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Title insurance? Check. Land survey? Double check.

One of the lesser known benefits of title insurance is that the insurer is obligated to provide and pay for the legal costs of defending the insured's title if a third party sues claiming an interest in the land.

That was the issue in the case of Knapman v. Deweerd released last month by the Ontario Superior Court of Justice.

Emily Knapman's cottage property on Whitestone Lake in Parry Sound is next door to one owned by the Deweerd family. Knapman bought her property in 1969 and the Deweerds acquired theirs in 2003.

The apparent boundary between the two properties was marked by a tree line and swamp area. This boundary was approximately 15 to 20 feet from the Deweerd cottage. Unfortunately, the Deweerds did not have the benefit of a land surveyor's report at the time of their purchase.

After closing, the Deweerds obtained a permit to raise the cottage and construct a permanent concrete block foundation underneath it on the original cottage footprint. The work was completed, and the municipality inspected and approved it.

Sometime later, the Deweerds retained the services of a land surveyor who determined that their cottage encroached by about three inches onto Knapman's land. The apparent boundary was well into Knapman's land.

Knapman discovered the encroachment in 2006, and told the Deweerds that their cottage and propane tanks were on her property. The tanks were removed and the Deweerds offered to purchase the disputed strip of land under the cottage, but that offer was refused.

Eventually, Knapman sued the Deweerds alleging that, in addition to the cottage and propane tanks encroachment, the Deweerds removed trees from the boundary line, placed backfill around the Knapman cottage, and created a side lot adjoining her land.

Knapman claimed that her privacy was adversely affected and that the value of her property was substantially reduced.

At the time of their closing the Deweerds purchased a title insurance policy from Stewart Title covering, among other things, the forced removal of all or part of a structure because it extends onto adjoining land. The policy requires Stewart to defend the title of an insured relating to a risk covered in the policy.

When the Deweerds were served with Knapman's lawsuit, they asked Stewart Title to file a defence on their behalf. Stewart refused, on the basis that the foundation of the house had been upgraded from piers to a block foundation.

Without the support of their title insurer to defend the claim against their ownership, the Deweerds retained their own lawyer to defend the Knapman action, and file a claim against Stewart Title for failing to honour the policy. They also counterclaimed against Knapman asking for a court order requiring her to sell them the disputed portion of her land.

The Deweerds brought a preliminary motion to force Stewart to provide and pay for a defence to the litigation. Stewart's position was that the removal of the trees, the encroachment of the propane tanks, and the deposit of backfill were not covered by the policy since they all took place after closing. It agreed that its duty to defend was limited to the costs of defending just the cottage encroachment issue.

After hearing arguments in March, Justice Frank Cornell ruled that Stewart Title was required to defend the cottage encroachment claim, while the defendants were required to defend the uninsured claims relating to the propane tanks, backfill, tree removal and the side yard.

Stewart was ordered to pay the Deweerds the full costs of the court application.

The case itself has yet to go to trial, but its lesson is that buying a property without a land survey – especially in cottage country – is very risky. And having to sue your own title insurer is not a pleasant experience.

(Full disclosure: I am a non-voting director of the Law Society of Upper Canada which owns TitlePLUS, a competing title insurer, but I have no role in its operations.)

Knapman v. Deweerd, 2011 ONSC 4269 (CanLII)

Print:	PDF Format
Date:	2011-07-21
Docket:	CV-2008-101
URL:	http://www.canlii.org/en/on/onsc/doc/2011/2011onsc4269/2011onsc4269.html
Noteup:	Search for decisions citing this decision

CITATION: Knapman v. Deweerd, 2011 ONSC 4269
COURT FILE NO.: CV-2008-101
DATE: 20110721

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Emily Knapman Plaintiff	)	No one appearing
– and – Kenneth John Deweerd, Diana Alberdina Deweerd, Christopher Scott Deweerd and Michelle Renee Deweerd Defendants	)	Annette A. Casullo, for the Defendants
– and – Stewart Title Guaranty Company Third Party	)	J. Daniel Dooley for the Third Party
	)	
	)	
	)	**HEARD:** March 21, 2011

DECISION ON MOTION

CORNELL J.:

[1] The defendants have brought a motion seeking a declaration that the third party, Stewart Title Guarantee Company ("Stewart Title") is obligated under a title insurance policy issued by Stewart Title to the defendants to defend all of the claims that have been brought by the plaintiff against the defendants. In addition, the defendants seek an order requiring Stewart Title to pay all of the legal costs incurred by the defendants in defending the plaintiff's claim.

