



Denial of Insurance Coverage to General Contractor Upheld by BC Supreme Court

*On September 9, 2005, the Supreme Court of British Columbia delivered Reasons for Judgment in *Swagger Construction Ltd. v. ING Insurance Company*. The decision could significantly limit liability insurance coverage to general contractors.*

Swagger acted as the general contractor for UBC, on a project known as the Forest Sciences Centre. In 1999 Swagger commenced an action against UBC for construction delays and extras under the contract. UBC counterclaimed for construction defects.

Swagger tendered defence of the counterclaim to its insurers. Swagger's insurers denied coverage and refused to defend the claim. Swagger commenced a petition seeking a declaration from the Court that one or more of its insurers had a duty to defend the counterclaim.

The Court held that there was no duty on the part of Swagger's insurers to defend the action. The Court made two important findings in reaching its decision. First, it held that there was no "property damage", as that term was defined within the insurance policy. Second, even if there was property damage, it was not caused by an "occurrence" or "accident".

On the first point, the Court noted that *property damage* was defined as "physical injury to tangible property". The Court reasoned that because of the limiting words within the definition, economic loss claims (claims to recover the costs of correcting a defect before the defect results in personal injury or property damage) were not covered. The Court held that UBC's counterclaim was in the nature of a claim for economic loss.

Further, in the Court's view, if coverage was granted, Swagger's liability policy would be elevated to that of a performance bond given that the claim related solely to Swagger's alleged defective work. Swagger argued that it was open to the Court to view the project as a divisible collection of components. The concern around elevating the liability policy to a performance bond could be addressed by denying coverage for defective components but allowing coverage for damage to non-defective components. The Court disagreed. It held that a notional division of Swagger's work into separate parts was unhelpful and in any event, discouraged by the Supreme Court of Canada.

On the second point, that is whether an "occurrence" or "accident" caused the damage (a requirement under the policy) the Court distinguished the leading Supreme Court of Canada case called *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.* In *Walkem*, the Court was asked to consider whether the collapse of a defective crane installed on a barge was an "accident" within the meaning of the policy. The Court ruled that it was. However, the Court in *Swagger*, was of the view that *Walkem* was distinguishable because, in that case, there was actual third party property damage (to the barge), whereas all allegations against Swagger related to damage in the project itself.

The fallout from the *Swagger* decision is difficult to gauge at this stage. The decision could be appealed, but there are no guarantees that the judgment will be overturned. Because of the competing authorities respecting liability coverage for general contractors, insurers will no doubt begin taking a harder line on coverage issues.

Indeed, some insurers are already speculating that the *Swagger* decision will result in limited coverage for sub-contractors. We do not share that view. The decision in *Swagger* flowed from the Court's determination that the whole project was the indivisible work product of Swagger. Allowing coverage for losses suffered because of construction deficiencies anywhere in the project would have been akin to converting the insurance into a performance bond. The same could not have been said for losses caused by Swagger's sub-contractors. Their work product is that particular part of the project to which they supplied material and services. If it is alleged that their defective work caused damage to another part of the project, the concerns around elevating the liability policy to a performance bond are addressed by restricting coverage to the "other damage", and excluding coverage for the sub-contractors' work itself (whether defective or not).

The Court in *Swagger* was careful to note that coverage cannot be considered in a vacuum. Policy wording changes from policy to policy, as does the nature of claims against contractors. Contractors should be slow to accept a denial of coverage by their liability insurers. When in doubt, consult a lawyer specializing in insurance coverage issues.

We would be pleased to answer contractors' enquiries about the Swagger case. Contact Bob Jenkins QC, or Tim Peters in Vancouver at 604 681.6564 or by e-mail to tpeters@jml.ca.