Citation: Lodge et al v Red River Valley Mutual Insurance Company et al, 2017 MBCA 76

Date: 20170822
Docket: AI16-30-08704

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

CYNRIC ROY LODGE, VIVIAN DIANNE LODGE and EAST HUNTLY STOCK FARM INC.	)	***L. K. Troup*** *for the Appellant*
(Plaintiffs) Respondents	)	
- and -	)	***R. M. Beamish*** *for the Respondents*
RED RIVER VALLEY MUTUAL INSURANCE COMPANY	)	
(Defendant) Appellant	)	*Appeal heard:* ***March 14, 2017***
- and -	)	
WALLIS AGENCIES LTD.	)	*Judgment delivered:* ***August 22, 2017***
(Defendant)	)	

On appeal from 2016 MBQB 184

BURNETT JA

Introduction

[1] The defendant Red River Valley Mutual Insurance Company (Red River) appeals the decision of Abra J (the motion judge) dismissing its motion for summary judgment.

[2] Red River moved for summary judgment dismissing the claim against it on the basis that the plaintiffs' insurance policy did not provide coverage for certain losses (the coverage issue).

[3] The motion judge was concerned that a trial judge hearing the plaintiffs' claim against the co-defendant Wallis Agencies Ltd. (Wallis) would also have to decide the coverage issue but would be "stuck" (at para 3) with his decision. For that reason, the motion judge was not prepared to decide the motion for summary judgment.

[4] The motion judge erred when he dismissed the motion on that basis. It is apparent from the pleadings (and conceded by the plaintiffs) that the coverage issue will not arise in the claim advanced by the plaintiffs against Wallis (the Wallis claim). Even if the same issue did arise, there was nothing preventing the motion judge from considering the coverage issue and applying the test for summary judgment. If it could be done, resolution of the coverage issue was clearly in the interests of justice and the most proportionate, timely and cost-effective approach.

[5] However, for the reasons indicated below and for reasons different than those expressed by the motion judge, I agree that a trial is required and I would dismiss the appeal.

Background

[6] The plaintiffs were the named insured in a comprehensive farm insurance policy (the policy) issued by Red River.

[7] On August 12, 2009, lightning struck a fuse box located on a hydro pole supplying power to the plaintiffs' property and hog barn (the barn). As

a result of the lightning strike, electricity stopped flowing to the barn. The lack of electricity caused the fans and ventilation system in the barn to stop. Without the fans and proper ventilation, the temperature in the barn increased, and a large number of hogs died from heat stress. In that regard, the plaintiff Cynric Roy Lodge (Lodge) deposed that:

> None of the animals died due to splitting, bloat or suffocation, nor by huddling, piling, smothering, freezing or stampeding as referred to in the policy. The animals died from heat stress, a well-known risk in hog barns where fans and the ventilation system are not operating.

[8] The fans and ventilation system in the barn were undamaged and started when the power was restored.

[9] The plaintiffs had previously installed a back-up generator which would provide power if electricity from the hydro system was interrupted. However, the power surge from the lightning destroyed the relay switches in the starting mechanism, which prevented the generator from operating.

[10] The plaintiffs made a claim under the policy and filed a proof of loss. Relying on various provisions in the policy, Red River denied coverage. The relevant insuring provisions, exclusions, special conditions and general conditions have been reproduced in Appendix A to these reasons.

[11] The plaintiffs then filed a statement of claim seeking a declaration confirming coverage under the policy and damages. In particular, the plaintiffs seek compensation for the loss of the hogs, the damage to the barn (when the hogs were removed) and lost farm earnings (collectively, the losses).

[12] The plaintiffs subsequently amended their statement of claim to include a claim against their insurance agent/broker (Wallis). The essence of the Wallis claim is that if there is no coverage under the policy, it is attributable to Wallis' breach of duty to provide appropriate advice and guidance.

[13] In its defence, Wallis admits that it provided advice to the plaintiffs and that it had a duty to act with reasonable care, but says that the plaintiffs made their own decisions concerning coverage and were fully aware of the coverage provided.

[14] Significantly, Wallis does not allege that coverage exists for the losses in question, and no issue is raised between the plaintiffs and Wallis as to whether the policy provides such coverage.

The Motion Judge's Decision

[15] In the Court below, counsel made extensive written and oral submissions as to whether the policy provides coverage for the losses.

