CITATION: Ottawa-Carleton Standard Condominium Corporation 687 v. ING Novex Insurance Company of Canada, 2009 ONCA 904
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COURT OF APPEAL FOR ONTARIO

Weiler, MacPherson and MacFarland JJ.A.

BETWEEN:

Ottawa-Carleton Standard Condominium Corporation 687

Applicant (Respondent in Appeal)

And

ING Novex Insurance Company of Canada

Respondent (Appellant in Appeal)

Steven Stieber, the appellant

K. Scott McLean, for the respondent

Heard: September 24, 2009

On appeal from the judgment of Justice Stanley J. Kershman of the Superior Court of Justice dated April 28, 2009.

MacFarland J.A.:

[1] This is an appeal from the judgment of Kershman J., dated April 28, 2009, declaring that the property section of the all-risk insurance policy ("the Policy") issued by the appellant, ING Novex Insurance Company of Canada ("ING"), to the respondent,

Ottawa-Carleton Standard Condominium Corporation ("Ottawa-Carleton"), covered the cost of replacing the respondent's standpipe system. Kershman J. ordered ING to pay Ottawa-Carleton $600,000, representing the entire replacement cost of the standpipe system.

[2] This is yet another appeal where the issue raised is the interpretation of a policy of insurance and whether a particular loss falls within coverage or does not.

[3] The application judge concluded that:

> The applicant is suing for the damage to the standpipe system itself, which happened to be caused by faulty or improper workmanship or design in conjunction with the water hammer event. Put another way, the applicant is not suing over a badly-installed standpipe system: the applicant is suing for a broken standpipe system. It was the water hammer event that broke the poorly – installed system and that breakage qualifies as "damage resulting from faulty or improper material, workmanship or design."

[4] Based on this finding, he went on to hold that: (i) the Policy covered the cost of replacing the entire standpipe system in the building; (ii) the governing statute does not allow for this type of loss to be excluded from the Policy; and (iii) the appropriate replacement cost is $600,000.

[5] For the reasons that follow I am of the view that the policy in issue does not cover the loss for which the claim is made. I would allow the appeal, set aside the judgment and in its place an order should go dismissing the application with costs.

THE FACTS

[6] The respondent, Ottawa-Carleton, is a 32 storey high-rise condominium corporation located in Ottawa, Ontario. It was created on September 3, 2004 upon the registration of the Declaration and of the description pursuant to the *Condominium Act*, 1998, S.O. 1998, c. 19. On September 24, 2005 the appellant, ING, came on risk and issued its policy of insurance to Ottawa-Carleton.

[7] Ottawa-Carleton owns a fire protection system (FPS), which is used to direct water throughout the building's sprinkler and fire hose systems. In high rises, such as this condominium, large pipes called standpipes or risers are used to bring water to the various floors of the building to supply water to the sprinkler and fire hose systems on each floor.

[8] It is the uncontroverted evidence that Ottawa-Carleton's standpipe system was improperly designed and/or installed. The affidavit of Bertram Blevis, President of the board of directors of Ottawa-Carleton, sworn February 11, 2008 and filed in support of the application, states:

> 6. On or about January 6, 2006, flooding occurred at the Condominium. Although this leak was soon resolved, the Condominium and the Owners suffered damages as a result thereof. *My understanding is that this flooding was caused by improper installation of the standpipes.*
>
> 7. On or about April 7, 2006, a second flooding occurred. On this occasion, one of the pipes or one of the couplings

> failed in one of the Condominium's standpipes on the thirty-second floor. This resulted in significant flooding to the condominium and damages estimated to be $20,000,000. ING has indemnified the greater portion of those losses.
>
> ...
>
> 9. *My understanding is that this flooding was caused by several factors including the following*:
>
> (a) *many of the clamps used to hold the standpipes were not properly secured*;
>
> (b) *the standpipe clamps were found to be incorrectly spaced*;
>
> (c) *some sections of the standpipe were not properly joined together; and*
>
> (d) *the improper support of the standpipes allowed movement of the standpipe structure which caused the pipe or coupling to fail due to a water hammer*. [Emphasis added.]

[9] As indicated in the Blevis affidavit, the direct cause of the flood on April 7, 2006 was a failure in one of the four standpipes on the 32nd floor.

