CITATION: AllenDB Holdings Limited v. Stewart Title Guaranty Company, 2024 ONSC 3243
COURT FILE NO.: CV-23-00693784-0000
DATE: 20240605

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ALLENDB HOLDINGS LIMITED, Plaintiff

AND:

STEWART TITLE GUARANTY COMPANY, Defendant

BEFORE: Akazaki J.

COUNSEL: Robert W. Trifts, for the Plaintiff

Sean N. Zeitz, for the Defendant(s)/ Respondent(s)

HEARD: May 27, 2024

REASONS FOR JUDGMENT

[1] This summary judgment motion arose from an insurance coverage dispute over the value of a mortgage lender's loss arising from title fraud.

[2] The plaintiff is a private mortgage lender who lent $600,000 to the impersonator of the owner of a property at 373 Joicey Blvd., Toronto. Once the parties became aware of the fraud, the mortgage had to be discharged. Because the mortgage entailed prepaid interest and various fees, the actual net advance was $509,939.12. Fortunately, the plaintiff recovered $498,256.40 through the cheque clearance process of the Canadian Payments Association (CPA).

[3] The defendant is a title insurer. After the CPA recovery, the defendant indemnified the plaintiff the amount of $79,366.45, consisting of the $11,682.72 difference between the net advance and the recovery, plus various other amounts irrelevant to the coverage analysis in this action.

[4] The issue between the parties is whether the defendant is also obligated to indemnify the plaintiff for an additional $72,000.00, equivalent to the interest portion of the loan.

TEST FOR SUMMARY JUDGMENT

[5] Para. 20.04(2)(b) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that the court shall grant summary judgment if the parties agree that the claim can be determined summarily, and if the court is satisfied that it is appropriate to grant summary

judgment. The parties agreed to submit the issue to summary judgment. Subrule 20.04(4) allows the court to determine a question of law and grant judgment accordingly.

[6] Summary judgment is clearly appropriate, and I need not recite case law confirming this interpretation of the rule. There is no factual dispute pertaining to the transaction. The insurance policy is a standard form of title insurance applicable to mortgage securities. The Supreme Court has characterized interpretation of standard form insurance contracts as a question of law: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016] 2 SCR 23, at para. 4.

INSURANCE POLICY INTERPRETATION

The Parties' Positions

[7] The plaintiff contends the $72,000 was part of its loss in the fraud. The mortgage contemplated the borrower discharging the loan by repayment of the full $600,000 principal. The mortgage $72,000 interest and certain fees were "collected" up front, in the sense that these amounts were withheld from the loan advance to the borrower at the start of the mortgage term.

[8] The defendant's position was that the contract of indemnity did not insure what the plaintiff never lost by retaining the $72,000 as a prepayment. The plaintiff had to have paid the funds before it could be considered a loss when it was not repaid or recovered.

The Relevant Insurance Policy Wordings

[9] The policy of title insurance contained the following insuring agreement:

> 7. DETERMINATION AND EXTENT OF LIABILITY
>
> This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant, who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

[10] There was no dispute that the mortgage fraud and identity fraud perpetrated against the plaintiff was an insured peril.

[11] Immediately below s. 7, the insuring agreement was subject to the following limitation of liability:

> (a) The liability of the Company under this policy shall not exceed the least of:
>
> …

> (ii) The amount of unpaid principal indebtedness as defined in 2(c)(ii) secured by the insured Mortgage … at the time of the loss or damage insured against by this policy occurs, together with the interest thereon;

[12] Clause 2(c)(ii) read as follows:

> (ii) the amount of the principal of the indebtedness secured by the Insured Mortgage, at the time of acquisition of the estate or interest, interest thereon, expenses of foreclosure, amounts advanced pursuant to the Insured Mortgage to assure compliance with laws or to protect the Insured Mortgage prior to the time of acquisition of the estate or interest in the Land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made;

[13] Clause 2(c)(ii) expanded the scope of the "unpaid principal indebtedness" in s. 7 to include foreclosure expenses and other amounts irrelevant to the issue before the court. When read in conjunction with s. 7, the concluding words of cl. 2(c)(ii) did not capture any payments of interest because interest under s. 7 was not qualified or defined by cl. 2(c)(ii).

