IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tremblett v. TD Insurance Direct Agency Ltd.,* 2023 BCSC 1366

Date: 20230622
Docket: 46672
Registry: Penticton

Between:

Carl Tremblett also known as Carl Tremblet

Plaintiff

And:

TD Insurance Direct Agency Ltd., Primmum Insurance Company, Primmum Insurance Company dba TD General Insurance Company, TD General Insurance Company and Meloche Monnex Financial Services Inc. dba TD Insurance Meloche Monnex

Defendants

Before: The Honourable Justice Hardwick

Oral Reasons for Judgment

Counsel for the Plaintiff:	J.R. Kitsul
Counsel for the Defendants:	J.L.S. Hodes
Place and Date of Summary Trial:	Kelowna, B.C. May 3 & 4, 2023
Place and Date of Judgment:	Kelowna, B.C. June 22, 2023

[1] **THE COURT:** The plaintiff is the registered owner of real property located at 1504 Cedar Street, Okanagan Falls, British Columbia (the "Property"). At all material times relevant to this litigation, he resided in a residential dwelling on the Property with his common-law spouse.

[2] The plaintiff secured insurance coverage for the Property from Primmum Insurance Company in February of 2020.

[3] In June of 2020, the plaintiff left the Property for a very brief holiday and returned to find that damage to the Property had occurred as a result of the ground settling or shifting below it, as will be described in further detail. It is not disputed that there is damage to the Property and the residential dwelling on the Property as a result of this subsidence.

[4] This summary trial thus turns on whether the damage is included or excluded under the applicable insurance policy.

[5] There remain outstanding claims against the defendants regardless of the outcome of this summary trial. Those claims are set out in the amended notice of civil claim filed January 24, 2022, and include, *inter alia*, punitive damages, special damages, and costs on a solicitor/client basis.

The Relief Sought

[6] The notice of application filed November 15, 2022, seeks the following relief:

a) an order declaring that the defendant Primmum Insurance Company is liable under the policy to pay and make good on the loss and damage sustained by the plaintiff in accordance with the provisions of the policy up to the maximum amount of $200,000 as set out in the policy; and

b) an order that the balance of the plaintiff's notice of civil claim be adjourned generally.

The latter relief is not opposed. The primary relief is opposed.

Agreed Statement of Facts

[7] Both parties are represented by experienced and capable counsel. They very helpfully agreed on an "Agreed Statement of Facts, Issues, and Document Agreement" (the “Agreed Statement") in advance of the hearing. It states as follows at Part A:

> The plaintiffs and the defendants each admit and agree that the facts set out below:
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> a) are true;
>
> b) need not be proven by any party at the trial of this matter; and
>
> c) may be used as though they were admissions made by each of the parties.
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> 1. The plaintiff is the registered owner of and resident of a single-family dwelling and outbuildings located at 1504 Cedar Street, Okanagan Falls, British Columbia, V0H 1R0, which is also defined as "the property." The defendant Primmum Insurance Company, "Primmum," is the homeowner's insurer and issued a policy of insurance to the plaintiff, which provided coverage for the premises during a policy term of February 13, 2020, to February 13, 2021, defined as "the policy."
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> . . .
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> 3. The pertinent Policy documents consist of the following:
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> (a) Overview of coverage, including “New Home Insurance Policy Details” and “Coverage Summary Page”;
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> (b) Policy Wordings; and
>
> (c) Extended Water Damage Endorsement (together the “Policy Documents").
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> 4. The Policy Documents were delivered to the Plaintiff as part of one package consisting of 62 pages on or about February 13, 2020. The Policy took effect on that date.
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> 5. Upon returning to the Property on June 6, 2020, after a vacation lasting 4 days the Plaintiff observed for the first time the sink holes in the yard and damage to the home located at the property (the “Damage").
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> 6. The plaintiff reported the Damage to Primmum, who dispatched Stutters DKI ("Stutters") to inspect the Property.
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> 7. Stutters identified and photographed certain damage to the Property.

8. Following the inspection by Stutters, Primmum engaged Rock Glen Consulting, geotechnical engineers ("Rock Glen"), to investigate the cause of the damage.

