SUPREME COURT OF NOVA SCOTIA

Citation: Hants Realty Ltd. v. Travelers Guarantee Company of Canada, 2013 NSSC 195

Date: 20130624
Docket:TRU413331 & 414673
Registry: Truro

Between:

Hants Realty Limited

Applicant

v.

Travelers Guarantee Company of Canada

Respondent

- and -

Hermiena Murphy

Applicant

v.

Travelers Guarantee Company of Canada

Respondent

DECISION

Judge: The Honourable Justice J. E. Scanlan

Heard: June 11, 2013, in Truro, Nova Scotia

Counsel:

Mr. Michael Scott, Solicitor for Hants Realty Limited
Mr. Charles Ford, Solicitor for Travelers Guarantee
Mr. John T. Rafferty, Q.C./ Mr. Daniel Roper, Solicitors for Hermiena Murphy

By the Court:

[1] This is an application by Hants Realty Limited and Hermiena Murphy wherein the Applicants seek to have the Respondent, Travelers Guarantee Company (Travelers) assume carriage of their defence to a claim made against them by Robert Patten and Anita Patten. Travelers denies they are obligated to respond under the insurance policy it issued to them.

[2] At all relevant times, through the years 2005 to and including 2009, the Applicants were insured by either Travelers, or AXA Insurance. Both insurances were "claims- made" policies. The coverage provided by Travelers extends only to claims made against its insurers during the policy period.

Background

[3] In 2005 Ms. Murphy was the realtor involved in the sale of a property to Mr. and Mrs. Patten, acting as dual agent for the Patten's and CIBC Mortgages. The property was sold on an "as is" basis. In or around July, 2005, the Pattens filed a complaint against Ms. Murphy with the Nova Scotia Real Estate

Commission in relation to problems that the Pattens were having with the water supply on the property. The complaint to the Nova Scotia Real Estate Commission was preceded by phone calls from the Pattens to Ms. Murphy and to Mr. Matthews, the broker with Hants Realty. It is not clear, in the materials before the Court, as to the precise contents of those phone calls but the substance of the complaint to the Real Estate Commission (the Commission) made it clear that the Pattens were complaining about the water problem and the costs associated with rectification.

[4] The complaint did proceed before the Commission and a decision was issued. It was appealed twice as reported in **Murphy v. Nova Scotia Real Estate Commission**, 2007 NSSC 318 and 2007 NSCA 85. A review of the materials as filed by the Applicants makes it clear that a complaint to the Commission is a request for an investigation and possibly disciplinary action. As noted in the letter to the Pattens dated July 25, 2005:

> No compensatory damages are available through the complaint process to the Nova Scotia Real Estate Commission. (See Tab 4, of the Applicant, Murphy, affidavit)

[5] As the Court understands the submissions of Travelers they denied coverage for two reasons:

1. The claim was not "first made" during the policy period. They submit that it was first made when the complaint to the Commission was filed against Ms. Murphy in July, 2005.

2. The claim was excluded, in any event, pursuant to exclusion (g) of the policy.

[6] At this stage the Court is dealing with the issue of duty to defend as distinct from the duty of coverage for the claims. This distinction is important as the burden is different at this stage. This duty to defend was discussed in **Trafalgar Insurance Co. of Canada v. Imperial Oil Ltd.,** 2001 Carswell Ont 4440. At paragraph 17 the Court noted:

> 17 The principles that apply in determining whether an insurer has a duty to defend are set out in the leading case of **Nichols v. American Home Assurance Co.** [1990] 1 SCR 801. The threshold established by **Nichols** is rather low. The duty to defend arises where there is "mere possibility" that the claim made against the insured is covered by the policy.

> 18 The onus is on the insured to establish that, on a possibility basis, the allegations made by the plaintiff, if proved, bring the claim within the four corners of the relevant policy. Once that threshold is met, the onus shifts to the insurer to show that the claim made falls outside the coverage provided by the policy because of an applicable exclusion clause. If there is an exception to an exclusion, the insured bears the burden of establishing that the exception applies.
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> 19 The **Nichols** principles were recently affirmed by the Supreme Court of Canada in **Monenco Ltd. v. Commonwealth Insurance Co.** 2001 SCC 49...
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> ...
>
> 21 The insurer's duty to defend will arise where, on a reasonable reading of the pleadings, a claim within coverage has been made. Although substantial latitude must be given to the allegations made in the statement of claim, the statement of claim should be read in a realistic way. Consistent with that theme, as Iacobucci J. notes in **Monenco** at para. 34, it is not the labels used by the pleader, but the true nature of the claim that matters. In other words, the substance of the claims made should be determined. Once that is done, the court will consider whether the claims made, if proved, will trigger the insurer's obligation to pay under the policy having regard to the insuring agreement and any relevant policy exclusions.

