CITATION: The Roman Catholic Episcopal Corp v. AXA Insurance Canada, 2016 ONSC 4061
COURT FILE NO.: CV-10-45-OT
08-CV-349174 PD3
DATE: 2016/06/20

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Roman Catholic Episcopal Corporation of the Diocese of London in Ontario (Plaintiff)

AND:

AXA Insurance Canada (Defendant)

BEFORE: Justice R. M. Raikes

COUNSEL: John K. Downing, for the plaintiff
Kelly Tranquilli, for the defendant

HEARD: March 23, 2016

ENDORSEMENT

Overview

[1] The Plaintiff moves to strike the jury notice served by the Defendant pursuant to s. 108(2) of the *Courts of Justice Act ("CJA")*. That section mandates that an action shall be tried without a jury for claims for, *inter alia*, specific performance of a contract (item 9), declaratory relief (item 10) and other equitable relief (item 11).

[2] In addition, the Plaintiff asserts that the court should exercise its discretion under s. 108(3) of the *CJA* to strike a jury notice where the dispute focuses on questions of law or mixed fact and law which is the case here.

[3] The Defendant argues that this determination at this stage of the proceeding is premature; it should be left to the trial judge. It also argues that some of the issues raised in the action are determinable by a jury and, as such, striking the jury notice is inappropriate. Finally, it asserts that at its core, this is a contract claim which can and should be determined by a jury.

The Pleadings

[4] This action was commenced on February 19, 2008. The Statement of Claim has been amended since issuance and the current pleading is a Fresh as Amended Statement of Claim delivered November 3, 2009.

[5] The Defendant, AXA Insurance Canada (hereafter "AXA"), delivered a Jury Notice when it served its original Statement of Defence and Counterclaim on November 10, 2008. The Defendant has since delivered a Fresh as Amended Statement of Defence and Counterclaim dated May 10, 2010.

[6] The Plaintiff, Diocese of London (hereafter "Diocese"), seeks, *inter alia*, the following relief in para. 1 of its pleading:

> a. a declaration that a policy of Comprehensive General Liability Insurance, bearing policy number L563972 (hereafter "the policy"), issued by the Defendant to the Plaintiff was in full force and effect from May 1, 1963 to May 1, 1971;
>
> b. damages for breach of the policy;
>
> c. indemnity for any amounts the Plaintiff has paid, will pay or is required to pay to the plaintiffs in the court actions at Schedule "A";
>
> d. indemnity for any amounts the Plaintiff has paid, will pay or is required to pay to claimants who have not commenced court actions;
>
> e. its costs of defending the court actions in Schedule "A" and handling claims for which no court actions have been commenced;
>
> f. punitive and/or aggravated damages.

[7] Schedule "A" to the Fresh as Amended Statement of Claim lists nine actions commenced by individuals against the Diocese for damages arising from alleged sexual assaults by a priest employed by the Diocese during the term of the policy.

[8] The Diocese alleges that Great American Insurance Company (hereafter "Great American") issued the policy to the Diocese that provided coverage from May 1, 1963 to May 1, 1971 pursuant to which the Diocese's clergy are additional insureds. AXA is the successor company to Great American. The policy provided indemnification for liability for bodily injury claims which included "assault and battery by a person, arising out of or in the course of his duties as an employee" of the Diocese. The policy had liability limits of $1 million exclusive of interest and costs with respect to any one occurrence.

[9] The Fresh as Amended Statement of Claim alleges that sexual assault claims were made by individuals against two priests of the Diocese: Sylvestre and Harper. The actions listed in Schedule "A" are actions brought against the Diocese for sexual assaults by Sylvestre. The Gardiner and Gahlinger actions referred to in the pleading involved sexual assaults by Harper. Notice of each action involving these priests was provided by the Diocese to AXA.

[10] In addition, some claimants have brought claims against Sylvestre and the Diocese that were settled before court proceedings were commenced arising from sexual assaults by Sylvestre which occurred during the term of the policy.

[11] The Diocese alleges that on August 25, 2005, AXA advised the Diocese that it was reserving its rights to deny coverage in respect of the Gardiner action. Defence counsel appointed by AXA attended on the examinations for discovery in that action, after the reservation of rights was made.