9. Rock Glen attended the Property on 3 occasions, on July 6, July 8, and July 20, 2020.

10. On August 10, 2020, Rock Glen issued a report which contained, amongst other things, the following conclusions:

    (a) Subsidence is pervasive throughout the rear yard. There is no confirmed subsidence in the front yard where the septic field is located (see *Figure 2*).

    (b) Groundwater flow appears to have undermined a substantial portion of the subject property.

    (c) Foundation cracking and a preliminary interior level survey showing floor slopes to the north and northwest indicates subsidence is affecting the northwest quadrant of the house more than other areas.

11. All conclusions contained in the Rock Glen report are not in dispute.

12. Following completion of the Rock Glen report, the Plaintiff's claim was initially denied on the basis of two exclusion clauses (17) and (26) found under the Common Exclusions clause of the Policy.

13. Primmum also relies on exclusion (3) for Earthquake, Erosion and Other Geological Phenomena.

Agreed Statement of Issues

[8] In Part B of the Agreed Statement, the parties agree that the issues to be determined at this summary trial brought pursuant to Rule 9-7 of the *Supreme Court Civil Rules* are as follows:

14) The Plaintiff seeks coverage under the Policy pursuant to the Extended Water Damage Endorsement,

15) The Defendants rely on the following exclusions contained in the Policy:

    i) Exclusion 3: Earthquake, Erosion and Other Geological Phenomena;

    ii) Exclusion 4: Ground Movement; and

    iii) Exclusion 17: Settling.

[9] The sole issue at this summary trial is thus whether the plaintiff's claim is covered by the Policy or excluded pursuant to one or more of the identified exclusion clauses.

Consideration of Expert Evidence

[10] As indicated above, an expert report was prepared by Rock Glen which forms part of the Agreed Statement. This report opined that the settling was probably caused by high groundwater levels, the source of which was a combination of the over-irrigation of nearby sports fields, possible leaking water lines, and the diversion of nearby Shuttleworth Creek by a sanitary sewer line trench adjacent to the Property.

[11] Of note, none of the three identified sources of the water resulting in the settling or subsidence were within the control of the plaintiff. Further, the plaintiff did not leave the Property unattended or vacant for an extended period of time. The vacation he took was mere days.

[12] Simply put, the expert evidence confirms that the plaintiff finds himself in the unfortunate position of having a property that suffered damage through no fault of his own and is seeking compensation from the defendant insurer under the extended water coverage which he purchased and paid for as part of the Policy.

Suitability for Summary Trial

[13] The rules regarding the suitability for summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules* are to be interpreted broadly, favouring proportionality and access to the affordable, timely, and just adjudication of claims. This is set out very clearly in the opening paragraphs of *Hryniak v. Mauldin*, 2014 SCC 7:

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The

> balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> . . .
>
> [5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims.

[14] Of significance is the relatively recent decision of a five-member panel of our Court of Appeal, *Cepuran v. Carlton*, 2022 BCCA 76. Prior to *Cepuran*, *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247, commonly known as *Saputo*, was the authority for converting a petition to an action under the *Supreme Court Civil Rules*. The "*Saputo* rule" was that a petition must be referred to the trial list where there was a *bona fide* triable issue. The Court of Appeal in *Cepuran* states, however, that the existence of a triable issue is no longer a good reason to convert a petition into an action. This new approach advocated by the Court of Appeal is to tailor the procedure to the proceeding. This is in line with the modern approach to civil procedure as encouraged by the Supreme Court of Canada as set out above in *Hryniak*. The approach is intended to allow parties and trial courts to tailor the pre-trial and trial procedures to a given case in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on its merits.

