

CANADA / JUDGMENT

Thind v. A.M. Fredericks Underwriting Management Ltd.

2020 BCSC 1733

COURT

Supreme Court of British Columbia

DECIDED

19 October 2020

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2020 BCSC 1733 Thind v. A.M. Fredericks Underwriting Management Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thind v. A.M. Fredericks Underwriting Management Ltd.,

2020 BCSC 1733

Date: 20201019

Docket: 186491

Registry: Vancouver

Between:

Karnail Singh Thind and Gajindera Kaur Sodhi

Plaintiffs

And

A.M. Fredericks Underwriting Management Ltd.,

Intact Insurance also known as Intact Insurance and in, French, Intact Compagnie D'Assurance
also known as Intact Insurance Company and also known as Intact Financial Corporation

Defendants

Before: The Honourable Madam Justice Norell

Oral Reasons for Judgment

Counsel for the Plaintiffs:

J.S. Malik

Counsel for the Defendants:

C.W. MacKinlay

Place and Date of Hearing:

New Westminster, B.C.

September 29, 2020

Place and Date of Judgment:

New Westminster, B.C.

October 19, 2020

[1] The plaintiffs apply pursuant to Rule 6-2(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 for an order adding International Insurance Company of Hannover SE, now known as HDI Global Specialty SE ("Hannover"), as a defendant in this action, and to amend the style of cause and notice of civil claim accordingly. The application is made after the expiry of the limitation period for a claim against Hannover.

Nature of Claim

- [2] The plaintiffs are owners of a building on Fraser Street in Vancouver, BC. On June 8, 2016, the building suffered a fire. Counsel advised the building is mixed-use and had commercial tenants on the bottom two floors, and residential tenants on the upper floors.
- [3] The defendants, Intact Insurance, also known as Intact Compagnie D'Assurance and Intact Insurance Company and Intact Financial Corporation (collectively referred to as "Intact"), admit they are one of two insurers who insured the building under a subscription policy of insurance (the "Policy"). Pursuant to the terms of the Policy, Hannover was the other insurer and each of Intact and Hannover are liable for 50% of insured losses. The liability of Intact and Hannover is stated in the Policy to be several.
- [4] The defendant, A.M. Fredericks Underwriting Management Ltd. ("Fredericks"), is the insurance broker.
- [5] The plaintiffs' claim is a first-party coverage claim for property damage and loss of rental income they allege they suffered as a result of the fire.

History of Litigation

- [6] The plaintiffs made a claim under the Policy. On June 6, 2018, the plaintiffs filed the notice of civil claim. Only Intact and Fredericks were named as defendants. The plaintiffs allege that the building suffered property damage. The plaintiffs' legal firm was CGM Lawyers. The lawyer signing the notice of civil claim was Ms. Manjeet K. Sandhu. Mr. Deepak Chodha states he owns CGM Lawyers and he was the responsible lawyer on the file. Ms. Sandhu appears to have had day-to-day conduct of the file.
- [7] On June 29, 2018, counsel for the defendants advised Ms. Sandhu that his firm was retained and that there is another defendant that should be added in the action. He asked that Ms. Sandhu contact him to discuss this.
- [8] On August 16, 2018, Ms. Sandhu advised defendants' counsel that upon receipt of the Policy and her clients providing their proof of loss, she would seek instructions to amend the notice of civil claim.
- [9] On August 28, 2018, counsel for the defendants provided a copy of the Policy to plaintiffs' counsel. The Policy states that the two subscribing insurers are Intact and Hannover, each severally liable for 50% of insured losses.
- [10] What followed for the next year was a series of requests by defendants' counsel to Ms. Sandhu to have her file an amended notice of civil claim and produce a proof of loss. I note here that a party cannot be added by filing an amended pleading. An application pursuant to Rule 6-2(7) is required: *Alexis v. Duncan*, 2015 BCCA 135 at para. 21.
- [11] Counsel for the defendants followed up with Ms. Sandhu on November 19, 2018, January 15, 2019, and March 1, 2019. On November 19, 2018, Ms. Sandhu advised that the plaintiffs were preparing the proof of loss and, upon receipt, she would amend the notice of civil claim. These would be forwarded "in due course". On January 15, 2019, defendants counsel requested the amended notice of civil claim and proof of loss by the end of the month. On March 1, 2019, counsel for the defendants advised he would be seeking to have the action dismissed if plaintiffs' counsel did not respond by March 22, 2019. On March 22, 2019, Ms. Sandhu advised that the plaintiffs were out of B.C. and would not be returning until March 27, 2019, and that she would prepare an amended notice of civil claim and provide a filed copy by no later than March 29, 2019. On March 27, 2019, Mr. Robert Delamar, another lawyer at the plaintiffs' legal firm, advised defendants' counsel that Ms. Sandhu had taken a two-week medical leave and that he understood she planned to amend the notice of civil claim upon her return to the office.
- [12] Defendants' counsel continued to follow up with Ms. Sandhu on May 24, 2019 and June 27, 2019. On July 9, 2019, Ms. Sandhu advised she would be making amendments to the notice of civil claim within the next two weeks.
- [13] On August 28, 2019, Ms. Sandhu filed and served a notice of intention to proceed.

