SUPREME COURT OF NOVA SCOTIA

Citation: *Sable Offshore Energy Inc. v. Ameron International Corporation*, 2013 NSSC 376

Date: 20130925
Docket: Hfx. No. 220343
Registry: Halifax

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the **Sable Offshore Energy Project, Exxon Mobil Canada Properties**, **Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd.**, and **Pengrowth Corporation, Exxonmobil Canada Properties**, as operator of the **Sable Offshore Energy Project**

Plaintiffs

v.

Ameron International Corporation, **Ameron B.V.**, **Allcolour Paint Limited**, **Amercoat Canada**, **Rubyco Ltd.**, **Danroh Inc**., **Serious Business Inc**.

Defendants

Judge:	The Honourable Justice Suzanne Hood
Heard:	June 26, 2013, in Halifax, Nova Scotia
Written Release of Decision:	November 22, 2013 **(Orally - September 25, 2013)**
Counsel:	Robert G. Belliveau, Q.C., Christopher Robinson, Q.C. and Kevin Gibson for Sable Offshore Energy Inc. et al John Merrick, Q.C. and Tammy Manning for Ameron International Corporation et al Bruce MacIntosh, Q.C. and E. Jane Andrewartha for Lloyds of London

By the Court:

[1] Ameron BV says in its defence that it is an insured under the Sable Project Policy.

ISSUE: Insured Status

[2] Amended defences were filed by the two Ameron defendants in June 2008. The gist of the amendments was that the insurance placed on the project was to cover all risks and include the defendants as insureds. They are paragraphs 48A and 48B of the Amended Defences.

[3] The Ameron defendants have made no claims under the insurance policy nor have they commenced any action. Ameron International is not now claiming coverage since it did not supply paint to the project. The Ameron defendants had their own coverage and have taken action in the United States against their own insurers.

[4] The general conditions of the Lloyds policy provide as follows with respect to "additional insureds":

> ADDITIONAL INSUREDS
>
> c) Any other company, firm or any executive officer, employee, director, shareholder or agent including, but not limited to, project managers, contractors, sub-contractors of any tier or with whom the Insured(s) in (a), (b), or this paragraph (c) have issued a Letter of Intent or with whom the Insured(s) have entered into written agreement(s) or contract(s) in connection with the subject matters of Insurance, and/or any works, activities, preparations connected therewith which are included in the Insured values hereunder.
>
> Also to include vendors and suppliers, in respect of contracts solely for supply of raw materials, but only in respect of physical loss or physical damage as may be covered under Section1 of policy wording relating to cargo transits covered hereunder.

[5] The principles of interpretation of insurance policies are as follows:

1. The principles of contractual interpretation apply equally to contracts of insurance. (*Family Insurance Corporation v. Lombard Canada Ltd.*, [2002] 2 S.C.R. 695)

2. The Court is to seek an interpretation which advances the intent of the parties at the time the contract was entered into. *(Consolidated-Bathurst Export Limited v. Mutual Boiler and Machinery Insurance Company*, [1980] 1 S.C.R. 888)

3. The Court is to start with the language used in the policy. (G. Hall, *Canadian Contractual Interpretation Law*, 2nd ed.. 2012 (LexisNexis)

4. The Court is to presume the parties intended what the language says. (*Chitty on Contracts*, 31st ed., 2012).

5. The policy is to be interpreted in a commercially reasonable manner. *(Consolidated Bathurst, supra*)

6. The Court is to interpret the policy in such a way that there is harmony and consistency within the provisions of the policy. (*Hall* text, *supra*)

7. The Court is not to strain to find a meaning. (*Hall* text, *supra*)

8. If there is no ambiguity, give effect to the contract language. *(Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 S.C.R. 245)

9. The document is to be considered as a whole and effect given to each part of the policy. (*Lewison, The Interpretation of Contracts* (London, Sweet & Maxwell, 2007)

10. Similar policies are to be construed consistently. (*Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59)

11. The principle of *contra proferentem* has a limited role, especially where the contract is not a contract of adhesion but a negotiated contract. (*Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada,* 2008 SCC 66)

