin to perform its snow clearing and salting services as such time as snow or sleet in the general locale of the property had fallen. Furthermore D & J Excavating agreed to "salt and sand the lot as necessary". In these circumstances, it is my opinion that it is entirely possible that the allegations in the Amended Statement of Claim could give rise to liability within the policy coverage, since it can be found that D & J Excavating failed to salt and sand the lot as necessary.

[26] Even if it could be said that the Amended Statement of Claim contains allegations that are both within and some that are outside the coverage, the claims are, in my opinion, so intertwined that there is no rational or practical basis for distinguishing costs related to the covered and arguably non covered claims.

[27] The mere existence of the assertion of claims plainly outside the insurance coverage does not relieve the insurer of the obligation to defend and fund the defence of the whole claim where there are claims within the coverage. In *Daher v. Economical Mutual Insurance Co.* (1996), 31 O.R. (3d) 472, [1996] O.J. No. 4394 a young student was injured in a science class that utilized Draino as part of

an experiment. He brought a claim against the School Board alleging negligence. The School Board brought a third party claim against the plaintiff's parents, alleging that they were negligent in their failure to properly instruct their son with respect of the use of Draino. They also alleged that the parents, who operated a store were negligent in the marketing and sale of the can of Draino to the plaintiff. The parents had a Storekeepers' Liability Policy which provided that the insurer would pay on behalf of the insureds all sums which the insured would be legally obligated to pay as compensatory damages arising out of bodily injury or property damaged caused by accident and arising out of the ownership, maintenance or use of the insured premises. The insurer also agreed to defend the insured against any civil action which may be brought against the insured. The third party claim was subsequently amended to specifically allege that the parents provided the can of Draino to the plaintiff in the course of their ownership, maintenance or use of the retail store premises.

[28] Ultimately the main action between the plaintiffs, defendants and the third party was settled. The parents brought a motion to determine the issue as to whether the insurer was required to defend the third party claim. The motions judge held that the insurer was required to defend since it was possible that a claim within the storekeeper's policy might succeed. The motions judge concluded that the obligation arose from the original third party claim.

[29] The insurer appealed. Rosenberg J.A. wrote the unanimous decision for the Ontario Court of Appeal. One of the principal arguments advanced by the insurer was that even if there was a duty to defend the third party claim, the defence costs

should be apportioned between the claim of negligence against the third parties in their role as parents as opposed to the allegations of negligence from their ownership, maintenance or use of the retail store premises. Rosenberg J. A. wrote:

> 14 In a proper case it may be possible to apportion the defence costs where only certain claims fall within the terms of the policy. See *Gosse v. Huemiller*, [1988] I.L.R. 9167 (Ont. H.C.J.) and *Continental Insurance Co. v. Dia Met Minerals Ltd*. (1996), 36 C.C.L.I. (2d) 72 (B.C.C.A.). This is not a case, however, of multiple causes of action where it is possible to divide the costs of defending the various causes of action. The third party claim alleges only a single cause of action with different theories of liability. The facts giving rise to the multiple theories of liability are so intertwined that I cannot see any principled basis upon which this court or an assessment officer could unravel them to apportion costs to one theory rather than another. The appellant did not place before us any material to demonstrate how this might be done and offered no theory upon which the assessment officer could fairly apportion the costs.
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> 15 This very issue was before this court in *Kerr v. Lawyers' Professional Indemnity Co*. (1995), 25 O.R. (3d) 804 (C.A.). In Kerr, the amended statement of claim alleged various acts and omissions in connection with the appellant's work as corporate secretary and as the company's solicitor. The insurer submitted that defence costs should be split so that the appellant would pay for his defence as it related to allegations made against him as corporate secretary, and the insurer would pay defence costs related to allegations in his capacity as the company solicitor. Osborne J.A. held that since all of the pleaded acts and omissions directly related to the appellant's retainer as the company's solicitor, it was possible that the coverage provisions of the policy would be engaged. The fact that the various allegations of breaches of duty also implicated the appellant in his role as corporate secretary, still left it open to the court to connect all alleged breaches of duty to the appellant's retainer as solicitor providing professional services. Accordingly, the insurer was required to defend the claim made against the appellant and the defence costs were not split.
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> 16 Admittedly, the facts in this case are somewhat different than in Kerr. It would appear that in Kerr, there was a complete overlap in that the same acts and omissions were alleged to underlie the appellant's liability as corporate secretary and as a solicitor. In this case not all of the alleged acts and omissions relate to the respondents' roles both as shopkeepers and parents. For example, the statements in para. 4(f) to (i) that allege that the respondents "authorized" or "permitted" the infant plaintiff to do certain things could not refer to the respondents' duties as shopkeepers. On the other hand, most of the alleged acts or omissions could relate

