COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Progressive Homes Ltd. v. Lombard General Insurance Co.,*** 2009 BCCA 129

Date: 20090326
Docket: CA034997

Between:

Progressive Homes Ltd.

Appellant
(Plaintiff)

And

Lombard General Insurance Company of Canada and in French Compagnie Canadienne D'Assurances Generales Lombard

Respondent
(Defendant)

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Huddart
The Honourable Madam Justice Kirkpatrick

G. Hilliker, Q.C.	Counsel for the Appellant
W. Branch C. Rhone	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia March 4, 2008
Place and Date of Judgment:	Vancouver, British Columbia March 26, 2009

Written Reasons by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Madam Justice Kirkpatrick

Dissenting Reasons by:
The Honourable Madam Justice Huddart (page 38, paragraph 90)

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] This is an appeal from the March 29, 2007 decision of Mr. Justice Cohen refusing the petition of Progressive Homes Ltd. ("Progressive"), a general contractor, for an order declaring that Lombard General Insurance Company of Canada ("Lombard") is under a duty to defend Progressive in four separate actions brought against it in the Supreme Court of British Columbia.

[2] Progressive alleges that it sustained losses when defects in one part of a condominium project built by Progressive's subcontractors caused damage to other parts of the building. Lombard's duty to defend turns on whether Progressive may rely on a "subcontractors' exception" to clauses which otherwise exclude coverage for such damage. If so, Progressive says that Lombard must defend it for the losses caused by the subcontractors. The answer to the questions posed on this appeal lies in whether the common law rules of interpretation with respect to implied exclusions or assumptions in insurance contracts ought to have prominence in interpreting the contracts at issue or whether those assumptions have been overcome by the clear language of the contracts.

Factual Background

[3] The appellant, Progressive, is a general contractor. The respondent, Lombard, is a liability insurance company. Lombard issued successive "commercial (or "comprehensive") general liability" insurance policies ("CGL policies") to

Progressive during the years 1987 to 2005. The policies are "occurrence policies" which provide coverage for the happening of covered occurrences within the period in question. The policies, to which I will return presently, provide that Lombard will defend Progressive for those claims where the damage which occurred falls within coverage.

[4] In late 2004 and early 2005 four actions were brought against Progressive by the B.C. Housing Management Commission ("BC Housing"). Each action concerned a separate condominium project that had been built by Progressive and financed by B.C. Housing. The condominium projects were erected during the 1990s pursuant to a government initiative to provide affordable housing for economically disadvantaged persons. The pleadings mention the work of sub-trades. Progressive asserts that it made use of subcontractors for most of the work.

[5] The actions alleged significant damage due to water penetration of the buildings' envelopes. The pleadings alleged that Progressive was in breach of contract and had been guilty of negligence in various respects, and, that the claimants had suffered damages and building defects including water leakage through exterior walls, improperly installed windows, insufficient venting and drainage, and deterioration of the building components as a result of water ingress.

[6] Lombard initially defended each of the four actions but soon withdrew from the defence, claiming that it was under no duty to defend the actions because they were not covered under the liability insurance policies it had issued to Progressive.

Following Lombard's withdrawal, Progressive brought the petition before Mr. Justice Cohen seeking a declaration that Lombard was obliged to defend.

The Pleadings

[7] The pleadings in all four actions are the same. The parties agreed that the relevant paragraphs are the following:

> Defects
>
> ...
>
> a) water leaking through the exterior walls;
> b) improper and incomplete installation and construction of framing, stucco walls, vinyl siding, windows, sheathing paper, flashings, ventilation, walkway membranes, flashing membranes, eaves troughs, downspouts, gutters, drains, balcony decks, pedestrian walkways, railings, roofs, and patio doors;
> c) insufficient venting and drainage of wall systems;
> d) inadequate exhaust ventilation system;
> e) water leaking through the windows;
> f) improper use of caulking;
> g) poorly assembled and installed windows;
> h) deterioration of the building components resulting from water ingress and infiltration
>
> all of which are collectively referred to as the "Defects" and were caused by the Defendants and all of which constitute further breaches of the terms of the agreements referenced above.
>
> ...
>
> a) As a result of the Defects and of the negligence and breaches of contract by the Defendants the Plaintiffs have suffered damages including but not limited to the following:
> b) inspection and professional advice concerning the Defects;
> c) cost to date of remedial work, both permanent and temporary;

d) cost of relocation and alternate housing of tenants during remediation work and other tenant expenses;

e) diminution in value of the Development; and

f) expense, inconvenience and hardship caused by the construction and design deficiencies and their repair.

WHEREFORE the Plaintiffs claim against the Defendants jointly and severally:

a) General damages,

b) Special damages,

c) Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, Chapter 79 and amendments thereto,

d) Costs, and

e) Such further and other relief as to this Honourable Court may seem just.

The Policies in Issue

[8] The policies are lengthy. I will reproduce only the parts of the policies that are relevant to the resolution of this appeal.

[9] In the policy effective October 31, 1988 to October 31, 1995 ("the first policy") the insuring agreement provided:

> [Lombard] ... agrees with the Named Insured as follows:
>
> ...
>
> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of property damage caused by accident.

[10] "Property damage" was defined in the first policy as:

> "Property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of

> tangible property which has not been physically injured or destroyed provided such loss of use is caused by an accident occurring during the policy period.

[11] "Additional Definitions" are found under the heading "Property Damage – Defined Occurrence Basis" which provides:

> When used in Part VI of this policy (including endorsements forming a part thereof):
>
> "Accident" includes continuous or repeated exposure to conditions which result in property damage neither expected nor intended from the standpoint of the insured.

[12] The policy in place from October 31, 1995 to October 31, 1998 ("the second policy") contained a number of changes. Instead of covering "damages" the policy was re-worded to cover "compensatory damages". The wording of the policy was also changed from applying to "property damage caused by accident" to "property damage caused by an occurrence." These words were continued in the policy effective from October 31, 1998 to October 31, 2000 ("the third policy).

[13] The second and third policies provided:

> [Lombard] will pay those sums that the Insured becomes legally obligated to pay as compensatory damages because of ... "property damage" to which this insurance applies ... This insurance applies only to ... "property damage" which occurs during the policy period ... The "property damage" must be caused by an "occurrence". The "occurrence" must take place in "coverage territory". We will have the right and duty to defend an "action" seeking those compensatory damages.

[14] The policy effective from October 31, 2002 to October 31, 2006 ("the fourth policy") provided:

> [Lombard] will pay those sums that the Insured becomes legally obligated to pay as damages because of ... "property damage" to which this insurance applies ... This insurance applies only to ... "property damage" which occurs during the policy period. The ... "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend an "action" seeking those damages ...

[15] "Property damage" is defined in the second to fourth policies as:

> "Property damage" means:
>
> a) physical injury to tangible property including all resulting loss of use of that property; or
>
> b) loss of use of tangible property that is not physically injured.

