SUPREME COURT OF NOVA SCOTIA
Citation: *Louisbourg Seafoods Limited v. Underwriters at Lloyd's*, 2023 NSSC 175

Date: 20230601
Docket: *Syd*, No. 498505
Registry: Sydney

Between:

Louisbourg Seafoods Limited

Plaintiff

v.

Underwriters at Lloyd's

Defendant

Decision on Motions

(Civil Procedure Rules 12 and 13)

Judge:	The Honourable Justice Robin Gogan
Heard:	October 18, 2022, in Sydney, Nova Scotia
Final Written Submissions:	May 30, 2023
Counsel:	Damien Barry, for the Plaintiff Matthew Williams, for the Defendant

By the Court:

Introduction

[1] On September 7, 2019, Hurricane Dorian struck the Port of Louisburg, Nova Scotia. During the storm, the fishing vessel, "*Kelly & Jordan*" broke free from her mooring lines and capsized. The vessel's hull was breached by rocks and then flooded by salt water. The vessel was a total loss.

[2] At the time of its loss, the *Kelly & Jordan* was insured under a Marine Hull Policy. The insurers were notified of the loss on September 9, 2019. After investigation, they denied coverage on the basis that the vessel's Canadian Steamship Inspection ("*CSI certification"*) had expired. The insurers say the expired certification is a breach of warranty. They also say that there were failures to disclose information material to the risk. The owners of the *Kelly & Jordan* disagree.

[3] Louisburg Seafoods Limited sued the insurers, Underwriters at Lloyd's, seeking coverage for the loss. As a preliminary motion, both Louisburg and Lloyd's ask for a determination of a question of law under Civil Procedure Rule 12. The parties agree on a series of questions to be addressed on the motion.

[4] What follows is a decision on the motion.

[5] Before moving on, I note that the parties filed the motion and made written and oral submissions without reference to the decision in ***T.E. Gordon Home Inspections Inc. v. Smith***, 2022 NSCA 13. ***T.E. Gordon*** is the most recent authority from our Court of Appeal on the scope of *Rule 12*. The parties were referred to that decision and given the opportunity to make supplementary submissions. Both parties provided a supplementary submission, maintaining their common position that this motion could be determined under *Rule 12*.

[6] The parties were also referred to the following decisions: (1) ***Atlantic Freighting Co. Ltd. v. Provincial Insurance Co. Ltd.***, 1953 CanLII 749 (NSCA); (2) ***Atlantic Freighting Co. Ltd. v. Provincial Insurance Co. Ltd.***, 1956 CanLII 368 (NSSC); and (3) ***Cleveland v. Sunderland Marine Mutual Inc. Co.***, 1987 CanLII 5290 (NSSC). Both parties provided supplemental submissions on these authorities.

Background

[7] There is no contest that the *Kelly & Jordan* was covered by a marine insurance policy at the time of its loss. Neither are the following facts contested:

(a) The date of loss is September 7, 2019.

(b) The initial policy was placed on December 16, 2016, and was renewed annually until the coverage in place at the date of loss (effective from December 31, 2018, to December 31, 2019);

(c) The vessel was fiberglass over wood, built in 1986, with a gross tonnage of 35.26 metric tonnes;

(d) At the time of loss, the vessel was not in active use or "trading" and was in a "state of lay-up" since 2018 but remained in the water;

(e) At the time of loss, the vessel was not CSI certified and had not been since May 22, 2018;

(f) The vessel had CSI certification and was "trading" when the initial coverage was placed but the insurer was not advised of the lapse of CSI certification or change in status to "lay up".

(g) Declaration 15 of the policy covering the vessel contains two statements: (1) "Warranted Insured complies with all statutory and regulatory requirements"; and (2) "Warranted vessel must be CSI certified if applicable".

(h) Similar language is found at page 14 of the policy endorsements.

(i) The General Conditions of the policy provide "this policy is subject to the *Marine Insurance Act*, S.C. 1993, c. 22, as amended".

(j) The insurer denied liability on the basis that the vessel (1) had no CSI certificate on the date of loss; (2) was in lay up status; and (3) these changes in status had not been disclosed.

[8] The coverage dispute between the parties is focused on the impact of the expiration of the *Kelly & Jordan's* CSI certification and its change of status from "trading" to "lay up".

[9] Depending on the outcome of the motion under Rule 12, the parties also seek summary judgement under Rule 13.

[10] The analysis that follows will begin with a determination of whether the questions posed can be disposed of, in whole or part, under Rule 12.

