Judy SC CIV 78 007

~~NWTSC 75~~

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

POOLE CONSTRUCTION LIMITED and
THE GOVERNMENT OF THE NORTHWEST
TERRITORIES as represented by the
Commissioner for the Northwest
Territories,

(Plaintiffs)

- and -

WOOD & GARDNER ARCHITECTS LIMITED;
H.L. BLACHFORD LIMITED; THE UPJOHN
INTER-AMERICAN CORPORATION; otherwise
known as THE UPJOHN COMPANY INCORPORATED;
UNITED PAINT MANUFACTURING COMPANY
INCORPORATED; THE UPJOHN COMPANY, C.P.R.
DIVISION and CLUETT COATINGS LIMITED,

(Defendants)

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE W.G. MORROW
(Sitting as Deputy Judge of the Supreme Court)

The defendant H.L. Blachford Limited seeks by notice of motion to have the plaintiffs' action dismissed as against the applicant. On the hearing before me at Yellowknife it was submitted that there could be no action against the applicant as the plaintiffs were claiming as a subrogated

action on behalf of their insurers. The applicant argues that it is itself included as an insured. It is further argued that in any event there has been a waiver as against the defendant.

Counsel for the plaintiff Poole Construction Limited (hereinafter referred to as "Poole" for convenience) takes issue with the above submissions, arguing that the applicant has failed to bring itself within the ambit of Alberta Supreme Court Rule 129, viz. a pleading cannot be struck out as not disclosing a cause of action where as in the present case evidence is put forth by the applicant. Further counsel for Poole asserts it is not clear whether the documents relied upon by the applicant even apply to the contract under review in the present action. Counsel for the second plaintiff The Government of the Northwest Territories, adopts the above arguments, and emphasizes that the relief sought by the applicant cannot be granted on an application such as the present unless the issues are clear beyond a doubt and that is not the case here. Counsel for the defendant United Paint Manufacturing Company Incorporated took a similar position against the applicant.

It appears from the allegations contained in the pleadings that in 1972 Poole contracted with the Government to construct an addition to the Cambridge Bay Elementary School based on plans and specifications prepared by the Defendant Wood & Gardner Architects Limited for the Government. Subsequently the defendant, applicant, entered into a sub-contract with Poole to among other things supply urethane insulation and elastron 855, with all labour and equipment to install same. In March 1973 a fire broke out seriously damaging the addition as well as the original school building with consequent loss and damage to both Poole and the Government.

In essence the allegations which concern the present parties in this application relate to the installation of urethane insulation and elastron 855 by the applicant, whether the products were reasonably suitable for the purpose intended, and whether the applicants are in breach of their sub-contract in respect to such installation, and whether such products were inherently dangerous, and whether the nature of same might cause flame to spread more rapidly or otherwise cause or contribute to the fire or loss alleged to have taken place. The total claim by both plaintiffs exceeds $700,000.00.

A defence has been filed by the applicant, in which it admits installing the products referred to but purports to put all other outstanding claims or allegations in issue. Paragraph 11 of this defence is to the effect:

> " This Defendant further says that the Plaintiffs bring this action as a subrogated action on behalf of their insurers, and that the policy of insurance issued to the Plaintiffs under which this action is brought includes this Defendant as an insured, and the Plaintiffs are not entitled in law to subrogate against this Defendant. "

It is to be seen from this paragraph that the question of subrogation stands raised in the pleadings.

In support of the application the applicant has filed an affidavit sworn by Robert M. Smiley, Vice-President of Manufacturing for the applicant Company. In this affidavit reference is made to a policy of insurance which he on information believes to have been issued by The Continental Insurance Companies to Poole, numbered 1361300. A copy of this policy, described as a Standard Fire Policy is attached as an exhibit to the affidavit. This

deponent states that in his belief the policy is in respect to the construction of the Cambridge Bay School addition located at Cambridge Bay, referred to by him as the "Cambridge Bay Project."

It is only necessary to refer to three clauses or partial clauses of this policy. These are:

" 4. PROPERTY INSURED:

This Policy insures (except as specifically excluded under Paragraph 8 below) all buildings, structures, additions to buildings or structures which the insured has contracted to construct or reconstruct while in the course of construction or reconstruction, including landlord's permanent fittings and fixtures, materials and supplies to enter into and form part of the finished building or structure, whether on the site of construction, incorporated in the construction or in transit (as defined) to the site of construction.

5. ADDITIONAL UNNAMED INSUREDS:

This Policy also insures:

a) owners;
b) sub-contractors and
c) subcontractors of sub-contractors, but only insofar as the work described in this policy or any endorsements pertaining thereto.

21. SUBROGATION:

Any release from liability entered into by the insured prior to loss shall not affect the right of the Insured to recover.

The Insurer hereby waives the right of subrogation against any named or unnamed Insured, or their subsidiary companies, including their employees, under this policy.

