In the Court of Appeal of Alberta

Citation: Ledcor Construction Limited v Northbridge Indemnity Insurance Company, 2015 ABCA 121

Date: 20150327
Docket: 1303-0272-AC
Registry: Edmonton

Between:
QB # 1203 09878

Ledcor Construction Limited

Respondent
(Plaintiff)

- and -

Northbridge Indemnity Insurance Company, Royal & Sun Alliance Insurance Company of Canada, and Chartis Insurance Company of Canada

Appellants
(Defendants)

- and -

QB #1203 09894

Station Lands Ltd.

Respondent
(Plaintiff)

- and –

Commonwealth Insurance Company, GCAN Insurance Company, and American Home Assurance Company

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice T.D. Clackson
Dated the 7th day of October, 2013
Filed on the 25th day of October, 2013
(2013 ABQB 585, Docket: 1203 09878; 1203 09894)

Memorandum of Judgment

The Court:

[1] The issue on this appeal is whether damage to the windows of the EPCOR Tower in Edmonton is covered by insurance. The appellant insurers appeal the decision of the trial judge, who held that the damage was covered: ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.***, 2013 ABQB 585, [2013] ILR I-5495. The central issue is whether the damage resulted from "poor workmanship" or is "resulting damage".

Facts

[2] The respondent Station Lands Ltd. retained the respondent Ledcor Construction as a construction manager to coordinate construction of the EPCOR Tower in Edmonton. Station Lands then entered into contracts with various trade contractors to supply and install the goods and services needed to construct the building.

[3] At the very early stages of the project, Station Lands obtained an "All Risks" policy from the appellants, covering all "direct physical loss or damage except as hereinafter provided". The named insureds are Station Lands and Ledcor. The additional insureds are the owners, contractors, sub-contractors, architects, engineers, consultants, and all individuals or firms providing services or materials to or for the named insureds. The policy is a "blanket" policy, designed to cover all actors and activities on the site, and was in force for 3 1/2 years from June 2008 until December 2011 or the completion of construction.

[4] The policy provides certain exclusions:

> 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.

The issue on this appeal is whether damage that occurred to the windows is excluded from coverage under this section.

[5] The windows on the EPCOR Tower were supplied and installed by a trade contractor. At the time construction neared completion, concrete splatter, paint specs, and other construction dirt remained on the windows. Another trade contractor, Bristol Cleaning, was retained by Station

Lands to do a "construction clean" of the exterior, including the windows. Cleaning up after construction was a part of the overall work for which Ledcor was responsible.

[6] Station Lands and Bristol Cleaning used (with some modifications) the standard CCA 17 1996 stipulated price contract to record their agreement. Clause GC 11.1.3, as modified, states that the owner will provide "all risks" property insurance for the project, naming the owner and the construction manager as insureds. All of the consultants, trade contractors, and trade subcontractors were to be additional unnamed insureds. These requirements of the contract had already been fulfilled by the "All Risks" policy previously obtained from the appellants.

[7] Some key provisions of the Bristol Cleaning contract are:

- "*Work*" is defined to mean "the total construction and related services required by the *Contract Documents*." It is, in other words, the cleaning of the exterior. "*Project*" is defined to mean "the total construction contemplated of which the *Work* may be the whole or a part". (italics identify defined terms in the contract)

- Under GC 2.2.7 Ledcor was not responsible for the control or supervision of Bristol Cleaning's construction methods.

- GC 3.1 confirmed that Bristol Cleaning had "total control" of the work, and was "solely responsible for the construction means, methods, techniques, sequences, and procedures". GC 12.3 confirms that Bristol Cleaning was "responsible for the proper performance of the *Work*".

- GC 2.4 is entitled "Defective Work". It states:

> 2.4.1 The *Trade Contractor* shall promptly remove from the *Place of the Project* and replace or re-execute defective work that has been rejected by the *Construction Manager* or the *Consultant* as failing to conform to the *Contract Documents* whether or not the defective work has been incorporated into the *Work* and whether or not the defect is the result of poor workmanship, use of defective products, or damage through carelessness or other act or omission of the *Trade Contractor*.
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> 2.4.2 The *Trade Contractor* shall make good promptly other trade contractors' work destroyed or damaged by such removals or replacements at the *Trade Contractor's* expense.

- GC 9.1 is entitled "Protection of Work and Property". It states:

> 9.1.1 The *Trade Contractor* shall protect the *Project* and the *Owner*'s property and property adjacent to the *Place of the Project* from damage which may arise as a result of the *Trade Contractor*'s operations under the *Contract* and shall be responsible for such damage, except damage which occurs as a result of:
>
> .1 errors in the *Contract Documents*;
>
> .2 acts or omissions by the *Owner*, the *Construction Manager*, the *Consultant*, other contractors, their agents and employees.
>
> 9.1.2 Should the *Trade Contractor* in the performance of the *Contract* damage the *Project*, the *Owner*'s property or property adjacent to the *Place of the Project*, the *Trade Contractor* shall be responsible for the making good of such damage at the *Trade Contractor*'s expense. (underlining added)

GC 9.2 and GC 12.1 provide general rights of indemnity for damage caused by one party to the other.

