

CITATION: Fridel Limited v. Intact Insurance co., 2018 ONSC 5923
COURT FILE NO.: CV-17-581734-0000
DATE: 20181004

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Fridel Limited, Plaintiff

– AND –

Intact Insurance Company, Defendant

BEFORE: EM Morgan J.

COUNSEL: *Theodore Charney*, for the Plaintiff
Avi Sharabi, for the Defendant

HEARD: October 4, 2018

ENDORSEMENT

[1] The Plaintiff is the Defendant’s insured under a property insurance contract. It has brought an action for coverage in order to compel the Defendant to defend it and, if necessary, indemnify it for any monies owing to claimants against it in a series of five underlying actions. Those are: Gaudet v Fridel (Court File No. 1003/17), Flynn v Fridel (Court File No. 1004/17), Ross v Fridel (Court File No. 1060/17SR), Aldread v Fridel (Court File No. 1061/SR), and King v Fridel (Court File No. 1425/17SR) (collectively, the “Underlying Actions”).

[2] In short, the Plaintiff is a land developer who sold a series of lots to a number of purchasers. After closing, those purchasers alleged that the Plaintiff misrepresented to them the size of the lots, claiming that the frontage of the lots turned out to be smaller than they were represented to be when they agreed to purchase them. Those representations were also contained in the agreements of purchase and sale in that the sketches of the lots containing the alleged misdescriptions of them was appended to and made part of those agreements. The purchasers have commenced the Underlying Actions against the present Plaintiff, claiming damages flowing from the alleged misrepresentations and breaches of contract based on the reduced size of their respective properties.

[3] The Plaintiff has, in turn, sought coverage from the Defendant under its Comprehensive General Liability policy no. 501292445 (the “Policy”). It has specifically claimed for coverage for property damage.

[4] The Defendant has brought a motion under Rule 21.01(1)(a) of the *Rules of Civil Procedure* for a determination of an issue of law – that is, for a Declaration that the alleged smaller size of the lots sold by the Plaintiff can constitute “property damage” within the terms of the Policy. It

seeks a Declaration that it has no duty to defend the Plaintiff in the Underlying Actions since those claims do not seek compensation flowing from damage to the claimants' property.

[5] The Plaintiff has brought a cross-motion seeking an Order that the Defendant has a duty to defend it in the Underlying Actions. The Plaintiff's duty to defend motion effectively embodies its response to the Defendant's motion for declaratory relief. Likewise, the Defendant's motion for interpretation of the phrase "property damage" effectively embodies its response to the Plaintiff's motion to have its defense of the Underlying Actions covered.

[6] The Underlying Actions do not allege any physical damage to the claimants' respective properties. The Plaintiff, however, relies on the definition of "property damage" in s. 24(b) of the Policy: "Loss of use of tangible property that is not physically injured." It is the Plaintiff's view that in alleging that they received smaller parcels than they bargained for, the underlying claimants are claiming for loss of use in the absence of physically injury.

[7] A similar issue was considered by the Alberta Court of Queens Bench in *Raylo Chemicals Inc. v AXA Pacific Insurance Co.*, 1999 ABQB 177, at para 20:

Property includes the tangible property, the land, building or chattel, as well the intangible property, ownership of the property, the right to use or possess the property and all those other rights of enjoyment, possession or use in relation to property. I must find in the pleadings allegations that Forest's property has been injured or damaged in some way or its interest in property has been injured or damaged in some way restricting its right to use or enjoy its property.

[8] The Supreme Court of Canada has indicated that property that is rendered useless may be covered under a "loss of use" section in an insurance policy: *Progressive Homes Ltd. v Lombard General Insurance Co.*, 2010 SCC 33, at para 39. Thus, for example, a tainted product that cannot be sold has been held to be covered under a "loss of use" provision: *Westaqua Commodity Group Ltd. v Sovereign General Insurance Co.*, 2014 BCSC 263. Likewise, steel fittings that do not meet the hardness requirements for their planned industrial use fall within this type of insurance provision: *International Radiography & Inspection Services (1976) Ltd. v General Accident Assurance Company*, 1996 CarswellAlta 932 (Alta CA).

[9] The Defendant relies on these cases for the proposition that one must first own the property before one can claim for loss of use, and that the provision does not apply to property of which a purchaser has never taken possession. As Defendant's counsel put it, you cannot lose what you never owned.

[10] Counsel for the Defendant submits that since the claimants in the Underlying Actions are alleging that they never were conveyed the full extent of what they thought they should have been conveyed, they have not suffered a "loss of use". He raises *Mason Homes Limited v Lombard General Insurance Co.*, 2016 ONSC 4846 as an example. There, a purchaser claimed that the property that it purchased was improperly graded by the builder and that part of it was thereby rendered useless. The court found that this was not covered by a "loss of use" clause in an insurance policy similar to the one at issue here.

[11] In *Mason Homes*, however, the rationale for the case was that the insured party had acted intentionally in creating the grade of the land. As the court pointed out, at para 34, “In this case, based on the pleadings, the nature of the claim is such that the insured intended the result of the steeper slope...” It was the intentional wrongdoing that fell within an exclusion of coverage, and not the definition of “property damage” on its own.

[12] Counsel for the Plaintiff submits that this appears to be a case of first impression, as neither side has found a decision that is directly on point or that arises in an analogous situation. That said, Plaintiff’s counsel is also of the view that this is not a particularly difficult case. He points out that the pleadings in the Underlying Actions specifically claim for loss of use. To quote one of those pleadings, it is alleged in the Gaudet claim referenced in para 1 above that, “The use of the property conveyed was limited by its actual smaller size than as marketed and represented.” The claim is framed in both contract and tort, and the compensation sought in the claim is in respect of this very loss of use.