[14] During the course of argument, there emerged an issue of the interpretation of the Lender Exception Endorsement. Counsel for the defendant agreed that this endorsement did not nullify coverage, because the fraudster had actually availed himself of the services of a law firm, Realtus Law P.C., for the purposes of receiving the mortgage advance. Therefore, this endorsement will not factor in my reasoning.

Principles of Contractual Interpretation Applicable to Standard Form Insurance Contracts

[15] The provisions in an insurance contract are essentially no different than any other commercial contract. As the Supreme Court of Canada has reiterated, "The actual words chosen are central to the analysis because this is how the parties chose to capture and convey their contractual objectives." To determine the true intent so captured, the court "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc*., 2024 SCC 20, at para. 63.

[16] Although Rothstein J. described a liability policy, his interpretive instructions in *Progressive Homes* can be applied to the structure of most insurance contracts. First, the insurance will provide an agreement to insure, i.e. a coverage grant. Second, the policy can contain exclusions. Exclusions derogate from the initial grant. Thirdly, exceptions from exclusions can bring an otherwise excluded claim back within the grant, although the exceptions do not create coverage: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 SCR 245, at paras. 26-28.

[17] Clauses limiting liability are in the same class as exclusions and are subject to their own set of legal rules: *Earthco*, at para. 66. In the insurance context, the insurer must demonstrate that it clearly and unambiguously derogates from the coverage grant: *Progressive Homes*, at para. 51. In these and other cases, the Supreme Court has applied the general principle of interpreting coverage grants broadly and exclusions narrowly: *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co*., [1993] 1 SCR 252, at 269.

Application of the Principles to the Clauses and the Plaintiff's Claim

[18] The defendant argued it was only liable for $11,682.78 in unpaid principal, which it has already paid. This was the difference between the net advance of $509,939.12 to the phantom borrower and the $498,256.40 CPA recovery. The plaintiff did not claim its loss of fees, but it did claim $72,000 lost in the transaction. The defendant denied coverage for this amount, equivalent to the $72,000 prepaid interest, because the plaintiff never paid it to the borrower.

[19] The defendant's argument was confusing, partly because it effectively read the coverage grant and limitation clauses together as a consolidated definition of coverage. Instead of treating the limitation clause as defining the coverage grant, and vice-versa, one must first review the grant as a stand-alone insuring agreement and then consider how the limiting clause might restrict the insurer's liability.

[20] The wording of the insuring agreement requires the court to consider what "actual monetary loss or damage" the plaintiff has sustained or incurred. The task of identifying the loss or damage can be simplified analytically by disregarding the items not related to principal and interest, such as fees and other expenses. (Technically, such additional items could qualify as loss or damage, but the plaintiff did not claim them because they were clearly limited by the subsequent limitation of liability clause. Inclusion of such items would raise the aggregate cost of the loan well above $672,000, but disregarding them will limit the equation to that basic figure.)

[21] The plaintiff entered into a mortgage loan with a principal value of $600,000 with the expectation that it would be repaid that amount with interest of $72,000, for a total monetary value for principal and interest of $672,000. Had the borrower been the true owner, that is the amount the lender would have had in its pocket by deducting $72,000 from the advance and being repaid $600,000 at the end of the term. Were it not for the CPA recovery, the actual loss or damage suffered by the plaintiff would have been $600,000, not $672,000, because the plaintiff received the $72,000 by not advancing it.

[22] The analysis may be seen more clearly from the perspective of the borrower. The use of a set-off to effect the prepayment feature of the loan means the borrower paid no interest up front. This means the word "prepayment" is factually a misnomer. The borrower would have paid the interest at the end, by repaying $600,000, i.e. $72,000 more than the original loan advance.

[23] The defendant's position excluded the $72,000 the plaintiff "collected" by withholding the prepaid interest amount and also excluded the plaintiff's loss of the borrower's actual payment of that amount at the end of the mortgage term through repayment of $72,000 more than the plaintiff had advanced. Crediting the borrower with a "payment" of prepaid interest when the borrower never made such a payment results in a false accounting of the plaintiff's loss by reducing the principal indebtedness from $600,000 to $528,000.

