IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Westaqua Commodity Group Ltd. v. Sovereign General Insurance Company,* 2014 BCSC 263

Date: 20140218
Docket: S117309
Registry: Vancouver

Between:

Westaqua Commodity Group Ltd.

Plaintiff

And

Sovereign General Insurance Company

Defendant

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Plaintiff:	D.H. Coles
Counsel for the Defendant:	J.M. Shore
Place and Date of Trial:	Vancouver, B.C. September 25, 2013
Place and Date of Judgment:	Vancouver, B.C. February 18, 2014

Introduction

[1] The plaintiff, by way of a summary application, applies for determination of coverage issues under a commercial general liability ("CGL") insurance policy (the "Policy") issued by the defendant.

[2] Specifically, the plaintiff purchased a product from a supplier and then sold it to a third party who then used it to make fish food. It was subsequently discovered to be contaminated. The contamination occurred before it was purchased by the plaintiff. Some of the contaminated product was used by the third party to manufacture fish food and it caused damage to the fish (including deaths). That damage has been settled (and the defendant defended the plaintiff) and it is not part of the subject application.

[3] Some of the contaminated product was sold to the third party but not used to make fish food. It could not be used for any other purpose and it had to be destroyed by the third party who then made a claim against the plaintiff. In this application the plaintiff seeks indemnification for the cost to dispose of this unused but contaminated product. The defendant opposes this claim.

[4] The issues in this application include whether there has been "property damage" and an "occurrence" within the meaning of the Policy and, if there was property damage and an occurrence, whether exclusions (and exceptions) in the Policy apply.

Background

[5] The facts are not in dispute.

[6] The plaintiff Westaqua Commodity Group Ltd. is in the business of, among other things, supplying ingredients to the aquaculture, agriculture and pet food industries. This included the sourcing, acquisition and supply of corn gluten meal ("CGM") for use in the manufacture of fish food.

[7] The defendant Sovereign General Insurance Company is an insurance company. At all material times the plaintiff was insured by the defendant under the Policy for both property and liability coverage, on terms and conditions set out in the Policy.

[8] One of the customers of the plaintiff was Skretting, a world-wide fish food manufacturer for the aquaculture industry, including operations in Japan. On or about 2006 the plaintiff supplied CGM to Skretting in Japan to be combined with other ingredients to make fish food. The CGM in question had been acquired by the plaintiff from a supplier in China, Lianyungang Nantian International EC ("Lianyungang"). It was shipped from China, directly to Skretting in Japan.

[9] Unbeknownst to the plaintiff, the CGM purchased by the plaintiff was contaminated with ammonia. This had the effect of falsely increasing the protein level of the CGM when it was tested. However, ammonia at sufficiently high levels also makes CGM toxic and unfit for any use.

[10] The plaintiff first received verbal notice from Skretting of likely contamination of the CGM supplied by the plaintiff in late April 2007. Among other problems some fish died as a result of the food that was made with the contaminated CGM. Skretting destroyed the fish food which had been manufactured using the contaminated CGM. Two court actions between the plaintiff and the defendant were settled through mediation in 2010 with the defendant defending the actions, subject to reservation of certain rights. The result is that there is no issue in the current application with regards to the fish food made from the contaminated CGM or the damage caused by it.

[11] Skretting also possessed contaminated CGM that had not been used in fish food and it was shipped back to China for destruction. None of the unused contaminated CGM could be sold or otherwise salvaged. There was a claim by Skretting against the plaintiff for the cost of destroying the unused contaminated CGM. On or about May 2007 the plaintiff made a claim under the Policy against the defendant for that cost. The defendant denied the plaintiff’s claim.

[12] In October 2011 the plaintiff commenced the subject action. It claims under the Policy the cost of the disposal of the unused contaminated CGM. At the time of the hearing of its application the claim was for $23,057.28.

