COURT FILE NO.: 04-CV-267509CM3
DATE: 20070213

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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YORK REGION CONDOMINIUM CORPORATION NO. 772, THE CORPORATION OF THE TOWN OF RICHMOND HILL, THE REGIONAL MUNICIPALITY OF YORK, ALAN ZEEGEN ASSOCIATES LTD. and HADDAD GEOTECHNICAL INC.	)	*Charles M. Loopstra, Q.C.* *Michael B.McWilliams* for the Plaintiffs
Plaintiffs	)	
- and -	)	
	)	
LOMBARD CANADA LTD., CONTINENTAL INSURANCE COMPANY, ALLIANZ INSURANCE COMPANY OF CANADA, CANADIAN SURETY COMPANY, AVIVA INSURANCE COMPANY OF CANADA and UNITED STATES FIRE INSURANCE COMPANY	)	*Mark L. J. Edwards* for the Defendants Lombard Canada Ltd. and Continental Insurance Company
Defendants	)	HEARD: November 16, 2006

WILSON J.:

The issues

[1] The plaintiffs bring a motion for summary judgment against the defendants Lombard Canada Ltd. and Continental Insurance Company (Lombard) pursuant to Rules 20.01 and 20.04 of the *Rules of Civil Procedure.* Lombard resists this motion, and seeks an order that this action be dismissed.

[2] Bradsil Leaseholds Limited ("Bradsil") was the general contractor for a condominium project at 175 Cedar Avenue, Richmond Hill, Ontario ("175 Cedar", the "Property"). Bradsil and

others were sued for defective work in Action 96-CU-114639 (“1996 Action”). Lombard insured Bradsil with a Commercial General Liability from October 1989 to October 1992 (the Policy).

[3] Throughout the 1996 Action and in this action Lombard has denied coverage.

[4] The Plaintiffs’ claims against all other defendants in the 1996 Action other than Bradsil have been settled.

[5] In December of 2003, Justice Somers granted summary judgment in the 1996 Action against Bradsil in favour of several plaintiffs in amounts significantly in excess of the Policy limits of two million dollars (the Judgment).

[6] As Bradsil was not able to satisfy the Judgment, the Plaintiffs bring this action against Lombard pursuant to section 132 of the *Insurance Act*, R.S.O. 1990, c. I.8 (“*Insurance Act”*) to recover the amounts in the Judgment up to the Policy limits. The Plaintiffs allege that the Policy insured Bradsil.

[7] Although the history and facts giving rise to this motion are complex, and occurred over a protracted period of time, counsel acknowledge that there are no facts in dispute, and that there is no genuine issue for trial. The interpretation of the established facts in relation to the wording of the Policy is disputed, but both counsel agree that all matters outstanding in this action can, and should be dealt with in this motion.

[8] The Statement of Defence and the defendants’ factum filed on this motion raise several issues, some of which appear at first blush to involve contested factual issues. The arguments by Lombard involving potentially contested factual issues have been abandoned. The legal issues outstanding in this action that I am asked to decide may be reduced to three questions as follows:

1. Have the plaintiffs proved that their claim is covered under the Policy as compensatory property damage caused by an occurrence? Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

2. Has the defendant met the onus of proof that the property damage is excluded by clause 2 (l) of the Policy? This clause excludes repairs for the insured’s work, if the work is withdrawn or recalled from the market.

3. The plaintiffs seek to enforce the Judgement against the insured granted by Justice Somers in a motion for judgment. Can the plaintiffs sue to enforce the Policy against Lombard given the limit in the Policy that the insurer can be sued to recover on a final judgment against the insured obtained after “an actual trial”.

The undisputed facts

[9] 175 Cedar is a 143 unit condominium building located in Richmond Hill, Ontario on the Oak Ridges Moraine. Construction of 175 Cedar took place between 1988 and 1990.

[10] In 1995 massive damage was discovered at 175 Cedar. The sand and soil layer under the building had gradually been pumped away due to a faulty dewatering system installed by Bradsil's subcontractors. The building was subject to an evacuation order for several months. Remediation took place to replace the lost soil and to stabilise and repair the foundations. The remediation costs totalled $7,266,336.00.

[11] The hydrogeological report confirms that the damage took place continually between early 1989 and September 1996.

[12] It is not disputed that the damage occurred during the Policy period. Counsel for Lombard concedes that the costs of the remediation during the period of coverage exceed the Policy limits.

[13] The condominium owners of 175 Cedar did not have the means to pay the remediation costs. The Regional Municipality of York, and the Town of Richmond Hill loaned the funds to 175 Cedar for the remediation costs, and received an assignment of the proceeds of litigation. Hence they are named plaintiffs in this action.

[14] Lombard refused to defend Bradsil in the 1996 Action asserting that the Policy and various other Lombard insurance policies did not engage.

[15] A mandatory mediation in the 1996 Action was ordered and took place in 1998. Mr. D'Silva, the principal of Bradsil, was present at the mediation. He had discharged his counsel, as he could no longer afford legal representation. The mediation began but was adjourned by the mediator to request the participation of Lombard.

[16] Before the mediation resumed in late September 1998, counsel acting for Lombard received all of the mediation briefs including all of the expert reports, as well as the amended Statement of Claim.

[17] Lombard continued to refuse to defend or to participate in the mediation.

