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DOSE A COMMERICAL GENERAL LIABILITY POLICY COVER A "NAMED INSURED" OR "ADDITIONAL INSURED" FOR PARTNERSHIP OR JOINT VENTURE ACTIVITIES?

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A. BACKGROUND - THE BUSINESS CASE FOR PARTNERSHIPS AND JOINT VENTURES

Over the past twenty years limited partnerships and joint ventures have become a more frequent mode in which commercial insureds do business. Many of the larger real estate projects undertaken in British Columbia are done by means of a limited partnership. Many resource based projects are undertaken by joint venture. For many commercial insureds, either a partnership or joint venture can offer significant business advantages when compared to a sole proprietorship or company.

The advantages can include:

1. sharing the risk with other participants, so that any losses are shared rateably;
2. overcoming the problem that not all commercial insureds have sufficient capital, equipment and manpower to take on a contract;
3. possibly allowing for tax advantages by maintaining separate ownership of property; and
4. providing flexibility to organize resources for a particular project, without the need for a long term financial commitment.

These alternative business vehicles also pose risk management challenges that the participants must understand and guard against with adequate, responsive liability insurance. From a liability standpoint, some of the disadvantages include the following:

1. a general partnership entails each partner being jointly and severally liable for the other partners' conduct. If one's partners become insolvent, the remaining partners may have to assume a joint and several liability that entails a financial responsibility for 100% of the loss;
2. partnership liabilities survive after the partnership dissolves and theoretically, in perpetuity, subject only to the applicable limitation periods;
3. a joint venture entails vicarious liability for the conduct of the other joint venture members;

4. a partnership or joint venture can result in legal liability for the conduct of partners and joint venturers which, practically, you cannot control, manage or supervise; and

5. a partnership, in particular, arises even if that legal relationship is not contemplated by the parties, if they act collectively with a view to securing a common profit. Unwittingly, they can be visited with partnership liability.

B. THE UNDERWRITING PERSPECTIVE ON PARTNERSHIPS AND JOINT VENTURES

The spectre of a commercial insured engaging in a partnership or joint venture poses the potential for "hidden risks" that cannot be fully understand unless there is full and complete disclosure by the insured working in conjunction with its broker.

If a company or an individual agrees to participate in a joint venture or a partnership, and does not disclose its existence to the liability insurer, the underwriter, in ways he or she will not appreciate, will be assuming a potential legal liability that reflects more than just the "moral hazard" incidental to the insured. If an individual or a company enters into a partnership, the insured could be jointly and severally liable for the acts and conduct of a wide variety of partners who pose their own "moral" and "physical" hazards, which are completely unknown to the underwriter. The problem is particularly acute for the commercial underwriter since he or she theoretically, would need to separately evaluate the underwriting profile of each participant in order to properly price the premium for a partnership or joint venture activity. If the insured does not disclose its involvement in either the joint venture or partnership, then the underwriter is bearing an added liability exposure without the commensurate premium that should go with that risk.

C. PRACTICAL EXAMPLE: THE "UNFORESEEN" UNDERWRITING RISK INHERENT IN A JOINT VENTURE OR PARTNERSHIP

A simple example will illustrate the extent to which an unknown risk can become an added hazard from an underwriting perspective. This example presupposes that a real estate developer is in the business of developing and constructing multi-unit residential buildings.

Historically the developer, using its own skilled tradespeople and financing, has developed in excess of twenty different residential buildings throughout the Lower Mainland of British Columbia. The developer has a liability policy with $5.0 million in limits both for its operations and additional "completed operations" coverage.

In 1995, the insured recognizes an opportunity to become involved in a 25 storey highrise in the False Creek area of Vancouver. The highrise will require a capital

commitment well beyond its means and a work force that exceeds its current capacity. The insured is reluctant to hire unskilled tradespeople for one job, knowing they would have to be laid off when the job is done. The developer, while having a healthy balance sheet, does not have the capacity to borrow monies that would be needed to finance the project during construction.

Limited in personnel and financial means, the developer approaches another developer who has a history of developing residential highrise buildings and is flush with capital from its success on previous projects.

