



Civil Resolution Tribunal

Date Issued: December 6, 2023

File: SC-2022-004931

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Geraghty v. Belair Insurance Company Inc. La Compagnie D'Assurance Belair Inc.*, 2023 BCCRT 1067

B E T W E E N :

CHRIS GERAGHTY

APPLICANT

A N D :

BELAIR INSURANCE COMPANY INC. LA COMPAGNIE
D'ASSURANCE BELAIR INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Alison Wake

INTRODUCTION

1. This dispute is about insurance coverage. Chris Geraghty held a homeowners insurance policy with Belair Insurance Company Inc. La Compagnie D'Assurance Belair Inc. (Belair). Belair denied Mr. Geraghty's insurance claim for retaining wall

damage following heavy rainfall. Mr. Geraghty disagrees with Belair's denial of his claim, and claims \$5,000 in compensation for the retaining wall damage. Mr. Geraghty represents himself.

2. Belair says that the damage to Mr. Geraghty's retaining wall is not covered by his insurance policy. It asks me to dismiss this dispute. Belair is represented by its in-house legal counsel, Molly Li.
3. For the following reasons, I dismiss Mr. Geraghty's claims.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly.
5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me.
6. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

ISSUE

7. The issue in this dispute is whether the damage to Mr. Geraghty's retaining wall is covered by his insurance policy with Belair.

EVIDENCE AND ANALYSIS

8. As the applicant in this civil proceeding, Mr. Geraghty must prove his claims on a balance of probabilities (meaning more likely than not), except where the burden shifts to Belair as noted below. While I have read all the parties' submitted evidence and arguments, I only refer to those necessary to explain my decision.
9. On November 17, 2021, Mr. Geraghty filed an insurance claim with Belair for damage to his retaining wall following significant rainfall. Belair investigated the claim, including by having its adjuster and a contractor visit the property, and ultimately denied coverage.
10. Belair says that it denied Mr. Geraghty's claim for several reasons. First, it says that Mr. Geraghty's insurance policy does not cover loss or damage to a retaining wall. Second, it says that loss or damage caused by heavy rainfall is not covered. Third, it says that even if the damage were covered, it would be excluded from coverage because it was caused by "earth movement", which is specifically excluded under the policy.
11. When the application of an insurance policy is in dispute, the burden is on the insured to establish that the claimed damage or loss falls within the initial grant of coverage. Then, the burden shifts to the insurer to establish that one of the exclusions to coverage applies. If they do so, the burden shifts back to the insured to prove that an exception to the exclusion applies (see *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paragraph 52).
12. When the language of an insurance policy is unambiguous, the court (or tribunal) should give effect to clear language, reading the contract as a whole (see *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33). Generally, coverage provisions should be interpreted broadly, and exclusion clauses should be interpreted narrowly (see *Derksen v. 539938 Ontario Ltd.*, 2001 SCC 72 at paragraph 52).

Has Mr. Geraghty proved that the damage to his retaining wall is covered by his insurance policy?

13. Both parties provided a copy of Mr. Geraghty's insurance policy in evidence. It shows that Mr. Geraghty purchased a homeowners Total Tranquility Plan (TTP) as well as an Enhanced Water Damage Package (EWDP).
14. Belair argues that the TTP excludes water damage, except in specific circumstances which do not apply here. I agree. The Water Damage Coverage section of the TTP sets out the circumstances in which Belair will provide coverage for loss or damage caused by water. Mr. Geraghty does not argue that any of these circumstances are present in this case, and I find they are not. So, I find the retaining wall damage is not covered by the TTP itself.
15. However, Mr. Geraghty's policy also includes the EWDP, which sets out additional water damage coverage. The EWDP includes overland water coverage, which provides in part that Mr. Geraghty is insured against "direct physical loss or damage caused by flood", and "direct physical loss or damage caused by the sudden and accidental entrance of surface waters that enter your dwelling or additional buildings on your premises through a point at or above the surface of the ground."
16. To determine whether this coverage applies to the damage to Mr. Geraghty's retaining wall, I must consider:
 - a. Whether the retaining wall is an insured structure,
 - b. Whether heavy rainfall meets the definition of "flood" or "surface waters" under the EWDP, and
 - c. Whether the loss or damage was caused by flood or surface water.

Is the retaining wall an insured structure?

17. First, Belair argues that the retaining wall is not covered under the policy because it is not a "dwelling or additional building" as required by the overland water coverage provision. Mr. Geraghty does not argue that the retaining wall is a dwelling. However,

he argues that it is an additional building. Additional buildings are not specifically defined in the policy, and Belair relies on dictionary definitions to argue that they must be interpreted as enclosed buildings with a roof and walls, which it says does not include a retaining wall.