[8] During the cleaning process Bristol Cleaning caused damage to the windows by using inappropriate tools and methods, specifically by using dull or inappropriate blades to scrape off the dirt, and by not properly cleaning the blades during the cleaning. It also used a "non uni-directional" cleaning method, and failed to follow the manufacturer's cleaning instructions. The glass had to be replaced at considerable expense. Under GC 9.1, Bristol Cleaning was responsible for replacing the glass it had damaged that had been previously installed by the glazing contractor. The ultimate issue is whether the cost of that replacement is insured.

[9] At trial the respondents argued that Bristol Cleaning's defective methods and tools were not "faulty workmanship" because no product was created by its efforts. In any event, they argued that the exclusion essentially denied coverage for the cost of having the cleaning re-done, using proper methods and tools. The damage to the windows was "physical damage not otherwise excluded", beyond the "faulty workmanship", and was covered.

[10] The appellants argued that this interpretation rendered the exclusion virtually meaningless. They argued that the "work" and "workmanship" did not just cover the labour component of the task, but also covered the materials being worked on, in this case the windows. Thus, replacing the damaged windows was "making good faulty workmanship" and was excluded. The interpretation put forward by the respondents, it is argued, would encourage the use of slipshod methods and

tools, with the knowledge that any damage that resulted would be covered by the insurance. This would turn the insurance policy into a construction warranty.

[11] The trial judge found that both of these interpretations were plausible. He found that the case law was inconclusive, inconsistent, and did not provide a clear answer. He found that the wording was ambiguous, and applied the doctrine of *contra proferentem*, following the decision in ***Progressive Homes Ltd. v Lombard General Insurance Co. of Canada***, 2010 SCC 33 at para. 24, [2010] 2 SCR 245. He concluded that the damage to the windows was covered by the policy.

Standard of Review

[12] This appeal turns on the interpretation of an insurance policy, which is a specialized form of contract. The Supreme Court recently considered the standard of review for the interpretation of general contracts in ***Sattva Capital Corp. v Creston Moly Corp.***, 2014 SCC 53, 373 DLR (4th) 393. ***Sattva*** was an appeal from the decision of a commercial arbitrator under the British Columbia *Arbitration Act*, RSBC 1996, c. 55, which limits appeals to questions of law. The Court concluded:

> (a) Evidence of the circumstances which were, or should reasonably have been known by both parties at the formation of the contract can be considered in interpreting the contract. Such evidence will not conflict with the parole evidence rule so long as it is ". . . used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words" and "the surrounding circumstances . . . must never be allowed to overwhelm the words of that agreement": at paras. 57, 60
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> (b) Because the ultimate objective of contractual interpretation is to determine the intention of the parties, and because evidence of surrounding circumstances can be considered, the interpretation of a contract is a mixed question of fact and law: para. 50.
>
> (c) Since appeals from an arbitrator were only allowed on a question of law, and since no extricable question of law had been shown, no appeal was possible respecting the arbitrator's decision on the interpretation of the ***Sattva*** contract: para. 66. That was sufficient to dispose of the ***Sattva*** appeal.
>
> (d) Characterization of the interpretation of contracts as a question of mixed fact and law also has an impact on the standard of review. Deference was appropriate, particularly on the factual component of the analysis. Extricable questions of law are still reviewed for correctness: paras. 51-4. A number of factors were listed as indicating when appellate intervention was warranted:

(i) the intervention of appellate courts is appropriate in "cases where the results can be expected to have an impact beyond the parties to the particular dispute": para. 51.

(ii) a key difference between a question of law and a question of mixed fact and law is "the degree of generality (or "precedential value")": para. 51.

(iii) other errors of law arise from "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": para. 53. Failure to construe the contract as a whole is such an error: para. 64.

The reasons in ***Sattva*** must be read having regard to the context in which it was decided. Appeals from the Court of Queen's Bench of Alberta to the Alberta Court of Appeal can be brought on any basis. While all appeals must be decided within the context of the appropriate standard of review, appeals are available on questions of law, mixed questions of fact and law, and questions of fact. Some of the restrictive language in ***Sattva*** does not apply to ordinary appeals in Alberta.

[13] Clearly all contracts have "surrounding circumstances" and are made within a certain "context". They are described in ***Sattva*** at para. 60 as "facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting". ***Sattva*** does not alter the core parole evidence rule: the test for "context" is objective, and the parties are still not allowed to testify as to their subjective understanding of "what the contract really means or was intended to mean". ***Sattva*** recognizes the traditional legal techniques of interpreting contracts, and provides at para. 50 that "the principles of contractual interpretation" (the legal component) are applied to the words of the written contract, "considered in light of the factual matrix" (the factual component). Thus, the interpretation of the contract is a question of mixed fact and law reviewable for reasonableness, although extricable errors of law are still reviewed for correctness.

[14] In cases where the parties had a real hand in negotiating a contract, one can explore the known surrounding circumstances to determine their intention, as expressed in the wording of the contract. What the parties knew or objectively ought to have known about the factual context can help explain what the wording of the contract means. Thus, contextual factors will be more important in cases where there is some admissible evidence that can assist in the interpretive process. However, in many cases (particularly involving contracts of adhesion) any search for the intention of the parties in the "context" is merely a legal fiction. If the parties did not actually negotiate the terms of the contract, and were not even present when those terms were set, the process is artificial. Interpreting the contract comes back to an application of legal rules and presumptions about the meaning of particular wording.