The two developers decided to embark upon a joint venture for the development of the highrise tower. The project will involve monies and staff from both companies with each company contributing to the overall leadership of the project. It is agreed that any profits or losses will be shared 50/50.

Work starts in January, 1996 and is completed by March, 1997. Both during and following construction both developers maintain a general liability policy, but neither company advises their broker of the fact of the joint venture. As a result, the declaration page on both liability policies does *not* specifically enumerate:

> The joint venture between ABC Developer Ltd. and CDE Developer Ltd. to develop a 25 storey highrise tower at 111 Marine Way, Vancouver.

In 2001 a fire hydrant on the 25th floor failed, causing 150,000 gallons of water to flow down the entirety of the residential and commercial portions of the highrise tower, resulting in water damage to building residents throughout the highrise, as well as to commercial tenants located in the bottom three stories of the building.

The two developers are both sued in 2003, on the basis that each company is vicariously liable for the conduct of the construction site participants, including the trade that installed the fire hose system. It is also alleged that the two joint venture participants are directly liable for their failure to check and inspect the fire safety equipment when the building was completed. Lawsuits are commenced by a wide range of building occupants and commercial tenants.

In the lawsuits, the Plaintiffs allege that ABC Developer Ltd and DEF Developer Ltd. formed a joint venture for the development of the building and it is alleged they are vicariously liable as joint venture participants.

Would these two companies have coverage for the losses that ensued? *If the insurance broker did not ensure the declaration page specifically enumerated the joint venture, the liability insurer would be entitled to avoid any defence and indemnity obligation since the policy, by its terms, did not specifically insure the joint venture in question. The fact that in their own right each joint venture participant had liability insurance in its own name would not, in and of itself, allow for coverage.*

Why is this so? This is the result in the recent decision of the British Columbia Court of Appeal in *Kingsway General Insurance Company v. Lougheed Enterprises Ltd et al*, 2004 BCCA 421, 32 B.C.L.R. (4th) 56.

The balance of this paper will discuss why, in the factual situation posed above, each of the developers would not have coverage under their respective general liability policies.

D. THE FACTS IN *KINGSWAY GENERAL INSURANCE COMPANY V. LOUGHEED ENTERPRISES LTD.*

Three companies, each with differing shareholders, agreed to build a three storey condominium building in Richmond, B.C., in 1983. The three companies agreed to enter into a general partnership for the specific purpose of constructing the residential building in question. The partnership agreement did not contemplate any "joint activity" other than the proposed development. Each of three corporate partners undertook other development projects to their own account.

All three partners contributed money and labour in differing degrees and the partnership agreement provided for the division of profits based on their relative contributions. The building was constituted as a strata corporation.

Commencing in July, 1997 Kingsway General Insurance Company (hereafter "the Liability Insurer") only insured two of the three corporate partners; primarily because they had common directors and officers and purchased insurance together using the same insurance broker. However, the development of the project entailed a third corporate partner, which made no monetary contribution to the project's development, but which acted as the "Managing Partner" for supervising the trades doing the work. The third corporate partner was unrelated to the other two corporate partners, at a shareholder level, and used a differing insurance broker to purchase its insurance.

Within several years of project completion, the residential units were sold and the partners disbanded the partnership having presumably withdrawn their profits.

So, while the Liability Insurer covered the first two corporate partners as "Named Insureds" on the same policy, it did not cover as a "Named Insured" or as an "additional insured" the third corporate partner.

Then two unfortunate events arose. On July 11, 1998, a year after the Liability Insurer came on risk, a fire occurred in the building destroying much of the structure. The fire started from a balcony barbecue, but spread dramatically since the building did not have proper firewalls and fire separations, as required by the in force B.C. Building Code.

Then, to compound matters on October 9, 2000, a second fire occurred in a differing part of the building. Again, like the first fire, the fire spread was extraordinary, in view of the lack of proper fire protection as required by the relevant B.C. Building Code.

The two corporate partners requested that the Liability Insurer defend them in the lawsuits that had ensued by 2003. The Liability Insurer responded "no" relying upon the following provision in the commercial general liability policy:

1. NAMED INSURED

   The Named Insured is as stated in the Declarations.

2. INSURED

   The unqualified word "Insured" includes the Named Insured and also includes:

   (a) any partner, officer, director, employee or shareholder with respect to acts performed on behalf of the Named Insured in that capacity.

