

Action No.: 1401-02247
E-File No.: CVQ15FEDERATED1
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

FEDERATED INSURANCE COMPANY OF CANADA

Plaintiff

and

IRONWOOD BUILDING SYSTEMS LTD.

Defendant

P R O C E E D I N G S

Calgary, Alberta
January 12, 2015

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

3 _____
4 January 12, 2015 Afternoon Session

5
6 The Honourable Court of Queen's Bench of Alberta

7 Madam Justice Anderson

8
9 C.A. Rhone (by telephone) For the Plaintiff

10 P.J. Stein, Q.C. For the Defendant

11 S. Simone Court Clerk

12 _____
13

14 THE COURT: Good afternoon.

15
16 MR. STEIN: Good afternoon.

17
18 THE COURT: So, we have Vancouver on the line, do we,
19 madam clerk?

20
21 THE COURT CLERK: We do, yeah. Mr. Rhone is on the line.

22
23 **Reasons for Judgment**

24
25 THE COURT: Okay, thank you. Okay, I'm going to give you
26 my decision orally. It's just -- it's much quicker that way, so bear with me, I may have to
27 review the transcript in the event I misspeak.

28
29 This matter involves Federated Insurance Company of Canada's, hereinafter "Federated",
30 obligation to defend its insured, Ironwood Building Systems Ltd., hereinafter "Ironwood",
31 pursuant to policy number 3039206 in an Alberta Court of Queen's Bench action number
32 0806-00260 commenced against Ironwood on April 30th, 2008. It is the position of
33 Federated that Ironwood breached its policy condition in that it failed to give prompt
34 notice of an occurrence which could have resulted in a claim and prompt notice of the
35 action. Federated maintains that it has been prejudiced by Ironwood's non-compliance
36 with the notice provisions of the policy. Ironwood concedes that it failed to provided
37 timely notice. However, Ironwood seeks relief from forfeiture pursuant to section 520 of
38 the *Insurance Act* and section 10 of the *Judicature Act* on the grounds that Federated has
39 not been prejudiced by its failure to provide timely notice.

40
41 Before me Federated seeks a declaration that it is not obligated to defend or indemnify

1 Ironwood in this action while Ironwood seeks the relief from forfeiture -- relief from
2 forfeiture referred to above.

3
4 I am granting Federated's application for a declaration that it is not obligated to defend or
5 indemnify Ironwood.

6 7 Background

8 9 The Policy

10
11 Federated insured Ironwood under a CGL policy. In that policy it set out the insured's
12 duties in the event of an occurrence, claim, or action including the insured's duty to notify
13 and duty to co-operate. Paragraph 12 of the policy reads, (as read)

14 15 Duties in the event of occurrence claim or action

16
17 You must see to it that we are notified promptly of an occurrence
18 which may result in a claim. Notice should include (1) how, when,
19 and where the occurrence took place; and (2) the names and
20 addresses of any injured persons and of witnesses;

21
22 (b) If a claim is made or action is brought against any insured, you
23 must see to it that we receive prompt written notice of the claim
24 or action; and

25
26 (c) You and any other involved insured must (1) immediately send
27 us copies of any demands, notices, summonses, or legal papers
28 received in connection with the claim or action; (2) authorize us to
29 obtain records and other information; and (3) co-operate with us in
30 the investigation, settlement, or defence of the claim or action; and
31 (4) assist us upon our request in the enforcement of any right
32 against any person or organization which may be liable to the
33 insured because of injury or damage to which this insurance may
34 also apply.

35 36 The Occurrence, Claim, and Action

37
38 It is alleged that Ironwood and Westco designed, supplied, and installed an addition to the
39 plaintiff's building, which included a large overhanging door. During high winds on
40 January 1st, 2007, the overhead door imploded causing damage to the plaintiff's building.
41 On January 2nd, 2007, Ironwood received notice of the implosion and damage to the

1 building.

2

3 On January 3rd, 2007, a representative of Ironwood, Mr. Henry Driedger, a professional
4 engineer attended the building site and prepared a report detailing his own opinion on the
5 cause of the implosion, which I refer to as the Driedger report.

6

7 On dran -- January 4th, 2007, the plaintiff's Hen -- Hasegawa Engineering prepared a
8 report that concluded that Ironwood and Westco's addition was at least partially
9 responsible for causing the implosion and damage. That report sets out that damage was
10 extensive, estimated at \$750,000.

11

12 On January 6, 2007, Ironwood received a fax from Westco Construction Ltd. that attached
13 the plaintiff's adjuster's letter to Westco stating that it would be prudent to notify the --
14 its insurer.