[12] With respect to the Gahlinger action, the Diocese alleges that by letter dated December 21, 2004, AXA confirmed that the policy provided coverage for indemnity and defence of that action. Further, the Diocese alleges that counsel for AXA confirmed by letter dated August 25, 2005 that the Gahlinger action was insured under the policy and a mediation in that action took place on May 3, 2006 on the understanding from AXA's counsel that it would make a substantial contribution to any settlement. The Diocese relied on the representations made and entered into an agreement to settle that action. AXA's counsel offered to contribute $166,666.67 to the settlement, which the Diocese accepted; but that payment was never made.

[13] The Diocese alleges that on March 5, 2007, on the eve of mediation in the Gardiner action, AXA denied coverage for the claim. AXA asserted that there had been non-compliance in providing notice of the claim. That action settled at mediation on March 7, 2007 for $707,351. AXA refuses to indemnify the Diocese and pay for the cost of the defence in that action.

[14] By letter dated March 26, 2007, AXA advised the Diocese in respect of the Sylvestre claims that it was treating the policy as void based on misrepresentation and failure to disclose material facts on inception of the policy in 1963.

[15] The Diocese alleges that:

a. it complied with the terms and conditions of the policy throughout;

b. AXA has breached of the terms of the policy by its refusal to pay and contribute to costs;

c. AXA's conduct amounts to bad faith;

d. as a consequence of AXA's breaches of the policy and bad faith, the Diocese has continued to incur defence costs and has paid the cost of defence and settlement of the Gardiner and Gahlinger actions.

[16] In its Fresh as Amended Statement of Defence and Counterclaim, AXA admits only that claims were made against the Diocese involving allegations of sexual assault by the named priests in those actions. It denies virtually every other allegation made by the Diocese including the alleged reservation of rights letter and email sent by counsel for AXA in respect of the Gardiner mediation and settlement.

[17] AXA alleges that:

a. AXA is the successor in interest to the obligations of Great American which provided insurance coverage under the policy to various institutions in the Province of Ontario, including the Diocese of Sault Ste. Marie;
b. AXA's predecessor was involved in an action with the Diocese of Sault Ste. Marie in which its predecessor denied coverage to that Diocese in a case involving a plaintiff who alleged the Diocese of Sault Ste. Marie was liable for assaults and sexual assaults committed by one of its priests. In that litigation, the trial judge found in 2000 that the policy provided coverage for sexual assaults and, in particular, that Great American could have enumerated exclusions that would have included the conduct complained of, i.e. sexual assault, but did not. The trial decision was upheld by the Court of Appeal;
c. following that decision, AXA and its predecessors contributed to the defence and indemnification of sexual assault claims advanced against other Roman Catholic Dioceses within Ontario, including the Diocese of London who claimed to be insured under an identical policy;
d. although there is some evidence to suggest that the Diocese may have been insured by Great American, no policy of insurance has ever been located for any diocese other than the Diocese of Sault Ste. Marie;
e. it is unknown whether any policy of insurance was provided by Great American to the Diocese of London and, if so, whether that policy contained the same coverage and exclusions. Likewise, the duration of the policy and the identity of persons insured under the policy are unknown. The Diocese in this action is put to the strict proof of same;
f. in 2006, the Diocese publicly disclosed documentation in its possession since 1962, i.e. prior to issuance of the policy, which showed that Sylvestre had been investigated by Sarnia police following complaints made that he had sexually assaulted a number of children within his parish;
g. the Diocese subsequently acknowledged that these allegations and police investigations came to attention of officials within the Diocese in January, 1962;

h. similar allegations of sexual assault made by children against Harper were reported to officials at the Diocese in 1964 and were known to the Bishop who directed that Harper receive psychiatric treatment. There are a number of actions involving Harper;
i. the Diocese dealt with the allegations of sexual assault by these priests in secrecy as required by Canon Law;
j. the sexual assaults by Sylvestre and Harper, and the subsequent placement of these priests into positions of trust and authority in relation to children was information material to the risk allegedly insured by Great American;
k. the Diocese failed to disclose that information to Great American at the time the Diocese allegedly applied for and obtained insurance coverage and renewals;
l. the Diocese made material misrepresentations and/or failed to disclose material facts at the time of its application for coverage and for renewals of coverage;
m. if the Diocese had disclosed the information it had concerning Sylvestre and Harper, Great American would have refused to provide a policy of insurance or any renewal, would have refused to insure against liability arising from assault and battery, would have included appropriate exclusions, and/or would have increased the quantum of the premium charged given that this information dramatically affected the risk;
n. any policy that might have been issued to the Diocese by Great American is void *ab initio* as a result of material misrepresentation and/or non-disclosure.

