

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Skipper Properties Ltd. v. Zurich Insurance
Company Ltd.*,
2015 BCSC 225

Date: 20150217
Docket: 13-0646
Registry: Victoria

Between:

**Skipper Properties Ltd., City Centre Storage Ltd.,
Skipper Holdings Ltd.**

Plaintiffs

And:

**Royal & Sun Alliance Insurance Company of Canada
and Zurich Insurance Company Ltd.**

Defendants

And:

**Chard Developments Ltd. and
834 Johnson General Partner Ltd.**

Third Parties

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

(In Chambers)

Appearing in Person for the Plaintiff:
Skipper Properties Ltd.

R.D. Singh

Counsel for the Defendant:
Zurich Insurance Company Ltd.

J.K. Lamb

Place and Date of Hearing:

Victoria, B.C.
January 28, 2015

Place and Date of Judgment:

Victoria, B.C.
February 17, 2015

[1] The defendant Zurich Insurance Company Ltd. (“Zurich”) applies for judgment dismissing the plaintiffs’ claims by way of summary trial. The plaintiffs’ claims against the defendant Royal & Sun Alliance Insurance Company of Canada have been dealt with separately, and that defendant is no longer at risk in this litigation.

[2] The plaintiffs seek an order under s. 12 of the *Insurance Act*, R.S.B.C. 2012, c. 1, appointing a dispute resolution representative for Zurich. Zurich’s application is well suited to summary disposition. It involves interpretation of documents, primarily a policy of insurance, there are no facts in dispute nor are there credibility issues.

Background

[3] The plaintiff Skipper Holdings Ltd. (“Skipper”) owns property at 824 Johnson Street in Victoria, B.C.

[4] A company called 834 Johnson Holdings Ltd. (“Johnson Holdings”) owns the property next door, at 834 Johnson Street.

[5] Johnson Holdings wished to redevelop its property by knocking down what was there, excavating three storeys deep, then building 14 storeys above ground. Johnson Holdings involved other corporations or entities: 834 Johnson Limited Partnership (Limited Partnership), 834 Johnson General Partner Ltd. (General Partner) and Chard Development Ltd. For convenience, I will refer to these entities altogether as the “834 Developers.”

[6] In order to facilitate the redevelopment, the Limited Partnership and the General Partner entered into a “Crane Swing, Easement and Shoring Agreement” with Skipper on October 15, 2009.

[7] One of the terms of that agreement required that the Limited Partnership and General Partner arrange a wrap-up comprehensive general liability insurance policy with coverage of at least \$5,000,000, with the Limited Partnership, the General Partner, and Skipper as named insureds.

[8] The Limited Partnership and General Partner also agreed to indemnify Skipper against losses resulting from their use of Skipper's property.

[9] The 834 Developers took out the policy of insurance in issue here with Zurich on October 19, 2009.

[10] The policy is a wrap-up liability insurance policy under which the 834 Developers are each listed as a "Named Insured," along with others employed on their construction project. Skipper was made an "Additional Insured" by a policy endorsement.

[11] Skipper alleges that its building at 824 Johnson Street was damaged as a result of construction activities carried on by the 834 Developers, or those working for them, and has sued the 834 Developers for damages in a separate action.

[12] In this action, Skipper alleges in paragraph 8 of its Notice of Civil Claim:

... the Defendant Zurich agreed to insure and indemnify the Plaintiff Properties [Skipper's building at 824 Johnson Street] as an Additional Insured *against loss or damage caused by the construction of a multi-level tower on an adjacent property located at 834 Johnson Street (the "Neighbouring Property")*. [Emphasis added.]

[13] Skipper claims a declaration that it is entitled to indemnity, and claims that there has been a breach of a policy of insurance.

[14] So far, I have referred to the plaintiff Skipper in the singular, but there are two other plaintiffs in this action, Skipper Holdings Ltd. and City Centre Storage Ltd. Neither of these plaintiffs are referred to in the Zurich policy, nor are they parties to the Crane Swing, Easement and Shoring Agreement on which the plaintiff seeks to rely.