[15] The insurance policy in question in this appeal had been in place for many months before Bristol Cleaning even showed up on the job site. The suggestion that there was any actual "meeting of the minds" between the various litigants on the issues that have subsequently arisen is

artificial. Ledcor, Station Lands and the appellants set the terms of the insurance policy knowing that an office building was going to be constructed, but there is little else about the "context" that assists in the interpretive process. There is no evidence that any thought was given to the cleaning of the windows, the relationship of poor workmanship to resulting damage, or anything else that would assist. There is nothing about the "known context" that sheds any light on the meaning of the disputed clause.

[16] Insurance contracts are a highly specialized form of contract. "Standard form" wording is common in the industry, and coverage is usually sold under those policies without any negotiation of the terms. Insureds realize that they are purchasing a standard form of coverage. In many cases the contents of the policies are set, or at least highly influenced, by statutory provisions. The interpretation of insurance policies is therefore of general importance beyond any particular dispute. Any decision on the proper interpretation of standard form wording in an insurance policy has great precedential value, and the primary objective should be certainty: ***Progressive Homes*** at para. 23.

[17] It is untenable for policy wording to be given one interpretation by one trial judge, and another by a different one: ***Atomic Energy of Canada Ltd. v Wilson***, 2015 FCA 17 at para. 52. The standard of review analysis in ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235 and ***Sattva*** does not anticipate or require that kind of uncertainty or variability. Underwriters could not possibly set their reserves without an assurance that the wording of policies will always be given the same interpretation, and insureds cannot have the peace and repose provided by insurance if they never know exactly how much coverage they have. As was said in ***Co-operators Life Insurance Co. v Gibbens***, 2009 SCC 59 at para. 27, [2009] 3 SCR 605: "Certainty and predictability are in the interest of both the insurance industry and their customers".

[18] Mixed questions of fact and law involve deciding if a particular set of facts meets a legal standard. This calls for the drawing of a legal inference from those facts, which in turn calls for a "higher standard" of review: ***Housen*** at paras. 26, 28. Setting that standard is a nuanced process because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** at para. 28. To the extent that interpretation of an insurance contract is a mixed question of fact and law, it falls on the extreme end of that "spectrum of particularly", and the standard of review for interpretation of insurance policies is correctness. Appellate intervention is required in order to ensure consistency of results, which is a legitimate part of the mandate of intermediate appeal courts: ***Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife***, 2015 NWTCA 2 at para. 28.

[19] The underlying findings of fact (for example, on how the windows were damaged) are subject to review only for palpable and overriding error. The interpretation of the key wording of the policy, and specifically the exclusion of "making good faulty workmanship . . . [but not] . . . resulting damage", is a question ultimately reviewable for correctness. The application of that legal interpretation of the policy to any contextual facts found to exist would potentially be a

mixed question of fact and law, which would be entitled to deference on review. In this case the trial judge did not engage in that analysis, because he applied the doctrine of *contra proferentem*.

Principles of Interpreting Insurance Policies

[20] The principles by which insurance policies are interpreted are well established, and some of the important ones were summarized in ***Progressive Homes*** at paras. 22-4:

> 22 The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).
>
> 23 Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
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> 24 When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* -- against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

The parties agree that these principles apply in this case.

[21] A number of broadly worded truisms are frequently invoked in the interpretation of insurance policies. It is said that the interpretation should not "negate coverage", and should be consistent with the "legitimate expectations" of both the insured and the insurer. The interpretation should not result in a "windfall", either because the insurer receives a premium for coverage withheld, or because the insured receives coverage not paid for. These generalizations, while true enough, are too abstract to assist in deciding individual cases. They also have a circular and conclusory component to them, because one must decide what the "true coverage" consists of before it is possible to tell if there is a windfall, a negating of the coverage, or a dashing of legitimate expectations. That is especially so where (as here) both the exclusion and the exception are widely worded.

[22] Both parties rely, at the most general level, on the effect that the possible alternative interpretations will have. The appellants argue that if "making good faulty workmanship" does not extend to damage to the materials being worked on, the exception essentially eats up the exclusion. They argue that the "all risks" policy becomes a "construction warranty" contract. The respondents, on the other hand, argue that if the exclusion is too widely interpreted, it essentially eats up the coverage. They argue that the "all risks" policy becomes a "no risks" policy. These positions neatly isolate the problem, but again they do not help much in resolving it.

[23] The parties referred the Court to numerous cases on "faulty workmanship", demonstrating how frequently this issue arises. Some of the cases attempt to formulate a test in general terms. All of them provide examples of how the coverage applies, or does not apply, in extremely varied factual circumstances. Some of the cases involve "poor workmanship", while others involve "poor design". The wording of the insurance policies sometimes varies. These cases reflect the normal method by which the common law develops, case by case. They are additionally important here because of the need for certainty and predictability in the interpretation of insurance policies. As has been noted, settled expectations about how policy wording should be interpreted should not easily be displaced. If nothing else, these cases provide some indication of the reasonable expectations of insurers and insureds as to what would be covered under this type of policy.

