CITATION: McKenzie v. Dominion of Canada General Insurance Company, 2007 ONCA 480
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COURT OF APPEAL FOR ONTARIO

CRONK, ARMSTRONG AND MACFARLAND JJ.A.

BETWEEN:

MICHAEL MCKENZIE

Appellant

and

DOMINION OF CANADA GENERAL INSURANCE COMPANY and WARREN TISCHLER

Respondents

Robin B. Cumine, Q.C. for the appellant Michael McKenzie

Christopher I.R. Morrison for the respondent Dominion of Canada General Insurance Co.

Brian M. Bangay for the respondent Warren Tischler

Heard: April 17, 2007

On appeal from the judgment of Justice Gertrude F. Speigel of the Superior Court of Justice dated August 22, 2006.

MACFARLAND J.A.:

Overview

[1] This is an appeal from the judgment of Speigel J. wherein she ordered that a boat owner's liability policy issued by State Farm Fire and Casualty Company ("State Farm") provided primary coverage to the appellant in respect of certain claims made against him. The said judgment further declared that after coverage under the boat owner's policy had been exhausted, the Dominion of Canada General Insurance Company ("Dominion"), pursuant to a home owner's policy issued to the appellant's father, and State Farm, pursuant to a personal liability umbrella policy ("PLUP") issued to Warren Tischler (the boat owner at all times relevant), were required to contribute equally in respect of claims made against the appellant. On consent of all parties, State Farm was added as a responding party to the application.

[2] In this appeal, the appellant (supported by the respondent State Farm) argues that the application judge erred when she determined that the Dominion home owner's policy and the State Farm PLUP are required to contribute equally to the claims against the appellant. The issue in this appeal is, therefore, the order in which the State Farm PLUP and the Dominion home owner's policy are required to contribute to the claims against the appellant. To decide this issue, this court is required to consider the particular language of these two policies, along with the scope and application of the Supreme Court of Canada's decision in *Family Insurance Corp. v. Lombard Canada*, [2002] 2 S.C.R. 695.

[3] For the reasons that follow, I agree with the appellant that the Dominion policy and the State Farm PLUP are not, by their language, required to contribute equally to the claims against the appellant. Rather, the State Farm PLUP is not called upon to respond to the claims until the limits of the Dominion home owner's policy are exhausted. Accordingly, I would allow the appeal.

Facts and Positions of the Parties

[4] On August 16, 2002 a collision occurred between two boats in the area of the Severn Channel about two hundred metres from the Big Chute Marina in the Township of

Georgian Bay. The consequences of that collision were tragic and have resulted in a number of actions for damages being commenced against the appellant.

[5] At the time of the accident, the appellant was operating one of the boats involved in the collision with the consent of the boat's owner, Warren Tischler.

[6] Three policies of insurance provide coverage to the appellant: (i) a boat owner's liability policy issued by State Farm to Warren Tischler; (ii) a PLUP also issued by State Farm to Mr. Tischler and; (iii) a home owner's policy of insurance issued by Dominion to the appellant's father.

[7] There is no dispute that coverage is available to the appellant under these three policies. Further, there is no appeal taken from the application judge's finding that the boat owner's liability policy provides primary first loss insurance; that is to say the policy will pay the first dollar, and continue to pay until its limits are exhausted, all sums that the appellant becomes legally liable to pay as compensatory damages because of unintentional bodily injury or property damage.[1]

[8] As I noted above, the issue raised on this appeal, simply stated, is which of the other two policies – the Dominion home owner's policy or the State Farm PLUP – pays next, or, do those policies contribute equally or *pro rata* to the losses, if any, which exceed the liability limits of the boat owner's policy.

[9] It is the position of the appellant, supported by the respondent State Farm, that once the limits of the boat owner's policy are spent or exhausted, it next falls to the home owner's policy issued by Dominion to pick up any losses to the limit of that policy. If, and only if, amounts remain to be paid after the Dominion policy limits are spent or exhausted is the State Farm PLUP required to contribute. This is the order in which the policies have an obligation to contribute to the losses in this case because, unlike the other two policies, the PLUP is a true umbrella policy, not a first loss policy. The PLUP therefore provides coverage for a different level or layer of risk than the other two primary policies.