Analysis

[13] In broad terms, according to the plaintiff, the defendant has failed in its obligation to the plaintiff under the Policy to defend, investigate, and indemnify its claim for the disposal costs of the unused contaminated CGM. According to the defendant, the unused contaminated CGM was not used for fish food, it did not cause any damage and, therefore, it is not covered by the insurance policy between the parties.

(a) The decision in *Progressive Homes*

[14] The Supreme Court of Canada decision in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 SCR 245 restated and summarized the general principles to be applied to the interpretation of CGL policies as follows:

> ...
>
> **B. General Principles of Insurance Policy Interpretation**
>
> [21] Principles of insurance policy interpretation have been canvassed by this Court many times and I do not intend to give a comprehensive review here (see, e.g., *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59 (CanLII), 2009 SCC 59, [2009] 3 S.C.R. 605, at paras. 20-28; *Jesuit Fathers*, at paras. 27-30; *Scalera*, at paras. 67-71; *Brissette Estate v. Westbury Life Insurance Co.*, 1992 CanLII 32 (SCC). [1992] 3 S.C.R. 87, at pp. 92-93; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888, at pp. 899-902). However, a brief review of the relevant principles may be a useful introduction to the interpretation of the CGL policies that follow.
>
> [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).
>
> …

[15] As described further in *Progressive Homes,* the general approach in disputes such as this one is to determine if the policy covers the damages at issue and, if so, to then consider any exclusions in the policy:

> …
>
> [26] The insurance contracts in this appeal are CGL policies. CGL insurance policies typically consist of several sections (see *Jesuit Fathers*, at para. 34; see also M. G. Lichty and M. B. Snowden*, Annotated Commercial General Liability Policy* (loose-leaf), vol. 1, at p. 1-9). The policy will set out the types of coverage contained in the agreement, for example, property damage caused by an accident.
>
> [27] This is typically followed by specific exclusions to coverage. Exclusions do not create coverage - they preclude coverage when the claim otherwise falls within the initial grant of coverage. Exclusions, should, however, be read in light of the initial grant of coverage (*Annotated Commercial General Liability Policy*, vol. 1, at p. 1-10).
>
> [28] A CGL policy may also contain exceptions to exclusions. Exceptions also do not create coverage - they bring an otherwise excluded claim back within coverage, where the claim fell within the initial grant of coverage in the first place (*Annotated Commercial General Liability Policy,* vol. 1, at p. 1-10). Because of this alternating structure of the CGL policy, it is generally advisable to interpret the policy in the order described above: coverage, exclusions and then exceptions.
>
> …

[16] *Progressive Homes* is also of broader significance in the development of insurance law and it was the subject of case comments (for example: Peter Bowal, *Progressive Homes v. Lombard General Insurance Co. of Canada*, (2013) 50:3 Alta L Rev 697; Mark G. Lichty and Marcus B. Snowden, *Annotated Commercial General*

Liability Policy, vol. 1, Aurora Ont.: Canada Law Book, 1997 (Loose-leaf updated December 2013, release 20) at 10-29 and 30).

[17] As will be seen, the plaintiff relies on *Progressive Homes* as support for its position in this application.

(b) Property damage

[18] As above, the parties are joined on the issue of whether the unused contaminated CGM in this case meets the property damage definition under the Policy. The plaintiff says there is property damage because the CGM was unusable for any purpose. The defendant says there was no property damage as the term is contemplated by the Policy.

[19] I note under the Policy the following definition of property damage:

> **"Property Damage"** means:
>
> (a) Physical injury to tangible property, including all resulting loss of use of that property; or
>
> (b) Loss of use of tangible property that is not physically injured.

[20] In my view, the second part of this definition is applicable here. The loss of the use of the unused contaminated CGM was clearly a loss of tangible property. Further, the nature of the contamination in this case is that there was no physical injury but there is no dispute that the unused contaminated CGM was defective, it was not suitable for any purpose and it had to be destroyed. For these reasons I disagree with the defendant and I conclude that there was property damage as defined by the Policy when there was the loss of use of the unused contaminated CGM.

