CITATION: York Region Condominium Corporation No. 772 v. Lombard Canada Ltd., 2008 ONCA 272

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COURT OF APPEAL FOR ONTARIO

FELDMAN, ARMSTRONG and MACFARLAND JJ.A.

BETWEEN:

YORK REGION CONDOMINIUM CORPORATION NO. 772, THE CORPORATION OF THE TOWN OF RICHMOND HILL, THE REGIONAL MUNICIPALITY OF YORK, ALAN ZEEGEN ASSOCIATES LTD. and HADDAD GEOTECHNICAL INC.

Plaintiffs (Respondents)

and

LOMBARD CANADA LTD., CONTINENTAL INSURANCE COMPANY, ALLIANZ INSURANCE COMPANY OF CANADA, CANADIAN SURETY COMPANY, AVIVA INSURANCE COMPANY OF CANADA and UNITED STATES FIRE INSURANCE COMPANY

Defendants (Appellants)

Charles Loopstra Q.C. and Michael McWilliams for the respondents

Mark L.J. Edwards for the appellants

Heard: October 4, 2007

On appeal from the judgment of Justice Janet Wilson of the Superior Court of Justice, dated February 13, 2007.

FELDMAN J.A:

[1] This appeal concerns the liability of the respondent insurer, Lombard, under a Commercial General Liability Policy, to indemnify condominium unit owners for

extensive damage caused to the foundation of their building by the negligence of the insured general contractor, Bradsil Leaseholds Ltd.

[2] Bradsil first damaged the aquifer below the building during the initial excavation, then negligently made the repair. Several years later, the garage sank and the entire building had to be evacuated for months in order to properly repair the foundation supporting the building. The condominium owners and others with subrogated claims successfully sued Bradsil for the damages caused by its negligence and in 1996 obtained summary judgment for an amount in excess of the policy limits. As Bradsil could not satisfy the judgment and Lombard had denied coverage throughout, the owners then sued Lombard under s.132 of the *Insurance Act* R.S.O. 1990, c. I.8, for recovery up to the policy limits.

[3] In response to the respondents' summary judgment motion, the appellant asked the motion judge to dismiss the action. The motion judge found that the condominium owners' claim was covered by the policy and awarded summary judgment against Lombard. I agree with the motion judge and would dismiss the appeal.

Facts

[4] Bradsil was the general contractor for a condominium project on the Oak Ridges Moraine at 175 Cedar Avenue in Richmond Hill, Ontario, which was constructed between 1988 and 1990.

[5] As part of its contractual responsibilities, Bradsil was to follow the recommendations of a geo-technical consultant which included the directive that excavations not breach the aquitard, a layer of soil composed of clay that prevents the waters of the aquifer below from permeating up into the layer of soil containing the foundation of the building.

[6] Bradsil and its subcontractors failed to follow this directive and punctured the aquitard during their initial excavations, causing the waters of the aquifer to rise to the level of the foundation's raft footings and concrete plugs.

[7] The parties agreed that it was Bradsil's responsibility, to install a dewatering system to rectify this situation. Bradsil accordingly hired experts who competently designed a dewatering system that would have solved the problem without removing the soil supporting the condominium.

[8] Unfortunately, Bradsil's subcontractors failed to install the system in accordance with the experts' designs. The subcontractors failed to ensure that the filter blanket beneath the building was continuous so as to avoid loss of soil, and failed to ensure that

the sump pumps were equipped with bases or filters to prevent them from pumping away soil along with water.

[9] Consequently, unbeknownst to anyone, the defective dewatering system pumped away silt and sand from beneath the condominium from 1989 until the defect was discovered in 1995. At that point, someone noticed that part of the condominium's garage was sinking. Further investigation revealed that the removal of soil created large voids beneath the building which left the column footings underpinning the garage hanging in the air without soil support, and had caused damage to other parts of the foundation.

