COURT FILE NO: 07-CL-7122
DATE: 20081008

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

MICHAEL J. QUILLING, IN HIS CAPACITY AS COURT APPOINTED RECEIVER FOR COURTNEY WALLIS SIMPSON	)	*Lincoln Caylor & David Rainsberry,* for the Applicant
Applicant	)	
- and -	)	
NICHOLAS SMITH ATTORNEY IN FACT IN CANADA FOR LLOYD'S UNDERWRITERS	)	*Robert L. Falby, Q.C.,* for the Respondent
Respondent	)	
	)	Heard: August 25, 2008

LEDERMAN, J.

Nature of Application

[1] This application seeks the interpretation of the limits of liability of an insurance policy held by the Real Estate Council of Ontario to cover losses of consumer deposits. The policy provides that each claim has a limit of liability of $100,000, but that the aggregate liability for each "occurrence" or "series of related occurrences" is $500,000. The question is whether the claims at issue constitute separate occurrences, and if so, are any of these occurrences part of a series of related occurrences.

Facts

[2] Michael J. Quilling ("Applicant") is the court-appointed receiver of Courtney Wallis Simpson ("Simpson"). He acts on behalf of victims of a real estate deposit scheme, which is one of two different fraudulent schemes put in place by Simpson and her company, York Region

Realty Inc. The deposit scheme involved the purported purchase and sale of real property. Simpson stole 25 deposits, ranging in size from $5,000 to $400,000 from 22 different victims (3 of the victims are claiming twice).

[3] In addition to the deposit thefts, Simpson created a 'Ponzi' scheme, soliciting money from individuals to "invest" in "interim occupancy mortgages". She used the misappropriated deposits to fund her mortgage scheme. Simpson was convicted and sentenced to five years in jail and a restitution order for $4.5 million was issued. The trial judge described the victims of both schemes as individual investors, not institutions, many of whom lost their life savings.

[4] Victims of the deposit thefts are covered by consumer real estate deposit insurance, held by the Real Estate Council of Ontario ("RECO"). RECO administers the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30. (*"Act"*) on behalf of the Ontario government. Its mandate is to regulate the activity of trade in real estate in the public interest. The insurance policy is provided by Lloyd's Underwriters ("Respondent").

[5] The policy stipulates in the "Consumer Deposit Insurance Extension" section that the insurer agrees:

> To pay on behalf of the Insured the amount of any Claim for Loss sustained by a Claimant in a trade in real estate in the Province of Ontario arising out of an Occurrence discovered during the Policy Period.

[6] However, there are coverage limits built into the policy. Each claim is limited to a $100,000 recovery, where a "claim" is a demand of money arising out of an "Occurrence". An Occurrence is defined as:

> "Occurrence" means the insolvency of a Registrant or the theft, fraud, misappropriation or wrongful conversion directly or indirectly by a Registrant or present or former employee, director, officer or manager of a Registrant of moneys or other property entrusted to or received by the Registrant in the Registrant's Professional Capacity.

[7] In addition, there is a $500,000 aggregate limit for any one Occurrence or series of related Occurrences. The policy states:

> The Limit of Liability – aggregate each Occurrence stated in the DECLARATIONS shall be the maximum liability of the Insurer and the Named Insured in any one Occurrence or series of related Occurrences. If the total amount of all Claims in any one Occurrence exceeds the aggregate Limit of Liability, then all Claims will be settled on a pro-rata basis in the same proportion that the aggregate Limit of Liability bears to the total amount of all Claims.

[8] The Applicant argues that each deposit theft was a separate, unrelated Occurrence. The Respondent argues that they constitute a single Occurrence, and in the alternative, that they are a "series of related Occurrences" such that the $500,000 limit applies.

Issues

1. Do the 25 deposit thefts constitute a single Occurrence within the meaning of the policy?

2. If not, do they, or a subset of them, constitute a series of related Occurrences, triggering the aggregate limit of liability?

1. Single Occurrence or Separate Occurrences?

Positions of the Parties

[9] Both the Applicant and the Respondent argue that the policy definitions are sufficiently clear on their face, but each holds they mean a different thing.

[10] The Applicant submits that Occurrence under the policy is defined in the singular. It is "...the theft" not "thefts". To consider all 25 separate acts of theft as one would stretch the singular "theft" to mean "thefts" which is beyond what the word can bear. The Applicant points out that there are no words *within* the definition of Occurrence to the effect of "an act or series of acts", nor indeed "the theft or series of thefts".

