Parker Pad & Printing Ltd. v. Gore Mutual Insurance Company et al.[1]
[Indexed as: Parker Pad & Printing Ltd. v. Gore Mutual Insurance Co.]

Ontario Reports

Ontario Superior Court of Justice,

Charney J.

26, 2017

Insurance -- Interpretation and construction -- "Flood" -- Property insurance policy and flood endorsement defining "flood" as meaning rising of, breaking out or overflow of any body of water -- Pooling of rainwater not falling within definition of "flood".

2017 ONSC 3894 (CanLII)

138 O.R. (3d) 603 | 2017 ONSC 3894

Case Summary

The plaintiff was insured under a property insurance policy issued by the defendant. Clause 6B(b) of the policy excluded coverage for loss or damage caused by "flood", which was defined as meaning the "rising of, the breaking out or the overflow of any body of water whether natural or man-made". Clause 6B(c)(i) excluded coverage for loss or damage caused by "seepage, leakage or influx of water from natural sources through . . . foundations . . .". The plaintiff obtained additional coverage for loss or damage caused by flooding (the "flood endorsement"). The definition of "flood" in the flood endorsement was identical to the definition of "flood" in the policy. Following significant rainfall, pooled water entered the plaintiff's premises through the foundation and the premises were flooded, causing damage to flooring, walls and equipment. The defendant denied the plaintiff's claim on the basis that the loss did not fall within the scope of coverage. The plaintiff sued, and brought a motion for partial summary judgment to determine whether the loss was covered.

Held, the motion should be dismissed. [page604]

The ordinary meaning of the phrase "the rising of, breaking out or overflow of any body of water whether natural or man-made" is limited to pre-existing bodies of water and does not include pooling of rainwater in a location where no body of water previously existed. The pooling of rainwater in this case did not fall within the definition of "flood" in the policy and the flood endorsement. The water damage was therefore not excluded under clause 6B(b) of the policy. The damage was excluded by virtue of clause 6B(c)(i). The damage was not covered by the flood endorsement.

T & T Realty Ltd. v. Allstate Insurance Co. of Canada, [1986] O.J. No. 532, 18 C.C.L.I. 102, [1986] I.L.R. Â1-2094 at 8088, 37 A.C.W.S. (2d) 441, 1986 CarswellOnt 727 (H.C.J.), **distd**

British Columbia (British Columbia Ferry Corp.) v. Commonwealth Insurance Co., [1987] B.C.J. No. 1671, 40 D.L.R. (4th) 766, 27 C.C.L.I. 281, [1988] I.L.R. Â1-2273 at 8803, 6 A.C.W.S. (3d) 223 (C.A.), **consd**

Other cases referred to

Cabell v. Personal Insurance Co. (2011), 104 O.R. (3d) 709, [2011] O.J. No. 622, 2011 ONCA 105, 278 O.A.C. 51, 331 D.L.R. (4th) 460, [2011] I.L.R. I-5117, 93 C.C.L.I. (4th) 28, 199 A.C.W.S. (3d) 1293; *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, 269 D.L.R. (4th) 79, 349 N.R. 1, J.E. 2006-1215, 212 O.A.C. 338, 20 C.B.R. (5th) 1, 10 P.P.S.A.C. (3d) 66, 148 A.C.W.S. (3d) 182; *Dilworth v. Commissioner of Stamps*, [1899] A.C. 99 (P.C.); *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7, 2014 SCC 7, 314 O.A.C. 1, 453 N.R. 51, 2014EXP-319, J.E. 2014-162, EYB 2014-231951, 95 E.T.R. (3d) 1, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 21 B.L.R. (5th) 248, 46 C.P.C. (7th) 217, 37 R.P.R. (5th) 1, 366 D.L.R. (4th) 641, 2014EXP-319, J.E. 2014-162; *Ipex Inc. v. Lubrizol Advanced Materials Canada Inc*., [2015] O.J. No. 5699, 2015 ONSC 6580 (S.C.J.); *Mazza v. Ornge Corporate Services Inc*., [2016] O.J. No. 5364, 2016 ONCA 753, 62 B.L.R. (5th) 211, 271 A.C.W.S. (3d) 735; *Oakleaf v. Home Insurance Ltd*., [1958] O.R. 565, [1958] O.J. No. 617, 14 D.L.R. (2d) 535, [1958] I.L.R. Â1-298 at 440 (C.A.); *Pilot Insurance Co. v. Sutherland* (2007), 86 O.R. (3d) 789, [2007] O.J. No. 2596, 2007 ONCA 492, 51 C.C.L.I. (4th) 12, [2007] I.L.R. I-4611, 55 M.V.R. (5th) 38, 159 A.C.W.S. (3d) 280; *R. v. Loblaw Groceteria Co. (Manitoba)*, [1961] S.C.R. 138, [1960] S.C.J. No. 73, 26 D.L.R. (2d) 485, 129 C.C.C. 223, 34 C.R. 224; *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101, [1984] O.J. No. 3422, 14 D.L.R. (4th) 404, 6 O.A.C. 161, 10 C.C.L.I. 1, [1985] I.L.R. Â1-1863 at 7152, 30 M.V.R. 167, 29 A.C.W.S. (2d) 56, 1984 CanLII 45 (C.A.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 20.01, 20.04, (2)(b), (2.1)

