Focus INSURANCE

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Detailing the policy

The language of each clause should be examined in relation to the whole

Ryan Shaw

Insurance counsel are undoubtedly aware of the need to look at the policy as a whole when interpreting the language of an insurance contract and providing coverage opinions. A recent case from the British Columbia Supreme Court, *Gill v. Ivanhoe Cambridge I Inc./Ivanhoe Cambridge I Inc.* [2016] BCSC 252, has underscored the importance of this guiding tenet of contractual interpretation and should serve as a reminder to insurers and their counsel to thoroughly consider the language of the whole of the policy when rendering opinions or making decisions on coverage.

In *Gill*, at issue was an exclusion clause in a homeowner's policy, often referred to as the household resident exclusion and referred to by the court as the "family exclusion." In the policy at issue, the family exclusion specifically barred claims "arising from…bodily injury to the insured or any person residing in the insured's household other than a residence employee."

The insured, Mr. Gill had commenced an action on behalf of his 2-year old son as a result of injuries the boy sustained falling through a missing glass partition on the second floor in a shopping mall. In the action, three of the defendants filed third-party claims against Gill alleging that Gill was negligent for failing to properly supervise his son. Gill reported the third-party claims to his insurer and the insurer denied coverage relying on the family exclusion. Gill claimed for a declaration of coverage and the insurer applied to have that claim dismissed.

At court it was agreed by all that Gill and his son would be entitled to personal liability coverage under the policy unless the family exclusion applied. The insurer argued that the language of the family exclusion was clear and unambiguous and ought to apply to claims by insureds directly against, and indirectly against one another as in this case. As there was no B.C. jurisprudence directly on point, the insurer relied heavily on a decision from the Ontario Court of Appeal, *Quick v. MacKenzie* [1997] 33 O.R. (3d) 362 (C.A.).

In *Quick*, the court upheld an insurer's denial of coverage under a similarly worded exclusion clause. In that case, the infant plaintiff was attacked by a dog and brought a suit against the dog owner. The dog owner claimed against the plaintiff's parents for failing to supervise the infant and the parents sought coverage under their homeowner's policy. Deciding in favour of the insurer, the court in *Quick* found that the exclusion was unambiguous, noting that the language of the clause was "precisely focused" and the claim by the dog owner against the parents could be considered one "arising from" bodily injury to their daughter. Notably, the decision in *Quick* was recently reaffirmed in *Allstate Insurance Company of Canada v. Aftab* [2015] ONCA 349. In both *Quick* and *Aftab*, only limited portions of the coverage and exclusion provisions in the policies in question were referred to in the reported decisions.

The court in *Gill* refused to follow these decisions. Rather, the court distinguished the Ontario precedents by focusing on the wording of other exclusion clauses in the policy at issue. In *Gill*, the phrase "arising from" was found in various other exclusion clauses in the policy, but the language used in those other clauses specifically demonstrated an intention to exclude coverage for both direct and indirect claims. For example, there was a clause in the policy which excluded loss or damage arising from drug activity, "whether or not the insured has knowledge of such activity." Further, the clauses in the policy excluding claims arising from terrorism and mould both contained language that left no

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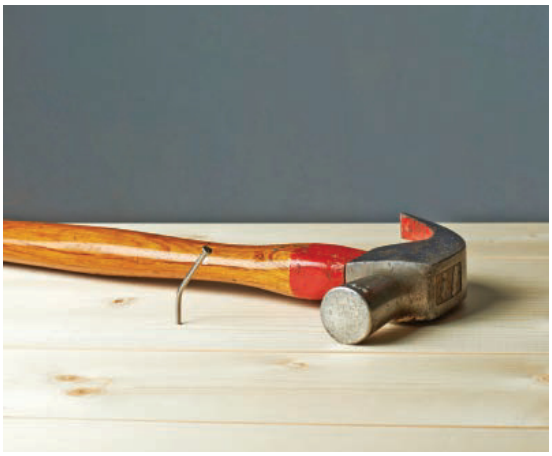
Exclusion by implication a non starter

Insurer on the hook for damage to log home caused by faulty workmanship

Shaun Hashim



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Many all-risks insurance policies exclude damage caused by a contractor's faulty workmanship. Such exclusion clauses vary widely and range from narrowly excluding the "cost of making good" the contractor's defective work to excluding both the cost of rectifying the mistake and any damage caused as a result of the faulty work. Such damage is commonly known as "resulting damage."

In *Monk v. Farmers' Mutual Insurance Co.* [2015] ONCA 911, the Ontario Court of Appeal held that an insurer cannot exclude "resulting damage" by implication. In *Monk*, the insured hired a contractor to perform restoration work to the exterior of her log home. The restoration involved the use of water and the home was damaged due to improper sealing. The home was insured under an "all-risks" homeowner's policy. Upon the insurer's denial of coverage, the insured brought an action for damages.

