CITATION: Appin Realty Corporation, Limited v.
Economical Mutual Insurance Company, 2008 ONCA 95
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COURT OF APPEAL FOR ONTARIO

LASKIN, MOLDAVER and FELDMAN JJ.A.

BETWEEN:

APPIN REALTY CORPORATION, LIMITED

Applicant (Respondent in Appeal)

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent (Appellant in Appeal)

Marcus B. Snowden and W. Colin Empke for the appellant

J. Stephen Cavanagh for the respondent

Heard: January 18, 2008

On appeal from the order of Justice Stanley Kershman of the Superior Court of Justice dated August 10, 2007.

BY THE COURT:

[1] This appeal raises two issues. The first relates to the scope of the exclusion clause and the motion judge's determination that it did not absolve the appellant insurer from its duty to defend the respondent insured against the plaintiff's claim for bodily injury arising from his exposure to mould and/or bacteria. The second relates to the motion

judge's determination that the insured could require the insurer to retain counsel of the insured's choice.

1. Scope of the Exclusion Clause

[2] On the first issue, the insurer relies on clause 7 of the policy under the heading "Common Exclusions". Clause 7 reads as follows:

> This insurance does not apply to:
>
> 7. FUNGI AND FUNGAL DERIVATIVES
>
> (a) "bodily injury", "property damage", "personal injury", or Medical Payments or any other costs, loss or expense incurred by others, arising directly or indirectly, from the actual, *alleged* or threatened inhalation of, ingestion of, contact with, exposure to, existence of, presence of, spread of, reproduction, discharge or other growth of any "fungi" or "spores" however caused, including any costs or expenses incurred to prevent, respond to, test for, monitor, abate, mitigate, remove, cleanup, contain, remediate, treat, detoxify, neutralize, assess or otherwise deal with or dispose of "fungi" or "spores"; or
>
> (b) any supervision, instructions, recommendations, warnings, or advice given or which should have been given in connection with (a) above; or
>
> (c) any obligation to pay damages, share damages with or repay someone else who must pay damages because of such injury or damage referred to in (a) or (b) above.
>
> *This exclusion applies regardless of the cause of the loss or damage, other causes of the injury, damage, expense or costs or whether other causes acted concurrently or in any sequence to produce the injury, damage, expenses or costs.* [This is the referred to as a concurrent exclusion clause.]
>
> For the purpose of this exclusion, the following definitions are added:

> "Fungi" includes, but is not limited to, any form or type of mould, yeast, mushroom or mildew whether or not allergenic, pathogenic or toxigenic, and any substance, vapour or gas produced by, emitted from or arising out of any "Fungi" or "Spores" or resultant mycotoxins, allergens, or pathogens.
>
> "Spores" Includes, but is not limited to, any reproductive particle or microscopic fragment produced by, emitted from or arising out of any "fungi". [Emphasis added.]

[3] The motion judge found that this exclusion, including the "concurrent exclusion" clause, did not absolve the insurer of its duty to defend because the plaintiff had pleaded that his injuries arose from mould and bacteria and if it were found that the injuries were due solely to bacteria (a non-excluded peril), the exclusion clause would not apply.

[4] On appeal, the insurer argued that the motion judge failed to consider the effect of the word "alleged" within s. 7(a) of the exclusion. According to the insurer, the effect of that language was to absolve the insurer of a duty to defend in any case where bodily injury from mould is alleged, even if combined with other causes of bodily injury, such as bacteria. The insurer further submitted that the effect of the clause is that the duty to defend is narrower than the duty to indemnify. In this regard, the insurer submitted that if, after a trial, it were found that the injury was caused solely by bacteria, the insurer would have a duty to indemnify the insured, even though it had not been obliged to defend the action on the insured's behalf.

[5] We disagree with the insurer's position. The language in clause 7(a) is both unclear and ambiguous in its effect. A plain reading of the provision does not support the insurer's position. Indeed, the clause is worded in a fashion that would leave most people guessing as to its meaning. For example, on another possible interpretation, the clause could be taken to mean that wherever injury from mould is alleged in a claim, even if it is ultimately established that the injury arose solely from a covered peril, such as bacteria, the claim would exclude both the duty to defend and the duty to indemnify. This would effectively extend the exclusion to otherwise non-excluded perils.

[6] The insurer's position stands on its head the general proposition that the duty to defend is broader than the duty to indemnify. (See *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 at para. 17). If, as the insurer submits**,** the clause was meant to convey that the insurer's duty to defend is narrower than its duty to indemnify, clear and unambiguous language was required. The language used falls well short of the mark.

[7] Accordingly, we agree with the conclusion of the motion judge that the insurer has the duty to defend this claim.

2. Choice of Counsel

[8] Having found that the insurer had a duty to defend its insured, the motion judge then had to determine whether the insured was required to accept the insurer's choice of counsel. The insurance policy provides that the insurer has "the right and duty to defend any action" that seeks damages covered by the policy.

[9] The insured is concerned that because of the coverage issue, counsel appointed by the insurer might tend to "steer" the conduct of the case to an outcome that would not require indemnity because of the concurrent exclusion clause. That clause would exclude indemnity for any bodily injury caused, even in part, by mould. The insurer expressed a similar concern about using counsel for the insured. It would be in the insured's interest to defend on the basis that if it was liable to the plaintiff for bodily injury, that injury was caused solely by bacteria and not by mould, and therefore the injury would not be an excluded peril for indemnity under the policy.

[10] In order to meet these concerns, the insurer proposed a set of safeguards to keep its trial counsel separate from its coverage claims representative. According to the insurer, these safeguards would alleviate any concern about conflict, real or apprehended. The motion judge did not accept the insurer's proposal.

[11] The motion judge referred to the principle that an insurer's right to control the defence of the action is not absolute: *Brockton (Municipality) v. Frank Cowan Co.* (2002), 57 O.R. (3d) 447 (C.A.). He rejected the proposed safeguards as impractical and ineffective. In view of the insurer's initial refusal to defend the plaintiff's action – which prompted Appin's application to compel the insurer to defend – and in view of the ongoing coverage dispute, the motion judge concluded that a reasonable person would still perceive a conflict despite the proposed safeguards.

[12] The motion judge found that the insured's counsel, Mr. Cavanagh, a competent and experienced insurance counsel, should be retained by the insurer to defend the action at the insurer's expense.

[13] In oral argument, counsel for the insurer suggested that in order to meet the mutual concerns expressed by both sides, a third approach would be for the parties to agree on an independent counsel to defend the plaintiff's claim on behalf of the insured and pursuant to the insurer's duty to defend.

[14] We understand the concern expressed by the trial judge, shared by counsel on appeal, that any counsel who acts for the defendant will necessarily be aware of the coverage issue and that he or she will be faced with the difficulty of ensuring a fair approach to the defence of the claim that does not "steer" the defence toward or against coverage. Recognizing this challenge, Mr. Cavanaugh remains prepared to act. On this

record, we are satisfied that the solution reached by the trial judge was appropriate and one he was entitled to make in the exercise of his discretion. We see no basis for interfering with it.

RESULT

[15] Accordingly, the insurer's appeal is dismissed. As agreed by the parties, the respondent shall have its costs of the appeal on a substantial indemnity basis fixed at $9,117.76, inclusive of disbursements and G.S.T.

"John Laskin J.A."
"M. J. Moldaver J.A."
"K. Feldman J.A."

RELEASED: "KNF" February 12, 2008