[11] The acts by Ms Simpson were separate, perpetrated on different days in relation to different transactions, with many different victims. The Applicant relies upon Hilliker's *Liability Insurance Law in Canada*, in which it states that all injuries flowing from one cause are one occurrence, but "[w]here, however, separate injuries result from separate acts, even though the acts may be of the same nature, each act constitutes a separate occurrence."[1]

[12] The Respondent also relies upon the definition of Occurrence but points to the use of the plural word "moneys". The plural, it is claimed, indicates that Occurrence includes a scheme involving multiple instances of theft of money, or a single theft encompassing several transactions. It was agreed between the parties that the thefts by Ms Simpson were a fraudulent scheme. Therefore, the Respondent argues that they are a single "Occurrence".

The thefts are not a single Occurrence

[13] That the deposit thefts were part of a scheme does not make them a single Occurrence. The wording of the policy is plain: an "occurrence" means "...the theft, fraud, misappropriation or wrongful conversion" of deposits. To find that the 25 thefts perpetrated by Ms Simpson are a single Occurrence stretches the singular into plural and may also render the aggregate limit of liability meaningless.

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[1] Gordon Hilliker, *Liability Insurance in Canada*, 3d ed. (Butterworths, 2001) pp. 63-4.

[14] The use of the word "moneys" does not change this. "Moneys" is also used in the definition of "Loss", which states: "'Loss' means loss of deposit in the form of moneys or other property..." It would seem that the policy is merely defining Occurrence with reference to its definition of Loss. In protecting consumer real estate deposits, the policy does not wish to limit coverage to deposits in the form of a single amount of money. So too, the definition of Occurrence is not limited to deposits in the form of a single amount of money, but extends to "...the theft...of moneys or other property...", mirroring the definition of Loss.

[15] Therefore, each of the 25 deposit thefts is a separate Occurrence.

2. Do the 25 thefts constitute a series of related Occurrences, triggering the aggregate limit of liability?

[16] Having found each theft to be a separate Occurrence, it is necessary to determine whether they constitute a series of related thefts. This policy contains a coverage limit of $500,000 in any one Occurrence or "series of related" Occurrences. If this limit applies, all 22 victims will share *pro rata* in the $500,000.

Positions of the Parties

[17] The Applicant argues that the deposit thefts are separate, unrelated occurrences, relying on *Pacific Rim Nutrition Ltd. v. Guardian Insurance Co. of Canada*[2]. In that case, a bookkeeper stole cash portions of daily deposits, and on one occasion, stole money from the vault. The employer's employee theft insurance policy read:

> "Occurrence" means any act or series of related acts involving one or more persons (or one or more "employees"...) which results in a loss insured by this Section.

[18] The trial judge found the deposit thefts to be a series of related acts, but held the vault theft was not part of the series, as the crime was dissimilar.

[19] To arrive at this conclusion, the trial judge reviewed a U.S. case which found that "...the common understanding of the word 'related' covers a very broad range of connections, both causal and logical".[3] He then turned to the dictionary definition of "related" as "any connection, correspondence, or association" and held that "related" was not ambiguous. Since the deposit thefts were all by the same person, against the same employer, using the same method, they were all related because there was "no doubt a connection or association between each". However, he

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[2] *Pacific Rim Nutrition Ltd. v. Guardian Insurance Co. of Canada*, [1995] 8 W.W.R. 74, [*Pacific Rim*], aff'd [1998] B.C.J. No. 1852 (C.A.) [*Pacific Rim Appeal*].

[3] See *Gregory v. The Home Insurance Co.*, 876 F.2d 602 (7th Cir. 1989).

found that the vault theft "was not in any way related" to the deposit thefts, because of the change in method of operation.[4]

[20] On appeal, the British Columbia Court of Appeal upheld the decision, noting that the decision in *American Commerce Insurance Brokers Inc. v. Minnesota Mutual Fire and Casualty Co.*[5] supported the trial judge's approach. That case dealt with an employee of American Commerce who stole premiums paid in cash to the company, and who forged payroll cheques to herself. The policy had a limitation deeming all loss resulting from an act or series of related acts to be one occurrence. The court rejected a strict causal interpretation of "related" and said:

> that a court may consider several factors in concluding whether dishonest acts are part of a "series of related acts," including whether the acts are connected by time, place, opportunity, pattern, and, most importantly, method or *modus operandi*.

[21] On that basis, the *Minnesota Mutual* court found that the premium thefts and payroll frauds were separate, unrelated occurrences.

[22] The Applicant submits that, similar to *Pacific Rim* and *Minnesota Mutual,* the deposit thefts are not related because Simpson's *modus operandi* was different in each case: different purchase and sale agreements, different warranties and representations, different properties, were used to secure a deposit from each victim.