12. The Court is to consider the surrounding circumstances or the factual matrix at the time the policy was negotiated in determining the parties'

intent. (*Lloyds Syndicate* 1221 (*Millennium Syndicate) v. Coventree*, 2012 ONCA 341)

13. In considering the factual matrix, it is what was known or capable of being known to both parties that is relevant. (*Dumbrell v. The Regional Group of Companies Inc*., 2007 ONCA 59, which cited *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 129)

14. The subjective intent of the parties is irrelevant. Mutual intent is what is to be determined and the court is to rely on fictional intent only if actual mutual intent cannot be ascertained. (*Hall* and *Chitty* texts and *Eli Lilly* & *Co. v. Novopharm Ltd.*), [1998] 2 S.C.R. 129)

[6] Ameron says I should interpret the Lloyds policy provision as follows:

> The Lloyds policy includes as 'additional insured' subcontractors 'of any tier' *or* any company with whom a subcontractor has a written agreement or contract in connection with the Sable Project.
>
> Ameron falls within that definition because it is clearly one of the 'tiers' of companies working on the Sable Project. Ameron also comes within the definition because it is a company which had a written agreement with a subcontractor (Barrier) in connection with the Sable Project.

[7] I must determine if that interpretation advances the intent of the parties when the policy was written.

[8] Looking first at the words used, I must interpret the provision so as to give a harmonious and consistent meaning to both paragraphs without straining to give the provisions meaning and giving effect to both parts of the provision with respect to additional insureds. I am also to presume the parties intended what the language says.

[9] In my view, the meaning Ameron says I should put on paragraph 1 strains the meaning of the words used. This is particularly so since I must give some meaning to the words in both paragraphs. It is difficult to envision what vendors and suppliers would not be covered by paragraph 1 according to Ameron's interpretation. In my view, they would all have a contract with an insured as defined in paragraph 1. Otherwise, they would not be selling or supplying goods to the project. In that case, paragraph 2 would be redundant. In considering the wording of the policy, in my view, it makes a distinction between suppliers and vendors and others involved in the project.

[10] I conclude some of the authorities cited by Ameron do not assist. Insofar as they deal with subcontractors, the issue is not the same. For example, in *529198*

Alberta Limited v. Thibeault Masonry Ltd., 2001 ABQB 1108, Rawlins, J. said in paragraph 18:

> 18 ... Other Canadian courts have recognized builders' risk insurance as unique policies, which serve to simplify and reduce the cost of coverage in the context of construction projects, and have tended to extend to subcontractors in recognition of these purposes...

[11] She continued in paragraphs 22, 27 and 28 to refer again to sub-contractors. She then concluded in paragraph 29:

> 29 In summary, I find based on the language of the policy; the intent of the parties as evidenced by the general purpose of builders' risk insurance and the request for coverage equivalent of IAO From 507; the trend in the authorities towards inclusive coverage under builders' risk policies; and the fact the entire value of the project was insured, the Defendant Thibeault was an unnamed insured under the State Farm Policy by necessary implication. Commonwealth, supra recognizes that subcontractors have an insurable interest in the whole of a construction project. Therefore, State Farm is precluded from pursuing its subrogated claim against Thibeault.

[12] Similarly, in *Inland Concrete Ltd. v. Commonwealth Insurance Co.*, 2011 ABQB 378, Germain, J. refers to subcontractors in his comments on insurance in large construction projects. He says in paragraph 52:

> **52** A common feature of a 'builders' risk' type of policy is that all of the subcontractors working on the project are automatically insured and entitled to the benefit of the policy.

[13] He then cites *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd.*, [1978], 1 S.C.R. 317 as well. He goes on to say in paragraph 54:

> However, a builders' risk policy does not include 'warranty replacement'. That is one of the litigation battlegrounds in this action, because Commonwealth asserts Inland is seeking coverage for supplying a faulty product - defective concrete.

