

CANADA / JUDGMENT

Owners, Strata Plan BCS 3206 v. KBK No. 11 Ventures Ltd.

2022 BCSC 766

COURT

Supreme Court of British Columbia

DECIDED

10 May 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 766 Owners, Strata Plan BCS 3206 v. KBK No. 11 Ventures Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Owners, Strata Plan BCS 3206 v. KBK No. 11 Ventures Ltd.,

2022 BCSC 766

Date: 20220510

Docket: S1510419

Registry: Vancouver

Between:

The Owners, Strata Plan BCS 3206

Plaintiff

And

KBK No. 11 Ventures Ltd., 1100 Georgia Partnership, Peterson Investment

(Georgia) Limited Partnership, Abbey Adelaide Holdings Inc.,

LJV Georgia Investments Inc., No. 274 Cathedral Ventures Ltd.

Ledcor Construction Limited, Tidball Projects (2005) Ltd.,

IGA/AGS Joint Ventures Inc., Garibaldi Glass Industries Inc.,

James Kim Cheng Architects Inc. and RDH Building Science Inc.

Defendants

And

IGA/AGS Joint Ventures Inc., Garibaldi Glass Industries Inc.,
KBK No. 11 Ventures Ltd., 1100 Georgia Partnership,
Peterson Investment (Georgia) Limited Partnership,
Abbey Adelaide Holdings Inc., LJV Georgia Investments Inc.,
No. 274 Cathedral Ventures Ltd., Brook Van Dalen & Associates Limited,
Vitrum Industries Ltd., Formglas Inc., Intricate Glass (1996) Ltd.,
Victory Glass and Aluminum, Ledcor Construction Limited, Jones Kwong
Kishi Consulting Engineers, Tidball Projects (2005) Ltd., James KM Cheng
Architects Inc., Peter Ross 2006 Ltd., Western Tank and Lining Ltd., Moi's
Waterproofing Inc., Lightmore Glazing Ltd., Northern Glass & Aluminum
Ltd., RDH Building Science Inc., Dow Silicones Corporation, Guardian
Glass, LLC, Guardian Industries Corp., Guardian Glass Company,
Allstar Holdings Incorporated, Fenzi North America Inc., Azon USA Inc.,
Brown Stratchan Associates, DSD Technical Services, Intertek Testing
Services NA Ltd., Rowan Williams Davies & Irwin Inc. RPM Rollformed Metal
Products Limited, Honeywell UOP, Honeywell International Inc. and
XL Insurance Company Ltd.

Third Parties

- and -

Docket: Vancouver

Registry: S1510431

Between:

The Owners, Strata Plan BCS 3165

Plaintiffs

And

KBK No. 11 Ventures Ltd., 1100 Georgia Partnership,
Peterson Investment (Georgia) Limited Partnership,

Peterson Investment (Georgia) Inc., Abbey Adelaide Holdings Inc.,
LJV Georgia Investments LP, LJV Georgia Investments Inc.,
No. 274 Cathedral Ventures Ltd., IGA/AGS Joint Ventures Inc.
Advanced Glazing Systems Ltd., Garibaldi Glass Industries Inc.
Glastech Contracting (BC) Ltd., Brook Van Dalen & Associates Limited
CRS Construction Ltd., DH Glass Solutions Inc., Taishan City Kam Kiu
Aluminum Extrusion Co. Ltd., Vitrium Industries Ltd., Dekor Glass and
Aluminum, National Glass, Alumicor Limited, Ledcor properties Inc.,
Ledcor Construction Limited, Jones Kwong Kishi Consulting Engineers,
Tidball Projects (2006) Ltd., RDH Engineering Ltd., RDH Building Science
Inc., James KM Cheng Architects Inc., Peter Ross 2006 Ltd., Western Tank
and Lining Ltd., Moi's Waterproofing Inc., Westcor Services Ltd., Compass
Cladding Inc., Lightmore Glazing Ltd., Northern Glass & Aluminum Ltd., US
Railing LLC, US Railings LLC, Micro Seal Ltd., East & West Alum Craft Ltd.,
Tractel Swingstage Division Ltd., and Nightingale Electrical Ltd.

Defendants

And

KBK No. 11 Ventures Ltd., 1100 Georgia Partnership, Tidball Projects
(2005) Ltd., Peterson Investment (Georgia) Limited Partnership,
Abbey Adelaide Holdings Inc., Peterson Investment (Georgia) Inc.,
LJV Georgia Investments LP, LJV Georgia Investments Inc., No. 274
Cathedral Ventures Ltd., IGA/AGS Joint Ventures Inc., Ledcor Properties
Inc., Ledcor Construction Limited, James KM Cheng Architects Inc., RDH
Engineering Ltd., RDH Building Science Inc. (formerly known as RDH Building
Engineering Ltd.), Garibaldi Glass Industries Inc., Dow Silicones
Corporation, Jones Kwong Kishi Consulting Engineers, Advances
Glazing Systems Ltd., Guardian Glass, LLC, Guardian Industries Corp.,
Guardian Glass Company, Allstar Holdings Incorporated, Azon USA Inc.,

Fenzi North America Inc., Taishan City Kam Kiu Aluminum Extrusion Co. Ltd., Intricate Glass (1996) Ltd., Western Tank and Lining Ltd., Moi's Waterproofing Inc., Compass Cladding Inc., Lightmore Glazing Ltd., Northern Glass & Aluminum Ltd., US Railing LLC, US Railings LLC, Micro Seal Ltd., Tractel Swingstage Division Ltd., Honeywell UOP, Honeywell International Inc. and XL Insurance Company Ltd.

Third Parties

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for Honeywell International Inc.:

M.D. Adlem

Counsel for XL Insurance Company Ltd.:

A.N. Epstein

Place and Dates of Hearing:

Vancouver, B.C.

August 9 and 10, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 10, 2022

I. Introduction

- [1] This is an insurance coverage dispute that arises in two construction law lawsuits relating to the Shangri-La tower in downtown Vancouver.
- [2] The coverage dispute is between Honeywell International Inc. ("Honeywell"), a third party in each of the two actions, and XL Insurance Company Ltd. ("XL" or "XL Insurance"). Honeywell seeks a determination of the coverage issue by way of a summary trial pursuant to Rule 9-7 of the Supreme Court Civil Rules. Both sides agree the matter is suitable for determination by summary trial.