[23] The Applicant also argues that the identity of the victim is germane. Counsel referred to professional liability cases as examples of this analysis. These cases have policies which limit recovery per occurrence, deeming "more than one act, error or omission...in relation to the same professional service" to be one occurrence. In *Yang v. Canadian Lawyers' Insurance Assn*[6], the trial judge held that a lawyer who had negligently invested the money of individuals unknown to each other in a shopping centre development had committed errors in separate professional services provided to each investor. In coming to this conclusion, the judge reviewed a Canadian case, *Royal Trust Corp of Canada v. American Home Assurance Co.*,[7] and several U.S. cases. All the cases cited focused on who the client was, and if there were more than one, whether a distinct duty or service could be discerned.[8] Similarly, here, the Applicant argues, the thefts were perpetrated against different victims, and must therefore be unrelated.

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[4] *Pacific Rim, supra* note 2, at paras. 53-56.
[5] 551 N.W. 2d 224 (Minn. 1996) [*Minnesota Mutual*].
[6] (1996) 133 D.L.R. (4th) 228, [1996] A.J. No. 172 (Q.B.), aff'd (1996) 147 D.L.R. (4th) 31, (C.A.), leave to appeal to S.C.C. refused, [1997] SCCA No. 318.
[7] (1992) 90 D.L.R. (4th) 582, [Royal Trust], aff'd (1993) 100 D.L.R. (4th) 447 (N.S.C.A.).
[8] *Royal Trust* was decided on the basis that the same service was provided to the same client, using the same instructions, between the same borrower and lender, albeit involving five properties. The properties were all subject to the same prior mortgage interest; the lawyer was supposed to have sought postponement agreements on them. The court found it "highly unlikely" that the lawyer would have been negligent with respect to one set of mortgages and not for the others (See p.604).

[24] The Respondent counters that the plain, dictionary, meaning of "related" includes "associated or connected", and "of the same type", which would include the deposit thefts at issue. In addition, prior case law has centered upon whether the perpetrator was the same in each theft, or in the case of multiple thieves, whether there was a conspiracy. According to the Respondent, Simpson was the sole thief, and so the thefts must be related. In *482467 Ontario Ltd. v. Wellington Insurance Co.*[9] there were multiple thieves. Five or six employees of a Mr. Submarine shop had stolen cash deposit money; one employee had committed deposit thefts on three occasions. In holding the thefts were not related, the court noted there were "nine discrete transactions involving at least five different (and maybe a sixth) employees." The court went on to say at para. 11:

> It has not been argued, nor do the circumstances reasonably invite the inference, that the employees were involved in any form of conspiracy such as to constitute the prima facie discrete acts into a "series of related acts". The most cogent argument that could be made on behalf of the responding party is to urge that the transactions associated with "A.M.P." be treated as "a series of related acts".

[25] *Pacific Rim*, in the Respondent's view, also supports the conclusion that the deposit thefts are related occurrences. In that case, the deposit thefts were "part of a systemic or continuing ongoing plan to steal cash from the insured"; here, too, the thefts were part of such a scheme.

Meaning of the word "related"

[26] The facts of the case clearly provide a series of Occurrences, so the meaning of "related" must be determined in the context of this policy. The dictionary definitions of the word "related" are as follows:

> **Canadian Oxford Dictionary** lists "associated or connected with" and "of the same type; in the same group, category".[10]
>
> **Shorter Oxford English Dictionary**: "having relation; having mutual relation; connected", where "relation" is defined as "the existence or effect of a connection, correspondence, or contrast between things; the particular way in which one things stands in connection with another; any connection or association conceivable as naturally existing between things."[11]

[27] If we take the definition to be "of the same type; in the same group, category, etc.", any two acts of theft are related, merely in their being thefts, without need for any other connection in time, place, or person. By this definition, the aggregate limit would apply to all thefts of all deposits by any Registrant for the duration of the policy. This would be an unreasonable

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[9] [1991] O.J. No. 1206 (Gen. Div.) [Wellington].
[10] *Canadian Oxford Dictionary*, 2d ed., s.v. "related".
[11] *Shorter Oxford English Dictionary*, 5th ed., s.v. "related" and "relation".

interpretation of the policy. Clearly, then, not just any relation is necessary, but a particular kind of relation.

[28] As the word is broad in meaning, we must determine what its scope is in the context of this policy. The term "related" implies degree: things can be closely or tangentially related. The goal, then, is to determine what degree of relatedness fits with the intention of the parties to this insurance contract, given the objective of the contract and the facts surrounding it.

[29] As a reminder, the word appears under Coverage Limits, section 3(b):

> The Limit of Liability – aggregate each Occurrence stated in the DECLARATIONS shall be the maximum liability of the Insurer and the Named Insured in any one Occurrence or series of related Occurrences.