[24] Both parties agree that the policy is intended to cover some element of unforeseen losses, and is not intended to be a construction warranty: ***Triple Five Corp. v Simcoe & Erie Group*** (1994), 159 AR 1 at paras. 179-80, 29 CCLI (2d) 219. The respondents accept the observation in ***Ploutos Enterprises Ltd. v Stuart Olson Constructors Inc***., 2008 BCSC 271 at para. 104, 60 CCLI (4th) 59 that on too narrow a reading of the exclusion: "The contractor or designer would theoretically be able to charge a full price for the work, save money by being careless, and then rely on the insurer to pay for the cost of correcting the mistakes." As it was put in ***Poole Construction Co. v Guardian Insurance Co. of Canada*** (1977), 4 AR 417 at para. 69, [1977] ILR 625, the interpretation should not "give the insured *carte blanche* to use faulty materials, workmanship or design."

[25] The fundamental intent of the policy is to indemnify the owner for a particular type of damage that occurs during construction. It is intended to provide coverage for some unexpected events and occurrences. It is admittedly not a "building warranty" agreement, which is intended to make sure that the building is constructed in a good and workmanlike way, using the proper materials. Thus, if the type of glass used turned out to be of a lower standard, and wore out or failed more quickly than expected, that loss would not be covered. If Bristol Cleaning did a shabby job of cleaning the windows, and left some dirt streaks, the policy would not cover having them re-cleaned.

[26] A cardinal rule for interpreting any contract is to look at all its words, construe them as a whole, and try hard to make them all fit and work together: ***Sattva*** at para. 64; ***Humphries v Lufkin Industries Canada***, 2011 ABCA 366 at para. 13, 68 Alta LR (5th) 175; ***BG Checo***

International v British Columbia Hydro, [1993] 1 SCR 12 at pp. 23-4. Insurance policies and their constituent clauses must accordingly be interpreted as a whole, but it is often analytically helpful to start with a sequential analysis. The first step is to determine if the loss is within the general coverage, and if so to next determine if it is within an exclusion. If it is within an exclusion, the final portion of the analysis is to determine if it is within an exception to the exclusion. However, in this appeal the exception and the exclusion cannot be interpreted in isolation; in many ways they are two sides of the same coin. In determining the perils and losses covered, the policy must be interpreted as a whole, and the exceptions and exclusions are as much a part of the policy as the sections providing the coverage: ***Triple Five Corp. v Simcoe & Erie Group*** at para. 180. The exclusion clause, by its plain wording, juxtaposes the excluded "cost of making good faulty workmanship" with "resulting damage" that is covered. The two phrases must be interpreted symbiotically.

The Interpretation of the Policy

[27] ***Progressive Homes*** confirms that the analysis starts with the wording of the policy. Firstly, the policy is said to be "all risks" and defines the coverage broadly: "direct physical loss or damage except as hereinafter provided". "Damage" can refer to damage to one's own property, and is not confined to damage to the property of third parties, nor is it confined to damage caused by forces external to the property: ***Progressive Homes*** at paras. 34-7.

[28] The key to this appeal is in exclusion 4(A)(b):

> 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.

It is not disputed that the damage to the windows is included in the basic coverage for "direct physical loss or damage". The dispute is first engaged over whether the damage is caught by the exclusion for making good faulty workmanship. The appellants say that it is caught, but the respondents disagree. Alternatively, the respondents argue that even if this damage is initially caught by the exclusion, it still falls within the exception for "resulting damage" not otherwise excluded.

[29] Because the base coverage is for "physical loss", the exclusion "cost of making good faulty workmanship" must exclude some physical loss, or the exclusion would be redundant. The clause then continues with the proviso that "resulting damage" that is "physical damage not otherwise

excluded" is nevertheless covered. The key is to determine the dividing line between the physical loss that is excluded because it is the "cost of making good", and that which is covered because it is "resulting damage".

The Workmanship Argument

[30] As a threshold issue, the respondents argue that the cleaning work done by Bristol Cleaning is not within the phrase "workmanship". They argue that "workmanship" only covers efforts that result in the creation of some physical product. In effect, any trade contractor that was merely providing labour or services would not be engaged in "workmanship".

[31] Such a narrow interpretation is outside the scope of the normal interpretation of the word "workmanship", which generally encompasses any application of skill or effort to a task. Certainly this narrow interpretation is not supported by the words of the construction contract. The "*Work*" is defined to include "services", and GC 2.4.1 refers to the "workmanship" of Bristol Cleaning, the trade contractor. The final "construction clean" of the exterior of the EPCOR Tower was as much a part of its construction as the designing of the foundations, the hammering of the nails, and the pouring of the concrete.

[32] The wording of the insurance policy also does not support this interpretation. There is nothing in it to indicate that only the creation of physical products is caught by the term "workmanship". The clause also excludes "the cost of making good design"; mere designing does not create any physical product, yet mistakes in design are clearly not covered. The policy covered all consultants and trade contractors involved in the construction process, with the obvious intent that all of the activities on the site would be covered. It is inconsistent with that type of coverage to say that those consultants and contractors who are not actually creating physical products are not covered. The trial judge correctly rejected this argument.

The Multiple Contractors Argument

[33] The respondents place great emphasis on the fact that Bristol Cleaning did not supply the glass, but was only cleaning it. They argue that the exclusion does not apply to damage caused by one contractor to the work of another. The exclusion, it is said, only applies when the contractor (through poor workmanship) damages a part of the building actually supplied or built by that same contractor. All other damage it is argued, particularly damage to the work of other contractors, is "resulting damage". The "cost of making good" only relates to the making good by any contractor of its own work product.