[18] When the mediation resumed, D'Silva represented himself and Bradsil at the mediation. Mr. D'Silva refused to sign the settlement agreement following the written warning in correspondence from Mr. Edwards, counsel for Lombard, that to participate in any settlement may jeopardise his rights under the Policy.

[19] The mediation resulted in a settlement of the 1996 Action against all parties except Bradsil and D'Silva. In the settlement agreement, Bradsil agreed to cooperate in any motion for judgment brought against Bradsil.

[20] Various unsuccessful discussions took place between the plaintiffs in this proceeding and Lombard, to attempt to resolve the coverage issue.

[21] Prior to the motion for summary judgment the plaintiffs in the 1996 Action served a Fresh as Amended Statement of Claim. This final version of the pleading outlined the claims of negligence against Bradsil in accordance with the expert reports that were filed at the mediation.

[22] Lombard sought leave to intervene in the motion for summary judgment against Bradsil. The saga with respect to the chronology of correspondence confirming Lombard's refusal to defend is fully outlined in the reasons of Somers, J. and does not need to be repeated here. After denying coverage, refusing to defend Bradsil since 1996, and after refusing to participate in the multi-party mediation held in 1998, Lombard argued in 2003 that it had a right to defend the action against its insured and insist upon a trial. Somers, J. disagreed. He concluded that all parties involved were entitled to finality in the large and complex claim. He denied Lombard's request to intervene in 2003.

[23] Somers, J. made blunt findings against Lombard. He concluded that Lombard had repudiated the contract with Bradsil by the continued refusal to defend.

[24] Lombard did not appeal the decision of Somers, J.

[25] The facts with respect to the nature and cause of the damages are not in dispute.

[26] The wording of the Policy must be considered in the context of the facts. I will outline the particulars of negligence against Bradsil and the undisputed facts relevant to the causation of the damage to 175 Cedar before reviewing the wording of the Policy and the applicable law.

[27] The expert reports commissioned in the 1996 Action outline how the damage to 175 Cedar occurred. The factual findings and the conclusions reached by the experts are not contested by Lombard.

[28] The conclusions in the expert reports form the basis of the particulars of negligence against Bradsil in the Fresh as Amended Statement of Claim filed and considered by Justice Somers in the motion for judgment in December 2003 as follows:

(a) it failed to properly follow the directives of the owner's geotechnical consultant, Geo-Canada;

(b) it excavated below recommended elevations;

(c) it failed to install an effective and continuous filter fabric throughout;

(d) it failed to install proper under floor granular material; and

(e) it failed to ensure that the dewatering system remained clear and uncontaminated without loss of fine soils.

[29] Following the completion of the project, and as a result of Bradsil's negligence the dewatering system became contaminated, removing silt and sand along with water from the underlying aquifer. The removal of silt and sand from the aquifer below the aquitard allowed material to slump down, thereby creating voids beneath the footings resulting in serious structural damage to 175 Cedar.

[30] Bradsil employed subcontractors to construct 175 Cedar and its component parts. Bradsil had a legal duty to ensure the work done by its subcontractors was done properly and without negligence. Bradsil failed to ensure that the work of its subcontractors was properly executed in accordance with the contract documents and recommendations of the consultants, and specifically the recommendations of Geo-Canada.

[31] The truth of the allegations of negligence in the Fresh as Amended Statement of Claim is not disputed by Lombard.

[32] Bradsil as general contractor was responsible for the excavation for the foundations as part of the contractual agreement. Excavation should not go beyond the aquitard clay level of soil. During the initial excavation, the aquitard level was exceeded in areas, going into the underlying aquifer layer of sand and gravel.

[33] The parties agree that Bradsil was responsible for rectifying the over-excavation.

[34] Through its subcontactors, Bradsil rectified the over-excavation by adding raft footings over concrete plugs to reinforce the pierced aquitard layer. Due to the slope at the Property, water from underneath the aquitard level rose in the location of the raft footings and concrete plugs.

[35] The parties agree that it was Bradsil's responsibility, as the general contractor, to install an effective dewatering system.

[36] Bradsil retained experts to advise with respect to the dewatering system. The experts designed an effective system to rectify the water problem.

[37] Unfortunately, the dewatering system installed by Bradsil's subcontractors was defective in two respects. First, to avoid loss of soil there needed to be a continuous filter blanket located underneath the entire building. The filter blanket was not installed properly, as it was not continuous. Second, the sump pumps installed had to have bases or filters to avoid the soil displacement when the water was being pumped away from the building. The sump pumps did not have such bases or filters.

[38] As a result of these two defects in the workmanship of Bradsil's subcontractors, silt and soil were pumped away from the Property along with the water by the sump pumps beginning in 1989 until the defect was discovered in 1995.

[39] The property damage was discovered when one part of the garage appeared to be sinking. When the problem was investigated the column footing underpinning the garage was found hanging in the air without soil support.

[40] Further investigation revealed that there were massive voids created underneath aspects of 175 Cedar as a result of the removal of silt and sand over time. These voids had caused damage to some of the foundation.

[41] In 1996 the primary remediation work included pumping tons of a grout-like substance into the soil substructure to fill the massive voids under the property where soil had been removed. The water table was also lowered below the level of the footings. In addition, the remediation work included some repairs to the foundation. It is important to note that the original foundation as constructed was not defective, but rather parts of the foundation were weakened and damaged over time as a result of the changing soil conditions and voids.

