In the Court of Appeal of Alberta

Citation: Condominium Corporation No. 9312374 v Aviva Insurance Company of Canada, 2020 ABCA 166

Date: 20200428
Docket: 1801-0314-AC
Registry: Calgary

Between:

Condominium Corporation No. 9312374

Appellant
(Plaintiff/Respondent)

- and -

Aviva Insurance Company of Canada

Respondent
(Defendant/Appellant)

The Court:

The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Ritu Khullar
The Honourable Madam Justice Dawn Pentelechuk

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice R.J. Hall
Dated the 19th day of September, 2018
(2018 ABQB 674, Docket: 1301 08252)

Memorandum of Judgment

The Court:

Introduction

[1] This appeal concerns the interpretation of a multi-peril policy of insurance issued by the Respondent Aviva Insurance Company of Canada (Aviva) to the Appellant Condominium Corporation No. 9312374 (the Condo Corp). The question is whether damage to the structural integrity of the Condo Corp's parkade, resulting from faulty workmanship, is covered under the policy.

[2] A master held the damage to the structural integrity of the parkade was covered by the policy; the chambers judge on appeal held that it was not. The Condo Corp appeals that decision.

[3] For the reasons that follow, we conclude the claimed damage is covered by the policy and allow the appeal.

Background

[4] The parties proceeded to summary trial for a determination of the coverage issue. The record included a brief agreed statement of facts. The salient facts follow:

1. The Condo Corp is comprised of the owners of a large mixed-use commercial and residential project located in Calgary;

2. In June 2011, the Condo Corp 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 complex;

3. Durwest and Williams were to provide repair and remediation work to the parkade membrane. While their work included cutting into the membrane of the parkade surface, Durwest and Williams were not to perform any work that would impact the structural integrity of the concrete slab;

4. On or about June 11, 2011, Durwest and Williams cut too deeply into the parkade slab while stripping and coating the membrane from the parkade, causing damage to the structural integrity of the parkade (the Property Damage);

5. At the time the Property Damage occurred, the Condo Corp was insured under a multi-peril contract of insurance with Aviva (the Policy). Aviva denied coverage for the claim on the basis of an exclusion in Section 1, paragraph 6(G)(b) of the Policy; and

6. The Condo Corp commenced an action against Williams, Durwest and other parties. This action has been settled by mutual agreement. A shortfall remains with respect to losses arising from the Property Damage.

Standard of Review

[5] There is no dispute between the parties that the standard of review is correctness, as outlined by the Supreme Court of Canada in ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 [***Ledcor***]. While not all insurance policies are necessarily standard form contracts, we are satisfied the three-part test outlined in ***Ledcor*** at para 46 has been satisfied:

1. The contract at issue was a standard form contract;[1]

2. The court's interpretation of the standard form contract would have precedential value; and

3. There is no meaningful factual matrix to assist the court's interpretive process.

The Policy

[6] The Policy in question is a multi-peril or "all-risk" policy providing broad coverage to the Condo Corp against all risks of direct physical loss or damage to the condominium complex. The Policy contains an exclusion for the cost of making good faulty or improper

[1] At para 25 of ***Ledcor***, the Supreme Court of Canada endorsed Professor John D. McCamus' description of standard form contracts in *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 185, which is as follows:

> . . . the document put forward will typically constitute a standard printed form that the party proffering the document invariably uses when entering transactions of this kind. The form will often be offered on a "take it or leave it" basis. In the typical case, the other party, then, will have no choice but either to agree to the terms of the standard form or to decline to enter the transaction altogether. Standard form agreements are a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate, in any meaningful sense, the terms of many of the transactions entered into in the course of daily life.

material, workmanship or design. The application of this exclusion is limited by an exception. The relevant portions of the Policy include:

> 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;

Applicability of the *Ledcor* Decision

[7] The submissions on appeal focussed largely on whether the analytical framework outlined in ***Ledcor*** has application to the Policy before us. The Condo Corp argues that ***Ledcor*** is the governing framework for this Court's analysis of the correct interpretation of the Policy exclusion. Aviva argues that ***Ledcor*** is of no assistance to this Court—first, because ***Ledcor*** involved a builders' all-risk policy which is different than an all-risk property policy and second, because the language of Aviva's exclusion clause differs from that in the exclusion clause under consideration in ***Ledcor***. Before addressing the applicability of ***Ledcor*** to this appeal, it is helpful to briefly summarize the facts in ***Ledcor*** and the principles arising from that decision.

[8] In ***Ledcor***, the Supreme Court of Canada interpreted a clause excluding from coverage the "cost of making good faulty workmanship" but providing an exception for "physical damage" resulting from faulty workmanship: para 1.

