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DEFEND AN OCCURRENCE OUTSIDE THE POLICY PERIOD?

Richards Buell Sutton Insurance Newsletter

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At issue in *Canadian Northern Shield Insurance Company v. Intact Insurance Company*, 2015 BCSC 767 (“CNS”), was whether the defendant insurer had a duty to defend an insured under a homeowner’s policy. The question arose in respect of actions brought against the insured for damages occurring after the policy had expired.

THE FACTS

The loss stemmed from a landslide that occurred on January 9, 2005 in North Vancouver after an unusually heavy rainfall. The landslide originated from property on Berkeley Avenue, situated at the top of an escarpment, and struck the property below causing substantial damage to that property and injuries to its inhabitants. Lawsuits were brought against the current and former owners of the Berkeley Avenue property.

The plaintiff insurer defended the former owners of the Berkeley Avenue property in the lawsuits pursuant to their homeowner’s policy. Those actions eventually settled. The plaintiff insurer then brought the within action seeking a declaration of entitlement to equitable contribution from the defendant insurer toward defence and settlement costs. The defendant insurer held a policy with the former owners of the Berkeley Avenue property for a ten year period, which ended about three months before the landslide occurred (the “Intact Policy”). The Intact Policy provided coverage for “accidents or occurrences” which take place during the policy period. There was no definition of “accident” or “occurrence” in the Intact Policy.

For the purpose of the proceeding, the defendant insurer admitted its insured committed negligent acts during the policy period, such as failing to implement adequate drainage and altering and removing vegetation continuously over the course of the policy period, which caused or contributed to the landslide.

THE POSITION OF THE PARTIES

The question for the court’s determination was whether the terms “accident” or “occurrence” as used in the Intact Policy apply to negligent acts or omissions of the insured occurring within the policy period in circumstances where damage or injury does not result until after the policy has expired. Both parties argued that the language used in the Intact Policy was unambiguous, but asserted opposite interpretations.



The plaintiff insurer argued that the words “accident” and “occurrence” must be interpreted broadly in favour of the insured and, subject to policy language to the contrary, can refer to the insured’s acts or omissions alone to trigger coverage. The defendant insurer argued that no ordinary person reading the policy would think a negligent act or omission was an accident or occurrence unless there was resulting damage during the policy period.

THE RULING

The court ultimately answered the question in the negative. Firstly, the court considered the relevant policy wording in the context of the policy as a whole. The court found that while the words “accident” and “occurrence” were not ambiguous in themselves, the lack of an express definition with some temporal restriction to damage created some ambiguity. As a result, the court preferred an interpretation determined to be consistent with the reasonable expectations of the parties and that given to similar policies.

The court relied on *Pickford Black Ltd. v. Canadian General Insurance Co.*, [1977] 1 SCR 261, for the proposition that an “accident” as used in its natural and ordinary meaning is not defined by the act or omission which caused it. The plaintiff insurer attempted to distinguish *Pickford Black* by drawing an analogy to *Cansulex Ltd. v. Reed Stenhouse Ltd.* (1986), 1992 CanLII 1545 (BC CA). In *Cansulex*, a geographical policy limitation was at issue. The insured had loaded a cargo of sulphur in a vessel under conditions that caused the vessel’s hull to corrode over time. The court in that case found that the corrosion damage was caused by an accident or occurrence that arose in Canada (i.e. the loading of the vessel) even though the process of corrosion was such that the damage occurred outside the country.

The court did not accept that *Cansulex* was analogous but rather followed the reasoning in *Landry v. Fenton*, [1994] BCJ No 1472 (SC), a case which involved the interpretation of a similarly worded homeowner’s policy in comparable circumstances. In *Landry*, the plaintiff suffered a slip and fall and sought damages for the negligent act of the former owner, specifically construction of a walkway on the subject property. The construction of the walkway occurred during the policy period but the plaintiff’s fall happened after the policy had expired. In that case, the court held that the insurer could only be responsible for a loss to the insured that arose during the policy period; loss, in the court’s view, being a claim for compensable injuries that are occasioned at least in part during the policy period.

PRACTICAL CONSIDERATIONS FOR INSURERS

At first glance *CNS* may not appear to warrant consideration, as many insurers will assume the duty to defend cannot be engaged where damages occur outside the policy period. However, a careful review of the decision brings that view into question. For instance, what if the coverage phrase “This insurance applies to



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accidents and occurrences which take place during the period this policy is in force” was not included in the policy. This appears to have been a key consideration for the court in determining the reasonable expectations of insurer and insured. Additionally, a policy containing definitions of “accident” or “occurrence” could have led to a different result. Finally, one has to wonder as to the potential result in this case had there been standard “deeming” language such as “property damage...shall be deemed to occur at the time of the “occurrence” that caused it”.

Insurers should also be aware of the more recent decision in *Selk Ventures Corporation v. Canadian Northern Shield Insurance*, 2015 BCSC 964, where the court determined the insurer under a CGL policy had a duty to defend a claim that involved a loss which happened outside the policy period. In *Selk*, the court was satisfied that allegations of defective workmanship might be construed as an “occurrence” within the policy period, even though the loss (i.e. the collapse of a building’s roof) came after the policy had expired.

These recent decisions serve as a useful reminder to carefully consider the policy wording in situations where loss or damage has occurred after the expiration of the policy. It may not be so clear such loss cannot attract coverage.

