Case Name:

Swagger Construction Ltd. v. ING Insurance Co. of Canada

Between
Swagger Construction Ltd., petitioner, and
ING Insurance Company of Canada and, in French,
Compagnie D'Assurance ING du Canada, Zurich Insurance
Company Zurich Compagnie D'Assurances and American
Home Assurance Company, respondents

[2005] B.C.J. No. 1964
2005 BCSC 1269
Vancouver Registry No. L050734

British Columbia Supreme Court
Vancouver, British Columbia
N.H. Smith J.
(In Chambers)

Heard: August 15 - 17, 2005.
Judgment: September 9, 2005.
(76 paras.)

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¶ 1 **N.H. SMITH J.**:— The petitioner, Swagger Construction Ltd. ("Swagger"), was the general contractor for a construction project at the University of British Columbia ("UBC"). Disputes arose between Swagger and UBC, litigation followed, and a trial is scheduled for September 19, 2005. Swagger now seeks an order that three liability insurers have a duty to defend it in that proceeding and to reimburse it for defence costs incurred to date.

¶ 2 Swagger contracted with UBC in February 1996, to act as general contractor for construction of a building called the Forest Science Centre. On June 10, 1999, Swagger started an action against UBC seeking compensation for extra work and delays. UBC issued a counterclaim against Swagger on September 7, 1999, and added other parties as defendants by counterclaim. The counterclaim has been amended four times. It was most recently amended on November 23, 2004. Some aspects of the action have been resolved and the counterclaim will be the major issue proceeding to trial.

¶ 3 Each of the respondent insurers issued a commercial general liability ("CGL") policy covering some portion of the period between 1996 and 2003. The policies generally provide indemnity to Swagger in the event of liability for personal injury or property damage. The insurers argue that the counterclaim is a claim for

deficiencies in Swagger's own work, which is not covered by the policies. Although the counterclaim was filed in 1999, the insurers were not notified of the claim and asked to provide a defence until 2004. Swagger says this is because of the changing nature of UBC's claim through the various amendments. In particular, Swagger says the counterclaim was expanded to include a claim that may be considered property damage under the policies.

¶ 4 The leading authority in this Court on the duty to defend under insurance policies of the type at issue here is Privest Properties Ltd. v. Foundation Co. of Canada. Ltd. (1991), 57 B.C.L.R. (2d) 88, 6 C.C.L.I. (2d) 23 [Privest]. Drost J., at [paragraph] 208, adopted American authority describing the general purpose of CGL policies:

> Comprehensive general liability policies ... are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured's defective work and products ....

Citing Ohio Casualty Insurance Co. v. Bazzi Construction Co. Inc., 815 F. (2d) 1146 (C.A. 7th circ. 1987), at [paragraph] 209 Drost J. added:

> There is a policy reason for this. If the insurance proceeds could be used to pay for the repairing or replacing of defective work and products, a contractor or subcontractor could receive initial payment for its work and then receive further payment from the insurer to repair or replace it. Equally repugnant on policy grounds is the notion that the presence of insurance obviates the obligation to perform the job initially in a good and workmanlike manner: see Centex Homes Corp. v. Prestressed Systems Inc., 444 So. (2d) 66 (Fla. App. 3 Dist., 1984).

¶ 5 This principle has been sometimes summarized by saying a CGL policy is not a performance bond. However, that general principle is always subject to the specific terms of the policy at issue. In Westridge Construction Ltd. v. Zurich Insurance Co., [2005] S.J. No. 396, 2005 SKCA 81 [Westridge Construction], the Saskatchewan Court of Appeal said:

> In the concluding paragraphs of his reasons for decision,([paragraph]s [38] to [42] the trial judge found that the claims against Westridge did not fall within the insuring agreements. In doing so, he made no reference to the terms of the policies themselves, but appears to have relied on what he termed to be a fundamental principle of insurance law that a Comprehensive General Liability Policy is not intended to be a means for a contractor to cover the expenses to cover its own defective workmanship or materials, or to be a performance bond (paragraphs [24] to [28]).
>
> While the statement of principle is sound, this was an erroneous approach, as the judge was obliged to decide the issue not upon general insurance principles, nor upon the general nature of the policies, but upon the exact terms of the insurance policies themselves. ([paragraph] 33 to 34)

¶ 6 The following general propositions, which are not disputed in this case, emerge from the extensive review of the law in Privest:

a) The duty of an insurer to defend is broader than its duty to indemnify. The duty to defend arises when the claim against the insured alleges acts or omissions falling within the policy coverage. The duty to indemnify arises only when such actions are actually proven at trial.
b) It is not necessary to prove that the obligation to indemnify will in fact arise. The duty to defend is triggered by the mere possibility that a claim within the policy may succeed.
c) Consideration of the duty to defend is governed by the pleadings. If the claim alleges facts that would, if proven, fall within the coverage provided by the policy, the duty to defend arises regardless of the truth or falsity of those allegations.
d) Any doubt as to whether the pleadings would bring the claim within the policy's

coverage must be resolved in favour of the insured.

