Date Corrigendum Filed: 2024 04 26
Date: 2024 04 25
S-1-CV 2016 000 209

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RAY KRUEZI

Plaintiff (Respondent)

-and-

AVIVA INSURANCE COMPANY OF CANADA

Defendant (Applicant)

Corrected judgment: A corrigendum was issued on April 26, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT

Application for Summary Judgment

BACKGROUND

[1] The respondent/plaintiff (the "respondent") owned a property (the "property") and rented it to tenants (the "tenants"). Due to non-payment by the tenants, natural gas and water services to the property were halted. The respondent issued an eviction notice and the tenants vacated the property on or about Aug 31, 2015. From August 31 to September 19, 2015 no one resided in the property, but the respondent regularly attended at the property to perform maintenance and repairs. The respondent met with a prospective tenant. They agreed on a monthly rental amount but did not immediately prepare a lease. The respondent continued to attend at the

property to conduct repairs. On occasion he slept overnight at the property. On September 9, 2015 the respondent paid the water and natural gas arrears and reconnected these services. On Sept 19, 2015, the property was damaged by fire.

[2] Following the fire, the applicant/defendant, (the "applicant") insurer retained a third party to investigate the cause of the fire. The third-party investigator produced a report of their findings (the "report"). The report does not conclusively determine the origin of the fire.

[3] The respondent/plaintiff holds a comprehensive homeowners insurance policy (the "policy") with the applicant and sought indemnification for losses suffered because of the fire. The applicant denied the respondent's claim on the basis it was excluded from coverage under two exclusions in the policy: (i) the fire causing damage to the property was the result of vandalism or a malicious act; and (ii) occurred while the property was "vacant". The respondent commenced an action, countering that it is not reasonable to conclude the fire was the result of vandalism or malicious acts, and also not reasonable to conclude that the property was vacant; thus, the exclusions do not apply to prevent coverage. The applicant seeks summary dismissal of the claim of the respondent under rr 175 and 176 of the *Rules of the Supreme Court of the Northwest Territories*, NWT Reg 010-96. Each party seeks costs.

[4] Both parties have agreed that this application is to be determinative of the action. In this sense, this application is more in the nature of a mini trial rather than a plea for summary judgment. Were this not so, I would have decided that the threshold for summary judgment was not met. Given the nonconclusive report on the cause of the fire, it is not possible to infer the cause and thus not possible to find there is no genuine issue requiring trial. It is not obvious that the respondent's claim would have no chance of success if this were to proceed to trial.

ISSUES

1. Which party bears the burden and what is the standard of proof?
2. Whether this an appropriate case for summary judgment;
3. Whether the property was "vacant" as defined in the policy;
4. Whether the respondent's losses are excluded from coverage;
5. Whether the property was vacant for 30 consecutive days; and
6. Whether the loss occurred through "vandalism or malicious acts".

Issue 1 Burden and Standard of Proof

[5] Generally, the onus is on the insured to prove that the claim falls within coverage.[1] Once the insured establishes that the loss falls within coverage, the onus shifts to the insurer to show that an exclusion applies.[2] Exclusions are constructed narrowly and, in the event of ambiguity, are construed against the insurer.[3] As this is a civil matter, the standard of proof is on a balance of probabilities.[4]

Issue 2 Is this an appropriate case for summary judgment

[6] Whether or not a case is suitable for summary dismissal is typically a threshold issue. The parties agree that summary judgment is not only appropriate, but that I should treat this application as dispositive of the action. There is no other evidence expected to be adduced and the parties have no desire to take the matter to a trial beyond this application. As such, this is essentially a mini trial to be decided on the basis of affidavit and documentary evidence. I have decided the matter accordingly.

[7] To resolve this matter via summary judgment, the issues must be sufficiently focused and the material sufficiently detailed to enable the court to:

(1) Make the necessary findings of fact;
(2) Apply the law to the facts;
(3) Conclude that summary judgment is a proportionate and more expeditious and less expensive means to achieve a just result between the parties; and
(4) Determine there is no genuine issue requiring a trial.[5]

[8] In my view, the record is sufficient to enable a determination that there is a genuine issue requiring a trial regarding whether the second exclusion relating to vandalism and malicious acts applies. I am, however, given the position of the parties, confident that a fair and just determination on the merits can be reached based solely on the evidence before me.

