

CANADA / JUDGMENT

Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters

2017 BCSC 1872

COURT

Supreme Court of British Columbia

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2017 BCSC 1872 Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters,

2017 BCSC 1872

Date: 20171020

Docket: S177391

Registry: Vancouver

Between:

Blue Mountain Log Sales Ltd., The Clark Group - Shake Division Inc.,
and Scott Clark

Petitioners

And

Lloyd's Underwriters

Respondent

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Petitioners:

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J. Michaud

Counsel for the Respondent:

E.A. Dolden

P. Dawson

Place and Dates of Hearing:

Vancouver, B.C.

September 27-29, 2017

Place and Date of Judgment:

Vancouver, B.C.

October 20, 2017

Introduction

- [1] The petitioners are insureds under two commercial comprehensive general liability ("CGL") policies issued in their favour by the respondent, Lloyd's Underwriters ("Lloyd's"). Each policy contains insuring agreements that provide coverage, in defined circumstances, for an insured's "advertising liability". The petitioners seek a declaration that Lloyd's is obliged to defend them in litigation brought in the Superior Court of Washington State and a declaration that Lloyd's is obliged to indemnify them for all costs and expenses incurred in defending that action.
- [2] The petitioners, and another entity, which is not party to the petition (American Treating Company, LLC), are being sued in the Washington Superior Court ("Washington Action") for unfair competition. The petitioners include two companies incorporated in British Columbia plus one of their principals, Scott Clarke. They are referred to in the Washington Action as "the Clarke Group".
- [3] The plaintiffs in the Washington Action are related companies incorporated in British Columbia who carry on business in Washington State. Three of the four plaintiffs are referred to by various iterations of "Global Building Products". I will refer to all of the plaintiffs collectively as "GBS".
- [4] In the Washington Action, GBS alleges that the defendants engaged in unfair competition. Insofar as the petitioners are concerned, GBS alleges that they misappropriated its trade secrets, which involved its secret and proprietary product used to treat roofing wood products. GBS claims that the petitioners used GBS's formula and manufacturing secrets to make their own product, which they then offered for sale to the public, representing it as their own. In addition, GBS alleges that the petitioners misrepresented to the public (through advertising) and to government regulators that the product they offered for sale was not only their own, but was identical to the product sold by GBS. As a result, GBS assert

that through their tortious conduct, the petitioners used GBS's trade secrets to unfairly earn substantial profits.

- [5] An insurer's duty to defend its insured arises from its obligation to provide indemnity for covered claims. The duty to defend is not an independent duty but is related to the scope of coverage afforded under a CGL policy issued in favour of an insured.
- [6] The authorities in Canada are clear: the widest possible latitude is to be given to the scope of coverage afforded in a CGL policy when determining an insurer's duty to defend. It is the pleadings and not the insurer's view of the nature of the claim or its merits that define the duty to defend. This is often referred to as the "pleadings rule": *Reid-Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252 at 269; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 at paras. 21-24; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 at para. 28; *Non-Marine Underwriters, Lloyd's' of London v. Scalera*, 2000 SCC 24 at paras. 70, 78-84.
- [7] The duty to defend is broader than an insurer's indemnity obligation. An insurer must defend its insured where there is the "mere possibility" of coverage if the facts, as pleaded, are proven true: *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 at 810-812; *Monenco* at paras. 28-32; *Scalera* at paras. 75-76, 78; *Bacon (Guardian ad litem of) v. McBride* (1984), 6 D.L.R. (4th) 96 (B.C.S.C.) at 99.
- [8] That is the situation presented to Lloyd's in this case. I agree with the petitioners that Lloyd's is obliged to defend them in the Washington Action.

Factual Background

The CGL Policies

- [9] Lloyd's issued two CGL policies in favour of "The Clarke Group", which is defined in schedules attached to each policy. Lloyd's agrees that the petitioners are insureds under both policies. The first policy, no. 10TL4924, was issued effective February 4, 2011, with an expiry date of February 4, 2012. It was extended to February 21, 2012, and replaced with the second policy, no. 1149V022, issued effective February 21, 2012, and in force for one year, expiring on February 21, 2013. No temporal element has been raised by Lloyd's in respect of the duty to defend the petitioners in the Washington Action.
- [10] The aggregate policy limits for each policy is \$5 million. The sublimit for advertising liability in each is \$2 million.
- [11] Both policies contain an insuring agreement providing coverage for "advertising liability". The format and structure for each one is different, but Lloyd's agrees that the net effect is the same.

