

SUPREME COURT OF NOVA SCOTIA

Citation: *Garden View Restaurant Ltd. v. Portage La Prairie Mutual Insurance Company*, 2014 NSSC 447

Date: 20141222

Docket: Hfx No. 353137

Registry: Halifax

Between:

Garden View Restaurant Limited

Applicant

v.

The Portage La Prairie Mutual Insurance Company

Respondent

Judge: The Honourable Justice Margaret J. Stewart

Heard: July 3, 7, 8 and 9, 2014 in Halifax, Nova Scotia

Decision: December 22, 2014

Counsel: Marc Dunning for the Applicant
Michael E. Dunphy, Q.C., for the Respondent

By the Court:

Introduction

[1] In this Application in Court the applicant, Garden View Restaurant Limited (Garden View), seeks a declaration that a claim arising out of a January 2011 home heating oil spill is covered by a policy of insurance (the Policy) issued by the respondent, the Portage La Prairie Mutual Insurance Company (Portage). Garden View also seeks to amend its pleadings in order to rely upon the doctrine of imminent peril.

[2] The spill originated from vandalism and the theft of a copper pipe line connecting an outdoor above-ground oil tank to a building containing two residential rental units (the Building) on Garden View's property on Tacoma Drive in Dartmouth (the Property), an insured location under the Policy. Garden View argues that Portage breached the Policy by failing to cover insured losses, specifically, past, present and future costs of identifying and removing spilled oil and costs to remediate the soil and repair damage to the Building and to the Property, as well as incurred interest costs to finance same and loss of rent.

[3] The applicant filed affidavits of Greg Fong, Randy McIntyre, and Jeff Faulkner, as well as a report of an expert, Donald Carey. The Respondent filed affidavits by its claims manager, William McCann, and a burner mechanic, Stephen Farrell affidavit, as well as a supplemental email by consent.

Issues

[4] Two global issues are raised on the application: (1) Does the doctrine of imminent peril apply; and (2) Was there damage to insured property so as to invoke coverage under the Policy?

Garden View's Position

[5] In order to engage the Policy, there must be damage to the insured property. If there is damage to the Building, an insured property under the Policy, then there must be coverage. Garden View's position is that damage existed immediately following the spill. In his November 2011 report, the applicant's expert, Donald Carey, describes risks associated with the Building and its occupants. His opinion was that it was predicable that the Building would not have been usable for

residential purposes until vapour risks from the oil spill were mitigated. This supports the conclusion that there was damage to the Building immediately following the spill, because the Building would not have been usable until those risks were mitigated. As well, Garden View argues having contaminated soil up against the Building in a situation where it represented a risk to people in the Building is equivalent to damage to the Building. Where there is existing damage, the cost incurred to prevent further damage is recoverable.

Portage's Position

[6] Portage denies Garden View's claim for remediation of the oil spill on the basis that it is not covered by the Policy. The insurer states that there is no factual or legal basis for any of the theories of coverage advanced by Garden View, and says it met all of its obligations under the Policy. Portage says the Policy is intended to cover damage to the Building, but not the land, which is where the spill occurred. As such, it submits, Garden View is obligated by the relevant provincial environment legislation to clean it up. Portage maintains that there was no damage to the Building, so the Policy was not triggered. According to Portage, neither the policy nor the common law entitles Garden View to recover expenses incurred to avert damage, such as costs arising from an inability to occupy the Building due to health risks from vapours that might or might not happen at some point in the future. Assuming oil vapours to be an insured risk, it is submitted, the law does not cover normal costs associated with averting or preventing named risks except when the criteria of the doctrine of imminent peril are met.

[7] Portage says the type of evidence needed to support recovery under the doctrine of imminent peril is lacking and the doctrine thus has no application. The insurer argues that such a determination in these circumstances and on these facts ends the need to address coverage and damage issues under the Policy. In particular, Portage's position on coverage can be summarized as follows:

The Building is the only relevant "insured property" item that the Policy covers; by definition land or soil under the Building are not covered;

The Policy requires direct physical damage for coverage, not damage to the Building from the risk;

There was no direct physical damage to the Building, meaning a distinct, demonstrable and physical alteration of its structure, and therefore coverage is not triggered under the Policy;

The damage to the shrub, deck, basement floor, and the driveway and drain tile was not fortuitous but was intentionally caused and thus, is not covered by the Policy;

The costs of testing, monitoring, evaluating, and assessing the spill are excluded by the pollution exclusion;

There is no coverage for loss of rent, if any was lost, or for interest on the cost of financing under the terms of the Policy.