[10] The respondent Dominion on the other hand says that the appellant's approach in characterizing the policies at issue as either being primary, excess and/or umbrella is flawed and contrary to the reasoning of the Supreme Court of Canada in *Family Insurance*, *supra*. Rather, the proper approach is to first determine whether the "other insurance" clauses in the Dominion home owner's policy and the State Farm PLUP can be reconciled. If they cannot – which the respondent Dominion urges is the case – then

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[1] See State Farm Boatowners Policy number 60-GB-4143-7 page 6, Section 11 – Liability Coverage, paragraph 11.

according to *Family Insurance* the policies should rateably contribute to the claims against the appellant.

[11] The application judge accepted Dominion's arguments. She concluded as follows:

> I conclude that the Umbrella Policy and the Home Owners Policy provide that each will cover the loss only if there is no other applicable insurance and that the "other insurance" clauses for each, although drafted slightly differently, seek to accomplish identical goals. Consequently, they conflict with each other and are irreconcilable.

Key Policy Provisions

[12] The relevant coverage provisions of the Dominion home owner's policy provide:

> **E Personal Liability**
>
> Coverage E applies separately, as follows:
>
> **1. Personal Liability**
>
> We will pay on your behalf all sums you become legally liable to pay as compensation for loss because of bodily injury or property damage.
>
> …
>
> **SPECIAL CONDITIONS**
>
> …
>
> **2. Watercraft You Do Not Own**
>
> You are insured against claims arising out of your use or operation of any type of watercraft you do not own provided that the watercraft is being used or operated with the owner's consent[.]
>
> …

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

[13] The relevant coverage provisions of the State Farm PLUP provide:

> 1. **Coverage L – Personal Liability**: If you are legally obligated to pay damages for a loss, we will pay your **net loss** minus the **retained limit**. Our payment will not exceed the amount shown on the Declarations Page as Policy Limits – Coverage L – Personal Liability. [Emphasis in original.]

[14] The PLUP defines "net loss", in part, as "the amount you are legally obligated to pay as damages for **personal injury** or **property damage**". [Emphasis in original.] "Retained limit" is defined, in part, as "the total limits of liability of any underlying insurance you may collect. The limits listed in the Declarations are the minimum you must maintain".

[15] Notably, the Dominion home owner's policy agrees to pay "all sums you become legally obligated to pay" whereas the State Farm PLUP agrees only to pay "your net loss minus the retained limit" as those terms are defined in the policy as set out above.

[16] Finally, the PLUP's "other insurance" clause provides that the PLUP "is excess over any other valid and collectible insurance".

Analysis

[17] As I alluded to earlier, I am of the view that the application judge erred in accepting the respondent Dominion's arguments as to the contribution obligations of the State Farm PLUP and the Dominion home owner's policy. Dominion's argument relies on two flawed assumptions. First, it equates the coverage provided by its home owner's policy with the coverage provided by the PLUP and assumes that both policies provide primary coverage. Second, it assumes that in deciding *Family Insurance*, *supra* the Supreme Court of Canada, in effect, did away with umbrella or excess policies and, perhaps as a result, misinterprets the Supreme Court's reasoning in *Family Insurance*.

[18] First, with respect to the language in the two relevant policies of insurance in this case, in my view, the language of these policies and the coverage provisions therein are very different. They demonstrate that the coverage provided by the Dominion home owner's policy and the PLUP is not equivalent; the policies cover different layers of risk.

[19] For example, as noted above at para. 15 of these reasons, the coverage provided by the PLUP is specifically limited; this is not so in the home owner's policy. Further, the home owner's policy, by its language, provides primary coverage while the PLUP does not. The PLUP requires the existence of an underlying primary policy with minimum liability limits of $300,000 as a condition of coverage. If there is no underlying liability policy then the policyholder becomes a self-insurer to the extent of the minimum required underlying liability limit. On a review of the language of these two policies, it is not correct to say that both the home owner's policy and the PLUP would provide coverage in the absence of the other.

[20] While both policies provide similarly worded other insurance clauses, they will only effectively cancel one another out if, to use the language of *Family Insurance*, *supra* at para. 28, the parties were under "coordinate obligation to make good the loss". In this case there can be no doubt that the State Family PLUP, by its language, was written in contemplation of there being other underlying insurance coverage. The Dominion policy was not; its coverage language makes it clear that the intention was that it provide primary insurance. These are not policies of coordinate obligation.

