CITATION: Greenwin Inc. v. St. Paul Fire and Marine Insurance Company, 2023 ONSC 5097
COURT FILE NO.: CV-19-00632825-0000
DATE: 20230908

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
GREENWIN INC. and CHUBB INSURANCE COMPANY OF CANADA Applicants	*Jason Mangano*, for the Applicants
– and –	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY Respondent	*Hudson Chalmers* and *Chris Morrison,* for the Respondent
	HEARD: June 27 and 28, 2023

MERRITT J.

REASONS FOR JUDGMENT

OVERVIEW

[1] On September 24, 2010, a fire (the "Fire") damaged a high-rise building located at 200 Wellesley Street in Toronto (the "Building"). The Applicants, Greenwin Inc. ("Greenwin") and Chubb Insurance Company of Canada ("Chubb") seek a declaration that St. Paul Fire and Marine Insurance Company ("St. Paul") is obligated to fund 50% of the $18,750,000.00 settlement for Greenwin's share of the damages owed in a subrogated claim asserted in the name of Toronto Community Housing Corporation ("TCHC") for damage to the property (the "Subrogated Claim" or the "Property Damage Claim"). This was the only issue addressed in the Applicants' factum and argued at the hearing of the Application.

BACKGROUND FACTS

[2] TCHC owned the Building that was damaged by the Fire and Greenwin was the property manager. As a result of the Fire, a number of claims were made, including a class action by third parties against TCHC and Greenwin for damages sustained as a result of the Fire. TCHC also has a claim against Greenwin for damage to the property.

[3] TCHC had a Composite Policy No. 2687260 from AIG Insurance Company of Canada ("AIG"). The AIG Composite Policy consisted of first party property insurance that covered TCHC's Building (the "AIG Property Coverage"), primary general liability coverage ("AIG Liability Coverage") and umbrella/excess general liability coverage ("AIG Excess Coverage"). The parties have agreed that as TCHC's "real estate manager" as defined under the policy, Greenwin has "insured" status under both the AIG Liability Coverage and AIG Excess Coverage, but not the AIG Property Coverage.

[4] St. Paul Fire and Marine Insurance Company, then called Travelers ("St. Paul") issued Excess Liability Protection Policy No. CPC0058829 (the "St. Paul Policy") which sits excess over the underlying AIG Liability Coverage and AIG Excess Coverage. The St. Paul Policy follows the form of the AIG policies and consequently, Greenwin also has "insured" status under the St. Paul Policy. The St. Paul Policy provides that "except as otherwise provided by this agreement, all terms, conditions, definitions, exclusions and limitations that apply to your immediate underlying liability insurance policy described on the 'SCHEDULE OF IMMEDIATE UNDERLYING INSURANCE' also apply to this agreement." The AIG Liability Coverage and the AIG Excess Coverage are identified as the underlying insurance.

[5] AIG paid for the damage to the Building under the AIG Property Coverage and makes the Subrogated Claim against Greenwin for its negligence in failing to properly address a hoarder tenant who caused the Fire. The Subrogated Claim is a claim by AIG against Greenwin for the damage to TCHC's property which was indemnified under the AIG Property Coverage.

[6] Chubb issued an excess liability insurance to Greenwin (the "Chubb Policy") that sits excess over the underlying Zurich primary general liability coverage (the "Zurich Policy").

[7] The Applicants' position is that the limits of the AIG policies were exhausted prior to the resolution of the Property Damage Claim. St. Paul is therefore next in line to cover Greenwin's liability along with Chubb.

[8] In 2013 the parties and their insurers commenced two applications seeking declarations regarding insurance coverage and priorities for the Property Damage Claim, and payments made to tenants under a compensation plan and the class action (the "2013 Applications"). The 2013 Applications were settled before they were heard. All of the issues between Zurich, Greenwin, TCHC, Chubb and AIG were resolved.

[9] On December 17, 2018, AIG and Chubb settled AIG's Subrogated Claim for damage to the building for $25,000,000.00 and agreed that the apportionment of liability for same should be 75 percent to Greenwin and 25 percent to TCHC such that Greenwin's share amounted to $18,750,000.00, and agreed that Chubb would pursue St. Paul for one half of Greenwin's share (the "2018 Settlement"). The only outstanding dispute is whether St. Paul is required to pay one half of the $18,750,000.00 settlement of the Property Damage Claim.

ISSUES

[10] The issues are as follows:

1. Should the action be stayed because a confidential litigation agreement between Chubb and AIG was not disclosed immediately or was made in bad faith?

2. Did St. Paul deny coverage such that it lost its right to approve the settlement?

3. Was the settlement reasonable?

4. Does the anti-subrogation bar prevent AIG from pursuing a subrogated property damage claim against Greenwin?

5. Does the owned property exclusion apply to Greenwin as TCHC's real estate manager?

6. Does the Tenants Insurance provision apply?

7. Is relief from forfeiture available to the Applicants?

ANALYSIS

1. The Litigation Agreement

[11] In December 2017, Chubb and AIG entered into a confidential litigation agreement whereby they agreed that Chubb would bring this application against St. Paul for payment of one half of the settlement of the Property Damage Claim being $9,375,000.00, that they would split the proceeds, and that, regardless of the outcome of this application, Chubb's liability would be capped at $14,062,500.00 (rather than the entire $18,750,000.00) and AIG would provide affidavit evidence changing its previous position and supporting Chubb's interpretation of AIG's Excess Coverage (which is identical to the St. Paul's Policy). This agreement was not disclosed to St. Paul until years later in the context of this application. In fact, at the time, St Paul was told that the settlement was for $18,750,000.00.

