FIELD LAW

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Defence + Indemnity

Field Law Insurance Group

INSURANCE ISSUES

The Supreme Court's decision in the Ledcor case (which held that "resultant damage" arising from faulty workmanship is not excluded by the faulty workmanship exclusion in a builders' risk policy) was held not to allow for coverage for "resultant damage" arising from faulty workmanship under an all-risks property policy.

> ***Condominium Corporation No 9312374 v Aviva Insurance Company of Canada*, 2018 ABQB 674**

FACTS AND ISSUES:

The condominium corporation argued that this exclusion clause did not apply to the damage to the parkade. The issue was whether the property damage, as defined in the Statement of Claim, was covered under the policy. The applicable provisions of the insurance policy were worded as follows:

Master Prowse found that the cost of "making good" the property damage was covered under the policy. The insurer appealed.

HELD: For the Defendant/Applicant; appeal allowed and the decision of the Master is reversed. The Appellant is entitled to costs of the Action.

Justice Hall distinguished the landmark Supreme Court of Canada decision on faulty workmanship exclusions in ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co.***, 2016 SCC 37 ("***Ledcor***") on the basis that the Supreme Court was dealing with a builder's risk policy whereas the Aviva policy in the case at bar was an all risks property policy:

> [25] In ***Ledcor***, the Supreme Court of Canada determined that the cost of removing and replacing the windows damaged by faulty workmanship was "resulting damage" as defined in the policy at issue. In reaching that conclusion, the Court focused on the reasonable expectations of the parties to the policy, that such a loss would be covered by a builder's risk policy. Justice Wagner, speaking for the majority said (para 66):
>
> > Therefore, in my view, the purpose behind builders' risk policies is crucial in determining the parties' reasonable expectations as to the meaning of the Exclusion Clause. In a nutshell, the purpose of these policies is to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage – in exchange for relatively high premiums – provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of disputes and potential

> litigation about liability for replacement or repair amongst the various contractors involved. In my view, the purpose of broad coverage in the construction context is furthered by an interpretation of the Exclusion Clause that excludes from coverage only the cost of redoing the faulty work itself – in this case, the cost of recleaning the windows.
>
> [Emphasis added by the Court]

[26] That is distinguishable, and indeed inapplicable to the Policy before me. Here I am considering an all risks property insurance policy, not a builder's risk policy. Here the only insureds are the owners; not the contractors and not the engineers. Here the "relatively high premium" consideration does not apply. Here the purpose of the Policy is not to provide broad coverage for a construction project, for all involved in that project. In short, this is not a builder's risk/course of construction policy.

[27] Here the Policy is intended to insure against property damage caused by a peril not otherwise excluded. There is no reasonable expectation that it covers any more, or any less.

[28] Here the Appellant has established that the cost of making good faulty workmanship is the cost not only of the contracted work, but also the cost of repairing the structural integrity of the parkade. The insurer has satisfied its onus of showing that the cost of making good the faulty workmanship is excluded from coverage.

[Emphasis added]

The Court held that a multi-peril contract of insurance like the condominium corporation's does not attract coverage in this instance:

> [23] The loss is initially covered by the Policy. The insurer has the onus, therefore, of establishing that it is excluded by an applicable exclusion. If the insurer succeeds, then the onus shifts back to the insured to establish the applicability of an exception to the exclusion.
>
> . . .
>
> [33] In the case before me, however, the exception to the exclusion is that the faulty workmanship exclusion does not apply to loss or damage caused by a resultant peril not otherwise excluded; that is to say, loss or damage caused by an otherwise insured peril. So, for example, if the faulty workmanship caused a fire, damages arising from faulty workmanship which caused the insured peril of fire would be covered by the policy by virtue of the exception to the exclusion. However, if no insured (i.e. not excluded) peril occurs, then the exception to the exclusion does not apply.
>
> [34] This is the plain reading of the policy wording. No ambiguity arises in either the exclusion or the exception to the exclusion.
>
> [35] No such resultant insured peril occurred in this instance. The Respondent argues that damage to the structural integrity of the building is itself a "resultant peril", since it has not been specifically excluded from

the "all risks" insuring agreement. However, damage is not a peril; it is a result. This argument by the Respondent must accordingly fail.

[Emphasis added]

COMMENTARY:

This decision of the Alberta Court of Queen's Bench limits the effect of the Supreme Court of Canada's decision in ***Ledcor*** regarding the reasonable expectation of the parties with respect to "making good faulty workmanship" provisions to builders' risk policies. It is unclear whether the reasoning of Justice Hall will remove policies other than all-risk property policies from ***Ledcor's*** reach.

This decision also serves as a reminder that careful attention ought to be paid to the type of policy under review and the wording of exclusion clauses when assessing whether a particular insurance policy will cover a loss.

Calgary
400 - 444 7 AVE SW
Calgary AB T2P 0X8
T 403-260-8500
F 403-264-7084
1-877-260-6515

Edmonton
2500 - 10175 101 ST NW
Edmonton AB T5J 0H3
T 780-423-3003
F 780-428-9329
1-800-222-6479

Yellowknife
601 - 4920 52 ST
Yellowknife NT X1A 3T1
T 867-920-4542
F 867-873-4790
1-800-753-1294