[16] The motion judge dismissed Red River's motion on the basis that the trial judge hearing the Wallis claim might receive additional evidence and would have to decide the same issue. This Court was advised that none of the parties made that argument in their submissions to the motion judge. His reasoning was as follows (at paras 6-15):

> In the amended statement of claim, the plaintiffs have specifically pleaded:
>
> > 16. The Plaintiffs state alternatively that if there is in fact and in law no coverage under the claim, then said lack of coverage is a result of the conduct of the Defendant, Wallis.

Based upon this allegation by the plaintiffs, the trial judge hearing the claim against Wallis will have to decide whether Wallis owed a duty of care to the plaintiffs and breached that duty of care. In doing so, the trial judge undoubtedly will have to make a finding whether the plaintiffs did or did not have coverage under the terms of the policy.

In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, in reference to a motion for summary judgment, Karakatsanis J. wrote (at para. 60):

> The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.
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> [emphasis added]

In the recent decision of *Hyczkewycz v. Hupe*, 2016 MBCA 23, 326 Man.R. (2d) 137, the Manitoba Court of Appeal wrote *per curiam* (at para. 5):

> . . . Judges deciding motions for summary judgment are strongly discouraged from making statements about law, where the law is in dispute, if they are referring that same legal issue back for determination by another judge. A short endorsement that the moving party has not met the test for summary judgment for a stated reason(s) is all that is required. Making statements as to the interpretation of a law in a case where the responsibility will fall to another judge in the same case to interpret that same law is an unnecessary use of judicial resources and, more importantly, jeopardizes judicial comity; the trial judge is placed in the difficult

position of potentially having to disagree with a colleague.

[emphasis added]

In their respective motion briefs and in their submissions before me, counsel for both Red River and the plaintiffs argued the issue of whether the language in the policy included or excluded the loss and damage allegedly suffered by the plaintiffs. Included in the plaintiffs' argument in particular was reference to certain wording in the policy, the meaning of which is in dispute. It was submitted on behalf of the plaintiffs that evidence might be led at the trial as to the meaning of that wording.

In *Homestead Properties (Canada) Ltd. v. Sekhri et al*., 2007 MBCA 61, 214 Man.R. (2d) 148, Freedman J.A. commented (at para. 19):

> Parties moving or responding on summary judgment matters ought to put their best and strongest case before the court, since the motion, and possibly the case, will be disposed of on the basis of the evidence before the court. . . . .

Notwithstanding this principle, at the trial of the plaintiffs' claim against Wallis, there may very well be additional evidence that is submitted that may affect the trial judge's determination as to whether the plaintiffs have coverage under the policy.

In order to decide whether Red River's motion for summary judgment should be granted, I have no alternative but to decide the legal issue of whether the policy provided coverage to the plaintiffs or it did not. Clearly such a decision will place the trial judge in the difficult position described in *Hryniak* and in *Hyczkewycz*.

The trial judge may have additional evidence on the interpretation of the language in the policy which could affect his or her decision on whether the plaintiffs' have coverage. But the trial judge will be stuck in the position of having my decision on the issue of interpretation of the policy arising from the motion for summary judgment.

For that reason, I am not prepared to make the findings that Red River has asked me to make. I am therefore dismissing the motion for summary judgment.

Issues and Standard of Review

[17] This appeal raises two issues:

1. Did the motion judge err in refusing to decide Red River's motion for summary judgment?

2. If so, should summary judgment be granted?

[18] The standard of review for summary judgment decisions was recently summarized in *Lenko v The Government of Manitoba et al*, 2016 MBCA 52 (at paras 34-36):

> *Standard of Review*
>
> The standard of review on an appeal of a summary judgment order was explained by Freedman JA in *Towers Ltd v Quinton's Cleaners Ltd et al*, 2009 MBCA 81 at paras 22-28, 245 ManR (2d) 70. In summary, questions of law are reviewed on the standard of correctness and questions of fact are reviewed on the standard of palpable and overriding error. A question of mixed fact and law, being the application of the facts to the law, is generally reviewed on the standard of palpable and overriding error. If, however, the question of mixed fact and law involves an error relating to an extricable principle of law, the applicable standard is that of correctness.
>
> The final determination of whether an applicant for summary judgment has made out a prima facie case and, if so, whether the respondent on the motion has established that there is a genuine issue for trial are both discretionary decisions. This is because each decision requires the motion judge to apply her or his judicial experience and expertise to all of the relevant facts and applicable law and then to make a judgment as to whether the required burden of proof has been met.
>
> Such a discretionary decision is reviewed according to a deferential standard, and appellate courts will not intervene unless the motion judge misdirects herself or himself or her or his

decision is so clearly wrong as to amount to an injustice.