[12] The grant of coverage for advertising liability in the first policy is set out in Endorsement No. 10. In it, Lloyd's agreed to provide coverage to the "Insured" (which Lloyd's agrees includes the petitioners) for all sums it becomes legally obligated to pay as damages because of "Advertising Liability" caused by an "Occurrence". The words in quotations are defined terms in the endorsement, as follows:

Insuring Agreement

The Insurer hereby agrees to pay on behalf of the Insured all sums which the Insured becomes legally obligated to pay as damages because of Advertising Liability caused by an Occurrence to which this insurance applies.

DEFINITIONS

Advertising Liability as used in this endorsement means:

- (a) Libel, slander or defamation;
- (b) Any infringement of copyright or of title or of slogan;
- (c) Piracy or unfair competition or idea misappropriation under an implied contract;
- (d) Any invasion of right of privacy;
- (e) Any of the foregoing alleged by any other name,

committed or alleged to have been committed during the Policy Period in any advertisement, publicity article, broadcast or telecast by or on behalf of the Insured and arising out of the named Insured's advertising activities.

Occurrence as used in this endorsement means any advertisement, publicity article, broadcast or telecast or any combination thereof involving the same injurious material or act, regardless of the frequency of repetition thereof or the number of kind of media used, whether claim is made by one or more persons.

[Emphasis added]

[13] With the exception of "damages" (which has added the prefix "compensatory"), the endorsement in the second policy is to a similar effect:

ADVERTISING LIABILITY ENDORSEMENT

Notwithstanding any other terms, conditions, or exclusions elsewhere in this policy, this policy is extended to include insurance coverage and clauses as follows:

A. INSURING AGREEMENT: The Insurer will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of advertising injury, to which this coverage applies.

B. ADDITIONAL DEFINITION: When used in reference to this coverage (including endorsements forming part of this coverage): "advertising injury" means injury, other than bodily injury, arising out of libel, slander, defamation, infringement of copyright, title or slogan, piracy, unfair competition, idea misappropriation or invasion of rights of privacy committed, or alleged to have been committed, in any advertisement, publicity article, broadcast or telecast, and resulting from the Insured's advertising activities.

[Emphasis added]

- [14] The primary principle of interpretation is that where an insurance policy is unambiguous, the court should give effect to its clear language, reading the policy as a whole: *Progressive Homes*, para. 22, citing *Scalera*; *British Columbia Medical Association v. Aviva Insurance Company of Canada*, 2011 BCSC 1399 at para. 39(a).
- [15] It is only where an ambiguity arises that the court looks to determine the reasonable expectations of the parties, and failing that determination, the principle or rule of contra proferentum is applied, so that any ambiguity is construed against the insurer: *Progressive Homes* at paras. 22-24; *British Columbia Medical Association* at para. 39(b),(c).
- [16] In this case, I do not need to resort to the second and third aspects of construction because I find the language of both policies, when each is read as whole, to be clear and unambiguous. Subject to certain exclusions which have no bearing on the duty to defend issue in this case, Lloyd's is required to pay on behalf of the petitioners all sums which they are required to pay as damages because of, inter alia, unfair competition, alleged to have been committed during the policy period, in any advertisement (which is broadly defined), regardless of frequency, arising out of the petitioners' advertising activities. It is the second policy that adds the further requirement that the unfair competition must also result from the petitioners' advertising activities. Lloyd's does not assert that it affects the result.
- [17] GBS's pleaded allegations, if proven true, invoke coverage under both policies.

The Washington Action

- [18] The factual backdrop to the Washington Action concerns a proprietary product belonging to GBS, which is manufactured for it by a Washington State company formerly known as Chemco, Inc. ("Chemco"). GBS alleges that it acquired Chemco's wood roofing treatment business, including all rights, title, and interest in the product and its formulation and method of manufacture, in December 2007.
- [19] GBS sells the product under various names, including Chemco 1000, Themex, Thermex-FR, CPX, and FTX. It is a fire retardant product used for treating wood products, including cedar and shake roofing products. For ease of reference, I will refer to it as "Thermex".
- [20] Thermex's ingredients and formulation are secret and are meant to be known only to GBS.

