THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Whitworth Holdings Ltd. v. AXA Pacific Insurance Company,* 2014 BCSC 1696

Date: 20140909
Docket: 92172
Registry: Kelowna

Between:

Whitworth Holdings Ltd.

Plaintiff

And

AXA Pacific Insurance Company; and in French, AXA Pacifique Compagnie D'Assurance, Grain Insurance and Guarantee Company, Lloyd's Underwriters, Intact Insurance Company and, in French, Intact Compagnie D'Assurance, Economical Mutual Insurance Company and, in French, Economical, Compagnie Mutuelle D'Assurance, Gore Mutual Insurance Company, Scottish & York Insurance Co. Limited/Compagnie D'Assurance Scottish & York Limtee, Canadian Northern Shield Insurance Company Le Bouclier Du Nord Canadien, Compagnie D'Assurance, and The Wawanesa Mutual Insurance Company

Defendants

Before: The Honourable Madam Justice Harris

Reasons for Judgment

Counsel for the Plaintiff:	D. Bloor L. Shurian (A.S.)
Counsel for the Defendants:	D. J. Smith S. T. Frost
Place and Date of Trial/Hearing:	Vancouver, B.C. April 9, 2014
Place and Date of Judgment:	Kelowna, B.C. September 9, 2014

I. OVERVIEW

[1] This is a summary trial application brought by the defendant insurers to dismiss the plaintiff's claim under an all-risk property insurance policy against them. The plaintiff's insured commercial property was damaged in a fire. As a consequence of the fire, pollutants escaped onto the premises of that property.

[2] The principle issue is whether the property insurance policy provides coverage for the loss or damage claimed by the plaintiff in respect of on-premises pollutant clean-up, beyond the maximum $25,000 provided by an extension of coverage for pollutant clean-up. For the reasons that follow, I find that it does not.

II. BACKGROUND

[3] The plaintiff, Whitworth Holdings Ltd. ("Whitworth"), was issued a commercial insurance policy (the "Policy") by the defendant AXA Pacific Insurance Company ("AXA Pacific"). AXA Pacific (now Intact Insurance Company) was the lead underwriter under the Policy. The Policy included both commercial general liability coverage (the "CGL Policy"), and property insurance for various properties owned by the plaintiff (the "Property Policy"). AXA Pacific assumed 12.5% of the Property Policy and 100% of the CGL Policy. The other defendant insurers together assumed the remainder of the Property Policy.

[4] This application concerns only the Property Policy.

[5] A number of properties were insured under the Property Policy, including the plaintiff's property known as the Stewart Centre located at 1851 to 1855 Kirschner Road, Kelowna, B.C.

[6] On July 31, 2010 a fire substantially damaged the building at 1851 Kirschner Road in Kelowna, B.C. (the "Fire"). The Fire, which started at 1851 Kirschner Road, destroyed that building and also caused damage to the adjacent three storey structure at 1855 Kirschner Road. At the time of the Fire, the tenants of 1851 Kirschner Road included a welding supply store, irrigation supply store, and Univar Canada Ltd. ("Univar"), a wholesaler of chemicals including fertilizers, pesticides and

herbicides. As a consequence of the Fire, chemicals escaped from Univar's premises, causing pollution damage.

[7] The plaintiff submitted signed and commissioned interim proofs of loss, dated September 7, 2010, November 10, 2010 and November 4, 2011, claiming a total of $2,779,169.23 under the Property Policy.

[8] A final proof of loss (the "Final Proof of Loss"), dated August 23, 2012, claimed a further $2,418,465.39 under the Property Policy.

[9] The total claim made by the plaintiff for loss and damage under the Property Policy was $5,197,634.62, which included the full $25,000 payable pursuant to an extension of coverage under the Property Policy for "On 'Premises' Pollutant 'Clean-up'". Cheques totalling $5,197,634.62 were provided to the plaintiff by the defendant insurers.

[10] This action was commenced on July 29, 2011. In the notice of civil claim filed against the defendants, the plaintiff claimed indemnity under the Policy for all losses duly covered under the Policy.

[11] It appears that in or about August through September 2012, the plaintiff had a number of discussions with the defendants' property adjuster, Stuart G. Macdonald, regarding the Final Proof of Loss payments and the prospect of filing of a notice of discontinuance in the present action.

[12] In the affidavit evidence of Roy Sinden, general manager of the plaintiff, he deposed that Whitworth did not file a notice of discontinuance due to concerns about the scope of pollution coverage afforded under the Policy: to Whitworth pursuant to the Property Policy; and to third parties pursuant to the CGL Policy.

