CITATION: Ashcroft Homes Inc. v. Aviva Insurance Company of Canada et al., 2019 ONSC 4634
COURT FILE NO.: 14-62062 A3
MOTION HEARD: 20190611

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ashcroft Homes Inc. and Ashcroft Homes – 108 Richmond Road Inc., Plaintiffs

AND:

Aviva Insurance Company of Canada, The Dominion General Insurance Company of Canada, Palladium Insurance Financial Services Inc., Palladium Insurance Brokers Ltd., Dufresne Piling Company (1967) Ltd. And Paterson Group Inc., Defendants

AND:

Ashcroft Construction Inc., Goodeve Manhire Partners Inc. and Robert I. Manhire, Third Parties

BEFORE: Master Kaufman

COUNSEL: Mitchell K. Kitagawa, Counsel for Dufresne Piling Company (1967) Ltd., Defendant / Moving Party

Mark Gallagher, Counsel for Ashcroft Homes Inc., Ashcroft Homes 108 Richmond Road Inc. and Ashcroft Construction Inc., Plaintiffs and Third Parties / Responding Parties.

HEARD: June 11, 2019

REASONS FOR DECISION

[1] This action arises from damage done to a monastery's foundation. The owner of the monastery, Ashcroft Homes – 108 Richmond Inc. (Ashcroft 108) alleges that Dufresne Piling Company (1967) Ltd. (Dufresne) caused or contributed to the damage while performing land clearing and excavation services on the Richmond Towers project, a real estate development adjacent to the monastery. The damage is estimated at $1,500,000.

[2] When Dufresne was advised about the damage to the monastery, it expected that it would be covered under a wrap-up insurance policy that Ashcroft Construction, the general contractor, was contractually obligated to obtain. It later found out that Ashcroft Construction never secured that insurance policy. Dufresne commenced a third party claim against Ashcroft Construction for contribution and indemnity, as well as for the costs of defending the action and prosecuting the third party claim (defence costs). Dufresne now brings this motion for partial summary judgment on the issue of Ashcroft Construction's liability for defence costs.

[3] The issues to be determined in this motion are whether the following questions raise genuine issues requiring a trial: 1) Was Ashcroft Construction contractually obligated to obtain wrap-up insurance? and 2) if yes, are any of the allegations against Dufresne within the possible coverage of a typical wrap-up policy? The third issue concerns the terms on which an Order for summary judgment should be granted in light of Ashcroft Construction's concerns about the potential for conflict of interest and abuse.

PRINCIPLES APPLYING TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT

[4] A party may seek summary judgment on all or part of a claim, and the court shall grant the motion if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.[1] There will be no genuine issue requiring a trial when the Court is able to reach a fair and just determination on the merits of a motion for summary judgment. This will be the case when the process allows the Court to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result.[2]

[5] Motions for partial summary judgment can undermine the Court's objective of ensuring access to justice. They delay the resolution of the main action, may be used tactically to wage a war of attrition, are expensive, may be appealed, and they add to judges and masters' workloads on matters that do not dispose of the action. Because the record on such motions is not likely to be as expansive as the record at trial, there is a danger of inconsistent findings. As a result, motions for partial summary judgment should be reserved for matters that can readily be bifurcated from those remaining issues in the main action, and can be dealt with expeditiously and in a cost effective manner. [3]

WAS ASHCROFT CONSTRUCTION OBLIGATED TO OBTAIN WRAP-UP INSURANCE?

[6] Dufresne bid on the Richmond Towers project on May 3, 2012. Its bid was based on a defined scope of work, and it included a stipulation that "A wrap-up insurance policy is to be provided for the project". On May 4, 2012, Ashcroft Construction accepted the bid. In its letter of intent, it confirmed that the parties would enter into a formal contract for the work specified in Dufresne's bid. Ashcroft Construction's letter of intent provided that "the scope of the contract shall include [...] a wrap-up policy is to be provided for the project".

[7] Initially, Ashcroft Construction did not admit that it had the obligation to obtain the wrap-up insurance policy, relying on the ambiguous language above which did not specify who had to provide the policy. Dufresne filed the expert report of Stephen J. White as part of this motion. Dufresne and Ashcroft Construction's experts have impressive credentials and

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[1] *Rules of Civil Procedure,* RRO 1990, Reg. 194, *Rule* 20.01 and 20.04.
[2] *Hryniak v. Mauldin*, 2014 SCC 7, at para 28.
[3] *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, at paras 30-34.

possess over 40 years of experience in the insurance industry. Mr. White's evidence was that a wrap-up insurance policy for a large construction project is typically arranged by the owner/developer or by the general contractor. This kind of policy benefits the owner of the general contractor to cover their interests and those of all sub-contractors for the duration of the construction project. Mr. White is of the opinion that a sub-contractor such as Dufresne would not arrange a wrap-up policy because it would not be in control of the project and would unlikely to be involved for the duration of the whole project.

[8] Ashcroft Construction's expert, Mr. Rory Roberts, agrees with Mr. White that a wrap-up insurance policy would be obtained by an owner or general contractor and not by a subcontractor.

