COURT FILE NO.: CV-22-00682355-0000

DATE: 20250714

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Accor Management US Inc. (formerly known as Fairmont Hotels & Resorts (U.S.) Inc.), FRHI Holdings Limited, FRHI Hotels & Resorts (U.S.) LLC, Accor Services US LLC and FRHI Hotels and Resorts S.a.r.l.	)	*Dennis Ong* and *Hovsep Afarian*, for the Applicants
Applicants	)	
– and –	)	
Chubb Insurance Company of Canada	)	*Mark Mandelker* and *Heather Gray* for the Respondent
Respondent	)	
	)	**HEARD at Toronto:** May 22, 2025

REASONS FOR JUDGMENT

J.K. PENMAN J.

Overview

[1] The Applicants, Accor Management US Inc. (formerly known as Fairmont Hotels & Resorts (U.S.) Inc.), FRHI Holdings Limited, FRHI Hotels & Resorts (U.S.) LLC, Accor Services US LLC, and FRHI Hotels & Resorts S.a.r.l. (collectively, “Fairmont”) own and operate a chain of luxury hotels and resorts around the world. In November 2015, this included 26 properties in the United States. Accor Management US Inc. acquired Fairmont in 2015.

[2] Hotels in the United States are subject to various legislation including the *Fair and Accurate Credit Transaction Act* ("FACTA"). Among other requirements, FACTA prohibits businesses from disclosing more than the last five digits of credit card numbers on customers' invoices and restricts the printing of the expiration date of the credit card or debit card.

[3] Fairmont hired Oracle to upgrade its hotel reservation software system to comply with FACTA.

[4] In 2017 Fairmont learned that between November 13, 2015, through November 16, 2017, guests at 13 Fairmont hotels received a printed folio which contained more than the last five digits of the credit card and/or the entire expiration date of the credit or debit card.

[5] Fairmont had an Errors and Omissions ("E&O") policy with Chubb Insurance Company of Canada ("Chubb"), that ran from November 1, 2015, to November 1, 2016. The Policy period was extended to November 1, 2022, when Accor acquired Fairmont in 2015.

[6] A Class Action was brought and ultimately settled by Fairmont for USD $2,000,000. Chubb indemnified Fairmont for the damages paid by Fairmont in connection with the individuals who had received FACTA non-compliant folios between November 13, 2015, and November 1, 2016. Chubb took the position that the funds paid by Fairmont in connection with the persons who received defective folios from Fairmont after November 1, 2016, through to November 16, 2017, were outside the coverage period and therefore not covered by the policy.

[7] Fairmont is now seeking full coverage under the Chubb policy for the damages that Fairmont paid to settle the Class Action lawsuit for liability arising from the faulty contractor-installed software that resulted in the printing of the defective folios.

[8] The question of Fairmont's entitlement to coverage turns on a determination as to what the Wrongful Act was as defined by the 2015-2016 policy.

[9] Fairmont argues that the Wrongful Act under the Policy is the installation of faulty software that led to the printing of defective folios. Fairmont relies on the Related Claims provision of the policy which treats all claims collectively that relate to Wrongful Acts that are logically and causally connected.

[10] Chubb takes the position that the Wrongful Act is the printing of the individual folios not the installation of the faulty software. On this basis, Chubb argues there is no coverage for the defective folios that were printed outside the coverage period, and that Fairmont's interpretation of the Related Claims is not available on a reading of the provision itself.

[11] The issues for me to decide are as follows:

- What is the Wrongful Act?
- Does the Related Claims provision of the Policy provide coverage?

Decision

[12] For the reasons that follow, I am satisfied that the Wrongful Act is the printing of the non-compliant folios by Fairmont, and that the Related Claims provision provides coverage for Fairmont for the printing of the folios that took place between November 13, 2015, and November 16, 2017.

Background Facts

[13] To prepare for FACTA's implementation Fairmont hired Oracle, a third-party contractor to upgrade its hotel reservation software system, Opera Property Management Software ("PMS"), to comply with FACTA. Oracle installed a booking system that among other things allowed for the printing of customer folios.

[14] In 2015-2016, several of the Fairmont hotels upgraded the Opera PMS software.