Factual Background

[2] The plaintiff and defendants own adjoining waterfront properties on Whitestone Lake in the District of Parry Sound, Ontario. The plaintiff has owned her property since 1969. The defendants purchased their property in 2003. When the defendants acquired this property, they purchased a title insurance policy from the third party, Stewart Title. A copy of the title insurance policy was included in the motion material.

[3] At the time that the defendants purchased their property, they were provided with a statutory declaration indicating that, to the best of the vendor's knowledge, the cottage that they were acquiring was located entirely within the limits of the property and there were no boundary disputes.

[4] The apparent boundary of the property was marked by a tree line and swamp area. The defendants' property was maintained to the apparent boundary, which was approximately fifteen to twenty feet from the cottage structure. The defendants did not have the benefit of a location survey at the time of purchase.

[5] Following the purchase, the defendants obtained a permit from the municipality to raise the cottage and construct a permanent block foundation using the original cottage footprint. This work was completed by the end of the summer of 2003, at which time it was inspected and approved by the municipality.

[6] At some point in time after this work was undertaken, the plaintiff retained the services of a surveyor who determined that the defendants' cottage encroached by about three inches onto the plaintiff's property. In view of this, it was also determined that the cottage did not comply with the municipal setback requirements.

[7] In November of 2006, the plaintiff advised the defendants that their cottage and propane tanks encroached on her property. The defendants removed the propane tanks and offered to purchase the disputed property from the plaintiff, but that offer was declined.

[8] The plaintiff issued this claim on October 27, 2008. The plaintiff alleges that, in addition to the cottage and propane tanks encroachment, the defendants removed trees from the boundary line, placed backfill around the cottage on the plaintiff's property and created a side lot adjoining the plaintiff's

land. The plaintiff claims that her privacy has been adversely affected and that the value of her property has been substantially reduced. The defendants defended the claim and have asserted a counterclaim seeking title to the land on which the defendants' cottage is located by virtue of adverse possession pursuant to s. 51(2) of the *Land Titles Act*, R.S.O. 1990, C.L.5. In the alternative, the defendants claim that the plaintiff deliver the portion of her land upon which a lasting improvement has been made pursuant to s. 37(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, C.C.34.

Title Insurance Policy

[9] The defendants purchased title insurance from Stewart Title under policy no. 0-7763 274125 ("the Policy"). The Policy is dated May 2, 2003 and has a face value of $125,000.

[10] The Policy includes, under Covered Title Risks, the following coverage, *inter alia*:

> This policy covers the following title risks if they affect your title on the Policy Date, or to the extent expressly stated below, if they affect your title after the Policy Date:
>
> > You are forced to remove your existing structure, or any portion thereof, other than a boundary wall or fence, or it cannot be used for single family residential purposes, because:
> >
> > (a) It extends on the adjoining land or on to any easement;
> >
> > (b) It violates an existing zoning by-law.
> >
> > Any adverse circumstance affecting the land which would have been disclosed by a local authority search of the land at the Policy Date.
> >
> > Other defects, liens or encumbrances.

[11] The Policy sets out Stewart Title's duty to defend as follows:

> We will defend your title in any court case as to that part of the case that is based on a Covered Title Risk insured against by the Policy. We will pay the covered costs, legal fees, and expenses incurred in that defence.
>
> We can end this duty to defend your title by exercising any of our options listed in Item 4 of the Conditions.

