

In the Court of Appeal of Alberta

Citation: Alberta Residential Corporation v Certain Lloyd's Underwriters, 2015 ABCA 195

Date: 20150605
Docket: 1403-0141-AC
Registry: Edmonton

2015 ABCA 195 (CanLII)

Between:

Alberta Residential Corporation

Respondent
(Plaintiff)

- and -

**Certain Lloyd's Underwriters Subscribing to Authority Agreement No. YF091589, Various
Lloyd's Underwriters Registration #B1191CR100018, Lloyd's Underwriters**

Appellants
(Defendants)

- and -

Economical Mutual Insurance Company

Respondent
(Defendant)

- and -

**Mary Longworth, Adam Larivee, Jessica Larivee, Tony Cluett,
Alberta Residential Corporation, Janelle Booth, Andrew Booth, Michael Anderson,
Ray Abday, Tayt Kosabeck, Michael Smith, Sheldon Popowich, Kris Watson,
Charity Watson, Lyle Dechief, and Lornadele Arychuk**

Intervenors

The Court:

**The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Mr. Justice Russell Brown**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Order by
The Honourable Mr. Justice E.J. Simpson
Dated the 11th day of April, 2014
Filed on the 12th day of May, 2014
(Docket: 1203-16660)

**Memorandum of Judgment
Delivered from the Bench**

Brown J.A. (for the Court):

[1] The appellant Certain Lloyd's Underwriters Subscribing to Authority Agreement No. YF091589, Various Lloyd's Underwriters Registration #B1191CR100018, Lloyd's Underwriters ("Lloyd's") insured the respondent Alberta Residential Corporation ("ARC") against all risks of direct physical loss or damage to ARC's condominium, including damage to the common property and to Unit 1105, a unit within the condominium. The policy was taken out by the ARC for the benefit of itself and of the owners of units within the condominium as required by section 47(1) of the *Condominium Property Act*, RSA 2000, c C-22 (the "*Act*").

[2] When water pipes burst in an adjacent unit on November 20, 2010, Unit 1105 sustained water damage, necessitating (*inter alia*) repairs to and replacement of drywall from the walls and ceiling, removal and replacement of damaged flooring and sub-floor.

[3] ARC claimed under the Lloyd's policy (as well as under a policy issued by the respondent Economical Mutual Insurance Company ("Economical") for Unit 1105). Lloyd's responded that its policy did not cover repair beyond the unfinished interior surface of the walls, ceiling and floor. ARC and Economical maintain that the Lloyd's policy covered finishing work and repairs to other property.

[4] The parties agreed to have the following issue tried on an agreed statement of facts in special chambers, under Rule 7.1 of the *Rules of Court*:

On November 20, 2010, did [the Lloyd's policy] provide insurance coverage for property located within the undecorated interior surfaces of the floors, walls and ceilings of [Unit 1105]?

[5] The chambers judge reviewed the relevant provisions of the *Act*, which are:

1(1) In this Act,

...

(y) "unit" means

(i) in the case of a building, a space that is situated within a building and described as a unit in a condominium plan by reference to floors, walls and ceilings within the building

...

9(1) Unless otherwise stipulated in the condominium plan, if

- (a) a boundary of a unit is described by reference to a floor, wall or ceiling, or
- (b) a wall located within a unit is a load bearing wall,

the only portion of that floor, wall or ceiling, as the case may be, that forms part of the unit is the finishing material that is in the interior of that unit, including any lath and plaster, panelling, gypsum board, panels, flooring material or coverings or any other material that is attached, laid, glued or applied to the floor, wall or ceiling, as the case may be.

...

47(1) A corporation

- (a) where a building is divided into units, shall place and maintain insurance on the units, other than improvements made to the units by the owners, and the common property against loss resulting from destruction or damage caused by any peril prescribed by or otherwise required by the regulations to be insured against

[6] The chambers judge also referred to term 9 of the registered condominium plan, which provides:

The boundary of any unit with common property is the undecorated interior surface of the unit floor, wall or ceiling, as the case may be.