[15] Zurich argues that its policy is a liability policy only, by which it has agreed to pay amounts that its insureds become legally obligated to pay. It says that any obligation on its behalf to pay money to Skipper must await the necessary intermediate step that one or more of its insureds are ordered to pay damages to

Skipper (or, obviously, that a settlement is reached), at which point its insureds will have a right to indemnity under the policy.

[16] Skipper argues that the Zurich policy entitles it to coverage for its own property damage as an Additional Insured, based on its interpretation of the insurance policy and the bargain it made with the Limited Partnership and the General Partner in the Crane Swing, Easement and Shoring Agreement.

The Policy

[17] As noted, the policy in question lists the 834 Developers as well as others, but not Skipper, as Named Insureds.

[18] It states in clause 2 that the project insured is “The 834 – Construction of a 14 storey residential tower over 3 levels underground at 834 Johnson Street, Victoria, BC V8W 1N3.”

[19] It provides on its second page, immediately after a list of Endorsements:

Through this Policy, the words “you” and “your” refer to the Named Insured shown in the Declarations. The words “we” and “our” refer to the Company providing this insurance.”

The word “Insured” means any person or organization qualifying as such under Section II–Who is an insured.

[20] The policy sets out what is insured in Section 1 - Coverages, where, in clause 1, headed Insuring Agreement, it provides:

(a) In consideration of the payment of the premium and of the statements contained in the Declarations made a part hereof and subject to the conditions, definitions and other terms of this Policy we will:

(i) Coverage A – Bodily Injury ... (Not applicable.)

(ii) Coverage B – Property Damage

pay on your behalf all sums which the Insured becomes legally obligated to pay as compensatory damages because of “property damage” which occurs during the Policy period. “Property damage” that is loss of use of tangible property that is not physically injured shall be deemed to occur at the time of the “occurrence” that caused it;

- (iii) Coverage C – Personal Injury ... (Not applicable.)
- (b) Bodily Injury” or “property damage” must be caused by an “occurrence”. The “occurrence” must take place in the “coverage territory.”
- (c) The amount we will pay for compensatory damages is limited as described in Section III – Limits of Insurance.
- (d) This Policy applies to “bodily injury”, “property damage”, and “personal injury” which arise out of the operations performed on or incidental to the Insured Project described in the Declarations and no other.

[21] The term “occurrence” is defined in Section VII of the policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

[22] Following the Insuring Agreement clause, the policy sets out Additional Insuring Agreements which oblige Zurich to defend any actions against its insured, in the name of its insured, at Zurich’s cost, to pay any costs taxed against its insured, and to pay its insured’s reasonable expenses of assisting Zurich in investigating or defending claims.

[23] The Coverages section also contains a three-page list of exclusion clauses. Clause 3(g) provides that the insurance does not apply to “Property damage” to “(i) property you own, rent, occupy or to property held by you for sale or entrusted to you for storage or safekeeping.”

[24] Skipper became an Additional Insured under the policy by General Endorsement 11, which provides:

The following are added as Additional Insureds, but only with respect to liability arising out of the operations of the Named Insured:

...

Skipper Properties Ltd.

...

[25] By definition in Section II of the policy, both the Named Insured and others listed in the Declarations fall within the definition of the term “Insured.”

[26] The plaintiff argues that its Crane Swing, Easement and Shoring Agreement with the Limited Partnership and General Partner required those parties to arrange an insurance policy under which the plaintiff would be a named insured along with the Limited Partnership and General Partner. Accepting that the Zurich policy is the one contracted for, the plaintiff says that it is first party insurance, covering its property damage directly.

[27] Zurich was not a party to the Crane Swing, Easement and Shoring Agreement with the Limited Partnership and General Partner, so if there is merit in this argument, Skipper's recourse would be against the Limited Partnership and the General Partner for failing to arrange the insurance coverage Skipper claims it is entitled to under that agreement. What the Crane Swing, Easement and Shoring Agreement called for was "a Wrap-Up Comprehensive General Liability Policy" in a minimum amount, and the Zurich policy in question fulfills that requirement.

