SUPREME COURT OF NOVA SCOTIA

Citation: Meridian Construction Inc. v. Royal & Sun Alliance Insurance Company, 2011 NSSC 177

Date: 20110510
Docket: Hfx. No. 336785
Registry: Halifax

Between:

Meridian Construction Inc. and Tribeca Mechanical Limited

Plaintiff

v.

Royal & Sun Alliance Insurance Company of Canada

Defendant

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	February 2, 2011, in Halifax, Nova Scotia
Final Written Submission:	March 11, 2011
Written Decision:	May 10, 2011
Counsel:	**J. Scott Barnett** for the Applicant, Meridian Construction Inc. **Clarence A. Beckett**, Q.C. for the Applicant, Tribeca Mechanical Limited **Murray J. Ritch**, Q.C. and **Wayne Francis** for the Respondent, Royal & Sun Alliance Insurance Company of Canada

By the Court:

[1] Meridian Construction Inc. (“Meridian”) and Tribeca Mechanical Limited (“Tribeca”) were the general contractor and a subcontractor, respectively, on a construction project. They seek to have Royal & Sun Alliance Insurance Company of Canada (RSA) defend them in an action against them for damages. RSA says there is no duty to defend and asks the court for a declaration that there is no coverage. Meridian and Tribeca seek to have the RSA application stayed until a decision is made in the action for damages.

ISSUES

1. Duty to defend
2. Declaration re coverage
3. Stay of RSA application

FACTS

[2] Shannex Health Care Management Inc. (“Shannex”) contracted with Meridian in May 2001 to build a nursing home in Truro. Two of the subcontractors was Tribeca and Exodus Limited. A Builders’ Risk policy

including Wrap-up Liability coverage was issued effective March 1, 2001. Section 11 of the policy, “Who is an Insured” provides:

> 2. all contractors, sub-contractors... are included as additional Insureds...”

The coverage was to expire on May 1, 2002 but was extended to June 15, 2002. Part of the project was completed and an endorsement to the policy was issued which provided as follows: “Permission is granted for the premises to be occupied for its intended purpose while renovations are being done.” A property policy was issued to Shannex effective June 16, 2002.

[3] In a statement of claim issued on May 25, 2005, Shannex commenced action against Meridian, Tribeca and Exodus Limited. In the statement of claim, it is alleged that a leak was discovered in a domestic cold water line on June 26, 2002, temporary repairs were done on June 27 and, on June 30, 2002, “the temporary fix ruptured.” The property insurer paid a loss of $699,745.78, according to the affidavit of Richard Morris of RSA. The action which was commenced was a subrogated action brought by RSA in the name of Shannex. Defences were filed by all defendants later in 2005.

[4] On September 23, 2010, Meridian and Tribeca commenced an application in court seeking "an order requiring the respondent, Royal & Sun Alliance Insurance Company of Canada, to:

> (a) defend the applicants in an action (and against crossclaims brought against the applicants) bearing Court File 2005 Hfx. No. 247154 ("the Shannex action");
>
> (b) appoint independent counsel to conduct such defences;
>
> (c) indemnify the applicants for all costs and expenses incurred to date, in their defences in the Shannex action.

[5] RSA filed a notice of contest and notice of application on October 13, 2010. Because there is no provision in the application Rule for a cross application, RSA gave notice of an application in court on December 2, 2010, seeking a declaration as to whether the loss was covered by the Builders' Risk Policy.

[6] Meridian and Tribeca contested RSA's application.

[7] Motions for directions were made in both applications and it was requested that the two be consolidated. The request was granted, but the matters remain unconsolidated as no order has yet been filed.

[8] Subsequently, Meridian and Tribeca filed a notice of motion in the RSA application seeking a stay of the RSA application until the Shannex action is concluded.

[9] All these matters were heard by me on February 2, 2011. After the date of that hearing I wrote to counsel with respect to Article 17 of the insurance policy. It provides

> 17. Dispute Resolution
>
> In the event that the Insurer and the Insured(s) cannot agree concerning either the coverage or the quantum afforded by this policy, it is agreed that the dispute shall be resolved in accordance with the dispute resolution process hereinafter described:
>
> 1. Mediation with a Mediator mutually agreed to by the parties to the dispute. ...
>
> 2. If settlement at Mediation is not possible, the dispute will be referred to Arbitration. ... The decision of the Arbitrator will b binding on all parties to the dispute with no right of appeal.
>
> 3. ...
>
> By agreement in writing, the Insurer and the Insured(s) may waive compliance with this section or any part thereof for purposes of a specified dispute.