[21] To be clear, I respectfully disagree with the respondent Dominion's submission, and the application judge's conclusion, that the "other insurance" clauses in the PLUP and the home owner's policy are irreconcilable. Such a conclusion is only possible where the policies in question cover the same level of risk. The two policies in issue before this court do not. The PLUP is a true umbrella policy while the homeowner's policy is a primary policy, which pays first dollar insurance coverage unless there is other insurance. The reference to "other insurance" in a primary policy can only reasonably refer to other primary insurance. Were it otherwise, the "other insurance" clauses in primary policies would make them excess or umbrella policies, which is clearly not the intent of a primary policy.

[22] Second, in my view, both the application judge and the respondent Dominion have misinterpreted *Family Insurance*, *supra*. It seems to me that if the Supreme Court of Canada had intended to do away with any distinction among primary, excess and/or

umbrella policies of insurance it would have done so in clear and express language to that effect.[2]

[23] Simply stated, the facts and issue before the Supreme Court of Canada in *Family Insurance* were substantially different than those faced by this court. The court's decision in *Family Insurance* is therefore not applicable to the facts in the present case.

[24] Briefly, the facts of *Family Insurance* were that a woman – Michelle Patterson – was injured in a fall from a horse. She sued Lesley Young, the owner of the stable, and Douglas Blanchard, the owner of the horse. At the time Ms. Young was insured under two policies of insurance – a home owner's residential insurance policy with limits of $1 million and a commercial general liability policy with limits up to $5 million. Both insurers conceded that the liability claims against Young came within the scope of coverage provided by both policies.

[25] The Supreme Court was called upon to consider the language of these two policies, each of which had similarly worded "other insurance" clauses. Namely, both policies contained "other insurance" clauses that declared the policies to be "excess coverage" to any other insurance coverage held by the insured, Young. Bastarache J., writing for the court, stated the issue as follows:

> The contest, then, is between the two insurers and concerns the extent to which each of them is liable to pay the insured's claim. Each insurer relies on its "other insurance" clause as a means of shielding itself from primary liability.

[26] Ultimately, the Supreme Court concluded that both policies revealed an intention to provide primary coverage, unless other valid insurance was available, in which case one of the policies was only intended to provide excess coverage; where other valid insurance was available the second policy was intended to limit its liability to only excess coverage, even where other insurance also provided excess coverage. Accordingly, as the Supreme Court noted at para. 20, the intentions of the policies gave rise to a "circular reasoning that does not resolve the problem of which policy provides primary coverage". In short, the "other insurance" provisions of the policies were irreconcilable.

[27] The court also stated that where the insured's claims have been satisfied and the contest is one only between or among insurers in relation to contribution, the unilateral and subjective intentions of the insurers, unaware of one another at the time the contracts

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[2] I note that the only time counsel were able to find that this court has considered *Family Insurance*, since its release, was in *Canadian Universities' Reciprocal Insurance v. Halwell Mutual Insurance Co.* (2002), 61 O.R. (3d) 113. That case is of no assistance to the issues here raised

were made, are simply irrelevant. The insurers' intentions are determined from the language they used in the policies.

[28] At para. 37 of its judgment the court noted:

> To endorse the intentions of one insurer over another, where both parties have sought to limit their liability to contribute and where the offending clauses, on their face, are irreconcilable, does violence to the intentions of the insurers and does not respect the obligation of both insurers to contribute.

[29] As I have said, in my view the reasoning in *Family Insurance* simply does not apply in the circumstances of this case where, as I discussed above, the relevant policies of insurance provide different layers of coverage, or, stated another way, where the contest is between a primary insurer and an excess or umbrella insurer. Unlike the situation in *Family Insurance*, we are not here concerned with two primary policies (leaving the boat owner policy aside) with similar "other insurance clauses".

[30] I am supported in this view by the authors of *Couch on Insurance 3d*, loose-leaf (Deerfield, Il.: Clark Boardman Callaghan, 1995). They describe the clear differences between primary policies and umbrella or excess policies at 220:32:

> 220:32 Nature of Excess and Umbrella Policies
>
> The question of allocating a loss among insurers often involves excess and umbrella insurers as well as various primary insurers. It is first of all important to understand the differences among these various types of policies. *Both true excess and umbrella policies require the existence of a primary policy as a condition of coverage.* [Emphasis added.]
>
> …
>
> The purpose of both excess and umbrella coverage is to protect the insured in the event of a catastrophic loss in which liability exceeds the available primary coverage. Accordingly, it is only after the underlying primary policy has been exhausted does the excess or umbrella coverage kick in. Unlike excess policies, however, umbrella policies often provide primary coverage for risks that the underlying policy does not cover.

