COURT OF APPEAL FOR ONTARIO

CITATION: Aitken v. Unifund Assurance Company, 2012 ONCA 641
DATE: 20120925
DOCKET: C54517

Lang, Epstein and Hoy JJ.A.

BETWEEN

James Leo John Aitken and Carole Mary-Lyn Aitken

Applicants (Respondents)

and

Unifund Assurance Company

Respondent (Appellant)

John F. Graham, for the appellant

Laird S.S. Scrimshaw, for the respondents

Heard: April 5, 2012

On appeal from the judgment of Justice B.R. Warkentin of the Superior Court of Justice dated September 29, 2011, with reasons reported at 2011 ONSC 1809.

Epstein J.A.:

[1] This appeal concerns an insurer's duty to defend. The respondents, James and Carole Aitken, were insured under a homeowners' insurance policy issued by the appellant insurer, Unifund Assurance Co. A claim was advanced by against the Aitkens in relation to alleged misrepresentations they made in the course of the sale of their home. When the Aitkens advised Unifund of the claim, Unifund took the position that it had no duty to defend. The Aitkens brought an

application for a declaration that Unifund had a duty to defend and to indemnify them. The application judge made a declaration that Unifund has a duty to defend and ordered that the issue of the duty to indemnify be left until trial. Unifund appeals.

[2] For the reasons that follow, I would dismiss the appeal.

A. THE FACTS

[3] The Aitkens purchased a home in Thunder Bay in 1999. On October 27, 2008, they sold it. In connection with the sale, the Aitkens completed a document known as a seller property information statement ("SPIS") in which they made a number of representations regarding the property.

[4] On September 10, 2009, the purchaser of the property commenced an action (the "Main Action") against the Aitkens and the company that performed the home inspection on his behalf. As against the Aitkens the purchaser claimed that in the SPIS the Aitkens not only intentionally failed to disclose a series of problems with the house, including a leaky roof and basement, bad wiring, and the improper removal of load-bearing walls, but also had taken steps to disguise these problems prior to the sale. In addition, the purchaser claimed that the Aitkens knowingly misrepresented that they had obtained building permits for renovations they had performed on the house.

[5] The Aitkens filed a statement of defence on September 22, 2009. Examinations for discovery commenced in early April 2010; further discoveries were set for February 2011.

[6] On March 30, 2010, the Aitkens notified Unifund about the Main Action and sought defence costs and indemnity. Unifund denied coverage.

[7] On August 31, 2010, the Aitkens brought this application claiming, in addition to other relief, a declaration that Unifund owes them a duty to defend them in the Main Action and indemnify them for any damages they were found to owe. On January 26, 2011, before the application was heard on February 18, 2011, the plaintiff in the Main Action amended the statement of claim making no changes to the facts. Essentially, the pleading was amended by re-labeling most of the alleged misconduct as being negligent rather than intentional.

B. REASONS OF THE APPLICATION JUDGE

[8] Before the application judge, Unifund raised three main arguments as to why there was no coverage. First, the cause of action against the Aitkens advanced in the original pleading was one based on intentional wrongdoing. Since intentional misconduct was not covered by the policy, Unifund had no duty to defend or indemnify. The amendments to the statement of claim were nothing more than an attempt to access insurance and should be disregarded. Second, Unifund submitted that two exclusions in the policy applied. The policy excluded

coverage for claims based on damage to property owned, used, occupied, leased or rented by the policyholder and also those involving damages arising from breach of contract. Finally, Unifund contended that the Aitkens were in breach of the policy due to their failure to provide timely notification of the Main Action.