[10] I asked counsel for their submissions about whether the coverage issues were properly before me. Counsel for RSA submitted that my decision on all matters should be stayed so there could be mediation. Counsel for Meridian and Tribeca did not agree, nor did they agree to waive Article 17. Accordingly, I concluded that I would render a decision only on the "duty to defend" issue.

ANALYSIS:

DUTY TO DEFEND

[11] This issue was complicated by the fact that the party making the subrogated claim, the property insurer, is also the insurer who provided the Builders' Risk Policy which included Meridian and Tribeca as insureds, as set out in the definition quoted above. Also, counsel on this application are the same counsel as plaintiff's counsel in the subrogated claim.

[12] The claim in the Shannex action, brought by RSA, alleges both breach of contract and negligence by the defendants. It states as follows:

6. Meridian subcontracted the supply, installation and testing of the Nursing Home's plumbing system to Tribeca or to Exodus or both.

8. Shannex states that the domestic cold water line in question had been supplied, installed and inspected by Tribeca.

9. Tribeca was made aware of the leak, and on June 27, 2002 Tribeca, or Exodus, or both, to knowledge of and with the concurrence of Meridian, decided to rig a temporary fix for the leak, notwithstanding that it had the equipment and materials necessary to effect a permanent repair at that time.

10. Shannex states that Tribeca or Exodus or both installed a temporary rather than a permanent fix because its employees wanted to start the long weekend, rather than stay to correct the leak with a permanent fix.

11. Meridian approved the temporary fix.

12. Neither Meridian nor Tribeca nor Exodus:

a. provided constant surveillance or security of the temporary fix;

b. provided a back-up system to divert or contain any leak that might develop in the event that the temporary fix failed over the weekend; or

c. took any steps to ensure that the temporary fix was stable and secure enough to last over the long weekend without failing.

13. On June 30, 2002 the temporary fix ruptured, resulting in water cascading out of ruptured pipe into the mechanical room, and then down through the

Nursing Home, resulting in significant property damage to property and equipment of Shannex all throughout the Nursing Home.

[13] The allegations of breach of contract or negligence by Tribeca and/or Exodus are as follows:

a. they installed a faulty pipe that leaked;

b. they installed a pipe in a faulty or negligent fashion, thereby causing the pipe to leak;

c. they installed a temporary fix for the leak when it knew or ought to have known that the fix was unstable and not likely to last;

d. they failed to provide a back-up surveillance system to ensure that if the temporary fix did fail any resulting water escape could be minimized if not avoided altogether;

e. they failed to advise Meridian or Shannex or both of them that the temporary fix required constant monitoring, was not likely to last the weekend, and was not the safest way of handling the problem; and

f. such further or other particulars as may become known following discovery.

[14] The allegations against Meridian are set out in paragraph 15

a. Meridian failed to supervise its suppliers, contractors and subcontractors in such a way as to prevent the occurrence of the problem in the first place;

b. Meridian purported to approve the temporary fix proposed by Tribeca or Exodus or both without first insuring:

i. that the fix would last at least the weekend;

ii. that the fix would be constantly monitored, so as to insure the minimization or avoidance of damage in the event the fix failed;

iii. that the fix was an appropriate response to the problem, given that Tribeca did have the means and equipment necessary to repair the problem without using a temporary fix, and

c. such further or other particulars as may become known following discovery.

[15] The allegations are broad, as would be expected, and encompass both the original installation of the pipe and the repairs to it.

[16] RSA says the focus of the Shannex action is only on the events of June 26th to 30th. At that time, it says the Builders' Risk Policy had expired. RSA also says the Products-completed Operations Hazard coverage is not applicable. Accordingly, RSA says there is no duty to defend. In furtherance of that argument, RSA's counsel on this application submitted a proposed amendment to the pleadings in the Shannex action to limit the claim to the time period beginning

June 26. In my view, amendment of pleadings is an issue in the Shannex action and is not before me. I therefore do not give any further consideration to the proposal to amend the Shannex pleadings.