[13] It appears there are a number of other ongoing actions related to the Fire.

[14] On October 12, 2011, the plaintiff commenced an action in this court against Univar (the "Univar Action"), claiming that as a result of the Fire, chemicals stored on Univar's premises escaped from their storage containers and caused damage to the

plaintiff's property. Univar filed a response and counterclaim raising, among other things, the plaintiff's alleged failure to claim under the Policy for the pollution damage.

[15] Two further actions have been filed in this Court against the plaintiff by Univar and Pro Source Irrigation Supply Ltd., tenants of the Stewart Centre. In those actions the tenants claim, *inter alia*, for tenant contents destroyed in the Fire (the "Tenant Content Actions").

[16] On January 16, 2013, which was the date the last payment was forwarded to the plaintiff under the Final Proof of Loss, Mr. Macdonald wrote to the plaintiff to provide the defendants' position on pollution coverage under the Policy, stating:

> With respect to any prospective pollution claims, the insurer has taken the position that the Policy limits any amount payable for pollution clean-up on the property to $25,000, and any third party liability claims for pollution are excluded.
>
> We have therefore provided you with cheques totalling $5,197,634.62, which constitute the full amount set out in the Final Proof of Loss. The insurer takes the position that this is the full insurance proceeds due and payable under the Policy for this loss and is inclusive of the full $25,000 limit for pollution clean-up.
>
> If you are in agreement with the above, and agree that you have been fully paid out under the Policy for this loss, then please sign and return the enclosed Consent Dismissal Order dismissing your claims against the insurer for coverage under the Policy.
>
> If you are unwilling to accept the insurer's position on the scope of the pollution clause, then we have instructions to refer this matter to legal counsel to proceed with a Summary Trial seeking the Court's interpretation of pollution coverage under the Policy.

[17] The plaintiff refused to execute the consent dismissal order, and on February 5, 2013, counsel for the plaintiff wrote to Mr. MacDonald setting out the plaintiff's position on pollution coverage under the Property Policy and requesting, *inter alia*, that the insurer defend the Tenant Content Actions. That letter read in material part as follows:

> As you are aware, our client has commenced an action against Univar Canada Inc. in respect of its damages stemming from pollution damage and clean up … In Univar's Response to our client's Notice of Civil Claim and in

> its Counterclaim, Univar has pled that our client failed to claim against its insurance or failed to obtain appropriate insurance. If this matter proceeds to trial, we anticipate that the issue of the scope of pollution coverage under the Policy will be an issue to be determined by the Court. For the reasons set out below, we believe there is an argument that the costs associated with pollution damage and clean-up are covered under the Policy. Accordingly our client cannot agree to a Consent Dismissal Order of the Action in the circumstances, as it would leave our client exposed in the Univar Action if the Court were to determine that said costs are covered under the Policy.

[18] On July 12, 2013, counsel for the defendants wrote to counsel for the plaintiff, outlining the defendants' contrary position on pollution coverage under the Property Policy, requesting again that a consent dismissal order be agreed to in the present action.

[19] It appears from the affidavit evidence of Roy Sinden that, following discussions between counsel for the plaintiff and representatives of Intact Insurance Company (formerly AXA Pacific), the CGL insurer has agreed to defend the plaintiff in the Tenant Content Actions.

[20] On March 21, 2014, the defendants filed this application for summary trial. The plaintiff's application response was filed April 2, 2014, and the matter was heard on April 9, 2014. I reserved judgment at the end of the hearing.

III. Issue

[21] The defendants take the position that the plaintiff's claim pursuant to the Property Policy should be summarily dismissed against them, pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Their position is that all insured losses advanced by the plaintiff under the Property Policy have been fully paid and the plaintiff's claim for indemnity under the Property Policy ought to be dismissed.

[22] According to the defendants, the Property Policy does not provide further coverage for pollution clean-up. They submit that if such coverage is afforded under the Policy, such a claim would have to be made under the CGL portion of the Policy.

[23] The plaintiff's notice of civil claim is not limited to the Property Policy, as it seeks indemnity for "all losses duly covered under the Policy". Despite the defendants' notice of application which seeks an order that "the plaintiff's action against the defendants be dismissed pursuant to Rule 9-7", the defendants confirmed in oral submissions that they are not seeking dismissal of the claim against the CGL insurer and that this application solely concerns the Property Policy.