[24] The phrase, "actual monetary loss or damage," in the coverage grant did not depend on a characterization of loss as principal or interest. The fact that the plaintiff withheld $72,000 from the advance as prepaid interest meant it did not receive from the mortgagor the $600,000 unpaid principal indebtedness. The holdback was an accounting exercise and masked the fact that it was no different than an advance of $600,000 paid by cheque to the borrower in exchange for a cheque from the borrower for $72,000, followed at the end of the one-year term by the borrower's repayment of $600,000. The prepayment feature only meant the borrower was not expected to pay interest in monthly instalments.

[25] The defendant argued that the limits clause defined the insurance coverage, but clearly that was incorrect. This point may not seem to have a practical impact on the coverage analysis because the insurance claim was limited to unpaid principal and interest. However, it could have a differential application if the coverage grant and the limitation of liability are each to be read in accordance with distinct interpretive principles. (The grant is broad. The limitation clause is to be construed with any ambiguities in the insured's favour.)

[26] The plaintiff's actual monetary loss or damage, however characterized as principal or interest, amounted to $600,000. After the CPA recovery, the indemnity from the defendant, and the exclusion of ineligible items, a plain reading of the coverage grant produces an insured loss amount of $72,000.

[27] The defendant relied on three decisions in support of its position that the policy did not cover the $72,000 the plaintiff had not advanced to the phantom borrower because it was not actual monetary loss or damage.

[28] First, it cited *Nodel v. Stewart Title Guaranty Company*, 2018 ONCA 341, at para. 24, for the proposition that the insured funds must have been advanced to the borrower or owner before qualifying as actual loss. That case entailed the interpretation of specific wording in a title insurance policy, namely "are paid to," in an entirely different context.

[29] One cannot interpret how monetary loss or damage is sustained or incurred as meaning amounts that are "paid," by reference to a court decision interpreting the word "paid." That reasoning is entirely circular. In fact, that logical flaw only highlights the fact that the defendant could have used the word "paid," if the defendant intended to restrict the indemnity available to the plaintiff. The defendant chose not to employ such wording.

[30] Second, the defendant relied on *Elmford Construction Company Limited v. South Winston Properties Inc.* (2002), 59 O.R. (3d) 107 (Div. Ct.), arguing that the case was analogous to

the requirement of actual receipt of funds under the trust provision under construction lien legislation. That statute is not relevant to the interpretation of an insurance contract.

[31] Third, the defendant cited the following reasoning in *Serbinski v. FCT Insurance Company Ltd*., 2018 ONSC 3029, at para. 31, as being "on all fours" with the instant case:

> [31] There remains the issue of the $20,000 "lender's fee". FCT submits that because the amount of that fee was deducted from the mortgage amount, reducing the amount that the plaintiff advanced under the mortgage, there is no loss. The plaintiff submits that he expected to be paid this fee out of the mortgage proceeds in due course and has therefore suffered a loss. The plaintiff also relies on the above submission based on the Standard Charge Terms, submitting that this fee should be treated as principal. However, this amount did not form part of the principal that was advanced under the mortgage and it too does not fall within the costs and expenses that are covered under the Policy.

[32] I did observe that, earlier in the *Serbinski* decision, the judge had stated in paras. 17-19 that the insuring agreement unquestionably covered "unpaid principal indebtedness together with interest thereon." Paragraph 31, however, turned on the fact that the lender's fee could not be considered principal. That reasoning has no bearing to this case. From a practical perspective, I agree with the learned judge in the *Serbinski* case that the limiting clause effectively defines the loss by restricting the available insurance to unpaid principal and interest thereon. The plaintiff here did not claim indemnity for the loss of its administrative fee, because the court in *Serbinski* correctly interpreted the limitation of liability as excluding such fees.

[33] The words, "actual monetary loss or damage sustained or incurred," do not specify precisely how such loss or damage can be sustained or incurred. Indeed, the causal element of that phrase is expressly very broad. The words "actual monetary" imply a real loss, as opposed to a theoretical or consequential loss. Both principal and interest are integral to the mortgage transaction. Absent a qualification that the loss can occur only through the mechanism of payment, a party can sustain or incur monetary loss or damage measured by an imbalance in debit and credit entries. This reflects the reality of real property transactions, in which the bottom line results from an accounting exercise. Had the insurer required the lender and borrower exchange a cheque of $600,000 in return for one of $72,000 to qualify for insurance on the unpaid $600,000, the policy could have expressed such an intention in clear terms. Certainly that transaction would have been less attractive to a fraudster, but the insurer accepted a premium for the risk of a transaction more conducive to title fraud.