[34] As can be seen, this argument contains echoes of the argument that what Bristol Cleaning was doing was not "workmanship", because the exterior cleaning involved did not create any physical product or structure. On this interpretation, no damage done by any mere service or labour provider would be excluded. This conclusion does not reconcile easily with the wording of the insurance policy, or the context in which it was operating.

[35] Firstly, under the construction contract it is artificial (especially in the context of an all risks blanket insurance policy) to try to draw a dividing line between the product created by the work of other contractors, and the work to be done by Bristol Cleaning. GC 2.4 requires Bristol Cleaning to repair any damage it does to the work of other contractors. In effect Bristol Cleaning's "*Work*" included replacing the damaged glass, even if it was installed by another trade contractor. To say that the exclusion in the policy only applies to a trade contractor "making good" its own work seeks to sever that replacement work. The "cleaning" work that Bristol Cleaning was required to do under the contract is said to be of a different character than the "repair of damage" work that is also required to be done by GC 2.4. Yet all this work had to be done before Bristol Cleaning could claim substantial completion.

[36] Secondly, the respondents concede that the exclusion is not limited merely to the cost of re-doing the cleaning. They concede that there must be some "physical damage" caught by the exclusion, although they had difficulty during oral argument explaining what (on their theory) was actually excluded. It is obvious that the work of Bristol Cleaning did not involve the creation of any physical product. If the exclusion does catch some physical damage, it must be physical damage to something that pre-existed the cleaning work, and presumably that was created by another contractor. Thus, the argument that damage caused to the work of other contractors is always "resulting damage" cannot be literally true. In many of the "faulty design" cases, the damage was caused to work done by another contractor, yet the damage was excluded from coverage: ***Simcoe & Erie Gen Insurance Co v Royal Insurance Co of Canada*** (1982), 19 Alta LR (2d) 133, 36 AR 553; ***Algonquin Power (Long Sault) Partnership v Chubb Insurance Co. of Canada***, [2003] OTC 446, 50 CCLI (3d) 107. The inability of the respondents to point to any physical damage that would actually be excluded in a case like this (involving cleaning of windows) is a significant weakness in their argument.

[37] Thirdly, it must be recalled that the insurance policy in question is a "blanket" wrap-up policy covering the entire project. It covers each and every consultant, contractor, and subcontractor. This form of policy undoubtedly reduces the overall insurance costs of the project because it reduces overlaps in coverage. It also eliminates litigation between various insurers over which particular subcontractor was responsible for any particular damage. Under a wrap-up policy the owner purchases one policy, pays one premium, and covers all of the work and all the contractors: ***Commonwealth Construction Co. v Imperial Oil Ltd.***, [1978] 1 SCR 317 at p. 328; ***Inland Concrete Ltd. v Commonwealth Insurance Co***., 2011 ABQB 378 at paras. 52-4, 46 Alta LR (5th) 304, 518 AR 379. In this context it does not make sense to interpret the policy such that the damage would be covered by the insurance if the work was done by two trade contractors, but not if it was all done by one trade contractor: ***Pentagon Construction (1969) Co. Ltd. v United States Fidelity and Guaranty Company***, [1977] 4 WWR 351 at p. 360, 77 DLR (3d) 189 (BCCA).

[38] Fourthly, in the context of a multi-year, blanket wrap up insurance policy designed to cover (i) all actors and activities on the site, during (ii) the entire course of construction of the EPCOR Tower as a single "*Project*", it does not make any difference:

(a) that there was any temporal gap between the installation of the windows and the window washing that damaged them. This was a multi-year insurance policy for the entire project, not an annual renewable policy. A project like the EPCOR Tower takes several years to build, and involves the coordination of the work of many different trade contractors. The installation of the windows likely occurred towards the end of the completion of the exterior of the building, while the exterior cleaning would obviously be one of the very last things done. Whether something is the "cost of making good faulty workmanship" for the purposes of a multi-year insurance policy, related to a single construction "*Project*", does not depend on the exact sequence or timing of the various constituent tasks required to build such a complex building, or

(b) that Ledcor was retained as a "construction manager", rather than as a "general contractor". It does not matter that Bristol Cleaning was retained directly by the owner, rather than by a general contractor. The scheme of the insurance policy is that all activities on the site are to be covered by one policy. There is nothing in the policy wording to suggest that coverage varies depending on the contractual relationships of the parties; the coverage depends on the type of "damage". It would undoubtedly come as a considerable shock to both the insurance industry and the construction industry to be told that the extent of coverage under this type of standard form policy varies significantly based on the contractual status of the primary construction coordinator. As previously discussed, the Bristol Cleaning contract (based on the standard CCA 17 1996 stipulated price contract) recognizes that there will be other trade contractors performing interrelated work, and that the activities of one trade contractor might damage the work of another. The policy is drafted having regard to the physical construction context, not a construction contractual context. The coverage is the same whether Bristol Cleaning is retained by Station Lands or Ledcor.

It is also significant that none of the many reported decisions on "making good faulty workmanship" refer to, or draw any distinction between general contractors, construction managers, or the timing of the work that causes the damage.

[39] Finally, there is nothing in the wording of the policy to support the respondents' argument that the key to the exclusion is the identity of the person who performed the work that is subsequently damaged.

