

Facts

[3] On February 28, 1997, a fire destroyed a house at 4235 Ennisclare Drive, Rockwood, solely owned by Mrs. Torchia but occupied by both Mr. and Mrs. Torchia.

[4] Mrs. Torchia sued the insurer pursuant to the provisions of her homeowner's policy (the "Policy.")

[5] The insurer refused to pay Mrs. Torchia's claim and alleged that the fire had been deliberately set.

[6] Mr Torchia was charged with arson with intent to defraud the insurer. On February 28, 2000 he was convicted by MacKenzie J. at Milton. The Ontario Court of Appeal dismissed Mr. Torchia's appeal on August 8, 2002.

[7] On this motion, Mr. Torchia was unrepresented. The insurer is clearly entitled to summary judgment on its counterclaim against him and I so order.

[8] With respect to its liability to cover Mrs. Torchia's loss, counsel for the insurer submitted that the wording of the Policy clearly and unambiguously excludes coverage. He referred to the following Policy wording:

"Definition of Terms used throughout the Policy."

You and your mean the person(s) named as Insured on the coverage Summary [Mrs. Torchia] and while living in the same household his or her wife or husband [Mr. Torchia]..." [Emphasis Added]

"Insured Perils"

You [Mr. And Mrs. Torchia] are insured against all Risks of direct physical loss or damage subject to the exclusion and conditions of this Policy.

The exclusion in the Policy reads as follows

We do not insure loss or damage:

3. resulting from the intentional or criminal acts of, or the failure to act by,
 - (a) any person insured by this policy, or
 - (b) any other person at the direction of any person insured by this policy.

[9] He referred to *Gecho v. BCAA Insurance Corporation*, in which the facts and the policy provisions were similar to those in the case at bar. The British Columbia Court of Appeal referred to the definition of 'you' and 'your' and held that since 'you' included the husband, the loss was excluded. The policy wording was "clear," the peril claimed not covered.

[10] Counsel for the insurer also relied upon the majority decision of the Supreme Court of Canada in *Scott v. Wawanesa*, [1989] 1 S.C.R. 1445, where the majority held that the parents of a 15 year old who had set fire to their house without their knowledge or complicity, were unable to recover for their loss on their homeowners' policy, because it occurred through the "wilful act... of the Insured" and that the wording of the Policy was clear and unambiguous.

[11] Counsel for Mrs. Torchia submitted that as a named insured under the Policy, she could reasonably expect protection to the extent of her interest. The Policy clearly provided protection against losses, including damage to her dwelling by fire. While she would expect to lose her right to recover as a result of her own criminal activity, she would not reasonably expect to do so if

her house were destroyed deliberately by someone else without her knowledge or involvement. Mrs. Torchia should not be disentitled to receive payment by reason of Mr. Torchia's criminal act.

[12] Alternatively, the word "insured" is not defined in the policy.

[13] On page 1 of the policy, the Coverage Summary page, beside the heading "Insured's Name and Address" the following appears:

TORCHIA, ANDREA LORI
P.O. Box 23 Ennisclaire Drive R.R. #2
Rockwood, Ontario NOB 2K0

Only the Plaintiff, Mrs. Torchia, is a named insured under the Policy.

[14] On page 4 of the Policy under the heading "Agreement" the following appears:

Only the person(s) named on the Coverage Summary page may take legal action against us.

Mr. Torchia is not named on the Coverage Summary page. Therefore, he could not take legal action to enforce his rights under the Policy against the insurer. Counsel for Mrs. Torchia submitted that because Mr. Torchia could not legally enforce any rights he may have under the Policy, he was/is not insured under the Policy.