[8] Portage also addresses the quantum of damages claimed. Garden View has the burden of proving the quantum of its loss and, the insurer says, has failed to do so. Portage says Garden View is unable to prove what was spent to clean up the contaminated soil arising from the January 27, 2011 spill, as opposed to any prior spills. It says Garden View is not entitled to general damages, and specifically to damages for mental distress. There is no legal basis for Garden View to recover credit card or other interest (other than prejudgment interest). Pursuant to the Policy, the payment for physically-damaged property that is not replaced is based on actual cash value (depreciated value) rather than replacement costs.

Policy

[9] The following provisions of the Policy are relevant to this decision:

2. INSURED PROPERTY

A. This form insures those of the following items for which an amount of insurance is specified on the "Declaration Page" and only while at the "premises":

"Building"

"Equipment"

"Stock"

"Contents"

" All Property"

.....

5. INSURED PERILS

This form, except as otherwise provided, insures against all risks of direct physical loss of or damage to the insured property.

.....

18. DEFINITIONS

Wherever used in this form:

...

(b) "Building" means:

The building(s) described on the "Declaration Page" and includes:

- (i) fixed structures pertaining to the building(s) and located on the "premises";
- (ii) additions and extensions communicating and in contact with the building(s);
- (iii) permanent fittings and fixtures attached to and forming part of the building(s);

....

- (iv) material, equipment and supplies on the "premises" for maintenance of, and normal repairs and minor alterations to the "building" or for building services;
- (v) growing plants, trees, shrubs or flowers inside the "building" used for decorative purposes when the Insured is the owner of the "building".

[10] Vandalism is listed under the s. 18(m) definition of "Named Perils", while mandating that "there shall in no event be any liability for loss or damage; ... (iii) due to theft or attempted theft."

[11] Under the heading "Clean Up Expenses for On Premises Pollutants" the Policy provides:

This Policy is extended to insure, for an amount not exceeding \$10,000, subject to all its terms and conditions, expenses incurred in the clean up of "pollutants" where such dumping:

- (i) originates at the "premises"; and
- (ii) the dumping of "pollutants" occurs without the knowledge or consent of the Insured;
- (iii) is sudden, unexpected and unintended from the standpoint of the Insured; and
- (iv) occurs during the Policy period.

[12] Garden View submits that as insured property, damage to the Building, including the soil beneath it, is covered under the Policy or under the doctrine of imminent peril. Central to its argument is that if oil vapours entered the Building, making it uninhabitable, that would be a covered loss. As the Applicant, Garden View has the burden of proving facts that bring the claim within the coverage.

Expert evidence

[13] Donald Carey, M.Sc., P.Eng., FGS, was qualified as an expert in the field of petroleum hydrocarbon contamination, capable of giving opinion evidence on the

subject of human health risks from petroleum hydrocarbon contamination and assessment and remediation of petroleum hydrocarbon contamination. His November 21, 2011, report and three supplemental reports were filed and his opinion relied upon. He did not testify. The following opinion as set out in his November report was proffered:

After reviewing all the material, it is my opinion that the petroleum hydrocarbon contamination that was present in the soil in the area surrounding the AST and in contact with the foundation wall and footings would more likely than not create an unacceptable human health risk to occupants of the building. This opinion is based on the following:

- human health risk modeling (as presented in the Atlantic RBCA guidance) indicates that the soil concentrations are significantly above the RBSLs, and therefore could create vapours that would be above risk levels;
- those concentrations were in direct contact with the foundation wall and footings; and
- there are vapor pathways through the foundation wall and between the foundation wall and the basement floor slab, as evidenced by the periodic entrance of groundwater.

Human health risks from exposure to the petroleum hydrocarbon vapours are a long term effect, i.e. at the RBSL levels they require exposure over a period of 20 years or more (chronic effects). However, the concentrations measured in soil at this site are significantly elevated above the RBSLs, and the human health effects are dependent on the sensitivity of the human receptors, so effects could occur more quickly.

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 vapor risks had been mitigated.

The remedial and assessment actions taken by Sturm Environmental and Maritime Remediation were as follows:

- Excavation of impacted soil below the source area (AST, as well as against the foundation wall and to a certain extent underneath the basement floor slab;
- Structural support was required to excavate under the floor slab, but further excavation was not possible without working from inside the apartment;
- Assessment in the areas surrounding the building, to ensure that the contamination at high concentrations did not extend to the other parts of the building, e.g. through footing drainage.