MOTION for partial summary judgment.

Justin R. Winch, for plaintiff.

Jeffrey R. Goit, for defendant Gore Mutual Insurance Company.

Mark W. Barrett, for defendant Worden Insurance & Financial Services Ltd.

---

[1] **CHARNEY J.**: — On June 30, 2014, following significant rainfall, the plaintiff's premises in Haliburton, Ontario were flooded. Water entered the building and covered an extensive [page605] area of the interior floor. The flood caused damages to the flooring, walls, printed products and equipment. The plaintiff reported the damage to the defendant Gore Mutual

2017 ONSC 3894 (CanLII)

Insurance Company ("Gore"), with whom it had an insurance contract. Gore denied the plaintiff's claim on the basis that the loss did not fall within the scope of coverage. The parties have agreed that the damages amount to $45,000.

[2] The plaintiff has brought this motion for partial summary judgment under Rule 20 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to determine whether the loss is covered by the contract of insurance between the parties. There is also a claim against the insurance broker, Worden Insurance & Financial Services Ltd., which is not before me on this motion.

[3] The plaintiff has divided this issue into the following sub-issues:

(a) whether the loss is covered by the policy;

(b) whether the loss falls within any exclusions; and

(c) whether the loss falls under the extension of the flood endorsement.

[4] The defendant consents to this matter proceeding on the basis of a summary judgment motion.

Facts

[5] The plaintiff, Parker Pad & Printing Ltd. ("Parker"), entered into an insurance contract that applied to Parker's two office locations, one of which is located in Haliburton, Ontario (the "premises"). The policy period was from June 14, 2014 to June 14, 2015. The total premiums paid by Parker were $18,373.

Relevant Terms of Insurance Policy

[6] The relevant terms of the policy are as follows:

5. PERILS INSURED:

This form, except as herein provided, insures against all risks of direct physical loss of or damage to the property insured.

6. EXCLUSIONS

B. PERILS EXCLUDED

This form does not insure loss or damage caused directly or indirectly:

(b) By "flood", including waves, tides, tidal waves, tsunami or the rising of, the breaking out or the overflow of, any body of water, whether natural or man-made . . . [page606]

(c)(i) by seepage, leakage or influx of water derived from natural sources through basement walls, doors, windows or other openings therein, foundations, basement floors, sidewalks, sidewalk lights, or by the backing up of sewers, sumps, septic tanks or drains, unless concurrently and directly caused by a peril not otherwise excluded in PERILS EXCLUDED, hereof.

2017 ONSC 3894 (CanLII)

(ii) by the entrance of rain, sleet or snow through doors, widows, skylights or other similar wall or roof openings, unless through an aperture concurrently and directly caused by a peril not otherwise excluded in PERILS EXCLUDED, hereof.

. . . . .

20. DEFINITIONS

Wherever used in this form:

(j) "Flood" means: The rising of, the breaking out or the overflow of any body of water whether natural or man-made and includes waves, tides, tidal waves and tsunami.

[7] As part of the policy, Parker requested additional coverage with respect to loss or damage caused by flooding. This is referred to as the "flood endorsement", and provides a specific extension of coverage as follows:

FLOOD ENDORSEMENT
This Insurance is hereby extended to include loss or damage caused directly by the peril of flood subject to the following conditions:

. . . . .

3. Exclusions

This endorsement does not cover loss or damage caused directly or indirectly by:

(a) Water which backs up through sewers, sumps, septic tanks or drains;

(b) Water below the surface of the ground including that which exerts pressure on or flows, seeps, or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows or other openings in such sidewalks, driveways, foundations, walls, or floors[.]

. . . . .

4. Extensions of Coverage
The Insurer shall be liable for loss or damage to the property caused by wind, hail, rain or snow entering the building through an opening in the roof or walls directly resulting from a flood.

. . . . .

