NOVA SCOTIA COURT OF APPEAL

Citation: *Garden View Restaurant Ltd. v. Portage La Prairie Mutual Insurance Company*, 2016 NSCA 8

Date: 20160211
Docket: CA 436877
Registry: Halifax

Between:

Garden View Restaurant Limited

Appellant

v.

The Portage La Prairie Mutual Insurance Company

Respondent

Judges:	Farrar, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	October 7, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Scanlan and Van den Eynden, JJ.A. concurring.
Counsel:	Marc Dunning and Will D. Russell, for the appellant Michael E. Dunphy, Q.C. and John T. Boyle, Articled Clerk, for the respondent

Reasons for judgment:

Overview

[1] The appellant, Garden View Restaurant Limited, appeals the decision of Justice Margaret Stewart dated December 22, 2014 (reported as 2014 NSSC 447) denying its claim for coverage under a policy of insurance issued by the respondent, Portage La Prairie Mutual Insurance Company.

[2] The factual background is straightforward. Garden View is the owner of a property known as 114A and 114B Tacoma Drive, Dartmouth.

[3] The property contains a 2-unit residential rental building. On January 27, 2011, Greg Fong, the principal and sole shareholder of Garden View, investigated a complaint by one of the tenants that she had no heat. He found that the copper pipe connecting an outside oil tank to the building furnace had been vandalized, causing oil to discharge on to the property.

[4] Mr. Fong contacted Maritime Remediation, a remediation contractor. He was informed that he needed a site professional and, as a result, he contacted Strum Environmental, an environmental consulting firm with expertise in domestic oil spills. Strum was retained to direct Maritime Remediation in excavating and removing the contaminated soil, to assess the extent of the petroleum hydrocarbon impacts and to remediate the oil spill in accordance with the Nova Scotia Department of Environment Domestic Fuel Oil Spill Policy.

[5] Maritime Remediation commenced excavation on January 28, 2011. Between January 28 and March 25, Strum's site activities included soil excavation, air and water testing, monitoring well installation and installation of a probe for sub-floor air sampling, and groundwater monitoring.

[6] In March, Garden View submitted a claim to Portage La Prairie and was advised that limited coverage was available. Earlier, Portage had paid the full amount of $10,000 it said was owing under the extension provision for the clean-up of on-premises pollutants.

[7] The insurer denied payment for any other claim relating to the remediation of the oil spill.

[8] Garden View applied to the Supreme Court seeking a declaration that the costs associated with remediation of the oil spill were covered under the policy. The application judge identified two global issues:

1. Was there damage to insured property so as to invoke coverage under the policy?
2. Did the doctrine of imminent peril apply?

[9] The application judge answered both of these questions in the negative. In making her determinations, the application judge made a number of factual findings which I will address in more detail when considering the grounds of appeal.

[10] For the reasons that follow, I would dismiss the appeal with costs to Portage La Prairie in the amount of $8,800.00 inclusive of disbursements.

Issues

[11] The appellant raises a multitude of issues on this appeal. I would summarize and address them in the following order:

1. Did the application judge err in finding that the definition of "building" did not include the soil under the building?
2. Did the application judge err in failing to find the drain tiles were insured property?
3. Did the application judge err in finding that the doctrine of imminent peril did not apply in these circumstances? The appellant alleges a number of errors on the part of the application judge in her consideration of the doctrine of imminent peril. I would summarize and address them in the following order:
    (a) The application judge erred in finding a peril that is "more likely than not" to occur is insufficient to engage the doctrine;
    (b) The application judge erred in finding that Garden View's expert, Don Carey, made no comment about when vapours would get in the building, therefore, she erred in finding the peril was not imminent;

(c) The application judge erred in finding that the foundation of the expert report was factually flawed because there were no pathways to allow vapours into the building;

(d) The application judge erred in finding that the extent of contaminated soil with concentrations near 17,200 MG/KG modified total petroleum hydrocarbons (TPH) are "significantly above" 2,140 MG/KG was material to Mr. Carey's opinion;