It is my opinion that the remedial and assessment actions taken were appropriate and necessary to remove the main source of potential vapour risks, i.e. the heavily contaminated soil outside and against the foundation wall, and to ensure that all of the heavily contaminated soil had been located.

[14] Thus, in Mr. Carey's opinion, "the remedial and assessment actions taken were appropriate and necessary to remove the main source of potential vapour risks, i.e. the heavily contaminated soil outside and against the foundation wall, and to ensure that all of the heavily contaminated soil had been located."

Facts and findings

[15] On January 27, 2011, Greg Fong, the principal and sole shareholder of Garden View, investigated a complaint by a downstairs tenant, Shelly Cromwell, that she had no heat. He found that the copper pipe connecting an outside oil tank located by the east wall, at the southeast corner of the Building, was gone, and oil was leaking out of the crimped-off pipe into the ground. Mr. Fong contacted Portage, the insurer.

[16] Mr. Fong contacted Maritime Remediation, a remediation contractor. He was informed that he needed a "site professional", and so he contacted Strum Environmental (Strum), an environmental consulting firm with experience in cleaning domestic oil spills. Strum was retained to direct Maritime Remediation in excavating and removing contaminated soil, to assess the extent of petroleum hydrocarbon impacts, and to remediate the oil spill in accordance with legal obligations under the Nova Scotia Department of Environment Domestic Fuel Oil Spill Policy (DFOS Policy).

[17] Maritime Remediation commenced excavation on January 28, 2011. Between January 28 and March 28, Strum's site activities included soil excavation, air and water testing, groundwater monitoring, well installation and sub-floor air sampling probe installation. In March, after submitting a claim, Garden View was advised that limited coverage was available. Earlier the insurer had paid the full amount of \$10,000 under the extension provision for the clean-up of on-premises pollutants. Garden View financed the clean-up by refinancing the Property, carrying the remaining debt on a credit card.

[18] Greg Fong had no historic knowledge of the heating system in the Building before he bought it in 1995, nor had he inquired about or investigated it. As such, he had no knowledge of any leaks from the indoor oil tank that was located near

the east wall of the six-by-twelve foot furnace room in the southeast corner of the basement rental unit. He had no idea how long it had been there. The indoor tank was replaced in February 2006 with the outdoor tank in question, after an overflow spill drew attention to its poor condition. At the time, an Irving service person noted on the invoice that the old tank had been leaking for some period of time and that the stain was not from the overflow. He saw old oil staining on the concrete floor and approximately six inches up the wall at the back of the tank. Those stains could not be cleaned from the concrete. When doing its assessment in 2011, Strum was unaware of any previous leak in the basement, or that a tank had been replaced; they knew only that a tank was moved outside.

[19] Mr. Fong identified where water had entered the basement on a few occasions prior to the January 2011 oil spill. The water entered the furnace room, filling the southeast corner, extending a third of the way along the interior north wall and along almost the entire south exterior furnace room wall. According to Mr. Fong, the last time there had been water in the furnace room was years before the January spill. He did not know whether the water on those occasions had come through the floor, wall or window.

[20] Mr. Fong said he knew he had a legal obligation to clean up the spill, and that he wanted as much as possible cleaned up as quickly as possible to prevent it from spreading to neighbouring properties or under the Building. Accordingly, Maritime Remediation was retained to excavate the spill and minimize the clean-up and related costs. Mr. Fong said he did not recall speaking to anyone from Strum about oil vapours in the basement or about the possibility of vapours entering the Building. He said that after the January spill he never detected oil vapours in the basement that he felt were caused by the spill. He did not dispute the statement of Strum's on-site manager Jeff Faulkner that he checked for oil vapour smells in the basement rental unit on many occasions and never detected any. Mr. Fong said there was a strong fuel odour in the outdoor air during the first two or three days that Maritime Remediation was removing the source of the spill.

[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.