---

[1] see for e.g.: *Indemnity Insurance. Co of North America v Excel Cleaning Service*, 1954 CanLII 9 (SCC); *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, 2010 SCC 33 at para 29 [*Progressive Homes*]; *G & P Procleaners and General Contractors Inc v Gore Mutual Insurance Company*, 2017 ONCA 298 at para 14

[2] *Progressive Homes* at para 51

[3] Special Chambers Brief of the Applicant, Para 22

[4] *Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125 at para 14, citing *F.H. v McDougall,* 2008 SCC 53 at para 40

[5] *Auchstaetter v Evolution Homes Ltd*, 2016 SKQB 360 at paras 4 and 5

Issue 3 Whether the property was "vacant"

[9] In determining whether the home was "vacant", as per the insurance policy term, the court will examine the circumstances and take a commonsense approach.[6] There is a difference between a property being vacant versus being unoccupied, which has been judicially considered. A dwelling is "'occupied' while it is dwelt in, and unoccupied when no person is dwelling therein".[7] In the context of interpreting exclusionary clauses, "vacant" is not synonymous with "unoccupied".[8] In determining whether a dwelling is "vacant", reference must be had to all the surrounding circumstances, including the presence of chattels and the intentions and actions of the policyholder.[9]

[10] The Policy defines "vacant" as:

> "Vacant" refers to the circumstances where, regardless of the presence of furnishings:
> 1. All occupants have moved out with no intention of returning and no new occupant has taken up residence; or
> 2. In the case of a newly constructed dwelling, no occupant has yet taken up residence.

[11] The applicant notes the threshold issue is whether the Property was "vacant" at the time of the fire. There is no dispute the prior tenant left the property and was not going to return. No new tenant had been secured or taken up residence in the property. The Applicant asserts the property was clearly "vacant" as defined in the policy, and when a policy defines a term, care must be taken not to substitute a judicial definition for the one chosen by the contracting parties.[10] Further, to periodically "check in" on a place does not mean it is not vacant or that there is occupancy.[11] The applicant submits that on the date of the fire all occupants had moved out of the property, the respondent resided elsewhere, and no new tenant had moved in to take up residence. As a result, the applicant submits the property was "vacant".

[12] Citing cases from Alberta, the respondent advances the proposition that the exclusion clause "must be construed in a reasonable manner so as to afford proper

---

[6] *Wright v Canadian Northern Shield Insurance Co.*, 2005 BCCA 599, at para 10. See also: *Marche v Halifax Insurance Co*, 2005 SCC 6
[7] *Lambert v The Wawanesa Mutual Insurance Company,* 1945 CanLII 99 (ON CA)
[8] *Nicoli v Liberty Mutual Insurance Co.*, 1996 CanLII 8242 (ON SC)
[9] *Metcalfe v General Accident Assurance Co of Canada*, 1929 CanLII 415 (ON CA)
[10] *Coburn v Family Insurance Solutions*, 2014 BCCA 73 [*Coburn*]
[11] *Nejim v Intact Insurance Company,* 2016 ONSC 5852, at paras 31-32,

protection to both parties rather than give it a meaning that would mislead the insured."[12] The respondent also asserts the New Brunswick decision, *Richie v Sun Alliance Insurance Company*, 1992 CanLII 6813 (NBKB) [*Richie*] is "on all fours" with the case at bar. In *Richie* the court held that the insured premises were not vacant in circumstances where the previous tenant had left, and the owner was endeavouring to rent the premises and had referred the matter to a real estate agent. Daily inspections were ongoing.[13] The respondent argues that, as in *Richie*, the residence was not vacant, as the respondent was attending at the property daily, occasionally stayed overnight, planned repairs, and brought tools to the property for same, had services reconnected, and intended to let to a new tenant. All these actions demonstrate the respondent had a continuous intention to return to the property.[14] The Respondent further asserts that it would be contrary to the respondent's reasonable expectations if the policy held with the applicant did not cover his fire loss.

[13] Whether the property was vacant per the policy definition and whether it was vacant per the policy's exclusions are different questions. At this juncture, the narrow question of whether the property was "vacant" per the policy definition must be answered in the affirmative. The respondent evicted a tenant who left the property on or about August 31, 2015. The decisions relied upon by the respondent involve the court seeking to define vacancy, often resulting in a distinction being drawn between vacant and unoccupied for purposes of policy interpretation. In my view, these decisions are distinguishable in that they do not deal with policies that define the term "vacant", unlike the present matter where the term is clearly defined. That the respondent was seeking a new tenant and planning renovations does not change that these facts align with the policy definition of vacant in that "all occupants have moved out with no intention of returning and no new occupant has taken up residence." Thus, the property was "vacant".