[12] AIG is not a party to this application even though the application requested a declaration that AIG's policy limits were exhausted and that AIG insured Greenwin for the Property Damage Claim. AIG has an undisclosed interest in this application. If this application is successful, then AIG recovers $4,687,500 more than if the application fails.

[13] The materials filed by Chubb lead one to believe that Chubb/Greenwin were obligated to pay $18,750,000.00 to AIG when in fact the confidential litigation agreement limited their liability to just over $14M. Two years after this application was commenced, Chubb filed a copy of the signed settlement agreement which references the confidential litigation agreement.

[14] St. Paul's position is that the Application should be stayed because the confidential litigation agreement between Chubb and AIG was not immediately disclosed to St. Paul.

[15] A litigation agreement that changes the litigation landscape entirely must be disclosed to the parties and the court immediately or the proceeding will be stayed: *Skymark Finance Corporation v. Ontario*, 2023 ONCA 234, 166 O.R. (3d) 131, at para. 47. When, in the context of existing litigation, one of the parties settles with another party and changes its position to the

detriment of a non-settling party, disclosure must be made to the non-settling party and failure to do so is unfair. The agreement must be disclosed as it directly affects the conduct of the litigation.

[16] In this case, the underlying litigation had settled in its entirety when the confidential litigation agreement was made. It was entered into before this application was commenced and, in that sense, it did not change the landscape. The Applicants did not settle with one party without the knowledge of the other. The Applicants' position did not change after the litigation was commenced.

[17] Counsel did not provide any authority for the proposition that an agreement made prior to the commencement of litigation which limits the liability of one party or otherwise impacts the effect of any decision, must be disclosed. Here the confidential litigation agreement did not alter the adversarial relationship between the parties to this application. Although it could be said that AIG and Chubb were adverse in interest prior to the making of the confidential litigation agreement, AIG is not a party to this Application. The Respondent argues that AIG should be a party pursuant to r. 5.03 (1) and (2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 193, but did not move to have AIG added as a party after it became aware of the confidential litigation agreement. I do not treat AIG as a party to this application. Even if AIG had been added or were treated as a party, the confidential litigation agreement was made before this application was commenced and therefore could not change the landscape of the litigation. To stay this application would constitute an expansion of the principle which is not supported by any precedent.

[18] I do not find that the litigation landscape or adversarial relationship between the parties changed after the litigation was commenced and do not order a stay.

[19] The Respondent also argues that by entering into the confidential litigation agreement, AIG and Chubb breached the duty of good faith they owed to St. Paul. The Respondent provided no authority for the proposition that entering into an agreement limiting liability such as was done here constitutes bad faith and, in the absence of same, I do not find that entering into the confidential litigation agreement was an act of bad faith.

2. St. Paul's Alleged Denial and Right to Participate in the Settlement

[20] There is no dispute that the AIG Liability Coverage, and the St. Paul's Policy which follows its form, require St. Paul to approve or consent to a settlement and that St. Paul did not consent to the settlement in this case.

[21] The Applicants' position is that St. Paul denied the claim and lost its right under its policy to approve the settlement, and in any event neglected or refused to provide any position on the settlement, the AIG limits are exhausted, and the settlement can only be challenged on the basis that it was unreasonable or if there are coverage defences.

[22] If an insurer wrongfully breaches the insurance contract, refuses to defend its insured, and abandons its insured, it breaches the insurance contract and the insured is entitled to settle an insured claim on a reasonable basis and for a reasonable amount and to recover such amount from its insurer as damages for breach of contract. The insured need only establish that there is coverage, the insurer has breached the policy by denying liability, and the settlement is reasonable, subject

to any defences that may be available to the insurer: *Cansulex Ltd. v. Reed Stenhouse Ltd*. (1986), 70 B.C.L.R. 273 (S.C.); *Jon Picken Ltd. v. Guardian Insurance Co. of Canada*, 1993 CarswellOnt 678 (C.A.); and *London Guarantee Insurance Co. v. Connor Clark & Company Ltd*., 2003 CanLII 9010 (Ont. S.C.).

Alleged Denial

[23] After the Fire in 2010, litigation was commenced against Greenwin and TCHC. In the following three years, Greenwin never sought coverage from St. Paul. There is no letter, email or other request from Greenwin, TCHC, AIG or Chubb for a defence to the Property Damage Claim. There is also, no letter, email or other document from St. Paul denying coverage or refusing to provide a defence. St. Paul was monitoring the litigation.

[24] In 2013, Greenwin brought an application against AIG challenging its right to bring a subrogated claim against Greenwin. This application was adjourned. A new, more comprehensive application was commenced in the summer of 2013 where Greenwin sought an order requiring contribution to the defence and indemnity of Greenwin from St. Paul "upon the exhaustion of" various underlying policies. In the 2013 Applications Greenwin asserted that it had tendered its claim to AIG; it did not assert that it had requested a defence from St Paul. At that time there was no allegation that any of the underlying policies had been exhausted. The AIG policy had not been exhausted. AIG took the position that it would only pay after the Chubb limits were exhausted. This argument was based on the contract between Greenwin and TCHC. AIG took the position that Greenwin did not have the right to coverage under AIG's policy and also took the position that they did have a right to subrogate against Greenwin. Greenwin and Chubb took the position that AIG could not bring a subrogated claim against Greenwin. St. Paul's position mirrored AIG's position with respect to coverage but on the issue of the subrogation bar, they supported Greenwin and not AIG. The 2013 Applications, in which St. Paul filed the factum with its position that there was no coverage, were eventually withdrawn.

