IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vogt v. Stewart Title Guaranty Company,* 2024 BCSC 1216

Date: 20240708
Docket: S22125
Registry: Nelson

Between:

Carol Suzanne Vogt

Plaintiff

And

Stewart Title Guaranty Company

Defendant

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Appearing on her own behalf:	C.S. Vogt
Counsel for the Defendant:	J.A. Bird
Place and Date of Trial:	Nelson, B.C. February 6, 2024
Place and Date of Judgment:	Nelson, B.C. July 8, 2024

Introduction

[1] Carol Vogt purchased title insurance from Stewart Title Guaranty Company (the "Company") when she purchased her home in 2012. In 2020, Ms. Vogt notified the Company that she had discovered that the septic system was not constructed to Building Code. She made an insurance claim for the costs associated with replacing the septic system. The Company denied Ms. Vogt's claim.

[2] Ms. Vogt filed a notice of civil claim. In her amended claim, she seeks compensation from the Company in the amount of $73,731.82 for expenses associated with the replacement of the septic system in 2020-21.

[3] The Company denies that it is liable to Ms. Vogt. Fundamentally, it contends that Ms. Vogt misconstrues the nature and purpose of title insurance, and that the title insurance she purchased does not cover her claim.

[4] Ms. Vogt filed the notice of application which this judgment addresses. In her amended notice of application she seeks judgment. While she did not refer to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, both parties agree that in substance this is an application for a summary trial. Both parties also agreed that the matter was suitable for summary trial. In light of the nature of the matters in issue, which can be determined on the affidavit evidence filed, and the amount of money at stake, I find that the matter is suitable for disposition by way of summary trial.

[5] For the reasons that follow, I have concluded that Ms. Vogt's action must be dismissed.

Facts

[6] Ms. Vogt purchased her home in Nelson, British Columbia in 2012. She purchased the property as to an undivided 99/100 interest. Two other persons were the purchasers as to the remaining undivided 1/100 interest. Those two persons were removed from title on June 8, 2018, leaving her the sole owner.

[7] At the time of purchase, Ms. Vogt purchased title insurance from the Company (the "Policy").

[8] Relevant provisions of the insurance Policy Ms. Vogt purchased include:

> **Covered Title Risks**
>
> 29. Any adverse circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at the Policy Date.
>
> […]
>
> **Exclusions**
>
> 3. Risks:
>
> - that are created, allowed, or agreed to by you;
> - that are actually known to you, but not to us, on the Policy Date;
> - that result in no loss to you; or
> - that first affect your Title after the Policy Date–this does not limit the coverage described in Items 1–8, 16, 23, and 26 of the Covered Title Risks….

[9] The Policy includes a Septic System Endorsement, which provides:

> 1. The Company insures against loss or damage sustained by the Insured arising from any outstanding notice of violation, deficiency notice or work order issued as of the Policy Date affecting the septic system which services the Land.
>
> 2. The Company also insures against loss or damage sustained by the Insured in the event that a Local Authority Search would have disclosed:
>
> a) that the certificate of approval and/or the use permit issued for the septic system servicing the Land does not conform with the current as-built nature of construction; or
>
> b) that a certificate of approval and/or a use permit had not been issued at the time the septic system was constructed and a certificate and/or use permit was required at the time of construction.
>
> 3. The Company does not insure against any loss or damage related to the functionality and/or age of the septic system unless such loss or damage arises from an issue covered under paragraphs 1 and 2 above.
>
> 4. For the purposes of item 29 under the Covered Title Risks section of this policy a response to a Local Authority Search indicating that there is no record with respect to a septic system installation or permit for the Land shall not constitute an adverse circumstance for the purposes of item 29 …

[10] On April 17, 2020, Ms. Vogt notified the Company that she had noticed water in a small area near her septic tank, had excavated it, and discovered that the septic system was not constructed to Building Code. In her letter to the Company, Ms. Vogt stated that she had contacted the Interior Health Authority ("IHA") on April 15, 2020 to request drawings, permits and approvals related to the property. She was told that no such documentation existed in their records. She then contacted the Regional District of Central Kootenay ("RDCK") to request the same, and was told that no such documentation existed in their records.

