From the Desk of
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CITATION: Dentons Canada LLP v. Trisura Guarantee Insurance Company, 2018 ONSC 7311
COURT FILE NO.: CV-18-595822
DATE: 20181211

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Dentons Canada LLP, Applicant

AND:

Trisura Guarantee Insurance Company, Respondent

BEFORE: Carole J. Brown, J.

COUNSEL: *Nina Bombier and Danielle Glatt*, for the Applicant

Christopher McKibbin, for the Respondent

HEARD: September 19, 2018

ENDORSEMENT

[1] In the context of this application brought by Dentons Canada LLP ("Dentons"), the respondent, Trisura Guarantee Insurance Company ("Trisura"), brings this motion to convert the application to an action pursuant to Rule 38.10(1)(b) on the grounds that there are facts in dispute, evidence which has not been produced and that the determination of the issue raised by the appellant requires additional evidence in the form, *inter alia*, of other insurance policies and the joining of the other insurers that may respond to the subject claim.

[2] Dentons had also sought an order that the actions be consolidated or heard together. It has now abandoned this, and, accordingly, I do not make any determination in that regard.

Proceedings

[3] Dentons brought an application on April 13, 2018 for various declarations, including that Trisura had a duty to reimburse the loss from the wrongful abstraction of money from Dentons in the amount of $1,733,510.50 and that Trisura is in breach of its policy issued to the plaintiff (Policy Number MFD1000506) by denying coverage. Trisura served a Notice of Motion to convert the application to an action and, based on that, the applicant served an Amended Application which sought a declaration that the Comprehensive Dishonesty Disappearance and Destruction Bond Policy provides coverage for the loss resulting from the wrongful abstraction of money from Dentons' premises or banking premises to an unknown place outside those premises pursuant to Computer Fraud Coverage Rider No 3. Trisura subsequently served a declaratory action, which also joins the other insurers who have issued policies, which are or are

potentially responsive to Dentons' loss, seeking a determination of all parties' rights and obligations.

Background

The Facts

[4] The seminal facts of this case are not in dispute.

[5] The dispute arises from an insurance claim submitted by the applicant, Dentons, to Trisura on April 10, 2017. The insurance claim arises out of an alleged social engineering fraud, in which Dentons asserts that one of its lawyers was duped into transferring over $2.5 million in funds belonging to a client to a fraudster's account in Hong Kong.

[6] Wilfred Chan, an associate with Dentons' Vancouver office represented a client as regards sale of real property, which was subject to a mortgage, held by Timbercreek Mortgage Servicing Inc. A portion of the sale proceeds in the amount of $2,518,250 was to be delivered to Timbercreek from client funds held in Dentons' trust account in exchange for a partial discharge for the mortgage registered against the property. Payout instructions were sent by email from Laura Wheller of Timbercreek to Dentons on December 28, 2016 and a copy of the wire instructions containing the account details for Timbercreek's account with TD Canada Trust. Patrick Smith and Charles Lindgren, of Timbercreek, were copied on the instructions.

[7] The transaction was completed at the end of business day on December 30, 2016. Dentons did not initiate the wire transfer to Timbercreek until the following business day, January 3, 2017. On January 3, 2017, Dentons received emails purportedly from Wheller, Smith and Lindgren requesting that Dentons wire funds to an international account, as Timbercreek's TD account was being audited. Dentons telephoned and left a voicemail message for Wheller to confirm the account information for the wire transfer, but did not receive a response. He received further emails from Wheller which included the international account information for the third-party account held in the name of Yiguangnian Trade Co. Ltd. in Hong Kong. Dentons requested letters of authorization from Timbercreek and from Yiguangnian, and was provided signed authorization letters purportedly from both Timbercreek and Yiguangnian, following which, it wired $2,518,250 from the client's trust account to Yiguangnian's account in Hong Kong.

[8] On January 6, 2017, Dentons' Ottawa office received an email and phone call from an individual who identified himself as Marc Jacobs, who advised that he was with Yiguangnian and requested information as regards the wire transfer. He thereafter telephoned Chan on December 9, 2017 and advised that he was not expecting a wire transfer from Dentons. He advised that he did not know the person who signed the authorization letter for Yiguangnian, nor did he know Timbercreek. He asked that Dentons recall the wired funds from his account and confirm once that had been done. On January 16, 2017, Chan received an email from the real Wheller asking for the status of funds, during the course of which call, he realized that the client funds had been misdirected.

[9] Dentons filed an Amended Proof of Loss with Trisura on May 29, 2017 claiming the return of $2,518,250 wrongfully abstracted. Subsequently, on recovering $784,739.59, Dentons notified Trisura that their net loss was now $1,733,510.50.