- [21] The document used to commence an action in the Washington Superior Court is referred to as a complaint. It is a form of pleading that sets out the nature of the claim, including the allegations of a defendant's purported delicts. The document is also structured to reflect the causes of action that a plaintiff intends to rely upon. GBS's complaint has been amended twice. GBS's current complaint is entitled "Second Amended Consolidated Complaint". It was amended with leave of the Washington Superior Court on June 16, 2017. I will refer to it as the "Complaint".
- [22] I was advised by Lloyd's in oral submissions that the word "Consolidated" in the Complaint refers to the consolidation of a separate action with the Washington Action, where it was agreed that GBS would take the lead as plaintiff. It is of no consequence to the duty to defend issue raised on this petition.
- [23] In the Complaint, GBS alleges that the petitioners acted in concert with a former owner and officer of Chemco to misappropriate Thermex so that they could market and sell it as their own, under a different name, to certain trades in the industry and to the public. Amongst the facts alleged in the Complaint is GBS's allegation that the petitioners misled government regulators in order to obtain the approval essential to market and sell their product, called "CPX", to the public in competition with GBS. Once regulatory approval was obtained, GBS alleges that the petitioners represented to the public, through their marketing activities, including advertising, that CPX was identical to Thermex.
- [24] The petitioners' defence costs were initially paid by an American insurer under a separate liability policy when the Washington Action was commenced. Lloyd's also acknowledged its obligation to defend once the claim was tendered to it by the petitioners. Later, the American insurer withdrew its defences, and from there, Lloyd's paid for post-tender defence costs until the Complaint was amended in its current form. It was at that point that Lloyd's advised the petitioners that in view of the revised pleading, it had no further duty to defend.
- [25] Issues concerning equitable contribution to defence costs between the American insurer and Lloyd's are not raised in this petition.
- [26] In its current iteration, the Complaint no longer refers to certain specific allegations concerning false, misleading, or deceptive representations made by the petitioners to the public and others, such as government agencies, resellers, and installers. References to certain causes of action, including statutory causes of action, have also been removed.
- [27] Nonetheless, the remaining allegations relevant to this proceeding clearly refer to both the petitioners' misappropriation of GBS's trade secrets and to the petitioners' advertising as part of GBS's claim for damages. Those allegations are contained in the following paragraphs of the Complaint:

8. At all material times, the Clarke Group held itself out to the public as a single business entity. For example, until after this lawsuit was filed, the Clarke Group maintained a website at www.clarkegroup.com, through which Clarke Group products, including fire retardant wood roofing products, were promoted and advertised.
34. By no later than April 2010, Amundson [former owner and director of Chemco] and Scott Clarke, and their agents, began to execute a scheme devised and agreed between them whereby (i) Amundson agreed to cause Chemco to supply the Clarke Group with Chemco Chemical to treat wood roofing products; and (iii) Amundson agreed to assist the Clarke Group in securing necessary product and manufacturing inspections, listings, approvals and reports for wood roofing products fire retardant treated by the Clarke Group identical to [prior approvals given to Chemco]. Acquiring such identical approvals for the Clarke Group-treated wood roofing products was essential so that [one of the defendant's] fire retardant treated wood roofing products could be sold and marketed effectively in competition with [the plaintiff] FSR-treated roofing products.
36. Knowing that [GBS] would not consent to Chemco supplying the Chemco Chemical to the Clarke Group for use in treating wood roofing material, Amundson and Scott Clarke concocted a scheme to avoid detection. Among other things, they agreed that the Chemco Chemical supplied to the Clarke Group would be called CPX rather than THERMEX ... The purpose of this name switch was to permit Chemco and the Clarke Group, if challenged by [GBS], to assert that Chemco was not supplying, and the Clarke Group was not using, the Chemco Chemical.
37. In fact, Chemco was supplying, and the Clarke Group was using, the Chemco Chemical. Chemco, Amundson, the Clarke Group, and their respective agents represented to [certain government agencies], to purchasers of treated roofing wood products and to others that the chemical and methods of wood roofing treatment being used by [one of the defendants] for fire retardant treatment of roofing shakes and shingles were "identical" to the chemical and methods of treatment that had been used by Chemco, and that was being used by [the plaintiff] FSR.
38. In furtherance of their wrongful scheme and conspiracy:
 - f. Amundson and Chemco provided the Clarke Group with confidential and proprietary information concerning Chemco Chemical formulation(s) and method(s) of manufacture.
46. Subsequently, in an effort to secure product and treatment approvals for the Clarke Group that were identical to the [prior approvals given to Chemco and one of the defendants], the Clarke Group, Amundson, and their respective agents represented to [government agencies], purchasers and others that the fire retardant [sold by one of the defendants] was "identical" in formulation and method of manufacture . To the approval agencies and the public, Amundson, Chemco and the Clarke Group represented that CPX and THERMEX were identical in formulation, method of manufacture and application on wood roofing products.

