No. C893198

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
WENDEB PROPERTIES INC.	
and	
TIMBERLAKE HOLDINGS LTD.	REASONS FOR JUDGMENT
PLAINTIFFS	
AND:	OF THE HONOURABLE
ELITE INSURANCE MANAGEMENT LTD., carrying on business as ELITE INSURANCE CO., COASTAL INSURANCE SERVICES LTD. and ALLSTATE INSURANCE CO. OF CANADA	MR. JUSTICE SPENCER
DEFENDANTS	(IN CHAMBERS)
AND:	
COASTAL INSURANCE SERVICES LTD.	
THIRD PARTY	

AND:)

)

ELITE INSURANCE MANAGEMENT LTD.)

and)

ELITE INSURANCE CO.)

)

THIRD PARTIES)

Counsel for the Plaintiffs: Frank G. Potts

Counsel for the Defendant and

Third Party Elite Insurance Co.: Joanne McKee

Counsel for the Defendant and

Third Party Coastal Insurance Services Ltd.: William Clark

Date and Place of Hearing: November 19, 1990

Vancouver, B.C.

This is an application by the plaintiff under Rule 18A for a declaration that it is entitled to by-law coverage under an insurance policy issued by the defendant and third party Elite Insurance Co., and for judgment in the amount of $100,000 which is the agreed amount of the coverage if the plaintiff is entitled.

The circumstances are that the plaintiff's building was covered by, among others, the defendant's fire insurance policy and was damaged beyond repair by fire. The defendant at first denied any coverage at all, alleging that its agent, Coastal, had no authority to bind it by a cover note at the relevant time.

That defence has been decided adverse to the insurer. Elite has therefore paid the amount of its ordinary cover but resists payment of the agreed amount under what is known as a by-law endorsement. Briefly put, the function of such an endorsement is to extend further cover beyond the ordinary repair or replacement cost to cover the additional costs entailed by any local by-law that requires the repair or replacement to conform to modern building standards. For example, where an older building is damaged, a current by-law may require that any replacement conform to a more expensive up-to-date building code with respect to sprinklers or fire walls.

The plaintiff has plans to rebuild on the same site where the insured building stood. However, it plans to build something which is 20% smaller and has a quite different utility and design from the original structure. Rebuilding has not yet commenced because of the present economy.

Two issues need to be decided. The first is, whether the by-law endorsement applies in this case. It is a question of interpretation and the burden of proof. The second is whether once the insurer has denied the policy and lost, it may then defend upon exceptions in the policy. I shall deal with them in that order.

THE INTERPRETATION OF THE POLICY:

The relevant clauses in this policy are as follows:

"1) In consideration of $ INCLUDED additional premium and subject to the terms, conditions and limitations of the Policy including endorsements thereon, a separate amount of insurance of $200,000. is provided applicable only to any increase in the cost of repairing, replacing, constructing or reconstructing the buildings or structures on the same site or on an adjacent site, of like height, floor area and style, and for like occupancy, where such increase in cost arises out of loss, destruction or damage by a peril insured against under the Policy and is occasioned by the enforcement of the minimum requirements of any by-law, regulation, ordinance or law which regulates zoning or the demolition, repair or construction of damaged buildings or structures and which is in force at the time of such loss, destruction or damage.

2) The Insurer shall not be liable under this endorsement for:

a) any loss occasioned by the enforcement of any by-law, regulation, ordinance or law which

i) regulates zoning or the demolition, repair or construction of damaged buildings or structures;

ii) is in force at the time of loss, destruction or damage by a peril insured against under the Policy; and

iii) prohibits the Insured from rebuilding on the same site or on an adjacent site or prohibits continuance of like occupancy;

b) the cost of demolishing any portion of the buildings or structures;

c) any loss by reason of an increase in cost of repair, replacement, construction or reconstruction by the Insured of the damaged or destroyed buildings or structures on the same site or on an adjacent site with due diligence and dispatch;

d) more than the amount actually and necessarily expended in repairing, replacing, constructing or reconstructing as above provided, in excess of the loss which would have existed without this endorsement;"

