

## **A Commentary on Recent Cases and Relevant Legal Issues**

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### **1. Insurance - Court of Appeal Upholds Insurer's Denial of Coverage due to Insured's Failure to Cooperate.**

In the 2006 decision of *Thompson v. ING Halifax*, the Ontario Court of Appeal upheld an Insurer's right to deny coverage to an Insured on the basis that it had violated the insurance policy by breaching its duty to cooperate with the insurer.

Thompson was employed as a "bouncer" by the Insured, when he was assaulted by some unidentified patrons in May 1998. As a result of his injuries, he put his employer on notice of his potential claim. After sending two further letters (which went unanswered), Thompson ultimately served his employer with a Statement of Claim.

Following service of the Statement of Claim, ING (the employer's Commercial General Liability Insurer) was put on notice of the claim through the Insured's solicitor. Thereafter, ING made numerous attempts to contact the Insured to no avail, including sending several registered letters (all of which were apparently received).

ING elected not to defend the matter on behalf of the Insured, and the action went undefended. As a result, Thompson obtained a judgment against his employer in June 2000, receiving an award exceeding \$175,000.00.

He then sued ING directly under s. 132(1) of the *Ontario Insurance Act*, which allows a judgment creditor to sue the debtor's Insurer directly (subject to the same equities that the Insurer would have against the Insured if the judgment had been satisfied).

At trial, the Court found there to have been a substantial and material breach of the Insured's duty to cooperate, thus absolving the Insurer of its obligations. Thompson's action was dismissed on this basis.

ING also sought to rely upon an exclusionary clause for "bodily injury to any employee of the Insured arising out of and in the course of employment by the Insured". The trial judge agreed with ING and found that the Insurer would also be entitled to rely on the exclusion in order to absolve it from indemnifying the Plaintiff in this action.

On appeal by Thompson, the Ontario Court of Appeal was satisfied that the Insured had breached its duty to cooperate. ING had been unable to contact the Insured by phone. It had little information regarding the claim, and the evidence showed that ING's correspondence to the Insured (indicating a need to establish contact) had apparently reached the Insured but remained unanswered.

This case serves as an important reminder of the duty to cooperate which is found in most policies of insurance. Although the precise

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terms may vary from insurer to insurer and from one type of policy to another, it is vital for Insureds to abide by the terms and conditions of the policy. These include, but are not limited to, providing prompt notification of the claim, complying with the Insurer's requests for information, and not admitting liability or taking any steps that could prejudice the Insurer's defence of the claim.

Not every breach of the duty to cooperate will absolve an Insurer of its contractual obligations. Rather, only substantial and material breaches may exonerate the Insurer. While relief from forfeiture may be available in the appropriate circumstances (even in the face of a substantial and material breach), it is always in the best interests of the Insured to cooperate and not to run the risk that coverage may be denied for failing to do so.

The main purpose of the cooperation clause is to allow the Insurer to mount an effective defence, which it cannot do in the absence of the Insured's assistance and cooperation. It is important to recognize that, without that cooperation, the claim may not be able to be resolved and may inevitably result in a costly and risky trial. This could potentially expose the Insured to greater liability, including a judgment for damages that are excluded or in excess of policy limits. A trial could also result in irreparable harm to the Insured's professional reputation, which might otherwise be avoided through a confidential out-of-court settlement.

### **2. Insurance - Limitation Periods - Plaintiff's Action against Insurer Statute-Barred.**

In a decision released on January 21, 2007, Guardian Insurance successfully brought a motion for summary judgment to dismiss a homeowner's claim.

The homeowner had purchased a property in 1990 and obtained a homeowner's policy which included coverage for water damage, including mould. Thereafter, the property was rented out to a variety of tenants. In December 1995, a hot water pipe burst, releasing water into the crawlspace, causing extensive flooding to the basement.

Guardian was put on notice of the claim and appointed an independent adjuster to investigate the loss. The adjuster offered to settle the insurance claim for \$10,000.00 and presented a release to the homeowner. However, she refused to sign it until she had received the advice of a lawyer.