[18] With respect to the Gahlinger claim specifically, AXA denies that it confirmed coverage or made any representation that it would contribute towards settlement of that action. In any event, if such representations were made, they were made before AXA or its predecessors learned of the documentation and information in the Diocese's possession showing that the Diocese had made material misrepresentations and non-disclosure.

[19] By way of counterclaim, AXA repeats and adopts the allegations from its statement of defence summarized above, and claims, *inter alia*, the following:

a. a declaration that any policy of insurance that might have been provided by Great American to the Diocese is void *ab initio* as a result of the Diocese's breach of the duty of utmost good faith, non-disclosure and misrepresentation; and,
b. restitution of all sums paid by AXA and its predecessors to the Diocese to defend and indemnify the Diocese pursuant to the alleged Great American policy, which amount is estimated to date to be in the amount of $10 million.

[20] I observe at this point that the policy on which the Diocese's claim is based bears the same policy number as that in the Diocese of Sault Ste. Marie litigation referred to in the

Fresh as Amended Statement of Defence and Counterclaim. It would appear to be the same policy, not a separate and distinct policy issued to the Diocese of London as AXA's pleading suggests.

Law

[21] S. 108(2) and (3) of the *CJA* state:

> "(2) The issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for any of the following kinds of relief:
>
> 1. Injunction or mandatory order.
> 2. Partition or sale of real property.
> 3. Relief in proceedings referred to in the Schedule to section 21.8.
> 4. Dissolution of a partnership or taking of partnership or other accounts.
> 5. Foreclosure or redemption of a mortgage.
> 6. Sale and distribution of the proceeds of property subject to any lien or charge.
> 7. Execution of a trust.
> 8. Rectification, setting aside or cancellation of a deed or other written instrument.
> 9. Specific performance of a contract.
> 10. Declaratory relief.
> 11. Other equitable relief.
> 12. Relief against a municipality.
>
> (3) On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury."

a. Declaratory and other Equitable Relief

[22] Where a party moves to strike the jury notice on the basis that the claim seeks declaratory relief, the court must go beyond the mere form of the prayer for relief to ascertain whether the claim is in pith and substance a claim for declaratory relief: *Pires v. Hermenegildo*, 2006 CanLII 34280 (ON SC) at para. 2; *Harrison v. Antonopoulos*, 2002 CanLII 28725 (ON SC) at para. 13.

[23] A declaratory judgment is "a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs": *MacNeil (Litigation Guardian of) v. Bryan*, 2009 CarswellOnt 3207 at para. 19 citing from *The Declaratory Judgment*, 3rd edition,

(London: Sweet & Maxwell, 2002) by Lord Woolf and Jeremy Woolf. It is important to distinguish between a mere declaration of fact and declaratory relief. The factual determination that two parties contracted may be a "precursor to the issue but it is different from the legal status of the agreement": *Thibault v. Empire Life Insurance Co.*, 2012 ONSC 1723 at para. 11.

[24] If the claim is found to be in pith and substance a claim for declaratory relief, there is no discretion to permit the action to proceed to trial by jury; s. 108(2) of the *CJA* contains mandatory language prohibiting trial by jury. That determination is made by reference to the pleadings which define the facts and matters in issue in the litigation.

[25] The same approach applies to a determination of whether the claim seeks specific performance or other equitable relief. The court does not stop at a consideration of the prayer for relief but must consider the claim as a whole to determine whether in pith and substance the claim is one for specific performance or other equitable relief.

b. Discretion to Strike Jury Notice

[26] The right to a trial by jury in civil actions is provided for in s. 108(1) of the *CJA* and has been held to be a substantive right which should not be taken away except for cogent reasons: *Cowles v. Balac*, 2006 CanLII 34916 (ON CA), leave to appeal to S.C.C. refused, at paras. 52 and 145; *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.*, 2002 CanLII 45019 (ON CA) at para. 52.