> either to the respondents' duties as parents or as shopkeepers. For example, para. 4(d) of the claim alleges that the respondents "failed to instruct the minor as to substances which were safe for the use of the minor plaintiff." With respect to this allegation and most of the alleged acts and omissions in para. 4, while the respondents may have failed in their duty as parents it is also "possible" that they failed in their duty as shopkeepers, thus triggering the duty to defend.
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> 17 In my view, it is simply not practical to divide the defence costs in these circumstances. As Hardinge L.J.S.C. observed in *St. Andrews Service Co. v. McCubbin* (1988), 31 C.C.L.I. 161 at p. 165 (B.C.S.C.) "there is no means of readily distinguishing the costs of defence between the covered and not covered items. The possible ways to apportion an expense between two parties submitted by the third party cannot apply in these circumstances." Also see *P.C.S. Investments Ltd. v. Dominion of Canada General Insurance Co.* (1996), 34 C.C.L.I. (2d) 113 (Alta. C.A.) reversing in part (1994), 25 C.C.L.I. (2d) 119 (Q.B.).

[30] ING raises the argument that requiring an insurer to defend in cases where some allegations are within and others outside the policy raises a conflict of interest.

[31] The issue of conflict of interest was referred to by McLachlin J., as she then was, in *Nichols v. American Home Assurance Co., supra*. *Nichols* was not a case about arguably mixed claims. It involved a lawyer who was sued and had to defend himself on groundless accusations of fraud said to have been committed while acting as a lawyer. The Court of Appeal had noted that had there been alternative pleadings in negligence, the insured would have been entitled to a defence. However, as the pleadings stood there was no possibility that a claim fell within the coverage defined by the policy. The comments by McLachlin J. are in relation to the one American authority cited in support of the proposition that an insurer must provide a defence when groundless charges of fraud and dishonesty

are alleged in an action against the lawyer. This case was *Connor v. Transamerica Insurance Co.*, 496 P.2d 770 (0kla.,1972). McLachlin J. wrote:

> 20 I offer two observations with respect to the Conner case. First, the duty to defend suits for fraud, groundless or not, is, in my view, clearly excluded by the wording of the defence clause in this case. In so far as Conner was concerned with a similar clause, I would respectfully disagree with the conclusion in that case that the clause did not exclude such a duty. Secondly, the adoption of the course chosen in Conner would give rise to practical difficulties. The insurer would always be obliged to defend regardless of how far outside the scope of the policy the claims might be, subject only to the possibility of recovery back in the event the claim ultimately succeeded only on grounds outside the scope of the policy. This raises policy questions of whether others in the insurance pool should be taxed with providing defences for matters outside the purview of the policy. Moreover, conflicts of interest may result. The insurer's interest in defending a claim is related to the possibility that it may ultimately be called upon to indemnify the insured under the policy. It is in the insurer's interest that if liability is found, it be on a basis other than one falling under the policy. Requiring the insurer to defend claims which cannot fall within the policy puts the insurer in the position of having to defend claims which it is in its interest should succeed.

[32] As noted above, *Nichols* was not a case about claims that are advanced against an insured where one aspect of the claim is covered and one is not. *G. Hilliker in Liability Insurance Law in Canada* (4 ed. 2006) refers to this scenario and the issues of conflict at p.144-5:

> A conflict of interest between insurer and insured may also arise where the plaintiff has alleged two grounds of liability, one which is covered under the policy and the other which is not. Perhaps the most common example of this sort of conflict is where the claim involves allegations of both negligence and intentional wrongdoing. As noted earlier, in these circumstances some courts permit the insured to select and control counsel to defend the action, while others have held that the right to select counsel still remains with the insurer. In either case, the duty on counsel is the same: namely, to defend the case on the basis that is most favourable to the insured:

> The defendants [*i.e.*, the insurers] undertake the defence in the name of the inured. Their duty and the duty of the solicitors is to defend him as an independent solicitor would.

[33] In my opinion, the appearance or actual existence of a conflict of interest with respect to the issue of coverage does not trump the duty of the insurer to defend. If the appointment of counsel by the insurer arguably prejudices the insured's right to indemnity by the fear of counsel favouring the insurer's coverage interests, the Court, if necessary, can take steps to address this problem. For example in *P.C.S. Investments Ltd. v. Dominion of Canada General Insurance Co,* [1996] A.J. No. 33 an insured faced a claim of damages for defamation. The claim also asserted that the defamation was malicious and calculated to cause damage and to sabotage current and future contractual relationships. The insured was exposed both to a clearly uninsured risk of damages from an allegation malicious defamation and to a possibly insured risk of defamation simpliciter. A duty to defend was found to exist. With respect to the issues of conflict of interest, the Chambers Judge resolved this problem by denying to the insurer its usual right to name and instruct counsel. This decision was affirmed by the Alberta Court of Appeal.