[9] The loss occurred in the course of construction of the Epcor Tower in Edmonton. Ledcor was the general contractor of the owner, Station Lands. Near the end of construction, Station Lands hired Bristol Cleaning to clean the Tower's windows. Bristol used improper tools and methods in the performance of its service contract and scratched the windows to the extent they required replacement.

[10] Both insureds, Station Lands and Ledcor, claimed the cost of replacing the windows, but their insurers denied coverage on the basis of the Policy's "faulty workmanship" exclusion:

> 4(A) Exclusions
>
> This policy section does not insure:
>
> …
>
> (b) The cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage [Emphasis added by Supreme Court of Canada].

[11] The insureds contended the "cost of making good" encompassed only the cost of redoing the cleaning work, where their insurers asserted it encompassed both the cost of redoing the cleaning work and the damage to the windows "as they were the very thing on which Bristol had performed the faulty workmanship": ***Ledcor*** at para 12.

[12] The Supreme Court of Canada determined the exclusion wording was ambiguous. By applying established principles of insurance contract interpretation[2], however, it concluded only one interpretation was consistent with the reasonable expectations of the parties and the existing commercial reality. The court held, "the faulty workmanship exclusion serves to exclude from coverage only the cost of redoing the faulty work, as the resulting damage exception covers costs or damages apart from the cost of redoing the faulty work. As such, excluded under the Policy is the cost of recleaning the windows, but the damage to the windows and therefore the cost of their replacement is covered": ***Ledcor*** at para 63.

---

[2] The general rules of insurance contract interpretation were summarized by Rothstein J in ***Progressive Homes Ltd. v Lombard General Insurance Co. of Canada***, 2010 SCC 33 at paras 21-24 [***Progressive Homes***].

[13] Ledcor's approach to resolving ambiguous insurance contract language need apply only if we find similar ambiguity in the express language of the exclusion and the exception to be interpreted here.

Are the Policy Exclusion and Exception Ambiguous?

[14] If the Policy read as a whole is unambiguous, effect should be given to the clear language: ***Progressive Homes*** at para 22. If the words of the exclusion are not reasonably capable of more than one meaning having regard to the entire context of the Policy, there is no ambiguity.

[15] As this Court stated in ***Cardinal v Alberta Motor Association Insurance Company***, 2018 ABCA 69 at para 20, "[a]n ambiguity cannot be created by external means such as reading in an element not present on a plain reading of the provision. If there is no ambiguity, there is no need to resort to interpretation rules such as the reasonable expectations of the parties or *contra proferentem* to construe the insuring agreements."

[16] Aviva argues the wording is not ambiguous; the Property Damage involved a single peril of faulty workmanship which caused a single instance of damage (the loss of structural integrity of the parkade). Aviva argues that to be brought back into coverage, the excluded peril of faulty workmanship must cause a second, resultant peril which causes separate, distinct damage. We disagree.

[17] As we will explain, ***Ledcor*** and subsequent jurisprudence provides some assistance in interpreting the phrase, the "cost of making good faulty workmanship." However, the Policy does not define the term "resultant peril" as found in the exception for "loss or damage caused directly by a resultant peril." We conclude that the exclusion clause and the exception to the exclusion, taken as a whole, are ambiguous. It is therefore necessary to apply the principles of insurance contract interpretation outlined in ***Progressive Homes*** and adopted in ***Ledcor*** to determine the correct interpretation:

- The interpretation should be consistent with the reasonable expectations of the parties, so long as that interpretation is supported by the language of the policy: ***Progressive Homes*** at para 23; ***Ledcor*** at para 50;

- The interpretation should not create an unrealistic result; but rather a result consistent with the commercial reality existing: ***Progressive Homes*** at para 23; ***Ledcor*** at para 50;

- If ambiguity remains, *contra proferentum* can be employed to construe the policy against the insurer who drafted the policy: ***Progressive Homes*** at para 24; ***Consolidated-Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co***, [1980] 1 SCR 888 at 899-901, 112 DLR (3d) 49 [***Consolidated-Bathurst***];

- A corollary to the *contra proferentum* rule is that coverage provisions in insurance policies are to be interpreted broadly, and exclusions interpreted narrowly: ***Progressive Homes*** at para 24; and

- The insured has the onus of establishing that the loss or damage falls within the coverage provided by the policy. If there is coverage, the insurer has the onus of establishing that an exclusion applies. If the insurer is successful in doing so, the onus shifts back to the insured to show that the loss or damage falls within an exception to the exclusion: ***Ledcor*** at para 52.

a) Purpose of the Policy Helps Inform the Reasonable Expectation of the Parties

[18] The agreed statement of facts provides no evidence of a factual matrix that would assist this Court in ascertaining the parties' understanding of and intent regarding the exclusion clause. In the absence of a factual matrix, the Supreme Court of Canada in ***Ledcor*** turned to the purpose behind builders' risk policies to determine the reasonable expectation of the parties: to provide "certainty, stability, and peace of mind" through broad coverage to ensure that "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": para 66.