51. On information and belief, American Pacific, along with other entities controlled by and/or affiliated with Scott Clarke and the Clarke Group, engaged in the marketing, distribution, and sale of cedar shakes and shingles treated by [one of the defendants] with the Chemco Chemical for use as roofing material in Washington, California and elsewhere, all at the direction and control of Scott Clarke.

[Insertions and emphasis added]

- [28] The Complaint refers to the "RCW", sections 4.28.185 and 7.24.010, as the foundation for GBS's claim. "RCW" is short for the Revised Code of Washington, which in turn contains chapter 19, entitled "Uniform Trade Secrets Act" [UTSA].
- [29] In addition to a claim for damages arising from the sale of CPX, one of the claims advanced in the prayer for relief is that the Clarke Group account for "all revenue" it and its agents obtained from the "use" and "disclosure" of GBS's trade secrets.
- [30] Owing to their disagreement concerning the precise nature of the claim now advanced by GBS in the Complaint, the petitioners and Lloyd's each sought to prove "foreign law" through expert evidence. I was advised that both experts are highly respected lawyers practicing in Seattle. Their opinions differ in a number of respects; for example, whether Washington law concerning unfair competition claims is now codified in the UTSA so as to pre-empt and preclude common law claims.
- [31] However, both experts agree that a statutory claim brought for misappropriation of a trade secret per the UTSA is a claim for unfair competition.
- [32] The UTSA, at ss. 19.108.010, defines "misappropriation" to include:
- a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
 - b) Disclosure or use of a trade secret of another without express or implied consent .

[Emphasis added]

- [33] A trade secret is defined in the UTSA to include a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, "actual or potential, from not being generally known to" and not being "readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."
- [34] According to Lloyd's' foreign law expert, "Trade secret law is a species of unfair competition law." Further, he states that:

[T]he American Law Institute, which attempts to state a comprehensive set of rules under United States law, organizes its discussion of trade secret law within its restatement of unfair competition law. See, e.g., Restatement (Third) of Unfair Competition [citations omitted]. In this way, misappropriation of trade secrets constitutes unfair competition in the same way it constitutes a tort.

In his opinion, a claim for unfair competition is brought in Washington State per the UTSA.

[35] Thus, it is clear from the evidence of the foreign law experts, as well as American case authorities cited in the Canadian text by David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, 2nd ed., Irwin Law, at 705, which was brought to my attention by the petitioners, that the Complaint in its current iteration alleges a claim for unfair competition that involves, in part, the petitioners' use and disclosure of GBS's trade secrets through their promotion, advertising, and sales of GBS's misappropriated product as their own.

Analysis

[36] Lloyd's agrees that the claim brought by GBS is for unfair competition. But it maintains that it is no longer required to defend the claim as a result of the recent amendments to the Complaint. Based on the opinion of its foreign law expert, Lloyd's argues that the UTSA is the only basis for liability and it pre-empts any other cause of action for unfair competition. Lloyd's insists that no coverage can arise on the policies because advertising is not a constituent element of the cause of action established by the UTSA. Lloyd's says that since advertising is not a requisite element to prove the cause of action, the facts as pleaded, if proven true, could not invoke coverage.

[37] Despite the conflict between the foreign law experts on various points, including pre-emption, I am able to decide the duty to defend issue since both agree that the Complaint properly pleads a cause of action involving unfair competition.

Lloyd's' Reliance on Scalera

[38] Lloyd's relies heavily on its characterization of Scalera to support its position. However, in doing so, Lloyd's mischaracterizes the holding in that case when it argues that, for the purpose of determining whether coverage is possible, and hence whether the duty to defend is engaged, it is the specific elements of the pleaded cause of action that determine the outcome.

[39] Scalera involved a duty to defend in underlying civil litigation involving allegations of sexual battery committed by a bus driver upon a passenger. The plaintiff's pleading also alleged negligence and breach of fiduciary duty. The insured argued that if proven true, the allegations of negligence, including allegations of negligent battery, could be covered, and hence, a duty to defend arose. The issue in the case was whether an exclusion in the policy excluding coverage for intentional acts applied to some or all of the claims. The Court determined that there was no duty to defend since battery always involved an intent to

injure and the remainder of the claims were derivative, and not independent, of that claim.