I accept the plaintiff's argument that clause 1) does not require it to re-build or repair before qualifying for the benefit of the by-law insurance. Generally speaking, fire insurance is an indemnity payable after the cost of repair or rebuilding is incurred, but each policy must depend upon its own wording. The only words debated before me were those of the by-law clause. Clause 1) does not speak in terms of reimbursing the owner after he has incurred the cost of rebuilding. It refers to the "cost of repairing, replacing, constructing or reconstructing". Such cost may be determined either by actually carrying out the work or by estimating it.

Here, the plaintiff has put before me estimates of the cost given by a very experienced estimator. They are uncontested. The condition that such cost "is occasioned by the enforcement of the minimum requirements of any by-law, regulation, ordinance or law", does not mean that the cost must first have been paid. In my opinion the governing words are in the first clause I have quoted and it is reasonably satisfied by an accurate estimate of what those costs must be.

The next relevant clause is 2) c). It appears to have words omitted from it. As it stands it makes no sense. Read literally it flatly contradicts the insuring provision of clause 1). It says that if the insured uses due diligence to reconstruct then the endorsement does not apply. No one could reasonably

think that was intended, but no application was made to rectify the clause. Perhaps none could succeed because the parties may not have been agreed on what they intended it to say. As it stands I disregard the clause as being clearly antithetical to the intent of the primary insuring clause.

The last clause to consider is 2) d). It is a modification of the primary coverage given by the by-law clause. As such the burden of showing it is applicable lies on the insurer. In my opinion that burden has been satisfied. The plain meaning of the clause is that the insurer should be liable for no more than is actually and necessarily expended in excess of the amount that would have been paid under the balance of the policy without the endorsement.

In my opinion that clearly means that the insured may not claim under the by-law coverage until the actual costs are known. The words, "actually and necessarily expended" make that point. It is not enough that the insured show what the costs would be if repair or reconstruction took place. It must have been done. Nor do I think that clause contradicts the meaning I have ascribed to clause 1). As I have already said, clause 1) is a clause which entitles the insured to coverage. Clause 2) d) deals with when the insured may claim that entitlement.

CAN THE INSURER NOW RELY UPON THE EXCEPTION CLAUSE:

The plaintiff relies upon two cases in support of the proposition that once an insurer has denied the policy covers at all, it is estopped, if it fails there, from relying on any of the exception clauses within the policy. The first case mentioned was *Jureidini vs. National British and Irish Millers Insurance Company Limited* [1915] A.C. 499 (H.L.). That was a case where an insurer denied coverage on the ground of arson. The insured was charged and acquitted and sued on the policy where arson was pleaded again. The jury found against the allegation and judgment for the amount of the loss was ordered. The insurer had also taken the point that there was a clause in the policy that required the insured to take the issue of the amount of loss to arbitration before it could sue on the policy. The House decided that the insurer having denied that the policy covered at all, was not entitled to rely upon its terms. Lord Haldane L.C. said at page 505:

"Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

That clause was much relied upon by Mr. Potts in his argument before me. It has however been very much restricted by subsequent cases, particularly by the House of Lords in *Heyman et al vs. Darwins, Limited* [1942] A.C. 356. The point taken there was that the principle for which Jureidini was advanced before me does not apply where, as in Jureidini itself, the insurer did not deny the existence of the policy itself but only denied liability under it. See the opinions of Viscount Simon L.C. at page 364 and following, of Lord McMillan at page 372 and Lord Wright at page 385. Their Lordships were content to limit the application of Jureidini to the fact that the arbitration clause covered the assessment of the loss which was the same issue as the court had to deal with in the insured's action to compel the insurer to honour the policy.

