WeirFoulds LLP

Keys, Please: The Econolodge Park-and-Fly Conundrum

November 20, 2018

By Marie-Pier Nadeau

On October 19, 2018, the Supreme Court of Canada released its decision in *3091 5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43. The decision mostly focused on the "care, custody and control" exclusion, but is also of interest for insurers wishing to pursue subrogation for theft of vehicles while in the care of others.

The Econolodge, a park-and-fly hotel, offered its guests accommodation, parking and a shuttle service to the Montreal airport. Guests were required to leave their car keys with the Econolodge in the winter, in the event the cars had to be moved for snow removal activities. Two guests had their cars stolen while they were abroad, during the winters of 2005 and 2006. The Econolodge was unaware of the thefts until the guests reported it, and the keys were still in the Econolodge's possession, for both cars. Their insurers compensated the car owners for their losses, and subrogated against the Econolodge. The Econolodge's liability insurer, Lombard, was also sued directly by one of the insurers and by the Econolodge itself for coverage. Lombard denied coverage on the ground of a standard care, custody or control exclusion clause, which excluded coverage for property in the custody, care and control of the Econolodge.

One of the main issues at trial was whether the contract was one for services (2098 CCQ) or one of deposit (2098 CCQ). In a contract for services, the provider of services is bound to act in the best interest of the client, with prudence and diligence. Negligence – a departure from the conduct of a prudent and diligent person – must be established by the plaintiff. In a contract of deposit, the depositor is bound to return the property. If the deposit is onerous, then the depositor is liable for the loss of the property unless he proves *force majeure*. This is a situation of strict liability against the depositor.

The trial judge[1] concluded that the contract was predominantly one for services. The main element of the contract was the hotel room rental. The parking services for the vehicle was only an accessory of the contract. Despite the higher burden of proof that then had to be met by the plaintiffs, the trial judge held that the Econolodge was liable for both thefts. The trial judge noted that the Econolodge heavily advertised its park-and-fly service, and as such, the guests were entitled to believe that the Econolodge had implemented reasonable security measures for its parking lot. However, in reality, the Econolodge did not have any security measures in place, and did not even monitor the parking lot.

Regarding coverage, the trial judge refused to apply the exclusion. Lombard accepted the risk, that of a park-and-fly hotel. The Econolodge did not have care, custody and control of the vehicles on its parking lot – it only requested the keys during the winter, and would only move the vehicles if it had to, for snow removal activities. The trial judge noted that Lombard would not have been able to rely on the exclusion during the summer months. To apply the exclusion during the winter months would create an absurd result.

The Court of Appeal[2] confirmed the trial judge's decision on liability, agreeing with the trial judge's finding of negligence on the Econolodge part: "Econolodge's fault is that it has led its customers to believe that security measures were in place when this was not the case."[3] The Court of Appeal however reversed the decision regarding coverage. In the Court of Appeal's view, since the hotel had the keys, it had the care, control and custody of the vehicles.

In a unanimous decision, the Supreme Court of Canada[4] restored the trial judge's decision on all issues. It confirmed that the characterization of the contract as one for services was appropriate. The finding of liability on the Econolodge's part was one of mixed fact and law that was entitled to deference on appeal. The trial judge's finding on the issue of the custody of the stolen vehicles was, too, entitled to deference. Writing for the majority, Justice Gascon noted:

"Here, there is no doubt that the handover of keys is a relevant fact in determining custody of the property, since the keys provide access to the vehicle (…). Nevertheless, I cannot accept Lombard's argument that custody is transferred automatically when the keys to a vehicle are handed over. Such an absolute rule is inconsistent with the highly contextual nature of the determination of custody and with the principles developed in the case law. (…) To determine whether there has been a transfer of custody and thus control of property, a court must consider all the circumstances, including the reason for any handover of keys. This is precisely what the trial judge did in the instant cases."[5]

Justice Gascon also agreed with the trial judge that Lombard's own interpretation of the exclusion would lead to absurd results:

"(…) I agree with the trial judge that Lombard's argument leads to results that are incongruous, if not absurd. In the Court of Québec, Lombard's senior analyst conceded that the exclusion clause was inapplicable in the summer, since Éconolodge did not have the keys to parked vehicles in its possession during that time. In short, in the same year of coverage, the applicability of the exclusion clause would depend on the season or even on the amount of precipitation." [6]

Overall, the Supreme Court of Canada found that the Court of Appeal should not have intervened.

The trial judge's finding of liability on the Econolodge's part, affirmed on appeal, is certainly interesting. Absent any advertisement by the Econolodge, it is quite possible that the lack of security measures of the parking lot would not have been considered negligent. The standard of care was not only assessed based on what another prudent and diligent hotel would have done, but also based on what the guests' expectations would have been, in view of the advertisement.

[1]Axa Assurances inc. c. 3091-5177 Québec inc. (Econolodge Aéroport), 2015 QCCQ 1539.

[2]Compagnie canadienne d'assurances générales Lombard c. Promutuel Portneuf-Champlain, société mutuelle d'assurances générales, 2016 QCCA 1903.

[3]*Ibid* at para. 20 [our translation].

[4]*3091 5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43.

[5]*Ibid* at paras. 40-41.

[6]*Ibid* at para. 55.

For more information or inquiries:

Marie-Pier Nadeau

Toronto
416.947.5055

Email:
mnadeau@weirfoulds.com

Marie-Pier Nadeau is a partner in the Subrogation & Recovery Practice Group at WeirFoulds LLP. Marie-Pier has a thorough understanding of the insurance industry and regularly provides her clients with clear and practical advice.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035