[11] Ms. Vogt also wrote that "construction of septic system dated 1982 violated all zoning by-laws and Governmental Authority requirements in place at the time of construction." She stated that "no permits were issued, no inspections were done to approve construction." She further stated that "The Governmental Authority information supplied at the time of purchase (2012) did not indicated any defects relating to compliance of building codes/zoning by-laws."

[12] The Company investigated the claim, sending a request for further information to Ms. Vogt. In response she provided a number of documents, including a form entitled "Application for a Permit to Construct a Sewage Disposal System". It is on Ministry of Health letterhead. It is undated, and the address of the property has been written in. A blank Permit to Construct is attached. No permit was granted. She also provided an "Inspection of Premises Report" dated September 30, 1982. It is also on Ministry of Health letterhead. It states "Will leave system until it malfunctions", and is signed by a Public Health Inspector. The evidence is that Ms. Vogt had obtained copies of these documents prior to purchasing the property.

[13] On the basis of the information provided, the Company determined that there was no coverage. The Company informed Ms. Vogt of its decision and the reasons for it in a letter dated May 15, 2020, which states the following:

> We direct you to Exclusion 3 of the Policy, which provides, in part, that an Insured is not insured against those losses resulting from issues or circumstances that are created, allowed or agreed to by the Insured on the Policy Date. In reviewing the documents you provided, you received a copy of the septic records prior to the Policy Date. The septic records revealed that

> an Application for a Septic Permit was applied for in 1982 (the "Application"). The records further revealed that the Application was not approved and no inspections were completed. In summary, you received a copy of the Application prior to the Policy Date, the Application showed that a permit had not been issued for the septic system installed, and you agreed to close the transaction. Notwithstanding your knowledge of the incomplete septic permit Application, you agreed to purchase the Land, and therefore you accepted the risk of having to bearing the costs to repair the unpermitted septic system. As such, there is no coverage to replace the septic system pursuant to Exclusion 3 of the Policy.

[14] Ms. Vogt asked the Company to reconsider its position in an email dated October 5, 2021. She said that after discovering the failing septic system in 2020 she sought information from a former owner of the property. As a result, she became aware that the septic system had been rebuilt in 1995 without plans, permits, inspections or approvals. The rebuild violated the Building Code. Ms. Vogt stated her view that her claim should be accepted as she received information nine years after she purchased the property to that effect. Ms. Vogt wrote that:

> There was no possibility that I could have obtained this information prior to the property purchase as nothing was on record at either Authority. (Interior Health and RDCK) I requested any and all information pertaining to my PID multiple times.
>
> As I reviewed the Insurance Policy provided by Stewart Title and the conversations with the adjudicator, it was my understanding the Title Insurance Policies are purchased to protect homeowners from unknown issues arising after the property is purchased. My policy specifically includes a Septic Endorsement for this reason.
>
> The claim denial is based on information that was, in fact, available prior to the property being purchased, not on the information obtained after the fact (which falls into the Insurance Policy language).
>
> I learned of the 1995 septic field re-build by chance as I took it upon myself to contact the original owner homeowner directly. The homeowner informed me that there was no paperwork ever applied for or filed with the Governing Authorities even though the homeowner stated that she thought that something should have been done but her husband (now deceased) neglected to file for inspections and approvals, neither did the contractor who performed the rebuild. Each and every point noted above was neglected and therefore the work done violates any and all zoning bylaws in effect at the time.

[15] The Company investigated the request to reconsider and again determined that there was no coverage. The Company informed Ms. Vogt of its decision and the

reasons for it in a letter dated November 4, 2021. Among other things, the Company advised Ms. Vogt that the unpermitted 1995 septic system rebuild did not trigger coverage because a Local Authority Search would not, and indeed did not, disclose the absence of a permit.