(e) The application judge erred in finding that none of the work prior to February 9, 2011 was motivated by the intention of stopping vapours from entering the building and in relying on that in determining whether the doctrine applied;

(f) The application judge erred in finding that the insurance policy did not cover damage related to the inability to use the building because of vapours;

(g) The application judge erred in finding the vapour peril never arose;

(h) The application judge erred in finding the relevant time to consider whether the peril began to operate was after Strum arrived on site and after excavation and removal of the contaminated soil, rather than immediately after the spill;

4. Did the application judge err in finding that the pollution exclusion applied?

Standard of Review

[12] The standard of review in relation to interpretation of contracts was recently considered in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. In *Sattva* the Court noted that historically courts approached the interpretation of written contracts as a question of law. The Supreme Court of Canada rejected this approach holding:

> 50. …Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[13] The Supreme Court concluded a deferential standard of review is appropriate unless there is a legal error with respect to an extricable question of

law. Legal errors made in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a requirement element of a legal test, or the failure to consider a relevant factor. (*Sattva*, ¶52-54 citing *Housen v. Nikolaisen*, 2002 SCC 33; see also *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104, ¶40).

[14] With respect to the first issue that I have identified on this appeal, the application judge was ascertaining the meaning of the word "building" as it was used in the insurance policy. In my view, this is an extricable question of law for which no deference is owed to the application judge.

[15] The second issue, whether the drain tile is insured property involves applying the terms of the policy to the particular facts of this case, to which deference is owed.

[16] The third issue, whether imminent peril applies in this case and the subsidiary issues under this ground of appeal, all involve questions of mixed law and facts to which deference is owed with the exception of (a) which is a consideration of the burden of proof; that is an extricable question of law to which the correctness standard applies.

[17] The fourth issue, involving the pollution exclusion, is also an extricable question of law which attracts the correctness standard. However, in my view, in light of the application judge's findings on the other issues, it is moot.

Issue #1 Did the application judge err in finding that the definition of "building" did not include the soil under the building?

[18] The principles underlying the interpretation of insurance policies have been canvassed by the Supreme Court of Canada on many occasions. In a companion decision to this decision, *Royal & Sun Alliance Insurance Company of Canada v. Snow*, 2016 NSCA 7, I summarized the relevant principles as follows:

(a) The primary interpretative principle is that where the language of the policy is unambiguous, effect should be given to the clear language of the policy reading it as a whole;

(b) Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction. Interpretations that are consistent with the reasonable expectations of the parties should be

preferred, so long as the interpretation can be supported by the text of the policy. Interpretations that would give rise to an unrealistic result or were not in the contemplation of the parties are to be avoided;

(c) The rules of interpretation are intended to resolve ambiguities. They are not intended to create ambiguities where none exist;

(d) Courts should strive to interpret similar policies consistently;

(e) When the contractual rules of construction fail to resolve the ambiguity courts will construe the policy *contra proferentem*. Under the *contra proferentem* rule, coverage provisions are interpreted broadly; exclusions narrowly.

(See *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, ¶21-24)

[19] With those principles in mind I will turn to the application judge's decision in this case when addressing the definition of "building":

> [62] I will touch briefly on several arguments advanced by Garden View relating to coverage under the Policy. Garden View argued that under the definition of "Building", an insured property item under the Policy includes the soil under the Building, and therefore damage occurred to insured property which the Policy covers. Within this context, Garden View seeks recovery for the costs of remediation of all the land excavated outside the Building that was affected by the spill as well as recovery for total remediation.
>
> [63] The definition of "Building" in the Policy is clearly not intended to cover soil. The types of items insured relate to assets other than soil, and soil itself is not listed. Anything soil-related is specific to the inside of the "building", and to a very limited and specific inside use. I am satisfied that when the Policy is read as a whole the only reasonable interpretation is that the soil is not insured. A similar conclusion – to the effect that soil was not part of the "building" insured – was reached in respect of a property policy with what appears to be an identical definition of "building" in *Grey & Bruce Mutual Insurance Co. v. MacKinnon Plumbing & Heating*, [2009] O.J. No. 5448, [2010] ILR.I-4940 (Ont. Sup. Ct. J.) at para. 45. Although it is not necessary to do so other than to provide context to the already-defined policy term, and show its lack of uniqueness, a focus on the ordinary and popular meaning of "building" would result in the same conclusion: that it does not include soil: see *M.J. O'Brien Ltd. v. Freedman*, [1923] O.J. No. 60, (1923), 54 O.L.R. 455 (Ont. S.C.A.D.) at para 15, and *J.M.D.S. Services Inc. v. Prudential Assurance Co. of England Property and Casualty (Canada)* (1997), 44 C.C.L.I. (2d) 223, [1997] M.J. No. 265 (Man. Q.B.), at para. 7. Nothing in the Garden View's argument, including distinguishable United States caselaw, causes