[21] I also find support for this conclusion in the following comments in *Progressive Homes* by Mr. Justice Rothstein:

> [38] Does the definition of "property damage" exclude defects? Or, can defective property constitute "property damage" as defined in the policies? …
>
> [39] While this point was not contested and nothing turns on it in this appeal, it is not obvious to me that defective property cannot also be "property damage". In particular, it may be open to argument that a defect could not

> amount to a "physical injury", especially when the harm to the property is "physical" in the sense that it is visible or apparent (see, e.g., *Annotated Commercial General Liability Policy*, vol. 1, at p. 10 – 10). Moreover, where a defect renders the property entirely useless it may be arguable that defective property may be covered under "loss of use", the second portion of the definition of "property damage" [as in the subject case].

Occurrence

[22] That the unused contaminated CGM constitutes property damages is not the end of the inquiry. The coverage provisions of the Policy stipulate that only property damage that is caused by an "occurrence" is covered:

> **SECTION I- COVERAGES**
>
> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> …
>
> **1. Insuring Agreement**
>
> (a) The Insurer will pay those sums that the Insured becomes legally obligated to pay as compensatory damages because of..."property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A, B AND D. This insurance applies only to..."property damage" which occurs during the policy period. The..."property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory". ...
>
> [Underlining added, capitals in original]

[23] An "occurrence' is defined in the Policy as: "… an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

[24] I next turn to whether there was an "occurrence" under the Policy. For the reasons that follow, I find that there has not been an occurrence.

[25] According to the plaintiff the Supreme Court of Canada decision in *Progressive Homes* supports a conclusion in the subject case that there was an occurrence under the Policy.

[26] In *Progressive Homes* the same definition of "occurrence" as in the subject case was used in later versions of the policies at issue in that case (paras. 11, 43). However, the focus of the judgment was on the meaning of "accident" rather than a

detailed analysis of this definition of “occurrence” (paras. 42-49). I also note that the facts in *Progressive Homes* were different than those in the subject case inasmuch as they involved a claim for water damage to one part of a building as a result of a defect in another part of the same building complex. The insurer was successful in having its decision to deny a claim under the policy upheld after a summary trial and also after an appeal by the insured to the Court of Appeal for British Columbia (in a majority decision). However, a further appeal by the insured to the Supreme Court of Canada was allowed.

[27] Before the Supreme Court of Canada the insurer in *Progressive Homes* argued that the situation in that case was one of a defective building as a result of faulty workmanship rather than an accident, and therefore was not covered by the CGL policy. It submitted that equating faulty workmanship to an accident that coverage would effectively convert a CGL policy into a performance bond. The majority in the Court of Appeal decision concluded that allowing coverage for faulty workmanship would offend the assumption that insurance is for a fortuitous contingent risk (although it also concluded that the claim against the insurer came under the coverage of the applicable policy); (paras. 15, 45).

[28] In the Supreme Court of Canada Mr. Justice Rothstein, writing for a unanimous court, disagreed with the insurer and the Court of Appeal. He stated that whether defective workmanship constitutes an “accident” as contemplated by any given CGL policy is a case-specific issue (depending on the facts and the policy at issue) and he did not agree that faulty workmanship can never be an accident. With regards to fortuitous contingent risk he concluded that fortuity was “built into” the definition of accident and it was consistent with previous jurisprudence that an “accident” was an “unlooked-for mishap or an untoward event which is not expected or designed” (citing *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59 at para. 22). Defining ‘accident’ in this way makes fortuity a requirement of coverage and therefore it cannot be said that an interpretation of “accident” that could encompass faulty workmanship “offends any basic assumption of insurance law.” Finally, Mr. Justice Rothstein disagreed that equating faulty workmanship to an accident converts a CGL policy into a performance bond because a bond ensures

work is brought to completion but a CGL policy covered damage after the work was completed. (See paras. 42-48).

