Commentary: Cleaning Building Window Glass - What Are you Insured For?

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The recent decision of the Ontario Court of Appeal in *G&P Procleaners and General Contractors Inc. v Gore Mutual Insurance Co.*[1] makes for an interesting discussion of the operation of faulty work exclusions in light of the recent SCC decision in *Ledcor*[2].

The facts in both cases are virtually identical. In *Procleaners*, the contractor contracted to provide window cleaning services at a newly constructed commercial building and during the cleaning, scratched the windows. The contractor paid the building owner to replace the damaged windows and sought reimbursement under its Commercial General Liability policy. Coverage was denied by the insurer on the basis of defective work exclusions in the policy. The court held that the cost of replacing the glass windows was excluded leaving it to the glass cleaning contractor to cover the cost to replace the glass windows it had damaged because of the cleaning. The contractor was not covered for the costs to re-clean the windows.

In *Ledcor*, the contractor contracted to provide window cleaning services at a building and during the cleaning, scratched the windows. The building owner sought coverage under a Builders Risk policy for the cost of replacing the glass. Coverage was denied by the insurer on the basis of defective work exclusions in the policy. The court held that the cost of replacing the glass windows was insured with the result that the insurer covered the cost to replace the glass windows that were damaged because of the cleaning. The contractor was not covered for the costs to re-clean the windows.

One reconciles these divergent results by looking at the policy wordings. In both the insured was not insured for the cost to re-clean the windows, a result we would all likely expect. However, the contractor insured was not insured for the cost of replacing the glass windows in *Procleaners* but was in *Ledcor*.

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[1] *G&P Procleaners and General Contractors Inc. v Gore Mutual Insurance Co.* [2017] ONCA 298
[2] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37

What makes it interesting in particular is the insurance wide purpose behind almost all exclusions for defective work. Such exclusions are found in insurance policies because insurers do not want to insure the costs to redo the work that was under the control of the insured – otherwise the insured could have little incentive to do it properly in the first place. Insurance Policies are not performance bonds.

As the Court of Appeal pointed out in *Alie v Bertrand & Frere Construction Co.*[3]:

> It is common ground between the parties that CGL policies are not performance bonds. They are not intended to cover the costs of repairing or replacing the insured's defective work or product. They are intended, rather, to cover tort liability for injury to other persons or damage to their property. This general intent is expressed in the language used in the various policies to define both the coverage and the exclusions.
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> As indicated, the CGL policies are generally intended to cover an insured's tortious liability to third parties, but not including the cost of repairing or replacing the insured's own defective work or product. This intent is manifest by the language [page360] usually found in CGL policies and the interpretation generally given by the courts to such policies. The policy reason underlying this interpretation is set out succinctly in *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1991), 57 B.C.L.R. (2d) 88, [1991] I.L.R. 1-2737 (S.C.) at p. 131 B.C.L.R. as follows:
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> > If the insurance proceeds could be used to pay for the repairing or replacing of defective work and products, a contractor or subcontractor could receive initial payment for its work and then receive further payment from the insurer to repair or replace it. Equally repugnant on policy grounds is the notion that the presence of insurance obviates the obligation to perform the job initially in a good and workmanlike manner.

[3] *Alie v. Bertrand & Frere Construction Co.*] 62 O.R. (3d) 345 at para 24.

In *Procleaners*, the court was dealing with a CGL policy which provided the insured with coverage for sums the insured becomes legally obligated to pay as compensatory damages (to third parties) because of “property damage” (which occurred during the policy period) caused by an occurrence. Coverage for defective work was excluded by refining the definition of property damage as follows:

> This insurance does not apply to:
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> (b) ...
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> "Property damage" to:
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> ...
>
> (v) that particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or
>
> (vi) that particular part of any property that must be restored, repaired or replaced because "your work" <u>was incorrectly performed on it. (emphasis added)</u>

The Court of Appeal agreed with the motion judge's conclusions that there was property damage (scratching of the windows) caused by an occurrence (the scratching was accidental) but that such was excluded from “property damage” by the exclusions above. It is hard to argue otherwise: the glass had to be replaced because the property damage arose from the glass cleaning operations of the insured (within (v) above) and/or that the glass had to be replaced because the cleaning of the glass had been incorrectly performed on it (within (vi)).

In *Ledcor*, the court was dealing with an “all risks” Builders Risk policy, which is a property policy providing coverage for damage to the project itself. In this case it was written on an all risks basis. In keeping with the purpose of such a policy, usually the owner, general contractor, all subcontractors and in some cases consultants, are all insureds protected against damage caused to the project, and to their work in particular, by any other insured working on the project. There is a waiver of subrogation.

Like the CGL policy, there was an exclusion for defective work since the insurers did not want to insure the costs to redo the defective work of the insured. Such policies are also not performance bonds. As Wagner J. put it for the majority:

> [70] Despite these qualifiers, builders' risk construction policies are the norm, if not a requirement, on construction sites in Canada. In purchasing these policies, "contractors believe indemnity will be available in the event of an accident or damage on the construction site arising as a result of a party's carelessness or negligent acts", which are *the most common* source of loss on construction sites: Dolden, at pp. 345-46. And, in selling these policies, insurers:
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> > are prepared to insure risks relating to problems caused by faulty . . . workmanship, but they are not prepared to insure the quality of . . . the workmanship in a construction project per se. The argument is that the contractor is responsible for doing [its] job right and the insurance company is not there to provide compensation for inadequate performance by a contractor of the very work the contractor agreed to perform.
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> Canadian College of Construction Lawyers, Report of the Insurance & Surety Committee, 'Covered for What?': Faulty Materials and Workmanship Coverage Under Canadian Construction Insurance Policies" (2007), 1 *J.C.C.C.L.* 101, at p. 104.