[25] It is the Applicants' contention that by commencing the 2013 Applications they tendered the Property Damage Claim for coverage, and that St. Paul denied coverage when it filed the factum in 2014 that took the position that there is no coverage for the claim because Greenwin was not an insured, and the owned property exclusion applied.

[26] St. Paul's position is that its policy limits were not reached, no demand was ever made and there was no denial.

[27] According to its policy, St. Paul's duty to defend arises only when "your scheduled immediate underlying liability insurance policy no longer has a duty to defend solely because its limit of coverage has been used up." As the underlying insurance had not been used up, St. Paul's layer of insurance had not been reached and they did not participate in the negotiations regarding the resolution of the priority disputes between Zurich, Chubb and AIG and TCHC's outstanding claims under its liability and property policies. When Chubb and AIG were negotiating in 2014, both took positions consistent with St. Paul not having to respond to the claim. AIG's position was that the claim was not covered because Greenwin was not an insured and the owned property exclusion applied, and Chubb's position was that AIG was barred from subrogating against Greenwin. If either were correct, St. Paul would not be called on.

[28] At no time did Greenwin or anyone demand St. Paul defend any claim. In fact, St. Paul was basically put on hold pending discussions among the other insurers, initially Chubb and AIG. St. Paul was told that after the settlement between TCHC, Chubb and AIG, AIG's subrogated claim against Greenwin would be addressed.

[29] In 2017 Chubb and AIG settled with TCHC for $5M and at that time, made the proposal to St. Paul to contribute to the settlement of the Property Damage Claim.

[30] There is no authority for the proposition that commencing an application for a declaration of coverage constitutes a demand for a defence and indemnity. A denial on its own is not a repudiation of the policy. Unless a policy contains an express provision having that effect, a denial of coverage by an insurer is no more than a notification to the insured that the insurer construes the policy in a way which precludes coverage for the loss claimed by the insured: *Dachner Investments Ltd. v. Laurentian Pacific Insurance Co.*, 36 B.C.L.R. (2d) 98, at para. 17.

[31] Challenging coverage in an application is not a contractual breach that forfeits an insurer's rights under a policy: *2091533 Ontario Limited et al. v. Vertigo Investments Limited et al.*, 2013 ONSC 2731, 115 O.R. (3d) 547.

[32] In *United States Fire Insurance Co. v. Mikes*, 576 F. Supp. 2d 1303 (Fla. D. 2007), the excess insurer brought a coverage application before its layer of coverage was reached and denied that it had obligations to defend and indemnify. Prior to the determination of the coverage application, the insured settled the claim without the consent of the excess insurer. The court held:

> [G]iven its role as an excess insurer in this dispute, its statements and conduct conveyed no more than a reservation of the rights to dispute its coverage obligations, its view that it had no duty to defend in the circumstances, and its further view on the value of the claims, the available underlying coverage and the likelihood that its policies would never be reached by the exhaustion of that coverage. [...] As the excess insurer, U.S. Fire did not wrongfully deny coverage or wrongfully refuse to defend its insureds. In the circumstances, U.S. Fire is not bound by the settlement: at paras 24-25; 30.

[33] I find that St. Paul did not deny coverage and breach its contract when it filed a factum taking the position that Greenwin was not an insured and the owned property exclusion applied. St. Paul was never asked for a defence and never refused to provide a defence. St. Paul did not abandon its insured. It appointed monitoring counsel, it attended mediations, it took a wait and see approach. At the time the factum disputing coverage was filed, the claim was not settled and St. Paul's layer of insurance had not been reached.

[34] If its layer of insurance had been reached, St. Paul would have to decide what to do. It could accept that its policy provided coverage and assume the obligations to defend and indemnify; it could deny coverage and allow the insured to deal with the claim, knowing that it was taking a risk that if it was later found to have breached the policy in so doing, it could be liable to the insured; it could reserve its right to deny coverage and proceed to defend the claim; or it could seek an immediate determination of coverage. St. Paul was never put to this decision. Rather, the

Applicants proposed a settlement wherein Chubb reversed its position on the anti-subrogation provision and AIG reversed its position on the owned property exclusion, and then they presented the proposal to St. Paul asking them to agree there is no anti-subrogation bar, agree Greenwin is covered and the owned property exclusion does not apply, and pay one half of the $18,750,000.00, with no deadline for response. Then, approximately one month later, the Applicants settled the claim and made the payment that exhausted AIG's limits and commenced this application. There was no explanation why the Applicants did not wait for St. Paul to respond to the proposal or advise St. Paul that they intended to proceed with entering into a settlement. As set out below, I do not find that St. Paul refused to provide any position on the settlement.

Were AIG's Limits Exhausted?

