Date: 20230509
Docket: CI 18-01-16868
(Winnipeg Centre)
Indexed as: Capitol Steel Corporation v. R. Litz & Sons Company Limited et al
Cited as: 2023 MBKB 76

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CAPITOL STEEL CORPORATION applicant(s), -and- R. LITZ & SONS COMPANY LIMITED, AVEC INSURANCE MANAGERS INC., GREAT AMERICAN INSURANCE COMPANY, NORTHBRIDGE GENERAL INSURANCE CORPORATION, AVIVA INSURANCE COMPANY OF CANADA AND THE BOILER INSPECTION AND INSURANCE COMPANY OF CANADA, respondent(s),	Scott J. Hammel, K.C Adrienne S. Funk Jordan W. Magico for the applicant Jeff A. Baigrie for R. Litz & Sons Company Limited Chris I.R. Morrison for Great American Insurance Company, Northbridge General Insurance Corporation, AVIVA Insurance Company, Boiler Inspection and Insurance Company of Canada Anthony C. Fletcher Michael D. Zacharias for GCAN Insurance Company and Royal & Sun Alliance Insurance May Mehrabi for Continental Casualty Company Vivian F.Y. Li Mitch Mraovic for Manitoba Public Insurance Judgment Delivered: May 9, 2023

KROFT J.

INTRODUCTION

[1] In this motion, the applicant, Capitol Steel Corporation (Capitol), seeks leave to add GCAN Insurance Company, Royal & Sun Alliance Insurance Company of Canada and Continental Casualty Company (collectively referred to as the Insurers), as respondents in its application filed September 25, 2018 (the Coverage Application). The Coverage Application asks for declarations determining insurance coverage that might be available to R. Litz & Sons Company Ltd. (Litz) through one or more of the named respondents. Capitol's interest in Litz's insurance coverage arises from Capitol having sued Litz in 2013 (the Action) and Litz's subsequent insolvency in 2017. In other words, the only way for Capitol to recover anything in the Action will be if Capitol's alleged losses are covered in whole or in part by insurance contracts Litz had with the existing and proposed respondents in the Coverage Application.

[2] In the Action, Capitol seeks damages arising from two incidents: the first occurring on February 4, 2013 and the second occurring on February 11, 2013. Both incidents involved damage to steel girders that allegedly occurred when the Litz trailers transporting them overturned. Capitol's claim exceeds three million dollars before interest and costs. Litz admits liability for the first incident but not the second. Litz disputes the quantum of damages claimed in respect of both incidents. The trial of the Action is scheduled for February 3 to 14, 2025.

[3] At the time of the incidents, Litz was insured under a Motor Truck Cargo Carrier's liability policy issued by AVEC Insurance Managers Inc. with the involvement of the various respondents named in the Coverage Application as it now stands. At a pre-trial conference, at the insistence and with the consent of the parties to the Coverage Application and the Action, I agreed the Coverage Application could be heard at the same time as the Action.

[4] In the course of discovery in the Action, Capitol has come to learn certain insurance contracts also existed between Litz and each of the Insurers, which Capitol now moves to add as respondents in the Coverage Application.

[5] Capitol's notice of motion also asks me to add Manitoba Public Insurance Corporation as a respondent, but that portion of the motion was adjourned at the request of Capitol and Manitoba Public Insurance Corporation, subject to hearing cost submissions.

DECISION

[6] The law concerning amendments to applications is found in the Manitoba *Court of King's Bench Rules*, Man. Reg. 553/88, and the case law. The principles governing amendments to applications are the same as those governing amendments to pleadings, including where the amendment in question is the addition of parties. They may be summarized as follows:

- Leave to amend a pleading/notice of application may be granted at any stage in a proceeding on terms that are just, unless prejudice would result that

could not be compensated for by costs or an adjournment (Rule 5.04(2), 38.05.1(2) and 26.01);

- When exercising its discretion to amend, the Court should consider the following:
    - The seriousness of the prejudice to the other party;
    - Whether any resulting prejudice could be compensated for by costs or an adjournment;
    - Whether there was a delay by the moving party and, if so, whether that delay had been satisfactorily explained; and
    - The nature of the proposed amendment and whether is raises a valid, arguable point that has merit;
- In respect of the fourth consideration, the question to ask is similar to that on a motion to strike a pleading for failing to disclose a reasonable cause of action: is it plain and obvious that the proposed amendment discloses no reasonable cause of action (i.e. it has no reasonable prospect of success)? See ***Winnipeg Airports Authority Inc. v. Allianz Global Risks US Insurance Company***, 2016 MBQB 185, at paras. 42 and 46; ***Winnipeg (City) v. Caspian Projects Inc. et al.***, 2020 MBQB 129, at para. 102, and ***All Points Electric v. Wright***, 2021 MBQB 129, at para. 44.