[7] Lloyd's had argued that section 9(1) of the *Act* and term 9 of the condominium plan make the boundary of the unit, and the unit, synonymous for insurance purposes. The chambers judge rejected that argument, noting that it would be impossible for anyone to occupy the "unit" were it confined to the boundary. He also observed that such a reading would be inconsistent with the *Act*, for two reasons. First, far from suggesting that the boundary *is* the unit, section 9(1) provides that the boundary forms *part of* the unit. And, secondly, section 1(y)(i) defines a unit as "space" (which is inherently three-dimensional), while the undecorated two-dimensional plane identified by Lloyd's as the unit cannot, lacking depth, reasonably be understood as "space".

[8] The chambers judge therefore answered the stated question in the affirmative.

[9] Lloyd's appeals, identifying what it says are three errors committed by the chambers judge.

[10] First, Lloyd's says that the chambers judge should have considered the condominium bylaws which, it says, were inadvertently excluded from the agreed statement of facts. The chambers judge's decision to restrict himself to the agreed statement of facts was, however, not unreasonable. The order setting down the matter for an application under Rule 7.1 restricted the evidence to the agreed statement of facts and exhibits thereto, which did not include the bylaws. In any event, the bylaws could not have purported to override the pertinent statutory provisions canvassed above regarding the meaning of the term "unit" (*Act*, s 32(7)), or the terms of a contract of insurance entered into in accordance with those statutory provisions.

[11] Lloyd's also impugns the chambers judge's interpretation of those statutory provisions, and reiterates its position that, in addition to delineating the boundary between common property and a unit, section 9(1) of the *Act* identifies the component parts of a unit. More particularly, Lloyd's argues that section 43 of the condominium bylaws, which identifies the insurance to be placed by ARC on the "unit" but which specifically excludes coverage for "furnishings, improvements, fixtures and any other property brought into or installed in a Unit by the Owner", operates to preclude coverage for surface finishes such as paint, ceiling texture and flooring.

[12] On this point, we adopt the chambers judge's reasons as our own.

[13] Lloyd's final ground of appeal is that the chambers judge erred in failing to consider whether coverage under the Lloyd's policy was excluded pursuant to the terms of that policy, the *Act* and the bylaws. Again, given that the bylaws were not properly before the chambers judge, his not accounting for them is unassailable. As to exclusions within the Lloyd's policy or the *Act*, it is worth bearing in mind that the chambers judge was asked to decide whether the Lloyd's policy "provide[d] insurance coverage". He was not asked about exclusions and, indeed, his reasons made clear that his answer to the stated question was "subject to any exclusions in the policy [which] question, however, must wait for another day should it ever arise." (ARD F000036/4-6).

[14] Further, Lloyd's neither pleads exclusions in its Statement of Defence nor points now to any specific exclusions that would apply to the subject claim. Further, while section 47(1)(a) of the *Act* excludes "improvements made to the units by the owners" from the ARC's duty to obtain insurance for the condominium units, there was no evidence before the chambers judge as to whether any of ARC's claim was in respect of improvements made *by the owners*. Bearing in mind that the burden of proving that some property is caught by an exclusion falls upon the insurer and not the insured, all these points go to show that, if Lloyd's is right that the chambers judge should have considered whether an exclusion removed some of the property from coverage, on the facts of this case he was bound to conclude that it did not.

[15] The appeal is dismissed.

Brown J.A.

[Discussion on costs]

Berger J.A.:

[16] Insofar as Economical is concerned we are all agreed that it is entitled to a set of costs in Column 2, simpliciter. Insofar as Alberta Residential Corporation is concerned, costs shall also be calculated in Column 2 but doubled to reflect the formal offer.

Appeal heard on June 2, 2015

Memorandum filed at Edmonton, Alberta
this 5th day of June, 2015

Berger J.A.

