$700

Citation: Assiniboine Credit Union Ltd. v. Aviva Insurance Co. of Canada, 2006 MBCA 45

Date: 20060516
Docket: AI 05-30-06135

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Guy J. Kroft
Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel

B E T W E E N:

THE ASSINIBOINE CREDIT UNION LIMITED	)	***M. G. Finlayson*** *for the Appellant*
(Plaintiff) Respondent	)	***J. A. Pollock*** *and* ***J. G. E. Young*** *for the Respondent*
- and -	)	
AVIVA INSURANCE COMPANY OF CANADA	)	*Appeal heard:* ***January 25, 2006***
(Defendant) Appellant	)	*Judgment delivered:* ***May 16, 2006***

MONNIN J.A. (giving the first judgment at the invitation of Kroft J.A.)

1 This is an appeal by the appellant insurer, Aviva Insurance Company of Canada (Aviva), from a finding that it is liable for damages to a house it insured. Aviva had argued that the damages arose as a result of an uninsured loss.

2 For the reasons that follow, I would dismiss the appeal but my reasons for doing so are different than those found by the judge who initially heard this matter. In fairness to him, however, it is to be noted that the parties argued their briefs very differently before us than they had in the court below.

3 Cheryl Conrod was the owner of a house located in Winnipeg (the property). The respondent the Assiniboine Credit Union Limited

Appeal from (2005), 193 Man.R. (2d) 113, 2005 MBQB 52

(Assiniboine), held the first mortgage on the property. The property was insured by Aviva or its predecessor-in-law, with coverage beginning on March 1, 1999, until March 1, 2002, at which time the coverage lapsed for non-payment of premiums.

4 On January 19, 2001, at the request of the owner, but without the knowledge of Assiniboine, Aviva added a vacancy permit to the insurance coverage. The vacancy permit was renewed from time to time but never with the knowledge of Assiniboine.

5 Assiniboine continued to receive mortgage payments up to and including May 29, 2002. After payments stopped, Assiniboine eventually obtained possession of the property on August 15, 2002.

6 Upon gaining possession, Assiniboine discovered that in May 2001, electricity to the property had been disconnected for non-payment resulting in the property being unheated during the winter of 2001-2002. As a result of the lack of heat, water in the plumbing system froze during the winter causing damage to the property which, as of September 15, 2003, was in the order of $26,658.03.

7 Assiniboine requested payment from Aviva who denied liability.

8 Following the issuance of pleadings, the matter came before the court by way of a motion to determine a question of law before trial. The point of law to be determined was whether in the circumstances of the case, Assiniboine could recover its loss from Aviva pursuant to the standard mortgage clause in the policy of insurance.

9 The judge confirmed liability against Aviva. His finding was that Aviva had been in breach of the terms of the policy when it failed to inform Assiniboine that a vacancy permit had been placed on the property. He stated in his reasons (at paras. 15-16):

> The location of the subject property, the nature of a vacancy permit, as well as the time of the year in which it was issued, endorse a finding that the policy was altered to the prejudice of the mortgagee without notice. There is merit in the observation of learned counsel for the plaintiff:
>
> > 24. In the present case, had the Mortgagee been made aware of the alteration of the Policy by the addition of the Vacancy Permit, it could have taken steps to protect its investment, such as entering upon the Property and ensuring it was in satisfactory condition, arranging for the Property to be made ready for winter, making enquiries of the Mortgagor, etc.
>
> And further:
>
> > 25. However, as the Mortgagee was unaware of circumstances which might have given it cause for concern, and which the Insurer was under an obligation to impart, it did not take any such steps. In effect, the Mortgagee was an innocent third party, whose interests the standard mortgage clause is clearly intended to protect.
>
> The mortgagee was prejudiced by the alteration and the failure of the requisite notice. Given the breach by the insurer of its statutory and contractual duty to the mortgagee respecting notice, the insurer is obligated to indemnify the mortgagee for the aforesaid loss sustained.

10 The matter had proceeded before the judge on the basis of an agreed statement of facts. Following is an excerpt of the portion of that agreed statement of facts that are relevant to these reasons:

> 1. This case concerns loss arising to the plaintiff, from water damage to certain lands and premises commonly known as 326 Cathedral Avenue, in Winnipeg (the "Property").
>
> 2. Although the precise date of loss is unknown, it is agreed that the loss occurred sometime during the winter of 2001 - 2002, and was

caused by water freezing in the plumbing system of the property.

. . . . .

