



The Law Society of
Upper Canada | Barreau
du Haut-Canada



CLIENTS' INSURANCE Issues for Real Estate and Business Lawyers

CHAIR

Brian Chu

Bogart Robertson & Chu LLP

October 6, 2016

cpd Continuing
Professional
Development



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CLIENTS' INSURANCE Issues for Real Estate and Business Lawyers

Chair: **Brian Chu**, *Bogart Robertson & Chu LLP*

October 6, 2016

12:00 p.m. – 1:30 p.m.

Total CPD Hours = 1 h 30 m Substantive

WEBCAST ONLY

**The Law Society of Upper Canada
Toronto, ON**

CLE16-0100200



Agenda

12:00 p.m. – 12:05 p.m.

Welcome and Opening Remarks

Brian Chu, Bogart Robertson & Chu LLP

12:05 p.m. – 12:25 p.m.

**Key Insurance Terms, Concepts, Available Insurance
Types and Scope, and Insurance Endorsements**

*Mona Krolak, CIP, CAIB, Partner & Vice President, HUB
International HKMB Limited*

12:25 p.m. – 12:40 p.m.

The Operation of Claims and Payments

Adelaide Marquardt, BA, CIP, Senior Claims Specialist, *HUB International HKMB Limited*

12:40 p.m. – 1:15 p.m.

Insurance Issues in the Context of a Real Estate and Business Law Fact Scenario: The Purchase and Sale of a Retirement Home

Moderator:

Brian Chu, *Bogart Robertson & Chu LLP*

Panelists:

John Atchison, *Gardiner Roberts LLP*

Mona Krolak, CIP, CAIB, Partner & Vice President, *HUB International HKMB Limited*

Adelaide Marquardt, BA, CIP, Senior Claims Specialist, *HUB International HKMB Limited*

1:15 p.m. – 1:30 p.m.

Go Ahead and Ask Us (Question and Answer Session)

1:30 p.m.

Program Ends



CLIENTS' INSURANCE

Issues for Real Estate and Business Lawyers

Thursday, October 6, 2016

SKU CLE16-01002

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Adelaide Marquardt, BA, CIP, Senior Claims Specialist
HUB International Limited

TAB 1



CLIENTS' INSURANCE

Issues for Real Estate and Business Lawyers

Fact Scenario

Brian Chu
Bogart Robertson & Chu LLP

October 6, 2016

Fact Scenario

Clients' Insurance Issues for Real Estate and Business Lawyers
CPD WEBCAST / October 6, 2016

Introduction

The first part of this course covered basic insurance terminology and insurance concepts. We are now going to look at a typical fact situation from an insurance perspective.


Fact Scenario

Acquisition Co. and Vend Co. have entered into an asset agreement of purchase and sale (the "APS") with respect to a seniors residence facility named "Live Well Seniors" and a nursing home called "Golftown Nursing Home" located in Golftown, Ontario. Live Well Seniors has been built on 3.4 acres and has 111 parking spaces. It is composed of a 125 unit retirement residence with 95 retirement home units and 30 memory care units ranging from 1 to four storeys together with landscaping improvements. Golftown Nursing Home 165 unit 3 storey long term care residence with 20 parking spots. While there is a single APS, each of Live Well Seniors and Golftown Nursing Home is situate on its own separate parcel of land that has a registered consent and therefore the Planning Act is not an issue. The two facilities share parking and there are various easements and rights of way in favour of each other in perpetuity that were established in compliance with the Planning Act. The laundry facilities are located in Live Well Seniors and the staff of Golftown Nursing Home access and use the laundry facilities pursuant to a combination of easements and a licence.

The relevant points of the APS are as follows:

- The overall purchase price is \$73 million allocated \$48 million to Live Well Seniors and \$25 million to Golftown Nursing Home.
- Acquisition Co. has a 60 day due diligence period.
- Closing is the 30th day following waiver of the due diligence condition.
- While the intention is for Acquisition Co. to acquire both Live Well Seniors and Golftown Nursing Home concurrently, the APS has a provision in favour of Acquisition Co. that allows it to close on only one of the facilities if it is not satisfied with its due diligence on the other.
- Vend Co. shall maintain all insurance up to closing and on closing Acquisition Co. Shall assume all risks and shall put in place its own insurance coverages.

- Acquisition Co. has arranged first mortgage financing of \$54,750 representing 75% loan to value. If Acquisition Co. chooses to close on only one facility, such financing can be closed on a 75% loan to value basis based on the value of the acquired facility.



