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NOTEWORTHY 2013 BRITISH COLUMBIA INSURANCE CASES

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Noteworthy 2013 British Columbia Insurance Cases

This review covers three noteworthy cases in insurance law in British Columbia over the past year.

Property Insurance – Interruption by Civil Authority

1. *The Owners of Strata Plan KAS3058 v. St. Paul Fire and Marine Insurance Company (Travelers)* 2013 BCSC 2197

The insureds were the owners of a resort located in Westbank, Kelowna, BC. The insurer issued a policy on August 24, 2006 that provided property insurance for the resort. The policy was renewed from August 24, 2008 to August 24, 2009.

The Policy included an extension to the loss of revenue coverage for an interruption by civil authority which stated:

> EXTENSION OF COVERAGE
>
> Interruption by Civil Authority
>
> We will pay your actual loss of revenue when a civil authority denies access to an insured location as a result of physical loss or damage by a covered cause of loss to property not at an insured location. We will pay for loss of revenue for up to four consecutive weeks while access to an insured location is denied.

On July 18, 2009, the Municipal District of West Kelowna issued an evacuation order that denied access to the insureds' property. The evacuation order was lifted on July 21, 2009. From July 21, 2009 to August 31, 2009 there were a significant number of cancelled bookings and empty suites among those available to rent at the resort. The insurer denied coverage for the loss of rental income incurred after July 21, 2009.

This case is noteworthy because it is the first Canadian case to consider the interpretation of the Civil Authority Clause.

The issue was whether the policy included coverage for subsequent or consequential losses that occurred after access by a civil authority was no longer denied, in this case, after the evacuation order was lifted.

The court summarized the general principles of policy interpretation set out by the Supreme Court of Canada in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* 2010 SCC 33 as follows:

> The primary interpretative principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole …
>
> Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction … For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties … so long as such interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded…. Courts should also strive to ensure that similar insurance policies are construed consistently …
>
> When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* … [which includes the] corollary … that coverage provisions are to be interpreted broadly, and exclusion clauses narrowly …

The principles of policy interpretation set out in *Progressive Homes* are also considered in the two cases that follow.

In this case, the court rejected the insureds' argument that the clause was ambiguous because the policy could have expressly excluded economic loss. The ambiguity principle resolves conflicts between two reasonable but differing interpretations of a policy: *Chilton v. Co-Operators General Insurance Co.*, [1997] 32 O.R. (3d) 161 (C.A.) at para. 26.

In this case, the clause was not capable of more than one interpretation. It was unambiguous.

The court reaffirmed the persuasive authority of US cases in matters of insurance law and policy interpretation in British Columbia: *Pacific Rim Nutrition Ltd. v. Guardian Insurance Co. of Canada,* [1998] 54 B.C.L.R. (3d) 111 (C.A.) at para. 13. The court also affirmed that US cases can be persuasive in determining whether the language of the insurance policy is ambiguous or not.

The court found that, when read as a whole, the second sentence of the civil authority clause was not a separate grant of coverage. The second sentence clearly modified the first sentence. The court found that, when read as a whole, coverage was only provided for the loss of revenue that occurs <u>when</u> a civil authority denies access, and <u>while</u> it continues to do so, for up to a maximum period of 4 weeks.

The court denied coverage for subsequent or consequential losses that occurred after access by a civil authority was denied, in this case, after the evacuation order was lifted.

Property Insurance – Vacancy and Material Change in Risk

2. *Peebles v. The Wawanesa Mutual Insurance Company* 2013 BCCA 479

The insureds', Mr. Peebles and Mr. Quinn, purchased a house in Surrey, BC on July 1, 2006 as an investment property. They obtained insurance coverage effective June 29, 2006. The policy was renewed for a second term from June 29, 2007 to June 28, 2008. The policy was in effect on April 26, 2008 when the house was destroyed by an explosion and fire.

Mr. Peebles never lived in the house. He lived nearby and came by to check the house 3 times a week. Mr. Quinn moved his possessions into the house and lived there from the summer of 2006 to late 2007, at which time he began spending more time at his girlfriend's house.

In late 2007, Mr. Peebles and Mr. Quinn decided to sell the property. Mr. Quinn removed most of his possessions from the house. In February 2008, Mr. Quinn took a job in the Northwest Territories, working 3 weeks each month. In the 30 days before the fire on April 26, 2008 he had slept in the house for one night.

The insurer denied coverage on the basis that the house had been vacant for more than 30 consecutive days and that there had been a material change in risk.

The term "Vacant" was defined in the policy as follows:

> "Vacant" refers to the circumstances where, regardless of the presence of furnishings: all occupants have moved out with no intention of returning and no new occupant has taken up residence; or in the case of a newly constructed house, no occupant has yet taken up residence.

Statutory Condition 4, prescribed by the *Insurance Act*, R.S.B.C. 1996, c.226 states:

> Material change
>
> Any change material to the risk and within the control and knowledge of the insured voids the contract as to the part affected by the change, unless the change is promptly notified in writing to the insurer or its local agent, and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if the insured desires the contract to continue in force, the insured must, within 15 days of the receipt of the notice, pay to the insurer an additional premium; and in default of such payment the contract is no longer in force and the insurer must return the unearned portion, if any, of the premium paid.

The trial judge found that vacancy had not been proved, as it could not be said that Mr. Quinn had permanently moved out of the house, with no intent to return. However, the trial judge found that the nature of the occupancy had changed dramatically, by reason of Mr. Quinn's reduced occupancy and absence for long periods of time. The failure to notify the insurer of this material change in risk justified the denial of coverage under Statutory Condition 4.