- [3] By way of brief overview, the plaintiffs in these two actions are the common property owners of different parts of the Shangri-La building and they also act as representatives of the individual owners. I will refer to them by the abbreviated names "Strata 3165" and "Strata 3206".
- [4] The building comprises three different parcels: (1) the Shangri-La Hotel, which occupies floors 1-15; (2) the live-work section occupied by Strata 3165 and individual owners on certain portions of floors 5 and 6 and all of floors 16 to 43; and (3) the residential section occupied by Strata 3206 and individual owners on floors 44 to 62.
- [5] In December 2015, Strata 3165 and Strata 3206 commenced separate building deficiency lawsuits against the developer, landowner, contractors and others, alleging deficiencies in the sealed insulated glass units ("IGUs") of the building. Specifically, they allege that: (1) the window panes (which are called lites) fog up due to moisture within the IGUs; and (2) this has caused damage and the IGUs need to be replaced. They also allege that the deficiencies caused certain of the lites to spontaneously crack, break or fail entirely.
- [6] These alleged deficiencies have prompted a number of lawsuits. In addition to these two actions, there are two actions against home warranty insurers as well as an action brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50.
- [7] These two actions involve breach of contract and tort claims against various defendants who, in turn, have brought third party proceedings against other parties. Until recently, different law firms represented the respective plaintiffs and, as a result, the pleadings in these two actions are different.
- [8] As already noted, Honeywell is a third party in both actions. It is alleged in each of the subject actions that Honeywell manufactured defective desiccant, a substance designed to adsorb moisture, and that its desiccant was incorporated into the Shangri-La IGUs.
- [9] Relatively recently, Honeywell learned that a wrap-up liability policy (the "Policy") was in place for the Shangri-La project. XL is the insurer under the Policy.
- [10] In October 2020, Honeywell sought coverage under the Policy, but in February 2021 XL denied coverage on several grounds, one of which was that Honeywell was not an insured party under the Policy.
- [11] Mr. Justice Walker has been assigned as the trial judge in these two actions, and he has been the case management judge for all of the actions.
- [12] In reasons for judgment dated May 11, 2021, Walker J. granted Honeywell leave to file third party notices against XL in these two actions. Honeywell filed third party notices in each of the actions on May 25, 2021, seeking orders requiring XL to indemnify Honeywell for its expenses in defending the third party claims made against it.

[13] XL filed responses to the third party notices on June 10, 2021. In its responses, XL admitted that it issued the Policy but maintained its denial of coverage to Honeywell.

II. The Pleadings

[14] Counsel provided a joint summary of the background facts and pleadings in each action, which was very helpful. The following summaries are derived from counsel's joint summary, including any emphasis that has been added.

A. Strata 3165 Action

The Amended Notice of Civil Claim

[15] The plaintiff claims on its own behalf as a strata corporation and as a representative on behalf of individual owners. Paragraph 7 in the amended notice of civil claim (ANOC 3165) says:

7. The Plaintiff claims on its own behalf as a strata corporation and as representative on behalf of:
 - a. all Individual Owners pursuant to s. 171 of the Strata Property Act - such Individual Owners being all owners who purchased their units at various times between 2004 and the present; and or
 - b. one or more but not all of the Individual Owners, as the case may be and where expressly stated below in this Amended Notice of Civil Claim, about matters affecting only their strata lots pursuant to s. 172 of the Strata Property Act, and/or pursuant to Rule 20-3 of the B.C. Supreme Court Rules.

[16] In paragraph 9 in the ANOC 3165, the plaintiff defines the "Developer" of the Shangri-La as KBK No. 11 Ventures Ltd., 1100 Georgia Partnership, Peterson Investment (Georgia) Limited Partnership, Abbey Adelaide Holdings Inc., LJV Georgia Investments LP and No. 274 Cathedral Ventures Ltd.

[17] In paragraph 19, the plaintiff alleges that the Developer engaged various entities who owed a duty to the plaintiff.

[18] In paragraphs 24 to 28, the Plaintiff groups claims against IGA/AGS, Advanced Glazing Systems Ltd. and Garibaldi Glass Industries Inc. ("Garibaldi") under the heading "Manufacturer/Supplier/Installer of the Insulated Glazing Units and Window Wall System".

[19] In paragraphs 27 and 28, the plaintiff makes the following allegations against Garibaldi:

27. Garibaldi Glass Industries Inc., a British Columbia company was engaged by Ledcor and/or IGA/AGS as the manufacturer of the IGUs and was responsible for:

- a. the detailed design of the various prototype IGUs and selection of materials and components for fabrication of the IGU assemblies which would satisfy the performance-based project specifications and design configurations prepared by the Architect and specialty design consultant, structural engineer providing wind loads, and the project mechanical engineer providing thermal (heat and cooling) loads;
- b. providing an IGMAC certification for each of the prototype assemblies specified for this project to determine inter-compatibility and longevity of the IGU component materials plus longevity of the thermal and visual properties of the IGU assembly which were to meet the service-life and longevity requirements stipulated in the project specifications and in the Developer's marketing/sales/maintenance materials and Building Enclosure Maintenance & Renewals Manual;
- c. providing quality control and testing of all components within the IGU assembly prior to and during the manufacturing process at the factory and prior to the installation at the construction site;
- d. fabricating the IGUs in accordance with the project specifications and the glazing industry's standards as they apply to the Shangri La Development and the Strata Complex, including IGMAC certification and relevant building bylaws of the City of Vancouver as described herein;
- e. evaluation and warranty of the IGU assembly's structural design to ensure safety and safe residual structural capacity in the event of the loss of either an inner or outer lite; and
- f. alerting and warning the Developer and IGA/AGS of any vulnerabilities or weaknesses or substandard conditions within the IGU assembly;

such that Garibaldi Glass Industries Inc. owed the duties and provided the warranties to the Plaintiff and the Individual Owners particularized above in paragraphs 19 and 27a. through 27f. and is liable to the Plaintiff and the Individual Owners for those Construction Deficiencies, Resultant Damage, and Dangerous Defects which are particularized below in Part E and the loss and damage claimed in Part F of these Statement of Facts below, rendering the strata lots and common property unsuitable and unfit for their intended purpose, including for the purpose of habitation.

- 28. Garibaldi specifically delivered a ten year warranty to the Plaintiff and the Individual Owners that its IGUs would be IGMAC certified (which would include an associated expectation relating to an anticipated service life of greater than 40 years) and expressly and/or impliedly warranted that the IGUs would be defect and blemish free for ten (10) years.
- [20] In paragraphs 31 to 33 and 37 to 39, the plaintiff alleges "resultant damage to the Strata Complex and loss of use of personal property":

31. In breach of each of the Defendants' implied and/or express warranties and/or contractual and/or common law duties to the Plaintiff and the Individual Owners and the Original Purchasers and in breach of the BPCPA and Strata Property Act as particularized in Parts B through D of this Statement of Facts, the Strata Complex was not properly completed or, as that term is defined at common law, completed at all and in particular not constructed in accordance with contract specifications and/or was constructed in a deficient and substandard manner and with a number of latent or, as the case may be, patent building deficiencies and construction defects caused by faulty materials, workmanship and design and which have caused resultant damage to the Strata Complex and loss of use of property to the Individual Owners, including defects and deficiencies that have given rise to conditions which pose substantial danger to person and property and which render the strata lots and the Strata Complex potentially uninhabitable or in the alternative much less habitable and/or unfit for their intended purpose and which are particularized below in paragraphs 32 through 36 (the 'Construction Deficiencies').
32. In particular, the Shangri La Development and the Strata Complex rely on a curtain-wall system based on four-sided structurally glazed sealed insulating glass units ("IGUs") which separate the exterior and the interior environments and which is integral to the proper functioning of the Shangri La development and the Strata Complex. The Developer was under a duty to the Plaintiff and the Individual Owners to ensure and expressly and impliedly warranted and represented to the Plaintiff and to the Individual Owners that the IGU component of the curtain wall system and component materials would meet the building specifications and CAN/CGSB - 12.8 standards set out in the building bylaw of Vancouver and particularized in paragraph 12.i. above and that the IGU and its component materials be certified by IGMAC when in fact the IGUs and their component materials were not certified and did not meet the project specifications or CAN/CGSB - 12.8 standards pertaining to their fabrication or installations or both. Consequently, the curtain-wall system has encountered systemic and total failures in the IGUs with, inter alia:
- a. moisture related condensation or fogging in the IGU sealed cavities;
 - b. drooping or flowing of the IGU's PIB sealant;
 - c. contaminated or defective dessicant (sic) contributing to the moisture fogging observed in the IGU sealed cavity;
 - d. cracked thermal barrier material found within the spacer bar, moisture and alcohols and volatile organic acids within the IGU sealed cavity caused by 'off-gassing' of materials used to create the IGU assembly;
 - e. condensation in and/or fogging of the IGU sealed cavity caused by 'off-gassing' of materials used to create the IGU assembly;
 - f. water ingress dripping;