18. As noted, an insurance policy must be interpreted in its entire context. I find the section of the TTP labelled “Coverage B – Additional Buildings” is more informative on this point than the dictionary definitions Belair relies on, because it forms part of the policy itself. This section says in part, “We insure private buildings **or structures** detached from the dwelling and which are on your premises, but not insured under the dwelling building” (emphasis added). Mr. Geraghty relies on this provision to argue that structures are covered in addition to buildings. I agree. I find that although the EWDP only refers to “your dwelling or additional buildings on your premises”, the reference to additional buildings in the EWDP includes structures, given the description in the TTP.
19. The word “structures” is also not defined in the policy. I find on a plain reading, “structure” implies something man-made or constructed. Bearing in mind the general rule that coverage provisions in insurance contracts must be interpreted broadly, I find a man-made retaining wall is a structure and is covered by Mr. Geraghty’s policy.

Is heavy rainfall “flood” or “surface water”?

20. As noted, the EWDP includes coverage for loss or damage caused by flood or the accidental entrance of surface waters. “Flood” and “surface waters” are both defined in the TTP. I find these definitions apply to the EWDP as well, as both form part of the entire insurance policy.
21. Under the TTP, flood includes, but is not limited to, “waves, tide, tidal wave, tsunami, dam break, seiche, or the rising of, the breaking out or the overflow of, any body of water or watercourse, whether natural or man-made”.
22. Belair relies on *Le Treport Wedding & Convention Centre Ltd. v. Co-operators Insurance*, 2019 ONSC 3041, in support of its argument that the significant rainfall in

this case did not constitute a flood within the meaning of the policy. In *Le Treport*, the Ontario Supreme Court interpreted a similarly worded insurance policy and found that water accumulating on the ground due to heavy rainfall was surface water rather than a flood. However, I note that on appeal (2020 ONCA 487), the Ontario Court of Appeal found that the water was a flood, in part because there had been catastrophic failure of the natural and man-made watercourses in the area including nearby creeks and the stormwater management system, which caused the influx of water into the insured's building. In this case, there is no evidence that Mr. Geraghty's retaining wall was damaged by a failure of nearby existing watercourses. While decisions from other jurisdictions are not binding on me in any event, I find *Le Treport* is distinguishable on this basis.

23. The definition of "flood", while not exhaustive, must be interpreted in the context of the specific examples given. The listed events in the definition generally include an existing body of water that breaches its ordinary boundaries. I find heavy rainfall is not sufficiently similar to the listed examples to be considered a flood within the policy definition. So, I find damage due to rainfall is not covered under the flood provisions of the EWDP.
24. "Surface Waters" is defined in the TTP as "water on the surface of the ground where water does not usually accumulate in ordinary watercourses, lakes or ponds." Neither party argues that Mr. Geraghty's yard is an ordinary watercourse where water usually accumulates. "Water" is not defined in the policy, but I find that on a plain reading it necessarily includes rainwater. So, rainwater accumulating on the ground surface in Mr. Geraghty's yard falls within the definition of surface waters in the policy.
25. Finally, Belair argues that the EWDP only covers surface waters which "enter" a dwelling or additional building. Belair says that surface water cannot enter a retaining wall, and that it can only pass through or around it. In my view, there is no practical distinction between water passing through a retaining wall, and water entering an enclosed building. In either case, the water breaches a barrier to break into a

structure. I find the word “enter” is sufficiently broad to include water passing through the retaining wall’s beams.

26. In summary, water from rainfall that accumulated on the surface of the ground in Mr. Geraghty’s yard does not meet the definition of “flood” under the policy, but does meet the definition of “surface waters”. Because the EWDP includes coverage for loss or damage caused by surface waters that enter a building, including the retaining wall, the next question is whether Mr. Geraghty’s retaining wall was damaged by surface waters.

What caused the damage?

27. While the parties agree that the retaining wall damage occurred following a period of heavy rainfall, they disagree about what ultimately caused the damage. Mr. Geraghty argues that it was caused by rainfall on the yard’s surface, and so is covered under his overland water coverage for surface waters. Belair argues that the soil around the retaining wall collapsed, so the damage was not caused by surface water. Instead, Belair argues that the damage was caused by “earth movement”, which is excluded from the EWDP, as discussed further below.
28. Photographs in evidence, taken after the damage, show that the retaining wall is on a sloped section of Mr. Geraghty’s property which consists of grass, soil, and small plants. The retaining wall is made up of wood beams. At the area where the damage occurred, there are 2 tiers of stacked beams. The photographs show that the lower beams are displaced, leaving a large gap at the bottom of the wall with soil, rocks and gravel accumulated nearby.
29. I find the ultimate cause of the damage is not obviously within ordinary knowledge, and so expert evidence is required to determine it: see *Bergen v. Guliker*, 2015 BCCA 283.
30. There are 2 opinions in evidence about the retaining wall damage. Both are written by Ante Bajic, GM of Landscape Construction for White Star Property Services Ltd. Beyond this title, Ante Bajic does not list their qualifications as required for expert

evidence under CRT rule 8.3. However, Belair does not dispute Ante Bajic's qualifications, and relies on their findings as well. In these circumstances, I consider it appropriate to exercise my discretion under CRT rule 1.2 to waive the strict application of rule 8.3. I accept Ante Bajic's 2 letters as expert evidence about the cause of the retaining wall damage.