[16] "Occurrence" is defined in the second through fourth policies as:

> Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

[17] All policies contained certain exclusions from coverage. The policy in force from 1988 to 1995 (the first policy) contained a "work performed" or "your work" exclusion which read:

> This insurance does not apply to:
>
> (i) property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;
>
> [Emphasis added.]

[18] However, Progressive also purchased a policy upgrade in 1988, described as the Broad Form Property Damage endorsement, designed to deal with loss suffered

after completion of the project. The endorsement replaced exclusion (i) in respect of "completed operations" as follows:

> Notwithstanding anything contained in Part VI of this policy to the contrary it is agreed that:
>
> Exclusions (g) and (i) are replaced by the following exclusion (Y) and (Z):
>
> ...
>
> (Z) With respect to the completed operations hazard to property damage to work performed by the Named Insured arising out of the work of any portion thereof, or out of materials, parts or equipment furnished in connection therewith.
>
> [Emphasis added.]

[19] The "completed operations hazard" is defined in the policy as:

> "Completed operations hazard" includes bodily injury or property damage arising out of operations, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the Named Insured. Operations include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
>
> (i) when all operations to be performed by or on behalf of the Named Insured under the contract have been completed;
>
> (ii) when all operations to be performed by on or behalf of the Named Insured at the site of the operations have been completed;
>
> (iii) when the portion of the work out of which the bodily injury or property damage arises has been put to its intended use by any persons or organization other than another contractor or sub-contractor engaged in performing operations for a principal as part of the same project;
>
> Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete shall be deemed completed.
>
> The completed operations hazard shall not include:

(i) operations in connection with the pick up and delivery of property;

(ii) the existence of tools, uninstalled equipment or abandoned or unused materials.

[20] The second and third policy work exclusion provides:

> "Property damage" to that particular part of your work arising out of it or any part of it and included in the products-completed operations hazard.

[21] The fourth policy work exclusion reads:

> "Property Damage" to that particular part of "your work" arising out of it or any part of it and included in the products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work of which the damage arises was performed on your behalf by a subcontractor.
>
> [Emphasis added.]

The Issue on the Petition

[22] At the hearing of the petition Lombard took the position that the essence of the actions against Progressive was that it had breached its contract with B.C. Housing by delivering an entirely faulty product – from the exterior walls to the interior frames, from the roofs to the walkways. Lombard argued that all the damages alleged by B.C. Housing concern normal expected consequences of poor workmanship. Lombard submitted that the insurance policies at issue do not afford coverage to indemnify Progressive for failing to meet its contractual obligations. Instead, the policies cover Progressive for damage to property caused by an accident or occurrence. Water damage, they said, caused by a building's defective

exterior envelope does not qualify as an accident or occurrence under the contract of insurance.

[23] Progressive took the position that the definitions of "accident" and "occurrence" in the policies negated any element of suddenness that may be associated with those terms and made it plain that coverage may extend to property damage which takes place over a long period of time. Thus, they argued, the claims against Progressive fall squarely within the language of the insuring agreements. Progressive also relied on the decision of the Ontario Court of Appeal in *Bridgewood Building Corp. v. Lombard General Insurance Co. of Canada* (2006), 266 D.L.R. (4th) 182, 79 O.R. (3d) 494, leave to appeal to S.C.C. refused, 277 O.A.L. 400 ("*Bridgewood*") where the Court looked to the "subcontractor exception" and held that the exception extended coverage to damage caused by subcontractors – the claim made by Progressive in this case.

The Decision in the Supreme Court

[24] In his reasons for judgment indexed at 2007 BCSC 439, 71 B.C.L.R. (4th) 113, Mr. Justice Cohen found that coverage under the insurance contracts had not been triggered, and Lombard was not under a duty to defend Progressive. He accordingly dismissed Progressive's application.

[25] Cohen J. first cited the test from *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, (1990) 68 D.L.R. (4th) 321, which states that if there is a possibility that the claims in the actions fall within the coverage provided by the insurance contracts, the insurer is under a duty to defend. He noted that any doubt

over whether the pleadings in the underlying actions brought the claims within the coverage of the insurance policy should be resolved in favour of the insured.

[26] In examining the impact of this test on the factual matrix of the case at bar, Cohen J. reviewed a number of relevant insurance law decisions. In particular, he concentrated on *Swagger Construction Ltd. v. ING Insurance Company of Canada*, 2005 BCSC 1269, 47 B.C.L.R. (4th) 75 ("*Swagger*"). In *Swagger*, the plaintiff contractor had been hired to construct a building, and had sued its client for damages resulting from extra work and delays caused by the client. The client counterclaimed for breach of contract and damages arising out of faulty workmanship and defective materials. The plaintiff then applied to the court for a declaration that its insurance company had a duty to defend the counterclaim, as the relevant insurance policy obligated the insurance company to defend the plaintiff in any lawsuit for personal injuries or damage to property caused by an occurrence.

[27] In his reasons in *Swagger*, Mr. Justice N. Smith rejected the contractor's application, holding that damages to other parts of the building constructed by the contractor that resulted from its faulty workmanship were not covered by the insurance policy. This approach was followed by Madam Justice Garson in *GCAN Insurance Company v. Concord Pacific Group Inc.*, 2007 BCSC 241, 47 C.C.L.I. (4th) 106 ("*GCAN*"), in which Garson J. summarized her interpretation of *Swagger* as follows:

> [42] I would interpret *Swagger* as authority for the proposition that a liability insurance policy covering physical injury to tangible property does not contemplate the artificial division of the work of the party responsible for that work into component parts for the purpose of

> establishing Resultant Damage, unless that is the clear intention of the entirety of the policy. Smith J. decided that the policies at issue in Swagger could not be interpreted as covering what I called above Own Work Resultant Property Damage, and therefore the University's claim against Swagger was not covered by its wrap-up liability policy. Swagger is also authority for the proposition that in the context of an insurance policy covering physical injury to tangible property, defective construction is not an "accident" unless there is damage to the property of a third person.

[28] At para. 43 of his reasons in the present case, Cohen J. distilled two main principles from *GCAN* and *Swagger* that had particular relevance to the case before him:

> [43] In sum, *GCAN* confirms that *Swagger* stands for two propositions which, I think, govern the outcome of the application in the case at bar:
>
> (1) liability insurance policies governing physical injury to tangible property do not contemplate the artificial division of work of the party responsible for that work into component parts for the purpose of establishing resultant damage, unless that is the clear intention of the entirety of the policy;
>
> (2) defective construction is not an "accident" unless there is damage to the property of a third party.

