

CANADA / JUDGMENT

RTR Properties Ltd. v. Lloyd's Underwriters

2017 BCSC 1117

COURT

Supreme Court of British Columbia

DECIDED

30 June 2017

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2017 BCSC 117 RTR Properties Ltd. v. Lloyd's Underwriters

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

RTR Properties Ltd. v. Lloyd's Underwriters,

2017 BCSC 1117

Date: 20170630

Docket: S142396

Registry: Victoria

Between:

RTR Properties Ltd.

Plaintiff

And:

Lloyd's Underwriters, Sean Murray/Nicholas Smith, Attorney in Fact for Lloyd's Underwriters, the Wawanesa Mutual Insurance Company and the Mutual Fire Company of BC, Greg Brown and Coast Claims Service Ltd.

Defendants

Before: Master Bouck

Reasons for Judgment

Counsel for Lloyd's Underwriters, Sean Murray/Nicholas Smith, the Attorney in Fact for Lloyd's Underwriters, the Wawanesa Mutual Insurance Company and the Mutual Fire Company of BC:

T.R. Davies

Counsel for Greg Brown and Coast Claims Services Ltd.:

A.M. Bookman

Place and Date of Hearing:

Victoria, B.C.

May 31, 2017

Place and Date of Judgment:

Victoria, B.C.

June 30, 2017

The Application

- [1] The defendants Lloyd's Underwriters, Sean Murray/Nicholas Smith, Attorney in Fact for Lloyd's Underwriters, the Wawanesa Mutual Insurance Company and the Mutual Fire Company of BC (the "Insurers") seek leave to file a third party notice against the defendants Greg Brown and Coast Claims Ltd. (the "Adjuster")[1]. The plaintiff takes no position on the application. The Adjuster asks that the application be dismissed, on the basis that the proposed third party notice is inconsistent with the Insurers' existing pleadings, the third party claim is not valid at law and, overall, the Adjuster will suffer the greater prejudice between the two sets of parties if leave is granted.

Facts

- [2] This proceeding emanates from a fire that occurred on June 25, 2013, at a residential apartment building owned by the plaintiff. The fire and its extinguishment caused extensive damage to the premises and led to remediation work being performed over the course of many months with disputes regularly arising over the necessity and quality of that work. The plaintiff claims for loss and damages said to be due under a policy of insurance. That claim includes the remediation costs incurred and loss of rental revenues.
- [3] The Adjuster was retained by the Insurers (or, more precisely, by Hub International) to determine, or make recommendations on, any monies that might be owed to the plaintiff pursuant to the insurance policy. The Adjuster was also involved in the repair and remediation work, but that involvement has been impugned by both the plaintiff and the Insurers. As the pleadings presently stand, the plaintiff alleges that the Adjuster was, at all material times, acting as agent for the Insurers, while the Insurers allege that the Adjuster was the plaintiff's agent at least in the performance of the improper or insufficient remediation work.

- [4] Complicating the analysis of this application is the fact that the Insurers have now brought a separate claim against the Adjuster (both Greg Brown and Coast Claims) in order to comply with the provisions of the Limitation Act. That action was commenced on May 26, 2017, in the Victoria registry and mirrors the content of the proposed third party notice.
- [5] The trial in this action is set to proceed in November 2017 in the Nanaimo registry. This will be at least the second trial date as the February 2017 trial was adjourned as a result of the Adjuster being added as defendants to the proceeding.
- [6] This proceeding has been litigated in fits and starts, with complexion of the action evolving over time. The plaintiff commenced its action on June 24, 2014, naming Lloyd's Underwriters and two other parties as defendants. The NOCC was served on Lloyd's in May 2015. The plaintiff filed an amended NOCC on June 22, 2015 and added the Insurers as the proper defendants to the action. The Insurers did not file their response to the amended NOCC until May 4, 2016. Next, an amended response to the amended NOCC was filed by the Insurers on October 20, 2016. In response to that pleading, the plaintiff sought and was granted leave to file a further amended NOCC and add the Adjuster as defendants. That application was unopposed. The Adjuster then filed a response on January 10, 2017.
- [7] As described by the Insurers, the pleadings as they presently stand reveal two aspects to the plaintiff's claim:
- (a) First, the plaintiff's claim is for damages alleged to be covered under a policy of insurance;
 - (b) Second, the plaintiff's claim is for further damages caused by the acts or omissions of the Adjuster(s) and/or Insurers and alleged to have arisen as a result of delay in repairing the plaintiffs property (the "Further Damages").
- [8] Until the filing of the further amended NOCC, the plaintiff's position was that the Insurers were liable for both claims. The Adjuster was added as parties as a direct result of the pleas made by the Insurers in their amended response, specifically, an allegation under Part 3 of the response (Legal Basis) that:

