Focus INSURANCE

Ruling spells out standard of review for title insurance

Matthias Duensing

The recent Ontario Court of Appeal *MacDonald v. Chicago Title Insurance Company of Canada* [2015] ONCA 842 decision clarifies the applicable standard of appellate review for the interpretation of a standard form title insurance policy, the principles for the interpretation of such policy and the scope of title insurance policies. As there is little case law on these issues, this decision is a must-read for every real estate lawyer.

The MacDonalds bought a multi-story Toronto home in 2006. Seven years later they learned that a load-bearing wall had been removed during renovations by a previous owner without a building permit. That made the second floor unsafe to use.

The City of Toronto issued a remediation order under section 15 of the Building Act Code, requiring the MacDonalds to temporarily support the floor. The couple made a claim under their Chicago Title insurance policy they purchased at closing. Chicago Title refused to pay, claiming there was no coverage under the policy.

The MacDonalds brought a summary judgment motion, but the judge ruled against them. They appealed to a three-judge panel. The panel unanimously granted the appeal.

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With respect to the applicable standard of appellate review, the panel held that the appropriate standard for the interpretation of standard form contracts such as the title insurance contract at issue is correctness. The panel reasoned that such contracts are not negotiated and are presented to prospective insured parties on a take-it-or-leave-it basis. Secondly, the interpretation of a standard form contract may in certain circumstances be of general importance and the appellate courts must ensure consistency in interpreting identical standard form agreements. Therefore, the principles set out in *Sattva Capital Corp. v. Creston Moly Corp.* [2014] SCC 53, do not apply to standard form contracts.

The panel rejected the motion judge's finding that the work order did not affect the ownership of the property because it had not been registered on title, as work orders are never registered. Work orders can only be discovered by what are commonly known as "off-title searches." To accept the motion judge's conclusion "would undermine one of the fundamental purposes of title insurance, being coverage of off-title defects." It would also "cause chaos in the real estate bar" as clients usually do not instruct their lawyer to conduct off-title searches on the understanding that such risks are covered by title insurance.

LAWPRO intervened and filed affidavit evidence describing a 2005 agreement between it and the major title insurers, including Chicago Title, whereby LAWPRO agrees to waive the real estate transaction levy if the title insurer release, indemnify and save harmless Ontario lawyers for any claims arising under a title insurance policy. LAWPRO understood title to mean more than just those claims/impediments/documents that are registered against title, and also included defects that would only be discoverable through off-title searches.

LAWPRO argued that if the ruling is not overturned, then the agreement with the title insurer would not cover claims that arose off-title and LAWPRO would bear the responsibility, although it waived the transaction levy.

The panel also disagreed with the motion judge's interpretation of clause 11 of the policy which states that a covered title risk is that "your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan."

The motion judge found that MacDonalds' title had not been affected because the property remained marketable, although the property would be sold for less than the MacDonalds paid for.

The panel disagreed. "The fact that someone might be willing to purchase a dangerously defective building does not mean that it is marketable under the title policy."

"The motion judge's interpretation of clause 11 is overly restrictive and violates the principle that coverage provisions must be construed broadly. It also imports a definition of unmarketable that is inconsistent with the wording of clause 11.

"The dangerous condition of the property, therefore, flows directly from the failure of the previous owner to attempt to obtain the necessary municipal approval. That failure has made the appellants' title unmarketable with the meaning of clause 11 of the title policy." Chicago Title did not contest that the discovery of the dangerous condition of the property would permit a potential purchaser to refuse to close.

The Court of Appeal awarded the MacDonalds their costs of $18,000 for the appeal and $32,800 for the earlier motion application.

This decision confirms the understanding of the real estate bar that title insurance policies cover risks which can only be discovered by off-title searches and more specifically that they cover work orders to remedy an unsafe building if the defect existed on or before closing.

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Claim: Being 20 per cent liable could mean paying 95 per cent of damages

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the City of Ottawa and the bus operator would become responsible for payment of the difference between the agreed upon damages and the $200,000 policy. Based on the circumstances, the City of Ottawa could be liable for a considerable amount of funds. The parties agreed to an amount that was not reported. The agreed upon damages are unknown.

Accident reconstruction experts for the plaintiffs concluded that the collision may have been avoided had the bus operator been travelling at the posted speed limit of 60 kilometres per hour, when faced with the imminent hazard being the defendant vehicle. Based on these conclusions, witness testimony, bus operator standards and other factors, the court held that the bus operator, and therefore the City of Ottawa vicariously, were 20 per cent at fault for the accident. In this circumstance, the City of Ottawa, which was found to be 20 per cent liable, could in fact be responsible for 95 per cent of the plaintiffs' damages, more or less (the City of Ottawa is appealing the decision).

The *Negligence Act*, and the principle of joint and several liability, recognizes that any defendant who is at fault in any way, is liable to indemnify an injured victim. In the case of the City of Ottawa, as of 2014, it had a fleet of over 900 buses and deploys these buses on our highways on a daily basis. This comes with a great responsibility and risk. In *Gardiner*, joint and several liability ensures that the victims and their families are fairly compensated by the negligent parties notwithstanding the apportionment of liability.

The doctrine of joint and several liability also arose recently in *Tuffnail v. Meekes* [2016] ONSC 710. In this case, the plaintiffs were involved in a single vehicle accident. The defendant had a policy with $2 million limit, and there appeared to be no coverage issues. The combined total of the plaintiffs' claims however amounted to roughly $8 million, resulting in a significant shortfall of insurance proceeds.

In *Tuffnail*, it was alleged that the operator of the defendant vehicle consumed alcohol at a wedding reception. The wedding reception took place at a community centre that was rented by an individual and owned by the Township of Perth. Accordingly, the plaintiffs commenced proceedings against these parties and others. The plaintiffs in *Tuffnail* alleged that the operator of the defendant vehicle was overserved alcohol and argued that the over-service was a contributing factor in the accident. A successful claim against the township to the extent of 1 per cent liability may have made up the shortfall for the plaintiffs. In this case, the court dismissed the claim against the township and other parties on the basis of *Hryniak v. Mauldin* [2014] SCC 7, the landmark Supreme Court of Canada case which held that "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims."

For those concerned that joint and several liability prejudices deep pocket defendants, the *Tuffnail* case demonstrates that the court does not readily attach liability to these parties. As a result, the victims and their families were inadequately insured.

As a result of the *Tuffnail* decision, unlike *Gardiner*, and the risk of dismissal and associated costs, plaintiff counsel may rethink their decision to add a party to an action on the basis of joint and several liability in certain circumstances. It is unknown whether the Tuffnail decision will be appealed.

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