Red River's Position

[19] With respect to the first issue, Red River submits that the motion judge erred when he concluded that a trial judge hearing the Wallis claim would have to decide the coverage issue. The Wallis claim only arises if there is a finding that there is no coverage under the policy, and there is no possibility that the coverage issue will need to be relitigated.

[20] As to the motion judge's suggestion that the trial judge might receive additional evidence in relation to the interpretation of the policy, Red River submits it is well established that, on summary judgment motions, the parties are required to put their best foot forward; it is no answer to say that evidence will be forthcoming.

[21] To the extent that the motion judge relied on this Court's decision in *Hyczkewycz v Hupe*, 2016 MBCA 23, Red River says that the comments relied on in that decision were simply words of caution about making *obiter* comments when a motion judge decides that summary judgment is not appropriate. Those cautionary observations have no application to the present case. The claim against Red River can and should be determined before the Wallis claim. It is only after a finding that no coverage exists that the Wallis claim (for failing to place the appropriate coverage) would be considered.

[22] According to Red River, this case is a straightforward matter of contract interpretation which should proceed by way of motion for summary judgment. Either the policy applies to the loss claimed or it does not. If no

coverage exists, the matter will shift to an examination as to whether Wallis was negligent in failing to secure the appropriate insurance coverage for the plaintiffs, which will necessarily require *viva voce* evidence and issues of credibility.

[23] Relying on *Hryniak v Mauldin*, 2014 SCC 7 at para 60, Red River says that resolution of the coverage issue will facilitate access to justice and would be the most proportionate, timely and cost-effective approach.

[24] With respect to the second issue—whether summary judgment should be granted—this issue turns largely on the wording of the policy which requires that losses be direct losses, caused by or directly resulting from lightning (an insured peril).

[25] Red River submits that the losses resulted from the chain of events described in para 7 of this decision, that there was no direct physical loss or damage caused by lightning, and that, at most, lightning was an indirect cause of the losses. See *Balon v SGI Canada*, 2004 SKPC 104 at paras 16, 20; and *The Owners, Strata Plan NW2580 v Canadian Northern Shield Insurance Company*, 2006 BCSC 330 at paras 22-23. Red River argues that to find that the losses were directly caused by lightning would ignore the numerous steps or chain of events that led to the losses and would give no meaning to the word "direct" where it appears in the relevant policy provisions.

[26] Red River says that the rules for interpreting an insurance contract were set out in *Brissette Estate v Westbury Life Insurance Co*; *Brissette Estate v Crown Life Insurance Co*, [1992] 3 SCR 87 (at pp 92-93):

> Interpretation of the Contract
>
> In interpreting an insurance contract the rules of construction relating to contracts are to be applied as follows:
>
> (1) The court must search for an interpretation from the whole of the contract which promotes the true intent of the parties at the time of entry into the contract.
>
> (2) Where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected.
>
> (3) Ambiguities will be construed against the insurer.
>
> (4) An interpretation which will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided. See *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888.

[27] Red River submits that rules (1) and (2) are of particular importance in the present context and that rules (3) and (4) have no application.

[28] As noted previously, the plaintiffs seek compensation for three distinct losses: loss of livestock, property damage to the barn and loss of earnings. Red River's submission in relation to each category of loss, and the relevant policy provisions, are summarized below.

Loss of Livestock

[29] The plaintiffs were insured under Rider 993H "against all risks of direct physical loss or damage subject to the exclusions and conditions" in the policy (emphasis added). Rider 993H further provides that Red River does not insure "animals . . . unless the loss or damage is caused by a Specified Peril". Lightning is a specified peril. General Condition (12) to

the policy provides that Red River does not insure extremes of temperature.

[30] The plaintiffs were also insured under Rider 2150. In this Rider, Red River insured the hogs "against direct loss or damage caused by the [listed] Insured Perils . . . and subject to the [listed] terms and conditions" (emphasis added). Under the heading "Insured Perils", Red River insured against death or destruction "directly resulting from or made necessary by . . . lightning" (emphasis added). An exclusion to Rider 2150 provides that the policy does not cover loss "with respect to livestock confined within a building, by freezing or temperature change unless as the direct result of a peril insured against" (emphasis added).

[31] Red River says that the loss of the hogs was not covered by Rider 993H or Rider 2150 because the loss was not directly caused by lightning. The lightning did not cause heat stress to the hogs.

[32] Red River submits that the phrase "or made necessary by" in Rider 2150, and in particular the word "necessary", should be given its ordinary dictionary meaning, which is: "absolutely needed", "required", "of an inevitable nature", "inescapable" or "logically unavoidable" (*Merriam-Webster*, (22 August 2017), online: <www.merriam-webster.com>). In this case, the death of the hogs did not directly result from, and was not made necessary by, lightning.