31. The first letter is dated January 5, 2022. In it, Ante Bajic says that their professional opinion is that the retaining wall failed because of heavy rainfall and the fact that the property is on a slope. They say that the water undermined the wall, which caused the soil around the wall to collapse, and that the wall itself then collapsed because it had no support. They say that in their opinion, the retaining wall failure was due to "heavy rainfall amounts and flowing surface water which eroded the soil in around the wall".
32. Ante Bajic's second letter is dated April 1, 2022. In it, they say that they have looked at the retaining wall and that it looks like water was flooding the surface of the sloped yard, which created a ripple effect of soil washing out and undermining the wall. They say the signs of water flow and direction were visible on the surface, and that it is their opinion that the wall failure was due to a heavy rainfall event that undermined the integrity of the wall.
33. Belair says that Ante Bajic's earlier letter should be given more weight than the later one, because it was written closer to the date of loss and gives more detail about the failure. It says the language in the second letter was intentionally changed. Mr. Geraghty says that Ante Bajic simply provided further clarity in the second letter because the first one was so brief. While both letters are generally consistent about the cause of the damage, I agree with Belair that the earlier letter should be given more weight and I prefer it where it conflicts with the later one, as noted below.
34. Based on Ante Bajic's evidence, I find Mr. Geraghty has proven that the retaining wall damage was caused, at least in part, by surface water. However, this does not end the matter. Belair argues that the damage is excluded under the terms of Mr.

Geraghty's policy. As noted above, the burden is on Belair to prove that an exclusion applies.

Has Belair proved that an exclusion applies?

35. The EWDP explicitly excludes coverage for loss or damage caused by "landslide or any other earth movement". Belair says that earth movement caused or contributed to the retaining wall damage, so the damage is excluded from coverage.
36. An insurer can exclude coverage where the loss or damage is caused by multiple or concurrent causes, even if one of the causes would otherwise have been covered, as long as they do so through clear language in the policy: see *Derksen v. 539938 Ontario Ltd.*, 2001 SCC 72 at paragraph 48. I find Belair has done so in this case, as the EWDP exclusions, including earth movement, specify that they apply "whether or not there are one or more other causes or events (whether covered or not) that contribute concurrently or in any other sequences to the occasioning of the loss or damage".
37. This means that even if damage caused by surface water is otherwise covered by the policy, it is excluded if earth movement also contributes the loss or damage. So, if Belair proves that earth movement contributed to the retaining wall damage, it will be excluded from coverage under the policy.
38. "Earth movement" is not defined in the policy, but Belair submits that it includes soil movement. I agree, as I find this is consistent with the plain meaning of "earth".
39. Mr. Geraghty argues that it is common sense that a flood of water will carry soil, rocks and other debris, but that this does not mean it is earth movement or a landslide. While I agree that a large volume of surface water may include other debris, Ante Bajic's opinion letters point specifically to the movement of the soil supporting the retaining wall, rather than debris in the surface water, as the cause of the wall collapsing. The first letter is more detailed on this point, as it refers specifically to erosion of soil around the wall, while the second letter refers to soil being washed out but does not specify where it originated. As noted above, I find the earlier letter is a

more reliable description of the cause of the damage, and I prefer it on this point. Based on this evidence, I find soil movement around the retaining wall contributed to the damage.

40. Mr. Geraghty also argues that he had previously had extensive perimeter drain work done on his property, and so the yard could not have become saturated by water. However, I find Belair does not need to prove that the yard was saturated in order to rely on the earth movement exclusion. It must only prove that movement of the earth contributed to the claimed damage, which I find it has for the reasons above.

41. So, I find Belair has proved that the earth movement exclusion applies to the damage claimed by Mr. Geraghty. The policy does not list any exceptions to the earth movement exclusion. It follows that I must dismiss Mr. Geraghty's claim.

CRT FEES AND EXPENSES

42. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As Mr. Geraghty was unsuccessful, I dismiss his claim for his paid CRT fees. Belair did not pay CRT fees and so I make no order for them. Neither party claimed dispute-related expenses.

ORDER

43. I dismiss Mr. Geraghty's claims and this dispute.

Alison Wake, Tribunal Member