4. The plaintiff, Assiniboine Credit Union, was the first mortgagee of the Property (the "Mortgagee"). The mortgage was subject to standard charge mortgage terms which provided, *inter alia*, that:

   a. the Mortgagor shall insure the Property in favour of the Mortgagee against loss or damage as the Mortgagee may require, and that if the Mortgagor fails to so insure, or fails to deliver policies, or fails to deliver evidence of renewal at least five days before termination, that the Mortgagee may, *inter alia*, insure the Property;

   b. the Mortgagor shall not permit waste to be committed to the Property;

   c. should the Mortgagor breach or not perform any of her covenants under the Mortgage, the Mortgagee may, *inter alia*, enter on the Property, make such repairs or arrangements as the Mortgagee may deem expedient, send an inspector to report on the condition of the Property, collect rent, obtain possession, lease the Property, sell the Property, ---.

. . . . .

6. The Policy (attached as Schedule A) was subject to a standard mortgage insurance clause (attached as Schedule B) in favour of the Mortgagee which states, *inter alia*,

   1. ***Breach of Conditions by Mortgagor Owner or Occupant*** *- This insurance and every documented renewal thereof - AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN – is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupancy of the property for purposes more hazardous than specified in the description of the risk.*

   PROVIDED ALWAYS that the Mortgagee shall notify forthwith the Insurer (if known) of any vacancy or non-occupancy extending beyond thirty (30) consecutive days, or of any transfer of interest or increased hazard THAT SHALL COME TO HIS

KNOWLEDGE; [...]

. . . . .

5. ***Termination - (Excluding Province of Quebec)** - The term of the mortgage clause coincides with the term of the policy; PROVIDED ALWAYS that the Insurer reserves the right to cancel the policy as provided by Statutory provision but agrees that the Insurer will neither terminate nor alter the policy to the prejudice of the Mortgagee without the notice stipulated in such Statutory provision.*

. . . . .

SUBJECT TO THE TERMS OF THIS MORTGAGE CLAUSE (and these shall supersede any policy provisions in conflict therewith BUT ONLY AS TO THE INTEREST OF THE MORTGAGEE), loss under this policy is made payable to the Mortgagee.

(the "Standard Mortgage Clause").

7. Among other things, the Policy provided, under the heading "Perils Insured," as follows:

7) WATER ESCAPE, RUPTURE, FREEZING

[...]

We do not insure loss or damage:

[...]

i) caused by continuous or repeated seepage or leakage of water;

vii) occurring while the building is under construction or vacant even if we have given permission for construction or vacancy;

viii) caused by freezing of any part of a plumbing [...] system [...] unless within a portion of your dwelling heated during the usual heating season;

(the "Exclusions").

8. On January 19, 2001, at the request of the Mortgagor, the Insurer added a vacancy permit to the Policy (the "Vacancy Permit"), which

was renewed from time to time and was continuously in effect from January 19, 2001 to March 1, 2002. An additional premium was charged for the Vacancy Permit.

9. Neither the Mortgagor nor the Insurer notified the Mortgagee that the Policy had been altered by the addition of the Vacancy Permit.

10. Until August 15, 2002, the Mortgagee was not aware that the Property had been vacant.

11. The Mortgagee received regular mortgage payments from the Mortgagor up to and including May 29, 2002 and, thereafter as a result of no longer receiving mortgage payments, the Mortgagee obtained possession of the Property on or about August 15, 2002.

12. Upon gaining possession, the Mortgagee discovered that, in May 2001, electricity to the Property had been disconnected for non-payment, resulting in no heat in the Property during the winter of 2001 - 2002. As a result, water in the plumbing system had frozen during the winter of 2001 - 2002, causing damage to the Property which, as of September 15, 2003, was in the amount of $26,658.03.

13. The damage occurred during a period in which the Policy and the Vacancy Permit were in effect.

14. The Mortgagee provided the Insurer with a Proof of Loss and requested payment pursuant to the Standard Mortgage Clause.

. . . . .