[24] In its application response, the plaintiff submits that the Property Policy provides further coverage for on premises pollution clean-up. Though reference in the statement of facts of the notice of civil claim is only made to losses in relation to coverage for gross rents and the replacement cost of the building, the plaintiff submits at para. 18 of its application response that:

> In the event that this Honourable Court determines that the Pollution Damage suffered by Whitworth is covered under the Property Policy and the Applicants' decline to make payment to Whitworth for same, Whitworth will … amend (or if necessary, apply for leave to amend) its pleadings in [this action] to further particularize its claims for indemnity under the Policy for the Pollution Damage.

[25] Thus, the main issue is pollution coverage under the Property Policy. I will first set out the relevant provisions of the Property Policy, and then outline the parties' positions on this issue.

IV. RELEVANT PROPERTY POLICY PROVISIONS

[26] The Property Policy is an all risks property insurance policy under form COM-2000A. The preamble to COM-2000A states:

> Words in quotation marks have special meaning as described in Section 17, Definitions, or in items e) and g) of Section 6, Extensions of Coverage

[27] Under section 3 of COM-2000A, "Insured Perils" is stated as follows:

> This Form, subject to all terms, limitations, exclusions and conditions of the Policy, and in conjunction with all applicable terms, provisions and conditions of form COM-3, insures against all risks of direct physical loss of or damage to the insured property.

[28] Under paragraph 1(a) of COM-2000A, "Insured Property" is stated as follows:

> This Form insures property owned by the Insured or in the care, custody or control of the Insured, or for which the Insured has a legal obligation to insure, while such property is at "Premises" during the Policy Period:

[29] The Property Policy contains a pollution exclusion clause at section 5 of COM-3 General Conditions and Limitations (the "Pollution Exclusion Clause"):

> 5. POLLUTION EXCLUSION CLAUSE: Unless otherwise indicated elsewhere in the Policy:
>
> a) This Policy does not insure against direct or indirect, damage, cost or expense arising out of the clean-up, removal, containment, treatment, detoxification, decontamination, stabilization, neutralization, or remediation resulting from any actual, alleged, potential, or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release, or escape of pollutants, but this exclusion does not apply to physical loss or damage, to the property insured, caused directly by an insured peril, rupture of pipes or breakage of apparatus, not otherwise excluded elsewhere in the Policy, theft or attempt thereat, or accident to transporting conveyance. Damage to pipes caused by freezing is insured provided such pipes are not otherwise excluded elsewhere in the Policy.
>
> b) Further, this Policy does not insure against direct or indirect loss, damage, cost, or expense, for any testing, monitoring, evaluation or assessing of an actual, alleged, potential, or threatened spill, discharge, emission, dispersal, seepage, leakage, migration release or escape of pollutants.
>
> c) Pollutants "means any solid, liquid, gaseous or thermal irritant, or contaminants including odour, vapour, fumes, acids, alkalis, chemicals and waste. "Waste" includes materials to be recycled, reconditioned or reclaimed.
>
> [Emphasis added.]

[30] The underlined portion above constitutes an exception to the Pollution Exclusion Clause (the "Exception"). Fire is a named peril under section 17(n) of COM-2000A.

[31] Section 6 of COM-2000A provides for extensions of coverage as follows:

> Subject to all other terms and conditions stated in this Policy, this Form also provides the following Extensions of Coverage. If, for any given extension, a Limit of Liability or amount of insurance is specified in the Declarations, the Insurer shall not be liable for more than the limit or amount so specified in respect of any one occurrence unless otherwise specifically state. In the event that coverage provided under any extension is more specifically and separately insured elsewhere in this Policy, then the relevant extension under this Section 6 shall not apply. Unless noted to the contrary, the amount of insurance shown for each extension is the Insurer's maximum limit of liability in any occurrence.

[32] Paragraph 6(e) of COM-2000A provides for an extension of coverage in respect of on-premises pollutant clean-up as follows (the "Pollution Extension Clause"):

