

CITATION: G.E.S Construction Limited v. Can-Sure Underwriting Ltd. et al. 2024 ONSC 1930
COURT FILE NO.: CV-18-596695-A2
DATE: 20240402

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: BRIAN KASHIN, ALISON KASHIN and SHERYL LIPTON
Plaintiffs

AND:
G.E.S. CONSTRUCTION LIMITED and LAND PRIDE GROUP INC.
Defendants

AND:
CAN-SURE UNDERWRITING LTD., KENAIR APARTMENTS LIMITED,
TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1516,
DAVID FORTIER MARCELLO DIAS, and LLOYD’S UNDERWRITERS
Third Parties

BEFORE: Koehnen J.

COUNSEL: *Christopher R. Dunn* for the defendant G. E. S. Construction Limited
Gerry Gill for the third party defendant, Lloyd’s Underwriters

HEARD: January 9, 2024

ENDORSEMENT

[1] The defendant, G. E. S. Construction Limited seeks a declaration to the effect that the third party defendant, Lloyd’s Underwriters has a duty to defend and indemnify G.E.S. in this action and that Lloyd’s attempt to void the insurance policy at issue is of no force or effect because Lloyd’s has either waived that right or is estopped from voiding the policy.

[2] For the reasons set out below, I dismiss that motion. Waiver requires the party waiving a right have demonstrated an unequivocal and conscious intention to waive. Lloyd’s conduct

does not rise to that level. Estoppel requires detrimental reliance. There is no evidence before me that the insured detrimentally relied on anything Lloyd's did with respect to the policy under which G.E.S. claims.

Background Facts

[3] G.E.S. is a general contractor that had agreed to renovate a suite in a condominium building at the corner of Avenue Road and Lonsdale Avenue in the City of Toronto. G.E.S. subcontracted the demolition of the unit to the defendant Land Pride Group Inc. Land Pride had liability insurance with Lloyd's. When Land Pride took out the policy, it advised Lloyd's that it was a snow removal and landscaping company. It did not tell Lloyd's that it did demolition work.

[4] G.E.S. was added as an additional insured on Land Pride's policy. The certificate of insurance in favour of G.E.S. stated:

It is hereby understood and agreed that G.E.S. Construction Ltd and Brian & Alison Kashin are added as Additional Insured, but only with respect to the Liability arising from the operations of the Named Insured.

[5] The relevant insurance policy described the operations that Lloyd's insured as follows:

Description of Business Operations

Landscaping Contractor and Snow Removal Service Excluding Public Roads.

[6] That description was found on the Policy Declarations page which is the cover page of the insurance policy. There is no evidence before me about whether G.E.S. ever asked to see the Policy Declarations page or the policy.

[7] The policy under which the claim was made ran between May 22, 2015 and May 22, 2016.

[8] On April 27, 2016 while Land Pride was carrying out its demolition work, a water breach occurred in the unit. The plaintiff says the water breach was attributable to the negligence of G.E.S. and Land Pride. G.E.S. and Land Pride say the damage was the responsibility of the property manager for failing to turn off the correct water pipes.

- [9] On May 2, 2016 Land Pride notified its broker of the claim who notified Lloyd's through its Canadian Managing General Agent, Can-Sure Commercial Insurance. All agree that the statements and actions of Can-Sure bind Lloyd's.
- [10] Lloyd's began investigating and knew by May 5, 2016 that Land Pride was involved in demolition operations that led to the incident. On May 5, 2016, Can-Sure advised Lloyd's to obtain a coverage opinion given the material change in risk between Land Pride's description of itself as a snow removal and landscaping business on the insurance application and the demolition work it was doing on the property.
- [11] Lloyd's retained an adjuster who advised it on May 19, 2016 that Land Pride's performance of demolition work may give Lloyd's a basis to void the policy. Lloyd's then retained coverage counsel. Coverage counsel advised Lloyd's on June 9, 2016 that it had grounds to void the policy *ab initio* for material misrepresentation.
- [12] On July 6, 2016 Land Pride submitted to new applications for insurance with Lloyd's.
- [13] On July 11, 2016 coverage counsel sent Lloyd's a draft letter to be sent to the insured which voids the 2015 policy *ab initio* but indicates that Lloyd's might be prepared to issue a new policy for 2015 to cover the landscaping and snow removal business. The new policy would include a specific term that excludes from coverage any damages arising out of construction or demolition work. That letter was never sent.
- [14] On July 15, 2016 Lloyd's billed Land Pride for the renewed policy which invoice Land Pride paid.
- [15] On July 28, 2016, Land Pride cancelled the new policy. Can-Sure processed the cancellation request and returned the pro rata portion of the premium for the renewed policy period in respect of which Land Pride no longer needed insurance from Lloyd's.
- [16] On September 13, 2016 Lloyd's advised Land Pride that it was voiding the 2015 and 2016 policies *ab initio* and sent a refund of the 2015 policy premium and that portion of the 2016 premium which Lloyd's had retained when cancelling the policy at the request of Land Pride.
- [17] G.E.S. submits that once Lloyd's learned of Land Pride's misrepresentation it had three options:
- (a) Advise the insured that it was voiding the policy *ab initio* and refund the premium.
 - (b) Retain the premium and treat the contract as valid and subsisting.