[35] The class action plaintiff claims settled at a mediation attended by St. Paul in 2013. The AIG payment for tenant damages totaled $6,609,072.47. Zurich reimbursed AIG $2,112,612.69. As a result, the total payments by AIG exhausted the $2,000,000.00 limit afforded by AIG Primary Policy and only $503,540 of the AIG Excess Policy limit remained. Subsequently AIG recovered from Chubb $523,230.00 as a result of an overpayment, leaving $1,026,770.00 remaining on its limits.

[36] The Applicant says that in early 2017, TCHC offered to resolve all of its outstanding claims under its property and liability insurance ("TCHC Uninsured Claims") and AIG and Chubb agreed to settled for $5M, which had the effect of completely exhausting the remaining available $1,026,777.00 of the AIG Excess Policy. There is nothing in the record to show that TCHC had to pay this precise amount (which was the exact amount remaining on the limits) as indemnity for an agreed upon settlement. St. Paul was not asked to contribute at this time. It seems strange that the exact amount required to exhaust AIG's limits was paid and not a penny more which would have resulted in St. Paul being asked to contribute.

[37] St. Paul takes issue with the payment of $5M as settlement and the remaining AIG limits. It is not clear whether the payment of the remaining limits of the AIG policy was made as payment for indemnity of a third-party settlement or judgment. The Applicant's affiant had no personal knowledge of or involvement in making these payments, and merely said that the only outstanding claim was for various costs and expenses which TCHC asserted should be covered by its liability insurers. The evidence of the property adjuster was that she believed that TCHC continued to advance various claims for direct and consequential losses and damage to its property and business and that TCHC continued to advance claims for indemnity under the liability coverage proved by AIG in respect of "various costs and expenses, including legal expenses, which had assured that it should be covered by its liability insurers by which claims are disputed." The Respondent says costs and expenses are payable in addition to the policy limits and do not erode same. Without more information it is impossible to determine whether the AIG limits were properly exhausted.

[38] I find that the issue of whether AIG Liability Coverage limits were properly exhausted is not an appropriate issue to determine on this application. St. Paul disputes the limits were properly exhausted and says that the payments which purported to exhaust the limits were made specifically to trigger its coverage. AIG's affiants had no direct knowledge of the facts and circumstances underlying the payments made. Additionally no internal file notes or communications between Chubb and AIG have been produced. There is conflicting evidence as to the timing and

circumstances of the payments and a serious question as to whether all of the payments were proper. Given the timing of the settlement, the confidential litigation agreement, the changes in the positions of AIG and Chubb regarding coverage and the timing and quantum of the payments made to exhaust the limits, I find that a trial would be required to fully explore all the relevant facts and documents and make appropriate determinations, including findings regarding credibility. However, given my finding that St. Paul did not breach the insurance policy by denying coverage, it is not necessary to determine whether the limits were exhausted.

St. Paul's Alleged Refusal to Participate

[39] By December 8, 2010, St. Paul had retained litigation monitoring counsel to monitor any claims and protect its interests. In 2011 St. Paul attended a mediation again to monitor the litigation. In 2013 St. Paul again attended mediation, the results of which were to reduce AIG's policy limits to $503,000 (later increased to just over $1M as set out above). St. Paul was aware that the Property Damage Claim had not yet been resolved. St. Paul adopted a wait and see approach.

[40] By 2015, St. Paul was aware that there were settlement discussions between Chubb and AIG. The underlying actions were basically on hold pending the negotiations between Chubb and AIG and St. Paul was monitoring only and asking for periodic updates.

[41] In 2017, St. Paul was told that TCHC's claims against the insurers had been resolved for $5M and St. Paul was not asked for a contribution.

[42] On November 2, 2018, defence counsel for TCHC wrote to St. Paul with a proposal to dispose of the overall dispute. On November 5, 2018, counsel for St. Paul met with counsel for Greenwin, Chubb and AIG to discuss the proposal. The proposal was to have St. Paul contribute to the settlement based on its alleged coverage obligation to Greenwin. In the draft agreement, the parties stipulated that AIG had exhausted its limits and the Property Damage Claim would be resolved with Chubb and St. Paul each paying $9,375,000.00 to AIG. St. Paul was not given a deadline to respond. Chubb indicated that it had reports justifying the liability and damages assessments. As it turned out, Chubb only had written liability opinions. In mid-December, St. Paul requested any pleading that set out the Property Damage Claim. Counsel for Chubb provided two liability opinions from 2014 and 2015 to counsel for St. Paul on Friday, December 14, 2018 at 3:20 pm. St. Paul was provided with a verbal opinion on damages and was told that if they wanted a written report on damages, it would take some time. No urgency was conveyed to St. Paul at this time. Three days later, on December 17, 2018, Greenwin, Chubb and AIG executed the settlement agreement setting the Property Damage Claim for $18,750,000.00. Two weeks later, AIG made a payment to TCHC which exhausted their limits and purported to trigger St. Paul's layer of insurance.

[43] I do not find that St. Paul refused to participate in the settlement. They did participate. There was no apparent urgency in December 2018 and they were not given a deadline by which to respond. Rather, Greenwin settled the claim without St. Paul's consent in violation of the policy.

3. Reasonableness of the Settlement

[44] In December 2018, AIG and Chubb settled AIG's Subrogated Claim as set out above. It is the Applicant's position that the settlement was reasonable. The Applicants say the settlement was based in part on AIG's determination that Greenwin was an insured (as a real estate manager) under the AIG Liability Coverage and the AIG Excess Coverage, the owned property exclusion did not apply, and the other insurance provisions contained in the St. Paul and the Chubb policies were mutually repugnant resulting in concurrent coverage for Greenwin under those two policies.