> On "Premises" Pollutant "Clean-up": The insurance under this Form is extended to insure up to a maximum of $25,000 for the cost or expenses incurred by the Insured to engage in "Clean Up" from land or water, at "Premises", but only if the spill, discharge, emission, dispersal, leakage, release or escape of pollutants:
>
> i. arises out of loss of or damage to insured property on "Premises" and for which insurance for such loss or damage is afforded under the Form to which this extension is attached; and
>
> ii. is sudden, unexpected and unintended from the standpoint of the Insured; and
>
> iii. first occurs during the Policy Period.
>
> The Insurer shall not be liable under this Extension 6 e) [sic] for:
>
> > (1) expenses for "Clean Up", away from or beyond "Premises", arising out of any spill, discharge, emission, dispersal, leakage, release, or escape of pollutants on or emanating from "Premises", or which began prior to the Policy Period;
> >
> > (2) any fines, penalties, punitive or exemplary damages;
> >
> > (3) expenses for "Clean Up" at or from "Premises", or any site or location which is or was at any time used by or for the Insured, or others, for the purpose of handling, storage, disposal, processing, or treatment of waste;
> >
> > (4) costs to test for, monitor, or assess the existence, concentration, or effects of "pollutants", however, this exclusion shall not apply if it has been determined that an insured loss has occurred;
> >
> > (5) more than the "Limit of Liability" specified in this Extension 6 (e).
>
> Reporting Period: It is a condition precedent to recovery under this Extension 6 (e), that all expenses insured by this extension must be incurred and reported to the Insurer within 180 (one hundred eighty) days of the spill, discharge, emission, dispersal, leakage, release, or escape of pollutants for which "Clean Up" expenses are claimed.
>
> Definitions: For the purpose of this Extension 6 e):
>
> "Clean Up" means removal, containment, treatment, detoxification, stabilisation, neutralisation, or remediation of "pollutants", including testing which is integral to these processes;
>
> "Pollutant" (in the singular of [sic] the plural) means as defined under Clause 5(c) of COM 3 of the Policy to which this Form is attached.

V. Parties' Positions

Plaintiff

[33] The plaintiff's overall position is that on-premises pollution damage is excluded by the Pollution Exclusion Clause, but reinstated by the Exception. Further, in these circumstances the Pollution Extension Clause does not operate to limit coverage to a maximum of $25,000.

[34] First, the plaintiff submits that the property insured under the Property Policy is not restricted to the "Building", which is a defined term in section 17 of COM-2000A.

[35] The plaintiff refers to paragraph 1(a) of COM-2000A, which defines the term "Insured Property" as "property owned by the Insured or in the care, custody, or control of the Insured, or for which the Insured has a legal obligation to insure, while such property is at 'Premises' during the Policy Period".

[36] "Premises" is defined in paragraph 17(o) as "the entire area within the property lines at the location(s) of the Insured described in the Declarations, including vehicles of the Insured within 100 metres of such area and also including areas under adjoining sidewalks and driveways, and in the open within 304.8 metres (1000 feet) thereof".

[37] The term "property" is not defined in the Property Policy.

[38] The plaintiff submits that because "property" is not defined in the Property Policy, the parties' intended the term to be given its ordinary meaning. The plaintiff refers to definitions of the term from the *Concise Oxford Dictionary* and *Black's Lack Dictionary* which would include the land and soil on the premises of the Stewart Centre. Whitworth highlights that section 4 of COM-2000A lists types of property that are excluded from coverage, and notably omits land and soil. It further argues that if COM-2000A was intended to insure only the "Building" located at "Premises", the term "Building" would have been used at paragraph 1(a). Instead, paragraph 1(a) does not expressly restrict "Insured Property" to the "Building".

[39] Second, the plaintiff submits that the proximate cause of all pollution damage was an insured peril, fire, triggering the Exception to the Pollution Exclusion Clause. Referencing the plain meaning of the Exception, the plaintiff argues that the on-premises pollution damage was "caused directly by an insured peril" because, but for the Fire occurring, the pollutants would have never escaped. The plaintiff relies upon three authorities in support of the above argument: *Bell Pole Company v. Commonwealth Insurance Co.*, 2003 BCCA 7; *Drumbolus v. Home Insurance Co.* (1916), 37 O.L.R. 465; and *Shea v. Halifax Insurance Co.*, [1958] O.J. No. 609 (Ont. C.A.).

[40] Third, the plaintiff submits that the Pollution Extension Clause is not applicable to its claim for on-premises pollution damage. Whitworth refers to the introductory language of that clause, which reads "The insurance under this Form is extended to insure up to a maximum of $25,000 …" (emphasis added). It is the plaintiff's submission that the case law supports not giving effect to the Pollution Extension Clause in this case, as the clause is a "limit masquerading as an extension of coverage". Alternatively, Whitworth argues that it is at least ambiguous as to whether the Pollution Extension Clause is intended to limit coverage for on-premises pollution damage or to provide additional coverage not provided elsewhere, limited to an amount of $25,000.

Defendants

[41] The defendants' position is that all insured losses advanced by the plaintiff under the Property Policy have been fully paid, and that the plaintiff's claim pursuant to the Property Policy should be summarily dismissed.

[42] The defendants clarified in their reply oral submissions that they do not suggest coverage under the Property Policy is confined to the building. The thrust of their submission concerns the Exception to the Pollution Exclusion Clause.