Analysis

[16] This case involves a claim for coverage under a policy of title insurance. According to the Continuing Legal Education Society of British Columbia *British Columbia Real Estate Practice Manual 2023 Update* (the "Manual") at paragraph 7.65, there is no British Columbia case law interpreting or examining title insurance. There is no specific legislation in this province which governs title insurance. The Manual states at paragraph 7.63 that title insurance has been a feature of American real estate practice since 1876, but it was not until 1996 that it was used to any significant extent in this province. The Manual goes on to explain:

> Title insurance is an insurance policy providing the coverage specified in the policy for the benefit of the named insured. Title insurance is unique in that most of the risks covered do not relate to potential future events, such as those covered in property and casualty insurance policies. Title insurance policies generally look retrospectively from the date of the policy, covering the policy holder for loss that may arise out of 'events' that have already occurred but have not been discovered, or for certain known defects such as encroachments or non-compliance with current zoning by-laws …

[17] Ms. Vogt does not seek to rely on the circumstances surrounding the septic system being built in 1982. She acknowledges that she had a copy of the 1982 Application for a Septic Permit, and knew that no permit had been issued, prior to purchasing the property. Ms. Vogt is correct to make this concession. She knowingly accepted the risks associated with the property's septic system being unpermitted. As a result, Exclusion 3 in the Policy clearly applies to deny coverage for any risks created by the 1982 septic system.

[18] Rather, Ms. Vogt relies on the unpermitted 1995 rebuild. She submits that it is an unreasonable imposition on the insured person that coverage is only triggered if a Local Authority Search would have disclosed the absence of a permit. In essence, she submits that the requirement to produce a document that does not exist in order

to have coverage is unreasonable and unfair. She says that it is impossible for the insurer to ask the owner for paperwork that does not exist. If the insurance only covers risks that could be discovered through a Local Authority Search, then Ms. Vogt asks the rhetorical question: what good is the insurance Policy?

[19] Ms. Vogt also submitted that the Company acted in bad faith in dealing with her claim. She submitted that the Company's investigation of her claim was too narrow, that the adjuster was abrupt and callous, and the Company's counsel caused her undue stress as a self-represented litigant.

[20] I will address this issue first. I do not doubt that Ms. Vogt has found the process of dealing with her septic system problems, the insurance claim and the ensuing litigation, stressful. As she said, she had to educate herself on the applicable legal processes, at a time when she was dealing with other significant life stressors. However, the evidence does not indicate that the Company acted in bad faith or that its adjuster or counsel treated Ms. Vogt unfairly. Given the nature of Ms. Vogt's claim, there was no need for it to undertake any independent investigation. The claim could be fairly determined on the information she provided.

[21] In response to the substance of her claim, the Company submits that Ms. Vogt has misconstrued the nature of title insurance. It says that title insurance is an alternative to due diligence prior to purchasing a property. The Company submits that title insurance only covers septic issues that would have been revealed by a due diligence search, not those that would not have been revealed by such a search, such as the unpermitted 1995 rebuild. As a result, it submits it was correct to deny Ms. Vogt coverage.

[22] I find that the Company was entitled to deny coverage to Ms. Vogt. The Septic Endorsement clearly states in paragraph 2 that insurance is provided for loss or damage "in the event that a Local Authority Search would have disclosed" either that a "permit issued for the septic system … does not conform with the current as-built nature of construction" or that a "permit has not been issued at the time the septic system was constructed". At the time of the 1995 rebuild, no permit was

applied for. A search of the relevant local authorities would not have revealed the absence of a permit or that construction was non-conforming. It would not have revealed anything.

[23] The Company introduced a document entitled “Residential Transaction Search Requirements – One to Six Units”, which was made available to solicitors obtaining title insurance for their clients, including Ms. Vogt’s solicitor at the time of the purchase of the property. It states that:

> Where coverage is provided, title insurance can eliminate the need for certain off-title searches. This can result in savings to the client, which can help outweigh the cost of the title insurance premium.