[23] Jeff Faulkner, BSc., GIT, is a geologist and an environmental consultant, with specialization in areas of domestic fuel oil spills, subsurface investigations and groundwater assessments, and phased environmental site assessments. He was Strum's main on-site management person, Garden View's on-site contact, and conveyor of directions to Maritime Remediation, as well as monitor of its efforts. He reported to, and consulted with, Randy McIntrye, CET, a senior environmental specialist. Mr. Faulkner's field notes cover the period between January 28 and March 24, 2011. The notes (including drawings) document his observations, including such things as when and where samples were taken, what some samples smelled like and which ones were sent for testing. Essentially, the notes cover the history of Strum's involvement in completing the assessment, providing options and developing a risk management plan. He was responsible for the review of analytical data and the preparation of interim and regulatory reporting.

[24] Strum prepared two reports. The first was a Remedial Action Plan report, dated February 9, 2011, and signed by Mr. Faulkner and Mr. McIntrye. This report outlined Strum's assessment activities and findings, and set out options to address hydrocarbon contamination in the soil. One boundary condition soil sample (S1 (FE18)), which was collected from the northwest limits of the excavation, below the east corner of the Building, did not comply with the applicable guideline criteria. All other boundary condition soil samples were compliant.

[25] The second report was a Remediation Report dated June 6, 2011, and signed by Mr. Faulkner and Sean Cassidy, P. Eng., Strum's senior environmental engineer. This report provided the findings of the Site Management Plan put in place to address risks associated with the remaining contaminated soil under the Building. Three sub-floor air sampling probes were installed through the concrete basement floor to assess for petroleum hydrocarbons in soil vapours below, and four groundwater monitoring wells were installed around the exterior of the Building to assess ground water conditions.

[26] All of the sub-floor air samples collected up to (and after) June 6, 2011, reported non-detectable concentrations of hydrocarbons and therefore complied with the applicable criteria defined by the province's July 2006 "Risk Based Corrective Action" (RBCA) user guidance document for soil vapour and indoor air monitoring assessments. Similarly, all groundwater samples collected from the monitoring wells reported non-detectable concentrations of hydrocarbons or concentrations below the applicable residential soil quality criteria, and therefore complied with DFOS Policy guidelines.

[27] Strum's June 2011 report, providing details of remediation activities required by DFOS Policy, was submitted to the Department of the Environment. Mr. Faulkner had provided notice of the spill to the Department of the Environment on February 8, 2011. Strum fulfilled the site professional requirements that were needed to assess and manage the remediation in accordance with DOE policy. A site professional report dated March 9, 2012, confirmed that Strum remediated and assessed the site as being in compliance with DFOS Policy. This report was provided to the Department. By letter dated September 17, 2012, the Department concluded matters by indicating that, based on Strum's certificate, Garden View's file was closed.

[28] Between January 28 and March 24, 2011, Mr. Faulkner made 20 site visits. He did not recall Mr. McIntyre being on site more than once. Strum was dealing with the contaminated soil until March 11. One of Mr. Faulkner's main jobs was to determine how far the excavation should go. It was not possible to see where the contamination stopped, so his primary tool was his sense of smell; he would bring a handful of the soil to his nose. On occasion, samples of soil were sent to the lab, thereby providing exact concentration of the oil.

[29] When Mr. Faulkner arrived on January 28, Maritime Remediation had already started excavating and removing the contamination below and around the oil tank at the Building's southeast corner. He took a sample of soil (S1Jan28) some two feet from the east foundation wall, under the end of the tank area where the spill had originated. This sample was sent to the laboratory for testing. The removal of the main concentration of oil created an backward L-shaped excavated source area in the southeast corner, along the south and east walls.

[30] The S1Jan28 sample revealed a total petroleum hydrocarbon (TPH) concentration in the soil of 17,200 TPH. Anything above the residential criteria of 140 TPH was unacceptable. Under the Department of the Environment guidelines,

if soil concentration is under 140 TPH, it does not have to be removed, provided certain requirements are met. The February report indicated that of three samples taken at various locations, the others were “non-detoxes”, meaning no contamination was present. No samples for analysis were ever taken along the south wall. One was taken along the east wall. To the extent that Mr. Faulkner was assessing the contamination along the south and east walls, he basically relied on smell. As he moved along those walls away from the S1Jan28 site, he expected the concentration to lessen. He never told Mr. McIntyre, as stated in Mr. McIntyre’s affidavit, that based on his observations (and smell) the concentration along the south and east foundation walls was similar to S1Jan28’s TPH level of 17,200. He did not detect concentrations that high along the south or east walls. Based on his experience the concentration of S1Jan28 would have been limited to the very narrow area of the southeast corner.