Analysis

Civil Procedure Rule 12 – The Scope

[11] The parties ask for a determination under Rule 12 which permits the determination of a preliminary question of law. The relief available under Rule 12 is limited, discretionary, and dependent upon conditions. The Rule provides:

Scope of Rule 12

12.01 (1) A party may, in limited circumstances, seek determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about the facts relevant to the question.

(2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.

Separation

12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:

(a) the facts necessary to determine the question can be found without the trial or hearing:

(b) the determination will reduce the length of the proceeding, the duration of the trial or hearing, or expense of the proceeding; and

(c) no facts to be found in order to answer the question will remain in issue after the determination.

Determination

12.03 (1) A judge who orders separation must do either of the following:

(a) proceed to determine the question of law;

(b) appoint a time, date, and place for another hearing at which the question is to be determined.

[12] The scope of relief available under Rule 12 has been considered by our Court of Appeal.

The Mahoney Test

[13] In ***Mahoney v. Cumis Life Insurance Company***, 2011 NSCA 31, the motion judge was asked to determine if the death of the insured was an "accidental death" or otherwise excluded from coverage. The motion judge found that the death was not accidental. On appeal, there was divided success. The reasons of the Court of Appeal emphasized that Rule 12 does not authorize determinations of questions of mixed fact and law. The correct approach was described in three steps:

> [18] So the first step with *Rule 12* is to identify the pure legal question to be determined. *Rule 12.01(1)* permits a determination of "a question of law". *Rule 12.03(1)* permits the judge to either determine "the question of law" or appoint a time to determine that question of law. **The Rule does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under *Rule 12.02(a)* as I have discussed.**
>
> [19] The second step is to identify- all the facts that are necessary to determine that question of law. Nothing in *Rule 12* permits a judge to decide facts that are unnecessary to determine the question of pure law in the motion. A party who wishes an assessment of evidence on other matters, leading to a judgement by interlocutory ruling, should make or join a summary judgement motion under *Rule 13.04* ("Summary judgement on evidence").
>
> [20] The third step under *Rule 12* is to decide whether all those facts necessary to determine the issue of pure law in the motion "can be found without trial or hearing".
>
> (Emphasis added)

[14] ***Mahoney*** was applied in ***Maritime Steele and Foundries Ltd. v. Economical Mutual Insurance Company***, 2011 NSSC 151, a case involving a property insurance coverage dispute. There, Duncan, J. (as he then was), identified the pure

question of law and addressed the prerequisites to the motion. With respect to the facts required, he concluded that these would be limited given that no ambiguity in the policy language had been identified. On this point, he considered the principles guiding interpretation of insurance contracts at para. 25:

> [25] In ***Wingtate Game Bird Packers (1993) Ltd. v. Aviva Insurance Company of Canada***, 2009 BCCA 343, the Court of Appeal, writing at para. 19 set out the principles that are to be applied in the interpretation of an insurance contract:
>
> 19 In my view, the interpretation principles may be summarized as follows:
>
> (a) the factual matrix existing at the time the parties enter into the contract may be considered in interpreting the words of the contract, but the words of the contract must not be overwhelmed by a contextual analysis;
>
> (b) the plain meaning of the words used should be given effect unless it would bring about an unrealistic or commercially unreasonable result;
>
> (c) one must search for an interpretation from the whole of the contract that promotes the true intent of the parties at the time they entered into the contract;
>
> (d) in the event of an ambiguity in the meaning of the words, the *contra preferentem* rule of interpretation will be applied in favour of the insured unless it will bring about an unfair result by way of the insured achieving an unanticipated recovery; and
>
> (e) coverage provisions should be construed broadly, while exclusion clauses should receive a narrow interpretation.

[15] In the end, Justice Duncan concluded that the question of law relating to the coverage dispute fell within the scope of Rule 12.

[16] ***Mahoney*** was also followed by Moir, J. in ***Korecki v. Nova Scotia (Justice)***, 2013 NSSC 312 where a preliminary question of law was separated after finding that it satisfied the prerequisites in Rule 12.

[17] More recently, our Court of Appeal had occasion to further consider the scope of Rule 12 in ***T.E. Gordon***. In that case, the motion judge embarked on an interpretation of a home inspection agreement as a question of law under Rule 12. The Court of Appeal found the questions posed on the motion involved mixed fact and law, the "*attempt to separate a question of law before trial was ill-conceived*", and "*did nothing to advance a speedy and inexpensive determination of the proceeding*".