¶ 7 In Wagner v. Commercial Union Assurance of Canada (1994), 95 B.C.L.R. (2d) 273, 27 C.P.C. (3d) 47 at [paragraph] 8, this Court adopted the following primary rules of construction for insurance contracts from Gordon Hilliker, Liability Insurance Law in Canada, (Toronto: Butterworths, 1991) at p. 21:

> i. words in a policy are to be construed according to their plain, ordinary and popular sense;
> ii. the policy should be considered in its entirety and be construed liberally so as to give effect to the purpose for which it was written;
> iii. where, due to an ambiguity, the policy wording is susceptible to two reasonable but opposing interpretations, the construction to be adopted is the one most favourable to the insured.

¶ 8 The Supreme Court of Canada adopted a somewhat different formulation of the same principle in Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co., [1993] 1 S.C.R. 252, 99 D.L.R. (4th) 741 at [paragraph]33:

> .... In each case the courts must examine the provisions of the particular policy at issue (and the surrounding circumstances) to determine if the events in question fall within the terms of coverage of that particular policy. This is not to say that there are no principles governing this type of analysis. Far from it. In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:
>
> (1) the contra proferentum 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.

¶ 9 The insurance contract must be interpreted in light of the pleadings that are said to give rise to the duty to defend. The Supreme Court of Canada said in Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801, 68 D.L.R. (4th) 321 at [paragraph] 21, that "the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy." However, the Supreme Court has also made clear that this does not mean the court should engage in "a fanciful reading of the statement of claim for the purpose of requiring the insurer to defend": Monenco Ltd. v. Commonwealth Insurance Co., [2001] 2 S.C.R. 699, 2001 SCC 49 at [paragraph] 32, [Monenco], citing G. Hilliker, Liability Insurance Law in Canada, 3rd ed. (Toronto: Butterworths, 2001) at p. 72.

¶ 10 In that context, the court must look beyond the terminology or labels used in the statement of claim in order to determine the "true nature" or "substance" of the claim and whether it can be supported by the factual allegations (Monenco).

¶ 11 The court must first determine whether the claim falls within the insuring agreement contained in the policy. If it does not, that is the end of the matter. If it does, it is necessary to determine if it is excluded by any of the exclusion clauses in the policy. If not, the final question is whether there is a possibility that the claim will succeed at trial: see Ellett Industries Ltd. v. Laurentian P & C Insurance Co. (1996), 17 B.C.L.R. (3d) 201, 34 C.C.L.I. (2d) 294.

¶ 12 This case is set to proceed to trial on the basis of UBC's third further amended counterclaim. Although that is the pleading on which any judgment will be based, it is important to examine how the counterclaim evolved to that point.

¶ 13 The original counterclaim filed in 1999 included a paragraph alleging that:

At all material times the Forest Sciences Centre, Phases 1 and 2, (the Project) has had construction deficiencies arising from faulty materials, workmanship and design (the "Construction Deficiencies"), particulars of which include, but are not limited to:

That statement was followed by a list of nine particulars, each referring to a failure to do something. For example:

...

(d) failing to design and/or install exterior flashing with an appropriate slope to allow for drainage of water from the exterior walls of the Project;
(e) failing to design and/or install the air/vapour barrier membrane over a sloped surface and protected by a properly sloped metal flashing;

¶ 14 The various amendments expanded that list of particulars to the point that it now continues for almost 12 pages. The particulars that have been added include four pages of allegations relating to "failing to properly design and construct the building envelope." Although the list of particulars has grown, the introductory portion of the paragraph continues to refer to alleged "construction deficiencies" that have existed "at all material times".

¶ 15 The most recent amendment to the counterclaim adds a new paragraph stating:

The construction deficiencies have caused damage to the exerior and interior building components (the "Resultant Damage").

It also alleges that construction deficiencies and resultant damage posed a danger to visitors and made the building unfit for its intended purpose. Throughout the remainder of the counterclaim, a reference to "resulting damage and dangerous defects" is added whenever reference is made to the construction deficiencies.

¶ 16 When the counterclaim was first amended in early 2001, UBC added a specific allegation that it has had to do remedial work to correct construction deficiencies and it set out a number of particulars. It also specified the amount it had spent and the amount it would have to spend in the future. Subsequent amendments have lengthened the particulars and increased the dollar amounts. With the last amendment, this remedial work is now said to arise not only from construction deficiencies but "construction deficiencies, resultant damage and dangerous defects." Examples of remedial work claimed include:

(m) repairs of wall and roof leakage;
(n) repairs to curtain wall leakage;
(o) completing other repairs relating to the failure of the building envelope.

¶ 17 The counterclaim then has a section setting out a specific claim against Swagger. I interpret that to mean that these are claims that are advanced only against Swagger and not against the other defendants by counterclaim. Contrary to one submission made in argument, it does not mean that the claims against Swagger are limited to those allegations. The previous lengthy allegations of construction deficiencies, resulting damage, and dangerous defects, must be read as referring to all of the defendants by counterclaim, including Swagger.

¶ 18 The original counterclaim, made specifically against Swagger, refers to the contract between Swagger and UBC. It then adds:

Further, and in the alternative, UBC says that Swagger owed a duty of care to UBC to ensure that the Project was constructed using all reasonable care, skill, diligence and competence, by the Completion Date and without the Construction Deficiencies.