6. Definitions

2017 ONSC 3894 (CanLII)

> "Flood" means for the purpose of this endorsement, flood shall mean the rising of, the breaking out or the overflow of any body of water whether natural or man-made and includes waves, tides, tidal waves, and tsunami. [page607]

[8] At this point, I will make two observations that become relevant later in my analysis. First, the definition of "flood" in clause 20(j) of the insurance policy is identical to the definition of "flood" in clause 6 of the flood endorsement.

[9] Second, the exclusion in clause 6B(c)(i) of the insurance policy differs from the exclusion in clause 3(b) of the flood endorsement in that the former applies to any water "derived from natural sources" that seeps through the foundation, while the latter refers only to "water below the surface of the ground" that seeps through the foundation.

The Flood

[10] On June 30, 2014, significant rainfall occurred in the Haliburton area. The rainfall resulted in large pools of water collecting outside of the northwest wall of the premises. Water entered the building and covered an extensive area of the interior floor which caused Parker to sustain $45,000 in damages to the flooring, walls, printed products and equipment at the premises. The loss was reported to Gore on July 1, 2014.

[11] The building is a single-storey building without a basement. It was constructed in at least three phases, so there are two additions to the original building. The building is on a concrete block foundation. A portion of the foundation is above ground.

[12] The only factual dispute in this case relates to where the water entered the building and, more specifically, whether it entered the building above or below "the surface of the ground".

[13] Gore denied the claim, taking the position that a gap in the waterproof wrapping where two walls met at an inside corner allowed for water to enter the building below the grade level through the foundation. It concluded that the water did not rise above the concrete block foundation wall. Accordingly, Gore takes the position that the loss fell within the exclusion in clause 3(b) of the flood endorsement. It also argues that the flood was not the result of an overflow of a body of water, and therefore did not meet the definition of flood in the flood endorsement.

[14] Parker takes the position that the flood resulted from an overflow of a body of water, and the water entered above-grade, and was therefore covered by the flood extension.

Analysis -- Motions for Summary Judgment

[15] Rule 20.04(2)(a) of the Rules of Civil Procedure provides:

> 20.04(2) The court shall grant summary judgment if
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence[.] [page608]

[16] Rule 20.04(2.1) sets out the powers of the court on a motion for summary judgment:

2017 ONSC 3894 (CanLII)

20.04(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

[17] These powers have been extensively reviewed by the Supreme Court of Canada in the case of *Hyrniak v. Mauldin*, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7, 2014 SCC 7.

[18] Even with these extended powers, a motion for summary judgment is appropriate only if the material provided on the motion "gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute": *Hryniak*, *supra*, at para. 50. In *Hryniak*, the Supreme Court held (at para. 49) that there will be no genuine issue for trial when the summary judgment process "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result".

[19] In order to defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party may not rest on mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

[20] The motion judge is entitled to assume that the record contains all of the evidence that would be introduced by both parties at trial. A summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial.

[21] It is now well settled that "both parties on a summary judgment motion have an obligation to put their best foot forward": *Mazza v. Ornge Corporate Services Inc.*, [2016] O.J. No. 5364, 2016 ONCA 753, at para. 9. Given the onus placed on the moving party to provide supporting affidavit or other evidence under rule 20.01, "it is not just the responding party who has an obligation to aelead trump or risk losing"': *Ipex Inc. v. Lubrizol Advanced Materials Canada Inc.*, [2015] O.J. No. 5699, 2015 ONSC 6580 (S.C.J.), at para. 28. [page609]

[22] Since the parties agree that this case should proceed by way of summary judgment rule 20.04(2)(b) applies. It provides:

20.04(2) The court shall grant summary judgment if,

. . . . .

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

2017 ONSC 3894 (CanLII)

[23] I agree with counsel that this is an appropriate case for summary judgment. The primary issue relates to the interpretation of a contract of insurance, and the relevant evidence has been provided by means of expert reports and photographs of the affected area. In my opinion, I have all the evidence that would be available to a trial judge if this matter proceeded by way of trial.

Factual Dispute

[24] The first issue is whether I can resolve the factual dispute on the basis of the affidavit evidence filed.