- g. very significant number of failed units within the limits of the Strata Complex, now approaching a very substantial majority of the total IGUs installed with a IGU failure rate expected to climb towards 100% over the next several years;
 - h. increasing staining of interior surfaces on the exterior and interior lites in the IGU cavity;
 - i. undermined thermal, insulation and R-value properties; and
 - j. other deficiencies which will be particularized as and when these become ascertained.
33. These systemic failures are a manifestation of and result from moisture and off-gassing which causes fogging, penetrations in the spacer bar used to fill the sealed cavity with argon gas and which have failed and which thus allow penetration of moisture, dripping and flowing PIB sealant and missing structural sealant along the perimeter of certain IGUs securing the IGU to the structural aluminum frame, and sealant falling away from the building so as to render the strata lots within the Strata Complex potentially uninhabitable or in the alternative much less habitable and/or not fit for their intended purpose such that the curtain-wall system and the IGUs require a wholesale replacement. The systemic failures in the IGUs are caused by the Defendants' breaches in design, fabrication, delivery, and installation of the component materials and the IGUs and in particular the breach by the Defendants of their respective duties as particularized in Parts B through D of this Statement of Facts.
37. The Construction Deficiencies have caused resultant damage to the Strata Complex and loss of use to the Individual Owners and resulted in continuous property damage and loss to the Strata Complex's strata lots, common property, common facilities and other common assets and property and include depreciation to the market value of the Individual Owners' interest in the strata lots, common property, common facilities and other common assets and property (the "Resultant Damage").
38. The Construction Deficiencies and Resultant Damage were caused or contributed to by each of the Defendants' deficient design, construction, development, manufacturing, approval, provision, and use of improper materials and deficient inspection and supervision of construction and repairs to the Strata Complex and failure to discharge their respective duties as particularized in Parts B through D above (the "Defendants' Breaches").
39. The Construction Deficiencies and Resultant Damage pose a real and substantial danger to the Individual Owners and other persons, and to the property of Individual Owners and other persons (the "Dangerous Defects")."

[Emphasis added.]

[21] In Part 2 of the ANOCC 3165, the plaintiff particularizes the relief sought:

- 1. The Plaintiff claims against the Defendants and each of them for breach of implied and/or express warranty and claims:

- a. specific performance of each of their respective warranties and general and special damages;
- b. in the alternative, general and special damages in lieu of specific performance;
- c. in the further alternative, general and special damages for breach of contract;
2. The Plaintiff claims against the Defendants and each of them in tort for general and special damages;
3. The Plaintiff claims against the Defendants and each of them for damages and statutory remedies under the Business Practices and Consumer Protection Act and the Strata Property Act and in particular:
 - a. damages pursuant to s. 171 of the BPCPA;
 - b. a declaration pursuant to s. 172(1)(a) of the BPCPA that the breaches of the Defendants contravenes the Business Practices and Consumer Protection Act;
 - c. restoration orders under s. 172(3) of the BPCPA;

Third Party Claims Against Honeywell

[22] Third party claims against Honeywell have been filed in this action by (1) Garibaldi, and (2) Guardian Glass, LLC, Guardian Industries Corp. and Guardian Glass Company (jointly "Guardian"). These are detailed in the headings that follow.

Garibaldi's Third Party Allegations Against Honeywell

[23] Garibaldi filed an Amended Third Party Notice on June 4, 2020, claiming against Honeywell and others, alleging negligence, breach of contract, breach of warranty, breach of duty to warn and/or breach of statutory duty against Honeywell and others. Garibaldi made to following allegations against Honeywell:

Claim Against Honeywell

27. Honeywell UOP and/or Honeywell International manufactured the desiccant used in the fabrication of the IGUs.
28. Honeywell UOP and/or Honeywell International owed Garibaldi and the plaintiff a duty of care to:
 - (a) ensure that the desiccant was fit for its intended purpose, free from defects, and that it would be durable for a reasonable period of time having regard to the use for which it would normally be put;
 - (b) ensure that the desiccant complied with the applicable specifications and all applicable codes and industry standards;

- (c) warn of any defects and/or deficiencies in the desiccant that Honeywell knew or ought to have known about; and
 - (d) such further and other particulars as counsel for Garibaldi may advise.
29. If the Strata Complex has the alleged construction deficiencies and defects, then they were caused or contributed to by the negligence, breach of contract and/or breach of duty of Honeywell UOP and/or Honeywell International and specifically were caused in whole or in part by defects and deficiencies in the manufacture of the desiccant used in the fabrication of the IGUs, particulars of which include, but are not limited to:
- (a) failing to ensure that the desiccant was fit for its intended purpose, free from defects, and that it would be durable for a reasonable period of time having regard to the use for which it would normally be put;
 - (b) failing to ensure that the desiccant complied with the applicable specifications and all applicable codes and industry standards;
 - (c) failing to warn the plaintiff and others, including Garibaldi, that there was a risk of failure of the desiccant used in the fabrication of the IGUs; and
 - (d) such further and other particulars as counsel for Garibaldi may advise.

[Emphasis added.]

Garibaldi's Third Party Allegations Against Guardian

[24] Garibaldi brought third party proceedings against Guardian. Garibaldi alleged as follows:

18. Garibaldi contracted with Guardian Glass LLC, Guardian Industries Corp, and/or Guardian Class Company (collectively, "Guardian") for the manufacture and supply of the glass used in the IGUs. The glass provided was 6mm Guardian SunGuard LE50 on Clear Heat Strengthened #2 surface and 6mm Guardian SunGuard SN68 on Clear Tempered #3 surface.

[Emphasis added.]

Guardian's Third Party Allegations against Honeywell

[25] Guardian is alleged to have manufactured the glass or lites incorporated into the IGUs that were installed in the Shangri-La building.