[10] After the flood, Ottawa-Carleton, in the language of Mr. Blevis; "... took the responsible step of replacing the FPS" at a cost of "approximately $600,000" for an entirely new standpipe system. It is that cost which Ottawa-Carleton sought to recover in the application it brought against ING.

[11] In its Notice of Application Ottawa-Carleton sought three orders "declaring the proper interpretation of the Policy in relation to the replacement costs of the applicant's standpipe system":

> (a) an order declaring that, pursuant to the provisions of the policy, all damages incurred relating to the replacement of the applicant's standpipe system are covered under the Property Insurance Section of the policy;
>
> (b) an order declaring that the respondent's denial of coverage on the basis that "the standpipe riser was improperly designed and/or installed", stated by the respondent to be perils excluded under the terms of the policy, is invalid on the grounds that the stated exclusion is not effective pursuant to section 99 of the *Condominium Act*, 1998, S.O. 1998, c. 19, as amended, (the "Act") and cannot be relied on;
>
> (c) an order declaring that the respondent's denial of coverage on the basis that the Equipment Breakdown Rider limits the applicant's indemnification rights is similarly invalid on the grounds that the Equipment Breakdown Rider is not effective pursuant to section 99 of the Act;

[12] Ottawa-Carleton listed among the stated grounds for the application:

> ... the standpipe system of the Corporation failed due to the improper design and/or installation of the standpipe system resulting in significant flooding damages estimated to be valued at $20,000,000.

[13] Ottawa-Carleton sets out in its Notice of Application the position of ING that the cost of repairing or replacing the failed standpipe (to be noted as the singular) does not fall within coverage because the standpipe (again singular form) was improperly

designed and/or installed and this constitutes an excluded peril pursuant to the policy. The exclusion is set out as follows:

> 5. Perils Excluded
>
> This policy does not insure against loss or damages caused directly or indirectly:
>
> (i) by mechanical or electrical breakdown, wear and tear, gradual deterioration, latent defect, inherent vice, or the costs of making good faulty or improper materials, faulty or improper workmanship, faulty or improper design, provided, however to the extent otherwise insured and not otherwise excluded under this Form, resultant damage to the property is insured.

[14] In its materials, Ottawa-Carleton then goes on to cite s. 99(3) of the *Condominium Act* which, it argues has the effect of nullifying the exclusionary clause upon which ING relies. Section 99(3) provides:

> An exclusion in the insurance required by this section is not effective with respect to damage resulting from faulty or improper material, workmanship or design that would be insured, but for the exclusion.

[15] In short, before the application judge, the parties seemed to agree that the Exclusion Clause would normally operate to exempt the loss from indemnification. Ottawa-Carleton argued, however, that s. 99(3) of the *Condominium Act* nullified the Exclusion Clause. The application judge ultimately accepted Ottawa-Carleton's position.

[16] The application judge framed the issues before him as follows:

1) Does the standpipe system trigger coverage under the policy?

2) Is the loss excluded by the Policy's Exclusion Clause?

3) Do the provisions of the *Condominium Act* nullify the Exclusion Clause?

4) Is Ottawa-Carleton entitled to the replacement cost of the damaged standpipe system?

ANALYSIS

I. Does the standpipe system trigger coverage under the Policy:

[17] On the first issue the application judge concluded:

> In my view, the event for which the applicant now seeks indemnification is not the faulty or improper workmanship or design of the standpipe system, but rather the water hammer which, when combined with the aforementioned faulty or improper workmanship or design, precipitated the flood and caused damages to the standpipe system itself as well as the building.

[18] Tellingly, nowhere in the Notice of Application does the respondent allege the cause of the loss was anything other than the faulty design/workmanship of the standpipe

system. Water hammer is not even mentioned in the document. Only in the affidavit of Mr. Blevis is there any mention of water hammer.[1]

[19] It is to be recalled, the purpose of this standpipe system is to carry water up 32 stories to supply the FPS on each of the floors of the building. It goes without saying that that water would be under considerable pressure and that there would be sudden changes from time to time, in that pressure as valves are opened and closed – with the resulting water hammer effect referred to by Mr. Blevis in his affidavit.

[20] In this case the standpipe system was improperly designed and improperly installed at inception. In *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814, the Supreme Court of Canada explained when a loss is properly considered "fortuitous", or within the scope of most all-risk policies. McLachlin J. stated, at p. 822-23:

> It should be sufficient to bring the loss within the risk if it is established that, viewed in the entire context of the case, *the loss is shown to be fortuitous in the sense that it would not have occurred save for the unusual event not ordinarily to be expected in the normal course of things.* [Emphasis added].