[28] The Crane Swing, Easement and Shoring Agreement does not assist Skipper in its claims against Zurich.

[29] Next, Skipper focuses on the wording of Insuring Agreement 1(a)(ii) in the Coverages section, by which Zurich agrees to "pay on *your* behalf" [emphasis added]. Skipper points to the provision immediately above the Insuring Agreement that states that "you" and "your" refer to the Named Insured, and argues that Insuring Agreement 1(a)(ii) therefore applies only to the 834 Developers as Named Insureds.

[30] Skipper argues that its claims are covered by Insuring Agreement 1(d) instead of 1(a)(ii), because 1(d) is not restricted by the word "your." Skipper argues that the wording of 1(d), which states that the policy applies to property damage arising "out of the operations performed on or incidental to the Insured Project," is broad enough to give it coverage for its own damage directly, without being required to establish liability for that damage on the part of the 834 Developers.

[31] In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, the Supreme Court of Canada summarized the principles applicable to interpretation of insurance policies at paras. 22 to 27. They include:

- The primary interpretive 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. Such rules are applied to resolve ambiguity; they do not operate to create ambiguity where there is none.
- When these rules of construction fail to resolve ambiguity, courts will construe a policy of insurance *contra proferentem* – against the insurer. Part of this approach is that coverage provisions are interpreted broadly, whereas exclusion clauses are interpreted narrowly.
- As exclusions preclude coverage for claims that otherwise falls within the initial coverage, they should be read in light of the initial grant of coverage.

[32] Skipper’s argument fails to recognize that 1(d) does not provide coverage, or impose an obligation on Zurich, but rather it restricts the ambit of the insurance provided in 1(a).

[33] Insuring Agreement 1(d) limits coverage to prescribed damages arising from “operations performed on or incidental to the Insured Project described in the Declarations and no other.” The concluding phrase “and no other” indicates the restrictive purpose of 1(d).

[34] Skipper also focuses on the opening words of Insuring Agreement 1(a)(ii) – to “pay on your behalf” as indicating an obligation to pay for its damaged property. This submission ignores the important words that follow: “all sums which the Insured becomes legally obligated to pay as compensatory damages.” The insured must first

have a legal obligation to pay compensatory damages, either as a result of a settlement or a judgment, before Zurich has an obligation to indemnify the insured.

[35] Skipper also argues that its losses fall within the policy definition of “property damage” as “physical injury to tangible property.” That may be so, but it does not assist in establishing that physical injury to its own tangible property is insured under the Zurich policy. Such an argument demonstrates the sort of errors in interpretation that can arise when isolated words or phrases become the focus instead of the policy as a whole.

[36] Skipper then argues that the property damage exclusion set out above does not apply to an Additional Insured because the exclusion clause is limited to property “you” own, and the definition of “you” and “yours,” also set out above, specifically applies to Named Insureds.

[37] This argument, even if persuasive, would apply only if Skipper’s losses otherwise fall within the coverage afforded by the policy: see *Progressive Homes*.

[38] In essence, the plaintiff is seeking to interpret Zurich’s liability policy as a policy that insures the plaintiff against damage to its own property.

[39] The plaintiff had such a policy, issued by Royal & Sun Alliance Insurance Company of Canada, and a comparison of the declarations, coverages and other provisions between the two policies should leave no uncertainty over the difference.

[40] The Zurich policy is a liability policy and a liability policy only. If and when the plaintiff succeeds in establishing that the 834 Developers, as the Named Insureds under the Zurich policy, are legally obligated to the plaintiff for injury or damage to the plaintiff’s property, the 834 Developers will be entitled to call on Zurich to respond under the policy.

[41] Skipper has no direct right of action against Zurich under this policy for its claimed losses; its claims are against those whose activities caused the losses.

[42] In light of that conclusion, Skipper has no basis for its application to compel Zurich to engage in dispute resolution, and it is unnecessary to decide that application. Skipper's claims against Zurich are dismissed.

[43] Neither Skipper Holdings Ltd. nor City Centre Storage Ltd. ever had a claim against Zurich, so the action is dismissed with costs payable to Zurich.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston