

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gill v. The Wawanesa Mutual Insurance Company*,
2023 BCCA 97

Date: 20230227
Docket: CA48396

Between:

Amritpal Gill and Baljit Gill

Appellants
(Plaintiffs)

And

The Wawanesa Mutual Insurance Company

Respondent
(Defendant)

And

AP Insurance Services Ltd.

Defendant

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated June 10, 2022 (*Gill v. Wawanesa Mutual Insurance Company*, 2022 BCSC 981, New Westminster Docket S228464).

Counsel for the Appellants:

T.R. Davies
J. McGregor

Counsel for the Respondent:

S.W. Abramson
E. LeDuc

Place and Date of Hearing:

Vancouver, British Columbia
February 3, 2023

Place and Date of Judgment:

Vancouver, British Columbia
February 27, 2023

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Abrioux

Summary:

The homeowner appellants appeal from dismissal of their claim against the respondent insurer. The judge interpreted the claim as outside the insurance policy coverage for water escape “within your dwelling”, because it arose from a drain located on the sun deck and the average person would understand “within your dwelling” to mean inside the exterior walls of the home. Held: Appeal allowed. The judge incorrectly interpreted “within your dwelling” from the perspective of an average person disconnected from the language of the insurance policy itself. Because the policy defined the dwelling as the building, and the sun deck was part of the building, the drain was within the dwelling and covered by the policy.

Reasons for Judgment of the Honourable Justice Griffin:

[1] The appellant homeowners (the “Gills”), appeal from the dismissal of their claim against their home insurer, the respondent Wawanesa.

[2] The claim turned on the interpretation of a standard form homeowner’s insurance policy, and specifically the words “within the dwelling”.

The Claim and the Insurance Policy

[3] In December 2019, water backed up and escaped from a drain located in an area of the Gills’ property, and caused damage to their home. For convenience, I will adopt the judge’s description of the area where the drain was located as the sun deck.

[4] The sun deck is located entirely within the exterior concrete foundation and footings of the Gills’ home, at the lowest level of the home, as depicted on the architectural plans. The sun deck had a ceiling with lights in it, and two decks directly above. Columns set on the exterior walls of the structure support the deck structure above. The perimeter rectangle shape of the sun deck is within the footprint of the structure. Two sides of the perimeter of the sun deck have openings to the outdoors.

[5] The following photograph illustrates the sundeck area, taken from inside the sun deck area, with the arrow pointing to the drain in the floor on the photographer’s side of the lounge chairs. One side that has openings to the outdoors is seen on the

left side of the photograph; the other side that has similar openings is unseen behind the photographer.



[6] The judge found that the sun deck is “well and comfortably furnished and is occupied” by the Gills: para. 68.

[7] The Gills had an all-risks insurance policy with Wawanesa.

[8] On its face, the policy excluded coverage for damage caused by the backup or escape of water from a sewer. However, pursuant to a “Sewer Backup Endorsement”, the policy added coverage for a sewer backup as follows:

... “you” are insured against direct physical loss or damage to property ... caused by “sewer backup”.

...

“Sewer Backup” means the sudden and accidental backing up or escape of water or sewage within your dwelling or detached private structures through a:

- Sewer on your premises ...

[Emphasis added.]

[9] The Policy also defined “dwelling” as “the building ... wholly or partially occupied as a private residence”. It defined “premises” as “the location where ‘you’ reside and the land contained within the lot lines where the ‘dwelling’ is situated”.

[10] All parties agree that a water backup from a “sewer on [the Gills’] premises” occurred when the drain on the sun deck overflowed, and water came into interior rooms in their home in December 2019, causing damage.

[11] Wawanesa denied insurance coverage. It took the position that the drain on the sun deck was not “within [the Gills’] dwelling”.

[12] The Gills brought a summary trial application seeking a declaration that the insurance coverage applied. All parties agreed that the matter was suitable for determination on summary trial, as did the judge.

Judgment Dismissing Gills’ Claim

[13] The sole issue before the judge was whether the drain on the sun deck was “within [the Gills’] dwelling” within the meaning of the sewer backup endorsement.

[14] Wawanesa admitted that the sun deck was part of the building and thus formed part of the “dwelling” as defined in the policy. That conclusion reflects the evident fact that the sun deck is part of the building partially occupied by the insureds as a private residence.

[15] After reviewing the principles of contractual interpretation that apply to insurance policies, the judge concluded:

[63] In my view, the relevant terms of the Sewer Backup Endorsement of the Policy are simple, clear and unambiguous. Coverage is afforded where there is “backing up or escape of water or sewage *within your dwelling*”. As was stated by Farrar J.A. in *Snow*, “in common parlance”, there is no ambiguity in the terms “dwelling” or “building”. Any average person reading the Policy would know and understand that “dwelling” and “building” mean the plaintiffs’ house.

[64] More significantly, any average person applying for insurance would understand the phrase “within your dwelling” to mean inside the dwelling or inside the house. For the average person, the determining factor in deciding whether something is “within” a dwelling would be its location relative to the

exterior walls of the dwelling. Something inside those exterior walls is “within”.
Something on the outside of the exterior walls is not “within” but is outside.
Put differently, any average person applying for insurance would know and understand that the phrase “within your dwelling” does *not* include areas outside the exterior walls of the house.

[65] I add that any average person viewing the sun deck area would immediately know and understand it to be outside, not inside, and would describe it as a patio, albeit a covered patio.

[66] It is not necessary to resort to dictionary definitions to conclude that the phrase “within your dwelling” means “inside”. Nevertheless, I am bolstered in this conclusion by the fact that “inside” is the first definition given to “within” in the *Concise Oxford English Dictionary*, (12th edition, Oxford University Press, 2011). Additionally, the *Concise Oxford English Dictionary* defines the word “patio” as “a paved outdoor area adjoining a house”, which very accurately describes the sun deck.