   (b) any owner, person, firm, organization, trustee, estate or governmental entity to whom or to which the Named Insured has contracted to effect insurance by virtue of a contract of agreement or by the issuance or existence of a permit. But the Insurance provided for such additional Insured is restricted to apply solely to liability arising out of operations performed under said contract and only to the extent required by such contract;

   It is understood and agreed however that the above extension (b) does not apply to subcontractors or contractors working on behalf of the Named Insured.

   (c) co-owners, joint ventures [*sic*] or *partners having a non-operating interest with the Named Insured in the operations insured hereunder*.

   (d) all employee social clubs which manage, operate, control or supervise recreational activities under the auspices of the Named Insured.

   (e) any organization you newly acquire or form *other than a partnership* or joint venture, and over which you maintain ownership or majority interest will be deemed an Insured.

   However:

   (a) The Insurance granted to such organization is excess to, and shall not contribute with, previously arranged insurance of such organization;

   (b) Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

   (c) Coverage does not apply to "personal injury" or "property damage" that occurred before you acquired or formed the organization; and

   (d) Coverage does not apply to "personal injury" arising out of an offence committed before you acquired or formed the organization.

   No person or organization is an Insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

> Nothing in this definition relieves the Named Insured of its obligation to make a full disclosure of matters material to the risk and to report to the [insurer] material change in the risk during the currency of the policy. [Emphasis added.]

Relying upon the explicit policy language that contemplates an absence of coverage for a partnership or joint venture that is not explicitly enumerated on the declaration page, or by means of a specific endorsement, the Liability Insurer said in effect "... while we would cover you for your own activities as a developer, when you are sued solely by reason of your participation in a joint venture or partnership which you did not disclose to us, we do not have to cover that".

The Liability Insurer filed a legal proceeding in the Supreme Court of British Columbia to determine whether its coverage position was indeed correct.

E. THE HISTORICAL ISO/IBC TREATMENT OF PARTNERSHIPS AND JOINT VENTURES

The existence of this limitation in the definition of "Insured" has been a traditional aspect of liability policy wordings in the United States. Uniform policy wordings in the United States are developed by the I.S.O. (Insurance Services Office) and customarily adopted in Canada at the urging of the I.B.C. (Insurance Bureau of Canada) in an identical or like manner.

Prior to 1990 the commonly used wording for "undisclosed partnerships and joint ventures" was in this form:

> This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the insured is a partner or member and which is not designated in this policy as a named insured.

This wording differs slightly from the wording later adopted in the United States (being identical to the wording in question in the *Kingsway* case.) Rather than using the words "…with respect to the conduct of…" (hereafter the "Current Wording") the older wording instead used the expression "...arising out of the conduct of..." (hereafter the "Older Wording").

Early United States insurance cases, decided on the Older Wording, make clear that the rationale for the limitation on "undisclosed partnerships and joint ventures" is to protect the liability insurer from hidden risks it did not consider in calculating the premium (for example, *Maryland Casualty Co. v. Reeder* 221 Cal. App. 3d 961 (1990) at p. 721, 730 and *Austin P. Keller Constr. Co. v. Commercial Union Ins. Co.* 379 N.W. 2d 533 (Minn., 1986) at page 536.)

Even in the context of the Older Wording, the United States Courts have been vigorous in concluding that the provision is clear and unambiguous. The judicial interpretation is one of the few instances in which the Unites States Courts have used the doctrine of "reasonable expectations" against a commercial insured and in favour of the commercial

liability insurer. (*Austin P. Keller Constr. Co. v. Commercial Union Ins. Co.* 379 N.W. 2d 533 (Minn., 1986) at page 536, footnote 3 and *Fireman's Fund Ins. Co. v. E.W. Burman, Inc.* (1978), 391 A.2d 99 at page 102.)