[7] The claim was clearly made, at the latest, in September of 2009, when the Applicants were insured by Travelers. It was in September, 2009, that correspondence was directed to the Applicants indicating the Pattens intention to seek damages in relation to the transaction in question. The burden falls to the insurer to defend the action as maintained by the Pattens against the Applicants herein or to show that they should be relieved from the obligation to defend.

[8] In analysing the arguments of the respective parties, I note there is nothing before the Court which would in any way suggest that the Applicants were anything but honest and forthright with the insurers, both AXA and Travelers, for the entire period in question. There is nothing before the Court which would suggest that the Applicants were, in any way, attempting to hide from either AXA or Travelers, the proceedings before the Commission or concerns expressed by the Pattens. The evidence of Ms. Murphy is that when the issue first arose, she discussed the complaint and phone calls with Mr. Matthews, who was the broker for Hants Realty. He noted the distinction as between the limited authority and scope of the inquiry by the Commission and any action - potential liability based on tort. It was Mr. Matheson's position that no claim had been made and, therefore, there was no "claim" of which they should advise AXA.

[9] The policy as between the Applicants and AXA is not before the Court. The Court is of the understanding, however, that under the AXA policy it was the broker that was insured. The coverage was then extended to include the various agents that worked through the brokerage. Under the Travelers policy it is understood that each agent is insured individually. Both policies however were, as

noted above, "claims- made" policies. Assuming the AXA policy, being a "claims-made" policy, had similar provisions to the Travelers policy, under the AXA policy the Applicants would not be able to seek coverage nor indemnity from AXA. That is because there was no claim during the period of coverage as provided by AXA. Again, I note that the AXA policy is not before the Court. In the Travelers policy section 1 provides:

> The insurer agrees to pay on behalf of the Insured all Loss, in excess of the Individual Deductible and the Self-Insured Retention stated in the Declarations, which the Insured shall become legally obligated to pay, including Defence Costs, by reason of liability for any Wrongful Act provided always that Claim therefore is first made against the Insured during the Policy Period and reported in accordance with SECTION VIII - NOTICE OF CLAIM - during the Policy Period.
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> Clause (k) of Section II of the Policy defines wrongful act:
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> (k) "**Wrongful Act"** shall mean any negligent act, error or omission committed or alleged to have been committed by the Insured, as a Member of the Association, in the performance of Professional Services for others.
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> Clause (b) of Section II of the Policy defines claim:
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> (b) "**Claim"** shall mean:
>
> (1) a written demand for damages or non monetary relief;

> (2) a civil proceeding commenced by service of a notice of action, statement of claim, writ of summon, complaint or similar pleading; or
>
> (3) an arbitration, mediation or other alternative dispute resolution proceeding if the Insured is obligated to participate in such proceeding or if the Insured agrees to participate in such proceeding, with the Insurer's written consent, such consent not to be unreasonably withheld (sic)
>
> against an Insured for a Wrongful Act committed by the Insured.

[10] The definition of "claim" is set out in Clause (b) of Section 2 of the Travelers policy. The Applicants were not entitled to make a claim or seek indemnity if the similar provisions existed in the claims made policy of coverage provided by AXA. That is, there was no written demand for damages or monetary relief. Secondly, there was no civil proceeding commenced, service of Notice of Action, or Statement of Claim, etc. Thirdly, there was no arbitration, or mediation, or other alternative dispute resolution proceeding dealing with the claim which was made in 2009 and for which the Applicants seek coverage. The Commission made it clear that they would not be dealing with damages. Using the definition as set out in the Travelers policy there is no claim within the period of coverage, during the effective coverage period, covered by AXA. Clearly the

Applicants had and still would have no recourse against AXA if the terms of the policy were similar.

[11] The Applicants intended to be covered either by AXA or Travelers through the entire time in question. The Applicants did not anticipate, or expect, there was any period of time wherein any claims made were not covered.