[1] The Oxford English Dictionary, defines water hammer as:

> The concussion or sound of concussion of water in a pipe when its flow is suddenly stopped, or when live steam is admitted.

The Oxford English Dictionary, 2d ed., s.v. "water hammer".

[21] There is nothing fortuitous about what occurred on April 7, 2006. The system failed to do what it was designed to do – it failed to keep contained water under pressure and it failed to do so because it was improperly designed and/or installed. Properly designed and installed, the system would have contained the water during the water hammer incident on April 7, 2006. On that date, there was no "unusual event not ordinarily to be expected in the normal course of things", to borrow the language of McLachlin J. in *C.C.R. Fishing*. In short, the water hammer was not a fortuitous event.

[22] The system was so flawed when installed it was not capable of performing its intended purpose and that was the state of affairs when ING went on risk. The policy covers against "ALL RISKS of direct physical loss ...". It does not provide coverage for events which predated the insurer going on risk. The policy is a contract of indemnity and nothing more. It does not warrant the building to be free of damage; rather, it insured against the risk of future damage. The Saskatchewan Court of Appeal put it well in *University of Saskatchewan v. Fireman's Fund Insurance Co. of Canada*, [1998] 5 W.W.R. 276 at para. 35:

> 35. If, as the judge found, the building had already been damaged by the design error when the insurer came on the risk, the building was insured in its damaged state, that is, the subject of the insurance was the building in its damaged state. The insurer, under the terms of the insurance contract did not warrant the building to be free of damage, hidden or otherwise. It insured against the risk of future damage. Another way of stating the same principle is found in *Trinity Industries Ltd. v. Insurance Co. of North America*, 916 F. 2d. 267 (5th Circuit, 1990) at p. 270:

> The language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state ...

[23] In *University of Saskatchewan,* the defective design involved the use of galvanized steel pins (rather than stainless steel pins) to fasten stone panels to the exterior concrete block walls of the university building. Moisture caused the pins to corrode and fail over time. The defect was discovered when one of the stone panels broke away from the building's facade.

[24] The University sought to recover for the cost of repairing/replacing the stone cladding under the terms of an "all-risk" insurance policy. The exclusion clause of the policy listed as excluded perils "inherent vice" and "latent defect[s]", but excepted from those exclusions "damage resulting therefrom" – as does the Policy in this case.

[25] The court concluded that the loss claimed by the University did not fall under the terms of the policy, since both the design flaws (the use of galvanized pins) and the damage flowing from those flaws (the corroded pins and their failure to hold the panels to the building) occurred "before the insurer came on risk." In the alternative, the court held that the loss fell under the exclusion clause of the policy as it stemmed from a type of inherent vice or latent defect, and did not constitute "damage resulting therefrom": *University of Saskatchewan* at paras. 53-56.

[26] The facts in the current case are analogous. Here the standpipe system was improperly designed. Neither the corrosive effect of moisture on the galvanized steel pins, nor the impact of the water hammer on the standpipes can be considered "fortuitous" within the meaning of *C.C.R. Fishing*. In both cases, the true cause of the claimant's loss was the improper design and/or installation and in both cases, these errors took place before the insurer came on risk.

[27] For these reasons, the application judge erred in concluding that the cost of replacing the standpipe system was covered under the terms of the policy. The real cause of the loss – the faulty workmanship and/or design of the standpipe system – occurred prior to ING coming on risk. Consistent with the fundamental tenets of insurance law, the policy did not contemplate coverage for such expenditures by Ottawa-Carleton to remedy the situation that existed at the time ING came on risk.

[28] In my view the application judge erred when he answered his first stated question: Did the loss trigger coverage under the policy? in the affirmative.

II. Is the loss excluded by the Policy's Exclusion Clause?

[29] The second issue for the application judge was whether the loss was excluded by the policy of insurance. In his reasons at paragraph 18 he observes:

> The parties agree that the exclusion clause in the policy would normally operate to exempt the loss from indemnification. This is evidenced by the plain wording of that provision:

> 5. *Perils Excluded*: This policy does not insure against loss or damage caused directly or indirectly ...
>
> (i) by mechanical or electrical breakdown, wear and tear, gradual deterioration, latent defect, inherent vice, or the cost of making good faulty or improper materials, *faulty or improper workmanship, faulty or improper design*, provided, however, to the extent otherwise insured and not otherwise excluded under this Form, resultant damage to the property is insured.