CLIENTS' INSURANCE

Issues for Real Estate and Business Lawyers

Sale and Purchase of a Retirement Home – Insurance Summary

Mona Krolak, CIP, CAIB, Partner & Vice President
Adelaide Marquardt, BA, CIP, Senior Claims Specialist
HUB International Limited

October 6, 2016

SALE AND PURCHASE OF A RETIREMENT HOME – INSURANCE SUMMARY

Insurance available to Retirement Home Risks

Similar to other businesses, owners of Retirement homes will generally choose to transfer risk to an insurance company. There are risks unique to this industry which must be considered. Typically, coverage placed will include:

Property;

Policy covers all risks of physical damage and business interruption subject to the conditions and exclusions as set out the policy wording, including:

- Valuation – replacement Cost
- Boiler and Machinery
- Stated Amount Co-Insurance Clause
- Newly acquired location covered for up to 120 days
- Vacancy permission for up to 60 days
- Demolition and Increased Cost of Construction
- Consequential Loss
- Property of Tenants

Business Interruption;

- Business Income, Rental Income, Profits & Extra Expense, also including;
- Extended Period of Indemnity, Gross Profits – 18 or 24 months, as declared
- Ordinary Payroll – 180 Days
- Civil Authority – 30 Days
- Off-Premises Service Interruption
- Contingent Business Interruption
- Infectious Diseases
- Mass Evacuation

Crime;

- Employee Dishonesty
- Third Party Employee Dishonest
- Forgery or Alteration
- On Premises Theft
- In Transit Theft
- Money Orders, Counterfeit Paper
- Computer Fraud, Funds Transfer Fraud

- Credit Card Coverage
- Auditor's Fees
- Resident Trust Fund

Cyber Liability;

- Cyber & Privacy
- Privacy Breach Notification Costs
- Cyber Crime
- Multimedia Liability and Advertising Injury
- Court Attendance Costs
- Crisis Communication Costs

Commercial General Liability, including;

- Bodily Injury and Property Damage
- Professional Liability (Medical Malpractice)
- Miscellaneous Professional Liability
- Abuse Liability
- Legal Expense
- Sudden and Accidental Pollution Liability
- Institution Counseling Services Liability
- Non-Owned Automobile
- Volunteers insured as employees
- Employment Practices Liability

Rational for each coverage section:

Property: Written under a Property of Every Description wording, this coverage is designed to protect the facility's building, equipment, stock for one amount. This eliminates any restriction of an individual limit for each building, stock, equipment, leasehold improvements, office contents, customers' goods and electric data processing equipment.

Boiler and Machinery: The policy protects the facility in the event of mechanical equipment failure or direct damage to the insured objects. Insurable objects include boilers, other pressure vessels, refrigeration equipment, electrical apparatus, and air conditioning systems.

Business Interruption: will replace the lost revenue and provide funds to meet continued expenses for standing charges. A Business Income form, which encompasses various situations; e.g., loss of income, extra expense, loss of rental income etc. Coverage can be expanded to add in infectious disease and mass evacuation to address the risk specific exposure.

Crime: provides coverage against loss due to employee dishonesty, money and securities, depositor's forgery and counterfeit paper. We have also included third party employee dishonesty to address the employee theft against resident scenario, trust fund coverage to address this unique risk. Auditor's fees are covered over and above limits provided, as forensic accounting is expensive and if not covered on a stand-alone basis quickly deplete limits insured. Electronic fraud coverage is added to address electronic theft of funds.

Commercial General Liability: covers the insured's legal liability for bodily injuries or damage to property of others;

Professional Liability for entity and professional errors and omissions (Med Mal), physicians excluded;

Limited Pollution Liability to address pollution incidents which occur without warning and are unintended;

Liquor liability to protect the facility for loss that occurs as a result of serving alcohol;

Counseling Liability to address losses arising out of wrongful acts;

Directors and Officers Liability: for professional errors and omissions of officers and management, including Employment Practices Liability to address claims such wrongful dismissal, harassment and discrimination.

Risk specific coverage explained:

Professional Liability: The policy is extended to include coverage for all sums which the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" that arises out of a "medical incident" in the operation of the Insured's resident health care facility. This Medical Malpractice for the facility and all licensed professions, with the exception of doctors.

Pollution Coverage Extension – 120 Hours: Insurer will pay those sums that the Insured becomes legally obligated to pay because of "bodily injury", "property damage", or "personal and advertising injury" in respect of a spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of "pollutants".

Institution Counseling Services: The policy is extended to pay those sums that the Insured becomes legally liable to pay as damages from a "wrongful act" resulting from "counseling services", including religious counseling.