In breach of the duty of care, Swagger negligently failed to exercise all reasonable care, skill, diligence and competence in the construction of the Project, resulting in delayed completion of the Project and the Construction Deficiencies, particulars of which have been provided or will be provided at the trial of this matter.

In specific reference to construction deficiencies, the counterclaim alleged that UBC has suffered the following damages as a result of breach of contract:

> (a) The Project was not constructed in a good and workmanlike manner, free of the Construction Deficiencies;
> (b) the Project was not constructed substantially in accordance with the approved drawings and specifications; and
> (c) the outstanding deficiencies were not rectified on or by January 31, 1999; (collectively the "Breaches").

¶ 19 The loss that was stated to flow from the breach of contract included "additional costs incurred" and "costs incurred by UBC to repair parts of the Project damaged by the defective installation of the air/vapour barrier membrane." A further paragraph alleged exactly the same damages as a result of negligence.

¶ 20 The second further amended counterclaim, dated April 28, 2003, added a number of further particulars including a claim against Swagger for "repairs relating to the failure of the building envelope". In the third further amended counterclaim, this section is changed to add reference to "resultant damage and dangerous defects." There is also some rewording of the basic negligence allegation, including a paragraph that reads:

> Pursuant to the Agreement, Swagger owed a duty of care to UBC to use all reasonable care, skill, diligence and competence to ensure that the Work was constructed properly, without the Construction Deficiencies, Resultant Damage and Dangerous Defects.

¶ 21 That change, in my view, does not in any way change the cause of action from what it was in 1999. UBC pleads negligence and breach of a duty of care, as well as breach of contract. However, but the duty of care is said to arise only out of the contract.

¶ 22 Giving the pleadings their broadest possible interpretation, the counterclaim against Swagger contains the following basic elements:

> a) a claim that Swagger was in breach of its obligations under the construction contract;
> b) a claim that Swagger was negligent in performing its contractual obligations;
> c) a claim that Swagger's breach of contract and negligence resulted in construction deficiencies;
> d) a claim that UBC has had to repair the construction deficiencies;
> e) a claim that the construction deficiencies have caused additional damage, including damage to other parts of the building that were not in themselves defective. This claim and includes failure of the building envelope and resulting leaks; and
> f) a claim that as a result of the construction deficiencies, resultant damage and dangerous defects, UBC has suffered a loss of use of the property.

It is important to emphasize that the damage alleged is damage to the very building that Swagger contracted to build. There is no allegation of personal injury to anyone, or any allegation of damage to property other than the Forest Science Centre.

¶ 23 These allegations must be reviewed in light of the insurance policies at issue. The respondent, ING, issued a Wrap-up Liability Policy for the project in February 1996. The relevant terms of the insuring agreement are as follows:

> We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage".
> "Property damage" must be caused by an "occurrence."
> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
> "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.

[Emphasis in original.]

¶ 24 The respondent, Zurich, is the petitioner's insurer under a General Liability Policy that went into effect on August 1, 1999. The relevant provisions are identical to those in the ING policy.

¶ 25 The respondent, American Home, became the petitioner's insurer under a Commercial General Liability Policy beginning in August 2001. The policy was renewed with new wording in August 2002. The insuring agreement in the first American Home Policy said the insurer would:

> Pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of property damage caused by accident.
> "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.
> "accident" includes continuous or repeated exposure to conditions which results in property damage neither expected or intended from the stand point of the Insured.
> [Emphasis in original.]

¶ 26 I do not interpret that language as being materially different from the ING and Zurich policies. The revised American Home policy contains wording identical to those policies.

¶ 27 In attempting to apply the policy language to the allegations in the pleadings, it is first necessary to consider the meaning of the term "property damage." Counsel for Swagger says that UBC's claims fall into three categories:

(1) the costs of repairing particular work which was allegedly defective;
(2) the costs of repairing work damaged by the other allegedly defective work; and
(3) the costs associated with the loss of use of the Project.

¶ 28 Swagger does not press any argument that the first category falls within the coverage provisions. If any authority is needed to make clear that it does not, that authority is found in Privest. The underlying action in that case concerned removal of asbestos from a building. Defence costs were sought from a number of different insurers with different policy language. Two of the insurers defined property damage as "injury to tangible property". This definition is identical to what appears in the policies at issue here. After a thorough review of Canadian and American law, Drost J. concluded at [paragraph] 156:

> So far as Canadian law is concerned, it seems clear that unless there has actually been personal injury or damage to other property, the cost of repairing or replacing defective work is considered to be pure economic loss rather than damage to property: Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692, 40 D.L.R. (3d) 530 [B.C.].

Drost J. also noted, at [paragraph] 160:

> Harbor Machine Ltd. v. Guardian Insurance Company of Canada (1985), 60 B.C.L.R. 360, 10 C.C.L.I. 72 (C.A.), also provides support for the proposition that, under our law, the mere presence of a defective product in an otherwise sound structure does not, in itself, constitute damage to property.

