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CASE SUMMARY: INSURER'S DUTY AND RIGHT TO DEFEND CANNOT ARISE UNTIL THE INSURED GIVES THE INSURER NOTICE OF THE CLAIM

Insurance law – Commercial general liability insurance – Duty to defend – Policies and insurance contracts – Notice – Late reporting – Legal and professional fees – Rights and duties of insured – Relief against forfeiture

[Lloyd's Underwriters v. Blue Mountain Log Sales Ltd.](#)

Appeal by the insurer from an order declaring that the insurer was required to pay pre tender defence costs incurred before the insureds gave the insurer notice of the claim and granting the insureds relief against forfeiture. The appeal was allowed because, pursuant to the insurance policy, the insurer's duty to defend could not arise until the insureds gave the insurer notice of the claim. The insureds were not entitled to relief against forfeiture with respect to the pre tender defence costs. The insurer assumed the defence upon receiving late notice of the claim and, therefore, there was no forfeiture of insurance.

[2016] B.C.J. No. 1769

2016 BCCA 352

British Columbia Court of Appeal

August 23, 2016

K.E. Neilson, H. Groberman and G.J. Fitch JJ.A.

The insureds are engaged in the manufacture of cedar shakes and shingles, and related enterprises in Canada and the United States. The insurer issued annual general liability insurance policies to the insureds between 2011 and 2015. In June 2012, the Washington affiliates of the insureds became engaged in several actions in Washington State. Several months later, the plaintiffs in the Washington State actions added claims against the Canadian insureds. The insureds did not immediately recognize that this triggered coverage under the insurance policies. As a result, the insureds did not tender their defence to the insurer until April 2014.

Following tender, the insurer acknowledged that some of the causes of action were covered and accepted that it owed a duty to defend from April 2014; however, the insurer refused to pay the pre tender defence costs in the amount of approximately \$588,000.

Subsequently, the insurer brought a petition seeking a declaration that it did not owe a duty under the policies to reimburse the insureds for the pre tender defence costs.

The chambers judge found the duty to defend arose at the same time as the cause of action and, since the insurer had not been prejudiced by the insureds delay in providing notice, responsibility for pre tender defence costs fell to the insurer. The chambers judge found the insurer had not suffered identifiable prejudice from the insureds' late notice and granted the insureds relief against forfeiture.

The insurer appealed that decision. On appeal, the insurer took the position notice was a prerequisite to its assumption of the duty to defend and, on a proper interpretation of the insurance contract, the pre tender defence costs incurred by the insureds without the insurer's consent were the responsibility of the insureds.

The Court of Appeal noted the Canadian authorities offer little assistance on determining the temporal nature of the duty to defend. The jurisprudence in the United States follows two divergent views on this issue. The Court of Appeal noted it is not uncommon to turn to American authorities on insurance law where Canadian guidance is limited; however, the absence of cohesion in the American cases in this circumstance limited their assistance in determining the temporal scope of the duty to defend.

The Court of Appeal ultimately concluded the right and duty to defend could not arise until the insureds provided notice or tender of the claims.

The second issue for consideration was whether the chambers judge erred by employing an analysis based on relief against forfeiture. The chambers judge found the insureds' failure to give prompt notice of the claim was imperfect compliance with the insurance policy and the insurer had suffered no identifiable prejudice. As a result, the chambers judge granted relief against forfeiture.

The Court of Appeal found that the insureds could not succeed in their position that the breach of the voluntary payment clause and the insurer's refusal to pay the pre tender costs was a forfeiture that attracts s.13 of the Insurance Act. The pre tender defence costs were incurred before the duty to defend arose and the Voluntary Payment Clause is clear that the insurer has no obligation to reimburse voluntarily made expenses. The Voluntary Payment Clause provides "[t]he Insured shall not, except at his own cost, voluntarily make any payment ... or incur any expenses." In this case, there was no forfeiture of insurance. Since the duty to defend did not arise until notice or tender had occurred, the Voluntary Payment Clause imposed responsibility for pre tender defence costs on the insureds.

This case was digested by [Aaron Atkinson](#) and edited by [David W. Pilley](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at aatkinson@harpergrey.com or dpilley@harpergrey.com or review their biographies at <http://www.harpergrey.com>.