[29] At para. 53 of his reasons, Cohen J. stated that he was bound by *Swagger*, and that *Swagger* required the dismissal of Progressive's application. At paras. 59-60, he summarized the law in this area and presented his conclusion with regard to the applicability of the insurance contract:

> [59] In summary then, when the Court is considering a building which is an integrated whole, and where the entire structure is allegedly defective, it is entirely improper to artificially divide it and claim that one part of the work has caused damage to some other part of the work. The pleadings in the underlying actions create no division, nor can the Court create such an artificial division for insurance cover purposes. Moreover, the claims in the underlying actions seek to recover costs to

> remediate allegedly faulty buildings that failed to keep out the elements and such allegations do not qualify as an "occurrence" under the insurance contracts. On the basis of the analysis and result in *Swagger*, there has been no "accident".
>
> [60] Thus, I find that on the basis of the holding in *Swagger*, the allegations in the underlying actions do not allege "property damage" (or an "occurrence" or "accident") as those terms are used in the insurance contracts. Accordingly, coverage under the insurance contracts cannot be triggered and Lombard is under no duty to defend Progressive.

[30] Finally, Cohen J. addressed Progressive's argument that a subcontractor exception in the insurance contract could only have meaning if the insurance contract was read to provide coverage to Progressive for damage to the work resulting from the actions of a subcontractor. At para. 61, Cohen J. rejected this argument:

> [61] Finally, I find that it is improper to look to the exclusions and exceptions to exclusions to find coverage where none exists in the first place. This is because, as Lombard argues, the operative coverage clause in the insurance contracts acts as a condition precedent to determine coverage. The exclusion clauses then act to take coverage away where it might otherwise exist. ...

[31] These conclusions led Cohen J. to dismiss Progressive's application without the necessity of determining whether any of the exclusions operated in Lombard's favour.

The Positions of the Parties on the Appeal

[32] Progressive asserted that the plain meaning of the policies provided coverage for damage to the buildings caused by rot and deterioration. Counsel for Progressive, Mr. Hilliker began his analysis of the policy provisions by examining the

ordinary meaning of the words of the insuring clauses in light of the pleadings in the actions against the company.

[33] In point form, the argument is made in this way:

1. The claims against Progressive may be said to be generally described as being in respect of rot and deterioration to building components as a result of water ingress.

2. Pursuant to the initial insurance policies Lombard undertook to defend Progressive against claims in respect of "property damage" caused by an "accident." In subsequent policies the term "occurrence" was substituted for "accident." This did not result in any material change with respect to the coverage afforded to Progressive in this case.

3. The term "property damage" is defined in the policies to include "physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom."

4. The term "accident" is defined as including "continuous or repeated exposure to conditions which result in property damage neither expected nor intended from the standpoint of the insured." The term "occurrence" is defined as including "continuous or repeated exposure to substantially the same general harmful conditions."

5. The term "accident" is defined in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*, [1976] 1 S.C.R. 309, 53 D.L.R. (3d) 1 as an unlooked for mishap or occurrence.

6. The policy definitions of both "accident" and "occurrence" negate any element of suddenness that may be associated with those terms and make it plain that coverage may extend to property damage which takes place over a long period of time.

7. Thus, on their face, the claims against Progressive fall squarely within the language of the insuring agreement as claims for "property damage" caused by "accident". To track the definition of those terms as set out in the policies, the claim for rot and deterioration is in respect of "physical injury to tangible property." The claim for cost of relocation and alternative housing or tenants during remediation work is a claim for "loss of use thereof" and the claim that the moisture penetration occurred over a number of years is a claim that there was "continuous or repeated exposure to substantially the same general harmful conditions."

[34] Mr. Hilliker says that this interpretation of the insuring clauses is supported by the content of the Exclusions and the Exception to the Exclusions.

[35] Mr. Hilliker submits that one of the risks that a general contractor faces is that he or she may be required to correct deficiencies in work performed under the contract. In liability insurance policies this concern may be addressed by the insurer through an exclusion often referred to as a "business risk", work/product or "work

performed" exclusions, the purpose of which is to limit the coverage provided to a contractor with respect to damage to the contractor's own work. As the Wisconsin Supreme Court explained in *American Family Mutual Insurance Company v. American Girl Inc.*, 673 N.W.2d 65 at 74 (2004) ("*American Family*") (quoting from an American insurance text),"Insurers draft liability policies with an eye toward preventing policyholders from converting their liability insurance into protection from nonfortuitous losses such as claims based on poor business operations. The 'own work' and 'own property' exclusions are two important and frequently litigated policy provisions designed to accomplish this purpose."

[36] In the case before us this risk was addressed in an exclusion to the first policy (in place 1988 to 1995) which, as I set out earlier in paragraph 17, provided:

> This insurance does not apply to:
>
> (i) property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;
>
> [Emphasis added.]

[37] However, the policy upgrade known as the Broad Form Property Damage endorsement, purchased by Progressive to cover Progressive's completed work, modified this clause. Again, as noted in paragraph 18 of these reasons the endorsement specifically replaced clause (i) with clause (Z) which reads:

> (Z) With respect to the completed operations hazard to property damage to work performed by the Named Insured arising out of the work of any portion thereof, or out of materials, parts or equipment furnished in connection therewith.
>
> [Emphasis added.]

[38] Progressive places emphasis on the fact that in clause (i) property damage arising out of the work of the insured or work performed by or on behalf of the insured was excluded from coverage. Progressive accepts that if the policy ended there, the damage alleged in the case at bar would be excluded from coverage as the work performed here was either performed by the general contractor or by subcontractors. Work performed by either or both would be caught by the exclusion. But the Broad Form Property damage endorsement specifically replaced clause (i) with clause (Z). Progressive says that the upgrade leaves open coverage for work done by subcontractors because clause (Z) refers only to work done by the insured.

[39] Mr. Hilliker submitted that an even clearer statement of the subcontractors' exception is found in the fourth policy which excludes:

> "Property Damage" to that particular part of "your work" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work of which the damage arises was performed on your behalf by a subcontractor.
>
> [Emphasis added.]

[40] Mr. Hilliker urges this court to follow the Ontario Court of Appeal decision of *Bridgewood* which interpreted a CGL policy containing provisions similar to the "subcontractor exception" found in the fourth policy as providing coverage for the insured. In his factum Mr. Hilliker put it this way:

> [If the decision in the lower court is not reversed] the Lombard policy under consideration has one meaning in Ontario and a different meaning in British Columbia. Plainly, this is unacceptable. The rules pertaining to the construction of insurance policies are the same throughout the common law provinces. There is no rational basis upon

> which Lombard's policy should be held as providing coverage to general contractors in Ontario but not in British Columbia.

[41] Lombard's answer to this last argument is that rules of interpretation pertaining to policies of insurance have been applied differently in this Province than they have in Ontario, and, that *Bridgewood* is wrongly decided.

[42] Lombard argued, as it had in the court below, that Progressive incorrectly frames the issues. Lombard asserts that Progressive too narrowly focuses on the rot and deterioration alleged in the pleadings. Counsel for Lombard, Mr. Branch, says that an examination of the pleadings in their entirety reveals that the underlying actions amount to claims that Progressive delivered wholly defective buildings to BC Housing. Thus BC Housing received something less than what it bargained for. As pleaded then, the loss alleged by BC Housing is not damage to property as urged by Progressive, but pure economic loss. Lombard maintains that for Progressive's point to have any validity Progressive must artificially subdivide the buildings into component parts and from there argue that one part can be said to be the cause of "property damage" to another part. Relying on the reasoning in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193 ("*Winnipeg Condominium*") Lombard says that Progressive's position cannot be sustained.