[43] With respect to the Exception, the defendants say that an exception does not create coverage, but brings an otherwise excluded claim back within coverage where the claim falls within the initial grant of coverage in the first place: *Progressive*

Homes Ltd. v. Lombard General Insurance Co. of Canada, 2010 SCC 33. It is the defendants' submission that the exception operates to ensure that there is still coverage for the fire damage, but it does not create coverage for the clean-up of pollutants escaping from the property where there is no direct damage caused by fire, such as escaped pollutants that contaminate non-fire damaged parts of the property such as the soil.

[44] The defendants take issue with the "proximate cause" analysis advanced by the plaintiff in respect of the Exception. They cite *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.,* [1990] 1 S.C.R. 814 and *Derksen v. 539938 Ontario Ltd.,* [2001] 3 S.C.R. 398, decisions of the Supreme Court of Canada expressing doubt as to the utility of such an analysis, in addition to the Court of Appeal's decision in *Dawson Truck Repairs Ltd. v. Insurance Corporation of British Columbia*, 2008 BCCA 209.

[45] With respect to the Pollution Extension Clause, the defendants take the position that it shows the intention of the parties that on-premises pollutant clean-up be excluded under the Pollution Exclusion Clause where there is no direct physical loss or damage by an insured peril, but that limited coverage be extended for the cost of clean-up from the escape of pollutants that "arises out of loss of or damage to insured property on 'Premises' and for which insurance for such loss or damage is afforded under the Form to which this extension is attached …" The defendants argue their interpretation of the Pollution Clause is consistent with the meaning they have ascribed to the Pollution Exclusion Clause and Exception thereto, whereas the plaintiff's suggested interpretation of the Pollution Extension Clause would render it meaningless.

[46] The defendants also make a submission on the effectiveness of the Pollution Extension Clause at limiting coverage to $25,000. They say the case law cited by the plaintiff for the proposition that the Pollution Extension Clause is a limit masquerading as an extension of coverage is distinguishable, because the court in

those cases found the extensions to be ambiguous as to the stipulation of a sub-limit, whereas no such ambiguity exists in the present case.

VI. ANALYSIS

[47] The test for disposition by way of summary trial is set out in Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The court may grant judgment in favour of any party, either on an issue or generally, unless it is unable to find the facts necessary to decide the issues of fact or law or it would be unjust to decide the issues on the application. In this case the parties agree on the relevant facts and I am satisfied that I am able to decide the case on the facts set out in the affidavit material.

[48] The issue before the court is whether or not the plaintiff's claim under the Property Policy should be summarily dismissed. That issue turns on an interpretation of the Property Policy, and in particular the provisions of that policy which pertain to pollution damage.

[49] The principles governing the interpretation of insurance contracts were set out in *Progressive Homes Ltd.* at paras. 22-24:

> 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 (*Scalera*, at para. 71).
>
> 23 Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), 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 (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). 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 (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are

> interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

[50] The insurance policy at issue in *Progressive Homes Ltd.* was a CGL policy. The Court stated that CGL insurance policies typically consist of several sections: types of coverage, followed by specific exclusions to coverage, and then exceptions to exclusions. Exclusions do not create coverage – they bring an otherwise excluded claim back within coverage, where the claim fell within the initial grant of coverage. In light of this alternating structure, the Court stated it is generally advisable to interpret the policy in the order described above: coverage, exclusions, and then exceptions: *Progressive Homes Ltd.* at para. 28. These general comments also apply to the interpretation of property insurance policies.

Interpreting the Property Policy

[51] The defendants do not suggest that coverage under the Property Policy is confined to the "building". I am satisfied that coverage under the Property Policy extends to land and soil on the premises, for the reasons raised by the plaintiff.

[52] In my view, the principal issue is whether the plaintiff's claim for on-premises pollution damage to the insured property is reinstated by the Exception.

[53] This being an all-risk policy, it would appear that pollution damage falls within the initial grant of coverage.

[54] Pollution damage is then excluded pursuant to the Pollution Exclusion Clause, which states "This Policy does not insure against direct or indirect, damage, cost or expense arising out of the clean-up, removal, containment, treatment, detoxification, decontamination, stabilization, neutralization, or remediation resulting from any actual, alleged, potential, or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release, or escape of pollutants …"

[55] The question is: what is the meaning of the words which directly follow upon the above language of the Pollution Exclusion Clause and state "but this exclusion does not apply to physical loss or damage, to the property insured, caused directly

by an insured peril …"? What is the meaning of this Exception in the Pollution Exclusion Clause?