[15] *Cepuran*, as noted, deals with the conversion of a petition to a trial. It is thus somewhat distinguishable. However, the Court of Appeal in *Universe v. Fraser Health Authority*, 2022 BCCA 201, follows the *Cepuran* decision and effectively, in my view, incorporates this same type of approach, albeit legally nuanced, into the summary trial procedures under Rule 9-7. Rule 9-7 of the *Supreme Court Civil Rules* in and of itself does provide for greater flexibility than was provided for even under the *Saputo* test. However, I think the principles are good law. I am specifically going to refer to paragraphs 20 and 21 of the decision in *Universe*, although paragraphs 19 to 35 are generally instructive as to this issue:

> [20] . . . [T]he summary trial procedure initiated in cases such as *Inspiration Management* has served our judicial system well. This is reflected by the substantial number of summary trials that take place in the Supreme Court of British Columbia each year. As Tysoe J.A noted in *Brissette*, two developments in the last several years have added to the Court's willingness to take into consideration time constraints and the costs of litigation. First, the *Supreme Court Civil Rules* introduced the concept of proportionality in 2010 as an express objective of the Court. Most notably, R. 1-3(2) now recognizes that the efficient use of court time is an important objective of the justice system:
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> > Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
> >
> > (a) the amount involved in the proceeding,
> >
> > (b) the importance of the issues in dispute, and
> >
> > (c) the complexity of the proceeding.
>
> [21] Second, the Supreme Court of Canada in *Hryniak v. Mauldin* 2014 SCC 7 had referred to the need for a "shift in culture" in the legal system. In the words of Justice Karakatsanis:
>
> > The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. *The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure*.
>
> [Emphasis in original.]

[16] I will also refer to the oft-quoted seminal authority in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.*, 1989 CanLII 229 (BCCA), which generally stands for the proposition that every effort is to be made to ensure a just result (see in particular paragraphs 46 and 47 of *Inspiration Mgmt.*).

[17] Finally, I refer to the decision of our Court of Appeal in *Gichuru v. Pallai*, 2013 BCCA 60, in particular at paragraph 30. In that case, our Court of Appeal outlines helpfully what factors the court should consider when determining whether a matter is suitable for summary determination. They are as follows:

a) the amount at issue in dispute;

b) the complexity of the matter;

c) the urgency;

d) any prejudice likely to arise by reason of delay;

e) the course of the proceeding;

f) the cost of taking the case forward to a conventional trial in relation to the amount involved; and

g) whether credibility is a critical factor in determination.

[18] In my view, having regard to the above legal principles, this matter is suitable for summary determination under Rule 9-7 of the *Supreme Court Civil Rules*. Specifically, I find as follows:

a) The amount in issue is capped at $200,000 pursuant to the terms of the Policy. I absolutely recognize that this is a significant amount of money to the plaintiff. However, practically speaking and having regard to the cost of litigation, it is an amount that favours summary determination where same is otherwise possible, having regard to the other relevant considerations;

b) The matter is not overly complex from a factual perspective. It turns on the interpretation of the Policy, including the relevant exclusions in accordance with the law on this point, which has been comprehensively addressed by our Court of Appeal previously;

c) The costs of taking this issue to a conventional trial are, in my view, likely disproportionate to the amount in issue;

d) There are no significant credibility issues which cannot be resolved having regard to the documents included as part of the application record and particularly having regard to the Agreed Statement.

[19] In reaching the above conclusion, I do recognize that the matter is not particularly urgent, and there is no identifiable prejudice from a delay in resolution. However, I consider these factors, in my discretion, to be of less weight than the principle of proportionality and the absence, as is often the case if summary trials, of significant factual disputes in the evidence.

The Policy

[20] The relevant portion of the extended water policy exclusion of the Policy reads as follows:

> You are insured against sudden and accidental loss or damage caused directly to the insured property, including animals, by:
>
> (1) Water originating from escape, overflow, or backing up of:
>
> - French drains or weeping tile;
> - sewer connections;
> - sewers;
> - storm drains;
> - septic tanks, drain fields, and other wastewater treatment systems;
> - ditches;
> - sumps, retention tanks or holding ponds.
>
> For the purpose of this endorsement, "ditches" means a man-made trench, usually dry, to help and channel drainage.
>
> (2) Ground or surface water that suddenly and accidentally enters or seeps into the building through walls, foundation, basement boards, or other means, or through openings therein.
>
> (3) Water originating from the rising or overflow of any stream or body of fresh water, whether natural or man made, or from dam breaks.

The Law and Overview

[21] Two decisions of the British Columbia Court of Appeal are critical to the interpretation of the Policy: *Buchanan v. Wawanesa Mutual Insurance Company*, 2010 BCCA 333; and *Pavlovic v. Economical Mutual Insurance Co.*, 1994, 99 BCLR (2d) 298, 1994 CanLII 2834 (C.A.).