[19] As with builders' risk policies, the purpose behind multi-peril or all-risk policies, like the one in question, is to provide broad coverage for fortuitous loss or damage, affording the insured certainty, stability and peace of mind. In ***Condominium Corp No 9813678 v Statesman Corp***, 2007 ABCA 216 at para 35 [***Statesman***], this Court drew the analogy between builders' all-risk policies and all-risk property policies issued to condominium corporations:

> Those concerned in a condominium development do not want to have to worry about such unpredictable and complex topics. They want to exclude fault, risk, causation fights, tedious technical investigations, and expense. Statute and bylaws direct the condominium corporation to take out one policy for all, to avoid delay, expense and uncertainty. They replace lengthy litigation with an immediate no-fault purse for all. That is the whole point of one no-fault all-perils policy. Many authorities find there a close analogy to builders' all-risk policies: ***Peel Condo Corp #16 v Vaughan*** [1996] I.L.R. I-3335, 1 R.P.R. (3d) 299 (para. 34); cf ***Sherritt Gordon v Dresser Can*** (1996) 187 A.R. 1 (C.A.) (para. 24).

[20] In ***Monk v Farmers' Mutual Insurance Company (Lindsay)***, 2019 ONCA 616 [***Monk (2019)***], the Ontario Court of Appeal upheld the trial judge's assessment of the reasonable expectation of the parties in the context of a homeowner's all-risk property policy. Referring to ***Ledcor***, the trial judge found that Ms. Monk's expectations aligned in many ways with the expectations of an owner who purchases an all-risk builders' insurance policy, stating:

> Both parties are purchasing broad coverage for their buildings. They are both looking for protection from a loss which is fortuitous to the insured. They are both seeking protection from damage caused by a third party. They are both looking for coverage which gives them stability, certainty and peace of mind. In the case of damages caused by faulty workmanship, a homeowner is no more interested in or able to engage in expensive and time-consuming litigation pending the completion of work than is a contractor. A homeowner expects to be covered for unexpected or resulting damages which are not directly related to the scope of his or her contract with a contractor. In the circumstances, a homeowner who purchases an all risk policy should be entitled to expect that the exclusion for faulty workmanship or for property while being worked on will be interpreted narrowly and the exception for resulting damage will receive a broad interpretation.
>
> ***Monk v Farmers and Muskoka Ins***, 2017 ONSC 3690 at para 131; ***Monk (2019)*** at para 46.

[21] We see no reason in law or principle not to import the same reasonable expectations as articulated in ***Ledcor***, ***Statesman*** and ***Monk (2019)*** to inform the interpretation of the exclusion clause in the Policy.

b) The Faulty Workmanship Exclusion

[22] As the Supreme Court of Canada explains, "insurers 'are prepared to insure risks relating to problems caused by faulty ... workmanship, but they are not prepared to insure the quality ... of the workmanship in a construction project per se. The argument is that the contractor is responsible for doing [its] job right and the insurance company is not there to provide compensation for inadequate performance by a contractor for the very work the contractor agreed to perform'": ***Ledcor*** at para 70, citing Canadian College of Construction Lawyers, report of the Insurance & Surety Committee, "'Covered for What?': Faulty Materials and Workmanship Coverage under Canadian Construction Insurance Policies" (2007), 1 JCCCL 101 at 104.

[23] The intent behind the exclusion is to discourage contractors from cutting corners and being careless in order to save money and then relying on the insurer to pay the cost of correcting their mistakes: ***Poole Construction Limited v Guardian Assurance Company***, [1977] ILR 1-879, [1977] AJ No 784 at para 69 (QL) (Alta SC) [***Poole Construction***]; see also Craig Brown, *Insurance Law in Canada* (Toronto: Thomson Reuters, 2002) (loose-leaf updated 2017, release 6), at IF-213.

[24] As this Court noted in ***Poole Construction***, the faulty workmanship exclusion makes clear "that the insurer will not indemnify the insured for costs caused by the insured's own use

of faulty workmanship, materials or design. To do otherwise would give the ensurer [sic] carte blanche to use faulty materials, workmanship or design": para 69.