> me to find otherwise. There is no evidence that there was any damage to the "Insured Property". Coverage under the Policy was not triggered.
>
> [Emphasis added]

[20] The application judge applied the correct legal principles to the interpretation of the insurance contract and came to the correct conclusion. She read the policy in its entirety and concluded that the building did not include the soil underneath it. Our decision in *Royal & Sun Alliance* as referenced above reached the same conclusion when considering the issue, albeit in relation to a homeowner's policy. I will not repeat what I said in that case but refer to the analysis at ¶15-55 of that decision. I would, therefore, not interfere with the application judge's conclusion.

[21] I would dismiss this ground of appeal.

Issue #2 - Did the application judge err in failing to find the drain tiles were insured property?

[22] Although the determination of the definition of "building" is an extricable legal question which required the application judge to be correct, the determination of whether the drain tile was insured property was an application of the terms of the policy to the particular facts of this case.

[23] Garden View says that the application judge did not address whether the drain tile was covered by the Policy. I disagree. She found "There is no evidence that there was any damage to the "Insured Property". (¶63) This would include a finding that she was not satisfied there was any damage to the drain tile.

[24] The evidence was the drain tiles were removed as part of the remediation of the contaminated soil outside the building. They were subsumed in the cleanup work that was claimed as part of the expenses incurred in avoiding an imminent peril.

[25] The appellant had the burden to establish that the drain tile (if covered by the Policy) suffered "direct physical loss of or damage". It established that there was some contaminated soil in some sections of the drain tiles. However, it did not prove the concentration of contamination of the soil in the drain tiles or, because of the concentration of the contaminated soil in the drain tiles they needed to be removed. Strum provided Garden View with the option of leaving all drain tiles in

place (Strum Report, Feb. 9, 2011). It is not apparent their ability to function as drain tiles was damaged.

[26] In finding there was no damage to insured property, the application judge did not commit a palpable and overriding error.

[27] I would dismiss this ground of appeal.

Issue #3 - Did the application judge err in finding that the doctrine of imminent peril did not apply in these circumstances?

[28] By far, the bulk of the time spent on the application and on this appeal was addressing the doctrine of imminent peril.

[29] The doctrine of imminent peril is a common law principle that permits an insured to recover damages resulting from preventative action taken to stop what would otherwise be an imminent peril (for which coverage is provided under the policy) from occurring. *Liverpool & London & Globe Insurance v. Canadian General Electric Ltd.*, [1981] 1 S.C.R. 600, set out the requirements of the doctrine as follows:

> 33. Although the rule may seem harsh when stated in the abstract, nonetheless it appears in distilled version in the texts, such *as MacGillivray & Partington on Insurance Law*, (6th ed. 1975, para. 1753) and commends itself to the application of the terms of the contract undertaken by the insurer and the insured:
>
> > Damages sustained due to the voluntary act of an insured to avoid a named peril are not a consequence of that peril and are not recoverable.
>
> Essential to an understanding of the rule and its application is the condition that before liability arises there must be an operating peril of the type or category described in the insurance contract. The danger must be present in the sense that unless something is done, damage will ensue. It may be that in the vagaries of nature, actual damage may not have yet been suffered (as in the *Maine* case, *supra*), but if the peril has actually arisen and damage can be reasonably anticipated from the peril (assuming it to be in the contract an enumerated risk), then damage suffered as a result of the preventive measures taken by the insured will be recoverable. (*The Knight of St. Michael, supra*.)
>
> Returning to the circumstances in this appeal, the critical question at this stage of the proceedings is not whether or not the insured event has occurred but whether or not the damage occasioned by the insured arose by reason of preventive action taken to avoid the imminent risk covered by the contract, namely an explosion. Here the exothermic reaction had begun and had reached an irreversible stage.