11 In its factum, Aviva argued that the judge erred in basing his finding of liability on the absence of notice from Aviva to Assiniboine of a vacancy permit being added to the insurance coverage, but in oral argument before us, counsel for Aviva focussed not on that issue but on the basic fact that the policy provided no coverage for the type of loss incurred. More specifically, Aviva relies on the exclusions set out in para. 7 of the policy as quoted in the above noted agreed statement of facts that specify:

... We do not insure loss or damage:

[...]

i) caused by continuous or repeated seepage or leakage of water;

. . . . .

viii) caused by freezing of any part of a plumbing [...] system [...] unless within a portion of your dwelling heated during the usual heating season;

12 Aviva further relies on a decision of this court in *Royal Bank of Canada v. Red River Valley Mutual Insurance Company* (1986), 42 Man.R. (2d) 124, to advance its argument that if a loss falls into an excluded category, it cannot be made liable pursuant to the terms of a standard mortgage clause. In that case, Twaddle J.A., writing for the court, said (at para. 18):

> On principle, I see no reason why a mortgagee should derive the benefits of its separate contract with the insurer without incurring the obligations imposed by the contract on it. The point apparently has not been decided by a court in Canada, but the position in the courts of the United States seems to be that a mortgagee claiming under a standard mortgage clause asserts its rights subject to the policy conditions. That position is put this way in **Couch on Insurance** (2nd Revd. Ed.), vol. 10A, p. 765, para. 42:731:
>
> > The rule that the standard loss clause creates a separate contract between the mortgagee and the insurer cannot be literally applied, to the exclusion of other provisions of the policy, for without those other provisions there would be no definition of the terms of the insurance, such as the property covered, the amount, and so on. Rather the standard mortgage clause creates an independent contract of insurance for the mortgagee's separate benefit, engrafted upon the main contract of insurance contained in the policy itself, which is rendered certain and understood by reference to the policy which makes it complete.
> >
> > In view of the applicability of other policy provisions, a mortgagee claiming under a standard mortgage clause asserts his right subject to all the terms and conditions of the contract of insurance, except those which are expressly waived in the mortgage clause.
>
> Because of the similarity between the law applied in the United States with respect to the contractual relationship between an insurer and a mortgagee protected by a standard mortgage clause, and the fact that the statement in

> **Couch** is in accord with principle, I accept that statement as being in concord with the law in Canada. I am therefore of the view that the bank's right to recover its loss is subject to the policy conditions.

13 In reply to this argument, Assiniboine maintains that the decision in *Royal Bank* does not affect it and takes the position that there in fact would have been coverage under the terms of the policy were it not for the actions of the owner of the property, and because of that it can rely on the standard mortgage clause to find that Aviva is liable for the loss. Specifically, it relies on the following words found in the first paragraph of the standard mortgage clause, namely "is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured" as those words apply to the peril excluded by para. 7(viii) of the policy.

14 Assiniboine argues that such an exclusion should not be applicable to it as the damage which occurred by freezing to the plumbing in the property was in an area of the dwelling that is heated during the usual heating season and would have been heated were it not for the actions of the owner in not paying her utility account, thereby causing the power to be shut off which eventually led to the freezing pipes and the damage to the property. In effect, this was a loss covered by the policy except for an act, neglect or omission attributable to the owner.

15 Assiniboine then relies on the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, and a more recent decision from the Ontario Superior Court of Justice in *Healy v. Pilot Insurance Co.* (2003), 68 O.R. (3d) 741, to justify its

interpretation that the standard mortgage clause protects it despite the conduct of the property owner.

16 Dealing specifically with the wording of the standard mortgage clause, La Forest J., writing for the majority in *National Bank*, wrote (at p. 1038):

> These comments remind one that it is important in interpreting a contract of insurance to give words their ordinary meanings. In the version of the standard mortgage clause under consideration here, no distinction is made between the "act", "neglect", "omission" or "misrepresentation" that a mortgagor might commit. The clause merely states, in simple and untechnical language, that the insurance, as to the interest of the mortgagee, is and shall be in force notwithstanding any act, neglect, omission or misrepresentation committed by the mortgagor. Given this unequivocal representation, it is unclear to me on what grounds one may seek to limit the application of the word "any", which, of course, is commonly understood as meaning "no matter which". ...

17 And (at pp. 1046-47):

> In summary, when the standard mortgage clause is interpreted in the light of the settled principles that govern the construction of insurance contracts, there can be no doubt that the insurer, by virtue of this clause, is representing to the mortgagee that a separate and distinct contract exists between them, and that the validity of this independent contract depends solely on the course of action between the mortgagee and the insurer. Moreover, even if the language of the clause was ambiguous, art. 2499 [*Civil Code of Lower Canada* am. 1974, c. 70, s. 2] reminds us that it would be necessary to resolve this ambiguity against the insurer. No mortgagee would wish that the validity of its "separate and distinct" contract with the insurer rest on the question whether its mortgagor dealt in good faith in effecting coverage on its (the mortgagor's) insurable interest. From the perspective of the mortgagee, this would stand to defeat the very purpose of relying on the standard mortgage clause in the first place.
>
> I therefore conclude that to adopt the interpretation of the standard mortgage clause proposed by the Court of Appeal would turn the clause into a sort of trap for the mortgagee. By ostensibly holding out to the mortgagee that the validity of its insurance contract was unaffected by the course of action between the mortgagor and the insurer, the clause would induce the mortgagee to rely on the standard mortgage clause, only to belie this expectation if a loss occurred and the insurer discovered that the mortgagor