- [40] In writing for the majority of the Court, Mr. Justice Iacobucci described, at paras. 50-52, a three-step enquiry to assess the "substance" and "true nature" of the claim in order to determine whether the intentional act exclusion removed any possibility of coverage for the underlying claim. First, he wrote, the court is to determine whether the plaintiff's legal allegations are properly pleaded. The enquiry extends beyond the labels used in the pleading. A plaintiff cannot change an intentional tort into a negligent one, he said, by "choice of words". Instead, the court must "examine the substance of the allegations contained in the pleadings." The second stage involves determining whether any claims are entirely derivative in nature. For example, if the same harm is cast in terms of negligence and an intentional tort, the intentional act exclusion is not avoided. Third, the court must determine if there are any claims, properly pleaded, that are non-derivative that could trigger coverage.
- [41] Scalera must also be viewed in its factual context, where the pleadings were seen to manipulate, through labels, a cause of action that, as a matter of law, always involved an intentional act that invoked an exclusion in the policy. The Court viewed the underlying pleading as an attempt to obscure the battery claim as an act involving the bus driver's purported negligent apprehension of the passenger's consent. The pleader's attempt failed. As Iacobucci J. said at para. 91, "All that is at stake is whether the exclusion clause applies" (see also the reasons of McLachlin J. at paras. 37-38, 42).
- [42] Lloyd's does not argue that any exclusions in the policies in issue in this case apply to the determination of its duty to defend.
- [43] Neither reasons for judgment of Iacobucci J. nor the concurring reasons of Madam Justice McLachlin (as she then was), frame the analysis in the manner suggested by Lloyd's. Their reasons do not suggest that coverage, and the duty to defend, are purely dependant on the requisite elements of the cause of action as pleaded. Instead, the result depends on a comparative analysis of the policy wording and the substance and true nature of the claim. When citing Nichols, Iacobucci J. said: "This conclusion is consistent with the majority of American courts, which have concluded that the 'duty to defend arises when the underlying complaint alleges any facts that might fall within the coverage of the policy.'"
- [44] Brought home to the case at bar, there is nothing in the reasoning in Scalera to support a broad statement of principle that since advertising itself is not a requisite element of a cause of action for unfair competition as pleaded in the Complaint, there is no coverage.
- [45] Scalera is also clear that an expansive approach to the enquiry is required. This point was reinforced by the Court in its subsequent decision in *Progressive Homes*, where, at para. 19, Mr. Justice Rothstein said: "What is required is the mere possibility that a claim falls within the insurance policy."

- [46] Lloyd's did not include language in its policy purporting to limit coverage to causes of action. It could have, and some respects, Lloyd's chose to describe coverage in terms of a cause of action, such as libel, slander, and defamation.
- [47] Claims for unfair competition, however framed, are covered so long as the requisite connection to advertising liability is present. It is also clear, in light of the language in para. (e) of the Definitions section of the insuring agreement - "Any of the foregoing alleged by any other name" - that Lloyd's intended a broad form of coverage. Coverage for advertising liability arising from unfair competition is not confined in the manner suggested by Lloyd's.

Grayson is Binding on this Court

- [48] Whether a direct causal link between an insured's advertising activity and the injury giving rise to the litigation is required to trigger coverage is the subject of conflicting authority in the United States. For this province, however, the matter was determined by the Court of Appeal in *Grayson v. Wellington Insurance Company* (1997), 37 B.C.L.R. (3d) 49, leave to appeal ref'd [1997] S.C.R. No. 487.
- [49] In that case, Madam Justice Newbury identified the conflicting lines of American authorities and the policy reasons underlying their decisions. For example, those courts requiring a connection suggest that if no causal connection was necessary, then any impugned product that "happened to be advertised" would be eligible for coverage, an outcome held to be contrary to the reasonable expectations of the parties: para. 16. Those cases holding the opposite appear to have taken a strict construction of the policy language and found that any ambiguity must be determined, *contra proferentum*, in favour of the insured.
- [50] With one exception, Newbury J.A. was not persuaded those cases represent divergent authority. She reconciled them on the basis that where an impugned product "happens" to have been advertised, this will not, without more, bring the claim for injury within coverage, because the advertising is merely "coincidental to the wrong". But where the claimant in the underlying action alleges it has suffered injury as a result of the insured's advertising activities, the causal link exists:
- [24] Before us, counsel assumed that cases such as *Meyers* and *Madison* on the one hand, and *Berger* and *Rymal*, on the other, represent divergent lines of authority. I am not convinced this is necessarily the case. Except perhaps for *Madison*, it may be possible to reconcile them on the following basis: first, the fact that a product manufactured in breach of patent or copyright happens to have been advertised will not by itself bring the injury within the definition - the advertising will be regarded as merely "coincidental" to the wrong. Where, however, the plaintiff in the underlying action alleges that it has suffered injury as a result of the infringer's advertising activities, or where one of the remedies sought is the cessation of the Defendant's advertising activities, those activities may be seen as causally linked to the Plaintiff's injury, and the requirements of the definition will be met.