[26] Guardian filed a third party notice against Honeywell on May 12, 2020. Guardian made the following allegations in that third party notice:

- 8. The Third Parties manufactured the desiccant used in the fabrication of the IGUs.
- 9. The Third Parties owed Garibaldi and the Plaintiff a duty of care to:

- (a) ensure that the desiccant was fit for its intended purpose, free from defects, and that it would be durable for a reasonable period of time having regard to the use for which it would normally be put;
 - (b) ensure that the desiccant complied with the applicable specifications and all applicable codes and industry standards;
 - (c) warn of any defect and/or deficiencies in the desiccant that the Third Parties were aware of or ought to have been aware of; and
 - (d) such further and other particulars as counsel for Guardian may advise.
10. If the Strata Complex has the alleged construction deficiencies and defects, then they were caused or contributed to by the negligence, breach of contract and/or breach of duty of the Third Parties and specifically were caused in whole or in part by the defects and deficiencies in the manufacture of the desiccant used in the fabrication of the IGUs, particulars of which include, but are not limited to:
- (a) the Third Parties' failure to ensure that the desiccant was fit for its intended purpose, free from defects, and that it would be durable for a reasonable period of time having regard to the use for which it would be normally be put;
 - (b) the Third Parties' failure to ensure that the desiccant complied with the applicable specifications and all applicable codes and industry standards;
 - (c) the Third Parties' failure to warn of any defects and/or deficiencies, or the risk of any defects and/or deficiencies, in the desiccant; and
 - (d) such further and other particulars as counsel for Guardian may advise.

[Emphasis added.]

B. Strata 3206 Action

The Amended Notice of Civil Claim

[27] Strata 3206 claims as a representative of the owners of the strata. In paragraphs 2 and 3 in the amended notice of civil claim (ANOC 3206) they say:

- 2. The plaintiff's members are owners of strata lots (the "Owners") in Strata Plan BCS 3206.
- 3. The plaintiff claims as the representative of the Owners pursuant to the Strata Property Act.

[28] In paragraphs 17, 18 and 19 in the ANOC 3206, the plaintiff alleges that the registered owner of the land upon which the Shangri-La is situated is the defendant, KBK No. 11 Ventures Ltd. ("KBK"), as agent and nominee for the Developer, the defendant, 1100 Georgia Partnership.

- [29] In paragraph 31, it is alleged that KBK engaged the defendant, IGA/AGS Joint Ventures Inc. ("IGA") as a subcontractor responsible for the design, fabrication, supply and installation of the IGUs for the Curtain Wall of the Shangri-La building.
- [30] In paragraph 32, the plaintiff alleges that IGA engaged and entered into purchase orders with Garibaldi Glass Industries Inc. ("Garibaldi") to manufacture and supply the IGUs to be used in the Curtain Wall of the Shangri-La.
- [31] In paragraph 37, the plaintiff refers to resulting window fogging, water ingress, dripping and missing sealant, as well as sealant falling away from the building.
- [32] In paragraph 38, the plaintiff makes allegations about the spontaneous breakage of glass lites in IGUs and in paragraph 39 the plaintiff provides particulars of 19 spontaneous glass breakage events.
- [33] In paragraph 40 the plaintiff alleges:

In or around July 2015, the plaintiff received an expert report on the IGUs. The report concluded the installed IGUs have systemic latent defects associated with their design and fabrication. Particulars of the defects include, but are not limited to, pre-existing moisture in the cavity of the IGUs, failed sealant, cracked thermal barriers and the release of organic acid gases within the IGUs at elevated temperatures (the "Defects").

- [34] In paragraph 46 the plaintiff makes the following allegations against Garibaldi:

Particulars of the duties of care owed by the defendant Garibaldi Glass to the plaintiff and Owners include to:

- (a) ensure that only qualified consultants, suppliers and personnel were retained to manufacture the IGUs;
- (b) ensure that the IGUs were manufactured in a good and workmanlike manner and in compliance with applicable specification and industry standards;
- (c) ensure that the materials and components obtained for manufacturing the IGUs would satisfy all applicable specifications and meet the IGU service-life and longevity requirements;
- (d) provide quality control and testing of all components and materials within the IGUs prior to, during and after the manufacturing process and the installation of the IGUs on the Shangri-La building; and
- (e) take reasonable steps to ensure that the IGUs were free of deficiencies and the Defects in particular, those which could pose a real and substantial or threat of danger to the health and safety of the Owners and other occupants of the lands on which the Shangri-La is located.

- [35] In paragraphs 53 and 54, the plaintiff's alleges loss and damage, including the following:

53. The Owners have suffered from extensive and ongoing loss and damage by reason of the Developer's breach of the implied warranty and the defendants' negligence.
54. Particulars of the loss and damage include:
 - (a) the cost of investigating the problems with the IGUs;
 - (b) the cost of replacing the IGUs;
 - (c) Damage to the common property and strata lots

Third party Claims Against Honeywell

[36] Third party claims have been filed in this action against Honeywell by (1) Garibaldi; (2) Guardian; and (3) Intertek Testing Services NA Ltd. ("Intertek"). I summarize these third party claims under the headings that follow.

Garibaldi's Third Party Allegations against Honeywell

[37] Garibaldi filed a further amended third party notice on June 4, 2020, claiming against Honeywell and others, alleging negligence, breach of contract, breach of warranty and/or breach of statutory duty. Garibaldi made the following allegations against Honeywell:

Claim Against Honeywell

50. Honeywell UOP and/or Honeywell International manufactured the desiccant used in the fabrication of the IGUs.
51. Honeywell UOP and/or Honeywell International owed Garibaldi and the plaintiff a duty of care to:
 - (a) ensure that the desiccant was fit for its intended purpose, free from defects, and that it would be durable for a reasonable period of time having regard to the use for which it would normally be put;
 - (b) ensure that the desiccant complied with the applicable specifications and all applicable codes and industry standards;
 - (c) warn of any defects and/or deficiencies in the desiccant that Honeywell knew or ought to have known about; and
 - (d) such further and other particulars as counsel for Garibaldi may advise.
52. If the Residential Strata has the alleged construction deficiencies and defects, then they were caused or contributed to by the negligence, breach of contract and/or breach of duty of Honeywell UOP and/or Honeywell International and specifically were caused in whole or in part by defects and deficiencies in the manufacture and supply of the desiccant used in the fabrication of the IGUs, particulars of which include, but are not limited to:

- (a) failing to ensure that the desiccant was fit for its intended purpose, free from defects, and that it would be durable for a reasonable period of time having regard to the use for which it would normally be put;
- (b) failing to ensure that the desiccant complied with the applicable specifications and all applicable codes and industry standards;
- (c) failing to warn the plaintiff and others, including Garibaldi, that there was a risk of failure of the desiccant used in the fabrication of the IGUs; and
- (d) such further and other particulars as counsel for Garibaldi may advise.

[Emphasis added.]

Garibaldi's Third Party Allegations against Guardian

[38] In its third party claim against Guardian, Garibaldi alleges that it contracted with Guardian (naming three Guardian companies collectively as "Guardian") for the manufacture and supply of the glass used in the IGUs.

Garibaldi's Third Party Allegations against RPM

[39] Garibaldi also brought third party proceedings against RPM Rollformed Metal Products Limited ("RPM"), alleging that it contracted with RPM for the supply of the desiccant used in the fabrication of the IGUs. RPM appears to be the party named in the invoices that I have found to be inadmissible on the coverage issue.