> This, however, did not on the evidence lead inevitably to an explosion and theevidence adduced by the plaintiff falls short of a demonstration of anything approaching inevitability. In any event, all of this in these proceedings is academic because, as has already been stated, the damage suffered by the respondent was caused substantially by phenolic corrosion (an uninsured risk) by vapours escaping through the hatch and not by an explosion, even if one in fact had occurred, or by preventive measures taken by the respondent in the face of an 'operating' imminent insured risk.
>
> [Emphasis added]

[30] The doctrine of imminent peril therefore requires the following:

(a) There must be an operating peril of the type or category described in the insurance contract; and

(b) The danger must be present in the sense that unless something is done, damage will ensue; i.e., it is inevitable.

[31] I will now turn to the alleged errors raised by Garden View.

(a) The application judge erred in finding a peril that is "more likely than not" to occur is insufficient to engage the doctrine

[32] The application judge found that, pursuant to the imminent peril doctrine, an insured peril and resulting damage must be inevitable. Garden View says she was wrong and the test is met if it is probable (more likely than not) that the insured peril and resulting damage will occur if actions to avert the damage are not taken.

[33] The recent case of *Mississippi River Power Corp. v. Municipal Electric Assn.*, 2014 ONSC 3784 specifically addressed the issue of whether the operating peril has to be "inevitable" and whether it is sufficient that the peril "was more probable than not". In that case, a power station included two "penstocks" which were large diameter concrete encased steel pipes designed to channel water to hydraulic turbines. In April 2012, Penstock # 2 failed and collapsed upon itself. It was determined that Penstock # 1 (which did not collapse) had similar deficiencies (defective welds) and could collapse in the future. The insured repaired the welds and claimed for the cost of repair and the business interruption losses that flowed from those repairs under the doctrine of imminent peril. The court referred to and relied upon the principles in *Canadian General Electric Ltd., supra,* in rejecting the insured's claim and stated:

> 27. I am of the view that the terms of the policy do not cover the costs of the repairs to Penstock # 1 nor the business interruption losses resulting from the repairs to Penstock # 1. There was no imminent peril in the sense that the peril had been engaged at the time the plaintiff took its decision and that it was "inevitable". At best, it was foreseeable that Penstock # 1 could fail sometime in the future. Although it was more probable than not that it would fail, it did not constitute an inevitable peril. Nothing in the policy provides for the course of action chosen by the plaintiff notwithstanding that the plaintiff's actions in correcting the faulty welds was reasonable in all the circumstances. There is no ambiguity in the wording of the policy which requires the court to find liability on the part of the insurer in these facts."

[Emphasis added]

[34] The doctrine of imminent peril is rarely considered or applied. Courts have recognized that the principle should be applied only when the peril and damage is inevitable and imminent. In my view there are sound public policy reasons for this stipulation. By requiring the peril and damage to be inevitable and imminent, insurers will not be obliged to pay and insureds will not be paid - other than in cases in which damages are a virtual certainty to occur at any moment, unless averting action is taken. The burden is on the insured to establish facts that trigger the doctrine.

[35] Garden View argues that the application judge "erred in stating that proof on a balance of probabilities was insufficient to engage the doctrine". It says there is only one civil standard of proof, which is the balance of probabilities. With respect, this misconstrues the issue. At no point did the application judge suggest that there was a higher burden of proof for the doctrine of imminent peril. In discussing Garden View's expert evidence that the damage was "more likely than not" to occur she said:

> [53] The doctrine of imminent peril does not apply under these circumstances. The doctrine is not triggered by a 51% chance that an insured risk might cause damage. It requires inevitability. Mr. Carey did not say damage from oil vapours in the Building was inevitable; rather, there was significant uncertainty as to whether there would ever be oil vapours in the Building. Damage that is "more likely than not" is not inevitable…

[36] The application judge was not invoking a higher burden of proof for the doctrine of imminent peril. Rather, she was not satisfied on a balance of probabilities that the damage was inevitable because the evidence did not establish it.

