Can Bad Workmanship Constitute an Occurrence under an Insurance Policy?

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Summary of the Decision in Développement les Terrasses de l 'Île inc. c. *Intact, compagnie* d'assurances , 2019 QCCA 1440

On appeal from a judgment of the Superior Court rendered by the Honourable Brian Riordan, J.C.S., dismissing the Wellington-type motion filed by an insured against its insurer, since a number of exclusions under the insurance policy applied. The Court of Appeal reversed the decision in first instance, holding that an insurer's refusal to perform its duty to defend is justified only where the claim has no possibility of falling within the initial grant of coverage.

Context

According to the contentions set forth in the originating application (the Claim), Développement les Terrasses de l'île inc. (Terrasses) and Darcon inc. (Darcon and collectively with Terrasses, the Appellants) allegedly acted jointly as contractor, project manager and project supervisor in the construction of a divided co-ownership (condominium) unit housing project (the Immovable). Appellants consequently hired the architects, engineers and a number of different subcontractors to complete the construction of the Immovable.

On May 17, 2013, the syndicate of co-owners of the Immovable (the Syndicate) filed the Claim, seeking damages of $436,000, holding Terrasses, as well as its engineers and architects, liable for a number of defects in the construction work that allegedly affected the Immovable.

On May 28, 2014, the Syndicate amended its Claim, to add Darcon as the principal defendant, whereas, initially, it had been only a *mise en cause*. The Syndicate re-amended its Claim on March 13, 2017, henceforth claiming damages totaling $1,019,811.08.

Appellants were insured under a civil liability insurance policy (the Policy) issued by Respondent, Intact Insurance Company (the Insurer). The Insurer denied coverage and Appellants then filed a *Wellington*-type motion[1], on May 23, 2017, in order to force the insurer to defend them and reimburse them for the costs already incurred in the suit.

The Judgment in First Instance

Justice Riordan analyzed the Policy and the Claim, applying the principles laid down by the Supreme Court's decision in *Progressive Homes Ltd.* v. *Lombard General Insurance Company of Canada*[2].

He first held that the damages claimed by Appellants resulted from errors committed by themselves, as well as by their architects, engineers and subcontractors. The Policy provided coverage where bodily injury or property damage resulted from an occurrence (*sinistre*). The term "occurrence" (*sinistre*) was defined as [translation]: "an accident, including the continuous or repeated exposure to substantially the same general harmful conditions".[3]

In the Court's opinion, the acts for which Appellants were being blamed had resulted from mistakes made in the planning and performance of the work. That fact alone sufficed to dismiss the *Wellington* motion. In an *obiter dictum*, Riordan J. examined the exclusions stipulated in the Policy, concluding that, in any event, [translation] "the vast majority, if not the totality, of the property damages on which the Suit is based would be excluded by one or other of those provisions"[4]. Furthermore, the Court was also of the view that Terrasses' action was prescribed (time-barred), having been instituted on May 23, 2017, more than three years after the Claim was filed, on May 17, 2013. The action against Darcon, which had been impleaded as a defendant only on May 28, 2014, was not prescribed, but it was nevertheless dismissed for the aforementioned reasons.

The Court of Appeal 's Decision

The Court of Appeal allowed the appeal and reversed the decision, on the grounds that the damages alleged in the Claim were included in the definition of "occurrence" (*sinistre*) under the Policy.

The Court of Appeal recalled the method of analysis to be followed in properly construing an insurance policy: (1) the insured must first establish the possibility of coverage, (2) the insurer must prove clearly and unequivocally that an exclusion is applicable, refuting any possibility of triggering the insurance policy, and (3) where applicable, the insured must prove the existence of an exception to the exclusion, in order to be covered. In this case, the issue of prescription also arose.

The Court also reiterated the holdings of the Supreme Court in *Progressive Homes*, to the effect that the mere possibility that a claim against the insured falls within the insurance policy is sufficient to trigger the insurer's duty to defend the insured. To do that, a court, in ruling on a *Wellington*-type motion, must determine the true nature or substance of the claim, and not limit itself to its "labels" (terminology).

Coverage: An Occurrence did Occur

The Court decided that the term “accident“ must be given its ordinary meaning, namely, an event unexpected and unintended by the insured.

Accordingly, the Court found that [translation]: “there is therefore coverage if the faulty construction and design, which were neither intended nor expected by the insured, caused property damage to the Immovable. The possibility of such damages suffices to trigger the duty to defend“[5]

The Court then dismissed the insurer’s argument that such a wide interpretation would transform a civil liability insurance policy into a performance guarantee. That argument having already been disposed of in *Progressive Homes*, the Court of Appeal reiterated its conclusions: a performance guarantee guarantees that work will be completed, whereas civil liability insurance covers only damages occurring after the work has been performed. The latter applies when the former is no longer applicable.

Exclusions and Exceptions

In *obiter*, the trial judge had indicated that, even if the alleged damages resulted from an occurrence, three exclusions stipulated in the Policy applied, having the effect of excluding the damages from coverage.

Although the judge based himself on three exclusions, this newsletter will deal only with exclusion 2.9, for repairs done to the faulty work. That exclusion provides that corrective work is not covered by the Policy. The Court of Appeal drew a distinction, however, between the part of that work that was defective and the damages resulting from that work, holding that the exclusion did not apply to the latter.

In this case, the Syndicate was alleging a series of construction defects, causing various damages that might possibly have resulted from faulty workmanship, from the accumulation of humidity and water to problems of condensation. The Court, analyzing the conclusions of the Claim and the expert reports, was of the opinion that it was not clear and unequivocal that the amounts claimed related exclusively to correcting the defects themselves. Relying on the authority of *Progressive Homes*, the Court reiterated the principle that damages resulting from defective work were covered by the Policy. Damages claimed for the (faulty) repair of the defects, however, would probably not be so covered.

Ruling prudently, the Court of Appeal found that given that a portion of the damages claimed might have resulted from the work performed, the insurer was obliged to defend its insured.

Prescription

Since the trial judge had not found Darcon’s action to be prescribed, the Court of Appeal reviewed only the case of Terrasses. Although the *Wellington*-type proceedings had been filed more than three years after the Syndicate’s action was filed, the Court of Appeal’s view was that the amendments made to the Claim on October 29, 2015 and March 13, 2017 constituted new claims, the time limitations of which had not expired when the Claim was instituted. Accordingly, the *Wellington* motion was allowed and the insurer was condemned to cover the pertinent damages.

The Court further concluded that the insurer's coverage would potentially be only partial, due to the application of some of the exclusions applicable, such as the one for the correction of defects. The insurer was therefore bound to pay all the defence costs incurred in connection with the portion of the claim of the Syndicate identified above by Darcon and those incurred by Terrasses after October 29, 2015.

[1] A remedy resulting from the decision in Compagnie d'assurance Wellington c. *M.E.C. technologie inc.* [1999] R.J.Q. 443, to compel an insurer to comply with its duty to defend its insured.

[2] 2010 SCC 33 (Progressive Homes).

[3] Judgment, para. 21.

[4] Judgment in first instance: Développement les Terrasses de l'Île inc. c. *Intact,* compagnie d'assurances, 2018 QCCS 5895 at para. 18. The exclusions applied to: 1) property damage to an immovable on which the insured carries out its work, 2) repairs made to faulty work and 3) damage caused by the rendering or failure to render professional services.

[5] Judgment, para. 45.

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