[45] On September 8, 2015, Chubb obtained a legal opinion from counsel retained to defend Greenwin that the liability apportionment was reasonable. Although counsel for the Applicant suggested that in *Jon Picken*, reliance on an opinion from counsel was sufficient to establish that a settlement was reasonable, I note that in that case, the reasonableness of the settlement was not in issue.

[46] Here, there was a prior opinion from the same counsel that assessed Greenwin's liability at 50-70 percent.

[47] The quantum agreed to was based in part on the evaluation of MKA cost consultants who said that an assessment of $25,000,000.00 before liability was apportioned was "more than fair".

[48] The Respondent disputes that the settlement was reasonable and asks the court to draw an adverse inference against the Applicants for failing to produce evidence of the individuals who were involved in the negotiations.

[49] The parties made submissions regarding legal arguments that would inform the settlement, such as whether Greenwin was an insured under the AIG Liability Coverage, and the applicability of the owned property exclusion and the anti-subrogation defence, but did not otherwise address the merits of the reasonableness of the settlement other than to say there were expert opinions to support the damages and liability assessments. As stated above, St. Paul requested a copy of the MKA opinion but was advised there was nothing in writing.

[50] The evidence on this motion was triple hearsay. There was a letter from Chubb's counsel to St. Paul's counsel providing a summary of what MKA said, which was filed as an exhibit to the affidavit of St. Paul's claims manager Claire Ferreira filed on this application.

[51] Aside from being hearsay, it is a summary of evidence from an advocate who is trying to persuade an opposing party to settle a case. There was no evidence filed from parties who had firsthand knowledge of the details of the settlement. In addition, it appears as though there was no discount or reduction for the litigation risk relating to the anti-subrogation provision or the owned property exclusion which is puzzling. Finally, the Applicant is asking me to find that the $18,750,000 settlement is reasonable, but we know that if this application is unsuccessful, AIG will actually settle for $14,062,500.00.

[52] Counsel for the Applicant submitted that if there were to be a trial on the reasonableness of the settlement, a number of witnesses would be required including the casualty examiners from AIG, Chubb, and St. Paul, the property examiner from AIG, two former counsel for TCHC, former

counsel for Chubb and St. Paul, expert witnesses from MKA, and the lawyer who provided the opinion on the comparative liability analysis. It is a mystery why these witnesses would be needed in a trial of the issue of the reasonableness of the settlement but not on this application. In my view, for all these reasons, the determination of the reasonableness of the settlement would require a trial; however, given my finding that St. Paul did not deny coverage and was not in breach of the policy, it is not necessary to determine whether the settlement was reasonable.

4. The Anti-Subrogation Defence

[53] Initially, both Chubb and St. Paul took the position that AIG was not entitled to advance, in TCHC's name, a subrogated claim against Greenwin (the "Anti-Subrogation Defence"). As part of the 2017 Settlement, Chubb changed its position and agreed to abandon the Anti-Subrogation Defence.

[54] The Respondent submits that AIG is prevented from subrogating against Greenwin because same is prohibited by the policy.

[55] The Applicants now submit that the Anti-Subrogation Defence is not a defence concerning coverage and not available to St. Paul because St. Paul breached the insurance contract when it denied coverage in its factum in the 2013 Applications, and now only coverage defences are available to it. As set out above, I do not find that St. Paul breached the insurance contract.

[56] The Applicants argue that the Anti-Subrogation Defence is a liability defence that was available to Greenwin in defence of the TCHC crossclaim that formed the Property Damage Claim. It was a live issue because Greenwin was not an insured under the AIG Property Coverage and had no insurable interest. Greenwin's status as an insured under the AIG Liability Coverage might not prevent AIG from subrogating for amounts paid under the separate AIG Property Coverage, and there is an absence of Ontario caselaw importing the US jurisprudence that applies the anti-subrogation rule in cases where there are separate policies.

[57] The Applicant submits that had St. Paul intended to challenge the Property Damage Claim on the basis of the Anti-Subrogation Defence, it should have acknowledged coverage and raised the issue then. The Applicant says that having denied coverage and remained silent on the issue when the settlement was presented to them, St. Paul cannot challenge the terms of the settlement on this basis.

[58] I was not provided with any authority regarding whether an anti-subrogation provision is a liability defence or a coverage defence. It does not make sense that AIG, through Chubb and Greenwin, could bring a claim for payment for a claim that should be barred. Regardless of whether the anti-subrogation defence is a coverage defence or a liability defence, the strength of the anti-subrogation argument would be relevant to an assessment of the reasonableness of the settlement.

[59] The AIG policy provides that AIG waives its right of subrogation against "any Insured under this Policy." The AIG policy is a single policy. The anti-subrogation provision is located in the AIG Property Coverage section of the policy.

[60] The Applicant argues that the anti-subrogation provision only applies to an "Insured" under the AIG Property Coverage. The Respondent argues that the AIG policy is a single policy and the fact that the anti-subrogation provision is contained in the AIG Property Coverage is of no relevance.

