

CANADA / JUDGMENT

Sellappah v. Ivanhoe Cambridge Inc.

2022 BCSC 1258

COURT

Supreme Court of British Columbia

DECIDED

19 May 2022

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2022 BCSC 1258 Sellappah v. Ivanhoe Cambridge Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Sellappah v. Ivanhoe Cambridge Inc., 2022 BCSC 1258 Date: 20220519 Docket: S212503 Registry: Vancouver Between: Rajaluxmy Sellappah Plaintiff And Ivanhoe Cambridge Inc. and Alpine Building Maintenance Inc. Defendants And Alpine Building Maintenance Inc. Third Party Before: The Honourable Justice Fitzpatrick Oral Reasons for Ruling Re Application for an Order to Invoke an Indemnity Clause in a Contract In Chambers (Hearing proceeded via MS Teams) Counsel for the Defendant, Ivanhoe Cambridge Inc. D. Wheaton No other appearances Place and Date of Hearing: Vancouver, B.C. May 19, 2022 Place and Date of Ruling: Vancouver, B.C. May 19, 2022

- [1] THE COURT: The substance of this action is a claim by the plaintiff arising from a slip and fall at the Guildford Mall (the "Mall") in March 2019. The defendant, Ivanhoe Cambridge Inc. ("Ivanhoe"), is the manager or agent of the limited partnership that owns the Mall. The defendant, Alpine Building Maintenance Inc. ("Alpine"), is a contracting party with Ivanhoe.
- [2] In June 2016, Ivanhoe and Alpine entered into a janitorial contract (the "Contract"). Ivanhoe's counsel has taken me through the Contract, that indicates, in general terms, that Alpine was responsible for the cleaning of the Mall. The plaintiff's specific allegation is that after she entered the Mall, she slipped and fell by reason of a slippery floor surface, or some hazard on the floor. The Contract provides that Alpine, as the janitor, had a contractual obligation to maintain a clean floor.
- [3] The plaintiff's claim against Ivanhoe and Alpine involve a number of allegations. Ivanhoe is alleged to be an occupier of the Mall, and therefore liable for damages arising from the plaintiff's alleged slip and fall. Alpine is similarly alleged to have been negligent by reason of its failure to take reasonable care to ensure that the plaintiff would be reasonably safe in entering the Mall and that she would be provided with a safe walking surface when she entered the Mall. Ivanhoe and Alpine are both defending the claim. In particular, Ivanhoe has been defending this action since August 2021, when the amended notice of civil claim was served.

- [4] On this application, Ivanhoe is seeking orders to invoke the indemnity clause in the Contract so as to require Alpine to: (a) pay Ivanhoe's past legal and adjusting expenses; (b) appoint counsel to defend Ivanhoe, perhaps in replacement of its current counsel; and (c) pay all of Ivanhoe's future costs, legal fees and expenses associated with defending this action. Neither the plaintiff or Alpine oppose the application. I have been assured by Ivanhoe's counsel that both parties are fully aware of the application, suggesting that both have apparently made a conscious decision not to oppose the relief sought.
- [5] The controlling document on this application is the Contract, and in particular the indemnity clause found in Schedule "A" to the Contract entitled "Insurance and Indemnity." The relevant provisions are found in clauses 1(a), (b) and (c) of Schedule "A". I will not repeat the substance of those extensive provisions. It will suffice for the purpose of these reasons that Alpine agreed to undertake various duties in relation to Ivanhoe. I accept counsel's position that those duties are threefold:
- a) Firstly, Alpine agreed to indemnify Ivanhoe for all "loss, claims, costs, actions, damages, liabilities and expenses in connection with personal injury that arises from or alleged to arise from" Alpine's performance of the Contract;
 - b) Secondly, Alpine agreed to defend Ivanhoe in respect of any such actions or claims; and
 - c) Thirdly, Alpine agreed to "save harmless" Ivanhoe with respect to any such claims, actions or expenses.
- [6] I am also satisfied that Ivanhoe comes within the term "Released Persons" set out at clause 1(c) of Schedule "A", as either the manager of the Mall's owner or its agent.
- [7] The governing authorities are also before me.
- [8] I addressed the correct approach in the past in *Co-operators General Insurance Company v. Kane*, 2017 BCSC 1720 [Kane]. The relevant principles that equally apply here are set out at para. 20 of Kane. In summary, when considering whether there is a duty to defend prior to any decision on liability, one need only apply the "pleadings rule" as stated in cases such as *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 at para. 28; *Progressive Homes* at para. 19; *Lombard General Insurance Company of Canada v. 328354 B.C. Ltd.*, 2012 BCSC 431 at para. 21; *Canadian Northern Shield Insurance Company v. Intact Insurance Company*, 2015 BCSC 767 at para. 18. In that event, the insurer is only required to defend a claim where the facts alleged in the pleadings if proven would require the insurer to indemnify the insured. All that is necessary to trigger the duty to defend is the mere possibility that a claim falls within coverage under the insurance policy.
- [9] Ivanhoe's counsel refers to a number of Ontario cases that discuss that approach, and counsel have taken me to *Stewart Title Guarantee Company v. Zeppieri*, (2009) 94 O.R. (3d) 196 (Ont. S.C.J.). At paras. 16-17, Justice Brown, as he then was, concluded that the "save harmless" provision was more expansive than the duty to defend and would require an insurer to defend the claim on that basis, prior as any determination of liability. In this case,