Guardian's Third Party Allegations against Honeywell

[40] Guardian filed a third party notice against Honeywell on May 8, 2020, making the following allegations:

- 8. Honeywell manufactured the desiccant used in the fabrication of the IGUs.
- 9. Honeywell owed Garibaldi and the Plaintiff a duty of care to:
 - (a) ensure that the desiccant was fit for its intended purpose, free from defects, and that it would be durable for a reasonable period of time having regard to the use for which it would normally be put;
 - (b) ensure that the desiccant complied with the applicable specifications and all applicable codes and industry standards;
 - (c) warn of any defect and/or deficiencies in the desiccant that the Third Parties were aware of or ought to have been aware of; and
 - (d) such further and other particulars as counsel for Guardian may advise.

2. If the Strata Complex has the alleged construction deficiencies and defects, then they were caused or contributed to by the negligence, breach of contract and/or breach of duty of Honeywell and specifically were caused in whole or in part by the defects and deficiencies in the manufacture of the desiccant used in the fabrication of the IGUs, particulars of which include, but are not limited to:
 - (a) Honeywell's failure to ensure that the desiccant was fit for its intended purpose, free from defects, and that it would be durable for a reasonable period of time having regard to the use for which it would be normally be put;
 - (b) Honeywell's failure to ensure that the desiccant complied with the applicable specifications and all applicable codes and industry standards;
 - (c) Honeywell's failure to warn of any defects and/or deficiencies, or the risk of any defects and/or deficiencies, in the desiccant; and
 - (d) such further and other particulars as counsel for Guardian may advise.

[Emphasis added.]

Intertek's Third Party Allegations Against Honeywell

- [41] The IGUs manufactured for the Shangri-La were incorporated into a wall system called a curtainwall and Intertek is alleged to have conducted testing on mock-ups of curtainwall elements for the Shangri-La project.
- [42] Intertek filed a third party notice against Honeywell on May 26, 2020, and in that notice Intertek adopted the allegations made against Honeywell by Garibaldi and Guardian, as shown below:
3. Intertek disputes the Plaintiff's claim, but in the event that Intertek is held to the Plaintiff, the Defendants or the Third Parties, or any of them (sic), in whole or in part, Intertek claims and is entitled to contribution from Honeywell to the extent of the degree to which they are found by the Court to have been at fault for any damage suffered by the Plaintiff and in respect of which Intertek is found liable to the Plaintiffs, the Defendants, the Third Parties, or any of them.
 4. If the Plaintiff has suffered any injury, loss, damage or expense as alleged in the Amended Notice of Civil Claim, or at all, which is not admitted but specifically denied, then any such loss was caused or contributed to by the negligence, breach of duty, breach of statute, breach of warranties and/or breach of contract of Honeywell, and each of them.
 5. Intertek repeats and relies on the allegations of the negligence, breach of duty, breach of statute, breach of warranties, and breach of contract as set out in the Amended Notice of Civil Claim, the Third Notice of IGA/AGS Joint Ventures Inc., the Third Party Notice of the Architect, the Amended Third Party Notice of Garibaldi Glass Industries Inc. filed March 18, 2020, and the Third Party Notice of Guardian Glass, LLC, Guardian Industries Corp. and

Guardian Glass Company filed May 8, 2020, except to the extent that they advance claims against Intertek, in which case they are denied.

III. The Policy

[43] Counsel also agreed on those extracts from the Policy that they say are relevant to the duty to defend coverage issue. These provisions are as follows:

NAME, LOCATION AND DESCRIPTION OF INSURED PROJECT:

Construction of multi-use high rise - retail, hotel, residential/commercial at 1120 West Georgia St., Vancouver, B.C.

1. Insuring Agreement

a. In consideration of the payment of the premium and of the statements contained in the Declarations made a part hereof and subject to the Conditions, Definitions and other terms of this Policy we will:

(2) Coverage B - Property Damage

pay on your behalf all sums which the insured becomes legally obligated to pay as compensatory damages because of "property damage" which occurs during the Policy Period. "Property damage" that is loss of use of tangible property that is not physically injured shall be deemed to occur at the time of the "occurrence" that caused it;

d. This Policy applies to "bodily injury", "property damage", and "personal injury" which arise out of the operations performed on or incidental to the Insured Project described in the Declarations and no other.

2. Additional Insuring Agreements

We will also:

a. Defend in your name and on your behalf and at our cost any "action" against the insured seeking compensatory damages for "bodily injury", "property damage" or "personal injury"

3. Exclusions

This insurance does not apply to:

h. "Property damage" to the Insured Project described in the Declarations including all materials, parts and supplies forming part or to form part thereof. But this exclusion does not apply after the date the Insured Project is physically completed and accepted by or on behalf of the owner.

k. Loss of use of tangible property which has not been physically injured or destroyed resulting from:

- (2) The failure of the insured's products or work performed by or on behalf of the insured to meet the level of performance, quality, fitness or durability warranted or represented by the insured.

But this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the insured's products or work performed by or on behalf of the insured after such products or work have been put to use by any person or organization other than an insured.

I. Any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of "your product", or "your work" or of any property of which such products or work form a part of such product, work or property is withdrawn or recalled from the market or from use by any person organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

SECTION II - WHO IS AN INSURED

1. The term "Insured" means:
- c. Each "contractor" designated as an Insured under written contract with the Named Insured, its "sub-contractors" and their "sub-contractors", with respect to loss or damage arising out of their operations, activities or existence of property at the Project Site for the performance of operations of (sic) activities in connection with the Project.

SECTION VII - DEFINITIONS

4. "Contractors" and "sub-contractors" include all persons or organizations who perform any part of the work under the Insured Project but do not include:
 - a. Suppliers whose only function is to supply materials, machinery or other supplies to the project and who do not carry out any installation, construction, or supervisory work on the Insured Project;
11. "Property damages" 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 "

[Emphasis added.]

IV. Positions of the Parties

A. Honeywell

- [44] Honeywell argues that it falls within the Policy's grant of coverage, subject only to certain exclusions. Honeywell says XL has a duty to indemnify it for its defence expenses because there is, at minimum, a "mere possibility of a covered claim" arising from the third party claims being made against Honeywell.
- [45] Honeywell framed its argument in relation to the three reasons relied on by XL to deny coverage. XL's assertions were: (1) Honeywell is not an "insured" as defined in the policy; (2) the "warranty exclusion" excludes coverage for Honeywell; and (3) the "recall" or "sistership" exclusion applies to exclude Honeywell from coverage. I summarize Honeywell's argument on each of these assertions under the headings that follow.

