COURT OF APPEAL FOR ONTARIO

CITATION: Thunder Bay (City) v. Great American Insurance Company, 2024 ONCA 837
DATE: 20241113
DOCKET: COA-24-CV-0250

2024 ONCA 837 (CanLII)

Pepall, Nordheimer and Zarnett JJ.A.

BETWEEN

The Corporation of the City of Thunder Bay

Applicant (Respondent)

and

Great American Insurance Company

Respondent (Appellant)

AND BETWEEN

Lloyd's Underwriters

Applicant (Respondent)

and

Great American Insurance Company* and
the Corporation of the City of Thunder Bay

Respondents (Appellant*)

Mark Barrett, for the appellant

Gord McGuire and Sean Blakeley, for the respondent, The Corporation of the City of Thunder Bay

Joyce Tam and Thomas J. Donnelly, for the respondent, Lloyd's Underwriters

Heard and released orally: November 12, 2024

On appeal from the judgment of Justice Tracey Nieckarz of the Superior Court of Justice, dated February 20, 2024, with reasons reported at 2024 ONSC 1085.

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REASONS FOR DECISION

[1] Great American Insurance Company appeals from the judgment of the application judge who found that the appellant had a duty to defend the respondent, The Corporation of the City of Thunder Bay ("the City"), with respect to certain proceedings, which we describe below.

[2] The City has been sued in a number of proceedings that allege that the City's introduction of sodium hydroxide into the City's water supply has caused widespread property damage and other losses, for which the City is alleged to be liable in negligence and other causes of action. From 2017 to 2020, the City had a general liability insurance policy issued by Lloyd's. Thereafter, the City was similarly insured by the appellant.

[3] The appellant contends that it does not have a duty to defend the City against these claims because the insurance policy contained an exclusion for claims related to the effects of lead. It is contended that the City introduced sodium hydroxide into the water system to counter the effects of lead.

[4] The application judge gave detailed reasons for her conclusion that the appellant had a duty to defend. In particular, the application judge found that at least one part of the lead exclusion was ambiguous and that there was at least "a mere possibility" that the exclusion did not apply to the claims. The application judge relied on the decision in *Progressive Homes Ltd. v. Lombard General*

Insurance Co. of Canada, 2010 SCC 33, [2010] 2 S.C.R. 245, where Rothstein J. said, at para. 51:

> Having found that the claims in the pleadings fall within the initial grant of coverage, the onus now shifts to Lombard to show that coverage is precluded by an exclusion clause. Because the threshold for the duty to defend is only the possibility of coverage, Lombard must show that an exclusion clearly and unambiguously excludes coverage (*Nichols*, at p. 808).

[5] The appellant has failed to show any error in the application judge's analysis and conclusion in this regard. We agree that one section of the lead exclusion provision is ambiguous and consequently, on the principle enunciated in *Progressive*, the appellant must defend the City with respect to these claims.

[6] In light of our conclusion on the main issue, it is unnecessary for us to address the argument that the lead exclusion is unenforceable pursuant to s. 124 of the *Insurance Act*, R.S.O. 1990, c. I.8.

[7] The appeal is dismissed. The respondents are entitled to their costs of the appeal. As agreed between the parties, the costs for the respondent Lloyd's are fixed on a partial indemnity basis in the amount of $16,500, inclusive of disbursements and HST and the costs for the respondent City are fixed on a substantial indemnity basis in the amount of $30,000, inclusive of disbursements and HST.

"S.E. Pepall J.A."
"I.V.B. Nordheimer J.A."
"B. Zarnett J.A."

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