[31] One of Strum’s assessments involved (in addition to taking samples) inside test hole and outside test pit drilling to determine soil condition relating to hydrocarbons. Within the four corners of the Building, six test holes (TH) drilled into the concrete basement floor revealed no evidence of contamination attributable to the spill. One test hole – TH 101 – showed “weathered oil” and a modified TPH of 1340. Mr. Faulkner believed this was attributable to an earlier spill. Otherwise, the test holes showed no evidence of contamination in the sixteen inches of soil beneath the concrete floor. TH 102 was within close proximity to sample S1Jan28, but showed no evidence of contamination below the concrete floor. This was also true for TH 104 which was up against the south foundation wall. In addition to the test holes, there were seven test pits (TP) dug into the ground for checking soil conditions by way of samples. Test Pit assessment in the February report indicated that soil impacted with hydrocarbons outside the drainage tiles was only observed in TP 202, located in the middle of the source contamination area, and at TP 302, at the end of the drain tile.

[32] Strum’s February 9 report provided two options to deal with the site. Option one involved excavating all remaining contaminated soil on-site above the DOE minimum limits. Option two involved leaving the remaining hydrocarbon-impacted soil on site and reinstating the excavated backward L-shaped source area in the southeast corner, along with drainage tiles, test pits, and test holes in the concrete basement floor. The potential for contamination in groundwater, or for exposing humans to hydrocarbon vapours in the Building due to the remaining impacted soil was addressed through a risk management program which entailed monitoring and was designed to take steps to remove vapours if that occurred.

[33] Garden View initially opted for option one. On February 16, while digging beneath the concrete floor below the footings on the east side, Strum found what Mr. Faulkner identified as a weathered impacted odour. He felt sample S1(Feb 16) was evidence of highly weathered impacted soil, and he did not think it was the result of a recent oil spill. This sample showed in Mr. Faulkner's field notes as a bottleneck and body-shaped area and included TH101 on the inside east foundation wall. The sample was not sent to the lab. Mr. Faulkner could not recall whether a second sample, S1Feb18, taken two days later within a short distance of S1Feb16, was different in appearance or smell. He did not qualify the second sample in his notes. On February 18, Mr. Fong met with Strum to discuss additional work. There was a discussion to the effect that it was unknown how far the contamination extended, and additional work would be required to remove it all under option one. Later laboratory results revealed S1Feb18 sample to have a hydrocarbon concentrate of 1200TPH.

[34] Mr. Fong then decided to proceed under option two. This meant leaving the contaminated soil under the Building, monitoring for vapour entry, and taking remedial action if vapours did enter the building. The project was completed in this manner. Strum installed four groundwater monitoring wells and three vapour monitoring sub-floor air sampling ports, which went thru the concrete into the earth under the bedroom and living room.

[35] Strum's June 6, 2011, report provided test results concerning hydrocarbon in groundwater and oil vapours in the air under the concrete floor. The results with respect to ground water – which was at .5 – were well below the minimum level of 20 acceptable to the Department of the Environment. Similarly, the results for oil vapours in the air for all three wells – less than .1 TPH – were well below the minimal acceptable level of 10TPH and as close to non-detox as possible.

[36] Further sampling was done in November 2011 and February 2012. On no occasion did the groundwater sample indicate contamination above the provincial minimum limits. In 2012 the monitoring wells were effectively shut down and monitoring stopped. Strum never found oil vapours under the floor in excess of the minimum level. The air sampling ports were shut down as well. Within a day of the oil spill, then, Mr. Faulkner had been in the basement with highly contaminated soil still present. He returned at least 12 times without detecting any noticeable oil vapour smells, or being advised of such smells. With the test pits open for weeks, allowing access to the earth below the concrete floor, at no time did he detect any

smell of oil vapours inside the rental unit. At no point was there need to engage a vapour extraction system.

[37] Garden View thus received confirmation from the Department of the Environment, with no ongoing requirements to monitor either groundwater or air.

[38] When Strum prepared its February report it had three samples that had been submitted to the laboratory to assess. S1Jan28, the sample taken from under the oil tank, contained 17,200THP. Test Hole 101, with the weathered oil, had a modified TPH of 1340. That was the only other sample that Mr. Faulkner found up to February 9 showing a TPH in excess of the guidelines.

