IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Hartlen v. Dominion of Canada General Insurance Co., 2006 NSSM 33

2005 Claim No. 256668
Date: 20060130

BETWEEN:

Name: **Seana Hartlen** Claimant

- and -

Name: **Dominion of Canada General Insurance Co.** Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on December 13, 2006. This decision replaces the previously distributed decision

Appearances:
Claimant: Lisa Teryl
Defendant: Roger Shepard

D E C I S I O N

[1] This proceeding was heard in Halifax on November 24, 2005, and following that written submissions were filed by each of the parties.

[2] I will not recite the evidence in detail. Where appropriate, I will reference evidence in the findings based thereon.

[3] It seems to me there are two basic issues in this case: whether the language of the insurance policy covers the circumstances here at all and, if so, secondly, to what amount? I will refer to these issues as “coverage” and “damages”.

Coverage

[4] This claim is under the section of the insurance policy entitled “Additional Living Expenses”, it reads as follows:

D Additional Living Expenses

1. Additional Living Expenses *If you cannot live in your residence because of damage to it caused by loss or damage we insure, we will pay*

your moving and storage expenses, plus
any increase in living expenses necessary to maintain your normal standard of living.

2. Fair Rental Value *If you rent or hold for rental a part of your residence, and a tenant cannot live there because of damage caused by loss or damage we insure, we will pay*

your actual loss of rental income from a part then rented, and
the loss of fair and reasonable rental income you had anticipated receiving from a part then held for rental.

We will, however, deduct those expenses which do not continue.

Under 1 and 2 above, we will pay only for the reasonable time required to repair, rebuild, or for you to permanently settle elsewhere. You are obliged to act as quickly as possible.

[5] The issue therefore is whether the facts in this case trigger the indemnity of the insurance policy. Under the wording of this clause, do the facts herein establish "*...if you cannot live in your residence because of damage to it caused by loss or damage we insure"*.

[6] In the submission of the Defendant at page 7, it is argued that the literal interpretation should be applied. I reject this suggestion for the following reasons.

[7] The word "live" has a number of potential meanings according to definitions. The primary meaning appears to be "stay alive" and if that is applied with a strict literal meaning, it would mean that the provision would only apply if the evidence established that to stay in the residence would result in death. Recognizing that that may be seen as an absurd

interpretation, the point is made to demonstrate that clearly a literal, or strictly literal definition ought not to be applied here.

[8] This is amplified by and consistent with the comments from the *Consolidated Bathurst* case quoted in the Defendant's submission at page 2:

> *"Consequently, literal meaning should not be applied or to do so would bring about an unrealistic result or result which would not be contemplated in a commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties..."*

[9] Indeed, the Defendant goes on in its submission to state that the ability to live in the residence would be premised on whether or not the insured had general amenities, example: heat, light, hot and cold water, et cetera. Therefore, it seems to be the position of even the Defendant that a strict literal construction is not to be applied here.

[10] I am aware of no case authorities and have been provided with no such authorities which provides specific guidance on the construction of this insurance policy. The *Consolidated Bathurst* case already referred to, as well as the Supreme Court of Canada case also referred to by the Defendant - *Brissette v. Westbury Life Insurance Company*, both indicate that the **whole** of the contract is to be examined in attempting to discern the true intent of the parties at the time of entry into the contract. With that approach, I find that reference to the second bullet, i.e. *"...maintain your normal standard of living"* provides assistance in gleaning the true intent of the parties in this language. This would seem to suggest that the insured's particular circumstances may properly be considered in the question of whether the insured can or cannot live in the residence. For example, in the case of an extremely affluent insured with an extremely expensive and extravagant personal residence, it would seem that the question of whether or not such an insured would be able to live in a residence would not be determined on whether or not the residence continued to

have the general amenities referred to by the Defendant, i.e. heat, lights, hot and cold water. Those are things of basic subsistence and I do not think that an insured contracts to only receive additional living expenses where the residence is rendered incapable of providing those basic amenities.

[11] I would suggest that a reasonable meaning consistent with this language and the case law already referred to and, in particular, consistent with Item 4 mentioned by the late Justice Sopinka in the *Brissett* is that this clause would be established where an insured (or part of the insured's household) cannot reside in the residence without a significant deviation from the pre-existing conditions and standards of living associated with the residence in question.