[17] In *Neary v. The Wawanesa Mutual Ins. Co.*, 2003 NSCA 66 Chipman, J.A. distinguished between the duty to defend and the duty to indemnify. He said in paragraph 6:

> [6] The obligation to defend must be addressed when the action is brought, but before liability and the basis for it have been determined by a court. When an application is made for an order that an insurer defend the insured, the court is confined to an examination of the insurance coverage and the pleadings in resolving the application. No external evidence can be resorted to in this process. The search by the court at this stage is to determine the potential for coverage based on the facts as pleaded and the insurance coverage provided, taking into account any exclusions from that coverage found in the policy. It is not necessary for the insured to prove that an obligation to indemnify will arise at the end of the day. The duty to defend, unlike the duty to indemnify, is triggered not by actual acts or omissions of the insured but by allegations against the insured. The mere possibility that a claim within the policy may succeed is enough. Thus it has been said that the duty to defend is broader than the duty to indemnify.

[18] After reviewing the statement of claim and the terms of the policy he concluded in paragraph 27:

> [27] In my opinion, Hall, J.'s finding that the respondent *prima facie* brought himself within the coverage afforded by ¶9(c) of the policy is sound.

In coming to that conclusion he noted in paragraph 26:

> [26] In reaching this conclusion I emphasize the limited role of the court at this preliminary stage in deciding the duty to defend as opposed to the duty to indemnify.

[19] In *Hanis v. University of Western Ontario*, (2003), 5 CCLI (4th) 277 at paragraph 86, Power J. set out the principles for determining if there is a duty to defend. He said:

> Governing Legal Principles:
>
> [86] I must be guided by the following principles: (some of the propositions that follow do not require citations as they are well known)
>
> (a) I must be satisfied that the only genuine issue before me is a question of law before deciding this matter. I am satisfied that there are no outstanding issues of material fact requiring determination.
>
> (b) Here, the determination of whether there was a duty to defend, must be determined on the basis of the allegations in the Statement of Claim within the context of the relevant insurance policies and the agreed upon facts. Therefore, there is a question of law to be determined and not a questions of fact or a mixed question of fact and law.
>
> (c) Any ambiguity in the insurance policies must be construed against the Insurer.

(d) Coverage principles must be construed broadly, whereas exclusionary clauses must be narrowly interpreted.

(e) When the terms of the policy are clear and unambiguous, I must give effect to them.

(f) The duty of the Insurer to defend is broader than the duty to indemnify - i.e., the duty to defend is triggered by the allegations in the Statement of Claim notwithstanding that they may not be meritorious.

(g) The threshold for determining that there is a duty to defend is the "any possibility test." In other words, the Insurer is required to defend unless it is clear from the pleadings and/or the policy that there is no coverage. However, the "possibility" must be one that is not triggered merely by fanciful or speculative grounds.

(h) The three-step approach stated by Iacobucci J. in *Scalera* must be followed.

(i) ...

(j) ...

(k) ...

(l) ...

(m) Where it is clear from the pleadings that the claims fall outside the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise. (See *Nichols, supra.*).

[20] In paragraph 76, Power, J., set out the three-step process from *Non-Marine Underwriters, Lloyds of London v. Scalera*, [2000] 1 S.C.R. 551 at page 590 as follows:

> ...
>
> Determining whether or not a given claim could trigger indemnity is a three-step process. First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.
>
> At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.
>
> Finally, at the third stage the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the Insurer's duty to defend....
>
> ...

[21] In *Slough Estates Canada Ltd. v. Federal Pioneer Ltd.*, 1994 CarswellOnt. 153, 20 O.R. (3rd) 429 (General Division), Rosenberg, J. said, in paragraphs 36 and 37:

> 36 The obligation to defend is governed by the pleadings. It depends on the nature of the allegations contained therein, not on their validity. The threshold condition is that the allegations fall within the policy coverage. This is satisfied where the action claims damages which might be payable under the policy. The widest latitude should be given to the allegations in determining whether they raise claims within the policy. Any uncertainty ought to be resolved in favour of the insured. [citations omitted]
>
> 37 In the *Picken* case, *supra,* Osborne J.A. said at p. 2461:
>
> > The appellant's duty to defend requires consideration of the claim made against the respondents in the Knoch estate action. This was made clear in *Nichols v. American Home Assurance Company et al.* (1990), 68 D.L.R. (4th) 321 (S.C.C.). The duty to defend arises where the action against the named insured (or any unamed insured) alleges acts, or omissions for which damages are claimed which might be payable under the policy. The widest latitude should be given to the allegations in the claim to determine whether the claim made raises claims within the policy. Any uncertainty as to whether the claim makes allegations which, if established, could give rise to an award of damages within the coverage provided by the policy ought to be resolved in favour of the respondents. See *Nicholas, supra.*, at p. 329.
>
> He said in para 38:
>
> 38. Where it is unclear whether the insurance policy affords coverage, the insured is entitled to a declaration directing the insurer to defend.