Issue 4 Whether the respondent's losses are excluded from coverage

[14] The Applicant submits that the Respondent is excluded from entitlement to coverage by virtue of the Policy's exclusions relating to loss or damage that is:

- occurring after your dwelling has, to your knowledge, been vacant for more than 30 consecutive days;

---

[12] Special Chambers Brief of the Respondent (Plaintiff) at para 33, citing: *4081471 Canada Inc. v. Dadswell Forster Insurance Services Ltd.*, 2005 ABPC 60, at para 19, and *Cody v. Beaver Insurance Company*, 1964 CanLII 511 (AB CA)
[13] Special Chambers Brief of the Respondent (Plaintiff) at para 34,
[14] *Ibid,* para 39

- caused by vandalism or malicious acts or glass breakage occurring while your dwelling is under construction or vacant even if permission for construction or vacancy has been given by us.

[15] To engage this exclusion, there are two distinct requirements to consider:

(a) the acts occurred while the dwelling was vacant; and
(b) loss or damage caused by vandalism or malicious acts.

The First Exclusion - Whether the property was vacant for 30 consecutive days

[16] The first exclusion applies if the loss is:

> *occurring after your dwelling has, to your knowledge, been vacant for more than 30 consecutive days*

[17] There are two different types of vacancy in the policy, one which applies to vacancy generally, discussed above, and another type of vacancy exclusion which is contingent on a temporal condition of 30 days. This latter exclusion is not satisfied here.[15] The 30-day condition was not met. The respondent's tenant moved out of the property on August 30, 2015. The fire occurred on September 19, 2015, well within the 30-day threshold for coverage. As a result, the first exclusion, namely that the loss occur after the dwelling has been vacant for more than 30 consecutive days, does not apply. The type of "vacancy" wholly contingent on the policy definition that does not have a temporal element is relevant to the second exclusion, discussed below.

The Second Exclusion - Did the loss occur as the result of vandalism or malicious acts?

[18] The second exclusion applies if the loss is:

> *caused by vandalism or malicious acts or glass breakage occurring while your dwelling is under construction or vacant even if permission for construction or vacancy has been given by us.*

[19] Unlike the meaning of vacancy being temporally restricted by the 30-day stipulation in the first exclusion the Applicant, as noted above, asserts that this

[15] See: Applicant's Rule 391 Pre-Hearing Brief, at paras 36-38.

exclusion has no temporal restriction. All that is required is that the vandalism or malicious acts occurred while the property was vacant. The Applicant asserts that most of the Policy's coverages remain in force despite a vacancy for up to 30 days, for certain limited risks there is no 30-day grace period. Those risks do not attract coverage once the property is vacant, regardless of the duration of the vacancy. The Applicant alleges this is a reasonable limitation on coverage, as the types of losses most likely to occur once a property is vacant do not attract coverage. Further, as the policy excludes coverage for these types of losses even if permission for vacancy has been granted by the Applicant, the Policy demonstrates a clear intent to not provide coverage for a property that is subject to vandalism and/or malicious act whilst "vacant" as per the Policy's definition.

[20] The only report on the fire before the court is the report prepared by Jensen Hughes Consulting. The applicant asserts the report concludes that the fire had an incendiary origin, stating:

> An incendiary fire that is deliberately set with the intent to cause the fire to occur in an area where the fire should not be. This implies an act of deliberation whereby the fire is ignited with an incendiary device.[16]

[21] The applicant further asserts that since the report is the only evidence before the court, the only conclusion the court can reach is that the fire had an incendiary origin and/or was an act of arson. Thus, the fire must constitute an act of vandalism or a malicious act per the definition in the policy.[17]

[22] The fire was investigated, which yielded a report in which the cause of the fire was never determined.[18] The applicant did not proceed with additional investigation. The fire being the result of an accident could not be ruled out. The respondent acknowledges several facts in the report are consistent with an incendiary act:

- Removal of contents;
- The fire originating in remote locations with the view blocked or obscured;
- The fire originating near service equipment; and
- Unsecured windows and doors.[19]

---

[16] Special Chambers Brief of the Applicant, at para 41, citing Affidavit of Matthew Hopley at Exhibit "B", p. 4

[17] Special Chambers Brief of the Applicant, at para 41, citing Latendresse v. Co-Operators Insurance Co., 2004 CanLII 7071 (ON SC), at para 8

[18] Special Chambers Brief of the Applicant, at para 43, citing affidavit of Matthew Hopley, filed May 11, 2023, Exhibit "I"

[19] Special Chambers Brief of the Plaintiff, at para 46,

[23] The respondent, however, asserts that these facts are all equally *inconsistent* with an incendiary act, noting as examples that:

- the cover was off the furnace, which made it more likely the furnace is the source of the fire; and
- an unsecured door made it more likely that steps could be taken to put out the fire.