Principles of Interpretation

[42] There is a shifting onus of proof with respect to coverage issues. The insured bears the initial onus of proof to establish that the facts bring the claim within the ambit of the relevant insuring agreement. If this threshold is met, the onus then shifts to the insurer to prove that an exclusion clause applies. If there is an exception to an exclusion clause, the burden of proof shifts back to the insured, to establish that the exception applies. *Alie v. Bertrand & Frere Construction* (2002), 62 O.R. (3d) 345 (C.A.) at 358; *Total Cleaning & Security Services Ltd. v. Guardian Insurance Co. of Canada,* [1993] O.J. No. 1456 (Gen. Div.), aff'd [1996] O.J. No. 4389 (C.A.), para. 9.

[43] Courts must decide coverage issues based upon an analysis of the words and exact terms of the insurance policy itself. General principles of insurance contract interpretation are merely interpretative aids but are not determinative of coverage issues. *Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Company of Canada* (2006), 79 O.R. (3d) 494 (C.A.).

[44] The Supreme Court of Canada in *Brisette Estate v. Wesbury Life Insurance Co.* (1992), 96 D.L.R. (4th) 609 (S.C.C.) sets out guidelines to be used by Canadian courts in interpreting insurance policies. Sopinka J. stated at pp.610-611 that the rules of construction relating to insurance contracts are to be applied as follows:

> (1) The court must search for an interpretation from the whole of the contract which promotes the true intent of the parties at the time of entry into the contract.

(2) Where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected.

(3) Ambiguities will be construed against the insurer.

(4) An interpretation which will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided.

[45] The general principles of interpretation of insurance policies have been further elaborated in several Supreme Court of Canada decisions including *Derksen v. 539938 Ontario Ltd*., [2001] 3 S.C.R. 398 (S.C.C.) at para. 47, *Monenco Ltd. v. Commonwealth Insurance Co.*, [2001] 2 S.C.R.. 699 at para. 11, *Reid Crowther & Partners Ltd. v. Simcoe & Eerie General Insurance Co.* (1993), 99 D.L.R. (4th) 741 (S.C.C.) at 752; *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th) 197 (S.C.C.) at 201.

(1) The *contra proferentem* rule construes any ambiguity in the policy against the insurer, as the author of the contract;

(2) the question of coverage should be construed broadly whereas the applicability of exclusion clauses should be interpreted narrowly;

(3) at least where the policy is ambiguous, the court should give effect to the reasonable expectations of the parties; and

(4) policy language should be construed in its ordinary, everyday meaning.

Requirements of Section 132(1) of the *Insurance Act*

[46] To succeed in an action based upon section 132(1) of the *Insurance Act*, the plaintiffs must prove that they have obtained a final judgment for damages for which indemnity was provided in an insurance contract, and that there is an unsatisfied execution in respect of the judgment.

[47] Section 132(1) of the *Insurance Act* provides as follows:

> Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the

> amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

[48] It is not disputed that Bradsil is the named insured and that Bradsil is legally obligated to pay damages to the plaintiffs. It is conceded that the damage occurred within the Policy coverage territory during the Policy period, and that the Judgment remains unsatisfied.

[49] There are two issues raised by Lombard with respect to the coverage requirements that must be proved by the plaintiffs in this action. First, Lombard asserts that the damages claimed against Bradsil are not compensatory damages due to property damage. Second, Lombard disputes whether the property damage was caused by an "occurrence" as defined in the Policy.

[50] I turn to consider the two disputed issues with regard to the specific words of the Policy. The two arguments raised by Lombard are somewhat intertwined. The characterisation of the property damage impacts upon the definition of an occurrence as an accident.

Have the plaintiffs proved a claim for which indemnity is provided?

The governing contract

[51] The following is the relevant wording of the Commercial General Liability Policy with respect to coverage:

> SECTION I – COVERAGES
>
> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A. B AND D. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory"…

[Emphasis added]

[52] Under part V definitions, "Occurrence" is defined:

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

Issue 1. Are the damages compensatory damages because of property damage?

[53] Property damage is a defined term under the Policy. 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.

[54] "Compensatory damages" is not a defined term in the Policy.

[55] The meaning of "compensatory damages" was considered by Speigel, J. in *Akey v. Encon Insurance Managers Inc.*, [2001] O.J. No. 2184 at para 16, aff'd [2002] O.J. No. 2605 (C.A.). She adopts the Black's Law Dictionary, 6th ed. (St. Paul: West Publishing Co., 1990) definition of "compensatory damages" as follows:

> Compensatory damages are such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Damages awarded to a person as compensation, indemnity or restitution for harm sustained by him. The rationale behind compensatory damages is to restore the injured party to the position he or she was in prior to the injury.

[56] *Akey* was approved by the Ontario Court of Appeal.

[57] I adopt this definition of compensatory damages.

[58] Lombard asserts that the damage resulted in a "pure economic loss" and therefore the Policy does not engage. I note that the words "pure economic loss" do not appear in the Policy.

[59] Traditionally the courts have characterised the cost of repairing or replacing defective work and products as "economic loss" on the ground that such cost does not arise from injury to persons or damage to property, apart from the defective work or product itself.

[60] The plaintiffs assert that the damages experienced by the owners of the Property are compensatory damages within the meaning of the Policy. The damage to the soil structure and foundation went well beyond Bradsil's defective work product and caused significant injury to the property of third parties.

