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Coburn v. Family Insurance Solutions, 2014 BCCA 73

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This was an appeal by the Insured from a judgment at summary trial that the Insurer properly denied coverage for a fire loss based on the vacancy exclusion of a homeowner policy. The Insured appealed and the Court of Appeal upheld the result of the summary trial. Nigel Beckmann of Whitelaw Twining acted for the Insurer throughout.

By way of background, the Insured owned a rental property in Qualicum Beach, BC that was insured by Family Insurance Solutions (MGA for the Economical). On January 1, 2011, the long-term tenant vacated and Mr. Coburn immediately started attending the property on an almost daily basis for 8-14 hours per day to undertake renovations. The fact of the renovations or Mr. Coburn's presence at the property was not communicated to the brokers but they advised and arranged for a vacancy permit effective February 1, 2011. Mr. Coburn gave evidence on examination that he understood the effect of the vacancy exclusion.

The vacancy exclusion and definition of vacancy in the policy were as follows:

> Perils Excluded
> This Insurance does not cover loss or damage arising from:
> n) any peril while the Dwelling Building is, to the knowledge of the Insured, Vacant, as defined, for more than thirty (30) consecutive days or in the Course of Construction, unless otherwise indicated in the Declarations;
>
> Vacant is defined as: The occupant(s) has/have moved out with no intent to return or the dwelling does not contain furnishings or household equipment sufficient to make it habitable.

On February 18, 2011, Mr. Coburn contacted brokers to advise that new tenants had moved into the property. The vacancy permit was cancelled and Mr. Coburn was advised of this. The actual circumstances were that a verbal agreement had been reached and the new tenants had begun moving some personal property into a lean-to attached the house.

On March 19, 2011, a written tenancy agreement was entered into. Date of move-in was April 1, 2011. On March 21, 2011, Mr. Coburn left Vancouver Island to meet his son in Prince George and gave a key to a carpeting subcontractor to access the house. On March 23, 2011, the subcontractor parked his truck very close to one of the entrances to facilitate transfer of materials into the house. Although the truck's engine had been turned off, a fire broke out in the truck and spread to the house, substantially damaging the Coburn's rental house.

The Respondent Family Insurance denied the claim on the basis of the vacancy exclusion and the Coburns sued.

By the time of the summary trial, Mr. Coburn's evidence that he was at the house everyday from January 1, 2011 to the date of the fire was shown to have been inaccurate,

although it was accepted he was there most days. There was also evidence that Mr. Coburn had stayed at the house one night in the last 30 days before the fire because the snowy weather conditions made it more difficult to return to his residence in Nanaimo where he lived with his wife. There was also evidence that a neighbour of the rental property had been asked and was keeping a watchful eye on that property for the Coburns.

The Court of Appeal reviewed the principles regarding interpretation of insurance contracts and considered the interpretations of "vacancy".

The Court cited the Ontario Court of Appeal decision in *Lambert v. Wawanesa Mutual Insurance Company*, ([1945] O.R. 105), as well as *Wright v. Canadian Northern Shield Insurance Company*, (2005 BCCA 599) by the BC Court of Appeal in support of the finding that visits to a property by an insured do not change the status of a property from being vacant to being occupied. The Court also relied on other cases from New Brunswick and Ontario which found for the insurer in cases where the insured was attending on a more substantial basis to effect repairs or renovations.

The Court adopted the following passage from Couch on Insurance:

> So, a dwelling house is "vacant" or "unoccupied", in the sense in which those terms are employed in a policy, when it is used otherwise than a fixed abode, although employees occasionally sleep there and some provisions are kept in the house, which is visited to obtain them. And the visiting of a dwelling house every day, after it becomes vacant, by the insured, or his hired men, or some member of his family, to see that things are all right, does not constitute an occupancy.
>
> When no one actually resides in a house, the acts of altering, repairing, or the process of moving the building do not constitute occupancy.

While the Court acknowledged that the definition of "vacant" in this case was not identical to those found in the other authorities (*Wu v. Gore Mutual Insurance Co.* (2009), 100 O.R. (3d) 131 (Ont.S.C.J.) and *Ellis v. Gore Mutual Insurance Company*, (September 28, 2007)) the effect was the same.

The property became vacant when the Coburns' tenant left the property on January 1, 2011. Mr. Coburn's almost daily presence did not make him an occupant. He did not live there. It was not his usual place of abode. He continued to reside in Nanaimo except for one evening that he stayed overnight.

The Court also found that the oral tenancy agreement did not change the situation. The tenants did not reside on the property. On this last issue, the evidence was that the Coburns and prospective tenants had a written lease signed March 19, 2011 and it contemplated a move-in date of April 1, 2011. It can only be assumed the Court's lack of reference to this is a minor omission given the finding that the tenants did not live there was the more important finding.

In the result, the Court of Appeal found that the vacancy exclusion applied and the Coburns did not have coverage for the loss.

Although the Summary Trial Judge raised significant questions about the reliability of Mr. Coburn's evidence, and this was touched on at the hearing of the Appeal, it does not feature into the final decision of the Court of Appeal. Neither did the Court of Appeal emphasize the fact that the Coburns understood the effect of the vacancy exclusion, although it is mentioned in the paragraphs cited from the summary trial decision. Both of these issues may have been considered detrimental to any appeal for fairness from the Insureds. Therefore, the strength of this precedent should serve well in other cases where there may be no concern about the insured's credibility and/or where the insured has no idea as to the effect of the vacancy exclusion.

If anyone has any questions about this case, please contact Nigel Beckmann at 604-443-3467 or nbeckmann@wt.ca .