SUPREME COURT OF NOVA SCOTIA

Citation: *Grafton Connor Group of Properties v. Murphy,* 2014 NSSC 308

Date: 20140819
Docket: *Halifax,* No. 293148
Registry: Halifax

Between:

Grafton Connor Group of Properties

Plaintiff

v.

Sean Murphy, Lloyd's of London Underwriters and Marsh Canada Limited

Defendants

Decision on Admissibility of Commission Evidence

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated January 5, 2015.
Judge:	The Honourable Justice Arthur LeBlanc
Heard:	July 4, 2014, in Halifax, Nova Scotia
Counsel:	John Merrick, Q.C., Darlene Jamieson, Q.C. and Tammy Manning, for the Plaintiffs
	Michael Ryan, Q.C. and Richard Norman, for the Defendant Sean Murphy and Lloyds of London
	Christopher Robinson, Q.C.; Kevin Gibson and Ian Dunbar, for the Defendant Marsh Canada

By the Court:

Introduction

[1] On October 29, 2013, I granted a motion by the Defendant Lloyd's of London Underwriters ("Underwriters") for an order permitting them to obtain the evidence of witnesses Christian Corby and Martin Pope by commission. Examination of Mr. Corby took place at the London office of Holman Fenwick William LLP on February 27 and 28, 2014. Mr. Pope was examined in the same location on April 9, 2014.

[2] The trial in this matter began on June 9, 2014. The evidence was completed on July 4, 2014, with written closing arguments to be filed by the parties in September. Transcripts of the commission evidence of Mr. Corby and Mr. Pope were filed with the court by consent at the close of Underwriters' case, subject to a number of objections raised during the examinations. This decision will deal with these objections.

Background

[3] On March 7, 2007, the North End Beverage Room (the "North End Pub") in Halifax was destroyed by fire. The North End Pub was owned by Beaufort Investments Incorporated, which is part of a group of companies with shared

ownership and management, collectively known as the Grafton Connor Group of Companies ("Grafton Connor"), the Plaintiffs in this action.

[4] The North End Pub was insured by Underwriters at the time of the fire under a property insurance policy effective from July 1, 2006 – July 1, 2007 (the "Policy").

[5] The Defendant Marsh Canada Limited ("Marsh") acted as insurance broker for Grafton Connor in obtaining property coverage, including business interruption, for all of its locations. In 2003, Marsh placed the risks with Underwriters. The coverages took effect on July 1, 2003 and were renewed annually by Marsh.

[6] In order to secure the Policy with Underwriters, Marsh forwarded a spreadsheet to Underwriters containing information about all of the Grafton Connor locations (the "Location Summary"). The Location Summary identified the North End Pub as "100% sprinklered" and of "masonry" construction. Each time the Policy was renewed, this information remained unchanged.

[7] In the course of its investigation after the fire, Underwriters discovered that the Pub was of masonry and timber construction and was not sprinklered. On October 7, 2007, Underwriters gave notice to Grafton Connor of its position that the Policy was void from inception on the basis of material misrepresentation.

[8] Grafton Connor filed an action against Underwriters alleging that it was not entitled to void the Policy. It relied primarily on the language of Endorsement 10, which provides in part:

> 23. ERRORS OR OMISSIONS
>
> Any unintentional error or omission made by the Insured shall not void or impair the insurance hereunder provided the Insured reports such error or omission as soon as reasonably possible after discovery by the Insured's Home Office Insurance Department …

In the alternative, Grafton Connor claims against Marsh for negligence and breach of contract.

[9] Underwriters takes the position that Grafton Connor breached its duty to the insurer to disclose all material information, and this breach entitled Underwriters to void the Policy.

[10] Like the Plaintiffs, Marsh says the language of Endorsement 10 prohibits Underwriters from voiding coverage on the basis of an unintentional misrepresentation. In the alternative, Marsh denies that it was negligent in relying on the representations made by Grafton Connor and passing that information on to Underwriters with taking steps to independently verify its accuracy.