Appearances:

J.L. Taylor
for the Respondent Alberta Residential Corporation

J.M. McDougall
for the Appellant

R. Martin
for the Respondent Economical Mutual Insurance Company

K.K. Nand
for the Intervenors

- 1
2 MS. SMALL: Correct. And the -- and the idea behind that,
3 I -- at least my understanding of the idea behind that is so that the condominium
4 corporation can limit their obligations as to what is repairable by the unit owner --
5
6 THE COURT: Yeah.
7
8 MS. SMALL: -- versus what is repairable --
9
10 THE COURT: Yeah.
11
12 MS. SMALL: -- by the condominium corporation.
13
14 THE COURT: Yeah, I see that. No, I know -- I know what
15 the -- the real question is.
16
17 MS. SMALL: Yes.
18
19 THE COURT: But I -- I have to answer the question you have
20 given me. Okay.
21
22 Well, thank you very much, Counsel. I'm going to take some time. Let's -- Madam
23 Clerk, will you will check with me at 3:30, and I should be ready to struggle towards an
24 answer by then, so . . .
25
26 Someone has risen?
27
28 (OTHER MATTERS SPOKEN TO)
29
30 THE COURT: Okay. It might be 3:35 now.
31
32 (ADJOURNMENT)
33
34 **Ruling**
35
36 THE COURT: Good afternoon, Counsel.
37
38 I'm just wondering, Counsel -- I know you want an answer, and I'll give you one today,
39 I'm just wondering how long you want it. Obviously if it needs to be reviewed, I was
40 just thinking of the agreed statement of facts, I think I'll just refer to the facts as those set
41 out in the agreed statement of facts. Are you okay with that? Okay. If you're not, tell

1 me and I'll read them in, but I think anyone else -- you or anyone else reviewing this can
2 read them.

3
4 All right then, Counsel. This is my ruling in a special chambers application heard today.

5
6 *Introduction*

7
8 The plaintiff, Alberta Residential Corporation, claims against two defendant insurers,
9 Lloyd's Underwriters and Economical Mutual Insurance Company, regarding water
10 damage to a condominium unit owned by the plaintiff in a condominium on Poplar Drive
11 in Grande Prairie, Alberta.

12
13 Lloyd's insured the condominium common property and units as primary insurer for the
14 condominium corporation. Economical insured only the unit under a policy obtained by
15 the plaintiff.

16
17 A water pipe burst in a neighbouring unit causing damage to the plaintiff's unit. Repairs
18 in the unit stand completed to the unfinished interior surface of walls, ceiling and floors.
19 Finishing work remains. Lloyd's takes the position their policy does not cover any further
20 repair. The plaintiff and Economical allege it does. Counsel for the parties have agreed
21 to proceed under Rule 7.1 to determine an issue on evidence by way of an agreed
22 statement of facts.

23
24 *Issue*

25
26 The issue stated in an amended consent order filed March 11, 2014, sets out the question
27 as follows:

28
29 On November 20th, 2010, did Lloyd's Policy Number 10-8522, the "Lloyd's policy"
30 provide insurance coverage for property located within the undecorated interior surfaces of
31 the floors, walls and ceilings of the plaintiff's unit.

32
33 *My Decision*

34
35 Of course it does. Lloyd's insured the unit.

36
37 *The Facts*

38
39 I will not restate the facts. Counsel have done a fine job of entering an agreed statement
40 of facts.

41

1 description of what part of a floor, wall or ceiling forms part of a unit when the floor,
2 wall or ceiling describes a boundary. All agree that the section permits a condo plan to
3 include more or less of the wall, floor or ceiling as part of the unit when a floor, wall or
4 ceiling is referenced as a boundary. Term 9 in this condominium plan makes such a
5 refinement.