[18] The main issue in ***T.E. Gordon*** was whether the questions posed could be reduced to pure questions of law. The analysis considered the basis for contractual interpretation on a spectrum from a individual bargains (tending to be questions of mixed fact and law: ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, at para. 49) to a highly specialized standard form contracts (tending to be questions of law: ***Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.***, 2016 SCC 37, at para. 24).

[19] The reasons in ***T.E. Gordon*** provide important guidance.

Is this motion within the scope of Rule 12?

[20] The parties advance a common position that the motion fits within the scope of Rule 12. They submit that the questions posed are pure questions of law supported by a limited factual matrix. They ask that these questions be separated from the proceeding and answered before further steps are taken. Determination of the questions of law will reduce the length and complexity of the main proceeding. The parties raise the possibility that the disposition of this motion could result in summary judgement for one of the parties and entirely dispose of the proceeding.

[21] Under the ***Mahoney*** test, there are three steps, the first being to identify a pure question of law for determination. The parties propose the following questions:

(a) For the purpose of the Warranties/Exclusions clauses under Lloyd's insurance policy 70T01443, was the requirement for CSI approval (if applicable) a warranty or a limitation of the risk insured against?

(b) If the requirement for CSI approval (if applicable) was a warranty, was *Kelly & Jordan's* lack of CSI approval (if applicable) a breach of warranty sufficient to void the policy?

(c) If the *Kelly & Jordan's* lack of CSI approval (if applicable) was a circumstance material to the risk, was the non-disclosure of that fact sufficient to void the policy?

(d) If the *Kelly & Jordan's* laid up status at all relevant times was a circumstance material to the risk, was the non-disclosure of that fact sufficient to void the policy?

[22] The parties acknowledge the governing law under Rule 12 and the limited factual determinations that can be made to "scaffold" the determination. There is no need to have agreement on the facts. However, the language of Rule 12 is clear that there are significant constraints on fact-finding. The factual determinations cannot be the kind requiring a trial or hearing. That said, the parties propose that the factual matrix be determined by answering three questions:

(a) Was CSI approval applicable to the vessel *Kelly & Jordan* at all relevant times?

(b) Was the vessel's lack of CSI approval, at any relevant time, a circumstance material to the risk?

(c) Was the vessel's laid-up status, at any relevant time, a circumstance material to the risk?

[23] The answers to these questions are contested. Louisburg says: (1) the vessel did not require CSI approval as it was in laid-up status, (2) the vessel's status diminished the risk and did not need to be disclosed; and (3) neither the laid-up status, nor the lack of CSI approval were material to the risk. In response, Lloyd's says: (1) the vessel required CSI certification at all times while insured, (2) the lack of CSI certification was material to the risk; and (3) the vessel's change to laid-up status was material to the risk.

Preliminary Observations

[24] The questions posed, and the factual determinations required, result in several preliminary observations.

[25] First, in my view, the questions posed as factual determinations go beyond what is contemplated by Rule 12. More will be said about this below.

[26] Second, the questions of law posed invite interpretation of a contract – in this case a marine insurance policy. The contract provides insurance coverage for a group of vessels in a commercial fishing fleet. The policy is specific to the marine industry, the perils of marine vessels, and the statutory regimes governing the industry. The interpretation of the contract is guided by the ***Marine Insurance Act***, SC 1993, c. 22, and the ***Canada Shipping Act***, 2021, SC 2001, c. 26. Beyond this, there is no context provided to enable a determination of where the policy fits on the spectrum between unique agreements and standard form contracts.

[27] The substance of the motions in both ***Mahoney*** and ***T.E. Gordon*** involved contractual interpretation. ***Mahoney*** involved an insurance policy and ***T.E. Gordon*** a home inspection contract. In both cases, the Chambers judge was persuaded to answer what were proposed to be questions of law. Both decisions were appealed. The Court of Appeal decisions are cautionary tales.

[28] In ***Mahoney***, Fichaud, J.A. concluded that the Chambers judge had determined a factual question and exceeded the scope of Rule 12:

> [27] The interpretation of the insurance policy's **unambiguous** terms was, in this case, a question of law. The pleadings agree that the policy in evidence for the motion was the document whose terms govern this claim. No trial testimony would alter that reality. All the facts necessary for the interpretation of those terms were before the judge on the motion. *Rule 12* entitled Cumis to an interpretation of the policy's **unambiguous** terms.
>
> [28] There is no error in the judge's interpretation of the policy … If Mr. Mahoney's pre-existing heart condition was even a partial contributing cause of death, then the policy's unambiguous terms would deny coverage or exclude his claim.
>
> [29] But an order declaring that interpretation exhausts the power on this motion.
>
> [30] Mr. Mahoney's cause of death – whether his fatal heart attack resulted solely from the motor vehicle accident or from a combination of the accident and Mr. Mahoney's medical condition - is a question of fact. It is not an issue of law to be determined under *Rule 12*. Neither is it an issue of fact "necessary to determine a question of law under *Rule 12.02(a)*. The judge may interpret the unambiguous words of the policy without finding the cause of death. Cumis' Notice of Motion joined the factual and legal (interpretive) issues into a mixed question of fact and law by requesting an order that the death was "not an accidental death as defined in the policy". The applicant's drafting technique does not expand the judge's power under *Rule 12*.
>
> (Emphasis added)