[25] The Supreme Court of Canada in ***Ledcor*** states that the cost of making good faulty or improper workmanship is informed by the scope of work contracted for: para 84.

[26] The scope of work contracted for defined the limits of the faulty workmanship exclusion in ***Monk (2019)***. Ms. Monk hired a company to restore the exterior logs and wooden surface areas of her home using a power wash process. The company was to seal all areas of her home where water from the washing might enter. As part of its clean up, the company agreed to thoroughly clean the exterior and interior surface of all the windows and glass. Ms. Monk later noticed a number of doors and windows were scratched and pock-marked. She also noticed further damage to her carpeting, exterior lights and trim.

[27] Ms. Monk's policy with Farmers' contained two exclusions, both of which were relied upon by Farmers' to deny coverage to Ms. Monk:

> (i) **Losses Excluded**, s. 2: "the cost of making good faulty material or workmanship" …and
>
> (ii) **Property Excluded**, s. 4: "property…(ii) while being worked on, where the damage results from such process or work (but resulting damage to other insured property is covered"...
>
> ***Monk (2019)*** at para 31 [emphasis in original]

Like the Supreme Court of Canada in ***Ledcor***, the Court in ***Monk (2019)*** concluded that the faulty workmanship exclusion applied *only* to the cost of redoing the faulty work originally contracted for; any "resulting damage" was covered.

[28] In a related decision in ***Monk v Farmers' Mutual Insurance Company (Lindsay),*** 2015 ONCA 911 at para 36, the Ontario Court of Appeal concluded:

> …an interpretation of "faulty workmanship" that denies coverage for resulting damage is an overly broad interpretation of the exclusion clause. I would interpret the provision as excluding from coverage only direct damage and not the resulting damage flowing from faulty workmanship. It is not a matter of reading an exception to the exclusion as the respondent submitted; it a matter of interpreting the "faulty workmanship" exclusion narrowly in accordance with established principle.

Notably, the Court reached this conclusion even absent an express exception to the faulty workmanship exclusion.

[29] We envision instances where the exact scope of work is not easy to ascertain. That is not the case here.

[30] The agreed statement of facts is clear that the contractor and engineer were retained to effect repairs and perform remediation work to the parkade membrane. In order to remediate the membrane, the contractors were required to cut into the parkade topper; however, they cut too deeply, cutting into the concrete slab. It was expressly agreed that their scope of work did not include any work that would impact the structural integrity of the concrete slab. Therefore, the consideration of what constitutes faulty or improper workmanship is limited to the scope of the contract—that is, remediation and repair work to the parkade membrane. Accordingly, the parties agree (as they did in ***Ledcor***) that the cost of making good the repair and remediation work to the parkade membrane is not covered under the Policy.

[31] The analysis moves to whether repairing the excessively deep cut that pierced the concrete slab causing the loss of the structural integrity falls within the "cost of making good faulty or improper workmanship" and is thus excluded, or whether it is covered because it is "loss or damage caused directly by a resultant peril not otherwise excluded in Coverage A of Section 1." Notably, the parties agree that damage to the structural integrity of the parkade is a loss not otherwise excluded in the Policy. In other words, subject to the faulty workmanship exclusion, damage to the structural integrity of the parkade is a loss covered under the Policy.

[32] In interpreting the meaning of "the cost of making good faulty or improper workmanship" and the exception to this exclusion for "loss or damage caused directly by a resultant peril" as set out in the Policy, several interpretive principles apply: the reasonable expectation of the parties, the commercial reality, and the narrow interpretation of exclusions to coverage.

[33] As we noted earlier, neither the term "resultant peril" nor the term "peril" is defined in the Policy.

[34] Aviva argues that the negligent cutting and resulting damage to the slab is all attributable to faulty workmanship and is therefore caught by the exclusion, and the exception does not apply. Aviva draws a distinction between a peril and damage. It argues that the Condo Corp's suggested interpretation of the clause is an attempt to separate the consequences of the contractor's actions – that is, the loss of structural integrity – from the contractor's faulty workmanship. Aviva argues this is an artificial separation.