In 1996, black material appeared in the basement of the home. By 1997, the homeowner was aware of a mould problem but still did nothing until June 2002, when she was notified by the municipality of a mould complaint by one of her tenants.

The homeowner issued a Statement of Claim against Guardian on July 7, 2003, claiming for the earlier flooding and the developing mould problem. Guardian took the position that the claim was statute-barred, in that the

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Statement of Claim was issued approximately 7½ years after the discovery of the burst water pipe. Furthermore, approximately 6 years had elapsed since the discovery of the mould.

Guardian also argued that the homeowner had failed to comply with the statutory condition, requiring the Insured to sue within one year after the loss or damage had occurred.

The applications judge agreed with Guardian and found that the homeowner had failed to demonstrate due diligence in relation to the loss and had issued her claim five years too late. Her action was therefore statute-barred.

This case highlights the need to pay particular attention to limitation periods that may apply to the bringing of claims against one's own Insurer, an often overlooked subject of enquiry. Many clients will give particular thought to limitation periods in the context of possible claims that may be brought against them or their firms, but the same analysis is sometimes lacking vis-à-vis claims against their own Insurers. As an Insured, it is important to read and understand the terms of your policy and, when in doubt, to consult a knowledgeable solicitor.

### 3. **Costs Awards - Divisional Court Upholds \$160,000.00 Costs Order Against Unsuccessful Party for One-Day Motion.**

In a decision released on March 5, 2007, the Divisional Court upheld a substantial indemnity costs award made against Jazz Air in the sum of \$160,000.00 following the dismissal of Jazz's one-day motion for an interlocutory injunction, providing a further example of today's often exorbitant costs of litigating.

The motion involved the termination of Jazz's tenancy at the Toronto Island Airport. Porter Airlines had planned to begin passenger flight operations there in its stead. Porter had a tight construction schedule for renovations, which were set to start on March 1, 2006. On February 23, 2006, Jazz served notice of a motion for an interlocutory injunction to restrain the termination of its lease (which was to take effect the day after the hearing of the motion). If the injunction were granted, it would have catastrophic consequences for Porter.

Porter successfully opposed Jazz's motion and was awarded substantial indemnity costs by the motions judge, who concluded that the only reasonable expectation that Jazz could have had would be that Porter would do everything it could to prepare for, and present, a case with the best possible prospect of winning. In the result, the

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motions judge granted the massive costs award to Porter.

On appeal, the majority of the Divisional Court upheld the costs award, stating that it was open to the motions judge to award costs on a substantial indemnity basis because of the unsubstantiated allegations of conspiracy and improper conduct on the part of Porter and because of Jazz's tactical approach to the timing of the motion.

It was noted that while Jazz was arguing that Porter's costs demands were grossly excessive, it refused to disclose its own dockets for the motion, from which the majority of the Divisional Court surmised that it was reasonable to conclude that Jazz had spent as much or more lawyers' time on the motion. The motions judge was entitled to consider the fact that Porter did not have the luxury of developing a finely calibrated litigation strategy and had to go "flat out" with all available resources.

The decision of the Divisional Court was not unanimous amongst the 3-member panel. The lone dissenting judge was persuaded by Jazz that the award was unreasonably high and should be reduced. He also disagreed with the majority with respect to the relevance of Jazz's refusal to produce its own dockets in fixing Porter's costs of the motion.

While this case is certainly not representative of a typical costs award for a one-day motion, it suggests that motions for injunctions brought on very short notice may attract significantly higher awards. It also

sends a strong message that parties can be "punished" through costs for their litigation tactics. That is not to say that parties should not bring interlocutory motions where appropriate. However, careful thought should be given before embarking down that path as to the likelihood of success, the costs involved, the tactics being employed by the parties, the timing of the motion, and whether any unfounded allegations could give rise to an order for substantial indemnity costs.

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