[43] Alternatively Lombard argues that even if the claims do pass the insuring agreement, and can be said to be claims for damage to property, exclusions apply to avoid coverage. I will return to the alternative argument in more detail later in these reasons.

Analysis

General Principles of Insurance Contract Interpretation

[44] The positions of the parties turn to a large degree on their approach to the rules that govern the interpretation of contracts of insurance. I begin my analysis then, by setting out the some relevant principles that must be employed in determining the meaning of the policy terms.

[45] In his text, *Insurance Law* (Toronto: Irwin Law, 2004) at 191, Professor Denis Boivin has summed up the approach a court must take in construing the provisions of an insurance contract:

> The main rules of interpretation were established by the Supreme Court of Canada in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* First the words used in the contract must be given their ordinary meaning, with the exception of expressions that have acquired a technical meaning within the industry. ..Second, the contract must be interpreted contextually, having regard to all sections of the agreement. Third, the objective of interpreting the contract is to give effect to the parties' true intentions. Hence, courts should avoid using a literal approach when the result would frustrate the reasonable expectations of either the insurer or the insured. Finally, any ambiguity must be resolved against the interests of the party that wrote the agreement – *contra proferentem.* In other words, ambiguities must be resolved in favour of the insured.

[46] The interpretive principles referred to by Mr. Justice Iacobucci in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 also have application to this appeal. Mr. Justice Iacobucci commenced his summary with these words at para. 67:

> ... I should like to discuss briefly several principles that are relevant to the interpretation of the insurance policy in question. While these principles are merely interpretive aids that cannot decide any issues by themselves, they are nonetheless helpful when interpreting provisions of an insurance contract.

[47] Mr. Justice Iacobucci categorized the principles under three headings: the general purpose of insurance; *contra proferentem*; and reasonable expectations.

[48] Iacobucci J. stressed that for interpretation purposes it is important to keep in mind the underlying economic rationale for insurance. He accepted the following passage from C. Brown and J. Menezes, *Insurance Law in Canada* (2nd ed., 1991), at pp. 125-26:

> Insurance is a mechanism for transferring fortuitous contingent risks. Losses that are neither fortuitous nor contingent cannot economically be transferred because the premium would have to be greater than the value of the subject matter in order to provide for marketing and adjusting costs and a profit for the insurer. It follows, therefore, that even when the literal wording of a policy might appear to cover certain losses, it does not, in fact, do so if (1) the loss is from the inherent nature of the subject matter being insured, or (2) it results from the intentional actions of the insured.

[49] In paragraph [2] of these reasons I have referred to this economic rationale as the "implied exclusions or assumptions" found in a contract of insurance.

[50] In his discussion of "reasonable expectations" Iacobucci J. said at para. 71:

> Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole [citations omitted]. Where there is ambiguity, this Court has noted "the desirability ... of giving effect to the reasonable expectations of the parties". [citations omitted]. Estey J. stated the point succinctly in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at pp. 901-2:

> [L]iteral meaning should not be applied where to do so would bring about an unrealistic result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

[51] In determining "the reasonable expectations of the parties" the court may take into account such things as "industry practice". In turn "industry practice" may be determined through industry bulletins if those bulletins are notorious. In determining the reasonable expectations of the parties the court may examine the context surrounding the contract, including such things as insurance industry practice. In *J.K. Expressions Jewellery Inc. v. Gerling Global General Insurance Company*, 2002 BCCA 86, 164 B.C.A.C. 135 Mr. Justice Thackray considered whether evidence of insurance industry practice could be relied upon to assist in the interpretation of the policy at issue in that case. He held a court may refer to trade practice in determining the meaning of policy wording; however, to do so the evidence must establish the trade practice is notorious. Quoting from *Georgia Construction Co. v. Pacific Great Eastern Railway Co.*, [1929] S.C.R. 630, 4 D.L.R. 161 (Duff J.) he held at para. 68:

> The term "trade practice", if it is allowed to factor into an interpretation of policy wording based upon the normal and ordinary

> meaning of the words, must be more than something that "on balance" or "generally" or "normally" is the practice in the industry. The evidence does not establish that the trade practice was "reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract."

In turn insurance industry practice may be determined through industry bulletins if those bulletins are so notorious that they "may be presumed to form an ingredient of the contract".

[52] As to the principle of *contra proferentem* Iacobucci J. stated at para. 70:

> Since insurance contracts are essentially adhesionary, the standard practice is to construe ambiguities against the insurer [citations omitted]. A corollary of this principle is that "coverage provisions should be construed broadly and exclusion clauses narrowly" [citations omitted]. Therefore one must always be alert to the unequal bargaining power at work in insurance contracts, and interpret such policies accordingly.

[53] To this last comment I would add what is implied in this summary of principles: An ambiguity is said to persist only when all the other rules of construction have failed.

[54] The interpretive principles set out by McLachlin J. (as she then was) in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, 99 D.L.R. (4th) 741 ("*Reid Crowther*") also touch on the issues raised in the case on appeal. McLachlin J. listed the principles at 269:

(1) the *contra proferentem* rule:

(2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and

(3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[55] Lombard began its analysis of the extent of coverage in this case with the undeniable assertion that insuring clauses define coverage while the exclusion clauses narrow it. However, Lombard turned that proposition into a two step principle of construction. Lombard submitted that the rules of interpretation require that in determining the extent of coverage in a particular case a court must look first at the insuring clauses, determine the scope of coverage, and only then examine the exclusions to see how that scope is narrowed. Lombard says that this is just an application of the logical rule that an exclusion clause cannot restore coverage where coverage did not first exist (*Ramsay v. Voyageur Insurance Company* (1998), 51 B.C.L.R. (3d) 213, 108 B.C.A.C. 59; *Ellett Industries Ltd. v. Laurentian P&C Insurance Co.* (1996), 17 B.C.L.R. (3d) 201, 73 B.C.A.C. 72. Lombard's reasoning also derives from the propositions that the insured bears the onus of proving coverage while the insurance company must prove an exclusion, and, that coverage clauses should be read broadly, while exclusion clauses should be read narrowly.