[10] As a result, the condominium residents were subject to an evacuation order for several months. The condominium owners had to borrow funds from the Regional Municipality of York and the Town of Richmond Hill to pay the $7.26 million required to fill the voids and lower the water level, as well as to repair the building foundations.

[11] Although the large voids caused damage to the original foundations, which the respondents had to pay to repair, the motion judge found that the construction of the original foundations themselves was not defective. Rather, the foundations were gradually damaged as a result of the voids produced by the faulty installation of the dewatering system, which was aimed at correcting Bradsil's first error in excavating beyond the aquitard soil layer.

The Commercial General Liability Insurance Policy

[12] The parties to this appeal do not contest that Bradsil was a named insured of Lombard; that Bradsil was legally obligated to pay damages to the plaintiffs based on the summary judgment obtained in 1996; or that the events that gave rise to Bradsil's liability fell within the period and territory covered by its CGL policy. The disputed issues on appeal turn on the scope of the policy's coverage, as set out in the following provision:

> SECTION 1—COVERAGES
>
> COVERAGE
>
> A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 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.… 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".…

[13] "Property damage" is defined under the policy as:

> a. Physical injury to tangible property, including all resulting loss of use of the property; or
>
> b. Loss of use of tangible property that is not physically injured.

"Occurrence" is defined under the policy as

> "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Issues

[14] The two primary issues raised on the appeal can be stated as follows:

(1) Did the damages awarded against Bradsil constitute compensation for property damage suffered by third parties of the type covered under Bradsil's CGL policy, or merely the cost of remediating defects in Bradsil's own work product?

(2) Did the damages arise from an "accident," and therefore from an "occurrence," within the meaning of Bradsil's CGL policy?

Analysis

Issue 1: Was the damage third party property damage or damage to Bradsil's own work?

[15] On the first issue, the appellant argues that the correct way to view the respondents' claim against Lombard is as a claim for damages to compensate for Bradsil's poor workmanship in the installation of the defective dewatering system that resulted in the damage to the foundation of the building, which was Bradsil's work product itself. The appellant argues that the claim therefore treats the CGL policy as a performance bond rather than as insurance against damage to the property of third parties.

[16] The basis for the appellant's position is its characterization of the "foundation" under the building as part of Bradsil's work. The trial judge correctly rejected this characterization. I believe that part of the appellant's argument stems from confusion

over the dual meaning of the term “foundation”. In relation to a building, the foundation can refer either to the structural components constructed by the contractor that anchor the building: the “constructed foundation”, or to the compacted soil, earth or rock that forms the natural base upon which the building is erected: the “natural foundation”.

[17] The major consequence of Bradsil’s faulty workmanship was that the dewatering system removed not only water but also silt and soil from under the constructed foundation, thereby removing the building’s natural foundation and leaving the footings that supported the garage hanging in a void. The natural foundation is the land beneath the building and is part of the property of the third party owners of the building.

[18] Another consequence of the defective dewatering system was that as the earth beneath the building was washed away over time, the structural columns that formed part of the constructed foundation were damaged by the erosion. The motion judge found that these structural components were not defective when they were constructed. Therefore, Bradsil’s faulty workmanship also damaged part of the constructed foundation, however that foundation had by then become part of the third party property.

[19] This case is governed by this court’s decision in *Alie v. Bertrand & Frere Construction Co.* (2002), 62 O.R. (3d) 345. Bertrand had supplied defective ready-mix concrete for the construction of the foundations of a number of homes. The defect was in the fly-ash component of the ready- mix which had been supplied by Lafarge. Eventually the concrete failed and both the foundations of the homes that had been constructed using the ready mix that had been formed into concrete, as well as the homes themselves suffered structural damage; also, remediation was required to prevent future damage. The insurers of Bertrand and Lafarge argued that the damage caused to the foundations of the homes was damage to the product supplied by Lafarge and Bertrand, that is, it was damage to their own work and was therefore not covered by their CGL policies. The court rejected the insurers’ position. Although the CGL policies would not pay for the portion of the damage referable to the cost of the concrete itself, the other damage, including all of the other costs involved in remediating and replacing the damaged foundations, was damage to the homes of the third party homeowners and was therefore covered by the CGL policies.