¶ 29 The result in Privest was that the insurers who defined property damage as the insurers have in this case

were not required to provide a defence to the contractor. I also note that the definition of property damage was not expanded merely because the defect at issue was a dangerous one.

¶ 30 However, the Court found that a different, broader definition of property damage in some policies did give rise to potential indemnity and a duty to defend. Those policies defined property damage as damage or injury to "property" rather than to "tangible property." The Court found that such language could include "an infringement of intangible property or an incorporeal right" ([paragraph] 168). That broader definition does not assist Swagger in this case because it was not used in any of the policies at issue.

¶ 31 In the context of these pleadings, the third category of damage referred to by Swagger, loss of use, adds nothing to the analysis. The only allegation against Swagger that can be interpreted as one for loss of use is the paragraph alleging the building was rendered unfit for its intended purpose. This relates to the Forest Science Centre itself, not to any different, undamaged property. Therefore, the relevant section of the policy is the portion that refers to loss of use of the property damaged. Accordingly, the third category of damages must stand or fall with the second.

¶ 32 This second category, defects in one part of the building causing damage to other parts, did not arise in Privest. This category still involves defects in, or damage to, work done by Swagger. There is, for example, no allegation of damage to equipment, furniture, or decorations that UBC added to the building after it was completed by Swagger. The question is whether there can be any notional division of Swagger's work into separate parts so that a defect in one part can be said to cause property damage to another.

¶ 33 In Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193 [Winnipeg Condominium], the plaintiff claimed the cost of removing and replacing a building's defective exterior cladding. The plaintiff advanced an argument similar to Swagger's second category of damages. It argued that one element of a structure should be regarded as distinct from another, so that damage to one part of the structure caused by a defect in another could qualify as damage to "other property". The assertion of this "complex structure theory" relied on dicta by Lord Bridge in D & F Estates Ltd. v. Church Commissioners for England, [1988] 2 All E.R. 992 (H.L.). The Supreme Court of Canada has rejected the theory, and noted that Lord Bridge had later rejected it in Murphy v. Brentwood District Council, [1990] 2 All E.R. 908 (H.L.): Winnipeg Condominium at [paragraph] 15. LaForest J. summarized the law relating to the "complex structure" theory at [paragraph]s 14 and 15:

> ... Counsel for the Condominium Corporation argued that the collapse of the cladding may have been attributable to the negligent installation of certain metal ties. Following the logic suggested by Lord Bridge, counsel argued that the loss suffered was not, in fact, economic loss but, rather, damage to "other property" and the recoverable under the principles established in Donoghue v. Stevenson, [1932] A.C. 562 (H.L.). In other words, he sought to localize the defect in one part of the structure and to claim that the damage to the rest of the structure was "caused" in some manner by the defect.
>
> I note at the outset that I do not find the Condominium Corporation's argument on this subsidiary point persuasive. In Murphy, supra, at pp. 926-8, Lord Bridge reconsidered and rejected the "complex structure" theory he had suggested in D & F Estates, criticizing the theory on the following basis (at p. 928):
>
> > The reality is that the 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 insulation 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.

¶ 34 Winnipeg Condominium dealt with the distinction between property damage and economic loss for the purpose of tort law. The Supreme Court of Canada held that the contractor owed a duty to subsequent purchasers of the building to prevent defects that caused danger to persons or property. The subsequent owner did not have to wait until there was an actual injury before doing corrective repairs. The duty was confined to dangerous defects and to subsequent purchasers who could not rely on any contractual relationship with the contractor.

¶ 35 After the Supreme Court of Canada's decision in Winnipeg Condominium, the defendant contractor sought an order that its insurer defend the claim. In Bird Construction Co. v. Allstate Insurance Co. of Canada, [1996] 7 W.W.R. 609 [Bird Construction], the Manitoba Court of Appeal said the insurer had no duty to defend and made clear (at [paragraph]s 11 and 12) that the Supreme Court of Canada's rejection of the "complex structure" theory for tort purposes, also applied to insurance law:

> The claim is obviously not one for "damages because of bodily injury." Nor is it one for "damages because of property damage" as those latter words are defined in the policy. As LaForest J. remarked in Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd., supra, at p. 98:
>
> > I observe that the losses claimed by the Condominium Corporation in the present case fall quite clearly under the category of economic loss.
>
> The only damage to property alleged in the claim against the policy holder is damage to the building itself. But this is not damage in the sense defined in the policy which expressly excludes coverage for damage to the work performed by or on behalf of the policy holder (Exclusion (k)(4)). Nor can it be argued that the defect in part of the building caused damage to the rest of the building. This argument, known as the "complex structure" theory, was rejected by the Supreme Court of Canada in Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd., supra, at p. 100.

¶ 36 The basic principle set out in Privest and the authorities on which it is based is that for the purpose of CGL policies, damage to "tangible property" does not include the cost of remedying defects in the insured's own work. Drost J. also said that a general contractor's "work" is the project for which the contractor was engaged ([paragraph]238). The effect of Winnipeg Condominium and Bird Construction is that, subject to one possible exception that I will discuss below, this basic principle can not be avoided by an artificial division of the insured's work into component parts.