With the introduction of the Current Wording in the United States, which is the wording in issue in the above, the decided American cases have made equally clear that the limitation in coverage is clear in its meaning and unambiguous. (*Geoffrey H. Palmer et al v. Truck Insurance Exchange et al* 66 Cal. App. 4th 916; 78 Cal. Rptr. 2d 389 at pages 3 to 7 and *Hardeman v. Commonwealth Lloyds Ins. Co.* 1999 Tex. App. Lexis 151 (Court of Appeals of Texas) at pages 3 and 4.*)*

The current limitation on coverage for undisclosed partnerships and joint ventures differs from the earlier I.S.A. and I.B.C. wording in two respects:

1. the Current Wording applies to both *"current"* and *"former"* partnerships and joint ventures; and
2. the words *"… with respect to the conduct of…"* practically broadens the range of situations in which coverage is excluded.

Accordingly, the current ISO/IBC wording is very broad in its scope for reasons which will be outlined below.

F. LIABILITY INSURER'S POSITION IN THE BRITISH COLUMBIA COURT OF APPEAL

On these facts, the Liability Insurer took the following position in seeking to avoid any "duty to defend" the underlying lawsuits or to indemnify for the two fire losses:

(a) The limitation on coverage for an "undisclosed partnership" applied to either a partner's direct or vicarious liability stemming from an "undisclosed partnership" since the gravamen of the words in the limitation are directed at excluding the partnership itself and its consequences regardless of the role played by the insured in the "undisclosed partnership";

(b) The underwriting rationale inherent to this limitation on coverage, as recognized by the United States Courts which have examined this same issue, is to ensure that the underwriter is not confronted with a materially increased risk, without the concomitant benefit of either the opportunity to decline the risk posed by the partnership or to increase the premium; and

(c) In this case, the undisclosed partnership included a corporate partner, not otherwise insured under the policy, which acted as the "Manager" and "Development Manager" for the building which

> was the subject matter of the underlying litigation. So, from an underwriting standpoint, the corporate partner that purchased this liability insurance was now confronted with the potential for legal liability by reason of the acts and conduct of a "non-insured" corporate partner for which the insured did not obtain a premium.

The two corporate partners, which were admittedly an "insured", responded that coverage should be fully granted notwithstanding that the Declaration Page did not expressly list the partnership. The corporate developers who admittedly had liability insurance said that since they could be liable in their own right, even if their partners were not sued, they should have coverage for their "individual liability".

Secondly, the corporate partners said that coverage should exist in their "individual capacity" even if they could be vicariously liable, or, jointly liable for any negligence or misconduct committed solely by their corporate partners.

The balance of this paper will examine whether the British Columbia Court of Appeal agreed with those positions.

G. CAN THE COURT EXAMINE PARTNERSHIP AGREEMENT, OR IS "DUTY TO DEFEND" GOVERNED SOLELY BY ALLEGATIONS IN STATEMENT OF CLAIM?

Historically, Canadian judges have only examined the Statement of Claim to determine whether a liability insurer has a "duty to defend". Essentially, it is a search to determine whether the pleadings, by their very nature, could give rise to a potential liability which is within the coverage granted by the liability insurer. In undertaking this analysis, the Court will not consider whether the allegations are in fact true. There is no "search for truth" at the "duty to defend" stage of a lawsuit. The mere possibility of a state of facts and law that could result in indemnity will result in a "duty to defend". The liability insurer is left to re-evaluate coverage when the case settles or proceed to trial to determine whether in fact the liability is within coverage.

However, in 2001 the Supreme Court of Canada expanded the range of documents that a Judge can examine in determining whether there exists a "duty to defend". In *Monenco Ltd. v. Commonwealth Insurance Company*, [2001] 2 S.C.R. 699, the Court said that a Judge can examine any uncontroverted contractual document, relevant to coverage, that is expressly referred to in the Statement of Claim.

Applying that principle to the issue of "undisclosed" partnerships and joint ventures, it practically meant that in this case the BC Court of Appeal could examine not only the Statement of Claim, but also the partnership agreement to determine the identity of the partners, the role each played and (indirectly) whether the nature of the partnership posed an "enhanced hazard" for which the underwriter would be unaware.

H. DOES EXCLUSION FOR UNDISCLOSED PARTNERSHIPS AND JOINT VENTURES ONLY APPLY TO "VICARIOUS LIABILITY", OR ALSO TO "DIRECT LIABILITY"?

