SUPREME COURT OF NOVA SCOTIA

Citation: Thorburn Wharf Fisheries Ltd. v. ING Insurance Company, 2010 NSSC 181

Date: 20100107
Docket: Yar 281532
Registry: Yarmouth

Between:

Thorburn Wharf Fisheries Limited

Plaintiff as Applicant

v.

ING Insurance Company of Canada and Aviva Canada Inc.

Defendants as Respondents

Judge:	The Honourable Justice John D. Murphy
Heard:	January 7, 2010, in Halifax, Nova Scotia
Written Decision:	April 30, 2010 *{Oral decision rendered January 7, 2010}* (Editing in written decision limited to improving grammar, incorporating quotations referenced but not read, and providing citation for referenced authority.)
Counsel:	Andrew S. Nickerson, Q.C. for the plaintiff as applicant Scott Norton, Q.C., for defendants as respondents

By the Court:

[1] I want to thank you both. The briefs were good in this case and it is always a help and makes my job easier when you give a 'heads-up' as to what is coming; you certainly narrowed the issue and that makes it much better for me.

[2] This is a Chambers Motion brought by the Plaintiff under *Nova Scotia Civil Procedure Rules 12* and *23* to determine a question of law before trial of an action. The Notice of Motion states the relief sought as follows:

> Thorburn Wharf Fisheries Limited, the plaintiff in this proceeding, moves for 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.

[3] The Agreed Statement of Facts succinctly set out the relevant facts and question for determination as follows:

> 1. The Plaintiff is and was at all material times the owner of a wharf located at the rear of 1482 Main Road, Sandy Point, Shelburne, and County Nova Scotia (herein called "the wharf").
>
> 2. The Defendant ING Insurance issued a policy of insurance designated as Policy Number C00922836 which was effective between May 31, 2006 to

June 30, 2006 and which insured the wharf for the perils described in the said policy, a true copy of which is attached here to as Schedule "A".

3. On or about the 15th day of June 2006 the motor vessel "Ragin Cajun" owned by one Frank Joseph Oikle (herein called "the vessel") was berthed at the wharf. Attached as Schedule "B" is an excerpt from the records of Transport Canada as to the particulars of the vessel.

4. The berthing of the vessel on June 15, 2006 was without the knowledge or consent of the Plaintiff at that time. The owner of the vessel had previously sold lobsters to the Plaintiff in a prior year and may have been given permission to use the wharf at that time for that purpose by a former employee of the Plaintiff.

5. In the afternoon or early evening of June 15, 2006 there were high winds causing high waves and the vessel was blown against the wharf repeatedly.

6. During the afternoon or early evening of June 15, 2006 a crowd of local people assembled and an unidentified group of people decided to move the vessel to the other side of the wharf which was more sheltered from the wind. These persons proceeded to untie the vessel and proceeded to drag the vessel. During this activity as the vessel came around the front of the wharf the vessel was swamped and sunk by waves. When the vessel resurfaced the stern came up under the front section of the wharf and tore the front section of the wharf off.

7. The Plaintiff filed a proof of loss dated March 21, 2007 claiming that its loss is an insured peril. The Defendant has denied that claim on the basis that the nature of the loss is an excluded peril. The Plaintiff has initiated action to resolve this difference of interpretation of the policy.

8. The Policy contains the following provision of coverage:

> *(G) WINDSTORM OR HAIL: There shall in no event be any liability hereunder for loss or damage:*
>
> *(i) to the interior of the "buildings" insured or their contents unless damage occurs concurrently with and results from an aperture caused by windstorm or hail;*
>
> *(ii) directly or indirectly caused by any of the following, whether driven by wind or due to windstorm or not: snow-load, tidal wave, high water, overflow, flood, waterborne objects, waves, ice, land subsidence, landslip*

9. The extent and value of the loss which is the subject matter of this action is undetermined and will be the subject of settlement or court determination in a subsequent hearing in this matter.

10. This statement of facts is agreed to by the parties in order to have a preliminary determination of whether the policy exclusion is a full defense to the Plaintiff's claim based on the manner in which the damage to the wharf was caused as described herein.

[4] The issue is simply whether the damage to the Plaintiff's wharf in this case was caused by an insured peril; perhaps a more practical way to express it in the context of the policy is whether the damage to the structure was caused by a peril which was excluded by the "*WINDSTORM OR HAIL*" clause. The parties have agreed on the principles of interpretation, and I concur with their view. Certainly

insurance policies are construed broadly and exclusions are strictly construed; and if there is an ambiguity, the Court will apply *contra preferendum* principles and also try to give effect to the reasonable expectations of the parties in a commercial context.

[5] The issue here with this specific perils policy is whether the type of event that occurred is covered. The Defendant concedes that without the exclusion there would be coverage; so the issue, as I said, is really whether the exclusion rules out coverage.

[6] I have concluded that the exclusion is broad, that it is unambiguous, and that it does rule out coverage in this case; in other words, the Defendant's position prevails.

[7] The "exclusion" clause (G) (ii) is in my view as broad really as it could be. It refers to "loss or damage directly or indirectly caused" - which is a broad term - "whether driven by wind or due to windstorm or not" which is also broad. I agree with the Defendant's analysis of Justice Cole's decision in **Aven v. Western Union Insurance Co.** (1999 Carswell BC 2186). Given the wording of this clause,

it is effective as an exclusion if the vessel is a waterborne object. Turning to that issue, I find that "waterborne object" in this exclusion includes vessel. It is a broad term - "waterborne object" is a very broad term - there is no doubt about that, but that does not mean that it is ambiguous or that it is ineffective. The intention which I glean from the policy is that any object borne on the water was to be included in the term "waterborne object", and that is an effective approach. It can be argued that if you try to do a narrow description and use a word like "vessel", you would raise questions such as 'are there kinds of boats which are not vessels?' and 'are rafts vessels?' or 'if you have something storing lobsters alongside the wharf, is that a vessel?' In my view the term "waterborne object" is effective to include vessels, to include the boat which was involved in this case, and to make the exclusion effective.

[8] I do not want to belabour the reasons - I will say that essentially I accept the Defendant's arguments made both in the Defendant's brief and orally. The brief will remain in the file - both briefs obviously will remain in the file - and I put on the record that I adopt the submissions in the Defendant's brief. (For ease of reference a copy is also appended to these reasons.) I also agree with the point made by the Defendant that, if vessels were to be a cause of damage or loss which

was to be insured against, there could have been a specific peril included for that as there was for aircraft, spacecraft and land vehicles in Clause 5(c). In any event, I find that the policy is effective to exclude liability for damage by vessels by using the broad “waterborne objects” terminology.

[9] The Plaintiff has certainly made the best representations that can be advanced to convince me otherwise, but they do not take me that far - I am just not convinced that there is any ambiguity or limitation in the words of the exclusion that requires me to apply any limiting principles such as *contra preferendum* or any other principle.

[10] For these reasons, I conclude that the policy does not cover the loss in this case.

Note: The parties agreed that costs would be resolved by subsequent agreement, or by court determination following further submissions.

J.