IN FACT AND IN LAW

Damage Insurance

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# Exclusion Raised Belatedly Without a Problem !

By Bernard Larocque

The Court of Appeal recently rendered a most useful judgment in the case of *Le Groupe Commerce, Compagnie d'Assurance* vs. *La Compagnie d'Assurance Missisquoi* [1].

Missisquoi insured the personal assets – including a building – of two brothers, who were the sole shareholders and directors of a construction company. The brothers had purchased the building from the construction company. Between the time of the construction and the purchase by the brothers, the building had been leased for several years by the construction company.

Groupe Commerce insured the civil liability of the construction company. Following the destruction of the building by fire, Missisquoi, indemnified the brothers, and subsequently brought an action in subrogation against Groupe Commerce. Missisquoi was successful in the first instance and demonstrated that the fire resulted from an electrical defect attributable to the builder and that the brothers, whom it insured, had committed no fault. The Court of Appeal upheld this conclusion.

Groupe Commerce had also argued that no action could be brought against the company on the grounds that an insurer may not be subrogated against persons who are members of the household of the insured. The trial judge dismissed this submission and the Court of Appeal maintained her ruling; a legal person is not a member of the household of the insured. The Court of Appeal therefore reiterated the principle set out in the case of *Capitale (La) compagnie d'assurances générales* vs. *Groupe Commerce, compagnie d'assurance*.[2]

However, Groupe Commerce had also submitted that no insurance protection existed in respect of liability that the company may incur in its capacity as vendor on the basis of the following clause:

**"This coverage does not include:**

**[...]**

**2.8 Loss of enjoyment, deterioration or destruction:**

**[...]**

**2.8.2 of premises you sell, give or abandon arising out of any part thereof, except if such premises are your work and were never occupied by you nor offered for lease by you."**

**[Translation]**

The trial judge had concluded that the above exclusion would have applied in the circumstances but that she could not allow it since it was raised **belatedly**.

In fact, the source of liability relied upon in Missisquoi's initial declaration was based on the general liability of the builder but, realizing that no formal contract existed between the builder and its insureds, Missisquoi raised for the first time its intention to rely upon the legal warranty against latent defects in its brief summary before trial filed only a few days before the trial was to begin.

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[1] *Le Groupe Commerce, Compagnie d'Assurance* vs. *La Compagnie d'Assurance Missisquoi,* C.A. 500-09-012198-024, October 14, 2004, Justices Forget, Pelletier, Bich

[2] [2003] R.R.A. 1132 (C.A.)

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The Court of Appeal is of the view that Missisquoi's new approach raised an issue that was absent from the procedures until then and that it justified Groupe Commerce in raising a new ground of defence, namely, the exclusion clause, to counter that submission. To prevent the liability insurer from raising that exclusion clause in such circumstances would cause unjustified imbalance between the parties.

The action is therefore dismissed since the insurer has no obligation to indemnify where the insured is sued in its capacity as vendor in the specific circumstances of this case, on the ground that it had already offered the premises for lease.

## A reminder

Even though it is generally imprudent to save grounds for denial of coverage as "ammunition" since it may be determined that they were raised belatedly, new submissions by the plaintiff may allow on amendment of the proceedings and a new ground of defence. Therefore, raising a clause or exclusion contained in the insurance contract, which had no relevance up to that point, will not be deemed to be a late submission.

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