[10] Trisura denied coverage for the loss on November 13, 2017, on the ground that the Computer Fraud Rider does not respond to the circumstances of the loss as alleged by Dentons, specifically that the transfer of funds by Dentons on January 3, 2017 was not itself fraudulently caused and that no computer was used to fraudulently cause any transfer of any funds because the transfer itself was not fraudulent; that Dentons is precluded from relying on the Computer Fraud Rider because it declined a Social Engineering Fraud Rider and, as a result, had no reasonable expectation of coverage for social engineering fraud losses; that exclusion (f)(1) of the policy applies because in Trisura's view, Dentons surrendered the funds in exchange for a partial discharge of a mortgage and as a result, any otherwise indemnifiable loss is excluded; and Condition XIII, the other insurance condition, makes coverage under the Computer Fraud Rider excess if the trust funds were "otherwise insured" and that, in any event, the funds were not "owned" by Dentons. See relevant provisions of policy as set forth below.

[11] It is the position of Dentons that the plain language of the policy provides coverage in the circumstances, in that the loss that accrued to Dentons resulted from the wrongful abstraction of "money, securities or other property" which follows and was related to the use of a computer to "fraudulently cause the transfer of such property from inside the Premises or Banking Premises or similar recognized places of safe deposit to a person… or to a place outside those Premises".

[12] Dentons initiated the proceeding by way of Notice of Application issued April 13, 2018, and thereafter was served with Trisura's Notice of Motion. Dentons then issued an Amended Notice of Application on July 10, 2018 and has further narrowed the question to the interpretation of the Computer Fraud Rider and not the Condition or Exclusion in the policy, relied upon by Trisura.

Relevant Provisions of Trisura Policy

[13] Dentons maintained a fidelity policy of insurance with Trisura for the period December 31, 2016 to December 31, 2017. Dentons takes the position that said policy includes coverage for social engineering fraud, while Trisura takes the position that the policy does not include coverage for social engineering fraud, and that Dentons specifically elected not to obtain such coverage, although it was offered to them.

[14] The provision relied upon by Dentons is Rider 3, the Computer Fraud Rider which provides as follows:

> Loss resulting from the wrongful abstraction of Money, Securities or other property which follows and is related to the use of any computer to fraudulently cause the transfer of such property from inside the Premises or a Banking Premises or similar recognized places of safe deposit to a person (other than a Messenger) or to a place outside those Premises.

[15] The Trisura policy contains Condition XIII which provides as follows:

> If there is any other valid and collectible insurance which would apply in the absence of such insuring agreement, the insurance under this bond shall apply only as excess insurance over such other insurance, provided the insurance shall not apply:
>
> (a) to property which is separately described and enumerated and specifically insured in whole or in part by any other insurance, or
>
> (b) to property otherwise insured unless such property is owned by the insured.

[16] Trisura submits that Condition XIII(b) removes the policy from coverage entirely in respect of property which is not owned by Dentons, including the client funds which were never owned by Dentons, but remained the property of the client.

[17] Dentons maintained additional coverage, which Trisura maintains is relevant to the determination of the Trisura insurance claim and the disposition of the motion, including the following which are known to Trisura:

> (a) LSBC Captive Insurance Company Limited Policy No. LPL 17-01-01;
>
> (b) Canadian Lawyers Liability Insurance Society (CLLAS) Lawyers Excess Professional Liability Insurance Policy No. 27005;
>
> (c) CLLAS Lawyers Excess Professional Liability Insurance Group Policy No 2016-UMB; and
>
> (d) Dentons Global Insurance Program (DGIP) policy or policies.

[18] Trisura was provided by Dentons with all policies except the DGIP policy or policies. It takes the position that each of the three policies provided potentially cover the loss in this matter.

[19] It cites, as an example, Insuring Agreement C 1 of the LSBC policy, which provides as follows:

> Part C: Trust shortage liability (for reliance on fraudulent certified cheques or misrepresentations)
>
> 1. Ensuring Agreement C 1

> We shall pay on your behalf all sums which you become legally obligated to pay as damages because of any claim first made against you and reported to us during the policy arising out of an error by you.

[20] An error is defined as:

> (c) Under Part C: A payment to a third party that creates an unintended shortage in trust funds that are held in a trust account in connection with the performance of professional services for others, provided that such payment is:
>
> (ii) made only because the Individual Insured believes that the payment is legitimate and duly authorized, and provided further that:
>
> a. The individual insured's belief is the result of a fraudulent and dishonest act; and
>
> b. the payment does not relate in any way to the Individual Insured's mistaken belief that funds have been deposited into trust.