Not A Mere Supplier

- [46] The first assertion has to do with the definition of "sub-contractors". "Sub-contractors are covered, but in the Policy definitions "suppliers" are "sub-contractors". The Policy says:
4. "Contractors" and "sub-contractors" include all persons or organizations who perform any part of the work under the Insured Project but do not include:
 - a. Suppliers whose only function is to supply materials, machinery or other supplies to the project and who do not carry out any installation, construction, or supervisory work on the Insured Project;
- [47] Honeywell says it does not fall within the definition of "suppliers" because it was not only a supplier of desiccant, it also manufactured it.
- [48] Honeywell notes the pleadings allege Honeywell was a "manufacturer" and do not allege its "only function [was] to supply materials to the project". In fact, the pleadings do not allege that Honeywell supplied anything to the project.
- [49] Honeywell argues that a manufacturer engages in manufacturing and a supplier engages in supplying, and these are different activities. If the insurer had intended to exclude coverage to manufacturers, it would have been simple enough to do so.
- [50] Honeywell notes that the subject pleadings themselves distinguish between "manufacturing" and "supplying" in several instances. For example, Garibaldi refers to Honeywell having "manufactured the desiccant" at para. 50 of its amended third party notice in the Strata 3206 action, and to Honeywell having been involved in the "manufacture and supply" of the desiccant in para. 52 of that same third party notice.

- [51] Honeywell also argues this issue was effectively decided by Walker J. when he granted Honeywell's application for leave to file third party notices against XL. The test Honeywell had to meet on that application ("not bound to lose") was effectively the same test that it must meet now ("mere possibility that a claim within the policy may succeed"). Honeywell argues that it would be a very strange result if, after Honeywell has passed the former test, it were fail to meet the latter test.

Warranty Exclusion Does Not Apply

- [52] Honeywell submits the warranty exclusion, which is clause k(2) in the Policy excerpted earlier, does not apply.
- [53] Honeywell says that for the warranty exclusion to apply, the Court would have to reach the following conclusions:
- a) There was a loss of use of tangible property;
 - b) The tangible property was not physically injured;
 - c) The tangible property was not destroyed;
 - d) The loss resulted from the failure of desiccant allegedly manufactured by Honeywell to meet the level of performance, quality, fitness or durability warranted or represented by Honeywell; and
 - e) The exception to the exclusion does not apply.
- [54] Honeywell notes that on this issue, XL relies on certain invoices, order printouts and order confirmations issued by "UOP LLC" and "UOP Canada Inc.", indicating a supply of products to "RPM Rollformed Metal Products". These documents are the subject of an evidentiary objection, as discussed below.
- [55] Leaving aside that objection for the moment, Honeywell says there is no basis on which to conclude: (1) Honeywell International Inc. sent these documents; (2) Honeywell International Inc. supplied any of the products referred to in the documents; or (3) Honeywell International Inc. "warranted and represented" anything. Honeywell also notes that any warranties provided by UOP LLC and UOP Canada Inc. would have been made to RPM Rollformed Metal Products Limited.
- [56] Finally on this point, Honeywell notes that, in any event, the warranty exclusion would not apply to the non-warranty claims being made against it, which sound in negligence, breach of contract and breach of duty to warn.
- [57] Honeywell also notes that this issue was considered by Walker J., who said in his reasons for granting leave to file third party notices (2021 BCSC 894):

- [63] In respect of the impugned exclusion contained within the definition of contractors and sub-contractors, XL's denial letter only says it is "likely" engaged. Whether the exclusion applies--or for that matter, whether the exception to the exclusion applies--is an open question until the facts concerning the nature of the alleged defects in the windows of the Shangri-La Building and the property damage are known. At this stage, at least in terms of the evidence adduced on the instant applications, it cannot be said that the exclusion applies to exclude coverage to Honeywell.
- [58] Honeywell notes that no new evidence has been adduced on this issue and to nothing has changed concerning the applicability of the exception to the exclusion.

The Recall or "Sistership" Exclusion Does Not Apply

- [59] This refers to exclusion "I" in the Policy, which excludes coverage for products withdrawn or recalled from the market.
- [60] Honeywell notes there is no evidence of any recall or withdrawal of any Honeywell product from the market. Honeywell says, in any case, this exclusion does not apply to consequential damage, which forms most of the claims here.

B. XL Insurance

- [61] Counsel emphasized that Honeywell bears the onus of satisfying the Court that coverage is triggered for the claims advanced against it. To understand the true nature of the claims against Honeywell, it is critical to review the contractual framework by which Honeywell is linked to the project.

Honeywell is a "Supplier"

- [62] Counsel spent some time identifying the various claims against Honeywell, which have their genesis in the amended notices of civil claim filed in the respective actions and which end with claims against Honeywell by way of third party notices brought by Garibaldi against Guardian, and then Guardian against Honeywell. In Action 3206 there is an additional third party notice filed against Honeywell by Intertek, but Intertek simply adopted the allegations of other parties and, in particular, those of Garibaldi and Guardian.
- [63] XL argues that in the various pleadings, the claiming parties have used "manufacture" and "supply" interchangeably. The essential allegation, however is one of providing a product. XL says the essence of these allegations is that Honeywell was a "supplier".
- [64] The Policy explicitly excludes "suppliers" that do not provide work on site. There is no allegation that Honeywell provided any services on site. In fact, there is not even any allegations that Guardian or Garibaldi provided any services to the site. XL says the only connection between Honeywell and the project was Honeywell's supply of a product to others, who then incorporated them into other elements for use in the project.

- [65] XL says an examination of the various third party pleadings shows the claiming parties use "manufacture" and "supply" interchangeably. Whether Honeywell was a manufacturer in addition to being a supplier was of no relevance to the claiming parties; the important thing from their perspective was that the product came from Honeywell.
- [66] XL argues the Court should look past the actual words to ascertain the true nature of the claim. Here, the essential role of Honeywell was as a supplier of a material that was incorporated into items that were eventually provided to the project. It is a "supplier", several steps removed from any direct supply to the site, which did not carry out any work on site.
- [67] As to the evidentiary issue, XL notes that these invoices were produced by Honeywell and listed in its list of documents. It has produced no documents suggesting any other contractual arrangement. The invoices indicate the supply of Honeywell's product came with a warranty. It is up to Honeywell to prove that it falls within coverage, not up to XL to disprove it.

Coverage is Excluded for Warranty Claims (Exclusion k(2))

- [68] Exclusion k(2) applies to claims that the insured's product failed to meet the level of performance, quality, etc. warranted or represented by the insured.
- [69] XL argues that the level of performance, quality, etc. was warranted and represented by Honeywell in its invoices. Alternatively, it is clear that, given the allegations the product was defective, it is clear that the product failed to meet the expectations of the purchase. Accordingly, the true substance of the claims against Honeywell are that it supplied products which did not meet expectations. Accordingly, exclusion k(2) applies to exclude the claims from coverage.
- [70] XL acknowledges an exception to exclusion k(2) - "loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the insured's product" - but says the insured bears the onus of proving this exception. Here, there is no allegation of a sudden or accidental injury or destruction of the insured's products after having been put to use.
- [71] In answer to Honeywell's argument that Walker J. had already essentially decided this issue on the application for leave to file third party notices, XL submits he did nothing of the sort. First, he did not say the issue had been decided, and he had cause to consider the issue directly as the matter came before him at a later point, when the question arose about another judge hearing the coverage issue. XL says, in any event, the test are different.

Coverage is Excluded for Recall or Withdrawal Claims (Exclusion 1)

- [72] XL next argues that coverage is excluded because the allegations against Honeywell include the suggestion that the IGUs need to be replaced by reason of having incorporated Honeywell's product. Honeywell's product is therefore subject to withdrawal, which is excluded by reason of exclusion 1.