[12] Applying this definition to the evidence here establishes in my view that the insured was entitled to be covered for additional living expenses.

[13] As I stated above, I believe the facts here do establish an allowable claim under the insurance policy pursuant to the definition which I adopt. Clearly, one or more of the boys' rooms were uninhabitable on any definition for some period of time. The main bathroom was under construction for a period of time and for a brief period during that, totally out of working order. There were workers coming and going, plastic was put up in the basement and, at one point, one of the sons had to break in the basement window to access his personal effects and clothing.

[14] I do not think it realistic to think that all of the family could have remained in the home during these repairs.

[15] On the evidence supplied I find it difficult to establish a precise time period during which the circumstances were such that the three boys were unable to live in the residence on the definition I adopt. I note that the Claimant and mother of the three boys, remained during

the whole time, as did the 14 year old exchange student who apparently had a bedroom on the upper level.

[16] I find that two weeks is the appropriate period of time. The evidence is not sufficiently clear to find in favour of the Claimant for the whole period of 23 days. While from the evidence it appears that Joshua was out of the house for 17 or 18 nights, the other two boys, Jonathan and Andrew, were each out for ten nights.

[17] The defence suggests, in the alternative to totaling disallowing the claim, that the date of August 22nd (ie, a claim for 11 days) is the appropriate date for when the household could have moved back in. I think that is cutting matters a little too fine and would not be prepared to go to that extent.

[18] Before turning to the damages section, I will comment on the aspect of this case dealing with the communication of the claim to the insured. There was a fair bit of evidence given about the telephone messages which seemed to go unanswered and voice mails and returned messages and the like. To some extent the evidence conflicted but my overall impression was that neither the Claimant nor the Defendant was wholly without blame in having this matter dealt with earlier rather than after 11 or more days had passed and the file had been passed to another adjuster. Indeed, it seems that part of the reason this matter came to a head is that the initial adjuster had given an indication that he would allow the claim for additional living expenses but when it came into the hands of the second adjuster the conditions had changed somewhat. I am not making any finding from that, but do make the observation as to why the mattered ended up in litigation and was not resolved through the normal process of adjusting a claim.

Damages

[19] The defence argues that it is only with respect to actually incurred expenses that liability would arise. I disagree. To adopt this type of definition would mean that an impecunious defendant insured would be disadvantaged as compared to an insured who can more easily afford to pay for the expenses.

[20] The insurance contact is just that - a contract. If the insurer breaches the contract then the measure of damages to the insured is the amount which would put the insured in the position they would have been in had the breach not occurred. Had the breach not occurred here the boys and possibly Ms. Hartlen herself would have been housed in a hotel for approximately two weeks. As the coverage was not put in place and was actually denied by Mr. Doucet, alternate arrangements with the ex-husband and a family friend were made. It seems to me that Ms. Hartlen should not have been put in that position of having to avail herself of those options. She was in the fortunate position of having that, others may not.

[21] That does not, however, affect her loss it seems to me.

[22] I am not prepared to allow the travel expenses and food expenses for Joshua as a claim. First, if the boys including Joshua had lived in the nearby hotel then it would seem to me that the travel expenses would be the same in that circumstance as they would be if he had been living in the home. In other words, no increase, or at least no measurable increase.

[23] A similar comment would be made with respect to the food. Although the comment was made and I appreciate the distinction between paying for grocery store food versus eating out. There was insufficient evidence to allow a claim for that difference.

[24] The broken window is not a claim that would fall under additional expenses and I would not allow that expense.

[25] The claim for the dog appears reasonable and appears to be directly related. Ms. Hartlen's evidence was that that amount would have to be paid and would total $460.00, i.e. 23 days times $20.00 per day. I will allow that amount.

[26] I will also allow the filing fee of $160.00 and service fee of $45.00.

[27] In summary therefore, I will allow for two rooms for 14 days at $100.00 per day. That totals $2,800.00. I will also allow the $460.00 for the boarding of the dog.

Disposition

[28] It is hereby ordered that the Defendant pay to the Claimant the following:

Debt:	$ 3,260.00
Costs:	205.00
Total:	$ 3,465.00

DATED at Halifax, Nova Scotia, this day of January, 2006.

Michael J. O'Hara
Adjudicator

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