[29] Similarly, in ***T.E. Gordon***, the Court of Appeal concluded that the Chambers judge had gone too far determining whether an exemption clause limited liability for a home inspection. The question was one of mixed fact and law. In coming to that conclusion, there was an extensive discussion on the nature of contractual interpretation with emphasis on standard form contracts. While acknowledging the

decision of the Supreme Court of Canada in ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, the Court went on to adopt the analysis in ***Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.***, 2016 SCC 37, a decision which clarified that in some instances the interpretation of standard form contracts such as insurance policies is a question of law. At para. 24:

> [24] … where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[30] With the later qualification:

> [48] Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to a deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate. As Iacobucci J. recognized in *Southam*, the line between questions of law and those of mixed fact and law is not always easily drawn. Appellate courts should consider whether "the dispute is over the general proposition" or "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future" (para. 37).

[31] After reviewing the law of contractual interpretation, Beveridge J.A. considered the record available on the home inspection contract, assessed its characteristics, and found its interpretation involved both questions of fact and law.

[32] The final preliminary observation relates to the common position the parties take on the motion. Louisburg and Lloyd's agree that this motion is within the scope of Rule 12. They agree on the questions of law for determination. They have jointly advanced a series of factual determinations that are required to answer those questions. They part ways on the answers to both the factual and legal questions.

[33] Before moving on to determine the motion, I note that the decisions in both ***Mahoney*** and ***T.E. Gordon*** underscore the scope of Rule 12. Neither the consent of the parties, nor a common position, can expand the power of a Chambers judge on the motion. It must fit within the scope of Rule 12 or be dismissed.

Determination - Civil Procedure Rule 12

[34] The parties seek answers to the questions they pose on the motion as questions of law. The real issue is whether they have satisfied the prerequisites to separation in Rule 12.02(a) through (c). There is no contest that answering the questions posed will reduce the length, duration and expense of the proceeding. I conclude that condition (b) is met.

[35] A more significant hurdle arises from the requirement that the facts necessary to determine the motion can be found without a trial or hearing (Rule 12.02(a)).

[36] Let me begin with the first question posed by the parties. They ask whether the provision of the policy requiring CSI approval, "if applicable", is a warranty or limitation of the risk insured. The language of the policy is vague. Whether a warranty or a limitation of risk, the requirement is limited by the words "if applicable". The parties disagree on what these words mean, both in fact and in law.

[37] The parties agree on some basic facts. They agree that a contract for coverage existed over the *Kelly & Jordan* at the time of loss. They agree on the policy language. They also agree that the vessel had no CSI certificate, was laid up, but remained in the water at the time of loss.

[38] The parties disagree on whether CSI certification was required in the circumstances. They characterize this disagreement as one of fact that can be assessed on the motion. To quote from the submissions, "Was CSI approval applicable to the vessel *Kelly & Jordan* at all relevant times?". Louisburg argues that no CSI certificate was required, as the vessel was laid-up. Lloyd's argues that the vessel remained in the water and the requirement continued as certification was part of the basis upon which it accepted the risk.

[39] The answer to this question requires interpretation of the contract and its statutory context. The *Canada Shipping Act*, S.C. 2001, c. 26, and its *Vessel*

Certificates Regulations govern the requirement for CSI certificates. Sections 9 and 10 of the regulations provide:

> **Canadian Vessel Inspection Certificates**
>
> Application
>
> 9(1) Sections 10 and 11 apply in respect of the following Canadian vessels if they are not Safety Convention vessels:
>
> …
>
> (b) vessels of more than 15 gross tonnage;
>
> **Certificates**
>
> 10(1) No vessel shall engage on a voyage unless it holds a certificate issued under subsection (2).
>
> (2) On application by the authorized representative of a vessel, the Minister shall issue an inspection certificate to the vessel if the requirements under the Act that apply in respect of the vessel when engaged in its intended service are met.