If two individuals form a partnership one of two situations could arise. One of the two partners could be careless and his or her conduct could result in a loss that results in legal liability. In that situation the partner could be sued alone on the basis that he or she was careless and caused harm. Or both partners could be sued and the "innocent" partner could be liable, not because he or she did something wrong, but rather because he or she is said in law to be jointly and severally liable for the conduct of the other partner.

It is a "status liability" because it flows not from the conduct that gave rise to legal liability, but because the law "attributes" legal responsibility to other partners by operation of law, based on their status as partners.

A partnership is not a legal entity *per se*. However, it can sue or be sued, and the Supreme Court *Rules of Court*, permit a partnership to be named by its partnership name in a lawsuit:

> Partners may sue or be sued in firm name
>
> 7(1) Two or more persons claiming to be entitled, or alleged to be liable, as partners may sue or be sued in the name of the firm in which they were partners at the time when the alleged right or liability arose.

However, liability attaches to all of the partners by virtue of substantive partnership law, as supplemented by the *Rules of Court* which permit execution against both the partnership assets and the members of the partnership:

> *Idem*
>
> (7) Subject to subrule (8), where an order is made against a firm, execution to enforce the order may issue against any person who
>
> > (a) entered an appearance in the person's own name in the proceedings as a partner,
> >
> > (b) having been served with the originating process as a partner, failed to enter an appearance in the proceeding,
> >
> > (c) admitted in a pleading or affidavit that the person is a partner, or
> >
> > (d) was adjudged to be a partner.

The substantive obligations of partners, as set out in Sections 7, 11 and 12 of the *Partnership Act*, R.S.B.C. 1996, c. 348, are as follows:

> *Liability of partners*
>
> 7 (1) A partner is an agent of the firm and the other partners for the purpose of the business of the partnership.

(2) The acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member bind the firm and his or her partners, unless

(a) the partner so acting has in fact no authority to act for the firm in the particular matter, and

(b) the person with whom he or she is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.

Liability of partners for firm debts

11 *A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred* while he or she is a partner, and after his or her death his or her estate is also severally liable in a due course of administration for those debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts. (emphasis added)

Liability of firm

12 If, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his or her partners, loss or injury is caused to any person who is not a partner in the firm or any penalty is incurred, the firm is liable for that loss, injury or penalty to the same extent as the partner so acting or omitting to act.

The nature of joint and several liability for the constituent partners of a partnership is summarized in *Lindley & Banks on Partnership* (London: Sweet & Maxwell, 1990) at 13-14 as follows:

D. Extent of Liability In All Cases

A distinct feature of the law of partnership has always been the unlimited liability accepted by partners for the debts and obligations of the firm, as Lord Lindley explained:

By the common law of this country, every member of an ordinary partnership is liable to the utmost farthing of his property for the debts and engagements of the firm. The law, ignoring the firm as anything distinct from the persons composing it, treats the debts and engagements of the firm as the debts and engagements of the partners, and hold each partner liable for them accordingly. Moreover, if judgement is obtained against the firm for a debt owing by it, the judgement creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners; nor is he under any obligation to levy execution against all the partners rateably; but he may select one or more of them and levy execution upon him or them until the judgement is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves.

Similarly, a joint venture can result in the attribution of legal responsibility notwithstanding a joint venture participant did not cause any harm. If two or more persons constitute a joint venture and one of the joint venture participants engages in careless behaviour that creates loss or damage to a third party then all of the joint venture participants can potentially bear a vicarious liability. In other words, they are

attributed with legal responsibility for the actions of those that they involved with, notwithstanding they alone did nothing wrong.

The Court of Appeal stated that the limitation on coverage for joint ventures and partnerships does not operate merely to avoid indemnity for a "vicarious liability" or a "joint liability". Even if the constituent partners could be liable individually for their conduct, they lose coverage if it arose by reason of a partnership or joint venture obligation.

That approach is consistent with the approach taken by the Courts in the United States which have examined this issue. U.S. Courts have taken the view that the limitation in the definition of "Insured" applies either to a partner's direct liability, or, merely a "vicarious liability" stemming from an undisclosed partnership. The limitation in coverage uses words directed to excluding the conduct of the partnership itself and its consequences, regardless of the role played by the insured in the partnership or the theory of liability being advanced against the insured in the underlying litigation. (*Associates Metals & Minerals Corp. v. Hartford Accident & Indemnity Co.* 1977 Fire & Casualty Cas. (CCH) 907).