The Objections

[11] The rules of evidence and procedure on commission are set out in Civil Procedure Rule 56.02:

> 56.02 (1) The rules of evidence apply to evidence taken or transmitted by commission.
>
> (2) A witness who gives evidence by commission must answer a question to which an objection is made, unless one of the following applies:
>
> (a) the appointment of a commissioner who takes evidence, or a provision in an order, provides otherwise;
>
> (b) the questioner withdraws the question;
>
> (c) the evidence is being transmitted and the presiding judge rules that the question is not to be answered;
>
> (d) the commissioner is taking evidence to be transcribed, and the witness or a party claims that the information called for by the question is privileged.
>
> (3) The presiding judge must rule on the admissibility of an answer given to a question objected to, but answered, at a commission.
>
> (4) The rules for order of examinations, and all other rules of trial procedure or procedure on a hearing, apply when evidence is taken or transmitted by commission, unless a judge orders or the parties agree otherwise.

[12] Mr. Pope and Mr. Corby were both employed by Underwriters as underwriters and dealt with the risk posed by the Grafton Connor properties. Mr. Pope was the lead underwriter dealing with the Plaintiffs' properties before 2006, and Mr. Corby was a lead underwriter in 2006 at the time of the last renewal.

[13] The first two objections were raised by Michael Ryan, QC, counsel for Underwriters, during cross-examination of Mr. Pope by John Merrick, Q.C., counsel for Grafton Connor.

[14] Mr. Merrick directed Mr. Pope's attention to the language of Endorsement 10 of the Policy, the errors and omissions clause, and the following exchange took place:

> MR MERRICK: Is it fair to say that the purpose of that clause is to protect the insured from innocent misrepresentations?
>
> MR RYAN: I object to that.
>
> MS BARTON: Can we just clarify the objection?
>
> MR RYAN: I just said that I object. I object on the basis that he's not the author of the document and can't speak to its purpose.

Mr. Pope proceeded to answer the question in accordance with Rule 56.02(2).

[15] Underwriters objects to this question on the basis that it calls for Mr. Pope's opinion as to the proper interpretation of the clause. Grafton Connor argues that evidence as to the purpose of errors and omission clauses as it is understood in the Canadian insurance industry is admissible as part of the surrounding circumstances or factual matrix of the contract.

[16] Evidence of the factual matrix of a contract is admissible to assist the court in its pursuit of the parties' true contractual intent. In *Lloyds Syndicate 1221 (Millennium Syndicate) v. Coventree*, 2012 ONCA 341, the Ontario Court of Appeal observed:

> **16** When interpreting the terms of a contract, including an insurance contract, the aim is to determine the intentions of the parties viewed objectively at the time they entered into the contract. The analysis begins with an examination of the text of the written agreement. The aim is to determine the objective intentions of the parties from the words they have used.
>
> **17** However, the words of a contract alone may not be determinative of the objective intention of the parties. Contracts are not to be looked at in a vacuum. Rather, it is "perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about": Hill v. Nova Scotia (Attorney General), [1997] 1 S.C.R. 69, at para. 20. The court's search for the intention of the parties may be aided by reference to the surrounding circumstances or factual matrix at the time of the negotiation and execution of the contract, as viewed objectively by a reasonable person. …

See also *Hefler Forest Products Ltd. v. MCAP Leasing Inc.*, 2011 NSSC 505 at para. 20; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 NSSC 376 at para. 5.

[17] However, the factual matrix is confined to the circumstances known to both parties at the time of the execution of the contract, including facts known or reasonably capable of being known by the parties when they entered into the contract: *Hefler Forest Products Ltd. v. MCAP Leasing Inc.*, *supra*, at para. 22; *Water Street Pictures Ltd. v. Forefront Releasing Inc*, 2006 BCCA 459, 2006 Carswell BC 2476 at para. 24). In *Canadian Contractual Interpretation Law, Second Edition* (Markham: LexisNexis, 2012), Geoff R. Hall explains that the factual matrix must be assessed objectively:

> The factual matrix of a contract consists only of objective facts known to the parties at or before the date of contracting. It also consists only of what is

> common to both parties, as opposed to individualized versions of the factual matrix particular to only one of the contracting parties. To permit the factual matrix to include subjective elements or facts known only to one side would undermine the principle that interpretation must be an objective exercise. (p. 35)

[18] Evidence as to the purpose of errors and omissions clauses in the insurance industry is not admissible as part of the factual matrix or surrounding circumstances of the contract. This information would not have been known to Grafton Connor at the time the contract was entered into, and is of no assistance to the court in interpreting the Policy. The objection is allowed, and the transcript evidence, starting at line 13 of page 64 and ending at line 17 of page 65, is inadmissible.