[12] After being served with the statement of claim, the defendants submitted a claim to Stewart Title seeking both coverage and indemnity with respect to the plaintiff's claims. Stewart Title originally took the position that because the cottage had been upgraded from piers to a block foundation, they would not provide any coverage. Stewart Title subsequently advised that it would require a current survey and an affidavit from the contractor who performed the work swearing that the new foundation was placed in the precise position of the old one. The defendants complied with this request. Stewart Title continued to deny that it was required to defend the action. In view of this, the defendants had no alternative but to obtain and instruct counsel who filed a statement of defence and counterclaim on their behalf. The defendants also issued a third party claim against Stewart Title on July 13, 2010. In the third party claim, the defendants assert that Stewart Title had a duty to defend the claim advanced against them in the main action and to indemnify the defendants in the event the plaintiff is successful with respect to the claim relating to the cottage encroachment. Stewart Title filed a third party defence dated August 26, 2010, as well as a third party defence to main action on the same day.

Position of the Parties

[13] The defendants say that Stewart Title is obligated to defend all of the claims that the plaintiff has made despite the fact that some of the claims made by the plaintiff are not covered by the Policy. The defendants claim that this action is mainly about the encroachment of the cottage onto the plaintiff's property for which Stewart Title has admitted coverage. The defendants say that all other claims are "intermingled with this main one" and accordingly, Stewart Title is obliged to defend the entire claim. In taking this position, the defendants rely on *RioCan Real Estate Investment Trust v. Lombard General Insurance Company*2008 CanLII 16073 (ON SC), (2008), 91 O.R. (3d) 63 (S.C.), and *Hanis v. Teevan* 2008 ONCA 678 (CanLII), (2008), 92 O.R. (3d) 594 (C.A.).

[14] Stewart Title takes the position that with respect to the removal of trees, the encroachment of the propane fuel tanks and the deposit of fill, these were acts done by the defendants after the Policy date and are therefore excluded from coverage. Stewart Title takes the position that the duty to defend is limited to the reasonable costs associated with defending the cottage encroachment issue as it is the only covered title risk under the Policy. In taking this position, Stewart Title relies upon the cases of *Nichols v. American Home Assurance Co.*, 1990 CanLII 144 (SCC), [1990] 1 S.C.R. 801, *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 (CanLII), [2001] 2 S.C.R. 699, and *Hanis v. Teevan*.

Analysis

[15] In order to determine the extent of coverage, the court must look to the relevant policy of insurance. This was made clear by the Ontario Court of Appeal in *Hanis v. Teevan* when it stated, at para. 22, "The relationship between an insured and an insurer is contractual and must be governed primarily by the terms of the relevant policy of insurance … It makes eminent sense that any inquiry as to the nature and scope of the insurer's duty to pay those costs should start with the language of the policy."

[16] In *Atlific Hotels & Resorts Ltd. v. Aviva Insurance Co. of Canada* (2009), 97 O.R. (3d) 233 (S.C.), Belobaba J. provided a useful summary of the law on an insurer's duty to defend at paras. 7-8:

> It is now well-settled law that if the pleadings allege facts which, if true, could possibly require the insurer to indemnify the insured on a particular claim set out in the pleadings, then the insurer is obliged to defend that particular claim: *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 (CanLII), [2001] 2 S.C.R. 699 (S.C.C.) at para. 28
>
> Conversely, the insurer is not obliged to defend a claim that clearly falls outside of the coverage provided by the policy. As McLachlin J., as she then was, explained in *Nichols v. American Home Assurance Co.* 1990 CanLII 144 (SCC), (1990), 68 D.L.R. (4th) 321 (S.C.C.) at para. 20:

> Requiring the insurer to defend claims which cannot fall within the policy puts the insurer in the position of having to defend claims which in its interest should succeed … for this reason, the practice is for the insurer to defend only those claims which potentially fall under the policy, while calling upon the insured to obtain independent counsel with respect to those which clearly fall outside its terms.

[17] The duty to defend is governed by the so-called "pleadings rule," meaning that the determination is made by relying on the allegations contained in the pleadings. As stated by the Supreme Court in *Monenco Ltd. v. Commonwealth Insurance Co*. at para. 28, "If the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence": see also *Nichols v. American Home Insurance*.

[18] Where the allegations in the pleadings raise both covered and uncovered claims, the issue becomes the extent of the duty to defend, and whether the insurer is required to defend the entire claim, or only those portions of the claim that fall within the policy coverage.