[27] In *Kempf v. Nguyen*, 2015 ONCA 114 at para. 42, Epstein J. wrote:

> "In the majority reasons in *Cowles v. Balac* [*supra*]… O'Connor A.C.J.O. set out a comprehensive list of principles governing striking out a jury notice and appellate review of such a decision, as paraphrased here:
>
> 1. The right to a jury trial in a civil case is a substantial right and should not be interfered with without just cause or cogent reasons (at para. 36). See also *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, at p. 533: "the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons".
> 2. A party moving to strike the jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence or in the conduct of the trial, that merit the discharge of the jury. The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury (at para. 37).
> 3. Appellate review of a trial court's exercise of its discretion to dispense with a jury is limited. The reviewing court can only intervene if the appellant can show that the discretion was exercised arbitrarily or capriciously or was based on a wrong or inapplicable principle of law (at

para. 40). See also *Kostopoulos v. Jesshope* (1985), 50 O.R. (2d) 54 (C.A.), at p. 69, leave to appeal to S.C.C. refused, [1985] S.C.C.A. No. 93. Put another way, the appellate court should inquire into whether there was a reasonable basis for the trial judge's exercise of discretion. If not, the trial judge will have made a reversible error (at para. 52).

4. The reviewing court should not interfere with the trial judge's exercise of discretion simply because it disagrees with the conclusion reached. Put another way, an appeal court should not merely pay lip service to the concept of deference and then proceed to substitute its own view as to what the proper result should be (at para. 42). In many situations, the trial judge's discretion may, with equal propriety, be exercised for or against discharging the jury (at para. 91). See also *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (C.A.), at p. 625.
5. The complexity of a case is a proper consideration in determining whether a jury notice should be struck. Complexity relates not only to the facts and the evidence, but also to the legal principles that apply to the case. Where one draws the line as to when a particular case would be better heard by a judge sitting alone is far from an exact science (at paras. 48-49).
6. While it is true that juries decide very long and complex criminal matters, the comparison is not particularly helpful. Accused persons in criminal trials have an absolute right to be tried by a jury when charged with specified offenses, even if the judge is of the view that a jury trial is not the best way to achieve justice. The same is not true for civil cases (at para. 58).
7. It is a reversible error for a trial judge to strike a jury notice on the basis that it would be difficult for her to explain the law to the jury. Trial judges are presumed to know the law and to be able to explain it to a jury (at para. 63). See also *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty* [*supra*] at para. 70.
8. In some cases, it is preferable to take a "wait and see" approach before deciding whether to discharge the jury. Experience has shown that in many instances the anticipated complexities of a case or other concerns do not materialize or at least not to the extent originally asserted. By "waiting and seeing", courts are better able to protect the substantial right of the party who wants a jury trial and to only dismiss the jury when it becomes necessary (at para. 70).
9. While in many cases the "wait and see" approach is the most prudent course to follow, it is not a rule of law. The *Courts of Justice Act* and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, contemplate that a

judge may strike a jury notice even before a trial has begun (at paras. 71-72).

10. If the reviewing court concludes that the trial judge erred in striking the jury notice, the merits of the action must be considered (at para. 92). As stated in *King*, at p. 533, a new trial is not warranted "if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge."

[28] The court must be careful to distinguish between issues that are factually complex and those that are legally complex. It is an error of law to discharge the jury solely on the ground of legal complexity: *McDonald-Wright v. O'Herlihy*, 2005 CanLII 13806 (ON SC) at para. 26. That the presence of a jury puts an additional burden upon counsel and the trial judge is not a basis to strike the jury "unless it is probable that even with a reasonable amount of additional time the jury "cannot reasonably be expected to be able to follow the evidence properly or to apply the Judge's charge properly…"': *Gutbir (Litigation Guardian of) v. University Health Network,* 2010 ONSC 6035 at para. 50; *Campbell v. Singal*, [1999] O.J. No. 566 (H.C.) at para. 14.

[29] Even at trial, the trial judge must be cautious not to discharge the jury prematurely, viz. until he or she hears the evidence and determines that an issue has, in fact, arisen: *Isaacs v. MHG International Ltd.*, [1984] CanLII 1862 (ON CA) at p. 5.

[30] Where the motion to strike is made pursuant to s. 108(3) of the *CJA*, the judge on the motion may and should consider whether to separate issues at trial so that damages and liability issues can be tried separately; one with the jury and one without: *Foniciello v. Bendall*, 2014 ONSC 2204 at paras. 44-52; *Ormerod v. Strathroy Middlesex General Hospital*, 2013 ONSC 1499 at paras. 35-37; *Hunt v. Sutton Group Incentive Realty Co.*, *supra*, at para. 83.

