

SCCH338993

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Ribahi v. Sovereign General Insurance Company, 2012 NSSM 33

Between:

Akram Ribahi

CLAIMANT

c/oLloyd Robbins
Quackenbush, Thomson & Robbins
2571 Windsor Street
Halifax, NS B3K 5C4

- and -

The Sovereign General Insurance Company

DEFENDANT

c/O Linda Hupman
Burchell MacDougall
710 Prince Street
PO Box 1128
Truro, NS B2N 5H1

Adjudicator: David T.R. Parker

Heard: November 21, 2011 and November 22, 2011

Decision: March 19, 2012

**Counsel: Lloyd Robbins represented the Claimant
Linda R .Hupman represented the Defendant**

DECISION

Pleadings:

The Claim:

This is a claim for \$17,857.29 and the reasons for the claim as provided by the claimant is that the defendant did not play the claimant for cleanup costs as required under the policy of insurance.

The Defence:

The defendant said it had a Commercial General Liability Policy-Occurrence Basis Policy in place with the claimant for lands and premises located at 1053 Sackville Drive Lower Sackville, Nova Scotia. The defendant stated in its pleadings that the policy was subject to the terms, limitations, exclusions and extensions as contained in or appended to the policy. The coverages afforded under the policy included coverage for bodily injury and property damage/liability, said coverage being subject to the exclusions contained in the policy. One of the common exclusions to all coverages under the policy is exclusions for "Pollution". The pollution exclusion provision provides that there is no insurance for any loss or damage "arising out of the actual alleged or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants".

The defendant stated the policy included as an endorsement referred to as the "Atlantic Comprehensive Extension Endorsement" (the "endorsement") which provided pursuant to clause 16, that Sovereign General Insurance Company ["Sovereign"] would indemnify Akram Ribahi ["Akram"] for expenses incurred to clean up pollutants on the insured

premises to a maximum coverage of \$10,000. The endorsement also provided a "top up extension" by which the coverage was extended to \$25,000. The endorsement did not provide any coverage for off premises (third-party) clean up.

On November 8, 2009 there was escape of pollutants onto the premises as result of an act by vandals in cutting the fuel line on the oil tank located on the premises. The act by vandals resulted in a pollutant (oil) escaping under the premises and onto third-party property.

Akram undertook remediation of the premises and submitted invoices to Sovereign in the amount of \$28,667.99 for costs associated with on-premises cleanup of pollutants. These invoices were paid by Sovereign.

On or about November 5, 2010 Akram delivered to Sovereign a "Proof of Loss", claiming the sum of \$17,857.29 for 'cleanup costs not reimbursed'. The cleanup costs relate in part, to off-site cleanup of third-party property in the amount of \$11,857.29 which Sovereign says is not insured under the terms of policy.

The balance sought in the amount of \$6000.00 relates to the anticipated costs associated with an assessment yet to be undertaken by Maritime Testing. Sovereign says that once incurred, and subject to limits of the policy, Sovereign will indemnify Akram for that portion of expenses which is covered pursuant to the provisions of the endorsement.

This proceeding was commenced in November 5, 2010 and was commenced in contravention of section 24 of the *Insurance Act*. Sovereign pleads and relies upon section 24 of the *Insurance Act* and says that this action is premature.

The Defendant Sovereign also says that it has indemnified Akram for all claims presented to date for which there is coverage available pursuant to the terms of policy and endorsement.

Both parties presented to the court and agreed statement of facts.

Agreed Statement of Facts:

1. Akram and Alham Ribahi are the owners of 1053 Sackville Drive, PID 40109191.
2. Sovereign insurance was, at all material times, the insurer of 1053 Sackville Drive [the "Property"] under a commercial policy #SBA 79548683 issued to Akram Ribahi as the insured.
3. The policy of insurance included coverage for a Commercial Building, Equipment and Stock (Broad Form) (CBESBF); Commercial General Liability-Occurrence Basis (CGL); Non-owned Automobile and Rent or Rental Valued Form.
4. On or about the 8th day of November 2009, vandals unknown cut the fuel line for the oil tank located on the Property and pushed the tank over on its side.
5. As result of the acts of the vandals there was a release of oil onto the Property.
6. Some of the released oil entered the storm drainage system that was adjacent to the Property and ran along the pipe until it was released into the Sackville River.
7. Akram Ribahi reported the spill to his insurance agent on the morning of November 8, 2009.
8. Sovereign insurance appointed René Fenez of ClaimsPro Inc. as its field adjuster.
9. On November 9, 2009 the Department of Environment issued a directive with respect to cleanup.
10. Pursuant to the Directive a cleanup, both on-site and off-site, was done under the supervision of, firstly, Strum Environmental Services Ltd. which was retained by Sovereign Insurance and then by Maritime Testing (1985) Limited which was retained by Akram and Alham Ribahi.
11. Maritime Testing prepared a Soil Remediation Report dated January 8, 2010.
12. On February 3, 2010 the Department of Environment provided a letter indicating that no further action would be necessary and indicating what was necessary to obtain a formal site closure.

