

CANADA / JUDGMENT

Osborne v. Family Insurance Solutions Inc.

2020 BCSC 1230

COURT

Supreme Court of British Columbia

DECIDED

22 July 2020

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2020 BCSC 1230 Osborne v. Family Insurance Solutions Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Osborne v. Family Insurance Solutions Inc.,

2020 BCSC 1230

Date: 20200722

Docket: S1912106

Registry: Vancouver

Between:

Bryony Shannon Osborne

Petitioner

And

Family Insurance Solutions Inc. and ClaimsPro LP,

by its general partner, SCM Insurance Services GP Inc.

Respondents

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

G.E. Rafter

Counsel for the Respondents:

S.M. Armstrong

Place and Date of Hearing:

Vancouver, B.C.

July 22, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 22, 2020

- [1] THE COURT: In this proceeding commenced by way of petition, the insured as petitioner and insurer as respondent raise issues with respect to the interpretation of a home insurance policy.
- [2] In October 2018, the petitioner acquired, by way of assignment of lease, certain lands located on the Musqueam Indian Reserve No. 2 located at 4270 Staulo Crescent, Vancouver.
- [3] The petitioner purchased a home insurance policy (the "Policy") for the property from the respondent Family Insurance Solutions Inc. The Policy is an all perils policy and includes an overland water coverage extension.
- [4] In December 2018, during a heavy rainfall event, damage arose to the lands in the petitioner's backyard. The insurer denied coverage in respect of the damage to the land in the backyard. It asserts that such lands are not insured by the Policy. The petitioner disputes that interpretation.
- [5] The Policy defines certain terms beginning on page 50. Those terms include the following:
- DWELLING: the building or Mobile Home, or if Tenant or Condominium Unit Owner, the unit or portion of the building used and occupied by you as a personal residence.

PREMISES:

Section I - Property: the land and buildings contained within the lot lines on which your insured Dwelling is situated.

Thus, where the word "Dwelling" is used, reference is made only to buildings, while the word "Premises" refers to both buildings and land.

- [6] A section of the Policy titled "Property Insured" commences on page 4. Under the subheading "Dwelling Building," it states:

If so indicated in your Policy Declaration, we insure:

- a) your Dwelling;

- b) structures such as garages, carports and retaining walls attached to your Dwelling;
- c) outdoor equipment permanently installed on your Premises, such as playground equipment;
- d) outdoor domestic water containers permanently installed on your Premises, such as swimming pools, hot tubs, saunas and their attached equipment;
- e) building fixtures and fittings, including storm doors and windows, temporarily removed for repair or seasonal storage; and
- f) materials and supplies to be used in construction, renovation or repair of your Dwelling and Detached Private Structures, but only while located on your Premises. Theft of these materials and supplies is only insured if your Dwelling is occupied by you and construction is complete.

Structures connected to your Dwelling by only a fence, utility line or similar connection, are considered to be Detached Private Structures.

- [7] Other portions of the property insured section extend coverage to "Detached Private Structures," "Personal Property," and "Additional Living Expenses." Nothing in this section of the Policy specifically includes land within the scope of "Property Insured".
- [8] At the commencement of the section dealing with property insurance, the policy provides, on page 1, that:

unless otherwise indicated in your Policy Declaration, we insure all events of direct loss or damage subject to the conditions and exclusions of your policy and applicable limits or amounts of insurance.

Thus, the policy is what is known as an all risks policy.

- [9] Under the heading "General Exclusions" on page 2, the policy provides that:

we do not insure loss or damage caused by:

- f) water damage of any kind including as defined: flood, ground water, surface or overland water and sewer backup except as provide [sic] under Additional Extensions of Coverage - Basic Water Damage;
- h) mudslide, snowslide, landslide, or other earth movement;

- [10] In this case, however, the petitioner had purchased an optional coverage for WaterCover (Overland Water) (the "overland water coverage"). That coverage had its own specified limit and deductible and its scope was set out on page 21 of the policy as follows:

We insure loss or damage caused by surface water as defined, entering the insured Premises as a result of the sudden accumulation of rain, spring run-off, or overflow from freshwater lakes and/or rivers.

We do not insure loss or damage occurring while your Dwelling is vacant, even if we have given permission for vacancy.

The Limit of Insurance indicated in your Policy Declaration is the maximum amount we will pay under Section I, except for Scheduled Items and Optional Watercraft.

Deductible. The WaterCover (Overland Water) deductible indicated in your Policy Declaration is applicable.

[11] The definition section includes the following with respect to Surface Water:

[W]ater which accumulates upon or submerges usually dry land, resulting from torrential rainfall, rapid snow melt, spring runoff, or the rising of, breaking out or overflow of any freshwater lakes, rivers, or watercourse whether natural or manmade, excluding: waves and flood (as defined) or spray from any of these.

[12] The insurer asserts that the scope of insured property is limited by what is set out in the "Property Insured" section of the Policy as set out above. It argues that the Property Insured section includes references to the Dwelling, to Detached Private Structures, and to Personal Property, but not to land. The insurer argues that the Overland Water Coverage provisions modify a "peril-based exclusion" and were not intended to modify the scope of the property insured. It argues that the water exclusion, a general exclusion, is strictly a peril-based exclusion, and thus it "makes sense" that the overland water coverage simply restores coverage for the peril of surface water, without impacting the property insured. Essentially, it argues, the overland water coverage creates an exception to the water exclusion. Thus, insured property damage by surface water is now covered, but this does not require that the definition of property insured be expanded to include soil.