¶ 37 Of course, parties to insurance contracts might expand the definition of property damage and the scope of coverage to include some, but not all, of the insured's own work, based on what might be a difficult and arbitrary division of building components. However, I can find no language in these contracts that can be stretched to include such a departure from the usual purpose of a CGL policy.

¶ 38 I also note, that although the Supreme Court of Canada distinguished between defects that were dangerous and those that were merely substandard for the purpose of tort law, the Manitoba Court of Appeal was not prepared to incorporate a building defect into the definition of property damage simply because it is alleged to be "dangerous." That is also consistent with the decision of this Court in Privest, which dealt with the dangerous presence of asbestos in a building.

¶ 39 An apparently contrary result was reached by the Saskatchewan Court of Appeal in Westridge Construction. The contractor in that case had built a swine barn and was sued by the owner, who alleged that

some time after the building was completed the roof began to rust. This rusting process continued so that by the time the writ was issued seven years after the building was completed there was a danger of catastrophic failure.

¶ 40 The Saskatchewan Court of Appeal said the damage alleged came within a definition of property damage similar to what is found in these policies. However, the Court does not appear to have been referred to Privest, Winnipeg Condominium or Bird Construction. Elsewhere in the judgment, the Court makes clear that it did not consider the alleged damage to be caused solely by faulty performance of a construction contract. The decision was based on a separate allegation of an independent tort. In Westridge Construction, the Saskatchewan Court of Appeal stated:

> ... These allegations raise a cause of action arising not from faulty workmanship or defective material, but from failure to warn, before the contract was entered into, that the work and materials called for by the contract were unsuitable for the conditions of the swine barn. ([paragraph] 48)

Although, the Court drew that distinction in discussing the issue of exclusion clauses rather than the definition of property damage, it is a distinction that makes the result of that case inapplicable here, unless anything in the pleadings can be called an allegation of an independent tort.

¶ 41 Swagger asserts that the counterclaim's references to breach of duty and negligence create such an allegation. But the finding of an independent tort claim in Westridge was based on a finding that the tort and contract claims arose from different and separate sets of facts. In particular, the tort claim arose from alleged advice and representations that predated the contract. No such allegation is made here against Swagger. The tort duty of care is alleged to arise only out of the contract and the references to negligence can only be read as negligence in the performance of the contract.

¶ 42 Swagger also relies on the decision of this Court in AXA Pacific Insurance Co. v. Guildford Marquis Towers Ltd. (2000), 74 B.C.L.R. (3d) 194, 2000 BCSC 197 [AXA Pacific]. This case involved claims for construction defects resulting in "substantial water infiltration into the interior walls." There was a specific claim for repairing parts of the building damaged by defects in other parts, such as drywall damaged by water entering through defective joists or caulking. After referring to Winnipeg Condominium and Bird Construction, Bauman J. said, at [paragraph] 24, that it was arguable that this category of damage "does not include parts of the buildings which form `a single indivisible unit' of structural elements with the defective parts of the building." [Emphasis added.]

¶ 43 This language suggests there may be a distinction between structural and non-structural elements of a building. That possibility arises directly from Winnipeg Condominium, which suggests a distinction between a part of a structure that "does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions." The Court used the example of a defective central heating boiler exploding and damaging the structure. That distinction must also work in the other direction. A defect in the structure may lead to damage to parts of the building that have no structural function and do not form part of an indivisible unit of structural elements. For example, a failure of the building envelope, such as is alleged in this case, may cause water damage to building elements that have an aesthetic or functional purpose but no structural significance. Carpeting and perhaps drywall could fall within this category. Although still part of the contractor's work, it might be said that the property damaged is so far removed from the defective portion, both in function and the specific construction steps taken in relation to it, that it would arguably be called "other property".

¶ 44 In AXA Pacific, Bauman J. did not have to decide whether that distinction was relevant because he relied on the specific policy language to find that the duty to defend existed for both the cost of repairing defects and any "resultant damage to other parts of the building. The policy in that case defined property damage as "injury to or destruction" of property ([paragraph] 32). Bauman J. noted that the wording was the same as the policy wording that gave rise to a duty to defend in Privest because it could include "infringement of intangible property or incorporeal right." ([paragraph] 36).

¶ 45 The policy in this case refers to "tangible property", which is the language that Privest said does not

give rise to a duty to defend. On its result, AXA Pacific is distinguishable from this case simply on the basis of what was found in Privest to be a significant difference in the wording of the policy. It certainly does not suggest any departure from the law stated in Privest, which has been adopted by courts across Canada.

¶ 46 However, AXA Pacific does leave open the question of whether the policies in this case could be interpreted as having application in the limited sense of resulting damage to non-structural portions of the plaintiff's work. Can, for example, a failure of the building envelope be considered property damage to the extent that it damages features like carpeting and interior drywall? If that can be considered property damage, it would appear to form a very small part of UBC's counterclaim.

¶ 47 But even if that very narrow category could be called property damage for the purpose of these policies, it would next become necessary to consider whether that property damage can be called the result of an "occurrence." In AXA Pacific, the parties agreed that the alleged events were an occurrence and it was therefore not necessary for the court to consider the authorities on that point.