[34] Having accepted the premium, the insurer cannot enlist the court to rewrite the policy after the loss to limit its liability. Indeed, the defendant's submission that actual payment by the lender to the borrower should be read into the insuring agreement turns on end the Court of Appeal's statement in *Alie v. Bertrand & Frere Construction Co. Ltd*., 2002 CanLII

31835 (ON CA), at para. 219, regarding the limits of liberal interpretation in favour of *policyholders*:

> [219] This court has vigorously interpreted ambiguities in insurance contracts in favour of the insured. It has, however, stopped short of rewriting those contracts: *Chilton et al. v. Co-operators General Insurance Co.* (1987), 1997 CanLII 765 (ON CA), 143 D.L.R. (4th) 647 at 652 (Ont. C.A.). An invitation to imply a duty to defend into the Guardian policy is an invitation to rewrite that policy in a dramatic way. None of the limited bases upon which Canadian courts have been prepared to imply terms into a contract operate here: see *G. H. L. Fridman, The Law of Contract in Canada*, 4th ed., (Toronto: Carswell, 1999) at 514-516.

[35] I therefore decline to interpret the coverage grant in s. 7 as having required an actual payment by the borrower in the full sum of the loss or damage. Moreover, the coverage grant does not define loss or damage in terms of principal or interest. I find that the plaintiff's insured loss was $600,000, less the $498,256.40 CPA recovery and less the $11,682.72

[36] The interpretive exercise then turns to cl. 7(a)(ii), limiting the liability of the insurer to the amount of unpaid principal indebtedness and interest thereon. The defendant argued that it was not liable to indemnify the plaintiff for $72,000 on account of prepaid interest. The plaintiff pointed out that it never received the interest. Rather, the withholding of $72,000 meant the borrower would be paying it at the end of term by repaying the principal even though it had received less at the outset. In this regard, prepayment was somewhat of a misnomer in that there was no payment but an accounting set-off.

[37] Because of the prepayment of interest, as set-off against the advance of principal, the plaintiff limited its claim to unpaid principal indebtedness of $600,000 less the CPA recovery. Characterizing the claim as interest because the interest was $72,000 the plaintiff "received" by way of set-off somewhat confuses the coverage analysis but should not allow the insurer to count it twice against its indemnity obligation. The face value of the principal stated on the loan was $600,000. The $72,000 interest was an additional amount the borrower owed.

[38] Clause 7(a)(ii) limited the amount of insurance liability but did not define it. Unlike clause (i), which defined the limits in relation to a monetary figure stated in a separate schedule, clause (ii) contained a verbal description of the limitation. In that regard, clause (ii) operated in a manner similar to an exclusion clause, by disqualifying any loss that was not principal indebtedness or interest.

[39] The limitation of liability measured by *indebtedness* and not by the amount of the advance may appear further to undermine the defendant's argument on the construction of actual loss or damage. I do not construe this clause as defining the loss, however. Rather, the clause expressed the insurer's intention to limit its liability in terms of indebtedness as a measure instead of the amount of the advance or payment. The limiting clause was a

second occasion to define the scope of coverage by taking away coverage granted in the insuring agreement. In the absence of clear wording that payment or advance of money restricts the scope, the court should not read such a meaning into the contract. The loan provided for the borrower to repay $600,000 at the end of the term. That being the indebtedness at the time of the loss, the fact that it included an accounting for withheld/prepaid interest did not change the fact that it was the full amount of principal owed by the borrower at the end of the term.

[40] Although the defendant did not expressly state it in its argument, I did observe that cl. 7(a)(ii) temporally fixed the unpaid principal indebtedness by the words, "at the time the loss or damage insured against by this policy occurs," followed by the words, "together with the interest thereon." Reading the clause as a whole, it clearly and grammatically meant to limit the available insurance to the unpaid principal indebtedness at the time of the loss, together with the interest thereon.