[37] The application judge's finding that the appellant did not prove an insured peril and resulting damage were inevitable is sufficient on its own to dismiss the claim based on the imminent peril doctrine. However, I will address Garden View's other arguments on this issue.

(b) The application judge erred in finding that Garden View's expert, Don Carey, made no comment about when vapours would get in the building, therefore, she erred in finding the peril was not imminent

[38] Not only must the peril be inevitable, it must be imminent or likely to occur at any moment. Garden View retained an expert, Don Carey of Stantec Consulting Limited to provide a report on the oil spill. The application judge found as a fact that Mr. Carey did not opine that vapours in the building were imminent or likely to occur at any moment. She said:

> [54] Neither did Mr. Carey make any comment on when the vapours would get in the Building. He did not opine that vapours were imminent or likely to occur at any moment. As he was aware, on January 28 and 29, 2011, with the concentration at its highest, there were no oil vapour smells. Between January 28 and February 8, despite six holes in the basement floor, and the presence of oil under the floor, under the footings, and along the foundation, there were no oil vapours in the Building.

[39] Garden View says in its factum (¶83) that the following portion of Mr. Carey's opinion is "clear evidence" of his opinion when vapours would get into the building:

> Although the effects are chronic, it would not be acceptable to expose human receptors to vapour concentrations above human health risk levels and therefore it is my opinion that the building would not have been able to be used for residential purposes, until those vapour risks had been mitigated.

[40] It argues this statement from Mr. Carey leads to the inference that the vapours would get into the building immediately after the spill (¶84). With respect, that is a very strained interpretation of this portion of Mr. Carey's opinion.

[41] Mr. Carey's opinion is ambiguous and unclear at best. He effectively said that humans should not be exposed to vapour concentrations above human health risk levels and that once the vapour concentrations got into the building and were in excess of human health risk levels (whenever that was) the building would not be able to be used for residential purposes until those vapour risks had been

mitigated. He did not comment on when the oil vapours would get into the building (if ever).

[42] It was the application judge's role to review the evidence and interpret the reports. She did not make any palpable or overriding error in reaching the conclusion that the vapours were not imminent nor likely to occur at any moment.

(c) The application judge erred in finding that the foundation of the expert report was factually flawed because there were no pathways to allow vapours into the building

[43] The application judge said:

> [58] …When the evidence concerning the presence of pathways is weighed and considered as a whole, it does not support their existence. This renders the foundation of the expert's report factually flawed. …

[44] This is a finding of fact after considering the evidence as a whole; it did not support the existence of pathways to allow vapours to get into the building.

[45] The evidence supports her finding, including:

(a) Strum inspected the concrete floor in the furnace room and there were no areas or conditions that needed to be addressed to prevent vapours from getting into the building;

(b) there was no evidence that pathways were ever repaired or closed after the spill;

(c) Strum did not recommend that any pathways needed to be sealed;

(d) Strum suggested the basement floor was acting as a cover to limit potential migration; and

(e) Strum recommended regular inspections to maintain the floors integrity in the future.

[46] Garden View also argues that she did not consider the window or cold joints between the walls and floors as pathways. This criticism of the application judge is without merit. With respect, the application judge was clearly aware of Garden View's argument with respect to pathways. She held:

> [57] Strum found no need to advise any tenant to vacate. In detailing the second option for managing the contamination, it made no mention of a need to seal any pathways in the foundation, floor or joints in the floor. There is no evidence from either Mr. Fong or Strum that anything was done prior to the June 6, 2011, Strum report to seal or cover any pathways, other than the six test holes that were covered over in March. Strum's June 6 report suggests that the concrete basement floor acted as a cover to limit potential migration of hydrocarbon vapours, with no suggestion of a need to seal anything. Strum recommended regular inspections to maintain the floor's integrity, and sealing of any openings to prevent potential ingress of vapours.