[61] *Fridman on Torts,* 2nd ed. (Toronto: Carswell, 2002) outlines the development of economic loss. Economic loss traditionally referred to out-of-pocket expenses, loss of income or loss of profits. Such loss is recoverable in an action for negligence if it is a consequence of damage to the plaintiff or his property. According to Fridman at page 373 such loss could "be compensated for in damages where it fell within the limits of what was recoverable damages in negligence".

[62] The case law questions the utility of the "pure economic loss" analysis when considering coverage questions for a comprehensive general liability insurance policy.

[63] La Forest J., in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 at 97, 121 D.L.R. (4th) 193, made reference to the usual property damage and economic loss classifications and questioned the distinction. La Forest J. noted at para. 13 that he "would find it more congenial to deal directly with the policy considerations underlying that classification."

[64] At paragraphs 15and 16, La Forest J. discredited "complex structure" theory and recommended instead the direct consideration of relevant policy issues:

> In cases involving the recoverability of economic loss in tort, it is preferable for the courts to weigh the relevant policy issues openly. Since the use of this theory serves mainly to circumvent and obscure the underlying policy questions, I reject the use of the "complex structure" theory in cases involving the liability of contractors for the cost of repairing defective buildings.
>
> Proceeding on the assumption, then, that the losses claimed in this case are purely economic, the sole issue before this Court is whether the losses claimed … are the type of economic losses that should be recoverable in tort.

[65] In *Winnipeg Condominium* the stonework cladding was falling off the condominium, creating a dangerous situation. The Supreme Court extended the insurer's responsibility for the contractor's tort liability to include the economic losses associated with repairing dangerous defects experienced by third parties.

[66] The Ontario Court of Appeal in *Alie v. Bertrand & Frere Construction Co.* (2002), 62 O.R. (3rd) 345 (C.A.) considered in extensive reasons the two contested issues raised in this motion. What are compensatory damages because of property damage, and how useful is the "pure economic loss" analysis? What constitutes an occurrence that is defined as an "accident"?

[67] *Alie* adopted the approach advocated by La Forest, J. in *Winnipeg Condominium* and again questioned the utility of determining coverage using the artificial characterisation of the loss as either "property damage" or "economic loss".

[68] It is preferable to address directly the words of the insurance policy guided by the applicable insurance policy concerns, rather than applying a theory that can mask and distort the underlying question. The Court in *Alie* confirmed at para 26:

> …we share La Forest's view and find in this context as well, that the classification of the insured's own work or product as economic loss is not particularly instructive. Rather, the focus should be on the language of the insuring agreements and their interpretation.

[69] The problem with using the economic loss analysis in assessing issues of insurance coverage is that its application in other contexts is far from clear. After a lengthy discussion of the various cases, and various approaches used when considering whether economic loss may be recoverable, Fridman concludes at p. 382:

> Thus, despite the proliferation of cases in which this matter has been considered, dissented and analysed by the highest courts in England, Canada, Australia and New Zealand, and the fact that in many instances pure economic loss is now recoverable, and has been recovered, where once this was refused by the common law, the grounds upon which recovery is granted, although allegedly clarified in Canada, remain unclear and confused.
>
> [Emphasis added.]

[70] The appropriate approach is to consider the actual words of the Policy. When considering the words, the court should apply the general rules of interpretation of insurance contracts. As well, the court should consider the relevant competing policy concerns when considering coverage questions.

[71] *Alie* confirms at para. 27 the two competing policies engaged when considering the question of coverage for general comprehensive insurance in the context of construction.

[72] First, comprehensive liability insurance is not meant to be a performance bond to allow an insured to recover from its insurer the costs of repairing or replacing defective work. The underlying policy reasons for this interpretation is reflected in the often quoted statement in *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1991), 57 B.C.L.R. (2nd) 88 at 131, as follows:

> 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.

[73] Second, insurance coverage is intended to protect the insured and third parties from certain risks. Comprehensive general liability insurance policies are generally intended to cover the insured party's responsibility and liability in tort to third parties.

[74] After considering the two competing principles, the Court narrowed the issue to the following question:

> The ultimate determination of whether the damage was to the insured's own product, or to the property of a third party, is largely a question of fact.

[75] In *Alie* the concrete furnished for the foundations of a condominium was defective. Over time, the defective cement caused deterioration to the foundations and damage to the houses in question.

[76] The Court of Appeal in *Alie* concluded that the damage to the foundations and to the structural integrity of the houses went beyond the insured's own product which was the defective concrete, and caused damage to property of the third party property owners. Hence the Court of Appeal in *Alie* confirmed the finding of the trial judge that the damage met the definition of "property damage" under the comprehensive general liability policy. The Court of Appeal also upheld the conclusions of the trial judge that the actual cost of replacing the defective concrete was not recoverable.

Conclusions on Issue 1- Is the damage Compensatory Property Damage?

[77] The facts in this case are similar to those in *Alie.* In *Alie* the contractor supplied defective concrete. That defect caused damage to property owned by third parties. Recovery under the comprehensive general liability insurance policy was to rectify the damage caused to the foundations and homes of the third parties, not to pay the cost of replacing the defective concrete.

[78] In this case, the contractor supplied a defective dewatering system. The defect caused damage to property owned by third parties. The damage of the third party property owners was the voids under the Property caused by the removal of soil. The voids destabilised the Property, and caused consequential damage to the foundation. The plaintiffs are not seeking to repair the defective dewatering system. Rather they are seeking compensation to rectify the consequential damages incurred including the cost of filling the voids, altering the water table and repairing the foundations damaged as a result of the voids. There is no allegation that the foundation as originally constructed was defective.