[33] According to Red River, the hogs were confined within the barn, triggering the exclusion, which is only saved if the loss is the direct result of lightning. Lodge confirmed in cross-examination that the hogs died due to the increase in temperature inside the barn. With that admission, Red River submits the hogs died from heat stress, not from lightning, and General

Condition (12) provides that extremes of temperature are not insured under the policy.

[34] Rider 2150 also contains a special condition requiring the insured to immediately call a veterinarian to attempt to establish the cause of death where the loss claimed is due to lightning, suffocation or physical injury. Red River says that the plaintiffs had suffered livestock losses in the past and that the plaintiffs had called a veterinarian with respect to those losses, but on this occasion the plaintiffs decided not to call. Red River relies on *Orr v Madill*, 1978 CarswellAlta 182 (SC (TD)), for the proposition that the requirement to call a veterinarian was a condition precedent to any liability under the policy and that a breach of that condition rendered the plaintiffs' claim null and void.

[35] The plaintiffs did not have Rider 2155, which would have provided coverage for the losses. Rider 2155 specifically covers death and destruction directly resulting from, or made necessary by, electrical power interruption or suffocation. The plaintiffs previously had a rider similar to Rider 2155, but it was subsequently replaced with Rider 2150.

[36] In summary, Red River says that the loss of the hogs was not a direct result of, or made necessary by lightning, the policy provisions granting coverage were not satisfied, and the exclusions and/or general conditions apply so as to deny coverage.

Damage to the Barn

[37] Red River submits that, as a general rule, insurance covers fortuitous events and that this loss was not fortuitous. Lodge confirmed that the damage to the barn was not caused by lightning, fire or the power

outage, and that the damage resulted from cutting the stalls and crates in the barn to remove the hogs.

[38] Red River acknowledges that the plaintiffs were insured under Rider 993H "against all risks of direct physical loss or damage subject to the exclusions and conditions" in the policy (emphasis added). However, General Condition (6) to the policy provides that Red River does not insure "loss or damage resulting from any intentional . . . act" by an insured or any other person at the direction of an insured. According to Red River, the damage to the barn was caused by the intentional actions of the plaintiffs when they dismantled the barn to remove the dead hogs, and General Condition (6) clearly specifies that there is no insurance coverage in those circumstances.

[39] The plaintiffs were also insured under Riders 995A, 995E and 995R, which provided coverage for farm property outbuildings, including the barn. Under Rider 995E, the plaintiffs were insured against direct loss or damage caused by fire, lightning and explosion, including "[l]ightning loss or damage to electrical appliances or devices". Under Rider 995A, the plaintiffs were insured against "all risks of direct physical loss or damage" from any external cause, and there is an exclusion for "loss or damage caused directly or indirectly by . . . changes of temperature", but that exclusion "does not apply to loss or damage caused directly by . . . lightning" (emphasis added).

[40] Once again, Red River says that the cause of the temperature change in the barn was not as a direct result of a named peril. Rather, the temperature change resulted from the failure of the ventilation system due to the absence of electrical power.

[41] In summary, Red River submits that either the policy does not provide coverage for the property damage to the barn because that damage was not a direct loss caused by lightning, or such coverage is specifically excluded by virtue of the intentional actions of the plaintiffs or persons they directed.

Loss of Earnings

[42] Rider 2220 provides insurance for the "loss of Farm Earnings . . . directly resulting from the interruption of [the plaintiffs'] business due to an insured loss to [the] barn or attached equipment or livestock" (emphasis added). Pursuant to Rider 2220, Red River agreed to pay "only for the loss of Farm Earnings you incur during the period of restoration."

[43] The "period of restoration" is defined to mean:

> [T]he period, beginning with the date on which the 'insured loss' occurs, which would reasonably be required to repair, rebuild or replace the damaged or destroyed property, to a maximum of 12 months (or other time period if shown on the Coverage Summary Page), not limited by the expiry date of this policy.

[44] Rider 2220 excludes "the cost of repairing or replacing damaged or destroyed property" and loss or damage as stated in the "Loss or Damage Not Insured" section of the General Conditions. All of the exclusions in Riders 995A, 995E, 995R, and in Rider 2150 apply to Rider 2220.

[45] Red River says that Rider 2220 only applies where there is an insured loss. In addition, the plaintiffs have not repaired or rebuilt the barn, and they have not replaced the hogs. As no loss of farm earnings was incurred during the period of restoration, there is no coverage.