[56] The plaintiff submits that a proximate cause analysis should be applied to interpret the words "caused directly by an insured peril" in this Exception. When a proximate cause analysis is applied to the Exception, it is apparent that the pollution damage was caused directly by the Fire – but for the Fire, there would have been no pollution damage.

[57] The defendant says that a proximate cause analysis is unhelpful and that one must look to the specific language of the policy to determine whether pollution damage falls within the Exception. It is the defendants' position that, in this case, the pollution damage was physically caused by the escape of pollutants, and not by the Fire. To go behind that cause, and attribute the escape of pollutants to the Fire falls afoul of the clear language of the policy.

[58] In response, the plaintiff says that the defendant's interpretation of the Exception renders it meaningless, as physical loss or damage caused by fire is covered by the Property Policy, in any event and regardless of the Exception. Accordingly, the plaintiff contends the defendants' interpretation of the Exception would make the Exception redundant.

[59] I agree with the defendants' interpretation of the Exception. With respect, the defendants' interpretation of the Exception does not render it redundant. This can readily be observed by reversing the facts in the present case. If the escape of pollutants had been the originating event which <u>then</u> precipitated the fire, on a plain reading of the Pollution Exclusion Clause the fire damage would be excluded as "indirect, damage, cost or expense arising out of the … escape of pollutants". In such a scenario, the Exception would be necessary in order to reinstate coverage for fire damage which would otherwise be excluded. The fire damage would be reinstated because it was "caused directly by an insured peril", notwithstanding the fact that it was proximately caused by an excluded peril.

[60] While it is clear that a proximate cause does not have to be the "actual instrument of destruction" (*Shea*), the interpretation of the Property Policy has to take into account the word "direct" in the Exception. Whether or not the release of the pollutants would be an intervening cause in the proximate cause analysis, based on the authorities advanced by the plaintiff, one must still ask: what is the meaning of a "direct physical … damage to the insured property" as opposed to simply "physical … damage to the insured property"?

[61] In my view, the plaintiff's authorities do not assist in interpreting the language of the Exception.

[62] *Drumbolus*, which is a 1916 Ontario decision, involved a fire which started in the basement of an ice cream store. Firemen were called. In a successful effort to contain the flames the firemen dismantled part of the furnace. Consequently, the heat was turned off causing the pipes to freeze and finally resulting in damage to the store. It was held that this damage was the "immediate consequence of the fire and the method adopted in dealing with it, and so may be recovered for as 'direct loss or damage by fire'".

[63] In *Shea*, a 1958 decision also from Ontario, the plaintiff was delivering fuel oil when a heating device used to facilitate the flow of oil in cold weather overheated. This caused a flash fire in the tank, resulting in an explosion from the expansion of the burning gases. The insurance policy provided coverage against loss caused solely by fire or lightning. The insurer argued the loss was caused by explosion. The court held that the proximate cause of the loss was fire.

[64] To the extent that *Drumbolus* and *Shea* support the plaintiff's interpretation of the Exception, I find these decisions conflict with more recent authority binding on me: *Canevada Country Communities Inc. v. GAN Canada Insurance Co*., 1999 BCCA 339. Their authority is also potentially called into question by the Supreme Court's comments on the proximate cause analysis in *C.C.R. Fishing Ltd.* and *Derksen*.

[65] *Canevada* Countries Community Inc. involved an all-risk builders' policy over a condo project. Due to low temperatures water froze in the sprinkler system in the building, the freezing caused the sprinkler pipes to break, and water subsequently discharged from the broken pipes causing damage to the building project. The respondent filed proof of loss for the water damage. The appellant denied coverage.

[66] The policy provided in part:

> 3. PERILS INSURED
>
> This Rider insures, except as herein provided, against all risks of direct physical loss or damage to the property insured.
>
> …
>
> 6. PERILS EXCLUDED
>
> This rider does not insure
>
> (a) …
>
> (b) loss or damage, unless directly caused by a peril not otherwise excluded herein, caused directly or indirectly by rust or corrosion, frost or freezing; …
>
> [Emphasis added.]

[67] Water damage was not excluded by the all-risk policy and, accordingly, was *prima facie* covered.

[68] The point in contention, according to the majority of the Court of Appeal, was the meaning to be given to the words "directly caused" in the exception in paragraph 6(b).

[69] The appellants argued that the exception in paragraph 6(b) did not apply because the water damage was proximately caused by the freezing of the pipes. The respondent's argument, on the other hand, was that the escape of water was the direct cause of the damage and that once the direct cause is established, it is unnecessary to go behind the direct cause to determine its antecedent cause and to verify that it was also an insured peril.