[40] The word "voyage" is not defined. Rather, its meaning encompasses three different categories of voyage each defined in section 1 of the regulations. Louisburg did not identify an exemption for laid up vessels remaining in the water. Lloyd's did not explain the basis on which any of the categories of voyage applied to a vessel that was laid up.

[41] In my view, the question of whether CSI certification was required in the circumstances here is a question of mixed fact and law. In my view, the exercise of

determining this issue is not resolving a factual issue that will scaffold the question of law. As presented, it is beyond the scope of Rule 12.

[42] A similar, but not identical, issue exists with respect to the remaining factual determinations presented on the motion. Both involve a determination of materiality - Was the expired CSI certification or the change in vessel status material to the insured risk? The parties ask the Court to determine materiality as a scaffold to the question of whether Louisburg failed to disclose material information that would allow Lloyd's to avoid liability.

[43] On this point, the *Marine Insurance Act* provides a definition of materiality in s. 21:

> Material circumstance
>
> (3) A circumstance is material if it would influence the judgement of a prudent insurer in fixing the premium or determining whether to take the risk.
>
> Question of Fact
>
> (4) Whether any circumstance that is not disclosed is material or not is a question of fact.

[44] Both parties offered affidavit evidence and were cross-examined during the motion. Suffice to say that the question of materiality is disputed. The question then

becomes whether this is the kind of factual issue that can be resolved under Rule 12. On this point, I am guided once again by the reasons in ***Mahoney***, at para. 21:

> [21] This third step generates a question – What does Rule *12.02(a)* mean that those facts "can be found without the trial or hearing"? In my view, it does not mean that a judge under *Rule 12* can assess the evidence in the same fashion as in a motion for summary judgement on the evidence under *Rule 13.04*. Under *Rule 13.04*, a responding party must "put his best foot forward" with evidence or risk a determination that there is no genuine issue of material fact requiring trial, or that its claim or defence has no real chance of success, and a consequent dismissal of the action or defence … *Rule 12* does not give the chambers judge that power. A judge under *Rule 12* may not determine contested facts that might hinge on testimony at trial. That is the point of *Rule 12.02(a)*'s condition that "the facts … can be found without the trial".
>
> (Citations Omitted)

[45] I conclude that the determination of materiality is beyond the scope of factual determinations permitted by Rule 12. As the parties presented the motion, the resolution of materiality is the basis for the determination of the question of law. Materiality is a central and disputed question of fact requiring a trial or hearing. Until resolved, there is no basis to proceed to assess a failure to disclose the expiration of the CSI certificate or the change in vessel status.

[46] I find that the questions posed cannot be separated and answered as the prerequisites under Rule 12 have not been met. There are factual determinations that require trial or hearing. These questions posed are questions of mixed fact and law. In the circumstances, the relief sought is beyond the scope of Rule 12. The motion is dismissed.

Determination – Civil Procedure Rule 13

[47] This motion was made under Rule 12. As I understand it, the parties joined the Rule 12 determination with a request for summary judgment under Rule 13.04. The motions were advanced sequentially, not alternatively. The amended Notice of Motion reads as follows at p. 2:

> Once the Court has made its determination of the Rule 12 questions of law, the Plaintiff, if successful on the questions of law, will further move that the Court make a corresponding order for summary judgment, pursuant to Civil Procedure Rule 13.04, striking the relevant parts of the Defendant's Statement of Defence. Likewise, the Plaintiff acknowledges that its Statement of Claim will be struck under Rule 13.04 should it not succeed on any of the questions of law.

[48] I considered whether I could proceed to grant relief under Rule 13.04 on the basis of the materials filed even though I dismissed the Rule 12 motion. The language in the relief sought drives the conclusion that it is inappropriate to consider summary judgment in isolation. It does not appear to be what the parties intended.

[49] For this reason, I dismiss the summary judgment motion without prejudice to it being brought by one or both of the parties in the future. To be clear, if either of the parties requests a summary judgment on evidence, I would allow any further evidence they may require to be satisfied that they have put their best foot forward.

[50] If the parties wish to proceed in this way, they may contact Cape Breton District scheduling to have the matter returned to Chambers for directions on the motion.

Conclusion

[51] In conclusion, I find that the substance of this motion exceeds the scope of Rule 12 and is dismissed.

[52] The motion for summary judgement under Rule 13 is also dismissed.

[53] These motions were advanced jointly. Both parties sought determinations under Rules 12 and 13. In the circumstances, there shall be no costs award to either party.

[54] If the parties wish to proceed with a motion under Rule 13.04, the matter must return to Chambers for directions.

[55] Order accordingly.

Gogan, J.