Court of Appeal for British Columbia
British Columbia v. Royal Insurance Company of Canada
Date: 1991-10-23

F.G. Potts and G.S. Miller, for appellants.

W.A. Pearce, Q.C., and D. Eastwood, for the Crown.

(Vancouver Doc. CA012796)

[1] October 23, 1991. LAMBERT J.A. (dissenting in part):– The Crown's claim is under an insurance policy described as "Wrap Up Builders Risk Insurance." The policy insured property in course of construction against all risks of direct physical loss or damage to that property. Faulty or improper design was an excluded peril but resultant damage to insured property from an excluded peril was covered. There was a deductible of $25,000 if the peril which occurred was flood. Flood was defined. The issues in this appeal relate to the meaning of those terms in the policy and the applicability of the policy to what occurred.

[2] A contract was let by the Crown to a construction company for a construction project called "C-3036 Reconstruction: Lions Bay Inter-change and Harvey Creek Channelization and Bridges." The Harvey Creek channelization part of the project consisted of reshaping the banks of the creek and then applying shotcrete so that the banks would retain their new shape. The creek had to be diverted while the work was done.

[3] The contract contained this provision:

> The Contractor shall provide a plan showing interception of the creek upstream of the work area and a piped channel diversion system to carry the creek flow clear of the work area(s).

[4] The piped channel diversion system that was built consisted of a 750 mm (30 in.) diameter corrugated steel pipe laid centrally in the creek bottom. It was about 275 metres long and lay at about a 21 per cent grade. The top of the pipe had a concrete inlet out of which the pipe projected. There was also a reinforcing steel mesh screen at the entrance to the pipe. I understand that the pipe was in a trench down the centre of the creek and that the shotcreting could be done and completed over the top of the pipe. When the creek was returned to its original channel (by then shotcreted) the pipe was to be blocked with concrete. The pipe was to remain in place but would have no continuing function.

[5] The Harvey Creek channelization work began in August 1986 and was to be completed by December 1986. The diversion pipe was laid and the inlet constructed. The shotcreting was begun. On September 22 and 23, 1986 there was heavy rain. The

diversion pipe could not handle the water flow. The creek started to rise at the inlet. As an emergency measure a temporary dam was created at the inlet but as the water rose the dam gave way and a heavy flow of water rushed down the creek bed and caused substantial damage to the diversion pipe and to the work in progress.

[6] The Crown claimed under the policy for the costs of restoring the damaged work in the creek bed but not for the cost of replacing the diversion pipe. The insurers denied liability.

[7] The terms of the policy directly relevant are:

> This policy does not insure
>
> (a)(i) faulty or improper material;
>
> (ii) faulty or improper workmanship;
>
> (iii) faulty or improper design;
>
> provided, however, to the extent otherwise insured and not otherwise excluded under this policy, resultant damage to the property shall be insured…
>
> Each claim for loss or damage shall be adjusted separately and from the amount of each adjusted claim the applicable sum shown hereunder shall be deducted. This deductible does not operate to reduce any applicable limit of liability.
>
> (a) Flood $25,000.00
>
> (c) All other losses $ 2,500.00
>
> "flood" means waves, tides, tidal waves, and the rising of, the breaking out or the overflow of any body of water whether natural or man made.

[8] Three issues were argued before the trial judge [(1990), 45 C.C.L.I. 315]. The first was whether the damage was from "faulty or improper design." The second was whether the damage was "resultant damage to the property." The third was whether the damage was from "flood."

[9] Mr. Justice Cowan decided that the damage was "resultant damage to the property," and that he did not have to decide whether it was from "faulty or improper design." He decided that it was not "flood" damage. The insurers appealed from Mr. Justice Cowan's decision and argued all three issues.

[10] For convenience, I propose to consider the first and second points together. If the damage claim is for "resultant damage to the property" within the exception to the exclusion then it does not matter whether the damage was within the exclusion as damage from "faulty or improper design" or whether it was simply insured property damaged by an insured risk. But it is essential to an understanding of the scope to be given to "resultant

damage" to understand first the scope to be given to damage for "faulty or improper design."

[11] Damage for faulty or improper design encompasses all the damage to the very thing that was designed faultily or improperly. Resultant damage is damage to some part of the insured property other than the part of the property that was faultily designed.

[12] *Simcoe & Erie General Insurance Co. v. Royal Insurance Co. of Canada,* [1982] 3 W.W.R. 628, 19 Alta. L.R. (2d) 133, [1983] I.L.R. 1-1597, 36 A.R. 553 (Q.B.), presents a very clear example of the operation of a similar clause. A bridge was being built. As it reached completion, rails for another bridge were stored on top of it. Because of a design error in the substructure of the bridge, the bridge collapsed. The superstructure had no design error but of course it also collapsed. The stored rails were destroyed. It was decided that the design error was a design error affecting the whole work, namely, the bridge; that the bridge was an integral whole; and that it would be improper to separate the bridge into separate items of property, namely, substructure and superstructure, and so regard one of the parts (the substructure) as excluded from coverage through being damaged by faulty design, and the other part (the superstructure) as being excepted from the exclusion as being resultant damage. On the other hand, it was decided that the damage to the stored rails was resultant damage. With respect, I regard that analysis by Mr. Justice Kryczka of the application of a similar clause to the clause in this case as being accurate and as being consistent with the decision of the Ontario Court of Appeal in *Sayers & Associates Ltd. v. Insurance Corp. of Ireland,* 126 D.L.R. (3d) 681, [1981] I.L.R. 1-1436, with the decision of the New Brunswick Court of Appeal in *Mr. Elegant Ltd. v. Canadian General Insurance Co.* (1988), 31 C.C.L.I. 243, 219 A.P.R. 232, 86 N.B.R. (2d) 232, and with the decision of this court in *B.C. Rail Ltd. v. American Home Assurance Co.* (1991), 54 B.C.L.R. (2d) 228, 49 C.C.L.I. 189, 79 D.L.R. (4th) 729. In each of those cases the decision was that the damage was damage to an integral part of the very property that was subject to the faulty design.