[29] Mr. Justice Rothstein also said the following about the meaning of an accident (para. 49):

> "Accident" should be given the plain meaning prescribed to it in the policies and should apply when an event causes property damage neither expected nor intended by the insured. According to the definition, the accident need not be a sudden event. An accident can result from continuous or repeated exposure to conditions.

[30] I accept that the discussion in *Progressive Homes* about fortuitous contingent risk has some application here. The evidence is that the plaintiff did not know of the defect in the CGM until after the product was delivered, so a conclusion of fortuity is appropriate in the subject case.

[31] However, in my view, the analysis and conclusions from *Progressive Homes* are otherwise of limited significance. I am unable to find in *Progressive Homes* an analysis of "occurrence" that assists the plaintiff in its position here. As above, any specific analysis of that issue appears to have been subsumed in the analysis of "accident"; in any event in *Progressive Homes* there was an occurrence.

[32] Furthermore, on the evidence, faulty workmanship by the plaintiff is not an issue here so the conclusion in *Progressive Homes* that there is no categorical bar to coverage where there is faulty workmanship is of limited application. Similarly, the discussion about performance bonds is not an issue that arises here. And I note that *Progressive Homes* was a duty to defend case where the standard was whether there is a "mere possibility that a claim falls within the insurance policy" (para. 19). In contrast, the subject case requires a full and substantive analysis of the Policy and evidence in order to decide whether the claim by the plaintiff has been made out.

[33] The plaintiff also submits that a recent decision in the Court of Appeal for British Columbia supports its position. This is the decision in *Bulldog Bag Ltd. v. AXA Pacific Insurance Company*, 2011 BCCA 178.

[34] *Bulldog Bag*, the plaintiff, supplied plastic bags with printed labels to a company, Sure-Gro, to package soil and manure. However, there was a defect in the printing on the bags that caused the ink in the labelling to run when exposed to moisture. The result was that the labels on the bags were unreadable and the packaged soil and manure in the defective bags were unsaleable. However, the contents of the bags were not damaged and were repackaged in new non-defective bags for resale. About 10% of the contents of the bags were lost in the repackaging. Sure-Gro claimed damages against *Bulldog*, the latter filed a claim with its insurer and the insurer denied the claim.

[35] At trial (2010 BCSC 419) the Court found the insurer was only liable to indemnify *Bulldog* for the cost of the 10% of Sure-Gro's product that was destroyed in the repackaging process. The Court found that the insurer was not liable to indemnify *Bulldog* for the cost to Sure-Gro of removing its product from the defective packaging, disposing of that packaging and the cost of replacement packaging on the basis that none of this was property damage covered by the policy in that case. *Bulldog* appealed against the latter finding. The Supreme Court of Canada's decision in *Progressive Homes* was issued after the trial judgment in *Bulldog* and before the hearing of the appeal.

[36] As a result of *Progressive Homes* the insurer in *Bulldog* conceded, before the Court of Appeal, that the trial judge's conclusions about the scope of coverage for property damage could no longer be supported. Specifically, the insurer agreed that, *prima facie*, the claim by *Bulldog* constituted property damage because its faulty bags were "injured" and Sure-Gro lost the use of them. And the insurer conceded that the faulty workmanship that resulted in the defective bags qualifies as an "accident" or "occurrence" under the applicable policy (para. 25 of the appellate decision in *Bulldog*). The Court of Appeal then proceeded to discuss the exclusion issues raised by the insurer. In the end, the appeal by Bulldog was successful.

[37] As pointed out by the plaintiff here there are some similarities between the decision in *Bulldog* and the subject case. For example, as with the plastic bags in

Bulldog, the unused contaminated CGM here was completely unusable and there were no alternatives but to destroy the defective bags and the CGM. However, it is also true that the insurer in *Bulldog* conceded before the Court of Appeal that faulty workmanship by *Bulldog* was the cause of the defective bags and there was an occurrence within the meaning of the policy in *Bulldog*. No such concession has been made here.