There was evidence from two underwriters that, if the insurer had been notified of the change, it would have altered the terms of the policy from an all risks to fire and extended perils and reduced limits of coverage from guaranteed replacement cost to simple replacement cost to limits. There would have been addition exclusions. The premium charged would have been 36% higher than that paid.

The Court of Appeal allowed the insureds' appeal. The Court of Appeal relied on *Laurentian Insurance Co. v. Davidson*, [1932] S.C.R. 491. In *Laurentian*, the loss occurred within 30 days of the insured moving to a new residence. The vacancy clause in the policy allowed 30 days of vacancy. The court held that the insurer had accepted the risk of vacancy of less than 30 days when it drafted the vacancy clause.

In *Laurentian,* the Supreme Court of Canada said:

> Evidence was offered at trial to show that the vacancy of the property was a change material to the risk, but there was no evidence of any change material to the risk in addition of the bare fact of vacancy."

In *Peebles*, the Court of Appeal found that, as was the case in *Laurentian*, no material change in risk had been identified apart from the "bare fact" of non-occupancy.

The Court of Appeal essentially equated vacancy and non-occupancy. The court did not deal with the insurer's argument that vacancy was determined by intention, whereas occupancy was a question of fact.

As well, the Court of Appeal said at para. 30: "… [W]e were not referred to any case that stands for the proposition that "reduced" occupancy – as opposed to "non-occupancy" – constitutes a material change in risk that must be reported…". The Court of Appeal did not deal with the evidence of the two underwriters as to materiality.

Finally, the court refers to the fact that these wordings were the insurer's wordings. This raises the issue of the application of the doctrine of *contra proferentem*, as set out in *Progressive Homes*, mentioned in the first case, in circumstances in which there is no ambiguity. Also, while the intent may have been to benefit these particular insureds, it may result in insurers placing more restrictive wordings.

Travel Insurance – Reasonable Expectations

3. *Turpin v. The Manufacturers Life Insurance Company* 2013 BCCA 282

On September 23, 2007, Ms. Turpin experienced abdominal pain. She visited a walk-in medical clinic in Victoria, BC on September 24, 2007. Her pain increased in intensity and on September 25, 2007, she went to the emergency department of the hospital. Tests were performed and she was given an injection of an analgesic and a prescription for antibiotics, and discharged. She completed the antibiotics prescribed and was pain-free by September 27, 2007.

On September 28, 2007 Ms. Turpin purchased travel insurance for a trip planned to California in early October. The Turpins left for California on October 4, 2007. On October 6, 2007, Ms. Turpin began to experience abdominal pain and visited a walk-in clinic. On October 7, 2007 she went to a hospital in Newport Beach where she was admitted. She remained in hospital until October 12, 2007, when she returned to Victoria. The Turpins incurred expenses of $27,170.81 for Ms. Turpin's medical treatment in California.

The insurer denied coverage on the basis that this was an "unstable preexisting condition."

The trial judge found that the language in the insurance policy was not ambiguous and that the exclusion applied. However, the trial judge allowed Ms. Turpin's claim on the basis that there was a reasonable expectation of coverage. The trial judge said, at paras. 57 to 59:

> Ms. Turpin applied to the defendants' agent for medical insurance, for a planned trip to Southern California. The defendants' agent presented a travel insurance policy, "off the shelf" as it were, without inquiry. Ms. Turpin paid the policy premium and left the agent's office, without reading the policy, notwithstanding the caution on the policy cover that she "PLEASE READ CAREFULLY".
>
> I find however, that if she had read the policy, she would have found it difficult to understand, with its myriad of excluding conditions, variously applicable, or not applicable, to an infinite array of possible risks.
>
> This is a proper case to apply the reasonable expectations principle …

The Court of Appeal allowed the insurer's appeal and upheld the exclusion clause. The court relied on the general principles of policy interpretation set out in *Progressive Homes*, above. The Court found that the reasonable expectations of the parties only become relevant if the language of an insurance policy is ambiguous.

The court considered examples, set out in *Chilton v. Co-Operators General Insurance Co.*, [1997] 32 O.R. (3d) 161 (C.A.), where the reasonable expectations principal might apply where there was no ambiguity in the policy:

> 1. The policy is difficult to read or understand and the insurer, by marketing practices or by giving its policy a misleading name, created or contributed to a reasonable expectation of coverage;
>
> 2. Where the insurer's interpretation of the relevant policy provision would virtually negate the coverage the insured expected by paying a premium.

The court found that neither of these exceptions applied in this case. The court said, at para. 45:

> … [I]t cannot be that simply requesting travel insurance, receiving a policy, and then not reading it can operated to create a reasonable expectation of coverage that will overcome the clear words of the policy. Indeed, it is difficult to

> understand how and insured could have a reasonable expectation of what loss may be covered if she has not read the policy. Moreover, the trial judge's finding that, had she read it, Ms. Turpin may have found the policy difficult to understand is speculative and irrelevant, in that the test of the reasonableness of her expectations is objective.

This case reaffirms that the principle of reasonable expectations does not apply in cases where the language of the exclusion clause is clear and unambiguous. The principle of reasonable expectations may not be relied upon where the insured has not read the policy.

Conclusion

All three cases raise the issue of the application of the general principles of policy interpretation set out by the Supreme Court of Canada in *Progressive Homes*, to varying degrees.

Although in *Peebles* raises some concern with respect to the application of the doctrine of *contra proferentem*, in circumstances where there is no ambiguity, *The Owners of Strata Plan KAS3058* and *Turpin* confirm that the principle of reasonable expectations and the doctrine of *contra proferentem* will not be applied in cases where the language of the insurance policy is clear and unambiguous.

These cases should instill insurers with some confidence in the application of clear and unambiguous policy wordings.