SUPREME COURT OF NOVA SCOTIA

Citation: Co-operators General Insurance Company v. Wawanesa Mutual Insurance Company, 2014 NSSC 23

Date: 20140127
Docket: Hfx No. 419271
Registry: Halifax

Between:

The Co-operators General Insurance Company

Applicant

v.

The Wawanesa Mutual Insurance Company

Respondent

Judge:	The Honourable Justice Michael J. Wood
Heard:	January 16, 2014, in Halifax, Nova Scotia
Written Decision:	January 27, 2014
Counsel:	Robert H. Pineo, for the Applicant
	Ian R. Dunbar, for the Respondent

By the Court:

[1] The sole issue raised by this application is whether the Co-operators General Insurance Company ("Co-operators") has a duty to defend Mark Wile Plumbing & Heating ("Wile Plumbing") in legal proceedings alleging damages caused by defective work. Wile Plumbing was insured under a policy issued by the Co-operators in May, 2004.

[2] The Supreme Court of Canada has described when an insurer's duty to defend is triggered in the following passage from *Progressive Homes Ltd. v . Lombard General Insurance Co. of Canada*, 2010 SCC 33:

> **19** An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (*Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-11; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 54-55). It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend (see *Nichols*, at p. 810; *Monenco*, at para. 29).

[3] The only information that should be considered in deciding whether a duty to defend arises are the statement of claim against the insured and the terms of the insurance policy.

STATEMENT OF CLAIM

[4] The statement of claim against Wile Plumbing was issued on March 28, 2013 under Halifax number 413861. The plaintiff is Intact Insurance Company, which is advancing a subrogated claim on behalf of Eric White Construction Limited. The essential elements of that pleading can be summarized as follows:

- In 2004, the plaintiff subcontracted with Wile Plumbing for plumbing work at a cottage property in Lunenburg County, which included the installation of an expansion tank for the hot water heating system.

- In April, 2011, an inspection of the cottage revealed that the expansion tank had fallen from its original place of installation and struck a fuel oil line, resulting in a significant oil spill. Expenses of $307,000.00 were incurred to remediate the property.

- Wile Plumbing was negligent by improperly installing or fastening the expansion tank and ensuring that it was properly supported.

THE CO-OPERATORS INSURANCE POLICY

[5] The Co-operators issued a commercial general liability policy to Wile Plumbing on May 10, 2004. The policy period expired on May 10, 2005. The insuring agreement provides as follows:

> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES 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". We will have the right and duty to defend any "action" seeking those compensatory damages but:
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> 1) The amount we will pay for compensatory damages is limited as described in SECTION III - LIMITS OF INSURANCE;
>
> 2) We may investigate and settle any claim or "action" at our discretion; and

3) Our right and duty to defend and when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A, B or D or medical expenses under Coverage C.

b. Compensatory damages because of "bodily injury" include compensatory damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

c. "Property damage" that is loss of use of tangible property that is not physically injured shall be deemed to occur at the time of the "occurrence" that caused it.

[6] The exclusions under the policy include the following:

h. "Property damage" to:

. . . .

6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

. . . .

i. "Property damage" to "your product" arising out of it or any part of it.

j. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

k. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

[7] The policy also includes the following definitions:

11. "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.

12. "Your product" means:

a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

1) You;

2) Others trading under your name; or

3) A person or organization whose business or assets you have acquired; and

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. and b. above.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

13. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. or b. above.

POSITIONS OF THE PARTIES

The Applicant

[8] The Co-operators say that the statement of claim does not allege facts showing that an occurrence causing damage took place before the expiry of the policy in May, 2005. Even if the allegedly defective installation could be interpreted as having caused damage at the time that the work was done, Co-operators says that such damage would be excluded from coverage as a result of the "your work" or "your product" exclusions.

[9] Co-operators submit that there is no possibility of coverage for the 2011 oil spill and therefore no duty to defend arises.