¶ 48 The policies define an occurrence as an "accident". The Supreme Court of Canada's decision in Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd., [1976] 1 S.C.R. 309, (1975) 53 D.L.R. (3d) 1 [Canadian Indemnity] is the leading Canadian authority on the definition of the word "accident." In that case, the insured manufactured what proved to be a defective crane that was installed on a barge. The crane collapsed and the insured was held liable to the owner of the barge.

¶ 49 The Supreme Court of Canada held that the collapse of the crane was an "accident" within the meaning of the policy. At p. 6, it accepted the definition of accident as "any unlooked for mishap or occurrence" including a mishap that would have been avoided by the exercise of greater skill. The court rejected previous authority to the effect that the definition of accident did not extend to the results of a calculated risk or dangerous operation. To define the term so narrowly would defeat the purpose of liability insurance.

¶ 50 Canadian Indemnity was followed in Cansulex Ltd. v. Reed Stenhouse Ltd. (1986), 70 B.C.L.R. 273 [Cansulex]. The insured in that case had loaded a shipment of sulphur onto a ship for transport. The condition of the sulphur caused corrosion of the ship's hull. McEachern C.J.S.C. found on the basis of Canadian Indemnity, that the damage to the ship came within the definition of accident or occurrence.

¶ 51 However, Canadian Indemnity and Cansulex both involved situations where a defect in the insured's product caused an event that damaged other property. Would the result in those cases have been the same if the only claim was for damage to the defective product itself?

¶ 52 That was the situation before the Court of Appeal in Harbour Machine Ltd. v. Guardian Insurance Company of Canada (1985), 60 B.C.L.R. 360 [Harbour Machine]. Engines had been installed improperly in a boat. This defect was discovered after a propeller fell off. The Court held that the improper installation and workmanship could not, in itself, be called either property damage or an accident or occurrence within the meaning of the insurance policy:

> On the other hand, I incline to the view that the second submission of the appellant is right. Were it not for the matter of the propeller falling off on November 26th, I would be able to see no possible basis for holding that there was any damage to or destruction of property as required by both insuring agreements 2(a) and 2(b). Nor, apart from the matter of the propeller, could I see any possible basis for holding that there was either an accident or an occurrence. Essentially, the cost of remedying the defect arose out of the faulty planning and design of the installation and the poor workmanship in carrying it out. Apart from the minor matter of the propeller, there was nothing which could constitute a mishap or occurrence, the event which must happen before there can be said to be either an accident or an occurrence.

¶ 53 More recently, the Ontario Court of Appeal reached the same result in Celestica Inc. v. ACE INA Insurance (2003), 229 D.L.R. (4th) 392 [Celestica]. In Celestica the insured provided defective transformers for incorporation into photocopy machines. The transformers had to be replaced, but the Court said mere defective design or manufacture did not constitute an occurrence or accident. In coming to that conclusion, the Court

referred to both Harbour Machine and Privest.

¶ 54 The Ontario Superior Court has subsequently applied Celestica and Privest to facts more similar to the facts of this case. A.R.G. Construction Corp. v. Allstate Insurance Company of Canada et al. (2004), 38 C.L.R. (3d) 221, 73 O.R. (3d) 211 [A.R.G. Construction], dealt with a claim for water damage to portions of a building resulting from defective design and installation of exterior limestone cladding, and defective installation of a roof membrane. Ferrier J. said at [paragraph] 26 that: "Every allegation bespeaks faulty material, faulty workmanship and breach of contract." He went on to hold that such allegations if proven would not constitute an accident.

¶ 55 A similar result was reached by the Newfoundland and Labrador Supreme Court in Twin Cities Mechanical and Electrical Ltd. v. Progress Homes Inc., [2004] N.J. No. 282, 2004 NL SCTD 157. That case dealt with the duty of a liability insurer to defend a mechanical and electrical contractor against construction deficiency claims. At [paragraph]s 32 to 34, the Court found:

> The relief requested is the cost of rectifying the deficiencies and the loss of revenue from the delay in opening the facility.
>
> There is only one item in the list of deficiencies which could suggest property damage. Item 5 in par. 30 of the statement of claim reads - "repair under-floor leaking ductwork - $38,000". The reply to the demand for particulars alleges the physical causes of this leaking to be "improper sealing of the ductwork" and a "collapse in the ductwork". The leaking is said to have caused consequential damage to the ventilation system.
>
> However, even if one were to conclude that the single reference to leaking connotes property damage, there is no reference in the pleadings to such leakage having been caused by an accident. The pleadings against Newton, read reasonably, assert a claim based on breach of contract or negligent or faulty workmanship. The true nature and substance of Progress Homes claim arises out of a contract for design and construction contract administration; it is in no sense a claim for property damage caused by accident.

¶ 56 Counsel for Swagger also relies on F.W. Hearn/Actes - A Joint Venture Ltd. v. Commonwealth Insurance Co. (2000), 75 B.C.L.R. (3d) 272, 2000 BCSC 764 [Hearn/Actes]. This case also involved a construction contract at UBC, alleged deficiencies in the contractor's performance, and an application by the contractor that its insurers provide a defence. The policy language was similar to the policies at issue here. It referred to damage or destruction of tangible property caused by an occurrence. J.T. Edwards J. held that there was a duty to defend because the claims fell within "the liberal interpretation of damage to property now specifically adopted by our courts." He also held that there was an occurrence.