6
7 It set the boundary at the undecorated interior surface of the unit floor, wall or ceiling.
8 For example, the boundary between common property and the unit with respect to a wall
9 is the undecorated interior surface of what appears to be gypsum board as it appears in the
10 pictures at Tab E in the agreed statement of facts. Behind that as viewed from the centre
11 of a room in the "unit" is common property. Lloyd's argues that Term 9 makes the
12 boundary and the unit synonymous for insurance purposes. Unfortunately for Lloyd's,
13 this Court takes a different view.

14
15 Section 9(1) is about boundaries between units and common property. The default
16 provision in the section makes the boundary about three-quarters of an inch thick unless
17 the condominium plan makes it thinner or thicker. Term 9 makes the boundary about as
18 thin as possible. It could have made it thicker, but it chose to make it thinner than the
19 default provision in Section 9(1). It limited the boundary to the unfinished surface.
20 Whether it has any thickness at all could be argued at our leisure at great length. If it
21 does not, it is but a plane with length and width and no depth. If it has any thickness, it
22 would be paper thin.

23
24 If boundary and unit were the same, it would take, as I noted to counsel in argument, a
25 very thin person to occupy that sort of unit, *The Shadow* perhaps. Nothing in Section
26 9(1) suggests to me that it can be interpreted to lead to a conclusion that the boundary is
27 the unit. Section 9(1) speaks of a portion of the wall, floor or ceiling used as a boundary
28 forming part of the unit. The point being the boundary forms part of the unit, not part of
29 the common property. It does not make the boundary the entire unit. It merely makes it
30 part of the unit, not part of the common property. If the intent of Term 9 was to render
31 the boundary and the unit one and the same, it would have to clearly so state.

32
33 Lloyd's has another problem with its position. Section (1)(c) defines a unit as a space.
34 Space has three dimensions -- length, width and height. An undecorated surface has no
35 depth, or at least no depth to create living space. A unit must have space that is three
36 dimensions -- length, width and height. The only sensible interpretation concerning this
37 section in context of the Act is the space lies between the boundaries creating a space in
38 which people reside. Accordingly, everything within, that is anterior to or in front of the
39 boundaries as viewed from a room in a "condo unit", forms part of the unit. Lloyd's
40 insured the unit. The unit is within the boundaries, which boundaries are the undecorated
41 interior surface of the walls, floors and ceilings.

1

2 *Conclusion*

3

4 Accordingly, the answer to the stated question posed is yes. I would add, subject to any
5 exclusions in the policy. That question, however, must wait for another day should it ever
6 arise.

7

8 Madam Clerk, would you be so kind as to remove all of my notes from here. And there
9 is one loose.

10

11 And I think it was Mr. Taylor who was most anxious to speak to costs, I think.

12

13 Submissions by Mr. Taylor (Costs)

14

15 MR. TAYLOR:

Thank you, My Lord. I want to be very brief
16 about this. My main point is that, you know, as I said during my earlier submissions, my
17 client has been waiting anxiously to get paid out on their property damage on this for
18 some time now -- over three years, almost four -- and my submission is that this is a
19 question that really shouldn't have been a question in the first place, and we have been
20 waiting a long time to have it answered, and in my submission, it really shouldn't have
21 been necessary to come to court to answer this question. And on that basis, I would
22 request somewhat increased costs of this application payable in favour of my client, and
23 what I would suggest and request is that my client have costs of this application at double
24 Column 2. This statement of claim is issued on Column 2, and so I would -- I would ask
25 for increased costs in the amount of \$2500, which is double Column 2.

26

27 THE COURT:

Double -- so a special application is about
28 1250, is it?

29

30 MR. TAYLOR:

It's 1250 on Column 2. I just checked that, and
31 so --

32

33 THE COURT:

So you're saying you were put to such
34 unnecessary labour and effort and --

35

36 MR. TAYLOR:

Essentially that's -- that's my submission is that
37 we -- we shouldn't have had to be here today and --

38

39 THE COURT:

I understand, but I'm wondering -- I'll hear
40 from Ms. Small.

41