[38] In my view, a significant distinguishing fact between the subject case and *Bulldog* is that the problem in the former was caused by a third party supplier to the plaintiff, Lianyungang. That is, the CGM was contaminated when it was purchased by the plaintiff and then sold to Skretting. In *Bulldog* it was the faulty workmanship or manufacturing of the plaintiff insured that resulted in the defective product. As well, as in *Progressive Homes*, I am unable to find in *Bulldog* a detailed analysis of "occurrence" that assists in resolving the issues in the subject case. The appellant insurer in *Bulldog* conceded there was an occurrence (and property damage) but it is not specifically explained how there was an occurrence.

[39] Returning to the specific issue of whether there was an "occurrence" in this case, the *Progressive Homes* decision is a recent direction that the primary interpretative principle is the language of the Policy and I should give effect to clear language, reading the policy as a whole (para. 22). I reproduce again the definition of "occurrence" from the Policy as follows: "… an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

[40] As above, the policy in *Progressive Homes* had the same definition of "occurrence" but that issue was not analyzed in any detail and the discussion was primarily about the meaning of an "accident". The court stated that the definition of "accident" and "occurrence" were "essentially the same" under the policy (para. 43) and the approach appears to have been to discuss the two terms together, even to conflate them.

[41] Whether considered on its own or included as part of an analysis of "accident" I am unable to find in *Progressive Homes* an analysis determinative of the facts in the subject case.

[42] The plaintiff relies on other decisions.

[43] In particular, there is the Alberta decision of *Hironaka v. Co-Operators General Insurance Company*, 2005 ABQB 705. In that case the insured, Hironaka, purchased seed potatoes from a supplier who warranted they were free of any genetically modified organisms ("GMO"). However, the potatoes did contain GMO, they were thereby unmarketable and they had to be destroyed. Litigation under two claims was commenced by a third party against *Hironaka* (and others), he made a claim against his insurer but the insurer advised him that he was not entitled to indemnity or a defence (para. 10). *Hironaka* then commenced two actions against the insurer and he was successful on the issue of duty of the insurer to defend.

[44] On the primary issue of whether there was property damage under the applicable insurance policy (and in the context of the plaintiff's claim that the insurer had a duty to defend him), the court concluded that it was "possible" that the claims of damage "could fall" within the coverage under the policy, there was loss of the retail value of the potatoes and that "could be" damages attributable to physical injury or destruction of tangible property (para. 35). Further, since the potatoes were a total loss there was no issue of partial loss or any issue of a defective product (para. 36-38).

[45] Another issue raised in the two *Hironaka* pleadings was the storage of unsold potatoes contaminated with GMO, according to one claim, and "storage costs of inventory not able to be sold" as of a specific date, according to the other claim. These two claims were found to be "different" because it was not clear if the claim was for damages for the resale of the potatoes or a claim for the cost of their destruction. In the end, there was "no clear indication of the fate of the stored potatoes" and, in "the absence of such clear wording," the conclusion was that it was "possible" the potatoes had been destroyed. Furthermore, this was a "possible"

claim for loss and it was property loss under the applicable policy (para. 46) for the purposes of assessing the insurer's duty to defend.

[46] According to the plaintiff, *Hironaka* is essentially on all fours with the subject case and it supports the claim by the plaintiff against the defendant here for the cost of disposing of the unused contaminated CGM. The primary similarity is that the potatoes in *Hironaka* and the unused contaminated CGM in this case were both defective as a result of being supplied to the insured that way. In both cases the insured's actions were not responsible for the defects. I agree that is a common feature of the two situations. I also agree that the result in *Hironaka* was that the cost of disposing the contaminated potatoes was considered a valid claim against the insurer.