[41] In construing this clause, one must remember that the measure of the loss or damage in terms of *unpaid* principal indebtedness entails a negative concept. What the lender loses is what the borrower has not be repaid as of the time of loss. This differs from forms of loss or damage in other legal contexts which typically accrue over time. Here, the limitation on liability measures loss in terms of the total amount of principal owing during the balance the mortgage term and due at the end of it.

[42] I do not read the words, "at the time the loss or damage … occurs" as capping the insurance on the interest on the unpaid principal to the interest earned to that time. Mortgage fraud occasions loss at the time the lender closes the transaction, i.e. at the beginning of the term. Reading the clause as "together with the *earned* interest" would derogate from the insurance in a manner that would render the insurance including interest "nugatory," *viz*. an interpretation to be avoided because the limit or exclusion could eliminate the coverage: *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 SCR 888, at 901.

[43] I can imagine scenarios, in the case of a traditional mortgage with monthly instalments, where a fraudster might string the lender along by making some initial payments and thus reduce the lender's loss of interest due on the loan. In those instances, the interest received as part of the monthly instalment would reduce the indemnity under the coverage grant and need not be limited by a clause such as 7(a)(ii). As a contractual provision limiting liability under the insuring agreement, even if it does not render an element of coverage "nugatory," the court must construe it narrowly and interpret any ambiguity in favour of the grant and not the limitation of coverage. Consequently, the most reasonable reading of the words, "together with the interest thereon" includes the interest on the unpaid principal indebtedness for the full term. This interpretation is also consistent with the coverage grant defining actual monetary loss or damage sustained or incurred by the insured. Interest, as the consideration for the loan principal, amounts to actual loss or damage if unpaid.

[44] Finally on the subject of the limiting clause, it might seem logical to construe language falling short of limiting liability for certain categories of interest as evidence that such interest came within the coverage grant in the insuring agreement. As Rothstein J. warned

in para. 27 of *Progressive Homes*, "Exclusions do not create coverage" by what they fail to exclude or limit. Rather, this part of the coverage analysis ends with the conclusion that cl. 7(a)(ii) limited the insurer's liability for loss or damage to the unpaid principal indebtedness and interest thereon, but not in a way that allowed the insurer to decide that its liability was further limited to some portion of the overall loss of $600,000.

[45] The plaintiff's actual loss under the coverage grant in s. 7, after the CPA recovery and the insurance payout, was $72,000. The limiting clause 7(a)(ii) did not affect the defendant's liability to indemnify the plaintiff for that remaining amount.

[46] Therefore, the plaintiff is entitled to summary judgment in the amount of $72,000. The parties agreed at the hearing that the insurer did make $1,117.79 in *ex gratia* payments for items that were not covered. The insurer should receive credit for such payments. The total damages are therefore fixed in the amount of $70,882.21.

PREJUDGMENT INTEREST

[47] The plaintiff contends that prejudgment interest should run at the rate stated in the loan agreement, 12%. Given that the insurance contract extends to interest as part of the insured loss, damages for the failure to indemnify the insured should bear interest at this rate.

[48] The prejudgment interest calculated from the February 5, 2021, date of loss amounts to $28,337.35.

COSTS

[49] There is a long line of authority for the proposition that an insured should not be put to any expense in a successful insurance coverage case: *EPCOR Electricity Distribution Ontario Inc. v. Municipal Electric Association Reciprocal Insurance Exchange*, 2021 ONSC 5680, at paras. 3-10. That said, the insured elected to bring an action instead of an application under rule 14.05, which is the preferred procedure when no material facts are in dispute. Given my comments below and my review of the costs outlines filed by the parties, I need not delve too deeply into the effect of the choice of procedure on the costs expenditures of the parties.

[50] The plaintiff has submitted a costs outline requesting costs on a substantial indemnity scale, in the amount of $41,248.43. In that this discounts the actual legal expenses that could be awarded on a full indemnity scale, I find the amount reasonable and comparable to the amount of $38,771.01 stated in the defendant's costs outline on a substantial indemnity scale.

[51] Having regard to the costs outlines submitted by each side, I award costs of the action and the motion to the plaintiff in the total amount of $41,248.43, all-inclusive.

Akazaki J.

Date: June 5, 2024