[22] The Wrap Up Liability coverage in the policy provides:

1. Insuring Agreement

(a) The Insurer will pay:

(i) those sums that the Insured becomes legally obligated to pay as compensatory damages because of ‘bodily injury’ or ‘property damage’ arising out of the Insured’s operations in connection with the project shown on the ‘Coverage Summary’. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverage A, B and D. This insurance applies only to ‘bodily injury’ and ‘property damage’ which occurs during the Policy Period. The ‘bodily injury’ or ‘property damage’ must be caused by an ‘occurrence’ The “occurrence” must take place in the ‘coverage territory.’

(ii) with respect to ‘Products-completed operations hazard’ those sums that the Insured becomes legally obligated to pay as compensatory damages because of ‘bodily injury’ or ‘property damage’ occurring at the project site’ and arising out of the ‘Insured’s work’ but only after such work has been completed or abandoned, this insurance will continue in force for the number of months shown on the ‘Coverage Summary’ under Completed Operations Hazard Extension from the end of the Policy Period or from the date of final acceptance or the substantial completion of the project shown on the ‘Coverage Summary’ as certified by the architect, whichever date shall occur first.

[23] I must consider both the above provisions from the insurance policy and the statement of claim to determine if there is a duty to defend based upon the potential for coverage. The question for me is whether there is a “mere possibility” that a

claim within the policy might succeed. The parties do not disagree that this is the test nor that this is a low threshold.

[24] As mentioned above, RSA says the focus of the Shannex action is on the events of June 26-30. However, the pleadings quoted above are broader than that.

[25] In the passage from *Neary*, *supra*, Chipman, J.A. said that one of the things the court must consider in determining the "potential for coverage" was "the facts as pleaded."

[26] In *Hanis*, *supra*, Power, J. referred to the "allegations in the Statement of Claim." He also quoted from *Scalera*, *supra*, where Iacobucci, J. said:

> ... when ascertaining the scope of duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations in the pleadings.
>
> ... all a court must do is decide based on the pleadings the true nature of the claims.

[27] In *Slough Estates*, Rosenberg, J. referred to giving "the widest latitude" to the allegations.

[28] I am not to consider external evidence and therefore I do not consider the effect of General Condition 11.1.1 in the contract between Shannex and Meridian. It provides in part," Unless otherwise stipulated, the duration of each insurance policy shall be from the date of commencement of the Work until the date of the final certificate for payment." In my view, this is a matter for trial in the Shannex action. It is not known for the purposes of this application when the final certificate was issued.

[29] In the statement of claim, negligence or breach of contract is alleged either at the time the pipe was installed or when it was repaired. Meridian and Tribeca say that in either case there is a mere possibility that a claim for coverage could succeed.

[30] Although the loss occurred when the pipe burst, Meridian and Tribeca say that the court in the Shannex action could conclude that the property damage occurred when the pipe was installed. They cite as authority *Annotated Commercial General Liability Policy* (Canada Law Book, looseleaf edition) pages 10-16 and 10-17

> Canadian courts appear to accept that mere incorporation of a deficient component does not constitute damage to property provided that property damage is defined as 'physical injury to tangible property'. However, in cases involving incorporation it is often difficult to determine if or when harm occurred until long after the incorporation. This was the situation in *Alie v. Bertrand & Frère Construction Co.* Defective fly-ash was incorporated into the concrete foundations of dozens of homes. Upon reviewing the evidence, including expert reports, the Ontario Court of Appeal concluded that actual property damage commenced at the moment of incorporation. It was at the moment of incorporation that the process of deterioration began. The foundation suffered actual physical injury only at the time of incorporation of the defective component.

In this context, I must consider what part 1(a)(i) of the Wrap Up Liability provisions provide. They provide for payment for "property damage" "arising out of" "the Insured's operations" "in connection with the project." It specifically provides that the property damage must occur "during the Policy Period" and must be caused by an "occurrence."

[31] "Property damage" is defined in the policy as follows:

> 15. "Property damage" means:
>
> (a) physical injury to tangible property, including all resulting loss of use of that property; or
>
> (b) loss of use of tangible property that is not physically injured.