[25] Gore determined that the flood fell within the exclusion to the flood extension on the basis of a report prepared by Mr. Greg Smrke, a professional engineer, which concluded that the water from the rainstorm entered the premises through a gap in the foundation wrap in the corner joint between two wall sections. His report states:

> (a) The rainwater rushed down a hillside adjacent to the building and accumulated at the side of the building before flowing down the driveway towards the road. As such the flow of water did not appear to be the result of an overflow of a natural or man-made body of water.
>
> (b) A waterproof membrane was attached to the foundation blocks with adhesive around the perimeter of the entire building, which consisted of an original building and a number of additions. While the membrane was in good condition in most places and well adhered to the wall where the water accumulated, there was a discontinuity in the membrane near a corner joint between two addition walls that met perpendicular at an inside corner of the building exterior.
>
> p(c) The resulting gap in the membrane created an entry point for the water which was shown to be pooling in this area.
>
> (d) It is most likely that the water entered below the surface of the ground through discontinuity of the water proof membrane at the point where the walls for the two additions met.
>
> (e) The water level did not rise above the top of the concrete block foundation wall.
>
> (f) Inspection of the interior supports this conclusion. Water damage is evident in the second addition where baseboards have been removed to [page610] facilitate removal of flooring material, but no baseboards or wallboard had been removed from the first addition. This suggests the point of entry of the water was not above the foundation wall, but through the joint in the foundation wall. Had the water entered above the foundation the insulation in the wall would have been soaked and the wallboard would have been removed to allow for the removal of the insulation.

[26] Parker relies on a report prepared by Henry Hutchison, a professional engineer who was retained by Parker to review the site conditions and provide comment with respect to the cause of water infiltration into the premises after the rainstorm on June 30, 2014. His report states:

2017 ONSC 3894 (CanLII)

(a) The pooling of water extended up to the exterior wall of the building and was higher than the exterior grade at the north-west corner of the building. The photographs taken at the time indicate that the flood waters extended at least 0.22 meters above the interior finished floor.

(b) Water within the building was concurrent with above-grade flooding and had an apparent path over the curb wall (approximately 0.20 meters above the interior finished floor) and sheet membrane.

(c) There is no evidence that water entered the building from a source below the surface of the ground.

(d) He agreed with "the apparent assessment of the location of water entering the building as indicated" by the report prepared by Smrke.

(e) The flood level was above the upper extent of the waterproof membrane and concrete curb.

[27] While I generally accept Smrke's observations and conclusions, I do not accept his conclusion that "it is likely that the water entered below the surface of the ground". His report does not explain how he reaches this conclusion. While the water level did not rise above the top of the concrete block foundation, the top of the concrete block foundation is several inches above the surface of the ground. It is clear that the rainwater pooled above the surface of the ground. The photographs appended to his report identify the "residue from Water Line", which confirms that the high water mark from the pooling of rain water is several inches above the exterior grade of the building and rises to just above the waterproof membrane (although still below the top of the foundation blocks). That the water is above the ground is also confirmed by the photographs of the pooling outside the building taken just after the rain storm. Finally, as I understand Smrke's photographs, the "likely point of water ingress" points to a gap that is clearly above ground. It is below the top of the foundation, but it is above the surface of the ground. [page611]

[28] Since the foundation wall projects above the surface of the ground, the fact that the water came in through the foundation wall does not mean that it came in below the surface of the ground. Smrke's report does not explain how water that came in below the surface of the ground made its way up to the above-grade flooring that was damaged. It appears to me that Smrke's report incorrectly conflates "through a joint in the foundation wall" with "below the surface of the ground". In this case, the joint in the foundation wall was above the surface of the ground. Accordingly, based on the evidence that I have reviewed, I conclude that the water that entered the premises through the foundation entered above grade and was not "water below the surface of the ground".

Analysis

[29] With that factual finding in hand, I can proceed with an analysis of the terms of the insurance contract.

Principles of Interpretation

2017 ONSC 3894 (CanLII)

[30] The general principles of interpretation that apply to insurance policies are well established. I adopt this summary of those principles from the Ontario Court of Appeal's decision in *Cabell v. Personal Insurance Co.* (2011), 104 O.R. (3d) 709, [2011] O.J. No. 622, 2011 ONCA 105, at paras. 11-13:

> A clause in the policy providing coverage will be broadly interpreted in favour of the insured. An exclusion clause limiting coverage will be strictly interpreted. Since insurance contracts are contracts of adhesion, any ambiguity in the policy will be construed against the insurer, applying the contra proferentem doctrine: *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993 CanLII 150 (SCC), [1993] 1 S.C.R. 252, [1993] S.C.J. No. 10, at pp. 268-69 S.C.R.]; *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133]. However, these principles of interpretation cannot create ambiguities; if the exclusion clause is clear, it is to be applied according to its terms, subject to the nullification of coverage doctrine discussed below.