[13] The petitioner on the other hand relies on the wording of the watercover provision, arguing that that provision explicitly makes the optional coverage that is provided applicable to the insured Premises, and that the scope of the property coverage for that provision is determined by the definition of Premises. Thus, the provision extends coverage under the policy to loss or damage to both land and buildings as a result of surface water.

[14] The insurer relies on the judgment of the Nova Scotia Court of Appeal in *Royal & Sun Alliance Insurance Company of Canada v. Snow*, 2016 NSCA 7. However, the insurance policy in issue in that case did not include a provision comparable to the Overland Water Coverage, and I find it of limited value in interpreting this Policy.

[15] Both parties rely on the general principles applicable to the interpretation of insurance policies as set out in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, at paras. 22 to 24:

[22] 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 (Scalera, at para. 71).

- [23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (Consolidated-Bathurst, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (Gibbens, at para. 26; Scalera, at para. 71; Consolidated-Bathurst, at p. 901), so long as such an 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 (Scalera, at para. 71; Consolidated-Bathurst, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (Gibbens, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
- [24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* -- against the insurer (Gibbens, at para. 25; Scalera, at para. 70; Consolidated-Bathurst, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (Jesuit Fathers, at para. 28).
- [16] The petitioner also references the subsequent decision of the BC Court of Appeal in *Coburn v. Family Insurance Solutions*, 2014 BCCA 73, in which Goepel J.A. commented:
- [28] The general principles governing interpretation of insurance contracts are settled law. The provisions of an insurance contract that provide coverage are to be construed broadly. Ambiguity in the language is resolved in the insured's favour. Provisions of an insurance contract that exclude or limit coverage are to be construed narrowly. Contracts are construed *contra proferentem* for the reason that the language chosen is that of the insurer. Where the policy is ambiguous, effect should be given to the reasonable expectation of the parties: *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, 99 D.L.R. (4th) 741. While any ambiguity in the contract should be resolved against the insurer a court must first find ambiguity before applying the *contra proferentem* rule: *Kinnear v. Canadian Recreation Excellence (Vernon) Corp.*, 2012 BCCA 291, 352 D.L.R. (4th) 57.
- [17] It is not clear to me from review of these two judgments whether I need to find that there is ambiguity before I consider the principles that require coverage to be construed broadly and exclusions to be construed narrowly.
- [18] I conclude that I do not need to have resort to any such principle in order to interpret the policy provisions in issue. On a straightforward reading of the Overland Water Coverage provisions, coverage is extended to loss or damage to the Premises, including land. The use of the term "Premises" leads directly to that conclusion. While the base coverage under the policy may be limited to Dwellings, Detached Private Structures and Personal Property, that does not mean that an extension of coverage must inevitably be similarly limited. That goes far beyond reading the contract "as a whole."

- [19] In my view, the clear language of the Overland Water Coverage provisions indicates that coverage is available for loss or damage to the Premises from perils falling within the scope of that policy extension.
- [20] It became apparent during argument that there are factual issues remaining with respect to whether in fact the policy extension applies in the circumstances, and in particular whether the loss was caused by perils that fall within the scope of that policy extension.
- [21] The evidence on those issues is not fully developed given the insurer's reliance on its position on the interpretation of the Policy. The parties were agreed that I should provide the contractual interpretation sought in this petition, and I am satisfied that it was appropriate for me to do so. The issues are discrete and not intertwined.
- [22] Those are my reasons. Is there anything counsel would like to raise with me now?
- [23] MR. RAFTER: I think the result of this decision, as it stands now, the claim should be allowed, I think, subject to further proof of whether it was caused by surface water or ground water. I think that's what we're left with.
- [24] THE COURT: Mr. Rafter, you have applied under Rule 2-1(2)(c) of the Supreme Court Civil Rules, which provides that where the sole or principal question at issue is alleged to be one of construction of a contract, an application may be made to the court. I have given you the interpretation. The specific order that you sought in the petition probably goes beyond that. It may have been drafted at a time when you may not have understood that there were issues as well as to the perils. Those issues may well have arisen after the petition was filed. So I do not think you can necessarily obtain the full order that you sought in your petition, but I am hopeful that between the two of you, you can come up with the terms of an order that encompasses the interpretation that I have provided. Does that make sense?
- [25] MR. RAFTER: Well, I think I will have to think about that. My friend may have comments that she wants to make, but perhaps leave to come back if we have questions after we've thought about it a little bit more.
- [26] THE COURT: Okay. Ms. Armstrong.
- [27] MS. ARMSTRONG: I'm just thinking this through, but I think that I've understood the decision, and that we'll be able to come up with an order, but I agree, it doesn't go so far as the order sought by the petitioner. So this isn't going to resolve our issues, but it does give a decision on the interpretation.
- [28] THE COURT: Well, certainly if you require further clarification or if you require assistance in settling the order, it is open to you to come back before me.
- [29] MS. ARMSTRONG: Thank you, My Lord.
- [30] THE COURT: Anything else?

[31] MR. RAFTER: And costs, My Lord?

[32] THE COURT: I do not see any reason to depart from the ordinary rule. Costs follow the event.

[33] MR. RAFTER: Thank you.

[34] THE COURT: Anything further?

[35] MR. RAFTER: Not from me.

[36] MS. ARMSTRONG: No, not from me either. Thank you.

"Veenstra J."

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