4.7 In the further alternative, if the Plaintiff suffered damage, loss or expense as a result of a the [sic] delay in repair and/or replacement of the Property, as alleged or at all, and if same was a result of delay on the part of the Adjuster, the Adjuster was acting as the agent of the Plaintiff and not as the agent of the Defendants at all material times.

[Emphasis added.]

- [9] The plaintiff specifically asserts in its pleading that at no material time was Mr. Brown acting as its agent. The Adjuster makes the same plea in its response to the further amended NOCC.

- [10] In the proposed third party notice, it is alleged that the Adjuster acted both as an agent for the Insurers and also as the plaintiff's agent, but for different purposes. The relevant pleas in the third party notice are as follows:
7. The Adjuster was assigned by the Claiming Parties to quantify the amount payable for loss under the Policy and owed a duty to the Claiming Parties to ensure that payments under the Policy were in accordance with its terms. In this role, the Adjuster was acting as the agent of the Claiming Parties.
 8. The Adjuster also provided the Plaintiff assistance in taking steps to protect and repair the Property. The Adjuster retained a number of consultants and contractors on behalf of the Plaintiff to assist with the protection and repair of the Property. The Plaintiff's reliance on the Adjuster's assistance formed the basis of an agency relationship between the Adjuster and the Plaintiff. In this role, the Adjuster was acting as the agent of the Plaintiff.
 10. If, on the recommendations of the Adjuster, the Claiming Parties have made any payments that were not in accordance with the Policy terms, the Adjuster has breached their duty of care, contractual or otherwise, to the Claiming Parties.
 15. If the Adjuster caused or contributed to the Further Damages in the role as agent of the Claiming Parties, the Claiming Parties are entitled to contribution and indemnity from the Adjuster to the extent of any liability the Claiming Parties may be under to the Plaintiff.
- [11] The distinction between these claims is described in the Insurers' written submissions as this:
- (a) First, if the Adjusters committed acts or omissions that caused Further Damages while acting as the agents of the Insurers (as alleged by the Plaintiff and the Adjusters), then the Insurers claim contribution and indemnity from the Adjusters; and
 - (b) Second, the Insurers state that they made payments under the Policy that should not have been paid, based on the recommendations of the Adjusters; the Insurers claim judgment for those amounts.
- [12] Under Part 2 of the third party notice (Relief Sought), the applicants seek, inter alia, contribution and indemnity for any damages found to be owing to the plaintiff "as a result of any act, omission and/or breach of duty committed by the Adjuster giving rise to the Further Damages" and judgment for any payments made to the plaintiff "not covered by the terms of the [fire insurance] Policy, as a result of any act, omission and/or breach of duty committed by the Adjuster."

[13] A case planning conference was held in January 2017, in part to address the adjournment of the trial date, given the addition of the Adjuster to the action. It is common ground that the Insurers' case plan proposal did not raise the prospect of adding the Adjuster as third parties. In accordance with the case plan order, the parties have exchanged lists of documents and conducted examinations for discovery. The applicants do not suggest that new information garnered in the discovery process led to this application.

Legal Framework

[14] This application is governed by SCCR 3-5:

- (1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
 - (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
 - (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
 - (c) a question or issue between the party and the person
 - (i) is substantially the same as a question or issue that relates to or is connected with
 - (A) relief claimed in the action, or
 - (B) the subject matter of the action, and
 - (ii) should properly be determined in the action.
- (4) A party may file a third party notice
 - (a) at any time with leave of the court, or
 - (b) without leave of the court, within 42 days after being served with the notice of civil claim or counterclaim in which the relief referred to in subrule (1) is claimed.