[22] Also relevant is *Leahy v. Canadian Northern Shield Insurance Company*, 2000 BCCA 408.

[23] Based upon these cases, in order for the plaintiff to succeed, I conclude he must show three interrelated things:

1) that the extended water damage exclusion in the Policy could apply to his loss;

2) that none of the exclusions in the Policy unambiguously apply to his loss; and

3) if some exclusions appear to apply and create ambiguity, that the Policy as a whole is ambiguous as to their meaning.

[24] As I have alluded to above, the plaintiff is an extremely sympathetic litigant. When purchasing the Policy, he saw fit to include the water damage exclusion. He paid an additional premium for this extended coverage. The Property has sustained damage as described from a combination of factors over which the plaintiff did not control.

[25] Legally speaking, however, the case favours the defendant insurer. There are two reasons for this. Firstly, the extended water damage exclusion in the Policy only covers loss or damage "directly caused" by water, whereas in this case, the water caused the loss or damage indirectly. Second is that the exclusion clause (3) is worded very similarly to what Finch J.A. suggested how an unambiguous exclusion clause should be worded in *Pavlovic*.

Does the Extended Water Damage Policy Apply?

[26] The first question is whether the extended water damage exclusion in the Policy applies.

[27] This presents two problems for the plaintiff, unfortunately.

[28] First is that the introductory passage states clearly that it applies to "loss or damage caused directly to the insured property." As I already noted above, the water is an indirect cause in this case because the water did not cause the damage

itself, but rather caused the subsidence, which in turn caused the damage. Finch J.A. spoke on factually similar situation in *Pavlovic* as follows at paragraph 21:

> [21] In these circumstances, I do not think one can fairly say that the appellants' loss and damage were "caused by" the leakage of water below the ground. At most all one can say is that the leakage of water was an indirect cause of the loss, and one of many other contributing causes.

[29] Upon significant consideration, I cannot see a way past this issue given Finch J.A.'s direct statement on this point. There is simply no viable means, in my view, to legally distinguish this authority, which of course is binding on this Court.

[30] The second issue with respect to the application of the extended water damage policy is that none of the enumerated types of water clearly fit within the factual matrix as I have detailed above. The water did not originate from escaping, overflowing, or backing up. The water did not enter the residential dwelling on the Property at all. There was thus not an overflowing or rising of a water in a stream, at least in the traditional sense.

Do Any of the Exclusions Apply Unambiguously?

[31] The question of whether the Policy is ambiguous, of course, lies at the heart of this matter, just as it did in *Pavlovic*, *Leahy*, and *Buchanan*.

[32] If the Policy is ambiguous, then the court will resort to interpretive principles to resolve ambiguity, such as the primacy of specific over general, namely *contra proferentem*, and the desirability of meeting the reasonable expectations of the parties (see, for example, *Buchanan* at paragraph 31). All of these principles tend to favour coverage for the benefit of the insured.

[33] However, if the Policy leaves no ambiguity, then the insurer will succeed given that the policy is drafted to protect the insurer's interest.

[34] I will briefly review the key takeaways from the cases cited above on the issue of ambiguity in insurance policies, starting with *Pavlovic*.

[35] In *Pavlovic*, Finch J.A. found that the meaning of the exclusion clause at issue was ambiguous because it left open the question of whether a loss was excluded where seepage or leakage was only a contributing cause rather than the sole cause of the loss at issue. As a result, he interpreted the policy in favour of the insured, finding that the loss was covered under the policy. Finch J.A. also suggested alternative wording for an exclusion clause, which he would have considered to be unambiguous: *Pavlovic* at para. 23.

[36] In *Leahy*, Esson J.A. considered an exclusion clause different from the one in *Pavlovic*. At paragraph 15, he noted the exclusion clause in issue in *Pavlovic* was clause-dependent in that it began with the words "caused by" and therefore was tied to the cause of the loss. In *Leahy*, there was a clause-independent exclusion clause in the policy which simply said, “We do not cover ... settling, expansion, contraction”, and so forth. Esson J.A. found that the cause-independent exclusion was unambiguous and ruled that the loss must be excluded. Essentially, based on my review, *Leahy* found that *Pavlovic* only applied to cause-dependent exclusion clauses.