[15] On or around November 9, 2017, Fairmont learned that the updated version of the software, which masked certain credit card numbers, left the first six digits and final four

digits visible. This was not compliant with FACTA. In total, 13 of Fairmont's properties had installed this updated version of the software prior to November 1, 2016.

[16] The insuring agreement of the 2015-2016 Chubb Policy states that no coverage would be available to the Insured, "…in connection with any claim made against any Insured based on or directly or indirectly arising out of or resulting from any Wrongful Act committed or allegedly committed on or after November 1, 2016".

[17] A Class Action was commenced against Fairmont around November of 2017. The parties agreed to settle on or around October of 2018. A settlement agreement was executed on March 4, 2019, and contained the following terms:

> (a) The "Class Period" was defined as November 13, 2015, through November 16, 2017;
>
> (b) "Settlement Class" means all consumers during the period November 13, 2015, to November 16, 2017, who stayed at a Fairmont Hotels and Resorts location in the United States and received a printed folio which contained more than the last five digits of the credit card or debit card and/or the entire expiration date of the credit or debit card; and
>
> (c) Fairmont agreed to fund a class action settlement in the total amount of USD $2,000,000, to be paid within 10 days of the court entering the final approval order and judgment.

[18] On September 6, 2018, Fairmont notified Chubb of the proposed class proceeding. On October 6, 2018, Chubb wrote Fairmont agreeing to provide coverage for the USD $2,000,000 in damages paid by Fairmont pursuant to the Class Settlement. They took the position, however, that the funds paid by Fairmont in connection with individuals who purchased goods or services from Fairmont between November 1, 2016, and November 16, 2017, would not be covered under the policy.

[19] Fairmont also made a claim to Chubb under a subsequent 2016-2017 policy. Chubb denied coverage under that policy on the basis that Fairmont failed to notify Chubb

of the claim within the policy period of the 2016-2017 policy. That denial is not the subject of this motion/application.

[20] On March 23, 2020, Fairmont and Chubb entered into a Partial Settlement Agreement in which Chubb accepted coverage under the policy for Wrongful Acts committed prior to November 1, 2016. Chubb, however, denied indemnification for damages relating to Wrongful Acts on or after November 1, 2016, and/or for damage incurred on or after November 1, 2016.

[21] On April 14, 2020, Chubb issued payment to Fairmont in the amount of USD $740,691.62 which consists of $54,891.62 in covered expenses, and $685,800 of the $2,000,000 Class Settlement funds paid by Fairmont.

Relevant Policy Provisions

[22] The following are the relevant insurance policy provisions:

The 2015-2016 Policy

[23] Fairmont was insured by Chubb under a Miscellaneous Professional Liability Policy, policy number 8172-9609, for the period November 1, 2015, to November 1, 2016 (the “2015-2016 Policy”).

[24] As a result of various acquisitions, effective November 1, 2016, the 2015-2016 Policy was put into run-off and the policy period extended to November 1, 2022.

[25] The 2015-2016 Policy provides coverage on the following terms, pursuant to Endorsement 13:

> The Company will pay on behalf of the Insured Damages which the Insured shall become legally obligated to pay and DEFENCE Expenses as a result of any Claim first made against the Insured during the Policy Period and reported in writing to the Company during the Policy Period for a Wrongful Act first committed on or after the Retroactive Date stated in ITEM 7 of the Declarations. As part of and subject to the applicable limits of liability, the

> Company shall have the right and duty to defend any such Claim, even if the Claim is groundless.

[26] The 2015-2016 Policy has an exclusion policy which says there is no coverage for any Wrongful Act committed or allegedly committed on or after November 1, 2016:

> No coverage will be available, however, under this Policy for Damages or DEFENCE Expenses in connection with any Claim made against any Insured based on or directly or indirectly arising out of or resulting from any Wrongful Act committed or allegedly committed on or after November 1, 2016.

[27] The 2015-2016 Policy defines Claim to mean, in relevant part:

> (1) […] [A] written demand for monetary damages or non-monetary relief […] that seeks to hold the Insured responsible for a Wrongful Act, actually or allegedly committed by the Insured or by any other person for whose Wrongful Acts the Insured is legally responsible; or
>
> (2) a written request to toll or waive a statute of limitations relating to a potential Claim described in paragraph (1) above.