- [14] On October 15, 2019, the plaintiffs filed an amended notice of civil claim, but did not apply to add Hannover as a defendant. The amended claim now included a claim for loss of rental income and particularized some of the alleged losses. The proof of loss was not produced.
- [15] On January 29, 2020, the defendants filed and served their response to the amended notice of civil claim.
- [16] On February 11, 2020, counsel for the defendants requested counsel for the plaintiffs to provide dates for discoveries and trial. On March 16, 2020, the plaintiffs' legal firm served a notice to produce, and responded regarding the setting of discoveries and trial. On April 1, 2020, counsel for the defendants sent a letter to counsel for the plaintiffs confirming that the action had been tentatively set for trial for seven days commencing on three possible dates in February 2023.
- [17] On April 8, 2020, Ms. Munn, another lawyer in the legal firm of the plaintiffs, filed a notice of application seeking to further amend the notice of civil claim by adding Hannover as a defendant. The application was returnable on June 17, 2020. The notice of application was served on April 20, 2020.
- [18] On May 6, 2020, Ms. Munn filed and served a notice of intention to withdraw in the action on behalf of Mr. Chodha. Ms. Munn signed the notice. The notice was delivered to defendants' counsel on May 7, 2020. On May 14, 2020, counsel for the defendants inquired of Ms. Munn who was counsel of record as defendants' counsel had never had any interactions with Mr. Chodha. Ms. Munn replied that Mr. Chodha had always been counsel of record and Ms. Sandhu assists him with files. Ms. Munn signed the notice as Mr. Chodha was not available.
- [19] Due the COVID-19 pandemic, the plaintiffs' application was adjourned as it did not meet the criteria to be heard. However, counsel for the plaintiffs in this application acknowledges that even if the application could have been heard, the materials filed in support of the application were insufficient.
- [20] On July 22, 2020, counsel for the defendants filed their application response and a notice of application to dismiss the claim for want of prosecution, or in the alternative, an order for document production. On August 10, 2020, Mr. Chodha sent a letter to defendants' counsel requesting an adjournment of the defendants' application then set for August 14, 2020, in exchange for a list of documents and proof of loss. Defendants' counsel refused. On August 14, 2020, the defendants' application was heard before Master Cameron. The plaintiffs' application to add Hannover was not heard as the plaintiffs had not filed their application record. Master Cameron ordered that the defendants produce documents by August 28, 2020, and that the plaintiffs had leave to refile their application to add Hannover as a defendant by August 28, 2020.
- [21] On August 28, 2020, the plaintiffs served a list of documents. It appears to be incomplete. The plaintiffs also filed this application to add Hannover as a defendant and amend the pleadings.

[22] No examinations for discovery have taken place.

[23] Mr. Chodha has sworn two affidavits. He states that he owns CGM Lawyers, and the procedure in his office is that on litigation matters, he remains the clients' main point of contact and various junior lawyers assist him by handling day-to-day matters. He supervises the lawyers and is ultimately responsible for what does or does not take place on files. He states "he will not blame" Ms. Sandhu for any errors on this file. If Ms. Sandhu made any errors, those are ultimately his fault for failing to supervise her properly and ensure the clients' interests were protected. He states the plaintiffs are "entirely blameless" in this matter. He was instructed to sue the proper and necessary parties from the very beginning of the file. The failure to do so rests with his office and ultimately him.