[20] This court had no trouble disposing of the insurers’ arguments in *Alie*. At para. 35, the court stated:

> In our view, little would be gained in reviewing the submissions of counsel on the relevant caselaw. The principle that a CGL policy is not intended to cover the insured’s own defective product or work is well-established and not disputed in this case. It is its application that is in issue. The ultimate determination of whether the damage was to the insured’s

> own product, or to the property of a third party, is largely a question of fact…

[21] In this case, as in *Alie,* the motion judge determined that the damage caused by the defective dewatering system to the natural foundation underneath the building as well as to the foundational columns was damage to third party property for which the appellant is responsible under Bradsil's CGL policy.

[22] In *Alie,* the insurers also sought to rely, as the appellant does in this case, on the Supreme Court of Canada decision in *Winnipeg Condominium Corp. No. 35 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, for the proposition that one cannot artificially differentiate between different components of the structure to say that one defective component caused damage to the rest – instead the entire structure must be treated as a single unit. In *Alie,* this court at para. 45 rejected the insurer's argument, explaining that in *Winnipeg Condominium*, the Supreme Court

> has simply rejected, as unhelpful, any artificial characterization of the nature of the loss as the basis for determining the extent of tortious liability. The court favoured a more principled approach based on relevant policy considerations. Further, the rejection of the complex structure theory does not assist the insurers. Their argument on this point still rests on the assumption that the defective foundations are Bertrand's product and that they constitute the entirety of the loss. As we have stated earlier, it is our view that the trial judge's finding that the damage went beyond Bertrand's ready-mix concrete is supported on the evidence. (para. 45)

Issue 2: Was the damage an "occurrence" under the insurance policy?

[23] Property damage is only compensable under the policy if it was caused by an "occurrence" which is defined as: "an accident, including continuous or repeated exposure to the same general harmful conditions."

[24] The appellant argues that the damage was caused by Bradsil's negligence and that an event caused by negligence cannot be an accident, relying on the 1964 Manitoba Court of Appeal decision in *Marshall Wells of Canada Ltd. v. Winnipeg Supply & Fuel Co.* [1964] 49 W.W.R. 664. However, as the motion judge stated in her reasons, the Supreme Court of Canada rejected that holding in 1975 in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.,* (1975) 53 D.L.R. (3d) 1 at 6-7, calling it "wholly erroneous", preferring instead to characterize an accident as "any unlooked for mishap or

occurrence". The court specifically rejected the notion that a negligent act could not be an accident or that damage caused by negligence would not be compensable under a CGL insurance policy.

[25] Nor does this court's decision in *Celestica Inc. v. ACE INA Insurance* (2003), 229 D.L.R. (4^{th}) 392 (Ont. C.A.) assist the appellant. That case held that errors in negligently manufacturing a product do not constitute an accident under a CGL policy and distinguished *Canadian Indemnity* on the basis that it involved compensation for damage to the property of a third party, rather than for the cost of repairing the negligently manufactured product itself.

[26] The damage in this case was caused by Bradsil's negligent installation of the dewatering system which caused an "unlooked for mishap", the destruction of the natural foundation of the building and the consequent damage to its structural integrity. In my view, the motion judge was correct in her conclusion that the damage was caused by an occurrence within the meaning of the CGL policy.

Conclusion

[27] In my view, the motion judge made no reversible error in finding that the damage to the condominium building caused by Bradsil's negligence in installing the defective dewatering system is compensable damage to third party property caused by an occurrence to which Lombard's CGL policy must respond.

[28] I would therefore dismiss the appeal with costs to the respondents fixed in the amount of $25,000, inclusive of disbursements and GST.

Signed: "K. Feldman J.A."
"I agree Robert P. Armstrong J.A."
"I agree J. MacFarland J.A."

RELEASED: "KNF" April 14, 2008