[37] *Buchanan* did not overturn or distinguish either *Pavlovic* or *Leahy*. The plaintiff in *Buchanan* requested a five-member panel of the Court of Appeal to reconsider *Leahy*, but our Court of Appeal did not grant that request. The policy in *Buchanan* was similar to the policy in *Leahy*, containing a clause-independent exclusion clause and another clause that excluded certain loss or damage except when caused by water from specified sources. In *Buchanan*, the second clause concluded by saying if the water fit within the exception, then "you are insured."

[38] The majority found this statement constituted a positive covenant, creating ambiguity with the clause-independent exclusion that had to be resolved in favour of the insured. The majority considered *Leahy* not to apply in the circumstances. Justice Groberman dissented, finding that there was no positive covenant and that *Leahy* allowed the insurer to deny coverage. Justice Groberman commented that the plaintiff made convincing submissions on the need to reconsider *Leahy* and

suggested that it might be appropriate for a future five-member panel to do so. This has not occurred to date.

[39] Further, general contractual interpretation principles apply to the interpretation of an insurance policy. In *Buchanan*, Justice Newbury stated for the majority as follows at paragraph 31:

> [31] There are a few rules of interpretation to which resort may be made – the *contra proferentem* rule, the fact that exclusions are to be interpreted narrowly, and the primacy of the specific over the general. All of these operate in favour of coverage. Moreover, these rules are merely specific variations on the general theme, adopted regularly by Canadian courts, that contracts are to be interpreted so as to carry out the parties' intentions as reflected by the entire document. At least where an ambiguity (which would include an apparent conflict: See *Brown, Insurance Law in Canada* (looseleaf) at 8-11) exists, it is desirable that it be resolved in accordance with the reasonable expectations of the parties: *Reid Crowther, supra*, at para. 33; citing *Brissette Estate v. Westbury Life Ins. Co.* 1992 CanLII 32 (SCC), [1992] 3 S.C.R. 87.

[40] Although *Buchanan* predates the leading case on contractual interpretation in Canada, namely *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, I find Justice Newbury's comments remain instructive. If the Court finds the Policy to be ambiguous, then interpretation should result in coverage.

Conclusion

[41] In the present case, there are three exclusion clauses at issue, namely (3), (4), and (17) as detailed above. All are exclusions in addition to the common exceptions in the Policy. All three are cause-dependent, and therefore *Pavlovic*'s instruction regarding ambiguity is especially on point. Exclusion 3 specifically stands out because it adopts the language extremely similar to what Finch J.A. stated would be unambiguous in its interpretation: *Pavlovic* at para. 23.

[42] In my view, exclusion 3 is ultimately fatal to the plaintiff's claim. It is unambiguous and unfortunately renders the plaintiff's loss excluded under the Policy. Exclusions 4 and 5 are, in my view, ambiguous when read alongside the extended water damage exclusion and the terms of the Policy generally. However,

any analysis of this issue would be *obiter dicta* given my primary conclusion that exclusion 3 unfortunately excludes coverage for the plaintiff's loss under the Policy.

Costs

[43] Costs are awarded at the discretion of the court pursuant to Rule 14-1 of the *Supreme Court Civil Rules*. The general rule is that costs are awarded to a party that is substantially successful unless the court otherwise exercises its discretion to otherwise order.

[44] The defendant insurer has been substantially successful in this summary trial as a result of my conclusions on the application of the relevant binding legal authority in terms of the interpretation of the Policy.

[45] Further, neither counsel made submissions that they wish to reserve the right to make additional submissions on costs arising from any formal offers that might have been delivered during the course of the action.

[46] Accordingly, I order that the applicant respondent is entitled to costs of this summary trial, in accordance with Rule 14-1(9) and (12) of the *Supreme Court Civil Rules* at Scale B from the plaintiff in any event of the cause but not payable forthwith, given that it is not opposed that the remaining relief in the amended notice of civil claim is being adjourned generally.

[47] Those are my reasons for judgment. Thank you.

"Hardwick, J."