[56] These principles and rules might seem to mandate that the two types of clauses be read in isolation, but I do not read the case law as warranting that approach. In fact, it seems to me that it does the opposite. A court begins with the presumption that all sections of an agreement have meaning. Thus, the contract should be read as a whole to understand each of its parts. In *RBC Travel Insurance Company v. Aviva Canada Ltd.* (2006), 274 D.L.R. (4th) 348, 82 O.R. (3d) 490 ("*RBC Travel*"), McFarland J.A. said this at para. 11:

> [11] The law presumes that the words used in a policy of insurance have meaning: If the meaning of the words is clear, it should be given effect. In *Neill and Gunter Inc. v. Simcoe & Erie General Insurance Co.*

> (1985), 60 N.B.R. (2d) 351 (Q.B. (T.D.)), at para. 14, aff'd [1986] N.B.J. No. 17 (Q.L.), 36 A.C.W.S. (2d) 133 (CA), it was stated: "The court will if possible give effect to all parts of an instrument and an interpretation which gives a reasonable meaning to all its provisions is preferable to one which leaves a portion of the wording useless or inexplicable."
>
> [Emphasis added.]

[57] In my view, an exclusion clause by definition, references the grant of coverage – it takes something away from it. Thus, insuring clauses and exclusionary clauses cannot be read in isolation. They must be understood as a whole, and to understand them as a whole the court must read them together.

Application of the Principles of Construction to this Case

1. The Complex Structure Theory

[58] Progressive's first position was that the plain meaning of the words of the policy covered the damage alleged in the statements of claim. While Progressive maintained it was not so, Lombard argued that Progressive was asking the court to accept the "complex structure theory" discredited in Canada in the *Winnipeg Condominium* case.

[59] I begin by noting that the *Winnipeg Condominium* case was not concerned with the interpretation of a contract of insurance. It dealt with recoverability in tort for economic loss. The issue in that case was whether a general contractor responsible for the construction of a building could be held tortiously liable for negligence to a subsequent purchaser of a building, who was not in contractual privity with the contractor, for the cost of repairing defects in the building arising out of negligence in its construction. Cladding had fallen from the building as a result of structural

defects in masonry work. As a result, all of the cladding had to be replaced. The Manitoba Court of Appeal concluded that the costs of the repair, being economic loss, were not recoverable under the tort law of Canada. In reversing that decision the Supreme Court of Canada reasoned that if a contractor can be held liable in tort when he or she constructs a building negligently and as a result of that negligence the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In reaching these conclusions La Forest J., who wrote for the Court, dealt first with the argument of the condominium corporation that the loss could be characterized as damage to property as opposed to pure economic loss since the defective part of the building had damaged other parts of the building when it collapsed. La Forest rejected this "complex structure theory" finding persuasive the words of Lord Bridge in *Murphy v. Brentwood District Council,* [1990] 2 All E.R. 908 (H.L.) ("*Murphy*") where he said at p. 928:

> ... The reality is that structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to 'other property'.
>
> A critical distinction must be drawn here between some part of a complex structure which is said to be a 'danger' only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and

> damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor in the other, can recover damages in tort on *Donoghue v. Stevenson* principles. ...

[60] In the subsequent insurance coverage action arising from the same case, *Bird Construction Co. v. Allstate Insurance Co. of Canada*, [1996] 7 W.W.R. 609 ("*Bird Construction*"), the Manitoba Court of Appeal applied the conclusions of La Forest J. with respect to the complex structure theory to the insurance policy as well. While the Court did say that it was not open to the insured to take the position that a defect in part of the building caused damage to the other part, because the "complex structure theory" had been disposed of in the predecessor *Winnipeg Condominium* case I do not read the case as standing for the proposition that that type of damage can *never* be covered by a contract of insurance. In *Bird Construction* the Court recognized that coverage depended on the wording of the policy. In its decision, the Manitoba Court of Appeal referred to the definitions of "property damage" and "occurrence" – identical to the definitions in the policies in the case at bar – and to an exclusion clause for work performed by or on behalf of the policy holder. The Court concluded that the claim was obviously not one for "damages because of property damage" because the pleadings clearly sought a remedy for economic loss. Turning to an exclusion clause in the policy for "work performed" the court noted as well that the clause excluded damage to the work performed on or on behalf of the policy holder. As a result the Court refused Bird's application for an order that Allstate was required to defend it in the underlying action.

[61] As noted by the trial judge in the court below, the reasoning in *Bird Construction* has been followed in a number of trial decisions in this Province including *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1991), 57 B.C.L.R. (2d) 88, 6 C.C.L.I. (2d) 23; *Swagger Construction Ltd. v. ING Insurance Company of Canada,* 2005 BCSC 1269, 47 B.C.L.R. (4th) 75; *GCAN Insurance Co. v. Concord Pacific Group Inc.,* 2007 BCSC 241, 47 C.C.L.I. (4th) 106.

[62] On the other hand the complex structure theory has been accepted and the economic loss doctrine rejected in other trial decisions in this Province. They include *F.W. Hearn/Actes-A Joint Venture Ltd v. Commonwealth Insurance Co.*, 2000 BCSC 764, 75 B.C.L.R. (3d) 272 and *Axa Pacific Insurance Co. v. Guildford Marquis Towers Ltd.*, 2000 BCSC 197, 74 B.C.L.R. (3d) 194.

[63] As I mentioned earlier, the Ontario Court of Appeal in *Bridgewood* accepted that a CGL policy, in the circumstances of that case, covered the insured contractor for damage to a building attributed to the work of subcontractors.

[64] We were also referred to a number of American authorities which are divided on the issue as well. *Ohio Casualty Insurance Co. v. Bazzi Construction Co. Inc.* 815 F.2d 1146 (7th Cir., 1987) is an example of a case where the court accepted that a building could not be divided into component parts; *American Family* is an example of a case where the court found that the language of the policy said it could.

[65] In the end it can be said that the courts which have rejected the complex structure theory tend to view CGL insurance policies as policies designed to protect the insured from liability for injury or damage to the persons or property of others,

not to pay the costs associated with repairing or replacing the insured's defective work and products. They suggest that to interpret the policies otherwise is to convert policies of insurance into performance bonds and to encourage shoddy workmanship. Those that accept the theory emphasize that subcontractors now play a large role in construction projects, that it is sensible for a general contractor to seek to protect him or herself against bad work over which they have little control and that in the end, coverage turns on the policy language.

[66] I do not intend to review the plethora of cases presented to us in this appeal on this point. In the end all of the trial court decisions in this Province accept that the language of the policy must govern. And, with respect to each one of them, counsel were able to demonstrate that the policies in question were not necessarily the same as the one we have before us in this Court.

[67] It follows then, that if the wording of the policy governs, Progressive's position cannot be rejected out of hand simply because one might argue that it postulates coverage on the basis of "the complex structure theory." The wording of the policy must be examined to determine whether it covers damage to one part of the building caused by defects in work or products provided by the insured.

2. The Exclusions and the Exception to the Exclusion

[68] As I concluded earlier, the exclusions in the contract are of assistance in determining what is meant by the insuring agreement in the case on appeal.