15

16 On March 5th, 2007, Ironwood received Hasegawa Engineering's report and on March
17 5th, 2007, Ironwood responded to Westco that the report expressed numerous opinions
18 and made numerous assumptions that could be debated and/or refuted.

19

20 On March 28th, 2007, Ironwood wrote to Westco stating that based on site inspections
21 and information provided to it, the structure was constructed as per the plans and
22 specifications prepared by Ironwood.

23

24 On March 30th, 2007, Ironwood attended a site building -- sorry -- a site meeting at the
25 building site. Ironwood did not conduct any further investigation of the damage or the
26 building site.

27

28 On April 5th, 2007, Ironwood emailed the Driedger report to Westco because Westco's
29 insurer requested a copy. Ironwood asked that it remain confidential.

30

31 On April 9th, 2007, Mr. Driedger sent a letter to Hasegawa Engineering stating that his
32 March 30th, 2007, site visit caused him concern. Specifically, Mr. Driedger was
33 concerned that work had been done to the building without Ironwood's authorization.
34 Because of this, he maintained that Ironwood was no longer responsible or liable for the
35 building.

36

37 On April 17th, 2007, despite the request to keep the Driedger report confidential,
38 Westco's adjuster sent a copy of it to an engineering firm.

39

40 On October 23rd, 2007, almost ten months after the occurrence, the building was
41 destroyed by fire.

1
2 On June 25th, 2008, Ironwood was served with a statement of claim. Ironwood retained
3 its own lawyer.

4
5 On November 3rd, 2008, Ironwood filed its statement of defence. It did not notify
6 Federated.

7
8 In May 2009, examinations for discovery took place and Mr. Driedger was examined on
9 behalf of Ironwood. In December 2011 after repeated requests, Mr. Driedger answered the
10 undertakings he gave at his examination for discovery.

11
12 On May 13th, 2013, Ironwood first gave notice of the claim and action to Federated, over
13 six years after the damage or occurrence and almost five years after Ironwood was served
14 with a statement of claim. Mr. Driedger told Federated he did not report the matter earlier
15 because he believed the claim would go away. Ironwood's counsel had recommended to
16 Ironwood that it report the loss to Federated, but Mr. Driedger declined because he did
17 not want Ironwood's insurance premiums to increase.

18
19 Upon being notified of the claim on May 21st, 2013, Federated sent a reservation of rights
20 letter to Ironwood. Thereafter it received the file materials and appointed an adjuster to
21 investigate. On September 17th, 2013, Federated denied coverage.

22 23 Federated's Position

24
25 But for the failure to provide timely notice, Federated concedes that what -- it would have
26 had a duty to defend although not necessarily or fully indemnify Ironwood in this action.
27 Federated therefore concedes that it must show prejudice, actual or potential prejudice, in
28 this application.

29
30 Federated maintains that it had been notified -- had it been notified of the loss in a timely
31 manner, it would have had the opportunity to undertake an investigation of the building
32 site prior to it being destroyed, retain an adjuster and appoint an engineer to attend the
33 building site, ensure legal counsel was involved early to preserve solicitor-client
34 confidentiality and privilege, and secure a confidential expert opinion prior to
35 examinations for discovery.

36
37 Federated referred to the Court to the evidence of Mr. Driedger that the report he prepared
38 from attending the building site in January 2007 was, in his own words, based upon a
39 cursory inspection and that his opinion might be altered after a thorough investigation.
40 He stated that further inspection was warranted. During his examination for discovery,
41 Mr. Driedger admitted to undertaking -- to returning to the building site only once on

1 March 30th, 2007, for a meeting and he did not undertake at that time any further
2 investigation. Further, Mr. Driedger did not, prior to being examined for discovery, and
3 giving answers that bound Ironwood, retain an independent expert to examine the cause of
4 the implosion or look at, for example, the strength of the wind storm.

5
6 Finally, Federated does not take issue necessarily with the quality of Gowling's
7 representation of Ironwood to date, but rather Ironwood's instruction to its counsel.
8 Federated maintains that had it had control over the defence, it would have remained
9 objective in conducting an investigation and in instructing counsel. It would have retained
10 an independent expert to assess damages and liability and started settlement discussions
11 early, if appropriate. Instead, Mr. Driedger gave an opinion on his own design, convinced
12 he and Ironwood were not at fault and for five plus years instructed counsel and directed
13 the course of the litigation. Federated maintains that after six years it has lost the early
14 opportunity to settle the claim.