[61] In *Morawietz v. Morawietz,* [1986] O.J. No. 582 (C.A.), a mother was allowed to sue her son for a house fire even though he had an insurable interest and was covered for his own personal loss. The son was not covered for the property damaged by his negligence. Only his parents as owners of the house were covered for property damage. Therefore, he was not protected from a subrogated claim. In *Rochon v. Rochon*, 2015 ONCA 746, 392 D.L.R. (4th) 304, the opposite result was reached because the son was a named insured under the property damage section of the policy. In both of these cases relied upon by the Applicants, subrogation was barred by operation of law, and the cases are distinguishable on this basis. I was not referred to any case where a subrogated claim is being advanced and the anti-subrogation provision is in the property damage section of the insurance policy.

[62] It does not seem to make sense for AIG to be allowed to pay itself for property claims out of the insured's liability insurance limits. This does not seem to be a reasonable interpretation of the policy. The only case provided to me by the Respondent is *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108, where the court endorsed the enforceability of an anti-subrogation provision. That case dealt with the application of the doctrine of privity of contract to a waiver of subrogation clause and did not address the issue of whether an anti-subrogation provision in one section of an insurance policy can apply to other sections. I was not provided any authority by either party on this point.

[63] Given my finding that St. Paul did not breach the insurance contract, it is not necessary for me to determine whether the anti-subrogation provision would have prevented AIG from subrogating against Greenwin.

5. The Owned Property Exclusion

[64] The Property Damage claim seeks compensation for damage to the Building that occurred during the Traveller's (St. Paul) policy period that was allegedly caused by Greenwin. There is no dispute that the Property Damage Claim falls within Insuring Agreement A of the AIG Liability Coverage and St. Paul's policy follows the form of that coverage.

[65] St. Paul denies coverage based on the Owned Property Exclusion. St Paul says that the owned property exclusion excluded coverage for claims arising out of property damage to property owned by TCHC.

[66] Exclusion (g) excludes coverage for "property damage" to

> property you own or occupy or rent, including costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason including prevention of injury to a person or damage to another's property; (the "Owned Property Exclusion")

[67] The policy distinguishes between the Named Insured and other insureds as follows:

> Throughout this policy the words "you" and ""your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured. The words "we", "us" and "our" refer to the company providing this insurance.
>
> The word "insured" means any person or organization qualifying as such.

[68] The Named Insured is TCHC and Greenwin is an insured; therefore, “you” and “your” do not refer to Greenwin in the AIG and St. Paul’s policies.

[69] According to the Applicants, “you” and “your” refer to the Named Insured TCHC and not Greenwin, and even if “you” refers to Greenwin, St. Paul has no evidence that Greenwin occupied the Building. St. Paul admitted it does not know whether Greenwin had a physical presence at the building, had access to the tenant units or exercised control over the Building. The onus is on St. Paul to show coverage is excluded based on the facts, not just the pleadings: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 SCR 23, at para. 52; *Nichols v. American Home Assurance Co* ., [1990] 1 SCR 801 at p. 808j. and 809b.

[70] The Applicant argues that the Owned Property Exclusion should be interpreted in conjunction with the severability of interests and cross liability provisions. The AIG Excess Coverage includes the following "severability of interests" and "cross liability" provisions:

> C. Severability of Interests
>
> The insurance afforded applies separately to each Insured against whom claim is made or suit is brought, but the inclusion herein of more than one Insured shall not operate to increase the limit of the Insurer's liability.
>
> E. Cross Liability
>
> In the event of claims being made by reason of Personal Injuries and/or "property damage" suffered by one Insured herein for which another Insured herein is or may be liable, this Policy shall cover such Insured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Insured herein. Nothing contained herein shall operate to increase the Insurer's limit of liability as set forth in Insuring Agreement IV.

[71] The Applicant argues that these provisions make it clear that the Owned Property Exclusion does not apply to Greenwin. The purpose of the Owned Property Exclusion is to prevent coverage for first party losses (*i.e.* losses to the insured’s own property). Greenwin was not entitled to first party coverage under the policy. Greenwin does not have an insurable interest in the Building or the AIG Property Coverage. The Property Damage Claim is not first party property coverage masquerading as third party liability coverage. If the Owned Property Exclusion applies to Greenwin, the general liability coverage afforded to real estate managers in the Building would be wholly illusory and amount to a nullification of coverage for Greenwin’s most obvious risk, being

damage to the property: *SFH Inc. v. Millard Refrigerated Services Inc.*, 339 F. (3d) 738 (8th Cir. 2003); *Parker Pad & Printing Ltd. v. Gore Mutual Insurance Company*, 2017 ONSC 3894, 138 O.R. (3d), at para. 34.

[72] The Applicants rely on *ING Insurance Co. of Canada v. Sportsco International L.P*., 2004 CanLII 14366 (Ont. S.C.), where the court held that a cross liability provision, such as the one here, modified an exclusion for property damage. The court said that the policy contemplated and permitted coverage for claims brought by one insured against the named insured and that the purpose of the owned property exclusion in the commercial general liability policy was to prevent coverage for first party losses. However, in the *Sportsco* case, the policy wording was different. It provided that the insurance did not apply to damage to "property owned or occupied by or rented to or loaned to **any** insured" (emphasis added). Arguably, there was ambiguity in that "any insured" could refer to either any insured under the policy, or it could refer only to the insured making the claim for coverage. In addition, the claim was for a business loss incurred which was separate from the property damage incurred by the named insured. The case is distinguishable on this basis.