¶ 57 Counsel for Swagger says that Hearn/Actes, and AXA Pacific indicate that the law in British Columbia has diverged from the law in other provinces. Counsel argues that the law in British Columbia now calls for a wider and more liberal interpretation of insurance policies in cases like this. I have already said that AXA Pacific is distinguishable on the basis of the policy wording.

¶ 58 But of course, if Hearn/Actes in itself sets out law that is different from the law in other jurisdictions, I am bound to follow it. However, there was no suggestion of any reason why the law in British Columbia should be different from the rest of the country. I was not directed to any statutes that mandate a different approach, or to any differences in the prevailing conditions or practices within the industry. In the absence of such differences, insurers and contractors, many of whom carry on business across the country, should be able to expect reasonable consistency in the law.

¶ 59 I confess, with respect, that I have difficulty understanding how the Court in Hearn/Actes reached the decision it did in light of the applicable authorities. One problem is that the pleadings are not described except in very general terms. They are said to allege construction deficiencies, including resultant damage.

¶ 60 The Court refers to Winnipeg Condominium. It does not refer to Bird Construction. However, it refers to AXA Pacific, which does refer to Bird Construction. If Bird Construction was argued in Hearn/Actes, there is no explanation of why a different result was reached. In reference to Winnipeg Condominium, the Court said:

In Winnipeg Condominium, supra, Mr. Justice LaForest used the potential of danger to back away from a previously unshaken characterization of this type of loss as pure economic loss.

The claims for "economic loss" fall within the liberal interpretation of "damage to property", now specifically adopted by our courts ([paragraph]s 12 and 13).

¶ 61 The Court then stated at [paragraph]s 26 to 29:

The respondents argue that the costs of repairing defects are "economic loss" and are not recoverable. The policy considered by Drost J. in Privest was identical to the coverage provided in the case at bar.

In Canadian Indemnity Insurance Co. v. Andrews and George Co., [1953] 1 S.C.R. 19 at 27 Rand J. defined "accident" as

> What is meant is something out of the ordinary or the likely, something fortuitous, unusual and unexpected, not of the range of "accident".

That a mishap might have been avoided by the exercise of greater care and diligence does not automatically take it out of the range of "accident".

These factors, in my view, bring the allegations in the amended counterclaim within the coverage provisions of the Policy.

The policy in Hearn/Actes was identical to one category of policy considered in Privest. However, this was the category that Drost J. held did not give rise to a duty to defend. In relation to the finding that there was an occurrence, the Court was apparently not referred to the discussion of that issue in Harbour Marine, and, of course, could not have had the benefit of subsequent authorities such as Celestica and A.R.G. Construction.

¶ 62 The conclusion reached in Hearn/Actes was stated as follows:

In conclusion, on the issue of whether or not there is coverage on the insuring agreement, it is my view that provided the court is required to construe the coverage provisions broadly and considering the definitions of "accident", "occurrence", "property liability" and the words of Bauman J. in AXA Pacific Insurance Company, supra, the petitioner has met the first part of the test and has established that the claims are within the scope of the Policy ([paragraph] 31).

I have already noted that the AXA Pacific case relied upon in that paragraph, is based on language established by previous authority to be significantly different from what was before the court in Hearn/Actes, and from what is before the court in this case.

¶ 63 Having said that, Hearn/Actes is a considered decision of this Court on facts that, as far as can be determined, appear to be very similar to the case at bar. I am bound to follow it except in the specific circumstances set out in Re Hansard Spruce Mills Ltd., [1954] 4 D.L.R. 590 (B.C.S.C.) [Hansard Spruce Mills]. Those circumstances were described by Wilson J. as occurring when:

(a) subsequent decisions have affected the validity of the impugned judgment;
(b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
(c) the judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority. (p. 592),

¶ 64 That passage was recently considered by Goepel J. in McCready v. Nanaimo (City), [2005] B.C.J. No. 1157, 2005 BCSC 762 at [paragraph]s 47 and 48. Goepel J. also considered the case of Cairney v. Queen Charlotte Airlines Ltd. et al. (No. 2) (1954), 12 W.W.R. (N.S.) 459 (B.C.S.C), which is referred to in Hansard Spruce Mills:

In Hansard Spruce Mills, Wilson J. reiterates what he said in Cairney and refers to it, but he omits specific reference to one of the conditions he mentioned in Cairney at p. 460:

> No suggestion has been made to me that the authorities bearing on the question were not considered by Fisher J. There is no subsequent judgment by any member of this court or by any higher court which would suggest that Fisher J. reached a wrong conclusion. There is no suggestion that his judgment is palpably wrong in that it displays a patent error as to law or as to the facts upon which his statement of law is based.

A patent error of law or fact is a ground on which I may refuse to follow an earlier judgment of this court: Leischner et al. v. West Kootenay Power & Light Co. Ltd. et al., 150 D.L.R. (3d) 242 (B.C.S.C.), varied (1983), 24 D.L.R. (4th) 641 (B.C.C.A.).