13. On February 12, 2010 Maritime Testing provided a letter confirming the mitigation action that was taken on-site at the Little Sackville River.
14. Maritime testing provided a quote on October 12, 2011 for the closure report of \$6000 exclusive of HST. The work for this report has not been done yet.
15. Sovereign Insurance pursuant to the Atlantic Comprehensive Extension Endorsement (ACE), a part of the CBESBF policy reimbursed the claimant for the total cost of on-site cleanup costs (not including the closure report), less HST in the amount of \$26,536.60.
16. Sovereign Insurance paid an additional \$2131.27 under the CBESBF policy for the replacement of the oil tank.
17. Sovereign Insurance has told the claimant the CBESBF and ACE do not apply to off-site cleanup and there is no coverage for off-site cleanup under the CGL because of the pollution exclusion in the CGL and therefore it will not pay for off-site cleanup expenses.
18. On or about June 7, 2010, the claimant, through his solicitor made a written request that Sovereign pay the off-site cleanup costs in the amount of \$11,897.28 excluding HST and cover the \$6000.00 cost of the final site closure report. Sovereign has denied coverage for the off-site cleanup costs but has indicated it will cover the on-site final site closure report.
19. The actual costs of the off-site cleanup was \$11,064.33 not \$11,897.28 as claimed by the Plaintiff.
20. In August of 2010 the claimant paid balances owed for on-site and off-site coverage with the exception of \$1122.50 plus HST for total of \$1268.43 owed to Maritime Testing the \$1122.50 is part of the \$11,064.33. The \$1268.43 is still due and owing.
21. A formal proof of loss for on-site costs in the amount of \$17,957.29 was submitted on the fourth day of November 2010. Proof of Loss was rejected by the defendants on December 17, 2010.

Various documents and letters described in the Agreed Statement of Facts in particular Facts numbers 3, 9, 11, 12, 13, 14, 19, and 21 were provided to the court.

Analysis:

On November 8, 2009 there was a fuel leak from the oil tank on the claimant's property. As a result oil found its way onto the property as well onto adjoining property and into the Sackville River. The claimant paid for the on-site cleanup costs. There were also offsite cleanup which the claimant undertook to do and it is the costs of the offsite cleanup which the claimant is requesting the defendant insurer pay and which the defendant insurer refuses.

On November 9, 2009 The Nova Scotia Department of environment issued a directive to the claimant. The directive stated that the claimant is to do the following:

- 1. Take immediate action to prevent the further release of petroleum hydrocarbons from the property.**
- 2. Take immediate action to ensure that the absorbent booms and pads that have been placed in the Little Sackville River as a result of this release are regularly monitored for effectiveness and replaced or added to as required.**
- 3. Submit to my attention[The Department of Environment] an Environmental Site Assessment and Remedial Action Plan complete with timelines for implementation for the property located above[1053 Sackville Drive] and any impacted third party properties in accordance with the *Guidelines for the Management of Contaminated Sites in Nova Scotia* on or before December 11, 2009.**

The claimant took the necessary steps requested by the Department of Environment.

The Issue:

The issue as framed by the claimant: "is the defendant required to indemnify the insured for the costs of cleanup beyond the boundaries of the insured's premises?" The issue as framed by the defendant specifically references the insurance policy in place and in

essence asked this court to determine if the claimant was covered under the insurance policy.

The policy of insurance for the insured includes **Commercial General Liability-Occurrence Basis** and **Commercial Building Equipment and Stock**. The former is under the heading **Liability** and the latter is under the heading **Property**. Applicable to the latter category is **Atlantic Comprehensive Extension Endorsement**.