[39] Mr. Faulkner saw oil outside at the base of the footings and reaching under the footings. At no time did he see any concentration directly under the concrete floor. There was no evidence of oil in any of the six open test holes. Based on Strum's assessment, the only sample that Mr. Faulkner had from under the concrete floor that he attributed to the recent oil spill and that was over the guideline was S1Feb18, at 1200PTH. This was less than 10% of the concentration of the S1Jan28 sample. S1Feb25, a sample taken from the middle of the inside southeast corner (rather than the edge) revealed no contamination .7 meters below the floor. Mr. Faulkner was unable to say that there was any contamination under the Building with a THP concentration greater than 1200. In the excavated area under the floor, Mr. Faulkner was not aware of any evidence of oil in contact with the underside of the concrete basement floor. He never told Mr. McIntyre that the concentration of soil under the floor was representative of the degree of concentration of source sample S1Jan28, as that was not the case.

[40] Mr. Faulkner checked the unfinished concrete floor in the furnace room for visible cracks. This was a prime area for entry of oil vapours to come in and was the area closest to the primary source of the spill with the highest concentration. He did not see any such cracks. No repair work to the floor to guard against vapours coming in was required. Strum's report of June 6, 2011, noted that the basement floor was "acting as a cover to limit the potential migration of hydrocarbon vapours from the sub floor to the indoor air flow. Therefore, regular inspection of the floor's integrity should be undertaken. Any cracks observed should be sealed to prevent potential ingress of vapours." Mr. Faulkner stated that there were no problems that had to be addressed regarding cracks in area that would allow oil vapours to get in. What would be required was future monitoring in case any cracks occurred, as they would have to be fixed.

[41] The first issue is whether there was an imminent oil vapour risk which could justify preventative action by the insured and which entailed recoverable damage?

The doctrine of imminent peril

[42] Garden View relies on doctrine of imminent peril as a basis to recover costs of preventative measures it took. The expert's opinion was that it was more probable than not that the Building would not have been usable for residential purposes until the vapour risks were mitigated. This supports the argument that there was present damage to the Building immediately after the spill; the Building would not have been usable until those risks were mitigated. In a situation as where there is existing damage immediately after the spill, costs incurred to prevent further damage are recoverable. Preventative action may be taken to prevent further damage. To hold otherwise, Garden View says, would essentially encourage insurers to do nothing while the situation worsens and to (using the example of the present scenario) to act only once the vapours have built up in the Building to a level measurable and known to be a risk. Waiting for the inevitable, in Garden View's submission, does not make sense.

[43] Portage counters that there is no Canadian caselaw applying the doctrine to a situation like the present one. The requirements to apply the doctrine are strict, Portage says. It argues that the doctrine applies in narrow circumstances, and that there are no facts before the court that would cause coverage to be triggered. The doctrine of imminent peril only allows costs for preventative action by the insured if the vapours are imminent and operable and if there will be inevitable damage to insured property, in this case the Building.

[44] The law respecting the imminence of an insured peril was set out by the Supreme Court of Canada in *Canadian General Electric Co. v. Liverpool & London & Globe Insurance Co.* [1981] 1 S.C.R. 600, 1981 CarswellOnt 622 at para.30-34 where the court said:

30 Because of the findings of fact we are not called upon to determine the law of imminent peril as it exists today. In view of the disposition made of this issue by the Court of Appeal, however, reference should be made to the state of the law as it bears upon the position of the parties to an insurance contract when faced with the imminence of an insured peril. As long ago as 1869, the courts of the State of Maine, in *White v. Republic Fire Insurance Co.*, stated, at p. 95:

...the imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods; it must be such as to

inspire a conviction that to refrain from removing the goods would be the violation of a manifest moral duty;

That case concerned a claim based upon the moving of goods out of a warehouse (which ultimately was not destroyed) onto the street where the goods in fact were damaged.

31 The doctrine began to evolve into its modern form in *The Knight of St. Michael* where the master of a vessel, detecting the presence of spontaneous combustion in a cargo of coal, unloaded the coal prior to reaching the contract destination, at a loss to the owners. No fire actually broke out, but the trial court determined "that there was an actual existing state of peril of fire and not merely fear of fire". This decision came under examination by Lord Reading in *Kacianoff v. China Traders Insurance Company Limited*, at p. 1128:

The danger was present, and if nothing had been done spontaneous combustion and fire would have followed in the natural course.