[31] If the issues to be tried are primarily matters of law or matters of mixed fact and law where the legal issues and factual issues that are mixed cannot practically or reasonably be separated by a judge in order to properly instruct a jury, the court may strike the jury notice: *Nassim v. Perth Insurance Company*, 2007 NSSC 391 at paras. 8-9; *Clarke v. McLauchlin*, 2002 CarswellOnt 1610 (S.C.J.) at paras. 26-27; *MacNeil (Litigation Guardian of) v. Bryan*, *supra*, at para. 24.

Analysis

[32] I will deal first with whether the action must be tried without a jury because the claim is in pith and substance one for declaratory relief, specific performance or other equitable relief. I will next consider whether the claim is one which is primarily a determination of a question of law or mixed fact and law where the determinations of fact are inextricably linked to the question of law. It is unnecessary for me to consider whether the jury notice should be struck because of complexity as counsel for the Diocese has clearly stated that that is not a ground relied upon for this motion.

a. S. 108(2) *CJA*

[33] Both the Diocese and AXA seek a declaration in the prayers for relief in the claim and counterclaim, respectively. However, as above, that is merely the start of the inquiry. I must consider the pith and substance of the claim.

[34] I am satisfied that the claim advanced by the Diocese is "in pith and substance" a claim for declaratory relief or other equitable relief. I come to that conclusion for the following reasons:

1. The critical issue to be determined at trial is whether the contract of insurance was in force or was void ab initio. All other relief flows from that determination of "the existence or non-existence of that legal state of affairs";

2. The counterclaim seeks equitable relief and the same facts integral to the counterclaim are essential to the defence of the claim by the Plaintiff; and,

3. The claim asserted by the Plaintiff extends beyond claims by victims presently known to the parties.

[35] The critical issues to be determined at trial are whether there is a contract of insurance and whether that contract is in force during the relevant time period, i.e. the legal status of the contract. All other relief claimed by either party in the claim and counterclaim rises and falls on the determination of the state of the legal relationship between the parties, viz. is there a contract of insurance that provides coverage for liability and defence costs in respect of sexual assaults by priests employed by the Diocese during the claim period?

[36] To succeed at trial, the Diocese must establish, *inter alia*, that:

1. Great American issued a policy of insurance under which the Diocese was an insured;

2. The term of the policy, i.e. the time period covered by the policy;

3. The policy covered liability arising from assault or battery by employees of the Diocese;

4. The claims made against the priests and Diocese fit within the coverage of the policy both as to when they occurred and the nature of the act complained of;

5. The Diocese complied with the terms of the policy which required notice to be given to the insurer when a claim was made;

6. The Diocese acted in reliance upon representations made by counsel for AXA on the Gahlinger action; and,

7. AXA has failed to pay for defence costs and monies payable in respect of those claims that fall within the coverage provided by the policy.

[37] With respect to items one to four, the Plaintiff pleads the very policy that was the subject of the decision finding coverage for the Diocese of Sault Ste. Marie in identical circumstances. It is fundamental to the claim by the Diocese that it establish that the contract of insurance was in full force and effect during the material time period for which the claim is made.

[38] AXA does not deny the existence of the contract of insurance but does not admit same either. It says first that the burden rests on the Plaintiff to prove there was a policy of insurance issued, including the terms of that policy. It takes this position despite having paid out approximately $10 million in claims and defence costs over several years according to its Counterclaim. That seems to me a very weak position and one that may well be resolved by the time of trial, as counsel for AXA suggested. Even if not resolved, it will be but a modest part of the trial.

[39] AXA's principal defence is that if a policy was issued for the time period in question on the terms pleaded by the Diocese, that contract should be declared void *ab initio* for misrepresentation and material non-disclosure. In essence, AXA seeks rescission of the contract and restitution, i.e. return of, the monies which it has already paid out in respect of the very same claims made by the Diocese.

[40] There is no question that the Diocese also seeks significant damages in this action; however, I find that this is more than a mere breach of contract claim. The existence of and entitlement to coverage under the policy lie at the core of the claim. As Justice Howden found in *MacNeil (Litigation Guardian of) v. Bryan*, *supra*, at para. 19, "the fact that (plaintiff) goes on to claim indemnity if the declaratory relief is determined in the plaintiff's favour, does not change the essence of the action."

