

INSURANCE AND REINSURANCE

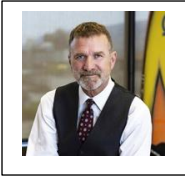
September 2019

IN THIS ISSUE

This article summarizes an appeal concerning the duty to defend insured parties for advertising liability under two policies of commercial general liability insurance. This article was originally published by Expert Guides on 8.27.19.

Advertising Liability in Canada: *Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters*, 2019 BCCA 240

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The Advertising Liability coverage that came into place in modern commercial insurance policies in the 1970's has been explored and clarified in many cases since it arose, perhaps less so in Canada than in other jurisdictions. Recently, the British Columbia Court of Appeal has had an opportunity to review this coverage and its scope and ambit in the present commercial environment: *Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters*, 2017 BCSC 1872, 2019 BCCA 240.

The British Columbia Court of Appeal has taken a leading role in Canada in resisting the siren call of ambiguity in the interpretation of insurance contracts in general. The Sirens, you may recall, were dangerous creatures who lured sailors with their enchanting music and singing voices to shipwreck on the rocky coast of their island. If justice requires certainty and predictability, then the attempt to create uncertainty and ambiguity where none properly exists is indeed a dangerous thing.

The BCCA has frequently cited the need to "fastidiously guard against the invitation to create ambiguities where none exist" with respect to exclusion clauses: *Riordan v. Lombard*, 2003 BCCA 267, *West Van Holdings Ltd. v. Economical Mutual Insurance Company.*, 2019 BCCA 110. By the same token, the Court has taken care to guard against the invitation to find ambiguities in the grant of coverage where none exist, and *Blue Mountain Log Sales*. Is one such case. In this case, it may be argued that Lloyd's took an overly aggressive

approach in their attempt to deny coverage in an advertising liability endorsement engaging in semantic gymnastics that may not be in the best tradition of Lloyd's or the insurance industry in general.

The facts in *Blue Mountain Log Sales* may be summarized as follows:

- The insureds, Blue Mountain Log Sales Ltd. and others (the Clarke Group) manufactured wood products and fire-retardant wood shakes and shingles
- The plaintiffs in the underlying action in the Washington State action initially alleged that the Clarke Group had engaged in conspiracy, misappropriation of trade secrets, statutory breaches and unfair competition relating to a product known as Thermex
- The insureds were insured with Lloyds which provided coverage for advertising liability
- Lloyd's initially acknowledged a duty to defend and did so under a reservation of rights.
- After an amendment of pleadings by the underlying plaintiffs, Lloyd's withdrew from its defence obligations.

Lloyd's issued the first policy to the Clarke Group in February 2011 and the second policy in February 2012. Both policies contain an insuring agreement that provides coverage for advertising liability. In the first policy, Lloyd's agreed to provide coverage

for all sums the Clarke Group becomes legally obligated to pay as damages because of "Advertising Liability" caused by an "Occurrence". "Advertising Liability" and "Occurrence" are defined terms in the advertising liability endorsement:

Insuring Agreement

The Insurer hereby agrees to pay on behalf of the Insured all sums which the Insured becomes legally obligated to pay as damages because of Advertising Liability caused by an Occurrence to which this insurance applies.

DEFINITIONS

Advertising Liability as used in this endorsement means:

- (a) Libel, slander or defamation;
- (b) Any infringement of copyright or of title or of slogan;
- (c) Piracy or unfair competition or idea misappropriation under an implied contract;
- (d) Any invasion of right of privacy;
- (e) Any of the foregoing alleged by any other name,

committed or alleged to have been committed during the Policy Period in any advertisement, publicity article, broadcast or telecast by or on behalf of the Insured and

arising out of the named Insured's advertising activities.

Occurrence as used in this endorsement means any advertisement, publicity article, broadcast or telecast or any combination thereof involving the same injurious material or act, regardless of the frequency of repetition thereof or the number of kind of media used, whether claim is made by one or more persons.

To similar effect, the advertising liability endorsement in the second policy provides:

A. *INSURING AGREEMENT: The Insurer will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of advertising injury, to which this coverage applies.*

B. *ADDITIONAL DEFINITION: When used in reference to this coverage (including endorsements forming part of this coverage): "advertising injury" means injury, other than bodily injury, arising out of libel, slander, defamation, infringement of copyright, title or slogan, piracy, unfair competition, idea misappropriation or invasion of rights of privacy committed, or alleged to have been committed, in any advertisement, publicity article, broadcast or telecast, and resulting from the Insured's advertising activities.*

There was a convoluted number of amendments to the Washington State complaint over the years which I will not fully

review herein. As a result of the amendments, Lloyd's argued that it was no longer under a duty to defend. While a few allegations were withdrawn from the original complaint, the chambers judge, Justice Walker, in *Blue Mountain Log Sales Ltd* held as follows:

- The primary principle of interpretation is that where an insurance policy is unambiguous, the court should give effect to its clear language, reading the policy as a whole: *Progressive Homes*, para. 22, citing *Scalera*; *British Columbia Medical Association v. Aviva Insurance Company of Canada*, 2011 BCSC 1399 at para. 39(a).
- It is only where an ambiguity arises that the court looks to determine the reasonable expectations of the parties, and failing that determination, the principle or rule of contra proferentum is applied, so that any ambiguity is construed against the insurer: *Progressive Homes* at paras. 22-24; *British Columbia Medical Association* at para. 39(b)(c).
- In this case, I do not need to resort to the second and third aspects of construction because I find the language of both policies, when each is read as whole, to be clear and unambiguous. Subject to certain exclusions which have no bearing on the duty to defend issue in this case, Lloyd's is required to pay on behalf of the petitioners all sums which they

are required to pay as damages because of, inter alia, unfair competition, alleged to have been committed during the policy period, in any advertisement (which is broadly defined), regardless of frequency, arising out of the petitioners' advertising activities. It is the second policy that adds the further requirement that the unfair competition must also result from the petitioners' advertising activities. Lloyd's does not assert that it affects the result.