[12] The issue of the conditions precedent for a claim was discussed in **Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.,** [1993] 1 S.C.R. 252 at paragraphs 43-45:

> 43 The authorities establish that as a general rule, for a "claim" to be made there must be some form of communication of a demand for compensation or other form of reparation by a third party upon the insured, or at least communication by the third party to the insured of a clear intention to hold the insured responsible for the damages in question.
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> 44 The authorities distinguish between a communication of a demand or assertion of liability sufficient to trigger coverage under a claims-made policy and: (1) mere requests for information; (2) filing of a lawsuit without serving it upon the insured or otherwise advising the insured of the claim embodied in the suit; and (3) expressions of dissatisfaction that are clearly not meant to convey a demand for compensation for the damages. These are sound distinctions.
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> 45 The rule that a demand or assertion of liability must be communicated for a claim to be "made" leaves open the further questions, however, of what

> constitutes a demand or assertion of liability, and whether that demand or assertion is established on the facts. The cases in the United States and Canada referred to the above which have found a claim had not been made can be distinguished on the basis of either or both of two factors: (1) the wording of the policies in question, which made it clear that "claim" meant an express demand; or (2) the fact situations, which fell short of establishing that a claim had indeed been made within the meaning of the general rule.

[13] The Pattens were advised that the complaints process through the Commission could not determine or deal with the issue of tortuous liability. It is noteworthy, as well, that in the disposition of the complaint the Commission determined that Ms. Murphy did disclose the problems with the water in the presence of a home inspector, however, the Commission imposed a penalty of $600.00, not for lack of disclosure but for other reasons.

[14] Having determined that, in accordance with the definition of a claim, as set out in the Travelers policy, a claim was not made by the Pattens prior to Travelers insuring the Applicants, the Court now turns to the issue as to whether or not exclusion (g) of the Traveler's policy alleviates Traveler's obligation to defend. Exclusion (g) of the Policy states:

> The Insurer shall not be liable to make any payment for Loss in connection with any claim:

...

(g) based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:

1. Any Wrongful Act, or any fact, circumstance or situation indicating the possibility of a Claim and already known to the Insured prior to the effective date of this Policy or, if this Policy is a renewal or part of a series of consecutive renewals issued by the Insurer, prior to the effective date of the initial policy; or

2. Any other Wrongful Act whenever occurring, which, together with a Wrongful Act which has been the subject of a notice, would constitute Interrelated Wrongful Acts.

[15] As noted by the Applicant, Hants Realty, exclusion (g) imports an element of "occurrence based policy" so that the end result can be viewed as a "hybrid policy". In **Reid** at paragraph 28 the Court said:

> This is inconsistent with the theoretical basis of true "claims-made" policies. Since it is the claim which is the focus of a true "claims-made" policy - not the underlying negligent act - knowledge prior to the commencement (or renewal) of coverage of an antecedent negligent act should not be a bar to coverage. Policies with this kind of provision may be viewed more as hybrid policies than as true "claims-made" policies. The insurer has in effect incorporated an element of an "occurrence" policy into its policy framework.

[16] The Court accepts the Applicants submission that the wording in clause (g) is so broad as to mandate a narrow interpretation of exclusion (g). At paragraph 37 of **Reid** the Court said:

> ...In each case the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance polices, including, but not limited to:
>
> (1) the *contra proferentum* rule;
>
> (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
>
> (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[17] Clearly the Applicants had intended to have coverage for the entire period of 2005 through 2009 inclusive. As noted above, if the AXA policy had similar provisions to the Travelers policy in terms of a definition of claim, no claim would trigger coverage during the AXA policy noted above. The Applicants are correct in their understanding of the limited jurisdiction of the complaints process of the Commission.

[18] Nothing was heard from the Pattens from the date the issue first arose, except for the complaint process and resulting appeals, between 2005 and 2009. It is of note that even the Commission had indicated that disclosure of the water issue to the Pattens had in fact been made prior to closing. Based upon what is now before the Courts the insured were not unreasonable in believing the matter had ended and there was no claim, or possible claim, in existence at the time the Travelers policy was issued. It was not until 2009 that the Pattens, through counsel, advised that they were making a "claim" against the Applicants. At that time the claim was promptly reported to Travelers. The Court is not satisfied the facts of this case warrant a denial of coverage pursuant to the paragraph (g) exclusion.

[19] The complaints process before the Commission was available to the Pattens and they chose that process. That process did not expose the Applicants to tortuous liability nor did it trigger the AXA obligation to defend. The only time that the Applicants became aware of liability, or potential liability, which would fall within the confines of Exclusion (g) was after Travelers policy came into effect.

[20] Travelers has an obligation to defend on behalf of both Applicants, Hermiena Murphy and Hants Realty Limited.

[21] The Court is prepared to hear the parties on the issue of costs if they are not able to resolve that issue.

J.

06/24/2013