However, that does not extend to any legal liability unrelated to the joint venture or partnership which is not disclosed. For example, assume that a developer built 20 projects over ten years. Only one of those 20 projects was done as a partnership. The fact of the partnership for the one project was not disclosed to the general liability insurer when the risk was bound. Later, there is a fire that occurs on one of the 19 projects which did not involve a partnership arrangement. The underwriter investigates the fire loss and determines, by accident, that one of the other historical projects involved a partnership that was not disclosed at the underwriting stage. That fact does not permit the liability insurer to avoid coverage for the project that had a fire but which was partnership free. The legal liability must flow from an "undisclosed" partnership or joint venture to avoid coverage.

I. MUST NON-DISCLOSURE OF JOINT VENTURE OR PARTNERSHIP MATERIALLY INCREASE RISK BEFORE LIABILITY INSURER WILL BE RELIEVED FROM "DUTY TO DEFEND"?

The imposition of the limitation on coverage, in terms of the underwriting rationale, is to ensure that the underwriter is not confronted with a materially increased risk without the concomitant benefit of either the opportunity to decline the risk posed by the partnership or to increase the premium.

How does a Court determine that the "undisclosed" partnership or joint venture posed an additional risk when the "duty to defend" is dictated solely by the allegations in the Statement of Claim, except to the limited extent it can examine the partnership or joint venture agreement? This is a perfectly valid question, since in some situations the fact

that the liability flows from a partnership or joint venture may not inherently enhance the risk that the liability insurer confronts.

One can pose an example where a partnership may *not* have increased the risk of legal liability. Let's assume two people decide to build a home. One of the partners has all of the money and no time nor skills in construction. The other partner has no money, but lots of time and is skilled in building a home. It is agreed that the "money partner" will pay for all of the building supplies and do nothing more. The partner with lots of time and skill, but no money, does not have to advance a single penny. Instead, he or she will build the entire home. Both partners agree that upon a sale of the home the profits will be split equally.

The home is built and the partners split the profits after paying for all of the building supplies.

One month after construction is completed, a fire occurs in the attic of the home. Subsequent investigation reveals that the partner with the so-called "skill" carelessly wired the electrical apparatus and so doing made a mistake that resulted in electrical arcing, heat buildup and then ignition. In this situation the "deep pockets" partner, who only supplied financing, did not cause or contribute to the carelessness that gave rise to legal liability.

Arguably on one view, it could be said that if that "two-person partnership" was not disclosed to the liability insurer and the underwriter did not know of the so called "skilled tradesman", how can it be said that the inclusion of a "deep pocket" in the circumstances of the loss has increased the moral or physical hazard. Furthermore, how can a Court, on a "duty to defend" issue, which is largely confined to the pleadings, possibly determine whether the inclusion of the "deep pocket" financial partner materially contributed to an enhanced risk, such that the liability insurer can avoid its "duty to defend"?

To overcome the apparent inability of the Court to evaluate whether in fact the risk was materially enhanced by the fact of the "undisclosed" partnership or joint venture, the Court of Appeal stated that a material increase in the risk could be assumed as a matter of law. In so doing the Court chose to not follow some U.S. cases that suggested a liability insurer must demonstrate that what was not disclosed materially enhanced the risk [(*see Scottsdale Insurance Company v. Essex Insurance Company* 98 Cal. App. 4th 86 (Cal. Ct. App. 2002).]

J. THE CONCLUSION OF THE B.C. COURT OF APPEAL ON WHETHER COVERAGE EXISTS FOR AN "UNDISCLOSED" PARTNERSHIP OR JOINT VENTURE THAT GIVES RISE TO A LAWSUIT

The Court stated that in circumstances where an "undisclosed" partnership or joint venture is sued, and where that partnership or joint venture is not specifically enumerated on the declaration page or added by means of a suitable endorsement, there is no coverage as a matter of law if the lawsuit arises from the "undisclosed" activity.