15
16 Federated submits that this Court does not have to decide whether Ironwood's failure to
17 provide timely notice constitutes non-compliance of the policy or rather imperfect
18 compliance with the policy conditions. It concedes that there are cases finding that failure
19 to promptly notify an insurer is deemed to be only imperfect compliance and cases that
20 hold that this failure is non-compliance of the policy conditions. Federated insten --
21 instead asked this Court to render its decision based on the prejudice or pre -- potential
22 prejudice to the insurer.

23 24 Ironwood's Position

25
26 Ironwood maintains that Federated has not suffered any actual or material prejudice. That
27 Federated's assertion that it is prejudiced is presumptive, without any foundation. It
28 maintains that potential prejudice is insufficient, Federated must have actual evidence of
29 prejudice. Ironwood maintains that its failure to notify or report the occurrence and claim
30 was due to an honest error of judgment and not because Ironwood was guilty of fraud,
31 deceit, or other serious misconduct that would disentitle it from relief for forfeiture.

32
33 As to prejudice Ironwood submits, first, all the relevant evi -- evidence was still preserved
34 prior to the fire of October 23rd, 2007, and, therefore, Federated can still retain an expert.
35 The expert retained by Ironwood after the destruction of the building had been able to
36 arrive at an opinion as to the cause of damage based on this preserved evidence. Second,
37 Ironwood has had the benefit of competent counsel and the defence would not have
38 proceeded any differently if Federated had been involved. Third, Mr. Driedger would have
39 been questioned on the Driedger report, which was prepared two days after the
40 occurrence, at a time when he did not anticipate litigation. As no litigation was
41 contemplated, there would have been no privilege attached to this report. Fourth,

1 Ironwood submits that Mr. Driedger gave honest evidence at his examination for
2 discovery as he was obliged to do and it is improper to suggest that an independent expert
3 retained by the insurer prior to Mr. Driedger's examination would have changed
4 Mr. Driedger's evidence. Fifth, there is no applicable course of construction policy in this
5 action, this was not stren -- strenuously argued by Federated at the time of the application,
6 although it is in the materials. Six, on its face Encon's professional liability policy was
7 issued to HD Engineering Services not Henry Driedger. And seven, settlement discussions
8 have not been possible.

9
10 The Law

11
12 It is trite law to find an insured has an obligation to provide the insurer notice of an
13 occurrence in all circumstance even if liability or validity of a claim appears to be without
14 foundation. The policy stipulated that Ironwood was to be given prompt notice.

15
16 As Justice Burrows stated *Qualiglass Holdings v. Zurich Indemnity Company of Canada*
17 2004 ABQB 577, a case upon which Ironwood relies for relief from forfeiture at page 19,

18
19 "Timely reporting is required so as to permit the insurer to
20 investigate the claim before evidence is lost."

21
22 The facts in *Qualiglass* are very different from those before me and, therefore, worth
23 summarizing. In *Qualiglass* the insured was notified of a claim within the policy period
24 on September 29th, 1994. The insured did not notify his insurer. Almost five months later
25 on February 22nd, 1995, an action was commenced against the insured for professional
26 negligence. The defendant insured was served mid-March 1995 and he was noted in
27 default. On May 18th, 1995, plaintiff's counsel notified the defendant's insurer of the
28 claim, approximately 7 1/2 months after the insured was notified of the claim and
29 approximately 3 1/2 months after the statement of claim was issued. On October 19th,
30 1995, the defendant notified his insurer of the claim, but refused to co-operate. On April
31 30th, 1997, the insurer denied coverage and on February 26, 2001, damages were assessed
32 and a judgment was granted.

33
34 Justice Burrows found that the evidence establishing negligence was entirely documentary,
35 all of which existed and was in the plaintiff's possession at the time the insurer received
36 notice. Further, in July 1995, five -- five months after the action was commenced
37 plaintiff's counsel wrote to the insurer stating,

38
39 ". . . legal proceedings have not progressed to a stage which would
40 prevent you from intervening or defending . . . Indeed should you
41 request, our clients would consent to an order setting aside the

1 noting in default to allow you to enter a defence . . ."

2
3 Justice Burrows found at page 21 that, (as read)

4
5 . . . in the absence of any prejudice to the insurer or any
6 foundation for concluding some fraudulent purpose or in order to
7 cause prejudice to the insurer, or to gain some improper benefit or
8 advantage to the insured, it would be inequitable that the insurance
9 be forfeited because of imperfect compliance.

10
11 As stated, the facts before me are very different to those found in Justice Burrows'
12 decision in *Qualiglass Holdings*. First, the insurer received notice within a few months of
13 the claim, here it was over six years. Second, in *Qualiglass Holdings* the insurer was
14 given the opportunity to prepare and file a statement of defence and initiate and direct the
15 defence on behalf of the -- of its insured, but declined to do so. Third, there was no
16 foundation for concluding that the insured was seeking some improper benefit or advan --
17 or advantage by failing disclose. And fourth, the in -- evidence was entirely documentary
18 and fully accessible to the insurer.