[46] Red River submits that there has been no loss of earnings, there is no coverage for the alleged loss, and the general conditions and exclusions apply. Simply put, there is no insurance coverage under the policy for the loss of earnings.

Conclusion

[47] Red River submits that no coverage exists, there is no issue warranting a trial, and summary judgment should be granted.

The Plaintiffs' Position

[48] Plaintiffs' counsel wisely conceded that the coverage issue will not arise in the Wallis claim, that the motion judge made a palpable and overriding error when he found otherwise, and that it was unfortunate that he did not address the substance of the motion.

[49] Plaintiffs' counsel also acknowledged that the motion and this appeal turn largely on whether the losses directly resulted from, or were made necessary by, lightning.

[50] The plaintiffs say that the losses were occasioned by a lightning strike which, through an unbroken chain of events, resulted in the death of the hogs due to heat stress. According to the plaintiffs, without the lightning strike, there would be no loss. The lightning strike was a fortuitous event for which insurance coverage is applicable on the wording of the policy. In particular, the death of the hogs resulted from an unbroken chain of events which began with a lightning strike, with lightning being a specified peril.

[51] The plaintiffs argue that the present situation is similar to the

situation in *Rivard v General Accident Assurance Co of Canada*, 2002 MBCA 70. In that case, the lower court found that the damage to the home would not have occurred but for the escape of water from the pool, and the question was whether the loss was excluded because the damage was caused by settling or expansion. The lower court found that the fortuitous event of the water escape was a covered loss and that the damage was part of a chain of physical events. This Court confirmed the lower court decision and stated that "it is evident that were it not for the escape of water from the pool [a covered specified peril], as is contemplated in exclusion clause 32, there would have been no damage to the residence" (at para 29).

[52] The plaintiffs emphasize that insurance provisions providing coverage are to be interpreted broadly in favour of the insured, and exclusions are to be interpreted strictly and narrowly against the insurer. As the policy was drafted by the insurer, the plaintiffs submit that the Court can either find that the phrases "resulting from" or "made necessary by" are applicable to the loss, or ambiguous, which ambiguity is to be construed against the insurer under *contra proferentem* principles. The qualification of the phrase "directly resulting from" with the addition of the words "or made necessary by" in Rider 2150 is capable of a reasonable interpretation supporting coverage for the loss in this case, being a chain of events, causing a loss resulting from or made necessary by, lightning. It is the plaintiffs' position that the death of the hogs, and the destruction of the barn, resulted from, or were made necessary by, the lightning strike.

[53] The plaintiffs rely on the British Columbia Court of Appeal decision in *Pavlovic v Economical Mutual Insurance Co*, 1994 CarswellBC 536, for the proposition that "it was possible for the insurer to choose

language which would not have left the meaning of the exclusion clause open to doubt" (at para 24).

[54] The plaintiffs distinguish the decision in *Orr* because the provisions of the policy in that case, unlike here, specifically provided that failure to immediately obtain the services of a qualified veterinarian would render the claim null and void. The failure to notify a veterinarian in that case was prejudicial to the insurer because the cause of death could not later be ascertained, and the dates of death could not be determined. Additionally, the failure to notify the veterinarian caused further losses, which may have been prevented had a veterinarian been notified immediately. In this case, no prejudice was occasioned.

[55] The plaintiffs submit that even if there was a breach of the requirement to call a veterinarian, relief from forfeiture is appropriate, particularly where there is no prejudice to the insurer.

[56] The plaintiffs point out that Rider 2150 specifically provides that Red River will pay "the cost of removing dead stock . . . as a result of any insured peril."

[57] The plaintiffs submit that it would be improper to consider Rider 2155 when it did not form part of the insurance contract between the parties.

[58] In summary, the plaintiffs say that the policy provides coverage for the losses. Lightning is a specified peril, the losses were caused by an unbroken chain of causation, resulting from, or made necessary by, that specified peril, and no exclusions apply. As Red River has not made out a prima facie case, the motion for summary judgment should be dismissed.

Analysis and Decision

Did the Motion Judge Err?

[59] The motion judge chose not to decide the summary judgment motion because, in his view, both he and the trial judge hearing the Wallis claim would have to determine whether coverage exists (i.e., the coverage issue), and his decision would place the trial judge in a difficult position.

[60] The motion judge was plainly wrong as the coverage issue is not raised in the Wallis claim.