The relevant exclusion wording was:

> 4(A) Exclusions
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> This policy section does not insure:
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> (b) <u>The cost of making good faulty workmanship</u>, construction materials or design <u>unless physical damage</u> not otherwise excluded by this policy <u>results</u>, in which event <u>this policy shall insure such resulting damage.</u> (Emphasis added by the Court)

In short, the court found the exclusion was clearly ambiguous. The insured argued for one plausible interpretation (that *the cost of making good faulty workmanship* was the cost to re-clean the windows) and the insurers argued for another (that *the cost of making good faulty workmanship* included replacing the damaged glass windows –how else could one make good

the faulty work?). As this term was not defined, it was not helpful to determine the scope of resulting damage.

Because of the ambiguity, the court looked to the general principles of contract interpretation. Because the Policy was a standard form contract, there was no evidence that the parties gave any thought to the cleaning of the windows, the relationship of faulty workmanship to resulting damage, or anything else that would help in determining their reasonable expectations.

The court then looked to the purpose behind builders' risk policies and held such a consideration was crucial in determining the parties' reasonable expectations as to the meaning of the exclusion clause:

> Because the purpose of these polices is to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage — in exchange for relatively high premiums — provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst the various contractors involved. In my view, the purpose of broad coverage in the construction context is furthered by an interpretation of the Exclusion Clause that excludes from coverage only the cost of redoing the faulty work itself — in this case, the cost of re-cleaning the windows.[4]

It is a general rule of insurance policy interpretation that coverage is to be construed broadly, exclusions narrowly and exceptions to exclusions broadly. That rule applies to both CGL policies and Builders Risk policies without consideration of their purpose.

Both are standard form contracts so there is not likely going to be any evidence of particular party expectations in the circumstances. In both cases, one can reasonably assume that the insureds always want the broadest possible coverage. But this expectation alone does not answer what were reasonable expectations.

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[4] *Ledcor supra* at para. 66

Under a CGL policy, coverage is provided to the insured so that it can compensate a third party for damages caused by the insured's defective work.

One way to look at the coverage under a builders risk policy is to view it as insurance protection to the culprit insured to make funds available to the injured party (which happens to be an insured and is usually the owner) to compensate the owner for damages resulting from the faulty work. It just so happens that the funds in this case are paid directly to the owner as entitlement to coverage proceeds.

In both cases, the insured wants the proceeds of insurance made available as quickly as possible, whether to compensate a third party or to have the funds available to the owner of a project to continue with the project.

This brings us to a consideration of the two exclusions. There is a compelling argument that it does not logically matter whether resulting damage includes damage to that part of the project on which the contractor was working if the intention is to cover damage that results from the faulty performance of the work.

This was the position of the insured in *Ledcor*. Wagner J. noted:

> Consequently, an interpretation of the Exclusion Clause that precludes from coverage any and all damage resulting from a contractor's faulty workmanship merely because the damage results to that part of the project on which the contractor was working would, in my view, undermine the purpose behind builders' risk policies. It would essentially deprive insureds of the coverage for which they contracted. [5]

A*ssuming* for the moment that the intention of the insurers is the same for both a CGL and Builders' Risk policy – to not cover the cost to redo faulty work of the insured including damage

[5] *Ledcor supra* at para. 70

to the property the insured was working on at the time of the loss (the window glass in the cases above) or the opposite – they only need to draft exclusion clause wording that makes that clear.

How hard can that be?[6] The insurers were successful in *Procleaners* but not in *Ledcor*. With tweaking of wording, in theory at least, it should not be that difficult to be clear that resulting damage in a builders risk policy does not include damage to that particular part of any property that must be restored, repaired or replaced because your faulty work was incorrectly performed on it….assuming that is the intention.

But then what do I know? There are hundreds of people that work on drafting policy wordings and seemingly, we still have *Ledcors* and *Procleaners* cases.

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[6] Consider for example, in *CIC Mining Corp. v. Saskatchewan Government Insurance*, (1994) 24 C.C.L.I. (2d) 229 (Sask. C.A.) the policy contained:

> THIS POLICY DOES NOT INSURE:
> (a) Cost of making good faulty workmanship or materials but this exclusion shall not apply to physical loss or damage resulting from such faulty workmanship or materials, except as provided in the faulty or defective workmanship clause
> (b) Cost of making good error in design of process, equipment or machinery, but this exclusion shall not apply to physical loss or damage resulting from such error in design.
>
> FAULTY OR DEFECTIVE WORKMANSHIP CLAUSE
> It is understood and agreed that this Policy is extended to insure the cost of making good faulty workmanship which renders any portion of the project unfit for its intended purpose;
> Faulty or Defective Workmanship rendering any portion of insured property unfit for the purposes for which it was intended is considered to have caused physical loss or damage but this extension will not extend to cover any Business Interruption or consequential loss.(my emphasis)

See Builders' Risk CCDC Endorsement, IBC 4047 intended provide for policy wording to be amended to incorporate the following definition of "resultant damage":

> "RESULTANT DAMAGE" shall mean physical damage to the insured property other than the cost of rectifying the defect or fault that caused the physical damage. The cost of rectifying the defect or fault (the cost of making good) shall be the cost which the Insured would have incurred to do so had such defect or fault been discovered immediately before the physical damage occurred and rectified at that time.

In other words, the excluded costs are only those costs that would have remedied or rectified the defect immediately before any consequential or resulting damage occurred, but the exclusion does not extend to exclude the cost of rectifying or replacing the damaged property itself; the excluded costs crystallize immediately prior to the damage occurring and are thus limited to those costs that would have prevented the damage from happening.