[47] The application judge specifically addressed floor joints and pointed out that Strum did not mention the need to seal any pathways in the "joints in the floor".

[48] Although she does not mention the window directly, presumably if there was an issue with the window it could have been sealed as well.

[49] She addressed her mind to the evidence with respect to pathways and found Garden View's theory that there were pathways which would allow vapours into the building was unsupported by the evidence. There is no basis to interfere with the finding.

(d) The application judge erred in finding that the extent of contaminated soil with concentrations near 17,200 MG/KG modified total petroleum hydrocarbons (TPH) are "significantly above" 2,140 MG/KG was material to Mr. Carey's opinion

[50] The application judge found that Mr. Carey relied on facts about the concentration of the contaminated oil being "significantly elevated above the RBS levels" in reaching his opinion and the concentrations he assumed to exist were wrong (¶55).

[51] Garden View argues that the concentrations of contaminated soil was not material to Mr. Carey's opinion (¶86). With respect, this position is inconsistent with the evidence before the application judge.

[52] The following suggests that the concentration of soil contamination was material to Mr. Carey's opinion:

1. In his report dated November 21, 2011, he states as a material fact the concentration of the soil contamination next to the foundation as being 17,200 TPH;

2. In his report dated November 21, 2011, he refers to the Atlantic RBCA soil vapour document indicating that at the maximum concentration measured in soil (TPH of 17,200) there is a potential risk that vapours will migrate from source into the house;

3. In his report dated November 21, 2011, he states his opinion is based on "those concentrations were in direct contact with the foundation wall and footings";

4. The only evidence he had of the concentrations of contaminated soil in direct contact with the foundation wall and footings was from the affidavit of Randy McIntyre (a Certified Environmental Technologist and a Senior Environmental Specialist with them) which the application judge found to be incorrect. In addressing this evidence the application judge found:

> [55] In addition, Mr. Carey relied on facts about the concentration of the contaminated soil "at this site" in the area around and in direct contact with the foundation wall and footings, and beneath the building, being significantly elevated above the RBS levels. This information came from the affidavits of Mr. Faulkner and Mr. McIntyre. Mr. McIntyre relied upon Mr. Faulkner telling him that the first sample taken on January 28 … at the source of the spill, with a concentration of 17,200 TPH, was representative of the degree of contamination of soil in these areas. Mr. Faulkner also referenced heavily-impacted soil in the areas … At the hearing, however, Mr. Faulkner stated that these references were wrong. He never concluded that the contamination in these areas was close to 17,200 TPH. He could only say that it was over 140 TPH – some 100 times lower than sample S1JA28. I question the degree to which Mr. Carey considered subsequent evidence that may have corrected the erroneous affidavits. In maintaining his opinion, he never clarified or elaborated upon the fact that the concentration of contaminated soil was actually nowhere near the level they referred to. He continued in his subsequent reports to qualify and describe the site as "significantly above" levels of concentration that "could create vapours". This is a major discrepancy. [Emphasis added]

5. Mr. McIntyre expressly stated in paragraph 20 of his affidavit of October 24, 2011 that he was concerned about the human health risk because sample S1 (JA28) (17,200 TPH) was representative of the degree of contamination of soil in the areas (contact with foundation);

6. Mr. McIntyre expressly stated in paragraph 21 of the same affidavit that soil with hydrocarbons concentrations as high as sample S1 (JA28) (17,200 TPH) can migrate into the indoors creating unacceptable risk to human health.

[53] On any fair reading of Mr. Carey's report, and Mr. McIntyre's affidavit, it is clear that the concentration of soil contamination was relevant and material to the likelihood of vapours getting inside the building and creating a human health risk.

[54] Garden View's argument on this issue fails.