[15] These provisions have been the subject matter of several decisions since the introduction of the SCCR in 2010. The principles governing the court's exercise of discretion is helpfully summarized in *Steveston Seafood Auction Inc. v. Bahi*, 2013 BCSC 1072 at para. 19:

[19] These can be summarized as follows:

- (a) The test on this application is the same as under Rule 9 - 5. The proposed third party must establish beyond doubt that the pleadings discloses no cause of action. The court is permitted to reject proposed claims only if the action is "bound to lose" or there is no bona fide triable issue.

Drummond v. Moore, 2012 BCSC 496 at para. 25.

- (b) In exercising its discretion as to whether leave ought to be granted, the court can consider factors such as prejudice to the parties, the expiration of a limitation period, the merits of the proposed claim, any delay in the proceedings and the timeliness of the application.

Clayton Systems 2001 Ltd. v. Quizno's Canada Corporation, 2003 BCSC 1573 at para. 9.

- (c) The court is required to assume that all pleaded facts are true.

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at 980.

Dhillon v. Coape and Hockaday, 2004 BCSC 1208 at paras. 17-18.

- (d) An important consideration is whether it is "just and convenient" in all the circumstances of the case to grant leave to file the third party notice.

Symes v. Knooihuizen, 1998 B.C.J. No. 611 at paras. 38-39.

Clayton Systems 2001 Ltd. at para. 9.

- (e) A third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defense.

Adams v. Thompson et al. (1987), 15 B.C.L.R. (2d) 51 at para. 20.

Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc., 2012 BCCA 22 at para. 1.

See also Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Ltd., 2014 BCCA 17, aff'g 2013 BCSC 1741, Faulkner v. Duncan (City), 2015 BCSC 1763, and Canfor Pulp Limited Partnership v. Siemens Building Technologies, 2016 BCSC 2089 ("Canfor").

- [16] Also relevant to the parties' submissions are SCCR 3-7(6) which prohibits a party from pleading an allegation of fact or a new ground or claim that is inconsistent with that party's previous pleading, and SCCR 3-7(7) which allows a party to plead alternative allegations. A party may plead inconsistent but alternative claims or defences but may not first raise an alternative inconsistent claim in reply or in a defence to a counterclaim [emphasis added]: Gabbs v. Bouwhuis, 2005 BCSC 1782 at para. 24.

Discussion

- [17] The avoidance of multiplicity of proceedings is the dominating factor and the starting point of any analysis under SCCR 3-5: Tyson Creek, Canfor.

- [18] Despite the fact that a proceeding has now been brought by the Insurers seeking the same remedies, the balance of convenience favours the inclusion of the third party claim in this proceeding. First, the plaintiff's claim and the proposed third party claim arise from the same set of facts and circumstances. Second, in order to resolve each of these claims, the court will be asked to determine whether an agency relationship existed between the plaintiff and the Adjuster. If the claims are not adjudicated at the same time, there is a risk of

having different judicial findings this issue. Third, by adjudicating the third party claim with this action, there will be no delay in the execution of any judgment granted and/or the Insurers will not be required to pay a judgment that may later found to be the full responsibility of the Adjuster: Canfor at para. 48. Fourth, the resources of the court are better utilized adjudicating these issues in one trial rather than adding further congestion to the judicial system by way of a separate action and trial: Canfor at para. 49.