The Court of Appeal concluded its Reasons for Judgment by stating:

> [24] In my view, the allegations made in the underlying lawsuit are in substance allegations "with respect to the conduct of" the [partnership] within the meaning of the "No person" clause. … My conclusion in this regard is consistent with that reached in various U.S. cases to which we were referred, notably, *Associated Metals and Minerals Corporation v. Hartford Accident and Indemnity Company*, *Fire & Casualty Cas.* 907 (D.C.N.Y., 1977); *Austin P. Keller Construction Company, Inc. v. Commercial Union Insurance Company,* 379 N.W. 2d 533 (Minn. S.C., 1986); *Fireman's Fund Insurance Company v. E.W. Burman, Inc.,* 391 A. 2d 99 (R.I.S.C., 1978); and the holding of the Court in *Geoffrey H. Palmer v. Truck Insurance Exchange,* 78 Cal. Rptr. 2d 389 (Cal. Ct. App., 1998) with respect to the so-called "Truck primary policy" and policies issued by the defendants Continental Casualty Company and American Casualty Company in that case.
>
> …
>
> As I have already found, the allegations in this case did not make such distinction or purport to describe [the partners} in any capacity other than qua partners of the [partnership].
>
> [27] Finally on this point, the appellants referred us to *Maryland Casualty Co. v. Reeder, supra*, and a case which recently followed it, *Scottsdale Insurance Company v. Essex Insurance Company*, 98 Cal. App. 4th 86 (Cal. Ct. App., 2002). Those decisions place an obligation on the insurer to show that their risks were materially increased by the participation of the corporate insured in a partnership that was not a Named Insured. With respect, I do not believe such an approach is justified under Canadian law, which more properly, in my respectful view, focuses on the wording of the policy in question.
>
> [28] I return at last, then, to [the Insured's] submission … that the "No person" clause read in context purports only to clarify who is *not* covered by the policy and does not affect or modify the rest of the definition of "Insured". [The Liability Insurer] makes two arguments in response. First, it says that such an approach makes the "No person" clause superfluous. In [counsel's] words, "There is no need to 'clarify' what is already self-evident, that is, unless a party is a 'Named Insured' or otherwise falls within the extended definition of 'Insured', that party is not an Insured." Second, it is said that [the Insured's] argument overlooks the fact that the "No person" clause applies to any "person or organization" – a broad term that in its face would include almost any Insured or Named Insured. Again to quote from [counsel's] argument on behalf of [the Liability Insurer]:

> In order to give the clause meaning, it must be read as having the application evident on the face of the wording. It is evident from sub-clause (e) of the definition of "Insured" that the term "organization" is of wide import and can include a "partnership". This is further support for the [the Liability Insurer's] position that the impugned clause, given a proper, broad interpretation, operates to remove coverage from both an "Insured" and a "Named Insured" where full and proper disclosure has not been made.
>
> The Intervenor's interpretation fails to acknowledge the overall commercial approach to coverage in [the Liability Insurer's] liability wording. The insuring agreement states coverage is afforded to an "Insured". In the definition section who constitutes an "Insured" is segregated as between a "Named Insured", which is a person or entity that is listed on the declaration page (or by means of a suitable endorsement) supplemented by those additional persons or entities that are treated as "Insureds" by virtue of sub-clauses (a) to (e) in the definition of "Insured". Then having stated that "Insured" includes both "Named Insureds" plus those additional "Insureds" deemed in effect to be an Insured, the penultimate sentence states that:
>
> > "No *person* or *organization* is an "Insured"……
>
> By use of the broad terms "person" and "organization" the policy language necessarily makes clear that neither a "Named Insured" nor someone deemed to be an "Insured" by virtue of subclauses (a) to (e) attracts coverage for any undisclosed partnership or joint venture unless it is specifically enumerated on the declaration page. To accede to the Intervenor's interpretation is to "re-write" the penultimate sentence to instead read:
>
> > "No person or organization, *except an Insured or Named Insured*, is an insured with respect to the conduct or [sic] any current or past partnership…" [Emphasis in original.]

With respect, I agree with these arguments, which are also sufficient in my view to dispel any argument based on the larger principle of repugnancy, illustrated by *Forbes v. Git*, [1922] 1 A.C. 256 (J.C.P.C.), concerning which we sought and received written submissions from counsel.