[32] "Arising out of" is not a defined term. However, it was considered by the court in *Hanis*. Power, J. gave a broad interpretation to the phrase. This is consistent with one of the principles of interpretation of insurance policies, that is that coverage principles are to be construed broadly. In paras. 78 and 79, he said:

> [78] I agree with the submissions of counsel for UWO that the claims cannot be described simply as constituting a claim for damages arising from the Plaintiff's wrongful dismissal.
>
> ...
>
> These claims, in my opinion, all relate to the Plaintiff's employment with UWO and his employment relationship with the university's co-defendents.
>
> [79] As aforesaid, the Plaintiff submits that the various heads of damages flow from two separate contracts, or agreements, which, in their totality, are wider than a contract, or agreement, governing the employment relationship between UWO and the Plaintiff. The University argues, correctly in my opinion, that there are actually several causes of action pleaded which arise out of the two hereinafter described agreements between the University and the Plaintiff.

[33] "The Insured's operations" is not a defined term but "The Insured's Work" is, as follows:

> 17. "The Insured's Work" means:

> (a) work or operations performed by any Insured or on any Insured's behalf in connection with the project shown on the "Coverage Summary"; and
>
> (b) materials, parts or equipment furnished in connection with such work or operations.

That definition includes in (a) the words "work or operations performed by any insured...in connection with the project..."

[34] It is a rule of statutory interpretation that if two different words or phrases are used, the intent is that they have two different meanings. In this case, the definition uses in (a) the words "work or operations"; however, the defined phrase in part (b) also refers to "materials, parts or equipment." I therefore conclude that the "Insured's Work" is a broader phrase than "operations." The former includes physical things provided whereas "operations" has the narrower meaning of the act of doing the work.

[35] In support of this conclusion, I note that the word "operations" is referred to in the definition of products-completed operations hazard. In that definition, it provides "operations shall include construction, installation or repair..."

[36] “Occurrence” is also defined:

> 10. “Occurrence” means an accident including continuous or repeated exposure to substantially the same general harmful conditions.

[37] Based upon these definitions, there was property damage as defined from an occurrence as defined. The question is whether the property damage was “arising out of the Insured’s Operations in connection with the project” and “during the Policy Period.”

[38] Using a broad interpretation of “arising out of” I conclude that the damage arose from the insured’s act of doing the work.

[39] The next issue is whether this was an “occurrence” within the Policy Period.

[40] In paragraph 14(a) of the statement of claim, it is alleged that Tribeca (or Exodus) “installed a faulty pipe.” In paragraph 14(b), the allegation is that “they installed a pipe in a faulty or negligent fashion.” In para. 14 (c), it is alleged that the “temporary fix” was known to be “unstable and not likely to last.”

[41] Para. 14 (d) alleges a lack of surveillance of the temporary fix. Para. 14 (e) alleges a failure by Tribeca (or Exodus) to advise with respect to the temporary fix.

[42] Meridian's alleged failures are set out in para. 15. They include a failure to supervise (15 (a)), and approval of the temporary fix (15 (b)).

[43] I must determine, at a preliminary stage of the litigation, what is the "true nature of the claims," giving the allegations in the statement of claim "the widest latitude." I am to consider the "facts as pleaded."

[44] When I do so, I consider that, although there is reference to the "temporary fix," there is also reference to the original installation of the pipe which subsequently burst. In my view, the nature of the claim is either that the original installation was faulty or the subsequent repair. The pleadings do not exclude the former as a potential source of the claim against Tribeca and/or Meridian. Meridian and Tribeca do not need to prove there is coverage. I am not to decide this issue definitively; that is for the trial judge in the Shannex action. I am not to decide if the claim against Meridian and Tribeca has merit. If it is clear that there is no coverage, there is no duty to defend; otherwise, if there is a potential for

coverage, a mere possibility, there is a duty to defend. The trial judge could conclude that the "property damage" occurred at the time the pipe was installed. Therefore, there is a "mere possibility" that there would be coverage within 1(a)(i). A claim within the policy might succeed. Accordingly, I conclude that there is a duty to defend.

[45] Although I do not need to do so, I will deal with Meridian and Tribeca's alternate argument, in the event that I am wrong with respect to 1(a)(i).