- GBS's pleaded allegations, if proven true, invoke coverage under both policies.

Lloyd's fared no better in the Court of Appeal where its appeal was unanimously dismissed. Lloyd's argued that the true nature of the underlying claim was misappropriation of trade secrets, not liability caused by or resulting from advertising. In reasons written by Madam Justice Dickson, she said this:

In my view, it is apparent, based on the foregoing, that the judge did not err in concluding the allegations in the SAC concern the Clarke Group's advertising activities and that those activities are central, not coincidental, to the wrong alleged by Global. The allegation that the Clarke Group used Global's misappropriated information to market and sell ATC-treated products by representing them to purchasers as identical to FSR-treated products, its

competition, pleaded a causal link between the alleged injury and advertising activities sufficient to meet the Grayson test. As counsel for the Clarke Group put it, the pleadings placed the misappropriated information directly into the advertising, thus meeting the definitions of “advertising liability” and “advertising injury” regardless of whether it was an independent wrong such as false or misleading advertising. . . the advertising activities were part and parcel of the injuries alleged in the underlying action and potentially covered by the policies. In consequence, Lloyd’s has a duty to defend.

With respect to the Grayson test—*Grayson v. Wellington Insurance Co.* (1997) 95 B.C.A.C. 103, leave to appeal ref’d [1997] SCCA No. 487— “Grayson stands for the proposition that where advertising is merely “‘coincidental’ to the wrong”, without more, the claim for injury will not be brought within coverage. However, the necessary causal link exists where the claimant alleges it has suffered injury as a result of the insured’s advertising activities.”

Lloyds’ also argue that the chambers judge erred in concluding that the allegation of trade secrets misappropriation is a claim for unfair competition covered by the policies. The court wrote that “this ground of appeal also lacks merit.”

Justice Dickson wrote as follows on this point:

I see no error in the judge’s conclusion that the SAC (Second Amended Complaint) alleged a claim for unfair competition within the meaning of the policies. As noted, the first policy specifically defined advertising liability as unfair competition by any name. According to the expert witnesses, while the UTSA (Uniform Trade Secrets Act) displaced common law claims for unfair competition in Washington State, a statutory claim for misappropriation of trade secrets is a species of unfair competition that has been codified. In other words, unfair competition is an aspect of the true nature and substance of the statutory claim pleaded by Global. In my view, the judge was entitled to rely upon the expert evidence to this effect and he made no palpable and overriding error in doing so.

Nor do I accept Lloyd’s submission that the factual allegations relating to advertising are somehow insignificant or inapplicable because the statutory claim pleaded is complete without proof of advertising or marketing activities. As Justice Newbury stated in *Grayson*, in determining whether an insurer has a duty to defend, the court is concerned with whether the pleadings disclose any allegation that possibly falls within coverage under the policy, not with the focus or

gravamen of the injury alleged. As to the evolution of the pleadings, in my view the judge correctly refused to consider it for purposes of interpreting the SAC and deciding whether coverage was triggered. It is the pleadings in their current form that must be examined and assessed when the court determines whether there is a duty to defend. . .

In review, in considering coverage under advertising liability, remember the following:

- I. Is there a legal obligation on the insured?
- II. To pay damages?
- III. Arising out of the specific offences set out in the policies?
- IV. Occurring in the course of the insured's advertising activities or the insured's advertisements?
- V. In the policy territory?
- VI. During the policy period?

Also remember the following:

- I. The duty to defend is broader is broader than the duty to indemnify.
- II. A mere possibility of a duty to indemnify will trigger a duty to defend.
- III. Coverage is interpreted broadly, and exclusions narrowly.
- IV. Parties are not bound by the labels used in the pleadings. What is determinative is the true nature of the or the substance of the claims.

- V. Factual allegations must be considered in their entirety in determining whether they could possibly support the plaintiff's legal claims.

As Madam Justice Dickson also wrote:

"A plaintiff, by describing his or her cat to be a dog, cannot simply by that descriptive description designation cause the cat to bark. In determining the true nature of the claim regardless of the descriptive designation used by the plaintiff, the court may go beyond the pleadings and consider extrinsic referred to within them to appreciate the nature and scope of the insurer's duty to defend. . ."

In my opinion, the pleadings here were barking "advertising injury" and no magician could turn them into anything else. Counsel and insurers are sometimes inclined to put on blinders that only allow them to see what they wish to see. This is dangerous and bordering on hubris. There were certainly no allegations of bad faith here. It was simply another Quixotic attempt to find ambiguity in coverage where none properly existed. Insurers and counsel may well wish to consider a sober second opinion in cases of complexity where large amounts are involved.

Parenthetically, the chambers judge had also awarded full indemnity for legal costs to the plaintiffs. As a result of the prior Court of Appeal decision in *West Van Holdings v.*

Economical Mutual Insurance Company, 2019 BCCA 110, the current law in British Columbia, and perhaps all of Canada, is that costs in a duty to defend case should be awarded in the same manner as in other litigation. In view of this prior decision, the Court of Appeal also reduced the award of costs here in ordinary costs instead of full indemnity.

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