[47] However, the primary issue in *Hironaka* was whether the insurer had a duty to defend and Mr. Justice Park found that was the case. This was prior to the Supreme Court of Canada decision in *Progressive Homes* but the approach was similar: whether any of the allegations in the pleadings could "possibly fall within the coverage provided in the insurance policy" (para. 21). The approach in *Hironaka* was that the "widest latitude" was to be given to the pleadings and allegations of the insured in order to decide whether a claim was raised under the policy (para. 23).

[48] In contrast, the subject case raises the issue of indemnity rather than duty to defend and, therefore, the standard of proof is more than a "possibility" (*Hironaka*) or a "mere possibility" (as described in *Progressive Homes*). The onus on the plaintiff here is to prove on a balance of probabilities that its claim comes under the Policy. As well, I note that in *Hironaka* there was a question whether the cost of destroying the potatoes with GMO was even pleaded and this was also decided on the "possibility" standard. Finally, I am unable to find in *Hironaka* where there is an analysis of the issues of "property damage" and "occurrence" as are joined in the subject case.

[49] For these reasons I conclude that *Hironaka* is not determinative of the issues in the subject case.

[50] *Carwald Concrete and Gravel Co. Limited v. General Security Insurance Company of Canada* (1985), 70 A.R. 340, 24 D.L.R. (4th) 58 (Alta. C.A.), is another case relied on by the plaintiff. There the Alberta Court of Appeal considered a situation where cement was supplied by the insured to another party to make concrete. However, the cement had been supplied to the insured by a third party, it was defective and substantial damages resulted when the concrete did not meet the required tests. The insured (who purchased and then supplied the defective cement) obtained judgment against the party who supplied the cement to it but that party became bankrupt. The insured then made a claim with the insurer and this was denied. The insurer's denial was upheld in the Court of Queen's Bench but this was overturned on appeal.

[51] The conclusion of the appeal court in *Carwald* was that the defective concrete amounted to physical injury to tangible property because the rebar and other material in the concrete pad (ducting, wiring etc.) were useless for the purpose for which they were installed and the pad could not be used (para. 20). Transposing that conclusion to the subject case, the specific comparison is that the fish food manufactured using the unused contaminated CGM was rendered useless (or worse) for the purpose of feeding fish. In *Carwald* the claim was for the result of damage from the defective cement not for the cost of disposing unused and contaminated cement. However, that is not the issue in this case because it is the unused contaminated CGM that was *not* used to make fish food that is at issue here.

[52] In *Gulf Plastics Ltd. v. Cornhill Insurance Company Limited and Cornhill Insurance Company of Canada*, 47 B.C.L.R. (2nd) 379 (S.C.) aff'd (1991), 61 B.C.L.R. (2nd) 64 (C.A.), the insured supplied a defective product used to make plastic bags. The insured purchased the defective product from a third party supplier. Mr. Justice Spencer concluded that the plastic made from the defective product was rendered useless for the purpose it was intended or, alternately, there was a loss of use of tangible property. He also noted that in *Carwald* the basis of the decision was that the work and materials imbedded in the concrete (rebar, wiring etc.) were not physically affected by the defect in the cement and then the concrete.

However, they had “lost their intended utility because the concrete would not support the structure they were to serve.” (pp. 4-5).

[53] In my view, *Gulf Plastics* must be distinguished from the subject claim on the same basis as *Carwald*: the contaminated CGM in the subject case was unused and did not cause damage while in *Carwald* and *Gulf Plastics* the defective products did cause damage. Further, in *Gulf Plastics* the defective product occurred as a result of the faulty workmanship of the insured.

[54] Accordingly, none of the cases relied upon by the parties in this case are particularly helpful in determining the issues here. The only true guidance is from the language of the Policy. Returning to the facts of the subject case, was there an “occurrence” and was there an “accident” in this case?