[30] The provision is contained in a section entitled "Coverage Limits" within a "Consumer Deposit Insurance Extension" to RECO's Errors & Omissions Insurance policy. The thrust of the policy is that the insurer agrees

> To pay on behalf of the Insured the amount of any Claim for Loss sustained by a Claimant in a trade in real estate in the Province of Ontario arising out of an Occurrence discovered during the Policy Period.

[31] In the definitions, the following terms are germane:

> "**Claim**" means a demand for money arising out of an **Occurrence**.
>
> "**Claimant**" means a customer or client of a **Registrant** and includes an individual or any proprietorship, partnership, co-operative, society, business, association, joint venture, syndicate, company, corporation, firm, or other legal or commercial activity.
>
> "**Loss**" means loss of deposit in the form of moneys or other property which has been entrusted to or received by a **Registrant** in his/her **Professional Capacity** from a customer or client arising out of a trade in real estate but does not include **Commission**.
>
> **"Occurrence"** means the insolvency of a **Registrant** or the theft, fraud, misappropriation or wrongful conversion directly or indirectly by a **Registrant** or present or former employee, director, officer or manager of a **Registrant** of moneys or other property entrusted to or received by the **Registrant** in the **Registrant's Professional Capacity**.

[32] These definitions paint a clear picture of the intention of the parties to create protection for consumers who provide deposits to a registered real estate agent or broker. This impression is reinforced by the circumstances surrounding the contract. The Statement of Agreed Facts

explains that RECO, who maintains the policy, administers the *Real Estate and Business Brokers Act, 2002*[12] on behalf of the province. RECO's mandate is to "regulate the activity of trade in real estate in the public interest".[13] The *Act* requires deposit insurance for consumers.[14]

[33] These facts, and the wording of the above definitions, point to the conclusion that the identity of the consumer claimant would be an important factor in interpreting the wording of the policy.

[34] *Pacific Rim* and *Minnesota Mutual* identified other factors to be considered, including time, place, opportunity, pattern, and most importantly, method. The Applicant provided affidavits of two victims outlining the various documents, conditions, and representations used by Simpson in perpetrating the various thefts, in an effort to show that each transaction was varied from the others. This was likely in light of the emphasis placed in both those cases on *modus operandi* as a controlling factor. That factor might have more importance in employee theft cases, but in the case at bar, involving consumer deposit insurance, the identity of the victim is the key determinant, because this accords with the intentions of the parties to protect consumers, as discerned from the wording and origin of the policy. In this regard, the professional liability cases such as *Yang* and *Royal Trust* are analogous. They turn upon the duty and service rendered separately to each client, just as here the definition of relatedness should turn upon the identity of the client.

[35] The Respondent argued that *Wellington* and *Pacific Rim* demonstrate that where the identity of the perpetrator is the same, or the perpetrators were acting in a conspiracy, the resulting thefts are related. However, as noted above, the relatedness must be determined in light of the policy and its purpose. Both of those cases involved a policy designed to manage the risk of one party, the employer. In so far as the identity of the party suffering the loss is part of the matrix of factors to be considered, the identity was fixed. The policy at issue manages the risks faced by consumers of real estate, so the fact that all thefts were perpetrated by one person must be weighed against the fact that there were many different and unrelated victims, all of whom were clients of Simpson.

[36] From the material provided, it would appear that 22 of the 25 transactions would be unrelated from the next, involving different victims and different properties. The cases of multiple fraud against a single victim would, however, be captured by the aggregate limit, given the information available. In those cases, the thief is the same, the victim is the same, and the type of occurrence causing the loss is the same.

[37] It should be noted that in other circumstances, much like in *Pacific Rim*, multiple losses of one victim might not be related.

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[12] S.O. 2002, c. 30, Schedule C [the *Act*].
[13] Statement of Agreed Facts, Application Record, Tab B, paras. 11, 12.
[14] See O. Reg. 579/05, s. 11, enacted under the *Act*. Other provinces have created statutory assurance funds to achieve a similar purpose.

Conclusion

[38] Therefore, an order will go declaring that each of the deposit thefts in respect of the 22 victims made by Simpson are separate occurrences of "theft, fraud, misappropriation or wrongful conversion" of funds and, except for the additional deposit thefts of 3 of the victims, they do not constitute a "series of related occurrences" within the meaning of the policy.

[39] If the parties cannot otherwise agree as to costs of the application, they may make written submissions within 30 days.

LEDERMAN, J.

DATE: October 8, 2008

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- AND -

NICHOLAS SMITH ATTORNEY IN FACT IN CANADA FOR LLOYD'S UNDERWRITERS

BEFORE: THE HONOURABLE MR. JUSTICE SIDNEY N. LEDERMAN

REASONS FOR JUDGMENT

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