19
20 Ironwood also relies on an Ontario case of *Thomas v. Hickey*, 1995 7158 (ON SC) in
21 which Justice Lederman granted relief from forfeiture where the insured failed to report an
22 accident for 20 months. He found that this failure was substantial and deliberate. The
23 insured did not want to involve its insurer because it felt that costs escalate when the
24 insurer took carriage of claims and like the facts before me, the insured worried that his
25 premiums would increase. However, significantly in the *Thomas v. Hickey* case, the
26 insured notified its insurer when they realized that the claim was going to proceed to a
27 law seat -- lawsuit.

28
29 Justice Lederman referred to the 20 month delay as an egregious delay in reporting. He
30 acknowledged at page 1 -- 14 of his decision that, (as read)

31
32 . . . notice of a claim informs the insurer of the possibility of a
33 future action allowing the insured to investigate and negotiate a
34 settlement.

35
36 Justice Lederman considered the troubling issue of the insured's in -- deliberate decision
37 to not report the claim. He acknowledged that the relief from forfeiture pres -- provisions
38 are not to be used to allow insurance contracts to be broken with careless disregard for the
39 rights of the insurer.

40
41 In reviewing dozens of cases, he found that relief from forfeiture depended on the facts of

1 the case and on whether there was clearly actual proven prejudice to the insurer or pen --
2 potential prejudice, which could not be quantified after the event. In the facts before him,
3 he found that there was no bad faith, concealment, or misrepresentation so as to disqualify
4 the insured from seeking relief.

5
6 I acknowledge and accept the insured's position that in *Falk Bros. Industries Ltd. v.*
7 *Elance Steel Fabricating Co.*, (1989) 2 SCR 778, the Supreme Court held in a case as to
8 whether the relief from forfeiture provisions of the *Insurance Act* extended to contractual
9 provisions, that such legislation is remedial and as such a broad interpretation is
10 appropriate. However, here the claim was not reported to the insurer until after the
11 building was destroyed, six months -- six plus years, sorry, after the insured knew of the
12 occurrence and almost five years after the statement of claim was issued and served, and
13 almost five years after the insured had retained counsel, and four years after examinations
14 for discovery had taken place.

15
16 If I accept the insured's position that Ironwood had competent counsel and that the insurer
17 had to prove it would have taken different steps in the litigation with different counsel in
18 order to establish prejudiced, then following this line of reasoning the insured could, with
19 impunity, report the claim to its insurer after the outcome of the trial provided the insured
20 had retained competent counsel. This argument, however, ignores a fundamental principle
21 in insurance law, except in exceptional circumstances, the duty to defend gives the insurer
22 the right to choose counsel and direct the course of the litigation. Regardless of the
23 competency of Ironwood's choice of counsel, it was not Ironwood's choice to make.

24
25 I am, based on the evidence before me, unable to make any finding on whether the
26 destruction of the building would affect the insurer's ability to obtain an expert report.
27 Ironwood has put forward an affidavit of Lyle Schmidt, president of Ironwood, who was
28 advised by Mr. Edward -- Carter Edwards (phonetic) that their expert, Mr. McDermott
29 (phonetic) was able to arrive at an opinion as to the cause of the loss based upon the
30 preserved evidence that was recovered. I accept Federated's submission that this is double
31 hearsay and accordingly should be given little weight. Further, I note that there is no
32 evidence before me that the expert said his inability to attend the now destroyed building
33 negatively affected his opinion. Likewise, however, Federated did not put forward
34 evidence that its expert would be prejudiced by the absence of evidence. Nonethe-- or by
35 the preserved evidence. Nonetheless, I accept Federated's submission that the failure to be
36 able to access and examine the physical site potentially prejudices Federated.

37
38 This is not a documentary case as in the *Qualiglass Holdings*, experts are likely to
39 disagree. I note that Mr. Driedger was unable to agree with Hasegawa's report and found
40 it based on assumptions that could be debated or reported. It is possible that a Court may
41 prefer the evidence of an expert who actually attended and examined the physical site

1 versus one who did not.

2
3 I reject Ironwood's position that any report prepared two days after the occur --
4 occurrence could not be privileged because Ironwood would not have anticipated lit --
5 litigation so soon after the implosion. Even if this is so, it is likely that a sophisticated
6 insurer and adjuster would anticipate potential litigation and take steps to protect any
7 evidence. Certainly by April of 2007, three months after the occurrence and well before
8 the building was destroyed, Mr. Driedger was concerned about or could foresee
9 Ironwood's liability as he wrote to Hasegawa Engineering stating that given the authorized
10 changes to the building, Ironwood would no longer be respon -- unauthorized changes to
11 the building, Iron -- Ironwood would no longer be responsible or liable for the building.