[55] The plaintiff did not have knowledge of the contamination of the CGM until after it was purchased from Lianyungang and then sold to Skretting. On this basis, I conclude that the “damage” was neither intended nor expected by the plaintiff; it was fortuitous. Further, an accident need not be a continuous and repeated exposure to substantially the same harmful conditions. This conclusion follows from *Progressive Homes* (para. 49) and from the language of the definition of “occurrence.” For example, the definition uses “including.” The logic of this is that the definition can be met if there is a single exposure to a harmful condition (or conditions).

[56] Considering the definition of occurrence more specifically, I have some difficulty finding that there was an occurrence in this case or, using the analysis in *Progressive Homes*, that there was an accident.

[57] I also reproduce again the following description of “accident” from the Supreme Court of Canada judgment in *Progressive Homes*:

> [49] “Accident” should be given the plain meaning prescribed to it in the policies and should apply when an event causes property damage neither expected nor intended by the insured. According to the definition, the accident need not be a sudden event. An accident can result from continuous or repeated exposure to conditions. [Emphasis added]

[58] While the decision in *Progressive Homes* broadened the scope of what can be considered an "accident" or "occurrence" in a CGL policy, it is clear that the definition presumes an event to have occurred. The evidence in this case does not explain what event contaminated the CGM and we do not know whether the contamination was the result of a sudden event or exposure to continuous or repeated harmful conditions. On the evidence, there were the sales of the unused contaminated CGM by Lianyungang to the plaintiff and then the sale from the plaintiff to Skretting. However, as might be expected, I am unable to find the sales can be characterized as any kind of exposure to harmful conditions or having any causative significance for the contamination. It is clear the contamination occurred before, and independently of, the transactions between Lianyungang and the plaintiff and then the plaintiff and Skretting. Clearly there was some event or events that caused the contamination. But we do not know what they were and there is no evidence from which to infer how the contamination occurred.

[59] Overall, I conclude that there was property damage in this case inasmuch as there was loss of tangible property that was not physically injured. However, the Policy requires property damage that is caused by an "occurrence." T. I am unable to find that there is evidence of an occurrence in this case, as that word is defined under the Policy.

Exclusions

[60] As a result of my decision above, it is not necessary to address the issues of exclusions. However, they were addressed in argument at some length and I will, therefore, provide decisions and brief reasons.

[61] The defendant submits that, if there is property damage and an occurrence, then the plaintiff's claim still fails because it is excluded under the contractual liability, impaired property, product recall/ sistership and own product exclusions in the Policy. As pointed out in *Bulldog*, exclusion clauses are to be read narrowly and consistent with the parties' reasonable expectations.

Contractual liability exclusion

[62] The contractual liability provision in the Policy is as follows:

> This insurance does not apply to:
>
> …
>
> (b) … "property damage" for which the insured is obligated to pay compensatory damages by reason of assumption of liability in a contract or agreement. This exclusion does not apply to liability for compensatory damages:
>
> 1) Assumed in a contract or agreement that is an "insured contract"; or
>
> 2) That the Insured would have in the absence of the contract or agreement.

[63] The defendant submits that the facts as they relate to an unpaid refund arrangement for a disposal cost create an "obligation" on Westaqua and this comes under the contractual liability exclusion. I conclude that this is something of a construction rather than a contractual term and, in any event, the exclusion is for "liability" rather than an obligation.

[64] I conclude that the facts do not support a contractual liability exclusion.

Impaired property exclusion

[65] The impaired property exclusion is:

> 2. Exclusions.
>
> This insurance does not apply to:
>
> …
>
> (k) "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "the Named Insured's product" or "the Named Insured's work"; or
>
> (2) A delay or failure by the Insured or anyone acting on the Insured's behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "the Named Insured's product" or "the Named Insured's work" after it has been put to its intended use.