[31] As to interpretation of endorsements generally speaking the endorsement does not operate independently of the policy. As Lang J.A. put it in *Pilot Insurance Co. v. Sutherland* (2007), 86 O.R. (3d) 789, [2007] O.J. No. 2596, 2007 ONCA 492, at para. 21:

> An endorsement changes or varies or amends the underlying policy. While it may be comprehensive on the subject of the particular coverage provided in the endorsement, it is built on the foundation of the policy and does not have an independent existence. [page612]

[32] However, if limitation of apparent coverage in an endorsement is ambiguous, the limitation should be set out in the endorsement itself. As Cory J.A. said in *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101, [1984] O.J. No. 3422, 1984 CanLII 45 (C.A.), at p. 120 O.R., in relation to underinsured motorist coverage:

> Limitations on the apparent coverage in the endorsement that are ambiguous in the sense that they are not clearly apparent, should be set out in the endorsement itself. If it was the intention of the insurer that the endorsement was not to cover an "unidentified" vehicle, it would have been a simple matter to say so in the explanatory note.

[33] In *Cabell*, the Ontario Court of Appeal also considered the doctrine of nullification of coverage (at paras. 15-17):

> These passages appear to indicate that the nullification of coverage is simply a particular application of the broader rule of interpretation that in case of an ambiguity in an exclusion clause, the ambiguity is to be construed against the insurer. The subsequent decision of the Supreme Court of Canada in *Consolidated Bathurst* also created some ambiguity as to how the doctrine applied. In a passage that has been repeatedly applied in interpreting insurance contracts, Estey J., speaking for the majority of the court, held as follows, at pp. 901-902 [S.C.R.]:
>
> > Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an

2017 ONSC 3894 (CanLII)

> interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.
>
> . . . . .
>
> These passages suggest a different way of looking at the nullification of coverage doctrine, namely, that it is an independent doctrine that applies even in the absence of an ambiguity. This court has adopted this interpretation of the doctrine in a number of cases, including *Weston Ornamental* and, [page613] more recently, in *Zurich Insurance Co. v. 686234 Ontario Ltd.* [(2002), 2002 CanLII 33365 (ON CA),] 62 O.R. (3d) 447, [2002] O.J. No. 4496 (C.A.), at para. 28 (leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 33):

From *Weston Ornamental Iron Works* it is clear that this court has concluded that even though an exclusion clause may be clear and unambiguous, it will not be applied where: (1) it is inconsistent with the main purpose of the insurance coverage and where the result would be to virtually nullify the coverage provided by the policy; and (2) where to apply it would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.

[34] The Court of Appeal also considered whether any evidence was necessary to reach the conclusion that the clause would nullify the coverage purchased. It stated (at para. 28):

> It seems to me that a court is in a good position to determine what are the most obvious risks for which an ordinary homeowners' policy is issued. If the court is able to determine on an objective basis that the insurer's interpretation would render nugatory coverage for the most obvious risks for which the endorsement is issued, a tactical burden shifts to the insurer. It will be for the insurer to show that the effect of its interpretation would not virtually nullify the coverage and would not be contrary to the reasonable expectations of the ordinary person as to the coverage purchased. This is a reasonable approach given that the insurer is in an ideal position to show that, contrary to what appears to be the case, the endorsement does in fact provide coverage. For example, the insurer would have access to its records and the experience in the industry and would be able to show that claims have been paid for loss or damage not falling within the exclusion.

2017 ONSC 3894 (CanLII)

Position of the Parties

[35] As indicated above the definition of "flood" in clause 20(j) of the insurance policy is identical to the definition of flood in clause 6 of the flood endorsement. Gore argues that the loss is not a "flood" within the meaning of the policy or the flood endorsement because it is not "the rising of, the breaking out of or the overflow of any body of water whether natural or man-made . . .". In this case there was no "body of water" because neither rain nor the pooling caused by rain is a "body of water". A body of water, Gore argues, must be a permanent and identifiable body of water like a river, lake or reservoir. Since there was no "body of water" before the rain began, the temporary pooling of water cannot be the rising of a body of water.

[36] Accepting Gore's interpretation -- that the pooling of rainwater does not qualify as "the rising of, breaking out of or the overflow of any body of water" -- would mean that the pooling of rainwater does not qualify as a "flood" for the purposes of "Perils Excluded" in clause 6B(b). Gore acknowledges this, but [page614] takes the position that the water damage in this case is excluded by virtue of clause 6B(c) (i), which excludes damage caused

> by seepage, leakage or influx or water derived from natural sources through . . . foundations[.]