- [19] A consideration of this dominant factor does not, however, end the analysis. One of the main arguments put forward by the Adjuster is that the third party claim is bound to fail and thus must not be included in the proceeding. The Adjuster submits that the Insurers have made inconsistent pleadings amounting to an abuse of process: see paras. 34 to 40 of the application response.
- [20] The amended NOCC is the pleading to which the Insurers first responded. In their response, the Insurers plead that the actions of the unidentified "Adjuster" with respect to any arrangements with the plaintiff over performance of remedial work is outside of their knowledge. The Insurers deny that either their actions or those of their agents have caused any of the plaintiff's losses. Those denials are made in general terms. It is only in the further amended response to the NOCC claim that the Insurers specifically address the relationship between themselves and the still unnamed Adjuster. On plain reading, the Insurers state that the Adjuster was acting as the plaintiff's agent ("at all material times") with respect to both the remediation work and the policy coverage disputes (see paras. 15, 25 and 29 of the amended NOCC and para. 8.1 of the amended response to the amended NOCC). However, arguably, there is a different interpretation to the language used in para. 8.1 as the Insurers go on to plead under Part 3 (Legal Basis) that the agency relationship between the plaintiff and Adjuster is limited to the remediation or reparation work (para. 4.7). It is established law that an insurance adjuster can be an agent for an insured with respect to remedial or repair work undertaken as a result of a particular policy: *Hoelzer Construction Ltd. v. Seidler*, 2008 BCCA 77. Indeed, as pled in the third party notice and, at least arguably, in the amended response to the amended NOCC, the Adjuster can be found to be both the agent of the Insurer with respect to quantifying the plaintiff's loss and also the agent of the plaintiff with respect to undertaking the reparation work. Thus, while there might be some ambiguity and possible inconsistency in the Insurers' current and proposed pleadings, the court should defer to the trial judge to resolve the issue. In other words, it is not plain and obvious that the third party claim will fail: Canfor at paras. 19-21.
- [21] The Adjuster also submits that only Coast Claims could be added as a party in the third party proceedings as the contractual relationship is between that entity and the Insurers: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Inc.*, 2010 BCCA 329 at paras. 75-78. There is considerable merit to this submission. The third party notice acknowledges that Mr. Brown is an employee of Coast Claims and yet also purports that individual to be equally liable with Coast Claims for any act, omission and/or breach of duty owed to the Insurers. While not without some doubt, I have concluded that the trial judge ought to determine Mr.

Brown's individual liability for the judgment sought by the Insurers in the third party notice. As a result, he will be added as a third party.

- [22] The factors of delay and timeliness are related and also go to the question of weighing the prejudices that might be suffered by the parties involved in this application depending on the result. The Insurers do not really address delay or timeliness in a fulsome way except to say that the application was brought well before trial. The Insurers submit that the basis for the third party claim did not arise until after the Adjuster was added to the proceeding and the corresponding response filed and served. However, the Insurers raised the issue of the Adjuster's agency relationship in their own amended response to the amended NOCC in October 2016 yet did not bring this application until six months later.
- [23] On the other hand, the Adjuster does not identify any actual prejudice that will be suffered if the third party claim is included in the proceeding. The Adjuster suggests that the third party proceedings will add to the length and complexity of the discovery process as well as the trial. There is no evidence that the Adjuster intends to seek an adjournment of the trial, although I would expect that step to be of most concern to the plaintiff. By virtue of the amended response to the amended NOCC, the Adjuster has had notice of the Insurers' position with respect to liability for losses flowing from the reparation work. The Adjuster would have been alert to this issue after being added to the proceeding in late December 2016. There is still time before trial to pursue additional discovery processes, or at least there is no suggestion that the Adjuster will be physically or practically unable to do so. Furthermore, the case plan order can be amended to take into account the third party claim.
- [24] The potential prejudice to the Insurers if leave is not granted has already been identified; that prejudice being the possibility of the Insurers having to pay out on a judgment for which they may not be fully liable.
- [25] Upon weighing all of these considerations, I find that it is just and convenient to grant the order sought by the Insurers. It is assumed that as a result of this order, the Insurers will discontinue the duplicate proceeding commenced on May 26th.
- [26] Costs of this application will be in the cause between the Insurers and the now added third parties.

"C.P. Bouck"

Master C.P. Bouck

- [1] Greg Brown and Coast Claims are referred to collectively in these reasons as the Adjuster, although the trial judge may find that each acted separately with separate legal consequences to those actions. The use of a singular identification of these two parties may result in grammatical errors.

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