COURT OF APPEAL FOR ONTARIO

CITATION: Construction Distribution & Supply Company Inc. v. Continental Casualty Company (CNA Insurance), 2024 ONCA 405
DATE: 20240522
DOCKET: COA-23-CV-1043

Huscroft, Miller and Favreau JJ.A.

BETWEEN

Construction Distribution & Supply Company Inc.
and Discounter's Pool & Spa Warehouse Inc.

Applicants (Respondents)

and

Continental Casualty Company o/a CNA Insurance

Respondent (Appellant)

W. Colin Empke and Kathleen Lefebvre, for the appellant

David N. Bleiwas, for the respondents

Heard: May 13, 2024

On appeal from the judgment of Justice William S. Chalmers of the Superior Court of Justice, dated September 1, 2023.

REASONS FOR DECISION

[1] This is an appeal from the judgment of the application judge declaring that the appellant has a duty to defend the respondents in an action brought by Highland Furniture for damages caused to its property by a leak of liquid chlorine from the respondents' premises. The only issue on appeal is whether the trial judge erred in concluding that the pollution exclusion clause in the commercial general liability policy issued by the appellant did not apply.

[2] The exclusion clause provides as follows:

> Pollution Liability
>
> (1) **Bodily injury or property damage** arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of **pollutants**:
>
> > (a) At or from any premises, site or location which is or was at any time, owned or occupied by, or rented or loaned to you;
> >
> > At or from any premises, site or location which is or was at any time used by or for you or others for the handling, storage, dispersal, processing or treatment of waste;
>
> Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or
>
> At or from any premises, site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:
>
> > (1) if the **pollutants** are brought on to the premises, site or location in connection with such operations by you, a contractor or subcontractor; or

> (2) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize, or in any way respond to, or assess the effect of **pollutants**.
>
> Any **loss**, cost or expense arising out of any government direction or request, demand, or that you or others test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize or in any way respond to, or asses the effect of **pollutants**. Sub-paragraphs (a) and (d)(1) of paragraph 1 of this exclusion do not apply to **bodily injury** or **property damage** caused by heat, smoke or fumes from a fire which becomes uncontrollable or breaks out from where it was intended to be.
>
> As used in this exclusion, **pollutants** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

[3] The appeal proceeded on the basis of the parties' agreement that the standard of review to be applied is correctness. The parties' agreement is not binding on the court, but in the circumstances of this case the standard of review is not determinative of the outcome. The application judge did not err in interpreting the contract.

[4] The application judge found that "the commonly understood definition of pollution is the escape of an irritant or contaminant into the natural environment that causes damages related to the clean-up of the contamination, and the costs of investigating, testing, and monitoring the contamination." In other words, he

said, “an ‘irritant or contaminant’ does not become ‘pollution’ unless the substance enters the natural environment, and there is a requirement to investigate, test and clean-up the substance.”

[5] The appellant argues that the application judge construed the exclusion too narrowly, as applying only where an irritant or contaminant is released into the natural environment.

[6] The appellant’s position is that the pollution exclusion does not capture damage caused by a negligent act or omission in the course of regular business activities that incidentally involves pollution if the insured’s business does not normally involve a pollution risk. However, the appellant argues that the exclusion clause applies in this case because the respondents were storing a large volume of liquid chlorine, which it says is a pollutant, and the damage caused by the liquid chlorine to the adjoining business is therefore a form of pollution. Further, the appellant claims that the pollution was not incidental to the respondents’ business because it arose from a known risk of pollution associated with the storage of liquid chlorine. The appellant says that the true nature of the claim is accordingly a claim for damages arising out of a form of pollution.

[7] We do not agree.

[8] The application judge’s finding that the exclusion clause does not apply in this case is supported by the purpose of the insurance and the respondents’

reasonable expectations. The claim in this case is essentially a claim for damages arising out of the respondents' alleged negligence in the course of conducting their regular business – the very sort of claim that the respondents were entitled to think would be covered by the policy, unless their regular business activities included an inherent risk of pollution. In this case, while liquid chlorine can cause damage if spilled, its storage for the purpose of resale does not comprise an inherent risk of pollution nor, more importantly, does Highland Furniture's claim, upon which the coverage assessment is to be based, plead the existence of such a risk. The application judge's finding is consistent with this court's decisions in *Zurich Insurance Co. v. 686234 Ontario Ltd.*, 62 O.R. (3d) 447, (C.A.) and *Hemlow Estate v. Co-operators General Insurance Company*, 2021 ONSC 664, aff'd 2021 ONCA 908, 160 O.R. (3d) 467. This is not a case like *ING Insurance Company of Canada v. Miracle*, 2011 ONCA 321, 105 O.R. (3d) 241, in which the respondent was engaged in an activity (storing gasoline in underground containers) that carried a well-known risk of pollution. Moreover, unlike Highland Furniture's claim, the claim in that case was for damage to the natural environment, contamination of the soil, and costs of investigating and rectifying the lands.

[9] In the circumstances, the application judge correctly found that there was at least a "mere possibility" that the claim against the respondents is covered by the policy.

[10] The appeal is dismissed. The respondents are entitled to costs in the agreed amount of $15,000, all inclusive.

"Grant Huscroft J.A."
"B.W. Miller J.A."
"L. Favreau J.A."