[37] This then takes us to the flood endorsement. Clause 4 of the flood endorsement provides that the insurer is "liable for loss or damage to the property caused by . . . rain . . . entering a building through an opening in the . . . walls directly resulting from a flood". Gore argues that since the pooling of rainwater does not qualify as a body of water within the definition of "flood" in clause 6 of the flood endorsement, it is simply not covered by the flood endorsement, regardless of how the water entered the premises. In the alternative, if the pooling of rainwater qualifies as "the rising of . . . any body of water", the gap in the waterproof membrane through which the water entered is not an "opening in the . . . walls directly resulting from a flood" because the gap was there before the flood and did not result from the flood.

[38] Parker's position is that "the rising of . . . any body of water whether natural or man-made . . ." includes the pool of rainwater that accumulated outside its premises on June 30, 2014. There is nothing that limits "body of water" to a permanent or pre-existing body of water. If this interpretation is correct, then the damage would be excluded by clause 6B(b) of the insurance policy, but included by virtue of clause 4 of the flood endorsement, since it would be "damage to the property . . . caused by . . . rain . . . entering a building through an opening in the . . . walls directly resulting from a flood". Since I have concluded that the water entered above ground level, it would not be captured by the exclusion in clause 3 of the flood endorsement because it is not "water below the surface of the ground".

Definition of "Flood" and "Body of Water"

[39] The resolution of this dispute depends primarily on the interpretation of the word "flood" in the insurance policy and flood endorsement: does the pooling of rainwater qualify as "the rising of, breaking out of or the overflow of any body of water whether natural or man-made"?

2017 ONSC 3894 (CanLII)

[40] Parker relies on the decision of this court in *T&T Realty Ltd. v. Allstate Insurance Co. of Canada*, [1986] O.J. No. 532, 1986 CarswellOnt 727 (H.C.J.). In that case, flooding of an underground parking garage was caused by surface water runoff from a "profuse and violent downpour of rain". The court found [page615] that none of the damage to the property was caused "by an overflow of a river, stream or natural watercourse".

[41] The question for the court was whether the loss was covered by the plaintiff's insurance policy. That policy contained wording similar to the policy in our case. The policy stated:

> Perils Excluded
>
> This policy does not insure against loss or damage caused directly or indirectly . . . by flood, and the word "flood" includes waves, tides, tidal waves, and the rising of, the breaking out or the overflow of, any body of water, whether natural or man made . . .
> (d)(i) by seepage, leakage or influx of water derived from natural sources through the basement wall, doors, windows or other openings therein[.]

[42] Anderson J. concluded that the damage had been caused by a flood within the meaning of that term in the insurance policy, and was therefore covered by the exclusion. He stated:

> Taking the word in its ordinary meaning I would have no hesitation in concluding that the incident described . . . comprised a flood. It is to be noted that among the definitions contained in the Shorter Oxford English Dictionary (1933 Edition) is the following: "a profuse and violent outpouring of water, a swollen stream, a violent downpour of rain."

[43] Parker argues that if I adopt this reasoning, the incident in our case would be excluded by clause 6B(b) of the insurance policy, but then covered by the flood endorsement.

[44] The difficulty with this argument is that the definition of flood in the *T & T* case used the phrase "the word aeflood' includes", while the clauses in our case uses the phrase "Flood means", and the difference between "includes" and "means" is significant. Anderson J. concluded that the word "includes" was intended to be non-exhaustive. While sometimes the term "includes" is intended to precede a list that is complete and exhaustive (see *Dilworth v. Commissioner of Stamps*, [1899] A.C. 99 (P.C.), at pp. 105-106; *R. v. Loblaw Groceteria Co. (Manitoba)*, [1961] S.C.R. 138, [1960] S.C.J. No. 73; *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, at paras. 47-50), it is generally used to indicate that what follows are examples rather than an exhaustive list. That latter interpretation was adopted by Anderson J. in *T & T*, at para. 8: "There is no such basis for interpretation here and the specified categories of flood are not exhaustive."

[45] In contrast, the word "means", which is used in the policy at issue in this case, "generally precedes a definition to be construed as exhaustive" (*Canada 3000*, at para. 46). [page616]

[46] There is no question that the ordinary meaning of the word "flood" would include the pooling of water resulting from a rainstorm; see *Oakleaf v. Home Insurance Ltd.*, [1958] O.R. 565, [1958] O.J. No. 617, 14 D.L.R. (2d) 535 (C.A.), *per* Porter C.J.O. [at para. 6]: "The word aeflood' as applied to quantities of water inundating cellars as in this case is in common use." Or, as LeBel J.A. (dissenting) stated in the same case [at para. 51]:

2017 ONSC 3894 (CanLII)

> It is not to be denied, of course, that rain is the commonest cause of a disastrous overflow or flood. After all, it was "rain upon the earth" for forty days and forty nights that caused the deluge: Genesis, 7: 4, 5 and 6.