C. Reply by Honeywell

- [73] Counsel for Honeywell clarified that Walker J.'s earlier decision did not render the coverage question moot or res judicata, merely that it was influential on the issue. While the tests are different, they are "almost identical" in substance, and the current evidentiary record is the same as it was before Walker J.
- [74] Counsel argued that the claiming parties have not used the terms "supply" and "manufacture" interchangeably, and gave examples, but said the key issue is what was being claimed against Honeywell in the third party notices, not in the other pleadings.

V. Duty to Defend - General Principles

- [75] The parties were largely in agreement on the applicable law, with the only differences being in the emphasis counsel applied to certain of the principles.
- [76] Subject to certain exceptions, referred to later, whether an insurer is required to defend a particular claim is determined from the pleadings filed against the insured. In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 [Progressive Homes], the court said:
- [19] An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (*Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-11; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 54-55). It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend (see *Nichols*, at p. 810; *Monenco*, at para. 29).

[77] While the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy, "bare assertions advanced in a statement of claim are not necessarily determinative": *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 at paras. 31 and 34 [Monenco]. What matters is not the labels used by the claimant, but the true nature of the claim: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 [Scalera], at para. 79; *Monenco*, at para. 34.

[78] As the Supreme Court of Canada said in *Monenco*:

[35] Based on this line of authority, it follows that the proper basis for determining whether a duty to defend exists in any given situation requires an assessment of the pleadings to ascertain the "substance" and "true nature" of the claims. More specifically, the factual allegations set out therein must be considered in their entirety to determine whether they could possibly support the plaintiff's legal claims.

[Emphasis added.]

[79] In determining whether a policy would cover a claim, the usual principles governing the construction of insurance contracts apply, namely, the *contra proferentem* rule, the principle that coverage clauses should be construed broadly and exclusion clauses narrowly and the policy giving effect to the reasonable expectations of the parties; *Monenco*, at para. 31 and *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras. 70-71.

[80] However, before resorting to the *contra proferentem* rule, an effort should be made to interpret the policy in a commercially reasonable fashion and in a way that gives effect to the reasonable expectations of the parties. In *Solway v. Lloyd's Underwriters (Attorney in Fact in Canada)*, 2006 CanLII 17254 (Ont. C.A.), the court said:

[43] I begin my analysis with the observation that an insurance contract, like any other contract, should be construed in a manner that attempts to harmonize and make sense out of the various provisions contained in it, and does not strain them. Ambiguities are to be resolved in favour of the insured. But ambiguity does not exist whenever the policy contains wording that could be open to two or more reasonable interpretations. Before resorting to the *contra proferentem* principle, an effort should be made to interpret the policy in a commercially reasonable fashion and in a way that gives effect to the reasonable expectations of the parties.

[81] The Supreme Court of Canada in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 [Ledcor], described the "generally advisable" order in which to interpret insurance policies:

[52] It is also important to bear in mind this Court's guidance in *Progressive Homes* on the "generally advisable" order in which to interpret insurance policies (para. 28). Although that case involved commercial general liability policies and not builders' risk policies, the two types of policies share a similar alternating structure: they set out the type of coverage followed by specific exclusions, with some exclusions containing exceptions. As such, the

insured has the onus of first establishing that the damage or loss claimed falls within the initial grant of coverage. The parties in these appeals have conceded that this particular onus has been met: trial judge's reasons, at para. 9. The onus then shifts to the insurer to establish that one of the exclusions to coverage applies. If the insurer is successful at this stage, the onus then shifts back to the insured to prove that an exception to the exclusion applies: see *Progressive Homes*, at paras. 26-29 and 51.

VI. Discussion

A. Extrinsic Evidence

- [82] As already noted, Honeywell objected to the admissibility of certain documents appended to an affidavit of a paralegal in the office of XL's counsel.
- [83] The documents in question are from an amended list of documents of the third parties Honeywell UOP and Honeywell International Inc. XL argues that these must be the contract documents showing Honeywell's sale of the product to the initial buyer because no other contract documents have been produced by Honeywell.
- [84] Honeywell says there is no basis for XL's assertion that Honeywell International Inc. made those documents. But leaving that aside, Honeywell argues that, as a general rule, it is the pleadings that govern an insurer's obligation to defend. While there are some limited exceptions to that rule, none of those exceptions apply here. I agree.
- [85] In *Gordon Hilliker, Insurance Law in Canada*, 7th ed. (Toronto: LexisNexis, 2020) at s. 5.30 and following, the author states that there are three situations in which extrinsic evidence may be considered on a duty to defend application:
- a) where the extrinsic evidence is admissible for the purpose of interpreting the terms of the insurance contract;
 - b) where documents are incorporated by reference into the pleadings; and
 - c) in limited circumstances, where facts are not in dispute and there is an issue that does not require findings to be made before trial.
- [86] The first exception does not apply here. That exception has to do with extrinsic evidence of, for example, the parties' intentions concerning coverage. The evidence in question here is not of that type.
- [87] The second exception also does not apply. No contract is incorporated by reference within the pleadings and, in any event, this exception does not apply if the contract document is itself a disputed fact, as it is here: *Monenco*, at para. 39.
- [88] The third exception is also inapplicable for the same reason, that is, because it is a disputed fact whether these documents are contract documents evidencing the sale of the subject product by Honeywell International Inc.

[89] Accordingly, the invoices appended to the paralegal's affidavit are not admissible in determining the scope of coverage.

B. Brief Summary of Claims Made Against Honeywell

[90] Although these claims were set out in detail earlier in these reasons, it is helpful to summarize them at this point in the analysis.

[91] In the Strata 3165 action, the claims against Honeywell have their origins in the ANOCC 3165, where Garibaldi is a defendant. Strata 3165 alleges that Garibaldi manufactured defective IGUs. Garibaldi, in turn, third partied both Guardian and Honeywell, and Guardian, in turn, also third partied Honeywell. The claims faced by Honeywell are therefore those made by both Garibaldi and Guardian.

[92] The plaintiff's claims that might be covered if coverage is found include those for "resultant damage" caused to the strata and the individual owners, along with the claim that the IGUs "require a wholesale replacement".

[93] In their third party claims against Honeywell, both Garibaldi and Guardian allege that: (1) Honeywell manufactured the desiccant used in the fabrication of the IGUs; (2) Honeywell breached a duty of care it owed to Garibaldi and Guardian, respectively, and (3) Honeywell failed in its duty to warn the claiming third party about defects or deficiencies in its product that it knew or ought to have known.

[94] In the Strata 3206 action, the claims against Honeywell also have their origins in claims by the plaintiff against Garibaldi, who is alleged to have been engaged by IGA to manufacture and supply the subject IGUs. The claimed loss and damage includes the cost of replacing the IGUs and damage to both the common property and strata lots.

[95] As with the other action, Garibaldi third partied both Guardian and Honeywell, and Guardian, in turn, also third partied Honeywell.

[96] The defendant architect (James KM Cheng Architects Inc.) third partied Intertek who, in turn, third partied Honeywell. It is unnecessary to separately consider Intertek's third party notice against Honeywell as it simply adopts the allegations made against Honeywell by Garibaldi and Guardian.