[73] I do not agree that the Owned Property Exclusion does not apply. The language of the policy is clear. "You" is defined as the named insured, *i.e.* TCHC, and does not include Greenwin. This interpretation is consistent with many of the American cases: see *Chet Morrison Contractors LLC v. One Beacon American Insurance Company*, 132 F. Supp. 3d 825 (La. D. 2015), at p. 5; *Century Insurance Group v. The Hartford Fire Insurance Co*., 2009 WL 10682224 (Md. D. 2009), at p. 3; and *Employers Mutual Casualty Co. v. Shivam Trading Inc*., 2017 WL 2126911 (Ga. D. 2017), which expressly rejected the contrary view expressed in *Wyner v. North American Specialty Insurance Co*., 78 F. 3d 752 (1st Cir. 1996) relied on by the Applicant. I note that Judge Torruella, who authored *Wyner*, later sat on a panel which observed that the mainstream of opinions has held that "you" is unambiguous and refers solely to the Named Insured: *Wright-Ryan Construction Inc. v. AIG Insurance Company of Canada*, 647 F. 3d 411 (1st Cir. 2013). As well, *Wyner* dealt with an endorsement to the insurance policy in which *Wyner* was specifically named. That is not the case here.

Nullification and Cross Liability

[74] It is a well-established principle of insurance law that where an insured holds more than one policy of insurance that covers the same risk, the insured may never recover more than the amount of the full loss but is entitled to select the policy under which to claim indemnity, subject to any conditions to the contrary. The selected insurer, in turn, is entitled to contribution from all other insurers who have covered the same risk. This doctrine of equitable contribution among insurers is founded on the general principle that parties under a coordinate liability to make good a loss must share that burden pro rata: *Family Insurance Corp. v. Lombard Canada Ltd*., 2002 SCC 48, [2002] 2 SCR 695.

[75] The St. Paul policy provides as follows:

> OTHER INSURANCE If there is other valid and collectible insurance for loss covered by this agreement, our obligations are limited as described below. This agreement is excess over any other valid and collectible insurance, other

> than such insurance that was purchased specifically to apply in excess of the limits of coverage that apply to this agreement. Other valid and collectible insurance means insurance policies or contracts or alternative risk transfer or financing methods such as risk retention groups or self-insurance programs.

[76] The Chubb policy provides as follows:

> Other Insurance
>
> If other valid and collectable insurance is available to the insured for loss we would otherwise cover under this insurance, our obligations are limited as follows. This insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis. We will have no duty to defend the insured against any suit if any provider of any other insurance has a duty to defend such insured against such suit. This insurance is not subject to the terms or conditions of any other insurance.

[77] The Applicant argues that the other insurance provisions of the Chubb and St. Paul policies are mutually repugnant, the insurers must share equally until their limits are exhausted (*Family Insurance*, at paras. 38 and 39) and therefore St. Paul is liable to contribute 50% of the Property Damage Claim.

[78] The Respondent's position is that nullification and cross liability arguments have no application.

[79] The purpose of cross liability provisions is to treat the policy as if it was issued separately to each insured so that a violation of the policy by one insured does not impact the coverage available to another insured. Cross liability provisions do not change the policy wording or definitions. The cross liability provisions do not change the definition of "Named Insured" or "you" or expand coverage so that an insured becomes a named insured. This would result in a cascading expansion of coverage. If Greenwin is the named insured, then Greenwin's real estate manager would be an insured, and so on. This is not the purpose of the coverage.

[80] The doctrine of nullification provides that an exclusion will not be applied if it is inconsistent with the main purpose of the insurance coverage and would result in virtually no coverage at all and applying the exclusion would be contrary to the reasonable expectations of the ordinary person in the position of the insured: *Parker Pad & Printing* at para. 33, citing *Zurich Insurance Co. v. 686234 Ontario Ltd.*, 62 O.R. (3d) 447 (C.A.), leave to appeal refused, [2003] S.C.C.A. No. 33, at para. 28.

[81] The purpose of the liability coverage purchased for TCHC is third party liability coverage, and it is not intended to cover damage to TCHC's own property. Greenwin, as a named insured, is protected for the same risk as TCHC and has coverage for claims by third parties. There is no reason why Greenwin would have coverage for extra risks beyond the coverage for TCHC.

[82] The Applicant argues that the policy purchased by TCHC is the same as the policies Greenwin purchased to protect itself from third party liability claims. If the Applicant's

interpretation was correct, the “your” property exclusion would be rendered meaningless. The exclusion states that TCHC cannot recover for damage caused to its own property. TCHC is a corporation and can only act via an individual, e.g., an officer, director, employee, or real estate manager. Under the Applicant’s interpretation, the exclusion would effectively allow for TCHC to recover for damage its employees caused to TCHC's property under its own liability policy. This was clearly not the intent and certainly not the wording of the exclusion. Under the Applicant’s interpretation that “you” means the insured seeking coverage, the exclusion would only apply if the insured seeking coverage’s property is damaged. That would make no sense. The exclusion would never apply and it would effectively be first-party coverage.

[83] The exclusion must be interpreted to mean that there is no coverage for damage to TCHC’s property caused by Greenwin. There is third party liability coverage for Greenwin as TCHC’s real estate manager and the owned property exclusion does not render this coverage meaningless.