The Insurers oppose Capitol's motion principally asserting that, at law, it is plain and obvious relief, including declaratory relief[1], is not available to Capitol <u>at this time</u>.

[1] i.e. as opposed to actually obtaining judgment

The foundation for that assertion is s. 127(1) of ***The Insurance Act***, C.C.S.M c. I40 (the ***Act***):

> **Right of injured third party against insurer**
>
> 127(1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
>
> (emphasis added)

[7] Section 127 of the ***Act*** was addressed by the Manitoba Court of Appeal in ***Athabasca Industries Ltd. v. Lambair Ltd.***, 1989 CarswellMan 89. One aspect of that case involved a liability insurer seeking a declaration that it need not indemnify a third party in the event that third party successfully obtained and was unable to enforce a judgment against an insolvent insured in respect of whom the insurer had already denied coverage. In essence, the insurer in ***Athabasca*** sought to do what Capitol seeks to do now - but in reverse.

[8] Specifically in respect of s. 127 of the ***Act***, the Court of Appeal held that the cause of action created thereby, only arises after execution of a judgment against the insurer is unsatisfied. A prior claim by a third party against an insurer, even for a declaration that the insurer is obliged to satisfy a judgment that may be obtained against the insured down the road, is premature. The court held the same logic applies where it is the insurer, rather than a third party, who seeks the declaration. The court also noted that whether the unwilling party is an insurer (the case at hand) or a third party,

they cannot be forced into litigation to determine a coverage issue (normally a contractual issue between the insurer and the insured) until there is an unsatisfied judgment against the insured. (see ***Athabasca***, at paras. 26 – 29).

[9] Provisions identical to or substantially the same as section 127 of the ***Act*** exist in other Canadian provinces. The Insurers referred me to a number of cases where the courts in those provinces interpreted the legislation in the same way as the Manitoba Court of Appeal in ***Athabasca*** (see for example ***Briggs v. Co-Operators General Insurance Company***, 2016 NBQB 83, at para. 19; ***Pope & Talbot Ltd. (Re)***, 2011 BCSC 548 (CanLII), at paras. 19 – 27, 122 – 131; ***Bliefernich v. Freeman***, 1989 CarswellBC 119, at paras. 41 – 43, 59 – 65; ***Geiger v. 803577 Ontario Ltd.***, 2000 CarswellOnt 105, at paras. 26 – 29; ***Algoma Steel Corp. v. Royal Bank***, 1992 CarswellOnt 163, at paras. 11 – 13).

[10] Bottom line, it is the Insurers' position Capitol has not obtained judgment against Litz, and as such, Capitol has no right of action against them at this time.

[11] In response, Capitol asserts its proposed amendments do have reasonable prospects of success and should not be shut down prior to a full hearing. In so doing, it relies on, among other things, ***Williams v. Pintar***, 2014 ONSC 1606 (Can LII), a decision of an Ontario Master.

[12] ***Williams*** involved a car-pedestrian accident and a personal injury claim arising there from. The defendant's insurer denied coverage but did add itself as a statutory third party pursuant to provisions in that province's insurance legislation specific to

automobiles. The plaintiff sought to add the insurer as a defendant for the purposes of seeking declaratory relief even though judgment had not issued. The insurer opposed the plaintiff's motion relying on language similar to s. 127 of the ***Act***. As there was no judgment, the insurer argued there was no cause of action and the amendment should not be allowed.

[13] The Master rejected the insurer's arguments and permitted the addition of the insurer as a defendant. The Master noted, among other things:

- Against the backdrop of the principles governing amendments to applications, even without a cause of action, the draft amended statement of claim disclosed a "tenable" claim in the form of declaratory relief between interested parties sufficient for the amendment to be allowed;
- Declaratory relief may be distinguished from seeking judgment. The Ontario ***Courts of Justice Act***, R.S.O. 1990, c. C.43, permits declarations of rights whether or not there is any consequential relief claimed;
- A superior court judge has power to make declarations whether or not there is a cause of action if the request comes from a party with an interest in the subject matter of the declaration;
- The rules of court permit applications to determine rights that depend on the interpretation of a contract and call upon parties to secure the most just expeditious and least expensive determination. The rules also permit disclosure of insurance policies in advance of trial to know if and how judgment can be satisfied;

- Section 258(1) of the Ontario ***Insurance Act***, RSO 1990, c I.8, is not exclusive. It provides how a plaintiff may upon recovery of a judgment proceed against the insurer of the defendant for payment of available insurance money – it does not prevent a plaintiff from seeking declaratory relief; and
- The plaintiff in ***Williams*** was pursuing the declarations not to minimize her exposure, as in the case when two insurers move to have this issue resolved, but to uncover whether she could obtain compensation for her injuries through this action. Without the proposed amendments, the plaintiff will not resolve this issue until after she has obtained judgment in what might be a long and complex personal injury trial. Allowing the amendments might allow the issue of coverage to be resolved perhaps by summary judgment or some other process that is proportionate, timely and affordable.