[19] Hennessy J. recently considered this issue in *RioCan Real Estate Investment Trust v. Lombard General Insurance Co* . In that case, the issue was the extent of Lombard General Insurance Company's duty to defend, given that the applicant conceded that some of the allegations in the pleadings, in particular, those relating to breaches of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, fell outside of the insurance contract. Hennessy J. reviewed the principles governing the duty to defend noting at para. 20, "If the insured can demonstrate even a mere possibility that the claim could fall within the policy, then a *prima facie* duty to defend has been established. This duty to defend may only be negated if the insurer can demonstrate that the claim falls outside of the coverage due to a specific exclusion within the policy." Hennessy J. further held that the fact that the plaintiffs had advanced a number of theories of liability does not necessarily negate the duty to defend, even if one of those theories is captured by an exclusion clause. At para. 16, she held:

> Notwithstanding the multiple theories pleaded by the plaintiffs, the fundamental issue raised in each of the actions is that the plaintiffs' slip and fall on the ice covered parking lot occurred because of the failure of the owner to keep the parking lot free of ice. The true nature of the claim is that the defendant was negligent in failing to maintain an ice-free parking lot and as a result the plaintiffs fell and sustained injuries.

[20] Hennessy J. held that in an action where the plaintiff makes multiple allegations, some covered and others not, the court should focus on the "true nature" of the action to determine the insurer's duty to defend. Where the covered claim represents the "true nature" of the action, the duty to defend arises for the entire action. As explained by Hennessy J., at para. 38, "[I]n most situations where there is a duty on an Insurer to defend some, or only one, of the claims made against an Insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even where the pleadings include claims that may be outside the policy coverage."

[21] In *Hanis v. Teevan*, the Ontario Court of Appeal considered the appropriate apportionment of defence costs when some, but not all, of the allegations were covered by the applicable insurance policy. The court noted that the insurer's obligations are found "first and foremost" in the applicable policy. The court further recognized that the allocation of defence costs might be more appropriate in some cases rather than others. It held, at para. 25:

> [I]n the context of defending covered and uncovered claims in the same suit, a distinction must be drawn between cases where defence costs are related exclusively to the defence of either covered or uncovered claims, and cases where the same costs are incurred in the defence of both covered and uncovered claims. In the former circumstance, an allocation of costs would be required, barring a policy which provided for payment of defence costs relating to uncovered claims. In the latter case, allocation would not be necessary unless the policy provided for allocation where the costs related to both covered and uncovered claims.

[22] The same issue was considered in *Daher v. Economical Mutual Insurance Co*. 1996 CanLII 639 (ON CA), (1996), 31 O.R. (3d) 472 (C.A.). In*Daher*, the action involved allegations of negligence, as well as allegations referable to the insured's operation of his store. Only the claims relating to the operation of the store were insured. The court recognized that the apportionment of defence costs may be possible in "a proper case" (at para. 14). However, the court found that, in this case, there were no means to "readily" distinguish between the costs of defending the covered and uncovered claims (see para. 17). The court stated at para. 14, "The facts giving rise to the multiple theories of liability are so intertwined that I cannot see any principled basis upon which this court or an assessment officer could unravel them to apportion costs to one theory or another."

[23] The jurisprudence indicates that the allocation of defence costs between covered and uncovered claims is appropriate in some cases – in particular, in cases where the insurer can demonstrate that some of the claims clearly fall outside the scope of insurance coverage: see *Atlific Hotels & Resorts Ltd. v. Aviva Insurance Co. of Canada*; *Nichols v. American Home Assurance Co*.

[24] However, where a claim alleges more than one theory of liability, and where the "true nature" of the claim falls within the scope of policy coverage, the insurer will have a duty to defend the entire action: see *RioCan Real Estate Investment Trust v. Lombard General Insurance*.

[25] This is so because, in such cases, there is no way to readily distinguish between the costs of defending covered and uncovered claims, and because the theories of liability are so intertwined that there is no principled way to allocate defence costs. The courts have recognized that this may mean that an insurer is obliged, in some cases, to fund the defence of uncovered claims. This has been held to be acceptable because the costs are incurred in the funding of the covered claim: see *Hanis v. Teevan*; *Daher v. Economical Mutual Insurance Co*.