[15] He stressed that the wording of the policy being interpreted in *Scott, supra* differed from the wording in the Policy here. In *Scott*, "insured" was defined to include (1) the Named Insured; (2) if residents of his household, his spouse, the relatives of either, and any person under the age of 21 in the care of an Insured. That policy clearly excluded loss or damage caused by a criminal or wilful act or omission of the Insured or of any person whose property is insured hereunder. It further included the following provision, which according to the majority gave additional support to their interpretation:

PERILS INSURED AGAINST

The insurance provided by Section I of this Policy is against direct loss or damage caused by the following perils as defined and limited:

- 13 VANDALISM OR MALICIOUS ACTS. There is no liability for loss or damage: (c) caused by the Insured spouse or any member of the same household

[16] He submitted the Supreme Court of Canada has made it clear in cases such as *Reid Crowther v. Simcoe and Erie* [1993] 1 S.C.R. 252 that ambiguities in insurance policies should be interpreted in favour of an insured:

(33) ... In each case the courts must examine the provisions of the particular policy at issue (and the surrounding circumstances) to determine [page269] if the events in question fall within the terms of coverage of that particular policy. This is not to say that there are no principles governing this type of analysis. Far from it. In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:

- (1) the *contra proferentum* rule;
- (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
- (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

...

14 These ambiguities, interpreted in accordance with the contra proferentum rule, militate in favour of adopting an interpretation of the policy that favours the insured rather than the insurer which drafted the policy.

(39) I turn to the third relevant principle of construction, the reasonable expectations of the parties. Without pronouncing on the reach of this doctrine, it is settled that where the policy is ambiguous, the courts should consider the reasonable expectations of the parties: *Wigle v. Allstate Insurance Co. of Canada* (1984), [49 O.R. \(2d\) 101](#) (C.A.), leave to appeal to S.C.C. refused, [1985] 1 S.C.R. The insured's reasonable expectation is, at a minimum, that the insurance plan will provide coverage for legitimate claims on an ongoing basis. The presumption must be that the intention of the parties is to provide and obtain coverage for all legitimate claims on an ongoing basis, whether through renewal with the same insurer or through securing new insurance with a different insurer. This presumption is consistent with the discovery principle discussed earlier in these reasons, in that the insurer is able to secure a means of certainty in calculating its risk without unfairly creating gaps in coverage.

[17] He cited examples of “ambiguity.” For example, on page 18 under the heading “Coverage G – Voluntary Property Damage” the following appears:

We will pay for unintentional direct damage you cause to property even though you are not legally liable. *You or anyone living in your household may also use this coverage to reimburse others for direct property damage caused intentionally by any person insured by this policy who is 12 years of age or under.*

He stressed that this wording creates ambiguity in the Policy. By adding the words “or anyone living in your household” the insurer created confusion regarding the definition of “you.” After reading this section a reasonable insured would be unsure when the word “you” used in the policy is the word “you” as defined in the provision quoted above.

Analysis

[18] It is trite to say that an insurance policy is a contract. Where a contract is clear and unambiguous, effect must be given to its terms, even if a perceived unfairness may result. Insurers are entitled to limit the risks they are prepared to cover.

[19] At the same time, I accept the submission of Mrs. Torchia’s counsel that the provisions of the policy here must be interpreted following the general principles of interpretation outlined in *Reid Crowther Ltd. v. Simcoe & Erie Ins. Co.*, [1993] 1 S.C.R. 252 (S.C.C) and that ambiguities in an insurance policy drafted by an insurer should be construed against the insurer. *Chilton v. Co-Operators General Insurance Co.*, [1997] O.J. No. 579 (Ont. C.A.)

[20] Further, I accept that where policy provisions are ambiguous, they must be interpreted in a manner consistent with the reasonable expectations of an insured. Absent unambiguous provisions to the contrary, a reasonable person would expect her individual interest to be covered by a policy naming her without qualification as an insured. A reasonable person [though she might not choose to express it in these terms] would view the obligations of the insurer as several. Where a fire insurance policy covers more than one person, the obligation of the insurer, in the absence of clear and precise language to the contrary, should be considered several as to each of them. *Higgins v. Orion Insurance Co. Ltd. et al* 50 O.R (2d) 352 at page 15.

[21] I have considered the reasoning of Shaw J. in *Riordan v. Lombard Insurance Co.*, [2001] B.C.J. No. 2676, 2001 B.C.S.C. 1627, who held despite meeting the definition of “you” and “your”, that the plaintiffs’ son [who had started a fire causing a fire loss], was not an “insured” within the exclusion in the parents’ homeowners’ policy:

...the plaintiffs' primary expectation is to be indemnified for loss caused by fire. They paid a substantial premium for this coverage. However, in light of the exclusion clause which clearly includes them within its scope, the plaintiffs would recognize that they would receive no coverage for losses caused by their own criminal or intentional acts. On the other hand, however, if the plaintiffs were innocent of wrongdoing, they would expect coverage for losses caused by others unless such coverage was clearly excluded in plain and unambiguous language.