[61] In my view, the motion judge erred when he failed to consider the merits of the summary judgment motion. As noted in *Hryniak*, there are undoubtedly circumstances where it would not be in the interests of justice to decide a summary judgment motion, but this is not one of them. If it could be done, resolution of the coverage issue would either resolve the entire claim (if there is coverage for the losses) or would result in a much shorter and focussed trial of the Wallis claim (if there is no coverage). Further, resolution of the claim against Red River at this stage would be completely in keeping with the proportionality principle. The *Hryniak* decision and the concept of proportionality which it speaks to, address important issues of accessibility and limited judicial resources. But they do not make judicial decision making any easier. To the contrary, judges are encouraged to deal with important and sometimes difficult issues at an early stage in the proceedings.

[62] Several observations regarding the motion judge's reference to this Court's *obiter* comments in *Hyczkewycz* are required. First, the comments are clearly directed to the situation where a motion judge considers the

merits of a summary judgment motion and decides on the merits that the motion should be dismissed. Second, and more importantly, the comments were not intended to be the basis for declining to decide a summary judgment motion.

[63] Put simply, there was no valid reason to decline to decide whether summary judgment should be granted.

Should Summary Judgment be Granted?

[64] Turning to the second issue, the test for summary judgment was summarized by Freedman JA in *Homestead Properties (Canada) Ltd v Sekhri et al* (at paras 14-17):

> The test for summary judgment is well established, and no further detailed explanation is needed. The test is to the same effect regardless of whether the moving party is the plaintiff or the defendant. When the defendant moves, as here, he must prove, on a *prima facie* basis, that the plaintiff's action must fail. If he meets that burden, then the plaintiff has the burden to establish that there is a genuine issue for determination. He must show that his claim is "one with a real chance of success" (see *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 15; see also *Manitoba Hydro Electric v. Inglis (John) Co. et al.* (1999), 142 Man.R. (2d) 1 (C.A.)). If he fails to do so, summary judgment dismissing the claim will follow.
>
> When a plaintiff moves, he must prove, on a *prima facie* basis, that his action will succeed. If he meets that burden, then the defendant has the burden to establish that there is a genuine issue for determination. If he fails to do so, summary judgment granting the claim will follow. As was made clear in *Blanco et al. v. Canada Trust Co. et al.*, 2003 MBCA 64, 173 Man.R. (2d) 247 at para. 62, regardless of who is the moving party, the analysis is a two-step process.
>
> These principles are based on Rule 20 of the Court of Queen's Bench Rules. That rule has been discussed and analyzed in

> numerous cases including *Podkriznik v. Schwede* (1990), 64 Man.R. (2d) 199 (C.A.), *Fidkalo v. Levin* (1992), 76 Man.R. (2d) 267 (C.A.), *Somers Estate v. Maxwell* (1995), 107 Man.R. (2d) 220 (C.A.), *Kleysen et al. v. Canada (Attorney General) et al.*, 2001 MBQB 205, 159 Man.R. (2d) 17, and *Blanco*.
>
> Whether the test is cast in terms of "the action fails in law" (*Somers*, at para. 10), or that the defendant must show "the absence of a valid claim in law" (*Somers*, at para. 11), or that "the action must fail in law" (*Somers*, at para. 16), or "that at a trial it will succeed" (*Blanco*, at para. 28), or some other like phrase, the expressions amount to the same thing. The moving party must show that, *prima facie*, on the facts the responding party's case must fail. If he does, then the second step of the analysis commences, and the responding party has the burden of showing that there is a genuine issue for trial.

[65] The motion judge did not apply the test for summary judgment. Specifically, he did not decide whether Red River had made out a prima facie case that the plaintiffs' claim must fail or whether the plaintiffs had established a genuine issue for trial. In these circumstances, given the error in his reasoning and the absence of a decision on the merits, the motion would normally be sent back to the lower court for determination. However, the parties have requested that we consider the merits of the motion, apply the test, decide any genuine issue(s) (if it/they exist) and grant judgment pursuant to Queen's Bench Rule 20.03(4). The parties point out that the loss occurred nearly eight years ago (in August 2009) and that the statement of claim was issued approximately six and one-half years ago (in October 2010), and they submit that sending the matter back would be contrary to the principle of proportionality.

[66] In my view, the motion must be dismissed. Given this Court's directions in *Hyczkewycz*, these reasons will be brief.

[67] Red River has provided a compelling argument that on a prima facie basis the plaintiffs' claim must fail. Having said that, I am also persuaded that there are genuine issues for trial, namely whether the policy wording is ambiguous and, if so, whether parol evidence is required and/or permissible to aid in its interpretation.

