Interpreting Exclusion Clauses in Insurance Policies

Modasir Rajabali
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Insurance policies are often buttressed by the fundamental principles of contract law, which include concepts such as the intention of the parties, understanding the policy's terms, and the surrounding circumstances known to the parties at the time of contract formation. Contractual interpretation serves to outline the principles of these policies, in consideration of any given factual matrix.

One such case, *First Condo Group Ltd. v. Lloyd's Underwriters*, 2020 ONSC 146, sheds light on the general view of the courts when it comes to interpreting exclusion clauses in insurance policies.

In this case, the unfortunate Mr. Jason Cash was injured on the premises of the Durham Condominium Corporation No. 62 ("DCC 62") while working on an electrical pole on October 20, 2015. Mr. Cash suffered a severe traumatic brain injury. The Cash family began the first of several proceedings against DCC 62 in 2016.

Previously, First Condo Group Ltd. had prepared a Reserve Fund Study for DCC 62, which addressed the safety and remaining life span of lampposts on the condominium corporation's property. The Reserve Fund Study was prepared on November 11, 2013, after which no other services were provided to DCC 62.

As a result, both DCC 62 and Mr. Cash issued a claim as against First Condo for contribution and indemnity, and negligence, respectively. In turn, First Condo reported the claim to Lloyd's, who denied coverage. First Condo made an Application for an order that Lloyd's provide coverage.

Lloyd's policy to First Condo was effective for four years between March 25, 2010 and March 25, 2014. No claims were made during this policy period. From March 25, 2014 to September 10, 2015, First Condo was insured by another insurer. Lloyd's issued a new policy on September 11, 2015 to September 11, 2016, which was annually renewed until 2019.

The policy differentiated between a "claims-made" insurance policy and an "occurrence policy". A "claims-made" insurance policy means that the insurer would provide coverage

regardless of when the negligence giving rise to those claims may have occurred. Coverage is triggered when a claim is made against the insured during the policy period.

In contrast, an "occurrence policy" provides insurance coverage for liability triggering events during the policy period, irrespective of when an actual claim is made.

Lloyd's argued that the policy in question was a claims-made insurance contract and that the alleged negligence in preparing the Reserve Fund Study was before the Retroactive Date of September 11, 2015.

The insurer further argued that the word "incident" in the exclusion clause referred to First Condo's conduct and not the claims arising from that conduct. As such, any claims that arise from the insured's conduct before the Retroactive Date, would be void of coverage.

The exclusion clause is reproduced below:

> 65. *Retroactive Date*
>
> in respect of INSURING CLAUSES 1, 3 (Section G only), 6 and 7 arising out of any actual or alleged incident occurring, in whole or in part, on or before the retroactive date.

First Condo argued that that the word "incident" meant "a discrete event or occurrence", referring to the injury of Mr. Cash, which occurred on October 30, 2015. As such, that date would be after the Retroactive Date, meaning that the incident was not excluded from coverage.

In following the precedent set by former Chief Justice McLachlin in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co*., [1993] 1 S.C.R. 252, Justice Perell stated that the word "incident" referred to the negligent preparation of the Reserve Fund Study by First Condo, which was completed in 2013. That was the incident that gave rise to the claim made by Mr. Cash against First Condo in September 2018.

The Court held that the policy remained a claims-made policy, and First Condo's application was dismissed.