Legal Expense: Insurer agrees to reimburse the Insured for "legal expense" incurred by the Insured arising from any hearing alleging "professional misconduct", or in defense of an "action" instituted against the Insured by a "Provincial Regulatory Board" governing the operations of the Insured's facility, or a legally constituted tribunal.

Consequential Loss: extends to include consequential loss or damage to property such as food or medication, caused directly by change of temperature or humidity resulting directly from damage by a peril insured.

Property of Tenants: extends to property of each resident or apartment, while such property is in the facility's care, custody, or control when damaged by a peril insured.

Civil Authority: If the Insured is denied access to the insured premises by a Government authority, due to damage to other property nearby, the Insurer will cover the Insured's loss of business income for up to four weeks.

Infectious Diseases: Insurer will pay for loss of business income arising from the inability to accept new bookings resulting from an order by Civil Authority which denies access to the Insured's premises due to the presence of any of the following, originating or emanating from "property insured":

- A noticeable human contagious or infectious disease including viral or bacterial infections;
- Food or drink poisoning;
- An infestation of vermin or pests;
- Defective sanitation.

Mass Evacuation: Covers for the reasonable expenses that the Insured incurs in the "emergency" vacating of the Insured's facility.

Third Party Employee Dishonesty: The Insurer will pay for loss of or damage to "money", "securities" and "other property", excluding any Resident Trust Fund, sustained by the resident, resulting directly from "theft" committed by an identified "employee", acting alone or in collusion with other person;

Resident Trust Fund: The Insurer will pay for loss of or damage to "money" and "securities" sustained by the Insured's "client" resulting directly from "theft" or Resident Trust Funds committed by an identified "employee" acting alone or in collusion with other persons.

THE OPERATION OF CLAIMS AND PAYMENTS:

1. Reporting a claim
2. Time Limitations
3. Repairs process
4. Claims process when there is a Sale and Purchase agreement in place – example wording:

Risk of Loss

From the date hereof up to the Time of Closing, the Purchased Assets shall be and remain at the risk of the Vendor.

(a) If, prior to the Time of Closing any Purchased Assets are destroyed or damaged by fire or any other casualty (collectively "Damage") or shall be appropriated, expropriated or seized by a Governmental Authority and the cost to rectify such damage or the compensation to be paid for expropriation or seizure of the Premises (such estimate being hereinafter referred to as the "Estimated Rectification Costs") is estimated to cost _____ Dollars or less (the "Maximum Amount"), the Purchaser shall complete the purchase in accordance with the terms and conditions hereof, provided that the Purchaser shall be entitled to an abatement in the Purchase Price equal to the Estimated Rectification Costs.

(b) If the cost to rectify the Damage or the compensation to be paid for any expropriation or seizure is in excess of \$_____, the Purchaser shall have the option, exercisable by notice in writing given within 10 Business Days of the Purchaser receiving notice in writing from the Vendor of such Damage, expropriation or seizure:

(i) to complete the purchase without reduction of the Purchase Price (except with respect to the amount of any deductible applicable to an insurance claim relating to Damage unless the Vendor shall have paid such deductible), in which event all proceeds of any insurance or compensation for expropriation or seizure shall be payable to the Purchaser, all right and claim of the Vendor to any such amounts not paid by the Closing Date shall be assigned to the Purchaser, any amounts on account of repairs or

replacements not covered by the Vendor's insurance shall be credited in favour of the Purchaser on the Statement of Adjustments and any amounts that the Vendor's insurer may refuse to pay resulting from any claim by the insurer of a breach by the Vendor of the conditions of the policy shall be credited to the Purchaser on the Statement of Adjustments. The Vendor agrees to take all actions and steps that may be required to enable the Purchaser to receive the proceeds of the Vendor's insurance (which, if possible, shall be paid directly to the Purchaser); or

(ii) to terminate this Agreement (a notice of such termination being a "Damage Termination Notice").

(c) If the Purchaser delivers a Damage Termination Notice, this Agreement shall terminate, the Deposits (together with all interest earned thereon) shall be returned to the Purchaser, and each party shall be released from all of its liabilities and obligations under this Agreement save for those specified to survive termination.

(d) If the Vendor and the Purchaser do not agree as to whether the loss or damage is in excess of the Maximum Amount and/or the quantum of the Estimated Rectification Costs, the matter shall be determined by an architect mutually agreed on between the Vendor and the Purchaser, each acting reasonably.

Helpful definitions of insurance terms can be found on the following website:

<https://www.irmi.com/online/insurance-glossary/terms.aspx>