March 2014

BRIEFING NOTE

Update on "Vacancy" Clauses
Coburn v. Family Insurance Solutions 2014 BCCA 7

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

The BC Court of Appeal recently reconsidered the issue of "vacancy" in the context of a denial of coverage under a homeowner's policy, on the grounds that the property had been vacant for more than 30 days prior to being damaged in a fire.

In ***Coburn v. Family Insurance Solutions*** **2014 BCCA 7,** the property at issue was a single-family residence located at Qualicum Beach, B.C. Ross and Garda Coburn purchased the property in 1986 with the intention of renting it out until they retired and made it their permanent home.

On January 1, 2011, the Coburns' long-term tenant moved out, leaving the property vacant. Mr. Coburn took this opportunity to renovate the residence before the next renters moved in. Mr. Coburn generally spent 8 to 14 hours a day working at the property and returned home to Nanaimo each evening. Mr. Coburn kept a mattress in the garage and slept at the property at least once in the 30 day period before the fire.

On February 18, 2011, the Coburns reached an oral agreement with new tenants. Shortly thereafter, the Coburns allowed the new tenants to move some belongings on to the property, but not inside the residence, as renovations were ongoing. The belongings were left outdoors under a lean-to. On March 21, 2011, the new tenants completed a written tenancy agreement which provided that they would take possession of the property on April 1, 2011. The renovations remained ongoing, and the tenants' belongings stayed outdoors.

On March 23, 2011, the property was damaged by fire. The insurer denied coverage on grounds that the property had been vacant for more than 30 consecutive days.

The applicable clause in the Policy states "*This Insurance does not cover loss or damage arising from …any peril while the Dwelling Building is, to the knowledge of the Insured, Vacant, as defined, for more than thirty (30) consecutive days…"*

The term "vacant" is defined in the Policy as "*The occupant(s) has/have moved out with no intent to return or the dwelling does not contain furnishings or household equipment sufficient to make it habitable*".

At a summary trial, the Coburns argued that the language in the perils clause provided for coverage as long as either the occupants have not moved out with the intention of not returning or the home has sufficient furnishings or household equipment to make it habitable. The Coburns said first, the property had sufficient furnishings to make it habitable given that Mr. Coburn was able to stay there. The trial judge rightly found that such an interpretation of the policy could not be within

the parties' intentions, as it would lead to the absurdity that a furnished property could never be vacant. Alternatively, the Coburns argued that Mr. Coburn's daily presence at the property amounted to occupation under the Policy. In this regard, the trial judge found that the tenant, who moved out on January 1, 2011, was the only occupant of the property. The new tenants were not permitted to occupy the residence because of the renovations, and Mr. Coburn was attending the property as a general contractor completing the renovations. All told, it was the ongoing renovations which actually kept the property vacant. The Coburns' application for a declaration of coverage was denied.

On appeal, the Coburns argued that the trial judge erred in equating "tenant" with "occupant" and that Mr. Coburn's sleeping in the residence within the 30 days prior to the loss qualified as occupancy. Alternatively, even if a tenant was the only possible occupant, vacancy ended with the oral tenancy agreement on February 18, 2011, as the new tenants thereafter intended to occupy the residence and even placed belongings on the property.

The Court of Appeal was not persuaded and dismissed the Coburns' appeal, confirming the residence had been no one's habitual abode since January 1, 2011, and was therefore vacant for at least 30 days pursuant to the policy. The Coburns did not live in the house and correspondingly the new tenants, with no right of possession until April 1, 2011, did not live there either. The property was vacant under the terms of policy.

Interestingly, one of the cases cited by the Court of Appeal was ***Peebles v. Wawanesa Mutual Insurance Company*** **2013 BCCA 479**, where the Court of Appeal, only months before, rendered a decision that a residence was not vacant where the owner had slept in the home one night in the previous 30 days. In *Peebles*, the owner was generally out of town for work or staying with his girlfriend. In finding the home occupied, the Court in *Peebles* noted that the owner had not moved out with the intention of never returning. Reduced occupancy, even for one day in the previous 30, was still occupancy under the policy at issue. In contrast, Mr. Coburn's presence doing renovation work did not change the fact that his home was in Nanaimo. The Coburns' property was not occupied in the 30 days prior to the fire.

In summary, when considering whether a property is vacant, the court will look at the intention of the party attending the property. Where the question is one of occupancy in the last 30 days, the attending party should have the ongoing intention to reside at the property. In this regard, *Peebles* still stands for the proposition that "reduced occupancy" may still be occupancy, for the purpose of a homeowner's policy, as long as the insured can show that an occupant used the property, however minimally, as a residence within the 30 days prior to the loss.

James E. Silvester
jsilvester@guildyule.com
604-844-5546

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com