I will deal with the **Commercial General Liability – Occurrence Basis** part of the policy first

Section 1 under Commercial General Liability -Occurrence Basis and often referred to as CGL deals with the following coverage:

- COVERAGE A. BODILY INJURY and PROPERTY DAMAGE LIABILITY.
- COVERAGE B. PERSONAL and ADVERTISING INJURY LIABILITY
- COVERAGE C. MEDICAL PAYMENTS
- COVERAGE D. TENANTS' LEGAL LIABILITY

Each of these sections in the policy deals with certain specified legal obligations which the insured may be required to pay and for which the insurer will cover. There are certain exclusions specifically stated in the policy with respect to coverage A, B, C and D.

These are known as "common exclusions" to Coverage A, B, C and D.

Under this common exclusions section for coverage A,B,C and D, the insurance policy states that this insurance does not apply to a number of specific incidences. The areas that are excluded and dealt with involve asbestos, fungi or spores, nuclear energy liability, pollution, terrorism and war risks. It is the pollution exclusion that we are involved with in this case.

Pollutants are defined in the definition section of the policy "Section V". Oil spills would fall into the categories enumerated under pollutants. That is not an issue in this case.

The exclusions section under the policy under the term "Pollution" being section 4 (1) specifically states that property damage arising out of an actual spill, seepage, leakage, migration, release or escape of pollutants from any premises occupied by the insured will not be covered except for specific enumerated areas describe the policy.

Section 4 (2) of the Pollution exclusions section states:

“Any loss, costs or expenses arising out of any:

a. Request, demand, order or statutory or regulatory requirement that any insured or other tests for, monitor, cleanup, removal, contain, treat, detoxify or neutralize, or in any way respond to or access the effects of "pollutants"; or

b. Claim or "action" by or on behalf of a government authority for "compensatory damages" because of testing for, monitoring, cleaning up, removing, containing, treating, detoxify or neutralizing, or it anyway responding to, or assessing the effects of, "pollutants".

Section 4(2) a. covers the situation in this case.

However, additional wording follows 4(2) a and b where it states the following:

However, this section (2) does not apply to liability for "compensatory damages" because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "action" by or on behalf of a governmental authority.

Property damage is defined in the definition section of the policy to mean the following:

"a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss or use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss or use of tangible property that is not physically injured. All such loss or use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purpose of this insurance and electronic data is not tangible property."

Compensatory damages is defined in the definition section of the policy to mean the following:

"Compensatory damages" means damage due or awarded in payment for actual injury or economic loss. "Compensatory damages" does not include punitive or exemplary damages or the multiple portion of any multiple damage award."

In this case, the claimant incurred expenses, arising as a result of a directive from the Department of Environment. This directive included and spoke to off-site cleanup by the claimant. If there was any action or claim on behalf of the government authority with respect to cleaning up the oil spill those costs related to compensatory damages would also not be covered by the insurer. However the question becomes because of what I would term the '“However" Clause' all of the above would not apply to any liability the insured might have if there had been no request, demand, or order or statutory or regulatory requirement or any claim or action by the government authority.

There is no information before this court that there is any liability to the insured by any third party. Nor are there any exceptions to the pollution exclusion provision enumerated in the various subparagraphs of Section 4(1) in the Common Exclusions of the policy. In looking at the report of February 12, 2010 from Maritime Testing Consulting Engineering and Environmental Services it would appear that all the remediation completed by the company related to the directive from the Nova Scotia Environmental Inspector. Therefore the only conclusion that can be drawn from the facts as presented is that all costs being claimed by the claimant are a result of losses resulting from the claimant's response to a directive from the Department of Environment which are excluded under the policy.

I have referred to numerous cases provided to me by counsel for both sides and I have considered them in reference to the burden of proof and upon whom it rests and also the interpretation to be given to insurance policies. I appreciate receiving these from Counsel and I appreciate receiving Counsels' briefs and submissions. There is no indication of any misrepresentation and while there is no empirical data that I am aware of, I suspect very few insureds go through their policy with a fine tooth comb as it were, when they sign up

for their insurance. It is almost as though an insured should have independent advice on what is contained in the contract.

In my view there is no ambiguity with respect to what is contained in the contract. Under section 4(2) of the pollution exclusion section the insured is not covered for any cost or expenses as a result of a directive from the Nova Scotia Department of Environment. Even if there was no directive from the department or claim or action by a government department the insurer would not be responsible for any loss due to the migration of oil except for those exceptions contained in 4(1) (i) (ii) and (iii). That is to say if 4(2) did not apply them the insurer must go back to 4(1) to see if he is covered and in this case simply is not.

Therefore this claim is dismissed with no Order as to costs. If the defendant wishes to receive a formal Order they may provide the Court with a draft Order