12
13 Finally, I agree that settlement may have been more likely if the insurer was able to bring
14 objectivity and its own expert to the negotiating table at the outset. It is well established
15 that one of the purposes of timely reporting is to en -- allow an insurer to consider and
16 weigh settlement options. The evidence is that Ironwood did not report because it didn't
17 want it's insurance premiums to increase and it avoided such an increase arising from this
18 claim for a number of years.

19
20 I reject Ironwood's position that Federated could not have looked to Mr. Driedger's
21 professional liability policy for -- with Encon for contribution simply because it was
22 issued to Mr. Driedger's professional corporation. As an officer and employee of his
23 professional corporation, Mr. Driedger personally would be a named insured under that
24 policy.

25
26 I cannot accept Ironwood's decision to not report for six plus years, years after
27 examinations for discovery were conducted and undertakings answered, and in the face of
28 having received legal advice to do so as an honest error of judgment. The insured's failure
29 and delay in reporting this claim is significant, egregious, and deliberate. I make this
30 finding on the facts before me and particularly given the length of involvement of
31 counsel, and the stage of this lawsuit. I'm satisfied that to require an insurer or any party
32 to step into a lawsuit six years hence is prejudicial. I accept that Federated has put
33 forward evidence of actual prejudice and ample evidence of pote -- potential prejudice.
34 Given the above, I reject Ironwood's position that it is inequitable that there be forfeiture
35 of insurance and to decline to grant relief from forfeiture. I further decline to find it fit to
36 relieve against forfeiture under the *Judicature Act* given the facts of this specific case. I
37 therefore grant Federated's application for a declaration that Federated is not obligated to
38 defend or indemnify Ironwood in this action. Thank you.

39
40 That's somewhat lengthy, and I may have misspoken a few times, so I will need to review
41 the transcript just to ensure that there's no typos.

1

2 **Submission by Mr. Rhone (Costs)**

3

4 MR. RHONE: Thank you, My Lady. Chris Rhone here, just
5 with respect to costs.

6

7 THE COURT: Yes.

8

9 MR. RHONE: We had asked as well for costs against --
10 against Ironwood.

11

12 THE COURT: Okay.

13

14 **Submission by Mr. Stein (Costs)**

15

16 MR. STEIN: M'Lady, I think that my friend and I can
17 probably work out what the costs would be, certainly costs follow the event.

18

19 THE COURT: Okay.

20

21 MR. STEIN: I would, however, point out that division 1 of
22 schedule 'C' of the *Rules of Court* indicates and I'll hand this up, and I'll read it for the
23 benefit of Mr. Rhone --

24

25 THE COURT: Thank you.

26

27 MR. STEIN: -- indicates that, "Unless the Court otherwise
28 orders", and you have discretion My Lady,

29

30 "(a) when a remedy is given in a judgment or order other than or
31 in addition to the payment of money . . .

32

33 costs must be assessed according to the higher of Column 1 of the
34 tariff in Division 2, and the scale that would have applied if the
35 other remedy had not been given or sought."

36

37 So, on that basis I submit that the -- the -- the default provision in any event is that costs
38 be assessed on column 1.

39

40 THE COURT: Can I leave it to the two of you to -- to try and
41 work it out and if you're not able to --

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MR. STEIN:

Sure.

THE COURT:
submissions?

-- then to come back to me and I'll hear further

MR. STEIN:

Sure.

THE COURT:

Unless you've got fulsome submissions --

MR. STEIN:

Sure.

THE COURT:

-- on that as well now, Mr. Rhone. But,
otherwise, I think it would be better if you can try and work it out and then --

MR. STEIN:

I agree.

MR. RHONE:

Yeah.

THE COURT:

-- and then return. Okay. Thank you both.

MR. STEIN:

Thank you, M'Lady.

THE COURT:

Thank you.

MR. RHONE:

Thank you, My Lady.

PROCEEDINGS CONCLUDED

1 Certificate of Record

2

3 I, Simone Scott, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench, held in courtroom 1501, at Calgary, Alberta, on
5 the 12th day of January, 2000 four -- 15 and that I was the court official in charge of the
6 sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

2

3 I, Debbie Bell, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record
10 and is transcribed in this transcript.

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Order No. 9636-15-1

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37 Characters: 22050

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Detailed Transcript Statistics	
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Title Page Characters:	549
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