

June 30, 2016

V. SURETY AND BOND ISSUES

**Obligee's claim against surety can survive despite
Obligee's claim against principal being
unenforceable as a result of wording of completion
agreement**

***HOOPP Realty Inc. v. The Guarantee
Company of North America, [2015 ABCA 336](#)***

I. FACTS AND ISSUES

This is the appeal of the decision in *HOOPP Realty Inc. v. The Guarantee Company of North America, 2015 ABQB 270*, which was briefed in the June 2015 edition of *Defence & Indemnity*. The appeal was unanimously dismissed, allowing HOOPP Realty Inc. (HOOPP), to continue its action against GCNA.

This case arises from a dispute involving the construction of a warehouse, between HOOPP, the owner, and Clark Builders, the general contractor.

GCNA, as surety, issued a Performance Bond whereby it guaranteed the performance of the obligations of Clark Builders to HOOPP under a Design-Build contract. After the construction of the warehouse was completed, deficiencies were found in the warehouse floor.

GCNA, Clark Builders, and HOOP entered into a completion agreement whereby Clark Builders undertook to replace the floor at its cost (Bond Agreement). Clark Builders then undertook the remedial work. Importantly, the 2004 Bond Agreement contained express provisions preserving HOOPP's ability to claim losses or damages for legal costs, investigation costs and interest (Fees Claim) in relation to the remedial work.

A dispute arose between Hoopp and Clark Builders as to whether or not the remedial work was successful. HOOPP commenced separate actions against Clark Builders and GCNA, with the latter action eventually being amended to be only with respect to the Fees Claim. The claim against Clark Builders was struck due to HOOPP's failure to commence mandatory arbitration within the limitation period.

GCNA then applied to strike HOOPP's claim against it on the basis that if HOOPP's action against Clark Builders no longer existed, then at law the claim against GCNA must also have been extinguished.

GCNA's application was brought under Rule 3.68(2)(b) of the *Alberta Rules of Court* which allows a party to have a pleading struck if that pleading fails to disclose a reasonable cause of action. Under this rule, no evidence may be tendered by the applicant to support its application.

The chambers judge dismissed the application. He first concluded that Rule 3.68(2)(b) required him to assume the facts in the claim were true, as no evidence could be led by the applicant, GCNA. He made this finding notwithstanding that the earlier decision in the Clark Builders' action addressed aspects of the claim against GCNA. In the alternative, the chambers judge applied ***Meridian Developments Ltd. v. Nu-West Group Ltd.*** (1984), 52 A.R. 248 to conclude that a guarantor remains liable even though the debtor is released where the contract creating the guarantee obligations so provides. He held that the provisions of the 2004 Bond Agreement created an arguable issue as to provide continuing obligations for GCNA.

The issues addressed on appeal were whether the words used in HOOPP's Statement of Claim described a valid cause of action, and whether the chambers judge was precluded from considering factors other than evidence, including decisions in companion litigation (i.e., the claim dismissed against Clark Builders).

On appeal, the majority held that the chambers judge erred in failing to consider earlier reported decision in the Clark Builders' action which addressed aspects of the same claim in determining whether a "reasonable claim" existed. They found that "[t]o conclude otherwise [and] allow actions to continue that have no reasonable prospect of success would be to ignore the culture shift described in ***Hryniak v. Mauldin***, 2014 SCC 7 toward simplifying pre-trial procedures and promoting timely and affordable access to justice." However, they deferred to the chambers judge with respect to his second conclusion and agreed that the provisions of the 2004 Bond Agreement may arguably be found sufficient to render GCNA liable to HOOPP.

Justice Wakeling, while concurring in the majority's result, found separately that a court may only refer to the facts alleged in the commencement document when it assesses the merits of an application under Rule 3.68 of the *Alberta Rules of Court*. He disagreed with the majority in this respect, finding that the argument "in favour of economical and expeditious resolution of disputes does not justify judicial amendment of clear text" and concluded that the appeal should be dismissed.

II. COMMENTARY

It should be noted that the Court of Appeal did not decide that GCNA was in fact liable to HOOPP even though the claim against Clark Builders has been struck. Rather, the Court only held that it was reasonably possible that a claim against GCNA could still exist at law notwithstanding there was no longer a claim possible against Clark Builders.

The facts of this case are somewhat unique. To the extent there is companion litigation which may affect the consideration of the reasonableness of a cause of action in a separate action, then we now know that the Court should consider any findings made in such companion litigation. While this case clarifies the factors to be considered by the Court in making a decision under Rule 3.68(2)(b), this technical finding will not matter to the surety industry. However from an industry perspective, this case underlines the importance of the content and scope of completion agreements. A review of the decision at the Court of Appeal and at the Chambers' level does not provide very much insight into the content of the completion agreement in question, but it was the scope of that agreement which resulted in a finding that the obligee's claim against the surety remained a legal possibility.

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