- (c) Treat the policy as valid but cancel unilaterally in accordance with the statutory conditions for unilateral termination.¹

[18] G.E.S. says that when Lloyd's renewed the policy and accepted the premium for an additional year it in effect chose option two: to retain the premium and treat the contract as valid. G.E.S. says that is a choice from which Lloyd's cannot resile because by electing that option, it waived the right to void the policy. In the alternative, G.E.S. submits that Lloyd's is estopped from voiding the policy. I turn first to waiver.

Has Lloyd's Waived its Right to Void the Policy?

[19] The Supreme Court of Canada summarized the test for waiver as follows in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*,²

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.³

[20] There is no doubt that Lloyd's had full knowledge of its rights shortly after Land Pride reported the claim. In my view, however, the evidence does not demonstrate an unequivocal and conscious intention to abandon the right to void the policy.

[21] The emails between the parties are not as clear as they could be because some of the communications conducted by phone, as a result of which the emails have a context that is not always clear from the email standing alone. Lloyd's did, however, raise the issue of misrepresentation and coverage from the outset. Land Pride was never under any misapprehension about the fact that Lloyd's was of the view that it had no liability on the policy. Even the acts of renewing the policy and accepting premiums on it were always couched in terms of resolving the issue of Lloyd's obligation to respond to the claim Land Pride had made under the old policy. A more detailed review of the communications between Lloyd's and Land Pride makes this clear.

¹ *Hansra v. York Fire & Casualty Insurance Co.*, 1982 CarswellOnt 1439, at para 27; *General Security Ins. Co. v. Howard Sand and Gravel Co.*, [1954] S.C.R. 785, [1954] 4 D.L.R. 682, [1954] I L.R. 1-158.

² *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490

³ *Ibid.* at para. 14.

[22] As noted earlier, the loss occurred on April 27, 2016. Land Pride notified its broker on May 2, 2016. Lloyd's began investigating almost immediately.

[23] By May 19, 2016 Lloyd's received a report from its insurance adjuster. The report, among other things, states:

The insured has been provided with a Non-Waiver agreement which he is reviewing and discussing with the council (sic) for Land Pride Group. He has been advised in emails and on the phone that coverage is not afforded at this time and that we are investigating the loss.

[24] That point is quite clear. Land Pride was told that coverage is not afforded and that the insurer is investigating the loss. That, plus delivery of the nonwaiver agreement is inconsistent with an "unequivocal and conscious intention" on the part of Lloyd's to waive its right to avoid the policy.

[25] The evidentiary value of the adjuster's report is, however, more limited. The statement quoted above is contained in the adjuster's report. The adjuster did not deliver an affidavit. Rather its report is attached as an exhibit to an affidavit from a lawyer at Lloyd's external law firm and is therefore hearsay. Neither the emails nor the nonwaiver agreement that the adjuster refers to have been produced. Lloyd's has made no effort to demonstrate the necessity of the hearsay statement or its reliability, both of which are required to admit a hearsay statement. That said, Land Pride has not denied the statement and the tenor of the adjuster's statement is corroborated by other evidence.

[26] The policy expired on May 22, 2016. On May 25, 2016 Lloyd's advised:

For now, we are binding renewal at expiry terms and conditions.

The qualifier "for now" suggests that Lloyd's course of conduct may change in the future. That too is not consistent with an unequivocal or conscious intention to waive the right to void the policy.

[27] On June 6, 2016 Can-Sure agreed to renew the policy subject to verification of certain terms.

[28] On July 14, 2016 Can-Sure advised Land Pride's broker that it had been instructed to "get off risk" and advised Land Pride to replace the policy within 10 working days.

[29] G.E.S. submits that only 6 hours later the author of the email instructing Land Pride to replace coverage confirmed that instead of getting off of risk, Lloyd's was holding cover until such time as the applications were completed. That statement is more nuanced than

G.E.S. indicates. The statement about holding cover arose in an internal email exchange between two Can-Sure employees. The first indicated that the policy had lapsed on May 22, 2016. The second replied saying that Lloyd's had agreed to hold cover until the broker could get the insured to make changes to the policy and the renewal applications.⁴ That is what the reference in paragraph 27 above to verification of certain terms relates to. The overall context suggests that the changes Lloyd's sought were changes to expressly exclude demolition coverage and to reach an agreement to withdraw the claim that is the subject of this motion.