It goes on to list a number of searches that are not required when acting for the purchaser of residential property. This includes searches for building and zoning compliance. With respect to septic file searches in particular, the document provides that:

> 7. **Septic File Searches** Our Septic Endorsement is designed to protect the insured regarding the status of the septic system to the extent that a lawyer could do so if the usual septic file search was performed and reviewed What should be made clear is that neither the policy nor a solicitor’s opinion will guaranty that the system is working (it is not a warranty of fitness or quality). Similarly, the coverage does not include protection against defects that would be revealed by a current inspection of the system. It is also worth recognizing that the septic inquiry may provide information which may nonetheless be useful or important to the client. Examples of such issues would include the age of the system or the location of the system on the property Thus, notwithstanding the comprehensiveness of the Septic Endorsement, it may still be prudent and courteous practice to advise clients of the additional option of ordering a septic inquiry.

[24] This document underscores the scope of coverage provided by the Septic Endorsement. It protects the insured with respect to risks associated with the septic system, to the extent a lawyer could do so by searching the local authorities, and no further.

[25] The Septic Endorsement itself goes on to specify in paragraph 3 that the Company does not insure against loss or damage related to the functionality or age

of the septic system. The Policy is not a warranty of fitness with respect to the septic system.

[26] The Septic Endorsement is consistent with the Policy itself, which provides in paragraph 29 that covered title risks include “any adverse circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at the Policy Date”. Paragraph 4 of the Septic Endorsement refers back to paragraph 29 of the Policy, and states that:

> 4. For the purposes of item 29 under the Covered Title Risks section of this policy a response to a Local Authority Search indicating that there is no record with respect to a septic system installation or permit for the Land shall not constitute an adverse circumstance for the purposes of item 29.

[27] Again, a search would not have disclosed anything at all about the 1995 rebuild. Problems arising from the 1995 rebuild are not covered by the Policy and Septic Endorsement.

[28] Ms. Vogt also relies on s. 32 of the *Insurance Act*, R.S.B.C. 2012, c. 1 [*Act*]. It provides:

> **Unjust contract provisions**
>
> **32** If a contract contains any term or condition, other than an exclusion prescribed by regulation for the purposes of section 33 (1) or established by section 34 (2) or (3), that is or may be material to the risk, including, but not restricted to, a provision in respect of the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.

[29] Ms. Vogt does not specify what term or condition in the Policy is unjust or unreasonable and ought therefore not be binding on her. As I understand her submission, it is that it is unjust and unreasonable that she does not have coverage for things that would not have been discoverable by means of a local authority search. She also submits that the Company was negligent or made negligent representations to her or her advisors regarding the nature of the risks insured against, which she says brings s. 32 into question.

[30] In response, the Company submits that all s. 32 of the *Act* can do is make a particular provision not binding. It submits that there is no provision which could be struck which would result in Ms. Vogt having coverage.

[31] Counsel for the Company referred to *Dubroy v. Canadian Northern Shield Insurance Co.*, 2021 BCSC 352, in which Justice Marchand, as he then was, considered s. 32 of the *Act*. Ms. Dubroy's house burnt down and the insurer denied coverage on the basis that she had failed to disclose a material change in risk relating to the identity of the persons occupying the home. Justice Marchand held that Ms. Dubroy had not failed to disclose a material change in risk, and that she was therefore covered by the insurance policy. In *obiter*, Marchand J. considered whether, if he was wrong about that, Ms. Dubroy was entitled to relief from forfeiture pursuant to s. 32 of the *Act*. He discussed the legal principles applying generally to relief from forfeiture at paras. 78–85. He found that Ms. Dubroy's conduct had been reasonable, but that if she had not failed to disclose the material change in risk it was likely that the insurer would have reasonably declined to renew the policy. The reasonableness of her conduct was held to tip the scales in her favour. In other words, Marchand J. would have not enforced the condition in the insurance policy in question that required the insured to disclose material changes in risk.