[28] Insured is defined in the 2015-2016 Policy to mean Fairmont and:

> … any independent contractor of the Insured, but only with respect to Claims arising out of Professional Services done for or at the direction of the Insured, and only if and to the extent that the Insured, after evaluating the merits of the Claim, has agreed in writing to include such independent contractor as an Insured under this Policy.

[29] The 2015-2016 Policy includes the following exclusion F, which reads, in relevant part:

> This Policy shall not apply to any Claim:

(F) based on or directly or indirectly arising out of or resulting from the performance of or failure to perform Professional Services for:

(1) the Insured, or

(2) any entity owned or controlled by any person or entity included within the definition of Insured, or

(3) any person or entity which owns or controls any entity included within the definition of Insured, or

(4) any entity which is under common ownership or control with any entity included within the definition of Insured, or

(5) any entity of which any person included within the definition of Insured is a director, officer, partner or principal shareholder; …

Principles of Contractual Interpretation

[30] The first principle of insurance policy interpretation is that, where the policy is unambiguous, the court should give effect to its clear language, reading the insurance contract as a whole, “giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 57, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 27; *Consolidated-Bathurst Export v. Mutual Boiler*, [1980] 1 S.C.R. 888.

[31] Words used must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law”: *Sebean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 17 at para. 13.

[32] The coverage provisions should be interpreted broadly, and exclusion clauses narrowly: *Progressive Homes Limited v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 at paras. 22-24.

[33] When determining the intent of the parties, the court should also consider the factual matrix and general context surrounding the creation and signing of the agreement. This extends to its genesis, purpose, and the commercial context in which the agreement is made. Interpretations consistent with the reasonable expectations of the parties is preferred, so long as an interpretation can be supported by the text of the policy: *Onex Corp. v. American Home Assurance Co.*, 2013 ONCA 117, 114 O.R. (3d) 161, at paras. 103 and 105; *Lombard* at para. 23.

[34] Courts should not interpret a contract in such a way that no rational commercial actor would agree to it or in a way that would lead to an absurd, unjust, or commercially unreasonable result: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 61.

Analysis

Issue 1: What is the Wrongful Act?

[35] Fairmont argues that the Wrongful Act was the delay in implementing a FACTA compliant system, and the subsequent installation of faulty software which resulted in the printing of non-FACTA compliant folios. Chubb argues that the printing of the individual folios is the Wrongful Act, not the faulty software installation.

[36] There is no question that Fairmont is the insured, and there is no question the policy was triggered. Chubb has already indemnified Fairmont for the damages associated to the printing of the folios that took place within the coverage period. Chubb denied Fairmont coverage for the printing of folios that took place outside the coverage period.

[37] Wrongful Act is defined in the 2015-2016 Policy to mean:

(1) any actual or alleged act, error or omission committed solely in the performance of, or failure to perform Professional Services; and/or

(2) any actual or alleged libel, slander or other form of defamation, or invasion or infringement of the right or privacy, committed solely in the performance of, or failure to perform Professional Services; and/or

(3) any actual or alleged breach of duty, committed solely in the performance of, or failure to perform, Professional Services.

[38] The policy under which Fairmont has coverage is a claims-based policy. Policy provisions must be looked at in the context of the factual matrix of the Claim: *Boliden Ltd. v. Liberty Mutual Insurance Co*., 2008 ONCA 288.

[39] The Claim is described in the Mediation Statement dated May 25, 2018, which served as the pleadings in this case. The Mediation Statement refers to the fact that, “Despite having 15 years to comply with FACTA, Defendant [Fairmont] provided Plaintiff and other customers with printed receipts containing prohibited credit and debit card information in violation of the statute.”

[40] I appreciate that the way the pleadings are framed, the Wrongful Act could be seen to be more than just the individual printing of the folios but the circumstances that led to the printing of the folio starting with the installation of the faulty software. Specifically, that Fairmont delayed in implementing a FACTA compliant system, they hired Oracle who installed faulty software, and Fairmont employees printed and provided guests with non-compliant folios that were generated because of Oracle’s faulty software.