> Excess "other insurance" clauses, on the other hand, are devices whereby a primary insurer attempts to limit or eliminate its liability where another primary policy covers the risk. The intent of excess and umbrella policies to serve a different function from primary insurance policies with "other insurance" clauses can be discerned from the fact that different rate structures apply to excess and umbrella policies on the one hand, and primary policies with other insurance clauses on the other. [Footnotes omitted.]

And at section 220:41:

> As a general rule, where two policies have competing excess "other insurance" clauses, the clauses cancel each other out and the policies pro rate. Likewise, two true excess policies at the same level of insurance pro rate the loss. As a rule, however, excess and umbrella policies are regarded as excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or any escape clauses. Such is the case because umbrella policies are not an attempt by a primary insurer to limit a portion of its risk by labelling it "excess" nor a device to escape responsibility. [Footnotes omitted.]

[31] The case of *Trenton Cold Storage Ltd. v. St. Paul Fire and Marine Insurance Co.* (2001), 146 O.A.C. 348 (C.A.) also provides support for my view that this appeal should be allowed. As characterized by counsel for the appellant in this appeal, *Trenton Cold* is sufficiently similar to the case before this court that they are almost on "all fours".

[32] In *Trenton Cold Storage*, this court dealt with the issue of contribution between a general liability policy and an excess policy.

[33] The facts of the case were as follows. The failure of an ammonia system resulted in a fire and implosion at the premises of Trenton Cold Storage Ltd., which provided cold storage facilities. One of Trenton Cold Storage's customers claimed damage to its product by ammonia contamination. Trenton Cold Storage was insured for this claim by two insurance policies: (i) a policy issued by the I.A.R.W. Insurance Company Ltd. that provided coverage identified as "Warehouseman or Bailee Liability" [the "IARW policy"]; and (ii) a policy issued by St. Paul Fire and Marine Insurance Co. called "Umbrella Excess Liability Policy" [the "St. Paul policy"].

[34] IARW settled the customer's claim and then commenced proceedings seeking contribution from St. Paul for the settlement. IARW alleged that St. Paul was Trenton Cold Storage's primary insurer and IARW was the excess insurer, or, alternatively, that both policies covered the same risk and, therefore, St. Paul was required to contribute equally to the settlement. St. Paul defended IARW's claim, in part, on the basis that St. Paul's coverage was excess to IARW's primary policy.

[35] The trial judge in *Trenton Cold Storage* held that St. Paul was required to contribute equally to the settlement. St. Paul appealed this judgment on the ground that the trial judge had erred in not finding that IARW's coverage was primary and underlying to St. Paul's umbrella excess liability policy.[3]

[36] In allowing St. Paul's appeal, Charron J.A. (as she then was) noted at para. 9:

> The issues between the parties turn on the wording of their respective policies. In order to determine the nature and extent of the coverage, it is necessary to look at the obligation to pay under each policy and to consider any other applicable provisions in the context of each insurance agreement as a whole.

[37] She then considered the specific language of the policies in issue. Charron J.A. noted at para. 11 that the IARW policy:

> provided specific coverage … for the very risk that was in issue in the [main] action. … Further, there [was] nothing in the policy that explicitly [conditioned] IARW'S obligation to pay and to defend on the existence of any other insurance coverage.

[38] By contrast, as she noted at para. 13,

> [t]he obligation to pay under [the St. Paul policy was] set out in very different language. It [was] premised not only on the happening of an occurrence but also on the existence of underlying insurance.

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[3] St. Paul also had an alternative ground of appeal based on an estoppel argument, but that argument is not relevant to the issues here raised.