[79] The pure economic loss argument advanced by Lombard is out of step with the approach taken by the Supreme Court of Canada in *Winnipeg Condominium* as interpreted by

the Ontario Court of Appeal in *Alie*. For the reasons previously outlined, this approach does little to assist in determining coverage questions, and may well cause confusion by masking the underlying policy questions.

[80] If I am incorrect in my analysis, in any event, I do not agree with Lombard's suggestion that the damage experienced was a "pure economic loss". The plaintiffs are not seeking to rectify Bradsil's faulty workmanship – i.e. to provide a continuous blanket filter under the Property and to provide appropriate filters to the sump pumps. Had that been the claim, it would not in my view be recoverable as compensatory damages. The plaintiffs in this case are seeking recovery of damages to the third party owners of 175 Cedar that arose secondary to and as a consequence of the faulty workmanship. They are not seeking their costs associated with the rectification of the faulty workmanship itself.

[81] I have considered the principles of interpretation including the *contra proferentem* rule, that the question of coverage should be construed broadly, and if the policy is ambiguous, effect should be given to the reasonable expectations of the parties. Ambiguities should be construed against the insurer.

[82] Applying these principles of interpretation to the definition of compensatory damages outlined in the *Akey* decision, I conclude that the property damage of the owners of 175 Cedar qualifies as compensatory damages because of property damage within the meaning of the Policy. The damages awarded were compensation for the harm sustained by the owners of 175 Cedar to restore them to the position that they would have been in had the property damage not occurred.

Issue 2. Was the property damage caused by an "occurrence"?

[83] The second dispute about whether the Policy is engaged relates to the meaning of an "occurrence" as an "accident".

[84] Provision 1 of Section 1 of the Policy provides as follows:

> …The "bodily injury" or "property damage" must be caused by an "occurrence".
>
> The Policy defines "occurrence" in Provision 7 of Section V:
>
> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

[85] The Policy does not define the term "accident". The parties disagree on the appropriate definition of this term.

[86] *Bridgewood Buildings* considers the issue of whether an occurrence is an accident. General policy considerations are interpretative aids, but are not determinative of coverage. The focus must be on an analysis of the exact words of the policy, applying the appropriate rules of interpretation. The approach of the Saskatchewan Court of Appeal in *Westridge Construction Ltd. v. Zurich Insurance Co.*, [2005] S.J. No. 396, 25 C.C.L.I. (4th) 182 (C.A.), is adopted in *Bridgewood Buildings* at para. 34:

> …. 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.

[87] The plaintiffs advocate the definition of accident found in *Canadian Indemnity Company v. Walkem Machinery and Equipment Ltd.* (1975), 53 D.L.R. (3d) 1 (S.C.C.) at 6, and *Celestica Inc. v. ACE INA Insurance,* [2003] O.J. No. 2820 (C.A.) at para. 20 as "any unlooked for mishap or occurrence" or "an unfortunate incident that happens unexpectedly and unintentionally, typically resulting in damage or injury". They also submit that it is well established in Canadian case law that negligence on the part of the policyholder may provide the factual basis that meets the definition of accident resulting in coverage under a commercial general liability policy.

[88] Counsel for the defendants, in contrast, assert that negligence on the part of the insured causing damage to third parties cannot support the finding of the occurrence being an accident. The defence relies on Black's Law Dictionary, which defines the term 'accident' as follows:

> …something that does not occur in the usual course of events or that could not be reasonably anticipated. 2. Equity Practice. An unforeseen and injurious occurrence <u>not attributable to mistake, negligence, neglect, or misconduct.</u>
>
> [Emphasis added.]

[89] The defence also relies on the majority decision in *Marshall Wells of Canada Ltd. v. Winnipeg Supply & Fuel* (1964), 49 W.W.R. 664 (Man. C.A.). The majority relied at page 4 on the following definition of "accident" from Halsbury: "the test of what is unexpected is whether the ordinary reasonable man would not have expected the occurrence…" In paragraphs 14 and 15 of the decision, Aylesworth J.A. confirms that negligence on the part of the policy-holder cannot support a finding of accident in a comprehensive general liability policy.

[90] The Supreme Court of Canada decision in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.* (1975), 53 D.L.R. (3d) 1 (S.C.C.), considered and unequivocally reversed the majority decision in *Marshall Wells*. Pigeon J. cited with approval and adopted the decision of the minority found at para – of *Marshall Wells*:

> With respect, this is a wholly erroneous view of the meaning of the word "accident" in a comprehensive business liability insurance policy. On that basis, the insured would be denied recovery if the

> occurrence is the result of a calculated risk or of a dangerous operation. Such a construction of the word "accident" is contrary to the very principle of insurance which is to protect against mishaps, risks and dangers. While it is true that the word "accident" is sometimes used to describe unanticipated or unavoidable occurrences, no dictionary need to be cited to show that in everyday use, the word is applied…to any unlooked for mishap or occurrence.
>
> [Emphasis added]

[91] Pigeon J. confirmed definitively at page 7 of *Canadian Indemnity* that there can be no longer be any question that there can be an "accident" where there is negligence:

> However, I wish to add that, in construing the word "accident" in this policy, one should bear in mind that negligence is by far the most frequent source of exceptional liability which a businessman has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called "comprehensive". But forseeability is an essential element of such liability. If calculated risks and dangerous operations are excluded, what is left but some exceptional cause of liability?

