

CITATION: 1562860 Ontario Ltd. (Shoeless Joe's) v. Insurance Portfolio Inc., 2011 ONCA 180
DATE: 20110307
DOCKET: C50400

COURT OF APPEAL FOR ONTARIO

Winkler, Rosenberg and Goudge JJ.A.

BETWEEN

1562860 Ontario Ltd. carrying on business as Shoeless Joe's

Plaintiff (Appellant)

and

Insurance Portfolio Inc. and Christopher Coniglio

Defendants (Respondents)

and

The Dominion of Canada General Insurance Company

Third Party

Katherine I. Henshell and M. Dylag, for the appellant

Mikel C. Pearce, for the respondents

Christopher I. R. Morrison and Stephanie R. Quesnelle, for the third party

Heard: February 25, 2011

On appeal from the order of Justice Thomas A. Bielby of the Superior Court of Justice
dated April 1, 2009.

BY THE COURT:

[1] At the conclusion of argument, the court ordered that the appeal be allowed to the extent of lifting the stay of the main action so far as it is based on the claim that the respondents caused the appellant to be underinsured. The court indicated that reasons would follow, which would also deal with costs. These are those reasons.

[2] The respondents arranged business loss insurance for the appellant. The third party was the insurer. When the appellant called on that insurance, it was told that there was insufficient coverage. Without the assistance of the respondents, it settled with the third party for less than the value of its loss, and signed a release in favour of the third party, agreeing not to make a claim against anyone who might claim contribution or indemnity from the third party.

[3] The appellant then sued the respondents, who claimed indemnification against the third party. The third party moved to stay the appellant's action and the respondents' claim for indemnification, on the basis of its release. The motion judge stayed both the main action and the third party claim, finding that the action and the third party claim were clearly linked, and that the appellant must live with the consequences of its release.

[4] Both the appellant and the third party have appealed.

[5] In our view, it is plain and obvious that the respondents' third party claim for indemnification arising from the appellant's underinsured claim cannot succeed. The

appellant's allegation in the main action is that the respondents left the appellant underinsured. The respondents' third party claim arising from this is founded on the allegation that the appellant was not underinsured, but was properly insured, and the third party was negligent in adjusting the claim and in paying less than it should have.

[6] If the appellant succeeds in the main action and proves that it was underinsured, the basis of the respondents' third party claim falls away. It cannot succeed because it cannot establish that the appellant was properly insured. On the other hand, if the appellant fails, it has suffered no loss due to underinsurance, and there is nothing for which the respondent can claim contribution or indemnity. In either case, the third party claim arising from the underinsured claim in the main action cannot succeed. It is not just clearly linked with the appellant's claim. It is incompatible with it. A stay of the third party proceedings arising from the underinsured claim is therefore appropriate and, in those circumstances, permitting the main action to proceed based on this claim no longer engages the appellant's release of the third party. To that extent, the stay of the main action ordered at first instance must be lifted.

[7] As the respondents point out, the appellant has also claimed that the respondents were negligent and in breach of their fiduciary duty in failing to assist the appellant in settling its insurance claim with the third party. The appellant seeks general damages as a result. The respondents deny this claim and claim indemnity from the third party for breaching the duty of care requiring it to settle the appellant's insurance claim on a reasonable basis.

[8] Although the motion judge did not expressly deal with this aspect of the matter, we see no reason to interfere with the stay of the main action and the third party arising from this claim. Both raise issues of negligence arising from the way the insurance claim was settled and are not incompatible with each other. The claim in the main action based on the manner of the appellant's settlement of its insurance claim and the claim of the respondents for indemnity from the third party based on this, must remain stayed. For this claim in its main action, the appellant must live with the consequences of its release of the third party. Indeed, in argument, the appellant did not oppose this.

[9] We would therefore allow the appeal in part and amend the order below consistent with these reasons.

[10] We would alter the costs order at first instance to provide that the appellant recover a portion of its partial indemnity costs at first instance from the respondents fixed at \$6,000 inclusive of disbursements and applicable taxes. This reflects the appellant's significant but only partial success. The amount of the third party's costs ordered below should not be altered but should be paid jointly and severally by the appellant and the respondents in light of their joint responsibility for the outcome.

[11] In this court, the same costs considerations should apply. The appellant should recover a portion of its partial indemnity costs to be paid by the respondents, fixed at \$6,000 inclusive of disbursements and applicable taxes. The third parties should recover

its partial indemnity costs jointly and severally from the appellant and the respondents fixed at \$10,000 inclusive of disbursements and applicable taxes.

RELEASED: MAR 07 2011 ("S.T.G.")

"Winkler C.J.O."
"M. Rosenberg J.A."
"S. T. Goudge J.A."