[13] In this case it is my opinion that the piped channel diversion system which was the part of the work that was alleged to be the subject of faulty design was not an integral part of the work being constructed, or, perhaps more accurately, the work being constructed was not an integral part of the diversion system. The diversion system was a necessary but conceptually separate construction device. There are two principal reasons which support my opinion. The first is that the diversion system had no continuing function in the completed channelization works and was not a designed part of them. The second is that

the construction contract treated the diversion system as a construction device separate from, and not a part of, the designed project. The fact that the particular diversion system that was adopted was to remain in place after the work was completed does not make a design flaw in the diversion system a design flaw in the channelization work for which damage is claimed. In short, the diversion system was not an integral part of the channelization work even though it was, by later design, incorporated in it.

[14] No claim has been made for damage to the diversion system itself.

[15] It follows from my opinion on resultant damage that the damage claimed was either covered directly as damage to property insured, or it was covered under the exception for resulting damage to the exclusion for faulty or improper design. Consequently, it is not necessary for me, as it was not necessary for Mr. Justice Cowan at trial, to decide whether the design of the diversion system was faulty or improper.

[16] The remaining question relates to whether the deductible for flood or the deductible for other losses applies. The effect of the rain on September 22 and 23, 1986 was that Harvey Creek rose rapidly. The inability of the inlet to the diversion system to carry the flow of Harvey Creek caused the creek to rise even more rapidly at the diversion inlet. The water that had risen so rapidly burst through the improvised dam and ran down what would have been the original channel of Harvey Creek if the original channel had not been altered in shape, but not location, by the channelization work.

[17] I will repeat the definition of “flood” from the policy:

> “flood” means waves, tides, tidal waves, and *the rising of* the breaking out or the overflow of *any body of water* whether natural or man made. (my emphasis)

[18] I am satisfied that the damage claimed was caused by the rising of a body of water, namely, Harvey Creek. The fact that the water that burst through the dam continued down the reshaped channel in the original location does not mean that the damage is outside the definition of “flood.” In the definition of “flood,” the rising of a body of water is treated as a separate event from the overflow of a body of water. In that context, the rapid rising of Harvey Creek should, in my opinion, be regarded as “the rising of … any body of water,” notwithstanding that the creek did not overflow its original banks, as those banks had been modified by the shotcreting work in progress. It follows that I would apply the flood deductible of $25,000. In reaching this conclusion I have not had to rely on, or refer to, any principle of law for resolving ambiguities in commercial documents.

[19] I would allow the appeal in part. The trial judge did not make any deduction for any amount of deductible, so I would reduce the judgment awarded by the trial judge by $25,000. I would award the respondent one half of its costs of the appeal. I would not award any costs to the appellant.

[20] GIBBS J.A.:– I agree with the reasons [appeal from (1990), 45 C.C.L.I. 315] of my colleague Mr. Justice Lambert except as to the $25,000 deductible provision of the insurance policy. That level of deductible only applies to the circumstances before us if the damage was caused by a flood, which is defined as follows:

> "flood" means waves, tides, tidal waves, and the rising of, the breaking out or the overflow of any body of water whether natural or man made.

[21] In that there is no datum specified against which one can measure or judge whether has been a rising or breaking out or overflow the definition is inadequate and incomplete. In order to give the definition and the other deductible provisions some rational meaning it is necessary to imply a common sense measure. In my opinion, given the nature and scope of the work and the perils ensured the measure to imply is the naturally occurring containment features – in other words, the creek banks. As there is no evidence that the water rose above the creek banks I would conclude that the damage was not caused by a flood. It follows that I would not apply the flood deductible of $25,000.

[22] There is, however, a deductible of $2,500 for "all other losses" which should have been taken into account by the trial judge thereby reducing the principal of the damages award from $83,263.23 to $80,763.23. To that limited extent I would allow the appeal but I would order costs in favour of the respondent.

[23] HOLLINRAKE J.A.:– I have read the draft reasons [appeal from (1990), 45 C.C.L.I. 315] of Lambert J.A., and on the issue of coverage and the exclusion clause, I agree with his conclusion and the reasons for reaching that conclusion.

[24] On the issue of whether this damage was caused by "flood," I agree with the draft reasons of Gibbs J.A. which I have also had the opportunity of reading. With respect, I cannot put these somewhat unique facts into the definition of "flood" in the policy.

[25] It should be noted here that the views I have on this issue are not influenced by or the result of the principle of construction found in the phrase contra proferentem. We were advised at the hearing of the appeal that the parties had agreed that in construing this policy "the doctrine of contra proferentum (sic) would not apply to either."

[26] In result, I agree with the disposition of this appeal made by Gibbs J.A.

Appeal allowed in part.