[9] At the outset of her analysis, the application judge identified the following controlling principles with which the parties took no issue:

> (a) In circumstances where there is a question about whether the plaintiff has drafted his claim in a way that seeks to turn intention into negligence merely to gain access to insurance coverage, the court is entitled to look beyond the wording in the pleadings to ascertain whether it is either a manipulative or a derivative claim that is subsumed in the intentional tort: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, at paras. 81-85.
>
> (b) The insured bears the onus of establishing that the allegations made by the plaintiff, if proved, possibly bring the claim within "the four corners" of the relevant policy. If this threshold is met, the onus then shifts to the insurer to show that the claim falls outside coverage because of an applicable exclusion: *A.R.G. Construction Corp. v. Allstate Insurance Co. of Canada* (2004), 73 O.R. (3d) 211 (S.C.).

[10] The application judge first dealt with Unifund's submission that the policy does not cover the loss. This argument is based on the provisions in the policy that Unifund "will pay all sums which you become legally liable to pay as compensatory damages because of unintentional bodily injury or property

damage" and will not cover "bodily injury or property damage caused by an intentional or criminal act". Unifund contended that the amended claim should be disregarded as derivative of the claim for intentional misrepresentation and that the real substance of the claim was as originally pleaded.

[11] In his analysis of Unifund's argument that the Aitkens were not covered by the policy given the nature of the wrongdoing upon which the plaintiff relied in support of his claim for damages, the application judge held that until the original statement of claim was amended the policy did not cover the loss. As noted by the application judge, the Aitkens conceded this point.

[12] In rejecting Unifund's argument that the amended claim should be ignored on the basis that it was manipulative and derivative, the application judge started with the legal premise that insurers have a duty to defend if there is a "mere possibility" that the claim falls within the scope of the insurance policy.

[13] Then, after finding no evidence that the plaintiff in effect artificially amended his pleading for the sole purpose of accessing insurance, the application judge considered the respondent's argument that the claim in negligence, that became the focus of the Main Action through the amended pleading, was derivative of the claim in intentional misconduct set out in the initial statement of claim. It did not change the nature of the cause of action against the Aitkens and therefore should be ignored.

[14] The application judge analyzed Unifund's argument with reference to the decision in *Scalera*. At para. 85, Iacobucci J. held that when both intentional and unintentional torts are pleaded, the court must determine:

> . . . whether the harm allegedly inflicted by the negligent conduct is derivative of that caused by the intentional conduct. In this context, a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated. If both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim is derivative, and it will be subsumed into the intentional tort for the purposes of the exclusion clause analysis. If, on the other hand, neither claim is derivative, the claim of negligence will survive and the duty to defend will apply.

[15] The application judge compared the original claim and the amended claim and noted the various ways in which the alleged misconduct of the Aitkens had been pleaded. She concluded that "one or more of the Plaintiff's claims could trigger indemnity" and Unifund therefore had a duty to defend unless it could demonstrate the application of an exclusion clause.

[16] The application judge then turned to Unifund's argument that the claim was excluded because the property had been "owned" by the Aitkens or alternatively was based on breach of contract.

[17] The policy contained the following exclusions:

> We do not insure claims made against you arising from:

> 1. liability you have assumed by contract unless your legal liability would have applied even if no contract had been in force, but we do insure claims made against you for the legal liability of other persons in relation to your premises that you have assumed under a written contract;
>
> 2. damage to property *owned* by an insured;
>
> 3. damage to property *used, occupied, leased, rented* by or in the care, custody or control of an Insured.... [emphasis added]

[18] Unifund argued that the word "owned" in the exclusion clause clearly referred to the past tense. Since the Aitkens had owned the property in the past, the exclusion applied.

[19] The application judge rejected this argument. She read the word "owned" as phrased in the present tense saying "… the exclusion applies if the property was *currently* owned, used, occupied or leased by the insured at the time of the occurrence." (emphasis in original)

[20] The application judge did not address whether the exclusion for contractual liability applied. However, her disposition suggests that either this was not pressed in the appellant's argument or that she rejected it.