[69] Progressive says that the plain meaning of the insuring provisions is to provide coverage for damage to one part of the building caused by a defect in another. While I agree that the plain meaning of the words of the contract could support this interpretation, such an interpretation flies in the face of the underlying assumption that insurance is designed to provide for fortuitous contingent risk. Progressive has allegedly constructed buildings which allow the entry of water from its roofs and walls, so much so that they are not inhabitable. The expected consequences of poor workmanship can hardly be classified as fortuitous. It follows that to establish the policies in question were designed to cover poor workmanship or faulty design, Progressive must demonstrate the policies contain clear language to that effect. To this end Progressive turns to the "work performed" or the "work" exclusions. Mr. Hilliker argues that the only way to make sense of the exclusions included in the policies is to read the contracts as providing coverage for damage to one part of the building caused by the work of subcontractors. That is how the Court in *Bridgewood* understood the operation of the subcontractors' exception in the CGL policy in dispute in that case.

[70] In *Bridgewood* the insuring clause reads:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

[71] Under "Exclusions" the policy stated:

> This insurance does not apply to:
>
> ...

> j. "Property damage" to
>
> 1) that particular part of "your work",
>
> 2) that particular part of machinery or equipment forming a part of "your work" described in 1) above, or
>
> 3) a component or constituent of "your work" described in 1) above, whether such component or constituent is a separate physical part or an integral element of "your work",
>
> that is defective or actively malfunctions. This exclusion applies only to "property damage" to "your work" included in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.
>
> [Emphasis added.]

[72] In *Bridgewood* Lombard was the insurer. It argued that the clauses should be understood in the context of the mandate of the usual CGL policy which is intended to cover an insured's tortious liability to third parties, not the cost of repairing or replacing the insured's own defective work or product. The Ontario Court of Appeal rejected that argument saying that the plain language of the contract supported the position of the insured. Writing for the court Moldaver J.A. said at para. 12:

> [12] ... if the effect of the "general principle" was as [Lombard] would have it, exclusion (j) was redundant, i.e. there would be no need to exempt faulty work performed by subcontractors if the "general principle" excluded such work in every case. And, as the respondents quite properly point out, if exclusion (j) is redundant, so too are five other exclusionary provisions in the same policy.

[73] The court went on to say that Lombard's position ignored the historical evolution of clauses such as the one in issue in *Bridgewood* and the reasonable expectation of the parties flowing from it. Moldaver J.A. continued at para. 14:

> [14] ... exclusion (j) and other like provisions are the product of a Broad Form Property Damage Endorsement (BFPD) implemented into the CGL in 1986 for the express purpose of bringing claims arising out of faulty work by subcontractors back into coverage through an exception to an exclusion. [citations omitted].
>
> [15] A concise statement of the purpose and effect of this revision of the CGL is found in *American Family Mutual*, *supra*, at para. 68:
>
> The subcontractor exception dates to the 1986 revision of the standard CGL policy form. Prior to 1986 the CGL business risk exclusions operated collectively to preclude coverage for damage to construction projects caused by subcontractors. Many contractors were unhappy with this state of affairs, since more and more projects were being completed with the help of subcontractors. In response to this changing reality, insurers began to offer coverage for damage caused by subcontractors through an endorsement to the CGL known as the Broad Form Property Damage Endorsement, or BFPD. Introduced in 1976, the BFPD deleted several portions from the business risk exclusions and replaced them with more specific exclusions that effectively broadened coverage. Among other changes, the BFPD extended coverage to property damage caused by the work of subcontractors. In 1986 the insurance industry incorporated this aspect of the BFPD directly into the CGL itself by inserting the subcontractor exception to the "your work" exclusion. See *generally* 21 Eric Mills Holmes, *Holmes' Appleman on Insurance*, § 132.9, 152-53.

[74] In my view this last part of the *Bridgewood* analysis takes into account industry practice in determining the reasonable expectation of the parties. That analysis is not open to this Court because the record does not support it. There was no evidence placed before the trial judge in the case at bar that the policy he was asked to examine was the standard CGL policy described in the *American Family Mutual* case relied on by the court in *Bridgewood*. Nor was any evidence led of industry practice. As I understand the principles of interpretation, resort may be made to the practice in the industry, if, after applying the rules of construction, the court concludes that the meaning of words in a policy remains ambiguous. If it reaches that point, the court will look to the reasonable expectation of the parties in

the context of industry practice. The practice however must be of such notoriety that the parties would be expected to know of it. We have none of that before us, and so the *Bridgewood* case is of limited assistance.

[75] That said, *Bridgewood* acknowledged that the subcontractor's exception would be meaningless if it did not mean that although general contractors were not covered for damage caused by their own poor workmanship (by virtue of the exclusions), the damage caused by work of subcontractors, who are generally out of the control of the general contractor, was covered. As the Court asked in *Bridgewood*, if the contract excluded shoddy work of contractors and subcontractors in the first place, why except subcontractors from the exclusion?

[76] Lombard's first response to this argument was to say that the British Columbia courts have expressed a greater tolerance for redundancy than the courts of Ontario. For this proposition Lombard drew to our attention the words of Esson J.A. in *Harbour Machine Ltd. v. Guardian Insurance Company of Canada* (1985), 60 B.C.L.R. 360, 10 C.C.L.I. 72 (BCCA) where he said at p. 366:

> To that I can only say that exclusion (9) is clear in what it says. If it is redundant, so be it. Avoidance of redundancy cannot by itself justify giving words a meaning which they simply cannot bear.

[77] Counsel for Lombard argued there will be often more than one exclusion clause applicable to invalidate coverage for a particular claim. There is nothing improper about a particular claim not being covered under the insuring agreement and by one or more exclusions. Mr. Branch described it as inserting both a "belt" and "suspenders" into a contract to support the insurer's interests. He made the

point that to require perfect mutual exclusivity in that regard would demand the impossible.

[78] I accept that this is so in many cases. For example, if clause (i) of the exclusions stood alone, unmodified by clause Z of the Broad Form Property Damage Endorsement, then one could easily come to the conclusion that by clause (i) of the exclusion the insurer was simply shoring up the insuring provisions by putting into words, in the form of an exclusion, the underlying premise that insurance is generally designed to protect against fortuitous contingent risks, not the shoddy work of the insured. But this reasoning starts to lose force when clause Z comes into play. One must ask why clause Z refers only to work done by the insured whereas clause (i) refers to work done by the insured and *on behalf of* the insured. If the policy, by its insuring provisions should be read as excluding coverage for shoddy work on the part of contractors and subcontractors, then what was the point of only mentioning the insured in the exclusion? Looked at in this light the exclusion, with its subcontractors' exception, is not redundant but rather is meaningless, or in the words of McFarlane J.A. in *RBC Travel*, "useless or inexplicable".

[79] Counsel for Lombard submitted that if this Court were not to accept its position that the exclusion in question was simply redundant, it could be argued that the exception to the exclusion did have limited application. For this part of his argument Mr. Branch returned to the reasons of Lord Bridge in *Murphy* where he distinguished between parts of a building required to sustain other parts, and distinct parts which happen to be incorporated into the structure which cause damage. To repeat, Lord Bridge noted at p. 928:

> A critical distinction must be drawn here between some part of a complex structure which is said to be a 'danger' only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor in the other, can recover damages in tort on *Donoghue v. Stevenson* principles.