[92] In the later decision, *Stats v. Mutual of Omaha Insurance Co.*, [1978] 2 S.C.R. 1153, the Supreme Court confirmed in a different factual context the definition of "accident" enunciated in *Canadian Indemnity*. At p. 13, Spence J. confirmed the *Canadian Indemnity* principles:

> …a mishap may be an accident even though it might have been prevented by the exercise of greater care and diligence. Applied to the type of policy being considered in the present case, it means that mere negligence, per se, would not prevent a resulting mishap from being an accident. With this I would agree.

[93] In *Celestica Inc. v. ACE INA Insurance, supra,* the Ontario Court of Appeal again adopted the definition of accident found in *Canadian Indemnity*, but distinguished the case based upon the facts.

[94] The recent Ontario Superior Court case of *A.R.G. Construction Corp. v. Allstate Insurance Co. of Canada*, [2004] O.J. No. 4517 (Super. Ct.), considered whether an occurrence is an accident. It is also distinguishable on its facts from this case. In the third party claim, *A.R.G.* the general contractor sued its insurer for coverage for its costs of remedial work due to defective workmanship. Justice Ferrier concluded that the property damage was not an occurrence as an accident and restated at paragraph 47 the policy concern that comprehensive general liability insurance is not meant to be a performance bond, but is intended to protect the insured from liability or damage caused to third parties:

[95] I have considered the principles of interpretation that engage. *Bridgewood Buildings* cites with approval the principles outlined in *Gordon Hilleker, Liability Insurance in Canada,* 3d ed. (Toronto: Butterworths, 2001) at 147. An overly narrow interpretation of a comprehensive liability insurance policy is to be avoided, although liability insurance is not to be a performance bond:

> In construction cases the interplay between the insuring agreement in respect of property damage caused by an accident and the exclusions with respect to product and performance requires careful analysis. Many courts approach these cases from the perspective that a liability insurance policy is not a performance bond, which, of course, is correct. Yet one must take care not to allow this perspective to lead to an overly narrow interpretation of the insuring agreement when, on a proper interpretation, the claim falls within the insuring agreement but is captured by one or more of the policy exclusions. [Emphasis added.]

[96] I conclude that a commercial general liability policy is intended to provide compensatory damages to third parties for an accident which includes any "unlooked for mishap or occurrence" or an "unfortunate incident that happens unexpected and unintentionally", typically resulting in damage or injury.

[97] I conclude that the negligence of Bradsil by its subcontractors, creating large voids under the Property that destabilised the integrity of the property and risked the safety of the occupants, is an occurrence as defined in the Policy. The damage to the Property went beyond Bradsil's defective work, resulting over time in an occurrence that is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions". The damage was unexpected and unintentional, an unlooked for mishap, and meets the definition of an occurrence in the Policy.

[98] As confirmed in *Canadian Indemnity,* interpreting the word "accident" as excluding an event caused by negligence "is contrary to the very principle of insurance which is to protect against mishaps, risks and dangers."

[99] I conclude that Bradsil's negligence caused damage that meets the definition of compensatory damages due to property damage caused by an occurrence within the meaning of the Policy. Therefore, the damages awarded by Somers J. against Lombard are *prima facie* recoverable under the Policy, subject to any applicable exclusions.

Concessions made by Lombard that only one exclusion clause applies

[100] In the Statement of Defence and factum filed on this motion for judgment Lombard relied upon five exclusion clauses in the Policy including provisions 2(h)(5) ("Real Property Damaged by Your Operations Exclusion"), 2(h)(6) ("Your Incorrectly Performed Work

Exclusion"), 2(i) ("Damage to Your Product Exclusion"), 2(1) ("Sistership Exclusion") and 2(m) ("Weakening of Support Exclusion") of Section I of the Policy.

[101] At the opening of argument, counsel for Lombard conceded that three exclusion clauses pleaded in the Statement of Defence and in the factum on this motion were not applicable. These concessions apply to clauses 2(h)(6) ("Your Incorrectly Performed Work Exclusion"), 2(i) ("Damage to Your Product Exclusion"), and 2(m) ("Weakening of Support Exclusion") of Section I of the Policy.

[102] During the argument Lombard relied on only two of the five exclusions, that is clause 2(h) (Real Property Damaged by Your Operations Exclusion), and clause 2(l) (Sisterhood Exclusion).

[103] During the argument counsel for the defence conceded that Lombard could not rely upon clause 2(h). (Real Property Damaged by Your Operations Exclusion). Lombard's counsel acknowledged that even if the exclusion clause applied (which was not conceded by Bradsil) that the exemption to the exclusion clause applied.

[104] In the final analysis, the only exclusion relied upon by Lombard was clause 2(l). This clause excludes repairs for the insured's work, if the work is withdrawn or recalled from the market, as is known in the industry as the "sisterhood exclusion".

Has the defendant met the onus of proof that exclusion clause 2(l) applies?

[105] Clause 2(l) of the Policy provides exclusions for:

> Any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> a. "your product"
> b. "your work"
> c. "impaired property"
>
> if such product, work or property is withdrawn or recalled from the market or from use by any person or organisation because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

[106] Lombard does not rely upon clause 2(l) (a) or (c) — "your product" or "impaired property".

[107] Counsel for Lombard acknowledges that the applicability of the exclusion clause is intertwined with the arguments advanced with respect to the definition of "property damage" previously canvassed.