[21] Finally, the application judge found no merit in Unifund's submission that the policy was void for the Aitkens' failure to give timely notice. She reasoned that when the Main Action was commenced, Unifund would have denied coverage because the damages were claimed as a result of intentional acts that

were not covered by the policy. The Aitkens notified Unifund as soon as they discovered that the plaintiff in the Main Action intended to amend the pleadings to include negligence. They therefore acted prudently. Furthermore, Unifund was not prejudiced by the timing of notice since it still had the opportunity to engage counsel of choice and amend the statement of defence.

C. ISSUES

[22] In this appeal Unifund raises the same issues as it did before the application judge, except for the application of the contractual liability exclusion clause, which the appellant abandoned in the course of argument of this appeal.

[23] Unifund therefore argues that the application judge erred in:

1. failing to find that the claim for negligent misrepresentation in the Main Action was derivative of the claim for intentional misrepresentation;
2. failing to find that the claims were excluded as the property was owned by the Aitkens in the past; and
3. failing to find that the Aitkens lost their coverage by their delay in notifying Unifund of the Main Action claim.

D. ANALYSIS

(1) Derivative Claims

[24] An insurer has a duty to defend if the pleadings allege facts which, if true, would require the insurer to indemnify the insured: *Monenco Limited v. Commonwealth Insurance Company*, 2001 SCC 49, [2001] 2 S.C.R. 699, at

para. 28. If there is any possibility that the claim falls within the policy coverage, the insurer must defend: *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at p. 810.

[25] As noted above, the policy only covers damage to property that is found to have been caused by unintentional conduct. On appeal, Unifund continues to maintain that the amended claim against the Aitkens based on negligent misrepresentation is derivative of the cause of action upon which the original claim was based, intentional misrepresentation.

[26] I would not give effect to this ground of appeal.

[27] Manipulation of pleadings in the insurance context was considered by the Supreme Court in *Scalera*. Iacobucci J. held that, when determining the scope of an insurer's duty to defend, "courts must take the factual allegations as pleaded, but then ask which of the plaintiff's legal claims could potentially be supported by those factual allegations" (at para. 83). According to Iacobucci J., at para. 84,:

> [A] plaintiff may draft a statement of claim in a way that seeks to turn intention into negligence in order to gain access to an insurer's deep pockets...A court must therefore look beyond the labels used by the plaintiff, and determine the true nature of the claim pleaded. It is important to emphasize that at this stage a court must not attempt to determine the merit of any of the plaintiff's claims. Instead, it should simply determine whether, assuming the veracity of all the plaintiff's factual allegations, the pleadings could possibly support the plaintiff's legal allegations.

[28] Iacobucci J. further stated that, if negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim will be derivative of the intentional tort for the purpose of the exclusion clause analysis. However, a plaintiff's decision to plead in the alternative does not preclude the insurer's duty to defend (at para. 85). See also *Cooper v. Farmers' Mutual Insurance Co.* (2002), 59 O.R. (3d) 417 (C.A.).

[29] I would also note that the general factual situation of this case, involving representations made on the sale of a home, can potentially generate claims both for fraudulent misrepresentation and negligent misrepresentation: see *Krawchuk v. Scherbak*, 2011 ONCA 352, 279 O.A.C. 109.

[30] The focus of the court's inquiry is not the labels attached to the claims but whether the facts as pleaded, if proven true, would require Unifund to indemnify the Aitkens. In this case, the plaintiff, in his amended claim, has advanced various possibilities relating to the Aitkens' state of mind when making the alleged misrepresentations – from making them deliberately, knowing they were false or making them carelessly. As noted by the application judge, the facts set out in the amended pleading, if proven, could support a finding either of negligent or intentional misconduct. Since the concern is not with whether the pleadings are designed to generate insurance coverage, only with the facts as pleaded, I agree with the application judge that the claim for negligent misrepresentation is not derivative of the claim for intentional misrepresentation: *Scalera,* at para. 86.

[31] Accordingly, I would not give effect to this ground of appeal.

(2) The Exclusion for Damage to Property Owned, Used, Occupied or Leased by the Insured

[32] In order to be effective, an exclusion clause must "clearly and unambiguously" exclude coverage: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 51.