From these and other cases there emerged in the courts in England the principle that the peril stated to be imminent must be within the insured risks of the policy and that the insured risk had "begun to operate as a peril" at the time of the taking of the preventive action which in fact brought about the damage to the insured. The factual situation in *Kacianoff*, *supra*, brings the rule into sharp focus. There the shipowner had contracted to deliver a cargo to Russia via Japan. The policy of insurance provided for coverage "against capture". After the policy had been entered into and before the ship set sail from San Francisco, war broke out between Russia and Japan. The shipowner decided not to set sail from the United States and disposed of the cargo. The Court found that the loss was not occasioned by capture nor by the imminent peril of capture because that risk had not begun "to operate". Lord Sumner, in *Becker, Gray and Company v. London Assurance Corporation*, *supra*, at p. 114, stated:

This is also why the reasonableness of the conduct of the Kattenturm's captain and the unreasonableness of suggesting that he might have done otherwise are alike off the point. So long as his action was voluntary it was his action and not that of the captain of a British man-of-war, and the policy insures against the second, but against the first only when it amounts to barratry.

Rowlatt J. carried the matter forward in *Joseph Watson and Son, Limited v. Firemen's Fund Insurance Company of San Francisco*, when he stated at p. 358:

It is one thing to say that where a peril in fact existed one must take the view of the captain formed at the time the peril existed as to what would be the outcome of that peril, and must not say to him, "If you had held on you would have found that all would have come right," or something of that sort. It is another thing to say that one must take the captain's view whether the state of facts existed which are alleged to have constituted the peril.

32 The damage there suffered by the insured arose when a cargo was sprayed by steam to extinguish a supposed fire. In fact, the cargo of "rosin" was not burning, and the "fire", which the captain set out to extinguish by a steam spray, was itself only steam escaping from a broken pipe in the hold. The Court concluded that the rule "does not touch losses incurred in a mistaken attempt to avoid a peril in fact non-existent". (at p. 359)

33 Although the rule may seem harsh when stated in the abstract, nonetheless it appears in distilled version in the texts, such as *MacGillivray & Parkington 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*.) [Emphasis added.]

[45] Accordingly, the “the critical question ... 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” (para 34). Besides referencing the insured risk as “imminent”, the court's subsequent analysis speaks of the need for evidence adduced by the insured to show the inevitability of the damage. Unless protective steps are taken, damage or reasonably anticipated damage must be inevitable from the insured peril that has begun to operate or has arisen for the doctrine to be invoked.

[46] As an all-risk property policy, the Policy insured “against all risks of direct physical loss of or damage to the insured property”, with some property, perils and pollution exclusions. “Insured Property” covered five listed items, including “building”. Whether the damage to the insured property must be direct physical damage, is a non-issue here. It is Garden View’s contention that if oil vapours got into the Building, this would be a covered loss, and that the remediation of the contaminated soil prevented a reasonably anticipated inability to occupy the Building due to human health risks from vapours. As such, Garden View says, the

cost of the preventative actions should be recovered. Under the doctrine, as has been discussed, the reasonably anticipated damage would have to be inevitable.

[47] I agree with Portage that the doctrine has no application to the case at bar. The necessary evidence is lacking. In arriving at this conclusion, the inevitability of the damage from the oil vapours, or more specifically the lack thereof, is a major but not sole focal point, given the peril's operability and imminence.

[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.

[49] Additionally, there is no evidence that Mr. Fong cleaned up the oil spill because vapours in the Building were an imminent peril and damage was inevitable. He initially had the source contamination around the southeast corner of the Building, the backward L, cleaned up because he did not want oil to spread to other properties and did not want it to get under the building, as it would cost more to clean up. He was aware that he was obliged under Nova Scotia law to clean up the oil. It was not until February 9, after the source spill was cleaned up, that a discussion arose about the possibility of vapours entering. At this time, Strum provided the two options going forward. Prior to that, there is no evidence whatsoever that anything was discussed about clean-up for the purpose of eliminating vapours that would cause damage on entering the building. The focus was on excavating the source of the contamination in compliance with the Department's domestic fuel oil spill directives. There is no evidence that any of the work prior to February 9 was at all motivated by the intention of stopping vapours from entering the Building and causing certain damage.