The Respondent

[10] The position of the respondent, Wawanesa Mutual Insurance Company ("Wawanesa") is that once the allegedly defective installation took place, the cottage property was damaged. In support of that position, they rely on the Ontario Court of Appeal decision in *Alie v. Bertrand & Frére Construction Co.*, [2002] O.J. 4697, which involved claims for defence costs and indemnity following trial. The claims against the insured arose out of the provision of a defective component which was incorporated in concrete used in home foundations. There was a period of six years between the initial use of the product and when it became apparent that the foundations would have to be replaced. The trial judge found that there was on-going deterioration of the concrete and, therefore, all of the policies in effect throughout the period were triggered.

[11] Although the *Alie* case did not involve a preliminary assessment of the duty to defend, but rather a claim for reimbursement of defence costs and damages

following trial, Wawanesa submits that the analysis with respect to liability where there is on-going deterioration is applicable to the facts of the present case.

[12] Wawanesa relies heavily on the Nova Scotia Court of Appeal decision in *Meridian Construction Inc. v. Royal & Sun Alliance Insurance Co. of Canada*, 2012 NSCA 84, and says that because of the similarities between the pleadings and insurance policy under consideration in that case, the decision is essentially conclusive and requires me to find a duty to defend on the part of the Co-operators.

ANALYSIS

[13] In light of the position of Wawanesa that *Meridian Construction* is binding and determinative of the issue in this application, I will start my analysis by reviewing that decision in some detail.

[14] *Meridian Construction* involved an application to determine whether Royal & Sun Alliance Insurance Company of Canada ("RSA") had a duty to defend Tribeca Mechanical Limited ("Tribeca") which had installed a plumbing system in a nursing home. According to the statement of claim, a leak in one of the water lines was discovered on June 27, 2002. Tribeca was alleged to have provided a temporary fix and on June 30, 2002, the temporary fix ruptured, resulting in significant water damage to the nursing home. The allegations of negligence against Tribeca were that the pipe was faulty and both the initial installation and temporary fix were negligently carried out.

[15] The RSA liability insurance policy expired on June 15, 2002. Most of the relevant clauses of the insurance policy are found in the Nova Scotia Supreme Court decision which is reported at 2011 NSSC 177. The insuring agreement was quoted by Justice Hood at para. 22 of that decision and it states as follows:

> **22** The Wrap Up Liability coverage in the policy provides:
>
> l. 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.

[16] The RSA policy included definitions for "property damage" and "the insured's work", which are essentially the same as those found in the Co-operators policy. The term "occurrence" has the same definition in both the RSA and Co-operators' policies and it reads (see para. 36 of the decision of Hood J.):

> **36** "Occurrence" is also defined:
>
> 10. "Occurrence" means an accident including continuous or repeated exposure to substantially the same general harmful conditions.

[17] Justice Hood's decision with respect to the duty to defend is set out at para. 44 of her decision which reads as follows:

> **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 definitely; that is for the trial judge the 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.

[18] The Court of Appeal upheld Justice Hood's decision and set out its analysis on the duty to defend at para. 26:

> **26** Royal's misunderstanding with respect to coverage under clause 1(a)(i) is expressed in para. 29 of its factum:
>
> > 20. The Shannex allegations, if proven, could not possibly establish coverage under the RSA Liability Policy. Even though the allegations relate to some events that occurred before the Policy Period ended, ***all of the actual "property damage" alleged occurred after the Policy Period ended.*** ... [Emphasis added]
>
> With respect, this simple assertion ignores the language of Royal's own policy which Justice Hood carefully considered. Interpretation of the policy language is a question of law, reviewable on a correctness stand: *Belmont, supra*, para. 31. Justice Hood correctly noted that the property damage coverage in Clause 1(a)(i) of the Wrap Up Policy must be caused by an "occurrence". The policy defines property damage to include not only physical injury to tangible property but resulting loss of use of that property and loss of tangible property that is not physically injured. "Occurrence" is defined as an accident, including continuous or repeated exposure to substantially the same harmful conditions. Property damage that results in a loss of use of tangible property that is not physically injured is "deemed to occur at the time of the occurrence that caused it". Justice Hood rightly observed that the allegations in the Shannex action encompassed both the original installation of the pipe and repairs to it. Therefore, the "occurrence" of property damage could have arisen from the original installation

> or the subsequent faulty repair. This means that there is a possibility of coverage under Clause 1(a)(i) as well as Clause 1(a)(ii) and the obligation to defend is triggered under either clause. Justice Hood did not err in so finding.