[40] The respondents' argument leads to the conclusion that coverage under the policy depends on how the work is divided up. Under the respondents' theory, if a single contractor is retained to supply the glass, install the glass, and do the construction cleanup, the scratches on the windows would not be covered by the insurance. However, because some other contractor supplied the windows, the very same damage caused by Bristol Cleaning is covered. This approach might create an incentive to artificially divide up the work as finely as possible, as then the maximum amount of damage would be covered by insurance. On the other hand, it would be dangerous for

the owner to hire a single contractor to do all the work, as then nothing would be covered. That cannot have been the expectation of the parties, and is not a commercially reasonable outcome. It is, as noted, inconsistent with the philosophy behind a "wrap-up" policy covering all contractors.

[41] Examples could be multiplied, but assume that electrical equipment has to be supplied, installed, and then tested and commissioned. Assume that as a result of poor workmanship, the electrical equipment is damaged, either during installation, or during the final commissioning process. Under the respondents' theory, if one contractor supplied the equipment, and another damaged it through improper workmanship during installation or commissioning, that damage would be covered by the insurance. However, if the same contractor had been retained for supply, installation, and testing, it would not be covered. Again, this is an unreasonable outcome. Further, under this example, it would not make any difference that the testing and commissioning occurred at the very end of the project, many months after the actual installation of electrical components. It would also not make any difference whether the testing and commissioning was done under a subcontract with a general contractor, or under a contract directly with the owner in a construction management arrangement. It would not matter if the entire design, installation, testing, and commissioning was done by a single contractor, directly retained by the owner, as happened in ***Ontario Hydro v Royal Insurance***, [1981] OJ No 215.

[42] Both parties pointed to ***Ontario Hydro*** as a very similar case to this one. In ***Ontario Hydro*** a single contractor was hired to design a boiler and boiler tubing, to supply and install them, and then to conduct an "acid wash" at the end of the construction process. The tubing was damaged by the acid wash. The trial judge held that this was damage resulting from "poor workmanship", and the repairs to the tubing were "cost of making good". The damage was held not covered by the insurance. Under the respondents' "multiple contractor" theory, the result in ***Ontario Hydro*** would have been different if only a different contractor had been hired to do the acid wash. The decision in ***Ontario Hydro*** is one example of the application of this policy wording to a particular fact situation, and while it may not be the full or final answer to the problem, the fact that all the work was done by one contractor is not a sound basis to distinguish it. That the contractor was working directly for the owner, or that the acid wash undoubtedly took place at the end of the project, many months after installation was complete, has little or no relevance.

[43] In summary, the fact that Bristol Cleaning was working on windows supplied and installed by another contractor does not provide the definitive answer as postulated by the respondents.

Physical or Systemic Connectedness

[44] The appellants put forward what was referred to in oral argument as a "geographic" theory. The appellants' position is that the physical damage excluded by "making good faulty workmanship" is: "the cost of repair of physical damage directly caused by faulty work to the part of the property being worked on". All damage to the part of the work actually being worked on is excluded; it does not matter which contractor did that original work. Here Bristol Cleaning was

working on the windows, it was the windows that were damaged, the damage directly arose from the cleaning activities, and therefore repairing that damage is excluded as "cost of making good". On the other hand, if Bristol Cleaning had damaged some other adjacent work, that would be "resulting damage" which would be covered. So, for example, if Bristol Cleaning had accidentally spilled a bucket of cleaning water on an electrical component, that would be "resulting damage not otherwise excluded".

[45] Thus, the appellants argue, if one contractor installs the doors, and a second contractor damages those doors while installing the doorknobs and lock sets, the damage to the doors is not covered. It would not make any difference if the same contractor installed both the doors and the doorknobs. The key is that the damage is being done to the very part of the work being worked on.