Legal Principles

[24] The plaintiffs acknowledge that the limitation period to bring a claim against Hannover has passed. Pursuant to s. 6 of the Limitation Act, S.B.C. 2012, c. 13, the limitation period is two years and it expired at the latest by August 29, 2018, when defendants' counsel provided the Policy to plaintiffs' counsel.

[25] Pursuant to ss. 22(1)(d) and 22(4) of the Limitation Act, the court may add a party to an existing action commenced within a limitation period, despite the expiry of the limitation period for an action against the proposed party. Those subsections provide:

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (d) new parties may be added or substituted as plaintiffs or defendants.
- (4) Subsection (1) does not interfere with any judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period.

[26] Rule 6-2(7)(c) of the Supreme Court Civil Rules states:

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[27] In *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at paras. 45-46 [Neilson], Madam Justice Neilson discussed that an applicant pursuant to the former Rule 15(5)(a)(iii), now Rule 6-2(7)(c), must establish two requirements. First, the applicant must show that "there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding". Second, the applicant must show that it is just and convenient that the proposed defendant be added and to decide the issues between the parties in the existing proceeding. This is a discretionary decision to be "exercised judicially, and in accord with the evidence adduced and the guidelines established in the authorities". The factors to be considered, as discussed in *Letvad v. Fenwick*, 2000 BCCA 630 [Letvad] at para. 29 and adopted from *Teal Cedar Products (1977) Ltd., v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161, include:

- a) the extent of the delay;
- b) the reasons for and any explanation for the delay;
- c) any prejudice arising from the delay; and
- d) the degree of connection between the existing action and the new parties and claims contemplated.

[28] If it is clear there is an accrued limitation defence, as is the case here, the question is "whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence": Neilson at para. 47. To answer that question, the court must consider the above factors. The fundamental principle is to balance the interests of justice and convenience in relation to all of the parties: *Lui v. West Granville Manor Ltd.* (1987), 11 B.C.L.R. (2d) 273 at 303 (C.A.).

[29] There is a presumed prejudice to the proposed defendant if the limitation period for the claim against it has expired: Letvad at para. 30. However, the prejudice is presumed only with respect to the period which has passed after the limitation period expired plus the one year for service of the notice of civil claim: *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297 [McIntosh] at paras. 7-8. The reason for this is that the action could have been filed within the limitation period and served at the end of one year without any prejudice to the defendant.

[30] Finally, as this case involves a situation where counsel has stated that the delay is his responsibility, and not the fault of the clients, the discussion in McIntosh at para. 10 is relevant. There, the Court discussed that the question of what is just and convenient requires a balancing of the interests of the parties and proposed parties, and not the conduct of the lawyers unless there is irremediable prejudice:

- [10] It is important not to be diverted from the conduct of the parties to the conduct of their lawyers, except to the extent that the conduct of the lawyers may be at the heart of real prejudice to the other side. In this case, the plaintiffs were neither the cause of the failure to add Bavaria in the first instance nor the cause of any of the delays. They should not be prejudiced because of conduct on the part of their lawyer unless that conduct was the cause of irremediable prejudice to the other side.

(See also Neilson at paras. 93 and 102).

Analysis

- [31] In this case, it is conceded for the purposes of this application that the first requirement is met. I agree. The issue of coverage between the plaintiffs and Hannover relates to the remedy and subject matter of the claim against Intact. It is identical relief arising out of the same policy. I therefore turn to the second requirement and the factors to be considered in exercising discretion as to whether it is just and convenient to add Hannover to this action.

Extent of Delay

- [32] Counsel for Hannover argues that the plaintiffs should have been aware of Hannover's involvement since September 2015 when the Policy was issued. Even if the plaintiffs were unaware of the content of the Policy, their counsel should have been aware prior to filing the notice of civil claim. Basic investigation would have revealed who the parties to the Policy were and the extent of their obligation to insure the plaintiffs. Even if the plaintiffs had lost their copy of the Policy, they could have requested another copy from the broker prior to filing the notice of civil claim.
- [33] In my view, it is not appropriate to consider the time period from September 2015. The fire had not taken place at that time. The fire was on June 8, 2016. The notice of civil claim was filed just within the two year limitation period in early June 2018, and the time to serve the claim expired in June 2019. Another ten months passed until the time the application was first filed in April 2020 and nearly 14 months until this new application was filed with leave of Master Cameron in August 2020. I do not consider this an inordinate amount of time; however, what colours whether that time is significant is the reasons for and explanation for the delay and whether any prejudice was incurred during that last time period. I turn to that next.