At another point in the Heyman's case (supra), Viscount Simon raised the issue that confronts me here. It is the question whether, when the insurer denies that a policy existed at all and loses on that point, it is entitled to go on and rely upon some condition of the contract as an alternative defence. At page 362 his Lordship dealt with it in the context again of an arbitration clause. He drew the distinction between a case where, as in the case before me, the insurer declares that the contract never existed, as opposed to one where the insurer acknowledges the contract but refuses to be bound by it. In the same vein see the opinion of Lord McMillan at page 374 where he said the insurer may not both approbate and reprobate the policy.

With the greatest of respect I do not accept what their Lordships said as preventing the defendant in this case from pleading alternatively that the contract never existed, and that if it did, its terms preclude recovery under the by-law coverage until the additional cost has been expended. If that is in fact a term of the policy, as I have found, then surely it is much the plaintiff who approbates and reprobates when, having successfully established the existence of the policy, it seeks to ignore one of its terms.

In my respectful opinion those cases where an insurer has been prevented from both denying the existence of the policy and as an alternative from claiming the non-fulfilment of one of its terms, are explicable on the basis of an estoppel. One such case is *Donald A. Foley Limited vs. The Canadian Indemnity Company et al* [1982] I.L.R. 974. There the Ontario High Court prevented an insurer from relying on an exclusionary clause where it had first denied coverage at all. The exclusionary clause required replacement of the insured equipment as a condition precedent to recovery. But the insured had not replaced the equipment because the insurer denied coverage outright and without the assurance that the replacement would be financed by the insurance proceeds the insured was not financially able to buy replacements. Grange J., as he then was, wrote at page 977:

"In my opinion the plaintiff acted reasonably in the circumstances in renting rather than buying. Faced with an outright refusal to pay anything, and a disputed interpretation of the coverage, it would, in my view, have been foolhardy to go ahead with the purchase. I consider this the type of repudiation that renders unnecessary the fulfilment of a condition precedent before the adjudication of the claim."

He then quoted the same passage from the Jureidini case. The Foley case is clearly one in which the principle of estoppel applies. The insured has been rendered unable to buy a replacement by reason of the insurer's insistence that the coverage did not exist. Having rendered the insured unable to buy, the insurer can no longer insist on replacement before payment.

Reverting to the decision in Heyman vs. Darwins (supra), one can look to the opinion of Lord Wright at page 387 where after discussing Jureidini he wrote:

"It is familiar law that a party who has prevented fulfilment of a condition precedent cannot set up the fact of its non-fulfilment".

That, in my judgment, is the proper way to approach the case at bar. I must examine the evidence to see if the defendant, by its denial that the policy existed at all, has put the plaintiff in a position that impedes any performance required of it under the policy as a condition precedent to recovery. In my opinion there is no such evidence in this case. The defence is not based upon any failure by the plaintiff to proceed as the policy required in such matter as the proof of loss. The defendant simply says that the insured's claim under the by-law coverage can only be made after the additional money has been expended. The affidavits filed for the plaintiff do not allege that it has been prevented or impeded from expending those monies because of the insurer's denial of coverage. That was the case in Foley, but it is not said to have happened here. Instead, the failure to rebuild first as required by the policy is attributed to the economic unreality in replacing the destroyed premises with a like structure of like area and utility.

In my judgment therefore the defendant is entitled to raise its alternative defence. It succeeds at this stage of events upon the ground that the plaintiff has not satisfied the provisions of clause 2) d) of the by-law endorsement. However, that is not to say that the plaintiff will not at some future time, which I am not here called upon to specify, qualify for indemnity

under that clause. That question must await resolution on other facts.

The plaintiff's present motion under Rule 18A for a declaration that it is entitled to by-law coverage and for judgment under that coverage must therefore be dismissed with costs, but without prejudice to the plaintiff's right to bring an action with respect to that coverage in the should it qualify to receive it in the future.

Vancouver, B.C.

December 4, 1990