[68] Queen's Bench Rule 20.03(4) provides:

> **Trial on affidavit evidence**
> **20.03(4)** Where the judge decides there is a genuine issue with respect to a claim or defence, the judge may nevertheless grant judgment in favour of any party, either upon an issue or generally, unless
>
> > (a) the judge is unable on the whole of the evidence before the court on the motion to find the facts necessary to decide the questions of fact or law; or
> >
> > (b) it would be unjust to decide the issues on the motion.

[69] I am not convinced that the evidentiary record is complete. Evidence may be required to establish that the policy is a standard form policy or contains standard clauses that are of precedential value. Moreover, there may well be a meaningful factual matrix specific to the parties, which is essential to a proper interpretation of the policy. For example, at one time the plaintiffs had the additional coverage contemplated by Rider 2155. That Rider clearly provides coverage for death or destruction of livestock directly resulting from, or made necessary by, electrical power interruption, or as a result of mechanical breakdown of fans, blowers or other equipment designed to control air circulation. The present record suggests that the plaintiffs decided not to install an alarm in the barn, and the coverage contemplated by Rider 2155 was therefore not available for them to

purchase. To the extent that the meaning of Rider 2150 may be ambiguous—and I decline to make any finding in that respect—the admission of extrinsic or parol evidence could be of tremendous importance in resolving any such ambiguity.

[70] It will be for the trial judge to decide what evidence (if any) is relevant and admissible as factual matrix, extrinsic evidence and/or surrounding circumstances to properly construe the meaning of the policy. I agree with the proposition that "[d]ifficulty in interpreting a contract is not synonymous with ambiguity" (see *Moore Realty Inc v Manitoba Motor League*, 2003 MBCA 71 at para 25), and I emphasize that I have made no determination as to whether the language of the policy is ambiguous.

[71] In addition, the law in this area is not settled. There are numerous "chain of event" cases which have come to different conclusions as to whether, and to what extent, an insured peril must be a direct or proximate cause of the loss in question. For the most part, these decisions are fact specific and turn on the wording of the policy under consideration. See, for example, *Edwards v Wawanesa Mutual Insurance Co*, 1959 CarswellBC 9 (CA); *Filkow v Gore Mutual Insurance Co*, 1965 CarswellMan 68 (CA) (where this Court expressed the view that (at para 4): "the question is one of fact to be decided in light of the circumstances"; *Arfin v Howick Farmer's Mutual Fire Insurance Co*, [1972] OJ No 738 (SC (CA)); *Pavlovic*; *Derksen v 539938 Ontario Ltd*, 2001 SCC 72; *Rivard; Balon*; *942325 Ontario Inc v Commonwealth Insurance Co*, 2006 CarswellOnt 1389 (CA); and *The Owners, Strada Plan NW2580*. There are other cases that suggest that the word "necessary" and the phrase "made necessary by" must be viewed in context. See, for example, *Mayrand v 768565 Ontario Ltd*, 1990

CarswellOnt 556 (CA); *Fitzpatrick v Red River Valley Mutual Insurance Co*, 2004 SKQB 300 (which considered Riders 2150 and 2155); and *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45.

[72] While I am sympathetic to the parties' desire to bring this action to a speedy conclusion, there is also a broader public interest given the important insurance law issues raised in this action.

[73] It is therefore my view that the genuine issues should be decided at first instance in the Court below.

Conclusion

[74] The motion for summary judgment is therefore dismissed. This is a proper case for an expedited trial. The costs of the appeal shall be in the cause.

Burnett JA

I agree: Steel JA

I agree: Pfuetzner JA

APPENDIX "A"

FARM INSURANCE POLICY

Your complete policy is made up of this booklet and the Coverage Summary Page(s) provided to you.

This policy is written in plain and easy to understand language. We encourage you to read it and consult with your Broker if you have any questions.

"Specified Perils" means: fire or lightning; explosion; smoke; . . . sudden and accidental damage from artificially generated electrical current.

Part 3 – COMPREHENSIVE FORM – 993

Homeowners – 993H

Insured Perils
You are insured against all risks of direct physical loss or damage subject to the exclusions and conditions in this policy.

Loss or Damage Not Insured
We do not insure:

(3) animals, birds or fish unless the loss or damage is caused by a Specified Peril other than impact by aircraft or land vehicle;

FARM PROPERTY –
OUTBUILDINGS AND / OR CONTENTS

B. Insured Perils
BUILDINGS and/or CONTENTS – (Fire & Lightning) – Form 995F

If the Coverage Summary Page indicates Form 995F applies, you are insured against direct loss or damage caused by:

(1) **Fire, Lightning** (excluding lightning damage to electrical devices or appliances) or **Explosion** of natural, coal or manufactured gas.