- [30] On July 15, 2016 Lloyd's invoiced Land Pride for a renewal of the policy. Although, without further context, this could be seen as an act of waiver, on July 19, 2016 Can-Sure advised in the context of the policy renewal that:

The only way this is going to work is if insured withdraws claim, and confirmation from the Insured the claim should not of (sic) been reported.⁵

- [31] This comment arose out of a conversation between Can-Sure and Land Pride's broker about the nature of Land Pride's demolition work and the misrepresentation in the policy application. After that conversation, Can-Sure followed up with an email asking:

Million dollar question.
Is the Insured going to withdraw the claim,

- [32] After Land Pride's broker replied suggesting that they form a common front and focus on the property manager's liability for failing to turn off the water on the property, Can-Sure wrote back reiterating that the only way the new policy would work is if Land Pride withdrew its claim under the old policy.

- [33] On July 28, 2016 Land Pride's broker wrote to Can-Sure to cancel the Lloyd's policy because things were "still in limbo." In doing so the broker, among other things, wrote:

Eugene said that Can-Sure's position may be to cancel the policy, refund money, do a new policy excluding demolition (even though it can be argued that he does not do demolition) and that originally Can-Sure wanted to give 10 days to replace and then to cancel. This would be a mess, so in order to protect the client against any further potential claims we sought insurance elsewhere and have now decided **(because of indecision on Can-Sure and Crawford)**

⁴ G.E.S. Motion Record, pdf. P. 325

⁵ Exhibit "X" to the affidavit of James Omran sworn December 1, 2023.

to place elsewhere effective August 1st and the cancel the Can-Sure policy effective August 1, 2016. I don't want to do this and I'd like to keep everything with Can-Sure, but since I'm going on vacation tonight I can't risk our insured being not insured.
(Emphasis added)

- [34] Plainly put, Land Pride knew that things with Lloyd's were "in limbo" and complained of indecision on the part of Lloyd's and its Canadian agents. In those circumstances, it would not be accurate to say that Lloyd's had communicated to Land Pride either by words or conduct an "unequivocal and conscious intention" to waive its right to void the policy.
- [35] Although Lloyd's first step in response to the cancellation of the policy was to return the unused portion of the premium for the new policy, Lloyd's voided both the new and the old policy approximately one month later. While this may not reflect the counsel of perfection, in circumstances where Lloyd's had raised the issue of misrepresentation from the outset and a misrepresentation appears to have occurred, that brief delay should not, in my view, preclude Lloyd's from voiding the policy for misrepresentation.

Is Lloyd's Estopped from Voiding the Policy?

- [36] The party asserting estoppel must demonstrate that:

- (1) the parties are in a legal relationship at the time of the promise or assurance;
- (2) the promise or assurance is intended to affect that relationship and to be acted on; and
- (3) the other party in fact relied on the promise or assurance. It is, as we will explain, implicit that such reliance be to the promisee's detriment.⁶

- [37] G.E.S. has demonstrated that the parties were in a legal relationship at the time the events occurred. Although G.E.S. has demonstrated that Lloyd's conduct would have affected the relationship had Land Pride renewed and withdrawn its claim under the policy, G.E.S. has not demonstrated how Lloyd's initial cancellation of the policy rather than voiding the

⁶ *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 (CanLII) at para. 15.

policy immediately was intended to be acted on. Land Pride knew at all times that coverage for demolition work was at best “in limbo.”

- [38] With respect to detrimental reliance, there is no evidence before the court from Land Pride about any steps it took or did not take because of Lloyd’s conduct. Moreover, there is no detrimental reliance that could have arisen with respect to the policy under which the claim arose. That policy ended on May 22, 2016. There is nothing that Land Pride could have done to obtain replacement coverage under the old policy after the loss occurred. Given that the voiding of the new policy has no effect of the rights of G.E.S. as an additional insured under the old policy, I make no findings about whether Lloyd’s’ is estopped from voiding the new policy.

Costs and Disposition

- [39] For the reasons set out above, I dismiss the motion of G.E.S..
- [40] The parties have agreed that cost should be fixed at \$20,000 in the event costs are payable on the motion.
- [41] I was given no reason for which costs should not be awarded to the successful party. I therefore award costs in favour of Lloyd’s which I fix in the amount of \$20,000 payable within 30 days.

Date: April 2, 2024

Koehnen J.