[41] I am not satisfied, however, that this is a proper characterization of the claim. First, there is no claim in connection with the faulty software installation. There must be a claim that holds an Insured responsible for that Insured’s Wrongful Acts or the Wrongful Acts for which the Insured is legally responsible. The violation of FACTA outlined in the mediation brief is that Fairmont printed prohibited credit and debit card information on receipts that it provided to consumers. There is no mention of Oracle and the faulty

software installation in the mediation brief, Oracle is not a party to the FACTA dispute, and at no time did the FACTA dispute seek to hold Oracle responsible for their Wrongful Acts. The claim was about the printing of the electronic receipts.

[42] In addition, while the printing of the defective folios came about because of the faulty Oracle software which was installed and utilized by Fairmont in the management of their hotels, it was only when the defective folios were printed that there was any basis for a claim. Although it may have begun with the delay in taking steps to become FACTA compliant, the Claim is ultimately based on Fairmont's error in allowing non-compliant folios to be printed.

[43] The Claim was triggered by the printing of the defective folios, not the installation of the faulty software. If the folios had not been printed, there would have been no claim. It is not until a folio is printed that there is a Wrongful Act to others.

[44] The Wrongful Act cannot be the installation of the faulty software because Oracle who installed the faulty software, is not an Insured under the policy.

[45] Endorsement 2 reads as follows:

> Any independent contractor of the Insured, but only with respect to Claims arising out of professional services done for or at the direction of the Insured, and only if and to the extent that the Insured, after evaluating the merits of the Claim, ***has agreed in writing to include such independent contractor as an Insured*** under this Policy.

[46] While I accept that Oracle was a third-party contractor hired by Fairmont to supply and install software for the purposes of luxury hotel operation and management, there is no evidence that Fairmont agreed in writing to include Oracle as an independent contractor as an Insured under the policy. This is fatal to coverage for Fairmont on this basis alone.

[47] In addition, a Wrongful Act under the policy is connected to omissions committed solely in the performance of, or failure to perform Professional Services. The 2015-2016

Policy defines Professional Services to mean "only services performed ***for others for a fee***, and which are listed in ITEM 6 of the Declarations." ITEM 6 of the Declarations describes the Insured's services as follows:

> Advising and providing services to hotel owners in connection with planning, designing, construction, furnishing, equipping, marketing, operation, management supervision and direction of full services and luxury hotels and vacation ownership properties.

[48] The professional service at issue here is the printing and providing of folios to guests for a fee. While there is no question Fairmont was providing services "for others" for a fee – the guests, Oracle was providing services to Fairmont.

[49] It is well established that the obligation to establish coverage is on the insured: *Progressive* at para. 29. If the Wrongful Act is the installation of the faulty software by Oracle, this is not a service **"*for others for a fee*"**. Oracle is not an Insured, and was performing services for Fairmont, the Insured, and not others.

[50] On the same basis, if the Wrongful Act is the installation of the faulty software, then there is also no coverage for Fairmont on the basis of Exclusion F. In interpreting exclusions, the onus is on the Insurer to prove that the coverage grant is excluded by the Policy language: see *Peterborough (City) v. General Accident Assurance Co.*, 1998 CanLII 7121 (ONCA).

[51] This is an Errors and Omissions policy designed to provide coverage for Fairmont for claims arising out of professional services provided for others. Exclusion F states that, the policy shall not apply to any Claim based on or directly or indirectly arising out of or resulting from the performance of or failure to perform Professional Services for ***the Insured***.

[52] Fairmont is the Insured. On this theory of coverage, Exclusion F excludes coverage for Fairmont because the faulty software was installed by Oracle ***for Fairmont***, who is the Insured. The faulty software installation was a service that was being provided

to Fairmont, not to guests of the hotel. The import of this provision is that an Insured cannot turn to its own policy when it has made a mistake that affects itself. It must be for others for a fee. A reading of the provision explicitly excludes coverage for Fairmont if the Wrongful Act is the installation of the faulty software.

