Date: 20240110
Docket: CI 19-01-22803
(Winnipeg Centre)
Indexed as: Osborne Towers Ltd. et al v.
Aviva Insurance Company of Canada et al
Cited as: 2024 MBKB 4

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

OSBORNE TOWERS LTD. and SHELTER CANADIAN PROPERTIES LIMITED, (plaintiffs) applicants, - and – AVIVA INSURANCE COMPANY OF CANADA, ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, STARR INSURANCE & REINSURANCE LIMITED, LLOYD'S QBE SERVICES INC., SYNDICATES 2003 AT LLOYD'S PER CATLIN CANADA and TEMPLE INSURANCE COMPANY, (defendants) respondents.	)	Brent C. Ross Robert J.E. Prokopanko for the applicants Charles A. Sherbo for the respondents JUDGMENT DELIVERED: January 10, 2024

GREENBERG J.

INTRODUCTION

[1] This motion relates to a claim for coverage under an insurance policy issued by the defendants for an apartment building owned by the plaintiff, Osborne Towers Ltd., and managed by the plaintiff, Shelter Canadian Properties Limited. The plaintiffs seek indemnification for the cost to repair parts of the building which repairs they say were required as a result of an insured loss. The underlying facts are not contentious, nor is

the quantum of damages. The contentious issue is the proper interpretation of the insurance policy. In this motion, the plaintiffs ask for a determination of that issue, which determination the parties agree will resolve the claim.

[2] For the reasons that follow, I find that the claimed costs are not covered by the terms of the policy.

BACKGROUND

[3] The property that is the subject of the policy is a 26-story residential tower. On September 2, 2017, there was a fire in the building. When the firefighters were extinguishing the fire, a valve in the building's fire hose system burst on the 7th floor, causing damage to the elevator shaft and to the mechanical duct shaft in the building's exit stairwell in the floors below. When the damage was investigated, it was discovered that the elevator shaft and mechanical duct shaft did not comply with the fire protection requirements of the Manitoba Building Code ("MBC") because they did not have the required fire-resistant wall assembly. In fact, the shafts did not comply with the building Code that was in effect in 1979 when the building was constructed.

[4] The architect retained to investigate the damage reported that, in order to provide proper fire protection, the shaft walls would have to be replaced at all floor levels. City of Winnipeg by-laws require compliance with the MBC. As a result, before issuing an occupancy permit, the City required the plaintiffs to remediate the shafts on all 26 floors of the building. The defendants covered the cost to bring the shafts up to Code on the first seven floors that were damaged by water. However, they declined coverage for remediation to the shafts on floors 8 to 26. The plaintiffs later arranged for the

remediation of the shafts on those floors at a cost of $228,676.50. They seek reimbursement for that amount.

[5] The plaintiffs and defendants each filed reports from architects who were asked to provide answers to the following questions:

- Are the shafts at issue in this matter single, contiguous assemblies?
- As it relates to the damage to, and repair of, the shafts, in your professional opinion:
    - Does the damage to the lower portion of the shafts constitute damage to the entire assembly?
    - Would a repair or upgrade of only a portion of the shafts create a life or safety concern for occupants of the building?

[6] The parties agree that both architects are qualified to provide opinion evidence on these questions. In his report for the plaintiffs, Robert Eastwood stated that the shafts at issue are contiguous assemblies for the full height of the building. He said that, to ensure the safety of the occupants, it was necessary to repair the shafts for all floors. Limiting repairs to the first seven floors would put occupants at risk.

[7] Evan Hanson, the defendants' expert, agreed that it was necessary to replace the entire shafts to make them Code compliant and safe. He also agreed that the fire separation in the shafts had to be "contiguous". However, he said that the fire separation did not have to be constructed in one uninterrupted piece for all floor levels. He said that the fact that the remediation of floors 8 to 26 was not done at the same time as floors 1 to 7 confirms this.

[8] The photographs of the elevator shaft show that the walls of the shaft while "contiguous" are not "continuous"; that is to say, the shaft is not constructed in one

uninterrupted piece. The concrete floor slab at each floor level separates the walls of the shaft at each floor.

ISSUES AND POSITION OF THE PARTIES

[9] The question which the parties ask the court to answer is whether the cost to repair the parts of the elevator and mechanical duct shafts that were not damaged by water (floors 8 to 26) is covered by the policy.