[47] In this case, however, the term flood is given a very specific and restricted definition in both the insurance policy and the flood endorsement, so the ordinary meaning of "flood" does not assist. The plaintiff is covered only if the influx of rainwater through the foundation was caused by a "flood" as defined in clause 6 of the flood endorsement: "the rising of, the breaking out or the overflow of any body of water whether natural or man-made".

[48] Gore relies on the decision of the British Columbia Court of Appeal in *British Columbia (British Columbia Ferry Corp.) v. Commonwealth Insurance Co.*, [1987] B.C.J. No. 1671, 40 D.L.R. (4th) 766 (C.A.). In that case, the plaintiff's property was damaged by six-foot waves raised by the winds across the Georgia Straits, an arm of the Pacific Ocean between Vancouver Island and the mainland. The waves pounded against and battered the structures comprising the plaintiff's ferry terminal. The trial judge concluded that all of the damages were caused exclusively by the waves and that the exclusionary clause in the insurance policy applied. He therefore dismissed the claim of the plaintiff. The Court of Appeal allowed the appeal, concluding that the damage was not caused by a flood as defined by the policy.

[49] The relevant definition in the exclusion clause was identical to the one in our case and read as follows:

> 10. Perils Excluded:
>
> This policy does not insure against . . .
>
> (b) loss or damage caused directly or indirectly by flood, and the word *"Flood" means waves, tides, tidal waves, and the rising of, the breaking out or the overflow of, any body of water whether natural or man made*[.]

(Emphasis added) [page617]

[50] The trial judge concluded that there was no ambiguity in the language of the exclusionary clause. Since the damage was caused by waves it was excluded from coverage. The Court of Appeal agreed that there was no ambiguity, but came to the opposite conclusion, deciding that the damage was not caused by a flood as defined. In reaching its conclusion, the Court of Appeal interpreted the words ". . . and the rising of, the breaking out or the overflow of, any body of water . . .", stating (at paras. 9 and 10):

> Properly construed, in my opinion, what the draftsman of the clause has done is to provide that flood is to be interpreted as covering both cause and effect. Thus, the flood may be caused by waves, tides, tidal waves, and if, for example, as in this case, waves result in the rising of, the breaking out, or the overflow of a body of water that would amount to a flood within the meaning of that term as defined in the exclusionary clause.
> . . . it is clear that what occurred . . . was that waves battered the plaintiff's ferry terminal causing damage, but those waves did not result in the rising of, the breaking out, or the overflow of any body of water. As a result, I conclude that there was no flood within the

2017 ONSC 3894 (CanLII)

meaning of the exclusionary clause in the policy. Therefore, the damage suffered by the plaintiff fell within the coverage of the all risks policy.

[51] I make two observations with respect to this decision. First, it strikes me that if two judges disagree over the interpretation of the same clause there must be at least some ambiguity in the language. Second, I would have thought that a six-foot wave on the Pacific Ocean does qualify as the "rising of . . . a body of water".

[52] Either way, the holding in *B.C. Ferry* does not directly address the issue in this case. Gore argues that the case stands for the proposition that the loss at issue "did not involve any body of water". That is not correct. There was no question in that case that the loss involved a body of water: the waves came from the Pacific Ocean, and no one disputed that the Pacific Ocean is a body of water. The issue, according to the Court of Appeal, was whether the waves *resulted* in the rising of, the breaking out, or the overflow of any body of water. The British Columbia Court of Appeal found that it did not. In any event, the case did not consider whether a "body of water" must be pre-existing, permanent and identifiable (although there is no doubt that the Pacific Ocean meets all of those criteria).

[53] In my opinion, the ordinary meaning of the phrase "the rising of, the breaking out or the overflow of any body of water whether natural or man-made and includes waves, tides, tidal waves, and tsunami" is limited to pre-existing bodies of water and does not include pooling of rain water in a location [page618] where no body of water previously existed. I come to this conclusion by considering all of the words in context. A pre-existing body of water such as a lake, river or reservoir can rise, breakout or overflow. In this case, the pool of water did not exist before the rain, and cannot be said to rise, break out or overflow because it has no pre-determined boundary or level from which it can rise, break out or overflow.

[54] While the term "body of water" might be ambiguous when considered in isolation, it is not ambiguous when considered in the context of the complete clause. In my view, the context clearly shows that the intention was to include the rising, breaking out or overflow of an existing and identifiable body of water.