Reasons for and Explanation for the Delay

- [34] Plaintiffs' counsel (who is not from Mr. Chodha's firm) argues that Mr. Chodha has clearly and unequivocally taken the responsibility for the failure to bring an application earlier to add Hannover as a defendant. When the mistake is that of the lawyer, the clients should not be prejudiced unless the prejudice to Hannover is irremediable: McIntosh at para. 10.

- [35] Hannover's counsel argues that the plaintiffs' evidence is insufficient with respect to the reasons and explanation for the delay. The defendants had been dealing with Ms. Sandhu as counsel for the plaintiffs. She was informed on multiple occasions of the need to amend the pleadings. No affidavit is filed from Ms. Sandhu explaining why she did not act. Further, no affidavit was filed from the plaintiffs regarding their instructions to their counsel, and what they knew and when they knew it. Counsel argues that the evidence suggests there was a breakdown in communication between the plaintiffs and their counsel, and that possibly, the delay was a result of the plaintiffs. For example, Hannover's counsel refers to: Ms. Sandhu saying the plaintiffs were out of town; no proof of loss being received by Ms. Sandhu; and the notice of intention to withdraw. Counsel argues that if the plaintiffs have not been responsive to requests from counsel, then this is not the fault of counsel. These should have been explained. Finally, Hannover's counsel argues that Mr. Chodha's evidence that it is his fault, and not the plaintiffs, is insufficient. Mr. Chodha does not explain the other evidence such as the notice to withdraw and why he did not supervise Ms. Sandhu. There was either an error within the counsel's firm or an external problem with the clients, and there is no clear evidence that the plaintiffs were not at fault. Counsel argues that Mr. Chodha's statement about what his "instructions were" is hearsay. This evidence should have come from the plaintiffs.
- [36] In response, plaintiffs' counsel acknowledges he does not have an affidavit from Ms. Sandhu, but states that Mr. Chodha takes responsibility and opens himself to a potential claim from the plaintiffs as a result of his affidavit. Given Mr. Chodha's admissions, there is no need to get affidavits from the plaintiffs. Plaintiffs' counsel does not agree that Mr. Chodha's statement regarding his instructions is necessarily hearsay, but even if it is, hearsay evidence is admissible on an interlocutory application. Plaintiffs' counsel also argues that if Hannover's counsel had a concern regarding Mr. Chodha's evidence, they could have applied to cross-examine him.
- [37] In my view, since at least August 2018, plaintiffs' counsel should have known that Hannover should be a party to the action, and upon learning this, counsel should have immediately brought an application to add Hannover as a defendant. An affidavit from Ms. Sandhu would have been preferable, but given Mr. Chodha's affidavit that he accepts responsibility for any error, I do not find an affidavit from Ms. Sandhu was necessary. The more significant issue is whether the evidence discloses that the delay was actually the fault of the client and not the lawyer. Hannover's counsel points to the plaintiffs being out of town for a few days and the lack of a proof of loss. In my view, the former does not suggest any fault on the plaintiffs, and the failure to produce a proof of loss in a timely way could be a result of many factors, not necessarily a failure by the plaintiffs. The notice of intention to withdraw does raise questions regarding the relationship between the plaintiffs and the lawyers, but again does not necessarily mean there was not an instruction by the plaintiffs to Mr. Chodha to sue all proper and necessary parties or that the lawyers were not getting instructions. While I appreciate there is a lack of detail in Mr. Chodha's affidavit as to why he did not supervise more closely or why Ms. Sandhu did not act, there is no compelling evidence to disregard his

unequivocal statement that the plaintiffs were entirely blameless, and that he accepts responsibility for whatever fault there is.