[10] The plaintiffs say that the cost is covered by the By-law Extension Endorsement to the policy, which covers the cost to repair, replace or reconstruct property that is damaged by an insured peril to the extent required to comply with applicable by-laws. They say the entire shafts had to be repaired to comply with the by-law, so the cost of doing so is insured.

[11] The defendants say that the endorsement requires them to cover the cost to ensure that property that is directly damaged by an insured peril complies with by-laws. Floors 8 to 28 were not damaged by the water. The fact that the deficiencies in those portions of the shafts were discovered in the course of inspecting the water damage does not bring their remediation within policy coverage. Further, they say that the deficiencies in the shafts on floors 8 to 16 pre-existed the issuance of the policy and are defects that are specifically excluded from coverage.

THE POLICY

[12] The insurance policy is an "all risks" policy which provides:

> This Policy, subject to the conditions and limitations as herein set forth, insures the property described herein against ALL RISKS of direct physical loss or damage occurring during the term of this Policy.

[emphasis added]

[13] The key issue in this motion is the interpretation of the By-law Extension Endorsement which provides:

> Should any by-law, regulation, ordinance or law be invoked as a result of any loss insured hereunder, the loss settlement shall include the cost of demolition, including demolition of undamaged structures, value of undamaged portion, clearing the site and repairs, replacement and reconstruction to the extent of the minimum requirement of such by-law, regulation, ordinance or law. If the use of the same site is not permitted the total payable shall include the cost of complying with the minimum requirements of any by-law, regulation, ordinance or law applicable to the site actually used. Payment for repairs, replacement and/or reconstruction shall not be made until these have been effected.
>
> . . .
>
> Except as otherwise provided by this endorsement all terms, provisions and conditions of this policy shall have full force and effect.
>
> [emphasis added]

[14] The defendants also rely on this clause which excludes coverage for latent defects:

> The policy does not insure against:
>
> (l) mechanical breakdown or derangement, latent defect, faulty material, faulty workmanship, inherent vice, gradual deterioration or wear and tear, but this exclusion shall not apply to damage resulting therefrom.

PRINCIPLES OF INTERPRETATION

[15] The general principles that apply to the interpretation of insurance policies were set out by Rothstein J. in ***Progressive Homes Ltd. v. Lombard General Insurance Company of Canada***, 2010 SCC 33:

> 22 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.

> 23 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.
>
> 24 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.
>
> [references omitted]

[16] The policy is to be interpreted by first looking at the terms of coverage, then at any exclusions and then at exceptions to exclusions (***Progressive Homes***, at para. 28). The onus is on the plaintiffs to show that the claim falls within policy coverage; the onus is on the defendants to show an exclusion applies (***Progressive Homes***, at para. 51).

[17] The parties have agreed that the applicants will not rely on the *contra proferentum* principle. While this is an unusual agreement, in the circumstances of this case, the agreement will not tie my hands because, as I will explain, the policy can be interpreted without considering the principle (***Roth v. Economical Mutual Insurance Company***, 2016 ABCA 399, para. 24).

ANALYSIS

[18] There is no dispute that the damage to floors 1 to 7 is covered by the policy and that the endorsement requires the defendants to pay for the cost to bring those portions of the shafts up to Code. The issue is whether the endorsement requires the defendants to pay for the cost to bring the undamaged portions of the shafts up to Code. The

defendants say the endorsement cannot be read that way. They rely on cases that have interpreted similar endorsements.

[19] In ***Roth***, the plaintiff's building was damaged by storm sewer overflow, an insured peril under their policy. In the course of inspecting the damage, the adjuster discovered potential building Code violations. On further inspection by the municipality, it was determined that the building was structurally unsound. In particular, the slab foundation had been improperly poured and the wood frame, having been exposed to moisture for an extended period of time, had rotted. The parties agreed that the deficiencies were not caused by the storm sewer overflow. The deficiencies pre-dated the event. However, the plaintiff argued that the by-law endorsement covered loss that was discovered as a result of an insured peril even if it was not caused by the insured peril. The court rejected this argument, finding that such an interpretation would be contrary to the reasonable expectations of the parties. The court stated:

> 23 It cannot reasonably be suggested that either the insurer or insured would have anticipated recovery for pre-existing deficiencies in a building where the peril insured against (water damage, in this case) did not actually create the bylaw issue. Extending coverage in such cases would require that the insurer determine in each case whether the property complied with all relevant bylaws, as it would be responsible for the costs of remedying any and all deficiencies unearthed as part of subsequent damage insured against. Quite apart from the fact that this would be practically impossible in most cases, it would also effectively turn an insurer into a guarantor of construction defects and building Code violations. Insurance indemnifies against risk whereas requiring an insurer to be responsible for hidden damage pre-existing the fortuitous event in question is more in the nature of a warranty: *University of Saskatchewan v Fireman's Fund Insurance Co. of Canada* (1997), [1998] 5 WWR 276 (Sask. C.A.) at paras 36-37. This cannot be reasonably expected of an insurer.
>
> . . .

> 27 In summary, "the enforcement of the minimum requirements of any by-law, regulation, ordinance or law" is not a separate stand-alone insured peril. Nor is it sufficient that a municipal decision to enforce a bylaw arose not as a result of a peril insured against but as a result of uncovering damage caused by the peril insured against. In other words, it is not enough that the damage was discovered by an inspection undertaken because of the insured peril. Rather, coverage exists where damage has been caused by a "peril insured against" and that damage requires remedial work or replacement to the standard mandated by the minimum requirements of any applicable by-law, regulation, ordinance or law in force at the time of the loss. That was not the situation here. The loss was not caused "as a result of a peril insured against"; indeed, it was expressly excluded by virtue of section IV of form 6557.

[20] In ***852819 Alberta Ltd. v. Sovereign General Insurance Company***, 2017 ABCA 76, leave to appeal to S.C.C. denied [2017] S.C.C.A. No. 146 (WL), the court, following ***Roth***, came to a similar conclusion. In that case, the insurer covered the cost to repair ice damage to a portion of the roof and trusses of a multi-bay commercial building. A building inspector then advised the plaintiff that the entire roof structure had to be repaired because it was not Code compliant. The court found that the policy did not cover repairs to the rest of the roof because, although the deficiency was discovered as a result of the damage caused by the insured peril, it was not caused by that peril.

[21] The plaintiff here argues that the wording of the policy extensions in ***Roth*** and ***852819*** is different than the wording in the endorsement in this case. This is the extension in ***Roth*** (para. 7):

> 3. Contingent Liability from Enforcement of Building By-laws:
>
> This form shall, as a result of a peril insured against, extend to indemnify the insured for:
>
> (A) loss occasioned by the demolition of any undamaged portion of the buildings or structures;
>
> (B) cost of demolishing, and clearing the site of any undamaged portion of the buildings or structures; or

(C) any increase in the cost of repairing, replacing, construction or reconstructing the buildings, or structures on the same site or on an adjacent site, of like height, floor area and style, and for the like occupancy;

arising from the enforcement of the minimum requirements of any by-law, regulation, ordinance or law which:

(i) regulates zoning or the demolition, repair or construction of damaged buildings or structures; and

(ii) is in force at the time of such loss or damage.

[22] The wording of the extension in ***852819*** was similar to ***Roth***. The plaintiffs say that the by-law extensions to the policies in those cases are narrower than the extension in the case at bar because, while they cover the cost to demolish, repair or replace undamaged portions of buildings, they do not cover the "value" of the undamaged portions. But the rationale for the decisions is not based on the extent of the coverage in the extensions, but on what triggers the coverage. The Alberta Court of Appeal held that, "[c]ompliance with by-laws is not an independent insured peril, and any damage or cost associated with such enforcement must be related to the insured peril" (***Roth***, at para. 25).

[23] In my view, to the extent that there is any difference in the wording of the extensions in those cases and the extension in this case, it is even clearer in this case that the policy does not provide stand-alone coverage for by-law required upgrades. The endorsement extends coverage only where a by-law is "invoked as a result of any loss insured" under the policy. That is to say, property, which is directly damaged by an insured risk, is repaired to the extent required by the by-law.