[70] A majority of the Court of Appeal sided with the respondent and upheld the trial judge's decision that the exception did apply. It reasoned as follows:

> 29 In my view, the interpretation of "direct cause" advanced by the respondents is clearly preferable. Taken in context, the terms "directly" and "indirectly" are intended to capture the sense in which an event leads straight or immediately to its consequence.
>
> 30 As noted above, the policy in issue in this case is an "all-risks" policy and, as such, all risks are covered unless expressly excluded. Paragraph 6(b) provides one such potential exclusion. By its wording, the Policy does not extend to loss or damage which is directly caused by, among other things, freezing. For that reason, the Policy would not cover the damage done to the piping itself.
>
> 31 By its wording, the Policy also does not extend to loss or damage which is indirectly caused by freezing, that is, damage which results from an event which can in turn be characterized as the direct result of freezing. It is crucial to note, however, that this second aspect of the exception in paragraph 6(b), i.e. that concerning an indirect cause, does not operate where the interposed event is itself a peril which the policy expressly covers.
>
> 32 The operation of paragraph 6(b) can be illustrated by considering the sequence of events leading up to the damage suffered in this case. The loss claimed in this case was damage to walls, woodwork, carpeting, and electrical work. The damage was caused by a discharge of water from the sprinkler system. The discharge of water, in turn, was caused by the damage done to the sprinkler system by freezing temperatures. The damage to the property was at once both a direct result of the discharge of water and an indirect result of the freezing temperatures. The damage to the property would accordingly have been excluded by paragraph 6(b) as being indirectly caused by freezing were it not for the fact that the interposed event in this case, namely, the discharge of water from the sprinkler system, was itself a peril expressly covered by the Policy.
>
> [Emphasis added.]

[71] The Court of Appeal's analysis of the word "direct" as "captur[ing] the sense in which an event leads straight or immediately to its consequence" makes sense. In that regard, the Court went on to explain how its interpretation of the leakage of water as the direct cause of the damage did not result in a specious distinction:

> 33 There is certainly some sense in the contrary view advanced by the appellants in relation to exclusionary clauses. The appellants caution correctly that exclusionary clauses would be rendered meaningless if every chain of events were divided too precisely and treated as a series of separate perils.
>
> 34 The examples given in Chadwick v. Fire Insurance Exchange, supra, illustrate attempts to bifurcate on a spurious basis what is, in reality, a single event. The Newfoundland Supreme Court, in N.D. Dobbin Ltd. v. Sun Alliance Insurance Co., supra, rejected a similar argument.

> 35 The argument in the present case, in contrast, concerns two distinct, albeit causally related, events: the damage to the pipes through freezing and the discharge of the water.
>
> 36 This is not a case in which a claimant has attempted to circumvent an exclusionary clause by drawing an illusionary and merely semantic distinction such as, in N.D. Dobbin, supra, attempting to distinguish "high winds and low temperatures" from freezing.
>
> [Emphasis added.]

[72] The same could be said in this case. Characterizing the fire damage but not the pollution as “direct” would not result in a specious distinction between the fire and the pollution damage. The fire and the pollution damage are “two distinct, albeit causally related, events”.

[73] To the extent that *Drumbolus* and *Shea* suggest the phrase “directly caused by an insured peril” in the Exception should be interpreted applying a proximate cause analysis, I conclude that they conflict with the analysis in *Canevada Country Communities Inc.* and should not be followed.

[74] Further, the authority of *Drumbolus* and *Shea* is called into question by the criticism of the proximate cause analysis by the Supreme Court in *Derksen* and *C.C.R. Fishing Ltd*. Though I need not decide how this criticism impacts on the authority of *Drumbolus* and *Shea*, in light of my view of *Canevada Country Communities Inc.*, I mention the point to illustrate the need for caution in placing reliance on these authorities.

[75] The plaintiff also relies on the case of *Bell Pole Company* to argue that the pollution damage in this case was “directly caused” by fire within the meaning of the Exception. However, in my view, the case does not assist the plaintiff.

[76] In *Bell Pole Company*, a fire destroyed a chemical treatment tank for telephone poles. The property had been insured under a policy with the insurer. The policy insured the replacement cost of the tank and provided additional bylaw coverage for the cost of replacing the property to minimum standards required by law. The agreed replacement cost of the tank was $464,000. Bell did not replace the

tank, but built a state of the art facility at a location remote from that of the destroyed tank. It did so to avoid the cost of remediating the soil at the location of the destroyed tank, which it would have been required to do by the regulator as a precondition to constructing a new tank at that location. Bell claimed to be entitled to payment of $4.8 million under the policy.