[21] LSBC has acknowledged notice of a "claim" by Dentons under Insuring Agreement C 1, but the status of the claim is not known.

[22] Trisura submits that this claim potentially falls within the LSBC definition and, further, that the CLLAS Excess Policy and Umbrella Policy may also potentially respond to the social engineering fraud loss alleged by Dentons.

[23] To the extent that any of those policies potentially provide coverage for the loss, Condition XIII(b) of the Trisura policy would operate to remove it from cover. Trisura further submits that the DGIP policy or policies may also potentially respond, but it has not been provided with these policies despite Trisura's requests for production.

[24] Following Trisura's Notice of Motion, Dentons amended its Notice of Application on July 10, 2018 to reconstitute the nature of the relief sought. The Amended Notice of Application seeks a declaration that the Trisura policy provides cover and a declaration that Condition XIII(b) of the Trisura policy does not apply to remove it from cover.

[25] It is the position of Trisura that a determination of the applicability of Condition XIII(b) necessitates the determination of the availability of other insurance to Dentons in respect of its misdirection of the client funds.

[26] Dentons subsequently reconstituted the Application again such that the Application will only be used to obtain an "advisory opinion" from the court with respect to one insuring agreement in the policy but without reference to Condition XIII(b). The Application will, as a result, not actually determine whether Trisura is obligated to pay Dentons any money. A separate litigation proceeding between Dentons and Trisura will ask the court to adjudicate on the applicability of Condition XIII(b) and to determine issues that cannot be determined within the Application. In a third proceeding, Trisura can seek to determine any rights it has *vis-à-vis* the other insurance policies as to contribution or otherwise.

[27] As a result, Trisura has commenced a Declaratory Action in order to enable the court to adjudicate all disputes between all relevant parties in one proceeding in order to avoid a multiplicity of proceedings, inconsistent findings of fact and the waste of judicial resources. Said action would resolve coverage issues between and among the various insurers.

Positions of the Parties

Position of the Moving Party

[28] It is the position of the moving party, Trisura, that the Application should be converted into an Action. It is the position of Trisura that a determination cannot be made as regards coverage without considering other potentially responding policies, and without a full record, including the wording of those other potentially responding policies in order to determine coverage. Further, it is the position of Trisura that were this Application to proceed on the basis of the record now before this Court, there would be no judicial economy, as additional proceedings would have to be ultimately taken in order to determine coverage and the parties' rights and obligations under not only the Trisura policy, but other responding policies.

[29] It is the position of Trisura that Dentons was offered, and declined, coverage for social engineering fraud, which would have responded to the circumstances alleged by Dentons, subject to other provisions in the policy regarding Conditions and Exclusions.

[30] It is the position of Trisura that Dentons has admitted that the reconstituted Application, which requests determination of the interpretation of one insuring agreement, will not actually determine the dispute between the parties, or whether Trisura owes Dentons any amounts pursuant to the policy.

Position of the Responding Party

[31] It is the position of Dentons that the plain language of the policy provides coverage in the circumstances and that the loss resulted from the wrongful abstraction of "money, securities or other property" and was related to use of a computer to "fraudulently cause the transfer of such property from inside the premises or banking premises or similar recognized places of safe deposit to a person or a place outside those premises".

[32] Pursuant to the reconstituted application, Dentons now seeks only an interpretation of the Computer Fraud Rider, and not the Condition or Exclusion relied upon by Trisura.

[33] It is the position of Dentons, that the narrow relief and interpretation question now sought in the application is whether the Computer Fraud Rider will capture the fraud and loss which occurred at Dentons surrounding transfer of real estate funds.

[34] It is the position of Dentons that the Application should not be converted into an Action. Dentons maintains that the application is properly constituted, there are no facts in dispute and no issues of credibility, such that the narrow issue set forth in the Application, namely interpretation of the wording of the Computer Fraud Rider, can be determined by the court. It states that there is judicial economy, given that if the court finds that the Computer Fraud Rider in the insurance policy does not respond, the matter is at an end. The responding party, in basic agreement with the moving party, states that the facts concerning the fraudulent transfer of funds and loss are not in dispute.

[35] It takes the position that Trisura denied coverage for the loss on November 13, 2017 on the ground that the Computer Fraud Rider does not respond to the circumstances of the loss as alleged by Dentons, specifically that the transfer of funds by Dentons was not itself fraudulently caused and that no computer was used to fraudulently cause any transfer of any funds because the transfer itself was not fraudulent; that Dentons is precluded from relying on the Computer Fraud Rider as it declined a social engineering fraud rider and as a result, has no reasonable expectation of coverage for social engineering fraud losses; that exclusion (f)(1) of the policy applies as, in Trisura's view, Dentons surrendered the funds in exchange for a partial discharge of mortgage and as a result, any otherwise indemnifiable loss is excluded; and Condition XIII makes coverage under the Computer Fraud Rider excess if the trust funds were "otherwise insured" and, in any event, the funds were not "owned" by Dentons.