[30] Obviously the application judge accepted the parties' joint position that the loss would, in the normal course, be caught by this exclusion because he immediately turned his attention to the third issue.

[31] In my view, this loss is clearly caught by the Exclusion Clause and the respondent did not take the position that it was not. It was Ottawa-Carleton's position below as evidenced by its pleading, that although this loss would ordinarily not be covered because of the faulty/improper workmanship/design exclusion, that exclusion was of no application because of section 99(3) of the *Condominium Act*, 1998, S.O. 1998, Chapter 19.

III. Does s. 99(3) nullify the Exclusion Clause in the Policy?

[32] Section 99(3) of the *Condominium Act, supra*, provides:

> An exclusion in the insurance required by this section is not effective with respect to damage resulting from faulty or improper material, workmanship or design that would be insured but for the exclusion.

[33] The application judge accepted the respondent's position that section 99(3) of the *Condominium Act* had the effect of "nullifying" the policy exclusion relied upon by ING. In my view he erred in so doing.

[34] The modern principle of statutory interpretation is set out by Professor Ruth Sullivan in *Sullivan on the Construction of Statutes,* 5th ed. (Markham: LexisNexis, 2008), at p. 3:

> The modern principle says that the words of a legislative text must be read in their ordinary sense harmoniously with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation.

[35] Professor Sullivan went on to explain how the plain or ordinary meaning of a statute may often prove determinative, at p. 42:

> It is presumed that the ordinary meaning of legislation is the meaning intended by the legislature. In the absence of a reason to reject it, this meaning is binding on the courts.

[36] A plain reading of s. 93(3) of the *Condominium* Act means simply that any Policy which excludes coverage for resulting damage caused by "faulty or improper material, workmanship or design" will not be effective. The Exclusion Clause, relied upon by ING tracks the language of the statute. Resultant damage is not excluded under this policy. In

fact the evidence discloses that ING has paid in excess of $20 million in satisfaction of claims for damages occasioned as the result of the flooding which occurred on April 7, 2006.

[37] The application judge's conclusion that the damage to the standpipe system itself was resultant damage stemming from both the water hammer event and the faulty/improper workmanship/design of the standpipe system is, for the reasons earlier stated, in error. The water hammer was not a fortuitous event – it was precisely the sort of occurrence the standpipe system ought to have been designed to withstand.

[38] Since the loss for which the claim is made does not constitute resultant damage, it is my view that s. 99(3) is of no application to the facts of this case.

IV. Is Ottawa-Carleton entitled to the Replacement cost of the standpipe system?

[39] The final issue for the application judge was whether the respondent was entitled to the replacement cost of the standpipe system. He concluded that the respondent was entitled, by virtue of section 99(7) of the *Condominium Act*, *supra*, "to the replacement cost of the standpipe system damaged by the water hammer event."

[40] Section 99(7) provides:

> Subject to a reasonable deductible, the insurance required under this section shall cover the replacement cost of the property damaged by the perils to which the insurance applies.

[41] In its Notice of Application, Ottawa-Carleton sought, at para. 3:

> An order that the respondent [ING] is accordingly required to indemnify the applicant [Ottawa-Carleton] for all damages it has reasonably incurred in relation to the replacement of the applicant's standpipe system.

[42] The standpipe system consists of four large pipes called standpipes or risers.[2] On April 7, 2006 as Mr. Blevis deposed in his affidavit:

> one of the pipes or one of the couplings failed in one of the condominium's standpipes situated on the thirty-second floor.

[43] The only evidence of damage to the standpipe system was that one (of the four) pipes had failed on the thirty-second floor. There was no evidence of any damage to the other three pipes which together comprised the system. In the Boiler Inspection and Insurance Company of Canada's letter dated December 19th, 2006 to ING, which letter was filed in evidence, it is stated:

> Based on this information and analysis, the opinion received is that the total replacement of the four standpipes was not necessary as a response to the breakdown at the Vitaulic Coupling at the 32nd floor. The repair of that joint and movement of the pipe above was all that was required with respect to the "breakdown" which has been admitted covered by BI&I.

[44] Mr. Blevis' evidence confirms this assessment.