[14] He distinguishes between those who worked on the project and those who supplied a product. In his earlier decision in the same matter, *Inland Concrete Ltd. v. Commonwealth Insurance Co.*, 2010 ABQB 600, Germain, J. had also referred to "all contractors, sub-contractors and trades persons working on a project". (para. 35)

[15] In *Sylvan Industries Ltd. v. Fairview Sheet Metal Works Ltd.*, [1994] B.C.J. No. 468, the British Columbia Court of Appeal was also dealing, not with a supplier, but with a sub-contractor who allegedly caused a fire. That was also the case in *Earl A. Redmond Inc. v. Blair LaPierre Inc.* [1995] P.E.I.J. No. 25 (P.E.I.S.C. Trial Division). In that case, Justice DesRoches said in paragraph 6, after citing among other cases, *Sylvan*:

> 6. These authorities stand for the proposition that in a project such as the one in the instant case, the interests of the principal contractor and the subcontractors are so inseparately interconnected that they can all be considered as one for the purposes of insurance.

[16] The purpose of project insurance in cases such as these is to provide coverage to those who work on the project. In my view, vendors and suppliers are not in the same position. They do not work on the project and are not participants in the construction of the project. This is recognized, I conclude, in the decisions to which I have just referred.

[17] Nor do I conclude the provisions are ambiguous. In so concluding, I look not only at the words but also the factual matrix at the time the policy was negotiated to determine the intent of the parties negotiating it.

[18] I have evidence of the parties' mutual intent from the affidavit evidence of Wayne DeBoice, William Howat and Robina Malik as well as the cross-examination of William Howat and David Sharp, transcripts of which were in evidence. Because I have this evidence, I do not need to resort to trying to determine what their intent would have been had they addressed their minds to it. They did so and, as I said, subjective intent is, of course, not relevant.

[19] This evidence informs me of what the parties knew when they negotiated the terms of the policy. It also gives me evidence of what a commercially reasonable interpretation of the policy provisions would be.

[20] Wayne DeBoice was employed by Mobil Oil Canada as an insurance adviser in 1993. He said in paragraph 4 of his affidavit:

> 4. **THAT** Mobil appointed me in late 1996 to lead the Sable insurance sub-committee which was charged with the responsibility for the placement of insurance for the construction of the Sable Project facilities.

[21] He says in paragraph 11:

> 11. **THAT** coverage as it would relate to raw material suppliers/vendors was specifically addressed by Sable and the exact proposed wording was reviewed by the Sable insurance sub-committee.

[22] Sedgwick was the broker and David Sharp was its London representative in the negotiations between Sable and Catlin, which was one of the underwriters. Paul Young was its Calgary representative. In paragraphs 13 and 14 of his affidavit, Mr. DeBoice quotes correspondence between Sedgwick's Sharp and Young which said:

> 13. ...
>
> 1) Additional Insureds - Catlin wishes to make it clear that suppliers of raw materials can be covered in their own right as additional insureds in respect of physical damage during the procurement stage, but this coverage does not extend to other benefits of the policy. This is a normal position under these policies. The wording thus needs to be suitably amended.
>
> 14. ...
>
> 'they do not want a position by which the supplier will also potentially be protected in respect of faulty or defective materials. Any such coverage available on the policy (i.e. for consequential damage, including the faulty part) will, of course, be available to Sable and their contractors, but underwriters would then want to retain any rights of subrogation under the policy against the supplier of the defective part.' This, I may say, is the standard position under most CAR insurances.

[23] He then says in paragraph 15:

> 15. **THAT** the Sable insurance sub-committee reviewed the wording and agreed that suppliers would not be included as additional insureds under the policy.

[24] He attaches as Exhibit "C" to his affidavit correspondence which he says finalized the wording. It is significant to note that it says with respect to the provision dealing with additional insureds:

> "It is agreed that 'suppliers'is deleted from third line."