> Notwithstanding the foregoing it is expressly understood and agreed that the Insured will not waive nor does the Insured waive any right of subrogation against any Architect or Engineer, whether or not a named or unnamed Insured under this policy. "

Looking first to the question of jurisdiction, Alberta Supreme Court Rule 129 is to the effect:

> " 129. (1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
>
> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
>
> (3) This Rule, so far as applicable, applies to an originating notice and a petition. "

This rule has been the subject of interpretation in several reported decisions in the Alberta Courts and as well its counterparts in other jurisdictions have been examined many times. It is only necessary for me to refer to a recent decision in the Appellate Division of the Supreme Court of Alberta, viz: Cerny v. Canadian Industries Ltd. et al, 1972 6 W.W.R. 88, wherein

Cairns, J.A. in giving judgment for the court makes a very complete review and exposition of the relevant law. In one of his concluding remarks after completing this review Cairns, J.A. states at page 95:

> " It is clear from these decisions that a court should not strike out a pleading or part thereof as disclosing no cause of action or as being frivolous or vexatious or as being an abuse of the process of the court, which in most cases would have the effect of dismissing an action or denying a party a right to defend, unless the question is beyond doubt and there is no reasonable cause of action; or a question is raised fit to be tried by a judge or jury, or merely because it is demurrable; or where the matter complained of is only part of the action set up, or where by going to trial the facts could be elicited which would have some effect on the case, or where justice and reason dictate that it should go to trial; or where a pleading is not clearly vexatious or frivolous but which would, if it were allowed to stand, be an abuse of the process of the court; or where questions of general importance are raised or serious questions of law are in issue, unless the matter is entirely clear. "

He then goes on to say:

> " These are generally the points which have to be considered under R. 129 but, as I have stated above, most of them apply to an application to strike out a pleading under the inherent jurisdiction of the court. This jurisdiction is exercised to stop the abuse of the process of the court or to prohibit scandalous, frivolous and vexatious actions. This power of the court certainly should not be exercised to strike out a pleading or to strike out a party from an action where there is a serious point of law to be considered which cannot be said to be clear. How can such a pleading be an abuse of the process of the court or frivolous or vexatious? "

This case is particularly persuasive in the present proceeding as the Alberta Supreme Court Rules apply equally to the Northwest Territories: Judicature Ordinance 1974 R.O. N.W.T. c. J-1, s. 24.

In the present application I am not required to confine myself to the pleadings only as dictated by Rule 129(2) because the present application was clearly two-pronged, being both under the Rule and also based on the Court's inherent jurisdiction to dismiss an action which is an abuse of the process of the Court.

Counsel for the applicant submits that the material before me satisfies the basic test established by the above authority, namely, that the present case comes within the term and is one of "the clearest possible cases."

Referring to the material it is pointed out that the applicant was a sub-contractor on the project, that Poole was insured and excerpts from that party's policy are before the Court. Also that the plaintiff Government was owner as set forth in the supporting material. From this and looking at the policy provisions set out above it is clear that the Policy covers both the Government and the applicant. Reliance is also placed on the waiver as set forth in Clause 21 also quoted above.

It is argued that the present case comes clearly within the principles laid down in Commonwealth Construction Company Limited v. Imperial Oil Limited and Wellman - Lord (Alberta) Ltd. 1976 6 W.W.R. 219. In this case the Supreme Court of Canada was considering much the same issue as is presently before me. The policy was what is known as a

builders risk multi-peril policy. The Appellate Division of Alberta had held that Commonwealth was indemnified "only to the extent of the portion of the work performed by it under the subcontract."

An examination of the contract under consideration in the Commonwealth Case shows that the insurance provided was obtained by the owner on his own behalf as well as in the capacity of trustee for all Contractors who would hereafter enter into a contract with the owner or other insured contractor relating to the construction of the project. This contract defined contractor to include all firms or persons who performed work under the contract including all sub-contractors, (and is extended to the whole of the subject matter of the contract.) In reversing the position taken by the Appellate Division of Alberta de Grandpre, J. concluded that the policy was worded in such a way as to recognize an insurable interest in all contractors and that therefore Commonwealth was an insured "whose insurable interest extended to the entire works prior to the loss so that, in accordance with the basic principles, the insurers had no right of subrogation."

In this case also, de Grandpre, J. on the wording of the contract, which wording is similar to that in the present application, went on to conclude that there had been a renunciation of the right of subrogation.

The question remains as to whether the applicant can bring the insurance contract and the surrounding circumstances within the purview of the above decision. In this respect I would observe that he has a fairly heavy burden here in view of what I consider to be the philosophy running through the decisions dealing with this issue that, as Lord Herschell

expresses it at page 219 of Lawrance v. Norreys, (1890) 15 A.C. 210, "It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases."

The amended Statement of Claim makes reference to an express and implied term of Poole's contract with the applicant that the materials supplied would be reasonably fit for the purpose for which they were intended and that there was a breach here which caused the fire. In the same connection there is an allegation that the fire loss was as a result of the negligent manufacture of the applicant's product urethane. There is also a claim based on an implied warranty as to suitability pursuant to the Sale of Goods Act.

Again there may be an issue as to whether the Poole contract can be considered as covering the loss caused to the main building.

Finally there is an indemnity provision which refers to an indemnity from the subcontractor when loss might arise from a breach of warranty.

It would not be appropriate for me on this type of application to make an adjudication of the issue of whether the above propositions apply or not. It seems to me however that the above propositions do raise serious issues, both factual and legal, and that as a consequence it would be most inappropriate for me to deprive the plaintiff, and along with it, certain of the other parties interested herein, of a trial on what to me appear to be real issues.

For the same reason the effect of the waiver clause should be left for the trial judge's interpretation.

With the above differences between the policy under consideration in the present case and the circumstances that were before de Grandpre, J. I am not satisfied that this would be an appropriate case where I would be justified in striking out the pleading at this stage. Rather it seems clear to me that this is not an exceptional case which would justify such an extreme remedy.

The application will therefore be dismissed with costs on Column 5.

D/J N.W.T.

DATED at Calgary, Alberta

the 28th day of April , A.D. 1978

Counsel:

C.S. Brooker, Esq.,
for Applicant H.L. Blachford Ltd.

L. Ares, Esq.,
for Poole Construction Ltd.

J. Prowse, Esq.,
for Wood & Gardner Architects Ltd.

J. Varies, Esq.,
for United Paint Manufacturing Co. Inc.

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