[Emphasis added]

- [51] In her analysis, Newbury J.A. posed the question, "on what side of the line do the injuries complained of by the Complainants in this case fall?": para. 25. She determined that the following allegations, which, in my opinion, are scant in their references to advertising in comparison to those in GBS's Complaint, were not coincidental to the injuries alleged, such that Wellington was obliged to defend:
76. The Defendants have offered for sale, sold, used and knowingly induced others to sell and use Pirate Devices in infringement of the rights of the Plaintiffs .
78. The Defendants have threatened to continue to authorize infringement of the Plaintiff FIRST CHOICE's copyright in its dramatic works unless restrained by the Order of this Honourable Court.
79. The Defendants have engaged in acts contrary to honest industrial commercial usage contrary to section 7(3) of the Canadian Trade Marks Act [citation omitted].
80. Plaintiff FIRST CHOICE's ability to market its programs in Canada is severely hampered by the presence of the Pirate Devices, since it is difficult to sell Programs to subscribers when others may receive the Programs for "free", albeit illegally.
- [52] In Grayson, Newbury J.A. also said that even if the reportedly divergent American case authorities could not be reconciled in the manner she described, the words "in the course of the Named Insured's advertising activities if such injury arises out of unfair competition", contained in an insuring agreement did not require a causal link, "at least," she stated, "in a narrow or technical sense":
- [26] Even if the American cases may not be reconciled in the manner I have suggested, I am not convinced that in Canadian law, the phrase "in the course of" does require a causal link, at least in a narrow or technical sense. The phrase is ordinarily used to refer not to causation but to context, especially temporal context. One can slander someone "in the course of" making an after dinner-speech, for example, but the after-dinner speech is not generally regarded as the "cause" of the slander. and it has been held that "in the course of" is wider than the word "during": [citations omitted]. I also note the recent decision of the Federal Court of Appeal in *Blanchard v. Canada* [1995] 2 C.T.C. 262, where Linden J.A. reasoned that by using the phrases "in the course of" and "by virtue of" in addition to the phrase "in respect of employment" in s. 6(1)(a) of the Income Tax Act, Parliament had intended to "emphasize that only the smallest connection to employment is required to trigger the operation of the section." [at 264]
- [53] At para. 28, Newbury J.A. also drew upon the decision of the Supreme Court of Canada in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, where the words in the insuring agreement, "arises out of the ownership, use or operation of a vehicle" were not to be ascribed a narrow, technical interpretation.