[46] In the alternative, Meridian and Tribeca say that there is coverage within 1(a)(ii). They say there is a "mere possibility" a claim within the policy on that basis might succeed. Section 1(a)(ii) is the "Products-completed operations hazard" provision of the policy. "Products-completed operations hazard" is defined as follows:

> 12. 'Products-completed operations hazard' includes all 'bodily injury' and 'property damage' occurring at the 'project site' arising out of the 'Insured's product' or the 'Insured's work' except:
>
> (i) 'products' that are still in the Insured's physical possession; or

(ii) work that has not yet been completed or abandoned.

The ‘Insured’s work’ will be deemed completed at the earliest of the following times:

(i) when all of the work called for in the Named Insured’s contract has been completed.

(ii) when all work to be performed by or on behalf of any Insured at the “project site” has been completed even if the Named Insures contract calls for work at more than one site.

(iii) when the portion of the work of which the ‘bodily injury’ or ‘property damage’ arises has been put to its intended use by any person or organization other than another ‘contractor or sub-contractor’ engaged in performing operations for a principal as part of the project shown on the ‘Coverage Summary’.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

Operations shall include construction, installation or repair of material, parts or equipment furnished in connection therewith.

This hazard does not include ‘bodily injury’ or ‘property damage’ arising out of:

(i) the existence of tools, uninstalled equipment or abandoned or unused materials; or

(ii) operations in connection with the pick up and delivery of property.

[47] The phrases “property damage” and “arising out of” have been considered above.

[48] The “Insured’s work” is the defined phrase used here. The time limit for coverage is one of two periods, whichever occurs first. The first period mentioned is the number of months from the end of the Policy Period set out in the Coverage Summary. The Coverage Summary provides for twelve months and the policy period was extended to June 15, 2002. The date of “final acceptance or substantial completion as certified by the architect” is not known. The pipe burst and water damage occurred on June 30, 2002.

[49] The pipe burst within the time the product-completed operations hazard provision was in force. The question is whether there is a “mere possibility” a claim could succeed within that provision.

[50] The Insured’s work must be either “completed or abandoned”, the latter not being relevant in this case. Meridian and Tribeca say that the work was completed because the pipe which burst had “been put to its intended use”. They also say that the definition provides that the work is completed although it “may need service,

maintenance, correction, repair or replacement." In this case, they say that the repair of the pipe on June 26 was work which was completed within the meaning of the "products-completed operations hazard."

[51] RSA says the provision would only apply if the pipe had burst on the day the leak was discovered. It says the pipe burst because of negligence in repairing it on June 26. It says that is an act not within the product-completed operations hazard coverage even on its broadest interpretation. It says that not everything that happens within the twelve month period is covered. RSA says the damage was not "arising out of the Insured's work" on the project but because of later negligence.

[52] The trial judge in the Shannex action will determine what caused the damage and when the damage occurred. The trial judge could conclude that the damage occurred after the project had been completed, although the pipe needed repair on June 26. The trial judge could conclude that there was no negligence in the repair. The effect of that conclusion would be that the work was <u>not</u> outside the completed-products operations hazard. If that were the case, there is a "mere possibility" that a claim within the policy could succeed, if the trial judge accepts the position of Meridian and Tribeca.

[53] I therefore conclude there is a duty to defend triggered by 1(a)(ii).

[54] Meridian and Tribeca ask that they be indemnified for all legal costs incurred to date. RSA says there was a substantial delay in raising the duty to defend issue and there should be no indemnification of those costs.

[55] There is a dispute among the parties about when the policy was requested. The Shannex action was commenced in May 2005. In November 2008 there was a meeting among the parties at which the policy and subrogation issues were raised. In the fall of 2009, Meridian and Tribeca each requested a defence from RSA in the Shannex action. Their requests were denied at that time. On September 23, 2010, a notice of application in court was filed requiring RSA to defend Meridian and Tribeca.

[56] In my view, the delay in making the application is not a bar to indemnification of Meridian and Tribeca's legal costs. However, it does affect the time period for which indemnification should be made. After it was discussed in

November 2008, no request was made until the fall of 2009 and thereafter the application was filed approximately one year later.

[57] I therefore conclude that indemnification should be made of legal costs only after the denial letters were sent by RSA to Meridian and Tribeca, the last of which was dated October 27, 2009. Indemnification shall commence as of that date.

COSTS

[58] Meridian and Tribeca are entitled to their costs of the application. If the parties cannot agree, I will accept written submissions.

Hood, J.