[19] Underwriters' second objection relates to a series of questions posed by Mr. Merrick regarding Mr. Pope's understanding of how another clause in the Policy is applied in the insurance industry. In particular, Mr. Merrick was interested in Mr. Pope's views as to what restrictions, if any, the clause imposed on the insured with respect to the rebuilding of a destroyed premises. Mr. Ryan again objected on the basis that Mr. Merrick was asking the witness to interpret the words of the agreement. In response, Mr. Merrick pointed out that the objection may be moot due to the exchange that occurred immediately after Mr. Ryan's objection:

> MR MERRICK: In your practice, that clause has never restricted the insured from using the new building for an alternate purpose, as long as they haven't reinsured it?

A. I can't answer that question, I'm afraid. I don't have that knowledge.

[20] In my view, asking Mr. Pope, a lead underwriter for one of the parties to the contract, for his understanding of the words contained therein based on how he has seen them applied in the industry is asking for an opinion as to the proper interpretation of the language. This is an issue for the court. Furthermore, the question runs afoul of the rule against evidence of subjective intention.

[21] Contractual interpretation is an objective exercise, the goal of which is to determine what the parties to the document would *reasonably* have understood the contested words to mean: *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1999] OJ No 3290, 45 OR (3d) 417 at para. 9 (Ont. CA). Evidence as to what one party *actually* understood the words to mean at the time the contract was entered into, or how that party has applied the same words in the past based on that subjective understanding, is irrelevant and inadmissible.

[22] In *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] SCJ No 59, Iacobucci, J. stated:

> **54** The trial judge appeared to take Consolidated-Bathurst to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be

> determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

[23] Asking a party how it "understood" the language at the time of the contract is indistinguishable from asking what that party intended the language to mean. As noted in *Canadian Contractual Interpretation Law, Second Edition*, *supra*, at p. 35:

> The inadmissibility of evidence of subjective intention has two separate aspects. First, evidence of a party's subjective understanding of the meaning of the words used in a contract is irrelevant and inadmissible. Second, evidence of what a party truly intended, independent from the words of the contract, is irrelevant and inadmissible (absent a claim for rectification).

[24] I allow the objection and the transcript evidence, starting at line 5 of page 78 and ending at line 11 of page 80, is inadmissible.

[25] The final objection during Mr. Pope's examination was raised by Christopher Robinson, Q.C., counsel for Marsh, in response to questions by Mr. Merrick about a report prepared by Technical Risk Services Inc. ("TRS") on or around January of 2003, and disclosed by Marsh in 2011 by Supplementary Affidavit of Documents.

[26] The Plaintiffs allege that Marsh knew or ought to have known that the North End Pub was not sprinklered due to information contained in the TRS report, and

claim that Marsh should have passed the TRS report on to Underwriters. Marsh denies having been in possession of the TRS report or having knowledge of any information contained therein at the relevant times.

[27] Following the close of Underwriters' case, Marsh led evidence that the TRS report was commissioned by Enterprise Canada Insurance ("ECI"), a separate corporate entity, and Marsh did not acquire control over the TRS report until April of 2006 when ECI was wound up into Marsh. The TRS report was retrieved in 2011 from a closed ECI underwriting file for the Grafton Connor account, stored in an offsite facility.

[28] During cross-examination, Mr. Merrick drew Mr. Pope's attention to the TRS report and the following exchange occurred:

> MR MERRICK: When did you first learn of the existence of this report?
>
> A. I would suggest very recently.
>
> Q. What do you mean by that?
>
> A. Within the last two weeks.
>
> Q. If that report had been given to Marsh, do you have any expectation or understanding or assumption as to what they should have done with that?
>
> MR ROBINSON: I'm objecting to the question, for the record, that I don't know how the witness can answer that question.