The Law re Rule 38.10

[36] Rule 38.10 of the *Rules of Civil Procedure* provides, *inter alia*, as follows:

> (1) On the hearing of an application the presiding judge may,
>
> grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or
>
> order that the whole application or any issue proceed to trial and give such directions as are just.

[37] In determining whether an application should proceed as an action, the court considers various factors, including:

1. whether there are material facts in dispute;
2. the presence of complex issues requiring expert evidence and/or weighing of evidence;
3. whether there is a need for the exchange of pleadings and discovery; and

4. the importance and impact of the application and of the relief sought.

Analysis

[38] Pursuant to the reconstituted application, the applicant seeks only an advisory opinion as regards interpretation of the Computer Fraud Rider and not as regards Condition XIII or the Exclusion clause.

[39] I am not satisfied that an "advisory opinion" on the one narrow point will be a more expeditious and efficient means of proceeding in this case. I am of the view that determination of the interpretation of the Computer Fraud Rider is not the only issue that should be determined in this matter and that the coverage issue must be considered. The coverage issue cannot be considered without reference to other policies which may provide coverage.

[40] At most, a court could only determine whether coverage may be available under the Computer Fraud Rider, which determination would be conditional on the potential coverage of other policies which is not the judicially most efficient way to proceed.

[41] Most facts are not in dispute; however there is no complete record regarding all relevant facts and policies in order to make a determination of coverage for purposes of this matter.

[42] Dentons submits that there are no factual issues in dispute as regards interpretation of the Computer Fraud Rider. However, there is no full record as regards other policies held by Dentons that may respond and cause the plaintiff's policy to be deemed excess coverage.

[43] If I understand correctly, Dentons also argues that in the context of an application to determine the meaning of the Computer Fraud Policy, Trisura can raise the issues regarding coverage under the other policies. However, based on the record before this Court, Dentons has failed to produce evidence of all other policies which may respond. Nor are the policy issuers part of this application.

[44] I am of the view that all evidence necessary to make a full determination of the issues is not in the record and is not before the Court on this application.

[45] As noted above, I am not satisfied that an "advisory opinion" on the one narrow point will be a more expeditious and efficient means of proceeding in this case.

[46] If the court determines that the loss does not fall within the Computer Fraud Rider that would end the issue. However, if it determines that there is coverage under the Computer Fraud Rider, another proceeding or proceedings would have to be brought with respect to whether there are exclusions in the Trisura policy itself which preclude coverage, or whether there are other policies, the provisions of which would make the Trisura policy excess to those other policies. Additional proceedings and evidence would be required to ensure all necessary parties and evidence to determine coverage issues are before the court.

[47] Determining the advisory question, at this juncture is not, in all circumstances, an expeditious or efficient use of judicial time and resources. I am of the view that this is not judicially efficient or economical, and not consistent with the guidelines set forth in *Hryniak v Maudlin*, 2014 SCC 7.

[48] The full factual matrix is not before this Court, and is needed to make a comprehensive determination of the issues of coverage.

[49] If Condition XIII(b) applies, Trisura is removed from cover entirely. That means Dentons does not receive indemnity. That must be determined in the context of a Dentons-Trisura proceeding, but it is also inextricably linked to the determination of the rights, if any, as between Trisura and the other insurers.

[50] As a result, it would be most efficient to resolve all issues as regards all insurers in one proceeding, which the Declaratory Action commenced by Trisura would do. It is of note that Dentons has acknowledged that involving all relevant parties may be the most appropriate way to proceed as regards whether the exclusion and condition it relies upon will apply so as to exclude coverage. The potential for such further action, in addition to the advisory opinion sought in the application is not, in my view, a wise use of judicial resources.

[51] Based on all the circumstances of this case, and considering the factors as set forth at Rule 38.10, I am of the view that the application must be converted to an action. While Dentons submits that Rule 38.10 permits a court to sever an issue from the whole of an application and deal with that issue as part of the application, while directing that the remaining issues in the application proceed to trial, I do not find that to be an expeditious means of proceeding in the circumstances of this case.

[52] I order that the application be converted to an action and that the matter proceed expeditiously.

Costs

[53] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

Carole J. Brown, J.

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Date: December 11, 2018