CITATION: Boland v. Allianz Insurance Company of Canada, 2008 ONCA 569
DATE: 20080730
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COURT OF APPEAL FOR ONTARIO

WINKLER C.J.O., FELDMAN J.A. and LAX J. (*ad hoc*)

BETWEEN:

LAWRENCE ALLAN BOLAND

Applicant (Appellant in appeal)

and

ALLIANZ INSURANCE COMPANY OF CANADA, GERLING GLOBAL GENERAL INSURANCE COMPANY and GCAN INSURANCE COMPANY

Respondent (Respondent in appeal)

Richard Macklin for the appellant

Leslie Wright for the respondent

Heard: June 17, 2008

On appeal from the order of Justice Carolyn Horkins of the Superior Court of Justice dated May 19, 2006, reported at (2006) 37 C.C.L.I (4th) 273.

FELDMAN J.A.:

[1] The issue on this appeal is whether the respondent has a duty to defend the appellant against a claim made against him in his capacity as a director of a condominium corporation.

[2] The respondent provided directors' and officers' liability insurance to the condominium corporation and to its directors and officers for claims made during the

policy period for “wrongful acts” that occurred during the policy period. The policy period of the respondent’s insurance policy was April 30, 2005 to April 30, 2006.

[3] The policy also contains an extension of coverage provision that covers: “any wrongful act which occurs prior to the Policy Period if claim or claims are made during the Policy Period and provided: (a) that the Directors and Officers of the Corporation, at the Effective Date of the Policy, had no knowledge of, and could not reasonably foresee, any circumstances which might result in a claim, and ….”

[4] The events that led to the claims in this case occurred during the 1990’s. The appellant was a developer of the condominium project along with Weldon. Each of them purchased a unit before the declaration date of the condominium. However, prior to the declaration, Weldon illegally enlarged his unit into the attic space as a third floor living space, although this space was designated as part of the common area. Boland, who was a director of the corporation both in 1994 and again in 1997-1998, is alleged to have known about the illegal unit, failed to disclose it to the corporation, and stood by in January 1998, when Weldon sold the illegal unit to Orr.

[5] The corporation applied against Orr to direct her to comply with the declaration and return the unit to its original condition. Orr sued the corporation, Boland and others in 2001 for damages of $4.5 million.

[6] The corporation issued a statement of claim dated June 1, 2005 against Boland for a declaration that: (1) he intentionally or negligently breached his legal duties to the corporation while he was a director regarding the existence of the illegal unit, and (2) he is liable to indemnify the corporation in respect of the Orr claim. The statement of claim states that the Orr action is still ongoing and outlines allegations of fact based in large part on evidence Boland gave on his examination for discovery in the Orr action.

[7] Boland then brought an application for an order that the respondent insurer either underwrite his defence to the corporation’s action against him or defend him in the action, based on the 2005 director and officers’ liability policy. The application judge dismissed the application and found that the insurer had no duty to defend on two bases: (1) the extension of the insuring agreement was not triggered and therefore the claim was not covered; and (2) the statement of claim alleged primarily deliberate conduct and that the allegation of negligent conduct was merely derivative.

[8] I would allow the appeal. In my view, the insurer has a duty to defend in this case.

The Extension of Coverage Clause

[9] The initial insuring agreement requires that the claim be made during the policy period for a wrongful act that occurred during the policy period. In this case, the claim

was made during the policy period, but the alleged wrongful act occurred during the 1990's.

[10] The extension insuring agreement also requires that the claim be made during the policy period but covers prior wrongful acts if, *at the effective date of the policy*, the directors and officers "had no knowledge of and could not reasonably foresee, any circumstances which might result in a claim." The purpose of this condition is to allow directors and officers to be covered by insurance for claims that are made during the policy period for acts that occurred before the policy period, but at the same time, to preclude the corporation from obtaining insurance coverage for potential claims against a director that the director was aware may be made during the policy period. In other words, one obtains future coverage only for unexpected claims, not for known potential claims.

[11] Although the policy in issue on the application provides coverage for the 2005 policy year and the claim was made during that year, the appellant points to the record which shows that the 2005 policy was the next in a succession of policies with the same extension of coverage agreement, beginning with the first Allianz policy in September, 1994. The issue for determining if the extension of coverage applies is, what is the "effective date of the policy" for the purpose of considering the knowledge of the insured director?

[12] In *Reid Crowther & Partners v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, the Supreme Court took the view that where an insurer provides continuous coverage by one year policies, this amounts to a "system of successive insurance coverage designed to provide liability coverage from year to year." Applying this approach, the effective date of the policy for the purpose of looking at the knowledge of the insured director that could preclude the extension of coverage is the effective date of the first policy in succession, in this case, September, 1994.

[13] The application judge concluded that Boland had knowledge of the illegal use of the attic space and that he could reasonably foresee that the illegal space might result in a claim. However, part of the allegations in the statement of claim that the application judge relied on in reaching her conclusion were allegations of his knowledge and actions up to January, 1998. If the consideration of his knowledge is limited to what he knew in 1994, the effective date of the policy, it cannot be said that at that time he could reasonably foresee a claim. Although the statement of claim is not explicit on the date, it is a reasonable inference from the pleading that in 1994, during his first term as director, the appellant asked Weldon to correct the problem. He did not know then that Weldon would not do that before selling the unit in 1998.

[14] In my view therefore, for the purpose of the duty to defend only, the allegations in the statement of claim, if taken to be true, are not sufficient to deny coverage under the extension of coverage clause.

The Application of the *Scalera* Case

[15] The application judge found that although the claim is framed both in negligence and for deliberate conduct, applying the Supreme Court of Canada decision in *Non-Marine Underwriters, Lloyds of London v. Scalera* [2000] 1 S.C.R. 551, the negligence claim was merely derivative of the claim for deliberate conduct. Since the policy excludes coverage for deliberate conduct, the application judge found that there was no duty to defend based on the claims made against the appellant in the statement of claim.

[16] In my view, the application judge erred in her characterization of the negligence claims made in the statement of claim as derivative. The application judge concluded that there were no facts pleaded in support of the negligence aspect of the claim and that effectively, that claim arose out of the same facts as the claim for deliberate conduct.

[17] I agree with the application judge that the negligence claim is a bare pleading. It possibly would not survive a pleadings motion without an order for particulars. However, when the issue is whether an insurer has a duty to defend, one must take the pleading as it stands and determine whether there is a viable claim for negligence. In this case, although the force of the claim is for deliberate conduct, there is an alternative and independent claim that the appellant acted negligently. As this claim is available as a basis for Boland's liability to the condominium corporation, the insurer has a duty to defend that claim.

[18] The appellant also asks for the right to appoint counsel of his choice. This issue was never reached by the application judge because she dismissed the application. Although it is discussed in the factums, the issue was not addressed by counsel in oral argument. If the appellant wishes to pursue this request, and the parties cannot agree, it must be brought back on in the Superior Court.

[19] In the result, I would allow the appeal with costs of the appeal to the appellant, fixed at $15,000 inclusive of disbursements and G.S.T., and costs below to the appellant in the amount fixed by the application judge.

Signed: "K. Feldman J.A."
"I agree Winkler CJO"
"I agree J. Lax J. (ad hoc)"

RELEASED: "KNF" July 30, 2008