[77] At trial, the insurer was ordered to compensate Bell for the replacement cost of the original treatment tank plus an additional amount of $250,000 for its bylaw coverage. The insurer was also ordered to pay Bell an additional amount of business interruption extra expenses, on top of what it had already paid Bell for extra expenses. The insurers cross-appealed on the extra expenses award and the Court of Appeal dismissed their appeal.

[78] It is helpful to examine the facts pertaining to the extra expense issue, as the plaintiff relies upon the reasoning of the Court of Appeal in upholding the trial judge's award of additional extra expenses.

[79] The trial judge agreed with the insurer that extra expenses should be paid for the period of time it would have taken Bell to construct a direct replacement for the tank, despite Bell's argument that it was entitled to extra expenses for the lengthier period of time it took to construct the new facility. However, the judge still awarded an additional amount of extra expenses because the insurer's position did not factor in the time it would have taken Bell to remediate the soil at the site of the destroyed tank before commencing construction. The trial judge included that time in calculating the period of indemnity for extra expenses, notwithstanding the existence of a pollution exclusion clause in the policy.

[80] The insurers cross-appealed on the extra expenses award, arguing that it was precluded by the pollution exclusion clause. In dismissing the cross-appeal, Madam Justice Southin stated (at paras. 47-48)

> In my opinion, the insurers' argument on [the pollution exclusion clause] is off the mark.

> The loss or damage here did not result from the spill of any contaminant or pollutant. It resulted from the fire and, indeed, fire, as a peril not otherwise excluded, is itself an exception from the exclusion.
>
> [Emphasis added]

It is these comments that Whitworth relies upon in arguing that the pollution damage in this case was the direct cause of the Fire.

[81] However, in *Bell Pole Company*, there was no claim for damage to insured property caused by pollution or contamination. It was in this context that Madame Justice Southin remarked that the pollution exclusion did not apply because "[t]he loss or damage here did not result from…any…pollutant. It resulted from the fire". With respect, this remark cannot be taken as supporting the view that where fire causes the release of pollutants, the resulting pollution damage to insured property was "directly" caused by fire. Bell was not advancing a claim for pollutant damage under the policy. This case, therefore, does not stand for the proposition for which it was advanced.

[82] There are other significant factual differences between *Bell Pole Company* and the instant case. For example, it appears that the site of the destroyed tank in *Bell Pole Company* was already contaminated prior to the fire, whereas there is no evidence here that any pollutants were released onto the premises prior to the Fire. I find the *Bell Pole Company* case distinguishable from the instant case.

[83] As for the defendants' authorities, *Dawson Truck Repairs Ltd.* did not address similar policy language to the instant case and I do not rely on it in interpreting the Exception, except to the limited extent that it illustrates the viability of a causal analysis which draws a distinction between the pollution and fire damage.

[84] In *Dawson Truck Repairs Ltd.*, a truck cab was damaged after faulty maintenance caused the explosion of the engine. Indemnity for loss or damage caused by mechanical fracture, failure or breakdown was excluded pursuant to s. 132(1) of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83. The trial judge found the damage to the cab was not excluded, because it was due to the faulty maintenance. The Court of Appeal reversed, stating at para. 42:

> In my view, in this case, the determination of the originating cause as the negligence of Dawson's employee and the conclusion it caused the engine damage was supported clearly by the evidence. To extend that cause on the basis of notions of proximate cause to the damage to the cab would lead to a metaphysical debate and ignore the clear evidence that the cab damage was caused physically by the engine damage.
>
> [Emphasis added.]

[85] The above approach on the physical cause of the engine damage parallels the focus of the Court of Appeal in *Canevada Country Communities Inc.* on the immediate cause of the water damage.

[86] Based on all of the above, it follows that I accept the defendants' interpretation of the Exception. I do not find the Pollution Extension Clause to be ambiguous. I find the defendants' interpretation of the Exception fits with its interpretation of the Pollution Extension Clause. If the Exception were interpreted as the plaintiff suggests, in my view, the Pollution Extension Clause language would be superfluous - which the parties cannot have intended.

[87] I conclude that the Exception operates to ensure that there is still coverage for the fire damage, but it does not create coverage for the clean-up of pollutants escaping from the property where there is no direct damage caused by fire (or by another insured peril). It is the Pollution Extension Clause which operates to provide on-premises pollution clean-up costs for fire damaged property up to $25,000 in accordance with its terms.

VII. Conclusion

[88] Accordingly, the plaintiff's action against the defendants under the Property Policy is hereby dismissed.

[89] The parties may speak to the matter of costs in the event they are unable to agree.

"Madam Justice Harris"