[46] The appellants' position is somewhat too narrowly stated, but nevertheless is attractive and comes close to being consistent with the wording of the policy. It, or a variation of it, has the advantage of providing a fairly clean line between what is covered and what is not covered; certainty and predictability are important values in determining insurance coverage. There are numerous cases that hold that the exclusion is not limited to the cost of re-doing the faulty work, but also extends to the cost of repairing the thing actually being worked on: ***Algonquin Power*** at para. 201; ***Ontario Hydro*** at para. 37; ***Ploutos Enterprises*** at paras. 104-5; ***Poole Construction Ltd. v. Guardian Assurance Company***, (1977) 4 AR 417 at para. 69, [1977] ILR 1-879; ***Simcoe & Erie Gen Insurance Co v Royal Insurance Co of Canada*** at paras. 47-9; ***Sayers and Associates Limited v The Insurance Corporation of Ireland***, [1981] ILR 1-1436 at para. 11, 126 DLR (3d) 681 (ONCA); ***Inland Concrete Ltd.*** at paras. 93-5; ***Canadian National Railway Co. v Royal and SunAlliance Insurance Co. of Canada***, [2004] OTC 851 at paras. 94, 174.5, 15 CCLI (4th) 1 affirmed on this issue 2007 ONCA 209 at paras. 138, 140, 85 OR (3d) 186 varied on other grounds 2008 SCC 66 at para. 67, [2008] 3 SCR 453; ***British Columbia Rail Ltd v American Home Assurance Co*** (1991), 79 DLR (4th) 729 at pp. 754-5, 54 BCLR (2d) 228 (CA); ***Triple Five Corp. v Simcoe & Erie Group*** (1997), 196 AR 29 at paras. 50-1, 47 Alta LR (3d) 310 (CA) affirming (1994), 159 AR 1 at para. 253, 29 CCLI (2d) 219; ***Poole-Pritchard Canadian Limited and Armstrong Contracting Canada Limited v. Underwriting Members of Lloyds*** (1969), 71 WWR 684 at pp. 691-2 (Alta SC); ***British Columbia v Royal Insurance Co of Canada*** (1991), 60 BCLR (2d) 109 at paras. 11-2, 4 CCLI (2d) 206 (CA); ***Bird Construction Co v United States Fire Insurance Co*** (1985), 45 Sask R 96 at para. 16, 24 DLR (4th) 104 (CA); ***Foundation Co. of Canada Ltd. v American Home Assurance Co.*** (1995), 25 OR (3d) 36 at pp. 54-5, 21 CLR (2d) 205 affirmed [1997] OJ No 2332 (CA); ***Greene v Canadian General Insurance Co***. (1995) 133 Nfld & PEIR 151 at paras. 14-6, 23 CLR (2d) 203 (Nfld CA) affirming (1991), 90 Nfld & PEIR 271 at paras. 41-7, 5 CCLI (2d) 193; ***Willowbrook Homes (1964) Ltd v Simcoe & Erie Gen Insurance Co.*** (1980), 22 AR 95 at paras. 33, 39, [1980] ILR 876 (CA); ***CIC Mining Corp. v Saskatchewan Government Insurance***, [1994] 10 WWR 1, 123 Sask R 219 (CA). ***Willowbrook*** and ***Triple Five*** are binding decisions of this Court, although both could be distinguished on matters of detail. However, a court interpreting similar policy wording should not lightly depart from this long line of authority: ***Progressive Homes*** at para. 23.

[47] There are a few cases to the opposite effect, but they have all been doubted or overruled. For example, ***Foundation Company of Canada Limited v Aetna Casualty Company of Canada***, [1975] I.L.R. 1-757 was not followed in ***Poole Construction*** at para. 69 or ***Triple Five*** at para. 257. The parties acknowledge that the American cases are somewhat inconsistent: see ***BSI Constructors Inc. v Hartford Fire Insurance Company*** 705 F3d 330 at p. 333 (US CA 8th Circ). It is, however, the Canadian cases that underlie the legitimate expectations of Canadian insureds and insurers.

[48] As previously noted, the exclusion cannot simply be limited to the cost of re-cleaning the windows; the "resulting damage" cannot be the same as the workmanship itself, because a thing cannot "result" from itself. Since the base coverage of "direct physical loss or damage" is obviously intended to include damage to the building itself, it follows naturally that the "faulty workmanship" exclusion is intended to exclude some damage to the building. There being no basis for limiting the exclusion to damage to work done by other subcontractors, the dividing line between "faulty workmanship" and "resulting damage" must lie elsewhere. The policy wording must depend on some difference or separation between the faulty workmanship and the resulting damage, which lies in the relationship between the workmanship and the damage.

[49] Therefore, the appellants' general approach is more consistent with the wording of the insurance policy. If the workmanship itself directly causes the damage, then both re-doing the work and fixing the damage from the first attempt easily fall into the expression "making good faulty workmanship". This test identifies a class of physical damage that is excluded from coverage by the exclusion clause, while recognizing a significant class of physical damage that would be "resulting" and therefore covered. It is also consistent with GC 2.4, which requires Bristol Cleaning to repair any damage it does to the work of other contractors. While that covenant is expressly found in this construction agreement, it would likely be implied in any construction contract; it is natural that if a contractor causes damage while doing its work, it should be required to repair that damage as the consequence of its own poor workmanship. The appellants' interpretation is consistent with commercial expectations.

[50] Nevertheless, the appellants' "geographic" test is not quite sufficient nor fully accurate. The proper test can more properly be described as a test of the connectedness between the work, the damage and the physical object or system being worked on. The application of the test will depend on an examination of the factual context, but the primary considerations will be:

> (a) The extent or degree to which the damage was to a portion of the project actually being worked on at the time, or was collateral damage to other areas. The test will be relatively easy to apply when the damage is caused directly by the work to the very object being worked on. There may be cases where several parts of the project work together as one system. Work on one part of the system may cause damage to another part, but repairing that damage might still properly be characterized as the cost of making good faulty workmanship if there is sufficient systemic connectedness;

(b) The nature of the work being done, how the damage related to the way that work is normally done, and the extent to which the damage is a natural or foreseeable consequence of the work itself. If the damage is a foreseeable consequence of an error in the ordinary incidents of the work, then it presumptively results from bad workmanship; and

(c) Whether the damage was within the purview of normal risks of poor workmanship, or whether it was unexpected and fortuitous.

The degree of physical or systemic connectedness is the key to determining the boundary between "making good faulty workmanship" and "resulting damage".