[41] In *MacNeil (Litigation Guardian of) v. Bryan*, *supra*, the owner of a motor vehicle and her grandson who was driving the vehicle when the collision occurred commenced a third party claim against their insurer seeking a declaration with respect to the validity of the policy as well is their entitlement to a defence. The insurer alleged that the claim was essentially a breach of contract case due to the insured's failure to disclose a material change in the risk and the insured's claim for indemnity to the limits of the policy. This bears remarkable similarity to the facts in this case. Justice Howden wrote:

> "19. …Validity in law of the insurance policy is the key issue in this case and that is one involving the existence or nonexistence of a legal state of affairs.
>
> 20. …the essence of the relief requested in this case is not a declaration of fact for the purpose of obtaining coercive relief.

> 21. In my view, for the reasons I have given, this case involves, in pith and substance, declaratory relief which is not to be determined by a jury pursuant to section 108 of the *Courts of Justice Act*."

[42] Other cases where the validity of the insurance policy was the focus of the relief sought have come to the same result: see *Clarke v. McLauchlin*, *supra*, and *Thibault v. Empire Life Insurance Co.*, *supra*.

[43] In this case, the principal defence advanced by AXA is inextricably linked to the declaratory relief claimed in its counterclaim – that the contract of insurance is void *ab initio*. Like the declaration sought by the Diocese, the declaration claimed by AXA is one which asks the court to pronounce upon "the existence or non-existence of a legal state of affairs". Further, I find that the declaration sought by AXA amounts to a claim for rescission which is itself an equitable remedy that invokes item 11 of s. 108(2) of the CJA.

[44] AXA also seeks restitution, an equitable remedy, in its counterclaim. The defence advanced by AXA relies on the same facts and determinations necessary to found the equitable claims made in its counterclaim. Thus, both the claim and counterclaim are deeply infused with issues inextricably linked to the equitable relief sought by each party.

[45] In addition, the claim made by the Diocese is not restricted to sexual assaults by priests in its employ for which litigation was commenced, or for which claims were brought to the attention of the Diocese and settled before litigation was commenced. The Diocese seeks a declaration that will bind AXA to provide coverage under the policy in the event further claims come forward for sexual assaults that occurred during the coverage period. In other words, the Diocese's claim in this action extends beyond the known claims made by individuals to date. It encompasses future claims which counsel for the Diocese asserts are inevitable.

[46] Counsel for the Diocese also submits that the claim advanced by the Diocese is in essence a claim for specific performance even though there is no reference to specific performance in the prayer for relief. He argues that the thrust of the Plaintiff's claim is to compel performance of the insurance contract both as to past and future covered occurrences.

[47] Specific performance is an equitable remedy. When used in its traditional sense, it is a remedy by which the court compels a person to perform a contractual obligation. At first blush, the claim by the Diocese has overtones of compelling AXA to fulfil its obligations under the policy. However, the remedy of specific performance involves the exercise of discretion and typically, is not appropriate where another remedy, including damages, will suffice. In this case, the claim for declaratory relief accomplishes the same purpose and renders the suggestion that the claim is one for specific performance superfluous.

[48] I conclude that the claim by the Diocese and the counterclaim by AXA both seek declaratory relief and/or other equitable relief. Accordingly, the trial of this action must proceed without a jury and the jury notice is struck.

Question of Law/Mixed Fact and Law

[49] I would not at this stage strike the jury notice but for my finding above that the claim and counterclaim fall within the prohibition in section 108(2) of the CJA.

[50] The Diocese asserts that the determination of whether there has been material non-disclosure or misrepresentation by the Diocese which would entitle the insurer to void the contract of insurance requires a detailed consideration of underwriting rules, general industry standards and the practice of the company involved at the time- all matters which can and should be done by a judge alone. In that regard, the Diocese relies upon paras. 22-23 in *MacNeil (Litigation Guardian of) v. Bryan*, *supra*.

[51] I am mindful of the admonition of the Court of Appeal that the substantive right to a jury trial in a civil action should not be taken away prematurely. At this stage, there is no evidence before me as to what the evidence at trial might be with respect to the underwriting rules, industry practices or the practices of Great American at the time the policy was put in place and was in effect. I also cannot determine on the pleadings alone that the issue is purely a legal one or a question of mixed fact and law where the factual determinations are inextricably tied up in the question of law.

[52] But for my conclusion under section 108(2) above, I would decline the Diocese's motion without prejudice to the right to move later to strike the jury notice either shortly before or at trial when the issue and evidence would be better defined.

Conclusion

[53] I conclude that the jury notice in this action shall be struck. If the parties cannot agree upon costs of the motion, they may make written submissions not exceeding three pages within 15 days hereof.

"Justice R. M. Raikes"

Justice R. M. Raikes

Date: June 20, 2016