(e) The application judge erred in finding that none of the work prior to February 9, 2011 was motivated by the intention of stopping vapours from entering the building and in relying on that in determining whether the doctrine applied

[55] The application judge found that Mr. Fong did not clean up the oil spill because vapours in the building were imminent and damages inevitable. She found he initially cleaned up the spill because he did not want the spill to spread to other properties, or under the building, as it would cost more to clean up. He also knew he was obligated to clean it up under Nova Scotia law .

[56] The appellant argues that why an insured took preventative measures is not relevant to the imminent peril doctrine. I disagree. The Supreme Court of Canada in *General Electric* adopted the principle that "… the imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods" (¶30). Clearly the imminence of the peril (in this case vapours in the building) was not what prompted Garden View to take remedial action.

[57] The application judge addressed this issue:

> [21] Immediately after the spill, Mr. Fong said, the main concern was getting the contaminated soil out of the ground so that oil did not spread to neighbouring properties. Vapours were not important or a concern. On February 9, 2011, Mr. Fong met with Strum. By this time, the major source area in the shape of a backward L around the southeast corner had been excavated and Mr. Fong could no longer smell oil standing outside. The possibility of vapours entering the Building became a focus at this meeting. Strum's February 9 assessment report gave Mr. Fong the options of a clean-up or putting in place a risk management program to meet Department of Environment requirements.

> [22] Mr. Fong said the downstairs tenant, Shelly Cromwell, never spoke to him about smelling oil inside or outside her unit, or about vapours. He said he did not know why she moved out, and she did not tell him. He said that after the spill he did no repair work to the concrete basement floor and did nothing to make sure no water or vapours got in the furnace room.

[58] The appellant says the application judge's finding of fact should be overturned because of the evidence of Mr. McIntyre that Strum carried out its work to address the human health risks the spill posed to the occupants of the building.

[59] With respect, it was open to the application judge to decide what weight, if any, she would give to Mr. McIntyre's evidence. As noted earlier, his affidavit was found to be inaccurate on a crucial point (the concentration of oil contamination in the soil in contact with the foundation walls). He does not say what work was carried out to address the human health risks posed to the occupants of the building or what constituted the human health risk. In addition the initial work in digging out the main spill was done without any involvement of Strum.

[60] The application judge had an evidentiary basis to make the finding of fact that there was no evidence that any of the work done prior to February 9th was at all motivated by the intention to stop vapours from getting into the building. In making this finding, she did not make any palpable and overriding error.

(f) The application judge erred in finding that the insurance policy did not cover damage related to the inability to use the building because of vapours

[61] This issue received the least amount of time on this appeal although it was thoroughly canvassed before the application judge. Garden View focuses on the application judge's decision where she says:

> [61] … even if vapours had been present, there was no term of the Policy providing for coverage when use of the Building is affected by gas from a stated source. … (Appellant's Factum, ¶22)

[62] To put that comment in context I will refer to the trial judge's decision in the paragraphs preceding that quoted by Garden View and the complete paragraph in which the quoted words are contained:

> [59] I am satisfied that the criteria of the doctrine have not been met. The necessary evidence to support recovery under the doctrine is lacking. Therefore, no loss is recoverable.
>
> [60] The remaining question is whether there was damage to insured property so as to invoke coverage under the Policy
>
> **Policy Coverage**
>
> [61] The basis for my conclusion on the doctrine of imminent peril, along with the principles that there is no coverage for expenses associated with preventing an insured peril and that insurance policies cover damage that has happened, not damage that might, or is more likely than not to happen, provides context for the lack of Policy coverage. The question of whether the kind of damage required for coverage under the Policy is met need not be addressed. Further, even if vapours had been present, there was no term of the Policy providing for coverage when use of the Building is affected by gas from a stated source. The Policy was intended to cover the Building. It was not intended to cover the land. There was no coverage for the oil on the land other than the monies paid.

[Emphasis added]

[63] Garden View raises this issue as part of the reason the application judge erred in finding the doctrine of imminent peril did not apply. However, when put in context, this argument is not supported.