> MR MERRICK: You don't know where that report – or if Marsh had become aware of that report when it was done, would you have had any expectation as to what they would have done or should have done with it?
>
> A. My expectation would be that that would – sorry?
>
> MS BARTON: What was that?
>
> MR ROBINSON: I'm objecting to the question again. Go ahead and answer it, sir.

[29] Marsh's objection is that this question calls for the opinion of an underwriter as to how Marsh, a broker, should have conducted itself, had it been given the TRS report. Mr. Merrick says that he was not asking for an opinion, but instead, was asking what would happen in the normal course of events if a report like the TRS report was given to a broker.

[30] I agree with Marsh's position. Mr. Merrick's question seeks an opinion from Mr. Pope as to the standard of care applicable to the co-defendant Marsh. The evidence from line 9 at page 68 to line 15 at page 69 is inadmissible.

[31] The remaining objections were raised during Mr. Corby's examination. Mr. Merrick asked Mr. Corby about his involvement in the decision by Underwriters to deny coverage. When asked to explain his views at the time as to whether there had been a material misrepresentation, Mr. Corby responded:

A. My view was the fact that we had received the same information each time for each —— for the initial risk and then for each -- for each of the three renewals, and each time the information was incorrect.

Q. Yes. and was that the extent of your views?

A. The fact information had been supplied four times and each time it was incorrect, it signified there had been a misrepresentation, and that the policy should be declined, that the claim should be declined.

[32] The examination continued as follows:

Q. Now that you know of the existence of the TRS report, does that change your views?

A. I have not been through — although I saw the document today, I have not been through the whole document. I haven't read the whole document.

Q. I suggest to you that if it's clear that Marsh was told that the premises were not sprinklered, that would impact your views?

A. Absolutely, yes.

MR RYAN: Excuse me, go ahead and answer the question, but I object. His view is irrelevant.

[33] Underwriters argues that this question requires speculation on the part of the witness and is irrelevant. Mr. Merrick says his question was simply whether the existence of the TRS report would change Mr. Corby's view that a material misrepresentation had occurred. I allow the objection. When Mr. Corby arrived at his views concerning the validity of the Policy, he was not aware of the TRS

report's existence. Mr. Corby is a fact witness; what his views would have been on a different set of facts is irrelevant. The evidence from line 10 to line 18 of page 79 of the transcript is inadmissible.

[34] The final objection was made by Mr. Merrick and relates to a series of questions asked by Mr. Ryan concerning Mr. Corby's understanding of the limits of coverage under the Policy for each building. Mr. Merrick objected on the basis that the questions call for Mr. Corby to interpret the Policy. Mr. Ryan says that since Mr. Corby is the underwriter who renewed the Policy in 2006, he is entitled to give his understanding of the limit of coverage on the North End Pub.

[35] I agree with Mr. Merrick, for the reasons articulated at paragraphs 21 to 23 of this decision. Mr. Corby's understanding of the limits of coverage at the time the Policy was renewed is inadmissible. The transcript evidence from line 6 of page 59 to line 1 of page 61 will not be considered.

Conclusion

[36] The objections raised during Mr. Pope's examination are allowed. The objections raised during Mr. Corby's examination are allowed.

Leblanc, J.

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Michael Ryan, Q.C. and Richard Norman, for the Defendant Sean Murphy and Lloyds of London

Christopher Robinson, Q.C.; Kevin Gibson and Ian Dunbar, for the Defendant Marsh Canada

Erratum:

[37] Paragraph 2 reads:

> [2] The trial in this matter began on June 9, 2014. The evidence was completed on July 4, 2014, with written closing arguments to be filed by the parties in September. Transcripts of the commission evidence of Mr. Corby and Mr. Pope were filed with the court by consent at the close of Underwriters' case, subject to a number of objections raised during the examinations. This decision will deal with these objections and an objection raised at trial concerning the identification of handwriting by a lay witness.

[38] Paragraph 2 should read:

> [2] The trial in this matter began on June 9, 2014. The evidence was completed on July 4, 2014, with written closing arguments to be filed by the parties in September. Transcripts of the commission evidence of Mr. Corby and Mr. Pope were filed with the court by consent at the close of Underwriters' case, subject to a number of

objections raised during the examinations. This decision will deal with these objections.

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