[84] Greenwin had its own insurance with Zurich and Chubb which does not exclude damage to TCHC’s property. The Named Insured in Greenwin’s policy is Greenwin. The owned property exclusion in Greenwin’s policies exclude damage to Greenwin’s own property.

[85] I find that the principle of nullification does not apply to prevent the application of the owned property exclusion.

[86] I find that the owned property exclusion excludes claims arising out of property damage to property owned by TCHC. The fact that Greenwin is also an insured under the policy does not change the plain meaning of the exclusion.

[87] The Applicant says not all of the $35M paid by AIG relates to property damage and that some of it relates to other things, like costs for security, and that these other things would not fall within the owned property exclusion. This was raised for the first time in reply and I was not given any authority for the proposition advanced nor any breakdown of how much of the $35M relates to property damage. It is impossible for me to make a determination of the amount of the claim that would fall within the owned property exclusion and, in the absence of an agreement, a trial would be required to determine this issue. However, since I have found that St. Paul did not breach the insurance contract, a trial on this issue is not necessary.

6. Tenants Insurance

[88] The Owned Property Exclusion does not apply to Insuring Agreement D of the AIG Liability Coverage and St. Paul’s policy, which follows the same form. Insuring Agreement D provides:

> COVERAGE D. TENANTS' LEGAL LIABILITY
>
> 1. INSURING AGREEMENT
>
> a) We will pay those sums that the insured becomes legally obligated to pay as "compensatory damages" because of "property damage" to which this insurance applies. This insurance applies only to

> **"property damage" to premises of others rented to you or occupied by you**. We will have the right and duty to defend the insured against any "action" seeking those "compensatory damages". However, we will have no duty to defend the insured against any "action" seeking "compensatory damages" for "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "action" that may result…. (Emphasis added.)

[89] The Applicants say this means AIG, and therefore St. Paul, agree to pay those sums that the "insured" (including Greenwin) becomes legally obligated to pay as "compensatory damages" because of "property damage" to premises of others (tenants) occupied by "you". The Applicants say this means damage to the tenants' premises is covered because the premises were occupied by TCHC. They say this coverage is not just for situations where TCHC is a tenant.

[90] I find that this tenant's liability insurance applies to property damage to the premises of others rented to TCHC or occupied by TCHC. The damages in issue here are damages to the property of TCHC and not damages to the premises of others. The tenants' claims have been paid; this claim is about damage to TCHC's premises. There is no coverage for this claim under the Tenants Insurance provisions of the policy.

7. Relief from Forfeiture

[91] On the second and final day of the hearing of this Application, counsel for the Applicants uploaded a case to CaseLines dealing with relief from forfeiture, which he addressed for the first time in reply. The Applicants' submission was that, in the event that I find that the Respondent did not deny coverage and had to approve the settlement, the Applicants should be granted relief from forfeiture for not obtaining the Respondent's consent to the settlement. The case provided is *Kozel v. The Personal Insurance Company*, 2014 ONCA 130, 119 O.R. (3d) 55. This case dealt with a motor vehicle accident where the insured had forgotten to renew her driver's license before the accident.

[92] The court considered the statutory provisions found in s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and s. 129 of the *Insurance Act*. Under s. 98, "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just." Section 129 provides:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

[93] Relief under s. 129 is available where there is imperfect compliance with a policy term relating to proof of loss, but not where the breach consists of non-compliance with a condition

precedent: *Kozel* at para. 33. Under s. 98, relief is available when there is imperfect compliance with a policy term rather than non-compliance with a condition precedent: *Kozel* at para. 34. The focus is on whether the breach of the term is serious or substantial and, where the term or provision is fundamental, its breach is cast as non-compliance with a condition precedent: *Kozel*, at paras. 40-41. I was provided with no authority as to whether the requirement for approval of a settlement has been considered in this context. In this case, the failure to obtain St. Paul's approval of the settlement was not inconsequential or trifling. When the Applicants proceeded to settle the case without St. Paul's approval, it breached a fundamental term of the insurance contract.

[94] In the event that I am wrong on this point, I find that this is not an appropriate case for relief from forfeiture. In determining whether to grant relief from forfeiture, the court considers three factors: (i) the conduct of the applicant; (ii) the gravity of the breach; and (iii) the disparity between the value of the property forfeited and the damage caused by the breach: *Kozel*, at para. 59. The Applicants offered no explanation as to why they settled the case without insisting on a reply from St. Paul. The breach was grave. The prejudice to St. Paul is great: they lost the opportunity to make a decision as to whether they would deny coverage, accept coverage, reserve rights or seek a coverage determination from the court. They lost the right to participate in the settlement, to properly assess the settlement and the opportunity to determine whether the limits were properly exhausted. The damage caused by the breach was great and this is not an appropriate case for relief from forfeiture.

COSTS

[95] The parties are encouraged to agree on costs. In the event that they are unable to do so, they may each make submissions of no more than 3 pages in length in addition to costs outlines on or before **September 22, 2023.**

Merritt J.

Released: September 8, 2023

CITATION: Greenwin Inc. v. St. Paul Fire and Marine Insurance Company, 2023 ONSC 5097
COURT FILE NO.: CV-19-00632825-0000
DATE: 20230908

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GREENWIN INC. and
CHUBB INSURANCE COMPANY OF CANADA

Applicants

- and -

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY

Respondent

REASONS FOR JUDGMENT

Merritt J.

Released: September 8, 2023