[9] I conclude that on this first issue there is no genuine issue requiring a trial: Ashcroft Construction breached the term of its contract with Dufresne which required it to obtain a wrap-up insurance policy.

IS ASHCROFT CONSTRUCTION LIABLE FOR DUFRESNE'S DEFENCE COSTS?

[10] The next issue is whether Ashcroft Construction is liable for Dufresne's defence costs. The answer to this question turns on whether Ashcroft 108 made claims which, if proven true, would fall within coverage under a wrap-up policy. The difficulty that arises in this case is that no wrap-up insurance was ever obtained, and there is no policy wording against which to assess the plaintiff's claims.

[11] The general principles that apply to determine whether or not there is a duty to defend arising from an insurance policy are well settled. The circumstances in which there will be a duty to defend are as follows:[4]

> (a) An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim.
>
> (b) The onus is on the insured to establish that the pleadings fall within the initial grant of coverage.
>
> (c) The pleadings govern the duty to defend. However, in examining the pleadings, the parties are not bound by the labels selected by the plaintiff. It is the true nature or substance of the claim that is determinative.
>
> (d) It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to

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[4] *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada,* 2010 SCC 33 (CanLII), [2010] 2 S.C.R. 245, at paras. 19 and 20, citing *Nichols v. American Home Assurance Co.,* 1990 CanLII 144 (SCC), [1990], 1 S.C.R. 801.

indemnify. What is required is the *mere possibility* that a claim falls within the insurance policy.

(e) Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or because it is excluded by an exclusion clause, there will be no duty to defend.

[12] The widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.[5]

Allegations against Dufresne

[13] The allegations against Dufresne are found in paragraphs 20-23 and 35-36 of the Amended Statement of Claim. In essence, the allegations sound in breach of contract and in negligence. Ashcroft 108 pleads that Dufresne was hired to do the "engineering, procurement and construction of: clearing and grubbing, tree removal, excavation, sheetpiling, shoring, rock removal, detailed-mass and interior backfill, weeping tile and dewatering". It is alleged that Dufresne, or its engineers, designed the shoring system for the defendant, and that it did the blasting, excavation and shoring system for the project.

[14] Ashcroft 108 alleges that the damage to the monastery was caused by Dufresne's failure to properly engineer and construct the shoring system in breach of its contractual obligations, or in the alternative, that it was negligent in failing to design and install a shoring system capable of preserving the stability of the retained structures within the project.

What would the wrap-up insurance have covered?

[15] Both experts agree that wrap-up insurance policies are in the nature of a general liability policies. Mr. White describes wrap-up insurance as an effective way of "insuring all of the liability risks associated with construction projects as presented by all of the levels of contractors connected with the project". Mr. Roberts cautions against the use of "all of the liability risks" and points out that there are always exclusions in coverage. Mr. Roberts' evidence is that wrap-up policies cover general liability risks, which refers to third party bodily injury or property damage.

[16] Both parties also agree that, even though the monastery belonged to Ashcroft 108, a corporation related to Ashcroft Construction, the damage would have been considered damage to a third party. This is because a wrap-up policy would have contained a cross-liability clause deeming the owner to be a third party. [6]

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[5] *Nichols v. American Home Assurance Co.,* 1990 CanLII 144 (SCC), [1990], 1 S.C.R. 801.

[6] In response to the question "is there anything in Mr. White's report that you disagree with or which is in your view misleading?" Mr. Roberts did not dispute Mr. White's conclusion that Ashcroft 108 would be considered a third party for the purpose of coverage.

[17] Mr. White is of the view that a typical wrap-up policy would apply to the type of damage suffered by the monastery. Mr. Roberts responds that there are a number of issues which *may preclude* coverage afforded by a wrap-up policy. In particular, Mr. Roberts says that exclusions for faulty workmanship, failure to render professional services, failure to report the damage in a timely manner, or for damage to part of the insured project itself may have applied. Mr. White agrees that wrap-up policies generally contain a number of exclusions, including those mentioned in Mr. Roberts' report, but he is of the view that they would not apply on the facts of this case.

[18] The parties made extensive arguments on whether certain possible exclusions might or might not apply. I do not need to resolve these questions. Where some but not all claims are covered by a policy, the insurer is required to pay *all reasonable costs* associated with the defence, even if those costs further the defence of uncovered claims. The insurer is not obliged to pay the defence costs related *solely* to uncovered claims. [7] The insurer (or in this case Ashcroft Construction) bears the onus of proving that an exclusion clearly and unambiguously excludes coverage.[8] This is a difficult task for Ashcroft Construction because it did not obtain the policy as per its contractual obligation, and is therefore unable to point to any exclusionary clauses, let alone prove that they clearly apply. But in any event, its expert's evidence that some issues *may* preclude coverage does not meet the burden of proving that an exclusion clearly and unambiguously applies.