[32] Counsel for the Company also referred to *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, a similar case applying s. 171 of the Nova Scotia *Insurance Act*, which is equivalent to s. 32 of the British Columbia *Act.* The owner in that case had failed to advise their insurer that they had left their house vacant and then allowed their brother to move in. The house burnt down and the insurer denied coverage on the basis that the owner had failed to advise them of a material change in risk. The trial judge found that, assuming the owner had breached the relevant statutory condition, it would be unjust or unreasonable to apply the condition, and granted relief from forfeiture. The Supreme Court of Canada upheld the trial judge. At para. 6, Chief Justice McLachlin wrote that the main issue in the case was whether s. 171 applied to statutory conditions. At paras. 10–12, McLachlin C.J. wrote:

> [10] For others, the question is whether s. 171 applies not only to delete conditions that are unreasonable on their face (should there be any), but also to relieve against the results of applying conditions that, in the particular circumstances of the case, are unreasonable in their application or draconian in their consequences. Framed in these terms, the question takes on an entirely different complexion -- which I find more attractive because it avoids an inequitable result otherwise inescapable.
>
> [11] The wording of s. 171 permits the issue to be characterized either way, but the second, in my view, better corresponds with the remedial objectives of the provision.
>
> [12] It follows that the essential question is whether s. 171 applies to statutory conditions that are unreasonable or unjust in their application. For the reasons that follow, I conclude that it does.
>
> [Emphasis in original.]

[33] I sympathize with Ms. Vogt's position. At first glance, it does seem unfair that there is no insurance coverage for something that could not have been discovered. However, that is, for the reasons I have already given, clearly the effect of the Policy and Septic Endorsement.

[34] I agree with the Company that there is no condition in the Policy or Septic Endorsement which this court could hold to be unjust or unreasonable in its application to Ms. Vogt and, therefore, find to be not binding on her, which would result in her having coverage for the1995 rebuild.

[35] Counsel gave a helpful example of a clause which theoretically could be held not to be binding under s. 32 of the *Act*, being Exclusion 3, which excludes coverage for risks "that are created, allowed, or agreed to by you; [or] that are actually known to you, but not to us, on the Policy Date". If Ms. Vogt was seeking coverage based on the 1982 unpermitted construction of the septic system, which she knew about at the time she purchased the property, and that exclusion was held to be unjust or unreasonable, then the court could find that it was not binding on her, and that Ms. Vogt should have coverage. That, of course, is not Ms. Vogt's position, as she was quite clear in her submissions that she was not arguing anything about 1982. Ms. Vogt relies on the 1995 rebuild, which she did not know about and could not have discovered by means of a local authority search. There is no condition in the Policy

or Septic Endorsement which this court could hold to be unjust and therefore non-binding which would result in Ms. Vogt having coverage for the 1995 rebuild.

[36] I turn to Ms. Vogt's submission that the Company was negligent. There is no evidence that the Company was negligent or made negligent representations to Ms. Vogt or her advisors, which I take to be a reference to her solicitor. The Policy and Septic Endorsement are clear about what risks they do, and do not, cover. The "Residential Transaction Search Requirements – One to Six Units" document, which I have already referred to, also makes clear what risks are and are not included. I accept the Company's evidence that that document was available to Ms. Vogt's conveyancing solicitor. Ms. Vogt says that she did not know anything about title insurance when she purchased the property, and relied on a staff member in her solicitor's office. If Ms. Vogt's solicitor failed to advise her what the title insurance did, and did not cover, and I will say that there is no evidence that he failed to do so, that would be a matter between Ms. Vogt and her solicitor, not the Company providing the title insurance.

[37] For these reasons, I have concluded that Ms. Vogt's claims against the Company fail. Her action is dismissed. The Company claimed its costs against Ms. Vogt and, as the successful litigant, is presumptively entitled to its costs. Should the parties be unable to agree on costs, they are to contact Supreme Court Scheduling within 30 days to schedule a brief hearing before me to speak to costs.

"L.M. Lyster J."

LYSTER J.