[97] As with the other action, each of Garibaldi and Guardian allege that: (1) Honeywell manufactured the desiccant used in the IGUs; (2) Honeywell breached a duty of care it owed to Garibaldi and Guardian, respectively, and (3) Honeywell failed in its duty to warn the claiming third party about defects or deficiencies in its product that it knew or ought to have known. Garibaldi also alleges defects and deficiencies in the "manufacture and supply" of the desiccant used in the IGUs.

C. Initial Grant of Coverage

- [98] I approach the interpretation of the Policy using the process outlined in *Ledcor*. The first question is: Has Honeywell met its burden of showing the claims fall within the initial grant of coverage?
- [99] In my view, the essence or "true nature" (as per *Scalera*) of the claims made against Honeywell are that its product, which was incorporated in the IGUs by other parties, was defective or deficient. There are no allegations that Honeywell performed any part of the work under the project or that it carried out any installation, construction or supervisory work to the project.
- [100] The coverage question turns on the policy wording in Section II of the Policy ("Who is an Insured"), and on the following wording in particular:
4. "Contractors" and "sub-contractors" include all persons or organizations who perform any part of the work under the Insured Project but do not include:
 - a. Suppliers whose only function is to supply materials, machinery or other supplies to the project and who do not carry out any installation, construction, or supervisory work on the Insured Project;
- [101] Honeywell argues that it is not a mere supplier as it is also alleged to have manufactured the product; thus, "supply" was not its "only function".
- [102] XL argues that the Court should look beyond the label used in the pleadings and instead look to Honeywell's essential role, that of supplying a product. XL says that whether Honeywell manufactured the product is irrelevant.
- [103] XL relies on definitions of "supplier" found in *Black's Law Dictionary* (8th Edition) and the *Paperback Oxford Dictionary* (Seventh Edition), but these did not advance the issue to any degree. The former dictionary referenced a U.S. statute, which undermined its utility as a universal definition, and the latter dictionary seemed merely to confirm that a manufacturer can be a "supplier" because it is "engaged in the business of making a product available to consumers".
- [104] The Supreme Court of Canada has provided guidance on the interpretation of insurance policies in numerous cases. These cases were summarized in *Progressive Homes* as follows:
- [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. 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).

[Some references omitted.]

- [105] I would add to that summary by quoting more fully from *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888 [Consolidated-Bathurst], referred to in the above excerpt from *Progressive Homes*. In *Progressive Homes*, the court cited *Consolidated Bathurst* for the proposition that "courts should prefer interpretations that are consistent with the reasonable expectations of the parties". However, the full quote from *Consolidated-Bathurst* is as follows (at 901):

the normal rules of construction lead a court to search for an 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.

[Emphasis added.]

- [106] I begin the interpretation process by examining the nature of the contract. A wrap-up policy is a "liability policy that provides insurance coverage for owners, contractors and subcontractors involved in project from lawsuits": *Temple Insurance Company v Aberdeen Specialty Concrete Services*, 2021 SKCA 94. I accept, of course, that a policy can provide coverage for whoever the parties wish, but the essential nature of the policy is to provide coverage for those involved in a construction project.

- [107] Honeywell's argument - that by also being a manufacturer it is more than a mere supplier (and so it is not a "supplier[s] whose only function is to supply materials") - does not fit well with the "commercial atmosphere" of a wrap-up liability policy as Honeywell was many steps removed in the supply chain and not involved in the project in any way.
- [108] Furthermore, in my view a requirement that the supplier be involved in the project in some way beyond the mere supply of good or materials is revealed in a full and fair reading of the disputed Policy provision, which grants coverage to "all persons or organizations who perform any part of the work under the Insured Project" and to those suppliers who "carry out any installation, construction, or supervisory work on the Insured Project".
- [109] In other words, Honeywell's submission centres on one phrase ("suppliers whose only function is to supply materials") and fails to interpret the entire provision as a whole in the context of the nature and purpose of a wrap-up liability policy.
- [110] I would add that Honeywell's interpretation leads to unrealistic results. On its interpretation, a supplier who delivered goods, materials or even fully-fabricated components to the very gates of the project would not be covered, but a party many steps distant in the supply chain, and entirely unaware of the project, would be covered so long as it did something in addition to supplying. So, for example, an entity that took bulk materials from a manufacturer and placed them into bags, and did so many steps removed in the supply chain, would not be a "supplier whose only function " because it had both supplied and packaged the material. So too, I conclude, in the case of a supplier that also happens to be a manufacturer.
- [111] On Honeywell's interpretation, entities many steps removed in the supply chain, and completely unaware of the project, might be covered, whereas those delivering directly to the project would not. This is an unrealistic result that would not have been contemplated by the parties given the nature and purpose of wrap-up insurance.
- [112] In summary, the fact that Honeywell is also - allegedly - a manufacturer of material that was ultimately used in the IGUs does not make it a "supplier" covered by the Policy because it did not do anything on the project itself, as the grant of coverage requires.
- [113] This conclusion renders it unnecessary that I consider the effect of any exclusions in the Policy.

D. The Third Party Leave Decision

- [114] Honeywell argues that the coverage issue was essentially decided by Walker J. when he permitted Honeywell to file third party notices against XL. As part of Walker J.'s consideration of this question, he was required to determine whether the third party notices disclosed a reasonable cause of action or whether those claims were bound to fail. He concluded in Honeywell's favour on both points.

- [115] Honeywell argues that the test applied there is much the same as the test to be applied here.
- [116] XL emphasizes that Walker J. himself did not indicate, when the issue arose subsequently, that he considered he had decided the issue. XL also says the tests are different.
- [117] I observe, at the outset, that the respective nature of the two hearings is not the same. As Walker J. noted at para. 13 of his reasons, the test to be met by Honeywell was "low", requiring Honeywell to "simply demonstrate that the proposed third party notices disclose a reasonable cause of action, such that the action is not 'bound to lose'". What is currently before the Court is a summary trial, requiring proof on a balance of probabilities.
- [118] Also, Walker J. commented on limitations in the evidence before him (see paras. 61-62 of his reasons). By the time of this summary trial the factual matrix seemed to have settled insofar as both parties argued their cases from the same essential set of facts. Whether the facts before Walker J. and the facts before me are exactly the same, I cannot say. I agree that if the evidence and arguments were identical for both hearings it may seem somewhat anomalous and undesirable for the Court to come to different conclusions, but the principle of res judicata does not apply (and Honeywell did not argue that it did), nor does the principle in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, and so I do not consider that I am fettered in any way in coming to my own conclusion on the matter.

VII. Conclusion

- [119] The claims against Honeywell are not covered under the Policy. In each action, Honeywell's third party claims against XL Insurance are dismissed.
- [120] XL Insurance shall have its costs in each third party proceeding, although with just one set of costs for the hearing and its preparation as the two matters were heard together.

"Blok J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/07/2022BCSC0766.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/owners-strata-plan-bcs-3206-v-kbk-no-11-ventures-ltd-2022>

Prepared on 26 October 2026 · Esheria