The defendants moved for summary judgment and argued that the insured's claim was specifically excluded by the insurance policy. The motion judge made a preliminary finding that the damage was caused by the contractor's failure to properly seal the home. As a result, the judge was asked to consider whether the "faulty workmanship" clause excluded coverage. The clause read as follows: "We do not insure…the cost of making good faulty material or workmanship."

The motion judge held that this clause was "clear and unambiguous" and that it excluded "both damage to the 'work' which forms the subject matter of the contract, as well as damages resulting from the faulty workmanship related to the work." The motion judge relied on four considerations.

First, he reasoned that an "all-perils" insurance policy should not be viewed as a "de-facto performance bond for the work of a third party."

Second, he decided that insurers have good incentive to exclude resulting damage due to the difficulties in interpretation by the courts and the removal of any reference to resulting damage in this case provided "greater certainty" of the insurer's intent.

Third, he considered that "most home insurance policies" explicitly state that resulting damage *is* covered in the faulty workmanship clause.

Finally, the motion judge noted that, unlike "most" policies, this particular contract was silent on the issue of resulting damage. He viewed this as an intentional absence meant to exclude coverage for resulting damage. The motion judge felt strengthened in this view because another clause of the policy explicitly included resulting damage. That clause read as follows:

"We do not insure loss or damage to…property…while being worked on, where the damage results from such process or work (but resulting damage to other insured property is covered)."

> Justice Huscroft pointed out that insurers draft their policies with full appreciation of the fact that the courts are required to interpret exclusion clauses narrowly and coverage clauses broadly.
>
> **Shaun Hashim**
> Theall Group LLP

In effect, the motion judge held that the default position for a faulty workmanship clause was the exclusion unless otherwise indicated.

In *Monk*, the Court of Appeal rejected the entirety of the above analysis. Writing for a unanimous court, Justice Grant Huscroft recognized that while it is true that a contractor should be responsible for its faulty work, and while it is also true that an insurer might reasonably have an incentive to exclude resulting damage, the reviewing judge must take into account the well-established principles of insurance contract interpretation. Justice Huscroft pointed out that insurers draft their policies with full appreciation of the fact that the courts are required to interpret exclusion clauses narrowly and coverage clauses broadly. As a result, the Justice held that "[i]f an insurer wants to exclude particular coverage, especially for something as well-known as resulting damage, it should do so specifically rather than by implication."

The Justice further disagreed with the finding that resulting damage was excluded due to the absence of explicit language. He held that "[a]n insurer's unilateral intention is not relevant to the interpretation of the insurance agreement." The judge also rejected the reference to "most" policies, as that consideration was "irrelevant to the proper interpretation of *this* insurance contract." Finally, Justice Huscroft disagreed with the motion judge's reference to the other clause in the policy which explicitly referenced resulting damage and held that it was inappropriate to refer to a clause intended to broaden coverage in order to strengthen the breadth of an exclusion. Accordingly, the court granted the appeal.

This case represents a necessary correction to an outlier in our jurisprudence. Relying on well-established principles of insurance contract interpretation, this decision serves as a cautionary reminder to insurers that they cannot benefit from exclusion by implication.

Shaun Hashim is an associate at Theall Group LLP where he maintains a commercial litigation practice with focuses in product liability and insurance coverage.

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doubt that the exclusions applied to both direct and indirect claims. In the court's view, the absence of similar language in the family exclusion rendered that clause ambiguous.

To resolve the ambiguity the court examined the historic purpose of the family exclusion in order to find an interpretation consistent with the reasonable expectation of the parties. The court noted that the jurisprudence made clear the purpose of the family exclusion was to prevent collusive claims by residents of the same household against one another. In other words, the purpose of the exclusion was to preclude coverage for direct claims by household residents as opposed to indirect claims such as those in *Gill*. As there was no allegation of a collusive claim being raised by Gill or his son, the court found that reading the family exclusion as the insurer proposed would strip Gill of coverage the policy was intended to provide.

> Further, the clauses in the policy excluding claims arising from terrorism and mould both contained language that left no doubt that the exclusions applied to both direct and indirect claims. In the court's view, the absence of similar language in the family exclusion rendered that clause ambiguous.
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> **Ryan Shaw**
> Richards Buell Sutton

Gill is of practical import to insurers and counsel when making decisions on coverage as it demonstrates both the need to look to the language of the policy as a whole to determine if ambiguity exists as well as the need to look to the purpose or object of an exclusion clause to possibly resolve that ambiguity. The *Gill* decision should also serve as a caution to counsel, for even when there is persuasive authority that seems to be on all fours with your case, on careful consideration that authority may not be so sturdy after all. It is notable that the insurer has commenced an appeal of the decision, so it is likely the B.C. Court of Appeal may have the final say on whether the aforementioned interpretation will stand.

Ryan Shaw is an associate at Richards Buell Sutton LLP in Vancouver. He practises insurance litigation and construction law.