Court of Queen's Bench of Alberta

Citation: Condominium Corporation No 9312374 v Aviva Insurance Company of Canada, 2018 ABQB 674

Date: 20180919
Docket: 1301 08252
Registry: Calgary

Between:

Condominium Corporation No. 9312374

Plaintiff/Respondent

- and -

Aviva Insurance Company of Canada

Defendant/Appellant

Reasons for Decision
of the
Honourable Mr. Justice R.J. Hall

Appeal from the Decision of
J.T. Prowse, QC, Master in Chambers
on the 15th day of March, 2018

[1] The Appellant, Aviva Insurance Company of Canada, appeals the decision of the learned Master in Chambers of March 15, 2018. The learned Master was provided with an Agreed Statement of Facts, and asked to decide a question which would summarily determine liability in the Action. The question posed before the Master, and now posed before me, is:

> Whether the "property damage" as defined in the Plaintiff's Statement of Claim, attracts coverage under the policy of insurance that the Defendant issued to the Plaintiff.

[2] The learned Master answered that question in the affirmative. The Appellant now appeals that decision.

[3] The Agreed Statement of Facts sets out that at the time of the incident in issue, the Respondent was insured under a multi-peril contract of insurance issued by the Appellant (the "Policy"). The Policy is in evidence.

[4] In June 2011 the Respondent contracted with Durwest Construction Systems Alberta Limited ("Durwest") and Williams Engineering Canada Inc. ("Williams") to provide parking rehabilitation and maintenance work to the parking surface in the parkade area within the Respondent's complex. The work involved cutting into the membrane of the parkade surface. However, Durwest and Williams cut too deeply into the parkade slab, causing damage to the structural integrity of the parkade (the "Property Damage").

[5] The Respondent made claim against the Policy for losses relating to the Property Damage. The Appellant denied coverage for the claim on the basis of the exclusion in Section 1, paragraph 6(G)(b) of the Policy.

[6] Actions were commenced against Durwest and Williams and were settled. There remains a shortfall in the Respondent's recovery, which is claimed in this Action.

[7] The standard of review of a Master's decision is correctness. ***Bahcheli v Yorkton Securities Inc.***, 2012 ABCA 166 at para 30. On appeal, this court may "exercise any discretion anew and substitute their own views for that of the Master". ***P. Burns Resources Ltd. v Locke, Stock & Barrel Company***, 2013 ABQB 129 at para 12 (reversed on other grounds 2014 ABCA 40).

[8] The key portions of the Policy's Section 1 Property Coverage are as follows:

> 1. Indemnity Agreement
>
> In the event that any insured property, under Coverage A of Section I, is lost or damaged during the policy period by an insured peril, the insurer will indemnify the Insured against the direct loss or damage so caused ...
>
> ...
>
> 5. Insured Perils
>
> Coverage A of Section I insures, except as otherwise provided, against all risks of direct physical loss of or damage to the insured property.
>
> ...
>
> 6. Exclusions
>
> ...
>
> G. Other Excluded Losses
>
> Coverage A of Section I does not insure:
>
> ...

(b) the cost of making good:

i. faulty or improper material;

ii. faulty or improper workmanship;

iii. faulty or improper design.

This exclusion does not apply to loss or damage caused directly by a resultant peril not otherwise excluded in Coverage A of Section I.

[9] It is to be noted that the Respondent and condominium owners are the only named insureds in the Policy, and the Policy does not extend insurance to any contractors or engineers. It is a contract of multi-peril property insurance. It is not a course of construction/builder's risk policy.

[10] The act of Durwest, of cutting too deeply into the concrete slab, is an act of improper or faulty workmanship. The Policy specifies that it does not provide insurance coverage for the cost of making good that improper or faulty workmanship.

[11] Two theories are put forth as to what the cost of making good comprises.

[12] The Appellant maintains the 'cost of making good' comprises the cost of making good the damages occasioned by the faulty workmanship, meaning the damage to the structural integrity of the building.

[13] The Respondent maintains that the cost of making good the faulty workmanship is confined to the cost of making good the work that was to be provided by the Contractor under his contract; and does not include damage to the parkade's structural integrity.

Aviva's Position

[14] Aviva acknowledges that the Policy provides indemnity for all risks of direct physical loss or damage to the insured property, subject to exclusions contained in the Policy. That is to say, were it not for an applicable exclusion, the Policy would provide coverage for the loss claimed.

[15] However, Aviva maintains that coverage for the damage claimed is excluded by Section 6(G)(b) of the Policy, set out above.

[16] It maintains that the cost of making good the damage to the parkade structure was caused by the faulty workmanship and is excluded.

[17] It then maintains that the exception to the exclusion is not engaged. The exception only applies if the subject loss or damage was caused by a resultant peril that has not been otherwise excluded by the Policy, such as where the faulty workmanship caused a fire which caused the damage in issue (fire being an insured peril). Here the Respondent has not established the existence of a covered resultant peril. Therefore the exception to the exclusion has not been established, and the loss remains excluded.