The essential question then is whether the policy clearly indicates that Forrest Schab (the son) is an "insured" within the exclusion clause. To answer this question, it is necessary to examine the policy closely.

An examination of the policy reveals no definition of "insured". The insurance company could have defined "insured" in the policy but did not. Thus, it is necessary to look elsewhere in the policy to determine whether "insured" as used in the exclusion clause includes Forrest Schab.

The policy definition of "you" and "your" is of limited help. Although I have found that Forrest Schab comes within the definition, it is significant that the definition provides that only the plaintiffs, Mr. and Mrs. Riordan, have the right to take legal action against the insurance company...

The Schedule names only the plaintiffs; it does not name Forrest Schab. Thus, an ordinary policy holder may reasonably be led to assume that Forrest Schab is not an insured because he has no legal right to sue the insurance company.

When the policy is read in its entirety, it is apparent that the words "you" and "your" are not always used in the same sense as in the policy's definition. They are sometimes used to mean the plaintiffs' only...

...

In summary, when I take into account the following: (1) the reasonable expectations of the plaintiffs; (2) the lack of any definition of "insured" in the policy; (3) the definition of "you" and "your" providing that only the policy holders can sue the insurance company; and (4) the usage of "you" and "your" in the policy varying the context and, at best, being ambiguous where the insurance company claims coverage for Forrest Schab; I conclude that the policy fails to clearly indicate to the plaintiffs that Forrest Schab is an "insured" within the exclusion clause.

[22] I have considered the submission of Mrs. Torchia's counsel that the wording of the Policy here is not as clear as the wording in *Scott, supra*. There is no similar definition of INSURED. Mr. Torchia is not a named insured.

[23] There is no suggestion here that in burning the house, Mr. Torchia was acting under the direction of Mrs. Torchia.

[24] While I have sympathy for a wife who is innocent of her husband's crime, I am reluctantly of the view that there is no ambiguity in this contract.

[25] I agree with the British Columbia Court of Appeal in *Riordan, supra* that the reasonable expectations doctrine is a tool to resolve ambiguities in policy wording, not to create them.

[26] The exclusion in the Policy at bar refers to "any person insured by this policy." Just as in *Riordan*, the definitions of "you" and "your" in the Policy make it clear [while he was/is not a named insured], Mr. Torchia was/is clearly "a person insured by this Policy." The exclusionary clause here refers to "any person insured by this policy."

[27] If the wording of the exclusion had provided that there would be no coverage if the damage "resulted from any intentional or criminal act by an insured", it could have been argued the Policy definition created two categories of "insured" – the named insured and insureds other than the named insured, including Mr. Torchia. However, that is not the wording contained in the Policy.

[28] In my view, the wording of the Policy is clear and unambiguous and excludes the insurer's liability for the fire loss at 4235 Ennisclare Drive, Rockwood on February 28, 1997.

[29] An order will go on consent amending the title of proceedings to substitute Royal and Sun Alliance Insurance Company of Canada for the Defendant and Plaintiff by Counterclaim Royal Insurance Company of Canada. In addition, summary judgment is granted declaring that the Plaintiff is not entitled to coverage under Homeowner's Policy No. 32864122/A and dismissing her claim against the insurer. The insurer, the Plaintiff by Counterclaim, is entitled to recover the amounts paid to the mortgagees less the net proceeds from the sale plus interest since December 15, 1997 against the Defendants by Counterclaim, Mr. and Mrs. Torchia.

[30] Counsel may make written submissions on costs on or before June 10, 2003.

M.A. SANDERSON

Released:

COURT FILE NO: 98-CV-141688
DATE: 20030526

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ANDREA LORI TORCHIA

Plaintiff

- and -

ROYAL INSURANCE COMPANY OF CANADA
Defendant

A N D B E T W E E N:

ROYAL INSURANCE COMPANY OF CANADA
Plaintiff by Counterclaim

-and-

ANDREA LORI TORCHIA and ANGELO
TORCHIA

Defendants by Counterclaim

REASONS FOR JUDGMENT

M.A. SANDERSON J.

Released: