

COURT OF APPEAL FOR ONTARIO

CITATION: Banque de Commerce et de Placements, S.A.
v. Bissma Pacific Inc., 2015 ONCA 618

DATE: 20150915
DOCKET: C60115

Weiler, van Rensburg and Roberts JJ.A.

BETWEEN

Banque de Commerce et de Placements, S.A.

Applicant

and

Bissma Pacific Inc.

Respondent (Appellant)

Kevin McElcheran, for the applicant Grant Thornton Limited, receiver of the
Bissma Pacific Inc.

John Nicholl and Katarina Germani, for the respondent Export Development
Canada

Heard: September 9, 2015

On appeal from the judgment of Justice Barbara Ann Conway of the Superior
Court of Justice, dated February 20, 2015.

ENDORSEMENT

[1] The motion judge's interpretation of the accounts receivable (shipments)
insurance policy between Bissma Pacific Inc. and Export Development Canada

(“EDC”) in the context of the factual matrix provided by the evidence on the motion was not only reasonable but correct.

[2] The parties agree that the buyers’ claims for set-off against the amounts owing under their contracts with Bissma are not frivolous. There is no ambiguity in clause 7 of the policy as to the nature of the dispute that would forestall EDC’s liability to pay Bissma’s claims for loss arising out of the buyers’ refusal to pay their invoices: it is “any matter which brings into question the amount owing (or whether there is any amount owing) by the buyer to the insured.” A “dispute” is not restricted to claims arising out of the unpaid shipment of goods that gives rise to the covered risks and losses under the insurance policy.

[3] In consequence, the buyers’ refusal to pay the subject invoices, as a result of a claim for set off of their damages caused by Bissma’s failure to supply goods because of its receivership (which occurred before the subject invoices were payable), constitutes “any matter which brings into question the amount owing (or whether there is any amount owing) by the buyer[s]” to Bissma.

[4] Clause 7 of the policy is not an exclusionary clause such that it should be interpreted *contra proferentem* EDC. Apart from not being included under the other “Exclusions” in the insurance policy, clause 7’s effect is not to exclude but only to defer EDC’s liability for payment of Bissma’s claims once the amount of Bissma’s loss is determined in accordance with the terms of the policy.

[5] The motion judge's interpretation of the insurance policy, in particular, of clause 7 of the policy, is consistent with the trial judge's construction of the same sections of EDC's insurance policy in *2964-32377 Québec Inc. v. EDC-Export Development Canada*, 2011 QCCS 1372, at para. 56, affirmed, 2012 QCCA 2154 (CanLII), at para. 12. In the latter case, it was determined that the set-off claimed by the insured's customer for unrelated claims against insured shipments constituted a "dispute" under clause 7 of the policy and served to suspend EDC's contractual obligations to pay the insured claims, for the following reasons set out by the trial judge:

[Clause 7] ne restreint pas le différend à une question portant sur la qualité du produit vendu, sa livraison ou la nature des services rendus par l'assuré, contrairement à la prétension de CAD. Le différend porte, peu importe la cause, sur le montant et l'existence de la créance de l'assuré, fonction de l'existence et de la valeur de la perte que EDC pourrait indemniser. Cette mésentente crée une incertitude qui empêche l'indemnisation recherchée, que n'a pas à trancher l'assureur qui y est étranger et n'en est pas l'arbitre. Cette incertitude empêche de déterminer de façon définitive la valeur de la perte admissible aux fins de cette indemnisation. (para. 56)

[6] As a result, the appeal is dismissed.

[7] In accordance with the parties' agreement, costs of the appeal payable to EDC are fixed in the amount of \$15,000.00 plus HST.

"K.M. Weiler J.A."
"K. van Rensburg J.A."
"L.B. Roberts J.A."