[24] These factors, the respondent asserts, make a fire easier to put out, which is the opposite of what one would expect with an intentional act of arson.[20]

[25] The report notes there was no evidence of an ignition source. It also posits two potential ignition sources that do not involve vandalism or malicious act(s). In the result, the cause of the fire remains unknown. In the respondent's view, any uncertainty should be resolved in favour of the respondent, as the applicant bears the burden of establishing that an exclusion applies. In the applicant's view, the lack of explanation for the fire should result in an inference being drawn that it was resultant of malice or vandalism.

[26] A useful discussion of the meaning of "vandalism" and "malicious acts" is found in *Reliable Distributors Ltd v Royal Insurance Co of Canada*, 1986 CanLII 959 (BCCA) [*Reliable Distributors*] where the court concludes that vandalism includes malicious damage *and* an element of blameworthiness or wrongful intention accompanying the destruction of property. Malice may be inferred from the act of destruction. The terms "vandalism" and "malicious mischief" refer to wanton or malicious acts *intended t*o damage or to destroy.[21] Thus, there must be a wrongful intention accompanying the destruction of property to warrant the term "vandalism".

[27] In my view, the determinative issue is whether the proximate cause of the fire loss was an act of vandalism. A cause is proximate when it sets in motion a chain of events which, in a natural sequence, unbroken by any new cause, produces the loss which would not have otherwise occurred.[22] The parties each speculate as to the source of the fire, with the applicant asserting that the lack of conclusive evidence as to the ignition source suggests an incendiary act that is malicious vandalism, and the respondent noting a host of factors that suggest the fire is inconsistent with a

[20] Special Chambers Brief of the Plaintiff, at para 47
[21] *Reliable Distributors* at para 19
[22] *B & B Optical Management Ltd v Bast*, 2003 SKQB 242 at para 13

willful act. The report notes two potential ignition sources were located proximal to the damaged area within the utility room. These include the furnace and a receptacle installed in the east wall. But "no physical damage was observed that would indicate that the ignition of gasoline vapours by the operating furnace had occurred." As the Applicant did not proceed with additional testing or evaluation this inconclusive report is essentially what this court is asked to rule on in relation to whether this was a malicious act of vandalism. Given the inconclusive findings of the report it is not possible to determine on a balance of probabilities the proximate cause of the fire, nor to conclude the fire resulted from an act of vandalism or malice. Though the applicant has established the property was "vacant" as per the Policy definition, this is only one hurdle the applicant must overcome if to claim the respondent is excluded from coverage by operation of the second exclusion. The second exclusion is itself the other hurdle for the applicant, and one which it has not met its burden in establishing applies.

Decision

[28] The applicant has the burden of proving any applicable exclusion on a balance of probabilities. The Applicant has proven the property was vacant as per the definition of "vacant" in the policy. However, the Applicant has not proven either applicable exclusion. The property was not vacant for at least 30 consecutive days and there is insufficient evidence to infer the fire loss resulted from "vandalism or malicious acts". Mere suspicion is not enough. I cannot conclude on the basis of the report, which is the only evidence I have of the cause of the fire, that it was caused by either vandalism or malicious act on a balance of probabilities.

[29] Given the agreement of counsel as to the expanded scope of this application, I therefore both dismiss the application for summary judgment and find in favour of the respondent Kruezi in the action.

[30] Both parties sought costs. Costs are awarded to the respondent Kruezi on a party and party basis as per the regulations.

A.M. Mahar
A.M. Mahar
JSC

Dated at Yellowknife, NT, this
25th day of April, 2024

Counsel for the Respondent (Plaintiff):	Teri Lynn Bougie
Counsel for the Applicant (Defendant):	David P. Wedge

Corrigendum of the Memorandum of Judgment

of

The Honourable Justice A.M. Mahar

---

1. An error occurred on page 9, at paragraphs 29 and 30 where the respondent's name was misspelled as **Kreuzi.** Those instances have been corrected to read:

> [29] (…) find in favour of the respondent **Kruezi** in the action.
>
> And
>
> [30] (…) Costs are awarded to the respondent **Kruezi** on a party and party basis as per the regulations.

2. The citation has been amended to read:

Kruezi v Aviva Insurance Company of Canada, 2024 NWTSC 20.cor1

(The changes to the text of the document are highlighted and underlined)

S-1-CV 2016-000209

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RAY KRUEZI

Plaintiff (Respondent)

-and-

AVIVA INSURANCE COMPANY OF CANADA

Defendant (Applicant)

Corrected judgment: A corrigendum was issued on April 26, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT
OF
THE HONOURABLE JUSTICE A.M. MAHAR