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BC COURTS APPLY *SWAGGER*

BACKGROUND

The 2005 British Columbia Supreme Court decision in *Swagger Construction v. ING* significantly impacted construction litigation, in particular leaky building claims in B.C. In *Swagger* the Court determined that an insured general contractor cannot attract a "duty to defend" under a CGL policy when the only damage in issue is the very "work" the insured was contracted to perform. Specifically, the Court in *Swagger* found "faulty workmanship", without more, is not an "occurrence". Faulty workmanship that results in an "accident" (e.g. a poorly constructed wall that falls over and injures a pedestrian) is covered but a claim arising solely out of the faulty workmanship (e.g. to stop the poorly constructed wall from leaking) is not an "accident" and is therefore not an "occurrence" within the meaning of the policy.

The *Swagger* decision has been criticized in some circles as running contrary to the 2006 Ontario Court of Appeal case of *Bridgewood Building Corp. v. Lombard General Insurance Company*. In February and March 2007 two B.C. Supreme Court decisions were released that considered both *Swagger* and *Bridgewood*: *GCAN Insurance Company v. Concord Pacific Group Inc.* and *Progressive Homes Ltd. v. Lombard General Insurance Company*. Each decision affirmed the conclusions reached in *Swagger* regarding the faulty workmanship of general contractors and further served to clarify the breadth of the *Swagger* analysis.

THE RULINGS

GCAN v. Concord Pacific

The *GCAN* case, and the *Swagger* and *Progressive Homes* cases, arose out of leaky building litigation. However, unlike in the other two cases, the "insureds" in *GCAN* included not only a general contractor but also property owners, developers and a construction manager. The Court applied *Swagger* in determining whether there was a covered "occurrence" and found that there was no coverage for the general contractor.

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The insurer argued that the *Swagger* analysis should apply equally to the other classes of insureds, namely the property owners, the developers and the construction manager. The Court disagreed, finding that the construction of the buildings were not the owners' or developers' "work". Accordingly, the owners and developers were entitled to coverage.

As for the construction manager the Court declined to decide the issue, stating:

> *It cannot be said at this time how the above applies to a "construction manager" as opposed to a "general contractor". The precise role of the party will have to be determined on the facts at trial.*

Notably the Court in *GCAN* did not attempt to define the role of a "construction manager", leaving the issue for trial. While the scope of a general contractor's work may be better understood than that of a construction manager, it may be that a construction manager's role as coordinator and supervisor of a construction project is sufficiently precise to permit for a coverage analysis. As such, the question of CGL coverage for a construction manager in the context of leaky building litigation remains an open issue.

Progressive Homes v. Lombard

Progressive Homes is another coverage case involving a general contractor named in a leaky building action. The judge in this case considered himself bound by *Swagger* and *GCAN*.

The notable aspect of this judgment, however, is its discussion of *Bridgewood*. In *Bridgewood* the Court found that a general contractor was entitled to coverage under a CGL in respect of a "faulty workmanship" claim. As *Swagger* did not reference the trial decision in *Bridgewood*, and the 2006 Court of Appeal decision in *Bridgewood* did not reference *Swagger*, insurers and counsel have been arguing the correctness and applicability of each decision.

The decision in *Bridgewood* primarily turned on the "subcontractor exception" to the "your work" exclusion in the policy (interestingly the definition of "occurrence" was not considered in *Bridgewood*, leaving only the exclusions clauses for analysis. The Courts in *Bridgewood* found that the subcontractor exception could not have meaning if the "your work" exclusion was interpreted to cover not only the work actually performed by the general contractor but also the work of the subcontractors it oversaw. Therefore, since much of the damage complained of in the underlying action arose out of the work of subcontractors, the Courts found coverage.

However, the Court in *Progressive Homes* considered that the building constituted a "single integrated whole" and it would be improper to segregate the general contractor's work from that of the subcontractors for the purposes of a coverage analysis. Therefore, while the Court considered *Bridgewood*, it determined that the faulty workmanship did not constitute an "accident" and, accordingly, there was no "occurrence" to trigger coverage. In the absence of an "occurrence" triggering coverage there was no need to examine the exclusion clauses as had been done in *Bridgewood*.

PRACTICAL IMPLICATIONS FOR INSURERS

In B.C. it now appears well settled that general contractors are not entitled to coverage under CGL policies for claims involving faulty workmanship. The reasoning in *Swagger* is likely to now be applied across Canada, including in Ontario where *Bridgewood* should be distinguished on the basis that only the exclusion clauses, and not the definition of "occurrence", were considered. However, it remains unclear whether the *Swagger* analysis will be extended to construction managers or others who exercise control over an entire building project.

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