[66] And "impaired property" is defined as:

> "Impaired property" means tangible property, other than "the Named Insured's product" or "the Named Insured's work", that cannot be used or is less useful because:
>
> (a) It incorporates the "the Named Insured's product" or "the Named Insured's work" that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> (b) The Named Insured has failed to fulfill the terms of a contact or agreement;
>
> If such property can be restored to use by:
>
> (i) The repair, replacement, adjustment or removal of "the Named Insured's product" or "the Named Insured's work"; or
>
> (ii) The Named Insured's fulfilling of the terms of the contract or agreement.

[67] The Policy also defines "The Named Insured's Product" as follows:

> (a) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
>
> 1. The Named Insured;
> 2. Others trading under the Named Insured's name; or
> 3. A person or organization whose business or assets the Named Insured has acquired; and
>
> (b) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
>
> "The Named Insured's Product" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in (a) and (b) above.
>
> "The Named Insured's Product" does not include vending machines or other property rented to or located for the use of others but not sold.

[68] It is clear that Westaqua "sold" the unused contaminated CGM to Skretting and, therefore, it is "The Insured's Product." Further, the product was defective.

[69] I conclude that the impaired property exclusion would apply in this case and the exceptions (loss of use of other property arising out of sudden and accidental physical injury to "the Named Insured's product or "the Named Insured's work" after it has been put to its intended use) do not apply.

Product recall exclusion

[70] The product recall exclusion provision in the Policy is as follows:

> 2. Exclusions.
>
> This insurance does not apply to:
>
> …
>
> (l) Any loss, cost or expense incurred by the Insured or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> (1) "The Named Insured's product";
>
> (2) "The Named Insured's work"; or
>
> (3) "Impaired property";
>
> if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

[71] The issue in this application is the "disposal" of the unused contaminated CGM. It was a "product" of the insured. Further, it was "withdrawn" from the market by an organization (Skretting) because of its known defect.

[72] I find that the product recall exclusion would apply in this case.

Own product exclusion

[73] The own product exclusion is as follows:

> 2. Exclusions
>
> This insurance does not apply to:
>
> …
>
> (i) "Property damage" to "the Named Insured's product" arising out of it or any part of it.

[74] I note that in *Bulldog* the Court of Appeal stated that, even before *Progressive Homes* other decisions had established that an "own product" exclusion did not apply to loss incurred by the insured's customer as a result of defects in the insured's own product (*Gulf Plastics Ltd.* at para. 10; *Carwald Concrete and Gravel Co. v. General Security Insurance Company of Canada and the Canadian Indemnity Co.* (1985), 24 D.L.R. (4th) 58 (Alta. C.A.)). And the court noted para. 68 of *Progressive Homes* where the Supreme Court of Canada considered the "work performed" exclusion in the applicable policy. The court ruled that this clause only

excluded “coverage for defective property” and that “[c]overage would remain for resulting damage” (*Bulldog*, para.34).

[75] The evidence in the subject case is that the plaintiff’s claim for the cost is to dispose of the unused contaminated CGM. I am unable to find that this can be reasonably interpreted to mean the replacement cost of that product.

[76] This exclusion would not apply.

Conclusion

[77] The plaintiff’s application is one that requires a full analysis of the Policy and the evidence; it is not one involving the duty to defend by the defendant.

[78] Under the Policy, there was property damage under the Policy because there was loss of use of tangible property that was not physically injured. Further, the CGM was not suitable for any purpose and it had to be destroyed.

[79] The Policy also requires that property damage must be caused by an “occurrence.” In this case there was no occurrence because the evidence does not explain what event contaminated the CGM or whether it was the result of a sudden event or exposure to continuous or repeated harmful conditions. The claim by Westaqua fails on this basis.

[80] In the event that the exclusions in the Policy apply, the impaired property and product recall exclusions apply. The contractual liability and own product exclusions do not apply.

[81] The plaintiff’s claim is dismissed. The defendant is entitled to its ordinary costs.

“Steeves, J.”