¶ 65 In dealing with an issue of interpretation of a statutory provision, Goepel J. found that a previous decision of this court was "palpably wrong" and declined to follow it.

¶ 66 It will be apparent from my previous review of Hearn/Actes that I believe the first two of the three conditions set out in Hansard Spruce Mills apply. The Court was not referred to a binding authority on the definition of occurrence - a subject which has also been considered by subsequent authorities. It may be that there were specific allegations in the pleadings that supported the result in Hearn/Actes. However, in the absence of such information, I am unable to see how the result could have been reached on a proper application of the law set out in Privest, Winnipeg Condominium, Bird Construction and the other cases to which I have referred. I therefore must conclude, with great respect, that I am not bound to follow Hearn/Actes.

¶ 67 I must also deal with another case relied upon by Swagger. In SCS Western Corp. v. Dominion of Canada General Insurance Co., [1998] 7 W.W.R. 570, 1998 ABQB 152 [S.C.S.], the insured constructed a gas bar and was alleged to have negligently installed underground gasoline piping. The Court summarized the claims at [paragraph] 3 as follows:

> Domo claims in contract and negligence against Pier Mac. It claims in negligence against SCS for negligently installing fibre reinforced plastic piping. Domo claims for costs incurred to rectify petroleum leakage, including removal and replacement of piping, environmental monitoring, installation of vapour extraction systems, excavation, removal and replacement of contaminated soil, regarding of the property and inspection and environmental testing costs. Domo also claims for revenue lost while the gas bar was shut down for the repair and remedial work.

The Court concluded at [paragraph] 63:

> In my view, this matter cannot be resolved by a chambers application. There are disputed facts, serious questions of law, and, in relation to the issue when the damage occurred, the possibility of inconsistent findings by separate courts. But SCS should not be required to have the duty to defend determined by a trial of an issue. Unless it has been shown that it is not possible for coverage to exist, the duty to defend remains. To hold otherwise would read the insurer's obligation to defend to narrowly, and the insurer's exclusion clauses too broadly.

¶ 68 The claim in SCS included a claim for contaminated soils, which would be injury to property other than the insured's work. I note that it also includes a claim for loss of use of the gas bar. The case may be seen as an application of a distinction similar to the one I have suggested may exist between structural and non-structural property. It could be argued that a gas bar, if that means a building, would be so different in function and construction from the underground piping that it could be said to be "other property." I do not think the case assists Swagger here.

¶ 69 Finally, Swagger relies on provisions of the ING policy that provide "completed operations coverage." This is further coverage, for which Swagger says it paid an additional premium, to extend coverage for two

years from the normal expiry date of the policy or from completion of the project. The additional coverage is defined as follows:

> 9. a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own and arising out of "your product" or "your work" except:
>
> 1) Products that are still in your physical possession; or
> 2) Work that has not yet been completed or abandoned.

¶ 70 "Property damage" is a defined term within the policy and I have already discussed how that definition must be applied in these circumstances. There is nothing in the definition of the "completed operations hazard" to indicate that a different definition of property damage should apply. The clear intention of the additional coverage, and the purpose for which Swagger paid an extra premium, was to extend the protection of the policy beyond the time when it would normally expire. Giving the policy's language the broadest possible interpretation, I still cannot find that it changes the nature of the damage for which coverage is provided.

¶ 71 I am fortified in that conclusion by reference to one of the exclusion clauses in the contract. The insurers have relied on a number of exclusion clauses and I generally do not need to deal with them because I have found that the claim does not fall within the insuring agreement. However, one of the exclusions applies specifically to the completed operations coverage.

¶ 72 The policy contains a general exclusion clause relating to the insured's own work. It excludes coverage for property damage to:

> ... that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

That paragraph goes on to state that the exclusion does not apply to property damage included in the completed operations hazard, but a subsequent paragraph provides an exclusion for property damage to:

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

¶ 73 As I said earlier in these reasons, it was held in Privest, that the "work" or "product" of a general contractor is "the project for which the contractor was engaged" ([paragraph] 238). The Court added:

> On the strength of these authorities, and bearing in mind the underlying purpose of a CGL policy, I am of the opinion that the work/product exclusion clause found in each of the subject policies ... relieves the insurer of any obligation to defend Foundation ([paragraph] 239).

¶ 74 Although the language of the policy is somewhat tortuous, I do not find any ambiguity. The clear intention of the policy was to extend the effect of the "work/product exclusion" as well as the basic definition of property damage, to any claim arising under the completed operations hazard. The completed operations hazard extends the time for which coverage is provided, but does not change the nature of the coverage.

¶ 75 In summary, I find that allegations in the counterclaim do not come within the insuring agreements of any of the policies. Because of that conclusion, I do not have to address all of exclusion clauses that the insurers relied on. I also do not need to address the submissions on behalf of American Home that it is in a different position from the other insurers because of the late inception of its policy.

¶ 76 None of the insurers are required to provide Swagger with a defence and the petition is dismissed.

N.H. SMITH J.

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