[25] In other words, the word "supplier" had been in a previous draft of the policy wording and, as a result of negotiations, was specifically removed. It was also at this time, in April 1998, that the second paragraph referred to above in the Lloyd's Policy was added. Mr. DeBoice says in paragraphs 18 and 20:

> 18. **THAT** the discussions between the insurance sub-committee, the brokers and/or underwriters, resulted in agreed policy wording which specifically excluded raw material suppliers such as Ameron, from inclusion in the definition of additional insureds under the Sable construction all-risk policies which are placed, except that raw material suppliers' goods if and while in transit at sea would be insured.
>
> 20. **THAT** raw material suppliers to the Sable project were not intended to be insured under the wrap-up liability or builders' all-risk policies with respect to faulty or defective materials based on the discussions, communications and correspondence in which I participated as lead member of the insurance sub-committee with the insurance brokers interfacing with underwriters.

[26] William Howat was an energy underwriter at Catlin. He says in his affidavit he was responsible in early 1997 for writing the policy in question. He says that he does not recall the negotiation of the policy but reviewed the policy to refresh his memory. He refers to the provision in question in paragraphs 10 and 11 of his affidavit saying:

> 10. The intent of this clause in a policy of this nature in 1997 was to extend cover to those contracted by the operators to work on the Project by way

> of written agreement. It relates only to those actively working on site. Vendors and suppliers are specifically not included as Additional Insureds but are added *'only in respect of physical loss or physical damage as may be covered under section 1 of [the] policy wording relating to cargo transits covered hereunder*'.

[27] In paragraph 11, he says:

> 11. In a policy of this nature in 1997, underwriters agreed to provide this limited cover to vendors and suppliers as Additional Insureds to ensure that the physical destruction or loss of materials in transit was covered regardless of the point at which title passed to operators and co-venturers. There is no cover of any sort granted to vendors and suppliers beyond this restricted cover; certainly no cover in respect of product liability is contemplated.

[28] In paragraph 12, he says in part:

> 12. ... I have no recollection that any such cover was requested. At that time, I would not have been willing to agree to provide such broad cover to parties over whom Underwriters have no control and with whom they have no relationship.

[29] He too refers to the correspondence between Mr. Sharp and Mr. Young in paragraph 15 saying:

> 15. As to the email sent by David Sharp to Paul Young, referred to in paragraph 13, the final sentence of the first paragraph is accurate in that it was standard practice to exclude suppliers from cover at that time.

[30] He concludes in paragraph 16:

> 16. The final document, referred to in paragraph 13 herein, being a fax from Paul Young to David Sharp, bears a manuscript record of a proposed meeting with Catlin on its first page. I know David Sharp. I do not recall meeting him on this matter and, after consideration I believe the person who attended this meeting was Robina Malik. I confirm that the position to Additional Insureds as stated in page 1 of that document was in accordance with Catlin's practice at that time, to my personal knowledge.

[31] He was cross-examined by Ameron pursuant to *Rule 38.10* of the 1971 *Civil Procedure Rules* which provides:

> **38.10**. A deponent of an affidavit to be used on a trial or hearing may be examined, cross-examined and re-examined on,
>
> (a) an examination for discovery ...

[32] The transcript of the cross-examination is at Exhibit "B" to Mr. Belliveau's Affidavit of May 17, 2013. William Howat said with respect to the insurance market at page 23:

> A. There was a general acceptance in the market that the breadth of cover that was being given under the original policies during the 90s was too broad, and it was impossible to underwrite some of the entities that were looking for coverage under the policies. Hence one of the limitations on the policy that we agreed was that for suppliers and vendors of materials in the project, we weren't prepared to give such broad coverage that every single supplier to the project works would be covered under our policy, regardless of whether we had – we had no underwriting information for those people, we had no premium paid by those people to us, we had no exposure information for those people. So we were only prepared at that stage to provide coverage for the named insured and the contractors and subcontractors that were involved on the scope of insurance.

[33] He continued on page 26 with respect to vendors and suppliers to say:

> ...
>
> A. We saw them as too remote from the project itself. We had seen in the industry at that stage an amount of poor work, and poor materials that were being supplied, and we would not have expected to have been in a position where we were having to pay for that poor work and improper materials being supplied on a project. That exposure was really one that those entities should have had coverage under their products liability policy for, and not under an offshore construction project.