[51] A number of the precedents do use a test close to and compatible with physical or systemic connectedness between the faulty work or design and the thing said to be physically damaged thereby: see ***Foundation Co of Canada v American Home Assurance Co*** at pp. 54-5; ***Greene v Canadian General Insurance*** (CA) at paras. 14-6; ***Triple Five Corporation*** (CA) at paras. 50-1 affm'g (QB) at para. 253; ***British Columbia v Royal Insurance*** at paras 11-2; ***Poole Pritchard*** at pp. 691-2; ***Simcoe & Erie v Royal Insurance*** at paras. 30-1; ***CIC Mining*** at para 43.

[52] Here the damage was caused directly by the actual doing of the cleaning by Bristol Cleaning. The scraping and wiping motions that caused the damage were the actual "*Work*". The damage was not "accidental" or "fortuitous". The scraping and wiping forces that caused the damage were intentionally applied to the windows, as a core part of the work to be done. Fixing the resulting damage is "making good the faulty workmanship" that caused the damage.

[53] The physical or systemic connectedness test itself might be criticized, and may lead to extreme results in extreme cases. Assume, for example, that a contractor is retained to clean the entire building, from top to bottom, inside and out. The cleaner is therefore working on the entire building. Assume that the cleaner foolishly uses an inflammable solvent to clean the floors in one particular location, and as a result burns down the entire building. The appellants conceded that on a strict application of their test, the loss would not be covered. Intuitively, it could be argued that a fire destroying the entire building would appear to be something that a reasonable owner would expect to be covered. It is damage that appears to go far beyond "making good faulty workmanship". The problem is that while the manifestation of the damage is widespread and unpredictable, its origin can be traced back, in some respect, to the workmanship.

[54] Nevertheless, there may be some cases where total losses are not covered, as appears to have happened in ***Greene v Canadian General Insurance***, ***Simcoe & Erie*** and ***Algonquin Power***. There are often other types of insurance in place that respond to these types of losses. In any event, the identification of extreme examples does not mean that the identified core interpretive principle should be rejected. Extreme cases should be decided when they arise. Whether these extreme situations call for a separate test, or are merely an exception to the connectedness test, need not be explored in this decision.

[55] As noted, the parties have produced numerous cases interpreting the same or similar exclusionary wording in insurance policies. As the volume and content of those cases demonstrate, determining if particular damage is within the exclusion is always going to involve an examination of the particular facts. Nothing can be done to change that. However, it is desirable to formulate as concrete a test as is possible. Too much uncertainty in determining whether there is coverage for a particular type of loss is not in the interests of either insurers or insureds.

[56] The key is to find the dividing line between physical damage that is excluded as "making good faulty workmanship", and physical damage that is "resulting damage" which is covered by the policy. As demonstrated in the previous discussion, the wording of the policy and the weight of the case law supports the test for physical or systemic connectedness. The exclusion (considered together with the exception) excludes from coverage the cost of redoing the work. But it also excludes damage connected to that work, such as any damage caused to the very object or part of the work on which the faulty workmanship is being applied. In this case, the cost of redoing the exterior cleaning of the EPCOR Tower is admittedly excluded. Also excluded is the damage to the windows being worked on at the time, which damage was directly caused by the cleaning activities that constituted the faulty workmanship. This damage was not only foreseeable, but it was highly likely (even inevitable) that this type of damage would result if the work was done in a faulty way. That type of damage is presumptively not within the scope of the insurance policy; the policy is not a construction warranty agreement.

[57] The principle just stated reflects the proper interpretation of this wording of the insurance policy. The presumptive test is that damage which is physically or systemically connected to the very work being carried on is not covered. Whether coverage is nevertheless extended under that test in the factual context of any particular case will depend on the consideration of the factors listed above (*supra*, para. 50). Those factors all engage elements of "causation" and "foreseeability", concepts which are well known in the common law, when applying the policy wording to particular factual situations. The presumptive test stated above reflects the proper interpretation of the policy, but these collateral factors will come into play in applying the policy wording to particular factual situations, especially in extreme cases.

Contra Proferentem

[58] The trial judge decided the case based on the doctrine of *contra proferentem*. That doctrine only applies if there is an ambiguity in the policy; it cannot be used to create an ambiguity. Merely because the application of the policy to particular fact situations might be tricky does not mean that there is "ambiguity" in the policy wording. In fact, it has been held that this type of exclusion is not ambiguous: ***Canadian National Railway Co. v Royal and SunAlliance Insurance Co. of Canada***, 2008 SCC 66 at para. 33, [2008] 3 SCR 453. Numerous cases have applied this wording to various fact situations, expressly disclaiming resort to the doctrine of *contra proferentem*, for example ***Triple Five*** (CA) at para. 43 and ***Poole-Pritchard*** at p. 691.

[59] On appeal the respondents noted that the appellants selected this wording and "could have used different language" in the policy, which is essentially the same argument. This appeal must be decided based on the wording the parties did use, not the wording they did not use.

[60] There is no need here to resort to the residual technique of construing the policy against the party that drafted it. A review of the wording of the policy, as well as the significant body of case law which has interpreted it, permits the case to be decided based on the proper interpretation of the scope of coverage provided by the policy wording.

Conclusion

[61] In conclusion, the appeal should be allowed. A declaration should issue that the damage to the windows in the EPCOR Tower is not covered by the policies issued by the appellants.

Appeal heard on January 9, 2015

Memorandum filed at Edmonton, Alberta
this 27th day of March, 2015

Côté J.A.

Watson J.A.

Slatter J.A.

Appearances:

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