[80] Mr. Branch submitted that the insuring provisions could be read as covering damage to property caused by a distinct item such as a boiler explosion. Thus, while the project is being built, clause (i) of the exclusions operates to exclude coverage for damage to the other parts of the building caused by something like a faulty boiler if it was installed by either the insured or a subcontractor. But it does not exclude it from coverage once the project is completed – clause Z then applying to revive coverage for work performed by a subcontractor.

[81] I agree with Lombard's submission on this point. In my view this is the logical way to interpret the insuring agreement along with this exclusion. It gives effect to the general principle that insurance is a mechanism for transferring fortuitous contingent risks, while giving life to an exclusion which would otherwise be meaningless. It also makes some commercial sense. While the building is under construction the general contractor has the ability to observe the work of the subcontractor and to check obvious problems. The general contractor cannot be expected to find latent defects which can cause damage after the work is completed.

Thus the insurance provides for accidents which cause damage to the property after the work is done.

[82] Counsel for Progressive submitted that if the Court were to accept this interpretation of the policy Lombard would still be under a duty to defend. Progressive's position is that it can be argued that the action against it does not seek damages for providing a useless product, but rather for providing a product that had defects that caused damage. Using the language of Lord Bridge, Progressive says that the claim is that distinct items which were incorporated into the structure have malfunctioned damaging the structure in which they were incorporated. Lombard says that this argument is fanciful. Again, using the language of Lord Bridge, it says the claim is that parts of the buildings did not perform their proper function in sustaining other parts of the buildings rendering them wholly defective.

[83] In the end then, this appeal must be resolved on the pleadings.

3. The Pleadings

[84] Progressive insisted that the pleadings need not be read as alleging only that the buildings it provided were functionally impaired. Mr. Hilliker submitted that the court must read the pleadings liberally with the understanding that if there is any possibility that the claims in the actions fall within the coverage provided by the insurance contracts, the insurer must be found to be under a duty to defend. Any doubt must be resolved in favour of the insured.

[85] Mr. Hilliker's argument accepts that Lombard has not insured Progressive against providing a defective product. His point is that much of the building in question was constructed by subcontractors who installed various building components that have over the course of time failed, causing damage to other parts of the building. He argues that the difference between a defective or non-functional building must be distinguished from the damage that a defective part has caused. The policy does not cover damage for the defective part itself, but it does cover the damage arising from the failure of the part.

[86] Mr. Branch's argument is that Progressive's reasoning is superficially plausible but generally fallacious. Progressive too narrowly focuses on the damage caused by the leaks. Its argument fails to acknowledge that the pleadings allege that the buildings were defective as built, not just when they began to leak.

[87] In para. 7 of these reasons I have reproduced the "defects" as set out in the pleadings. I agree with Lombard that the pleader has not identified any interior components of the building such as boilers or electrical wiring that caused damage. Instead the case against Progressive alleges that the building components themselves were defective. In essence it is alleged that integral parts of the structure, the roofs and walls, have not functioned properly.

[88] In my view Cohen J.'s view of the pleadings was correct. The damage alleged in this case does not fit within the "subcontractors' exception" as I understand it.

Conclusion

[89] In my view the policies of insurance in the case at bar do not cover losses to the insured caused by poor workmanship. The policies in question do not contain the clear language necessary to overcome the implied assumption that insurance is designed to transfer fortuitous contingent risk. I would dismiss the appeal.

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Madam Justice Kirkpatrick"

Reasons for Judgment of the Honourable Madam Justice Huddart:

[90] I have had the privilege of reading the draft reasons of Madam Justice Ryan, and while I agree with the principles of interpretation of insuring agreements that she sets down, I find myself in disagreement with her application of those principles to the policies this Court is called upon to interpret. I am persuaded by the submissions of the insured that the policies in issue provide for coverage for the contingent risk that the negligence of a subcontractor might give rise to an "accident" or "occurrence" that could cause "property damage".

[91] I do not accept that such an interpretation "flies in the face of the underlying assumption that insurance is designed to provide for fortuitous contingent risk." Rather, I take the view the wording of the insuring provisions permits this interpretation, and that of the exclusions supports it. My reading of the four policies in their entirety satisfies me that coverage for property damage resulting from subcontractors' negligence was an intended effect of the Broad Form Property Damage Endorsement, as was comparable language in the policy interpreted by the Ontario Court of Appeal in *Bridgewood Building Corp. (Roverfield) v. Lombard General Insurance Company of Canada* (2006), 266 D.L.R. (4th) 182, 79 O.R. (3d) 494 (C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 204. To read the policies otherwise would be to make them a "trap for the unwary": see Maurice Audet, "Broad Form Completed Operations: An extension of coverage or a trap", *Canadian Underwriter*, Oct. 1984; *Westridge Construction Ltd. v. Zurich Insurance Co.*, 2005 SKCA 81, [2006] 4 W.W.R. 437, at para. 10.

[92] The natural consequences of careless conduct will be fortuitous to the victim of that negligence who neither expects nor intends them. Whether knowledge of careless conduct (or poor workmanship) precludes the triggering of coverage is a question of fact, requiring evidence. In my view, the damage claims pleaded in the underlying actions give rise to the possibility they may fall within the coverage as I understand it.

[93] Specifically, placing the claims within the policy wording, the claim for rot and deterioration to buildings is in respect of "physical injury to tangible property", the claim for cost of relocation and alternative housing of tenants during remediation work is a claim for "loss of use thereof" and the claim that the moisture penetration occurred over a number of years is a claim that there was "continuous or repeated exposure to conditions which result in property damage" or "continuous or repeated exposure to substantially the same general harmful conditions."

[94] For the purposes of these reasons, I shall confine my analysis to the relevant provisions of the insuring agreement that came into effect on October 31, 1988. None of the subsequent agreements change their effect; they confirm it. I have re-organized those provisions for ease of reading.

> **Relevant Provisions of the 1988 Policy**
>
> **PART VI**
>
> ...
>
> **COVERAGE B – Property Damage Liability**
>
> To pay on behalf of the Insured all sums which the Insured shall become legally obliged to pay as damages because of property damage [which means]

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
>
> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an accident occurring during the policy period

caused by accident [which includes]

> continuous or repeated exposure to conditions which result in property damage neither expected nor intended from the standpoint of the insured.

General Liability Broad Form Extension Endorsement

4. **Broad Form Property Damage (including completed operations).**

> "completed operations hazard" includes ... property damage arising out of operations, but only if the ... property damage occurs after such operations have been completed or abandoned ... Operations shall be deemed completed at the earliest of the following times:
>
> (i) when all operations to be performed by or on behalf of the Named Insured under the contract have been completed;
>
> (ii) when all operations to be performed by or on behalf of the Named Insured at the site of the operations have been completed;
>
> (iii) when the portion of the work out of which the bodily injury or property damage arises has been put to its intended use by any persons or organization other than another contractor or sub-contractor engaged in performing operations for a principal as a part of the same project.
>
> Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete shall be deemed complete.
>
> ...