Interpretation of the Insurance Policy

[55] Given this interpretation of the term "body of water", I would interpret the insurance policy as follows:

(1) The water damage to the plaintiff's premises is *not* excluded by the flood exclusion in clause 6B(b) of the insurance policy because the definition of "flood" in clause 20(j) of the policy restricts the otherwise inclusive definition of flood in clause 6B(b). These provisions only exclude floods caused by the rising, breaking out or overflowing of a body of water.

(2) The water damage to the plaintiff's premises *is* excluded by virtue of clause 6B(c)(i) of the policy since the damage was caused "by seepage, leakage or influx or water derived from natural sources through . . . foundations".

(3) The water damage to the plaintiff's premises is *not* covered by the flood endorsement because the water damage was not caused by "the rising of, the breaking out or the

2017 ONSC 3894 (CanLII)

overflow of any body of water whether natural or man-made" as required by the definition of flood in clause 6 of the flood endorsement.

(4) The water damage to the plaintiff's premises is not covered by the "Extension of Coverage" in clause 4 of the flood endorsement because the rain that entered the building did not enter the building as a direct result of a "flood" as that term is defined by clause 6 of the flood endorsement.

[56] If I am incorrect about the definition of flood in clause 6 of the flood endorsement, I would have found that the water damage did meet the other requirements of clause 4. If the word flood had a wider definition, it would be my view that the water damage qualifies as "damage to the property caused by . . . rain [page619] . . . entering the building through an opening in the . . . walls directly resulting from a flood".

[57] Gore argues that there was no opening in the walls "directly resulting from a flood", since the gap in the waterproof membrane existed before the rainstorm. In my opinion, this phrase is ambiguous. Relying on the principles of interpretation that insurance policies must be broadly interpreted in favour of the insured and that any ambiguity in the policy will be construed against the insurer, I would interpret the sentence as requiring that the damage to the property be caused by rain, which it was, that the rain entered the building through an opening in the walls, which it did, and that these two factors -- the damage to the property caused by rain entering the building through an opening in the walls -- be the direct result of a flood, which it would be if I am wrong about the definition of flood in clause 6.

[58] Finally, given my factual finding that the water entered the premises above the surface of the ground, the opening words in the exclusion in clause 3(b) of the flood endorsement -- "Water below the surface of the ground" -- would not apply if this case were otherwise covered by the flood endorsement. For the exclusion in the endorsement to apply the gap in the foundation wall must be "below the surface of the ground", and the photographic evidence indicates that the gap and the water were both above the ground, although below the top of the foundation blocks. Accordingly, the exclusion in clause 3(b) of the flood endorsement would not apply if the damage was otherwise covered by the flood endorsement.

Doctrine of Nullification

[59] The doctrine of nullification applies to an exclusion clause that nullifies or renders nugatory the intended coverage. In this case, the plaintiff's claim fails because the damage does not fall within the definition of flood as set out in the flood endorsement, not because the damage is excluded by an exclusion clause.

[60] The coverage provided by the definition of flood in clause 6 of the flood endorsement is not on its face illusory. Buildings proximate to a body of water may well experience flooding if the body of water rises, breaks out or overflows. Recent events at Toronto Island and communities along the Ottawa River, as well as the 2013 flooding in Calgary caused by the Bow River overflowing its banks, demonstrate the potential value of such insurance. I leave to another day the issue of whether the interpretation of the exclusions advanced by Gore in this case would [page620] survive the doctrine of nullification if the damage were otherwise covered by the endorsement.

2017 ONSC 3894 (CanLII)

[61] There is no evidence in this case whether the Parker premises was anywhere near a "body of water" such that this flood endorsement was the appropriate coverage for that building. It may be that what Parker needed was coverage to override the exclusions in clause 6B(c) of the policy, rather then the flood endorsement to cover what was excluded by clause 6B(b).

Conclusion

[62] Based on the foregoing, the plaintiff's motion for summary judgment against the defendant Gore is dismissed, and the plaintiff's claim against the defendant Gore is dismissed.

[63] The parties filed costs submissions at the end of the motion. Gore has requested costs on a partial indemnity basis, fixed at $6,000, including fees and disbursements. The amount was not disputed by Parker, whose claim for costs had it succeeded was much higher. I agree that this is a reasonable amount for a summary judgment motion that includes an expert report. Costs are fixed at $6,000, payable within 30 days.

Motion dismissed.

---

1 Vous trouverez la traduction française à la p. 620, post.

End of Document

2017 ONSC 3894 (CanLII)