[108] Lombard argues an expansive interpretation of “your work”. Their submission is that Bradsil’s “work” is not only the defective dewatering system, but also includes all of the necessary remediation work. Repair to Bradsil’s “ work” according to Lombard’s argument includes the remediation work conducted including repair to the soil under the Property, lowering the water table to below the footings, as well as repairs to the damage to the foundation caused by the voids in the soil structure.

[109] The plaintiff argued that Bradsil’s “work” which was defective was the negligently installed dewatering system. This work, in turn caused property damage to third parties.

[110] For the reasons previously outlined, I accepted the plaintiffs’ characterization of the damage. For the same reasons I accept the plaintiffs’ argument with respect to the scope of Bradsil’s “work”.

[111] Counsel for Lombard argues that as the Property was subject to an evacuation order for several months after the damage was discovered, and until the remediation took place, that therefore “repair” to Bradsil’s “work” was “withdrawn from the market”. Hence, Lombard argues that exclusion clause 2(l) applies.

[112] “Your work” is defined in the policy:

> 12. “Your Work” means:
>
> a. Work or operations performed by you or on your behalf; and
>
> b. Materials, parts or equipment furnished in connection with such work or operations.
>
> “Your work” includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. or b. above.

[113] Lombard concedes that this exclusion clause is designed to limit the insurer’s exposure in product liability cases. After the initial failure of the insured’s product, similar products are withdrawn from use to prevent the potential failure of these other products, with the same potential defect. See: *Foodpro National Inc. v. General Accident Assurance Co. of Canada et al.* (1986), 57 O.R. (2d) 489 (H.C.J.), aff’d (1988), 63 O.R. (2d) 288 (C.A.), leave to appeal to S.C.C. refused, [1988] S.C.C.A. No. 707; *ING Insurance Co. of Canada v. Sportsco International L.P.*, [2004] O.J. No. 2254 (Super. Ct.) at para. 51.

[114] The exclusion has been interpreted not to apply to the original product that failed, but only to the “sister” products. See *Foodpro, supra,* at pp. 493-495; *ING, supra,* at para. 51; *Carwald Concrete & Gravel Co. Ltd. v. General Security Insurance Co. of Canada* (1985), 70 A.R. 340, 24 D.L.R. (4th) 58 (C.A.), leave to appeal to S.C.C. refused, (1986), 72 A.R. 80 n.

[115] Counsel for Lombard argues that even if the exclusion was not intended to deal with facts such as in this case, if the clause applies, the insurer is entitled to the benefit of the exclusion.

[116] Although these cases interpreting a similar clause are helpful background, I must review the wording of the exclusion itself to see if it applies to the facts of this case. *Bridgewood Building Corp. (Riverfield v. Lombard General Insurance Company of Canada)* (2006), 79 O.R. (3d) 494 (C.A.).

[117] Based upon a review of the plain language of the Policy I conclude that exclusion clause 2(l) does not apply.

[118] Lombard's interpretation of the Policy strains the meaning of the language of the exclusion and makes no practical sense.

[119] First, Bradsil's "work" was installing a defective dewatering system. The replacement of the sand and silt beneath 175 Cedar with tons of grout, the changes to the water table and consequential necessary repairs to the foundation flowing from the voids created cannot be interpreted to be repairs to Bradsil's "work".

[120] To suggest that Bradsil's work, i.e. the defective dewatering system, was withdrawn from the market, is a distortion of the exclusion clause, rendering the clause quite meaningless in the context of the facts of this case. It was the Property, not the dewatering system, that was evacuated and removed from the market to allow for the remedial work.

[121] Second, the compensatory damages did not result from the recall or withdrawal of the building from the market.

[122] Third, the exclusion has been interpreted as applying only to the "sister" products. Using the sisterhood analogy, the exclusion would not apply to the withdrawal of 175 Cedar Avenue from the market, but only to sister products, such as other similar buildings built by Bradsil with similar problems which had to be withdrawn from the market.

[123] The onus is upon the insurer to prove that the exclusion applies. Exclusion clauses are to be interpreted narrowly.

[124] The principles identified by Sopinka. J. in *Brisette Estate v. Wesbury Life Insurance, supra,* are useful. It is conceded that the intention of the exclusion clause, from the perspective of the insurer, is to exclude product liability from a comprehensive general liability policy. The court must search for an interpretation from the whole of the contract. If words are capable of two or more meanings, the meaning that is most reasonable is preferred. Ambiguity is construed against the insurer. An interpretation that results in an unanticipated windfall for the insured or the insurer is to be avoided.

[125] Applying the test of the "true intent" or promotion of the "reasonable intention" of the parties is a somewhat artificial exercise when it comes to considering the intricacies of the multiple exclusion clauses. There is no evidence before me as to the actual understanding of the insured, nor would I expect there to be. It would be a rare case when an insured party read and considered the various exclusion clauses in a standard policy of insurance before purchasing insurance. During argument, experienced counsel, specialists in insurance litigation, had difficulty with the nuances of the numerous, lengthy and complex exclusion and exemption clauses.

[126] The focus of the analysis must be upon the exact words of the Policy itself. The words of the Policy are to be given their plain meaning. General insurance principles – in this case, the acknowledged intended purpose of such a clause – provide an interpretative aid, but are not determinative of whether the exclusion applies.

[127] For these reasons, I conclude that the exclusion clause 2(l) in the Policy does not apply to the facts of this case.