- [54] Lloyd's suggests that a fresh look to Grayson should be taken because, it argues, there has been a "maturation" to the approach taken in advertising liability coverage cases subsequently decided in Canada and the United States. The Canadian cases cited by Lloyd's are those of the Ontario Superior Court and the Ontario Court of Appeal in *prairieFyre Software Inc. v. St. Paul Fire and Marine Insurance Co.* (2003), 66 O.R. (3d) 331 (S.C.), *aff'd* (2004), 71 O.R. (3d) 712 (C.A.) and *Halifax Insurance Company of Canada v. Innopex Limited et. al.* (2004), 72 O.R. (3d) 522 (C.A.), leave to appeal *ref'd* [2004] S.C.C.A. No. 586.
- [55] In *prairieFyre*, the application judge relied in part on the reasoning in Grayson. Mr. Justice Lalonde found a causal link between the advertising activity and the injury, but ultimately held that there was no duty to defend because an exclusion clause (for advertising liability arising as a result of a breach of contract) applied. The Ontario Court of Appeal affirmed the result, but diverged in its reasoning. It viewed there to be an insufficient connection between the plaintiff's allegations of advertising activity and *prairieFyre*'s alleged copyright infringement to trigger a duty to defend. It also construed the policy wording to require a causal connection based on the following language excerpted in para. 23 of the reasons:
- Advertising injury means injury caused by any of the following offences that result from the advertising of your products or work [emphasis in original]
- [56] That language does not appear in Lloyd's first policy. Its wording is more closely aligned with the policy wording in Grayson. The words "resulting from" do, however, appear in the definition in Lloyd's second policy. That is not sufficient, in my opinion, to affect the result in this case. Nor did Lloyd's assert that it does.
- [57] In reaching its decision, the Ontario Court of Appeal did not comment on Grayson. Nor did it remark upon the application judge's seeming reliance of the overarching approach taken to the issue in Grayson as applicable law in Ontario. Instead, the Ontario Court of Appeal made its own determination of the duty to defend issue based upon its construction of the policy wording in that case. In those circumstances, I do not accept that there is a basis to say that the Ontario Court of Appeal's decision in *prairieFyre* casts doubt on the holding and dicta in Grayson. Nor did Lloyd's seek to parse out the words in its policies in any substantive way to distinguish them from Grayson and liken either or both of them to *prairieFyre*. Lastly, and in any event, the approach taken in Grayson to causation concerning the duty to defend arising from CGL advertising liability policies remains binding authority in this province.
- [58] The other Canadian advertising liability coverage case cited by Lloyd's is the decision of the Ontario Court of Appeal in *Innopex*. The case concerned the duty to defend Halifax Insurance Company's insured against a claim in underlying litigation that the insured allegedly committed trademark infringement and unfair competition when it sold knock-off Gucci watches. From my reading of the reasons, the main focus of the decision concerned issues surrounding the admissibility of extrinsic evidence. However, in respect of the issues raised on this petition, the reasons do not suggest that courts in Ontario take a different

approach from Grayson. The Court of Appeal's analysis in Innopex was not fettered by the pleader's choice of words. It determined, in the absence of any reference to advertising in the pleading in the underlying action, that the insured's impugned conduct involved advertising and that it was central to the wrong alleged: para. 64.

- [59] American authorities concerning insurance law are viewed to be of great assistance in Canadian jurisprudence, particularly in the absence of existing authority (see, e.g., Innopex at para. 56), but as I have pointed out, Grayson remains the leading authority in the Province and is binding.

Central, Not Coincidental

- [60] The allegations in GBS's Complaint concerning the petitioners' advertising activities, which I have excerpted earlier in these reasons, are central and not coincidental to its claim. The alleged unfair competition is placed directly in the advertising activities of the petitioners, who allegedly used GBS's misappropriated trade secrets by advertising and selling it as their own in order to profit. I disagree with Lloyd's characterization of the allegations in the Complaint as essentially a claim for misappropriation of a trade secret with incidental and vague references to advertising.
- [61] In its submissions, Lloyd's argues that other than a reference to a website, there are no particulars in the Complaint concerning the impugned advertising activities. However, Lloyd's is aware that particulars are not contained within pleadings as a matter of Washington State legal practice. Hence, there is no articulation of the type and method of advertising engaged in by the petitioner, and Lloyd's' submission is of no consequence.
- [62] An insured, such as the petitioners, is not at the mercy of the draftsmanship of the third party pleader. The Court made it clear in Monenco that where pleadings are not framed with sufficient precision to determine whether the claims are covered by the policy, the obligation to defend will be triggered where a claim for coverage "can be inferred" from a "reasonable reading of the pleadings". Citing Nichols, and relying on the contra proferentem rule, the Court made it equally clear that for the purpose of determining the duty to defend, the scope of coverage must be construed broadly: para. 31.
- [63] Nonetheless, I do not find any aspect of the relevant portions of the Complaint to be unclear or ambiguous. The allegations contained within the Complaint are sufficiently pleaded to determine the substance and true nature of GBS's claim. The rule permitting limited extrinsic evidence to be admitted as an aid to determine the duty to defend is not engaged: Monenco at para. 36; 1540039 Ontario Ltd. v. Famers' Mutual Insurance Co. (Lindsay), 2012 ONCA 210 at paras. 25-29, 35.
- [64] A further aspect of Lloyd's' insuring agreement also makes it clear that Lloyd's must defend the petitioners. Lloyd's' policies require it to pay all sums which the petitioners become legally obligated to pay as damages for advertising liability. In oral submissions, Lloyd's conceded that if GBS proves that the petitioners profited from the advertisement of CPX,

which it obtained through misappropriation of GBS's trade secrets, the petitioners would be exposed to GBS for greater damages beyond those arising solely from the misappropriation itself. In that respect, the link between the misappropriation and advertising, and Lloyd's' obligation to pay for damages, is established.