[53] I also note that in October of 2018 at a time when coverage was being considered, Barbara Kilner from Accor Management wrote to Chubb and advised that they would be putting Oracle on notice of the claim and contacting them for indemnification. If Oracle was an Insured, they would not be entitled to subrogation: *Rochon v. Rochon*, 2015 ONCA 764 at para. 73. Based on the record before me, Oracle was a stranger to the policy.

[54] For the foregoing reasons, I am satisfied that the Wrongful Act is Fairmont's printing of the non-compliant folios.

Does the Related Claims Provision Provide for Coverage?

[55] Chubb denied coverage for Fairmont for the printing of the non-compliant folios that took place outside the coverage period. In my view, however, the "Related Claims" provision provides coverage for the following reasons.

[56] The limits of liability coverage in the policy include defence expenses for "each Claim or Related Claims". The Related Claims provision reads as follows:

> "Related claims", means collectively all Claims involving the same Wrongful Act or Wrongful Acts which are logically or causally connected by reason of any common fact, circumstance, situation, transaction, event or decision.
>
> Date of Related Claims:
>
> Related Claims shall be deemed to have been first made at the earlier of the following times:
>
> i) At the time of the earliest of the Related Claims was first made, or

ii) At the earliest time at which notice was given under any policy of insurance of any act, error, omission, fact, circumstance, situation, transaction, event or decision underlying any of the Related Claims.

[57] Fairmont takes the position that the Wrongful Acts are interrelated, that is to say that the same non-complainant printing of the folios kept occurring albeit on different days. This position was communicated to Chubb in June of 2019. Chubb argued that the term "interrelated" is not defined in the policy as a basis for continuing to deny coverage to Fairmont.

[58] I do not agree with Chubb's interpretation. A synonym of interrelated is connected. Interrelated is the same as connected and is one of the elements of Related Claims as defined in the policy. The printing of the non-compliant folios is the same Wrongful Act in all claims that formed the Class Action.

[59] It is also a matter of common sense. The individual printing of the folios took place in the same circumstances and for the same reason. While they took place at different points in time, the same error repeated itself. The individual printing of the folios shares a common fact, circumstance, situation, element, and transaction.

[60] Chubb argues that Fairmont is seeking to re-write the Related Claims provision, and that the provision does not apply because it refers to multiple, related Claims not multiple Wrongful Acts, and in this case, there is only one Claim. For example, Chubb argues that had there been another Class Action commenced elsewhere in the US, these would reasonably be considered Related Claims.

[61] I am not persuaded by this submission. This was a Class Action which by its very nature is a joining of related Claims and brought by a representative plaintiff. All the Claims of the class members whether from before or after November 1, 2016, arose from the same Wrongful Acts which are logically and causally connected.

[62] The Related Claims provision deems the Claims to have been made at the earlier of Notice being given or when the first Claim was made. In this case notice was given to Fairmont on November 1, 2017, and the threat of the Class Action was reported to Chubb on September 6, 2018. Both of these dates are within the policy period.

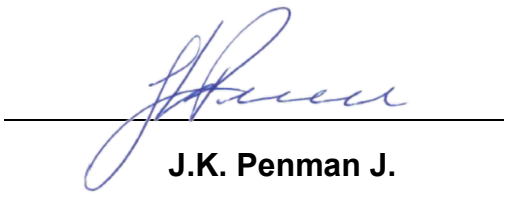
[63] The logically and causally connected Wrongful Acts happen to be aggregated in a Class Action. The Wrongful Acts in my view are deemed back to the earliest of 'the claims (the first instance of printing of a defective folio), which was within the policy period.

[64] In my view on a fair commercial reading of the policy, Fairmont is entitled to coverage for the damages paid because of the settlement of the Class Action. The Class Action was brought on behalf of individual claimants who had been provided with defective folios. It would be commercially absurd that coverage is not granted when it was the same circumstance, event, transaction that occurred over a period of time.

[65] Given my finding that these are Related Claims, coverage is available for Fairmont for the full amount of damages paid to settle the Class Action.

Costs

[66] I would encourage the parties to try to settle costs of the application. If they cannot, the Applicant's may serve and file written cost submissions within 20 days of the release of these Reasons for Judgment followed by the Respondent's written cost submissions within a further 15 days. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.



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