[64] The application judge, at the outset, identified two global issues to be addressed:

1. Did the doctrine of imminent peril apply? And
2. Was there damage to insured property as to invoke coverage under the policy? (¶4)

[65] The doctrine of imminent peril was dealt with in ¶42-60 and the Policy Coverage in ¶61-65 of the application judge's decision.

[66] Whether the policy covered loss of use of the building because of the existence of oil vapours was not part of her reasoning in rejecting the application of the imminent peril doctrine. The application judge only addressed the coverage issues under the section "Policy Coverage".

[67] Although her wording could have been clearer, the application judge was simply said that it was not necessary to determine whether vapours entering the

building needed to be considered an insured peril in light of her determinations under the imminent peril doctrine. The words "Further, even if the vapours had been present, there was no term of the Policy providing for coverage when use of the Building is affected by gas from a stated source" is simply stating what the policy says. She was not determining that the imminent peril doctrine required the policy to contain express language describing the specific peril as argued by the appellant (Factum, ¶23). Whether loss of use of the building because the vapours constituted "direct physical loss of or damage to the insured property" was not addressed by the application judge and did not need to be addressed in light of her determinations on the other aspects of imminent peril.

(g) The application judge erred in finding the vapour peril never arose

[68] The application judge found the relevant peril was not oil or vandalism but vapours entering the building. She made this finding in the context of whether there was an operating peril (which is one of the requirements necessary to invoke the imminent peril doctrine). She held:

> [48] The relevant peril is not oil, or the vandalism that caused the oil spill; rather, it is the oil vapours from the contaminated soil entering the Building. There is no evidence of actual oil vapours entering the Building prior to the clean-up of the reverse L-shaped contamination source. The vapour peril never actually arose prior to the preventative action being taken. On January 28, 2011, Mr. Faulkner checked specifically for evidence of vapours in the Building. Between that date and February 8-9, he checked three or four times. There was no evidence of vapours in the building, and therefore no operating peril.

[69] For ease of reference I again refer to the *Canadian General Electric* case where the Supreme Court held:

> 33. …there must be an operating peril of the type or category described in the insurance contract. The danger must be present in the sense that unless something is done, damage will ensue. …

[70] In that same case the question appeared to be whether there was an operating peril of the type covered by the Policy (explosion). In deciding whether there was an insured peril that was operating, the court looked at whether an explosion was inevitable. The court stated at paragraph 34:

> 34. … Here the exothermic reaction had begun and had reached an irreversible stage. <u>This, however, did not on the evidence lead inevitably to an</u>

> explosion and the evidence adduced by the plaintiff falls short of a demonstration of anything approaching inevitability. …
>
> [Emphasis added]

[71] The application judge properly turned her mind to whether vapour in the building was inevitable. She found it was not. In addition, she properly addressed the issue of whether "unless something is done, damage will ensue." She found it would not. Clearly these are the key considerations on whether there is an operating peril.

[72] In this particular case, it was open to the application judge to find that there was no operating peril because there was no evidence vapours could have entered the building at any time before the preventative action was taken. She made this finding in the context that there was no evidence that vapours in the building were inevitable or imminent. The application judge did not make any palpable and overriding error.

(h) The application judge erred in finding the relevant time to consider whether the peril began to operate was after Strum arrived on site and after excavation and removal of the contaminated soil, rather than immediately after the spill

[73] With respect, the application judge addressed this very point. She stated "The vapour peril never actually arose prior to the preventative action being taken." (¶48) She clearly considered whether the operating peril started to operate before preventative action was taken. This argument is without merit.

Issue #4 - Did the application judge err in finding that the pollution exclusion applied?

[74] In light of the application judge's findings that the imminent peril doctrine did not apply and that the definition of building did not include the land under the building it was not necessary for her to address this point. There was no coverage. Therefore, whether the pollution exclusion applied was moot. As a result, it is not necessary to address this issue on appeal.

Conclusion

[75] The appeal is dismissed with costs to the respondent in the amount of $8,800.00 being 40% of the costs awarded at trial, inclusive of disbursements.

Farrar, J.A.

Concurred in:

Scanlan, J.A.

Van den Eynden, J.A.