[24] The plaintiffs argue that, in order to repair the water damaged portion of the shafts and make them Code compliant, it is necessary to remediate the entire shafts to bring

them up to Code. They rely on the opinion of Mr. Eastwood that remediation of the entire shafts is necessary to protect the safety of building occupants and firefighters who are engaged in the course of a fire. Remediating only floors 1 to 7 would not resolve the safety risk to occupants in the event of a fire. But that is not disputed. The reason that the City would not issue an occupancy permit until all floors of the shafts complied with the Code is because the Code requirements are meant to address fire safety issues. But that does not mean that the cost of remediating the entire portion of the shaft is covered by the policy. Had there been no fire and no water damage and the City found out that the shafts did not comply with the Code, it would have undoubtedly required the plaintiffs to remediate the deficiencies.

[25] As such, the question is whether it was necessary to repair the entire shaft in order to address the water damage on floors 1 to 7, regardless of the by-law issue. In that regard, the experts were asked whether the shafts in this case were single, "contiguous" assemblies. Mr. Eastwood said that they were. Mr. Hanson agreed, but said:

> The last concept is the construction that establishes the fire separation. At issue are not concepts 1 [that the space contained by the shaft had to be contiguous] and 2 [that the fire separations had to be contiguous] - Mr. Eastwood has made the case that these characteristics of the shaft must be contiguous in order to fulfil their intended purpose, and he is correct. Rather it is concept 3 that is at issue, namely the degree to which the defective construction that established the boundaries of the shaft was required to be uninterrupted.
>
> The Code expects that the space contained by the shaft is contiguous. The Code also requires that a fire separation be established continuously around the shaft. The Code does not, however, expect that the fire separations be constructed of one interrupted piece for all 26 storeys of the building.

[26] This is not a case where the experts disagreed on the questions that are relevant to interpreting the policy. They essentially agreed on the questions put to them - that the shafts were contiguous assemblies, and that the entire shafts had to be remediated to ensure Code compliance and fire safety. But the question that should have been put to both experts and was answered more directly by Mr. Hanson, is not whether the shafts had to be "contiguous" assemblies, but whether they had to be "continuous" uninterrupted assemblies so that they could not be repaired or replaced piecemeal. Mr. Hanson said that the MBC did not require the shafts to be continuous assemblies:

> Like many other parts of a building, the shafts at 7 Evergreen are not a monolithic product but are comprised of individual sections of fire-rated wall that abut one another horizontally and are stacked vertically to the desired height. This is standard construction practice that has been used for centuries and which is understood and contemplated in the Code. Particularly as it relates to shafts, the Code is quite clear that interruptions of fire separations at the floor level are expected.

[27] The provisions of the MBC to which Mr. Hanson refers support his opinion:

> 3.1.6.1.(3) Where a shaft, including exit enclosures, penetrates a fire separation, it shall extend through any horizontal service space or any other concealed space and shall terminate so that a smoke-tight joint is provided at the point where the shaft abuts on or intersects the floor, roof slab or deck except as provided in Subsection 3.5.3 where the shaft pierces through a roof assembly.

[28] The photos of the shafts show that they were comprised of a series of assemblies. The concrete slab at each floor created natural divisions in the assembly. Perhaps the most significant fact in determining whether repairing the damage caused by the water required the entire shafts to be "upgraded' is that the repairs to floors 8 to 26 were not

undertaken at the same time as the repairs to the first seven floors. This confirms that the shafts were not single continuous units.

[29] In my view, the unambiguous wording of the by-law extension is that it covers the cost of making property Code complaint only where that property is directly damaged by an insured risk, that is to say, where the loss is an insured loss under the policy. To the extent that there is any ambiguity in the wording of the endorsement, I agree with the court in ***Roth*** that the parties could not have reasonably expected that the policy would cover pre-existing deficiencies in property where the insured peril did not create the by-law issue. The difference in the wording of the policy extension in ***Roth*** and this case is not relevant to the court's rationale in ***Roth*** and should not lead to a different conclusion here.

[30] Because the policy can be interpreted on the basis of the above principles, it is not necessary to consider *contra proferentum*.

[31] The defendant also relies on the policy exclusion for latent defects. As the plaintiffs have not shown that the claimed loss falls within policy coverage, there is no need to consider the exclusion.

CONCLUSION

[32] The cost to remediate the elevator and mechanical shafts on floors 8 to 26 to make them Code compliant is not covered by the insurance policy.

[33] Costs may be spoken to if they cannot be agreed upon.

_____J.