Date: 1999 01 11
Docket: CV 07853

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

Applicant

- and -

851791 N.W.T. LTD.

Respondent

Application for declaratory relief respecting an indemnity clause in a construction contract. Application denied.

Application heard: October 20, 1998

Reasons filed: January 11, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for Applicant: Pierre J. Mousseau

Counsel for Respondent: Gary J. Draper

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REASONS FOR JUDGMENT

[1] On this application, brought by originating notice pursuant to Rule 22, the Court is asked to give declaratory relief by interpreting a so-called indemnity clause contained in a highway construction contract. One unusual aspect of the application is its timing.

[2] In the summer of 1996 the applicant invited tenders for a construction project to improve a portion of highway #1 a few kilometers south of the village of Fort Simpson. The respondent's tender was accepted and the two parties entered into a formal written contract. It is general condition #8 of that contract which is at the centre of this application.

GC8 Indemnification By Contractor

> 8.1 The Contractor shall indemnify and save the G.N.W.T. harmless from and against all claims, demands, losses, costs, damages, actions, suits or proceedings by whomever made, brought or prosecuted and in any manner based upon, arising out of, related to, occasioned by or attributable to the activities of the Contractor, his servants, agents and subcontractors in performing the work including an infringement or an alleged infringement of a patent of invention or any kind of intellectual property.
>
> 8.2 For the purpose of GC8.1, "activities" includes but is not limited to any act improperly carried out, any omission to carry out an act and any delay in carrying out an act."

[3] The respondent commenced work on the construction project on or about August 20, 1996.

[4] On August 27, 1996 there was a motor vehicle accident on highway #1 just south of Fort Simpson. A young woman, Keri-Lynn Hardisty, received serious injuries. It is alleged that she was a passenger on a motorcycle owned by one Trudel and operated by one Andre. It is alleged that the accident occurred when the moving motorcycle collided with an obstruction (a dirt pile) on the portion of the highway which was the subject of the construction project.

[5] In September 1997 Hardisty commenced a civil lawsuit (CV 07279) in this Court, seeking damages for pain and suffering, loss of enjoyment of life, loss of earnings, loss of future earnings, etc. In her statement of claim, Hardisty seeks judgment against several defendants:

a) against Andre, citing his negligence in operating the motorcycle in an unsafe manner, his negligence in operating the motorcycle while impaired by alcohol consumption, and other negligent acts;
b) against Trudel, citing his negligence in allowing Andre to operate the motorcycle while impaired by alcohol consumption, his vicarious liability for Andre's negligence, and other negligent acts;
c) against the owner/operator of a tavern in Fort Simpson, citing its negligence in serving alcohol to Andre, and other negligent acts;
d) against the Government of the Northwest Territories (the applicant herein), citing its negligence in inspecting and maintaining the highway, its negligence in failing to warn Hardisty and other users of the danger of obstructions on

the highway, its negligence in permitting dirt piles to remain on the highway, and other negligent acts;

e) against the village of Fort Simpson, citing its negligence in inspecting and maintaining the highway, its negligence in failing to warn Hardisty and other users of the danger of obstructions on the highway, its negligence in permitting dirt piles to remain on the highway, and other negligent acts;

f) against Rowe's Construction Ltd. (a company related to the respondent herein), citing its negligence in inspecting and maintaining the highway, its negligence in failing to warn Hardisty and other users of the danger of obstructions on the highway, its negligence in permitting dirt piles to remain on the highway, and other negligent acts.

[6] On August 27, 1998 Hardisty commenced a second lawsuit (CV 07855) in this Court, in which the respondent herein is a named defendant. In her statement of claim in CV 07855 Hardisty makes allegations of negligence against the respondent that are identical to those made against the defendant Rowe's Construction Ltd. in CV 07279.

[7] Consequent upon being sued as a named defendant in CV 07279, the Government of the Northwest Territories relies upon the indemnity clause GC8 in its contract with the respondent and seeks declaratory relief on this application. It asks for an Order:

a) declaring and determining that the respondent is under an immediate and ongoing obligation pursuant to the terms of the construction contract to save the applicant harmless from the claim brought by Hardisty against the applicant in CV 07279, and

b) declaring and determining that the respondent is under an immediate and ongoing obligation pursuant to the terms of the construction contract to pay all costs and expenses incurred by the applicant in defence of Hardisty's claim in CV 07279.