Conclusion

[19] I am satisfied that at least some of the allegations in a statement of claim trigger a duty to defend. The mere possibility that a claim may fall within the wrap-up policy that should have been taken is sufficient to trigger the duty to defend. The Court must look at the true nature of the claim to assess whether the facts pleaded fall within the policy.[9] Here, Ashcroft 108 claims, among other things, that the damage was caused by Dufresne's failure to properly construct the shoring system in breach of its contract or as a result of negligence. Wrap-up policies are in the nature of a general liability policy and would have covered the owner, the general contractor and all sub-contractors against liability arising from damage to third parties. Both parties agree on that point.

[20] Ashcroft Construction concedes that Dufresne's entitlement to defence costs and selection of counsel depends on whether the wrap up policy would have provided it coverage for the claims in the main action. [10] Because at least some claims would have possibly been covered by a wrap-up policy, had it been taken, I find that there is no genuine issue for trial on the issue of damages for defence costs. Moreover, I find that this is a matter that can readily be bifurcated from the other issues in this proceeding. I make no findings with respect to the possible existence or application of exclusion clauses. My conclusion is simply this: had Ashcroft Construction obtained the wrap-up insurance it concedes it

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[7] *Hanis v. Teevan,* 2008 ONCA 678.
[8] *Goodeve Manhire and Partners Inc. v. Encon Group Inc.*, 2016 ONSC 7005, at para 22 (Ont. Sup. Ct).
[9] *Carneiro* v. *Durham*, 2015 ONCA 909 at para 15.
[10] Responding factum, at para 43.

should have obtained, there is a possibility that the some of the allegations made against Dufresne would have been covered by that policy, which gives rise to the duty to defend.

THE TERMS OF THE ORDER

[21] The damages payable for breaching an obligation to insure defence costs is an award equivalent to the defence costs that would have been paid by an insurer.[11]

[22] Ashcroft Construction correctly points out that to ask it to pay for ongoing defence costs would put it in a conflict of interest. It would be approving Dufresne's legal invoices, which would necessarily be heavily redacted for privilege. It would accordingly be unable to contest the amounts. Moreover, allowing Dufresne to spend as much as it wants on legal costs could be subject to abuse. Ashcroft Construction asks that Dufresne's damages be determined at the end of the proceeding, after they have crystallised.

[23] I am not persuaded by that submission. In *Carneiro* v. *Durham*, the Court of Appeal rejected an insurer's argument that a person who was mistakenly omitted from an insurance contract as an additionally named insured should be required to defend the action at its expense and would be entitled to recover costs at the end of the litigation. The Court held that the duty to defend is a separate contractual obligation which would be quite hollow if the insurer's only obligation was to indemnify the insured at the end of the day. [12]

[24] Had Ashcroft Construction obtained the wrap-up insurance, an insurance company would have provided Dufresne with independent legal counsel and approved invoices. Pursuant to Rule 1.05, in making an order, the Court may impose such terms and conditions as are just. In attempting to place Dufresne in as close of a position as it would have been had the wrap-up insurance been obtained, I order the following:

a. Ashcroft Construction shall reimburse Dufresne for the legal costs incurred to date in defending this proceeding, as agreed or assessed;

b. Ashcroft Construction shall retain a lawyer with the requisite experience in construction claims, who will act independently and be responsible for approving Dufresne's legal fees and disbursements. That lawyer shall perform the same duties normally performed by an insurance adjuster. If the parties cannot agree on who the lawyer should be, Ashcroft Construction will provide Dufresne with three names and Dufresne will select one of them. Ashcroft Construction will be responsible for this lawyer's fees.

c. At the end of the proceeding, Ashcroft Construction is entitled to seek an apportionment of the defence costs to the extent that they deal solely with claims that would not have been covered.

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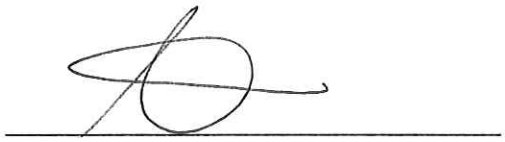
[11] *Amello* v. *Bluewave Energy Limited Partnership*, 2014 ONSC 4040, at para 80 (Ont. Sup. Ct.).
[12] *Carneiro* v. *Durham*, 2015 ONCA 909 at para 26.

COSTS

[25] Dufresne was successful on this motion and would presumptively be entitled to costs. However, Ashcroft Construction argues that Dufresne abandoned much of the relief sought in its original notice of motion (where it sought contribution and indemnity), and that it was required to file expert evidence, and respond to arguments, on matters which were not ultimately pursued. Moreover, motions to determine a duty to defend should be brought without delay.[13] I am not in a position to fairly assess the extent to which Dufresne's costs ought to be reduced taking these issues into account. If the parties are unable to agree on costs, Ashcroft Construction may serve and file written submissions (no longer than 6 pages double spaced) within 30 days. Dufresne will have 15 days after receiving Ashcroft Construction's submissions to file responding submissions of the same length.

[26] I will remain seized should there be any issues regarding the implementation of this order.



Master Kaufman

Date: August 2, 2019

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[13] *Carneiro v. Durham*, 2015 ONCA 909 at para 29.