[26] In this case, the pleadings allege both covered and uncovered claims. The claim relating to the cottage encroachment is covered, while the claims relating to the propane tanks, the back fill, the removal of trees, and the creation of a side yard were caused by the defendants after the policy date, and therefore are excluded from coverage. These facts are distinguishable from the facts in *RioCan*. In *RioCan*, multiple theories of liability were put forward to prove the same damages. Here, rather than multiple theories of liability, multiple instances of encroachment are alleged. As such, this case falls into the category of cases in which the allocation of defence costs is appropriate. Stewart Title should not be required to defend claims that clearly fall outside the scope of coverage.

Conclusion

[27] Though the "true nature" of the claim is the encroachment of the defendants onto the plaintiff's property, there appear to be a number of distinct instances of encroachment that can be defended separately. The defendants argue that "the action is mainly about the encroachment of the cottage onto the plaintiff's property; and that in reality all other claims are intermingled with this main one." Though this may be true in that the defence theory for all the claims is the same or similar – primarily, that the defendants made lasting improvements to the land under the genuine belief that it was their own – the actionable conduct alleged is different and distinguishable between the covered and uncovered claims. Unlike the cases cited by the defendants, this is a

case in which there can be a "principled basis" upon which to apportion defence costs. Stewart Title is required to defend the cottage encroachment claim, while the defendants are required to defend the uncovered claims relating to the propane tanks, the backfill, the removal of trees, and the side yard.

Costs

[28] Stewart Title refused to provide a defence for a considerable period of time leaving the defendants with no alternative but to defend the claim and start third party proceedings. It was only after these steps had been taken that Stewart Title acknowledged responsibility to defend the claim which it did by delivering a defence to the main action. Despite this, Stewart Title presented oral argument that it was open to question whether Stewart Title was required to defend the action or to indemnify the defendants as the cottage was now on a block foundation instead of piers. This position is curious and untenable in light of the delivery of the defence to the main action by Stewart Title. As a result of the actions of Stewart Title, the defendants were left with no alternative but to incur legal costs to protect their position.

[29] The encroachment by the propane tanks was addressed by the defendants prior to the delivery of the statement of defence. The material indicates that the defendants only removed a few dead trees along the apparent boundary. I am inclined to agree with the position taken by the defendants that virtually all of the work done in this action related in one respect or another to the claim involving the encroachment of the cottage or the failure of Stewart Title to respond to the claim in a timely fashion. The draft bill of costs submitted by the defendants also supports this view. In *E.M. v. Reed*, 2003 CanLII 52150 (ON CA), (2003), 171 O.A.C. 145, Gillese, J.A. held the following for a unanimous court:

> Entitlement to solicitor- and-client costs in the third party proceeding flows directly from the unique nature of the insurance contract which entails a duty to defend at no expense to the insured. The obligation to save harmless the insured from the costs of defending the action is sufficiently broad to encompass the third party proceedings. It is the contractual basis for the claim to the solicitor-and-client costs that justifies the award and therefore constitutes an exception to the usual role that solicitor-and-client costs will not be awarded except in unusual circumstances.

[30] I therefore order that Stewart Title shall pay the defendants their solicitor-and-client costs with respect to all reasonable costs incurred by the defendants in connection with the defence of the cottage encroachment claim and the third party claim. If the parties are unable to agree on this amount, they may contact the trial co-ordinator to arrange a further appointment before me.

The Honourable Justice R. D. Cornell

Released: July 21, 2011

CITATION: Knapman v. Deweerd, 2011 ONSC 4269
COURT FILE NO.: CV-2008-101
DATE: 20110721

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Emily Knapman

Plaintiff

– and –

Kenneth John Deweerd, Diana Alberdina Deweerd, Christopher Scott Deweerd and Michelle Renee Deweerd

Defendants

– and –

Stewart Title Guaranty Company

Third Party

DECISION ON MOTION

Cornell J.