[50] Between January 28 and February 8, 2011, there were no oil vapours in the Building, although there was contaminated soil under the Building, against the foundation, under the footings under the south and east concrete walls. According to Mr. McIntyre's evidence, this was the period of the year at which the "greatest potential from vapour intrusion in basements can be expected." At any point beyond January 29, vapours were not inevitable in the Building, and not likely to

occur at any moment. If they were inevitable, they ended by February 9, when Strum gave Mr. Fong an option to leave all remaining contaminated soil in the ground. At no point after the spill is there any evidence that Strum ever suggested that the occupants should vacate either rental unit in the Building, nor was there any evidence that there was ever any indication that any tenant had to leave because of the risk of oil vapours and ensuing damage. Strum's February 9, 2011, report reflects the absence of vapours in the Building, and of there being no apprehension that oil vapours were necessarily going to occur. There is no evidence that Mr. Fong took any steps specifically because of oil vapours and the imminent risk of oil vapours.

[51] Garden View's expert, Donald Carey, expressed an opinion on whether it was likely or not that vapours would have entered the Building if the oil spill had not been cleaned up; put differently, what would have happened if the preventative measures that Garden View is seeking recover for had not been taken? In answering same, the court is dealing with damage that had not yet occurred; Mr. Carey says, however, that such damage would "more likely than not" have occurred without the remedial measures. It is not a question of oil vapours actually being in the Building, but the potential for vapours. According to Mr. Carey, the "significantly above" contaminated level soil could create vapours that would be above risk level.

[52] It was Mr. Carey's opinion that "the petroleum hydrocarbon contamination that was present in the soil in the area surrounding the AST and in contact with the foundation wall and footings would more likely than not create an unacceptable human health risk to occupants of the building." He added that the basis for the human health risk was the fact that the soil concentrations were significantly above the RBS levels "and therefore could create vapours that would be above risk levels". Thus, his opinion was that it was more likely than not that if the oil spill was not cleaned up, there would be vapours in the Building that would make it uninhabitable. When he opines that it was "is more likely than not" was that if the material is left in place, there was a 49% chance that there would be no vapours getting into the Building, and that there would be no problem therefore for the tenants in the Building.

[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. No other principle in law addresses his suggestion so as to invoke coverage.

[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.

[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 (S1JA28) 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 along the northeast, southeast, and southwest exterior foundation walls, and inside the footing drains along these walls, with a concentration representative of the degree of contamination in sample S1JA28. 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.

[56] In addition, the foundation for the Carey report has a cogent factual flaw. Mr. Carey relied on the fact that “there are vapour pathways through the foundation wall and between the foundation wall and the basement floor slab, as evidenced by the periodic entrance of groundwater”. Mr. Fong advised that the basement furnace room had flooded on a number of occasions. During his October 18, 2011, site visit, some nine months after the oil spill, Mr. Carey saw evidence of

previous ingress of ground water, in the form of staining and mineralization along the wall and floor slab immediately adjacent to the outside oil tank. He did not see actual cracks, pathways or openings. Although Mr. Fong acknowledged on cross-examination that there were several occasions when water entered the basement, he did not know how it got in and could not dismiss other possibilities such as entry through a window. The evidence is clear that between January 29 and February 8, 2011, with contamination under the footings, there was no evidence of vapours having entered the Building. This was true even with six open test holes located in the furnace room floor, close to the south east corner foundation walls, providing pathways from late January to March 17.

[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.

[58] Without pathways, the inevitability of damage to the insured property from vapours is non-existent. Although contaminated soil up to 30m from the foundation could affect air quality, Mr. Carey made it clear in his e-mail to counsel that past experience showed that where there was a competent foundation and no pathways, even in circumstances with a "significant concentration" of impacted soil in the ground, there was no impact to indoor air. 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. Furthermore, as argued even if there were pathways that allowed vapours to get in, they did not get in. This peril was in fact nonexistent.

[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.

[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.

[64] As for pollution coverage, the wording of the pollution exclusion clause under Section C of the Policy is plain. It clearly says the Policy does not insure against “cost or expenses for any testing, monitoring, evaluating or assessing of an actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of ‘pollutants’”. On the facts of the case, it applies.

[65] The damage sustained to the basement floor, asphalt, shrubs, steps and deck was not done to remediate a loss that was insured. There is no coverage for the intentional actions of the insured: *Non-Marine Underwriters, Lloyds London v. Scalera*, 2000 SCC 24, at para. 68.

Conclusion

[66] Accordingly, I conclude that the doctrine of imminent peril is inapplicable in the circumstances and that the claim is not covered by the Policy. The application is dismissed.

[67] The parties may provide written submissions on costs.

Stewart, J.