[13] Plaintiff’s counsel also points out that the Underlying Actions raise claims based not only on the tort of misrepresentation but on breach of contract. That is, they state that the description of the lots were incorporated into the agreements of purchase and sale, and that the claimants had an enforceable interest under those agreements. It is well known that a disappointed purchaser under an agreement of purchase and sale has a sufficient claim in land to register a certificate of pending litigation: see *Chilian v Augdome Corp.*, [1991] OJ No 414, at para 57 (Ont. CA).

[14] Perhaps even more to the point, it is long established in English law that once “you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser”: *Lysaght v Edwards* (1876), 2 Ch D 499, at 506. It is this view that grounds the right to the equitable remedy of specific performance where the vendor fails to complete the sale. This traditional doctrine of equitable conversion is premised on the notion that a so-called “equitable conversion” of land has taken place, establishing for a purchaser a proprietary interest enforceable in equity at the moment of contracting.

[15] In the Underlying Actions, each of the claimants has in a formal sense an interest in a large plot of land but only received and can thus only make use of a smaller plot of land. In property law terms, at least, they are not claiming for something they never owned; rather, they are claiming compensation for loss of use of something that they already owned. Although some modern cases have tended to treat the purchaser of real estate as a purchaser of goods and have limited the remedy to damages rather than specific performance, see *Semelhago v Paramadevan*, [1996] 2 SCR 415, it is at least arguable that in the present circumstances the claimants in the Underlying Actions had an equitable interest in the lost use of the land for which they claim.

[16] It is well established that the proper basis for determining whether an insurer has a duty to defend a claim against an insured is, first and foremost, an assessment of the pleadings that assumes all of the facts alleged in those pleadings to be true: *Progressive Homes, supra*, at para 6-7. The question is not whether the Underlying Actions will be successful, but rather whether it is arguable that the claim could fall under the coverage of the Policy: *Monenco Ltd. v Commonwealth Insurance Co.*, [2001] 2 SCR 699, at para 28. As McLachlin J. (as she then was) stated in *Nichols v American Home Assurance Co.*, [1990] 1 SCR 801, at para 17, “...it is not necessary to prove that

the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices.”

[17] In my view, there is certainly a possibility that a claim of property damage, as defined in the Policy, may succeed. The Defendant has a duty to defend the Plaintiff in the Underlying Actions.

[18] Of course, I make no finding here with respect to the merits of the Underlying Actions. I likewise venture no opinion on whether the Defendant will ultimately have a duty to indemnify the Plaintiff for any amount found to be owing to the claimants in the Underlying Actions.

[19] Counsel for the Defendant suggests in his factum that there may be other exemptions in the Policy that could ultimately bar indemnity. That may or may not be so, but it is a question for another day. The Defendant has raised nothing in the Policy or otherwise that counters its duty to defend.

[20] Counsel for the Plaintiff has also requested an Order that it be the Plaintiff, rather than the Defendant, that selects counsel to represent the Plaintiff in the Underlying Actions. He submits that having brought this motion and resisted the Plaintiff’s cross-motion, the Defendant has put itself in a position of conflict with the Plaintiff and should no longer be entitled to choose Plaintiff’s counsel.

[21] Depriving the Defendant of that right is contrary to the terms of the Policy, which gives the insurer [i.e. the Defendant] both the “right and duty to defend the Insured [i.e. the Plaintiff] against any ‘action’...seeking ‘compensatory damages’ for ‘bodily injury’ or ‘property damage’” The Policy specifies that the Defendant’s right to defend carries with it the right to “investigate any ‘occurrence’ and settle any claim or ‘action’ that may result”, which generally carries with it the right to appoint counsel to carry out those tasks.

[22] The question of conflict between an insurer and an insured was carefully considered by the Court of Appeal in *Brockton (Municipality) v Frank Cowan Co.* (2002), 57 OR (3d) 447. Goudge JA, at para 41, stressed that the focus must be on the particular mandate that the insurer gives to the counsel it appoints to conduct the insured’s defence:

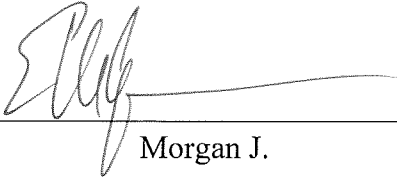
Do the circumstances of the particular case create a reasonable apprehension of conflict of interest if that counsel were to act for both the insurer and the insured in defending the action? If the insurer puts counsel in a position of having conflicting mandates it must surrender control of the defence to an insured who wishes to retain its own counsel paid for by the insurer.

[23] I will leave it to counsel to work out who will represent the Plaintiff in the Underlying Actions. On one hand, present counsel for the Plaintiff is already invested in those defences. It seems wasteful to require new counsel appointed by the Defendant to have to re-invent the wheel and spend time coming up to speed in those actions.

[24] On the other hand, it is premature to say that there will be a conflict in the mandate given to any counsel appointed by the Defendant. The fact that the Defendant disputed the duty to defend, or that it continues to question whether it will have a duty to indemnify under the Policy, does not

in itself create such a conflict: *Brockton*, at para 41, citing *Zurich du Canada v Renaud & Jacob*, [1996] RJQ 2160 (Que. CA).

[25] The parties have agreed on costs. The Defendant shall pay the Plaintiff costs in the all-inclusive amount of \$7,500.



Morgan J.

Date: October 4, 2018