[34] He was asked about the interpretation of the policy provisions and, at pages 40 to 43, he was asked and answered as follows:

> Mr. Howat, I put it to you that the first paragraph under "Additional insureds", we're looking at paragraph 9 of your affidavit, the section you've extracted, that the first paragraph contains a workable definition of additional insured, and that the second paragraph serves to provide a further inclusion, but does not limit the scope of what's outlined in the first paragraph. Do you agree with that?
>
> A. No.
>
> Q. Why not?
>
> A. The first paragraph specifically doesn't name vendors or suppliers. The unusual nature of that second paragraph I believe is because of the discussions between the broker and us on requesting coverage for vendors and suppliers, and the coverage grant that we were prepared to give was only in respect of the section 1 coverage as it related to cargo transits.
>
> Q. And your position you've just recounted is based in part on the discussions you have seen that occurred between brokers and Sable representatives?

A. Sorry, could you just repeat the first part of that question?

Q. You made reference to the discussions with brokers. Are you referring to the documentation that you've reviewed, that you cite in your affidavit, including the documented discussions between the broker and Sable representatives?

A. In part, but I'm also of the belief that at that time, we would have excluded, so in the draft wording, we would have looked to exclude the vendors and suppliers from the first paragraph, and that as a result of doing that, there was a discussion with the broker, where they re-approached us and looked for some coverage for vendors and suppliers, and we stated, the only coverage we were prepared to give was in respect of cargo transit under section 1.

Q. You mentioned that vendors and suppliers are not mentioned in te first paragraph.

A. Yes.

Q. Is it your position that no categories of entities not mentioned in the first paragraph, take, for example, engineering consultants, they are specifically not mentioned in the first paragraph, are they not considered additional insureds under this policy?

A. They could be, if they satisfied the requirements of that first paragraph.

Q. Am I hearing you correctly that in relation to vendors and suppliers, even if the vendors and suppliers were able to satisfy the conditions in the first paragraph, they are ousted by the second, is that correct?

A. Our intent was to exclude vendors and suppliers from being an additional insured under this policy, other than where the coverage was being requested for cargo transits under section 1.

Q. Is it your position that the language in these paragraphs fulfill that intent?

A. Yes.

Q. Mr. Howat, the Sable project included the installation of a significant amount of packaged equipment on the facilities that are now offshore, packaged equipment included large vessels, pressure vessels, valves,

those sorts of things. Is it your position that the vendors and suppliers of those packaged equipment are not additional insureds under these provisions?

A. If they didn't fall within the category of a contractor or subcontractor, then yes.

Q. But if they fall within the category of contractor or subcontractor, then they did have coverage, they were insureds?

A. If as well as being the provider of the, in your example, pressure vessels, they were also installing and had a contract with an insured, then they would fall within the inclusion of an additional insured.

[35] Robina Malik says in her Affidavit that in 1997 she was a law school graduate and assisted with policy wording, working primarily with William Howat. She says she could not provide precise details but does recall meeting with David Sharp. She says in paragraph 14 of her Affidavit:

14. In my role as Underwriting Assistant, it was I who met with David Sharp in respect of this issue. It was my responsibility to review policy language presented by the brokers so as to ensure that it met the Underwriter's intent. In the case of Additional Insureds it was the normal position, as David Sharp states in the fax referred to in paragraph 12 hereof, for limited cover only to be available to vendors or suppliers. Such cover was with respect to physical loss or damage during transit only.

[36] She continues in paragraph 15:

15. Had any Broker presented wording to me that provided for anything other than such limited cover for vendors or suppliers I would have rejected the wording.