I agree with counsel that it is not necessary to resort to that interpretation of "save harmless" given that there is an express duty in the Contract to defend, in addition to both an indemnity and save harmless clause.

- [10] Counsel have also referred me to two decisions that have applied these principles in the context of an indemnity in a commercial contract.
- [11] The first decision is *Crosslinx Transit Solutions Constructors v. Capital Sewer Serving Inc.*, 2021 ONSC 1091 at para. 34 where that point is made. At para. 37, Justice Koehnen also cites the *Stewart Title* in support of adopting the more expansive interpretation of the "hold harmless" clause as including an ongoing duty to defend. Finally, at para. 38, Justice Koehnen refers to *UPS Supply Chain Solutions, Inc. v. Airon HVAC Service Ltd.*, 2015 ONSC 1734, which counsel has also brought separately to my attention. At paras. 100-101 of *UPS Supply Chain*, Justice Matheson concluded that the specific clause there did not comport with an interpretation that the "save harmless" clause meant something more than a mere indemnity. Nevertheless, I agree with counsel that *UPS Supply Chain* can equally be distinguished from this case, again, for the reason that there is an express duty to defend here.
- [12] The second decision is *Ruetz v. Metro Canada Inc.*, 2021 ONSC 20. There, Justice Nicholson considered and applied the above principles in relation to an indemnification and "save harmless" clause and, in particular, at paras. 86-87, adopted the findings found in *Stewart Title*. The point from *Reutz* is that it was applied in a commercial indemnity scenario.
- [13] I am satisfied that the duty to defend and to pay the legal expenses for this action come within the ambit of the indemnity or duty to defend provisions and, possibly, the "save harmless" provision. Accepting that the plaintiff can possibly prove her claim at the end of the day, that is sufficient to trigger Alpine's obligation to defend and pay the related expenses at this time.
- [14] The ultimate determination of this claim will of course will determined in time. In the meantime, as Justice Brown perhaps colourfully said in *Stewart Title* at para. 17, Ivanhoe should not be required to "put [its] hands in [its] pocket" in light of the clear contractual obligation that existed in the Contract at the time of the incident and that continue to exist at this time.
- [15] Accordingly, I grant the relief sought in paras. 1-4 of the notice of application, with one exception. In para. 4, the original relief sought was to require Alpine to pay all future legal costs, fees and/or expenses associated with defending this action and pay any damages, interest or costs that Ivanhoe is ordered to pay to the Plaintiff or any amount that is agreed in the settlement to be paid by Ivanhoe to the Plaintiff. [Underline added.]

[16] In my view, the underlined portion of para. 4 above is not appropriate at this time. It remains to be seen whether any award or settlement will be achieved at all, and if so, what that relates to. Only at that time will it be appropriate to determine whether or not that final award, if there is an award, falls within the scope of the indemnity clause that is in place between the parties.

[17] With that deletion, the relief sought is granted. "Fitzpatrick J."

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