BUILDINGS and/or CONTENTS – (Fire & Extended Coverage) – Form 995E, or
BUILDINGS (Fire & Extended Coverage – incl. Optional Loss Settlement Clause) – Form 995R

If the Coverage Summary Page indicates Form 995E or 995R applies, you are insured against direct loss or damage caused by Peril (1). stated above and by the following Extended Coverage Perils:

(3) **Lightning**: Lightning loss or damage to electrical appliances or devices;

BUILDINGS – (All Risk – incl. Optional Loss Settlement Clause) – Form 995A

If the Coverage Summary Page indicates Form 995A applies, you are insured against all risks of direct physical loss or damage except the following:

Perils Excluded
We do not insure against loss or damage caused directly or indirectly by:

(g) dampness or dryness of atmosphere, changes of temperature, freezing, heating, shrinkage, evaporation, loss of weight, leakage of contents, exposure to light, contamination, change in colour or texture or finish, rust or corrosion, marring, scratching or crushing, but this exclusion does not apply to loss or damage caused directly by fire, lightning, [emphasis added]

LIVESTOCK/POULTRY FLOATER – Form 2150

If the Coverage Summary Page indicates Form 2150 applies, we insure the livestock/poultry described on the Coverage Summary Page against direct loss or damage caused by the Insured Perils listed below and subject to the terms and conditions listed below.

Insured Perils
This Rider insures against:

A. Death or destruction directly resulting from or made necessary by:

1) Fire, lightning or explosion:

This Policy Does Not Cover Loss or Damage

(g) with respect to livestock confined within a building, by freezing or temperature change unless as the direct result of a peril insured against;

Additional Coverage –
Dead Stock Removal – We will pay the cost of removing dead stock of the property insured under this form as a result of any insured peril.

Special Conditions

1. Where loss is claimed to be due to lightning, suffocation, entrapment, hardware ingestion or physical injury, the Insured shall immediately call a veterinarian to attempt to establish the cause of death, and the Insurer shall pay all reasonable expenses so incurred.

LIVESTOCK/POULTRY FLOATER (BROAD) – Form 2155

If the Coverage Summary Page indicates Broad Form 2155 applies, the following perils are insured in addition to the perils insured under Form 2150:

C. Death or destruction directly resulting from or made necessary by:

(a) Electrical power interruption, or as a result of mechanical breakdown of fans, blowers or other equipment designed to control air circulation;

(b) Huddling, piling, smothering or freezing as an immediate and direct consequence of one or more of the Insured Perils;

(c) Suffocation as a direct result of poisonous pit gases;

FARM EARNINGS (BROAD) – Form 2220

If the Coverage Summary Page indicates that Form 2220 applies, we provide the insurance described below.

A. DESCRIPTION OF COVERAGE

We insure your loss of Farm Earnings you incur, directly resulting from the interruption of your business due to an insured loss to your **barn or attached equipment or livestock/poultry** which occurs while this Form is in effect. We will pay only for the loss of Farm Earnings you incur during the period of restoration.

B. LOSSES EXCLUDED

We do not insure:

1. the cost of repairing or replacing damaged or destroyed property;

7. loss or damage as stated in the "LOSS OR DAMAGE NOT INSURED" section of the General Conditions.

All exclusions in Forms 995F, 995E, 995R, 995A, 2150, or 2155 as well as the following exclusions apply to Form 2220.

C. BASIS OF LOSS SETTLEMENT

If you do not resume operations, or do not resume operations as quickly as possible, we will pay based on the length of time it would have taken to resume operations as quickly as possible.

D. DEFINITIONS – As used in this Form:

"**farm earnings**" means Revenue (adjusted for opening and closing stocks and work in progress) less Variable Operating Expenses.

"**period of restoration**" means the period, beginning with the date on which the "insured loss" occurs, which would reasonably be required to repair, rebuild or replace the damaged or destroyed property, to a maximum of 12 months (or other time period if shown on the Coverage Summary Page), not limited by the expiry date of this policy.

GENERAL CONDITIONS

Loss or Damage Not Insured

We do not insure:

(6) loss or damage resulting from any intentional or criminal act or failure to act by:

(1) any person insured by this policy; or

(2) any other person at the direction of any person insured by this policy;

(12) wear and tear, deterioration, defect or mechanical breakdown, marring or scratching, rust or corrosion, extremes of temperature, dampness of atmosphere, condensation, wet or dry rot, fungi, spores and contamination;