[37] Although he did not file an Affidavit, David Sharp was also cross-examined pursuant to *Rule 38.10* which I have quoted above. The transcript of his cross-examination is at Exhibit "A" to Mr. Belliveau's Affidavit. He was asked and answered as follows at pages 14 and 15:

> Q. Now I've looked at the policy wording that Sedgwick provided, and we'll come to this, Mr. Sharp, in relation to the RFP that was issued by Sable, and it did include suppliers in the insured, additional insureds clauses. Was that typical in your experience and recall for the late 1990s in this manuscript policy?
>
> A. It would have been typical to have included an assured clause as wide as one could but it would always be on the basis that this was a wish list, and ultimately what would be achieved for your clients would be the product of a negotiation with the market.
>
> Q. In this period leading up to 1997/98, based on your knowledge and experience, having dealt with various projects in the marine side, CAR projects, or coverages, rather, did you see policies where suppliers were covered, actual issued policies as opposed to your manuscript wording?
>
> A. I only saw policies that were produced by Sedgwick and those earlier policies may well have named suppliers but for specific insured interests, not in a sense of giving blanket coverage to suppliers.
>
> Q. What's the restriction or the parameters that you have in mind, that you say there was not broad coverage?
>
> A. The restriction would be that if the market were prepared to extend the coverage for what we call the procurement stage, which is procuring the materials from various destinations around the world to the fabrication sites, the coverage they will be extending to suppliers would be for the transit risk which would effectively be from the time that the materials left the manufacturers' premises until arrival at the various fabrication sites.

[38] He also confirmed that the wording was negotiated wording. He said at pages 20 and 21:

> Q. The Lloyd's wording, you're talking about?
>
> A. You talk about a Lloyd's wording, it's actually a wording that was agreed by – for and on behalf of the market which was partly Lloyd's and partly limited liability companies.

[39] On re-examination at that same discovery, Mr. Sharp was asked about the negotiations for the wording with respect to additional insureds. At pages 88 and 89, he was asked and answered:

> Q. Now, you were asked about that particular paragraph, which appears under the wording 'Additional insureds'?
>
> A. Yes.
>
> Q. When you were asked about that particular paragraph, one of the things you said was you recall having difficulty getting to that point, do you remember saying that?
>
> A. Yes, I do.
>
> Q. What point? What's the point you're referring to when you say 'that point'?
>
> A. This refers to the comment that we had to argue forcibly for it.
>
> Q. For what?

A. For the coverage for transit risks for suppliers.

Q. All right, so the difficulty was even to getting the insurers to agree for that limited coverage for transit risks?

A. Yes, and I don't remember, but the inference has to be that Catlin was unwilling to include suppliers and vendors at all, and we got to a point where they were included, but just for the cargo risk.

Q. Your belief was that you had difficulty even getting to that limited coverage, is what you're driving at?

A. Yes.

[40] In my view, it is clear from the factual matrix what the mutual intent of the parties was when they agreed upon the wording in the subject provision with respect to additional insureds. That mutual intent was to provide only limited coverage for vendors and suppliers. It is consistent with the interpretation of the words themselves and the commercial reality within which the negotiations were undertaken. I make particular note of the correspondence in 1998 as it is an independent and contemporaneous record of the negotiations and the final agreement on the wording long before problems arose and litigation was commenced.

[41] Ameron argues that, if the provisions are not clear, the principle of *contra proferentem* should apply to give them coverage. There are several difficulties with this argument.

[42] First, the principle has a limited role. It applies where there are contracts of adhesion. As is clear from the affidavits and cross-examinations, there were negotiations about the terms of the policy. Accordingly, the policy was not a contract of adhesion but a negotiated contract.

[43] Secondly, *contra proferentem* is a principle to be used only as a last resort. I have concluded above that there is no ambiguity. In any event, the other rules of construction apply to the interpretation of the provision, enabling me to give it an interpretation consistent with the intent of the parties to it.

[44] Thirdly, as a litigant who was a stranger to the contract, Ameron has no standing to seek to apply the principle.

[45] I therefore, conclude that Ameron BV is not an insured under the Lloyd's policy.

[46] It is therefore unnecessary for me to address the issue of privity. Ameron BV was not a party to the contract of insurance. To fall within the exception to the principle that one must be a party to the contract to benefit from it, I must be satisfied that it was within the contemplation of the parties to the contract of insurance that Ameron BV would benefit from it and that it would frustrate that intent to strictly apply the principles of privity. I refer to *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 decision with respect to the issue of privity. In light of my conclusions above, that exception does not apply.

Hood, J.