[19] There are a number of similarities between the allegations made in the *Meridian Construction* case and those found in the statement of claim against Wile Plumbing. Both involve allegations of negligent installation of plumbing systems with a sudden event causing damage after the expiry of the policy period. The wording of the insuring agreement in the two policies is slightly different. I do not think these variations are material or affect the scope of the coverage. I am satisfied that in substance the two insuring agreements are the same.

[20] In light of my conclusion with respect to the scope of the insuring agreements, I believe I am bound by the decision of the Court of Appeal in *Meridian Construction* that such a provision gives rise to a duty to defend where there are allegations of negligent installation and a subsequent failure outside of the policy period.

[21] Mr. Pineo, on behalf of Co-operators, argues that the *Meridian Construction* decision can be distinguished because of the exclusions in the Co-operators' policy for damages to the contractor's own work. He correctly notes that there is no discussion in either the Supreme Court or Appeal decision in *Meridian* about such an exclusion. Unfortunately, we do not have the full text of the RSA policy which was under consideration in *Meridian* and, therefore, do not know for certain whether it contained similar exclusions. What is apparent is that neither Justice Hood nor the Court of Appeal expressly commented on that issue.

[22] Where a party relies on an exclusion to avoid a duty to defend which would otherwise arise out of an insuring agreement, they have a significant burden to meet. The Supreme Court of Canada describes the onus at para. 51 of the *Progressive Homes Ltd.* decision:

> [51] Having found that the claims in the pleadings fall within the initial grant of coverage, the onus now shifts to Lombard to show that coverage is precluded by an exclusion clause. Because the threshold for the duty to defend is only the possibility of coverage, Lombard must show that an exclusion clearly and unambiguously excludes coverage (*Nichols*, at p. 808). For example, in *Nichols*, this Court found that an exclusion clause that stated that the policy did not apply to "any dishonest, fraudulent, criminal or malicious act or omission of an Insured"

> (p. 807) clearly and unambiguously precluded coverage for a claim against the insured for fraudulent conduct. Thus there was no possibility that the insurer would have to indemnify the insured on the claim as pleaded.

[23] In order to conclude that Co-operators have no duty to defend, they must satisfy me that the exclusion relied upon "clearly and unambiguously" precludes coverage.

[24] The argument advanced by Mr. Pineo on behalf of Co-operators is that if there was property damage during the policy period, it must have related to the work of the insured and, therefore, fall within the scope of the exclusion. If this were a hearing to determine coverage, there would be significant evidence on the nature and extent of the allegedly negligent installation and the resulting deficiencies. With this information the Court would be in a position to assess whether there was damage beyond the specific work carried out by the insured. Evidence is not available to the Court in assessing the duty to defend. I must consider the possibility of coverage relying only on the pleadings as drafted. After reviewing the broad allegations in the statement of claim, I do not think that the Co-operators have demonstrated that the exclusion clearly applies. We have little information about the particular defects alleged to result from the insured's work.

CONCLUSION

[25] After reviewing the pleadings and the policy language, I am satisfied that the Court of Appeal decision in *Meridian Construction* requires me to conclude that a duty to defend arises out of the insuring agreement in the Co-operators' policy. I am not satisfied that any of the exclusions in that policy clearly and unambiguously exclude the possibility of coverage and, therefore, I am prepared to grant a declaration that the Co-operators has a duty to defend Mark Wile Plumbing & Heating from the allegations in the action initiated by Intact Insurance Company under Halifax number 413861.

[26] If the parties are unable to reach an agreement on the issue of costs, I will receive written submissions from them within thirty days.

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Wood, J.