[2] See para. 5 Affidavit of Bertram Blevis and Exhibit C to that affidavit.

[45] Indeed, there is no indication anywhere in the record that the entire standpipe system had to be replaced. The application judge made no finding that damage had been occasioned to the other three standpipes which comprised the system. Notwithstanding Mr. Blevis' view that replacing the FPS was "reasonable", both the Blevis Affidavit and the Boiler Inspection & Insurance Company of Canada's letter to ING reveal that replacement of the four standpipes was not necessary and there is no evidence to the contrary.

[46] In my view, Ottawa-Carleton's position, at best, can only be that it is entitled to the cost of repair/replacement of the property that was damaged "as a result" of the flood and no more and then it could recover only if the loss were covered under the property section of the Policy. For the reasons set out earlier, however, I am of the view that the damage to that particular segment of standpipe was a function of its flawed design and installation – errors that occurred before ING came on risk – and is thus not covered under the property section of the Policy.

[47] Moreover, even if some level of recovery were appropriate in this case, there is no basis on which to support the damage award. The only evidence pertaining to the replacement cost of the standpipe system is found in the Blevis Affidavit:

> The particulars of the loss specific to this application include the replacement of the standpipe system for *the approximate amount* of $600,000. Full particulars are available to ING. [Emphasis added.]

[48] No precise cost is given in Mr. Blevis' affidavit nor can one be found anywhere else in the evidence. No contract, bill of sale, invoice or any other document was filed. Nor is there any evidence whatsoever that the entire system had to be replaced. The only evidence is that of Mr. Blevis who says that the corporation took the "reasonable step" of replacing the FPS. And while it may well have been a "reasonable step" to replace a defective system that had now caused two significant floods in the building, the replacement was necessary because of the fact that the system was improperly designed and installed at the outset. By contrast the opinion expressed in the Boiler Inspection and Insurance Company of Canada's letter was that replacement of the four standpipes was not necessary as a result of the events of April 7, 2006.

[49] The application judge made no finding that damage had been occasioned to the other three pipes which comprised the standpipe system. He made no finding in relation to the cost – other than to say that the respondent was "entitled to the replacement cost of the standpipe system damaged by the water hammer event" and then awarded the sum of "$600,000: the cost of the full replacement of the standpipe system". Even Mr. Blevis did not know the precise cost of replacement of their entire system, he said the "approximate" cost was $600.000.

[50] The policy is one of indemnity and the insured under any circumstance is not entitled to recover more than the actual loss. As Digby C. Jess observed in *The Insurance of Commercial Risks: Law and Practice* (London: Butterworths, 1986), at p. 288:

> Contracts of insurance have the underlying purpose of providing the insured with an indemnity against his loss .... and this purpose is enforced by the law. Accordingly, this fundamental rule of indemnity – that the insured shall recover no more than his loss – is a rule of universal application throughout the law of insurance. The overwhelming importance of this legal principle was enunciated by Brett L.J. [in *Castellain V. Preston* (1883) 11 QBD 380 at 386 C.A. in the following manner;
>
> > In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity and of indemnity only, and that this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance ... [Emphasis added.]

[51] In light of the absence of evidence regarding the replacement cost, the only relief that could have been granted, based on the application judge's findings, would have been a declaratory judgment in favour of the respondent subject to the proof of its actual loss.

CONCLUSION

[52] In my view Ottawa-Carleton was entitled to nothing under the property section of the Policy for reasons set out above. Simply put, the "damage" to the system was due to its faulty design and workmanship which occurred before ING came on risk. The water hammer was not a fortuitous event, but rather something to be expected in the normal course of operation of the FPS. In any event the damage occasioned falls squarely within the Exclusion Clause and s. 99(3) does not apply. Ottawa-Carleton, if coverage were available, is entitled to no more than its actual loss. ING accepts that any damage occasioned to the standpipe as the result of the flood is covered under the Breakdown Rider subject to proof of its loss and the available limits under that section of the policy.

[53] For these reasons I would allow the appeal, set aside the judgment below and in its place a judgment should issue dismissing the application with costs as agreed by counsel. Costs of the appeal to the appellant on a partial indemnity scale fixed in the sum of $9,500 inclusive of disbursements and G.S.T.

RELEASED: December 21, 2009 ("K.M.W.")

"J. MacFarland J.A."
"I agree K.M. Weiler J.A."
"I agree J.C. MacPherson J.A."