[39] Charron J.A. therefore concluded that the trial judge had erred in deciding that the policies in *Trenton Cold Storage* were "on the same footing" in relation to the loss in that case. She wrote at paras. 21-24 and 26:

> It is apparent from the trial judge's reasons that his finding that IARW's policy was excess was based solely on the "other insurance clauses" contained in the policy. In my view, this approach was fundamentally flawed. An insurance policy must be construed as a whole, not by its separate provisions. The trial judge failed to consider the fact that, apart from the possible effect of the other insurance clauses which must be considered in conjunction with other existing policies, there is nothing in the IARW policy to show an intent to provide anything other than primary coverage. The policy clearly provides for an obligation to pay and a duty to defend upon the happening of a specified occurrence without any reference to, or requirement that there be, underlying insurance. The policy further contains a clause that given the insured permission to secure "other insurance being the excess of the insurance" provided by the policy. On its face, the IARW policy appears to be primary. Its character becomes much more apparent when the wording of the policy is compared to St. Paul's policy.
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> The wording used in the St. Paul policy is significantly different. The St. Paul policy clearly shows an intent not only to provide coverage with respect to certain risks but to limit the company's liability to the loss in excess to that which may be collected by the insured under any underlying insurance. Further, it obligates the insured to maintain underlying insurance to the extent provided for in Schedule A during the currency of the policy. If the insured fails to maintain the stipulated underlying insurance or its equivalent, the insurer's liability is limited to the amount for which it would have been held liable had the insurance been maintained. Therefore, in effect, the limits of the underlying policies listed in Schedule A operate as a kind of deductible. The policy also provides for "drop-down" coverage where there is no underlying insurance.

St. Paul's policy expressly and correctly identifies itself as an umbrella policy. An umbrella policy generally provides two types of coverage: standard form excess coverage; and broader coverage from that provided by the underlying insurance including a duty to defend lawsuits not covered by the underlying coverage. An umbrella policy is in effect a hybrid policy that combines aspects of both a primary policy and an excess policy. [Citations omitted].

The distinction between primary and excess insurance is succinctly set out in *St. Paul Mercury Insurance Co. v. Lexington Insurance Co*. (1996), 78 F.3d 202 (5th Cir.), at footnote 23, quoting from *Emscor Manufacturing Inc. v. Alliance Insurance Group* (1994), 879 S.W.2d 894, at 903 (Tex. App.), writ denied):

> "Primary insurance coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to the liability. An excess policy is one that provides that the insurer is liable for the excess above and beyond that which may be collected on primary insurance. In a situation where there are primary and excess insurance coverages, the limits of the primary insurance must be exhausted before the primary carrier has a right to require the excess carrier to contribute to a settlement. In such a situation, the various insurance companies are not covering the same risk; rather, they are covering *separate and clearly defined layers of risk*. The remote position of an excess carrier greatly reduces its chance of exposure to a loss. This reduced risk is generally reflected in the cost of the excess policy." [Emphasis in original.]
>
> …

> Based on the foregoing, I conclude that the IARW coverage is primary. The "other insurance" clauses in the policy do not change this characterization. The only effect of the "other insurance clauses" would be to require a second primary insurance carrier to share in IARW's liability. The key to the obligation to share is that the other carrier would have to provide coverage at the same level, in this case primary coverage, and not excess coverage that insures a "separate and clearly defined layer of risk". A primary insurer cannot use an "other insurance clause" to require an umbrella carrier to share in its liability. [Citations omitted.]

[40] As the court noted in *Trenton Cold Storage*, the limits of the IARW policy were $2,000,000 and the premium $6,936. By contrast, the St. Paul policy limits were $4,000,000 and the premium $2,121. Charron J.A. pointed out that "the St. Paul premium still represented a fraction of the cost of the IARW coverage".

[41] On the facts before this court the cost of the Dominion home owner's policy with liability limits of $1,000,000 was $659.34 whereas the PLUP, also with limits of $1,000,000, was $125.28.

[42] As I have already noted, in my view *Trenton Cold Storage* is "on all fours" with the case at bar. The respondent's only answer to *Trenton Cold Storage* is that it pre-dates *Family Insurance.* In my view, for the reasons canvassed in my previous discussion of *Family Insurance*, this explanation does not succeed in rebutting the applicability of the reasoning in *Trenton Cold Storage* to the case at bar.

[43] I conclude, therefore, that the State Farm PLUP is a true excess or umbrella policy and its limits are not called upon to respond to this loss until the limits of the Dominion's home owner's policy are spent.

[44] I would therefore allow the appeal, set aside the judgment of the application judge, in its place judgment shall issue in accordance with these reasons.

[45] I would allow the costs of this appeal to the appellant, in accordance with the agreement of counsel, fixed in the sum of $5,000.00, inclusive of disbursements and G.S.T.

RELEASED: June 27, 2007 "EAC"

"J. MacFarland J.A."
"I agree E.A. Cronk J.A."
"I agree Robert P. Armstrong J.A."