Can the plaintiffs enforce the Policy against Lombard given the judgment was obtained as a summary judgment motion, not "an actual trial?"

[128] Lombard seeks to rely upon the following clause in the Policy:

> Legal Action Against Us.
>
> No person or organization has a right under this policy:
>
> a. To join us as a party or otherwise bring us into an "action" asking for compensatory damages from an insured; or
>
> b. To sue us on this policy unless all of its terms have been fully complied with.
>
> A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial: [Emphasis added]

[129] Justice Somers denied Lombard's request for standing at the motion for summary judgment, given Lombard's steadfast refusal to defend Bradsil for some six years of litigation. Justice Somers concluded that Lombard had repudiated the Policy by refusing to defend.

[130] He outlined the law in paragraphs 21 and 22 of his decision:

> …it is my view that in refusing to provide a defence to the action in the manner it has, Lombard has repudiated the contract. In the case of *Guarantee Co. of North America v. Gordon Capital Corp.*

et al. (1999), 178 D.L.R. (4th) 1 (S.C.C.), Iacobucci and Bastarache JJ., speaking for the court, made the distinction between the rescission and repudiation by defining repudiation at page 40 as follows:

> Repudiation by contrast occurs 'by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands Ltd.*, [1923] 4 D.L.R. 751 that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right.' (S.M. Waddams, The Law of Contracts (4th) Ed. 1999 at para. 620.) Contrary to rescission which allows the rescinding party to treat the contract as if it had been void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party.

In my view, an insurer refusing to defend an action on behalf of its insured in a non-automobile accident case in Ontario has repudiated the contract and no longer has the right to raise defences which might have ordinarily been available to it had it chosen to render a defence in the first instance. As Cartright J., as he then was, said in the case of *Global General Insurance Co. v. Finlay* (1961), 28 D.L.R. (2d) 654 (S.C.C.) at page 665:

> In an action brought under s. 214(1) the question to be determined is whether the plaintiff has made against an insured a claim for which indemnity is provided by a motor vehicle policy and has recovered a judgment therefor; the question is not whether that judgment was correct.

See also *Hamilton v. Laurentian Pacific Insurance Co.* (1989), 37 C.C.L.I. 190 (B.C.C.A.).

It is in addition my view that where a reasonable settlement has been entered into, it is not open to the insurer to resist indemnity on the basis of there not having been a judgment obtained. The insurer by its wrongful denial of coverage has excused the insured from having to run the risk of conducting a trial and facing the possibility of even increased damages. *Reliance Petroleum Ltd.v. Stevenson*, [1953] O.R. 807 (Ont. H.C.J.); reversed in part [1954] O.R. 807 (Ont. H.C.J.); reversed in part [1954] O.R. 846 (Ont. C.A.); affirmed (1956), 5 D.L.R. (2d) 673 (S.C.C.).

[131] I adopt the reasons and conclusions of Somers J.

[132] I conclude that the argument advanced by Lombard cannot succeed for three reasons.

[133] First, as Lombard has repudiated their obligations to their insured in the Policy, the insurer cannot now rely upon the technical terms of the Policy that may assist them.

[134] Second, I conclude that section 132 of the *Insurance Act* governs, and trumps the requirement of an "actual trial". A tiny percentage of cases commenced conclude by way of a trial. It would be contrary to public policy to enforce this term in the governing policy of insurance, which is in conflict with the requirements of the governing provincial legislation. There is ample protection for an insurer who denies coverage and refuses to defend their insured. Section 132 of the *Insurance Act* requires there to be an unsatisfied judgment against the insured as a prerequisite to the right of a third party to sue the insurer. The *Insurance Act* does not specify that the judgment be obtained in a trial, as opposed to a motion for judgment.

[135] Third, counsel for Lombard concedes that the Judgment of Justice Somers is reasonable. There is no prejudice to the insurer due to the absence of an "actual trial".

[136] For these reasons I conclude that the Policy applies, and that the plaintiffs are entitled to judgment against Lombard in the amount of $2,000,000.00 plus post-judgment interest from the date of the Judgment plus costs. If the parties are unable to agree upon the costs, counsel may make submissions to me in writing within thirty days of the release of these reasons.

[137] I note in reviewing the file that counsel for Lombard has acknowledged in correspondence to Bradsil that Lombard would be responsible for any legal costs incurred by Bradsil in the 1996 Action.

[138] It is not clear to me whether Bradsil had notice of this action and this motion. The principals of Bradsil, and Bradsil, should be provided with a copy of these reasons, and given the opportunity to make submissions with respect to legal costs incurred within 30 days of the receipt of these reasons.

RELEASED:

_____

WILSON J.

COURT FILE NO.: 04-CV-267509CM3
DATE: 20070213

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

YORK REGION CONDOMINIUM CORPORATION NO. 772, THE CORPORATION OF THE TOWN OF RICHMOND HILL, THE REGIONAL MUNICIPALITY OF YORK, ALAN ZEEGEN ASSOCIATES LTD. and HADDAD GEOTECHNICAL INC.

Plaintiffs

- and -

LOMBARD CANADA LTD., CONTINENTAL INSURANCE COMPANY, ALLIANZ INSURANCE COMPANY OF CANADA, CANADIAN SURETY COMPANY, AVIVA INSURANCE COMPANY OF CANADA and UNITED STATES FIRE INSURANCE COMPANY

Defendants

REASONS FOR JUDGMENT

WILSON J.

RELEASED: February 13, 2007