[33] Unifund relies on the verb tense used in the exclusion clause set out above. It argues that since the clause is written in the past tense and the Aitkens owned the house at the time of the alleged misrepresentations, the exclusion clause applies and the policy does not cover the loss.

[34] In advancing this argument, Unifund relies on the reasoning in *Poplawski v. McGrimmon*, 2010 ONSC 108, 100 O.R. (3d) 458, aff'd 2010 ONCA 655, [2010] I.L.R. I-5057 in which, as in this case, a purchaser of a home sued the vendor who was insured under a homeowners' insurance policy. The insurance policy contained an exclusion clause that contained the following wording: "You are not insured for claims made against you arising from damage to property *you own, use, occupy or lease*" (emphasis added). The motion judge found that the insurer had a duty to defend as the exclusionary clause was phrased in the present tense, noting, however, at para. 41, that "had the past tense been employed in the exclusionary words, the Defendants would be denied coverage."

[35] This court agreed with the lower court, holding, at para. 2, that the exclusion clause did not apply:

> The property here is not owned by the respondent although it once was. The exclusion cannot be read as if it was written both in the present tense and the past tense. It is in the present tense only.

[36] In *Hector v. Piazza*, 2012 ONCA 26, 108 O.R. (3d) 716, this court considered an exclusion clause with wording virtually identical to the present case. In *Hector*, the purchaser of a building sued the previous owner. The vendor was insured by an insurance policy in which damage to property "owned or occupied by or rented to the Insured" was excluded from coverage. The insurer argued that "owned" unambiguously referred to the past tense.

[37] The application judge held that the insurer had not met its burden of demonstrating that the policy clearly and unambiguously excluded coverage. This court agreed, saying, at para. 15, that:

> "Property owned" by the insured can grammatically refer to property which is now owned or which was previously owned. Words take their meaning from the context in which they are used. In the case before us, the words surrounding the word "owned"...can all be read in the present tense. They do not exclusively relate to the past tense.

[38] First, I agree with the application judge that "owned" may be interpreted in two ways; the past tense or the present tense. Second, I agree with this court's approach in *Hector*. The task is to go beyond a simple consideration of the verb

tense and consider context and common parlance in interpreting the wording of contracts.

[39] The wording of this exclusion clause was not like that considered in *Poplawski*, which was worded unambiguously in the present tense. Rather, the wording of the exclusion clause in this case is virtually identical to that in *Hector*. In the light of the two acceptable interpretations of the clause, the policy cannot be said to unambiguously exclude coverage. I would therefore not give effect to this ground of appeal.

(3) Breach of Policy – Late Notice

[40] The policy provides that "[w]hen an accident or occurrence takes place you must promptly give us notice (in writing if requested by us)".

[41] The Main Action was commenced in September 2009. The Aitkens notified Unifund in March 2010, six months later. By that time, several steps had been taken in the action, including the delivery of the statement of defence and the holding of the first portion of examinations for discovery.

[42] As previously noted, initially it was conceded that the claim advanced in the Main Action would not trigger insurance coverage. As soon as the Aitkens became aware that the plaintiff in the Main Action was planning on amending the claim in a way that would attract coverage, they notified Unifund promptly. In these circumstances I see no breach of the policy.

E. DISPOSITION

[43] For these reasons, I would dismiss the appeal.

[44] Since I would hold that the Aitkens are entitled to a defence from Unifund at no cost to them, I am of the view that they are also entitled to their costs of this appeal on a full indemnity basis until Unifund takes over the defence of the Main Action: *Godonoaga (Litigation Guardian of) v. Khatambakhsh* (2000), 50 O.R. (3d) 417 (C.A.).

[45] I would therefore award costs in favour of the Aitkens on a full indemnity basis fixed in the amount of $25,000 including disbursements and applicable taxes.

Released:

"GE"
"SEP 25 2012"

"Gloria Epstein J.A."
"I agree S.E. Lang J.A."
"I agree Alexandra Hoy"