[34] A similar result was reached in the recent decision of the Ontario Court of Appeal in *Appin Realty Corp. v. Economical Mutual Insurance Company*, [2008] O.J. No. 436, 2008 ONCA 95. An insured faced a claim for injury arising out of exposure to mould or bacteria. The insurer refused to defend as there was a comprehensive exclusion from claims based on an actual or alleged inhalation of fungi. Fungi was defined to include any form of mould. The motions judge concluded that this exclusion did not absolve the insurer of his duty to defend the

insured because it could be found that the plaintiff's injuries resulted solely from bacteria, a non-excluded peril. The motions judge also found that the insured's counsel, a competent and experienced insurance practitioner, should be retained by the insurer to defend the action at the insurer's expense. This decision was upheld by the Ontario Court of Appeal.

[35] Following the conclusion of submissions, counsel for SREIT and O & Y forwarded to the Court the recent decision by Hennessy S.C.J. in *Riocan Real Estate Investment Trust v. Lombard General Insurance Co*., an unreported decision released April 16, 2008. (Since reported at [2008] O.J. No. 1449.) The situation in *Riocan* is similar, but not identical to the case at bar. Riocan operated two mall properties. It was named as the defendant in two actions seeking damages for personal injuries said to have resulted from ice or snow in mall parking lots. Riocan contracted with a third party to provide snow plowing and winter maintenance for its lots. As part of that contract, the contractor agreed to indemnify Riocan for losses suffered as a result of anything arising from the work performed by the contractor and was required to maintain a contact of insurance, naming Riocan as an additional insured.

[36] The contractors insurance was with Lombard. The claim against Riocan alleged that the plaintiff slipped and fell on ice and that Riocan failed to salt or sand the parking lot. In the second claim it was alleged that Riocan had no adequate or any system of inspection and maintenance, and as a consequence highly dangerous conditions went unnoticed and unremedied. In each action claims were made asserting breaches of Riocan's statutory obligation as an

occupier. The contractor's insurance coverage with Lombard did not cover Riocan's own negligent acts or breaches of the *Occupiers Liability Act*. Hennessy J. wrote:

> [16] Notwithstanding the multiple theories pleaded by the plaintiffs, the fundamental issue raised in each of the actions is that the plaintiffs' slip and fall on the ice covered parking lot occurred because of the failure of the owner to keep the parking lot free of ice. The true nature of the claim is that the defendant was negligent in failing to maintain an ice-free parking lot and as a result the plaintiffs fell and sustained injuries. It will be up to the trial judge to determine firstly if there were conditions in the parking lot which caused the plaintiffs to fall and if so whether these conditions arose because of the work performed or not performed by the contractor or whether the landowner bears some or all of the responsibility under the *Occupiers' Liability Act*. It is also possible that the trial decision will not cleanly apportion the fault as between the contractor and Riocan. In any event, it is impossible at this stage to determine where fault may lie for the plaintiffs' injuries.

[37] Hennessy J. went on to conclude that the insurer had an obligation to defend. Her conclusion was expressed as follows:

> [37] The fact that a plaintiff pleads multiple and potentially conflicting claims does not automatically negate the insurer's duty to defend as defined in *Nichols*. A pleading containing multiple and potentially conflicting theories is not analogous to a claim that is found to be covered by an exclusion.
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> [38] I am of the view that in most situations where there is a duty on an Insurer to defend some, or only one, of the claims made against an Insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even where the pleadings include claims that may be outside the policy coverage. Conflict issues can be addressed in a number of ways. Counsel did not request me to deal with this issue.

CONCLUSION

[38] In my opinion the Amended Statement of Claim makes allegations that could possibly give rise to liability within the insurance coverage. Furthermore, even if it could be said that rain gutter allegations are outside the policy coverage, they are palpably intertwined with a claim admittedly within the coverage.

[39] For the reasons already given, I find that the claim set out in the second Amended Statement of Claim against SREIT and O & Y triggers an obligation on their insurer, ING to defend the entire claim. As a consequence ING is ordered to pay the defence costs incurred to date by SREIT and O & Y forthwith on a solicitor-client basis, with prejudgment interest at the rate of five percent.

[40] Originally SREIT and O & Y sought costs of this application, on a solicitor-client basis. The claim for this relief was later varied to seek costs on a party and party basis pursuant to Tariff C. Since this application is determinative of the entire matter at issue, and in light of the importance of the matter to the parties, costs are awarded in the amount of $1,500.00.

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Beveridge J.