> had, in fact, made a misrepresentation when effecting its policy. I alluded in *Scott v. Wawanesa Mutual Insurance Co.*, [[1989] 1 S.C.R. 1445], at p. 1459, to the burden that rests on an insurer when it is offering insurance on terms that can reasonably be supposed to defeat the very objective of the coverage sought by the purchaser of insurance. By application of this principle it is clear that the insurer has, in this instance, failed to use the requisite degree of clarity if it has indeed wished to represent to the mortgagees who choose to rely on the standard mortgage clause that their coverage was in fact subject to defeat, in certain circumstances, solely because of the acts of the mortgagor.

18 The facts in *Healy* are rather similar to the facts of this case. Polowin J. sets them out as follows (at paras. 2-3):

> The facts can be succinctly stated and are not in dispute. The plaintiff, Trenholm Healy, is a businessman residing in Cornwall, Ontario, who was the first mortgagee of premises, including land and a building, at 12 Elm Street, in Cornwall. The defendant, Pilot Insurance Company, insured these premises. 1384233 Ontario Inc., which is not a party to the action, was and is the owner of the premises and the mortgagor.
>
> On December 31, 1999, the defendant issued an insurance policy, insuring the above-noted premises against loss or damage caused by, among other things, water damage. The policy indicated that the plaintiff was the first mortgagee and it carried the Standard Mortgage Clause approved by the Insurance Bureau of Canada in favour of the plaintiff as first mortgage. The policy was in force and effect on April 14, 2002. On that day, the premises were seriously damaged by the sudden and accidental escape of water inside the building in circumstances that would have given rise to coverage if all the terms and conditions of the policy had been met. However, at the time of the loss, the building had been vacant and had been so vacant for at least six months. The plaintiff was unaware of this vacancy.

19 In finding in favour of the mortgagee on the basis of the terms of the standard mortgage clause the, judge wrote (at paras. 35-38):

> While found in Insured Perils' portion of the policy, subparagraph 9(a)(vii) is, in essence, an exclusion. There will be no coverage for water damage where the building is vacant. However, the Standard Mortgage Clause does not distinguish between vacancy provisions set out in the Insured Perils section and vacancy provisions in the Exclusions section of the policy. Paragraph 1 of the Standard Mortgage Clause refers to any neglect, etc.

attributable to the mortgagor ... including any vacancy, etc. Further, the closing words of the Standard Mortgage Clause ("and these shall supersede *any* policy provisions in conflict there with ...") (emphasis mine) does not distinguish between those policy provisions under the Insured Perils section, as opposed to those under the Exclusions section. It seems clear to me that "any vacancy", "any provision" must mean precisely that, that is, all, not some.

To use the words of Justice La Forest in the *National Bank of Greece* case, *supra*, the Standard Mortgage Clause merely stated, in simple and untechnical language, that the insurance, as to the interest of the mortgagee, is and shall be in force notwithstanding any act, neglect, etc. committed by the mortgagor. Any other interpretation would distort the plain and ordinary language used in the Standard Mortgage Clause. If the insurer were reserving to itself the right to invalidate the coverage of the mortgagee, as a result of vacancy with respect to water damage, while a building is vacant (subparagraph 9(a)(vii)), it could have included a provision in the Standard Mortgage Clause to that effect. Instead, the Standard Mortgage Clause states: "notwithstanding *any* act ... *any* vacancy" (emphasis mine).

Even if the provisions are viewed as ambiguous, it would seem to me that the above-enunciated principles of insurance contract interpretation would apply, in the circumstances of this case, to provide for recovery for the plaintiff. I note, in this regard, the principles of *contra proferentem* and that coverage provisions are to be interpreted by courts broadly, while exclusions are to be interpreted narrowly. I am also mindful of the advantages and purposes of the Standard Mortgage Clause, as referred to by Justice La Forest in the *National Bank of Greece* case, *supra*. From the perspective of the mortgagee, the interpretation put forward by the insurer, in this case, would stand to defeat the very purpose of relying on the Standard Mortgage Clause.