[29] I am reluctant to give effect to what is really an exclusion clause that was misplaced in the "definitions" section of the policy, but the principles of construction require that effect be given to all words used in a contract, if at all possible and that the plain meaning of the words used should be given effect unless the result would be commercially unreasonable or absurd. In my opinion, the intention of the "No person" clause was to ensure that the insurer would not be bound to defend claims arising from the conduct of a partnership of which it was not aware and which was not therefore also named as an Insured. There was, then, a reasonable commercial purpose for the clause thus construed. The allegations in the underlying action are properly characterized as arising from the conduct of the [partnership], and it was not a Named Insured. In my opinion,

the "No person" clause does operate to qualify the coverage available to [the Insured]. I would dismiss the appeal.

K. PRACTICAL LESSONS TO BE LEARNED FROM *KINGSWAY GENERAL*

This recent decision from the B.C. Court of Appeal is a salutary warning to commercial insureds and brokers of what needs to be undertaken to ensure full and responsive liability insurance coverage for partnership and joint venture activities. Several lessons emerge:

1. If a commercial insured engages in a partnership or joint venture, whether for a particular project, or generally, the broker must ensure that the full details of the partnership are explicitly enumerated either on the declaration page, or, by means of a suitably worded endorsement.

2. Practically, that means that an insurance broker should have, as part of any commercial questionnaire, a specific question directed to any historical partnership or joint venture activity.

3. When we refer to a joint venture or partnership it need not be formally undertaken by means of a written partnership agreement. Insureds that verbally enter into these arrangements or undertake joint activity with others with a view to profit are likely "partners" and need to disclose that fact to the liability underwriter.

4. When a commercial general liability policy needs to be renewed, the issue of any or emerging partnerships or joint ventures should be canvassed with the commercial insured.

5. Keep in mind that even though a partnership or joint venture may be completed or abandoned years ago, subject to the limitation periods that apply, former partners and joint venturers can be sued many years after the partnership or joint venture terminates. There is very little reason to delete a partnership or joint venture from a declaration page or endorsement, unless the insured is satisfied, with legal advice, that it cannot be sued now or in the future.

6. The limitation on coverage operates even if the claimant elects not to sue all of the partners or joint venturers. Your insured could be the only one sued. However, if the basis of the allegations is that he, she or it participated in a joint venture or partnership and that fact was not disclosed and listed in the policy, there is a loss of coverage for this legal liability.

7. If an insured does reveal that it has been involved in historical partnerships or joint ventures or is so currently involved, you need to rationalize the insurance arrangements that are entered into. If three corporate bodies participate in a partnership, it does not make business sense for each of them to gain additional coverage for the partnership. Instead, the decision to buy liability insurance for that partnership should be borne by one of the partners and, in turn, that partner provide proof of liability insurance which can be used in the future.

8. If obtaining liability insurance is entrusted to one partner or joint venture, be mindful that if that entity ceases doing business or does not perform its insurance obligations, then the remaining partners must ensure it is included in their liability policies in the years ahead.

For those interested in reading more about this restriction in coverage on commercial general liability policies you may find the following U.S. and Canadian cases instructive:

1. *Associated Metals & Minerals Corp. v. Hartford Accident & Indem. Co.*, 1977 Fire & Casualty Cas. (CCH) P907

2. *Austin P. Keller Constr. Co. v. Commercial Union Ins. Co.*, 379 N.W. 2d 533 (Minn., 1986)

3. *Fireman's Fund Ins. Co. v. E.W. Burman, Inc.*, 391 A.2d 99 (1978)

4. *Geoffrey H. Palmer et al v. Truck Insurance Exchange et al*., 66 Cal. App. 4th 916; 78 Cal. Rptr. 2d 389

5. *Hardeman v. Commonwealth Lloyds Ins. Co.*, 1999 Tex. App. Lexis 151 (Court of Appeals of Texas)

6. *Maryland Casualty Co.* v. *Reeder*, 221 Cal. App. 3d 961 (1990)

7. *Monenco Ltd. v. Commonwealth Insurance Co.,* [2001] 2 S.C.R. 699

8. *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551