Respondent's Position

[18] The Respondent relies, in the main, on the Supreme Court of Canada decision in ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co***., 2016 SCC 37.

[19] In that case, the courts were dealing with a builder's risk or course of construction insurance policy, under which not only the owners, but all contractors and engineers on the project were insured.

[20] A contractor was hired to clean the windows during construction of the building. The contractor used improper tools and methods and thereby scratched all the windows, to the extent that they needed to be replaced. The insurer denied coverage under the policy for the cost of replacing the windows, based upon an exclusion from coverage contained in the policy which read:

> 4(a) This policy section does not insure
>
> > (b)The cost of making good faulty workmanship...unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage.

[21] The Supreme Court of Canada held that the cost of removing and replacing the windows was covered by the policy in question. The Respondent says a like interpretation would apply herein.

[22] In the alternative, the Respondent argues that the exception to the exclusion applies, and restores coverage for the cost of repairing the damage to the building. The Respondent argues that the damage to the structural integrity of the building is the "resultant peril not otherwise excluded".

Analysis

[23] The loss is initially covered by the Policy. The insurer has the onus, therefore, of establishing that it is excluded by an applicable exclusion. If the insurer succeeds, then the onus shifts back to the insured to establish the applicability of an exception to the exclusion.

[24] There is no doubt that the damage to the parkade structure was caused by faulty workmanship.

[25] In *Ledcor*, the Supreme Court of Canada determined that the cost of removing and replacing the windows damaged by faulty workmanship was "resulting damage" as defined in the policy at issue. In reaching that conclusion, the Court focussed on the reasonable expectations of the parties to the policy, that such a loss would be covered by a builder's risk policy. Justice Wagner, speaking for the majority said (para 66):

> Therefore, in my view, the purpose behind builders' risk policies is crucial in determining the parties' reasonable expectations as to the meaning of the Exclusion Clause. In a nutshell, the purpose of these policies is to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage – in exchange for relatively high premiums – provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst the various contractors involved. In my view, the purpose of broad coverage in the construction context is furthered by an interpretation of the Exclusion Clause that excludes from coverage only the cost

> of redoing the faulty work itself – in this case, the cost of recleaning the windows. (underlining added)

[26] That is distinguishable, and indeed inapplicable to the Policy before me. Here I am considering an all risks property insurance policy, not a builder's risk policy. Here the only insureds are the owners; not the contractors and not the engineers. Here the "relatively high premium" consideration does not apply. Here the purpose of the Policy is not to provide broad coverage for a construction project, for all involved in that project. In short, this is not a builder's risk/course of construction policy.

[27] Here the Policy is intended to insure against property damage caused by a peril not otherwise excluded. There is no reasonable expectation that it covers any more, or any less.

[28] Here the Appellant has established that the cost of making good faulty workmanship is the cost not only of the contracted work, but also the cost of repairing the structural integrity of the parkade. The insurer has satisfied its onus of showing that the cost of making good the faulty workmanship is excluded from coverage.

[29] The onus therefore shifts to the Respondent to establish that the exception to the exclusion applies.

[30] In *Ledcor*, the exception to the faulty workmanship exclusion wording arose if physical damage not otherwise excluded by the Policy resulted, in which case the Policy insured the resultant damage.

[31] In the case before me, the exception to the exclusion is different. It provides:

> The [faulty workmanship] exclusion does not apply to loss or damage caused directly by a resultant peril not otherwise excluded.

[32] In *Ledcor*, the policy talked of property damage not otherwise excluded, calling it resulting damage. It made no reference to the perils insured against.

[33] In the case before me, however, the exception to the exclusion is that the faulty workmanship exclusion does not apply to loss or damage caused by a resultant peril not otherwise excluded; that is to say, loss or damage caused by an otherwise insured peril. So, for example, if the faulty workmanship caused a fire, damages arising from faulty workmanship which caused the insured peril of fire would be covered by the policy by virtue of the exception to the exclusion. However, if no insured (ie not excluded) peril occurs, then the exception to the exclusion does not apply.

[34] This is the plain reading of the policy wording. No ambiguity arises in either the exclusion or the exception to the exclusion.

[35] No such resultant insured peril occurred in this instance. The Respondent argues that damage to the structural integrity of the building is itself a "resultant peril", since it has not been specifically excluded from the "all risks" insuring agreement. However, damage is not a peril; it is a result. This argument by the Respondent must accordingly fail.

[36] In the result, and in answer to the question as posed, I find that the property damage complained of in the Statement of Claim does not attract coverage under the policy of insurance.

[37] The appeal is allowed.

[38] The costs award of the Master is reversed. The Appellant shall have costs of this action from the Respondent, from the inception of the Action, including costs of the application before the Master and before me. If the parties cannot agree on the appropriate column for costs, or on particular items of costs, they may appear before me.

Heard on the 7th day of September, 2018.
Dated at the City of Calgary, Alberta this 19th day of September, 2018.

R.J. Hall
J.C.Q.B.A.

Appearances:

David Cumming
for the Plaintiff/Respondent

David P. Wedge
for the Defendant/Appellant