The Standard Mortgage Clause benefits the insurer and the mortgagee. From the point of view of the insurer, it saves time, paperwork and consequently, money that would be occasioned by the need to enter into a separate policy of insurance with the mortgagee. From the perspective of the mortgagee, it serves as a protection from the acts, omissions, etc. of the mortgagor over which it has no control. Economic chaos would be created if a mortgagee (whether an individual or a company) would be obligated to ensure that premises are continuously occupied, etc.

20 On the basis of the existing status of the law dealing with standard mortgage clauses as exemplified by all of the cases to which I have referred in

these reasons, coupled with the factual circumstances of this case, I am satisfied that Aviva is liable to Assiniboine for the damages caused to the property it held as security for its mortgage loan.

21 I would therefore dismiss the appeal with costs.

J.A.

I agree:  J.A.

KROFT J.A. (concurring)

22 I concur with the conclusion of my colleagues, and for the most part, my reasons do not differ. I would not normally write a separate judgment only to repeat the same things that others have said but in a different way. I do, however, have some concerns which I think should have been addressed more explicitly as a part of this judgment, but were not.

23 At the original hearing in the Court of Queen's Bench, the Assiniboine Credit Union Limited (Assiniboine) submitted amongst its other arguments, that by issuing a vacancy permit without notice to or knowledge by it, Aviva had altered the policy in a way that was to the detriment of Assiniboine, and violated s. 141 of *The Insurance Act*, C.C.S.M., c. I40 (the *Act*) and para. 5 of the standard mortgage clause. Those provisions stipulate:

> **Cancellation by insurer**
> **141(1)** Where the loss, if any, under a contract has, with the consent of the insurer, been made payable to a person other than the insured, the insurer shall not cancel or alter the policy to the prejudice of that person without notice to him.
>
> ***5. Termination – (Excluding Province of Quebec)***
> *... [T]he Insurer reserves the right to cancel the policy as provided by Statutory provision but agrees that the Insurer will neither terminate nor alter the policy to the prejudice of the Mortgagee without the notice stipulated in such Statutory provision.*

24 Counsel for Aviva argued in his factum that the "alteration" was not prejudicial. The motions judge, however, found to the contrary. He held that in the circumstances of this case, Assiniboine was prejudiced and that the statutory argument should be applied. That was the only ground upon which the judge based his decision in favour of Assiniboine.

25 He was convinced that the insurer, that is, Aviva, had altered the policy in a manner contrary to the *Act* and s. 5 of the standard mortgage clause; that is, he endorsed one of the submissions of Assiniboine in this regard. In so saying, the motions judge assumed that the policy had been altered to the prejudice of Assiniboine without notice to it or knowledge by it. Without such notice, he found that Assiniboine was unable to take steps to protect its investment or to assure that the property was prepared for winter.

26 On that sole basis, the motions judge concluded his reasons by saying (at para. 16):

> The mortgagee was prejudiced by the alteration and the failure of the requisite notice. Given the breach by the insurer of its statutory and contractual duty to the mortgagee respecting notice, the insurer is obligated to indemnify the mortgagee for the aforesaid loss sustained.

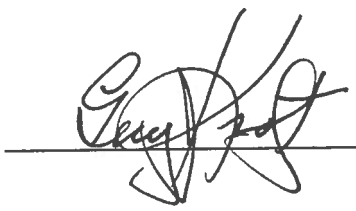
27 When I say "sole basis" I mean to emphasize that the motions judge erred in finding that this was the only ground upon which he could grant judgment in favour of Assiniboine.

28 The ultimate decision of this court has the same result as the Queen's Bench decision, but I am satisfied, and it seems my colleagues are as well, that on a straightforward reading of the policy and the facts of this case, Aviva is liable to indemnify Assiniboine for its loss under the actual terms of the policy.

29 The trial judge was simply mistaken when he said "[i]n clear, explicit and unequivocal language, the policy excluded coverage for the subject loss" (at para. 8).

30 With these few remarks, I have tried to explain why, in my opinion, Assiniboine was entitled to coverage under clause 7(viii) of the policy itself and standard mortgage endorsement, without reference to or reliance on the *Act*. In so saying, I hope that I have made it clear that this judgment is not intended to resolve for insurers or their customers any of the questions concerning the form and nature of notice that should be used.

31 Based on the reasons of Monnin J.A. and these few supplementary comments, I, too, would declare that the insurer is obligated to indemnify the mortgagee and that Assiniboine is entitled to costs.



J.A.