[8] At the time of the hearing of the within application, the respondent and Rowe's Construction Ltd. (represented by the same counsel) had only recently been formally served with the statements of claim and had not yet filed a statement of defence in either CV 07279 or CV 07855. Counsel advised that both defendants intended to defend the actions.

[9] For its part, the applicant filed its statement of defence in CV 07279 on August 13, 1998. By letter of August 18, 1998 to the respondent, the applicant referred the

respondent to the indemnity clause and called upon the respondent to "satisfy its obligation by either undertaking the defense of the GNWT or by paying whatever costs and expenses the GNWT incurs in its own defence as they are incurred". This request was not met, and the present application ensued.

[10] At first blush it appears that the request for a determination that the respondent must indemnify or save the applicant harmless is premature. At this point, the applicant has not been found liable to Hardisty because of the activities of its agent (i.e., the respondent). However, it is submitted on behalf of the applicant that, by its wording, the contractual obligation to save harmless is a proactive one. Also, the applicant points out that it is not only the result of a lawsuit for which indemnity is provided but also the lawsuit itself.

[11] In support of its submission that the "save harmless" obligation is a proactive one, the applicant relies upon *Mewburn v. MacKelcan* (1892) 19 O.A.R. 729 (Ont.C.A.). That case involved a bond of indemnity given by the defendant in favour of the plaintiff. The wording of the bond was that the defendant was obliged to "indemnify and save harmless" the plaintiff "from payment of all liability of every nature and kind whatsoever" for which the plaintiff shall "become liable or responsible" as a member of a dissolved partnership of the two parties. Subsequent to the signing of the bond, the plaintiff was successfully sued by one of the partnership's ex-clients, and judgment was entered against the plaintiff. Without having paid the judgment to the third party, the plaintiff called on the defendant to indemnify him in the amount of the judgment. In defence, the defendant argued, *inter alia*, that under the indemnity bond the plaintiff could only recover what he has actually paid. The Court rejected this defence. The applicant here relies on the following excerpts from the reported decision:

> "When parties declare that they are bound to "indemnify and save harmless" the plaintiff from payment of a liability, I consider the plain meaning of the language, as construed by the whole instrument, must mean a saving harmless from the liability to pay with all its serious consequences. They were also to save him harmless from all costs he might incur or be put to in connection with the liability. These latter words seem to me to point to liability to pay although no actual payment be made."
>
> at p.738, per Hagarty C.J.O.

> "...The word "indemnify" may mean either to prevent loss, so that it do not occur, or to make reimbursement or compensation after the loss has occurred. ...I should have thought that to indemnify from payment, or against payment, of a liability, meant that the

> obligor was to come forward and pay it and save the obligee from doing so; and that if it was meant that there should be no indemnity until after the obligee had paid, the expression should have been to indemnify for payment, or by reason of payment.
>
> . . .
>
> To restore a party to his former state after suffering him to receive harm is not to *save* him *harmless*."

at p.741-742, per MacLennan J.A.

[12] With respect, the *Mewburn* decision, though interesting, is distinguishable. There, the plaintiff's liability to the third party had already been determined -- in fact, judgment had been entered. Here, the applicant has not yet been found liable on any claim arising from the respondent's activities.

[13] The applicant does not cite any other case authority for the proposition that the indemnity obligation is proactive.

[14] The applicant further submits that by the wording of the indemnity clause, the respondent is not only obliged to save the applicant harmless from any judgment and costs that are determined at the end of a lawsuit but is also obliged to save the applicant harmless from the ongoing expense and inconvenience of the lawsuit as it is proceeding. Counsel submits that the addition of the words "action, suits or proceedings" to the words "losses, costs, damages" is significant and must have some meaning. It is submitted that the interpretation which would not render these additional words redundant is that lawsuits themselves are a form of harm to be protected against, and that the parties to the agreement intended the ongoing expense and inconvenience of defending lawsuits to be included within the ambit of the indemnity clause.

[15] I note, however, that there is no specific covenant in GC8 to <u>defend</u> the applicant in any relevant legal proceeding.

[16] The applicant submits that its litigation costs in CV 07279 come within the scope of GC8, whether or not fault is found against the respondent in the lawsuit or the amalgamated lawsuits. With respect, I cannot, at this stage, accept such a proposition.

[17] The main difficulty is that the lawsuit is not merely based upon or attributable to the respondent's activities under the construction contract. It is more than that.

[18] At this early stage of the litigation we have the plaintiff Hardisty's wide-ranging allegations of negligence against several and separate defendants including the Government of the Northwest Territories. We have the Government's denial of liability and allegation of negligence against the plaintiff Hardisty, the other defendants and the respondent. We have the respondent's statement (through counsel at the hearing of this application) of its intention to deny liability.