Notwithstanding anything contained in Part VI of this policy to the contrary it is agreed that:

A. Exclusions (g) and (i) are replaced by the following exclusion (Y) and (Z):

> [This insurance does not apply]

...

> (Y) PROPERTY DAMAGE
>
> (2) except with respect to liability under a written sidetrack agreement or the use of elevators, to
>
> ...
>
> (d) that particular part of any property,
>
> ...
>
> (iii) the restoration, repair or replacement of which has been made necessary by reason of faulty workmanship thereon by or on behalf of the Insured;
>
> ...
>
> (Z) With respect to the completed operations hazard to property damage to work performed by the Named Insured arising out of the work or any portion thereof, or out of material, parts or equipment furnished in connection therewith.

Analysis

[95] I begin by acknowledging the commercial importance of a uniform Canadian interpretation of a general contractor's commercial general liability policy containing the completed operations hazard endorsement required by the standard CCDA contract. I also note that although no authority cited contains the precise wording this Court is called upon to interpret and apply to the claims being made against the appellant in this case, the differences are not material to the essential point in issue: whether property damage to a component of a building resulting from defective workmanship by a subcontractor can trigger coverage under such a policy, assuming the insured can prove damages are the result of an accident, an event that it neither anticipated nor intended.

[96] In *Swagger Construction Ltd. v. ING Insurance Co. of Canada*, 2005 BCSC 1269, 47 B.C.L.R. (4th) 75, Mr. Justice N. Smith answered the question in the negative, holding that the insuring clauses in an ING wrap-up liability policy, a Zurich general liability policy and an American Home commercial general liability policy did not permit the general contractor's work to be divided into component parts. Unlike Mr. Justice Edwards in *F.W. Hearn/Actes-A Joint Venture Ltd. v. Commonwealth Insurance Co.*, 2000 BCSC 764, 75 B.C.L.R. (3d) 272, (*Hearn/Actes*), he read (at para. 74), the completed operations hazard as extending the time for which coverage was provided, but not having any effect on the nature of the coverage. In *GCAN Insurance Co. v. Concord Pacific Group Inc.*, 2007 BCSC 241, 47 C.C.L.I. (4th) 106, Madam Justice Garson held she was compelled to apply this reasoning to the wrap-up liability policy she was construing, while agreeing (at para. 71) "that given the language of the exclusion clause, the interpretation of the policy is less tortuous if the non-redundant meaning is given to the insuring clause, one that permits the general contractors work to be divided into component parts". After noting that the redundancy argument was not before the court in *Swagger* and quoting Mr. Justice Esson in *Harbour Machine Ltd., v. Guardian Insurance Co. of Canada* (1985), 60 B.C.L.R. 360 at 366, 10 C.C.L.I. 72 (C.A.), that "[a]voidance of redundancy cannot by itself justify giving words a meaning which they simply cannot bear", she concluded that the language of the exclusion clause was "not necessarily inconsistent with the *Swagger* interpretation of the insuring clause because "the policy covers those insureds whose work may properly be divided into component parts" (para. 71).

[97] The same cannot be said of the CGL policies in this case. Nor can the exclusions be considered "redundant", particularly that in the fourth policy with its subcontractor's exception (set down at para. 39 of my colleague's reasons). As my colleague asks at para. 78 of her reasons, if the insuring provisions are to be read as excluding coverage for shoddy work by contractors and subcontractors, then why exclude only the insured contractor in clause (Z)? The exclusion clauses in all four policies are either meaningless or they are inconsistent with the *Swagger* interpretation of the insuring clause.

[98] I accept the appellant's submission that the learned judge in *Swagger* allowed the rationale underlying the initial version of the work-performed exclusion (the equivalent of clause (i)) to influence his interpretation of the insuring agreement. With the inclusion of the Broad Form Property Damage Endorsement in the 1985 Policy, clause (i) was replaced by clause (Z). Thus, whatever may have been the effect of the endorsement before the court in *Swagger*, clause (i) can have no effect on the interpretation of the insuring clause in the policies before this Court. It formed no part of them and is helpful only to explain the evolution of the policy wording over the twenty years during which the respondent provided liability coverage to the insured.

[99] Like Mr. Justice Cohen (at para. 33), I find the argument advanced by the appellant, set down by my colleague at paras. 33 to 40, "compelling". However, unlike Cohen J., I am not bound by either the analysis or the result in *Swagger*; I would not adopt its reasoning. I prefer that of Edwards J. in *Hearn/Actes* and of the

Saskatchewan and Ontario Courts of Appeal, clearly expressed by the former in *Westridge* at para. 38:

> The definition of property damage in the policy in this case is not qualified to mean physical injury to property other than the insured's own work product and cannot be read as though it were so qualified (subject, of course, to the exclusion clause which will be referred to later.)

[100] At least in policies containing the completed operations hazard endorsement, this is the only interpretation of the insuring provisions that gives meaning to the entire policy. Arguably, it is also the correct understanding of the same wording in any general liability policy. The qualifications on the meaning are the task of exclusion clauses. The general principle on which Lombard relies so heavily that so influenced the reasoning in *Swagger* cannot supersede the only reading of the policies that makes coherent all its provisions. As the Ontario Court of Appeal noted in *Alie v. Bertrand & Frere Construction Co.* (2002), 222 D.L.R. (4th) 687, 62 O.R. (3d) 345 (C.A.) at para. 26, "the focus should be on the language of the insuring agreements and their interpretation", not on the classification of the insured's own work or product as economic loss.

[101] However I read the policies, I can find no basis in the exclusion clauses to exclude coverage of property damage resulting from defective work by subcontractors.

[102] It is premature to rule on whether any of the damage claims in the underlying action flow from defects in subcontractors' work and resulted from an accident or

occurrence. The requirement for coverage at this stage is that the pleadings allege property damage within the meaning of the policy.

[103] The pleadings allege that the insured, retained to construct buildings in accordance with plans and specifications provided by the architect, was in breach of that contract and negligent. In addition to allegations of defective workmanship in the construction of buildings by the "Defendants and others", the pleadings allege that the insured advised the project proponents that the building envelope system specified by the architect was appropriate when it was not, and failed to adequately instruct and warn them of the maintenance and inspection procedures that should be taken to reduce damage to the building envelope from water penetration. The pleadings allege that the cause of the rot and infestation that rendered the buildings uninhabitable was water ingress and/or insufficient egress capacity caused by the breach of contract and negligence of the insured and others, including subcontractors. They refer to subtrades, including a ventilation and sheet metal company, a roofing contractor and a deck installer. They suggest the insured neither anticipated nor intended that damage.

[104] It follows from this reasoning that I would declare that the insurer is under a duty to defend the appellant in the four Supreme Court actions Nos. S045955, L042510, S045865 and S047147.

"The Honourable Madam Justice Huddart"