[35] Aviva relies heavily on the British Columbia Court of Appeal decision in ***Canevada Country Communities Inc v GAN Canada Insurance Co,*** 1999 BCCA 339 [***Canevada***]. In

that case, the insured claimed for damages to walls, woodwork, carpeting and electrical work caused by a discharge of water from a sprinkler system which had ruptured due to freezing temperatures. The exclusion clause read:

> 6. Perils Excluded
>
> This rider does not insure
>
> ...
>
> (b) loss or damage, unless directly caused by a peril not otherwise excluded herein, caused directly or indirectly by rust or corrosion, frost or freezing;

[36] Aviva suggests ***Canevada*** demonstrates the need for a second (resulting) peril and suggests the interpretation of the exclusion clause in the Policy must follow a four-part framework:

1. there must be an initial, excluded event or peril (faulty workmanship);

2. that causes initial damage (loss of structural integrity);

3. the initial peril and the initial damage must cause a second, resultant peril (for example, building collapse); and

4. the second peril (building collapse) must cause additional covered damage.

[37] We do not find ***Canevada*** of assistance. That decision, which involved interpretation of a clause in a builders' all-risk policy, did not involve a "faulty workmanship" exclusion qualified by an exception, and in any event, must be read cautiously in light of ***Ledcor***. The policy language is not the same, and Aviva is attempting to parse certain words to ground its argument that the correct interpretation of the exception in the Policy before us must involve different occurrences.

[38] *Black's Law Dictionary* defines "resultant" as meaning "a consequence, effect or conclusion", and defines "peril" as "[the] cause of a risk of loss to person or property": Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St. Paul, MN: Thomson Reuters, 2019) sub verbo "resultant" and "peril". Therefore, "resultant peril", while not a defined term in the Policy, can be interpreted to mean a "consequence that causes a risk of loss to person or property."

[39] In our view, the resultant peril, or consequence, that causes a risk of loss to property, is the loss of structural integrity to the parkade; in other words, the risk of structural collapse.

[40] In essence, Aviva's broad reading of the exclusion clause would exclude the cost of making good the *consequences of* faulty workmanship. Such an interpretation does not accord

with the reasonable expectation of the parties, the commercial reality nor the wording of the exclusion clause itself.

[41] It is not this Court's role in interpreting the Policy to read in additional words or otherwise rewrite the term under consideration: ***AXA Insurance (Canada) v Ani-Wall Concrete Forming Inc***, 2008 ONCA 563 at paras 29-31.

c) No Unrealistic Results; Consistent Commercial Reality

[42] As said, the interpretation of an insurance policy should not bring about unrealistic results or results inconsistent with the commercial context existing between the parties. The interpretation should promote a sensible commercial result. Courts should avoid an interpretation that "would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract": ***Consolidated-Bathurst*** at 901-902.

[43] We agree that the interpretation advanced by the Condo Corp fulfills the reasonable expectation of the parties: broad coverage for fortuitous or unexpected loss and damage. The cost of making good the faulty workmanship – in this case, a significant sum of approximately $500,000 – is excluded from coverage. This achieves the commercial purpose of ensuring the contractor and engineer are not paid twice for their faulty workmanship. However, the Property Damage (loss to the structural integrity of the building) is covered. This is not a situation where this Court's interpretation leads to coverage not otherwise contemplated by the terms of the Policy read as a whole.

d) Ensuring Consistent Interpretation

[44] The Supreme Court of Canada in ***Ledcor*** canvassed a selection of faulty workmanship cases and concluded that an interpretation of a faulty workmanship clause that limits the scope of the exclusion to the cost of redoing the faulty work was consistent with the established case law: paras 84-94. We have reviewed the cases set out therein and find no reasonable basis from which to distinguish the Policy in this appeal from the case law cited in ***Ledcor***. We note that the cases surveyed did not all involve builders' risk policies. Furthermore, in our view, the ***Monk*** decisions provide additional support for the conclusion that the interpretation advanced by the Condo Corp, and accepted by this Court, does not disrupt the principle of ensuring consistent interpretation.

Conclusion

[45] The analytical framework to resolve insurance contract ambiguity as outlined in ***Ledcor*** is appropriate here. The parties reasonably expected that the cost of making good the faulty or improper workmanship (determined by the scope of work contracted for) would be excluded,

but that the consequences of that faulty workmanship would be covered. This interpretation does not create unrealistic results because, among other reasons, loss of structural integrity to the parkade (and the building itself) is a loss covered by the terms of the Policy. Further, this interpretation is consistent with the jurisprudence. It is not necessary to resort to *contra proferentum* to resolve the ambiguity, but if we had, the same result would follow.

[46] The appeal is allowed. The Condo Corp is entitled to indemnity for the Property Damage as defined by the parties.

Appeal heard on March 10, 2020

Memorandum filed at Calgary, Alberta
this 28th day of April, 2020

Schutz J.A.

Khullar J.A.

Pentelechuk J.A.

Appearances:

D.S. Cumming/A. Sran
for the Appellant

D.P. Wedge
for the Respondent