Insurer’s Duty to Defend: The Court Rules in a Case of Contractual Breach

July 13, 2021

The question of insurers’ duty to defend is back in the spotlight. On March 18, 2021, the Superior Court once again considered the issue in its application of the law to facts relevant to the dispute.[1]

Facts

In April 2016, Cégerco Inc. (“**Cégerco**”), a general contractor, retained the services of Construction Placo Inc. (“**Placo**”) for the supply and installation of exterior cladding made of metal wall panels, which were manufactured by Kingspan Insulated Panels Ltd. (“**Kingspan**”).

On May 24, 2017, Cégerco resiliated its contract with Placo on the grounds that Placo had caused numerous delays to the work schedule. Placo therefore instituted proceedings against Kingspan to recover sums advanced to the company, and against Cégerco for the damages resulting from the resiliation of the contract. Kingspan and Cégerco filed cross-applications, alleging non-performance by Placo.

Faced with these cross-applications, Placo turned to its insurer for it to take up its defence.

However, the insurer adopted the position that it had no obligation to defend Placo or accept its insurance claim. Placo then applied to the Superior Court by way of an Wellington type application to have the insurer take up its defence in the dispute opposing it to Cégerco and Kingspan.

Reasons

After briefly reviewing the principles of *Wellington type* applications and the Supreme Court’s teachings in the landmark *Progressive Homes*[2] decision, the Court concluded that the damages claimed in Kingspan’s cross-application did not arise from material damage or a loss. It did not dwell on this question any further, judging that insurance coverage did not apply.

The Court then addressed Cégerco’s cross-application. Here again, it held that the damages claimed were not the result of material damage within the meaning of the insurance policy. Thus, after having analyzed Cégerco’s breakdown of damages claimed, it concluded that the sums represented monetary damage resulting from the fact that Placo had failed to fulfill its obligation to deliver compliant panels.

The Court further noted that [translation] “monetary losses related to defective or non-compliant products” did not fall within the scope of the commercial liability insurance’s coverage.

The Court drew a distinction between the facts of this case and those of *Progressive Homes* cited above,[3]pointing out that the issue here was simply the non-performance of a contract. The Court

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held that the panels could not be the cause of the material damage that Cégerco suffered, as they had not been installed on the building, and that the material damage [translation] “rather resulted from a normal, if not foreseeable, incident that could have occurred in the normal course of any business.” Thus, according to the Court, although Cégerco was bound to take steps to remedy the delay in the delivery of the panels, and that such steps may have resulted in damage to the structure, Placo’s breach of contract did not result in a loss that would make insurance coverage applicable.

For these reasons, the Court dismissed the plaintiff’s *Wellington type* application and that of the cross-applicant Placo.

Conclusion

What this decision means is that although an insurer’s duty to defend arises as soon as there is a possibility that material damage claimed falls within the scope of an insurance policy’s coverage, monetary damage suffered purely as a result of a breach of contract is not a sufficient legal basis for triggering an insurer’s duty to defend.

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1. Construction Placo inc. c. Kingspan Insulated Panels Ltd., 2021 QCCS 1230
2. *Progressive Homes Ltd.* v. *Lombard General Insurance Co. of Canada*, 2010 SCC 33. [2010] 2 SCR 245.
3. *Id.*

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