[67] The coverage afforded by the Sewer Backup Endorsement of the Policy is in respect of “sudden and accidental backing up or escape of water or sewage within your dwelling”. Giving these words their usual and ordinary meaning as they would be understood by the average person applying for insurance, there is only a single interpretation that emerges, namely, the backing up or escape of water must occur within the exterior walls of the dwelling or building. The backing up or escape of water that occurred here did not occur within the exterior walls of the dwelling. It occurred on the sun deck, an area that was outside the exterior walls of the basement of the dwelling or house. The sun deck may have been covered by the deck on the main floor of the house but it was fully exposed to the elements on two sides. In no sense would any average person applying for insurance say or conclude that this area was “within” the dwelling or building. To the contrary, the average person would readily understand that the sun deck, though partially protected, is an outdoor patio and not “within” the dwelling.

[Italic emphasis in original; underline emphasis added.]

[16] Having concluded that the sun deck was an outdoors area, the judge concluded it was not “within the dwelling” and dismissed the Gills’ action against Wawanesa.

Positions on Appeal

[17] The Gills submit that the judge erred in his analysis of the plain language of the sewer backup endorsement, and in particular, the words “within your dwelling”.

[18] Given that the judge accepted Wawanesa’s concession that the sun deck was part of the dwelling, and the drain was within the sun deck space, the Gills say the sun deck was “within [the] dwelling”. The Gills seek an order setting aside the

dismissal of their claim and declaring that Wawanesa indemnify them for their loss and, or, damage in accordance with the terms and conditions of the insurance policy, together with interest pursuant to the *Court Order Interest Act*, R.S.B.C 1996, c. 79.

[19] Wawanesa submits that the judge made no error in concluding that an average person would interpret the word “within” to mean inside exterior walls and that therefore the sun deck was not “within [the] dwelling”. Wawanesa seeks dismissal of the appeal.

Standard of Review

[20] The parties agree that the interpretation of this standard form insurance policy does not turn on a factual matrix specific to the parties and therefore it is a question of law for which the standard of review is correctness: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at 24; *McLean v. Canadian Premier Life Insurance Co.*, 2013 BCCA 264 at para. 12.

Analysis

[21] The principles that apply to interpretation of insurance policies are well established and were summarized in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 at paras. 22–24, and *Sabeen v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7 at para. 13. In summary:

- a) The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole.
- b) Determining whether the language of a policy has a clear meaning should be from the perspective of how the words would be understood by the average person applying for insurance, as opposed to insurance law experts.

- c) Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction. For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded. Courts should also strive to ensure that similar insurance policies are construed consistently. These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.

- d) When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer. One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly.

[22] In this case, the language of the policy has a clear meaning, reading the policy as a whole and from the perspective of the average person applying for insurance.

[23] Respectfully the judge did not interpret the policy as a whole and misapplied the average person perspective and therefore arrived at an incorrect interpretation.

[24] When the judge found that the average person would understand that “within your dwelling” meant inside the exterior walls of the house, and would view the sun deck as a patio outside the exterior walls, he appeared to be considering the perspective of an average person engaged in conversation about what was inside their house, not the average person considering the coverage afforded by the Wawanesa policy. The judge’s “average person” was erroneously disconnected from the language of the policy.

[25] The insurance policy as a whole shed light on the ordinary meaning of “within your dwelling”. The policy covered sewage or water backup both “within your dwelling or detached private structures” and:

- a) A detached private structure was not defined. There was nothing in the policy language that implied that a detached private structure was only a structure entirely enclosed by four walls.
- b) The policy defined dwelling as the building. The building included the sun deck, as admitted by Wawanesa. The sun deck therefore was included in the definition of dwelling.

[26] The judge’s analysis incorrectly reduced the plain language “within your dwelling or detached private structures” as turning on the word “within”. The judge focused on one part of the definition of “within” from the Oxford English Dictionary, as meaning “inside”. His analysis then equated “inside” to “indoors”.

[27] Respectfully, “within” or “inside” are simply prepositions expressing a relationship to the nouns they precede. The word “within” does not always equate to indoors as opposed to outdoors. It simply begs the question: within what? For example, to be “within Canada”, or “inside Canada” means to be anywhere in Canada, whether indoors or outdoors.

[28] The phrase “within your dwelling” in the insurance policy expressed a spatial relationship with the dwelling. Based on the definition of the dwelling as the building wholly or partially occupied as a private residence, an object on the sun deck was within the dwelling. This is so whether or not the sun deck was entirely enclosed from the elements. The drain on the sun deck was therefore within the dwelling. To hold otherwise is to disregard Wawanesa’s acknowledgement that the sun deck is part of the dwelling. It results in the sun deck being both part of the dwelling but entirely outside the dwelling, an inconsistent and nonsensical result.

[29] I return to the perspective of an average person purchasing insurance. If an average person purchasing insurance was told that the insurance policy defines the

dwelling as the building and the building includes the sun deck, and the person was then asked whether the drain on the sun deck was “within the dwelling”, the answer would be “yes”.

[30] This interpretation also is consistent with the manner in which the sun deck was built and used as a living area of the Gills home, and thus is consistent with the parties’ expectations.

Disposition

[31] I would therefore allow the appeal, set aside the judge’s order and grant the declaration sought by the Gills.

“The Honourable Justice Griffin”

I AGREE:

“The Honourable Mr. Justice Willcock”

I AGREE:

“The Honourable Mr. Justice Abrioux”