(***Williams*** at paras. 22 – 31)

[14] Capitol also relies on certain words or phrases in the Insurers' cases, which arguably qualify the interpretation of s. 127 of the ***Act*** proposed by the Insurers. More particularly, Capitol argues this qualifying language should be interpreted as permitting declaratory relief in exceptional circumstances. For examples of this qualifying language, Capitol points to the Manitoba Court of Appeal's decision in ***Athabasca*** where, at para. 29, the court states: "[t]he issue of the insured's liability to the third party should ordinarily be determined first" (emphasis added). According to Capitol, the Court of Appeal used the word "ordinarily" to distinguish it from the word

"always." Capitol also refers to para. 28 of ***Athabasca*** where the Court of Appeal writes: "the general rule remains that declaratory relief will only be given to resolve an actual dispute concerning present rights" (emphasis added). Capitol submits using the phrase "general rule" implies exceptions are possible. Capitol also referred me to ***Pope*** where at para. 21 the British Columbia Superior Court notes there are "a few exceptional instances where courts have permitted coverage issues to be determined in advance of the determination of the issues in the underlying action" (emphasis added).

[15] Capitol says the present case is exceptional in part because Litz admits liability for the February 4, 2023 incident. In other words, at least in respect of the first incident, success is a certainty such that it makes no practical sense to await a formal judgment before seeking a declaration in respect of the Insurers' policies. Separate but related to the admission argument, and in respect of both the first and second incident, Capitol submits strict adherence to s. 127 of the ***Act*** in the present circumstances, is inconsistent with the principles articulated in *King's Bench Rule* 1.04 concerning proportionality and advancing proceedings in an expeditious and least expensive manner.

[16] Simply put, as mentioned previously, Capitol submits it is not plain and obvious its proposed amendments have no reasonable prospect of succeeding.

[17] Notwithstanding Capitol's very capable submissions, for the following reasons (most of which were articulated by the Insurers) I am unable to rule in its favour:

- There is no contractual relationship between Capitol and the Insurers. Capitol's right of action is a statutory one, arising by virtue of s. 127

of the ***Act***. In my view, the plain and ordinary meaning of s. 127 is clear and unambiguous;

- In ***Athabasca***, our Manitoba Court of Appeal states s. 127 of the ***Act*** applies even where a party is seeking declaratory relief in respect of insurance policies as opposed to judgment;
- Absent further pronouncement from our Court of Appeal, or the Supreme Court of Canada, ***Athabasca*** is binding;
- In some of the decisions referenced in para. 10 hereof, the court's express concern participation by an insurer in a liability trial risks introducing elements at trial that might skew the court's findings in a direction more favourable to the interpretation question as opposed to liability. I acknowledge that at the moment, the Coverage Application has not been consolidated with Capitol's claim against Litz but rather, is set to be heard at the same time. In my opinion, that fact does not sufficiently extinguish the skewing concerns expressed in the case law[2];
- Capitol appropriately points out that liability for the first incident is admitted such that, to some extent, judgment is a certainty. Nevertheless, liability is not admitted in respect of the second incident, nor are damages in the case of either incident. This case is not as exceptional as Capitol submits; and
- I took very seriously Capitol's submissions in respect of proportionality,

[2] I say this mindful that here, it is Capitol itself that seeks to add the Insurers.

efficiency and the economic use of Court resources. Moreover, I read with great interest the Ontario Master's decision in ***Williams***. However, in all of the circumstances, I find the clear wording of s. 127 of the ***Act*** and our Court of Appeal's interpretation of that section carries the day. Until directed otherwise by our Court of Appeal or the Supreme Court, I do not consider the ***Athabasca*** decision to be outdated or non-binding; and

- As the insurer was already a third party in ***Williams***, the facts may be distinguished from the facts before me.

[18] In my opinion, it is plain and obvious Capitol cannot pursue its application for declaratory relief before obtaining judgment against Litz.

[19] Before concluding, I note that in addition to arguments pertaining to s. 127 of the ***Act***, Continental Casualty Company submits Capitol's amendment motion is not justified based on what it says is the clear wording of its policy with Litz. If that had been the only issue before me (i.e. had s. 127 of the ***Act***, not been argued), I would have permitted the amendments to the Coverage Application. The Insurers also suggest Capitol's motion should not be entertained on the ground Capitol delayed bringing it. That position is not substantiated by the evidence before me and moreover, is inconsistent with the Insurers' position Capitol's motion is premature.

CONCLUSION

[20] In the circumstances, Capitol's motion to amend its Notice of Application is dismissed.

[21] Note, I was not asked to comment on, nor will I comment on, the implications of this order, if any, on the existing Coverage Application.

[22] I award tariff costs to the Insurers. If Capitol and the Insurers cannot agree on the amount, counsel can return before me.

_____ J.