GBS's Purported Intent in Amending the Complaint

- [65] Lloyd's' submits that GBS's withdrawal of prior allegations concerning other statutory claims involving advertising means that the current Complaint should be construed as not involving the petitioners' advertising and marketing activities. Lloyd's' suggests that an inference should be drawn that GBS intended to withdraw all claims concerning advertising when it amended the Complaint the second time.
- [66] This approach overlooks the "pleadings rule", where the inquiry is focused on a comparative analysis between the claim(s) advanced in the pleading and the insuring agreement (including any applicable exclusions). Further, any such inference would have to be made upon extrinsic evidence, which in my opinion might involve inadmissible evidence from the third party pleader.
- [67] The mischief caused by the consideration of intent in the manner proposed by Lloyd's is evident. To start with, it would involve an inappropriate departure from the application of the pleadings rule to an otherwise unambiguous Complaint. It could also lead to a wide ranging inquiry. For example, the petitioners or Lloyd's might attempt to adduce specific evidence of intent from the third party pleader. Arguably, it might be necessary to consider the reasons of the Superior Court Judge, who in permitting GBS's prior allegations to be withdrawn and considering whether costs should be awarded, remarked on the overlap between the allegations to be withdrawn (through dismissal) and those in the remaining pleadings:

I have gone through the complaint and reviewed the - - um, the claims that are now being dismissed and many of them seem to me to overlap to the claims that are not being dismissed .

- [68] Further, Lloyd's' argument that I should infer GBS's intent to withdraw all claims for advertising liability when it amended the Complaint, might make relevant and potentially admissible the opinion of defence counsel concerning the nature and substance of the claim that is in fact being pursued.

Conclusion

- [69] In conclusion, GBS's claim includes allegations that the petitioners engaged in unfair competition by first stealing GBS's trade secrets and then engaged further in unfair competition to make money, in part through its advertising activities to the public. The duty to defend is triggered under both of Lloyd's' policies. I grant the declaratory relief sought by the petitioners that Lloyd's is obliged to defend them in the Washington Action. Lloyd's must also indemnify the petitioners for any reasonable post-tender defence costs that the

petitioners have incurred to date that have not been paid for by Lloyd's.

Costs

- [70] The longstanding rule applied in this province is that an insured who successfully sues its insurer for coverage is entitled to special costs: *Tanious v. The Empire Life Insurance Company*, 2017 BCSC 85; *Williams v. Canales*, 2016 BCSC 1811; *Co-operators General Insurance Company v. Kane*, 2017 BCSC 1720.
- [71] Lloyd's submits that a different approach should be taken in this case. It relies on two decisions from Ontario, both in the same case: *Coventree Inc. v. Lloyd's Syndicate 1211 (Millenium Syndicate)*, 2011 ONSC 6660, varied on other grounds, 2012 ONCA 341, leave to appeal ref'd [2012] S.C.C.A. No 276. Lloyd's submits that where there is a "legitimate question to be tried", an insurer should only be liable for ordinary Rules costs as per Rule 14 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Lloyd's also questioned the basis for the long-standing approach in this province to costs, asking why CGL policies entered into between sophisticated parties should automatically attract an elevated scale of costs when other classes of commercial contracts do not.
- [72] Whether the approach taken in *Coventree* is of universal application to insurance coverage disputes in Ontario is unclear. Recently, in *Hoang (Litigation Guardian of) v. Personal Insurance Co. of Canada*, 2017 ONSC 4193, Mr. Justice Morgan cited what he described as longstanding authority in Ontario, supporting the approach taken in this jurisdiction. He characterized the approach taken in those cases - that an insurer must pay full indemnity to its insured where the latter is required to bring an action to enforce the former's obligations under the policy and is successful - as "both authoritative and logical": paras. 4-6.
- [73] Lloyd's did not provide any briefing that would permit me to depart from the approach taken in this province to costs. Lloyd's did not address *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.). It did not provide any briefing of the law other than to refer to *Coventree*. Lloyd's did not seek to identify the origins of the rule adopted in this province or to justify a departure from it other than through its reference to *Coventree* and to rhetorical questions concerning its merits.
- [74] The petitioners are entitled to special costs.

"Walker J."

The Honourable Mr. Justice Walker

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