Any Prejudice arising from the Delay

- [38] Plaintiffs' counsel argues there is no evidence from Hannover or Intact of any actual or irreparable prejudice in the ability of Hannover to defend the action if it is now added as a defendant. There is only assumed prejudice from the passage of time. There is no evidence from any adjuster involved. Counsel argues that, presumably, the defendants and Hannover have the same adjuster, but counsel concedes there is no evidence of this.
- [39] Hannover's counsel argues that prejudice is presumed where a limitation period to commence an action has expired and an action was not served within the year available for service. Further, the amendments in October 2019 expanded the claim to include a claim for lost rent which is substantial. Hannover's counsel also refers to the general prejudice from the passage of time. He notes that Hannover will have to locate the previous tenants. Counsel argues that witnesses and documents may disappear. The plaintiffs have compounded this by not providing a proper list of documents including supporting evidence for the claim for lost rent. In response to the last point, plaintiffs' counsel argues if the defendants are not happy with the disclosure, they can bring an application to address that or conduct examinations for discovery.
- [40] Alternatively, Hannover's counsel argues that if the court is inclined to add Hannover, it should be subject to the limitation defence being preserved to be decided at trial. He refers to the fourth option at para. 48 of Neilson. In response, plaintiffs' counsel argues this option does not apply. The limitation period has expired, and the fourth option is only applicable when it cannot be decided on the joinder application whether the limitation period has expired. As it is conceded, the limitation period has expired, the only applicable option is to add Hannover or not, and if added, the limitation defence is gone.
- [41] Apart from losing a limitation defence, I am not satisfied that Hannover has suffered any irreparable prejudice or any actual prejudice in its ability to defend the action. There is no evidence of either. For example, there is no evidence that witnesses have disappeared or documents have been destroyed. Any prejudice is that which is presumed by the passage of time. Intact and Hannover are represented by the same counsel. That counsel has been defending the action since its inception. In the circumstances, it is difficult to see how the ability of Hannover to defend this action has been affected. Hannover's interest in the litigation is identical to that of Intact. As for the ability to prepare for trial, no examinations for discovery have yet taken place, and the trial is tentatively scheduled more than two and a half years in the future.
- [42] I also agree with plaintiffs' counsel that the fourth option discussed in Neilson is not applicable. The limitation period has expired, and there is no need to preserve that defence for decision on a fuller record.

Degree of Connection

- [43] The defendants concede for the purposes of this application that there is a connection between the existing claims and the claim against Hannover. I agree. As already discussed, the claim against Hannover is identical to that against Intact and is founded on the same document.

Other Factors

- [44] Hannover's counsel argues that the plaintiffs need not suffer any prejudice because there is a way any loss to the plaintiffs can be remedied. Counsel argues the plaintiffs can bring a claim against Mr. Chodha for failing to do what should have been done from the beginning. In my view, that is a consideration when there is irremediable prejudice, but not otherwise.
- [45] Hannover's counsel argues that adding Hannover would be a tacit endorsement of the dilatory approach of plaintiffs' counsel. Plaintiffs' counsel disagrees. He argues the Court can make an order for costs if the Court finds it appropriate to do so. In my view, permitting the addition of Hannover as a defendant is not an endorsement of the handling of this matter by plaintiffs' counsel. I have already noted the application should have been brought immediately. This decision is a determination that, in accordance with the guidelines in the case authorities, and after considering all relevant factors, it is just and convenient to add Hannover. The exercise of that discretion includes a consideration that the application should have been brought earlier.

Just and Convenient

- [46] Considering all of the above, and for the reasons given above, I find that plaintiffs' counsel did not bring an application to add Hannover in a timely way, and that this was an error on the part of counsel and not the plaintiffs. The delay in bringing the action, while not to be condoned, was not inordinate. While the addition of Hannover will deprive it of a limitation defence, the refusal of such an application would equally deprive the plaintiffs of one half of their claim against Hannover. Hannover has not established evidence of any actual or irremediable prejudice in its ability to defend the action. The same counsel are defending Intact and Hannover. In my view, balancing the interests of all parties and the proposed party, Hannover, I find that it is just and convenient that the plaintiffs' application be granted and Hannover be added as a defendant in this action.

Order

- [47] Hannover is added as a defendant to this action. The plaintiffs are granted leave to amend the style of cause to add Hannover as a defendant and to file and serve the draft amended notice of civil claim attached to the notice of application filed August 28, 2020, (as appropriately amended to correct the underlining) within two weeks from the date of this order being entered.

[48] If the parties cannot agree on costs, they may make written submissions no longer than three pages, on a schedule to be agreed between the parties within the next 30 days, and to be delivered to me through Supreme Court Scheduling.

"Norell J."

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