[19] Accordingly, there are many possible outcomes to the litigation; e.g.:

- the driver Andre is solely responsible for Hardisty's injuries;
- the owner Trudel is partly responsible for Hardisty's injuries;
- the plaintiff Hardisty is partly or wholly responsible for her own injuries;
- the respondent as contractor is solely responsible for Hardisty's injuries;
- the Government is partly responsible for Hardisty's injuries (either because of its contractor's negligence or its own independent negligence);
- the tavern owner is partly responsible for Hardisty's injuries.

[20] At this point in time, it cannot be said that action CV 07292 is necessarily an action "based upon, arising out of, related to, occasioned by or attributable to the activities of the Contractor [the respondent], his servants, agents and subcontractors in performing the work". It may, however, be open to such characterization at the conclusion of the action. That characterization must await the determination of the factual circumstances surrounding Hardisty's injuries, and the factual circumstances of the litigation itself.

[21] As one hypothetical, the plaintiff Hardisty might abandon all claims save as against the driver Andre and succeed at trial as against Andre. As a second hypothetical, the plaintiff Hardisty might proceed against all defendants and succeed at trial as against the Government of the Northwest Territories only, on account of some negligence independent of any activity of the respondent. In either hypothetical
it is at least open to argument that the action or proceeding does not come within the scope of indemnity clause GC8.

[22] In yet another hypothetical, the trial judge may determine that the sole or major cause of Hardisty's injuries was the negligent activities of the respondent. In such case, it may then be open to the Court to find that action CV 07279 commenced against the Commissioner of the Northwest Territories was clearly attributable to the respondent's activities in the performance of the contract and therefore that the Government's litigation costs come within the scope of GC8.

[23] The within application is commenced by originating notice. Such applications are authorized by Part 4 of the Rules of Court, in particular Rule 22:

> 22. A proceeding may be commenced by originating notice in the following cases:
>
> (a) a proceeding to recover possession of land;
> (b) an application for the appointment of a new trustee, with or without a vesting or other consequential order;
> (c) an application for a vesting or other consequential order on the appointment of a new trustee whether the appointment has been made in Court or out of Court;
> (d) a proceeding relating to land
>
> (i) for the declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,
> (ii) for a declaration setting the priority as between interests or charges, notwithstanding any entry in a registration system or the registration or filing of any instrument, or
> (iii) for an order cancelling a certificate of title or making a title subject to an interest or charge;
>
> (e) a proceeding where, under an enactment or these rules, provision is made for the proceeding to be taken by originating notice;
> (f) a proceeding for the determination of a question where there are no material facts in dispute and the rights of the parties depend on the construction of a written instrument, an enactment or an order in council and for a declaration of the rights of the persons interested;
> (g) a proceeding for the opinion, advice or direction of a judge under the *Trustee Act*;
> (h) a proceeding to fix the compensation of a trustee;
> (i) an application for the approval of an arrangement for the variation of a trust;
> (j) a proceeding to compel partition of land;
> (k) a proceeding in respect of which an enactment gives the Court or a judge authority to issue a certificate, give a direction or make an order otherwise than in the course of an action, where no procedure for application is established;
> (l) an application respecting support for a spouse, child or other dependant or for custody of, access to or guardianship for a child and matrimonial causes other than divorce;
> (m) a proceeding in which the person against whom relief is sought is unknown or unascertained;
> (n) a proceeding in which there is no person against whom relief is sought;

(o) an application or proceeding in respect of any other matter where it is unlikely that there will be any substantial dispute of fact.

(emphasis added)

[24] The only possible categories in Rule 22 within which the present application might be included are categories (f) and (o). However, on the present application there are indeed material facts in dispute. What was the cause or causes of Hardisty's injuries? Is Hardisty's lawsuit against the Commissioner of the Northwest Territories attributable to the respondent's activities in the performance of the construction contract?

[25] In my view, with such factual matters in issue it would not be appropriate or practical to utilize the summary procedure mechanism of a Rule 22 originating notice application to determine the rights and obligations of the parties under the indemnity clause of their agreement. In the circumstances of this case, the application is premature.

[26] For these reasons the application is dismissed. The respondent shall be entitled to its costs of the application.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
11th day of January 1999

Counsel for Applicant: Pierre J. Mousseau
Counsel for Respondent: Gary J. Draper

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