

INSURANCE ISSUES

Where an insurer contributes more than its share to a defence and settlement of a claim vis-à-vis other insurers who are involved, it may seek contribution from the other insurers even where the policies are complementary and not overlapping.

***Aviva Insurance Company v. Intact Insurance Company,* 2018 ONSC 238**

FACTS AND ISSUES:

The Plaintiff Novak fell off a ladder at an after-hours jam session held at Patel's engineering firm Lakeland Engineering. The engineering firm leased the property from a numbered company, 106220 Ontario Inc., which was controlled by the insured Patel. Novak sued the insured, the engineering firm, and the numbered company.

The insured sought coverage from three insurers and all three policies contained "other insurance" clauses:

- Royal Sun Alliance ("RSA") which covered the insured Patel as a principal of the engineering firm;
 - Aviva which covered the insured Patel as the principal of the numbered company; and
 - Intact which provided the insured Patel's personal coverage.
1. RSA covered Patel as an officer of the engineering firm but excluded personal liability. The "other insurance" clause read as follows:

Other Insurance

If other valid and collectable insurance is available to the insured for a loss we cover under Coverage A, B, D or F of Section III, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when (b) applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all other insurance by the method described in (c) below.

b. Excess Insurance

This insurance is excess over:

1. Any of the other insurance, whether primary, excess, contingency or on any other basis:

That is Property Insurance which also includes but is not limited to Builder's Risk, Installation Floater or similar coverage for "your work" or for premises of other rented to you or occupied by you;

a) If the loss arises out of the maintenance or use of watercraft to the extent not subject to Exclusions (e) of Coverage A.

2. Any other primary insurance available to you covering liability for "compensatory damages" arising out of the premises or operations or products-completed operations for which you have been added as an additional insured by attachment of an endorsement.
2. Aviva covered Patel as the principal of the numbered company but excluded personal liability. The "other insurance" clause was the same as in the RSA policy.
3. Intact covered Mr. Patel in his personal capacity. The "other insurance" clause read as follows:

Insurance Under More Than One Policy

If you have other insurance which applies to a loss or claim, or would have applied if this policy did not exist, this policy will be considered excess insurance and we will not pay any loss or claim until the amount of such other insurance used up.

The Statement of Claim did not distinguish between the various capacities in which the insured could have been operating at the time of the fall.

RSA and Aviva offered a defence subject to a reservation of rights letter. Intact declined to defend.

In a previous coverage application, the Court had held that Intact's policy was excess to the coverage offered by RSA and there was no duty to defend.

The matter settled in mediation with liability apportioned equally between the engineering firm, numbered company, and Patel personally.

Aviva brought an application to compel Intact to contribute to the costs and settling liability of the claim against their mutual insured Patel.

The issues were:

1. Should the application be dismissed because the issues raised are res

judicata and/or an abuse of process?

2. Can Aviva compel Intact to contribute to defence and settlement costs?
 - a. Does Intact have a duty to defend and indemnify, or is it an excess insurer only?
 - b. Given that Intact did not participate in the settlement, can it question the allocation of 1/3 liability against Patel personally?
 - c. Has Aviva established equitable grounds to compel Intact to contribute to defence and settlement costs?

HELD: For Aviva: Intact had a duty to defend and indemnify Patel and must proportionally share in the settlement and defence costs.

The Court applied its residual discretion not to apply issue estoppel as it would work an injustice.

- a. The Court noted that the previous application had been brought by RSA and not Aviva.
 - i. It is generally desirable to have issues involving sequential insurance decided together to avoid multiplicity of proceedings.
 - ii. However, there are reasons why an insurer may not want to participate in a pre-trial declaratory application.
 - iii. The prior application was raised by RSA in relation to Intact's duty to defend and did not bind Aviva.
 - iv. Intact's duty to indemnify had never been finally decided.
 - v. The issues from the prior application and this application were not the same. Aviva and RSA both offered defences, but these were offered in different capacities: when Mr. Patel was the principal of two different corporate entities.
 - vi. Aviva did not have any right to control whether RSA made an application.
 - vii. The Court held that "...the interests of fairness and the integrity of the administration of justice must receive greater weight than Intact's interests in finality and consistency..." at para 33.

The Court held that Intact had a duty to defend and indemnify as the policies were not overlapping. Each insurance policy operated in a different capacity:

- a. An insurer can still rely on equity to compel contribution where a defence is owed but refused (at para 44).
- b. Aviva and RSA jointly funded an independent lawyer for Mr. Patel given

the cross claims against him personally.

- c. The Court agreed with Aviva's position, finding Intact to have wrongfully failed to provide a defence and failing to indemnify Patel for the loss in his personal capacity (at para 50)

Even though Intact had not participated in the settlement, it was not entitled to question the allocation of liability and was bound by the settlement.

- a. Intact had been offered the ability to participate in the mediation settlement and took a significant risk by not attending.
- b. The portion of liability was reasonable given the pleadings.
 - i. The Court must presume that two insurers would not settle an underlying action gratuitously.
- c. Where an insurer denies a defence, it takes a risk that the settlement will bind it.

The Court applied the unjust enrichment framework requiring Intact to proportionately share the defence costs, settlement costs, and defence costs relating to Mr. Patel's personal liability.

- a. It was inequitable for Aviva to bear the full costs.
- b. There was an enrichment to Intact when a personal defence was offered to Mr. Patel that it would have had to provide if it had honoured its duty to defend and indemnify.
- c. Aviva suffered a corresponding deprivation related to defence and settlement.
- d. There was no juristic reason found applying the Supreme Court of Canada's two step framework as set out in ***Kerr v. Baranow***, 2011 SCC 10 at para 43
 - i. There is "...no juristic reason from an established category why Intact should retain the benefit" at para 59.
 - ii. Intact could not demonstrate that the benefit could be retained based on the reasonable expectations of the parties nor from a public policy perspective.

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